IN THE COURT OF APPEAL OF MALAYSIA

Coram: Ahmadi Asnawi, JCA; Abdul Rahman Sebli, JCA; Kamardin Hashim, JCA

Mohsen Parsei Nabi v Public Prosecutor

Citation: [2018] MYCA 301 **Suit Number:** Criminal Appeal No. B-05(M)-160-04/2017

Date of Judgment: 20 September 2018

Criminal law – Trafficking in dangerous drugs – Conviction – Death sentence – Appeal

Criminal law – Defence of innocent carrier – Whether the trial judge erred in not adequately consider the appellant's defence

JUDGMENT

Introduction

[1] The appellant, an Iranian national, was charged with an offence of trafficking in dangerous drugs under section 39B(1)(a) of the **Dangerous Drugs Act, 1952 ('the Act')** punishable under section 39B(2) of the same Act. The charge reads as follows:

> *Bahawa kamu pada 26 Januari 2013, jam lebih kurang 1.45 pagi di Cawangan Pemeriksaan Penumpang 2 (CPP 2), Balai Ketibaan Antarabangsa, Terminal Pengangkutan Tambang Murah (LCCT), Lapangan Terbang Antarabangsa Kuala Lumpur, di dalam Daerah Sepang, dalam Negeri Selangor Darul Ehsan telah didapati mengedar dadah berbahaya iaitu Methamphetamine seberat 1,846.9 gram dan dengan itu kamu telah melakukan 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 prosecution's case, the appellant was ordered to enter his defence upon proof of a prima facie case been established against him. Having heard the appellant's defence, the learned High Court Judge ('learned trial Judge') found the appellant guilty and convicted him on the preferred charge. The appellant was sentenced to death accordingly.

[3] Aggrieved, the appellant appealed to this Court against the said conviction and sentence. We heard the appeal on 7.8.2018, and after due consideration of the issues raised, we unanimously

dismissed the appellant's appeal. We now give our reasons in dismissing the appeal.

The Prosecution's Case

[4] The case for the prosecution can be summarized as follows. On 26th January 2013, at about 1.45 a.m., Customs Officer Mohd Zamri Bin Shafii (PW6) sighted the appellant walking towards screening machine No. 5 while carrying a luggage bag (P6) and a satchel bag (P7). Upon arrival at the scanning machine, the appellant then placed his respective bags on the machine belt for the purpose of screening.

[5] According to PW6, the results of the screening implied existence of suspicious images on P6. PW6 instructed the appellant to open P6 for the purpose of examination. An examination of P6 was conducted by Customs Superintendent Fatimah Munirah Binti Ismail (PW8) and witnessed by PW6, the appellant and the investigating officer, Keith Jonathan (PW9).

[6] During the examination, PW8 noticed the presence of suspicious lumps on the inner linings of P6. PW8 removed the linings and thereafter, she found that they contained crystalise substances suspected to be drugs. PW8 placed the substances into four different receptacles subsequently marked as exhibits P8A(1), P8A(2), P8A(3) and P8A(4) respectively.

[7] On 1st February 2013, all the exhibits P8A(1) to P8A(4) were sent by PW9 to the Chemistry Department for analysis and received by chemist, Zulkefli Bin Mohd Edin (PW5). Upon analysis, PW5 confirmed that the substances found in P8A(1), P8A(2), P8A(3) and P8A(4) to contain a total of 1,846.9 grammes of Methamphetamine. PW5 also confirmed that Methamphetamine is a dangerous drug listed in the First Schedule of **the Act**.

[8] At the end of the prosecution's case, the learned trial Judge made a finding that the appellant had the custody and control of the bag P6 that contained the impugned drugs. The learned trial Judge then went on to invoke the presumption of knowledge against the appellant by virtue of section 37(d) of **the Act**. The learned trial Judge said as follows at page 29 of the Appeal Record, Volume 1:

> *"OKT mempunyai milikan terhadap dadah tersebut. Pada setiap masa yang material, dadah tersebut berada di dalam kawalan dan milikan OKT sekaligus mengguna pakai anggapan pengetahuan di bawah seksyen 37(d) Akta Dadah Berbahaya 1952. Mahkamah bersetuju bahawa inferens pengetahuan boleh ditimbulkan kerana di dalam beg tersebut terdapat barangan peribadi milik OKT dan tiada orang lain yang dilihat bersama OKT bersama dengan bagasi yang membawa barang kes dadah tersebut.".*

[9] As regard to the element of trafficking, the learned trial Judge used direct evidence of trafficking under section 2 of **the Act** based on the fact that the impugned drugs was in big quantity and cunningly concealed in P6. The learned trial Judge said this:

> *"OKT telah pada tempat, masa dan tarikh telah melakukan kesalahan mengedar dadah atau "trafficking" iaitu dengan mengambil kira tindakan OKT menyembunyikan barang kes dadah*

tersebut terjumlah kepada tafsiran pengedaran di bawah seksyen 2 Akta Dadah Berbahaya 1952. Malah, barang kes dadah yang dibawanya mengandungi dadah jenis Methamphetamine dalam kuantiti yang banyak adalah jelas bahawa ianya bukanlah untuk kegunaan sendiri.".

[10] The learned trial Judge made a finding that the prosecution had succeeded in establishing a prima facie case against the appellant. Her Ladyship decided:

"Setelah meneliti dengan berhati-hati dan membuat pertimbangan secara maksima, dengan menilai kesemua keterangan saksi-saksi pendakwaan dan ekshibit sama ada fizikal ataupun dokumen berserta alasan-alasan yang dinyatakan di atas, Mahkamah berpuas hati bahawa pihak pendakwaan telah berjaya menimbulkan satu kes prima facie terhadap OKT. Seperti mana elemen-elemen pertuduhan yang dinyatakan di peringkat awal alasan ini, Mahkamah berpuas hati bahawa 3 elemen pertuduhan telah berjaya dibuktikan oleh pendakwaan.".

[11] Having found that the prosecution had established a prima facie case against the appellant, the learned trial Judge called upon the appellant to enter his defence.

The Defence

[12] The appellant elected to give evidence under oath. In essence, the appellant's defence was that the bag P6 was given to him by 'Murtaza', a friend of him from the same village. The appellant denied any knowledge of the impugned drugs found in P6. The appellant tendered his cautioned statement (D34) recorded on 31st January 2013, 5 days after his arrest. The contents of D34 are similar with his oral testimony.

[13] After considering the defence, the learned trial Judge found that the appellant had not succeeded in raising a reasonable doubt on the prosecution's case. The learned trial Judge found that the crux of the appellant's defence was that he was an innocent carrier without knowledge. The appellant put the blame on 'Murtaza' who was responsible for his predicament. The learned trial Judge however rejected the appellant's defence of an innocent carrier and held that the appellant was guilty of wilful blindness for shutting his eyes to the obvious. The learned trial Judge as well found that the appellant had failed to rebut the statutory presumption of knowledge and possession under section 37(d) of **the Act** on balance of probabilities.

[14] The appellant was thus convicted and sentenced to death. Hence the appeal before us.

The Appeal

[15] Before us, learned counsel for the appellant posited only one solitary ground of appeal namely that the learned trial Judge erred in not adequately consider the appellant's defence and to hold that the appellant's defence had casted a reasonable doubt on the prosecution's case thereby entitled him for an acquittal.

[16] Learned counsel submitted that the learned trial Judge had wrongly rejected the appellant's defence of an innocent carrier based on the following reasons:

(a) The defence is not an afterthought defence as the appellant had advanced a consistent defence with his cautioned statement in D34;

(b) 'Murtaza' is not a fictitious character. The appellant had provided the investigating officer with some information regarding 'Murtaza"s phone number that was stored in his hand phone memory during investigation (Alcontara Notice);

(c) The appellant had also provided PW9 with the details of 'Murtaza"s location and whereabouts during D34's recording process;

(d) PW9 merely made few calls to the phone number without any further attempts to substantiate the appellant's defence; and

(e) Since the appellant had no personal luggage for the purpose of his travel, he agreed to use 'Murtaza"s luggage whom he had befriended for the past few years before the incident.

[17] Based on the foregoing, learned counsel argued that the appellant's defence is a credible defence. There was no evidence, be it direct or circumstantial, to suggest that the appellant had the requisite knowledge of the impugned drugs hidden in P6. Learned counsel relied on the following authorities:

(a) **Ng Chai Kem v PP** [1994] 2 MLJ 210;

(b) **PP v Mohamed Noor Jantan** [1977] 2 MLJ 80;

(c) **Seyedalireza Seyedhedayatollah Ehteshamiardestani v PP** [2014] 4 CLJ 406; and

(d) **Mohamed Sulaiman Sahulhameed v PP** [Criminal Appeal No. Q-05-188-07/2012 COA].

Our Decision

[18] It is trite that possession involved two elements, that is, the physical element and mental element. Physical element would mean whether the appellant was in custody or control of the impugned drugs. Whereas mental element means the appellant had knowledge of the impugned drugs. The learned counsel did not raise any complaint regarding the physical element. The facts clearly showed that the appellant had physical custody and/or control of P6, where the impugned drugs were hidden inside it. The learned counsel's complaint was principally on the mental element i.e. knowledge. It was argued on behalf of the appellant that there was no evidence to prove that the appellant had the necessary knowledge of the impugned drugs.

[19] We disagreed with learned counsel's submission that there was no evidence to support knowledge on the appellant's part. The learned trial Judge found that the appellant was in custody and control of P6 which contained the drugs. The learned trial Judge then rightly invoked the presumption of knowledge and possession of the impugned drugs on the part of the appellant under section 37(d) of **the Act**. Once the presumption is invoked, the burden is now shifted to the appellant to rebut the

presumption on the balance of probabilities (see: **PP v Yuvaraj**).

[20] The learned trial Judge made the following finding on the issue of knowledge (pages 41-42 Appeal Record Volume 1):

> *"Seperti mana yang dinyatakan di peringkat kes pendakwaan, anggapan di bawah seksyen 37(d) ADB 1952 adalah terpakai ke atas OKT, maka OKT harus mematahkan anggapan di bawah seksyen 37(d) ADB 1952 di atas imbangan kebarangkalian (on the balance of probabilities). Setelah meneliti keterangan pembelaan OKT yang menyatakan bahawa OKT tiada pengetahuan dan beg tersebut milik 'Murtaza' yang berada di Iran dan tidak dipanggil memberi keterangan bagi menyokong keterangan pembelaan OKT. Mahkamah bersetuju dengan hujahan pihak pendakwaan bahawa penama 'Murtaza' tersebut hanya rekaan OKT semata-mata dan tidak wujud. Kewujudan penama 'Murtaza' ini tidak dapat dibuktikan oleh OKT.".*

[21] We did not find any appealable error in the learned trial Judge's above finding. Once the presumption is invoked, the appellant bears a higher burden than to merely casting a reasonable doubt to rebut the presumption that he had knowledge of the impugned drugs.

[22] On the failure of the prosecution to investigate 'Murtaza', learned counsel argued that 'Murtaza' is not a fictitious character and it is not right for the learned trial Judge to dismiss the appellant's defence of an innocent carrier. We found that this issue had been considered and explained at great length by the learned trial Judge in her judgment, which we reproduce as follows:

> "1. **<u>Innocent Carrier</u>**
>
> *Bagi isu ini, Mahkamah juga bersetuju dengan hujahan pihak pendakwaan bahawa OKT ada pengetahuan berkenaan isi kandungan beg P6 yang mengandungi dadah dan bukanlah seorang "innocent carrier". OKT boleh memilih untuk menggunakan bagasi beliau untuk melancong tetapi bersetuju dengan tawaran "Murtaza" untuk membawa beg beliau. Malahan, penama "Murtaza" ini bukanlah seorang kenalan rapat yang boleh dipercayai tetapi OKT masih memilih untuk membawa bagasi yang diberikan oleh "Murtaza". Secara logik akal, OKT sewajarnya berasa pelik dan hairan dengan tawaran tersebut.*
>
> *Malah, OKT juga wajar berasa was-was dan ragu-ragu apabila "Murtaza" dengan baik hati membelikan "e-tiket" untuk terbang ke Malaysia dari Macau untuk OKT. Mahkamah berpendapat bahawa pembelaan "innocent carrier" ini adalah tidak berasas dan wajar ditolak. Berdasarkan keterangan saksi dan dokumen yang dikemukakan, OKT jelas mempunyai pengetahuan kandungan beg P6 dan sanggup mengambil risiko untuk membawa beg P6 tersebut ke Malaysia. Malah, Mahkamah juga mendapati bahawa pihak pembelaan juga tidak menafikan bahawa OKT adalah orang yang membawa beg P6 dan tiada orang lain yang dilihat bersama dengan OKT. Selain itu, beg P6 tersebut adalah di "check-in" bersama OKT. Mahkamah juga bersetuju bahawa isu beg P6 itu milik siapa ("ownership") adalah tidak menjadi persoalan kerana OKT adalah orang yang memiliki kawalan dan milikan terhadap beg P6 tersebut. Rujuk kes* ***Law Yew Kwan v PP [2011] 5 LJ 850****.*

2. **Alcontara Notice**

Mahkamah bersetuju bahawa OKT tidak memberi maklumat yang cukup untuk Pegawai Penyiasat membuat siasatan lanjut berkenaan penama "Murtaza" ini. Mahkamah berpendapat adalah mustahil untuk Pegawai Penyiasat mencari penama "Murtaza" yang berada di Iran ini hanya melalui nombor telefon yang terdapat di dalam telefon bimbit OKT. Kes ***Mahdi Moghadam Zarandi Khanali v PP [2017] 1 LNS 518*** *adalah dirujuk dan Mahkamah Rayuan membuat dapatan berikut:*

> *"[20] ... Tambahan lagi, kami perhatikan jika SD2, SD3 sendiri ataupun pihak berkuasa di Iran tidak dapat mencari Ali Mohammadi ini, adakah munasabah untuk menjangka SP8 atau pihak polis Malaysia boleh berbuat sedemikian, walaupun melalui panggilan telefon? Jika benar Ali Mohammadi ini wujud sekalipun, adakah akan semudah itu dia hendak menjawab panggilan telefon pihak polis Malaysia! Jauhlah lagi untuk pihak polis untuk pergi ke Iran atau di mana jua untuk mencari Ali Mohammadi ini. Pada kami, penghujahan seperti ini tidak berpijak di bumi nyata! Tidak munasabahnya kedudukan ini tidak boleh dijadikan asas perundangan dan penemuan.".*

Maka, setelah meneliti keterangan saksi-saksi dan penghujahan kedua-dua belah pihak, maka saya mendapati pihak pendakwaan berjaya membuktikan kesnya melampaui keraguan munasabah dan Mahkamah mendapati bahawa pihak pembelaan telah gagal mematahkan anggapan di bawah seksyen 37(d) ADB 1952 dan sekaligus gagal menimbulkan sebarang keraguan terhadap kes pendakwaan.

Oleh yang demikian, bersasarkan alasan-alasan di atas, Mahkamah mendapati OKT adalah bersalah dan disabitkan atas pertuduhan. Maka OKT dijatuhkan hukuman gantung sampai mati.".

[23] We agreed with the above finding of fact made by the learned trial Judge and that the prosecution should not be blamed as detailed particulars of 'Murtaza' were not furnished to PW9. Without the detailed particulars, it is impossible for a meaningful investigation to be done by the authority (see **Alcontara Ambross Anthony v PP** [1996] 1 MLJ 209; [1996] 1 CLJ 705 and **Teng Howe Seng v PP** [2009] 3 MLJ 46 FC).

[24] It is our finding that the learned trial Judge had adequately considered the issues raised by the learned defence counsel before Her Ladyship arrived at the correct decision. We also agreed with the learned trial Judge's decision that the appellant had failed to cast a reasonable doubt on the prosecution's case and had failed to rebut the statutory presumption of knowledge and possession under section 37(d) of **the Act** on a balance of probabilities, earlier invoked by the learned trial Judge against the appellant.

Conclusion

[25] 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 of trafficking had been proven beyond a reasonable doubt against the appellant.

[26] For all the reasons above stated, we hold that the appellant's conviction is safe and amply supported by overwhelming evidence on record. We found no merits in the appeal. Therefore, the appellant's appeal is dismissed. The conviction and sentence entered by the High Court against him is affirmed.

Dated: 20 September 2018

signed

KAMARDIN BIN HASHIM
Judge
Court of Appeal
Malaysia

COUNSEL

For the Appellant: Ridha Abdah Bin Subri, Messrs Ridha & Rai, 13A-07, Level 14, Plaza Azalea, No. 6, Persiaran Bandaraya, Seksyen 14, 40000 Shah Alam

For the Respondent: Kwan Li Sa, Deputy Public Prosecutor, Appellate and Trial Division, Attorney General's Chambers, Putrajaya

LEGISLATION REFERRED TO:

Dangerous Drugs Act 1952, Sections 2, 37(d), 39B(1)(a), 39B(2)

JUDGMENTS REFERRED TO:

Alcontara Ambross Anthony v PP [1996] 1 MLJ 209; [1996] 1 CLJ 705

Mohamed Sulaiman Sahulhameed v PP [Criminal Appeal No. Q-05-188-07/2012 COA]

Ng Chai Kem v PP [1994] 2 MLJ 210

PP v Mohamed Noor Jantan [1977] 2 MLJ 80

PP v Yuvaraj [1969] 2 MLJ 89

Seyedalireza Seyedhedayatollah Ehteshamiardestani v PP [2014] 4 CLJ 406

Teng Howe Seng v PP [2009] 3 MLJ 46 FC