

**DALAM MAHKAMAH PERSEKUTUAN MALAYSIA
(BIDANGKUASA RAYUAN)
RAYUAN JENAYAH NO. 05-29-2005 (W)**

ANTARA

CHAN KING YU

... PERAYU

DAN

PENDAKWA RAYA

... RESPONDEN

[Dalam Mahkamah Rayuan Malaysia
(Bidang Kuasa Rayuan)
Rayuan Jenayah No. W-05-17-2002

Antara

Chan King Yu

... Perayu

Dan

Pendakwa Raya

... Responden]

[Dalam Mahkamah Tinggi Malaya Kuala Lumpur Wilayah Persekutuan
Perbicaraan Jenayah Bil: 45-16-2001

Antara

Pendakwa Raya

Dan

Chan King Yu]

Coram: Abdul Aziz Mohamad, FCJ
Hashim Yusoff, FCJ
Zulkefli Ahmad Makinudin, FCJ

JUDGMENT

(of Hashim Yusoff, FCJ)

1. I had the benefit of reading the draft judgments of my learned brothers, Abdul Aziz Mohamad and Zulkefli Ahmad Makinudin, FCJJ and having weighed the prosecution evidence as against the defence, I am inclined to agree with the decision of my learned brother Zulkefli Ahmad Makinudin, FCJ for the following reasons:-
2. The facts of the case have been sufficiently narrated in the judgments of my learned brothers, so I won't repeat them anymore.
3. At the end of the prosecution case, the evidence before the trial High Court Judge was that when the police party raided the Appellant's room at Hotel Nova, the incriminating exhibits, containing a total of 9,103.9 grams of methamphetamine were found in his room together with the Appellant. There was no other person in the room except the Appellant when the police party entered the room. The said room No. 1303 was registered in the name of the Appellant. That being so, the learned trial Judge had called for the defence of the Appellant pursuant to Section 37(da) of the Dangerous Drugs Act 1952.
4. However in his defence, the Appellant did not merely deny the allegation, but afforded an explanation which if accepted would raise a reasonable doubt in the prosecution case. It is trite law

that even if the Court does not believe the accused's explanation but nevertheless it raises a reasonable doubt as to his guilt then he should be acquitted. (See: **Mat v. Public Prosecutor [1963] 29 MLJ 263**).

5. In his defence the Appellant had given evidence on oath stating that he was sent by his employer, one Michael Chan, in Hong Kong to collect money from his client in Kuala Lumpur. On arrival at the Kuala Lumpur International Airport, he was met by one "Man Chai" supposedly to be one of Michael Chan's friends. The Appellant then checked first into Midah Hotel and subsequently on Man Chai's instructions, into another hotel on the 19/06/2000 i.e. the Nova Hotel. Apart from denying that the drugs found in his Nova Hotel room 1303, were his, the Appellant said that the plastic bags and their incriminating exhibits belonged to "Man Chai" who was supposed to have come to collect them from the said room.

6. Even at the time of his arrest in the Nova Hotel room, the Appellant had already mentioned "Man Chai's" name to the raiding officer, ASP Giam Kar Hoon (PW.7) and had begged PW.7 not to switch off the Appellant's hand phone because "Man Chai" would be calling the Appellant to collect the plastic bags. But PW.7 ignored his plea and switched off the Appellant's hand phone. The Appellant reiterated the same story in his cautioned statement to the police subsequently (see Exhibit D.29). Why did PW.7 not wait to see if "Man Chai" would indeed have made the call to the Appellant's hand

phone? There is no other evidence adduced by the prosecution to negate the possibility of Man Chai's existence.

7. PW.7's switching off the Appellant's hand phone therefore denied the Appellant's explanation to show that "Man Chai" did in fact exist if he were to receive the call. There was no evidence given by the prosecution as to whether there were calls made to the Appellant's hand phone around that material time. This gives rise to a reasonable doubt as to the possibility of the existence of the so called "Man Chai". In fact this piece of evidence was corroborated by a travel agent (DW.9) who said he knew and had met Man Chai who he believed was now operating a video shop in Ringlet, Cameron Highland. However, PW.3 in his evidence admitted that he did not investigate regarding "Man Chai." In **Alcontara Ambross Anthony v PP [1996] 1 MLJ 209** this Court at page 219 E-H said:

"To resume our discussion regarding the important point of misdirection as regard the burden of proof, especially the burden on the defence we must point out, with respect, that it was wrong for the Judge to have criticised the defence for having failed to put to the investigating officer, the name of Che Mat, or the latter's telephone number, or his place of abode, for the simple reason that these particulars had been disclosed in the caution statement of the appellant made the day after the arrest so that the police had all the time in the world to check their veracity. That being the case, the onus was on the

prosecution to check on whether the accused's version of the facts, as they appeared in his caution statement and to which we have referred, was true or false. In other words, the onus was upon the prosecution to disprove this important part of the accused's version of facts. The defence was, therefore, under no duty to put the matters aforesaid to the investigating officer, having regard to their prior disclosure in the cautioned statement. In holding to the contrary had undoubtedly overlooked the material portions of the caution statement touching on Che Mat, reversed the onus, and placed it on the defence, so that on this further ground also, the conviction had to be quashed."

8. Then there is the evidence of the Nova Hotel staff, one Tang Chee Heong (DW.2) who testified that DSP Yap Seng Hock had also booked room No. 1310, at about 6.30 p.m. on 19/06/2000. Later at about 8.40 p.m. the same day, two other police officers had requested DW.2 to open room 1303, which was registered under the Appellant's name. So DW.2 took the police officers to room 1303 and opened the door to the said room in the presence of DSP Yap Seng Hock and a group of about 8 police officers. After that DW.2 was asked to leave the place. This piece of evidence is relied upon heavily by Dato' Shafee, learned counsel for the Appellant, to suggest that there was an earlier entry by the police into the Appellant's room when he was not there. That in turn would give rise to a reasonable doubt as to whether the time when the Appellant's room was opened after the Appellant had returned and after

some knocking on the room door by the police and that it was subsequently opened after the Appellant had unlatched the door from inside was the only time the raiding party had gone to room 1303 or whether there was an earlier entry into the room by the police when it was opened by DW.2 using the master key card.

9. It must be borne in mind that DW.2 is a staff of Nova Hotel. There is no evidence to suggest that he might in anyway be giving evidence to help the Appellant or to discredit the police. He simply gave evidence as to what actually transpired. It would therefore be difficult to brush aside his testimony that it was him who opened the door to room 1303 using his copy of the key card when requested by the police on 19/06/2000 at about 8.40 p.m. It was also in evidence that the Appellant had left his room at about 7.30 p.m. and only returned at about 8.50 p.m.

10. In cases where access to the room which was occupied by a person had been made available to others as well, it would not be safe to find that person to be in exclusive possession of the drugs found in the said room. In the case of **Gooi Loo Seng v PP [1993] 2 MLJ 137** this court held, inter alia:-

“(3) Even if the appellant had knowledge of the presence of the heroin in the room, that by itself would not have been sufficient to establish that he was in possession or in control of it given the fact

that others had access to the room and could have concealed the heroin there.”

11. Although in an appeal, findings of facts by the trial court are seldom disturbed, I find on the evidence in this appeal, a reasonable doubt has been raised by the defence which necessitates an interference. With respect, the trial Judge did not view the whole of the evidence objectively and from all angles with the result that the Appellant had lost the chance which was fairly open to him of being acquitted.
12. As such I would allow this appeal and set aside the conviction and sentence of the Appellant and acquit and discharge him.

Dated this 14th November, 2008

Signed.
(DATO' HASHIM BIN DATO' HJ. YUSOFF)
Judge
Federal Court of Malaysia

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