MALAYSIAN JUDGMENTS

IN THE COURT OF APPEAL OF MALAYSIA

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

Ogbonna Kingsley Chukwu v Pendakwa Raya

Citation: [2018] MYCA 312 **Suit Number:** Rayuan Jenayah No. B-05(M)-241-06/2017

Date of Judgment: 29 August 2018

Criminal law – Trafficking in dangerous drugs – Conviction – Death sentence – Appeal Criminal law – Whether the High Court failed to adequately consider the defence – Whether there was a break in the chain of evidence

JUDGMENT

THE CHARGE

[1] The accused/ appellant ("appellant"), a national of Nigeria, was charged in the Shah Alam High Court as follows:

> "Bahawa kamu pada 31 Mei 2014, lebih kurang jam 4.20 petang di Cawangan Pemeriksaan Penumpang 1 (CPP1), Lapangan Terbang Antarabangsa Kuala Lumpur (KLIA), dalam daerah Sepang, dalam negeri Selangor Darul Ehsan, telah mengedar dadah berbahaya iaitu Methamphetamine berat bersih 717.6 gram, dan dengan itu kamu telah melalukan kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama".

BRIEF FACTS

[2] On 31.5.2014, the appellant was seen walking alone towards the scanning machine at the arrival area of the Kuala Lumpur International Airport ("KLIA"). He was carrying a hand luggage, and a trolley bag (P6).

[3] The initial scan by Ahmad Kamal bin Arsani (SP3), who was together with Mohd Zulhairi bin Che Hamid (SP6) and Muhammad Helmi bin Harun (SP4) ("Customs Officers"), revealed a suspicious image within P6. The Customs Officers then brought the appellant to the inspection counter for a physical search.

[4] At the inspection counter, the appellant was directed to empty P6. The Customs Officers found that inside P6, there were 4 yellow plastic bags containing food, as well as a pair shoes. SP6 found that when he tapped on a certain part of P6 it gave a solid sound ("berbunyi padat"). SP6 stated that the back portion of P6 was found to have been repainted, together with its screws. SP6 then directed that P6 be scanned at the scanning counter. The second scan, after the 4 yellow bags and pair of shoes were removed from P6, still showed a suspicious image inside P6.

[5] The appellant was directed to bring all his things to the "Cawangan Pemeriksaan Penumpang 1" ("CPP1") for further inspection, accompanied by SP3, SP4 and SP6. SP6 made a search on P6 in the presence of Keith Jonathan (SP10), Mohamad Faridzul bin Haron (SP9), Abdul Muiz, Ahmad Yazid Khan and Muhammad Addin.

[6] Further inspection by the enforcement officers of the Royal Customs Department revealed that there was a secret compartment at the back portion of P6 which could only be opened by removing several screws that had held it shut. No screw driver or similar implement was found in P6 or on the person of the appellant.

[7] 3 aluminium foils, C1(1), C1(2) and C1(3), were found in the back portion of P6 (P26). Underneath each outer layer of aluminium foil was an inner layer of yellow cellophane tape, and a powdery substance was found inside the chocolate packages marked as C1(1)(1)(P21), C1(2)(1) (P22), and C1(3)(1)(P23). All the exhibits were handed over to Keith Jonathan (SP10), the investigating officer.

[8] On 6.6.2014, P21, P22 and P23 were sent to the Chemistry Department Malaysia for analysis by Vanitha a/p Kunalan (SP5). SP5 confirmed that the contents of the powdery substance found in P21, P22 and P23 are Methamphetamine drugs weighing 717.6 grams as stated in her chemist report (P20).

DECISION OF THE HIGH COURT

[9] At the end of the prosecution's case, the High Court, upon a maximum evaluation of the evidence, was satisfied that the prosecution had succeeded in establishing a prima facie case against the appellant. The learned Judicial Commissioner ("JC") found that the prosecution had proved the following 3 elements of the Charge:

(a) the drugs are dangerous drugs as listed in the First Schedule to the **Dangerous Drugs Act 1952 ("DDA")**;

(b) the appellant had custody and control over the drugs. Therefore, the appellant had possession of the drugs. The statutory presumption in s. 37(d) of the **DDA** was relied upon by the prosecution;

(c) the appellant was trafficking in the drugs by virtue of the weight being above 50 grams of Methamphetamine, and pursuant to the statutory presumption in s. 37(da)(xvi) of the **DDA.**

[10] The learned JC then called upon the appellant to enter this defence.

[11] Upon hearing the defence, the learned JC found that the defence of the appellant being an innocent carrier did not raise any reasonable doubt in the prosecution's case to rebut it.

[12] Accordingly, the High Court found the appellant guilty as charged, convicted him and sentenced him to death by hanging.

THE APPELLANT'S APPEAL

[13] The appellant appealed to this Court against his conviction and sentence.

OUR DECISION

[14] On 16.7.2018, after having heard the submissions of learned counsel for the appellant and the learned Deputy Public Prosecutor ("DPP"), and having perused the Appeal Record, we found no merits in the appeal. We therefore dismissed the appeal of the appellant, and affirmed the decision of the High Court on conviction and sentence.

GROUNDS FOR OUR DECISION

[15] The appellant had 2 main issues for consideration in this appeal:

(a) failure of the High Court to give adequate consideration to the defence; and

(b) break in the chain of evidence-missing aluminium packaging of the drugs.

Issue (a): failure of the High Court to give adequate consideration to the defence

[16] The High Court considered the following defence of the appellant:

[17] The appellant's reason for coming to Malaysia was to buy car spare parts to be sold in Nigeria since the spare parts here are cheaper and of quality. The appellant had been to Malaysia before, in 2013, for such purpose. According to the appellant, his friend, Jedu, had requested the appellant to bring some food for him from Nigeria to be given to Jedu's younger sibling, Ifyeani, who was furthering his studies in Malaysia. Jedu gave the appellant the telephone number of Ifyeani, and told the appellant that Ifyeani, who was in Malaysia, would be able to assist the appellant to find a wholesaler for car spare parts.

[18] The appellant testified that on the same day, at about 20 minutes before the appellant checked in at the Lagos airport in Nigeria, Jedu had met him and given him P6 which was said to contain a pair of shoes, together with four packs of local food to be given to Ifyeani in Malaysia. The appellant stated that he did open the bag P6 infront of Jedu, and did not notice anything suspicious. He then brought P6 to Malaysia.

[19] The appellant maintained that P6 belonged to his friend, Jedu. He was a mere innocent carrier,

and he had no knowledge of the drugs hidden inside P6.

[20] The defence submitted before us that the High Court failed to consider the existence of Jedu as the individual who had handed P6 to the appellant. The custom officers did not deny the existence of Jedu. Therefore, Jedu is not a fictitious person. The appellant alleged that the custom officers ought to have investigated on the incoming calls to the appellant, and the measures undertaken by the customs officers in suppressing such phone calls for security reasons ("keselamatan") amounted to wilful suppression of evidence that could be favourable to the defence, and this has resulted in a miscarriage of justice.

[21] From the Judgment of the High Court, we observe that the learned JC considered the inconsistencies between the appellant's cautioned statement (D41), and his oral testimony in Court. In D41, the appellant only mentioned the 4 packs of African food stuff, and nothing about the pair of shoes. In his oral testimony, the appellant said that the contents of P6 were the pair of shoes and 4 packs of African native food. In D41, the appellant stated that P6 was checked in at the Lagos airport by his friend, Jedu. However, in his oral testimony, the appellant said that he himself had checked in P6 after being given the bag by Jedu at the airport (see D1, and Notes of Evidence, in Appeal Record Vol 3 pages 62-64 and Appeal Record Vol 2 page 73, respectively).

[22] The learned JC therefore found that the evidence of the appellant was doubtful and not convincing to the Court.

[23] Even though the learned JC did not consider the defence on the existence of Jedu, we agree with the submissions of the prosecution that regarding the contents of the appellant's cautioned statement in D41, it is far from being a good "Alcontara Notice" as there was no mention at all by the appellant on the details or particulars of Jedu, or Ifyeani (see Federal Cout decision in **Alcontara Ambrose v PP** [1996] 1 CLJ 705).

[24] The learned JC stated that the appellant did not produce any documents to show that the appellant was actually involved in the business of buying or selling car spare parts. The appellant not only did not produce a list of the car spare parts that he intended to buy in Malaysia he also failed in his oral testimony to state what were the spare parts that he had intended to buy here. The learned JC also asked the appellant in Court as to why the appellant needed assistance from Ifyeani, a student, on car spare parts, when there was nothing to show that Ifyeani has knowledge of car spare parts in Malaysia.

[25] The learned JC went on to conclude that it made no sense for a person, who had been to Malaysia before for the same purpose, can now no longer remember the name of the wholesale company for car spare parts that he intended to visit. The learned JC observed that anyone would do research on it before coming to Malaysia. Thus, based on his findings, the learned JC held that the defence was a bare denial and an afterthought. Since the learned JC did not accept the appellant's defence of being an innocent carrier, the High Court then went on to find that the doctrine of wilful blindness was applicable to the appellant in this case.

[26] The appellant relied on the case of **Siti Aishah Sheikh Abd Kadir v PP** [2014] 1 MLRA 496, where the Court of Appeal stated as follows:

> '[48] "Means rea" is a necessary ingredient of the offence under s 15(1) of the ACA. Mens rea can be proved in diverse ways. Here, the Sessions Court Judge acknowledged at p 207 of the Appeal Record at Jilid 2 that there was "carelessness" on the part of the appellant. That being the case, "carelessness" should be construed as a defence because there was no mens rea on the part of the appellant to commit the offence.
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> [49] **It is said that every crime requires a mental element (Allchurch v. Cooper [1923] SASR 370). It is the state of mind that constitutes a particular crime: a guilty mind (He Kaw Teh v. Teh Queen [1984-1985] 157 CLR 523)**.' (emphasis added)

[27] Though the above case is a commercial crime case, the appellant submitted that the principle is the same-that ultimately all criminal cases shall be considered on the basic point of actus reus and mens rea despite the various technicalities of possession and knowledge that have evolved over the years. Therefore, a defence based on carelessness, if it is found to be reasonable, is sufficient to negate mens rea if established by the defence, and the present case is a suitable case to consider this proposition.

[28] In **Munuswamy Sundar Raj v PP** [2016] 1 CLJ 357, the Federal Court decided that the defence of innocent carrier is a valid defence. However, ignorance *simpliciter* is not sufficient to let an accused person off the hook. At pg 362, the Federal Court stated:

> "[8] ... The defence of innocent carrier is a valid defence that could be alluded to by an accused person, and in this case the appellant. A plethora of cases sprinkles the legal journals in Malaysia and suffice if we merely refer to a chosen few to clarify this defence without the need for comprehensive judicial activism. The Court of Appeal in *Venkatesan Chinnasami v. PP* [2011] 1 LNS 1736 put it aptly in the following terms:
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> > ... A defence of innocent carrier refers to a state of affairs where an accused person acknowledges carrying, for example a bag or box, as in the case before us, containing the dangerous drugs but disputes having knowledge of the drugs. Whether it will succeed or not would very much depend on the facts of each case.
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> [9] As said above it is imperative that the success of the defence of innocent carrier depends very much on the facts of each case, a matter that falls within the realm of the trial judge. Ignorance *simpliciter* is not sufficient to let an accused person off the hook as otherwise every other accused person will allude to that defence. It needs more than that. Without any reason for suspicion, or there is no right of opportunity of examination, ignorance may be a good defence."

[29] Applying the principles laid down by the Federal Court in the above case to the present case, we are of the view that the learned JC was not wrong when he held that the case doctrine of wilful blindness would apply to the appellant as an alleged innocent carrier. The learned JC decided that the

appellant failed to examine the bag P6 carefully even though he had every opportunity to do so. From the facts, SP6 found that P6 gave a solid sound when it was tapped, and it would not be difficult for a person, including the appellant, to detect that there were hidden goods inside the bag. However, the appellant did not do that. Further, the learned JC found that it did not make any sense for the appellant to bring P6 belonging to his friend when it only contained a few packs of cheap food which had turned bad after coming so far from Lagos to Malaysia for a friend of whom the appellant failed to give any information or particulars to the investigating officer, and the Court.

[30] In our view, the learned JC did consider all the evidence before him, including the defence of Jedu being the alleged person who had given P6 to the appellant. However, the learned JC did not believe the appellant's story. We are of the opinion that the learned JC did not err in concluding that the appellant's defence of being an innocent carrier did not cast any reasonable doubt in the prosecution's case to rebut it.

Issue (b): break in the chain of evidence-missing aluminium packaging of the drugs

[31] The dangerous drugs were found to be a powdery substance contained in 3 packages; each of the packages comprised an inner layer of yellow cellophane tape while the outer layer of each of the 3 packages were aluminium foils.

[32] Learned counsel for the appellant submitted that the learned JC had failed to give proper consideration to the incomplete chain of evidence. SP10, the investigating officer, did not account for the 3 aluminium foil sheets that wrapped the yellow cellophane tape containing the drugs. There was inordinate delay when SP10 subsequently made a police report to record the missing exhibits sometime after realising that they were lost.

[33] According to the submissions of learned counsel for the appellant, the nature of Methamphetamine is a powdery substance. No human being, except an expert, can confirm and explain any chemical changes that could have undergone during the intervening period between seizure and production in court of the substance as it had been subjected to opening, analysis, repackaging and storage. Proof of the cellophane tape P21, P22 and P23 was inadequate because each of them was apparently contained in 3 distinct, and missing aluminium foils. The aluminium foils were relevant to prove the chain of evidence because each of them contained P21, P22 and P23 which in turn contained the powdery substance. There was therefore a break in the chain of evidence and the finding of the learned JC was erroneous.

[34] The appellant relied on the decision in **Pendakwa Raya v Lee Yau Ket** (High Court Shah Alam, Criminal Appeal no. 45-115-2004) where Nallini Pathmanathan JC (as she then was) found that there was no prima facie case on account of a break in the chain of evidence due to the missing carbon paper (and not the missing pill capsules containing the drugs).

[35] We note that in paragraphs 4, 5, and 7 of the Grounds of Judgment (Appeal Record Vol 1 pg 10-12), the learned JC considered the whole chain of evidence adduced by the prosecution:

"4. Tertuduh telah diarahkan untuk membawa kesemua barangannya ke Cawangan pemeriksaan Penumpang 1 (CPP1) untuk pemeriksaan lanjut dengan diiringi oleh SP3, SP4 dan SP6 telah melakukan pembongkaran P6 dengan kehadiran Keith Jonathan (SP10), Mohamad Faridzul bin Harun (SP9), Abdul Muiz, Ahmad Yazid Khan dan Muhammad Addin. 3 bungkusan aluminium foil C1(1), C1(2) dan C1(3) telah ditemui dalam bahagian belakang P6 (P26) dan di bawah setiap bungkusan aluminium foil tersebut terdapat bungkusan coklat yang telah ditandakan sebagai C1(1)(1) (P21), C1(2)(1) (P22), C1(3)(1) (P23). Kesemua barang kes telah diserahkan kepada Keith Jonathan (SP10) yang merupakan pegawai penyiasat kes ini.

5. Pada 6/6/2014, P21, P22 dan P23 telah dihantar ke Jabatan Kimia Malaysia untuk dianalisa oleh Puan Vanitha a/p Kunalan (SP5). SP5 telah mengesahkan bahawa kandungan serbuk Kristal yang didapati dalam P21, P22 dan P23 merupakan dadah jenis Methamphetamine seberat 717.6 gram dalam laporan kimia (P20) beliau.

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7. Intipati yang pertama adalah pihak pendakwaan perlu membuktikan bahawa serbuk Kristal dalam P21, P22, P23 merupakan jenis dadah yang tersenarai dalam Jadual Pertama ADB. Intipati ini telah disahkan oleh SP5 dimana laporan kimia P20 telah mengesahkan bahawa P21, P22, P23 merupakan dadah jenis Methamphetamine yang tersenarai dalam Jadual Pertama ADB. **Saya juga mendapati bahawa rantaian keterangan adalah tidak terputus dan saksi-saksi pendakwaan telah mengecamkan dan mengesahkan bahawa P21, P22 dan P23 yang dikemukakan di Mahkamah merupakan eksibit yang sama dengan eksibit yang dirampas daripada Tertuduh pada masa kejadian. Pihak pembelaan juga tidak pernah menyangkal identiti dadah yang dijumpai dalam P26 tersebut**." (emphasis added)

[36] We are of the view that the learned JC had considered the evidence regarding the drugs in totality. We agree with him that there was no break in the chain of evidence even though the 3 aluminium foils were not produced in Court. What is crucial here is the identity of the drugs, which the learned JC had considered. The drugs exhibits were all sent to the chemist for analysis by SP5, and the same drugs which were analysed by the chemist SP5 were produced in Court during the trial.

[37] As submitted by the prosecution, even though the 3 aluminium foils recovered by SP6 and marked as "C1(1), C1(2) and C1(3)" were not sent to the chemist, these 3 aluminium foils were not the drug exhibits. The actual drug exhibits were in 3 plastics clearly marked as "C1(1)(1), C1(2)(1) and C1(3)(1)" (P21, P22 and P23). They were shown and identified by all the relevant prosecution's witnesses and confirmed by the chemist SP5 that those exhibits were analysed by her to be the dangerous drugs as produced in Court.

[38] The issue regarding whether there is a break in the chain of evidence has been well analysed and set out in the case of **Gunalan v Ramachandran & Ors** [2004] 4 CLJ 551 where the Court of Appeal at pg 568 and 569, *inter alia*, stated:

'...in a drug trafficking case what is important is that it must be proved that it is the substance that

> was recovered that was sent to the chemist for analysis and it is the same substance that is found to be heroin or cannabis etc. and it is in respect of that substance that an accused is charged for trafficking.
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> ...
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> The proof of the chain of evidence is only a method of proving that fact. The fact that there is "a gap", does not necessarily mean that fact is not proved. It depends on the facts and circumstances of each case. There may be a gap in the chain of evidence. But, if for example, during that "gap" the exhibits are sealed, numbered with identification numbers, there is no evidence of tampering, there is nothing that would give rise to a doubt that exhibit is the exhibit that was recovered in the case and that was analysed by the chemist, that the fact that there is a gap, in the circumstances of the case, may not give rise to any doubt of that fact.
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> ... there is no law that the exhibit recovered must be produced in court and if not the prosecution's case must necessarily fall.'

[39] Similarly, in the present case, even though there is a gap in the evidence of the prosecution due to the non-production of the 3 aluminium foils, we are of the view that the learned JC did not err when he was satisfied that the same drugs that were found in P6 were the same ones that were analysed by the chemist SP5, and produced during the trial. There is no confusion over the identity of the said drugs. The 3 aluminium foils, even if they were produced in Court by the prosecution, would only serve the purpose of filling the gap in the whole chain of evidence. However, the 3 aluminium foils are not the drugs which are the subject matter of the Charge. Based on the facts and circumstances of this case, to our minds, the non-production of the 3 aluminium foils will not cause the prosecution's case to fall.

CONCLUSION

[40] Going by the above considerations, we find no merit in this appeal. We are satisfied that the learned JC did not err in fact and in law to warrant our appellate intervention. In our considered opinion, the conviction is safe and the sentence ought to be upheld. We therefore dismissed the appeal of the appellant, and ordered accordingly.

Dated: 29 August 2018

YEOH WEE SIAM
Judge
Court of Appeal, Malaysia
Putrajaya

COUNSEL

For the Appellant: Arik Zakri (appointed by the Court), The Chambers of Arik and Kamal

For the Respondent: DPP Dhiya Syazwani, DPP Izyan binti Mohd Akhir, Appellate & Trial Unit, Attorney General's Chambers, Malaysia

LEGISLATION REFERRED TO:

Dangerous Drugs Act 1952, First Schedule; Sections 37(d), 37(da)(xvi)

JUDGMENTS REFERRED TO:

Alcontara Ambrose v PP [1996] 1 CLJ 705

Gunalan v Ramachandran & Ors [2004] 4 CLJ 551

Munuswamy Sundar Raj v PP [2016] 1 CLJ 357

Pendakwa Raya v Lee Yau Ket (High Court Shah Alam, Criminal Appeal No. 45-115-2004)