

**IN THE FEDERAL COURT OF MALAYSIA
CRIMINAL APPEAL NO. W-05-34 OF 2008**

BETWEEN

TAN YEW CHOY ... APPELLANT

AND

PUBLIC PROSECUTOR ... RESPONDENT

**[In the matter of Criminal Appeal No. W-05-50 of 2002
Court of Appeal at Putrajaya**

Between

Tan Yew Choy ... Appellant

And

Public Prosecutor ... Respondent

Coram: Alauddin bin Dato' Mohd. Sheriff, PCA
Arifin bin Zakaria, CJM
Zulkefli bin Ahmad Makinudin, FCJ

JUDGMENT OF THE COURT

Introduction

The appellant was charged in the High Court at Kuala Lumpur on the following two charges under the Dangerous Drugs Act 1952 ["the Act"]:

First Charge

“Bahawa kamu, pada 10 Januari 2001, jam lebih kurang 1.00 tengahari, di rumah nombor 3-1-15, Green View Apartment, Jalan 8/40, Taman Pusat Kepong, Kuala Lumpur, Wilayah Persekutuan, telah mengedar dadah berbahaya, iaitu 224.65 gram cannabis, oleh itu kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.”

Second Charge

Bahawa kamu, pada 10 Januari 2001, jam lebih kurang 1.00 tengahari, di rumah nombor 3-1-15, Green View Apartment, Jalan 8/40, Taman Pusat Kepong, Kuala Lumpur, Wilayah Persekutuan, telah memiliki dadah berbahaya iaitu 20.73 gram methamphetamine, oleh yang

demikian kamu telah melakukan satu kesalahan di bawah Seksyen 12(2) Akta Dadah Berbahaya dan boleh dihukum di bawah seksyen 39A(1) Akta yang sama.”

The appellant was found guilty by the High Court in respect of both the charges. He was sentenced to death on the charge of trafficking of cannabis under the first charge and was sentenced to three years imprisonment on the charge of being in possession of methamphetamine under the second charge. The appellant appealed to the Court of Appeal against the decision of the High Court. The learned Judges of the Court of Appeal dismissed the appellant’s appeal in respect of both the charges. The appellant now appeals to this Court against the decision of the Court of Appeal affirming his conviction and sentence with regard to the trafficking charge.

The Case for the Prosecution

The relevant facts of the case for the prosecution are as follows:

On 10 Januari 2001 PW7 (ASP Mohd Rafique) and a team of three other police officers raided an apartment at No. 3-1-15, Green View Apartment, Jalan 8/40, Taman Pusat, Kepong, Kuala Lumpur. When PW7 gained access into the said apartment he saw the appellant seated on the floor of the rear room. PW7 said that he saw the appellant was then rolling dried leaves suspected to be cannabis.

The dried leaves were placed on a newspaper on the floor (Exhibit P6A). About one foot away from the appellant was a box (Exhibit P8). Inside the box were 40 plastic packets containing dried leaves suspected to be cannabis. From the trouser's pocket of the appellant, PW7 found a Dunhill cigarette box (Exhibit P7A). Inside it were five plastic packets (Exhibit P7B[1-5]) of syabu and four plastic packets (Exhibit P7B[6-9]) containing ninety seven pills suspected to be ecstasy. The dried leaves were confirmed by the chemist to weigh 224.65 grams of cannabis, the subject matter of the first charge. The contents of the nine plastic packets in the cigarette box were found to contain 20.73 grams of methamphetamine, the subject matter of the second charge.

The Appeal

Before this Court the appellant advanced three grounds of appeal as follows:

- (a) There is doubt as to the identity of the cannabis in that the nett weight exceeded the gross weight and as such it cannot be said that the prosecution has proved the offence of trafficking beyond reasonable doubt;
- (b) The learned trial Judge erred in law in that he did not apply the same approach in determining whether possession had been proven in respect of the cannabis and the methamphetamine; and

- (c) Alternatively, in respect of the cannabis even if there was possession, possession was passive.

We noted that the above three grounds of appeal were not raised as grounds of appeal of the appellant before the Court of Appeal and issues relating to them were not canvassed at all before the Court of Appeal. Learned Counsel for the appellant confirmed this fact. On this point we take the view that in criminal proceedings, whether at the hearing at first instance or at the appellate level, the appellant, as the accused person, is at liberty to raise any questions or issues which relate to the question whether or not the prosecution has proven its case beyond all reasonable doubt as required by law.

We shall first deal with the second and the third grounds of appeal of the appellant. With regard to the drugs (methamphetamine) found in the trouser's pocket of the appellant, the learned trial Judge invoked the presumption under section 37(d) of the Act to find that the appellant was in possession of the said drugs. However with regard to the cannabis placed on the newspaper and in the 40 plastic packets, which were on the floor, the learned trial Judge did not invoke the presumption section 37(d) of the Act. Learned Counsel for the appellant submitted that there cannot be different standards applied to the two sets of offending exhibits in this case. He posed two questions as to firstly, why the presumption under section 37(d) of the Act was not be invoked in respect of the cannabis and secondly, why an affirmative finding of possession was not made in respect of the drugs in the pocket. It is the contention of the

appellant that the approach undertaken by the learned trial Judge was in error and had prejudiced the appellant. The approach taken by the learned trial Judge had put the appellant at a disadvantage. To the appellant the trial court had clearly misdirected itself in that it failed to give the appellant the benefit of the doubt and drew an inference favourable to him.

With respect to the above contention of learned Counsel for the appellant, we do not agree with him. We are of the view, that on the basis that there is no dispute as to the identity of the offending exhibits, the learned trial Judge did not err in fact and in law in not invoking the presumption section 37(d) of the Act with regard to the cannabis placed on the newspaper and in the 40 plastic packets which were on the floor. We also find that the learned trial Judge did not err in fact and in law in not making an affirmative finding of possession in respect of the drugs found in the trouser's packet of the appellant. It is to be noted in this case that one of the two offending exhibits, that is the methamphetamine was not found together at the same place as the cannabis which was found on the floor of the rear room. Furthermore the appellant was charged with two separate offences under the Act in respect of the said two offending exhibits. Based on the facts and the circumstances of the case, we are of the view that the learned trial Judge did not misdirect himself in making such a finding in respect of the two offending exhibits. We would state here that each of the respective charge in this case must be considered on its own facts.

In relation to the cannabis charge which the prosecution relied on section 37(da) of the Act, we find that the learned trial Judge was justified in making a factual finding of possession as understood in criminal law, based on the evidence before the Court. **[See the case of Muhammed Bin Hassan v. P.P. (1998) 2 MLJ 273]**. In the present case the amount of dangerous drugs (the cannabis) exceeded the quantity specified in section 37(da) of the Act thereby attracting the presumption of trafficking. As for physical possession, the learned trial Judge accepted the evidence of PW7 that the proscribed drug was only a foot away from the appellant. On this point in the case of **Public Prosecutor v. Foo Jua Eng [1966] 1 MLJ 197** where the accused was found by the police who raided the premises to be seated in close proximity to the offending exhibit, it was held that such close proximity was sufficient to find a case to answer. As for “*meas rea*” possession the learned trial Judge concluded that the appellant knew the nature of the drug. This is a finding of fact. This Court will not differ from the view formed by the learned trial Judge upon such an issue. In relation to the drugs (methamphetamine) found in the trouser’s pocket of the appellant, it is to be noted that the said drugs were found to have been placed inside a cigarette box. The learned trial Judge was therefore justified in invoking the presumption under section 37(d) of the Act to find that the appellant was in possession of the said drugs.

We shall now deal with the first ground of appeal. We find there is merit in the arguments advanced by learned Counsel for the appellant. We agree with the contention of the appellant that there is

a serious doubt as to the weight of the cannabis, thus affecting the identity of the cannabis. According to the chemist (PW3) the total weight of the cannabis is 224.65 grams. The weight of 224.65 grams is obtained by adding the weight of the cannabis placed on the newspaper which is 151.08 grams and the cannabis from the 40 plastic packets which is 73.57 grams. However, Exhibit P15 (Borang Serah menyerah) stated that the weight of the cannabis to be 140 grams (on the newspaper) and 65 grams (in the 40 packets) making the total gross weight to be 205 grams. This would mean that by the time the cannabis reached the hands of the chemist the cannabis has increased in weight by 19.65 grams. PW7, the raiding officer in his evidence confirmed that he weighed the cannabis and found the weight to be 140 grams and 65 grams, making a total of 205 grams. SP6 (the investigating officer) also confirmed that he weighed the cannabis and that the weight obtained by him was 205 grams. Both SP6 and SP7 used the same weighing scale (Exhibit P17) seized from the appellant's apartment. With regard to the discrepancy in the weight, the only explanation that PW7 gave was inter alia as follows:

“Perbezaan dalam berat kasar mungkin kerana alat timbang yang tidak ikut kalibirasinya.”

[See page 104 of the Appeal Record].

We are of the view that the above purported explanation given by PW7 cannot be accepted. It is merely speculative for PW7 to say that the weighing scale might not be accurate. It could very well be that the weighing scale was accurate and that probability cannot be

brushed aside. The fact that both PW7 and PW6 used the same weighing scale showed that both the police officers had confidence in the accuracy of the said weighing scale. It is our judgment that the learned trial Judge erred in law in not resolving this aspect in favour of the appellant bearing in mind that this is a borderline case where the weight of the cannabis is 224.65 grams and that amount is only 24.65 in excess of the amount of 200 grams to attract the statutory presumption of trafficking under section 37(da) of the Act. We noted the learned trial Judge's response to this discrepancy was that it is not always the case that the weight obtained by the chemist would be less than the weight obtained by the police. The learned trial Judge also said that Exhibit P17 was not calibrated and what is important is the nett weight as stated by the chemist. With respect we find the reasonings given by the learned trial Judge are not tenable in the circumstances of the case. The reasons advanced by the learned trial Judge are based merely on general statement and not based on evidence. No question was put to the appellant that Exhibit P17 had not been calibrated and therefore inaccurate. In fact it is our view that it is incumbent upon the prosecution to prove by way of expert evidence that Exhibit P17 was not calibrated, and therefore unreliable.

We are of the view that if we were to accept the reasons given by the learned trial Judge as representing the correct law it means that the identity of the exhibit when it is first recovered is immaterial as ultimately what is important is the weight as determined by the chemist. With respect, this is not the law. In the present case the

appellant has shown there is a discrepancy in that the nett weight of the cannabis as determined by the chemist exceeded the gross weight of the cannabis when they were first recovered by the police. It would therefore follow that the prosecution cannot be said to have proven the offence of trafficking beyond reasonable doubt against the appellant. A reasonable doubt has been created as to whether the cannabis that was recovered by the police that was sent to the chemist for analysis is the same substance that is found to be cannabis and it is in respect of that substance that the appellant is charged with trafficking. **[See the case of Gunalan Ramachandran & Ors. v. P.P. (2004) 4 CLJ 551]**. On this ground alone the appellant would succeed in his appeal.

Conclusion

For the reasons above stated we would allow this appeal. The conviction and sentence recorded by the learned trial Judge in respect of the first charge is hereby set aside. The appellant is accordingly acquitted and discharged in respect of the charge of trafficking.

(DATO' ZULKEFLI BIN AHMAD MAKINUDIN)
Judge
Federal Court

Dated: 8th May 2009.

Counsel for the Appellant

Encik Hisham Teh Poh Teik

Solicitors for the Appellant:

Messrs. Teh Poh Teik & Co.

Counsel for the Respondent:

Deputy Public Prosecutor Encik Awg. Armadajaya B. Awg. Mahmud.