

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

ANTARA

CHAN KING YU

... PERAYU

DAN

PENDAKWA RAYA

... RESPONDEN

**[Dalam Mahkamah Rayuan Malaysia
Perbicaraan Jenayah Bil. 45-16-2001**

Antara

Pendakwa Raya

Dengan

Chan King Yu]

Coram: Abdul Aziz bin Mohamad, FCJ
Hashim bin Dato' Hj Yusoff. , FCJ
Zulkefli bin Ahmad Makinudin, FCJ

JUDGMENT OF ZULKEFLI BIN AHMAD MAKINUDIN, FCJ

Introduction

The appellant, a Hong Kong national was charged in the High Court of Kuala Lumpur on a charge of trafficking, 9,103.9 gms. of methamphetamine under section 39B(1)(a) of the Dangerous Drugs Act, 1952 [“the Act”] and punishable under section 39B(2) of the Act. The learned Judge of the High Court found the appellant guilty, convicted and sentenced him to death. 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 against conviction and sentence, and upheld the death sentence imposed by the High Court. Being dissatisfied with the decision, the appellant now appeals to this Court against the whole decision of the Court of Appeal.

The Case For The Prosecution

The evidence adduced by the prosecution may be briefly summarized as follows:

On the morning of 19 June 2000 ASP Giam Kar Hoon (PW7) from the Narcotics Division of Bukit Aman received information that a Chinese male from Hong Kong by the name of Chan King Yu would be trafficking in a dangerous drug at a hotel in Kuala Lumpur on that very day. Acting on that information PW7 assembled a team of police personnel. Among the members of the team were Shamsuddin

Jantan (PW4) and Lance Corporal Abdul Halim Basri (PW5). At about noon on the same day, PW7 received further information that the hotel at which the offence was to be committed was the Hotel Nova at Bukit Bintang. He at once dispatched PW4 and one Detective Corporal Teoh to the hotel to conduct a surveillance of the appellant. On arrival at the scene, PW4 remained in his car which he parked close to the entrance of the hotel. At about 12.25 pm he saw the appellant emerging from the hotel. The appellant was alone. He carried a sling bag. PW4 recognised the appellant from a photograph given to him by PW7. The appellant walked into Bukit Bintang Plaza, a well known shopping complex in Kuala Lumpur. When the accused emerged from the Plaza, he was seen carrying a new suitcase (Exhibit P12) which bore the brand name "Polo". The appellant then returned to the hotel. He went into Room 1303 on the 13th floor. Then, at about 5.50 pm, the appellant once again emerged from the hotel. He was alone. He walked onto the street and disappeared in the crowd. He returned to the hotel at about 7.20 pm. He came in a taxi. After he had descended from the taxicab, the appellant removed three plastic bags from the trunk of the vehicle. Having paid off the taxi the appellant re-entered the hotel. He carried the plastic bags with him. He took the lift to the 13th floor. The appellant re-emerged about five or ten minutes later. He carried a plastic bag (Exhibit P24) which he placed in a dustbin near the hotel. He then walked away. Exhibit P24 was recovered almost at once by PW4. It bore the words "TANG'S SALE OF THE YEAR". Inside it was a metal lid, tin foil, a card bearing the words "SANTA BARBARA POLO & RACQUET CLUB" and another card with the word "TONGWU" printed on it. At

about 8.30 pm a police ambush party arrived at the hotel and took their positions on the staircase landing on the 13th floor.

The appellant returned to the hotel at about 8.50 pm and went into Room 1303. A little later, PW7 and the ambush party who were already on the 13th floor were alerted of the appellant's arrival. They waited for him. PW7 and his team tried to gain entry into the room. They failed even with the assistance of the hotel's staff. The ambush party then tried to break open the lock to the room door. A few minutes later the appellant opened the door. PW7 introduced himself as a police officer to the appellant. The room and bathroom were searched. Several items were recovered. On a table beside the bed was small packet of transparent plastic containing what proved on subsequent chemical examination to be methamphetamine. Also seized was Exhibit P12. Inside P12 were three plastic bags. Each of these plastic bags contained a cylinder wrapped in tin foil. Each cylinder had within it four small parcels wrapped in carbon paper and sponges. All the parcels that were recovered contained a white crystalline substance which on subsequent chemical analysis showed to be methamphetamine, a prescribed drug under the Act.

Based on the foregoing facts the learned Judge of the High Court ruled that a prima facie case of actual possession had been established under section 37(da) of the Act. He then called upon the appellant to make his defence.

The Case For The Defence

The appellant [DW1] testified on oath and the relevant parts of his evidence and defence are as follows:

The appellant had been sent by his employer in Hong Kong, one Michael Chan to collect money from the latter's client. On the appellant's arrival at the airport at Kuala Lumpur he was met by one Man Chai, one of Michael Chan's clients. The appellant first checked in at Hotel Midah and later checked out into Hotel Nova on 19.6.2000 as instructed by Man Chai. He was told by Man Chai to collect some tools which the appellant did. He denied placing the plastic bags inside the POLO suitcase. He claimed that the policemen had done that. He denied any knowledge of the drugs in the cylinders. He denied that the small packet of drugs found on the bedside table was his. He also denied that he threw Exhibit P24 into the dustbin outside the hotel. He said that the plastic bags and their contents belonged to Man Chai who was supposed to come to the hotel and collect it. The appellant in his cautioned statement (Exhibit D29) had mentioned the name of Man Chai and had given the telephone number of Man Chai to the investigating officer (PW3). The appellant in his evidence also stated that when he was arrested he begged ASP Giam Kar Hoon (PW7) not to switch off his handphone as Man Chai would be calling him to collect the plastic bags but PW7 switched off his handphone.

The appellant also called nine (9) other witnesses in presenting the case for the defence. In my view the evidence of the following witnesses are relevant for the consideration of the defence case:

Tan Chee Keong (DW2)

DW2 in his evidence inter alia stated that on 19 June 2000 he was working at Hotel Nova. While on duty that day a police party came to Hotel Nova. One policeman whom DW2 referred to as Yap Seng Hock [DSP Yap Seng Hock] came in at 6.30 pm to book a room number 1310 at the said hotel. DW2 gave Yap Seng Hock the room and keyed-in the particulars into the computer. Yap Seng Hock was alone when he checked in. At about 8.40 pm two other police officers came to the hotel counter asking DW2 the key to room 1303 of the said hotel stating that they wanted to open the door to room 1303. DW2 then made available a key and followed the two police officers to the 13th floor of the hotel. When DW2 arrived at the 13th floor he saw about 8 police officers about to ambush the room 1303. DW2 was also told by one of the police officers that a police officer in room 1310 wanted to see him. Once DW2 entered room 1310 the police officer introduced himself as DSP Yap Seng Hock and DW2 was informed that the police officers wanted to ambush room 1303. DW2 was asked to open the door to room 1303. When DW2 opened the door to room 1303 DSP Yap Seng Hock was together with members of the police raiding team. DW2 was then asked to go away and he so left the place.

Cemal Mohamed Abdus Samad (DW3)

DW3 on 19 June 2000 was the Hotel Nova's Front Office Manager in charge of operations. At about 11.52 pm on 19 June 2000 he received a call from one, William Tan Chee Kiong, the Hotel Nova Supervisor that a raid had taken place at room 1303 and that a suspect had been apprehended. He was also told that DSP Yap Seng Hock wished to speak to him. DSP Yap Seng Hock informed DW3 that he had occupied room 1310 just for a few hours and this was to enable him to carry out the police raid in the hotel, and he requested that the room charges be waived. DW3 agreed to do so. DW3 in his evidence stated that the key to the room door 1303 is by using a key-card and the occupant will hold one key-card. The front office supervisor, the house-keeping maid and the floorman will each carry one key-card. DW3 also said he will carry one key-card but the security guard does not carry one. Each time the key-card is inserted to the room door it will be recorded. When DW3 was asked as to the record of how many times entry were made into the said room 1303 on 19 June 2000, DW3 answered that he would not be able to do so. This was because the lock to the door room 1303 was damaged and he was informed that it was damaged by the police. On this damaged door to room 1303 DW3 spoke to DSP Yap Seng Hock wherein DW3 was told to write in to his office for compensation.

Lo Vai Mei (DW4)

DW4 is the girl friend of the appellant and was then residing in Hong Kong. In her evidence DW4 inter alia stated that she had known the appellant since September 1995. She knew that the

appellant left Hong Kong on 12 June 2000 and that the appellant was asked by his employer by the name of Michael Chan to come to Malaysia to look for his friend and to collect some moneys. DW4 said that she bought the ticket for the appellant's trip to Malaysia by using her credit card. DW4 also said that she knew Michael Chan, the employer of the appellant since July 1998. DW4 described Michael Chan as a person of about 50 years of age, five feet seven inches tall and of medium size. DW4 further stated that she knew Michael Chan's wife and Michael Chan has two daughters. DW4 in her evidence stated that on 18 June 2000 at about 10.30 pm she did call the appellant wherein she had asked the appellant to buy for her a handbag, shoes and souvenirs. The appellant informed DW4 that his bag was small and those items to be bought could not be placed inside his bag. For that reason DW4 requested the appellant to buy a new bag. DW4 spoke to the appellant for about seven minutes on this occasion using the telephone number 601-6361-2782. On 19 June 2000 at about 8.30 pm DW4 stated that she again called the appellant. The appellant informed DW4 that he was then having dinner and that he would call DW4 later that night. The appellant called on her at about 8.45 pm and they spoke for about ten minutes. Some time later that same night Michael Chan called on DW4 informing her that the appellant had been arrested. On that same night DW4 went to see Michael Chan at his house to find out what had actually happened to the appellant. When DW4 was at Michael Chan's house, Michael Chan made a call to Man Chai seeking the help of Man Chai to save the appellant as the appellant was innocent and did not know anything.

Richard Herboldr (DW9)

DW9, a freelance travel agent in his evidence stated that he knew and have met a person by the name of Man Chai. Man Chai has a brother whom DW9 called as Bota Chai. DW9 used to spend the time together with Man Chai and his brother as friends around the areas at Bukit Bintang, Jalan Alur, Sungai Wang Plaza and Imbi Road in Kuala Lumpur. DW9 believed that Man Chai is now residing in Cameron Highlands operating a video shop in Ringlet.

Findings of the High Court

At the conclusion of the trial the learned Judge of the High Court held that the appellant in his defence had failed to raise a reasonable doubt as to the truth of the prosecution's case. He accordingly convicted the appellant.

The learned trial Judge found that the appellant had possession, custody and/or control of the drugs found in the room and made a finding that the prosecution had proved possession of the drugs with the appellant by direct evidence. The learned trial Judge in his judgment also stated that the evidence showed that the appellant was a police target in their operation from the very beginning. The police had received information that a male Chinese from Hong Kong would be trafficking in drugs on that day, 19 June 2000 and they were also given a photograph of the appellant. As regards the person by the name of Man Chai, the learned Judge stated that from the prosecution's case, it did not suggest or show that Man Chai was the target of the police operation. The learned Judge rejected the defence of the appellant that he was keeping the three plastic bags

containing the metal cylinders for Man Chai to collect from him at the hotel. The learned Judge found that the explanation given by the appellant that he was directed by his employer, Michael Chan to collect debts from Michael Chan's friends did not at all create any doubt in his mind in view of the fact that there was no corroborative evidence. In the result the learned Judge held that the defence failed to rebut the statutory presumption that the appellant was trafficking in the said drugs as provided for under section 37(da) of the Act which had arisen against him. The appellant was found keeping the drugs in his room in the hotel wherein the learned Judge stated that the appellant was alone when the police party raided that room.

Findings of the Court of Appeal

The Court of Appeal inter alia held that the trial Judge was quite correct in accepting PW4 as a truthful witness and in acting upon his evidence. The appellant's overt act of disposing of Exhibit P24 shows that he was exercising dominion over the contents of that bag, all of which came from his room. There is the plastic packet on the bedside table containing the proscribed drug in question and there is the act of the appellant purchasing the large Polo suitcase when he already had one in his room. There is the unexplained delay by the appellant to open the door to his room taken together with inability of the police to get the door open even with the assistance of the hotel staff. The appellant gave no explanation for his conduct in this respect, especially the long delay on his part. Each of these circumstances when taken alone may be insufficient to prove *mens rea* possession but taking into account the combined strength of the

individual strands of evidence in this case, there can be no doubt whatsoever that the appellant was aware of his possession of the drug, that he knew the nature of drug he possessed and that he had the power of disposal over it. The overt acts of the appellant certainly established these matters. In short, the appellant had *mens rea* possession. The learned Judge was therefore entirely correct in invoking and applying the presumption under section 37(da) of the Act and in holding that the appellant had committed the offence of trafficking.

The Appeal

At the outset of the hearing before us, learned counsel for the appellant submitted that essentially the learned trial Judge and the learned Judges of the Court of Appeal had failed to consider and evaluate the entire evidence and the glaring material discrepancies and weaknesses in the prosecution's case in convicting the appellant. It was also submitted that there were overwhelming evidence that the appellant in his defence had raised a reasonable doubt as to the truth of the prosecution's case. The appellant advanced a number of grounds of appeal. However, I shall deal only with the main grounds of appeal which were focused on the following issues:

(1) The Police were acting on information received

It was argued for the appellant that the learned trial Judge and the Court of Appeal Judges had misdirected themselves in admitting hearsay evidence and other inadmissible evidence which was highly prejudicial to the appellant. It was submitted that in respect of some

of the admitted evidence there were elements of higher prejudice than probative value and the Court ought to have exercised its discretion to exclude them. It was contended for the appellant that the prejudicial element is that the police were acting on information received by ASP Giam Kar Hoon (PW7) from an informant that on 19.6.2000 a Chinese male from Hong Kong by the name of Chan King Yu would be trafficking in a dangerous drug (“syabu”) at Hotel Nova, Kuala Lumpur. Based on this information PW7 assembled his team to raid the said hotel room occupied by the appellant.

It can be gathered from the evidence adduced by the prosecution witnesses that the police team were in fact acting on information received to effect the arrest and detention of the appellant. PW7 in his evidence inter alia had stated as follows:

- (i) *“Sebelum tugas serbuan, pagi hari tersebut saya telah menerima maklumat dari sumber. Maklumat darinya mengatakan satu rakyat lelaki Cina Hong Kong bernama Chan King Yu akan mengedar dadah syabu di sebuah Hotel di Kuala Lumpur.... Dalam lebih kurang 12.10 tengahari sumber telah menalipon saya dan telah beri nama hotel tersebut, iaitu Hotel Nova.”*

[See page 193 of the Appeal Record Volume 2]

- (ii) *“Selain dari menyerbu di premis disyaki bilik hotel saya telah beri description sasaran kami, iaitu lelaki Cina bernama Chan King Yu, serta dengan gambarnya. Saya boleh tunjuk gambar*

sasaran.... This is the original copy yang diberi oleh sumber saya.... Saya beri salinan photocopy kepada anggota saya. Saya terima gambar ini pada hari kejadian jam lebih kurang pukul 8.00 lebih.

[See pages 218-219 of the Appeal Record Volume 2].

- (iii) *“Saya Nampak yang buka pintu tersebut adalah lelaki Cina merupai sasaran kami.”*

[See page 221 of the Appeal Record Volume 2].

L/Cpl. Samsudin Bin Jantan (PW4) in his evidence stated as follows:

“ASP Giam memberitahu siapanya suspek, iaitu, satu lelaki Cina bernama Chan King Yu rakyat Hong Kong berada di sekitar Kuala Lumpur. Pemerhatian ini adalah berkenaan kegiatan pengedaran dadah. Arahan adalah buat pemerhatian di Hotel Nova, Jalan Bukit Bintang. Lepas itu, saya lihat satu lelaki bangsa Cina seperti deskripsi yang diberi oleh ASP Giam melalui gambar yang ia beri turun dari Hotel Nova.”

[See page 163 of the Appeal Record Volume 2].

L/Cpl. Abdul Halim bin Basri (PW5) in his evidence stated as follows:

- (i) *“Operasi yang diketuai oleh ASP Giam untuk membuat tangkapan ke atas seorang lelaki Cina rakyat Hong Kong di sebuah hotel di Jalan Alor, Bukit Bintang. Ia Hotel Nova.”*

[See page 176 of the Appeal Record Volume 2].

- (ii) *“ASP Giam arah untuk standby kerana ada maklumat seorang bangsa Cina lelaki rakyat Hong Kong ada membawa dadah jenis syabu ke kawasan Bukit Bintang. Masa taklimat saya diberitahu ada orang akan membawa syabu.”*

[See page 183 of the Appeal Record Volume 2].

The learned trial Judge in his judgment on this issue of acting on information received had stated as follows:

“Keterangan menunjukkan tertuduh adalah sasaran pihak polis dalam operasi ini dari sejak awal. Pihak polis telah menerima maklumat bahawa seorang lelaki Cina dari Hong Kong akan mengedar dadah ‘syabu’ pada hari itu dan telah menerima salinan portret tertuduh.”

[See page 118 of the Appeal Record Volume 2].

The Court of Appeal in its judgment had also likewise stated as follows:

“On the morning of 19 June 2000 ASP Giam Kar Hoon (PW7) from the Narcotics Division of Bukit Aman received information that a Chinese male from Hong Kong by the name of Chang King Yu would be trafficking in dangerous drug at a hotel in Kuala Lumpur on that day.”

[See page 6 of the Appeal Record Volume 1].

I am of the view from the above quoted findings in the judgment of the Courts it can be said that both the High Court and the Court of Appeal had acted on statements which were clearly hearsay and prejudicial to the appellant and therefore inadmissible. On this point I would like to refer to the case of **Alcontara Ambross Anthony v. P.P. [1996] 1 MLJ 209 FC** wherein **Edgar Joseph Jr.**, FCJ in delivering the judgment of the Federal Court had this to say:

“The penultimate point which arose from consideration concerned the admission of certain irrelevant, inadmissible and gravely prejudicial evidence to wit that part of the testimony of ASP Abdul Wahab wherein he gave an account of the briefing he had given his men on the night before he had mounted the road block to stop and search the car driven by the appellant; more particularly, he said this ‘I informed them (his men) that information had been received that a certain Indian would be travelling in a blue Colt Gallant Mitsubishi WBE 2789 and transporting dadah, proceeding from Kawasan Permatang Bendahari towards Pulau Pinang.’ Now this statement by ASP Abdul Wahab was clearly based on hearsay, was prejudicial to the appellant, and therefore, inadmissible. Although no objection had been raised to the admission of this inadmissible evidence, the Judge was nevertheless under an automatic duty to stop it from being adduced for inadmissible evidence does not become admissible by reason of failure to object.”

In another case of Vijayaratnam v. P.P. [1962] 28 MLJ 106 on a similar point **Hashim J.** at page 106 stated:

“I think, if possible, the expression ‘on information received’ should not be used by police officers when giving evidence. It would appear to mean that somebody has given information, which may be hearsay, to the police and the police act on this information. In this particular case, the police witness went on to say that on arrival at the scene, he laid an ambush. This statement, read in conjunction with the expression ‘on information received’, would tend to indicate that the police had been told that an offence would be committed. In my opinion this would, to say the least, cloud the issue when the trial commenced and it might to a certain degree prejudice the court against the appellant. To put in another way, there was a probability that the court trying the appellant was to a certain extent, influenced by the opening statement of the police witness. In my opinion, such a state of affairs should be avoided.”

(2) Failure of the Police to investigate Man Chai’s role/existence

It is the contention of the appellant that despite the name of the person “Man Chai” was mentioned in the cautioned statement of the appellant [Exhibit D29], Man Chai’s photograph identified by the appellant and Man Chai’s telephone numbers found in the appellant’s notebook seized by the police [Exhibit P11N], still the police failed or

refused to investigate Man Chai. It is also noted that the learned High Court Judge and Court of Appeal Judges also failed to appreciate the fact that Man Chai's name was mentioned in Exhibit D29. Neither did the learned Judges consider that the police had not investigated Man Chai or all of the persons mentioned in Exhibit P11N. On this point the appellant (DW1) in his evidence had stated the following:

“Kawan Michael Chan nama Man Chai ada jemput saya di lapangan terbang apabila saya sampai di Malaysia.... Saya ada bertemu dengan Ken di Johor. Ken ada masuk kereta Man Chai dan beri wang RM30,000 kepada saya..... Michael Chan telah minta saya serah RM25,000 ke Man Chai dan RM5,000 lagi itu untuk perbelanjaan saya di Malaysia. Ken ada disebut di dalam buku ini. Ia itu pelanggan pertama di muka surat 3 di P11N.”

[See page 270 of the Appeal Record Volume 2].

DW1 further stated as follows:

“Lelaki tersebut tanya saya dalam loghat Kantonis di mana Man Chai. Saya jawab saya tidak tahu dan saya juga beritahu polis saya sedang tunggu dia. Saya tanya pihak polis, boleh tak saya telefon dia. Saya beritahu polis saya ada nombor telefon Man Chai.”

[See page 283 of the Appeal Record Volume 2].

The prosecution witness PW3, the investigating officer when cross-examined whether he had taken any steps to investigate Man Chai replied that he did not do so wherein he stated as follows:

“Q. *Dalam D29, OKT ada cakap bila polis masuk dalam bilik, polis ada cakap mereka cari seorang nama Ah Man Chai. Awak tahu siapa Ah Man Chai?*

A. *Saya tidak tahu.*

Q. *Adakah awak buat apa-apa siasatan atas Ah Man Chai?*

A. *Tiada.”*

[See page 154 of the Appeal Record Volume 2].

When further shown Exhibit P11N, PW3 had this to say:

“*Saya terima P11N pada 20.6.2000. Saya lihat secara kasar sahaja P11N.*

Put: *If you had gone through this notebook, you would have seen local telephone numbers and names. Kamu ada lihat muka surat 3.*

A: *Saya tidak buat semakan atas kandungan buku ini.”*

[See page 157 of the Appeal Record Volume 2].

The prosecution witness PW7 when asked if the appellant had mentioned the name Man Chai, he answered in the affirmative. PW7 also stated that he did not investigate or trace the last ten telephone calls recorded in both appellant mobile phones. PW7 had in fact

stated that he had switched off the two mobile phones belonging to the appellant that were seized on the day the appellant was arrested. When the following question was put to PW7, his reply was as follows:

“Put: Had you not switched off the handphone you would have allowed the appellant to receive a phone call from one Man Chai.

A: Kemungkinan boleh.”

[See page 234 of the Appeal Record Volume 2].

The appellant in his defence called Shamsidar Bt. Hashim (DW8), the Manager at Pre-Paid Times Cell Sdn. Bhd. who testified that the police did not make any inquiries about the telephone No. 017-5810792 being one of the appellant’s telephone seized by the police party from the appellant.

I am of the view had the police investigated the local telephone numbers found in Exhibit P11N and the last ten calls made and received as shown in Exhibits P18 and P19, it would have led to the discovery of the people the appellant was in contact with, and the existence of Man Chai. Man Chai in my view was not a fictitious character. Man Chai had played a key role in leading the police party to effect arrest on the appellant. On this point I would like to refer to the case of **Chow Kok Keong v. P.P. [1998] 2 CLJ 469 (FC)** wherein the Federal Court at page 482 stated:

“In this situation, it was certainly open to the defence to contend that if the whole matter had been probed, the

judge might have felt unable to accept the police evidence at all on the ground if the testimony of the police witness was unreliable as to when the accused had made disclosure of his defence, their testimony as to other matters for example, about the bread and iced tea and about the accused dropping the bag might also be unreliable. Had such a submission been made, it might or might have carried weight, but if upheld, it would have led to an outright acquittal.”

As regards the material particulars relating to the existence of Man Chai which had been disclosed by the appellant in his cautioned statement Exhibit D29 which was made on the day after his arrest, I am of the view that the police had all the time to check as to their veracity. The burden was on the prosecution to check whether the appellant's version of the facts as they appeared in the cautioned statement was true or false. The onus was upon the prosecution to disprove this important part of the appellant's version of facts. The appellant was under no duty to put to the investigation officer the aforesaid material particulars in view of their prior disclosure in the cautioned statement. **[See the case of Alcontara Ambross Anthony v. P.P. (supra)].**

It is also to be noted of the fact that according to the appellant Man Chai asked him to check out of Hotel Midah and checked into Hotel Nova at noon on 19.6.2000 and the action taken by the police

ambush party to be at Hotel Nova was also on the same day. On this point the appellant (DW1) testified as follows:

“Pada 19 Jun 2000 saya check-out Hotel Midah jam lebih kurang 11.00 pagi. Saya check-out selepas saya diberitahu oleh Man Chai. Man Chai suruh saya check-in Nova Hotel... Saya check-in Hotel Nova lebih kurang 12.00 lebih tengah hari.”

[See page 275 of the Appeal Record Volume 2].

I am of the view it cannot be merely a coincidence that PW7 who in his evidence said that he received information from the informant at about 12.10 pm on 19.6.2000 that the appellant will be at Hotel Nova. This is what PW7 said:

“Sebelum tugas serbuan, pagi hari tersebut saya menerima maklumat dari sumber, maklumat darinya mengatakan satu rakyat lelaki Cina Hong Kong bernama Chan King Yu akan mengedar dadah syabu di sebuah Hotel di Kuala Lumpur.... Dalam lebih kurang 12.10 tengahari, sumber telah menalipon saya dan telah beri nama Hotel tersebut, iaitu Hotel Nova.”

[See page 193 of the Appeal Record Volume 2].

It is the contention of the appellant that when the appellant checked in at Hotel Nova around 12.00 pm, the police raiding party had already received the name of the hotel from the informant. To the appellant the shift from Hotel Midah to Hotel Nova was pre-planned or pre-arranged by Man Chai and the police. I am of the

view on this point from the evidence earlier shown there is a justification to support such a contention by the appellant.

(3) Drugs planted in Room 1303 and two raids made by the Police team

I shall now deal with the more serious allegation made by the appellant against the prosecution's case. The defence had alleged that the police raiding party in this case had "planted" the evidence against the appellant after they had knowledge of the existence of the incriminating exhibits in the said room 1303 of Hotel Nova. On this issue it is the contention of the appellant that in actual fact there were two raids made by the police on room 1303 and not one raid as contended by the prosecution. In the first raid made on room 1303 the defence contended that the appellant was not present and at this stage it was alleged that the police raiding team had staged a scene by creating an activity which the prosecution relied in order to prove knowledge of the drug in order to establish possession against the appellant. On this point it is to be noted that it is the prosecution's case that when the police ambush party entered room 1303 and conducted a search they recovered incriminating items placed in the said room and bathroom. The appellant however in his evidence denied knowledge of the incriminating items found and claimed that the police ambush party had planted the evidence of the incriminating items against him.

Having carefully considered the evidence adduced as a whole there is a justification to find that the raiding party had actually entered the appellant's room earlier in the absence of the appellant. On this point I am of the view the learned trial Judge and the Court of Appeal Judges failed to consider the evidence of DW2 and DW3 at all, who were independent witnesses and had no reason or interest to lie. The learned Judges chose instead to believe the testimony of PW5 and PW7 who were police witnesses and took part in the raid. Neither did the learned Judges give any reason for rejecting DW2's and DW3's evidence.

With regard to the first raid that was carried out without the presence of the appellant, DW2 in his evidence stated that at about 8.40 pm on 19 June 2000 two officers came to his counter at the Hotel Nova asking the key to room 1303 saying that they wanted to open the door. DW2 made a key and followed them to the 13th floor. When he arrived at 13th floor he saw about eight police officers about to ambush the room. One of the police officers asked him to see a police officer in room 1310. DW2 entered room 1310 and was introduced to a police officer by the name of DSP Yap Seng Hock who told him to open the door to room 1303 as the police wanted to ambush the said room. DW2 opened the door to room 1303 and DSP Yap Seng Hock together with the raiding team entered the room. The police then asked DW2 to go away and DW2 left.

DW2 in his evidence further stated that he did not see any member of the police team trying to break the lock to the room door of room 1303. He did not see the police knocking the door and shout

“police” and did not hear somebody answering in Cantonese. He did not hear the police knocking several times before somebody answered the door. DW2 categorically said that he was the person who opened the door to room 1303 using his key-card that he had brought along.

In support of the evidence of DW2 that he opened the door to room 1303, the Front Office Manager of Hotel Nova, DW3 testified that a master key in the form of a key-card can open every door. It is carried by the Manager. DW3 has the master key and the Front Office Supervisor will have one as well. The housekeeping staff and the supervisor on duty will also have the room master key. DW3 further testified that if the door is locked from inside it can only be opened by an emergency key. Only two person hold that emergency key and they were DW3 and the hotel Manager. If it is used it will be recorded and on 19 June 2000 the emergency key was never used at any time.

From the above evidence given by DW2 and DW3 I am of the considered view there are merits in the defence contention that:

- (i) DW2 opened the door once at the request of the police using the master key;
- (ii) DW2 could not possibly have opened the door with the master key if the door was latched from inside;
- (iii) if the door was not latched from inside, the appellant could not have been in the room;

- (iv) there was no force used to open the door the first time;
and
- (v) no voice from inside speaking in Cantonese as contended by the prosecution.

It is also to be noted as regards the existence of the first raid in this case as contended by the defence the appellant left the hotel room three times between 12.30 p.m. and 9.00 p.m. on 19.6.2000 during which time the room could not have been latched from the inside and anyone could have had access to the said room.

As regards the second raid there are material contradictions or discrepancies in the evidence of the prosecution witnesses PW5 and PW7 when compared with the evidence by defence witness, DW2. The second raid conducted by the police team as contended by the defence is premised on the presence of the appellant in room 1303 and that defence witness DW2 who had earlier in the first raid assisted the police team to open the door to room 1310 was not present. PW5 in his evidence inter alia stated as follows:

“Kami sampai ke hotel jam 8.00 malam. ASP Giam arah team serbuan berada di Hotel Nova dan pada jam 9.00 malam ASP Giam arahkan team serbuan naik ke tingkat 13. Seterusnya ASP Giam telah mengetuk pintu bilik 1303 dan menyebut perkataan ‘polis’ dalam bahasa Cina. Pintu masih tidak dibuka. ASP arahkan saya pecahkan pintu bilik hotel. Pecahkan pintu dengan pemecah pintu yang dibawa. Tapi pintu tidak dapat dipecahkan dan

saya dengar orang menjerit dalam bilik dalam bahasa Cina. Dalam dua atau tiga minit pintu pun dibuka. ASP Giam dan team serbuan terus menyerbu masuk ke bilik....”

[See page 177 of the Appeal Record Volume 2].

When cross-examined PW5 further stated as follows:

“Ada ASP Giam cuba memanggil pekerja hotel masuk buka pintu. Kemudian pekerja hotel datang untuk membuka pintu tetapi tidak dapat buka kerana pintu diselak dari dalam.

Setelah tak boleh buka ia beredar dari tempat itu. Dia pakai kad kunci.....Kad itu tidak boleh buka.”

[See pages 185 and 186 of the Appeal Record Volume 2].

PW7 on the other hand in his evidence in cross-examination had stated as follows:

“Kami tunggu di sana sehingga jam 9.00 malam. 8.50 malam kami dapat berita dari D/Kpl. Samsudin bahawa sasaran kami telah masuk hotel. Saya tak nampak OKT masuk bilik.

Saya ketuk pintu bilik tersebut lebih kurang jam 9.15 lebih. Saya hanya percayai OKT masuk bilik lebih kurang jam 8.50 malam. Itu pada pendapat saya. Saya pergi ke depan pintu bilik tersebut dan belum saya ketuk pintu saya telah arah Insp. Nizam pergi jumpa pihak hotel untuk mendapat kunci master....Seorang staff hotel naik

ke tingkat . Hotel staff itu tidak pergi ke bilik No. 1310. Sebelum hotel staff mari saya belum ketuk pintu. Saya tidak panggil atau ketuk pintu....Saya telah ambil kad master itu dari staff itu dan telah cuba buka pintu bilik 1303....Saya telah cuba dua kali tetapi pintu tidak dapat dibuka. Maka saya syaki pintu telah dikunci dengan latch dari dalam bilik. Master key itu saya telah serah balik ke pihak hotel dan selepas staff hotel beredar dari tingkat 13, baru saya mula ketuk pintu bilik tersebut. Saya dengar suara dari bahagian dari bilik tersebut yang bertanya siapa di pintu dalam bahasa Kantonis. Saya jawab saya kakitangan kerajaan dalam bahasa Kantonis....Pintu itu dibuka selepas kami cuba pecah masuk pintu tersebut beberapa kali. Selepas suara dalam bilik jawab 'tunggu sebentar' dalam seminit lebih pintu tidak dibuka. Saya minta lagi buka pintu tetapi tidak dibuka. Kemudian saya suruh anggota saya pecahkan pintu."

[See pages 227 and 228 of the Appeal Record Volume 2].

Based on the above version of the prosecution's witnesses PW5 and PW7, I am of the view there is a clear fabrication of the evidence because DW2 who is not an interested witness had testified that he opened the door of the room 1303 only once at the request of the police using the key-card he carried along and there was no force used. Neither was there any knocking, shouting and answering in Cantonese as alleged by the police. Therefore, when the prosecution

suggested that DW2 was present during the second raid, it was clearly a lie. Further, if the door to room 1303 is locked from inside it has already been established in the evidence of DW3 that it can only be opened by an emergency key. On 19.6.2000 the emergency key was never used at any time. As such, if room 1303 was latched from the inside, the police could have easily requested that the door be opened with the emergency key and there was no necessity to break open the lock to the room door, especially if the police wanted to make a surprise attack on the appellant as testified by PW7. On this issue of discrepancies in the evidence of the witnesses who gave evidence at the trial and the allegation of fabrication of evidence by the prosecution witnesses, I would like to refer to the case of **Gunalan a/l Ramachandran & Ors. v. P.P. [2006] 2 MLJ 197** wherein **Arifin Zakaria**, FCJ in delivering the judgment of the Court at page 206 had this to say:

“The learned trial Judge dismissed this as minor discrepancy which he said is expected of any witness and this goes to strengthen the point that they were not fabricating evidence, they were telling the truth. To him, what is important was whether the things containing the drug were in their possession at the material time. However, he went on to say that between the two he would prefer the evidence of SP4, being the first police officer to have entered the room. In this regard, I am in agreement with Abdul Aziz, JCA that the discrepancy here is far from being trivial as it pertains to an activity which the prosecution relied on in order to prove

knowledge of the drugs in order to establish possession. This discrepancy has to be considered against the evidence of the accused that when SP4 and SP6 entered the room, the first and the third accused were in the standing position. This gives rise to serious doubt on the accuracy of the evidence of SP4 and SP6, that when they entered the room, the first and third accused were sitting down cross legged facing drug. If their attention was in fact focused on what the two accused were doing at the material time, as they claimed, then they could not be seeing to different activities. And it is all the more telling when no empty plastic packet was ever produced in evidence.”

(4) The Truth Behind the Damaged Door and the Intentional Concealment of the Role Played by DSP Yap Seng Hock

For the appellant it was also argued that there was no necessity for the raiding party to damage the door lock of room 1303 to such an extent, especially if they could have used the emergency key available. It was submitted for the appellant that the only reason the said door lock of room 1303 was damaged intentionally to such an extent was to permanently destroy the information registered in the lock as to how many entries that had been made to room 1303 on 19.6.2000. There is evidence from the testimony of DW3 who stated that the key to the room door 1303 is by using a key-card. Each time the key-card is inserted it will be recorded. However in the present case the lock was damaged and therefore DW3 cannot trace how

many times it has recorded on 19.6.2000. I am of the view this piece of evidence would conclusively point to the fact that the raiding party had intentionally destroyed a crucial evidence to cover up the first raid conducted in the absence of the appellant to plant the said drugs and implicate the appellant.

In relation to the existence of the two raids conducted by the police team on room 1303 as contended by the defence I am of the view the defence had also validly raised the issue of the intentional concealment by the prosecution as to the identity and involvement of DSP Yap Seng Hock in the raid. It is to be noted the prosecution witnesses, namely the police officers PW3, PW5 and PW7 repeatedly denied the presence of DSP Yap Seng Hock and his involvement in the raid at Hotel Nova. PW3 in his evidence denied knowing DSP Yap Seng Hock and said that the raiding team only comprised ASP Giam Kar Hoon (PW7), Inspector Ahmad Nizam, Koprak Halim (PW5), DSM Abdullah and Koprak Teoh. PW5 in his evidence stated that he could remember clearly there were only five officers at the front door of room 1303 and that DSP Yap was not in the hotel on the night of 19.6.2000. PW7 in his evidence inter alia stated that after receiving information, he got his raiding team ready comprising DSM Abdullah, D/Kpl. Teoh, L/Kpl. Abdul Halim, D/Kpl. Shamsudin and Inspector Abdul Nizam. On 19.6.2000 the raiding team including PW7 comprised six officers and the six of them were in the room until the appellant was brought out. PW7 also stated that he did not know if there was any police officer in room 1310. However, when elicited through cross-examination and when shown the hotel print out as in

IDD34, PW7 confirmed that room 1310 was registered under DSP Yap Seng Hock's name on 19.6.2000.

On the other hand, directly in contrast to the evidence given by the prosecution witnesses on the issue of the presence of DSP Yap Seng Hock at Hotel Nova on 19.6.2000, the defence had through the evidence of DW2 and DW3 stated that on 19.6.2000 a policeman by the name of Yap Seng Hock came to the hotel and booked the room No. 1310. DW2 met DSP Yap Seng Hock at room 1310 and was briefed by DSP Yap Seng Hock that the police team wanted to ambush room 1303. DW2 further stated that when he opened the door to room 1303, DSP Yap Seng Hock was together with the raiding team. DW2 was later asked to go away.

The evidence of DW2 that DSP Yap Seng Hock was present at Hotel Nova and in room 1303 on 19.6.2000 is corroborated by DW3 who had stated that DSP Yap Seng Hock informed him on that day that he (DSP Yap) had occupied room 1310 for a few hours and this was to enable him to carry out the raid in the hotel. According to DW3, DSP Yap Seng Hock thanked the hotel for cooperation in giving assistance to the police and had requested for the room charges on room 1310 which he occupied for about three hours be waived.

The appellant (DW1) in his evidence inter alia stated that there were at least ten police officers in his room 1303 and during the raid a Chinese man questioned the appellant on Man Chai's whereabouts. The appellant went on to state that the Chinese man who enquired

about Man Chai is not in court and there were three Chinese men altogether in the said room 1303. It should be noted here that the three Chinese in the raiding team must be ASP Giam (PW7), Kpl. Teoh and DSP Yap Seng Hock.

In the circumstances of the case I am of the view the appellant's contention that DSP Yap Seng Hock was at the scene or even earlier is tenable as he had checked in room 1310 at 6.30 pm on 19.6.2000. DSP Yap Seng Hock was there until the raid was carried out and completed. It cannot be true that PW7 does not know DSP Yap's whereabouts as PW7 admitted that DSP Yap is the coordinator of the operation and PW7 reports to DSP Yap. It must be noted again that the learned Judge of the High Court and Court of Appeal Judges completely rejected the testimony of DW2 and DW3 and documentary proof as in D34 (the hotel print out stating DSP Yap Seng Hock checked in at 6.30 pm) which conclusively showed that DSP Yap had in fact checked into room 1310 and had actively participated in the raid. The learned Judges failed to realize that D34 was not rebutted at all by the prosecution. Again, the learned Judges chose to believe PW5 and PW7 who were police officers in the raiding team. I would hasten to add here by stating that there has been a failure by the prosecution to call a material witness, that is DSP Yap Seng Hock to give evidence for the prosecution and hence a justifiable case for the defence to invite for the invocation of adverse presumption under section 114(g) of the Evidence Act against the prosecution case.

(5) Disposal of P24 - Whether Concocted by Police

Learned counsel for the appellant had also raised in this appeal on the issue of Exhibit P24 and the contents found therein which the prosecution contended were thrown into the dustbin outside Hotel Nova by the appellant. The complaint of the appellant on this issue is that P24 was not sent to the fingerprint department for analysis at all. P24 contains a very vital piece of evidence, that is the cover or lid that is placed on top of the cylinder in which the drugs were placed. P24 is a material prosecution exhibit imputing the appellant has knowledge of the drugs, and his power to dispose off the same. Despite this, the learned Judge of the High Court never once considered the failure of the police to send such a vital piece of evidence in P24 for finger print analysis. If this had been done, it would have pointed to the fact as to whether or not that the appellant had dealt with and handled the drug exhibits. On this point it would not be far-fetched to say that the police had not sent P24 for fingerprint analysis because they knew so well P24 was never handled by the appellant and it would be futile exercise as the appellant's fingerprints will never be found in P24. It is the defence case that the disposal of P24 as contended by the police never occurred. It was fabricated for the sole purpose of imputing the appellant had knowledge as to the contents of the cylinder and his power to dispose off the drugs. It is also to be noted that P24 was never mentioned in the report lodged by PW7. PW7 when cross-examined on this point had this to say:

“Q. You gave evidence that a lid of one of the containers was found in the dustbin?”

A. *Benar. Saya ada buat laporan polis.*

Q. *In that report did you mention that one of the lids was thrown into the dustbin?*

A. *Saya tidak ingat.*

A. *In the report I did not mention that one of the lids was missing.”*

[See page 223 of the Appeal Record

Volume 2].

On the purported disposal of P24 by the appellant I am of the view there was no reason for the appellant to dispose P24 into a dustbin outside the hotel. There were dustbins in the room and outside the room along the corridor at the hotel where the appellant could have easily disposed P24 and its contents. Moreover, P24 was discovered at a public dustbin which is accessible to any member of the public.

(6) Missing Items Belonging to the Appellant

For the appellant it was submitted that a number of personal items seized by the police team belonging to him were missing and not produced as exhibits at the trial. The pink plastic bag as seen in Exhibit P30A and Exhibit P30B containing VCD was not stated in the Search List P28, nor was it produced in Court. Other items included ladies handbags, shoes and souvenirs bought by the appellant, which were in the room 1303. These items were also not stated in the

search list and had all gone missing. The appellant had also stated that he bought the Polo bag (P12) which the prosecution produced as exhibit for the purpose of putting the items and souvenirs he bought in Malaysia to be brought back to Hong Kong.

The appellant's evidence on these missing personal items and the Polo bag (P12) that he had bought in Kuala Lumpur is corroborated by the evidence of DW4, the appellant's girl friend in Hong Kong who inter alia stated that on 19.6.2000 she spoke to the appellant and had requested him to buy for her items such as ladies handbags, shoes and souvenirs. DW4 had also informed the appellant to buy a new bag for putting in those items bought since the appellant had only carried a small bag. DW4's evidence is corroborated by her telephone bills dated 18.6.2000 and 19.6.2000 marked as D37A and D37B.

Conclusion

Having considered the defence case as against the prosecution case, with all the infirmities and the glaring discrepancies in the prosecution's case as discussed earlier, I am of the firm view that the defence had succeeded in raising a reasonable doubt on the prosecution's case. The appellant from the time of his arrest and through out the entire trial had consistently maintained that he has no knowledge of the drugs because the three plastic bags found in the hotel room 1303 in fact belonged to the person named Man Chai and that the appellant genuinely believed that these plastic bags contained tools. From the evidence unraveled in Court, it is clear that

the defence of the appellant was not a bare denial but an explanation indicating that the alleged drugs could have belonged to Man Chai and Man Chai could have been the trafficker. The appellant at most was only an innocent carrier. In the circumstances, I would allow the appeal herein and set aside the conviction and sentence imposed on the appellant. The appellant is accordingly acquitted and discharged of the charge.

(DATO' ZULKEFLI BIN AHMAD MAKINUDIN)
Judge
Federal Court

Dated: 14 November 2008.

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