



IN THE HIGH COURT OF MALAYA AT SHAH ALAM

IN THE STATE OF SELANGOR, MALAYSIA

[CRIMINAL TRIAL NO: 45A-3-01/2015]

BETWEEN

PENDAKWA RAYA

AND

NADARAJAN MUNIAN

(NO KAD PENGENALAN: 790609-08-6115)

CRIMINAL LAW: *Dangerous drugs - Trafficking - Possession - Accused was allegedly carrying plastic bag that contained drugs - Whether accused had physical custody or control of white plastic bag - Whether presumption of possession under s. 37(d) Dangerous Drugs Act 1952 applicable - Whether prima facie case of trafficking against accused proven*

EVIDENCE: *Witness - Credibility - Witness made two statements which differ in material particulars - Whether witness was truthful - Whether evidence was suspect*

CRIMINAL PROCEDURE: *Prosecution - Prosecution's case - Serious contradiction in prosecution evidence - Whether evidence favourable to accused must be preferred - Whether prima facie case proven*

[Prosecution had failed to prove prima facie case. The accused was acquitted and discharged.]

Case(s) referred to:

Adzhaar Bin Ahmad & Anor v. PP [1996] 1 LNS 68 (*refd*)

Ah Mee v. PP [1967] 1 LNS 3 FC (*refd*)

Ong Ah Chuan v. PP & Koh Chai Cheng v. PP [1980] 1 LNS 181 PC (*refd*)

Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA (*refd*)

Mohamed Kasdi v. PP [1968] 1 LNS 78 HC (*refd*)

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

PP v. Lee Eng Kooi [1993] 2 CLJ 534 HC (*refd*)

PP v. Muhammad Nasir b Shaharudin [1994] 2 MLJ 576 (*refd*)

Teh Hock Leong v. PP [2008] 4 CLJ 764 CA (*refd*)

Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC (*refd*)

Legislation referred to:

Dangerous Drugs Act 1952, ss. 2, 37(d), 39B(1)(a)(2)

Criminal Procedure Code, ss. 64, 180

Evidence Act 1950, s. 91

JUDGMENT

- [1] The accused, Nadarajan a/l Munian, a male Indian, was charged with trafficking in 2797 grammes of cannabis under section 39B(1)(a) of the Dangerous Drugs Act 1952 (“the Act”) and punishable under section 39B(2) of the same Act.

[2] The amended charge against him read:

Bahawa kamu pada 2 June 2014, jam lebih kurang 2.30 petang di stesyen minyak Shell, Lot Pt 4087, Bandar Baru Sungai Buloh, di dalam Negeri Selangor Darul Ehsan, telah melakukan kesalahan memperedarkan dadah berbahaya sejumlah berat 2797 gram cannabis. Oleh dengan itu, kamu telah melakukan kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta Dadah Berbahaya”

Case for the prosecution

- [3]** The prosecution called 5 witnesses to prove the charge. According to the evidence led by the prosecution, at about 12 noon on 2 June 2014, DSP Mohd Husni bin Manaf (PW3) who was attached to the Narcotics Unit at IPK Selangor received information that a male Indian trafficker would be delivering drugs in a motorcycle bearing registration number WTV 1276. Acting on the aforesaid information, DSP Husni led a party of 10 Narcotics Officers to a Shell petrol station (“Shell station”) at Lot Pt 4087, Bandar Baru Sg Buloh, Selangor.
- [4]** The raiding team reached the Shell station at about 2.15 pm, and split into four groups and waited in ambush. The accused was arrested at the Shell station about 15 minutes later and a Modenas Kriss motorcycle bearing registration number WTU 1276 was seized. There was a serious dispute on the evidence as to the events that led to the arrest of the accused.
- [5]** DSP Husni testified that whilst waiting at the Shell station, he saw the accused riding motorcycle WTV 1276 into the station.

The accused parked his motorcycle near the exit and took a white plastic bag (exhibit P10) from the carrier, and proceeded to walk towards a car park in the adjacent property. The police moved in and arrested him and seized the white plastic bag that he was carrying in his right hand.

- [6] Inside the white plastic bag was a blue plastic bag (exhibit P11) that contained 3 slabs of compressed dried leaves (exhibit P14) wrapped in clear plastic paper. The accused was searched and no incriminating items were found on him. The police then proceeded to seize the motorcycle, the motorcycle keys, a handphone (exhibit P18) and a crash helmet (exhibit P17). The items seized and the accused were taken to the Narcotics Unit at the Sg Buloh police station, where DSP Husni labelled the items and prepared a search list. At about 5 pm, DSP Husni handed the items seized and the accused to the Investigating Officer, Inspector Muhamad Izhar (“Investigating Officer”) (PW5).
- [7] The main thrust of the cross-examination of DSP Husni was aimed at establishing that he was mistaken as to the identity of the person who had rode the motorcycle into the Shell station. It was put to DSP Husni that the person who rode the motorcycle into the Shell station was one Abdul Karim bin Hussin (“Karim”) (PW2), the owner of the motorcycle. It was further put to him that the accused had come to the Shell station to meet Karim for lunch. He had driven there in his motor lorry WHS 9029 which he had parked on the grass verge just before the entrance to the Shell station and walked towards Karim who was waiting for him. DSP Husni denied every one of the above suggestions and maintained what he had said in examination-in-chief.

- [8] In further cross examination, it was put to DSP Husni that whilst Karim and the accused were discussing where to go for lunch, Karim received a phone call and excused himself to go to the toilet. It was whilst the accused was waiting for Karim near the motorcycle, the police pounced on him and arrested him. It was also put to DSP Husni that the accused was not carrying anything in his hands when arrested and the police recovered the white plastic bag from the motorcycle carrier. DSP Husni vehemently denied these suggestions as well. DSP Husni, however, accepted that the accused had no fingers on his left hand, but denied this made it improbable for him to ride a motorcycle.
- [9] The Investigating Officer testified that on receiving the seized items from DSP Husni, he placed his own markings on them. On 4 June 2014, he sealed and sent the drug exhibits to the government Chemist, Dr Vanitha Kunalan (“PW4”) for chemical analysis who confirmed that the substance in exhibit P14 was cannabis as defined under section 2 of the Act.
- [10] Under cross examination, the Investigation Officer stated that the rear number plate of the motorcycle was WTV 1276 and the front number plate was WTU 1276.
- [11] The next witness whose testimony I should like to refer to is that of Karim, the owner of the motorcycle seized at the shell station. He testified that registration number of his motorcycle was WTU 1276 and not WTV 1276. According to Karim, he got to know the accused about 2 months before the incident. The accused frequented the nasi lemak stall he operated in Segambut to buy nasi lemak. On the morning of 2 June 2014, the accused came to his stall to borrow his motorcycle. He lent his



motorcycle to the accused who claimed that his motor lorry that had broken down and needed to look for a mechanic to repair.

[12] Karim stated that he waited at the stall for more than an hour for the accused to return his motorcycle but the latter failed to show up as promised. He then decided to head home in his wife's car. On his way home, he noticed the accused's motor lorry parked on the roadside not far from his stall. The motor lorry remained at the same spot for the next 4 to 5 days and he did not hear from the accused. It was only when the police contacted him about a month later he discovered that his motorcycle had been seized by the police.

[13] I shall now turn to the highlights of the cross-examination of this witness. Karim admitted that he did not lodge a report when the accused failed to return his motorcycle. He did not think anything was amiss as he thought the accused, who was physically disabled, was using his motorcycle until he was able to find the funds to repair his lorry.

[14] It was further put to Karim in cross examination that he was also known as Babu and that it was he who had transported the drugs to the Shell station on his motorcycle and the drugs belonged to him. Next, it was put to him that the accused had come to the Shell station to meet him to have lunch with him but he had hid himself in the toilet on receiving information about the presence of police at the Shell station and the police arrested the accused by mistake.

[15] Karim emphatically denied all these suggestions and maintained he was not at the Shell station and the drugs did not belong to him.

[16] 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

[17] The burden on the prosecution at the close of the prosecution case to make out a *prima facie* case is encapsulated in section 180 of the Criminal Procedure Code. The Federal Court in *Looi Kow Chai & Anor v. PP* [2003] 2 MLJ 65 explained the term *prima facie* in this manner:

It is the duty of a judge sitting alone to determine at the close of the prosecution's case, as a trier of fact, whether the prosecution has made out a *prima facie* case.....It therefore follows that there is only one exercise that a judge sitting alone under s. 180 of the CPC has to undertake at the close of the prosecution case. He must subject the prosecution evidence to maximum evaluation and to ask himself the question: if I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no *prima facie* case has been made out and the accused would be entitled to an acquittal.

Statutory provisions and Case Law

[18] For convenience, I 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.

[19] The charge against the accused 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) ...

[20] The definition of trafficking is found in section 2 of the Act which provides:

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.

[21] It is settled case law that to sustain a charge of trafficking under section 2 of the Act, the prosecution must first prove that the accused had possession of the drugs. Possession is essential as unless an accused has possession or custody or control of the drug, he would not be in a position to traffic in the same. In this regard, Augustine Paul J in *Public Prosecutor v. Chia Leong Foo* [2000] 6 MLJ 705, 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

- [22]** 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.

- [23]** It is also settled law that to sustain a charge of trafficking, an accused must be shown to have done the act of trafficking in one of its forms as found in section 2 of the Act for the purpose of distributing the drugs to another. See *Teh Hock Leong v. Public Prosecutor* [2010] 1 MLJ 741 and *Ong Ah Chuan* [1981] 1 MLJ 64.

Ingredients of the Offence

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

- i. That the substance in exhibit P10 was dangerous drugs within the definition of section 2 of the Act: and
- ii. that the accused person had possession of the drugs i.e. he had custody and control of the drugs and knowledge that it was dangerous drugs; and
- iii. that the drugs were in the possession of the accused for the purpose of trafficking.

[25] 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

[26] As regards ingredient (i), there was clear evidence that the substance sent for analysis to Dr Vanitha Kunalan was the substance seized from the white plastic bag at the Shell station. The evidence of Dr Vanitha Kunalan was not seriously challenged, and her evidence established that the substance contained a net weight of 2797 of cannabis, and that cannabis was a dangerous drug and came within the definition of section 2 of the Act

Whether the accused had possession of the dangerous drugs

[27] To prove possession, the prosecution sought to rely on the evidence of DSP Husni that the accused was carrying the white plastic bag that contained the drugs. The learned Deputy Public

Prosecutor contended that he was a reliable witness and urged the court to accept his oral testimony.

- [28] It was contended that DSP Husni's evidence established that the accused had physical custody or control of the white plastic bag that contained the drugs and this entitled the prosecution to rely on the presumption of possession under section 37(d) of the Act. The said section read:

In all proceedings under this Act or any regulations made thereunder-

- (a)
- (b)
- (c)
- (d) any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;

- [29] The question I needed to consider was whether DSP Husni was a credible witness. It is settled law that a judge in deciding whether to accept or reject the evidence of a witness, must test it against certain criteria. He must, take into account the presence or absence of motive that a witness may have in giving evidence. And, if there are contemporary documents, test the oral evidence of a witness against these documents.

- [30] In the instant case, the oral evidence of DSP Husni clashed with the search list, a contemporaneous document that was prepared

by him soon after the seizure of the drugs. In his evidence, DSP Husni alleged that the drugs were recovered from the white plastic bag that the accused was carrying. However, the search list stated that the drugs were recovered from “di tepi motorsikal”. For some inexplicable reason, DSP Husni was not asked and proffered no explanation as to why there was a contradiction between his oral evidence and the search list on a critical issue. It cannot be gainsaid that both statements made by DSP Husni could not be true.

- [31] The importance of contemporaneous documentary evidence was considered by the Federal Court in *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979]2 MLJ 229. Chang Min Tat FJ, in delivering the judgment of the Federal Court observed:

Nevertheless the learned trial judge expressed himself to be completely satisfied with the veracity of the respondent’s witnesses and their evidence. He purported to come to certain findings of fact on the oral evidence but did not notice or consider that the respondent’s oral evidence openly clashed with its contemporaneous documentary evidence. For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity.

[32] It has also been held that when a witness makes two statements which differ in material particulars there must necessarily be ground for believing that he was not a truthful witness and his evidence was suspect. See *Mohamed Kasdi v. PP* [1969] 1 MLJ 135, *Adzhaar bin Ahmad & Anor v. PP* [1996] 4 MLJ 85 and *PP v. Lee Eng Kooi* [1993] 2 MLJ 322. In instances like this where there is a serious contradiction in the prosecution evidence, the law leans in favour of the accused and the evidence favourable to the accused must be preferred.

[33] In view of the serious conflict between the oral evidence of DSP Husni and the search list, I rejected DSP Husni's oral evidence.

[34] It bears mention that the oral evidence of DSP Husni that the accused was carrying the white plastic bag that contained the drugs was also inadmissible on another ground. The duty of the Raiding Officer to prepare a search list is mandated by section 64 of the Criminal Procedure Code. The provision read:

A list of all things seized in the course of a search made under this Chapter and of the places in which they are respectively found shall be prepared by the officer or other person making the search and signed by him.

[35] By virtue of section 64, a search list is a document required by law to be reduced to the form of a document. In *Ah Mee v. PP* [1967] 1 MLJ 220 the Federal Court in addressing the scope of section 91 of the Evidence Act 1950 stated:

Section 91 of the Evidence Ordinance applies equally to criminal trials, no less than to civil proceedings, and it categorically states that "in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms

... of such matter except the document itself.” The report was information relating to the commission of an offence which “shall be reduced to writing” pursuant to section 107 of the Criminal Procedure Code (Cap. 6), and section 92 of the Evidence Ordinance goes on to exclude all parole evidence seeking to contradict or vary what was set out in writing. Hence it should have remained uncontradicted, on the prosecution evidence, that whoever might have raped the complainant he was certainly not this appellant.

[36] The decision in *Ah Mee v. PP* illustrates that the prohibition contained in section 91 of the evidence Act 1950 precludes oral evidence being led to contradict or vary the contents in the search list. The prosecution, in the absence of any explanation for the variance between DSP Husni’s oral evidence and the search list, was bound by the facts noted in the search list.

[37] For the reason stated, I found that the prosecution had failed to prove that the accused had physical custody of the white plastic bag that contained the drugs.

[38] In view of my finding it became unnecessary to consider the third ingredient.

Conclusion

[39] I therefore found that the prosecution had failed to prove a *prima facie* case of trafficking against the accused. The accused was accordingly acquitted and discharged.

Dated: 7 NOVEMBER 2017

(SM KOMATHY SUPPIAH)



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Legal Network Series

Judicial Commissioner
High Court of Malaya
Shah Alam

Date of Decision: 29 AUGUST 2017

COUNSEL:

For the accused - Amrit Pal Singh; M/s Amrit & Company

*For the prosecution - Farah Wahida Md Nor; Deputy Public
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