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Judgment

The appellant (accused) was convicted in the High Court Johore Bahru for the offence of trafficking, under section 39B Dangerous Drugs Act, 1952 (the Act) in 36.44 grammes of monoacetylmorphines at about 4.00 p.m. on 14/3/2001 at house No 16, Jalan Lembing 2, Taman Puteri Wangsa, Ulu Tiram, Johore Bahru. He was sentenced to death. The accused's appeal is against the conviction and sentence.

The salient facts adduced by the prosecution and the defence at the trial in the High Court are as follows. Acting on information received, Chief Inspector Charun Aan (SP4) led a police party comprising of 7 members to raid house No16, Jalan Lembing 2, Taman Puteri Wangsa, Johore Bahru (the said house). SP 4 and his men gained access into the said house when one male Myanmar, later identified as Islam Mahmood, opened the main door and grille to the said house upon SP4 knocking at the door. A search was made in respect of the said house. SP4 recovered 3 plastic packets containing substances suspected to be heroin from Islam Mahmood's room upstairs. The plastic packets were seized. Islam Mahmood was then arrested and brought downstairs to the living room. At all material times, present in the said house with Islam Mahmood was a male child, about 3 or 4 years of age. SP4 then directed Islam Mahmood to telephone the child's relatives to come and collect the child. About half an hour later 2 Myanmar women came, with 2 other children, to collect the said child.

5 Whilst SP4 was in the process of handing the child to the
Myanmar women, a male Malay, later identified as the accused,
suddenly came into the said house through the same main door
used by the police. At this point of time, SP4 and members of his
raiding team, together with Islam Mahmood, the 2 Myanmar
10 women and the 3 children, were in the living room. SP4 then
detained the accused. SP4 said the accused shivered when he
introduced himself as a police officer.

A body search was conducted on the accused. SP4 recovered a
15 brown paper package (P7A) tucked at the waist of the accused.
Inside the brown paper package, SP4 found a transparent plastic
packet (P7B) which contained substances (the “incriminating
substances”) suspected to be heroin.

20 The accused and Islam Mahmood, together with the exhibits
recovered, were then brought to the police station and were
handed over to Inspector Chew Chee Lee, the investigating officer
(SP7).

25 The incriminating substances were confirmed by the chemist
(SP6) to contain 36.44 grammes of monoacetylmorphines.

Islam Mahmood and the 2 Myanmar women were not called as
witnesses for the prosecution nor were they were offered to the
30 defence. They could not be located. Apparently, no statements
had been recorded from anyone of them.

5 Islam Mahmood was charged in the Magistrate's Court for an
offence of possession of dangerous drugs under s 39A (1) of the
Act and had been duly sentenced. SP7 did not know the
whereabouts of Islam Mahmood at the time of the trial of the
accused in the High Court. SP7 made several attempts to locate
10 Islam Mahmood but his efforts proved futile. He also requested the
local newspapers to help locate Islam Mahmood but to no avail.

The accused was charged with trafficking in dangerous drugs
because he was in possession of monoacetylmorphine which
15 exceeded 15 grammes in weight. The accused was thus deemed
to be trafficking in the said drug under the provisions of s 37 (da)
(iii) of the Act.

The defence of the accused is that he was an innocent carrier
20 having no knowledge of the drugs in question. He elected to give
his evidence on oath.

The accused challenged the version of SP4 as regards the
recovery of exhibits P7A and P7B. The accused said P7A and its
25 contents P7B were not tucked at his waist but, were in a black
plastic bag which he carried in his right hand into the said house to
deliver to Islam Mahmood, at the behest of one Rahim. The
accused said he had known Rahim for about 10 years as he was
from the same kampong. Rahim told him that the contents of the
30 package were "*barang masakan*" (cooking ingredients). Rahim
was not called by the accused to testify.

5 The only relevant issue before us in this appeal is whether the accused is an innocent carrier of the incriminating package without knowledge of the contents of the said package (P7A and P7B).

10 We are of the view that the said issue is primarily a question of fact to be determined by the trial court upon a consideration of all the evidence produced and, upon an assessment of the credibility of the witnesses, on the pertinent facts in issue. Here, the accused in his defence, had presented a differing version from that of the prosecution of how the drugs were recovered from him. It was the case for the prosecution that the drugs were actually found in 15 exhibit P7A, tucked at the accused's waist. On the other hand, it was the accused's version that the drugs were found in a black plastic bag held in the accused's right hand. The learned trial judge, therefore, carefully re-assessed the credibility of the prosecution's witnesses, in the light of the differing versions and 20 concluded:

25 "It is my finding that they are credible witnesses and are telling the truth after also watching their demeanor in the witness box, the manner in which they had testified and after anxiously scrutinizing their answers in examination-in-chief, cross-examination as well in re-examination. I am therefore satisfied beyond any reasonable doubt that the drugs were found in exhibit P7A tucked at the waist of the accused. And further in my judgment the black plastic bag did not exist and it was simply a creation of the accused."

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We have no reason to disturb the trial judge's finding of fact that exhibit P7A was tucked at the waist of the accused and that a

5 black plastic bag did not exist. We are of the view that there has
been no misdirection at all by the trial judge, in this crucial finding
of fact.

10 The learned trial judge had indeed carefully considered the
defence of the accused that he was an innocent carrier who had
asserted that he did not know that the package that he had been
asked to deliver by Rahim contained dangerous drugs. Thereafter,
the trial judge made a finding that the accused knew what he was
15 carrying and that he was not an innocent carrier. We are
unanimous that this finding was correct and consistent with the
evidence before the trial court.

The learned trial judge concluded that the most telling and critical
evidence which showed that the accused knew precisely the
20 contents of the brown paper package was the fact that the
accused had tucked it at his waist and covered it with the T-shirt
he was wearing. We have no reason to disturb the trial judge's
rejection of the accused's assertion that he had been misled by
Rahim who had told him that the package contained "barang
25 masakan".

"The proper and only irresistible inference to be drawn from the facts and
circumstances must be that the accused knew he was carrying dangerous drugs on
behalf of Rahim. The accused tucked exhibit P7A at his waist for the reason that he
30 did not want it to be seen and also because of his guilty conscience.

5 In my judgment the totality of the evidence, the surrounding circumstances and the
conduct of the accused when taken together irresistibly point to the accused having
knowledge of the offending exhibits at the material time.”

10 We are unanimous that this appeal is without merits. The accused
has failed on a balance of probabilities to rebut the presumption of
trafficking under s.37 (da) of the Act.

The appeal is dismissed. Conviction and sentence of the trial court
is affirmed.

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(DATO' NIHRUMALA SEGARA A/L M.K. PILLAY)

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Judge
Court of Appeal
PUTRAJAYA

Peguam Perayu

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