MALAYSIAN JUDGMENTS

IN THE COURT OF APPEAL OF MALAYSIA

Coram: Ahmadi Asnawi, JCA; Kamardin Hashim, JCA; Kamaludin Md Said, JCA

Le Ngoc Thu v Pendakwa Raya

Citation: [2018] MYCA 234 **Suit Number:** Rayuan Jenayah No. B-05(IM)-10-01/2017

Date of Judgment: 31 July 2018

Criminal law – Trafficking in dangerous drugs – Conviction – Sentence – Appeal – Whether conviction safe

Criminal procedure – Whether the trial court failed to adequately consider the appellant's defence of an innocent carrier without knowledge and in holding that the appellant was guilty of wilful blindness – Whether the trial court failed to make a specific finding on the elements of possession and trafficking – Whether appellate intervention warranted

JUDGMENT

Introduction

[1] The Appellant, a Vietnamese national, was charged and tried in the High Court at Shah Alam with an offence of trafficking in dangerous drugs under section 39B(1)(a) of the **Dangerous Drugs Act, 1952 ('the Act')** and punishable under section 39B(2) of the same Act. The charge reads:

> "Bahawa kamu pada 30 Oktober, 2013 jam lebih kurang 2.30 pagi, bertempat di Kawasan Ketibaan Antarabangsa LCCT, Sepang, di dalam Daerah Sepang, di dalam negeri Selangor Darul Ehsan telah didapati memperedarkan dadah berbahaya seberat 732.7 gram Methamphetamine dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama".

[2] At the end of the trial, the Appellant was found guilty, convicted and sentenced to suffer the mandatory death penalty by the learned High Court Judge ('learned trial judge').

[3] Aggrieved with the conviction and sentence, the Appellant appealed to this Court. We heard the appeal on 10.7.2018 and after hearing the parties, we unanimously dismissed the Appellant's appeal.

We now furnish our reasons in dismissing the Appellant's appeal.

The Prosecution's Case

[4] On 30.10.2013 at about 2.30 am, while ASP R. Azizan Bin Ibrahim (SP3) together with his raiding team were on duty at the arrival hall LCCT, arrested the Appellant who had slung a brown bag (P22) and carried a grey bag (P21). SP3 had introduced himself as a police officer when he affected the arrest.

[5] SP3 then instructed the Appellant to bring the 2 bags to the Customs Department's scanning machine at the international arrival hall at LCCT. At the scanning machine, SP3 instructed the Appellant to scan the bags. The scanning revealed some suspicious images in P22.

[6] SP3 then instructed the Appellant to bring the bags to the 1st floor of the Narcotic Office, LCCT, for further inspection. There SP3 inspected the Appellant's passport (P15).

[7] SP3 and his team inspected P21 and found clothes and nothing incriminating in it. Thereafter SP3 instructed the Appellant to open P22. The Appellant took out a key from the left pocket of her blouse and unlocked the padlock of P22. SP3 instructed the Appellant to remove the contents of P22 and found:-

(a) 10 pairs of pants;

(b) 11 pairs of shirts;

(c) A pair of slippers; and

(d) A pair of shoes.

[8] Upon further examination of P22, SP3 found out that the back of the sling bag looks suspicious. SP3 cut a layer from the inside of the bag and found a blue plastic package. SP3 removed the blue plastic package and made a small slit and found inside it another bright plastic bag containing crystalline substance suspected to be drugs, covered in blue carbon paper tied in blue rubber band.

[9] SP3 seized the suspected drug exhibits together with other exhibits. The Appellant was arrested and brought to the police station. Later the Appellant and the exhibits were handed over to the Investigating Officer, Inspector Eddy Amin Bin Hussin Ala (SP4) for further actions.

[10] The drug exhibits were sent to the chemist Suhana Bte Ismail (SP2) and SP2 who conducted the analysis, confirmed that it contained **732.7 grams of Methamphetamine** which is listed under the First Schedule to the Act.

Findings at the end of the prosecution's case

[11] The learned trial judge had considered and accepted the testimony of SP2 on the drugs analysis undertaken by her. The result of the analysis confirmed that the crystalline substance is dangerous

drugs listed under the First Schedule to the Act. SP2's report is exhibit P10.

[12] As for the element of possession, the learned trial judge accepted the evidence SP3 that the Appellant had custody and control over the said drugs found in a blue plastic package inside P22 and such evidence led to the fair inference that the Appellant had possession of the drugs and knowledge of the said drugs.

[13] The evidence that the Appellant had custody, control and knowledge of the said drugs is overwhelming. The evidence is as follows:-

(a) Tag P22A attached to the bag P22 is registered under the Appellant's name;

(b) The Appellant was seen by SP3 carrying the bag P22;

(c) The Appellant was carrying the bag P22 from the place she was detained by SP3 to the Narcotic Office, LCCT;

(d) When the Appellant was directed to open the bag P22, the Appellant took out the keys from the left pocket of her blouse to open the padlock of the bag P22;

(e) The bag P22 had 2 padlocks which were opened by the Appellant using the keys that she took out from the pocket of her blouse.

[14] Based on the evidence, the learned trial judge held that the Appellant had possession of the said drugs. The manner in which the drugs were neatly concealed in the bag P22 shows that the Appellant had knowledge of the existence of the said drugs (See **Pendakwaraya mln Sarumathi Rengasamy** [2013] 1 LNS 945 and the Federal Court case of **PP v Abdul Rahman Akif** [2007] 4 CLJ 337). The drugs were brought into Malaysia by hiding them inside P22 to avoid being detected by the authorities. It clearly shows that the Appellant had knowledge of the said drugs (See **Abbas Sharazi Davoud v PP** [2015] 6 MLJ 387). The evidence that the Appellant had given her, cooperation to SP3 during her detention and search conducted on her did not necessarily mean that the Appellant was not guilty and had no knowledge of the drugs she was carrying (See **Teh Hock Leong v PP** [2010] 1 MLJ 741; **Alcontara a/l Ambross Anthony v PP** [1996] 1 CLJ 705).

[15] The learned trial judge found that the following conduct of the Appellant is also relevant and consistent showing that the Appellant had knowledge of the drugs:-

(a) The first time SP3 saw the Appellant coming down the escalator, the appellant was behaving in a very suspicious manner;

(b) SP3 saw the Appellant walking down the escalator in the hurry and in a rushing manner;

(c) The Appellant panicked when SP3 started to examine the bag P22.

[16] Having found the Appellant had possession of the impugned drugs inside the bag P22 which the

Appellant was carrying, the learned trial judge held that the Appellant's conduct is tantamount to trafficking in dangerous drug within the definition of section 2 of **the Act** i.e. carrying. The Appellant was carrying the drugs from Shenzen for trafficking in Malaysia. It is sufficient if it can be proved that the Appellant was carrying the drugs from one place to another place. It is beyond question that the large amount of drugs i.e. 732.7 grams she had carried shows her to traffic in the said drugs (See: **Ong Ah Chuan v PP** [1981] 1 MLJ 64; **Mohamad Yazri Minhat v Public Prosecutor** [2003] 2 CLJ 65). There is concrete evidence that the Appellant was trafficking in dangerous drugs. She came to Malaysia from Shenzen carrying the bag P22 which contains 732.7 grams of dangerous drugs of **Methamphetamine**. The learned trial judge held that the element of trafficking of dangerous drugs under section 2 of **the Act** had been proven by the prosecution.

[17] After being satisfied that all the elements of the charge had been established, the learned trial judge found that the prosecution had proven a *prima facie* case against the Appellant. Thus, the Appellant was called upon to enter her defence.

The Defence

[18] The Appellant chose to give evidence on oath and did not call any other witness to support her defence.

[19] The Appellant who hailed from Vietnam, a divorcee and has 3 children, one girl and 2 boys. She worked as a maid with an income of 3 million Dong per month. She came from a poor family and her friend, Miss Thao suggested to her to work in Malaysia and to meet Miss My, to arrange for the same.

[20] Miss My asked the Appellant to work for her sister in Malaysia. The Appellant was promised a salary of RM1200-RM1500 (equivalent to 7 million Dong). Miss My and the Appellant left to China from Vietnam. In China, Miss My checked the Appellant into a hotel and went to meet her husband to collect some money to buy clothes for her business.

[21] On the day they were supposed to leave for Malaysia, at the airport in China, Miss My told the Appellant that her father in law had passed away. Miss My gave the bag containing the drugs to the Appellant and asked her to give it to Miss My's sister, with whom the Appellant was supposed to work.

[22] Miss My told the Appellant that the full address of her employer will be sent through her hand phone. The Appellant was aware that the bag was locked with a padlock and saw the bag contained clothes and a pair of shoes. However, she did not touch the contents of the bag and neither did she check for any compartments inside the bag. At the airport everything was handled by Miss My. The black/ brown bag belongs to Miss My was a checked in luggage. She only carried the sling brown bag. Inside her bag there were 4 to 5 clothes only.

[23] On arrival at LCCT and after her passport was stamped, she bought a sim card. She denied that she was in a hurry or behaving suspiciously. She did try to contact Miss My with the new sim card but was unsuccessful.

[24] When she was detained she felt strange but not panic. She denied giving any statement to the police and signing any document. According to her there was no Vietnamese interpreter accorded to her. She denied having any knowledge of the drugs found inside the black/ brown bag. She did not know that there is a compartment inside the bag. She did not know whether the bag is heavy or not because all transactions was done by Miss My. She knows that drugs are prohibited items in Malaysia as well as in Vietnam.

[25] Her defence in essence is a defence of innocent carrier.

Finding at the end of Defence's case

[26] After considering the Appellant's defence, the learned trial judge found that the Appellant had not succeeded in raising a reasonable doubt on the prosecution's case. The defence put up by the Appellant was a weak defence which cannot be accepted. The defence not only failed to raise a reasonable doubt but on a maximum evaluation of the whole evidence, the defence is merely her own creation, a bare denial and afterthought. The learned trial judge found that the Appellant's defence is uncorroborated by the role played by Miss My who was not called. The defence is clearly based on evidence of afterthought and hearsay which is inadmissible and was rejected. The defence is not supported by evidence of other witnesses which may be considered whether the defence had raised a reasonable doubt on the prosecution's case. (See: **PP v Lim Hock Boon** [2009] 1 CLJ 440).

[27] Although Miss My's name was mentioned a few times by the Appellant in her defence and the role played by Miss My, however, the non-calling of Miss My goes to show that Miss My is a fictitious character. The other point is Miss My' sister who according to her is in Malaysia, Miss My' sister was also not called to give evidence to support the Appellant's version. The defence story is that she came to Malaysia carrying 1 bag P21 containing 4 to 5 clothes only. The Appellant denied seeing the compartment where the drugs were found inside P22 at Shenzen Airport, China, before she was detained at LCCT, Malaysia. It was her evidence that she carried the bag P22 to Malaysia because Miss My asked her to give it to her sister. It is a small matter to the Appellant and she did not mind doing it because Miss My's sister is supposed to be her employer. The Appellant did not suspect and did not know that the bag P22 contained drugs.

[28] The learned trial judge had considered the defence story and found that the story is unbelievable. Firstly, if the Appellant came to Malaysia to work as a maid, she had not obtained the work permit and visa for such purpose. Secondly, she had with her 4 to 5 clothes only in the small bag which she was carrying of which the learned trial judge felt that it was insufficient if her purpose was to stay put with Miss My's sister. Thirdly, if she is going to work in Malaysia, what will happen to her children which she left behind in Vietnam in relation to their financial support and daily care? The learned trial judge found that there were no reasonable explanation from the Appellant to account for the same. The learned trial judge also found that the Appellant has return air ticket back to China dated 2.11.2013. It would mean that the Appellant will be in Malaysia for 3 days only. This evidence is not consistent with her evidence that she came to Malaysia to work as a maid. The learned trial judge's mind is very clear that the Appellant had knowledge of the drugs inside P22 which she had carried for

the purposes of trafficking them in Malaysia.

[29] At the end of the defence's case, the learned trial judge held that the Appellant's story is created by her own for the purpose of exculpating herself from the charge made against her based on witnesses who had given evidence as follows:-

(a) SP3 saw the Appellant coming down the escalator carrying a grey bag (P21) and slung a black/ brown bag (P22);

(b) The Appellant was in a hurry, rushing and behaving suspiciously;

(c) The 2 bags were scanned and P22 contained suspicious image;

(d) The Appellant was directed to bring the 2 bags to Narcotic Office for further examination;

(e) The bag tag (P17) is registered under the Appellant's name;

(f) P22 which was locked was directed to be unlocked. The Appellant took out the key from the left pocket of her blouse and unlocked the padlock;

(g) The Appellant was in the state of panic.

[30] The Appellant in her defence did not deny that she carried P22 with her except she denied P22 is her bag and having no knowledge of the drugs found inside P22. The learned trial judge held that the issue of the ownership of P22 is irrelevant. The relevant issue is that the Appellant had custody, control, possession and knowledge of the said drugs (See: **PP v Aida Dizon Garcia** [2015] 1 LNS 141; **Ali Hosseinzadeh Bashir v PP** [2015] 1 CLJ 918). The learned trial judge made a firm finding that the Appellant's defence is a bare denial and an afterthought. His Lordship found support in the authorities which held that the defence of bare denial, unreasonable and incredible ought to be rejected (See: **Losali v PP** [2011] 4 MLJ 694, **D.A Duncan v PP** [1 LNS 12; **PP Ling Tee Huah** [1980] 1 LNS 212 and **PP v Abdul Rahman Akif** [2007] 5 MLJ 1).

[31] Based on the evidence, the learned trial judge held that the Appellant is not a passive carrier or an innocent carrier. The learned trial judge held that based on the large amount of drugs it is not definitely for the Appellant's own consumption. It raised an inference that the drugs are for the purpose of trafficking (See: **Ong Ah Chuan v Public Prosecutor** [1981] 1 MLJ 64 and **Mohd Yazid Minhat v Public Prosecutor** [2003] 2 CLJ 1). Most importantly, there is direct evidence linking the Appellant with the conduct of trafficking as defined under section 2 of **the Act** i.e. transporting and carrying the drugs into Malaysia. The learned trial judge held that the Appellant's conduct and action of carrying the drugs inside P22 is trafficking under the Act. Since the Appellant had failed to raise a reasonable doubt against the prosecution case, the conclusion is that the prosecution had successfully proved its case beyond reasonable a doubt.

[32] The Appellant was thus convicted and sentenced to the mandatory death penalty as provided under section 39B(2) of **the Act**. Hence the appeal before us.

The Appeal

[33] Before us, learned counsel for the Appellant canvased the following two (2) grounds of appeal, namely:

(a) Failure by the learned trial judge to adequately consider the Appellant's defence of an innocent carrier without knowledge and in holding that the Appellant was guilty of wilful blindness.

(b) Failure by the learned trial judge to make a specific finding on the elements of possession and trafficking.

Our Deliberation and Decision

[34] In regard to the first ground of appeal, learned counsel submitted that the impugned exhibit (P11-A) was found at the inner part of the sling bag P22 carried by the Appellant. The Appellant had given the explanation that P22 did not belong to her but she helped to carry it on behalf of Miss My. Miss My did all the check-in for the bag into the cargo. Further, there is no evidence/ prove that the clothings in P22 belong to the Appellant. It follows that the impugned drugs found inside P22 could not be said as belonging to the Appellant. Therefore, counsel submitted that the prosecution had failed to prove that the drugs belonged to the Appellant. The learned counsel relied on the decision in **Public Prosecutor v Badrulhisham Bin Baharom** [1988] 2 MLJ 585 that it must be first shown that the Appellant had knowledge of the drugs which were found to be in her possession. Knowledge is a mental element and it is one of the pre-requisites of possession (See: **PP v Alfian** [2012] 2 MLJ 357). The conduct of the Appellant that she did not make any attempt to escape and in fact had cooperated with SP3's instruction to scan P22 is sufficient for the Court to accept her explanation that P22 did not belong to her and that she had no knowledge of the drugs found in P22. Counsel referred to the case of **PP v Salleh Zakariah & Anor** [2010] 4 CLJ 671 to support his submission. In other words, counsel submitted that the Appellant is just an innocent carrier.

[35] Learned Deputy Public Prosecutor ('learned DPP') argued that the evidence of possession and knowledge of the drugs against the Appellant is overwhelming. This can be seen at page 11, 13 and 14 of the grounds of judgment. The learned trial judge had considered the entire evidence including the Appellant's defence and found the defence to be a bare denial, unreasonable and an afterthought. The learned DPP referred us the case of **Parlan bin Dadeh v PP** [2008] 6 MLJ 19 on the law relating to evidence of conduct. Therefore, the learned DPP submitted that the first issue raised by the Appellant has no merit. This Court should not disturb the finding of facts of the learned trial judge.

[36] We had perused the appeal records. We agreed with the learned DPP that the learned trial judge was correct in making a ruling on the issue of knowledge as seen at page 14 of Jilid 1:

"...Meneliti kepada aspek kelakuan dan keadaan Tertuduh semasa ditahan juga relevan dan konsisten bagi menunjukkan Tertuduh mempunyai pengetahuan terhadap barang kes dadah tersebut, seperti 'conduct' berikut:

(a) Menurut keterangan SP3, pada mula apabila melihat OKT turun daripada escalator, mata Tertuduh pandang liar,

(b) SP3 juga mendapati Tertuduh jalan terburu-buru dan kelam kabut apabila turun daripada escalator,

(c) Tertuduh juga kelihatan panic apabila SP3 mula membuat pemeriksaan pada beg P22...”

[37] In **Parlan bin Dadeh v PP**, (supra) the Federal Court on the issue of conduct held at page 44 that,

> “The law relating to evidence of conduct is thus patent. If there is no evidence to show that the conduct is influenced by any fact in issue or relevant fact as required by s. 8 then it is not admissible as it would then be an equivocal act justifying inferences favourable to the accused being drawn. If it satisfies the requirement of s. 8 it is admissible. It must be observed that the degree of proof required to establish evidence of conduct would depend on the nature of the conduct. Conduct like the flight on an accused is a more positive act and is easily established. On the other hand, conduct like the accused looking stunned, nervous, scared or frightened is very often a matter of perception and more detailed evidence may be required. **Once admitted the court cannot resort to any other explanation for the conduct or draw inferences on its own accord to render it inadmissible. The onus is on the accused to explain his conduct pursuant to s. 9. Such explanation must not be in their barest possible form, but with a reasonable fullness of detail and circumstance...**” (Emphasis added)

[38] The learned trial judge had discussed at length the Appellant’s defence. These can be seen from pages 21-31 of the Appeal Record (Jilid 1). It is very clear that the learned trial judge had rejected the Appellant is explanation that P22 belong to Miss My. At page 21 the learned trial judge held that:-

> “Pembelaan Tertuduh tidak disokong berasaskan kepada peranan penama Miss My (yang tidak dipanggil). Pembelaan yang dikemukakan adalah berupa keterangan yang difikirkan semula (afterthought) dan juga keterangan dengar cakap (hearsay evidence) yang semestinya tidak boleh diterima undang-undang”.

At page 25, the learned trial judge further held that-

> “... namun dengan ketidak jayanya membuktikan kewujudan Miss My, hakikat yang dapat digarap adalah itu semuanya hanyalah rekaannya semata-mata. Jelas beliau mempunyai pengetahuan akan isi kandungan yang terdapat di dalam beg P22. Dia mengetahui yang isi kandungan beg itu mengandungi dadah dibawanya untuk diedarkan ke Malaysia...tiada bukti bebas dikemukakan bagi mengukuhkan dakwaannya mengenai kewujudan Miss My. Ini jelas menunjukkan watak Miss My ini adalah suatu watak yang ‘fictitious’ sengaja diadakan sebagai usaha untuk melepaskan dirinya dari pertuduhan yang dihadapi”.

[39] The drugs were brought into Malaysia by hiding them inside P22 to avoid the drugs being

detected by the authorities. The learned trial judge found that the large amount of drugs i.e. 732.7 grams she carried, raised the inference that the drugs are for the purpose of trafficking. He had correctly relied on the case of **Ong Ah Chuan v PP** [1981] 1 MLJ 64 and **Mohamad Yazri Minhat v Public Prosecutor** [2003] 2 CLJ 65. The Appellant came to Malaysia from Shenzen carrying the bag P22 which contains 732.7 grams of dangerous drugs of **Methamphetamine**. The learned trial judge held that in such event, the element of trafficking of the said drugs under section 2 of **the Act** had been proved by the prosecution. In **Teh Hock Leong v PP** [2008] 4 CLJ 764, the Court of Appeal discussed the method employed to bring drugs into our country to infer knowledge. At page 769, Gopal Sri Ram JCA held that,

> "It is true that *mens rea* possession is an element of the offence of trafficking. But it is an element like the mental element in other crimes which cannot be established by direct evidence save in a case where an accused expressly admits the commission of the offence. It has, like the *mens rea* in other offences, to be established by circumstantial evidence. In other words, it is an ingredient that is to be inferred from the totality of the circumstances of a particular individual case. We can here do no better than to quote from the judgment of Lord Diplock in **Ong Ah Chuan v. Public Prosecutor [1980] 1 LNS 181; [1981] 1 MLJ 64**, at p. 69:
>
> Proof of the purpose for which an act is done, where such purpose is a necessary ingredient of the offence with which an accused is charged, presents a problem with which criminal courts are very familiar. Generally, in the absence of an expressed admission by the accused, the purpose with which he did an act is a matter of inference from what he did. Thus, in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he was transporting them for the purpose of trafficking in them would, in the absence of any plausible explanation by him, be irresistible-even if there were no statutory presumption such as is contained in section 15 of the Drugs Act.
>
> [8] Turning to the facts of the present instance, **we agree with the learned trial judge that the method employed to bring the drugs in question from Thailand into Malaysia was done in a most cunning fashion to escape detection by the authorities. The method employed to convey or transport a drug may sometimes furnish evidence of knowledge. For example, an attempt to carefully conceal a drug may indicate an intention to avoid detection and thereby point to knowledge.** Of course it all depends on the facts of each individual case." [Emphasis Added]

[40] The learned trial judge found that the Appellant in her defence did not deny that she carried P22 with her except that she denied P22 is her bag and having no knowledge of the drugs found inside P22. We agreed with the law applied by the learned trial judge that the issue of ownership of P22 is irrelevant. The relevant issue is that the Appellant had custody, control, possession and knowledge of the said drug as held in **Aida Dizon Garcia v PP** [2015] 1 LNS 151 referred to by the learned trial judge. Similarly, the case of **Ali Hosseinzadeh Bashir v PP** [2015] 1 CLJ 918 where it says as follows-

"[27] Even assuming it is true that Ashgar does exist and that he did ask the Appellant to carry the bag to Malaysia, the question for the trial court to consider was whether the accused had knowledge of the drugs. To prove trafficking knowledge must of course be established but that is a matter for the appellant di disprove by virtue of S. 37(d) of the DDA and not for the prosecution to establish at the close of its case once custody or control had been established. Thus, whether he was asked by someone to carry the bag is irrelevant in any event".

[41] In **Mah Kok Cheong v R** (1953) 19 MLJ 46, at page 47 the court held that:

"... Almost all defence put forward by an accused is consistent with innocence or it would not be put forward; nor would it be a very good defence if it could not reasonable be true. But whatever may be the defence to a criminal charge the sole question which a Subordinate Court has to ask itself at the conclusion of the trial is-Does the defence raise a reasonable doubt as to the truth of the prosecution case or as to the accused's guilt..."

[42] Based on the evaluation of the Appellant's evidence, the learned trial judge at page 31 of her grounds of judgment held that the Appellant had failed to raise a reasonable doubt against the prosecution case-

"Tertuduh di peringkat akhir pembelaan ini telah gagal menimbulkan sebarang keraguan yang munasabah terhadap kes Pendakwaan. Tiada keterangan berjaya dikemukakan bagi tujuan menimbulkan keraguan yang munasabah. Sehingga ke akhir kes Pembelaan ini, jelas bahawa pihak Pendakwaan telah berjaya membuktikan kes mereka melampaui keraguan yang munasabah terhadap Tertuduh".

[43] We did not find any appealable error on the part of the learned trial judge on his above said finding.

[44] We turn next to the second ground raised by the learned counsel for the Appellant that the learned trial judge had failed to make a specific finding on the element of possession and trafficking. The learned counsel argued that the learned trial judge had erred in law when he found that the Appellant had *mens rea* possession and at the same time invoked the presumption under section 37(da) of **the Act**. The learned trial judge stated at page 30 of his grounds of judgment as follows-

"Di bawah Seksyen 37(da) Akta Dadah Berbahaya 1952, di peruntukkan:

(da) mana-mana orang yang didapati ada dalam milikannya-

...

(xvi) 50 gram atau lebih berat Methaphetamine selain dari menurut kuasa Akta ini atau mana-mana undang-undang bertulis lain, hendaklah sehingga dibuktilan sebaliknya, dianggapkan sebagai mengedarkan dadah tersebut.

Fakta dan keterangan jelas membuktikan bahawa Tertuduh telah mengedar dadah jenis

> Methapetamine berjumlah 737.7 gram, yang jelas melebihi berat yang diperuntukkan di bawah seksyen 37(da)(xvi) Akta Dadah Berbahaya 1952".

[45] The Appellant's counsel submitted that the learned trial judge did not state his reason at the finding of prima facie case save by invoking presumption under section 37(da) of **the Act** when reaching his decision that the Appellant had failed to raise a reasonable doubt at the end of defence case. Counsel referred to the case of **Sureeya Wutthisat & Satu Lagi v PP** [2012] 8 CLJ 773 where it was held that the judge must give explanation as to how he had reached his decision. Counsel also relied on cases such as **Soorya Kumar a/l Narayanan & Anor** [2013] 1 MLJ and **Seyedalireza Seyedhedayatollah Ehteshamiardestani v PP** [2014] 4 CLJ 406, that there is serious misdirection if the judge at the close of prosecution case was relying on the statutory presumptions under section 37 of **the Act** and actual act of trafficking as defined under section 2 of **the Act** at the same time.

[46] The learned DPP on the other hand submitted that there is no such confusion by the learned trial judge because at the close of the prosecution's case the learned trial judge was relying on direct evidence of trafficking under section 2 of **the Act** until the end of the defence case.

[47] With respect, we disagreed with the learned counsel argument and submission. We noted from the grounds of the learned trial judge that His Lordship had clearly made the finding of actual act of trafficking as defined under section 2 of **the Act**. We had carefully scrutinize the whole evidence and facts relating to this case and we agreed with the learned trial judge in coming to his decision that the Appellant is not an innocent carrier and the doctrine of wilful blindness applied in this case. We also found that there was no error in law or misdirection on the part of the learned trial judge's appreciation of the evidence with regards to his findings that Miss My was a fictitious character and not a real person.

[48] In our view, the impugned passage of section 37(da) of **the Act** referred by the learned trial judge in the grounds of judgment is mere verbosity which does not affect the core finding of the learned trial judge. The learned trial judge found that there was overwhelming evidence that the Appellant had possession and knew he was carrying the impugned drugs for the purpose of trafficking.

[49] In this case we are very clear that the finding of trafficking of the dangerous drugs by the learned trial judge against the Appellant is based on direct evidence that the Appellant was transporting or carrying the drugs from Shenzen Airport, China to KLIA, Malaysia. Hence the prosecution had proven direct trafficking as defined under section 2 of **the Act** for "trafficking". At page 16 of the grounds of judgment, the learned trial judge opined:

> "Keterangan saksi-saksi bagi membuktikan bahawa Tertuduh mengedar dadah tersebut adalah kukuh, Tertuduh telah datang ke Malaysia dari Shenzen, China dengan membawa sebanyak 732.7 gram dadah berbahaya jenis Methampetamine yang dijumpai tersorok di bahagian dalam beg galas yang dibawanya.
>
> Perbuatan Tertuduh tersebut adalah termasuk di bawah definasi pengedaran seperti yang

termaktub di bawah Seksyen 2 Akta Dadah Berbahaya, 1952".

At page 30 at the close of defence case, the learned trial judge held-

> "...Tertuduh melakukan perbuatan pengedaran dadah sebagaimana ditakrifkan di bawah Seksyen 2 Akta Dadah Berbahaya 1952 iaitu mengangkut dan membawa dadah-dadah tersebut ke Malaysia, bagi tujuan untuk diedarkan. Perbuatan serta tindakan Tertuduh membawa dadah tersebut di dalam beg P22 adalah terjumlah kepada pengedaran secara langsung seperti yang ditakrifkan di bawah Seksyen 2 Akta".

Conclusion

[50] We were satisfied that the learned trial judge had not misdirected himself in any way to occasion an error either on the law or the facts to warrant appellate intervention.

[51] Having regard to the totality of the evidence, the surrounding circumstances and the probabilities of the case, it is our unanimous finding that the charge had been proven beyond reasonable doubt against the Appellant.

[52] For all the reasons above stated, we hold that the conviction is safe and amply supported by cogent and overwhelming evidence on record. Therefore, the Appellant's appeal is dismissed and the conviction and sentence of the High Court is hereby affirmed.

Dated this 31st July 2018

t.t

Kamaludin Md. Said
Judge
Court of Appeal Malaysia
Putrajaya

COUNSEL

For the Appellants: Mohd Aimi Zaini and Zainurithaalfa (Messrs Aimi, Zainuritha & Co.)

For the Respondent: Mangai, Deputy Public Prosecutor (Attorney General Chambers)

LEGISLATION REFERRED TO:

Dangerous Drugs Act 1952, First Schedule; Sections 2, 37, 37(da), 39B(1)(a), 39B(2)

JUDGMENTS REFERRED TO:

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