MALAYSIAN JUDGMENTS

IN THE COURT OF APPEAL OF MALAYSIA

Coram: Mohtarudin Baki, JCA; Yeoh Wee Siam, JCA; Rhodzariah Bujang, JCA

Saburdeen Mohamed Abdul Kathar v Public Prosecutor

Citation: [2018] MYCA 305 **Suit Number:** Criminal Appeal No. J-05(M)-87-02/2017

Date of Judgment: 19 September 2018

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

JUDGMENT

Introduction

[1] The appellant in this appeal was charged with and convicted of trafficking in 740 grams of Methamphetamine which offence was committed on 21/10/2013 at about 3.45 pm at Senai International Airport, Johor. The charge against him in Bahasa Malaysia reads:

> *"Bahawa kamu pada 21 Oktober 2013 lebih kurang jam 3.45 petang di Unit Khas Pemeriksaan Penumpang (UKPP), Lapangan Terbang Antarabangsa Senai (LTAS) di dalam daerah Kulaijaya, dalam negeri Johor Darul Takzim telah didapati mengedar dadah berbahaya iaitu Methamphetamine seberat 740.4 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".*

The case presented by the prosecution against him is as follows:

Prosecution case

An officer of the Royal Malaysian Customs, Mohd Kamal bin Mohd Isa (PW4) was on duty at the Passengers Examination Unit of the Airport as a traffic controller tasked with scanning passengers' baggages at that material time. The accused who was in a flight from New Delhi was asked by PW4 to scan his briefcase (ExP8B) which was without any baggage tag and with no evidence that it was checked-in. Therefore it can safely be assumed that the briefcase was in his possession at all material times. After this was done, his fellow officer who was manning the scanning machine, Nor Ashikin binti Ibrahim (PW6) then asked the accused to open the briefcase. Inside there were a pair of shorts

and trousers but a physical examination of the items by her reveals a suspicious bulge at the side of the briefcase. She asked the accused what was the bulge but the accused just kept quiet. The discovery prompted her to re-scan the briefcase and it revealed a suspicious image. The accused was then taken to the Custom's office at the Airport to await the arrival of the Narcotics team of the Department. The team was headed by Khairul Anuar bin Ishak (PW8) who proceeded to physically examine the briefcase. He said he felt a bulge on its top when he pressed on it and suspected that something was concealed therein. Upon a more thorough examination of the briefcase he also noticed a bulge at the base of the briefcase. When the top of the briefcase as well as its base were cut open, a transparent plastic containing crystalline substance were found inside and when these were later analysed by a Scientific Officer of the Chemistry Department, Aedrianee Reeza Alwi (PW5), they were found to contain the amount of drug as stated in the charge. An initial analysis by PW8 earlier had also revealed that the said substance was Methamphetamine.

According to PW8, when the accused was told of the result of the initial analysis by him, he started crying and said that the drug did not belong to him, and only the clothes were his. He further said that he was supposed to hand over the briefcase to someone who was waiting for him at the Airport. On the instruction of PW8, a caution was read out and explained to the accused in Tamil by another officer, Prem Ananth, whereupon the accused again broke down and cried. Thereafter at about 7.15 pm, the accused and all the exhibits were handed over to the Investigating Officer of the case, Mohd Radzi Affendy bin Misnan (PW9), who brought and kept the briefcase and its contents as well as the personal belongings seized from the accused such as his wallet and cash in a locked steel cabinet in his office.

After the close of the prosecution's case, the learned Judicial Commissioner, Dr Sabirin bin Jaafar, delivered an oral ruling, without full grounds, to call the accused to give his defence to the charge and a date, 16/8/2016 was fixed for that purpose. However, on the said date the case could not go on because there was no Indian interpreter available and it was adjourned for mention to 8/9/2016. By the time the case was further mentioned on 12/10/2016, another Judicial Commissioner, Tuan Collin Lawrence Sequerah had taken over the conduct of the case as the previous Judicial Commissioner was no longer in service with the Judiciary then.

The defence

[2] The accused gave evidence under oath and called his friend, Seeni Mohamad (DW2) as his witness. DW2 was also arrested at the Airport on the same day in question but 10 minutes after the accused because they were walking separately after disembarking from the plane. According to DW2 he was charged with a drug offence and was sentenced to 15 years imprisonment and 10 strokes of whipping. He was a detainee at Kluang Prison when he testified at the trial. DW2 corroborated the evidence of the accused that they both travelled together from New Delhi and were each given a suitcase and a briefcase, respectively by a man called Ravi. According to the accused he knew Ravi since 2008 and he met Ravi for the third time at a wedding on 19/10/2013. Ravi asked him to pass the briefcase, which Ravi handed to him at New Delhi Airport before his departure, to a friend in Malaysia. Ravi said that the briefcase was a sample and that friend would be waiting for the accused

at the Airport and would call him once he arrived there. However, Ravi did not tell him the name of that friend. The accused said he did check the briefcase when it was given to him and saw it was empty and that prompted him to put his clothings in it. He did not notice anything amiss with the briefcase, there was no bulge and the stitching of the briefcase was still good. The accused said that he told the arresting officer about the briefcase being given by Ravi and that his family's attempt to locate Ravi in Chennai failed. He took the flight to Johor Bahru just to accompany Seeni who was looking for a job. After giving the briefcase to Ravi's friend he said he would then take a bus to go to Kuala Lumpur.

[3] DW2 said he travelled to Johor Bahru to meet a friend and did so with the accused who had worked in Malaysia from 2009 until September 2013 because he was not familiar with our country. The accused was supposed to bring him to see this friend of his by the name of Asif Rahman. He was asked by Ravi to hand over the suitcase to an unknown person in Malaysia which he agreed because his own suitcase was torn. He denied being paid by Ravi to carry the suitcase to Malaysia, but admitted that in his own trial he did testify that the suitcase was passed to him by Ravi whilst they were on their way to the New Delhi Airport and not at the said Airport as he had stated in this trial.

[4] The learned Judicial Commissioner, after considering the evidence and the law on his duty at the close of the defence case, held that Ravi was not a fictitious person because from the line of questioning posed by the learned Deputy Public Prosecutor to the accused and DW2, the prosecution did not dispute Ravi's existence. However, he decided that the accused was not an innocent carrier as it was not reasonable for the accused to accept the rather strange request from Ravi to carry the briefcase to Malaysia without further inquiry because they were by no means close friends. The accused, said the learned Judicial Commissioner, should have known about the death penalty for drug trafficking in this country since he had previously stayed and worked in Malaysia.

[5] Based on PW6's evidence, the learned Judicial Commissioner stated that a cursory examination of the inside of the briefcase would have revealed that something was amiss because PW6 said she could feel the bulge when she pressed the inner sides of the briefcase. Under these circumstances, the Judicial Commissioner opined that the accused should have made further inquiries as to why he should carry an empty bag and hand it over to a complete stranger because there was no evidence that it was an unusually expensive, a rare or an antique item. His Lordship concluded therefore that the accused was wilfully blind based on the decision of the Singapore's Supreme Court in **Public Prosecutor v Hla Win** (1995) 2 SLR 424 which concept has been accepted by our Malaysian courts. Also the fact that each one of them had to carry separate empty bags to Malaysia should have put the accused to further enquiry said the learned Judicial Commissioner and is also further evidence to show that he was wilfully blind. His Lordship further found the act of the accused emptying his own sling bag and putting his clothes inside the briefcase absurd, an act which the accused in cross-examination admitted was not reasonable. Another unreasonable behaviour of the accused, said His Lordship, was to proceed to the Customs Examination counter without waiting for DW2, whom he said was in the same queue with him but not directly behind, for PW4's evidence on this was clear that the accused was alone when he approached the counter. The learned Judicial Commissioner found contradictions in the evidence of the accused and DW2, disbelieved his defence and held that

the evidence was concocted to absolve the accused of the offence. We would like to hastily add here that if indeed what the accused said about being given the briefcase by Ravi was true, it would be reasonable for the accused to alert PW4 and PW6 about the existence of DW2 as soon as he was arrested since he claimed that they were each given the briefcase/ suitcase by Ravi and he had no knowledge of the impugned drug in the briefcase. However, there was no evidence that this was so.

[6] We need to further state that the accused's reason for going to Johor Bahru with DW2 in itself was contradictory-first saying that it was to accompany DW2 to see a friend, and then saying that DW2 went there to look for a job. The learned Judicial Commissioner accordingly concluded that the accused had failed to rebut the statutory presumption on possession and knowledge under section 37(d) of the **Dangerous Drugs Act 1952 ("DDA")** on a balance of probabilities and has failed to raise any reasonable doubt on the prosecution case for trafficking for the circumstances show that he was tasked by Ravi, with whom he was acting in concert with to traffic the drug in Malaysia which were deliberately and cleverly concealed in the briefcase.

The appeal

[7] Before us, learned counsel for the accused rested his client's appeal on two points. First, that the accused was an innocent carrier and secondly, given that there were no grounds of judgment by the first learned Judicial Commissioner who heard the prosecution's case, there was nothing to suggest that His Lordship had relied on any of the presumptions under section 37(d) of the **DDA** when he called for the defence.

[8] On the first issue, it is of course without doubt that the drug was concealed in the linings of the briefcase and could not be seen with the naked eyes. No drug trafficker would be so stupid as to put the drug out in the open for all and sundry to see. The learned Judicial Commissioner had rightly addressed his mind to the Federal Court's decision in **Mohamad Radhi Yaakob v Public Prosecutor** (1991) 3 CLJ 2073 which behoves upon the court to conduct a 2 stage exercise and this was clarified in **Yee Wen Chin v Public Prosecutor** (2008) 6 CLJ 773 as follows:

> *First, it must be determine as a fact whether the person alleged by the accused to be the real trafficker is real or simply a fragment of the accused's imagination and invented for the purpose of the trial. Secondly, if that person is real then whether he was the real trafficker.*
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> *The learned Judicial Commissioner has done exactly that as can be seen from paragraphs 51 and 52 of his grounds of judgment for he did find that Ravi was a real person and to determine the next stage whether he was the real trafficker and the accused a mere innocent carrier, His Lordship had rightly considered the concept of wilful blindness which goes hand in hand with the said defence of innocent carrier.*

As summarised above, the learned Judicial Commissioner had, after laying down the case authorities on this concept of wilful blindness, concluded in paragraph 69 that the accused was guilty of wilful blindness and therefore the accused had knowledge of the existence and the nature of the drug in question. His Lordship did not stop there but went on, as also summarised earlier, to show how

unreasonable the defence was and disbelieved it. It is a finding that we had no cause to disagree with. The sheer absurdity of the main crux of the defence, which was to hand over an empty common briefcase to an unknown person in Johor Bahru whilst on a trip to purportedly accompany DW2 to Johor Bahru to look for a job or to meet up with a friend is simply glaring. The obvious conclusion, even though the learned Judicial Commissioner did not specifically say so but the gist of His Lordship's consideration is that the accused was the real trafficker.

[9] On the second issue, admittedly there is some difficulty here in view of the change of the trial judge and the absence of the grounds when His Lordship called for the defence. There was therefore no clear statement whether His Lordship had when calling for the defence, invoked any of the presumptions under section 37 of the **DDA.** The learned Deputy Public Prosecutor highlighted to us the opening speech of the Deputy Public Prosecutor conducting the trial at page 207 Volume 3 of the Appeal Record where he said at paragraphs 6 and 7 as follows:

> *6. Pihak pendakwaan akan mengemukakan saksi-saksi untuk membuktikan bahawa OKT telah mengedar dadah tersebut. Keterangan-keterangan langsung, dokumentar dan keterangan ikut keadaan juga akan dikemukakan untuk membuktikan elemen-elemen seperti dalam pertuduhan berdasarkan peruntukan undang-undang di bawah Akta Dadah Berbahaya 1952.*
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> *7. Secara pilihan, pihak pendakwaan juga akan membuktikan elemen-elemen pertuduhan melalui keterangan langsung, dokumentar dan keterangan ikut keadaan dan setakat yang dibenarkan bergantung kepad anggapan pemilikan dan pengetahuan di bawah seksyen 37(d) Akta Dadah Berbahaya 1952.*

[10] According to the learned Deputy Public Prosecutor, this shows that reliance, although in the alternative, was placed on section 37(d) of the **DDA.** Admittedly this was so, but it still does not clarify the issue whether the first trial judge was relying on that presumption when he called for the defence. The accused's learned counsel then referred us to this court's decision in **Sureeya Wutthisat & Satu Lagi lwn Pendakwa Raya** (2012) 8 CLJ 773 where Ahmad Maarop JCA (as His Lordship then was) commented adversely on the fact that the judgment of the High Court was not a "speaking judgment" for no reasons were given for calling the defence. Now the material difference between that cited case and the one before us here is that in the former case there it was only one Judge hearing the case, not two like in this case. Although it is a salutary practice to at least give broad reasons for calling the defence and to specifically state if any presumptions are being relied upon when calling for it so as to give the defence notice of the legal burden on its shoulders which needs to be discharged, nonetheless the general practice is to do so only in the final judgment. That was not done in **Sureeya**'s case (supra). Similarly in the case of **Soorya Kumar Narayanan v Public Prosecutor** (2009) 6 CLJ 257 also cited by accused's learned counsel in his written submission, there was also no affirmative finding made that the appellant was in possession of the drugs to justify the trial judge's invocation of the presumption under section 37(da). Again, here we are talking about a single Judge presiding over the case.

[11] In response, the learned Deputy Public Prosecutor referred us to the Federal Court's decision in

Ahmad Najib Aris v Public Prosecutor (2009) 2 CLJ 800 and which, in our view was a complete answer to the grievance of the accused here. In this cited case, the judgment of the trial judge lacked specific findings and provided no reasons for the findings made. The Court of Appeal found that the said judgment was of no assistance to the court. Nevertheless, it went on to consider and subject the evidence of the prosecution to a critical re-examination. It was an exercise which the Federal Court approved. In no uncertain terms, Zulkifle Ahmad Makinudin FCJ (as His Lordship then was) endorsed the power of the Court of Appeal to review or re-evaluate all the evidence adduced by the prosecution in order to determine whether the various findings of the trial judge were correct and when the High Court's judgment was of no assistance, the Court of Appeal was allowed to embark on a critical re-examination of the evidence.

[12] Our task in this case was made easier because Collin Lawrence Sequerah JC had evaluated the evidence adduced by the prosecution and made his findings on the weak defence. Even without his evaluation of the same and when we subjected the said evidence to careful scrutiny, it was clear to us that there was sufficient evidence to raise the presumption under section 37(d) of the **DDA** since the accused was caught red-handed with the drug in question and his act of carrying the briefcase containing the impugned drug comes squarely within the definition of trafficking under section 2 of the **DDA.** The fact that he was cooperative throughout the examination of the briefcase by PW4 and PW6 was not evidence which was favourable to him, for as held by the Federal Court in **Teh Hock Leong v Public Prosecutor** (2010) 1 MLJ 741, *" ... docile conduct throughout the period prescribed could not have inferred an absence of knowledge of the said drugs".* After all, our duty as an appellate court in a criminal case, according to Sulong Matjeraie JCA (as His Lordship then was) in **Mohamad Deraman v Public Prosecutor** (2011) 3 CLJ 601 at page 612 and relying on **Mohd Johi Said v Public Prosecutor** (2005) 1 CLJ 389 at page 397, is to ascertain if the conviction was safe and not whether the decision was wrong. Therefore, the absence of the trial judge's written grounds of judgment does not automatically vitiate the decision of the trial judge, said His Lordship. Likewise, we say for the absence of the written grounds of judgment at the close of the prosecution's case in this appeal for we were indeed satisfied when we re-examined the evidence adduced by the prosecution that the accused was rightly called to give his defence to the charge by Dr. Sabirin bin Jaafar JC and equally deserved to be convicted of the charge by Collin Lawrence Sequerah JC. His appeal was therefore dismissed and the conviction and sentence passed by the High Court affirmed.

Date: 19 September 2018

signed

RHODZARIAH BINTI BUJANG
Judge Court of Appeal
Malaysia

COUNSEL

For the Appellant: Mohd Aimi Zaini bin Mohd Azhar, Zainuritha Alfa bt Abu Hassan Aimi, Zainuritha & Co,

No. 4B, Tingkat 2, Jalan Diplomatik 3/1, Presint 15, 62050 Putrajaya

For the Respondent: Tengku Intan Suraya binti Tengku Ismail, Public Prosecutor

LEGISLATION REFERRED TO:

Dangerous Drugs Act 1952, Sections 2, 37, 37(d), 37(da)

JUDGMENTS REFERRED TO:

Ahmad Najib Aris v Public Prosecutor (2009) 2 CLJ 800

Mohamad Deraman v Public Prosecutor (2011) 3 CLJ 601

Mohamad Radhi Yaakob v Public Prosecutor (1991) 3 CLJ 2073

Mohd Johi Said v Public Prosecutor (2005) 1 CLJ 389

Public Prosecutor v Hla Win (1995) 2 SLR 424

Soorya Kumar Narayanan v Public Prosecutor (2009) 6 CLJ 257

Sureeya Wutthisat & Satu Lagi lwn Pendakwa Raya (2012) 8 CLJ 773

Teh Hock Leong v Public Prosecutor (2010) 1 MLJ 741

Yee Wen Chin v Public Prosecutor (2008) 6 CLJ 773