DALAM MAHKAMAH RAYUAN MALAYSIA DI PUTRAJAYA
[BIDANGKUASA RAYUAN]
[RAYUAN JENAYAH NO: P-05-185-07/2014]

ANTARA

PENDAKWA RAYA **... PERAYU**

DAN

1. **LIM CHSUNG MENG**
(NO. K/P: 740809-07-5407)

2. **CHEN HUI** **... RESTORAN-RESPONDEN**
(W/N CHINA) (NO. PP: G 4776987)

Didengar bersama

DALAM MAHKAMAH RAYUAN MALAYSIA DI PUTRAJAYA
[BIDANG KUASA RAYUAN]
[RAYUAN JENAYAH NO.P-5-341-11/2014]

ANTARA

1. **LIM CHSUNG MENG**
(NO.K/P: 740809-07-5407)

2. **CHEN HUI**
(W/N CHINA) (NO. PP: G 476987) **... PERAYU-PERAYU**

DAN

PENDAKWA RAYA **... RESPONDEN**

(Dalam Perkara Mahkamah Tinggi Malaya di Pulau Pinang
Perbicaraan Jenayah No: 45A-24-07/2013

Antara

Pendakwa Raya

Lawan

1. Lim Chsung Meng
2. Chen Hui (W/N China)

Coram:

AZIAH ALI, JCA
MOHD ZAWAWI SALLEH, JCA
ABDUL RAHMAN SEBLI, JCA

JUDGMENT OF THE COURT

Introduction

[1] Before us, there are appeal and cross-appeal against the decision of the learned High Court Judge dated 16.6.2014.

[2] The Public Prosecutor (the appellant before us) is dissatisfied with the learned judge's decision in amending the first charge of trafficking to one of possession under section 12(2) of the Dangerous Drugs Act 1952 ("the DDA 1952") and punishable under section 39A(2) of the DDA 1952.

[3] There is also a cross-appeal by the accused persons (the respondents before us) against conviction and sentence in respect of the second, third and fourth charges.

[4] At the Court below, there were four charges preferred against both the respondents as follows:

i) **Amended First Charge, (P4A)**

> "Bahawa kamu bersama-sama pada 13.10.2012 jam lebih kurang 9.15 malam di rumah No 12 Lebuhraya Halia, Mt Erskine, Tanjung Tokong, di dalam Daerah Timur Laut, di dalam Negeri Pulau Pinang, telah didapati mengedar dadah berbahaya iaitu 3,4 - methylenedioxymethamphetamine (MDMA) sejumlah 60.90 gram dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama dibaca bersama Seksyen 34 Kanun Keseksaan.".

(ii) **Amended Second Charge, (P5A)**

> "Bahawa kamu bersama-sama pada 13.10.2012 jam lebih kurang 9.15 malam di rumah No 12 Lebuhraya Halia, Mt Erskine, Tanjung Tokong, di dalam Daerah Timur Laut, di dalam Negeri Pulau Pinang, telah didapati memiliki dadah berbahaya iaitu Ketamin sejumlah 106.77 gram dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 12(2) Akta Dadah Berbahaya dan boleh dihukum di bawah Seksyen 12(3) Akta yang

sama dibaca bersama Seksyen 34 Kanun Keseksaan.

(iii) **Amended Third Charge, (P6A)**

"Bahawa kamu bersama-sama pada 13.10.2012 jam lebih kurang 9.15 malam di rumah No 12 Lebuhraya Halia, Mt Erskine, Tanjung Tokong, di dalam Daerah Timur Laut, di dalam Negeri Pulau Pinang, telah didapati memiliki dadah berbahaya iaitu 5.12 gram methamphetamine dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 12(2) Akta Dadah Berbahaya dan boleh dihukum di bawah Seksyen 39A(1) Akta yang sama dibaca bersama Seksyen 34 Kanun Keseksaan.".

(iv) **Amended Fourth Charge, (P7A)**

"Bahawa kamu bersama-sama pada 13.10.2012 jam lebih kurang 9.15 malam di rumah No 12 Lebuhraya Halia, Mt Erskine, Tanjung Tokong, di dalam Daerah Timur Laut, di dalam Negeri Pulau Pinang, telah didapati memiliki dadah berbahaya iaitu 0.04 gram Nimetazepam dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 12(2) Akta Dadah Berbahaya dan boleh dihukum di bawah Seksyen 12(3) Akta yang sama dibaca bersama Seksyen 34 Kanun Keseksaan.".

[5] At the end of the prosecution's case, as stated earlier, the learned trial judge amended the first charge of trafficking to one of

possession under section 12(2) of DDA 1952 and ordered both respondents to enter their defence on the said amended charge.

[6] As to the other three charges, the learned trial judge held that a prima facie case had been established against both respondents and called them to enter their defence on the said charges.

[7] At the end of the defence case, the learned trial judge found that the defence of both respondents had failed to raise a reasonable doubt in the prosecution's case and had also failed to rebut the presumption under section 37(d) or under section 37(g) of the DDA 1952. The learned trial judge then convicted them on all four charges and sentenced them as follows:-

(a) First Charge (Exhibit 4B) - Both respondents were sentenced to 18 years imprisonment (and 10 strokes of the rotan against the 1st appellant);

(b) Second Charge (Exhibit 5A) - Both respondents were sentenced to 5 years imprisonment;

(c) Third Charge (Exhibit 6A) - Both respondents were sentenced to 5 years imprisonment (and 3 strokes of the rotan against the 1st appellant); and

(d) Fourth Charge (Exhibit 7A) - Both respondents were sentenced to 3 years imprisonment,

and all the above sentences were ordered to run concurrently.

[8] Hence, the appeal and cross-appeal.

The Prosecution's Case

[9] The prosecution's case may be summarised as follows:-

(a) On 13.10.2012, at about 9.15 pm, Insp Lim Wei Yin (SP7) and a team of seven narcotics officers raided a house No. 12, Lebuhraya Halia, Mt Erksine, Tanjong Tokong, Pulau Pinang.

(b) Upon entering the house, SP7 identified himself as a police officer to a male and female Chinese (the 1st and 2nd respondents). They were seated on the sofa in the living room and were shocked on being informed that SP7 was a police officer.

(c) SP7 conducted a search in the living room in the presence of both respondents and found:-

(i) A "Julie" biscuit tin (Exhibit P58) containing 10 transparent packets, each containing 200 pink-coloured pills suspected to be ecstasy;

(ii) 2 transparent plastic packets, each found to contain 50 pink-coloured pills suspected to be ecstasy; and

(iii) A transparent plastic packet containing a number of empty packets.

(d) The "Julie" biscuit tin was found on the dining hall floor next to a door on the right side of the living room, behind the sofa where both respondents were seated.

(e) A further search by SP7 in the living room, SP7 found the following exhibits:-

(i) 5 tablets in an aluminium foil suspected to be Eramin 5 pills (Exhibit P59A - B);

(ii) A Malaysian international passport No. A 26291034 in the name of the 1st respondent, (Exhibit P45);

(iii) An international passport of China No. G 47769867 in the name of the 2nd respondent (Exhibit P.47);

(iv) A small weighing scale (Exhibit P48); and

(v) A plastic packet containing 4 pieces of the 1st respondent's photograph (Exhibit P50).

(f) Both respondents and the exhibits were taken to the Narcotics Office at the IPK, Pulau Pinang. A search list (Exhibit P43) was prepared and served on both respondents.

(g) On the same day, a police forensic team led by SP4 visited the said house and collected the following exhibits:-

(i) 2 blue coloured "Gillette" razor bladders (Exhibit P23B and P24B);
(ii) A black comb (Exhibit P25B);
(iii) An underwear of "SUB" brand (Exhibit P 26B);
(iv) A "Colgate" toothbrush (Exhibit P27B);
(v) 2 "Aqua Fresh" tooth brushes (Exhibit P28B and P29B); and
(vi) A "Gillette" razor blade (Exhibit P30B).

(h) Upon analysis by the Chemist (SP8), the 200 pink-coloured pills were found to contain the following dangerous drugs:-

(i) 60.90 grams of 3, 4 - methylenedioxy-methamphetamine (MDMA) (the subject matter of the 1st charge);
(ii) 106.77 grams of Ketamin (the subject matter of the second charge); and
(iii) 5.12 grams of methamphetamine (the subject matter of the 3rd charge);

(i) Upon analysis of the exhibits collected by the forensic team, SP5 confirmed as follows:-

(i) A male DNA profiling (14 locus) as detected on a trace DNA on a comb, (Exhibit P25B) which was consistent with the DNA profiling from the blood specimen "II" (labelled "Chen Hui");

(ii) A mixed DNA profiling (at least two individuals) was detected on a trace DNA on an underwear, (Exhibit P26B), the blood specimen "9" (labelled "Lim Chsung Hui") and the blood specimen "11" (labelled "Chen Hui") were consistent to be the major and minor contributors to the said mixed DNA profiling; and

(iii) A mixed DNA profiling (at least two individuals) was detected on a trace DNA on a toothbrush, (Exhibit P28B), the blood specimen "9" (labelled "Lim Chsung Hui") was consistent to be the major contributor to the said mixed DNA profiling. However, the minor contributor was too weak to be identified for comparison purposes.

(j) A property agent (SP9) confirmed that the house raided by SP7 was rented to the 1st respondent from 1.12.2011 until 30.11.2012. The house was rented empty, without any furniture and other household items.

Findings of the Learned Trial Judge at the End of the Prosecution's Case

[10] The key findings of the learned trial judge at the end of the prosecution's case were as follows:-

(i) Both respondents were in custody and control of Exhibit P58 and the drugs on the table in front of them;

(ii) Both respondents were the only persons present in the house where the drugs were recovered on the date of their arrest;

(iii) The 1st respondent rented the said house as confirmed by SP9;

(iv) Both respondents' clothings were found in the living room and in the room upstairs;

(v) The weighing scale and both respondents' passport were found mingled with the drugs which were found on the table near the sofa where both respondents were seated;

(vi) The "Julie" biscuit tin that contained the drugs were seized from the dining room floor at a distance of about 6 feet behind the sofa where both respondents were seated; and

(vii) The DNA profiling of both respondents were detected on the comb (Exhibit P25B), and the male undergarment (Exhibit P26B) was detected with a mixed DNA profiling of at least two individuals which were consistent with the DNA profiling of both respondents and the tooth brush (Exhibit P28B) was detected with the DNA profiling of the 1st respondent.

[11] As regards the drug found in the "Julie" biscuit tin (Exhibit P58) which was the subject matter of the first charge, the learned trial judge made specific findings as follows:-

(i) That in furtherance of both respondent's common intention under section 34 of the Penal Code, the "Julie" biscuit tin was under their custody and control at the material time;

(ii) That the presumption of knowledge under section 37(d) of DDA 1952 had arisen against both respondents;

(iii) That in the alternative, as the drug was found in the biscuit tin (Exhibit P58) in the said house, both of them being occupier thereof, were presumed to have knowledge of the concealment of the said drug by reason of the presumption under section 37(g) of the DDA 1952; and

(iv) That despite the weight of the drugs MDMA being in excess of 30 grams, the presumption of trafficking under section 37(da) of DDA 1952 cannot be invoked as it offends the rule against double presumption as decided in the case of *Muhammed bin Hassan v. P.P* [1998] 2 MLJ 273.

The Defence Case

1st Respondent

[12] The 1st respondent's defence in brief was that he was arrested by the police together with the 2nd respondent in the living room of the said house on 13.10.2012. The 1st respondent rented the house for a year and was staying with the 2nd respondent in the room as shown in the photograph at Exhibit P19(28). According to the 1st respondent, the police were looking for Ah Yong, his brother. Ah Yong was also staying in the same house, in the room as shown in the photograph at Exhibit P19(23). There was another person staying in the house by the name of Sunny since April 2012.

[13] The 1st respondent testified that the drugs found in the living room and outside the living room belonged to Ah Yong. He gave the officer Ah Yong's contact number.

[14] The 1st respondent said that the biscuit tin that contained the drug was found outside the dining room. He saw Ah Yong holding the said biscuit tin before.

[15] He claimed no knowledge of the exhibits found in the said house.

2nd Respondent

[16] The 2nd respondent's defence in a nutshell was that she was the girlfriend of the 1st respondent and lived with him at the said house and they both occupied the room as shown in the photograph at Exhibit P12(28).

[17] The 2nd respondent told the police that she did not know what were the items found in the biscuit tin and they belonged to Ah Yong, the 1st respondent's brother.

[18] She corroborated the evidence of the 1st respondent that Ah Yong and another person named Sunny had also stayed in one of the rooms in the said house (room shown in the photograph at Exhibit P19(24)) since April 2012.

Findings Of The Learned Trial Judge At The End Of The Prosecution's Case

[19] The learned trial judge held that both respondents failed to cast any reasonable doubt in the prosecution's case. Thus, the prosecution had proved its case beyond any reasonable doubt.

The Appeal

[20] Learned Deputy Public Prosecutor ("Deputy") submitted that the learned trial judge had erred in amending the first charge of

trafficking to one of possession under section 12(2) of DDA 1952 and punishable under section 39A(2) of the same Act.

[21] Learned Deputy posited that the evidence adduced by the prosecution was sufficient to sustain a charge of trafficking under section 39B(1)(a) of the DDA 1952.

Cross-Appeal

[22] In the cross-appeal, the 1st and 2nd respondents argued that the learned trial judge had failed to undertake a maximum evaluation of the evidence adduced by both respondents. The main defence of both respondents was that the drugs found in the said house belonged to the 1st respondent's brother, Ah Yong, and they had no knowledge whatsoever of the said drugs.

[23] Learned counsel for both respondents submitted that the defence of the respondents was not an afterthought. The defence was suggested during the prosecution's case and the evidence of both respondents was corroborated by the evidence of SD3.

[24] Further, the fact that the drugs belonged to Ah Yong was not rebutted by the prosecution.

Our Findings

[25] It is perhaps convenient at the outset to briefly state the law on "possession" where the drugs were found in a place/area under the control of an accused. A determination of whether there is

"possession" depends on the particular facts of each case. Factors that used to be considered in determining whether an accused is in possession of the drugs found in a place/area under his or her control include his or her knowledge that the drugs were in the place/area, his or her access to the place/area where the drugs were found and his or her physical proximity to the drugs.

[26] The possession prohibited by law need not be actual physical custody and control of the drugs; it is sufficient if the prosecution proves that the accused had knowledge of its presence and the power and intent to control its disposal. Further, possession need not be exclusive; a person may be deemed to be in joint possession of a drug which is in the physical custody and control of another person, if he or she wilfully shares with the other the right of control over the drug.

[27] As a matter of common sense, there is a strong inference that a person who is the sole occupant of a house or apartment has custody or control over anything in the house or apartment. Where the drugs are found in a dwelling house, then it would be reasonable to infer that the sole occupant knowingly possessed the drugs. On the other hand, where there is more than one person living at the residence, there must be some additional evidence to prove the guilt of each of the accused. While association between the accused may be relevant, association alone is never sufficient to prove guilt beyond a reasonable doubt. (See *Leow Nghee Lim*

v. Reg [1956] 22 MLJ 28; *Chan Pean Leon v. P.P* [1956] MLJ 237; *Yee Ya Mang v. P.P* [1972] 1 MLJ 120; *P.P v. Badrulsham bin Baharom* [1988] 2 MLJ 585; *P.P v. Muhammad Nasir bin Shaharuddin & Anor* [1994] 2 MLJ 576; *Peng Chee Meng v. P.P* [1992] 1 MLJ 137; *Gooi Loo Seng v. P.P* [1993] 2 MLJ 137; *P.P v. Lin Lian Chen* [1992] 2 MLJ 561; *P.P v. Abdul Rahman bin Alif* [2007] 4 CLJ 337).

[28] With the above principles at the forefront of our mind, we now proceed to consider the appeal.

[29] We have carefully reviewed the Appeal Record and found that the prosecution had proved that both respondents had control and custody of the impugned drugs found in the said house. The prosecution had adduced the facts, evidence and the circumstances as follows:-

(a) The 1st respondent rented the said house. This was confirmed by SP9;

(b) The 1st and 2nd respondents were present and seated on the sofa in the living room of the said house when SP7 and his officer raided the house;

(c) The 1st and 2nd respondents' clothing were found in the living room and in the room upstairs;

(d) 2 keys (Exhibit P49(A-B)) of the said house were found and seized from the table in front of the 1st and 2nd respondents where they were seated in the living room;

(e) The weighing scale, the 1st respondent's and the 2nd respondent's international passports were found mingled with the impugned drugs on the table which were in their "plain view";

(f) There was no other occupiers or persons present in the said house when the raid was conducted;

(g) The "Julie" biscuit tin containing the impugned drugs was found in the dining room floor at a distance of about 6 feet from the sofa where the 1st respondent and the 2nd respondents were seated;

(h) The seized clothings fitted and matched with both respondents; and

(i) The DNA profiling of the respondents on the comb (Exhibit P25B) and the male garment (Exhibit P26B) was detected with a mixed DNA profiling of at least two individuals which was consistent with the DNA profiling of both respondents and the tooth brush (Exhibit P28) was detected with the DNA profiling of the 1st respondent.

[30] In our view, based on the above evidence, it is clear that there was "affirmative link" between both respondents and the impugned drugs other than the evidence of their presence and proximity to the said drugs. The single most important link or connection between both respondents and the impugned drugs was the simple fact they were sitting on the sofa in the living room at a distance of 6 feet away from the place where the "Julie" biscuit tin which contained the impugned drugs was found. This evidence constituted strong "presence" and "proximity". Both respondents were not merely present in a house with the impugned drugs cached away somewhere but the impugned drugs were right under their noses. The "Julie" biscuit tin was in their plain view. This was the first link. They were the only persons present in the house when the raid was conducted. This was the second link. Both respondents' clothings were found in the living room and in the room upstairs and the seized clothings fitted and matched with them. This was the third link. The DNA profiling of the respondents on their several personal items was consistent with the DNA profiling of both respondents. This was the fourth link.

[31] The sum total of this circumstantial evidence is sufficient to support the learned trial judge's finding beyond a reasonable doubt that both respondents had custody and control of the impugned drugs found in the said house.

[32] The critical issue to be determined is whether the prosecution had succeeded in establishing the requisite knowledge on the part of both respondents. The learned trial judge had this to say at page 36 of the Appeal Record:-

> "On the facts, there was no evidence which can be used to justify inference as to knowledge, let alone common intention. All that the prosecution could show that both the accused were seated on the sofa in the living room and nothing more.".

[33] Learned Deputy vehemently argued that the 1st respondent's and 2nd respondent's conduct of appearing scared on knowing the police presence indicated that they had knowledge of the impugned drug in the biscuit tin (Exhibit P58) and the impugned drugs on the round table in front of them.

[34] We disagree with the submission. It is not disputed that the incriminating items were contained in the biscuit tin, which according to SP7, was closed or lidded ("dalam keadaan tertutup"). There was no evidence to show that the "biscuit" tin was opened by both respondents prior to their arrest. Under these circumstances, they could not have known that the biscuit tin contained the impugned drugs.

[35] Knowledge refers to a mental state of awareness of a fact. Since courts cannot penetrate the mind of an accused and thereafter state its perceptions with certainty, resort to other

evidence is necessary. Animus possidendi, as a state of mind, may be determined on a case-to-case basis by taking into consideration the surrounding circumstances. (See *Ong Ah Chuan v. P.P* [1981] 1 MLJ 64; *P.P v. Mohd Farid bin Mohd Sukis & Anor* [2002] 3 MLJ 401; *Surentheran Selvaraja v. P.P* [2005] 2 CLJ 264].

[36] Inference is a question of fact. Each case must depend on its own peculiar facts. In the case of *Kural* [1987] 70 ALR 658, the Court stated:-

> "[T] he requisite intention is a question of fact and that in most cases the outcome will depend on an inference to be drawn from primary facts found by the tribunal of fact. In this, as in other areas of the law, it is important not to succumb to the temptation of transforming matters of fact into propositions of law.".

[37] In *Abdullah Zawawi bin Yusoff v. P.P* [1993] 3 MLJ 1, the then Supreme Court did not consider the accused's flight as amounting to guilt even after the discovery of the drugs. Edger Joseph Jr SCJ observed as follows:-

> "We now come to what does seem to us to be evidence of a potent kind against the appellant, namely his conduct in taking to his heels upon Inspector Mat Yusoff announcing the discovery of the drugs in the box. This conduct of the appellant was consistent with his having known of the presence of the drugs in the box before their discovery, indicating thereby a sense of guilt.

> On the other hand, it was conduct equally consistent with the appellant being in a state of pure panic. An innocent man faced with the prospect of arrest on a capital charge might foolishly react in that way.".

[38] After scrutinising the whole of the evidence adduced by the prosecution, we agree with the finding of fact by the learned trial judge that the 1st respondent's and the 2nd respondent's conduct of appearing scared on knowing the police presence, without more, did not necessarily indicate that they had knowledge of the impugned drugs in the biscuit tin (Exhibit P58) and on the round table in front of them. As a matter of common sense, the appearance of surprise was a normal reaction when strangers persons entered the house until their identifications were made known.

[39] On the totality of the evidence, the inference made by the learned trial judge was rational and reasonable.

[40] In the circumstances, the learned trial judge had correctly invoked the presumption under section 37(d) of the DDA 1952 against both respondents.

[41] It is trite that once it is proved that both respondents had control and custody of the impugned drugs, they were deemed not only to be in possession of the impugned drugs but is also deemed to have had knowledge of the nature of the impugned drugs until

the contrary is proved. (See *Ling Haw Cheun v. P.P* [2015] 5 MLJ 164).

[42] Undaunted, learned Deputy further submitted that even without resorting to the presumption of trafficking under section 37 (da) of the DDA 1952, there was sufficient direct evidence to prove that both respondents were engaged in the act of trafficking. She referred us to the following facts:-

(a) the quantity of the impugned drugs seized in the said house was large - 60.90 grams of MDMA in respect of the first charge;

(b) the impugned drugs were packed in small plastic packages as can be seen in the photographs at pages 400 and 401 of the Appeal Record; and

(c) the police recovered a small weighing scale (Exhibit P48) in the said house.

[43] Learned Deputy posited that based on the above evidence, an irrefutable inference can be drawn that the impugned drugs were for the purpose of trafficking. In support of her submission, she relied on the case of *Ong Ah Chuan (supra)* where Lord Diplock, at page 69 said:-

> "As a matter of common sense the larger the quantity of drugs involved the stronger the inference that they were

> not intended for the personal consumption of the person carrying them, and the more convincing the evidence needed to rebut it. All that section 15 does is to lay down the minimum quantity of each of the five drugs with which it deals at which the inference arises from the quantity involved alone that they were being transported for the purpose of transferring possession of them to another person and not solely for the transporter's own consumption. There may be other facts which justify the inference even where the quantity of drugs involved is lower than the minimum which attracts the statutory presumption under section 15. In the instant cases, however, the quantities involved were respectively one hundred times and six hundred times the statutory minimum.".

[44] Learned Deputy also relied on the decision of the Federal Court in *P.P v. Abdul Manaf Muhammad Hassan* [2006] 2 CLJ 129 where the Court held that the respondent was not a passive carrier judging from the numerous small packets of drugs found tucked in his waist and in the pockets of his track top trousers.

[45] We pause here to say that the observations made by the Courts in the above two cases must be considered in the light of the factual matrix of the cases. In these cases, the accused persons were arrested when they were "transporting" and "carrying" the drugs. In this instant appeal, there is no overt on the part of both respondents. We are of the view that **direct trafficking** in section 2 of DDA 1952 is not proven if an overt act on the part of both

respondents that they had intended to traffic the impugned drugs is not established. A mere passive possession of the impugned drugs, for example, keeping simpliciter, is insufficient to constitute trafficking. (See *P.P v. Hairul Din bin Zainal Abidin* [2001] 6 MLJ 146; *Mohamed Yazri bin Minhat v. Public Prosecutor* [2003] 2 MLJ 241; *Wjchai Onprom v. P.P* [2006] 3 CLJ 724).

[46] In *Y. Jeyamuraly Yesiah v. P.P* [2007] 5 CLJ 605; Mohd Ghazali Yusoff JCA (as he then was) had this to say:-

> "The evidence clearly showed that the said biscuit tin which contained the said dangerous drugs was in the custody and under the control of the appellant. This is what is termed as passive possession in several authorities. That the appellant had knowledge of the said dangerous drugs in the said biscuit tin has to be inferred from the circumstances as discussed earlier. We find that the evidence showed that he had knowledge. But to constitute trafficking under s. 39B(1) of the Act, there must be *mens rea* possession accompanied by some overt act. We find no such evidence in this instant appeal. Further, we cannot use the presumption of possession under s. 37(d) of the Act to invoke the presumption of trafficking under s. 37(da) of the Act as has been decided in *Muhammed bin Hassan v. Public Prosecutor* [1998] 2 CLJ 170 (see also *Pendakwa Raya v. Tan Tatt Eek* [2005] 1 CLJ 713).".

[47] Before we end the discussion on this issue, it is interesting to note the antecedents of the case. Upon representations made by the defence, the first charge (Exhibit P4) under section 39B(1)(a) of DDA 1952 was reduced and amended to section 39A(2) of DDA 1952. However, both respondents pleaded not guilty to the amended charge. Consequently, the prosecution withdrew the reduced charge and proceeded with the original charge under section 39B(1)(a) of the DDA 1952.

[48] For the foregoing reasons, we dismissed the prosecution's appeal against the decision of the learned trial judge in amending the first charge of trafficking to one of possession under section 12(2) of DDA 1952.

The Cross-Appeal

[49] The issues raised by both respondents in the cross-appeal involved the finding of facts by the learned trial judge. We found that the learned trial judge had carefully weighed and considered all the evidence adduced before the Court and we found that his findings of fact were supported by substantial evidence.

[50] The learned trial judge rejected the defence of both respondents that the impugned drugs found in the said house belonged to the 1st respondent's brother, Ah Yong.

[51] The learned trial judge relied on the following evidence:-

(a) Although the characters of Ah Yong and Sunny were brought up during the prosecution's case, it does not automatically elevate the defence case as being truthful and, therefore, worthy of belief;

(b) No documents, clothings and other personal items of the Ah Yong or his DNA profiling were found in the said house. As such, the non-calling of Ah Yong does not activate an adverse presumption under section 114(g) of the Evidence Act 1950;

(c) The 1st and 2nd respondents and Sunny (SD3), were not witnesses of truth in so far as they said Ah Yong lived in the said house and all the drugs seized by the police belonged to Ah Yong or in Ah Yong's possession at all material times; and

(d) The prosecution witnesses, SP7 and SP10 were reliable and credible witnesses.

[52] Well-settled is the rule that the learned trial judge's finding on the issue of the credibility of witnesses and his findings of fact must be accorded great weight and respect on appeal, unless certain facts of substance and probative value had been overlooked which, if considered, might affect the result of the case. Both respondents failed to persuade us that the learned trial judge's findings of fact were plainly wrong or not supported by the evidence.

[53] With regard to the failure on part of the prosecution to call Ah Yong or to tender his section 112 statement, we agree with the learned trial judge that such failure does not activate the adverse presumption under the section 114(g) of the Evidence Act, 1950. The prosecution had adduced sufficient evidence against both defendants. Further, Ah Yong was not present when his house was raided by the police. Therefore, he was not a material witness. (See *Ooi Chee Seong & Anor v. P.P* [2014] 3 MLJ 593; *Lean Siew Boon & Anor v. P.P* [2014] 2 MLJ 572; *Mohd Shamsir bin Mohd Rashid v. P.P* [2008] 4 MLJ 299).

[54] We must emphasize that for the offence of drug trafficking under section 39B(1)(a) or section 12(2) of DDA 1952, the issue of ownership of the drugs is irrelevant. Someone else may own the impugned drugs, but if both respondents were in possession of the impugned drugs, they committed the offence.

Sentence

[55] We are of the opinion that the sentence imposed by the learned trial judge was reasonable, appropriate and not manifestly excessive. The deterrent aspect of punishment is of primary importance in cases of this kind. Those who engaged in drug offences must expect to face a stern attitude on the part of the criminal courts. They must be punished in such a fashion as to deter them and others from engaging in similar offences.

Conclusion

[56] All told, the Court found no reason to reverse the conviction and sentence passed by the learned trial judge. The appeal and cross-appeal were dismissed.

Dated: 31 DECEMBER 2015

(MOHD ZAWAWI SALLEH)
Judge
Court of Appeal
Malaysia

Counsel:

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