

**DALAM MAHKAMAH PERSEKUTUAN MALAYSIA
(BIDANGKUASA RAYUAN)
RAYUAN JENAYAH NO. 05-44-2005 (W)**

LETCHUMANAN A/L SUPPIAH ... PERAYU
LAWAN
PENDAKWA RAYA ... RESPONDEN

RAYUAN JENAYAH NO. 05-45-2005 (W)

PENDAKWA RAYA ... PERAYU
LAWAN
LETCHUMANAN A/L SUPPIAH ... RESPONDEN

[Dalam Mahkamah Rayuan Malaysia
(Bidang Kuasa Rayuan)
Rayuan Jenayah No. W-05-26-2000

Antara

Pendakwa Raya ... Perayu
Dan
Letchumanan a/l Suppiah ... Responden]

Koram: Alauddin Bin Dato' Mohd Sheriff, PMR
Hashim Bin Dato' Hj. Yusoff, HMP
Zulkifli Bin Ahmad Makinudin, HMP

Judgment Of Hashim Bin Dato' Hj. Yusoff, FCJ

Background

1. The Respondent (Accused) in this appeal was originally charged for drug trafficking under section 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). He was acquitted by the High Court at the close of the prosecution case without his defence being called. The Public Prosecutor then appealed to the Court of Appeal against the High Court decision. The Court of Appeal thereafter ordered the Respondent to enter his defence on a reduced charge of possession of the said drugs under section 12(2), punishable under section 39A of the Act. Hence this appeal by the Public Prosecutor against the said Court of Appeal decision and a cross appeal by the Respondent against the decision of the Court of Appeal in calling for his defence on the reduced charge of possession.

Preliminary Objections

2. At the outset of the hearing of the Appeal and the cross appeal before us, the learned DPP raised a preliminary objection against the cross appeal by the Accused on the ground that he

had no right of appeal as the decision of the Court of Appeal had not finally disposed off his rights yet. Similarly, the learned counsel for the Accused also raised objection against the Public Prosecutor's appeal against the Court of Appeal's decision of acquitting the Accused on the trafficking charge at the end of the prosecution case and ordering the Accused to enter his defence on a charge of possession of the said drugs.

3. Learned DPP's reply to the preliminary objection by the Respondent is that the prosecution has a right of appeal against the said decision of the Court of Appeal since by calling the Respondent to answer on the reduced charge of possession, it would mean that he was acquitted from the original charge of trafficking in the said drugs. In other words, it was submitted that there was already a final disposal of the matter regarding the trafficking charge.
4. On this point, learned counsel for the Respondent submitted that while conceding that the Respondent's appeal was not appealable because the trial of the Respondent has not been finally disposed of yet, the prosecution also should have no right to appeal at this stage of the trial otherwise it would mean

that the Court of Appeal would have no power to exercise its discretion. Reference was made to Article 8 of the Federal Constitution which provides that there should be equality before the law. He submitted it to mean that if the Respondent was not allowed to appeal at this stage, then the same should apply to the Public Prosecutor.

5. The learned DPP submitted that the right of appeal to the Federal Court against the decision of the Court of Appeal is provided under section 87(1) of the Courts of Judicature Act 1964 ('the CJA') which reads:-

“Section 87 (1) The Federal Court shall have jurisdiction to hear and determine any appeal from any decision of the Court of Appeal in its appellate jurisdiction in respect of any criminal matter decided by the High Court in its original jurisdiction subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal.”

The word “*decision*” (in section 87) is defined in section 3 of the CJA as follows:-

““decision” means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.”

Prior to the amendment of the word ‘decision’ in 1998, the word ‘decision’ was defined as follows:-

““decision” includes judgment, sentence or order.”

6. The purpose of the amendment as found in the explanatory statement to the amendment Bill of Act A 1031 which came into force on 31/07/1998 is to avoid any delay in the hearing of a case, because if a dissatisfied party were allowed to appeal against the Court’s decision regarding the admissibility of any evidence or document then the Court would be forced to stay the hearing for the case pending the outcome of the appeal.

7. In **Saad bin Abas & Anor v PP [1999] 1 MLJ 129** the Accused were acquitted by the Magistrate's Court at the close of the prosecution case on a charge under section 354 of the Penal Code. On appeal to the High Court, the Accused were ordered to enter their defence on the said charge. The Accused being dissatisfied with the High Court decision, applied for leave to appeal to the Court of Appeal. The Court of Appeal however ruled at page 137 as follows:-

“The order of the High Court in the present case for which leave to appeal is sought was that the applicants were to enter their defence. At the stage of making the order, certainly it has no finality in its intent. Only after the close of the defence as a result of that order will there be finality. Only after the close of the defence will there be a decision to ‘affect the event of the appeal’, meaning that the defence story will finally determine the result of the whole case which was the purpose of the appeal.”

The Court of Appeal further ruled at page 138:-

“So, for the purpose of s. 50(2) (of the CJA), this Court has to first ascertain whether the ‘decision’ of the High Court in ordering the applicants before us to enter their defence was a ruling that had the effect of finally disposing of their rights. Certainly not, and it would only happen after a decision had been made at the close of the defence.”

8. The Court of Appeal in **Saad Bin Abas**, supra, relied on 2 Federal Court authorities i.e. **Lee Pin Seng v PP [1986] 2 MLJ 416** and **Cecil Rajah v PP [1981] 1 MLJ 147** where in both cases, the Federal Court ruled that the Court should not interfere with the decision of the learned judge who had ordered the defence to be called after he had heard the appeal against the decision of the Sessions Court which had acquitted the respective Accused at the close of the prosecution case. Although both these cases went to the Federal Court by way of reference under section 66 of the CJA, it goes to show that the order of the Court of Appeal should be upheld so that the trial could proceed smoothly.

9. Although it is the Respondent's counsel's argument that since the Respondent could not appeal as the matter has not been finally disposed of yet, therefore the same should apply to the prosecution to prevent them from appealing against the order of the Court of Appeal asking the Respondent to answer on the reduced charge of possession, I would agree with the learned DPP's submission that it does not necessarily mean so. The reason is that the original charge against the Respondent was one of trafficking. The effect of the Court of Appeal's decision to call the defence on the reduced charge of possession would mean that the Respondent had been acquitted of the original charge of trafficking. If the trial were to continue on the basis of possession, then the Respondent could only be required to rebut the presumption of possession. It would also mean that the prosecution could only get back the original charge of trafficking by appealing to the Federal Court at this stage, as it did in the instant appeal. The effect of the Court of Appeal's order is that the charge of trafficking has been finally disposed of by calling for the defence only for possession. It is my considered opinion that this would be the correct time for the Public Prosecutor to appeal against the Court of Appeal's decision if he wants the case to continue on

the trafficking charge and not wait to file his appeal at the end of the whole trial.

10. In **Koh Zhan Quan Tony v PP & Anor Motion [2006] SGCA 17** reported in **[2006] 2 SLR 830** the Singapore Court dealt with the issue of whether a conviction of an Accused on a lesser charge amounts to an acquittal of the original charge. In that case the Accused were originally charge with murder under section 302 read with section 34 of the Penal Code but were convicted of the lesser charge of robbery with hurt under section 394 Penal Code. The Court of Appeal said “*the fact that the applicants were convicted of the lesser charge of robbery with hurt did not detract from the fact that they were acquitted of the charge of murder. At no time did the Respondent apply to the Court to drop the original charge of murder and substitute a lesser charge instead.*”

11. It is also my considered view that the Respondent is not prejudiced if this Court were to allow the Public Prosecutor’s appeal at this stage of the trial by reversing the Court of Appeal’s decision and calling upon the Respondent to make his defence on the original trafficking charge because he would still

have the right and the chance to raise a reasonable doubt in the prosecution case. Even if he were to be found guilty and then convicted on the trafficking charges, the Respondent would still have his right to appeal to the Court of Appeal and further to the Federal Court. The Respondent would still not be deprived of the right provided by the law for the two tiers of appeal. (See: **Megat Najumuddin B. Dato' Seri (Dr.) Megat Khas v Bank Bumiputera (M) Bhd. [2002] 1 MLJ 385** at page 429).

12. As stated earlier in my judgment, the learned counsel for the Respondent had conceded that his appeal is not appealable because the matter had not finally dispose of the rights of the Respondent. His only argument was that since the Respondent could not appeal, therefore the same should apply to the prosecution. This means that the Respondent's appeal is not competent before us at this stage.

Conclusion

13. For the above reasons, I would allow the Public Prosecutor's preliminary objection and dismiss the Respondent's preliminary objection. It follows that the Respondent's appeal is struck out

and that the Public Prosecutor's appeal before us is to be proceeded with.

14. My learned brothers Alauddin Bin Dato' Mohd Sheriff, PMR and Zulkefli Bin Ahmad Makinudin, FCJ have seen this judgment in draft and have expressed their concurrence.

Dated: 10th July, 2009

Signed.
(DATO' HASHIM BIN DATO' HJ. YUSOFF)
Judge

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Cases referred to:-

- (1) Saad bin Abas & Anor v PP [1991] 1 MLJ 129;
- (2) Lee Ping Seng v PP [1986] 2 MLJ 416;
- (3) Cecil Rajah v PP [1981] 1 MLJ 147;
- (4) Koh Zhan Quan Tony v PP & Anor Motion [2006] SGCA 17
[2006] 2 SLR 830;
- (5) Megat Najumuddin B. Dato' Seri (Dr.) Megat Khas v Bank
Bumiputera (M) Bhd. [2002] 1 MLJ 385