IN THE HIGH COURT OF MALAYA AT SHAH ALAM
IN THE STATE OF SELANGOR, MALAYSIA
[CRIMINAL TRIAL NO: 45A-24-03/2014]

BETWEEN

PENDAKWA RAYA ... APPELLANT

AND

1. YEO CHIAN HUAT ... RESPONDENT

2. LEE CHEE HOW

CRIMINAL LAW: *Dangerous drugs - Trafficking - Possession - Drugs found in room of apartment where accused persons were arrested - Reliance on circumstantial evidence - Accused persons were alone in apartment and their DNA was found therein – Whether sufficed to prove they were occupiers of apartment - Whether accused persons had exclusive possession of apartment - Whether accused had custody or control and knowledge of drugs in apartment - Whether mere knowledge was sufficient to constitute possession of dangerous drugs - Whether element of possession had been established*

CRIMINAL PROCEDURE*: Prosecution - Prosecution's case - Forensic officer admitted failure to send fingerprints collected for analysis due to an oversight - Investigating officer admitted sending DNA samples collected for analysis 7 months after it had been handed to him by forensic officer - Investigating officer not able to contact*

owner of apartment - Whether there was a serious gap in narrative of prosecution case - Whether prima facie case has been made out - Whether accused ought to be acquitted and discharged without calling upon for them to enter their defence

[Prosecution failed to prove prima facie case. Accused was acquitted and discharged without calling defence.]

Case(s) referred to:

Balachandran v. Public Prosecutor [2005] 1 CLJ 85 FC ***(refd)***

Choo Yoke Choy v. PP [1992] 1 CLJ Rep 43 SC ***(refd)***

Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC ***(refd)***

PP v. Chia Leong Foo [2000] 4 CLJ 649 HC ***(refd)***

PP v. Kalaiselvan [2001] 1 LNS 24 HC ***(refd)***

PP v. Khoo Boo Hock & Anor [1990] 2 CLJ Rep 716 HC ***(refd)***

PP v. Muhamad Nasir Bin Shaharuddin & Anor [1992] 1 LNS 8 HC ***(refd)***

Public Prosecutor v. Lin Lian Chen [1992] 1 CLJ Rep 285 SC ***(refd)***

Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC ***(refd)***

Legislation referred to:

Criminal Procedure Code, s. 180

Dangerous Drugs Act 1952, ss. 2, 12(2), 37(b), 37A (b), 39B(1)(a)

JUDGMENT

[1] The first and second accused were charged with committing these two offences:

First charge:-

"Bahawa kamu pada 29 June 2013, jam lebih kurang 3.50 pagi, bertempat di A-12-7, Blok A East Lake, Seksyen 3, Taman Serdang Perdana di dalam Daerah Petaling, di dalam Negeri Selangor Darul Ehsan, telah melakukan kesalahan memperedarkan dadah berbahaya seberat 262.75 gram methamphetamine. Oleh dengan itu, kamu telah melakukan kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dibaca bersama Seksyen 34 Kanun Keseksaan dan boleh dihukum di bawah Seksyen 39B(2) Akta Dadah Berbahaya"

Second charge:-

"Bahawa kamu pada 29 June 2013, jam lebih kurang 3.50 pagi, bertempat di A-12-7, Blok A East Lake, Seksyen 3, Taman Serdang Perdana di dalam Daerah Petaling, di dalam Negeri Selangor Darul Ehsan, telah melakukan kesalahan memiliki dadah berbahaya iaitu sejumlah berat 1.8 Ketamine. Oleh yang demikian kamu telah melakukan satu kesalahan di bawah Seksyen 12(2) Akta Dadah Berbahaya 1952 dibaca bersama Seksyen 34 Kanun Keseksaan dan boleh dihukum di bawah Seksyen 12(3) Akta Dadah Berbahaya."

Case for the Prosecution

[2] The prosecution called 9 witnesses to prove the charges against the accused persons. The prosecution's evidence revealed these facts. Acting on information received, at about 3.50 in the morning of 28 June 2013, Inspector Sherman Jackson ("Inspector Sherman") (PW7) and a police party raided unit no A-12-7, Block A ("the apartment") at East Lake, Section 3, Taman Serdang Perdana, Seri

Kembangan. The police party gained entry into the unit by cutting open the padlock on the grill door and breaking the wooden door.

[3] Inspector Sherman testified that when they entered the apartment, the lights were switched on and he found the first and second accused standing in the living hall. He identified himself and administered the caution under section 37A(b) of the Dangerous Drugs Act 1952 ("the Act") to both of them. No incriminating items were found on the accused persons when searched. Inspector Sherman then proceeded to search the apartment in the presence of the accused persons and found, *inter-alia*, numerous materials for processing drugs in the living hall.

[4] Inspector Sherman also found granular and powdery substance in a plastic container (exhibit P75) on a table in the first room, which substance was subsequently analysed by the government chemist, Puan Norhaya binti Jaafar, (PW6), and found to contain 237.1 grammes of methamphetamine and 1.8 grammes of ketamine. Inspector Sherman further found on the floor of the living hall, four glass containers (exhibits P40E, P40G, P40K and P40M) which contained a liquid substance. The liquid substance was subsequently analysed by PW6, and found to contain, respectively, 0.8 grammes, 7.2 grammes, 14.3 grammes and 3.35 grammes of methamphetamine.

[5] All the items were seized and a search list (exhibit P2) was prepared. He marked all the items by dating and signing on them.

[6] At about 6 in the morning, Inspector Yam Tze Yong (PW8), a forensic officer, came to the apartment to collect samples for DNA profiling. He collected 18 samples. The samples he collected included, *inter-alia*, a towel, cigarette buds and toothbrush. He was also able to lift 10 fingerprints from the glass containers, exhibits P40E, P40G and P40K.

[7] The items mentioned in the search list and the accused persons were subsequently handed by Inspector Sherman to Inspector Mohamad Nor Hafiz bin Ismail ("the investigating officer") (PW9) when he came to the apartment the same morning. The investigating officer testified that he made his own markings on the drug exhibits and thereafter sent them to PW6 for analysis.

[8] In cross examination, the investigating officer admitted not sending the fingerprints collected by PW8 for analysis due to an oversight. He further admitted that that the DNA samples collected by PW8 were only sent for analysis 7 months after the same had been handed to him by PW8. In further cross examination, he confirmed that one Tan Han Cheah was arrested by a different narcotics team at the same time in another unit in the same apartment block. The investigating officer also admitted that the accused persons were neither the owners nor tenants of the apartment and he was not able to contact the owner.

[9] Puan Nor Alfarizan binti Mokhtaruddin (PW2) was the government chemist who conducted the DNA testing on the samples collected by PW8. She found the DNA of the first accused on the toothbrush and the cigarette butts, whilst the DNA of the second accused was found on the towel.

[10] The evidence of Erik Oh Shu Hwang ("PW1"), a real estate agent showed that the apartment had been rented out by the owner, Lau Sie Heng to one Yap Kian Hao as evidenced by the tenancy agreement that was produced and marked as exhibit P9. Exhibit 9 was signed between the owner's representative, Miss Bibi Lum and Yap Kian Hao. PW1 accepted that the accused persons were neither the owner nor the tenant of the apartment. PW1 testified that the rental for the apartment was paid to him by one Mr Yong.

[11] So much was the evidence from the principal witnesses for the prosecution. The other witnesses produced by the prosecution gave general evidence in support of the prosecution.

Burden on prosecution

[12] The burden on the prosecution at the close of the prosecution's case to make out a *prima facie* case is encapsulated in s. 180 of the Criminal Procedure Code. The nature of the burden on the prosecution under section 180 was discussed and elucidated by the Court of Appeal in *Balachandran v. Public Prosecutor* [2005] 1 CLJ 85; [2005] 2 MLJ 301 as follows:

> Section 180(1) makes it clear that the standard of proof on the prosecution at the close of its case is to make out a *prima facie* case while s. 182A(1) enunciates that at the conclusion of the trial the court shall consider all the evidence adduced and decide whether the prosecution has proved its case beyond reasonable doubt. The standard of proof on the prosecution at the end of its case and at the end of the whole case has thus been statutorily spelt out in clear terms. The submission made must therefore be ratiocinated against the background of the meaning of the phrase '*prima facie* case' in s. 180.Section 180(2) provides that the court shall record an order of acquittal if a *prima facie* case has not been made out while s. 180(3) provides that if a *prima facie* case has been made out the accused shall be called upon to enter his defence. A *prima facie* case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal. The phrase '*prima facie* case' is defined in similar terms in *Mozley and Whiteley's Law Dictionary*, (11th Ed) as:

> A litigating party is said to have a *prima facie* case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A *prima facie* case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by other side.

The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand if a *prima facie* case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier. In order to make a finding either way the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established. As the trial is without a jury it is only with such a positive evaluation can the court make a determination for the purpose of s. 180(2) and (3). Of course in a jury trial where the evaluation is hypothetical the question to be asked would be whether on the evidence as it stands the accused could (and not must) lawfully be convicted. That is so because a determination on facts is a matter for ultimate decision by the jury at the end of the trial. Since the court, in ruling that a *prima facie* case has been made out, must be satisfied that the evidence adduced can be overthrown only by evidence in rebuttal it follows that if it is not rebutted it must prevail. Thus if the accused elects to remain silent he must be convicted. The test at the close of the case for the prosecution

would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a *prima facie* case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If there is any such doubt there can be no *prima facie* case.

The statutory provisions and case law

[13] For convenience, I will set out the material sections of the Act on which the prosecution relied on to prove the charge, or which are otherwise material to this case.

[14] The first charge against the accused persons was framed under section 39B(1)(a) of the Act which provided:

> (1) No person shall, on his own behalf or on behalf of any other person, whether or not such other person is in Malaysia -
>
> (a) traffic in a dangerous drug;
>
> (b) ...
>
> (c) ...

[15] The word trafficking is defined in section 2 of the Act as follows:

> In this Act, unless the context otherwise requires - trafficking includes the doing any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug otherwise than under the authority of this Act or the regulations made under the Act.

[16] To prove trafficking under section 2 of the Act, it was incumbent on the prosecution to first establish that the accused had possession of the drugs. The element of possession was essential as an accused would not be in a position to traffic in drugs unless he was in possession or in custody or control of the same. This is illustrated by the judgment of Augustine Paul J in *Public Prosecutor v. Chia Leong Foo* [2000] 6 MLJ 705, wherein he explained:

> It must be observed that most of the acts that constitute trafficking as defined in section 2 of the Act like, for example, keeping, concealing, storing, transporting, and carrying dangerous drugs involve the prerequisite element of possession ... It follows that a person cannot keep, conceal, store, transport, or carry dangerous drugs within the meaning of trafficking in the Act without being in the possession of them.

[17] The meaning of possession for the purposes of the Act is well established. It has been held that there were two elements to possession. There was the physical element, and the mental element. The physical element involved proof that the thing was in the physical custody of the accused or subject to his control. The mental element involved proof that the accused had knowledge he was in possession of drugs. In *PP v. Muhammad Nasir b Shaharudin* [1994] 2 MLJ 576, the court explained:

> Possession is not defined in the DDA. However, it is now firmly established that to constitute possession, it is necessary to establish that: (a) the person had knowledge of the drugs; and (b) that the person had some form of control or custody of the drugs. To prove either of these two requirements, the prosecution may either adduce direct evidence or it may rely on the relevant presumptions under s. 37 of the DDA.

[18] The second charge against the accused persons was under section 12(2) of the Act which was in these terms:

> No person shall have in his possession, custody or control any dangerous drug to which this Part applies unless he is authorized to be in possession, custody or control of such drug or is deemed to be so authorized under this Act or the regulations made thereunder.

Ingredients of the offence

[19] It is clear from the foregoing that to prove the charges, it was incumbent on the prosecution to prove:

First charge

i. that the substance found in P40A, P40E, P40G, P40K and P40M was dangerous drugs within the definition of section 2 of the Act: and

ii. that the drugs were in the possession of the accused persons drugs pursuant to a common intention between them; and

iii. that the drugs were in the possession of the accused persons for the purpose of trafficking.

Second Charge

i. that the substance found in P40A was dangerous drugs within the definition of section 2 of the Act: and

ii. that the drugs were in the possession of the accused persons drugs pursuant to a common intention between them.

[20] I turn now to examine the evidence led by the prosecution to prove the ingredients of the offence.

Whether the substance was dangerous drugs within the definition of section 2 of the Act 1952

[21] As regards the identity of the substance found in the containers recovered from the apartment, the unchallenged evidence of PW6 established that the substance in P40A contained 237.1 grammes of methamphetamine and 1.8 grammes of ketamine. And, the substance in exhibits P40E, P40G, P40K and P40M PW6, respectively, contained 0.8 grammes, 7.2 grammes, 14.3 grams and 3.35 grammes of methamphetamine. PW6 explained that methamphetamine and ketamine were dangerous drugs and came within the definition of section 2 of the Act.

[22] Counsel for the accused contended that as the methamphetamine was found in two separate places in the apartment, it was not open to the prosecution to combine the total weight into one charge. I found no merit in the submission as the drugs were found in the same apartment.

Whether the accused had Possession of the Dangerous Drugs

[23] To prove that the accused had possession of the drugs, it was incumbent on the prosecution to establish that the accused had custody or control and knowledge of the presence of the drugs in the apartment.

[24] There was no direct evidence to show that the accused persons were in possession of the dangerous drugs at the material time. The prosecution therefore relied on circumstantial evidence to make out the charge with which the accused persons have been charged. The learned deputy public prosecutor contended that the fact that the

first and second accused were the only two persons in the apartment where the drugs were found, coupled with the fact that their DNA was found on some items in the apartment therein showed they had were the joint occupiers of the apartment. As joint occupiers, they had physical custody and control of all the items including the drugs found therein.

[25] The prosecution also sought to invoke the presumption under section 37(b) of the Act, which provided:

> a person, until the contrary is proved, shall be deemed to be the occupier of any premises, if he has, or appears to have, the care or management of such premises;

[26] Whilst it is true that the two accused persons were found alone in the apartment and their DNA was found therein, but that was insufficient to prove the accused persons were the occupiers of the apartment for the following reasons.

[27] First, it is settled law that for a person to be an 'occupier' of a room or premises within the meaning of section 37(b) of the Act, he must have had exclusive occupation or exclusive use and care or management of the room or premises where the drugs are found. *See PP v. Muhamad Nasir bin Shaharuddin & Anor* [1994] 2 MLJ 576 and Kalaiselvan [2001] 2 MLJ157. This means if exclusive occupation of the premises cannot be established, especially where other people would also have had access to the premises, it was not open to the prosecution to contend that the occupier had custody and control over everything found in the premises. In the instant case, it was significant that the personal documents and clothings of the accused persons were not found at the apartment to suggest that they were living there.

[28] Secondly, the evidence of PW1 demonstrated that the accused persons did not have exclusive possession of the apartment where the police found the drugs. PW1's evidence indicated that the tenant of this apartment was Yap Kian Hao and the rent was paid by one Mr Yong.

[29] Thirdly, the investigation undertaken by the investigating officer to determine whether the accused persons had exclusive possession of the apartment was unsatisfactory and shoddy. The evidence of the investigating officer showed that there were no serious efforts taken by him to prove that it was only the accused persons who had exclusive occupancy of the said apartment. No statements were taken from Yap Kian Hao and Mr Yong and nor were they called as witnesses though they could have shed light on who was occupying the premises at the material time. There was a serious gap in the narrative of the prosecution case without the testimony of these witnesses. It is trite that witnesses essential to the unfolding of the narratives on which the prosecution is based, must be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution.

[30] This statement of the law is succinctly set out by the Federal Court in *Ti Chuee Hiang v. PP* [1995] 2 MLJ 433:

> On the other hand, it is clear law that the prosecution must have in court all witnesses from whom statements have been taken, but they have a discretion whether to call them or not. (See *Teh Lee Tong v. PP* [1956] MLJ 194.) That discretion, however, must be exercised having regard to the interests of justice, which includes being fair to the accused (per Lord Parker CJ in *R v. Oliva* [1965] 3 All ER 116 at p 122; [1965] 2 WLR 1028 at p 1035), and to call witnesses essential to the unfolding of the narrative on which the prosecution case is

based, whether the effect of their testimony is for or against the prosecution (per Lord Roche in the Ceylon Privy Council case of *Seneviratne v. R* [1936] 3 All ER 36 at p 49, applied in *R v. Nugent* [1977] 3 All ER 662; [1977] 1 WLR 789).

In *R v. Nugent*, Park J sitting in the Central Criminal Court introduced an exception to the rule in *Oliva,* which says that if a potential witness concerned is capable of belief, then it is the prosecutor's duty to call the witness despite the fact that the testimony he will be giving will be inconsistent with the case the prosecution intends to prove (per *Lord Parker CJ* [1965] 3 All ER 116 at p 122; [1965] 2 WLR 1028 at pp 1035-1036). The exception introduced by Park J being that if in the circumstances the calling of the witness concerned by the prosecution would confuse the jury as to what it is that the prosecution are seeking to prove, then the prosecution would be under no duty to call the witness...

Having said that, it is in our view clear law that while the prosecution has a complete discretion as to the choice of witnesses to be called at the trial (see, eg *Adel Muhammed el Dabbah v. A-G of Palestine* [1944] AC 156 at pp 167-169; [1944] 2 All ER 139 at pp 143-144), the most basic limitation upon prosecutorial discretion in the presentation of a case is that it also has a duty to call all of the necessary witnesses to establish proof against the accused beyond all reasonable doubt, and if, in the exercise of its discretion, it fails to fulfil this obligation - which is nothing less than a statutory duty - the accused must be acquitted.

[31] Fourthly, it will be recalled there was evidence that the police were able to lift fingerprints from the containers in which the drugs were found. It cannot be gainsaid that the fingerprints was crucial

evidence that would have shown if the accused persons had custody, control and possession of the drugs. However, the investigating officer failed to send the fingerprints to the Chemistry Department for analysis. The failure to do so merited the drawing an inference in favour of the accused persons that if sent, it would have shown that the fingerprints did not belong to either of them. Support for that approach is to be found in the judgment of the Federal Court in *Lee Kwan Who v. PP* [2009] 5 MLJ 301.

[32] It would be useful to briefly narrate the facts in *Lee Kwan Who v. PP*. There, it was the prosecution's case that the accused had emerged from a car carrying a white plastic bag containing drugs. The accused had informed the investigating officer that he was not apprehended the moment he emerged from the car but was arrested in the compound of the house. The investigating officer however failed to investigate this allegation at all. In setting aside the conviction of the accused, the Federal Court held that this was a serious omission and an inference in the accused's favour ought to have been drawn by the learned judge at the close of the prosecution case. The Federal Court observed:

> There are three important evidential points. We take the first. The appellant's case as put to the relevant prosecution witnesses was that he was not apprehended the moment he emerged from the car. He was arrested in the compound of house No 52 PW3, the investigation officer confirmed under cross examination that the appellant had, during investigations, informed her of this fact. She however failed to investigate this allegation at all. This is a serious omission. In *Public Prosecutor v. Lim Ah Bek* [1989] 2 CLJ 1090 there was a doubt whether the investigating officer in that case had investigated the defence of alibi mentioned by the accused in his cautioned statement. Based on this possible omission,

> Gunn Chit Tuan J (as he then was) drew an inference in favour of the accused in that case. The present case is much stronger in that there was no investigation at all. An inference in the appellant's favour ought therefore to have been drawn by the learned judge at the close of the prosecution case. Had that been done, doubt would have been cast upon the evidence of PW4 and PW8. Unfortunately this point was missed by the learned trial judge, no doubt, because of his ruling. If he had heard the submission of no case by the appellant, he may perhaps have not acted upon the evidence of these two witnesses.

[33] Fifthly, no evidence was led as to whether the accused hands or fingernail clippings were examined for traces of methamphetamine and ketamine. It cannot be gainsaid that if this had been done it could have either implicated or exonerated them.

[34] Sixthly, it was true that the accused persons were arrested in the living room where some of the drugs and drug paraphernalia were found. Even if an inference can be drawn from this evidence that the accused persons had knowledge of the existence of the drugs in the living hall that was not sufficient to constitute custody or control of the drugs.

[35] There is a long line of cases that have established that mere knowledge of the presence of drugs is not sufficient to constitute possession of the dangerous drugs. See *PP v. Khoo Boo Hock & Anor* [1990] 2 CLJ 971, *Public Prosecutor v. Lin Lian Chen* [1992] 2 MLJ 561 and *Choo Yoke Choy v. PP* [1992] 2 MLJ 632. In the third case, the Supreme Court held:

> In order to found a conviction, the prosecution must establish not only that the appellant had knowledge of the existence of

the drugs but that he also had exclusive custody or control of them.

[36] The evidence against the accused persons amounted only to grave suspicion and was insufficient to show they had custody or control of the drugs. I therefore found that the prosecution had failed to prove its case against the accused persons in respect of both charges.

Conclusion

[37] In the upshot, I was satisfied that the prosecution had not made out a *prima facie* case against the accused persons. Accordingly, I acquitted and discharged the accused persons without calling upon them to enter their defence.

Dated: 27 JULY 2017

(SM KOMATHY SUPPIAH)
Judicial Commissioner
High Court of Malaya
Shah Alam

Date of Decision: 7 JUNE 2017

Counsel:

For the appellant - Aidatul Azura Zainal Abidin, Deputy Public Prosecutor

For the first respondent - KK Mak; M/s TL Chen & Co

For the second respondent - Liow Boon Lee & Goh Kim Lian; M/s Norma Goh & Co