

**DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANG KUASA RAYUAN)**

MAHKAMAH RAYUAN RAYUAN JENAYAH NO: W-05-61-2004

ANTARA

LIEW CHEE HONG

.... PERAYU

DAN

PENDAKWA RAYA

.... RESPONDEN

**DARIPADA MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
(MAHKAMAH TINGGI K.LUMPUR PERBICARAAN JENAYAH BIL. 45-10-95)**

Coram : Mokhtar Sidin, HMR
Mohd Ghazali Mohd Yusoff, HMR
Tengku Baharudin Shah Tengku Mahmud, HMR

JUDGMENT OF THE COURT

Introduction

The appellant's appeal is against his conviction and death sentence for trafficking in dangerous drug (1989 gram of cannabis) (the drug) at a bus stop near Sekolah Menengah Kebangsaan Jinjang Utara, Kuala Lumpur on 12.2.2002, an offence punishable under section 39B(2) of the Dangerous Drugs Act 1952 (DDA). He was arrested on a motorcycle

bearing registration number WJC 360 which had stopped at the bus stop where Chief Inspector Tansli Mering (SP10) and his police team lay an ambush based on information received identifying the said motorcycle. SP10 and SP11, a member of his team, approached the appellant who, when SP10 introduced himself as a police officer, was alleged to have thrown away a red plastic bag (P14) containing the drug in 2 packets wrapped in Chinese newspapers, and attempted to escape with the motorcycle. He was however apprehended after a struggle.

The Appeal

2. It was submitted before us that no prima facie case was made out against the appellant on the charge of trafficking at the close of the prosecution case. This is because the learned trial judge in his finding at that stage was not equivocal whether it was possession or trafficking.

3. We were referred to the learned Judge's note (see page 64 of the Appeal Record) to the effect that the prosecution had

succeeded in proving prima facie that the appellant was in possession of and was trafficking in the said drug and therefore called him to enter his defence on the charge under section 39B(1)(a) DDA.

4. It was further contended on the facts as found by the learned Judge it was also unclear whether he found possession or trafficking, as in his grounds of decision he mentioned “evidence without inference” to show that the appellant had exclusive custody and control of the drug and also knowledge of it (see page 86 of the Appeal Record). He did not appear to have invoked the statutory presumption of trafficking.

5. It was also submitted that the learned trial Judge simply found the appellant in possession of the drug on the motorcycle. Even that was by inference or presumption though the judge did not say so. Hence learned counsel urged upon us to reduce the charge to possession which he conceded was proven.

6. The learned Deputy contended that the learned trial Judge did not invoke any of the statutory presumptions. The court relied on actual physical possession and based on the large amount of drug involved the appellant was deemed to be trafficking. We note that when submitting in the court below the prosecution relied on the presumption of trafficking under section 37(da) DDA (see page 62 of the Appeal Record).

Finding

7. We do not agree with learned counsel that the learned Judge was equivocal in his finding of a prima facie case. He clearly states that he found both possession and trafficking proven which should entitle him to call for the appellant's defence on the charge of trafficking. But the question is whether on the evidence before him he was justified to so find.

8. The learned Deputy is not wrong to say that the learned Judge did not invoke any of the statutory presumptions because no such reference was made in his grounds of decision

for calling the defence. But the learned Judge also did not say anywhere that the appellant was deemed to be trafficking because of the large amount of drug.

9. In calling for the appellant's defence, the learned Judge merely said that he applied the test propounded by this court in *LOOI KOW CHAI v. PP* (2003) 2 MLJ 66. We take him to mean that he had subjected the prosecution evidence to maximum evaluation and asked himself the question "If I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative, then no prima facie case had been made out and the accused would be entitled to an acquittal" as submitted by learned counsel.

10. The learned Judge was satisfied that there was no breach in the chain of evidence relating to custody of the said drug after recovery and accepted the testimony of SP4 on the identity and weight of the same as they were unchallenged. He

did not however state his finding on the testimony of SP10 which he merely narrated and found support from SP11's evidence apart from stating that they both saw the appellant shiver when approached by SP10, throw P14 from the motorcycle and try to escape with the motorcycle. With that the learned Judge appeared to have made a finding of prima facie case that the appellant had exclusive custody and control of the cannabis in the charge and had knowledge of the same and that the court could, on the available evidence, convict him for trafficking under section 39B DDA (see page 86-87 of the Appeal Record).

11. We would not be wrong to assume that the learned Judge accepted the prosecution's narrative of the case for in the later part of his judgment, when considering the defence, he states that the appellant was found in possession of the drug with knowledge being inferred from his own conduct in throwing it out of the motorcycle and attempting to escape when the police tried to apprehend him (see page 91 of the Appeal Record). But the learned Judge himself states

immediately thereafter that though such conduct of the appellant could also be imputed to his reaction when taken by surprise, which conduct could not then infer knowledge of the drug being carried, he (the Judge) was in all the circumstances of the case of the view that the court could also take the inference to the contrary, which he apparently did. He also inferred that the appellant was aware of the drug on the ground that anyone having possession of P14 would know its contents because of the loose packing in Chinese newspapers when there was no such evidence.

12. It is trite law that when more than one inference can be drawn from a set of facts, then the court must adopt the inference most favourable to an accused person. The learned Judge had therefore clearly misdirected himself in law when he inferred from the appellant's conduct that he knew about the drug wrapped in Chinese newspapers inside P14 when the same conduct, as conceded by the learned Judge, could also infer otherwise.

13. The prosecution case is thus left only with custody and control of the drug by the appellant which established fact would attract the statutory presumption of possession under section 37(d) DDA. Such presumed possession would not attract the presumption of trafficking under section 37(da) DDA as that applies only if the drug is found in the appellant's possession and not when he is presumed to be so found as in this case. See MUHAMMAD HASSAN v. PP (1998) 2 CLJ 170. The learned Judge had therefore erred in calling for the appellant's defence as he did.

14. As conceded by learned counsel for the appellant in his submission and indeed proven to the satisfaction of the learned Judge in the court below, the prosecution only established a case of possession of the drug for the appellant to rebut, as such his defence should only have been called on a charge so reduced.

Conclusion

15. In all the circumstances aforesaid we allowed the appeal and set aside the appellants conviction and sentence and substituted the conviction with one under section 6 DDA read with section 39A(2).

16. In assessing sentence, we considered the submission of learned counsel that the appellant was a young first offender but also took judicial notice that cases of this nature were rampant. To arrest the ensuing social problem and deteriorating drug abuse among the youth we felt that public interest would be best served by a deterrent sentence being imposed. We sent the appellant to prison for 20 years with effect from the date of his arrest and ordered that he be given the statutory minimum of 10 strokes of the rotan.

TENGGU DATO' BAHARUDIN SHAH BIN TENGGU MAHMUD
Hakim Mahkamah Rayuan
Malaysia.

Tarikh : 19.9.2007

Karpal Singh for the appellant
(Solicitors : Messrs Karpal Singh & Co.)

Teo Say Eng
Deputy Public Prosecutor
on behalf of the Public Prosecutor
(Jabatan Peguam Negara)