

A **PP v. SOPIAN OTHMAN & ANOR AND ANOTHER CASE**

HIGH COURT MALAYA, SHAH ALAM
SM KOMATHY JC
[CRIMINAL TRIAL NOS: 45A-100-09-2015 & 45-15-09-2015]
20 MARCH 2018

B

CRIMINAL LAW: *Dangerous drugs – Trafficking – Drugs found in car and pocket of trousers – Whether drugs seized analysed and confirmed by chemist to be dangerous drugs – Whether drugs tampered with – Whether there was proper handling of drug exhibits – Whether there was break in chain of evidence –*
C *Whether ingredients of trafficking satisfied – Whether prosecution successfully established prima facie case – Penal Code, ss. 39B(1)(a) & 12(2)*

C

EVIDENCE: *Witness – Credibility – Testimony of witness in drug-trafficking charge – Whether testimony reliable – Whether testimony probable – Whether statements consistent – Whether there were discrepancies – Whether safe to accept testimony of witness*

D

Acting upon information received that a certain drug-trafficking activity would take place, a team of narcotic officers carried out a surveillance at a petrol station. Half an hour later, a silver car driven by the first accused entered and stopped at the petrol station. This was followed, 15 minutes
E later, by a black car driven by the second accused which pulled over behind the silver car. The first accused alighted from his car and walked to the black car holding a package. This package was handed over to the second accused who, in exchange, gave the first accused another package. The ambush team sprung into action and arrested the accused persons. A search (i) on the silver
F car revealed a package which contained a crystalline substance suspected to be drugs; (ii) on the black car revealed cash; (iii) on the first accused led to the discovery of 21 pills in the pocket of his trousers; and (iv) on the second accused found no incriminating items. The substance found in the silver car was later confirmed to be 393.9g of methamphetamine while the pills found
G on the first accused were confirmed to be 0.15g of nimetazepam. The accused persons were jointly charged for drug-trafficking, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). The first accused also faced another charge under s. 12(2) of the Act. The Deputy Superintendent of Police ('DSP Anuar') who led the ambush, testified that (i) he had testified
H against the second accused in an earlier case ('the earlier case'); (ii) after the drugs were seized, they were handed to Inspector Faizal for the same to be brought to IPK Kuala Lumpur when he left to search the second accused's home; and (iii) upon his return to IPK Kuala Lumpur, Inspector Faizal handed the drugs back to him and he handed the same to the investigating officer after labelling them. In his testimony, Inspector Faizal stated that
I DSP Anuar did hand the drugs to him when the former left to search the second accused's house.

Held (acquitting and discharging accused persons):

- (1) The prosecution failed to prove a *prima facie* case against the accused persons. An essential ingredient to sustain the offence of trafficking is possession of drugs. It was imperative for the prosecution to prove that the drugs analysed and confirmed by the chemist to be dangerous drugs were the drugs recovered from the accused. This must be done by showing that there was no break in the chain of evidence from the time the drugs were seized until they were sent to the chemist for analysis and were not tampered with in any manner. The drugs were seized at 7.15pm on 30 November 2014 and were handed to the investigating officer at 5.05am the following day, which was some ten hours later. The prosecution failed to prove that the drugs analysed by the chemist were in fact the drugs seized and the same had not been tampered with. (paras 22, 25, 32 & 33)
- (2) The evidence of a witness could be termed unreliable if (i) it is inherently improbable; (ii) he made mutually contradictory or inconsistent statements; (iii) his oral evidence is contradicted by the contemporaneous evidence; and (iv) his demeanour, while under examination, is found to be abnormal and unsatisfactory. (para 24)
- (3) DSP Anuar's testimony in the present case was inconsistent with his evidence in the earlier case. In the earlier case, he testified that he took the drugs with him in his car when he left to conduct a search on the second accused's house and the drugs remained in the car when he went up to the apartment to carry out the search. The two accounts given by DSP Anuar were diametrically opposed. The discrepancy in the two accounts was serious, material and could not be dismissed as inconsequential. Both the accounts given by DSP Anuar could not be true. It was not safe to accord any weight to either account. (paras 25, 26 & 28)
- (4) Apart from the bare assertion of Inspector Faizal, there was no other evidence to prove the drugs were in fact handed to him. In any act of transfer of possession of criminal exhibits, especially so in capital punishment cases, there must be an acknowledgment or some documentary proof to establish that there was a proper handling of the exhibits. Documentary proof of handover of this vital piece of evidence is a *sine qua non* in capital offences. In the absence of proof, it was not safe to accept the bare assertion of Inspector Faizal's testimony. There was a serious doubt as to whether the drugs analysed by the chemist were the drugs seized at the petrol station. (paras 29-30)

A

B

C

D

E

F

G

H

I

A Case(s) referred to:

Khoon Chye Hin v. PP [1961] 1 LNS 41 HC (*refd*)

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

Pavone v. PP (No 2) [1985] 1 LNS 99 HC (*refd*)

PP lwn. Bazleh Saeid Saleh & Satu Lagi [2014] 6 CLJ 979 CA (*refd*)

PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC (*refd*)

B *Zaifull Muhammad v. PP & Another Appeal* [2013] 2 CLJ 383 FC (*refd*)

Legislation referred to:

Dangerous Drugs Act 1952, ss. 12(2), 37A(1)(b), 39B(1)(a), (2), First Schedule
Evidence Act 1950, s. 114(e)

C *For the 1st accused - Ghazali Taib; M/s Noor Jihan, Ghazali & Co*

For the 2nd accused - Geethan Ram Vincent & Lavanyia Raja; M/s Geethan Ram

For the prosecution - Farah Wahida Mad Nor; DPP

Reported by Najib Tamby

JUDGMENT

D SM Komathy JC:

E [1] Sopian bin Othman, who I shall hereafter refer to as the first accused and Anya Michael Onyedikachi, who I shall hereafter refer to as the second accused, were jointly charged for an offence of trafficking under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (“the Act”) and punishable under s. 39B(2) of the same Act.

[2] The amended charge against them was as follows:

F Bahawa kamu bersama-sama pada 30 November 2014, jam lebih kurang 7.15 petang, kawasan stesen minyak Petron Sg besi, KL-Seremban Highway, Daerah Petaling, di dalam Negeri Selangor Darul Ehsan telah mengedar dadah berbahaya jenis methamphetamine sejumlah 393.9 gram, dan dengan itu kamu telah melakukan suatu kesalahan di bawah Seksyen 39B(1) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta Dadah Berbahaya 1952 dibaca bersama seksyen 34 Kanun Keseksaan.

G [3] The first accused also faced another charge under s. 12(2) of the Act that was as follows:

H Bahawa kamu bersama-sama pada 30 November 2014, jam lebih kurang 7.15 petang, kawasan stesen minyak Petron Sg besi, KL-Seremban Highway, Daerah Petaling, di dalam Negeri Selangor Darul Ehsan, telah didapati dalam milik kamu dadah jenis nimetazepam seberat 0.15 gram. oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah seksyen 12(2) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 12(3) Akta yang sama.

I

Case For The Prosecution

[4] The prosecution called five witnesses. According to the prosecution evidence, at about 5.45pm on 30 November 2014, DSP Anuar bin Hj Md Azali (PW2) (“DSP Anuar”), acting on information received, led a team of eight narcotics officers to a Petron station at Sg Besi along the Kuala Lumpur-Seremban Highway. The officers in his team included Inspector Faizal bin Mohd Ali (“Inspector Faizal”) (PW3) and Sub Inspector Dalila binti Mansor. The raiding team arrived there at about 6.30pm and split into two groups and lay in wait.

[5] DSP Anuar testified that at about 7pm, a silver Mercedes Benz bearing Singapore registration number “SKC 7188 A” entered the Petron station and stopped there. They kept the car under surveillance. About 15 minutes later, a black Nissan Almera bearing registration number “WA 6843 P” entered the station and pulled up behind the Mercedes Benz. The first accused was the driver of the Mercedes-Benz, whilst the second accused was the driver of the Nissan Almera. The first accused alighted from the Mercedes Benz and walked to the Nissan Almera holding a black package which he handed over to the second accused, who in exchange gave the former another black package which he took to his car.

[6] DSP Anuar gave instructions to the raiding team to surround the cars. He and his team approached the Mercedes-Benz, whilst Inspector Faizal and his team approached the Nissan Almera. The first and second accused, who were the sole occupants in the respective cars, were arrested. After administering the caution under s. 37A(1)(b) of the Act to both accused persons, DSP Anuar and his team proceeded to search the Mercedes-Benz in the presence of the first accused. A black package (exh. P7) was found on the front passenger seat. Inside it was a small box, and in the box, there was a clear plastic bag (exh. P8A) that contained a crystalline substance suspected to be drugs.

[7] Continuing with his testimony, DSP Anuar testified that he then searched the first accused and found 21 pills suspected to be eramin 5 in his front left trouser pocket. He saw Inspector Faizal and his team search the Nissan Almera. On being told by Inspector Faizal, he had found cash in the Nissan Almera, he walked over and had a look at it. No incriminating items were found on the body of the second accused.

[8] DSP Anuar said that after he had seized the items found in the possession of the accused persons, he sought the assistance of Inspector Faizal to take the first accused and the items to IPK Kuala Lumpur, whilst he proceeded to the second accused’s house in Jalan Semantan to conduct a search. After the search on the second accused’s house was completed, he returned to IPK Kuala Lumpur and labelled the items he had seized at the

- A Petron station by writing the date and placing his signature on them. Two search lists (exhs. P13 and 16) were prepared to show the items recovered from each car. The search list P16 showed that among the items seized from the Nissan Almera, included cash amounting to RM43,800. The accused person and the items seized were then taken to IPD Serdang and at 5am on
- B 1 December 2014, handed to investigating officer Inspector Mohd Raqib bin Abu Bakar (PW3) (“the investigating officer”).

- [9] DSP Anuar was subjected to lengthy cross-examination aimed at establishing that his version of the facts was not correct. DSP Anuar accepted that he and one Sub-Inspector Dalila, who was part of the raiding team, had
- C given evidence against the second accused in the Kuala Lumpur High Court in Case No 45A-31-05-2015 (“the earlier case”). He acknowledged that the subject matter of the charge in the earlier case concerned drugs found in the second accused’s house. He accepted that there in the earlier case, he had testified that when the two cars arrived at the Petron station, he and his team
- D immediately stopped and checked the cars. Drugs were found in the first accused’s car but nothing was seized from the second accused’s car. Both he and Sub-Inspector Dalila did not allude to any exchange of drugs and money between the second and first accused.

- [10] Based on the foregoing, it was put to DSP Anuar that his testimony
- E in the present case that there was exchange of drugs and money between the accused persons, and that police found cash in the second accused’s car were lies. DSP denied the suggestions put to him and maintained that his evidence was the truth. He said that the reason the exchange was not mentioned in the earlier case was because it was not relevant to the charge. He said that the
- F exchange of money and drugs was not mentioned in his police report as it was not important.

- [11] The next witness, Inspector Faizal corroborated DSP Anuar’s testimony that there was an exchange of drugs and money between the first and second accused at the Petron station. He also corroborated DSP Anuar’s
- G evidence that he recovered cash amounting to RM43,800 from the second accused’s car.

- [12] The investigating officer in his evidence confirmed receiving the seized exhibits from DSP Anuar. He added that he made his own markings on the exhibits, and the exhibits suspected to be drugs were sealed in a box and sent to government chemist, Suhana bt Ismail (PW1) for chemical
- H analysis who confirmed that the substance in the package contained 393.9g of methamphetamine, and the 21 pills contained 0.15g nimetazepam, which are dangerous drugs as listed in the First Schedule of the Act.

I

[13] The investigating officer was also subjected to lengthy cross-examination. The certified copy of the notes of proceedings in the earlier case was produced through him and marked as 'IDD45'. He acknowledged that both DSP Anuar and Inspector Faizal did not mention anything to him about having seen the exchange of drugs and money between the first and second accused.

A

[14] The defence of the accused persons was then put to the investigating officer, *to wit*, (a) that the drugs recovered from the car driven by the first accused belonged to one Abang Mat who had alighted from the car on arriving at the Petron station; (b) that the first accused had travelled and Abang Mat had come there from Johor and (c) that the monies recovered from the second accused's car were monies that the latter had brought to the Petron station to hand over to the first accused at the behest of his sister.

B

C

[15] PW4, Inspector Faizulnizam bin Abu Kassim testified that the money seized from the second accused's car was forfeited under the Dangerous Drugs (Forfeiture of Property) Act 1988.

D

[16] That essentially was the evidence for the prosecution against both the accused persons.

[17] I will at this juncture deal with exh. IDD45. Counsel for the accused applied for it to be marked as an exhibit under s. 114(e) of the Evidence Act 1950. The learned Deputy Public Prosecutor resisted the application on the basis that the investigating officer was not the maker of the document and had no personal knowledge of what transpired at the proceedings.

E

[18] Section 114(e) of the Evidence Act relied on by counsel reads:

The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.

F

...

(e) that judicial and official acts have been regularly performed.

G

[19] Based on the rule embodied in s. 114(e), I ruled that it could be presumed that IDD45 was an accurate record of the testimony given by the witnesses called at the earlier trial. I therefore marked it as an exhibit.

H

Ingredients Of The Offence

[20] To prove the first charge against the accused persons, it was incumbent on the prosecution to prove:

- i. that the substance found in the car was dangerous drugs within the definition of section 2 of the Act; and

I

- A ii. that the accused person had *mens rea* possession of the drugs i.e. they had physical custody and control of the drugs and knowledge that it was dangerous drugs; and
- iii. that the accused persons had common intention to traffic in the drugs.
- B And, to prove the second charge against the first accused:
- i. that the substance found in the jeans of the first accused was dangerous drugs within the definition of section 2 of the Act; and
- ii. that he had *mens rea* possession of the drugs i.e. he had physical custody or control of the drugs and knowledge that it was dangerous drugs; and
- C

Finding At The End Of The Prosecution's Case

[21] After considering the prosecution's evidence and submissions of both sides, I found that the prosecution had failed to prove ingredient (i). My reasons were as follows.

D

[22] An essential ingredient to sustain the offence of trafficking is possession of the drugs. To establish ingredient (i), it is imperative for the prosecution to prove that the drugs analysed and confirmed by the chemist to be dangerous drugs were the drugs recovered from the accused. This must be done by showing that there was no break in the chain of evidence from the time the drugs were seized until they were sent to the government chemist for analysis, and were not tampered with in any manner. See *PP lwn. Bazleh Saeid Saleh & Satu Lagi* [2014] 6 CLJ 979 and *Pavone v. PP (No 2)* [1985] 1 LNS 99; [1986] 1 MLJ 423.

E

[23] The Federal Court in *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 gave guidance as to the correct approach to be adopted by the court when considering the evidence of the witnesses called by the prosecution at the close of the prosecution's case. It was said:

F

What is required of a subordinate court and the High Court under the amended sections is to call for the defence when it is satisfied that a *prima facie* case has been made out at the close of the prosecution case. This requires the court to undertake a maximum evaluation of the prosecution evidence when deciding whether to call on the accused to enter upon his or her defence. It involves an assessment of the credibility of the witnesses called by the prosecution and the drawing of inferences admitted by the prosecution evidence. Thus, if the prosecution evidence admits of two or more inferences, one of which is in the accused's favour, then it is the duty of the court to draw the inference that is favourable to the accused. See *Tai Chai Keh v. Public Prosecutor* [1948-49] MLJ Supp 105; *Public Prosecutor v. Kasmin bin Soeb* [1974] 1 MLJ 230. If the court, upon a maximum evaluation of the evidence placed before it at the close of the

G

H

I

prosecution case, comes to the conclusion that a *prima facie* case has not been made out, it should acquit the accused. If, on the other hand, the court after conducting a maximum evaluation of the evidence comes to the conclusion that a *prima facie* case has been made out, it must call for the defence.

A

[24] For the purpose of assessing the credibility of a witness, the court has to consider how the witness stood up to cross-examination and the impression created by his evidence, taken in context of other facts of the case. The evidence of a witness can be termed unreliable if; (a) it is inherently improbable; (b) he has made mutually contradictory or inconsistent statements; (c) his oral evidence is contradicted by the contemporaneous evidence, and; (d) his demeanour, while under examination, is found abnormal and unsatisfactory.

B

C

[25] To prove that there was no break in the chain of evidence, the prosecution relied on the testimony of DSP Anuar and Inspector Faizal. It was not in dispute that the drugs were seized at 7.15pm on 30 November 2014 and were handed to the investigating officer at 5.05am, the following day some 10 hours later. I shall examine DSP Anuar's evidence, first. It was his testimony that after the drugs had been seized, he handed them to Inspector Faizal for the same to be brought to IPK KL when he left to search the second accused's house. He further testified that upon his return to IPK Kuala Lumpur, Inspector Faizal handed the drugs back to him and he handed them to the investigating officer after labelling the same. It is noteworthy that his testimony was inconsistent with his evidence in the earlier case. There, DSP Anuar had testified that he took the drugs with him in his car when he headed to Semantan to conduct a search on the second accused's house, and the drugs remained in the car when he went up to the apartment to carry out the search.

D

E

F

[26] The two accounts given by DSP Anuar were diametrically opposed. The discrepancy in the two accounts was serious, material and could not be dismissed as inconsequential. It is settled law, as noted earlier, that when a witness makes two statements which differ in material particulars, this has the effect of rendering his evidence suspect and constitutes sufficient ground for believing that he was not a truthful witness. See *Lee Kwan Woh v. PP* [2009] 5 CLJ 631; [2009] 5 MLJ 301. There is no requirement in law that a witness credit has to be impeached for his evidence to be disbelieved. Both the accounts given by DSP Anuar could not be true. Either DSP Anuar lied during the earlier case or he was lying now.

G

H

[27] Thomson CJ in *Khoon Chye Hin v. PP* [1961] 1 LNS 41; [1961] MLJ 105 in regard to inconsistencies in the testimony of a witness observed at 107:

I

- A When a witness demonstrably **tells lies** on one or two points then it is clear that he is not a reliable witness and as a matter of prudence the rest of his evidence must be scrutinised with great care and indeed with suspicion. To say, however, that because a witness has been proved to be a liar on one or two points then the whole of his evidence “must in law be rejected” is to go too far and is wrong. (emphasis added)
- B [28] In the absence of an explanation, it was impossible to tell which of the two versions advanced by DSP Anuar was the true version. It was thus not safe to accord any weight to either account. It was probable that the change in DSP Anuar’s evidence was prompted by his realisation that his testimony in the earlier case that he had left the drugs unattended in his car, could adversely affect the prosecution’s case. It was possible that he was lying in a stupid attempt to bolster a genuine case.
- C [29] That brings me to the evidence of Inspector Faizal who it will be recalled said that DSP Anuar handed the drugs to him when he left to search the second accused’s house. Apart from the bare assertion of Inspector Faizal, there was no other evidence to prove the drugs were in fact handed to him. In any act of transfer of possession of criminal exhibits, especially so in capital punishment cases, there must be an acknowledgement or some documentary proof to establish that there was a proper handling of the exhibits.
- D [30] If indeed, DSP Anuar had handed the drugs to Inspector Faizal, it would be reasonable to expect an acknowledgement to that effect by the latter. Documentary proof of handover of this vital piece of evidence is a *sine qua non* in capital offences. In the absence of proof, it was not safe to accept the bare assertion of Inspector Faizal’s testimony. There was a serious doubt as to whether the drugs analysed by the chemist were the drugs seized at the Petron station.
- E [31] In *Zaifull Muhammad v. PP & Another Appeal* [2013] 2 CLJ 383; [2013] 2 MLJ 348, the Federal Court explained the importance of proving the identity of the drugs analysed by the chemist:
- F The prosecution further argued that based on the evidence before the court, there is no break in the chain of the evidence with regard to the Drug exhibit. The prosecution submitted that all the relevant witnesses called by the prosecution had positively identified the Drug exhibit based on the contemporaneous markings made by the witnesses. On that premise, the prosecution contended that the discrepancies do not create any doubt in the identity of the Drug exhibit.
- G
- H With respect, we could not agree with the prosecution on this issue. We are of the view that, in the circumstance of this case, it is incumbent on the prosecution to offer some explanation for the discrepancies. With the discrepancies left unexplained, this created a reasonable doubt as to the identity of the Drug exhibit. In the circumstance, the defence should not have been called at the close of the prosecution case ...
- I

[32] For the reasons stated, I found that the prosecution had failed to prove ingredient (i) ie, that the drugs analysed by the chemist were in fact the drugs seized and the same had not been tampered with.

Conclusion

[33] I therefore found that the prosecution had failed to prove a *prima facie* case against the accused persons. They were both acquitted and discharged of the charges brought against them.

A

B

C

D

E

F

G

H

I