IN THE HIGH COURT OF MALAYA AT SHAH ALAM

IN THE STATE OF SELANGOR, MALAYSIA

CRIMINAL TRIAL NO.: 45A-43-04/2014

BETWEEN

PUBLIC PROSECUTOR

AND

SONIA CUSI PESINGAN

(WARGA FILIPINA - NO PASSPORT: ES 1278386)

JUDGMENT

1. The accused, Sonia Cusi Pesigan, a female Filipino citizen, was charged with trafficking in, to wit, 1554.8 grammes of methamphetamine, under 39B (1)(a) of the Dangerous Drugs Act 1952 ("the Act") and punishable under section 39B (2) of the same Act.

2. The amended charge against her read:

> Bahawa kamu pada 28/08/2014, jam lebih kurang 7.35 pagi, di kaunter 45 Imigresen, Balai Ketibaan Antarabangsa, Aras 3,

MTB KLIA, di dalam Daerah Sepang, dalam Negeri Selangor, telah mengedar dadah berbahaya setelah dianalisa mengandungi 1554.8 gram methamphetamine dan oleh demikian, kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama."

Case for the prosecution

3. The prosecution called 9 witnesses to prove the charge. According to the prosecution's evidence, on the morning of 26 August 2014, Inspector Mohd Faizal bin Mohd Ali (PW7) and a team of police officers, acting on information received, proceeded to the Kuala Lumpur International Airport ("KLIA"), at Sepang. There, they took positions near the immigration counter of the Arrival Hall. This was at about 5.15 am on that day.

4. At about 7.35 am, PW7 spotted the accused carrying a red handbag and approached her. He arrested her after identifying himself and she was taken to the Customer Inspection room at KLIA. There, she was searched and two boarding passes were found on her. The boarding passes showed that the accused had just arrived at KLIA from New Delhi and was to take a connecting

flight to Kuching from KLIA at 8.15 am that same morning. Her handbag was also searched and a key (exhibit P32) was found inside it.

5. When asked, the accused informed PW7 that her luggage bag (exhibit P19) would have been loaded on the plane (flight MH2504) that was to fly to Kuching. PW7 then contacted MAS and arranged for her luggage bag to be unloaded from the plane. Following that, the accused was taken to the baggage reclaim counter where she retrieved exhibit P19. The baggage tag (exhibit P12A) on exhibit P19 carried the accused's name. Following this, the accused was brought to the Narcotics Office at KLIA. There, the accused opened exhibit P19 using the key found in her red handbag and removed the contents. PW7 conducted a thorough examination of exhibit P19 in her presence.

6. PW7 found 5 brown packages (exhibits P23 [1-5]) concealed in the front and back shell of exhibit P19. He made an incision on exhibit P23(5) and saw white powder inside. He used a test kit and confirmed by performing a simple chemical test that the

substance was methamphetamine. He then placed a white cellophane tape on the slit. He also placed a white cellophane tape on exhibit P23(3) as the package had torn whilst he was removing it from the bag.

7. PW7 then labelled the exhibits by writing the date and placing his signature on them and prepared a search list (exhibit P6) which he served on the accused. Later, he lodged a police report about the arrest of the accused and handed the accused and the items seized to Investigating Officer, Inspector Zulhasnan bin Zulhasnan (PW8).

8. PW8 was the next witness. He confirmed receiving the exhibits seized by PW7 as listed in the search list. He maintained that he kept the items safely and no one had access to them. On 2 September 2014, PW8 placed the packages in a box and sent it to government Chemist Suhana bt Ismail (PW3) ("the chemist") for analysis. On 4 February 2015, he received the exhibits back together with the Chemist Report dated 19 January 2015.

9. PW8 was subjected to lengthy cross examination which was aimed at establishing that he had tampered with three of the five packages, namely, exhibits P23(1), P23(2) and P23(5) that were handed to him by PW7. PW8 denied that he had cut open the exhibits and patched the openings with brown cellophane tape after having taken out the drugs. He maintained that the brown cellophane tape were already on the exhibits P23(1), P23(2) when PW7 seized them. And, that the white and brown tape on exhibit P23 (5) were affixed by PW7.

10. Under further cross examination, PW8 accepted that he was detained at Batu Gajah Rehabilitation Center under a detention order (exhibit D30) made by the Minister under the Dangerous Drugs (Special Preventive Measures) Act 1985 for two (2) years from 18 December 2014. He also accepted that according to the "allegations of fact" attached to the detention order, he had been found trafficking in drugs (methamphetamine) at the Narcotics Office in IPD Sentul and at the Narcotics Office in IPD Sepang from 15 May 2014 until early October 2014. Equally, he accepted that the detention order was made, inter-alia, on the basis that he

had been found trafficking in methamphetamine weighing 320 grammes at the IPD Sepang Narcotics Office. PW8 denied that the 320 grammes of methamphetamine had come from exhibits P23(1), P23(2) and P23(5). He further maintained that the facts set out against him in the annexure to the detention order were untrue and it was for this reason the Federal Court set aside the detention order.

11. The next witness was the Chemist. She testified that the substance analysed by her contained 1554.8 gammes of methamphetamine, a dangerous drug listed in the First Schedule of the Act.

12. So much for the evidence from the principal witnesses for the prosecution. The other witnesses produced by the prosecution gave general evidence in support of the prosecution.

Burden on prosecution

13. The burden on the prosecution at the close of the prosecution case to make out a prima facie case is encapsulated in section 180 of the Criminal Procedure Code. Section 180 was discussed

and elucidated by the Court of Appeal in **Looi Kow Chai v PP [2003] 2 MLJ 65** as follows:

> It is the duty of a judge sitting alone to determine at the close of the prosecution's case, as a trier of fact, whether the prosecution has made out a prima facie case…..It therefore follows that there is only one exercise that a judge sitting alone under s 180 of the CPC has to undertake at the close of the prosecution case. He must subject the prosecution evidence to maximum evaluation and to ask himself the question: if I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no prima facie case has been made out and the accused would be entitled to an acquittal.

14. In **Mohd Radzi bin Abu Bakar v PP [2006] 1 CLJ 457,** the Federal Court echoed the same view:

> What is required of a subordinate court and the High Court under the amended sections is to call for the defence when it is satisfied that a *prima facie* case has been made out at the close of the prosecution case. This requires the court to undertake a maximum evaluation of the prosecution evidence when deciding

> whether to call on the accused to enter upon his or her defence. It involves an assessment of the credibility of the witnesses called by the prosecution and the drawing of inferences admitted by the prosecution evidence. Thus, if the prosecution evidence admits of two or more inferences, one of which is in the accused's favour, then it is the duty of the court to draw the inference that is favourable to the accused…… If the court, upon a maximum evaluation of the evidence placed before it at the close of the prosecution case, comes to the conclusion that a *prima facie* case has not been made out, it should acquit the accused. If, on the other hand, the court after conducting a maximum evaluation of the evidence comes to the conclusion that a *prima facie* case has been made out, it must call for the defence. ..

Statutory provisions and Case Law

15. For convenience, I set out the material sections of the Act on which the prosecution relied on to prove the charge, or which are otherwise material to this case.

16. The charge against the accused was framed under section 39B(1)(a) of the Act which provided:

(1) No person shall, on his own behalf or on behalf of any other person, whether or not such other person is in Malaysia –

(a) traffic in a dangerous drug;

(b) …

(c) …

17. The definition of trafficking is set out in section 2 of the Act :

> In this Act, unless the context otherwise requires — trafficking includes the doing any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug otherwise than under the authority of this Act or the regulations made under the Act.

18. It is settled case law that to sustain a charge of trafficking under section 2 of the Act, the prosecution must first prove that the accused had possession of the drugs. Possession is essential as unless an accused had possession or custody or control of the drug, he would not be in a position to traffic in the same. In this regard, Augustine Paul J in **Public Prosecutor v Chia Leong Foo [2000] 6 MLJ 705**, explained:

> It must be observed that most of the acts that constitute trafficking as defined in section 2 of the Act like, for example, keeping, concealing, storing, transporting, and carrying dangerous drugs involve the prerequisite element of possession … It follows that a person cannot keep, conceal, store, transport, or carry dangerous drugs within the meaning of trafficking in the Act without being in the possession of them.

19. The meaning of possession for the purposes of the Act is well established. It has been held that there were two elements to possession. There was the physical element, and the mental element. The physical element involved proof that the thing was in the physical custody of the accused or subject to his control. The mental element involved proof that the accused had knowledge he was in possession of drugs. In **PP v Muhammad Nasir b Shaharudin [1994] 2 MLJ 576**, the court explained:

> Possession is not defined in the DDA. However, it is now firmly established that to constitute possession, it is necessary to establish that: (a) the person had knowledge of the drugs; and (b) that the person had some form of control or custody of the drugs. To prove either of these two

requirements, the prosecution may either adduce direct evidence or it may rely on the relevant presumptions under s 37 of the DDA.

20. It is also settled law that an accused who commits the acts mentioned in the definition of trafficking in section 2 of the Act, would not be a trafficker unless the purpose of the act was for the distribution of the drugs to another. See **Teh Hock Leong v Public Prosecutor [2010] 1 MLJ 741** and **Ong Ah Chuan [1981] 1 MLJ 64**.

Ingredients of the Offence

21. It is clear from the foregoing that to prove the charge, it was incumbent on the prosecution to prove:

i. that the substance found in exhibit P19 was drugs within the definition of section 2 of the Act:

ii. that the accused person had possession of the drugs i.e. he had custody and control of the drugs and knowledge that it was dangerous drugs; and

iii. that the drugs were in the possession of the accused for the purpose of trafficking.

22. I turn now to examine the evidence led by the prosecution to prove the ingredients of both the offences.

Whether the substance was dangerous drugs within the definition of section 2 of the Act

23. To sustain the charge of trafficking, it was incumbent on the prosecution to establish that there was no break in the chain of evidence and the drugs analysed by the chemist were the drugs seized by PW7 from exhibit P19. This means it must be proven that the drugs were not tampered with before it was sent for chemical analysis.

24. Reverting to the evidence in the instant case. There was cellophane tape on four of the 5 brown packages (exhibits P23 (1) to P23 (5) produced in Court. There was brown tape on exhibits P23 (1) and P23 (2) and white tape on exhibit P23 (3). And, exhibit P23 (5) had both brown and white cellophane tape patched on it.

25. Counsel for the accused contended that evidence of PW7 in relation to cellophane tape on the packages indicated that they had been tampered with by PW8. In view of the point taken, it was necessary to examine PW7's evidence in detail.

26. First, as regards exhibits P23(5) and P23(3) PW7 testified in examination in chief, that he used brown cellophane tape to patch the exhibits. It will be recalled that exhibit P23(5) was the package on which he had made a slit, and exhibit P23(3) was the package that tore when he attempted to remove it from the bag. However, when shown exhibit P23(5) which had both brown and white tape, he changed his testimony and stated he had affixed the white tape but had no knowledge as to how the brown cellophane tape came to be there. In re-examination, PW7 changed his testimony again and this time stated that he initially patched exhibit P23(5) with brown cellophane tape but had to switch to white cellophane tape when he ran out of brown tape.

27. As PW7's testimony in relation to the cellophane tape on exhibits P23(3) and P23(5) constantly changed as the trial progressed, it

was clear his evidence could not be accepted. In the result, there was no evidence to show how the tape had come to be on the exhibits except for the evidence given by PW8.

28. Next, I refer to PW7's evidence as regards exhibits P23(1) and P23(2). In examination in chief he stated that he had no knowledge as to the brown cellophane tape found on exhibits P23(1) and P23(2). And, in cross-examination, he admitted that that he could not recollect whether the brown cellophane tape on these exhibits were already on the packages when he seized them. But, in re examination, he stated that the brown tape was already on the packages at the time they were seized. It bears mention that his memory was apparently jolted when he was shown the police photographs by the learned deputy.

29. I found PW7's reliance on the photographs to refresh his memory unreliable as the evidence of PW5, the police photographer revealed the photographs were taken about 5 hours after PW7 had handed the exhibits to PW8. It was significant that there was no mention in the seizure list and police report made by him that

there was cellophane tape on the exhibits when he seized the same.

30. Next, and crucially, PW7 in his police report (exhibit P1) stated the gross weight of exhibit P23(5) was 520 grams. However, the chemist stated the gross weight of exhibit P23(5) was 575.43 grams, which was 55.43 grammes higher than the weight stated by PW7. It was true that different weighing machines were used by the chemist and PW7, and the weighing machine used by PW7 was not calibrated, but the discrepancy in the gross weight of Exhibit P23(5) was significant as the difference in the gross weight of all the other four exhibits did not exceed 10 grammes.

31. The evidence indicated that PW8 had every opportunity to cut open exhibits P23(1), P23(2) and P23(5) and take out some of the drugs and replace it with flour or powder. This would explain the difference in the gross weight of exhibit P23(5), and why the weight of methamphetamine in exhibit P23(5) was only 4.8 grammes, whilst the other exhibits contained 368, 499.4, 366.3 and 316.3 grammes of methamphetamine, respectively.

32. Thus, upon the evidence for the prosecution, the possibility that the brown cellophane tape was patched on exhibits by PW8 could not be ruled out. The absence of credible evidence upon a question of crucial importance in the case for the prosecution, gave rise to more than a reasonable doubt as to whether the brown cellophane tape was already on the exhibits at the time they were seized or had been patched on by PW7 or PW8 subsequently, the benefit of which the accused was plainly entitled to.

33. In the oft quoted case of **Tai Chai Keh v Public Prosecutor [1948-49] MLJ Supp 105** the Malayan Court of Appeal explained :

> Where there is more than one inference which can reasonably be drawn from a set of facts in a criminal case, we are of opinion that the inference most favorable to the accused should be adopted.

34. For the reasons stated, I found that the prosecution had failed to prove a prima facie case against the accused. The accused was

accordingly acquitted and discharged of the offence of trafficking against her.

Dated : 29 December 2017

(S.M KOMATHY SUPPIAH)
Judicial Commissioner
High Court of Malaya
Shah Alam

Date of Decision : 13 November 2017

Solicitors :-

For the Accused : Dato' Sivananthan a/l Nithyanantham & Cik Low Huey Theng [Ms. Sivananthan]

For the Public Prosecutor : Puan Siti Norbaya binti Jamil & Puan Aidatul Azura binti Zainal Abidin [Deputy Public Prosecutor of Selangor]