IN THE COURT OF APPEAL MALAYSIA

[APPELLATE JURISDICTION]

CRIMINAL APPEAL NO. C-05(M)-310-08/2016

(IN THE HIGH COURT OF MALAYA AT TEMERLOH
CRIMINAL TRIAL NO: 45A-03-01/2015 & 45-04-02/2015)

BETWEEN

G.VASAN A/L GUNASEGRAN **APPELLANT**

AND

PUBLIC PROSECUTOR **RESPONDENT**

CORAM:

MOHD ZAWAWI SALLEH, JCA
ZAKARIA SAM, JCA
KAMARDIN HASHIM, JCA

JUDGMENT OF THE COURT

Introduction

[1] The appellant was charged with two counts of drug offences. The first charge was for an offence of trafficking in dangerous drugs under section 39B(1)(a) and punishable under section 39B(2) of the Dangerous Drugs Act 1952 ("the Act") and the second charge was for an offence of possession under section 12(2) of the Act and punishable under section 39A(1) of the same Act. The charges against the appellant read as follows:

> *"First Charge:*
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> *"Bahawa kamu, pada 25 Januari 2014, jam lebih kurang 05.20 petang, di Jalan Besar Kampung Cinta Manis, Karak, dalam Daerah Bentong, dalam Negeri Pahang Darul Makmur telah didapati mengedar dadah berbahaya berat bersih 28.1 gram (13.6 gram Heroin dan 14.5 gram Menoacetylmorphines). Oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama."*
>
> *"Second Charge:*
>
> *"Bahawa kamu, pada 25 Januari 2014, jam lebih kurang 05.20 petang, di Jalan Besar Kampung Cinta Manis, Karak, dalam Daerah Bentong, dalam Negeri*

Pahang Darul Makmur telah didapati dalam kawalan kamu berat bersih 9.28 gram Methamphetamine. Oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 12(2) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39A(1) Akta yang sama."

[2] The High Court found the appellant guilty and convicted him of both charges. For the first charge, the appellant was sentenced to death whereas for the second charge, he was sentenced to four years imprisonment, with effect from the date of his arrest and 4 strokes of the rotan. Dissatisfied with the decision, the appellant appealed to this Court.

[3] We heard the appeal on 4.10.2017. Having heard the submissions, examined the records of appeal and considered the case in light of the evidence on record, we unanimously dismissed the appeal and affirmed the convictions and sentences imposed by the High Court. We set out below our reasons for doing so.

The Prosecution's Case

[4] On 25.1.2014, at about 5.20 p.m., Inspector Ng Tee Yian (PW3) together with a team of raiding party conducted the "Operasi Tapis" at Jalan Besar Kampung Chinta Manis, Karak, Bentong, Pahang.

[5] The appellant, who was driving a Perodua Myvi bearing the registration number WXV 8540 (“the vehicle”), entered the surveillance area. PW3 observed that the appellant had dropped a Dunhill cigarette box (P13) underneath the driver seat. PW3 became wary of the appellant’s conduct. PW3 went towards the vehicle and identified himself as a police officer to the appellant.

[6] PW3 then opened the car door and informed the appellant that the police would conduct a search of the car. PW3 retrieved the Dunhill cigarette box and found inside it a transparent plastic packet containing crystalline substance (P19A) suspected to be dangerous drugs.

[7] PW3 conducted a body search on the appellant and found nothing incriminating. In the presence of the appellant, PW3 searched the vehicle, and found a black coloured sling bag (P11) under the front passenger seat. PW3 opened the black sling bag and found inside it a small zipper bag (P12). Inside the small zipper bag were a transparent plastic bottle (P12C) and a transparent plastic package (P12A) containing eighty small transparent plastic packets (P12A(1) – (80)).

[8] PW3 conducted a further search and saw a piece of red coloured plastic sticking out of the lid of an oval shape compartment (photograph P22(12)), located in between the centre

cup holders and the handbrake (photographs P22(8) and P22(11)). After having removed the lid, PW3 discovered a secret compartment beneath. PW3 found a red coloured plastic bag (P16) and a pink coloured plastic bag (P17) inside the hidden compartment. In the red plastic bag was a transparent plastic packet containing crystalline substance (P18B). PW3 also found similar crystalline substance inside the pink plastic bag.

[9] PW3 also found the following items at the handphone slot next to the handbrake (photograph P22(22)):

a) a CIMB ATM card (P28);

b) a Maybank ATM card (P29); and

c) a Maybank ATM transaction slip (P12B).

Further investigation revealed that the appellant was the account holder of both ATM cards.

[10] PW3 seized all the exhibits and handed them to the investigating officer, Inspector Nurhuda bte Mohamed Fadzil (PW6).

[11] The chemist, Puan Suhana bte Ismail (PW4) had conducted the chemical analysis and confirmed the following:

a) The crystalline substance inside the plastic packet P18A to be Heroin weighing 6.4 grams and Monoacetylmorphines weight 6.8 grams;

b) The crystalline substance inside the plastic packet P18B to be Heroin weighing 7.2 grams and Monoacetylmorphines weight 7.7 grams; and

c) The crystalline substance inside the plastic packet P19A to be Methamphetamine weighing 9.28 grams.

[12] Subsequent investigation revealed that the said vehicle was registered under the name of Thulasi a/p Raja (the appellant's wife).

Findings of the High Court

[13] At the end of the prosecution's case, the learned Judicial Commissioner ("JC") was satisfied that *prima facie* case had been established for both charges preferred against the appellant, in that:

a) The appellant was driving the vehicle prior to the arrest and he was the only person inside the vehicle at the material time and, therefore, had custody and control of it;

b) P19A i.e. 9.28 grams of Methamphetamine, which were the subject matter of the second charge, was found inside the Dunhill cigarette box (P13) underneath the driver seat. The appellant's act of dropping the cigarette box prior to police inspection could be inferred that he knew of the impugned drugs;

c) P18A and P18B, found inside the compartment near the handbrake, were placed inside the coloured plastic bags. The appellant had knowledge of the drugs since the drugs were placed in close proximity of the appellant;

d) The prosecution had succeeded in proving the essential ingredients of custody, control and knowledge on the part of the appellant in respect of exhibits P18A and P18B. Knowledge was established by direct evidence; and

e) The learned JC had also relied on the authority of ***PP v. Abdul Rahman Akif*** **[2007] 4 CLJ 337** to support his decision on possession.

[14] The learned JC held that since the amount of drugs seized was 28.1 grams (13.6 grams of Heroin and 14.5 grams of Monoacetylmorphines), section 37(da)(iiia) of the Act was therefore

applicable. With all the material ingredients satisfied, the learned JC then called the appellant to enter into his defence.

The Defence's Case

[15] The appellant gave evidence on oath. In his defence, the appellant stated that at the material time, he was residing in Subang, Selangor together with his wife Thulasi, and his father (DW2). In his evidence, the appellant said that Raja (Thulasi's cousin) had borrowed the said vehicle on a few occasion. On 23.1.2014, Raja had borrowed the said vehicle and returned it on 25.1.2014.

[16] On the day in question, Raja met the appellant at his house in Subang. Raja had requested the appellant's assistance to send him to Bentong, to which the appellant had agreed. The appellant had informed DW2 of the trip to Bentong. According to the appellant, Raja had brought along a black coloured sling bag to which he placed underneath the front passenger seat. They left at about 4.00 p.m. and reached Bentong at about 6.00 p.m. Raja then alighted the vehicle in a hurry. Raja informed the appellant to safe keep the sling bag and he would collect the said bag from the appellant.

[17] The appellant denied that the search and seizure were conducted by PW3. According to the appellant, the arrest, search

and seizure were conducted by one Corporal Norizan. The appellant had permitted Corporal Norizan to examine the sling bag. Corporal Norizan had retrieved the ATM cards, a plastic bottle and the emptied plastic packets from the sling bag. In answer to questions by Corporal Norizan, the appellant said that he did not owned the “barang” that was found inside the sling bag.

[18] The appellant denied having any knowledge of the contents of the red and pink plastic bags. He could not have seen the impugned drugs placed inside the compartment because there were other items such as coins and receipts.

Findings of the High Court at the End of the Case

[19] At the conclusion of the trial, the learned JC held that the defence was improbable; it merely an attempt to shift the blame on Raja. The existence of Raja was never mentioned to PW3 and/or PW6 at the first opportunity available. His Lordship also found that the appellant had failed to explain why so many drugs were found in the vehicle. The appellant was thus convicted and sentenced to death. Hence, this appeal.

The Appeal

[20] The appellant is now before us, urging reversal of the decision of the learned JC on the following grounds:

(a) That the learned JC erred in ruling that the appellant was in custody and control of the drugs found in the vehicle despite the prosecution's failure to exclude the possibility of access by others to the vehicle ;

(b) That the learned JC erred in law and fact when delving into the realm of speculation in arriving at conclusion that the appellant had the requisite knowledge of the existence of the drugs in the vehicle;

(c) That the learned JC erred in failing to invoke the presumption of adverse inference under section 114(g) of the Evidence Act 1950 against the prosecution's for the failure to call, offer and/or produce witnesses that are material to the unfolding of the prosecution's narrative; and

(d) That the learned JC erred in hastily dismissing the appellant's defence without having accorded maximum evaluation and full judicial appreciation to it.

[21] We will deal with each of the grounds advanced by the appellant in turn.

Grounds (a) & (b) Possession

[22] We shall deal with both grounds (a) and (b) together. The learned JC concluded that the appellant had possession of the impugned drugs and remarked as follows:

> *"Oleh kerana beliau berseorangan di dalam kenderaan tersebut, maka tertuduh mempunyai kawalan dan jagaan ke atas kenderaan tersebut dan apa-apa barang yang dibawa di dalamnya.*
>
> [Grounds of Judgment, page 12, Record of Appeal, Volume 1]

> *… dadah yang dijumpai di dalam ruang kosong berdekatan dengan handbrek jelas terletak "in plain view" tertuduh dan berada berdekatan dengannya ketika memandu kereta tersebut. Ianya boleh dilihat dengan mata kasar. Oleh itu berdasarkan kepada warna plastic yang berbeda dengan warna hitam di persekitaran tempat dadah dijumpai tersebut dan kedudukannya dengan tertuduh adalah tidak mungkin beliau tidak mengetahui kandungannya.".*
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> [Grounds of Judgment, page 15, Record of Appeal, Volume 1]

[23] It was the submission of the learned counsel for the appellant that the mere fact that the appellant was the sole occupant in the vehicle, cannot be taken as a conclusive proof that the appellant was in possession of the drugs found in the vehicle (see ***Romi***

Amora b. Amir v. PP **[2011] 4 MLJ 571**). The appellant's case, as put to PW3, was that he had given Raja a lift to Bentong prior to the arrest and the black sling bag belonged to Raja. Learned counsel for the appellant sought to show the probability of access by others in order to negate the exclusive possession on the part of the appellant. According to learned counsel, the impugned drugs i.e. exhibits P18A and P18B could have been concealed or planted there by Raja. It was contended by learned counsel that the appellant's reaction was pertaining to the drugs found inside the cigarette box that he was alleged to have dropped and nothing to do with exhibits P18A and P18B.

[24] Learned counsel further submitted that the finding of the learned JC that P18A and P18B could be seen by the naked eye was flawed because the drugs were not placed in plain view of the appellant but underneath a secret compartment. In the circumstances of the case, there was nothing to show that the appellant knew what was contained in the red and pink bags and the learned JC was in serious error when delving into the realm of speculation and in arriving at the conclusion that he did. Thus, learned counsel for the appellant submitted that the learned JC erred in failing to consider the evidence from all angles and to draw the inference that is favourable to the appellant.

[25] It is trite that what constitutes possession under the Act is a question of law. However, whether a person can be said to be in possession of the impugned drugs in a given case is a question of fact depending on the particular circumstances of the case. (See ***Siew Yoke Keong v. PP*** **[2013] 4 CLJ 149**).

[26] We have scrutinised the whole evidence on record and with respect we found that the learned counsel's argument was misconceived. It was clearly proved that the appellant was the sole occupant of WXV 8540 and was having the sole control of the vehicle from at about 4.00 p.m, until the time of his arrest whilst at the driver's seat inside the vehicle at about 5.20 p.m. by PW3 and his team. The keys and remote were recovered from the appellant. He was in physical proximity to the plastic bags containing the impugned drugs. All these factors, taken together, showed that the appellant could have dealt with the impugned drugs, though he was not the owner of the vehicle. For the same reason, the appellant was thus also having custody or control of the two plastic bags containing the said drugs (see ***PP v. Abdul Rahman Akif (supra)***; ***Parlan Dadeh v. PP*** **[2008] 6 MLJ 19; *Khairuddin Hassan v. PP*** **[2010] 6 MLJ 145** and ***Aedy Osman v. PP*** **[2011] 1 CLJ 273**).

[27] The presence of the two plastic bags inside the vehicle which were under the exclusive control of the appellant at the material

time, and the fact that he needed to guard the plastic bags, must necessarily give rise to a strong inference that the appellant had the requisite knowledge that the two plastic bags contained the said drugs. As said by the Federal Court in ***PP v. Abdul Rahman Akif (supra)*****:**

> *"... again knowledge cannot be proved by direct evidence, it can be proved by inference from the surrounding circumstances. Again the possible variety of circumstances which will support such an inference is infinite...."*

[28] The fact that the plastic bags were found hidden in the secret compartment would not assist the appellant to negate such an inference (see ***Zulfikar bin Mustaffah v. PP*** **[2001] 1 SLR 633** and ***PP v. Abdul Rahman Akif (supra)***). From the oral evidence of PW3 and the photographs, it could be seen that the red coloured plastic was sticking out from the black coloured lid. The contrast of red accent against the neutral background is easily perceived, thus making the presence of plastic bags more noticeable. From the evidence of PW3, it is clear that little effort was required to uncover what was hidden in the secret compartment. Further, the appellant's ATM cards were also recovered from the vehicle. Therefore, we are of the view that on the facts and in the

circumstances of this case, the learned JC was correct in holding that a prima facie case had been established against the appellant.

[29] We noted that during the cross-examination of PW3 and PW6, the defence had suggested to those witnesses that Raja or someone else had hidden the plastic bags in the vehicle without the appellant's knowledge. PW3 and PW6 strongly disagreed with the suggestion.

[30] Now, it is elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concern that witness and to inform such witness that other witness may contradict him or her so as to give such witness fair warning and an opportunity of explaining the contradiction and defending his or her credibility. It is grossly unfair and improper to let the evidence go unchallenged in cross-examination and afterwards argue that he or she must be disbelieved. Failure to put an accused's version to a prosecution witness will generally be taken to mean that the accused accept the version of the prosecution witnesses.

[31] It is also trite that mere suggestions in the cross-examination are not substantive evidence. Of course, if he or she admits to the suggestion put, the fact is proved. Otherwise, evidence must be led to prove the allegation.

[32] In the instant appeal, not a shred of evidence was produced to substantiate the allegation. The undisputed fact was that the appellant was alone in the vehicle when he was caught with the impugned drugs. There was no possibility of the involvement of any other person/persons.

[33] The next question to be considered is whether there is evidence of trafficking by the appellant. In this instant appeal, the amount of dangerous drugs involved is 28.1 grammes in weight (13.6 grammes of Heroin and 14.5 grammes of Monoacetylmorphines), which is in excess of 15 grammes; thus triggering the presumption of trafficking as provided in section 37(da) (iiia) of the Act. Further, other drug paraphernalia such as empty bottle and empty transparent packets found in the zipper bag (P12) underneath the front seat are circumstantial evidence which showed that the appellant was indeed engaged in drug trafficking activities. Therefore, on the available evidence on record, it is our finding that the learned JC had correctly called upon the appellant to enter upon his defence on the trafficking charge.

Ground (c) Adverse inference

[34] Learned counsel for the appellant mounted an attack on the alleged failure of the prosecution to call Corporal Norizan and

Thulasi, thereby occasioning the application of the presumption of an adverse inference against the prosecution's case.

[35] On the contrary, learned Deputy Public Prosecutor submitted that there was no necessity to call Corporal Norizan because he did not play an active role during the raid. He candidly admitted that a subpoena had been served on Thulasi but she had failed to turn up in Court. He argued that the prosecution has a discretion whether or not to call a particular witness. In this instant appeal, all essential witnesses were called to unfold the narrative on which the prosecution is based. Therefore, the discretion had been exercised in a manner in which the appellant suffered no prejudice or unfairness. He further argued that the presumption does not arise in this instant appeal as there was no withholding of evidence since Corporal Norizan was offered to the defence.

[36] Now, a number of witnesses may have observed a criminal occurrence and have their statements taken by the police. However, it is not necessary for the prosecution to produce each and every one of them. All that is required from the prosecution is to produce witnesses whose evidence can be believe in the unfolding of its complete narrative, that is, to prove the essential elements of the crime and in this case, custody, control, and knowledge, so as to prove the case beyond reasonable doubt. The

usage of the word ‘may’ under section 114 illustration (g) of the Evidence Act 1950 gives the discretion to the court whether or not to invoke the adverse inference to a given set of facts. It is not a mandatory inference. To draw an adverse inference against the prosecution, the Court must be satisfied that the witness that was not offered was a material witness; the prosecution purposely withhold evidence which it possessed and which was always available; and that what the prosecution did was done with an ulterior motive to frustrate the defence’ (see ***Munusamy v. PP*** **[1987] 1 MLJ 492**, ***Chua Keem Long v. PP*** **[1996] 1 SLR 510,** ***Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen*** **[1998] 1 MLJ 465,** ***Nanda Kumar Kunyikanan & Anor v. PP*** **[2011] 8 CLJ 406,** ***Siew Yoke Keong v. PP (supra), Ong Hooi Beng & Ors v. PP*** **[2015] 3 MLJ 812** and ***Ghasem Hozouri Hassan v. PP*** **[2018] MYFC 13**).

[37] Applying the above principles to our instant appeal, it is our considered view that counsel’s argument is without merit. After having examined the evidence on record on its totality, we are of the considered view that the prosecution had discharged its burden by calling all essential witnesses to establish its case. It was our judgment that the learned JC was correct to find that the appellant had *mens rea* possession of the impugned drugs. We found no gap in the narration of the prosecution’s case. Therefore, the failure on

the part of the prosecution to call Corporal Norizan and Thulasi to testify did not in any way attract the invocation of adverse inference against the prosecution. There was nothing in the record to show that the prosecution was actuated by oblique motive and was suppressing evidence favourable to the appellant in order to impair the appellant's defence.

Ground (d) Non-appreciation of the Defence

[38] Learned counsel for the appellant submitted that the learned JC had erred when his Lordship had dismissed the defence as an afterthought. Our attention was drawn to the fact that it was put to PW3 and PW6 during cross examination concerning the existence and role of Raja.

[39] The Federal Court, no doubt, in ***Alcontara a/l Ambross Anthony v. PP*** **[1996] 1 CLJ 705**, has observed at pages 718 – 719 that:

> *... However, failure on the part of the defence to put its case as aforesaid, can never, by itself, relieve the prosecution of its duty of establishing the charge against the accused beyond any reasonable doubt.*
>
> *At this stage, we would interpolate to remark - though we are digressing somewhat from the point concerning the onus of proof - that the Judge went so far as to hold*

'that the defence by its failure so to put such questions to the prosecution witnesses ought not to be allowed to raise such issues at the defence stage'. In this, he was clearly wrong, since it is settled law, that although a Court may view with suspicion a defence which has not been put to the appropriate prosecution witnesses who might have personal knowledge of the points at issue, the Court is still bound to consider the defence, however weak, and to acquit if not satisfied that the prosecution has discharged the burden of proof which rests upon it.".

[40] In the case before us, it must however be noted that there was a difference scenario altogether. The appellant was not stopped from raising the defence on account that such defence was not put to the prosecution's witnesses as was stated in the ***Alcontara's*** decision. We have carefully scrutinized the JC's evaluation of the defence case. In our view, to say that the learned JC failed to appreciate the defence of the appellant is totally misconceived. The learned JC did not reject the appellant's defence on the simple ground of belated disclosure. In fact, at page 24 to page 27 Volume I of the record of appeal, it is evident that the learned JC had carefully analysed and scrutinized the defence's case before categorising the defence as an afterthought. We say that there was nothing to show that the JC's decision was made

without proper evaluation of the appellants' statement on oath. The learned JC's comment on the late disclosure of Raja during trial merely goes to show the weight that the court attached to the appellant's defence (see ***Teng Howe Sing v PP (supra)***, ***PP v. Badrulsham bin Baharom*** **[1988] 2 MLJ 585**). The existence of Raja was critical to the defence's case. In such circumstances, one would have expected the appellant to extricate himself and inform SP3 or SP6 about Raja and his alleged role at the first available opportunity when he was stopped at the roadblock or when his cautioned statement was recorded. It is pertinent to observe here that the appellant and SD2 did not know the full name of Raja nor his full address except that they know that Raja stays at Kota Damansara and works as a despatch. So we are left with nothing more than the bare oral assertion of the appellant in respect of Raja's existence and the role played by him. The evidence in this instant appeal goes to show that the defence has not given an 'Alcontara Notice' in the right perspective (see ***Phiri Mailesi (Zambian) v. PP*** **[2013] 5 MLJ 780**, ***Rengarajan Thangavelu v .PP*** **[2015] 1 CLJ 993**, ***Marimuthu Seringan v. PP*** **[2016] 1 LNS 64**).

[41] Besides the defence's failure to put their case to the material prosecution witnesses at the earliest opportunity, the learned JC also considered the inconsistencies of the defence version. The

appellant had initially testified that he had sent Raja to Karak on 25.1.2014. He then changed the destination to Bentong. He made no mention of the location where Raja alighted the vehicle. The appellant seems clueless about the destination and he was not re-examined on this point to offer further explanation. We are also mindful that in his defence the appellant claimed Corporal Norizan had retrieved the ATM cards from the sling bag that belonged to Raja who had entrusted it to the appellant. We found that the appellant's assertion did not dwell well with the prosecution's evidence. As explained by SP6, appellant was the account holder of both ATM cards and this piece of evidence was not challenged by the defence. If the bag had truly belonged to Raja, it seems illogical for the appellant to put his own ATM cards in Raja's bag? The appellant's assertion that it was Corporal Norizan who had conducted the search and arrest was contradicted by PW3 and PW6, all of whom had denied that Corporal Norizan's involvement in the raid and his alleged role. There is no reason to doubt their version of events. Their evidence were further corroborated by the search list P24 and the police report P25 which confirmed that it was PW3 who conducted the search. Thus, all in all, we found that the inconsistencies of appellant's testimony on such a crucial issue diminished the weight that could be attached to the defence version.

[42] Learned counsel also submitted that, there was no evidence of “overt act” such as an attempt to escape from which *mens rea* could be imputed and on the contrary the appellant had gave full cooperation to the authority. This argument, with respect, overlooks the situation at the material time. The roadblock was set up at a narrow street to enable the police officers to funnel pedestrians and vehicles. There were barriers or blocking obstacles to deny entry or exit. The whole area was guarded by 12 police officers and restricted that would make it hardly impossible to escape and even if the appellant did he would surely be arrested.

[43] Since the appellant in his defence did not say anything on the purpose for which he was carrying such large amount of drugs, his defence being a defence of no knowledge (and not that he was not trafficking), there was no material before the learned JC for his Lordship to consider whether the appellant's explanation had cast a reasonable doubt in the prosecution case. In the circumstances, the learned JC was right in finding that the charges had been proved beyond reasonable doubt. It is our view that in any event, there was no material misdirection by the learned JC on this score given that the overwhelming and unrebutted evidence in this case directly implicated the appellant.

Conclusion

[44] An appeal is a rehearing and we have undertook this onerous task to re-evaluate the evidence. We found no difficulty in holding that based on the strength of the prosecution's evidence considered in the light of the defence testimony and the well-recognised legal principles, that the finding of the learned JC is unassailable. Thus, we upheld the convictions and sentences by the High Court and the appeal is dismissed. So ordered.

Dated: 24th October 2018

sgd.

(MOHD ZAWAWI SALLEH)
Judge
Court of Appeal
Malaysia

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