

**DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANGKUASA RAYUAN)**

RAYUAN JENAYAH NO. P-05-42-2004

ANTARA

IDRIS BIN HAIRUN

...PERAYU

DAN

PENDAKWA RAYA

...RESPONDEN

(Dalam Mahkamah Tinggi Malaya Di Pulau Pinang
Dalam Negeri Pulau Pinang
Perbicaraan Jenayah No. 45-28-1999)

Antara

Pendakwa Raya

Lwn.

Idris bin Hairun

**CORUM: DATIN PADUKA ZALEHA ZAHARI, JCA
DATO' KANG HWEE GEE, JCA
DATO' AZHAR HJ. MA'AH, JCA**

JUDGMENT OF THE COURT

At the High Court below the appellant was charged as follows:

1. *"Bahawa kamu pada 20 Jun 1998 jam lebih kurang 8.20 malam di lorong belakang Desa University*

Commercial Complex, Jalan Sungai Dua, dalam Daerah Timur Laut, di dalam Negeri Pulau Pinang, telah didapati mengedar dadah berbahaya iaitu cannabis seberat 3.819 gram, dan oleh itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 (Semakan 1980) dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama”.

2. *“Bahawa kamu pada 20 Jun 1998 jam lebih kurang 8.20 malam di lorong belakang Desa University Commercial Complex, Jalan Sungai Dua, di dalam Daerah Timur Laut, di dalam Negeri Pulau Pinang, telah memiliki dadah berbahaya iaitu cannabis seberat 2.90 gram dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 6 Akta Dadah Berbahaya 1952 (Semakan 1980) dan boleh dihukum di bawah seksyen yang sama”.*

On the first charge the learned trial judge found the appellant guilty as charged and convicted him and accordingly

sentenced him to death. Against this order the accused now appeals and upon hearing counsels for both parties we unanimously dismissed the appeal. We now give our reasons.

The facts show that on 19 June, 1998 DSP Yusof bin Mat Taib (SP5) from Jabatan Narkotik, Ibu Pejabat Kontinjen Perak, upon information received arrested one Zainal Abidin bin Shafie (SP6) in connection with Bagan Serai Report concerning drug trafficking activities. Following an investigation on SP6 it was revealed that SP6 received his supplies of drugs from one Idris bin Hairun, the appellant in this appeal. Being furnished with this information SP5 took the initial step on the investigation of the present case by asking SP6 to telephone the appellant to arrange for a purchase of 4 kilograms of ganja by SP6 from the appellant. A telephone call was made by SP6 to the appellant and the appellant agreed to supply 4 kilograms of ganja at the price of RM1,000.00 per kilogram and a meeting was arranged for the transaction to be executed. It was agreed that the delivery was to take place at lorong belakang Desa University Commercial Complex at 8 p.m. Following this arrangement

made between SP6 and the appellant the police immediately swung into action.

At about 6 p.m. SP5 and a party of thirteen police officers proceeded to Penang in four cars and a lorry driven by SP6. Upon arrival at the arranged location at about 7.30 p.m. SP6 was instructed to park his lorry in front of a tyre shop whilst the others positioned themselves at various other locations. Soon they noticed a motorcar No. PBJ 9770 driven by a male Malay entering the area where they had been waiting. It stopped behind the Commercial Complex and the driver alighted from the said car. Immediately this person was apprehended and arrested by SP5 who had earlier positioned himself in the vicinity. Everyone then rushed up to assist SP5. SP5 then examined the body of the person arrested and found one small plastic packet of ganja in his trousers pocket. This was the subject matter of the 2nd charge. SP5 then opened the booth of the car using the ignition key. Inside the booth they saw a green bag. Upon opening the bag they found four packages which they suspected to be ganja. Then they took the man, the

car and the confiscated drugs back to the police station. SP5 and other witnesses identified the appellant as the person arrested. At the police station the exhibits were handed over to the investigating officer, Chief Inspector Rajaram a/l Arumugam (SP15). In his evidence SP15 among other things informed the court that on the night in question SP5 handed over to him 13 items that were said to have been seized from the appellant following his arrest at the scene of the crime. Among them were:

- 1 paket plastik disyaki mengandungi ganja tanda **YA (P10A)**,
- 1 beg hijau Panther tanda **YB (P12)**,
- 4 ketulan mampat disyaki ganja tanda **YB1-YB4** pada balut plastic wrapper (**P11 G1-G4**),
- Kereta Proton Saga PBJ 9770 (**P14A**),
- 1 handphone Ericsson (**P17**).

Exhibits P10, P11 and P12 were subsequently sent to the chemist for analysis. The chemist SP3 in her evidence confirmed that the “4 ketulan mampat disyaki ganja tanda YB1-

YB4 pada balut plastic wrapper (P11 G1-G4)” to be cannabis with net weight of 3,819 grams.

With regard to the car No. PBJ 9770 the investigating officer further informed the court that a search made at the office of Jabatan Pengangkutan Jalan revealed that the said vehicle was registered in the name of one Siti Mariam bt. Idris who was the daughter of the appellant. Attempts were made to bring Siti Mariam to testify on this matter. The process server did serve a subpoena on her and came back with the following note and endorsement on the subpoena.

“Telah pergi ke alamat tersebut dan berjumpa Siti Mariam pada 5.5.04. Beliau ada pemeriksaan di Klinik Sungai Dua dan akan datang pada 6.5.04. Beliau mengandung hampir 9 bulan.

*Sgd.
Ku Mohd. Roshidi bin Ku Marzuki
L/Kpl/ 124141”.*

Siti Mariam turned up in court on 6th May, but she was not called to testify. The learned DPP requested for another date for the evidence of this lady to be recorded as she was then under maternity confinement. The court somehow refused to grant adjournment. Under the circumstances the prosecution applied for the statement of the witness be tendered in court on the account of delay under the provision of section 32(1)(i) of the Evidence Act. This, the court allowed. Siti Mariam's statement that was recorded under section 112 of the CPC was admitted and marked as exhibit P30. With that last piece of evidence the prosecution closed its case and offered eleven witnesses to the defence. The defence declined all of them.

Faced with the evidence from the prosecution adumbrated as above, the learned High Court Judge was satisfied that a prima facie case had been established and thereupon called the defence. The appellant had chosen to read a statement from the dock. His evidence was that he was arrested as soon as he alighted from the car. He went to that place to buy goods. He was not told why he was arrested. He

was not taken to the rear of the car when the police examined the booth of the car. He was also not shown the offending items allegedly taken from the car. Even when he was taken to the police station he was not shown the offending drugs. He was merely given a document to sign which he did. He had never trafficked in or did sell ganja. On the day in question he was not transporting ganja nor was he in possession of the green bag in which the drugs were found. He had nothing to do with the drugs identified in court. He did not know whose bag it was and he didn't know who had left the bag in the booth of his daughter's car.

The car was also used by others staying in the house including his son-in-law married to another daughter. This particular key was always left on the table whilst the other key was in the possession of Siti Mariam.

On the day of his arrest he did not know how the said bag came to be inside the booth of the car. He did not examine the booth of the car when he used it that day. According to him

even SP6 had borrowed the said car and had used it since SP6 was his friend. He denied having any telephonic conversation with SP6 on that fateful day. He denied agreeing to meet SP6 with the ganja.

In his appraisal of the above unsworn defence of the appellant the trial judge had these to say,

“I am of the view that taking all the evidence in its totality, and even though there is no evidence that the accused had dealt with the green bag or its contents, it is safe for this court to find that the accused had knowledge of the 4 kilos of ganja found inside the green bag and which was found inside the booth of the car the accused was driving. This coupled with the fact that SP6 had said he had previously dealt with the accused who was his supplier, and the fact that a small quantity of cannabis was found in his possession to which he had pleaded guilty, all these go to show his previous

conduct in dealing with cannabis and his knowledge of what cannabis is.

I therefore found the accused guilty as charged convicted him under section 39B(1)(a) of the DDA.”.

The Appeal

Before us the learned counsel for the appellant raised two grounds of appeal -

- 1) that the prosecution failed to tender the record of the telephone conversation between the agent provocateur (SP6) and the appellant to prove that there was such a transaction for sale and purchase of the drugs in question;
- 2) that the trial judge erred in law in admitting the section 112 statement of the appellant's daughter under s

132(1)(i) of the Evidence Act as it would caused unfairness and prejudice to the appellant.

It was also submitted that the trial judge had erred in giving too much weight on the statement.

We shall now consider the grounds of appeal.

Re ground (1) - The drugs transaction was triggered when SP6 the agent provocateur upon instruction of SP5 telephoned the appellant informing the appellant of his intention to purchase 4 kilograms of ganja. After making the call SP6 informed SP5 that the appellant agreed to meet him at the appointed place with the requested quantity of drugs i.e. 4 kilograms. According to SP6 their arrangement was for the delivery to take place at the back of 7-Eleven at about 8 p.m. With the arrangement made between SP6 and the appellant the ambush party led by SP5 raced to the scene. Sure enough, upon arrival from their respective position they saw the

appellant in his car approaching and stopping at the appointed place. This was at about the appointed time i.e. around 8 p.m. The appellant alighted from his car and was immediately nabbed by the raiding party. Upon inspection on the car the police recovered 4 slabs of compacted materials from inside a green bag that were later analysed and confirmed to be cannabis with a total net weight of 3,819 grams.

From the above episode it can be clearly seen that what took place at the scene of the crime was consistent with the evidence of SP6 with regard to the subject matter of the telephone conversation that he had with the appellant prior to that.

It is a consistent testimony that there was a prior arrangement between SP6 and the appellant for the delivery of the offending drugs and it had crystallised. In the circumstances, we are of the opinion that the evidence led by the prosecution in respect of the telephone conversation is well supported by the evidence of the sequence of events that took

place at the scene of crime. There is no need therefore for any further corroborative evidence of any recording of any conversation between SP6 and the appellant nor is there any need to produce the telephone bills of SP6 or the appellant as corroborative evidence.

We now come to the second ground.

Perusing the appeal records we find the following passage from the trial judge's ground of decision.

“Counsel then submitted that Siti Mariam ought to have been called. Counsel initially objected to Siti Mariam’s statement being admitted into evidence under section 32 of the Evidence Act. Having been served a copy of the statement and finding at that stage that the said statement was in his favour, he agreed to its admission although counsel qualified the admission by reserving his right to submit on the weight to be given to such

evidence. To my mind counsel cannot blow hot and cold. I agree that inadmissible evidence, even though not objected to by parties, cannot be admissible. But the statement of Siti Mariam is not inadmissible under section 32 but subject to certain qualifications. When such qualifications are waived by counsel it does not behove to protest subsequently. In any case I have already found based on counsel's submission that the accused indeed was given one ignition key and although he said that he left it on the table, Siti Mariam's statement showed that she gave that key to the accused. Whereas the other key which she had was for her use and for her family."

With respect of the above passage, we are in agreement with the trial judge and would like to add that the impugned statement is of not much significance to the case as we are of the view that the statement is not the foundation of the prosecution's case. There are other incriminating evidence

that points to the appellant having committed the offence. There is more than sufficient credible evidence of the appellant's involvement in the negotiation and agreement to sell to SP6 the 4 kilograms of cannabis subsequently brought to the appointed place in the car belonging to his daughter Siti Mariam.

Based on the above reasons we dismissed the appellant's appeal and affirmed the conviction and sentence.

Dated this 1st day of July 2009.

AZHAR HJ. MA'AH
Judge
Court of Appeal, Malaysia

Note:

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