

DALAM MAHKAMAH PERSEKUTUAN MALAYSIA

RAYUAN JENAYAH NO. 05 - 82 - 08 (B)

DI ANTARA

SAMUNDEE DEVAN A/L MUTHU KERISHNAN ... PERAYU

DAN

PENDAKWA RAYA

... RESPONDEN

[Dalam Mahkamah Rayuan Malaysia di Putrajaya  
Rayuan Jenayah No. B-05-39-05 & B-05-40-05

Di antara

Pendakwa Raya

dan

Samundee Devan a/l Muthu Kerishnan]

Koram:

Zaki Tun Azmi, KHN  
Hashim Yusoff, HMP  
Mohd Ghazali Mohd Yusoff, HMP

JUDGMENT OF THE COURT

1. The appellant was charged with two offences of trafficking in dangerous drugs under s.39B(1)(a) of the Dangerous Drugs Act 1952 (the Act) and punishable under s.39B(2) of the same. The first charge relates to 33.2 grammes of heroin and monoacetylmorphines (5.8 grammes of heroin and 27.4 grammes of monoacetylmorphines) and the second charge

relates to 514.1 grammes of heroin and monoacetylmorphines (73.6 grammes of heroin and 440.5 grammes of monoacetylmorphines).

2. The facts showed that on 2 April 1999 at 7.40 am, acting on information in relation to a stolen motorcar, L/Kpl Chandran (PW7) and L/Kpl Appasamy from the Criminal Intelligence Unit, Police Headquarters, Petaling Jaya went to the car park of Flat C, Taman Petaling Utama, Petaling Jaya to investigate. Having identified the stolen motorcar and having noted that there was no one in the motorcar, they made an observation from a distance for about an hour and 40 minutes. Subsequently, they saw the appellant walking towards the motorcar. The appellant then stopped, looked around, opened the boot of the motorcar and took out a red plastic package and then closed the boot. PW7 together with L/Kpl Appasamy immediately rushed towards the appellant and PW7 identified himself as 'police'. The appellant looked shocked and pale and attempted to run away but was apprehended. PW7 seized the red plastic package from the appellant's hand and upon opening the package, found therein 140 small plastic packets each containing pinkish crystallite and powdery substance later analysed by the chemist to be heroin monoacetylmorphines. Upon searching the boot of the motorcar, they found four plastic packages and therein 1,648 small plastic packets which also contained a similar pink crystallite and powdery substance also later analysed by the chemist to be heroin

monoacetylmorphines.

3. When the case for the prosecution was concluded, the learned trial judge of the High Court found that a *prima facie* case had been made out against the appellant on both charges of trafficking and hence called upon the appellant to enter on his defence. He was satisfied that the appellant was in possession of the dangerous drugs and accordingly invoked the presumption of trafficking under s.37(da)(iiia) of the Act.

4. The appellant elected to make a statement from the dock. He also called 2 witnesses, namely, his mother (DW1) and sister (DW2).

5. At the close of the case for the defence the learned trial judge concluded that the defence was one of mere denial. He also found the evidence of DW1 and DW2 to be irrelevant as they were not present at the time of the arrest and nor did they know anything about the motorcar or the packages containing the dangerous drugs seized from the appellant by the police.

6. However, at the conclusion of the trial and after hearing the submission of both the Deputy Public Prosecutor and counsel for the appellant, the learned trial judge amended the two charges of trafficking and substituted therewith to one of possession of 4.875 grammes of heroin and monoacetylmorphines under s.12(2) of the Act punishable

under s.39A(1) of the same and sentenced the appellant to 5 years imprisonment and 9 strokes of whipping.

7. The learned trial judge made the decision that he did after concluding that the analysis carried out by the chemist (PW6) based on the small quantities of samples for the purpose of quantitative test was not sufficient, i.e., he was dissatisfied with the small weight of the samples used by the chemist for analysis. In relation to this, the learned trial judge said in his grounds of judgment that he relied on *Leong Bon Huat v Public Prosecutor* [1993] 3 MLJ 11 as a basis for his conclusion. In *Leong Bon Huat*, a conviction under s.39B(1)(a) of the Act for trafficking in 793.85 grammes of cannabis was attacked on appeal on the ground that the testimony of the chemist did not prove beyond reasonable doubt that the bulk of the dried leaves was cannabis within the meaning of s.2 of the Act. In that case, the chemist testified “I did not obtain the weight of each sample taken but the total weight of samples taken for analysis was more than 10% of the net weight of 793.85g”. In delivering the judgment of this court, Edgar Joseph Jr SCJ said (at pages 14-15) -

“What is necessary is that the testimony of the chemist upon such a matter must be clear and convincing.

To take the point a little further, if by the expression ‘more than 10% of the net weight of 793.85g’ means a little more than 10% - and we think, in ordinary parlance, it would not be incorrect to say that it bears such a meaning - then, as a matter of simple arithmetic, the

testimony of the chemist, at best, established that the appellant was in possession of a little more than 79.30g of cannabis, which would be well below the statutory minimum of 200g of cannabis required for the operation of the presumption of trafficking under s 37 (da) of the Act.”

“Accordingly, we have no option but to allow the appeal, to quash the conviction for trafficking in cannabis, to set aside the sentence, and to substitute in lieu thereof, a conviction for possession of cannabis in contravention of s 39A of the Act and a sentence of life imprisonment to take effect from the date of arrest, with the mandatory ten strokes of the rotan.”

8. On appeal by both the appellant and the Public Prosecutor in the instant appeal, the Court of Appeal allowed the appeal by the Public Prosecutor, set aside the whole decision of the learned trial judge and substituted it with a conviction under s.39B(1)(a) of the Act and punishable under s.39B(2) of the same in respect of both the original charges of trafficking. The Court of Appeal accordingly imposed the mandatory death sentence on the appellant under each of the original charges of trafficking.

9. The appellant appealed to this court.

10. In the judgment of the Court of Appeal in the instant appeal (since reported as *Samundee Devan a/l Kerishnan Muthu v Public Prosecutor* [2009] 1 MLJ 697), the Court referred to its judgment in *Gunalan a/l Ramachandaran & Ors v Public Prosecutor* [2004] 4 MLJ 489 where it was decided that *Leong*

*Bon Huat* did not lay down any general principle. In delivering the judgment of the Court in *Gunalan*, Abdul Hamid Mohamad, JCA (as he then was) said (at page 516) -

“With greatest respect, I find that the judgment of the Supreme Court in that case is not an authority for saying that the law requires that 10% of the total weight of the drug must be tested. No reference was also made to *Public Prosecutor v Lam San* ([1991] 3 MLJ 426). With respect, the judgment seems to focus on the interpretation of the words ‘more than 10%’ used by the chemist as if it is a statutory provision or a clause in a contract. The point is, there is no provision whatsoever in the Act which requires at least 10% of the total weight of the substance in question to be taken out for the purpose of analysis. As seen in *Public Prosecutor v Lam San* ([1991] 3 MLJ 426), the 10% is nothing more than the practice among chemists.”

The views of the learned judge above was accepted by this court in *Chu Tak Fai v Public Prosecutor* [2007] 1 MLJ 201.

11. In its judgment in the instant appeal, the Court of Appeal was of the view that the decision of the learned trial judge to amend both charges from trafficking in the dangerous drugs to one single charge of possession of the dangerous drugs was flawed.

12. Before us, learned counsel for the appellant conceded that he has to accept the evidence of the chemist and hence did not pursue the above issue. He only raised one point, namely, whether there was *mens rea* trafficking. He pointed out that the dangerous drugs were found in plastic bags and this showed

that there was no *mens rea* trafficking and thus the learned trial judge was wrong in relying on the presumption of trafficking under s.37(da)(iiia) of the Act at the conclusion of the case for the prosecution. Counsel then attacked the judgment of the Court of Appeal on the ground that the judgment seems to revolve around the conduct of the appellant. In relation to this, he referred to pages 705-706 of the judgment of the Court of Appeal (as reported in the Malayan Law Journal) where Abdul Malik Ishak JCA, in delivering the judgment of the court, dealt with the conduct of the appellant just before he was arrested as follows -

(a) 'the first conduct' - when the appellant stopped at the motorcar, he was seen "looking to the left, to the right and to the front and at the same time turning his head to the left and to the right";

(b) 'the second conduct' - when PW7 and L/Kpl Appasamy rushed to the appellant and PW7 introduced himself as 'police', the appellant "looked shocked and attempted to run away";

(c) 'the third conduct' - because of the squeaky noise made by the shoes worn by PW7 and L/Kpl Appasamy, the appellant saw PW7 and "looked surprised and his face turned pale".

13. We cannot see any merits in this argument. The learned judge was merely laying the factual matrix at the close of the prosecution's case based on the evidence adduced which also

included the following -

(a) that before the appellant opened the boot of the motorcar he was “behaving suspiciously”;

(b) that the appellant had a set of keys and had used one of the keys to open the boot of the motorcar;

(c) that the appellant then took out a red plastic package inclusive of its contents and held it in his right hand and was seen walking away from the motorcar;

(d) that when PW7 and L/Kpl Appasamy rushed toward the appellant and PW7 introduced himself as ‘police’, the appellant attempted to run away with the red plastic bag but was apprehended “and he behaved as per the second conduct and as per the third conduct”;

(e) that when the appellant was asked to open the boot of the motorcar by the police, PW7 discovered four more plastic packages which contained the subject matter of the second charge.

14. Consequent to laying down the factual matrix discussed above, the learned judge of the Court of Appeal said -

“Those were the facts and the circumstances of the case as adduced by the prosecution. We merely reproduce them without any addition or

subtraction. Our approach is in accord with the decision of this court in *Basil bin Omar V Public Prosecutor* [2003] 1 MLJ 192. Each of the conduct of the accused when taken separately may appear neutral but when taken together they gave rise to the inference that the accused was aware of the contents of the red plastic package that he was carrying in his right hand as well as the drugs that were found in the boot of the blue Honda Civic. We must not forget that when PW7 and his colleague went to the car park of Flat 'C', it was entirely based on the information pertaining to the theft of a stolen motor vehicle. No information was received in regard to a drug related offence. Both PW7 and his colleague must have least expected to arrest the accused for being in physical possession of the drugs. We are entitled to take into account the damning conduct of the accused before he was arrested."

15. We are also of the view that the contemporaneous conduct of the appellant in attempting to run away when PW7 identified himself as 'police' is relevant and admissible pursuant to s.8 of the Evidence Act 1950 under the circumstances of the instant appeal. Such conduct is of course not to be taken in isolation but together with all the other circumstances of the case. That would be the correct approach to circumstantial evidence (see *Chan Chwen Kong v PP* [1962] MLJ 307).

16. We also find no merits in the argument canvassed by learned counsel for the appellant that since the dangerous drugs were found in plastic bags, this showed that there was no *mens rea* trafficking and thus the learned trial judge was wrong in relying on the presumption of trafficking under section 37(da)(iia) of the Act at the conclusion of the case for the prosecution.

17. We find that the evidence adduced by the prosecution before the learned trial judge showed that the appellant was clearly in possession of the plastic packages and that he had knowledge of the contents of the packages. The facts denote that the said dangerous drugs were in his custody and control. He was in possession of a set of keys one of which was used to open the boot of the motorcar in which the dangerous drugs were found. He was clearly aware of the packages and was in fact holding one of the packages when he was approached by the police and consequently attempted to run away. The combined strength of these facts and circumstances gave rise to a strong inference that the appellant had *mens rea* possession of the packages containing the dangerous drugs and he had knowledge of the dangerous drugs. There was evidence of possession of the dangerous drugs independent of s.37(d) of the Act.

18. The dangerous drugs as per the two charges were in excess of 15 grammes respectively as provided under s.37(da)(iiia) of the Act and this would trigger the statutory presumption of trafficking as provided in s.37(da) of the Act. Premised upon these facts, the learned trial judge was correct in finding that a *prima facie* case has been made out against the appellant at the conclusion of the case for the prosecution on the two offences that he was charged with and calling upon him to enter on his defence. The learned trial judge found that the defence was a mere denial.

19. The Court of Appeal found that the learned trial judge had erred in arriving at the whole of the decision and as a consequence had set aside his whole decision and substituted it with a conviction under s.39B(1)(a) of the Act and punishable under s.39B(2) of the same in respect of both of the original charges of trafficking and rightly so as the appellant failed to cast a reasonable doubt.

20. As we find no plausible reason to disturb the decision of the Court of Appeal, this appeal is hereby dismissed. Conviction and sentence imposed on both charges are affirmed.

Dated this 17th day of June 2009.

(Mohd Ghazali Mohd Yusoff)  
Judge  
Federal Court Malaysia

Counsel

For the Appellant: Karpal Singh  
Tetuan Karpal Singh & Co

For the Respondent: Nurulhuda Nur'aini Mohd Noor  
Deputy Public Prosecutor