

KOH KENG GUAN

A

v.

PP

COURT OF APPEAL, PUTRAJAYA

B

LOW HOP BING JCA

ABDULL HAMID EMBONG JCA

AHMAD MAAROP JCA

[CRIMINAL APPEAL NO: B-05-23-2004]

20 JULY 2009

C

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in 1836g of heroin - Appeal against conviction and sentence - Drugs found attached to accused's thighs and calves - Whether accused had knowledge of drugs - Evidence of state of mind - Defence of innocent carrier - Whether accused acting under duress and threat to himself and his family - Actual possession of drugs established - Whether presumption of trafficking under s. 37(da)(i) rebutted*

D

CRIMINAL LAW: *Defence - Defence of duress and threat - Dangerous Drugs - Trafficking in 1836g of heroin - Whether accused acting under duress and threat to himself and his family - Burden to establish defence of threats - Evidence Act 1950, s. 105*

E

CRIMINAL PROCEDURE: *Defence - Burden of establishing defence - Dangerous Drugs - Trafficking in 1836g of heroin - Defence of innocent carrier - Whether accused acting under duress and threat to himself and his family - Burden to establish defence of threats - Evidence Act 1950, s. 105*

F

The appellant ('the accused') was apprehended at the Kuala Lumpur International Airport whilst attempting to board a flight from Kuala Lumpur to Frankfurt. The alarm was triggered when the accused walked through a detector. The security officer ('PW1') then carried out a body check and felt some hard items on the accused's legs. The accused claimed that his legs were blistered. PW1 found some bandages on the accused's thighs and calves. The accused refused to allow PW1 to remove the bandages. When the bandages were removed, three plastic packages were found bandaged on each thigh, and one plastic package on each calf. All eight packages contained a total of 1836g of heroin. The accused was charged with the offence of trafficking in heroin, in contravention of s. 39B(1)(a) of the Dangerous Drugs Act 1952. In his defence, the accused testified that he was an innocent carrier, acting

G

H

I

A under duress and threat to himself and his family with no knowledge of what he was carrying and he did that at the behest of one Ah Hai. The accused was convicted and sentenced to death by the High Court and hence this appeal.

B **Held (dismissing appeal and affirming decision of High Court)**
Per Low Hop Bing JCA delivering the judgment of the court:

- C (1) The accused's state of mind may be gathered from the evidence of what he did or failed to do or what he said on the occasion in question; and in order to arrive at a finding of knowledge, the court will have to consider the totality of the evidence, including the explanations and denials made by the accused and his conduct on the occasion in question; *PP v. Badrulsham Baharom* (refd). (para 12)
- D (2) The accused was found to have eight packages strapped to his thighs and calves. They were concealed on the person of the accused. He had lied that his legs were blistered and refused to allow PW1 to open the bandages or remove them for examination. In the absence of any plausible or reasonable explanation by the accused, these facts were sufficient for the trial court to make an affirmative inference and finding that the accused had knowledge of the enormous quantity of heroin and that he was in actual possession of the proscribed drug *ie*, heroin. (para 16)
- E (3) Under s. 105 of the Evidence Act 1950, the burden was on the accused to establish the defence of threats. There was not an iota of evidence to show that the accused was under any threat to lead to his apprehension of instant death or to his life or limb. The defence was devoid of merits. (paras 19 & 20)
- F (4) The learned judge had not erred in his finding, beyond reasonable doubt, that the accused had actual possession of the eight plastic packages and the dangerous drugs, and that the accused had not rebutted the presumption of trafficking under s. 37(da)(i). (para 21)
- G

Case(s) referred to:

- H *Chan Pean Leon v. PP* [1956] 1 LNS 17 HC (refd)
Emmanuel Yaw Teiku v. PP [2006] 3 CLJ 597 FC (refd)
Leow Nghee Lim v. Regina [1955] 1 LNS 53 HC (refd)
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC (refd)
PP v. Badrulsham Baharom [1988] 1 LNS 72 HC (refd)
Roslan Sabu v. PP [2006] 3 CLJ 607 CA (refd)
- I *Syed Ali Syed Abdul Hamid & Anor v. PP* [1982] CLJ 188; [1982] CLJ (Rep) 340 FC (refd)
Teh Hock Leong v. PP [2008] 4 CLJ 764 CA (refd)
Warner v. Metropolitan Police Commissioner [1968] 2 All ER 356 HL (refd)

Legislation referred to:

Common Gaming Houses Act 1953, s. 4(1)(c)
Dangerous Drugs Act 1952, ss. 37(da)(i), 39B(1)(a), (2)
Evidence Act 1950, s. 105
Penal Code, s. 94

A

For the appellant - RV Lingam; M/s RV Lingam & Co
For the respondent - Nurulhuda Nur'aini Mohd Nor; DPP

B

[Appeal from High Court, Shah Alam; Criminal Trial No: 45-26-2001]

Reported by Amutha Suppayah

C

JUDGMENT**Low Hop Bing JCA:****Appeal**

D

[1] The appellant (“the accused”) was charged with the offence of trafficking in heroin, in contravention of s. 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under s. 39B(2) thereof. (Unless otherwise stated, a reference hereinafter to a section is a reference to that section in the Dangerous Drugs Act 1952).

E

[2] He was convicted and sentenced to death by the Shah Alam High Court. This is his appeal against the conviction and sentence.

Finding Of Facts

F

[3] After a full trial, the narrative of facts as found by the learned trial judge unfolded that on 17 October 2000, at about 9pm, a security assistant (“PW1”) was on duty at Gate C1 and Gate C3, Satellite Building, Kuala Lumpur International Airport, together with another colleague (“PW8”) and one Ramly. At about 10.10pm, PW1 was at Gate C3 to carry out security checks on passengers boarding flight MH006 from Kuala Lumpur to Frankfurt.

G

[4] At about 10.40pm, the accused went through the first “walk-through detector”, which then triggered an alarm. PW8 directed the accused to go through the second “walk-through detector”, which also triggered an alarm. With the accused’s permission, PW1 carried out a body check, by frisking the accused’s body with his (PW1’s) hands. Upon touching some hard items on the accused’s legs, PW1 asked the accused what the hard items were. The accused replied that his legs were blistered. PW1 told PW8 that the accused’s explanation was not convincing. Both PW1 and PW8 then led the accused to the security

H

I

A room. PW1 lifted the accused's trousers and saw, on the accused's calves, some bandages. The accused refused to allow PW1 to remove the bandages. PW1 and PW8 accompanied the accused to the police base. On the way, PW1 stopped at the Immigration Department, located in the building, to enable Immigration personnel to make the necessary
B endorsement on the accused's passport. The accused was not allowed to leave Kuala Lumpur for Frankfurt. The "exit" stamp of the Immigration, endorsed earlier on the accused's passport, was duly re-endorsed "void".

C [5] At the police base, PW1 directed the accused to remove his trousers, whereupon PW1 found that the accused's thighs and calves were wrapped in bandages. There were three plastic packages bandaged on each thigh, and one plastic package on each calf. PW1 seized the accused's air ticket, boarding pass and passport. The chemist ('PW6') confirmed that, on analysis, all the eight packages contained a total of
D 1836g of heroin.

E [6] In his defence, the accused testified that he was an innocent carrier, acting under duress and threat to himself and his family with no knowledge of what he was carrying and he did that at the behest of one Ah Hai.

Knowledge And Innocent Carrier

F [7] Learned defence counsel Mr RV Lingam submitted that the accused had no knowledge of the heroin, which the accused thought was medicine, and so the accused was an innocent carrier.

G [8] The stand taken by learned Deputy Public Prosecutor Ms Nurulhuda Nur'aini bt Mohd Noor is that the accused was not an innocent carrier, as the prosecution had discharged the burden of proving knowledge and actual possession against him.

[9] In our view, the immediate question that must be answered under this head is whether the learned judge was correct in finding that the accused had possession and knowledge of the contents of the eight packages bandaged to his thighs and calves.

H [10] In *Leow Nghee Lim v. Regina* [1955] 1 LNS 53, Taylor J had the occasion to consider the meaning of possession in relation to a charge of possession of *chandu*. He was of the view that:

I (a) the most helpful definition of possession is "the relation of a person to a thing over which he may at his pleasure exercise such control as to the character of the thing admits, to the exclusion of other persons". This definition includes some element of knowledge of the

existence of a chattel and some idea of its whereabouts before he can exercise any control over it, thereby importing *mens rea* as an essential element; and A

- (b) how much a man knows about things in, or apparently in, his possession is a matter of fact, to be inferred from all the circumstances: See also *Emmanuel Yaw Teiku v. PP* [2006] 3 CLJ 597. B

[11] In *Chan Pean Leon v. PP* [1956] 1 LNS 17, Thomson J (later LP) explained the meaning of the word “possession” in the context of assisting in the carrying on of a public lottery under s. 4(1)(c) of the Common Gaming Houses Ordinance (now Act) 1953. He propounded that: C

- (a) There can be no possession without knowledge, as an essential ingredient of all possession is that there must be an intention to exercise the power of disposal in case of need to exercise that power to the exclusion of other persons; and D
- (b) There are therefore two elements *viz* a physical element which may be proved by direct evidence; and a mental element or *animus possidendi* ie, intention, which in the nature of things, cannot be proved by direct evidence, but by inference from the surrounding circumstances, and it is impossible to lay down any general rule. E

[12] The accused’s state of mind may be gathered from the evidence of what he did or failed to do or what he said on the occasion in question; and in order to arrive at a finding of knowledge, the court will have to consider the totality of the evidence, including the explanations and denials made by the accused and his conduct on the occasion in question: See *PP v. Badrulsham Baharom* [1987] 1 LNS 72 per Lim Beng Choon J (as he then was). F

[13] In *Warner v. Metropolitan Police Commissioner* [1968] 2 All ER 356 HL, 375I to 376A, the House of Lords pointed out that: G

- (a) If the accused had a suspicion but deliberately shut his eyes, the court is well entitled to hold him guilty. Further, it would be pedantic to hold that it must be shown that the accused knew precisely which drug he had in his possession. Ignorance of the law is no defence and in fact virtually everyone knows that there are prohibited drugs. So it would be quite sufficient to prove facts which it could properly be inferred that the accused knew that he had a prohibited drug in his possession. This would not lead to an unreasonable result: per Lord Reid at p. 367E to F. H I

- A (b) If someone deliberately assumes control of some package or container, then he is in possession of it. If he deliberately so assumes control knowing that it has contents, he would also be in possession of the contents. It would not be rational to hold that someone, who is in possession of a box which he knows to have things in it, is in possession of the box but not in possession of the things in it. If he had been misinformed or misled as to the nature of the contents, or if he had made a wrong surmise as to them, he would nevertheless be in possession of them: per Lord Morris at pp. 375I to 376A.
- B
- C (c) In all cases, the starting point will be that the accused had physical control of something – a package, a bottle, a container – found to contain the substance. This is evidence – generally strong evidence – of possession. It calls for an explanation. The explanation will be heard and the jury (in Malaysia, the court) must decide whether there is genuine ignorance of the presence of the substance, or such an acceptance of the package with all that it might contain, or with such opportunity to ascertain what it did contain or such guilty knowledge with regard to it as to make up the statutory possession: per Lord Wilberforce at 394E (words in bracket added).
- D
- E [14] The above propositions were affirmed by the Federal Court in *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337, in considering the issue of knowledge as a necessary element to establish possession: per Arifin Zakaria FCJ (now CJ(M)).
- F [15] Illustration of the inference of knowledge include:
- G (a) *Emmanuel Yaw Teiku, supra*, where 515.7g of heroin were found in the stomach of the accused who initially refused to undergo the X-ray procedure. The Federal Court held that this indicated the accused's knowledge of what was inside his body;
- H (b) *Roslan Sabu v. PP* [2006] 3 CLJ 607, where the accused was carrying the two transparent plastic carrier bags with glaring sight of the drugs, and the plastic wrappers were transparent, thereby fulfilling the element of knowledge ie, *mens rea* to constitute possession on the part of the accused;
- I (c) *Teh Hock Leong v. PP* [2008] 4 CLJ 764, where the method employed by the accused to bring the drugs in question from Thailand into Malaysia was done in a most cunning fashion to escape detection by the authorities; and

- (d) *Syed Ali Syed Abdul Hamid & Anor v. PP* [1982] CLJ 188; [1982] CLJ (Rep) 340 at p. 346, where the representation the accused made to a prosecution witness therein regarding the purpose of borrowing the car was a deliberate lie; such lie was held to be a reflection of his consciousness of guilt as regards the use he intended to make of the car in question.

[16] In the instant appeal, it is significant to state that the accused was found to have eight packages strapped to his thighs and calves. They were concealed on the person of the accused. He had lied that his legs were blistered and refused to allow PW1 to open the bandages or remove them for examination. In the absence of any plausible or reasonable explanation by the accused, these facts are sufficient for the trial court to make an affirmative inference and finding that the accused had knowledge of the enormous quantity of heroin and that he was in actual possession of the proscribed drug ie, heroin.

[17] As the prosecution had proved the accused's actual possession of 1,836g of heroin, and the weight thereof far exceeded the statutory trigger of 15g, the presumption of trafficking as provided in s. 37(da)(i) is activated against the accused. We are of the view that the High Court had correctly held that the accused was in actual possession of the heroin and that the weight in question being in excess of the statutory trigger had effectively activated the presumption of trafficking pursuant to s. 37(da)(i).

Threats

[18] The next and final issue raised for the accused is the defence of threats. This defence must be considered by reference to s. 94 of the Penal Code which states:

94. Act to which a person is compelled by threats.

Except murder, offences included in Chapter VI punishable with death and offences included in Chapter VIA, nothing is an offence which is done by a person who is compelled to do it by threats, which at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence:

Provided that the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint.

A [19] The simple and straightforward question for determination under this head is whether there is any evidence to sustain the applicability of this defence. Under s. 105 of the Evidence Act 1950, the burden is on the accused to establish the defence.

B [20] Upon a careful consideration of this issue, we are unable to find any iota of evidence to show that the accused was under any threat to lead to his apprehension of instant death or to his life or limb. We have no difficulty in dismissing this defence as it is devoid of merits.

Conclusion

C [21] The learned judge has not erred in his finding, beyond reasonable doubt, that the accused had actual possession of the eight plastic packages and the dangerous drugs, and that the accused had not rebutted the presumption of trafficking under s. 37(da)(i). Hence, we dismissed the accused's appeal and affirmed the entire decision of the High Court.

D

E

F

G

H

I