IN THE COURT OF APPEAL, MALAYSIA AT PUTRAJAYA

(APPELLATE JURISDICTION)

[CRIMINAL APPEAL NO: B-05-212-08/2013 (IRN)]

BETWEEN

MOUSA NIKZAD ANZABI KHEIROLLAH ... APPELLANT

AND

PUBLIC PROSECUTOR ... RESPONDENT

(In the Matter of High Court of Malaya at Shah Alam

Criminal Trial No: 45A-201-2011

Between

Public Prosecutor

And

Mousa Nikzad Anzabi Kheirollah)

CORAM:

MOHTARUDIN BAKI, JCA

TENGKU MAIMUN TUAN MAT, JCA

ZAKARIA SAM, JCA

JUDGMENT OF THE COURT

[1] The appellant was convicted and sentenced to death by the High Court at Shah Alam for the offence of trafficking in dangerous drugs. The charge against the appellant reads:

> "Bahawa kamu pada 12.12.2010 jam lebih kurang 11.00 malam, di Kawasan Tuntutan Bagasi E, Aras 3, MTB, KLIA, di dalam Daerah Sepang, dalam Negeri Selangor, telah didapati mengedar dadah berbahaya iaitu 601.05 gram Methamphetamine dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39(B)(2) Akta yang sama".

[2] In gist, the prosecution's case was that on the material date stated in the charge, the appellant was seen at the airport pulling a trolley bag (exhibit P17). Exhibit P17 had a bag tag in the name of the appellant and it was not locked.

[3] Upon examination by Kpl Nor Reshian Kasim (SP3), P17 was found to contain among others, a yellow box (exhibit P20). Inside P20, there was a tea pot (exhibit P23) with 4 pieces of cups and saucers wrapped in a blue cloth and placed in a green sponge moulding.

[4] The sponge moulding caught the attention of SP3 as SP3 noticed the existence of traces of white substance on parts of the sponge. Upon taking out the sponge, SP3 felt the sponge was heavier than normal. He also noticed that not all parts of the sponge were green in colour. Some parts of the sponge were dark green in colour and some appeared like it had absorbed something.

[5] To allay his suspicion, SP3 broke the sponge mould into pieces. SP3 found that parts of the sponge were hard as if they had been dried. Using a test kit, SP3 tested the sponge and found it to be positive of dangerous drugs.

[6] SP3 did not mark the sponge that had broken into pieces but he had placed all the pieces into a plastic bag (exhibit P10) and he had affixed a label marked N2 on exhibit P10. The cloth and the plastic bag containing the pieces of sponge and all other items seized from the appellant were handed over to the investigating officer Insp. Mohd Firdaus Ali (SP4). SP4 had marked the cloth as FN3 and the pieces of sponge moulding received as FF1-FF13 and had put his signature on FN3 and FF1-FF13 (exhibits P9 and P11(A-M) respectively). The items seized were placed by SP4 in a box (exhibit P8).

[7] Upon analysis by the chemist, Dr. Vanitha Kunalan (SP1), the cloth and the sponge were confirmed to contain a total of 601.05 grams of Methamphetamine.

Findings of the trial judge at the end of the prosecution's case

[8] The learned trial judge found that the appellant had the custody and control of the drugs and that there was no break in the chain of evidence. The learned trial judge further found that the exhibits were properly handled, from the time of seizure by SP3 right up to the time the exhibits were handed over to the investigating officer, SP4 and to the chemist SP1, for analysis.

[9] Based on the fact that the drugs were in huge quantity and were cleverly concealed, the learned trial judge made an inference that the

drugs were meant for trafficking and not for the appellant's own consumption.

[10] Having found that the prosecution had made out a *prima facie* case against the appellant, he was called upon to enter his defence.

The defence

[11] In his evidence given under oath, the appellant in essence denied having any knowledge of the drugs absorbed in the cloth and the sponge moulding. The appellant testified that the tea set was given to him by his friend Oyad (noted as Ayat by the trial judge). Oyad had asked the appellant to give the tea set to Oyad's friend, Hossein in Malaysia. Hossein will contact the appellant upon the appellant's arrival in Malaysia.

[12] The appellant also testified as to the purpose of his visit to Malaysia. He stated that he came to buy souvenirs and wedding items and fragrances at the "Fragrance Fair, SOGO" which was to be held on 13.12.2010 until 26.12.2010.

[13] Apart from the appellant, the defence called three (3) other witnesses:

(i) Rosma Tajuddin from SOGO (DW2) who gave evidence on the Fragrance Fair at SOGO;

(ii) Yusef Nikzad Anzabi Kheirollah (DW3), the appellant's brother, who stated among others that a police report had been lodged in Iran against Oyad; and

(iii) Professor Zainuddin Ariffin, The Head of Chemistry Department and Deputy Dean, Faculty of Science, University Malaya (DW4) who had testified on the proper analysis to be conducted on the drugs soaked in the sponge moulding.

Findings of the trial judge at the end of the defence

[14] The learned trial judge found that the oral evidence of the appellant was inconsistent with his cautioned statement (exhibit D35). The learned trial judge made a finding that the appellant had failed to examine exhibit P20 when it was given to him by Oyad although he had the opportunity to do so. The learned trial judge thus found that the appellant was 'wilfully blind to the obvious' and that he was not an innocent carrier.

[15] The prosecution was thus found to have proved its case beyond reasonable doubt and that the appellant had failed to rebut the presumption of possession under section 37(d) of the Act. Hence the learned trial judge convicted and passed the mandatory death sentence against the appellant.

The Appeal

[16] Before us, the appellant canvassed the following issues:

(i) the identity and the chain of exhibits; and

(ii) non-appreciation of the defence.

[17] Central to the issue of identity of exhibit was the submission of learned counsel that when the broken pieces of the sponge was placed by SP3 into the plastic bag (exhibit P10), SP3 had put a label, N2 on the plastic bag. The label went missing and the 13 pieces had become 14 pieces when the exhibits were opened in court.

[18] The other aspect of the first issue was in relation to the evaluation of the defence expert witness, DW4. At the end of the defence, the prosecution applied to recall SP1 to rebut the evidence of DW4. The application was granted by the court, but the prosecution decided not to recall SP1. It was submitted by learned counsel that the failure of the prosecution to call their rebuttal evidence to rebut the discrepancies between the evidence of PW1 and DW4 had created a gap in the prosecution's case and had raised a reasonable doubt on the identity of the drugs.

[19] On the second issue, learned counsel submitted that in rejecting the appellant's defence, the learned judge had failed to take into consideration the important aspects of the defence and therefore no maximum evaluation can be said to have been taken by the learned trial judge at the end of the defence case.

Findings

Identity of the drugs

[20] There were three complaints raised by learned counsel in respect of this issue. The first was on label N2 prepared by SP3 which was found missing, the second was on the existence of an extra piece of

the sponge moulding and the third was on the failure by the prosecution to recall SP1 to rebut the evidence of DW4.

[21] In determining the issue of identity of the exhibits, guidance may be found in the judgment of Richard Malanjum CJ (Sabah & Sarawak) in *Lew Wai Loon v. PP* [2014] 2 CLJ 649 where his Lordship stated thus:

> "[26] ... an exhibit, in a criminal or a civil trial, is physical or documentary evidence brought before the court. Its admission and reliance upon as a piece of evidence requires factual analysis of the facts and/or events that are relevant not only for its admission as a piece of evidence but that such facts and/or events may also be relied upon to test its reliability and trustworthiness as a piece of evidence. In short it is a fact sensitive exercise.
>
> [27] ... discrepancies in weight alone of an exhibit such as drug should not *ipso facto* cast doubt on its identity. There are other primary factors to consider for its admission as a piece of evidence. One fact and/or event to consider is whether there is any break in the chain of evidence. If such event occurred then that should cast a doubt in the exhibit as a reliable and trustworthy piece of evidence".

[22] In the instant appeal, the learned trial judge had set out them facts/events forming the basis of his conclusion as follows (pg 12, Appeal Record Vol. 1):

> "(a) SP3 dari mula pemeriksaan, rampasan dan serahan kepada SP4 tidak pernah membiarkan barang-barang kes tersebut berada dalam keadaan tanpa kawalannya. Pemeriksaan pada kandungan P17 dilakukan dengan disaksikan oleh OKT. Kandungan P20 yang menemukan P11 (A-M) juga dilakukan di hadapan OKT. Menurut SP3, pada ketika mula-mula penemuan P11 (A-M), ia adalah dalam

keadaan satu bongkah span yang sempurna yang menjadi alas acuan ("moulding") kepada set cawan, piring dan teko yang ada di dalam P20 ... Ia telah dipecahkan menjadi bahagian-bahagian kerana SP3 ingin memeriksa kandungan P11(A-M) dan ia terasa berat sedikit dari span biasa ....;

(b) SP3 jelas dalam keterangannya menyatakan bahawa tandaan tidak dilakukan kerana menurut beliau, susah untuk membuat tandaan dan susah untuk melekatkan sebarang bentuk tandaan pada setiap P11 (A-M) ... Namun, SP3 boleh mengecam setiap P11 (A-M) berdasarkan warna dan bentuk-bentuk yang SP3 sendiri telah pecahkan ... P11 (A-M) yang dipecahkan itu telah dikumpul dan dimasukkan ke dalam plastik hitam (P1) yang dibekalkan oleh SP3. Pada P10 menurut SP3, telah ditandakan pelekat dengan tandaan 'N2'. Di sepanjang masa P10 dan kandungannya P11 (A-M), ia tidak pernah dibiarkan oleh SP3 dalam keadaan tidak dikawal olehnya. ... Sepanjang perjalanan ke IPD Sepang dari Pejabat Narkotik Aras 3, KLIA hinggalah serahan kepada SP4, barang kes dikawal oleh SP3 dan OKT dikawal oleh Kpl. Rosmayasim dan Kpl. Fadzlie ...;

(c) SP4 pula mengesahkan telah menerima barang-barang kes sepertimana pada P24 daripada SP3 ... Semasa penerimaannya, barang-barang tersebut adalah dalam keadaan baik iaitu maksudnya yang boleh dibilang dan dilihat. Setelah penerimaan barang-barang kes tersebut SP4 telah menyimpannya di dalam kabinet besi di pejabatnya dan tiada orang lain yang ada akses kepada kabinet besi tersebut. Barang-barang kes yang dimaksudkan oleh SP4 yang disimpan di dalam kabinet besinya adalah beg plastik hitam (P10) yang mengandungi bongkah-bongkah span P11(A-M) yang telah disimpan di dalam kotak P8, satu teko kecil (P23), 4 piring (P22A-D), 4 cawan (P21 A-D), dan sehelai kain biru (P9). Kesemua barang-barang kes ini telah disimpan di dalam kabinet besi milik SP4. .... Pada 15.12.2010, SP4 sendiri telah membuat penandaan semula pada barang-barang kes tersebut ...;

(d) Selesai penandaannya, SP4 telah mengarahkan SP2 untuk merakam gambar barang-barang kes iaitu pada hari yang sama. Sepanjang tempoh tersebut kendalian barang kes adalah oleh SP4 sahaja. SP2 mengesahkan perkara ini. ... Selesai rakaman gambar, kesemua barang kes tersebut diletak dan disimpan semula di dalam kabinet besi milik SP4 yang aksesnya hanyalah oleh SP4 sahaja;

(e) Seterusnya pada 27.1.2011, SP4 telah berjumpa dengan SP1 untuk menyerahkan kotak P8 yang terkandung di dalamnya beg plastik hitam (P10) yang mengandungi bongkah-bongkah span P11 (A-M) dan sehelai kain biru (P9). Semasa serahan tersebut, P8 adalah dalam keadaan berseal dengan meterai CAD Sepang dan telah diperiksa oleh SP1 ...;

(f) Semasa pemeriksaan pada P11 (A-M) itu, telah didapati ada label-label yang telah tertanggal dan SP4 telah melekatkan kembali label-label tersebut. Apa yang pasti, menurut SP4, sepanjang tempoh penerimaan P10 dan kandungannya, ia disimpan di dalam P8 dan P8 disimpan di dalam cabinet besi berkunci milik SP4 sendiri yang mana hanya SP4 yang ada akses terhadapnya ...;

(g) Selanjutnya melalui keterangan SP1, sepertimana dalam P5, penerimaan P8 dan kandungannya adalah dalam keadaan berseal dengan meterai CAD Sepang. Jelas juga melalui keterangan SP1 dalam P5 itu bahawa pada bila-bila masa sepanjang P8 dan kandungannya di analisa oleh SP1, ia tidak pernah dibiarkan berada tanpa kawalan beliau dan akses kepada eksibit tersebut hanyalah oleh beliau seorang. Kemungkinan untuk bercampur aduk juga tidak berlaku kerana eksibit tersebut telah ditandakan dengan nombor makmal sepertimana pada P7. Kembalian P8 dan kandungannya telah dilakukan pada 23.5.2011 dengan keadaan P8 dimeteraikan dengan label keselamatan Jabatan Kimia Malaysia. Turut diserahkan kepada SP4 adalah P7 serta 3 botol cecair yang mengandungi hasil analisa oleh SP1 iaitu P13 dan P14 (A&B).

> Mahkamah sendiri telah memerhati bahawa pada masa P8 dibuka semasa perbicaraan, meterai pada P8 adalah dalam keadaan sempurna dan dicam pula oleh SP1 ... Oleh itu, Mahkamah membuat pendapat ("finding") bahawa rantaian keterangan kendalian barang kes adalah jelas dan tidak pernah terputus pada bila-bila masa sepanjang ia berada pada SP3 dan kepada SP4, dan seterusnya kepada SP1 dan dikembalikan semula kepada SP4. ...".

[23] In the light of the above events relating to the handling of the exhibits, we were of the view that the missing label N2 and the extra piece of the sponge did not vitiate the trial judge's finding. We found no reason to depart from his findings and we agreed with the learned trial judge that there was no break in the chain of evidence.

[24] On the evidence of the chemist, SP1 had stated that she used water to extract the drugs contained in P11 (A-M) as according to her, water had been used to soak the drugs into the green sponge. The first complaint by learned counsel was that nowhere in her evidence did she state that she had conducted an analysis to determine that water, and not some other liquid was used as a medium to soak the drugs into the green sponge. The second complaint was that she did not analyse the 13 pieces of sponge separately but altogether which had resulted in an error in her chemist report, exhibit P7.

[25] The defence, through DW4 had challenged the analysis of SP1 where DW4 essentially stated that the extraction process of the drug exhibits were flawed as it did not adhere to the standard set by ISO 9001 and ISO 17025. DW4 had also stated that SP1 had failed to use a vacuum dessicator to ensure that the drying process was completed and that a constant weight is achieved in the analysis and that an

extraction method using a Soxhlet Extractor ought to have been used by PW1 in this case.

[26] We found that the same challenge had been put to SP1 during cross examination. SP1 had given her explanation why she had resorted to the method of analysis that she did and not the method as testified by DW4. The learned judge having heard both SP1 and DW4 had accepted the evidence of SP1 over DW4 for the following reasons:

> "16. Mahkamah sekarang membuat tinjauan serta pendapat ("ruling") ke atas keterangan-keterangan pakar SP1 (Ahli Kimia Jabatan Kimia Malaysia) dan DW4 (Professor, Jabatan Kimia, Fakuti Sains, Universiti Malaya), yang telah diberi dalam perbicaraan ini seperti berikut:
>
> (a) Prosedur analisis yang telah dituruti oleh SP1 adalah suatu kaedah yang disyorkan oleh UNODC. Persoalan cara mengekstrak dadah yang disyorkan oleh DW4 dengan menggunakan Soxhlet Extractor telah diberi penjelasan oleh SP1 tidak sesuai bagi kes ini ... Tambahan, "recrystallisation" tidak dilakukan ke atas air rendaman kerana SP1 telah menggunakan kaedah HPLC untuk tentukan kandungan dadah dalam hasil ekstrak air rendaman itu. Mahkamah tidak berasa hairan ataupun terperanjat bilamana DW4 sendiri mendapati dalam akuannya ... bahawa proses HPLC yang berasas Chromotography yang tersendirinya "identifies the compounds qualitatively and quantitatively". DW4 sendiri telah mengatakan alasan mengapa Soxhlet Extractor tidak digunakan dalam kes ini adalah kerana telah diandaikan bahawa "only water soluble substances ie, Methamphetamine are present" ... Pendapat DW4 ini mengiyakan proses pertama sekali yang dijalankan oleh SP1 (Ahli Kimia) yang telah jalankan "screening" ujian warna pada setiap bahan, yang telah mempastikan positif kehadiran methamphetamine pada

kesemuanya eksibit berkenaan sebelum menjalankan proses analisis yang lain seterusnya.

Mahkamah mengambil maklum penyertaan pendapat DW4 bahawa "the ideal method to extract the chemical substances from the sponges is to mix the sponges with water" ... Akan tetapi DW4 berkata Soxhlet Extractor perlu digunakan kerana "the substance content in the sponge is not known."DW4 meramal kemungkinan kehadiran kimia-kimia lain dalam span-span itu, dan dengan itu diperlukan penggunaan pelarut Ethanol ke atas bahan itu untuk "complete the extraction process for less soluble chemicals on those that are not soluble in water." ... Mahkamah membuat pemerhatiannya ke atas hal perkara ini. Bukankah terjawab sendiri, bilamana DW4 menyatakan alasan bagi ketakpenggunaan Soxhlet Extractor adalah kerana kehadiran "water soluble substance ie, Methamphetamine" pada bahan-bahan tersebut dan lagipun telah terawal dipastikan kehadirannya pada bahan-bahan itu melalui ujian warna yang telah dijalankan oleh SP1. Dan bukankah proses HPLC telah memberi keputusan kualitatif dan kuantitatif methamphetamine dalam analisis oleh SP1. Jawapan Mahkamah terbentuk positif dan hasil ujian HPLC memberi keputusan berat methamphetamine yang telah menjadi asas pertuduhan pengedaran di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952. Dengan itu maka jelaslah keterangan SP1 yang menyatakan "keputusan hasil analisis saya merangkumi dadah yang bukan sahaja di permukaan span-span itu tetapi yang ada di dalamnya".

Mahkamah menerima keterangan SP1 menurut analisis yang telah dijalankan olehnya yang mematuhi kaedah UNODC yang tidak dinafikan oleh DW4 ... seperti berikut:

"Q: Are you aware of the method and standard of chemical analysis advised by the United Nations Office on Drugs and Crime (UNODC)?

A: Yes, I am also aware that the United Nations Office on Drugs and Crime standard are being followed by Jabatan Kimia Malaysia".

Cabaran DW4 untuk menyangkal pendekatan yang dituruti oleh SP1 dengan mengatakan proses melalui alat-alat Soxhlet Extractor dan Vacuum Dessicator dengan itu tidak dapat diterima oleh Mahkamah atas penjelasan seperti yang ditunjuk di atas tadi".

[27] The law as regards the opinion of an expert as observed in *Munusamy Vendagasalam v. PP* [1987] 1 CLJ 250 is:

> "... the court is entitled to accept the opinion of the expert on its face value, unless it is inherently incredible or the defence calls evidence in rebuttal by another expert to contradict the opinion. So long as some credible evidence is given by the chemist to support his opinion, there is no necessity for him to go into details of what he did in the laboratory step by step".

[28] Although the defence in the instant appeal had called evidence in rebuttal and SP1 was not recalled to rebut DW4, we found no lacunae in the prosecution's case as regards the identity of the drugs. SP1 had given evidence in respect of her analysis of the drugs as opposed to DW4 who had not conducted any analysis but had only testified on the theoretical aspect of it. And by DW4's own admission, he was "familiar with the protocol and procedure that is involved in sampling analysis and quantification of drugs analysis on a theoretical level and in particular on a practical level in general." (see *Dato' Seri Anwar Ibrahim v. PP & Another Appeal* [2015] 2 CLJ 145).

[29] Thus, we found no appealable error in the evaluation of the evidence of the two experts by the learned trial judge and on his

reasoning why the evidence of SP1 was preferred over that of DW4 (see pages 64-79 of the Appeal Record Vol. 1). We were satisfied that the identity of the drugs had been proved by the prosecution.

Non-appreciation of the defence case

[30] On this issue, learned counsel submitted that the learned trial judge had only focussed on the inconsistencies between the oral evidence of the appellant and his cautioned statement as regards the inspection of P20 at the airport and the appellant's intention to visit the Fragrance Fair at SOGO. Even if there were discrepancies in the evidence given by the appellant, those discrepancies, submitted learned counsel, were minor and did not take away the appellant's main defence that P20 did not belong to him and that he did not know about the existence of the drugs in P20. The defence was consistent that P20 belonged to Oyad. The learned trial judge, contended learned counsel, had failed to consider the defence *in toto*.

[31] And in respect of Oyad, learned counsel had raised a further issue on the failure of the prosecution to investigate Oyad despite Oyad's number being saved in the appellant's hand phone.

[32] Having perused the appeal records, we disagreed with learned counsel. We found, in particular from the grounds of judgment, that the learned trial judge had considered not just the inconsistencies in the evidence of the appellant as against his cautioned statement as alluded to above, but the learned trial judge had considered the defence as a whole.

[33] We do not wish to reproduce the relevant findings, suffice to state that the learned trial judge had extensively dealt with the defence as set out in the evidence of the appellant, DW2 and DW3 (see pages 39-62 of Appeal Record Vol. 1). We found that the learned trial judge had given proper and sufficient evaluation of the defence before concluding that the defence had failed to raise a reasonable doubt on the prosecution's case and had failed to rebut the presumption of possession under section 37(d) of the DDA.

[34] In respect of the failure to investigate Oyad, we were of the view that on the facts and circumstances of this case, the failure had not occasioned any miscarriage of justice to the appellant.

[35] Having regard to the totality of the evidence, we agreed with the learned trial judge that the prosecution had proved its case against the appellant beyond reasonable doubt. In our judgment, the conviction of the appellant is safe. We unanimously dismissed the appeal and we affirmed the conviction and sentence of the High Court.

Dated: 5 OCTOBER 2015

(TENGKU MAIMUN TUAN MAT)
Judge
Court of Appeal

Counsel:

For the appellant - N Sivananthan (Tina Ong with him); M/s Sivananthan & Co

For the respondent - Tengku Amir Zaki Tengku Hj Abdul Rahman, Timbalan Pendakwa Raya; Jabatan Peguam Negara