

DALAM MAHKAMAH RAYUAN MALAYSIA

(BIDANGKUASA RAYUAN)

MAHKAMAH RAYUAN

RAYUAN JENAYAH NO. B-05-156-2006

[Mahkamah Tinggi Shah Alam Semakan Jenayah
Selangor No: 43-18-2006]

DI ANTARA

PENDAKWA RAYA

..... PERAYU

DAN

MARWAN BIN ISMAIL

..... RESPONDEN

**CORAM: Mohd. Ghazali Mohd. Yusoff J.C.A
Zulkefli Ahmad Makinudin, J.C.A.
Abdull Hamid Embong J.C.A.**

JUDGMENT OF THE COURT

The sole question for our decision is simply what a magistrate needs to do in a case where an accused person who is tentatively charged for drugs trafficking under s.39B (1) Dangerous Drugs Act is brought up before him for a mention.

2. The High Court at Shah Alam had called up this matter for a revision. The learned judge set aside the order of the magistrate who had earlier remanded the accused for a further period of two months when his case was brought up before the magistrate for an initial mention. The reason given for the further remand was that the chemist report on the drugs which was the subject matter of a tentative charge for trafficking under s.39 B(1) of the Dangerous Drugs Act 1952 (DDA) against the accused was not ready. As such

the magistrate withheld the transmission of the case to the High Court.

3. Both the learned deputy public prosecutor and the accused person were represented and advanced submissions at the revision proceedings before the High Court. The learned judge concluded that to further remand the accused person for another two months was unlawful and amounted to the usurpation of a judicial function by the prosecution. The learned judge then revised the order made by the magistrate (for a further remand of the accused) pursuant to his power of revision under s.325 of the Criminal Procedure Code (CPC). The High Court then ordered that the accused be reproduced before the magistrate to reconsider whether the case should be transmitted to the High Court under s.41A DDA or alternatively for his discharge pursuant to s.29 CPC.

4. Against that order the learned public prosecutor appealed to this Court.

5. Before us the learned deputy public prosecutor argued that the magistrate has no power to transmit the case to the High Court without the consent of the Public Prosecutor under s.39 B(3) of the DDA. That section reads :-

“(3) A prosecution under this section shall not be instituted except by or with the consent of the Public Prosecutor;

Provided that a person may be arrested, or a warrant for his arrest may be issued and executed, and any such person may be remanded in custody notwithstanding that the consent of the Public Prosecutor to the institution of a prosecution for the offence has not been obtained, but the case shall not be further prosecuted until the consent has been obtained.” (emphasis by the DPP).

Subsection (4) reads as follows :-

“4. When a person is brought before a Court under this section before the Public Prosecutor has consented to the prosecution the charge shall be explained to him but he shall not be called upon to plead, and the provisions of the law for the time being in force relating to criminal procedure shall be modified accordingly.”

6. The DPP argued that reliance by the learned judge on s.41A of the DDA was a clear misdirection relying, in the main, on the decision of the High Court in the case of **PENDAKWA RAYA V ILLAMARAN A/L KANNIAPAN @ ANNIAPAN** [1992] 1 CLJ 492 and quoting in particular this passage of that judgment :-

“..... the accused is brought before the court when the charge may be read and explained to him. He will not be asked to plead to the charge (see s.

39B(4) and neither will he be formally tried for the offence with which he had been tentatively charged until the consent by the Public Prosecutor as required under s.39B(3) has been obtained. In the meantime the offending drugs should, as expeditiously as the circumstances of the case permit, be delivered to the Chemist for analysis and final determination of its weight and contents. Pending the Chemist report and the consent from the Public Prosecutor, the accused may by virtue of the proviso to subs.(3) of s.39B, be remanded in custody.”

7. The case of P.P V. OLADOTUN LUKMARU UMARU & ORS [1991] 1 MLJ 187 was also relied upon where the learned High Court judge there opined that the Public Prosecutor’s consent is a necessary safeguard that needs to be undertaken before one is exposed to a prosecution for an offence of drug trafficking in the High Court.

8. It was further submitted that it would be unfair to subject an accused person to a charge under this section if the weight of the drugs had not been determined upon an analysis by the Chemist. As such s. 41A of the DDA should be read subject to s.39B (3) of the DDA.

9. Our understanding of the learned DPP's submission is that in short, the prosecution of an accused person for an offence of drugs trafficking under s.39B (1) DDA should be put on hold until a consent of the Public Prosecutor has been given. The accused person may then, pending that consent be remanded in custody, and that s.41A DDA till then, cannot be applied.

10. S.41A of the DDA reads :-

“41A. Special Provision relating to transmission of a case to and trial by, the High Court.

- (1) Where any case in respect of an offence under this Act is triable exclusively by the High Court or is required by the Public Prosecutor to be tried by the High Court, the accused person shall be produced before the appropriate subordinate court which shall, after the charge has been explained to him, transmit the case of the High Court without holding a preliminary inquiry under Chapter XV11 of the Criminal Procedure Code, and cause the person to appear or brought before such Court as soon as practicable.

- (2) When the accused person appears or brought before the High Court in accordance with subsection (1), the High Court shall fix a date for his trial which shall be held in accordance with the procedure under Chapter XX of the Criminal Procedure Code.

- (3) The trial of a case transmitted to the High Court under subsection (1) shall be by a Judge of the High Court sitting alone, and the provisions of Chapters XXI and XXII of the Criminal Procedure Code shall not apply to such trial.
- (4) The provision of subsections (1), (2) and (3) shall have effect notwithstanding any other written law to the contrary.”

11. In the case of PUBLIC PROSECUTOR V LEE CHAN SANG [1989] 1 MLJ 224, the Supreme Court said this of that section :-

“Section 41 of the Act therefore confers jurisdiction on the Magistrate’s Court only in so far as to receive the production of the accused and to have the charge explained to him and then to transmit the case to the High Court forthwith without holding a preliminary inquiry.

The Magistrate's Court has no jurisdiction even to record a plea of the charge. Indeed s.41(3) of the Act directs that the trial of the case shall be by a judge of the High Court sitting alone.

Section 39B(3) of the Act provides that a prosecution under that section shall not be instituted except by or with the consent of the Public Prosecutor. That subsection also direct that the case shall not be further prosecuted until the consent has been obtained. In respect of the respondent the Public Prosecutor's consent was issued on only on 16 July 1984.

Section 39B(4) provides that when a person is brought before a court but before the Public Prosecutor has consented to the prosecution the charge shall be explained to him but he shall not be called upon to plead."

12. S.41A DDA deals with the procedure to be undertaken in respect of cases triable exclusively by the High Court. A charge for trafficking under s.39B (1), an offence that attracts the mandatory death penalty, is certainly a case triable exclusively by the High Court.

13. In our view therefore, this special provision governs the procedure to be followed in respect of a person charged under s.39B(1) DDA. The magistrate has no option but to strictly adhere to the steps to be undertaken thereunder. If an accused person charged for an offence under s.39B (1) DDA is produced before a magistrate, he must do the following :-

- (i) Have the charge read to him.
- (ii) Explain to him the charge.
- (iii) Not to record any plea by the accused, even if he chose to make one.
- (iv) Transmit the case to the High Court.

- (v) Cause the accused person to be brought before the High Court as soon as is practicable.

14. It may be noted that the reference to the preliminary inquiry in the section is now superfluous since Chapter XVII of the CPC has now been repealed (see Act A 908 w.e.f. 17.02.1995).

15. S.39B (3) DDA, deals with a step in the prosecution of an accused person charged under s.39B (1) DDA. The consent of the Public Prosecutor is a public policy requirement which Parliament has provided for the safeguard of the accused person. In practice this step is undertaken by producing a letter of consent from the Public Prosecutor (or a deputy public prosecutor pursuant to s.376 of the CPC, since the consent of the Public Prosecutor under s.39B (3) is in effect, not a personal power), before the High Court upon the commencement of the trial. It must be

emphasised that once the case has been transmitted to the High Court, the provisions regarding trials before the High Court as provided in Chapter XX of the CPC takes effect.

16. S.41A DDA is a special provision under a special law which operates independently of any other provisions. It provides for a convenient procedure whereby one who is charged with a capital offence under the DDA which is triable only by a High Court may be produced before “the appropriate subordinate court” (note that it need not be a Magistrate Court) in order to obtain an order for transmission. Once produced, that court is under a mandatory obligation to order a transmission the case. This is the clear directive of the Supreme Court in LEE CHAN SANG (supra).

17. The prosecution of the case on the other hand begins in the High Court, when the charge is read and the accused is asked to plea to it. (see PERUMAL V PP [1970] 2 MLJ 265.)

18. Thus giving a consent or the withholding of it, being a prosecutorial power, may be exercised even at that stage. The exercise of this power by the Public Prosecutor is in our view unconnected with the special procedure for transmission under s.41A DDA. We cannot therefore accept the proposition that s.41A has to be read subject to s.39B.

19. With respect, we cannot agree with and hold it as wrong, the view in PP V ALADOTUN LUKMARU UMARU that the act of a magistrate of transmitting the case to the High Court under s.41A is a further step in the prosecution. In our view, the prosecution of the case, following PERUMAL, begins only at the High Court. Similarly we

would also hold that the ruling of the learned judge in ILAMARAN A/L KANNIAPPAN that an accused person in that situation may be remanded in custody pending the outcome of the analysis of the drugs to be wrongly decided. The DDA does not empower a magistrate to remand an accused person tentatively charged for trafficking under s.39B (1).

20. For these reasons, this appeal is dismissed. However upon our deliberation of the learned judge's order, we are minded to also set that aside and in place make an order that this case be remitted to the Magistrate Court to make an order under s.41A of the DDA.

Dated: 28th December, 2007

sgd

**(ABDULL HAMID EMBONG)
JUDGE COURT OF APPEAL
MALAYSIA**

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