

DALAM MAHKAMAH RAYUAN DI PUTRAJAYA
DALAM WILAYAH PERSEKUTUAN PUTRAJAYA
RAYUAN JENAYAH NO: D-05(M)-518-12/2021

ANTARA

KHAIROL ANUAR BIN ZAKARIA
(NO KP: 830225-03-5283)

... PERAYU

DAN

PENDAKWA RAYA

... RESPONDEN

(Mahkamah Tinggi Malaya Di Kota Bharu
Dalam Negeri Kelantan Darul Naim
Perbicaraan Jenayah No Kes: DA-45A-08-09/2017)

Pendakwa Raya

Lawan

Khairol Anuar Bin Zakaria
(No KP: 830225-03-5283)

KORAM:

VAZEER ALAM BIN MYDIN MEERA, HMR
HAJI AZMAN BIN ABDULLAH, HMR
WONG KIAN KHEONG, HMR



JUDGMENT

INTRODUCTION

[1] The accused was charged with an offence under section 39B(1)(a) of the Dangerous Drugs Act 1952 (“DDA”) punishable under section 39B(2) of the DDA. The charge read as follows:

Charge:

“Bahawa kamu pada 17/4/2017, jam lebih kurang jam 2.55 petang bertempat di dalam sebuah rumah beralamat di No 83, Kampung Dangar, Rantau Panjang, di dalam Jajahan Pasir Mas, di dalam negeri Kelantan telah mengedar dadah berbahaya iaitu 1227.9 gram Cannabis dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.”

("That you on 17/4/2017, at approximately 2.55 pm in a house with an address at No 83, Kampung Dangar, Rantau Panjang, in Jajahan Pasir Mas, in the state of Kelantan, had trafficked in a dangerous drug to wit 1227.9 grams of Cannabis and thereby you have committed an offence under section 39B(1)(a) of the Dangerous Drugs Act 1952 punishable under section 39B(2) of the same Act.")

[2] At the end of the trial, the High Court found that the prosecution had succeeded in proving its case beyond reasonable doubt, and accordingly the accused was found guilty and convicted of the offence. The High Court imposed the mandatory death sentence as then prescribed by law.



PROSECUTION CASE

[3] The prosecution called 9 witnesses. The evidence adduced at the prosecution stage showed that:

(a) On 17.04.2017 at approximately 2.55 pm, Insp Muhamad Hanif Bin Abd Halim (SP4) together with a team of 12 policemen from the 9th PGA Battalion Intelligence team raided a house at address No. 83, Kg. Dangar Panjang, 17200 Rantau Panjang, Kelantan (“the said house”);

(b) Before the raid, SP4 had ordered the raiding party consisting of Sjn Rahizal bin Abdul Rahim, Cpl Rosdi, Cpl Zaki and Cpl Zainuddin (SP8) to follow SP4 into the house while the other members of the team were instructed to stand guard outside the house;

(c) SP4 confirmed that at that time the door of the house was half open and not locked, he then entered and introduced himself as a Senior Police Officer by showing his authorization card to the accused who was at that time in the living room of the house and asked the accused to show his identity card. After confirming the identity of the accused, SP4 instructed Sjn Rahizal bin Abdul Rahim to conduct an examination of the accused's body, however there was nothing incriminating on the accused's body;



(d) SP4 then read out the words of caution under Section 37B(1)(b) DDA 1952 to the accused and proceeded to question the accused in Bahasa Malaysia. The questions posed by SP4 to the accused and the answers by the accused were recorded by SP4 as stated in the police report made by him (Rantau Panjang Rpt: 1317/17);

(e) The accused then led SP4 and his team members to a location in the first room on the left side of the upper floor of the house and showed a package [Exhibit P7] on the side of the wall in the room;

(f) In the presence of the accused, SP4 inspected the package (Exhibit P7) which had the words 'kito smart different' written on it, and inside it was a rectangular package wrapped in gold colored aluminum foil [Exhibit P8] in which there were green compressed dried leaves suspected to be cannabis, together with (1) transparent plastic [P9] containing (5) small pieces of greenish compressed dried leaves suspected to be cannabis [P9 a-e] and (1) transparent plastic [P10] containing (6) pieces of greenish compressed dried leaves suspected to be cannabis [P10 a-f];

(g) SP4 seized all the case items, and informed the accused of the offence suspected to have been committed by him and arrested the accused;



(h) While leaving the house, a Malay man named Sharul Azwan bin Samsuddin [SP7] came on a motorcycle to meet the accused. SP4 introduced himself as a Police Officer and detained SP7; and

(i) All the case exhibits together with the accused and SP7 were brought to IPD Pasir Mas and handed over to the Investigating Officer Insp Zulfadly Syazwan Bin Zolkhair (SP9).

HIGH COURT'S ANALYSIS AND FINDINGS AT THE END OF THE PROSECUTION CASE

[4] The learned High Court Judge analysed the evidence in respect of the proof of the ingredients of the offence as follows:

(a) The first element: Whether the drugs in question were dangerous drugs as listed under the First Schedule of the DDA?

(i) SP4 had handed over the seized drugs to the Investigating Officer (SP9). SP9 weighed and marked the exhibits and kept them locked in a cabinet in his room. These exhibits were then handed over to the Chemist, Puan Hashimah bt Yahya (SP3), on 19.4.2017 for analysis. SP3 in her testimony confirmed that upon analysis she found that the greenish compressed dried leaves in exhibits P8, P9(A-E) and P10 were cannabis. SP3 further confirmed that cannabis is listed under the First Schedule of the DDA and that the combined weight of the drugs was



1,227.9 grams. An analysis report was prepared by SP3 and tendered as exhibit P13.

(ii) The learned counsel for the accused did not challenge the analysis and findings of SP3, nor her report in P13. Further, there was no challenge on the chain of evidence of the handling of seized drugs from the time of seizure by SP4 and their movement to SP9 and then SP3, and finally they being tendered in court. The High Court was satisfied that the drug exhibits analyzed by SP3 and those tendered in court were the same as those seized by SP4.

(iii) Further, the learned trial judge did not find SP3's evidence to be inherently incredible and accepted SP3's expert testimony. See: *Munusamy Vengadasalam v PP* [1987] CLJ (Rep) 221.

(iv) Accordingly, the High Court Judge concluded that the prosecution had established that the drugs in question were cannabis, a dangerous drug listed under the First Schedule of the DDA.

(b) Second Element: Whether the drugs in question were under the custody, control and possession of the accused?

Custody and control



(i) The learned counsel for the accused had argued that there was no evidence to show that the drugs were in the custody and control of the accused since they were not found on the accused, nor were they hidden. Further, counsel submitted that none of the accused's actions could lead to the inference that the accused had knowledge of the drugs.

(ii) In this case, the High Court found that the drugs were in a room by the wall in an open state. The accused's mother, SP5, confirmed that the house was shared by SP5, SP5's deceased husband, the accused and his son. According to SP5, at the time of the police raid there was only SP5, her late husband, the accused and his son who was lying down in the house.

(iii) According to SP5, she and her late husband had just returned home the day before the raid after her late husband underwent surgery at the hospital. The most important evidence is that according to SP5, only the four of them lived in the house and the room where the drugs were found belonged to the accused. This testimony is also supported by the testimony of the accused's younger brother SP6 who lived nearby and often came to the house.

(iv) The learned trial judge after evaluating the testimonies of SP5 and SP6 found them to be honest and reliable witnesses. The testimonies of SP5 and SP6 prove that only the accused used the room where the



drugs were found and no one else dared to enter the room. Their testimony also confirmed that no one else came to the house and went upstairs.

(v) Counsel for the accused further raised the issue that no personal belongings of the accused were found or seized from the room. The trial judge considered this argument and held that the absence of personal belongings or documents of the accused in the room did not mean that the room was not used by the accused. The testimony of SP5 and SP6, specifically SP5 who lives in the house, is sufficient to prove that the room was only occupied by the accused. This was in addition to the statement made by the accused to SP4 that the room was his room.

(vi) Based on these testimonies, the trial judge found that the prosecution had succeeded in proving that the drugs were in the custody and control of the accused as he had possession of the drugs with the power of disposal over the same to the exclusion of others.

Knowledge

(vii) Knowledge is to be inferred from the surrounding circumstances of the case. The prosecution relied on the testimonies of SP4 and SP8 regarding the accused's action in leading the police party to his room until the discovery of the drug to establish the accused's knowledge. The



learned Deputy urged the trial court to accept this evidence based on sections 8 and 9 of the Evidence Act 1950 as conduct which is relevant to prove the element of knowledge.

(viii) On the other hand, the accused's learned counsel argued that this evidence should not be accepted since it did not meet the requirements under section 27 of the Evidence Act 1950. Learned counsel contended that the words of the caution read to the accused did not meet the requirements of the law as there was no evidence to prove that SP4 had explained to the accused the meaning of the warning.

(ix) In this regard, the High Court was of the view that the evidence showed that the discovery of the drugs in the room was the result of the information given by the accused to SP4, and his action in leading the police party to the place where the drugs were kept are crucial. In order for this evidence to be relevant and admissible, it had to comply with the strict requirements under section 27 of the Evidence Act 1950. The learned trial judge found that from SP4's testimony and the contents of the police report made by SP4 (Exhibit P21), the caution was properly read and explained to the accused before the accused was questioned by SP4, and that this was corroborated by the words written on a piece of paper and signed by the accused (Exhibit P16).



(x) After weighing P16 and P21 and comparing the testimony of SP4 and SP8 as well as the corroborative support from the testimony of SP5, the learned High Court Judge found that the accused understood the caution that was administered by SP4 and that the accused also understood the questions posed by SP4. Hence, the learned trial judge found the evidence of the information given by the accused to SP4 and the act of leading SP4 to the discovery of the drugs were relevant under sections 8 and 27 of the Evidence Act.

(xi) Further, the learned High Court Judge held that in any event the application of section 27 is not subject to any prior administration of the caution or consent of the accused before it can be accepted as evidence.

(xii) The inference of knowledge of the drugs was also derived in part from the testimony of SP5, the mother of the accused, who stated that she heard the accused tell the police to not open the closet as the “barang” was in the room, meaning that the drugs were in the room and not in the closet. SP5’s testimony in Malay was as follows: “Saya dengar OKT cakap pada polis jangan buka almari rumah saya. Saya dengar dia cakap barang tu ada di dalam biliknya di dalam rumah.”

(xiii) Based on this, the learned trial judge concluded that the accused had knowledge of the drug. Therefore, the evidence in totality clearly



showed that the accused had the requisite mens rea in respect of possession of the drug.

(c) Third Element: Trafficking

(i) The prosecution relied on the statutory presumption under section 37(da)(vi) of the DDA to establish the third element of trafficking. The weight of the drugs seized was 1227.8 grams of cannabis, which was well above the statutory weight to trigger the presumption of trafficking. Hence, having found that the accused was in possession of the 1227.8 grams of cannabis, the High Court was entitled to rely on the presumption of trafficking under section 37(da) of the DDA. Following a maximum evaluation of the evidence, the High Court found that a prima facie case of trafficking in a dangerous drug as per the charge was successfully established by the prosecution as required under section 180(4) of the Criminal Procedure Code.

[5] Accordingly the accused was ordered to enter his defence to the charge. The accused elected to give sworn testimony and called several witnesses in his behalf. After considering the entire evidence of the prosecution and the accused's defence, as well as the credibility of the witnesses, the learned trial judge found that the accused had failed to rebut the presumption of trafficking under section 37(da)(vi) of the DDA on the balance of probabilities. The High Court was satisfied that the



accused's defence as a whole had failed to raise any reasonable doubt on the prosecution's case. Therefore, the High Court found that the prosecution had succeeded in proving its case beyond reasonable doubt against the accused.

Conviction and sentence

[6] The accused was found guilty and convicted of an offence under section 39B(1)(a) DDA punishable under section 39B(2) of the same Act. The High Court imposed the mandatory to death sentence and ordered that the accused be hanged by the neck until death at a date, time and place to be determined.

The appeal

[7] The accused lodged an appeal to this Court against both conviction and sentence.

[8] At the hearing of the appeal, learned counsel for the accused/appellant informed the Court that the appellant had instructed learned counsel to withdraw the appeal against the conviction and only proceed with appeal against sentence. The learned Deputy informed the Court that if the accused withdraws his appeal against conviction, then the prosecution was agreeable to the sentence of death being set aside and substituted with life imprisonment (i.e. 30 years) and 12 strokes of



the cane following the amendment to the DDA which removed the mandatory death penalty and allowed for judicial discretion in sentencing. Learned counsel for the appellant was agreeable to the position taken by the learned Deputy.

[9] Hence, we unanimously struck out the appeal against conviction and affirmed the conviction under section 39B(1)(a) DDA as ordered by the High Court. And having considered the facts and circumstances of the case, in particular the weight of the cannabis, and also the plea in mitigation advanced by counsel for the appellant, we set aside the death penalty imposed by the High Court and substituted it with life imprisonment, i.e. imprisonment for a term of 30 years from the date of arrest and further ordered that the appellant be given 12 strokes of the cane. When pronouncing the sentence, we may have inadvertently not mentioned that the sentence of imprisonment was to commence from the date of arrest, and we invite the Federal Court to correct that omission.

Dated this 18th day of June 2024.

- sgd -

(VAZEER ALAM BIN MYDIN MEERA)

Judge

Federal Court of Malaysia



Counsel

For the Appellant:

Ahmad Ridzuan bin Awang
[Ridzuan Awang & Co.]

For the Respondent:

Mohd Fairuz Bin Johari
Deputy Public Prosecutor
(Attorney General's Chambers)



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