IN THE COURT OF APPEAL MALAYSIA

(APPELLATE CRIMINAL JURISDICTION)

CRIMINAL APPEAL NO. B-05(M)-78-02/2017 (NGA)

BETWEEN

OGBUGO CHIOMA MARTHA ... APPELLANT

AND

PUBLIC PROSECUTOR ... RESPONDENT

[IN THE MATTER OF SHAH ALAM HIGH COURT CRIMINAL TRIAL NO: 45A-25-02/2013

BETWEEN

PUBLIC PROSECUTOR V. OGBUGO CHIOMA MARTHA]

CORAM

AHMADI HAJI ASNAWI, JCA

ABDUL RAHMAN SEBLI, JCA

KAMARDIN HASHIM, JCA

JUDGMENT OF THE COURT

[1] In the High Court at Shah Alam the appellant, a Nigerian national, was charged with drug trafficking and the charge against her was as follows:

> "Bahawa kamu pada 28 Ogos 2012, lebih kurang jam 7.45p.m. di Cawangan Pemeriksaan Penumpang 1 (CPP 1), Balai Ketibaan Antarabangsa, Lapangan Terbang Antarabangsa Kuala Lumpur (KLIA), di dalam Daerah Sepang, dalam Negeri Selangor Darul Ehsan, telah mengedar dadah berbahaya iaitu Methamphetamine seberat 1,406.7 gram dan dengan itu kamu telah melakukan suatu kesalahan dibawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum dibawah Seksyen 39B(2) Akta yang sama."

[2] The proved facts show that at the time and place specified in the charge, the appellant was found to have had in her custody and under her control the impugned drug without lawful authority. It was found hidden in a specially constructed compartment in the bag that she was carrying.

[3] The evidence of the chemist was that the drug was Methamphetamine, a scheduled drug under the First Schedule to the Dangerous Drugs Act, 1952 ("the DDA"). This was undisputed.

[4] At the close of the prosecution case, the appellant was acquitted and discharged by the learned trial judge without calling for her defence as he found that the prosecution failed to establish a *prima facie* case against the appellant. However, on a successful appeal by the prosecution to a different panel of this court, the appellant was ordered to enter her defence to the charge.

[5] When called upon to state her defence, the appellant chose to give evidence on oath. We reproduce below the narrative of her case as set out by the learned trial judge in his grounds of judgment:

> "Tertuduh adalah seorang warganegara Nigeria berusia 25 tahun. Beliau memiliki sebuah restoran di Okota, Lagos. Beliau meninggalkan Nigeria untuk pergi ke Ghana untuk berjumpa dengan seseorang yang bernama Chima kerana Chima boleh menolong menguruskan pembelian barangan salon di Malaysia. Beliau mengenali Chima selama 3 tahun. Chima inilah yang mencadangkan kepada Tertuduh untuk datang ke Malaysia bagi membeli barang-barang salon kerana barangan di Malaysia lebih murah dan berkualiti. Setelah dirujuk P9 kepada Tertuduh, beliau tidak pasti apakah itu beg beliau atau tidak. Setelah disoal lanjut oleh peguambela beliau, Tertuduh tidak mengaku itu adalah beg beliau. Semasa tiba di Ghana, beg beliau telah diperiksa. Perbelanjaan Tertuduh untuk datang ke Malaysia ditanggung oleh bapanya dan juga pihak gereja. Chima pula

menguruskan soal visa dan tiket untuk ke Malaysia. Semasa di Ghana, Tertuduh tinggal bersama dengan Chima.

Beliau tinggal di Ghana selama 3 hari sebelum bertolak ke Malaysia. Tertuduh membawa wang USD4000.00 sewaktu datang ke Malaysia. Sewaktu singgah di Ghana selama 3 hari di rumah Chima, Tertuduh tidak mengunci beg beliau. Apabila sampai di KLIA, beg Tertuduh telah diimbas. Menurut Tertuduh, terdapat seorang lelaki yang membuka beg beliau dan membawa keluar barang-barangnya. Selepas itu, begnya diimbas sekali lagi. Selepas itu, Tertuduh dibawa ke sebuah bilik dan dia ditunjukkan dengan sesuatu yang diambil dari beg beliau yang beliau sendiri tidak tahu. Beliau memberitahu mereka berkenaan dengan penama Chima di Ghana yang menguruskan kedatangan beliau ke Malaysia. Pegawai-pegawai tersebut membenarkan beliau untuk menghubungi Chima. Walaubagaimanapun, Chima tidak menjawab panggilannya."

[6] It is not clear what exactly her defence was but what is clear is that she wavered in her evidence on the question as to who actually owned the bag that the Customs seized from her and which contained the drug. In examination in chief, she at first said that she was unsure if the bag belonged to her but on being questioned further by her counsel, she said the bag was similar to her bag but not her bag. So it was not her bag.

[7] Then in cross examination she admitted that the bag belonged to her but claimed that she did not know there was drug inside the bag. We must say at the outset that the infirmity in her evidence on such an important issue as ownership of the bag (inside which the subject matter of the charge was found) had shown her to be an unreliable witness on the issue of knowledge.

[8] The appellant went on to explain that the bag that she brought to Malaysia was packed by her cousin in Nigeria and that her trip to Malaysia via Ghana and Egypt was the first time that she travelled outside Nigeria.

[9] She testified that while in Ghana, she stayed with "Chima" for three days and that during that period, her bag was not locked and she would not know what happened to the bag while she was away shopping with Chima's wife. She concluded her answer in examination in chief by saying that when she left Ghana for Malaysia, she did not know that there was drug inside the bag.

[10] Having given careful consideration to the appellant's defence, the learned trial judge found that she failed to cast any reasonable doubt in the prosecution case and that the prosecution had proved its case beyond reasonable doubt.

[11] It was the learned judge's finding that the appellant's defence was a bare denial *("penafian kosong belaka")* and ought to be rejected. He accordingly found the appellant guilty of the offence charged and sentenced her to death. This was the appellant's appeal against the decision, which we dismissed by a unanimous decision after hearing the parties.

[12] The only issue before us was whether the learned trial judge was right in finding that the case for the prosecution had been proved beyond any reasonable doubt. The appellant's complaint was that there was no proper consideration of the defence case by the learned trial judge and therefore the conviction should be set aside.

[13] It was submitted that the learned judge failed to evaluate the case in its totality when he failed to take into consideration:

(a) the prosecution evidence and test it against the appellant's defence; and

(b) his own findings of fact made at the close of the prosecution case, namely:

    (i) there was a doubt as to whether the said drug that was sent to the chemist was the same drug that was recovered from the appellant's bag;
    (ii) inaccurate amount of drug was analysed by the chemist in breach of section 37(j) of the DDA;
    (iii) the monetary exhibit P10(A-G) had been tampered with by removing part of the money;
    (iv) the investigation officer failed to conduct a full and thorough investigation.

[14] The procedure at the conclusion of a criminal trial in the High Court is prescribed by section 182A of the Criminal Procedure Code ("the CPC"), which reads:

> "182A. (1) At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.
>
> (2) If the Court finds that the prosecution has proved its case beyond reasonable doubt, the Court shall find the accused guilty and he may be convicted on it.
>
> (3) If the Court finds that the prosecution has not proved its case beyond reasonable doubt, the Court shall record an order of acquittal."

[15] Sub-section (1) requires the court to consider "all the evidence adduced before it", which the learned trial judge had done as can be seen

from the last paragraph of page 32 to the last paragraph of page 35 of the grounds of judgment. It was therefore incorrect for learned counsel to say that the learned trial judge did not evaluate the case in its totality.

[16] It is not the procedure under section 182A(1) of the CPC that the trial court must re-evaluate the prosecution case. The need to re-evaluate the prosecution evidence does not arise because at the end of the prosecution case the prosecution evidence had been subjected to a maximum evaluation and the witnesses had been found to be credible witnesses: *PP v Ong Cheng Heong* [1998] 4 CLJ 209; *PP v Dato' Seri Anwar Ibrahim* (No.3) [1999] 2 CLJ 215; *Balachandran v PP* [2005] 1 CLJ 85; *PP v Mohd Radzi Abu Bakar* [2006] 1 CLJ 457.

[17] When a *prima facie* case has been found to have been established by the trial court or by the appellate court on appeal, it is not permissible for the trial court to "reverse" that finding. Neither is it permissible for the trial court to re-open the issue of whether a *prima facie* case had been established by the prosecution.

[18] What the section requires is for the trial court to consider the entire evidence and determine whether the evidence presented by the defence has cast a real and reasonable doubt in the prosecution case or, where a statutory presumption applies, whether the presumption has been rebutted by the accused on the balance of probabilities.

[19] In the present appeal, the defence case was that although ownership of the bag containing the drug was admitted by the appellant, she denied knowledge of the drug. So the question for the learned trial

judge to determine was not whether the bag belonged to her but whether she knew about the drug.

[20] The case for the prosecution on the other hand was that by virtue of section 37(d) of the DDA, the appellant was presumed to be in *mens rea* possession of the drug hidden in the bag, i.e. she was presumed to have had knowledge of the drug.

[21] Given the line of defence adopted by the appellant, and the prosecution's reliance on the presumption under section 37(d) of the DDA, the question to ask in determining whether the case for the prosecution has been proved beyond reasonable doubt at the conclusion of the trial was whether there was any essential part of the prosecution evidence that had been rendered doubtful arising from the appellant's defence that she had no knowledge of the drug.

[22] In our view there was none, and this is because the appellant failed, on the balance of probabilities, to rebut the presumption of "possession" and knowledge of the nature of the drug under section 37(d) of the DDA. We shall say more on the applicability of the presumption in a moment.

[23] A situation where a reasonable doubt could possibly be raised in the prosecution case by the defence evidence would be where, for example, an expert witness called by the defence contradicts the evidence given by the chemist called by the prosecution and the court finds the defence evidence to be credible, which makes the court less than sure of the accuracy of the evidence of the chemist called by the prosecution.

[24] In the present case, the only evidence adduced by the appellant in an attempt to cast a reasonable doubt in the prosecution case was that she had no knowledge of the drug but the evidence was rejected by the learned trial judge.

[25] We did not therefore find any merit in counsel's argument that there was no proper consideration of the defence case by the learned trial judge by his failure to evaluate the case in its totality.

[26] If at all the learned trial judge had erred, it was his failure to direct his mind to the question whether the appellant had rebutted the presumption of "possession" and knowledge of the nature of the drug under section 37(d) of the DDA, which reads:

> "37. In all proceedings under this Act or any regulation made thereunder –
>
> (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 been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug."

[27] Nowhere in his grounds of judgment did the learned judge refer to this provision. There are two things 'deemed' by section 37(d), namely (1) that the accused was in possession of the drug and (2) that the accused knew the nature of the drug. The apex court had decided that once custody or control is established, the presumptions must be invoked: see *Muhammed Hassan v Public Prosecutor* [1998] 2 CLJ 170 FC; [1998] 2 MLJ 273 where Chong Siew Fai CJ (Sabah & Sarawak) delivering the judgment of the Federal Court said:

> "The 'deemed' state of affairs in s. 37(d) (ie, deemed possession and deemed knowledge) is by operation of law and there is no necessity to prove how that particular state of affairs is arrived at. There need only to be established the basic or primary facts necessary to give rise to that state of affairs ie, the finding of custody or control. Such presumptions as under s. 37(d) (and for that matter, the one under s. 37(da)) are sometimes described as "compelling presumptions" in that upon proof of certain facts by a party (in our present case, proof of custody or control in s. 37(d) by the prosecution), the court **must** in law draw a presumption in its favour (ie, presumptions of possession and knowledge) unless the other party proves the contrary. Such a presumption has the compelling force of law. It is a deduction which the law requires the trial court to make."
>
> (emphasis not ours)

[28] Our view however is that the omission by the learned judge to invoke the presumptions under section 37(d) is not fatal as he had rejected the appellant's explanation that she had no knowledge of the drug. The rejection necessarily means that the presumptions of possession and knowledge of the nature of the drug remain unrebutted, or to put it in another way, the appellant failed to prove to the contrary.

[29] This was a misdirection by way of non direction by the learned judge but in our view the error, although serious, is of no consequence as it was favourable to the appellant. To the appellant's advantage, the learned judge applied the lighter evidential burden of merely to cast a reasonable doubt in his mind in considering whether or not the appellant had knowledge of the drug when he should have applied the heavier legal burden of proof on the balance of probabilities, given that she had a legal and not merely evidential burden to discharge: see *Public Prosecutor v Yuvaraj* [1968] 1 LNS 116; [1969] 2 MLJ 89.

[30] Having regard to the line of defence adopted by the appellant, which was a general denial of knowledge of the drug, the learned judge could

not have found that she had succeeded in rebutting the two presumptions under section 37(d) of the DDA even if he had directed his mind to the provision. Apart from the appellant's own evidence, there was no evidence at all to support her claim that she had no knowledge of the drug.

[31] We were mindful of the fact that the appellant was charged with trafficking under section 39B(1)(a) of the DDA and not with possession under section 12(2) and therefore what the prosecution needed to prove beyond reasonable doubt at the conclusion of the trial was that the appellant was trafficking and not merely in possession of the drug.

[32] We were also mindful of the fact that just because "possession" and knowledge of the nature of the drug had been proved (or by the appellant's failure to rebut the presumptions), it does not mean, *ipso facto*, that the appellant was trafficking in the drug. Unless the presumption under section 37(da) applied, trafficking must be proved by evidence, direct or circumstantial. Possession alone is not sufficient, although "carrying" is also an act of "trafficking": see section 2 of the DDA.

[33] However, since a *prima facie* case of trafficking (and not mere possession) had been established by the prosecution against the appellant at the close of its case, the evidential burden, i.e. the burden of introducing evidence, shifted to the appellant to explain the purpose of carrying such large amount of drug without authorisation. This shifting of the evidential burden is implicit in section 180(4) of the CPC which provides as follows:

"(4) For the purpose of this section, a *prima facie* case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which **if unrebutted or unexplained** would warrant a conviction."
(emphasis added)

[34] This simply means that the appellant must rebut or explain the case that had already been made out against her. Whether or not the appellant's act of carrying the drug into Malaysia was an act of trafficking is a question of fact for the trial court to determine.

[35] For this purpose, it would be sufficient for the appellant to earn an acquittal if she succeeded in raising a reasonable doubt in the court's mind as to whether or not the drug was for the purpose of trafficking. Proof on the balance of probabilities is not required as the presumption of trafficking under section 37(da) of the DDA had no application.

[36] The question is whether the appellant had adduced any evidence to discharge her evidential burden of showing that the drug was not for the purpose of trafficking. There was none, and in the absence of evidence that the drug was for her own consumption, which is a defence to a trafficking charge as shown in *Lorraine Phylis Cohen & Anor v Public Prosecutor* [1989] 1 CLJ Rep 4; [1989] 2 CLJ 131; [1989] 2 MLJ 288, or for any purpose other than trafficking, the only reasonable inference to be drawn is that the appellant was carrying the drug for the purpose of trafficking.

[37] The large amount of the drug (1,406.7 grammes) and the manner it was cleverly hidden inside the bag that the appellant was carrying dispels any doubt that she was carrying it for the purpose of trafficking: see *Ong Ah Chuan v PP* [1980] 1 LNS; [1981] 1 MLJ 64. Possession of a mere 50

grammes of this type of drug is sufficient to attract the presumption of trafficking: see section 37(da)(xvi) of the DDA. The amount that the appellant had in her possession was 28 times in excess of the prescribed minimum.

[38] The defence that the drug was not for the purpose of trafficking was available to the appellant but if she had chosen to rely on this defence, she had to first admit that she had knowledge of the drug, and then show by evidence that the drug was not for the purpose of trafficking.

[39] If the appellant had adopted this line of defence and succeeded in raising a reasonable doubt in the court's mind as to whether or not the drug was for the purpose of trafficking, she would be acquitted of the trafficking charge and would only be liable to be convicted of the lesser offence of possession under section 12(2) of the DDA. She would not be entitled to a total acquittal though as possession would have been admitted.

[40] The effect of the appellant putting up the defence of no knowledge rather than the defence of no trafficking is that the *prima facie* case of trafficking already established against her by the prosecution at the close of its case remained unrebutted or unexplained. A conviction for trafficking was therefore warranted in terms of section 180(4) of the CPC, which the learned trial judge rightly entered against her.

[41] It was for all the reasons aforesaid that we dismissed the appellant's appeal and affirmed her conviction and sentence. We were satisfied that the conviction was safe.

Signed

ABDUL RAHMAN SEBLI

Judge

Court of Appeal Malaysia

Dated: 25 April 2019.

For the Appellant:	Surjan Singh Sidhu and Lee Boon Keat of Messrs Surjan Singh Sidhu & Co.
For the Respondent:	Mangaiarkarasi a/p Krishnan, Deputy Public Prosecutor of the Attorney General's Chambers.