IN THE HIGH COURT OF MALAYA AT ALOR SETAR
IN THE STATE OF KEDAH DARUL AMAN, MALAYSIA
[CRIMINAL APPEALS NO: 42S-01-01/2015; 42S-04-01/2015]

BETWEEN

PUBLIC PROSECUTOR ... APPELLANT

AND

1. MOHD RIHAN HAQQI ROZALI

2. NG YIK JUEN ... RESPONDENTS

CRIMINAL PROCEDURE: *Appeal - Appeal against conviction and sentence - Offence of possession of dangerous drugs and poison - Proof of common intention - Accused persons' denial of knowledge and custody of seized drugs and poison - Incriminating items found in hotel room of accused persons - Prosecution's failure to prove existence of common intention - Whether common intention was an essential element in charges preferred against accused persons - Whether failure to prove element of common intention was fatal to prosecution's case*

CRIMINAL LAW: *Common intention - Participation in criminal act - Offence of possession of dangerous drugs and poison - Incriminating items found in hotel room of accused persons - Whether room records could prove that room was booked in furtherance of accused person's common intention - Whether mere fact that both accused person were inside hotel room at time of police raid could show existence of common intention*

[First and second appellants' appeal allowed. Conviction and sentence of trial judge against both appellants were set aside. The appellants are acquitted and discharged.]

Case(s) referred to:

Ghazalee Kassim & Ors v. PP [2009] 4 CLJ 737 FC ***(refd)***

Low Kian Boon & Anor v. PP [2010] 5 CLJ 489 FC ***(refd)***

Mimi Wong & Anor v. Public Prosecutor [1972] 1 LNS 88 HC ***(refd)***

Namasiyiam Doraisamy v. Public Prosecutor & Other Cases [1987] CLJ Rep 241 SC ***(refd)***

Public Prosecutor v. Neoh Bean Chye & Anor [1974] 1 LNS 122 HC ***(refd)***

Shaiful Edham Bin Adam & Anor v. Public Prosecutor [1999] 2 SLR 57 ***(refd)***

Wan Yurillhami Wan Yaacob & Anor v. PP [2010] 1 CLJ 17 FC ***(refd)***

Legislation referred to:

Dangerous Drugs Act 1952, ss. 12(2), 39A(2)

Penal Code, s. 34

Poison Act 1952, ss. 9(1), (2)

JUDGMENT

HASHIM HAMZAH, J

INTRODUCTION

[1] The first and the second appellant were jointly charged with another accused for possession of dangerous drugs and poison at the Sessions Court, Alor Setar, Kedah.

[2] The two charges read as follows:

> *"Bahawa kamu pada 23hb Oktober 2013 jam lebih kurang 6.20 petang di dalam bilik No. 312, Hotel Samila, 27, Lebuhraya Darul Aman, Alor Setar, di dalam daerah Kota Setar di dalam Negeri Kedah dengan tanpa kebenaran telah didapati dalam milikan kamu dadah berbahaya sejumlah berat 36.16 gram Methamphetamine. Oleh yang demikian kamu telah melakukan kesalahan di bawah Sek. 12 (2) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Sek. 39A(2) Akta yang sama dibaca bersama seksyen 34 Kanun Keseksaan".*
>
> **("the first charge")**

"Bahawa kamu pada 23hb Oktober 2013 jam lebih kurang 6.20 petang di dalam bilik No. 312, Hotel Samila, 27, Lebuhraya Darul Aman, Alor Setar, di dalam daerah Kota Setar di dalam Negeri Kedah dengan tanpa kebenaran telah didapati dalam milikan kamu 40.36 gram Phenazepam. Oleh yang demikian kamu telah melakukan kesalahan di bawah Sek. 9(1) Akta Racun 1952 dan boleh dihukum di bawah Sek. 9(2) Akta yang sama dibaca bersama seksyen 34 Kanun Keseksaan".

("the second charge")

[3] Both the appellants with the other accused were convicted after full trial. For the first charge, the Sessions Court sentenced both the appellants and the other accused to 10 years of imprisonment from the date of arrest. Only both the appellants were sentenced to 10 strokes of whipping each in addition to imprisonment. As regards to the second charge, the Sessions Court sentenced both the appellants and the other accused to seven months of imprisonment from the date of arrest. Both the sentences were ordered to run concurrently.

[4] Dissatisfied with the decision of the learned Sessions Court judge, the first and second appellant proceeded to file this appeal against their conviction and sentence. The other accused did not file any appeal.

THE PROSECUTION'S CASE

[5] The evidence adduced by the prosecution throughout the trial can be summarised as follows.

[6] On 23 October 2013 at about 6.00 p.m, Sub Inspector Muslim bin Elias (**"PW1"**) with his team of police officers went to Hotel Samila, Alor Setar, Kedah. An observation was made for approximately 20 minutes outside Room 312 ("the said room"). The said room was locked from the inside.

[7] At around 6.20 p.m., PW1 noticed that somebody was opening the door and was coming out from the said room. PW1 and his team immediately proceeded with the raid. PW1 found that the first appellant was the one coming out from that room and the second appellant was inside the said room with the other accused.

[8] PW1 introduced himself as a police officer. PW1 himself conducted a body search on both the appellants but found nothing incriminating on them. A further search was conducted in the said room. PW1 found a plastic bag with the word "Terima Kasih" written on it **("P7")** on the dressing table in the said room. Upon examining P7, PW1 found two transparent plastic bags **("P8")** with contents suspected to be drugs and 20 aluminium foils **("P9A-P")** containing a total of 200 pills, also suspected to be drugs. Consequently, all the exhibits were seized. Both the appellants and the other accused were arrested.

[9] Both the appellants and the other accused together with all the seized exhibits were handed over to the investigating officer, Inspector Ab Halim bin Mohd Sajudi **("PW4").**

[10] The exhibits were sent to the chemist for analysis. It was confirmed that the exhibits contained **36.16 grams of Methamphetamine and 40.36 grams of Phenazepam.**

THE APPELLANTS' DEFENCE

[11] Basically the first appellant's defence was that he only booked the said room on behalf of the second appellant and the other accused. Therefore, the first appellant claimed that he had neither knowledge nor custody to the seized drugs and poison.

[12] The second appellant's defence,on the other hand, was that he never knew there were drugs and poison in the said room and it was possible that somebody had planted the drugs and poison in the said room.

[13] Both the appellants' versions were consistent. One day before the raid, the room was booked by the first appellant on his name upon the request by the second appellant. On the day in question, the second appellant contacted the first appellant to go out and eat together with him and the other accused. The first appellant came to the hotel room around 2.00 p.m. and they all went out around 5.00 p.m. to eat. They came back to the said room at around 6.00 p.m.

[14] Two to three minutes later, the first appellant told the second appellant that he wanted to go out. Immediately after the first

appellant opened the door, the police, led by PW1, rushed in. The second appellant was shown P7 and all the contents. He claimed that he did not see where the things were recovered by the police. He also claimed that he never saw the drugs and poison prior to the raid. The first appellant on the other hand claimed that the police never showed him anything.

THE APPEAL

[15] Several issues were raised during the appeal. However, upon careful consideration of the facts and circumstances in the present case, I am of the view that the main issue is whether the prosecution had proven the charge against the appellants, in particular, the element of common intention under section 34 of the Penal Code as stated in both the charges.

SECTION 34 OF THE PENAL CODE

[16] Section 34 of the Penal Code provides that:

> *"When a **criminal act is done by several persons, in furtherance of the common intention of all**, each of such persons is liable for that act in the same manner as if the act were done by him alone".*
>
> (own emphasis added)

[17] The law on section 34 of the Penal Code in Malaysia is very much settled. The Federal Court in the case of *Low Kian Boon & Anor v. Public Prosecutor* [2010] 4 MLJ 425 dealt with this issue in great details.

[18] As regards to the elements that must be proven by the prosecution in invoking this provision, the Federal Court in *Low Kian Boon (supra)* made reference to and agreed with the lengthy decision of the Singapore's Court of Appeal in *Shaiful Edham Bin Adam & Anor v. Public Prosecutor* [1999] 2 SLR 57 where in the exact words of Yong Pung How CJ (as he then was) at p. 59 of the report, it was held that:-

> *"On this view, all that it is necessary for the prosecution to prove is that **there was in existence a common intention between all the persons involved to commit***

a criminal act *and that* ***the act which constituted the offence charged (the 'criminal act' referred to in s. 34 of the Penal Code) was committed in furtherance of that criminal act****. The rider to this is that the* ***participants must have some knowledge that an act may be committed which is consistent with or would be in furtherance of, the common intention****".*

(own emphasis added)

[19] See also *Mimi Wong & Anor v. Public Prosecutor* [1972] 2 MLJ 75, SCCA and *Public Prosecutor v. Neoh Bean Chye & Anor* [1975] 1 MLJ 3, SCCA.

[20] What is regarded in law as common intention can be seen succinctly explained in the Supreme Court case of *Namasiyiam Doraisamy v. Public Prosecutor & Other Cases* [1987] CLJ (Rep) 241 whereby Syed Agil Barakbah SCJ (as he then was) held at pp. 251of the report that:-

> *"In law,* ***common intention requires a prior meeting of the minds and presupposes some prior concert. Proof of holding the same intention or of sharing some other intention, is not enough****".*
>
> (own emphasis added)

[21] On the same point, it was noted by Yong Pung How CJ (as he then was) in *Shaiful Edham(supra)* that:-

> *"The second anal more important point is that the* ***common intention must precede the criminal act:*** *see, eg Asogan Ramesh s/o Ramachandren & Ors v. PP [1998] 1 SLR 286. In this connection, the question is whether or not there must be found a pre-arranged plan in determining whether the 'criminal act' was done 'in furtherance of the common intention'. In Mahbub Shah, the Privy Council held that* ***common intention implies the existence of a pre-arranged plan****. Sir Madhavan Nair said at:*
>
> > *... it is clear to their Lordships that* ***common intention within the meaning of the section***

> ***implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan.*** *As has been often observed, it is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case".*
>
> (own emphasis added)

[22] The prosecution may adduce such evidence of common intention either by direct or by circumstantial evidence. When circumstantial evidence is adduced, the evidence proved must lead only to the inference that there is common intention amongst all the accused.

[23] Again in *Namasiyiam Doraisamy (supra),* it was further held that:

> *"There must be proved* ***either by direct or by circumstantial evidence*** *that there was (a) a common intention to commit the very offence of which the accused*

persons are sought to be convicted and (b) participation in the commission of the intended offence in furtherance of that common intention. ***Where the prosecution case rest on circumstantial evidence, the circumstances which are proved must be such as necessarily lead only to that inference****".*

Direct evidence of a prior plan to commit an offence is not necessary in every case because ***common intention may develop on the spot and without any long interval of time between it and the doing of the act commonly intended. In such a case, common intention may be inferred from the facts and circumstances of the case and the conduct of the accused.*** *(The Supreme Court (of India) on Criminal Law (1950-1960) by J.K. Soonavala p. 188 to 193)".*

(own emphasis added)

[24] Another important point to note is that common intention may develop on the spot and it can be inferred from the facts and circumstances of the case.

[25] In *Wan Yurillhami Bin Wan Yaacob & Anor v. Public Prosecutor* [2010] 1 MLJ 749, Zulkefli FCJ in delivering the judgment of the Federal Court had this to say at p. 764 of the report:

> *"It is a well established principle of law in dealing with the criminal liability under s. 34 of the Penal Code that a* ***pre-concert or pre-planning may develop on the spot or during the course of the commission of the offence, but the crucial test is that such plan must precede the act constituting the offence. The existence of common intention is a question of fact and in each case it may be proved as a matter of inference from the circumstances of the case*** *(see the cases of Mahbub Sha v. Emperor AIR 1945 PC 118 and Suresh v. State of Uttar Pradesh AIR 2001 SC 1344)".*
>
> (own emphasis added)

FINDINGS

[26] Therefore, based on the abovementioned principles, the prosecution in the present case were required to prove that there was common intention between both the appellants involved to commit a criminal act, ie, possession of drugs and poison, and that the possession of drugs and poison was committed in furtherance of that common intention. There must also be proof of pre-concert or pre-planning to establish common intention.

[27] Now that the relevant principles have been laid out, I turn to consider the submissions by all parties.

[28] The learned counsels for the appellants submitted that the prosecution had failed to prove the element of common intention as preferred against the appellants in both charges. There was no evidence to prove common intention against both the appellants.

[29] The learned DPP then contended that these proven facts ought to be taken into account by the Court in inferring that there was common intention amongst the appellants, namely:-

a. the evidence of PW1 that before the raid he enquired at the front desk who occupied the said room and he was told that the said room was occupied by one Malay male, one Chinese male and another Chinese female;

b. PW1 was further told that the room was registered under the name of the first appellant;

c. the drugs and poison were found on the dressing table inside the said room while both the appellants and the other accused were still in the room; and

d. an observation was made for the whole 20 minutes before the raid.

[30] The same factors were also taken into consideration by the learned Sessions Court Judge in finding that there was, in fact, common intention amongst both the appellants and the other accused as can be seen at pp. 37-40 of the appeal record.

[31] In support of her contention, the learned DPP in the present case then quoted the Federal Court case of *Ghazalee Kassim & Ors v. PP* [2009] 4 CLJ 737 and in particular at p. 746 of the report, the wordings of Zaki Tun Azmi CJ (as he then was) as follows:

> *"Section 34 of the Penal Code is invoked by the prosecution in order to prove that although an accused did not directly commit the criminal act,* ***he was involved in a series of other acts with the others to show that he had the common intention of committing that criminal act with the others.*** *The accused need not be present together with the others who had committed the actual criminal act [6]. It is sufficient that he participated jointly with the others. It must however be shown that there was* a *prior arranged plan with the others. In other words, all those who are charged pursuant to s. 34 of the Penal Code, must have the common intention to commit the offence charged".*

[32] However, I am unable to agree with this contention by the learned DPP. I have gone through at great length the appeal record and perused all evidence adduced in the present case. I find that there

is no evidence to show the existence of any common intention between the appellants to be in possession of the drugs and poison by reasons stated below.

[33] Firstly, based on the evidence, the prosecution was only able to prove that the room was registered under the first appellant's name. The first appellant explain that the room was booked upon request by the second appellant for him to stay that night. No other evidence was adduced for this Court to infer that the room was booked in furtherance of the appellants' common intention to be in possession of the drugs and poison.

[34] Secondly, though it was not denied that when the police raided the room, both the appellants were inside the room, there was also no evidence from PW1 of the conduct of the appellants when the drugs and poison were found by the police to support the learned DPP's contention that common intention had developed on the spot especially at the time when the drugs and poison were found.

[35] As such, I am of the view that the prosecution had failed to prove common intention as between the appellants in the present case. There was no evidence in the present case from which common

intention could be inferred. Common intention was an essential element in the charges preferred against the appellants. Failure to prove this element is fatal to the prosecution's case.

CONCLUSION

[36] Based on all of the above, the first and the second appellant appeal is hereby allowed. The conviction and sentence against both the appellants are therefore set aside. The appellants are hereby acquitted and discharged.

Dated: 5 OCTOBER 2015

(HASHIM HAMZAH)
JUDGE
HIGH COURT OF MALAYA ALOR SETAR

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