

DALAM MAHKAMAH PERSEKUTUAN MALAYSIA

(BIDANG KUASA RAYUAN JENAYAH)

RAYUAN JENAYAH NO: 05-40-2005(W)

ANTARA

PENDAKWA RAYA

...

PERAYU

DAN

REZA MOHD SHAH BIN AHMAD SHAH

...

RESPONDEN

(Dalam Mahkamah Rayuan Malaysia
Rayuan Jenayah No: W-05-34-2002

Antara

REZA MOHD SHAH BIN AHMAD SHAH

...

PERAYU

Dan

PENDAKWA RAYA

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RESPONDEN)

(Dalam Mahkamah Tinggi Malaya Di Kuala Lumpur
Wilayah Persekutuan Perbicaraan Jenayah No. 45-10-2001

PENDAKWA RAYA

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REZA MOHD SHAH BIN AHMAD SHAH)

Coram: ZAKI TUN AZMI, PCA (now CJ)
ABDUL AZIZ MOHAMAD, FCJ
HASHIM YUSOFF, FCJ

JUDGMENT
(of Abdul Aziz Mohamad, FCJ)

1. In the High Court, the prosecution relied on evidence of actual knowledge to prove the element of knowledge that is necessary for possession in criminal law. The evidence relied on was that of the respondent, upon being aware of police presence, when their leader shouted "Police!", immediately running away and throwing the plastic bag containing two packages of cannabis that he was carrying. The prosecution did not choose to rely on the presumption of knowledge in section 37(d) of the Dangerous Drugs Act 1952. That was because if they did, then, by reason of this court's decision in *Muhammed bin Hassan v Public Prosecutor* [1990] 2 MLJ 273, they would not have been able to rely also on the presumption of trafficking in section 37(da), arising from possession of the requisite amount of drug.

2. The presumption of knowledge in section 37(d) is in the following terms:

“(d) any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;”

3. The judgment of the High Court is reported as *Public Prosecutor v Reza Mohd Shah bin Ahmad Shah* [2002] 4 MLJ 13. This is what the learned trial judge said at page 23 C-F:

“The fact that the accused was carrying [the plastic bag] with its contents followed by the speed at which he ran and threw it upon being confronted show that there is a clear nexus between his conduct and the offence in question. He wanted to part possession with what constituted the offence. It is a clear indication of his guilty mind. This is sufficient to infer that the accused had knowledge of the existence of the dangerous drugs in [the plastic bag] . . . The inference drawn in this case that the accused had knowledge of the existence of the dangerous drugs does not suggest that he knew that it was cannabis. With regard to the extent and nature of knowledge of the dangerous drugs that the prosecution must prove, I consider it necessary to reproduce what I had said in *Public Prosecutor v Mohd Farid bin Mohd Sukis & Anor* at pp 420-421.”

4. There follows the passage reproduced from *Mohd Farid*, reported in [2002] 3 MLJ 401, in which the learned trial judge began by saying, “It must be observed that in proving this element [of knowledge] the obligation of the prosecution is only to establish that the accused had knowledge . . . of the existence of the dangerous drug but not its qualities”. He then quoted a passage from the Singapore case of *Sim Teck Ho v PP* [2000] 4 SLR 39, at pages 42-43, where Yong Pung How CJ, after quoting a passage from the speech of Lord Pearce in *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256, at page 305, concluded that, as regards knowledge, proof of possession requires proof of “knowledge of the existence of the thing itself,

that is the existence of the controlled drug, but not the name nor nature of the drug”.

5. Then following the end of the passage reproduced from *Mohd Farid*, the learned trial judge said, “Thus, it is not necessary for the prosecution to prove that the accused had knowledge of the nature of the drugs. It follows that the inferences drawn from the direct evidence are sufficient to show that the accused had possession of the cannabis.”

6. The grounds of judgment of the Court of Appeal are reported as *Reza Mohd Shah Ahmad Shah v PP* [2005] 4 CLJ 581. The Court of Appeal took the view that the prosecution had to prove knowledge of the particular drug in question, that is cannabis, and said at page 585 d-e that “the issue is whether the appellant had the knowledge that he was carrying cannabis”. The Court of Appeal arrived at the following conclusion at page 587 g-h:

“But in our view, just because the appellant took flight and threw the plastic bag containing dangerous drug does not point to one and only conclusion that he knew what he was carrying was the dangerous drug, cannabis. In the circumstances, other inferences can be made such as that he did so because he may be carrying any other prohibited goods other than cannabis or that he was panicky and therefore chose to run away and throw out the bag he was carrying more so, in this case, when the police who confronted him were not in uniform.”

7. The Court of Appeal therefore found that the prosecution had failed to prove actual knowledge but the court had recourse to the presumption of knowledge in section 37(d) and found the respondent guilty of possession under section 6 of the Act. Recourse being had to the presumption in section 37(d), it was not possible, because of *Muhammed bin Hassan (supra)*, to also have recourse to the presumption of trafficking in section 37(da).

8. There are two aspects to the judgment of the Court of Appeal as regards knowledge. The first aspect is regarding the type or extent of knowledge that is required for proof of possession. To the Court of Appeal it must be knowledge of the particular drug in question, in this case cannabis. The learned DPP understood the learned trial judge to mean that the requisite knowledge need not be "as to the exact nature or quality" of the drug, and maintained in this appeal that the learned trial judge was right. The second aspect is the view of the Court of Appeal that other inferences could be drawn from the respondent's act of running away and throwing the plastic bag than that he knew he was carrying cannabis, such as that he knew he was carrying some other prohibited goods or that he became panicky when confronted by men not in police uniform. To the learned DPP that was mere speculation on the part of the Court of Appeal. Learned counsel for the respondent's submission in this appeal has been confined to those two aspects.

9. The second aspect can be disposed of briefly. I think it is fanciful to say that the respondent took flight and threw the plastic bag because he probably knew that he was carrying some other prohibited goods. In the absence of any indication to the contrary, the inference must be that he knew that he was carrying what he was in fact carrying, namely, a prohibited drug. It is also in my judgment fanciful to admit the probability that the appellant acted as he did because he became panicky when confronted with men not in police uniform. If he had thought that they were, say, robbers pretending to be police officers in order to rob him of his belongings, he would have fled *without* throwing the plastic bag.

10. As regards the first aspect, learned counsel for the respondent submitted that this appeal by the Public Prosecutor revolved around the following "narrow question of legal interpretation" which he framed in his written submission:

"For a Court to find an accused guilty for possession of dangerous drugs i.e. 'actual possession' as understood in criminal law without the aid of the statutory presumption under section 37(d) of 'deemed possession', must the prosecution prove beyond a reasonable doubt that the accused had knowledge of the *nature* of the dangerous drugs (in addition to having knowledge of the existence of the dangerous drugs)?"

11. The question obviously arose from the learned trial judge's finding that with proof that the respondent had knowledge that there existed

dangerous drugs in the plastic bag, the prosecution did not also have to prove that the respondent had knowledge of the "nature" of the drugs. Obviously, in framing the question, the learned trial judge was construed as saying that to prove possession it is not necessary to prove knowledge of the "nature" of the thing possessed. But it is clear to me, after considering as a whole all that the learned trial judge said on the question of knowledge, as I have set out, including what was said by him and by Yong Pung How CJ in the passage reproduced from *Mohd Farid*, that was not what the learned trial judge meant. What he meant was that with proof of knowledge that what was in the plastic bag were dangerous drugs, the prosecution did not also have to prove that the respondent knew what type of dangerous drugs they were or their name or exact qualities. That was what he meant by the "nature" that the prosecution did not have to prove knowledge of. He did not mean to say that the prosecution did not have to prove knowledge of the "nature" of the drugs *as dangerous drugs*. That he did find the prosecution had proved when he spoke of knowledge of the existence of dangerous drugs in the plastic bag. He meant that the respondent knew that there were dangerous drugs in the plastic bag or, in other words, that the respondent knew that what the plastic bag contained were dangerous drugs. That was what the learned trial judge meant when he said that the respondent "wanted to part possession with what constituted the offence" and that it was "a clear indication of his guilty mind". The respondent had a guilty mind because he knew that he had dangerous drugs in his possession.

12. To the learned trial judge, therefore, for the prosecution to prove that the respondent was in possession of cannabis the prosecution need only prove, as regards knowledge, that the respondent had knowledge that what he was carrying were dangerous drugs. The prosecution did not also have to prove that he knew that the dangerous drugs were cannabis. Therefore once knowledge that the thing carried was dangerous drugs was proved, possession of the particular drug, that is cannabis, was proved. That was why the learned trial judge, while saying that proof by inference "that the accused had knowledge of the existence of the dangerous drugs does not suggest that he knew that it was cannabis", nevertheless concluded "that the inferences drawn from the direct evidence are sufficient to show that the accused had possession of the cannabis".

13. I am sure that the learned trial judge was not unaware of the authorities, such as those that I will be mentioning later, that say that possession in criminal law requires knowledge of the nature of the thing possessed and that he was not disagreeing with those authorities. In *Mohd Farid*, after the passage reproduced in his judgment in the present case, he had said, at page 421 H-I, in reference to *Director of Public Prosecutions v Wishart Brooks* [1974] AC 862 and *Neo Koon Cheo v R* [1959] MLJ 47, "Both these cases support the proposition that knowledge of the nature of the drugs possessed can be inferred from the circumstances of the case". He was speaking of proof by inference of knowledge of "the nature of the drugs possessed". I think it is a matter of his understanding of what is meant by "nature of the drugs possessed". When he said in the present case that the

prosecution did not have to prove knowledge of the nature of the drugs he must have said it on a view of "nature" as meaning name or type or exact qualities. But if "nature" means nature as a dangerous drug, then, when he said that the accused had knowledge of the existence of the dangerous drugs, which I understand to mean that the accused knew that there were dangerous drugs in the plastic bag, the learned trial judge must be taken to be saying, consistently with the authorities, that the prosecution did have to prove, and did prove, knowledge of the nature of the dangerous drugs, but *nature as dangerous drugs*.

14. The "question of legal interpretation" that learned counsel for the respondent posed is that of the meaning of the word "nature" in section 37(d). As to why the meaning of a word in a statutory provision is relevant in this case that does not rely on the provision, this became clear as oral submission progressed. The respondent's counsel contended that "nature" in section 37(d) means the particular type or name of the dangerous drug. On that basis he argued that to prove actual possession in a case that does not rely on the presumption in section 37(d), it must be proved that the accused knew the name or type of the dangerous drug concerned – as being knowledge of the "nature" of the drug – because if it were not so, the burden of proving possession in a case that does not rely on the presumption would be lower than that in a case that does. This is a fallacious argument. Even if, in a case that does not rely on the presumption, the knowledge that is necessary to be proven as knowledge of the nature of the drug is knowledge as to the name or actual type of the

drug, the burden on the prosecution in a case that relies on the presumption will always be lower, because in such a case all that the prosecution would need to prove is custody or control of the thing containing the dangerous drug.

15. Learned counsel for the respondent submitted that the Dangerous Drugs Act 1952 being a penal statute, it should be construed strictly, and if there is any ambiguity in the meaning of the word "nature" in section 37(d), the construction that is in favour of the accused should be favoured. But he did not cite any authorities on the meaning of the word "nature" in section 37(d), probably because there are none. Instead he cited the following five authorities.

16. In *Tan Teck Chew v Public Prosecutor* [2002] 2 MLJ 321, K.C. Vohrah JCA said in the Court of Appeal, at page 324 G-H, "There was of course no finding of knowledge of heroin in the bag. The trial judge had to rely on s 37(d) . . . to infer as a presumption that he knew of the nature of the heroin", and, at page 326 H-I, he spoke of the appellant failing to rebut the presumption in s 37(d) "that he knew that what was contained in the bag was heroin". That case cannot, by those statements, be taken as authority for contending that "nature" in section 37(d) means the particular type or name of the dangerous drug because the question of the meaning of "nature" did not arise in that case. Since the dangerous drug that was the subject of the charge in that case was heroin it was natural to speak of knowledge as knowledge as to heroin. The same may be said of *Taib bin*

Mohamad v Public Prosecutor [2002] 3 MLJ 477 where K.C. Vohrah JCA said in the Court of Appeal, at page 480 H-I, " . . . the judge should only have called the accused to make his defence on the charge of the possession of the cannabis based on the presumption under s 37(d) . . . that he knew that [sic] nature of the drug . . . ", and, at page 481 H-I, " . . . his defence . . . did not rebut the presumption of knowledge under s 37(d) . . . that he knew the nature of the material he was carrying was cannabis".

17. In *Chan Pean Leon v Public Prosecutor* (1956) 22 MLJ 237, the charge was of assisting in carrying on a public lottery and the question of possession concerned certain counterfoils. The case did not concern any statutory presumption of possession. Speaking of the *mens rea* aspect of possession, Thomson J, at page 239 (upper right), said, " . . . it is necessary to prove that the person in possession knows the nature of the thing possessed" and added, as an example, "If . . . it was a lottery document it must be proved that he knew it was a lottery document". The latter statement cannot be taken as authority for the proposition that in a drug case possession requires proof of knowledge of the particular drug in respect of which the accused is charged. That is because the statement does not involve the idea of a particular type of lottery document. Lottery document was spoken of as a general class, like dangerous drug. Applied to dangerous drug, that statement becomes "If . . . it was a dangerous drug, it must be proved that he knew it was a dangerous drug", and not the type or name of the particular dangerous drug as well.

18. A similar situation is to be found in *Toh Ah Loh and Mak Thim v Rex* (1949) 15 MLJ 54. It was a case of possession of ammunition in ammunition boxes. Gordon-Smith Ag. CJ said at page 55 that in order for possession to incriminate, the possessor "must know the nature of the thing possessed" and that as regards the accused in that case the jury must be satisfied that "he knew the boxes contained ammunition". The case concerned ammunition as a general class and not any particular type of ammunition.

19. Of the five cases relied on by learned counsel for the respondent in support of his contention that "nature" in section 37(d) means the particular name or type of the dangerous drug concerned, *Toh Su Kuan v PP* [2005] 3 CLJ 740, a drug case, is the only case which may be understood to rule that knowledge of the nature of the thing possessed must be exact or specific knowledge. In that case the prosecution did not rely on section 37(d) but sought to prove possession by evidence. The accused was found to carry 356 packets of heroin concealed at various parts of his body. The learned trial judge held that the manner in which the packets were concealed indicated knowledge that the packets contained heroin. On appeal it was submitted on behalf of the accused that from the manner in which the packets were concealed the accused might be taken to have known that he was carrying some illicit substance but not its precise nature. The Court of Appeal agreed and held that the accused ought not to have been called to enter upon his defence. The Court of Appeal said, at page 746:

"In our judgment, the manner in which the packets were fastened to the appellant's person shows at the highest that he

had knowledge the packets contained some prohibited substance, perhaps, drugs or perhaps some other substance which was unlawful to have in one's possession. But it certainly does not prove that the appellant knew that the packets contained heroin, the drug which forms the subject matter of the charge. It follows from what we have said thus far that from the totality of the evidence led by the prosecution that the vital ingredient of *mens rea* possession required by s. 37(da)(i) had not been established. On that ground alone the learned judge ought not to have called the appellant to enter upon his defence. And this is a case where the learned deputy took the position that this was either a case of actual trafficking or no offence."

That decision was relied on by the Court of Appeal in the present case.

20. The learned DPP informed us that the Public Prosecutor's appeal against that decision had been withdrawn because the warrant of arrest against the accused, who had been released following his success in the Court of Appeal, could not be executed. In my judgment, the decision was, with respect, an erroneous decision. Nik Hashim FCJ has also said so quite recently in *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19.

21. In my judgment, where possession of a dangerous drug is concerned, to prove the element of guilty knowledge or *mens rea* the prosecution need only prove that the accused knew the *nature* of the particular dangerous drug that he was in possession of *as a dangerous or prohibited drug*. The prosecution need not also prove knowledge as to the name, type or exact qualities of the dangerous drug. When the authorities say that for proof of

possession in criminal law it is necessary to prove that the possessor knew the nature of the thing possessed, they mean knowledge of what the thing essentially or basically is. I share the view of Taylor J, who said in *Leow Ngee Lim v Reg.* (1956) 22 MLJ 28, at page 31 (upper left), "Without at least general knowledge there cannot be possession but there can be possession without full and exact knowledge".

22. Not only is that, to my mind, a fair and just construction of what is meant by knowledge of the nature of the thing possessed, but were the meaning to be as may be inferred from the decision in *Toh Su Kuan (supra)*, in cases of trafficking in a dangerous drug where the prosecution seek to rely on the presumption of trafficking by reason of possession of the requisite amount of the drug, such as the present and many other cases that are likely to arise, where guilty knowledge can only be inferred from circumstances, the accused will always be acquitted without their defence being called because it will always be argued that while the circumstances show that they knew they had in their possession a dangerous drug, the circumstances do not show beyond reasonable doubt that they knew what type of drug it was or its name or exact qualities, and it would be virtually impossible to defeat the argument. In my judgment, therefore, the Court of Appeal erred in holding that the prosecution had to prove that the respondent knew that what he was carrying was actually cannabis.

23. As to the meaning of "nature" in section 37(d), I do not think it really matters what the extent of the meaning is, because the presumption is

rebuttable. The moment custody or control of the thing containing the dangerous drug is established, knowledge of the nature of the drug is presumed. If nature means only nature as a dangerous drug, the accused is entitled to prove, if he can, that he did not know that the contents of the thing he was in custody or control of were a dangerous drug. If, as contended by learned counsel for the respondent, nature means only the name, type or exact qualities of the dangerous drug, or if it means also *that* besides nature as a dangerous drug, the accused is still entitled to prove, if he can, that he did not know that the contents of the thing that he was in custody or control of were a dangerous drug and it would inevitably follow that he did not know the name, type or exact qualities of the dangerous drug.

24. For the reasons that I have given I would allow the appeal, set aside the orders of the Court of Appeal and confirm the conviction and sentence by the High Court.

Dated: 16 January 2009

DATO' ABDUL AZIZ BIN MOHAMAD

Judge

Federal Court of Malaysia

Counsel for the appellant: Nurulhuda Nur'aini bt. Mohd Nor
Deputy Public Prosecutor

Counsel for the respondent: Edmund Bon Tai Soon and Nik Mohamed
Ikhwan

Solicitors for the respondent: Chooi & Company