**IN THE HIGH COURT OF MALAYA AT SHAH ALAM**

**IN THE STATE OF SELANGOR, MALAYSIA**

**[CRIMINAL TRIAL NO: 45A-117-10/2015]**

**BETWEEN**

**PENDAKWA RAYA**

**AND**

**BALA MURUGAN RAMASAMY**

(NO KAD PENGENALAN: 771110-14-6509)

***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****: Documentary evidence - Admissibility - CCTV footage - CCTV footage marked as IDD - Whether CCTV footage could be accepted as evidence*

***CRIMINAL PROCEDURE****: Police officer - Investigating officer - Offence that attracts capital punishment - Breach of duty - Failure to properly view CCTV recording - Whether investigating officer has a duty to undertake a thorough investigation of cases assigned to him - Whether investigating officer is required to be diligent, truthful and fair in his investigation - Whether breach of duty by investigating officer could be*

*fatal to prosecution's case - Whether failure on part of investigating officer to properly view CCTV recording warranted an inference in favour of accused*

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

**Case(s) referred to:**

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

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

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

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

*PP v. Lee Jun Ho & Ors [2009] 4 CLJ 90 HC (**refd**)*

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

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

*Rahmani Ali Mohamad v. PP [2014] 7 CLJ 405 CA (**refd**)*

*Tai Chai Keh v. Public Prosecutor [1948] 1 LNS 122 CA (**refd**)*

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

**Legislation referred to:**

Criminal Procedure Code, s. 180

Dangerous Drugs Act 1952, ss. 2, 39B(1)(a),(2), First Schedule

## JUDGMENT

**[1]** The accused, Bala Murugan, was charged with two offences of trafficking under section 39B(1)(a) of the Dangerous Drugs Act 1952 ("the Act") and punishable under section 39B(2) of the same Act. The amended charges against him read:

> Amended First charge
>
> Bahawa kamu pada 17 Mac 2015, jam lebih kurang 7.45 malam, bertempat di tepi jalan PJS 1/50, Petaling Utama Avenue, Taman Petaling Utama, di dalam Daerah Petaling, di dalam Negeri Selangor Darul Ehsan telah mengedar dadah berbahaya sejumlah 135.3 gram (128.8 gram Heroin dan 6.5 gram Monoacetylmorphines) 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."
>
> Amended Second charge
>
> Bahawa kamu pada 17 Mac 2015, jam lebih kurang 7.45 malam, bertempat di tepi jalan PJS1/50, Petaling Utama Avenue, Taman Petaling Utama, di dalam Daerah Petaling, di dalam Negeri Selangor Darul Ehsan telah mengedar dadah berbahaya jenis Methamphetamine dengan berat 69.23 gram dan dengan itu kamu telah melakukan suatu kesalahan di bawa Seksyen 39B(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta Dadah Berbahaya 1952."

### Case for the prosecution

**[2]** The prosecution called 3 witnesses to prove the charge. According to the prosecution evidence, acting on receiving information at about 5 pm on 17 March 2015, DSP Mohd Husni bin Manaf (PW1) ("DSP Husni") led a team of 10 Narcotics Officers to a row of shops at PJS 1/50 Petaling Utama Avenue, Taman Petaling Utama, Petaling Jaya. The raiding team reached there at about 7.30 pm. A motorcycle bearing registration number WKX 1423 was parked outside a shop called Sinar Jernih Sdn Bhd ("Sinar Jernih"). The team split into four groups and took position.

**[3]** DSP Husni testified that at about 7.45 pm, the accused emerged from a lane beside Sinar Jernih carrying a plastic bag (exhibit P10) in his right hand and walking towards the motorcycle. At this juncture, he raiding team pounced on him and arrested him and seized the plastic bag. Inside the bag were 5 brown envelopes (exhibit P11 [A to E]) and a small purple plastic bag (exhibit P13). In each of the envelopes was a clear plastic packet (exhibit P11 [A1 to E1]) that contained substance suspected to be drugs. And, in the purple plastic bag were two clear plastic packets (exhibits P13 [1 and 2]) that contained substance also suspected to be drugs. The police also seized a mobile phone, the motorcycle, a crash helmet and a bunch of keys.

**[4]** The accused was taken to the Klang police station together with the exhibits. There, DSP Husni labelled the exhibits by writing the date and placing his signature on them. At about 9 pm, he handed the accused and the exhibits seized to Investigating Officer, Inspector Cairun Niza binti Mohamed (PW2) ("the investigating officer").

**[5]** DSP Husni was subjected to lengthy cross examination. Cross examination of DSP Husni was aimed at establishing that his

version of the facts was not correct. It was put to DSP Husni that the accused parked his motorcycle in front of Sinar Jernih on arriving there and waited along the corridor of the said shop. A few minutes later, a car approached the place of incident and stopped near the accused's motorcycle and the accused got into the front passenger seat of the car and sat in the car with the driver for about 15 minutes. It was further put to DSP Husni that the accused subsequently alighted from the car and was walking in the direction of a toilet located in the lane beside Sinar Jernih, when the police surrounded and arrested him.

**[6]** DSP Husni vehemently denied each and every one of the above suggestions and maintained what he had said in examination-in-chief. He further denied that the drugs were recovered from the driver of the car, one called "Rashid".

**[7]** Returning to the narrative, the Investigating Officer confirmed receiving the seized exhibits from DSP Husni. She added that she made her own markings on the exhibits, and the exhibits suspected to be drugs were sealed in a box and sent to government chemist, Norhaya binti Jaafar (PW3) for chemical analysis who confirmed that the substance in the brown envelopes contained 128.8 grammes of heroin and 6.5 grammes of monoacetylmorphines and the substance in the purple plastic bag contained 69.23 grammes of methamphetamine, a dangerous drug listed in the First Schedule of the Act.

**[8]** The Investigating Officer was also subjected to lengthy cross examination. She was asked if she had obtained any CCTV footage of the incident from Sinar Jernih. She confirmed that she was given a copy of the footage but explained that it was not produced at the trial as evidence as it did not show anything relevant to the case as the front of the building where the

accused parked his motorcycle and arrested was not captured in the footage.

**[9]** The defence then played a CCTV footage (IDD 23) it had obtained from Sinar Jernih. The Investigating Officer confirmed that the footage was identical to the one she had viewed at Sinar Jernih except that the footage at Sinar Jernih was a little dark. The Investigating Officer accepted that, contrary to her evidence, IDD23 showed the front of the building. She also accepted that it showed the accused getting into a car that came and stopped near the motorcycle, and that the accused was still in the car at 7.45 pm. She further accepted that it showed that the accused alighting from the car after 7.45 pm and walking towards the lane beside Sinar Jernih, not carrying anything in his hands.

**[10]** That essentially was the evidence for the prosecution.

**Burden on prosecution**

**[11]** 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. Section 180 was discussed and elucidated by the Court of Appeal in *Looi Kow Chai & Anor v. PP* [2003] 2 MLJ 65 as follows:

> 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.

**[12]** In *PP v. Mohd Radzi bin Abu Bakar* [2006] 1 CLJ 457, the Federal Court echoed the same view:

> 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..... If the court, upon a maximum evaluation of the evidence placed before it at the close of the 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. If the accused then elects to remain silent, the court must proceed to convict him. It is not open to the court to then re-assess the evidence and to determine whether the

prosecution had established its case beyond a reasonable doubt. The absence of any evidence from the accused that casts a reasonable doubt on the prosecution's case renders the *prima facie* case one that is established beyond a reasonable doubt. Put shortly, what the trial court is obliged to do under ss. 173(f) and 180 of the CPC is to ask itself the question: If the accused elects to remain silent, as he is perfectly entitled to do, am I prepared to convict him on the evidence now before me? … If the answer to that question is in the affirmative, then the defence must be called. And if the accused remains silent, he must be convicted. If the answer is in the negative, then the accused must be acquitted.

**Statutory provisions and Case Law**

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

**[14]** The charges against the accused were 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 definition of trafficking is set out in section 2 of the Act:

> 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]** 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 had 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

**[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]** It is also settled law that an accused who commits the acts mentioned in the definition of trafficking in section 2 of the Act, [e.g., transporting or carrying the drugs in his possession] would not be a trafficker unless the purpose of the act was for the

distribution of the drugs to another. See *Teh Hock Leong v. Public Prosecutor* [2010] 1 MLJ 741 and *Ong Ah Chuan v. PP & Koh Chai Cheng v. PP* [1981] 1 MLJ 64.

**Ingredients of the Offence**

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

First charge

i. that the substance found in the five brown envelopes was drugs within the definition of section 2 of the Act:

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.

Second charge

i. that the substance found in the purple plastic bag was drugs within the definition of section 2 of the Act:

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.

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

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

**[21]** As regards ingredient (i), there was clear evidence that the drugs analysed by Norhaya binti Jaafar were the drugs recovered from the plastic bag. The prosecution relied on Norhaya's evidence to prove the identity and weight of the drugs. Her unchallenged evidence established that the substance recovered from the envelopes and purple plastic bag contained 135.3 grammes of heroin and monoacetylmorphines and 69.23 grammes of methamphetamine, respectively, which were dangerous drugs as listed in the First Schedule of the Act

**Whether the accused had possession of the dangerous drugs**

**[22]** The prosecution sought to rely solely on the evidence of DSP Husni to prove that the accused had physical possession of the plastic bag that contained the drugs. The learned deputy public prosecutor accepted that the CCTV footage produced in Court, if admissible, was damning of DSP Husni's credibility and inconsistent with the prosecution's narration of the facts. She contended, however, that the CCTV footage could not be accepted as evidence at the end of the prosecution's case as it was still marked as IDD and had not been properly proved.

**[23]** In my view, the submission was without merit as the Investigating Officer had accepted that IDD23 was identical to the footage she had viewed at Sinar Jernih. I therefore ruled that it was admissible. The CCTV footage showed DSP Husni's version of the facts was inaccurate and it would be unsafe to accept his evidence that the accused was caught carrying the plastic bag that contained drugs. As there was no other evidence to show that the accused was carrying the said plastic bag, I

found that the prosecution had failed to prove that the drugs were in the possession of the accused.

**[24]** There was one other point raised by counsel for the accused which should be mentioned. It had to do with the adequacy of the investigation conducted by the Investigating Officer in this case. In this connection, it is instructive to refer to the observation by Apandi Ali J (as his Lordship then was) in *PP v. Lee Jun Ho & Ors* [2009] 4 CLJ 90, wherein it was stated:

> "Where if it is available and could have been made available and made the subject of scrutiny of the Trier-of-fact but was not, this represents a conduct that a party ought not to take advantage of, for it would prevent the accused from the advantage of all available materials whose value may assist the accused or the Trier-of-fact by presenting the evidence in all possible light. This is pertinent especially where the evidence may be potentially execulpating. Therefore this could have been a piece of exculpatory evidence to which the prosecution have denied the accused. It is submitted that the burden is not placed upon the defense to prove the case of the prosecution, but the onus of proof lies solely upon the prosecution."

**[25]** In the instant case, the Investigating Officer in her evidence explained that she did not undertake any further investigation in relation to the CCTV footage as it did not show the front view of the building where the incident took place. However, under cross examination it became patently clear that this was untrue. The front view of the building was captured in the CCTV recording. Obviously, the Investigating Officer had either failed to properly view the CCTV recording or had some other motive for not producing it in Court.

**[26]** It has been repeatedly stressed in the case law that the Investigating Officer has a duty to undertake a thorough investigation of the cases assigned to him, especially when it comes to offences that attract capital punishment. The iInvestigating Officer is required to be diligent, truthful and fair in his investigation. He must not withhold evidence. A breach of this duty, intentionally or otherwise, can be fatal to the case of the prosecution.

**[27]** A CCTV recording that may have captured the commission of an offence is critical evidence and the Investigating Officer must view it properly as it could contain evidence that could exonerate an accused person or prove his guilt.

**[28]** Counsel for the accused contended, and I agreed, that the failure on the part of the Investigating Officer to properly view the CCTV recording warranted an inference in favour of the accused as his right to a fair trial was compromised by this failure. In my view, the present case is a glaring example of irresponsible investigation. If a proper investigation had been undertaken by the Investigating Officer, it would have cast doubt on DSP Husni's evidence and exonerated the accused. See *Lee Kwan Woh v. PP* [2009] 5 CLJ 631 and *Rahmani Ali Mohamad* [2014] 7 CLJ 405**.**

**[29]** In the oft quoted case of *Tai Chai Keh v. Public Prosecutor* [1948-49] MLJ Supp 105 the Malayan Court of Appeal explained:

> Where there is more than one inference which can reasonably be drawn from a set of facts in a criminal case, we are of opinion that the inference most favorable to the accused should be adopted.

**[30]** For the reasons stated, I found that the prosecution had failed to prove a *prima facie* case against the accused. The accused was accordingly acquitted and discharged of both offences.

**Dated:** 30 NOVEMBER 2017

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