IN THE COURT OF APPEAL MALAYSIA
[CRIMINAL APPEAL NO: B-05(M)-397-08/2018]

BETWEEN

ALAN SOH HENG LIANG - ... APPELLANT

AND

PUBLIC PROSECUTOR - ... RESPONDENT

[In the Matter of High Court of Malaya at Shah Alam
Criminal Trial No.45A-26-03/2016

Between

Public Prosecutor

And

Alan Soh Heng Liang]

CORUM:
NOR BEE ARIFFIN, JCA
HADHARIAH SYED ISMAIL, JCA
MOHD SOFIAN TAN SRI ABO RAZAK, JCA

JUDGMENT OF THE COURT

[1] The appellant, Alan Soh Heng Liang was charged at the Shah Alam High Court for an offence of trafficking in dangerous drugs. The charge against him reads as follows:

> *"Bahawa kamu pada 14 Mei 2015 jam lebih kurang 2.45 petang bertempat di Kawasan Balai Pelepasan Domestik, Aras 3, KLlA 2, di dalam Daerah Sepang dalam Negeri Selangor Darul Ehsan telah di dapati mengedar dadah berbahaya iaitu 2,313.9 gram Methamphetamine dan dengan itu, kamu telah melakukan suatu kesalahan di bawah seksyen 398 (1) (a) Akta Dadah 8erbahaya 1952 yang boleh dihukum di bawah seksyen 398 (2) Akta yang* sama."

[2] At the end of the trial, the learned trial judge convicted and sentenced the appellant to death for the offence as per the charge. This is the appellant's appeal against his conviction and sentence.

The Prosecution's Case

[3] On 14.2.2015 at about 1445 hrs, SP5 together with a team of officers from Sahagian Siasatan Jenayah Narkotik KLIA Sepang conducted a surveillance work at KLIA2 airport. Whilst doing the surveillance duty at the Domestic Departure area, Level 3, KLIA 2, SP5 saw one male Chinese pulling a black trolley bag brand name - *Beverlyhills Polo Club* towards a scanning machine in a suspicious manner.

[4] SP5 and his team approached the male Chinese who was later identified as the appellant. SP5 instructed the appellant to scan his bag. After the scanning was done, an officer from Malaysia Airport Berhad informed the surveillance team that the scanning showed a suspicious image.

[5] SP5 instructed the appellant to bring his bag to the Pejabat Bahagian Siasatan Jenayah Narkotik, Level 2, KLIA 2, Sepang (Pejabat Narkotik) for further examination.

[6] At the Pejabat Narkotik, physical examination was carried out on the appellant by SP5 and no incriminating item was found on him. Upon examination of the bag, SP5 found a green towel and inside the towel was 6 silver packages. Each silver package contained a trans-culent plastic packet containing white powders suspected to be dangerous drugs.

[7] The contents of the 6 silver packages were analysed and confirmed by the chemist (SP3) as 2313.9 gram methamphetamine, a dangerous drugs listed in the First Schedule of the Dangerous Drugs Act 1952.

[8] At the end of the prosecution's case, the learned trial judge found the prosecution has proved possession against the appellant by invoking section 37 (d) of the Dangerous Drugs Act 1952. For trafficking, the learned trial judge applied section 2 of the Act. Hence, the appellant was called to enter his defence.

The Defence Case

[9] The appellant gave a sworn statement as follows:

(a) He was from Sabah and worked as a cook at a Chinese restaurant.

(b) He was detained by SP5 whilst queing at a check in counter to board a flight to Tawau, Sabah. His bag was scanned and thereafter he was brought to the police office at KLIA 2. About 15 minutes later, the police brought in

his friend, named Law Tian Hock (LTH) who also is going to Sabah together with his trolley bag.

(c) After the police had examined their bags, the police informed them that they found drugs in the appellant's black bag as well as LTH's bag. But the police did not show the drugs to him. He told the police he had no knowledge about the drugs and it was not him who put the drugs inside the bag.

(d) His bag was not locked and whilst he was packing his bag, LTH and another friend of him, named "Panjang" were also there. The three of them slept at the appellant's rented house at Taman Connaught, Cheras.

(e) After he had packed his bag, the three of them drank alcohol and he was drunk. The next morning, Panjang sent him and LTH to the airport and he had no opportunity to check his bag.

(f) He knew Panjang at Genting. His full name is Kong Way Meng. He knew Panjang since 2013. Panjang lives at Taman Len Seng, Cheras, Kuala Lumpur. He has been to Panjang's house 2 to 3 times but he could not remember the exact location of Panjang's house. He said he had kept Panjang's handphone's number.

(g) LTH worked at a Casino in Genting Highland and they eat out at restaurant together. Now, he did not know the whereabout of LTH and he could not locate him.

(h) He wanted to go back to Sabah to celebrate Chinese New Year.

(i) He did not know who put the drugs in his bag. He claims he was used as a mule to carry the drugs.

[10] At the end of the defence case, the learned trial judge ruled that the defence raised by the appellant was an after thought and failed to cast any reasonable doubt to the prosecution's case. He was thus convicted and sentenced to death.

The appeal

Before us, the appellant has raised 4 issues as follows:-

(i) that the charge is defective;

(ii) that the appellant has no knowledge about the drugs inside the bag;

(iii) that there is break in the chain of evidence;

(iv) that the High Court Judge had failed to consider the appellant's defence.

Defective Charge

[11] The defective charge complained of by the appellant relates to the date of the commission of the offence. The charge against the appellant (P1), the consent to prosecute (P2) and the opening speech (P3) all stated that the offence of drug trafficking was said to have been committed by the appellant on 14.5.2015. But, the police report made by SP5 (P25) stated that the appellant was arrested on 14.2.2015. The respondent chose not to amend the charge or consent to prosecute to be in line with the police report, P25. The appellant submitted that the charge was defective and fatal to the prosecution's

case since it formed an element of the charge to be proven by the respondent against the appellant.

On the issue of defective charge, the learned trial judge said (at page 18 Appeal Record Jilid 1)):

> *"29. Mengenai isu pertuduhan yang dihujahkan oleh pembelaan sebagai cacat, iaitu tarikh kejadian yang dikatakan tidak selari dengan pertuduhan, saya berpendapat, pihak pendakwaan seharusnya lebih berhati-hati di dalam hal ini, supaya tidak berlaku ketidak adilan atau pun prejudis kepada pihak pembelaan, khususnya apabila pembelaan berhasrat untuk memasukkan "notice of alibi" bagi menafikan pertuduhan. Bagaimanapun di dalam kes ini notis alibi telah tidak dimasukkan.*
>
> *30....*
>
> *31. Oleh itu Mahkamah ini mengguna pakai seksyen 422 Kanun Acara Jenayah bagi meminda tarikh dalam pertuduhan, bagaimana pun fakta- fakta lain di dalam pertuduhan adalah tidak berlaku apa-apa kesilapan."*

[12] When there is error in a charge, it can be cured by sections 156 and/or 422 of the Criminal Procedure Code (CPC) which read:

> ***Section 156 CPC***
>
> *No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded, at any stage of the case, as material unless the accused was in fact misled by that error or omission.*

Section 422 CPC

Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of-

(a) any error, omission or irregularity in the complaint, sanction, consent, summons, warrant, charge, judgment or other proceedings before or during trial or in any inquiry or other proceeding under this Code;

(b) the want of any sanction; or

(c) the improper admission or rejection of any evidence, unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice.

[13] In *Ravindran Ramasamy v. PP* [2015] 3 CLJ 421, the Federal Court said :

Pursuant to section 156 of the CPC, "no·error in stating the offence or the particulars required to be stated in the charge and no omission to state the offence or those particulars shall be regarded, at any stage of the case, as material unless the accused was in fact misled by that error or omission" (the Indian equivalent, section 215 of the Indian Criminal Procedure Code, ends with the words "and it has occasioned a failure of justice"). However, in view of section 422, for an error or omission to be material, it is not enough that the accused has been misled; there must also be a failure of justice. Whether any court should apply s. 422 aforesaid will depend, among other things, on whether the irregularity involves the breach of a principle of general importance to the administration of

criminal justice. If it does, the court would not apply s. 422, as this appears to us to be the same thing as the irregularity having occasioned a failure of justice" (Yap Sing Hock & anor v. PP [1992] 2 MLJ 714 at 725 per Peh Swee Chin SCJ, later FCJ, delivering the judgment of the court).

[14] Based on *Ravindran Ramasamy v. PP* cited above, we find there is no merit in the appellant's submission. We took the view that the error of the date in the charge had not occasioned a failure of justice. It is only an error of the particulars of the offence and is curable by section 422 CPC. Therefore, the trial judge was right when he applied section 422 CPC and amend the date of the offence from 14.5.2015 to 14.2.2015.

Knowledge About The Drugs

[15] To prove possession, the prosecution must proved the appellant had the pre-requisite knowledge about the drugs found inside his bag. It is trite law that knowledge being a state of mind could only be proven by surrounding facts, a person's acts or omissions and inferences (*PP v. Badrulsham bin Baharom* [1988] 2 MLJ 585). In this case, the prosecution relied on SP5's evidence that the appellant has acted suspiciously while queing to scan his bag. At page 92 Appeal Record Jilid 2(2), SP5 has explained why he said the appellant had acted in a suspicious manner as follows:

"S : Jadi boleh kamu jelaskan apakah yang mencurigakan pada OKT ini semasa kamu buat imbasan walaupun dia dalam keadaan beratur?

J: Ya, semasa beratur dia ada perbuatan yang mencurigakan, maksudnya apabila dia beratur macam ada rasa serba salah hendak ke depan ke belakang, melihat ke kiri ke

kanan seolah-olah macam tidak selesa."

[16] The learned trial judge has accepted SP5's explanation and made an inference that the appellant had the pre-requisite knowledge about the drugs inside the bag. The appellant's complaint is the trial judge had erred in making such an inference because there are other evidence which support the appellant's case that he had no knowledge about the drugs. They are as follows:-

(a) The bag containing the said drugs was not locked.

(b) No personal items belonging to the appellant were found 1n the bag.

(c) No DNA or finger prints of the appellant was found on the plastic bag containing the drugs.

(d) The appellant did not attempt to run away and did not struggle with the police. Instead, it is not disputed that the appellant co- operate with the police.

(e) The drugs were concealed in a folded green towel at the bottom of the bag.

(f) The appellant has told the police that he did not know who put the drugs inside the bag.

[17] In addition to the above, when cross-examined by counsel for the appellant, SP6 (Investigation Officer) gives evidence as follows:

S: Memandangkan beg tersebut tidak berkunci saya cadangkan kepada kamu sesiapa sahaja boleh buka beg hitam tersebut dan sorok atau letak barang dalam beg hitam?

J: Berkemungkinan.

S: Memandangkan kamu jawab berkemungkinan, saya juga cadangkan bahawa ada kemungkinan di dalam kes ini tertuduh telah dipergunakan atau pun telah dianiaya oleh individu lain, kamu setuju atau tidak?

J: Mungkin.

[18] We find there is merit in the appellant's complaint. The above facts show that the appellant's conduct as someone who had no knowledge about the drugs is consistent throughout the entire incident. If the appellant knew about the drugs, the least we could expect is the appellant would attempt to run away. And he would not have voluntarily put his bag on the scanning machine. It is obvious to us that the learned trial judge did not consider the evidence in its entirety, including eviderice favourable to the appellant. SP6's evidence has create a doubt to the crucial issue of whether it was the appellant who put the drugs inside the bag. Apart from the appellant's act of pulling the bag, there is no other evidence to link the appellant with the drugs. We are of the view that it is not safe for the trial judge to rely solely on SP5's evidence when there are other evidence to suggest that Law Tian Hock and Panjang could have access to the bag. And there is a possibility that Law Tian Hock or Panjang could have put the drugs inside the bag. It is trite law that if more than one inference can be made from a set of facts, the court must make inference favourable to the accused. For the aforesaid reasons, we agree with the appellant that the learned trial judge had erred in his finding that the appellant had knowledge about the drugs.

Break In The Chain Of Evidence

[19] The appellant submit there was a break in the chain of evidence due to the following reasons:

(i) SP5 said he made a marking W3 (A)-(F) on the drugs said to be found in the bag carried by the appellant. However, during cross-examination, SP5 conceded that no such markings were made when the drugs (in silver plastic covers) were shown to him.

(ii) In the Handing Over Of Exhibits Form, SP5 said he wrote the. markings on the drugs as W1, W2 and W3. But, in his police report, SP5 states he puts the marking W3 (A)-(F). There is a contradiction in the markings.

(iii) When both Handing Over Of Exhibits and Acceptance Of Exhibits Forms were looked at, the markings of W3 (A)-(F) by SP5 is nowhere present. This fact is admitted by SP5 as can be seen at page 72 Jilid 2 (2) Appeal Record as follows:

S: Dan juga saya cadangkan kepada kamu, dalam Borang Serah Terima Barang Kes tersebut tiada sebarang maklumat yang merujuk kepada tandaan W3 (A)-(F) seperti mana yang kamu sebut dalam pernyataan saksi kamu?

J: Ya, saya tidak nyatakan.

iv) While the drugs were confiscated around 2.45 pm on the day of the incident, it was only handed to SP6 (the Investigation Officer) at 11.00 pm on the same day. SP5 maintained that he was constantly in control of the drugs for 8 hours and 15 minutes and it was not out of his sight even though there was no safe keeping store at the police office at KLIA 2; the drugs were placed in an open area; and more likely than not, SP5 would have gone to the toilet and also took time to perform his prayers. SP5

agreed that when he went to the toilet or prayers, the exhibits were left in an open area unattended. His testimony can be seen at page 76-79 of Jilid 2 (2) Appeal Record as follows:

S: Sewaktu kamu pergi solat dan juga pergi bilik air, barang kes ditinggalkan di satu tempat yang terbuka seperti mana yang telah kamu beritahu mahkamah sebentar tadi, kamu setuju atau tidak?

J: Setuju.

[20] The question that begs an answer is who was guarding and taking care of the drugs whenever SP5 leaves the Pejabat Narkotik to perform his prayers and answer the call of nature. It is inherently incredible that SP5 was there all alone for such a long time with the drugs and able to care of it although he was away for some time. Although SP5 later explained that he got assistance from his fellow police officer, these police officers were never called to give evidence in court. SP5's evidence leaves a gap in the prosecution's case. There is a possibility that the drugs produced in court were not the drugs seized from the appellant. There could be a mixed up with the drugs confiscated from Law Tian Hock who was arrested on the same day at the same place. Since the appellant has raised doubts as to the identity and movement of the drugs, the burden is on the respondent to dispel any such doubts. But this was not done. Accordingly, we agree with the appellant that there is doubt whether the drugs produced in court were the drugs seized from the appellant.

Failure To Consider The Appellant's Defence

[21] After hearing the appellant's defence, the learned trial judge said at para 52, 53 and 57 (page 52 Appeal Record Jilid 1) as follows:

> *"52. Di dalam usaha untuk mematahkan anggapan pengetahuannya OKT telah membawa keterangan bahawa beliau dan kawan-kawannya, iaitu LTH dan "Panjang" telah mabuk teruk pada malam sebelum dia bertolak balik ke Sabah. Perlu diingat bahawa pembelaan ini tidak pernah diletakkan kepada mana-mana saksi pendakwaan semasa kes pendakwaan. Begitu juga pembelaan OKT tidak menimbulkan yang dadah itu telah diletakkan oleh LTH atau "Panjang" ke dalam beg beliau, begitu juga tidak pernah diletakkan kepada saksi-saksi pendakwaan bahawa OKT terpaksa bergegas ke KLlA untuk mendapatkan pesawatnya untuk ke Sabah.*
>
> *53. Kegagalan OKT berbuat demikian menjadikan OKT dikatakan hanya membawa satu pembelaan 'after thought' dan mereka-reka cerita yang membawa padah kepadanya.*
>
> *57. Pihak pembelaan ingin mahkamah ini mempercayai versi beliau di atas, bagaimanapun, OKT gagal untuk mengesahkan versi beliau itu tanpa disokong oleh keterangan mana-mana saksi, khususnya LTH dan Panjang. Rujuk seksyen 101 Akta Keterangan."*

[22] Learned counsel for the appellant submitted that the trial judge had erred in making the above finding because the appellant's defence was put to SP5 and SP6 during the prosecution's case. Counsel refer us to the evidence of SP6 at page 104 -105 Appeal Record Jilid 2 (2) as follows:

S: Dalam kes ini Tertuduh semasa disoal siasat dan direkodkan keterangan beliau ada sebut tentang satu lelaki Cina nama "Panjang". kamu setuju atau tidak?

J: Setuju, dalam siasatan dalam rakaman percakapan ada ditimbulkan penama Panjang, seorang lelaki bangsa Cina.

S: Memandangkan dalam kes ini wujud 1 lelaki Cina nama Law Tian Hock dan juga 1 lelaki Cina bernama Panjang, saya cadangkan bahawa dadah yang telah dijumpai di dalam beg hitam tersebut ada kemungkinan telah diletakkan oleh Panjang ataupun Law Tian Hock sendiri?

J: Tidak setuju.

[23] We therefore agree with counsel for the appellant that the learned trial judge was wrong in concluding that the defence case was not put to the prosecution's witnesses.

[24] Next, we took note that SP5 had vehemently denied that Law Tian Hock was also arrested at the same place, on the same day 15 minutes after the appellant was arrested. But, the defence's witness, Detective Corporal Rusniyah bt Hasan (SD2) confirmed that she had arrested Law Tian Hock at Gate 17, Domestic Departure Area KLIA2, Sepang on 14.2.2015 at about 1500 hours. SD2 also confirmed that Law Tian Hock was arrested for carrying drugs. It was not disputed that 6 silver packages containing drugs were found concealed in a blue towel in the bag carried by Law Tian Hock. It was not disputed that Law Tian Hock after the arrest was taken by SP2 to the Pejabat Narkotik. Evidence show that Law Tian Hock was at the Pejabat Narkotik for at least 4 hours 54 minutes until 7.45pm. It was also not disputed that Law Tian Hock was charged and tried at the Shah Alam High Court for drug trafficking. He was acquitted and discharged. The

defence could not bring Law Tian Hock to give evidence because he could not be located.

[25] But, in evaluating the evidence in its totality, the learned trial judge simply brushed aside the defence as an after thought. In fact, the learned trial judge did not even consider the evidence of 802. In *Alcontra Ambross Anthony v. Public Prosecutor* [1996] 1 MLJ 209, at page 218, the Federal Court states:

> *At this stage, we would interpolate to remark-though we are digressing somewhat from the point concerning the onus of proof - that thejudge 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.*

[26] In *Zainudin bin Raujan v. PP* [2013] 3 MLJ 773, at page 793, the Federal Court said:

> *"At the conclusion of the trial, s. 182A of the Criminal Procedure Code imposes a duty on the trial court to consider all the evidence adduced before it and to decide whether the prosecution has proved its case beyond reasonable doubt. The defence of the accused must be considered in the totality of the evidence adduced by the prosecution, as well as in the light of the well established principles enunciated in Mat v. Public Prosecutor [1963] 1 MLJ 263 with regard to the approach to be taken in evaluating the evidence of the defence."*

[27] Learned counsel for the appellant submitted that the approach taken by the learned trial judge is wrong. The trial judge not only has failed to consider the defence case, but also has put a higher burden on the appellant. And this amounts to a misdirection of law. We find there is merit in the counsel's submission. It is trite law that the burden of proof is always on the prosecution and the appellant only needs to raise a reasonable doubt on the prosecution's case. In this case, we find the learned trial judge has failed to take into consideration SD2's evidence which share that Law Tian Hock is a real person who has been arrested and charged for drug trafficking; that in both cases (Law Tian Hock and the appellant), the drugs were concealed in a folded towel and the quantity of containing drugs recovered was also similar; that the appellant's bag was not locked, that Law Tian Hock and Panjang were together with the appellant when the appellant was packing his bag, the three of them were sleeping together in the appellant's rented house before the appellant and Law Tian Hock departed to the airport. These facts show that Law Tian Hock and Panjang had access to the appellant's bag and there is a possibility that Law Tian Hock or Panjang could have put the drugs inside the appellant's bag. There is nothing inherently improbable about the defence case. Had the learned trial judge properly evaluated the defence case, he would find that the defence has raised a reasonable doubt in the prosecution's case. This the trial judge has failed to do. His Lordship's failure to consider the defence case constitutes a misdirection of law which occasioned a miscarriage of justice to the appellant.

Our decision

[28] Having carefully considered all the issues raised by the appellant, we find the conviction against the appellant is not safe. For

this reason, we unanimously allowed the appeal and set aside the conviction. The appellant is acquitted and discharged.

Dated : 3 SEPTEMBER 2020

(HADHARIAH SYED ISMAIL)
Judge

COUNSEL:

For the appellant - Norman Mohd Nasir & Fahrni in Adilah; M/s Fahrni Zhafri Ashraf & Co

For the respondent - Allan Suman, Deputy Public Prosecutor; Attorney General Chambers

Case(s) referred to:

Ravindran Ramasamy v. PP [2015] 3 CLJ 421

PP v. Badrulsham bin Baharom [1988] 2 MLJ 585

Alcontra Ambross Anthony v. Public Prosecutor [1996] 1 MLJ 209

Zainudin bin Raujan v. PP [2013] 3 MLJ 773

Legislation referred to:

Dangerous Drugs Act 1952, ss. 2, 37 (d), First Schedule

Criminal Procedure Code, ss. 156, 422