

**DALAM MAHKAMAH RAYUAN MALAYSIA  
(BIDANGKUASA RAYUAN)  
RAYUAN JENAYAH NO: B-05-23-2005**

**ANTARA**

**PENDAKWA RAYA**

**... PERAYU**

**DAN**

**AGUS BIN AGIL**

**... RESPONDEN**

(Dalam Perkara Mengenai Mahkamah Tinggi Shah Alam  
Perbicaraan Jenayah No. 47-9-2000 & 47-17-2000

**ANTARA**

**PENDAKWA RAYA**

**DAN**

**AGUS BIN AGIL)**

**CORAM : James Foong Cheng Yuen, J.C.A.  
Hasan bin Lah, J.C.A.  
Sulong bin Matjeraie, J.C.A.**

## **GROUND OF JUDGMENT**

- [1] This is an appeal by the Public Prosecutor against the decision of the learned trial judge in the High Court at Shah Alam amending the original charge of trafficking in 341.1 grammes of methamphetamine under s 39B(1)(a) of the Dangerous Drugs Act 1952 (“the Act”) against the respondent (the accused in the High Court) to one of possession punishable under s 12(3) of the same Act. The respondent pleaded guilty to the amended charge and was sentenced to 4½ years with effect from the date of his conviction i.e. 9.12.2005.
- [2] We heard this appeal on 13 December 2008 and unanimously allowed it. We now give the grounds of our decision.
- [3] The facts of the case as found by the learned trial judge are as follows. The respondent is an Indonesian who came to Malaysia for a short visit on 14.5.1998. He wanted to go back to Indonesia on 16.5.1998. At the Subang International Airport at about 6.20 p.m. PW4 (Kpl. Joseph Bartram Anak Brain), a security assistant on duty at Gate 6, Terminal 1 of the Subang Airport, conducted a body search on the respondent. PW4 suspected that something was hidden on both part of the thigh underneath the pants worn by the respondent. On PW4’s instruction, the respondent took out from underneath his pants 2

black plastic packages containing crystalline substance which was later confirmed by the chemist to contain 298.3 grammes of methamphetamine, the subject matter of another charge.

- [4] PW4 proceeded to seize the respondent's international passport, boarding pass and air ticket and escorted him to the airport police station where the respondent was handed over to SP6 (Sjn. Jagdev Singh a/l Saran Singh) at about 8.20 p.m. SP6 then rearrested the respondent. From there, the respondent was then brought to the Damansara Police Station at about 10.45 p.m. by SP7 (L/Kpl Zamrus bin Abd. Kudus) and L/Kpl Jelani bin Mohamad Nor.
- [5] At the Damansara Police Station the respondent was handed over to Sjn. Ahmad bin Othman (SP8) at about 10.50 p.m. who then sent the respondent to the lock-up. PW10 (L/Kpl Che Manan bin Rejab) and PW11 (L/Kpl Akhbar bin Nayan) were on duty at the station's lock-up at that time. They received the respondent at about 11.10 p.m. from L/Kpl Jelani bin Mohamad Nor). SP11 carried out body check on the respondent and the respondent was asked to undress. While the respondent was undressing his underpants PW10 saw 2 black plastic packages dropped from the underpants. PW10 checked the content of the 2 packages and found that they contained crystalline substance.

When PW10 asked the respondent about that the respondent said they were “Chinese vitamin medicine”. The chemist later confirmed that the crystalline substance contained 341.1 grammes of methamphetamine. It is the subject-matter of the charge in this case.

- [6] At the close of the case for the prosecution the learned trial judge held that the prosecution failed to prove a prima facie case against the respondent on the basis that since the appellant was already arrested and detained he no longer had the necessary intention to traffic. This is what the learned trial judge said in his judgment –

“Mengenai pertuduhan kedua iaitu bagi dadah yang dijumpai di tempat pemeriksaan di lokap Balai Polis Damansara, saya mendapati bahawa pendakwaan gagal membuktikan kes prima facie pengedaran dadah terhadap tertuduh. Pada penghakiman saya seorang yang telah digari kedua-dua tangannya sejak ia mula ditahan di lapangan terbang dan sentiasa di dalam kawalan dan jagaan polis sehingga dadah tersebut dijumpai semasa pemeriksaan di lokap, tidak mungkin lagi boleh mengedar dadah. Jika sekalipun diandaikan OKT mempunyai niat untuk mengedar dadah sebelum ia ditangkap di lapangan

terbang niat tersebut secara logiknya sudah tidak wujud lagi dan dilupakannya apabila ia telah ditangkap, digari dan dikawal sepanjang masa oleh polis. Pendakwaan tidak ada mengemukakan sebarang keterangan bahawa OKT cuba melakukan sesuatu bagi menyembunyikan dadah tersebut, untuk tujuan pengedaran selepas ia ditangkap. Dadah tersebut tidak dijumpai lebih awal semata-mata kerana polis atau SP4 tidak membuat pemeriksaan fizikal secara rapi ke atas OKT selepas ia ditahan. Jika sekalipun diandaikan anggapan pengedaran dadah di bawah seksyen 37(da) ADB terpakai, anggapan tersebut bukanlah satu anggapan yang tidak boleh disangkal. Pada saya, fakta kes ini sendiri sudah mencukupi untuk menyangkal sebarang anggapan pengedaran dadah.”

- [7] The learned trial judge, however, found that the drug was in the possession of the respondent. He accordingly amended the charge to an offence under section 12(2) of the Act. The respondent pleaded guilty to the amended charge and he was sentenced to 4½ years of imprisonment.
- [8] In the hearing of the appeal before us the respondent did not dispute the learned trial judge’s finding that the respondent was in actual possession of the said drugs. In his judgment the

learned trial judge held that the respondent had the custody, control and exclusive possession of the two packages containing the said drugs. With regard to the knowledge he said –

“Dalam kes ini inferens mengenai pengetahuan tertuduh terhadap dadah tersebut dapat dibuat dari perbuatan tertuduh yang sengaja menyembunyikan bungkusan tersebut di dalam seluarnya. Tindakan ini tidak konsisten dengan kelakuan seseorang yang tidak bersalah. Ia tidak perlu bersusah payah menyembunyikannya jika ia adalah ubat yang tidak menyalahi undang-undang”.

We too, after having given careful consideration to the facts of the case, agree with the learned trial judge’s finding that the respondent had actual possession of the said drugs in view of the manner in which the respondent carried the drugs on his person.

[9] As such, the only issue for determination in this appeal was whether the respondent was trafficking in the said drugs. The learned deputy public prosecutor contended that based on the facts of the case the respondent had the intention to traffic in the said drugs prior to his arrest. The respondent was in fact waiting to board the aeroplane to fly back to Indonesia. At that time the said drugs were already in his possession.

[10] It must be noted that at the date of the commission of the offence methamphetamine was not included in paragraph (da) of section 37 of the Act which provides for presumption of trafficking in certain drugs. As such the prosecution could not use the presumption of trafficking in section 37(da) of the Act to prove its case against the respondent. The prosecution therefore had to prove by evidence that the respondent was trafficking in the said drugs.

[11] The learned deputy public prosecutor submitted that what was done by the respondent amounted to the act of trafficking of the said drugs as defined under section 2 of the Act. In support of that the learned deputy public prosecutor cited the case of **Ong Ah Chuan v Public Prosecutor [1981] 1 MLJ 64.**

[12] In response to that learned counsel for the respondent submitted that mere act of carrying the said drugs is not sufficient to constitute the offence of trafficking. In support of that he referred to the observation made by Lord Diplock in **Ong Ah Chuan v Public Prosecutor (supra)** at p. 68 that –

To “traffic” in a controlled drug so as to constitute the offence of trafficking under section 3 involves something more than passive possession or self-administration of the drug; it involves doing or offering to do an overt act of one or other of the kinds specified in

paragraph (a) of the definition of “traffic” and “trafficking” in section 2. Even apart from any statutory definition, the ordinary meaning of the verb “to traffic”, in the particular context of trafficking in goods of any kind, imports the existence, either in fact or in contemplation, of at least two parties: a supplier and a person to whom the goods are to be supplied.

[13] According to him Augustine Paul J (as he then was) held in **PP v Mohd Farid bin Sukis [2002] 3 MLJ 427** that the mere act of, say, “keeping”, or “concealing” or “carrying” dangerous drugs as enumerated in section 2 of the Act would not constitute “trafficking” without any further evidence of an intention to trade or deal in them.

[14] It is the respondent’s contention that the word “trafficking” in the Act must be given its ordinary meaning and the legal meaning of “trafficking” as defined in Black’s Law Dictionary, 6<sup>th</sup> Edn. is –

“Trading or dealing in certain goods and commonly used in connection with illegal narcotic sales”.

[15] Learned counsel for the respondent further submitted that in the instant case the prosecution did not lead evidence to show that the quantity of the said drugs carried by the respondent was large. There was no evidence to show what was the quantity of the drugs consumed by an average addict or the value of the said drugs.

[16] It is trite law that mere keeping, concealing or carrying of the drugs is not sufficient to constitute trafficking. Lord Diplock in **Ong Ah Chuan's** case, however, also said at p. 69 that –

Proof of the purpose for which an act is done, where such purpose is a necessary ingredient of the offence with which an accused is charged, presents a problem with which criminal courts are very familiar. Generally, in the absence of an express admission by the accused, the purpose with which he did an act is a matter of inference from what he did. Thus, in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he was transporting them for the purpose of trafficking in them would, in the absence of any plausible examination by him, be irresistible – even if there were no statutory presumption such as is contained in section 15 of the Drugs Act.

As a matter of common sense the larger the quantity of drugs involved the stronger the inference that they were not intended for the personal consumption of the person carrying them, and the more convincing the evidence needed to rebut it.

[17] In **Public Prosecutor v Karim bin AB Jabar [2008] 3 MLJ 685**, 10.384 kg of cannabis was recovered from the car driven by the respondent. Gopal Sri Ram JCA, after referring to the passage above from **Ong Ah Chuan's** case said at p. 690 that –

[8] In the present appeal the respondent was found conveying the proscribed drugs in the motorcar in question. The quantity of the drugs discovered was far in excess of that he would require for his personal use, if any. The irresistible inference that the learned trial judge ought to have drawn from the totality of evidence was that the respondent was conveying the drugs for the purpose of trafficking in it. Unfortunately, the learned trial judge in the court below did not direct his mind along these lines.

[18] In **Mohamad Yazri bin Minhat v Public Prosecutor [2003] 2 MLJ 241**, the appellant was transporting 133 kg of cannabis in a

car. The High Court judge convicted him of the offence of trafficking. On appeal, this court, through Gopal Sri Ram JCA said at p. 250 that –

Applying the common sense approach laid down by Lord Diplock in **Ong Ah Chuan**, the learned judge's conclusion that the appellant was guilty of trafficking is abundantly justified.

This is how the learned judge put it at p 24 of his judgment:

I find the story and the defence of the accused has not raised any reasonable doubt on the prosecution case that he was in exclusive control and custody of the cannabis in the car at about 4.30 pm on 17 January 1997 and that he was aware of the nature of the cannabis in the car – that he was in possession of the cannabis – and that he transported the cannabis in the car from outside Kg Chubadak Dalam to Kg Chubadak Dalam, Sentul Pasar. I find him guilty on the charge save that the date and time of the offence is amended to read as occurring on 17 January 1997 at about 4.30 pm. And I convict the accused on the charge.

We find counsel's attack on this finding by the learned judge to be without merit. It is plain and obvious from a reading of the judgment as a whole that the learned judge had the large quantity of drugs here in the forefront of his mind. The several passages in his judgment reflect the learned judge's satisfaction that the appellant could not have had such a large quantity of drugs in his possession, custody and control save for the purpose of trafficking it to others known or unknown. That explains the transporting by the appellant of the drug in the car in which it was found. For that reason we must with respect reject the arguments advanced to us by learned counsel for the appellant.

[19] In **Public Prosecutor v Abdul Manaf bin Mohamad Hassan [2006] 3 MLJ 193** Ariffin Zakaria FCJ (as he then was) said at pp. 206 and 207 –

[22] In the present case, the drug was carried in small plastic packets each containing small quantity of the drug. According to the evidence, 39.77g of heroin was found in a number of small plastic packets tucked in his waist, while 50 small plastic packets containing 9.09g of heroin was found in the right side pocket and another 30 small plastic packets containing 5.57g of heroin was found in the left side pocket of the track top he was wearing, 20 small plastic packets were found in each of the right and left pockets of his trousers, containing a total of 7.66g of heroin. Judging from the manner the drug was being carried, ie in small plastic packets and taking into account the total amount of the drug involved, the reasonable inference that may drawn is that the respondent was in fact carrying it for the purpose of trafficking. And bearing in mind the large quantity of the drug involved, it cannot be seriously contended that the drug was for his own consumption. In any event, it was never suggested in his defence that it was so. His defence was a mere denial that the drug was ever found on him. This was rejected by the learned trial judge. We are satisfied he was not just a passive carrier. Armed with these facts, we are satisfied that had the learned trial properly directed himself, he would nonetheless have come to the same finding. In the circumstances, we hold that the Court of Appeal ought to have applied the proviso to s 60(1) of the CJA and uphold the conviction and sentence notwithstanding the misdirection by the learned trial judge. For the above reasons, this appeal is allowed and the order of the Court of Appeal is set aside. Accordingly, the conviction and sentence imposed by the High Court are reinstated and affirmed.

[20] It is true as submitted by learned counsel for the respondent that no evidence was adduced by the prosecution to show the value of the said drugs or how many people could consume that quantity of methamphetamine so as to show that the quantity of the drugs found in the respondent's possession was large. However, when section 37(da) was amended later by the Dangerous Drugs (Amendment) Act 1998 (Act A1025) and came into force from 15 September 1998, which was 4 months after

the commission of the offence, a presumption of trafficking was included in respect of 50 grammes or more in weight of methamphetamine. As such we are of the view that an inference that may be drawn is that the 341.1 grammes of methamphetamine found in possession of the respondent was large in quantity and so it was not intended for the respondent personal consumption. It is to be observed that the weight of the drug involved was more than 6 times of the minimum weight of 50 grammes and it was therefore far in excess of what he would normally require for his personal use, if any.

[21] With regard to the learned trial judge's finding that the respondent did not have the necessary intention to traffic the said drugs because when the said drugs was recovered from him he was already under arrest and being detained in the police lock-up, with respect, we are of the view that the learned trial judge erred in his finding. It is to be noted that this is not a case whereby the drugs were obtained by the respondent while he was in the police lock-up. The facts clearly show that the said drugs were already in his possession while he was at the airport waiting to board a plane to go back to Indonesia. The facts of the case, in our view, show that, the respondent had the intention to traffic the said drug from the beginning. The learned trial judge should have viewed the prosecution evidence

in its entirety when considering whether the respondent had the intention to traffic the said drugs. What the learned trial judge did here was to consider only the evidence as to what had happened in the police lock-up. The evidence adduced by the prosecution clearly show that there was an intention by the respondent to traffic the said drugs, otherwise why was the need to bring back the drugs to Indonesia in a large quantity.

[22] For the reasons already given we held that the prosecution has proved a prima facie case against the respondent on the original charge. We therefore allowed the appeal by the prosecution. The decision of the learned trial judge in reducing the charge and in convicting and sentencing the respondent on the amended charged was set aside. The respondent's defence ought to be called on the original charge proffered against him. The case was therefore remitted back to the High Court for the accused's defence to be called on the original charge under section 39B(1)(a) of the Act by the learned trial judge.

Dated this 27 April 2009.

Hasan Bin Lah  
Judge  
Court of Appeal Malaysia

## Counsel

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