Pendakwa Raya v Sim Kok Chai & Ors
[2019] MLJU 332

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HIGH COURT (SEREMBAN)

ABU BAKAR JAIS, J

PERBICARAAN JENAYAH NO.: 45A-20-11/16 & 45-21-11/16

26 April 2019

Rahimah binti Abd. Majid (Deputy Public Prosecutor) for the prosecution.
N. Sivananthan (Law Huey Theng and Jasmine Cheong with him) (Sivananthan) for the four accused.

Abu Bakar Jais J:

GROUNDS OF JUDGMENT

It is better to risk saving a guilty man than to condemn an innocent one-Voltaire

Introduction

[1]This is a drug trafficking case carrying the death penalty against four accused persons. At the end of the prosecution case, all four were acquitted and discharged without calling their defence.

[2]This written judgment among others deals with the law and facts in this case on manufacturing of the drugs. The conduct of the four accused and the conduct of others connected to this case are also highlighted to indicate whether the charges are proven.

Material Background Facts

[3]The four charges against the four accused persons were as follows:

Pertuduhan Pertama (Eksibit P2A)

(i) “Bahawa kamu dengan niat bersama pada 17 Januari 2016 jam lebih kurang 2.20 petang, di alamat No. 198, Jalan Mantin, Kampung Baru, 71700 Mantin, Negeri Sembilan, di dalam daerah Nilai, di dalam negeri, Negeri Sembilan, telah didapati mengedar dadah berbahaya jenis Methamphetamine seberat 25,220.07 gram. Dengan itu, kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama dengan dibaca bersama Seksyen 34 Kanun Keseksaan.”

Pertuduhan Kedua (Eksibit P2B)

(ii) “Bahawa kamu dengan niat bersama pada 17 Januari 2016 jam lebih kurang 2.20 petang, di alamat No. 198, Jalan

Mantin, Kampung Baru, 71700 Mantin, Negeri Sembilan, di dalam daerah Nilai, di dalam negeri, Negeri Sembilan, telah didapati mengedar dadah berbahaya jenis Methylenedioxymethamphetamine (MDMA) seberat 196.6 gram. Dengan itu, kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 29B(2) Akta yang sama dengan dibaca bersama Seksyen 34 Kanun Keseksaan."

Pertuduhan Ketiga (Eksibit P2C)

(iii) "Bahawa kamu dengan niat bersama pada 17 Januari 2016 jam lebih kurang 2.20 petang, di alamat No. 198, Jalan Mantin, Kampung Baru, 71700 Mantin, Negeri Sembilan, di dalam daerah Nilai, di dalam negeri, Negeri Sembilan, telah didapati mengedar dadah berbahaya jenis Ketamine seberat 160.58 gram. Dengan itu, kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama dengan dibaca bersama Seksyen 34 Kanun Keseksaan."

Pertuduhan Keempat (Eksibit P5A)

(iii) "Bahawa kamu dengan niat bersama pada 17 Januari 2016 jam lebih kurang 2.20 petang, di alamat No. 198, Jalan Mantin, Kampung Baru, 71700 Mantin, Negeri Sembilan, di dalam daerah Nilai, di dalam negeri, Negeri Sembilan, telah didapati dalam milikan kamu bahan yang mengandungi seberat 13,361 gram Caffeine. Oleh itu, kamu telah melakukan satu kesalahan di bawah Seksyen 30(3) Akta Racun 1952 dan boleh dihukum di bawah Seksyen 30(5) Akta *yang sama* dengan dibaca bersama Seksyen 34 Kanun Keseksaan."

[4]The prosecution called 13 witnesses to court to prove the charges. Eight police officers, two chemists and three civilians. The prosecution brought evidence to suggest this case is commonly known among deputy public prosecutors and defence counsels as a lab case. A lab case loosely means where drugs are manufactured or produced in a laboratory.

[5]Indeed, the prosecution brought evidence that the four accused were arrested in a house used as a lab, full of apparatus for drugs making and the drugs itself. There were also chemicals in that house allegedly used for making drugs.

[6]The prosecution led evidence that police officers acting on information received, organised themselves in several groups or teams to raid the house. They surrounded the house upon reaching the same.

[7]Prosecution witness, SP 3, ASP Azri Bin Ramli entered the front compound of the house with his team, while another team led by SI Mohd Dalila Mansor, SP 7 entered the back potion of the house. SP 3 then entered the house with his team. They then identified themselves as police officers. SP 7 saw the four accused in the kitchen area. They tried to run away but were caught nonetheless. Arrest was made at the kitchen area.

[8]In the house various items were seized including what were suspected to be drugs and other items thought to be used to manufacture drugs. Also seized were personal items of the four accused including hand phones.

Summary of Prosecution's Case

[9]The Prosecution submitted that the three elements for the charges have been proven based on *prima facie* evidence and these elements are as follows:

(a) The drugs found were dangerous drugs as listed in the Dangerous Drugs Act 1952 ("DDA");

(b) The dangerous drugs were trafficked by the four accused;

(c) The four accused had common intention to traffic the drugs.

[10]As to the first element that the drugs found were listed as dangerous drugs, this is not disputed by the defence in this case.

[11]On the second element that the four accused had trafficked the drugs, the prosecution is relying on s. 2 DDA on the definition of “manufacturing”. This is because as stated earlier this is a lab case. There is according to the prosecution no duty to prove possession since this is a manufacturing of drugs case. More of this submission will be explained later.

[12]For this element, the prosecution contended too that various items used for manufacturing drugs were found in the house. These include the chemicals toluene and acetone, electrical stove and heated glass jar containing liquids. And of course, drugs were found too.

[13]The chemist called by the prosecution, PW 1 Mohd Izuan Othman also found the DNA profile of the first accused on among others a drinking glass on the television set and cigarettes. The DNA profile was also found on the second accused trousers. The DNA profile of the first and fourth accused were also found on a sofa.

[14]The prosecution submitted the foregoing evidence prove that all four accused were manufacturing the drugs. Further, based on case law, since this a manufacturing case, there is no requirement to also prove possession to constitute a complete trafficking.

[15]As for the last element according to the prosecution for common intention, the prosecution argued that all four accused had participated in the criminal action of trafficking. All four accused were said by the prosecution to have acted in concert. The conduct of the four accused persons in being caught in the house and attempting to run away when police officers came to raid the place, justified inference of common intention. It is also contended that all four accused had participated in the criminal offence of trafficking the drugs.

[16]There is also submission by the prosecution that the evidence of PW 12, Inspector Mohd Hasif bin Razali, one of the Investigation Officers should be accepted. This witness testified he tried to trace the whereabouts of six individuals said to be involved in this case but to no avail. Efforts have been made to get these potential witnesses who are alleged to be involved in this drugs case and where the defence had cast aspersion that these individuals more that the four accused should be held accountable for the trafficking of these drugs.

Summary of Defence’s Case

[17]The defence in this case argued that firstly, all four accused had no custody and control of the drugs. This is because it is questionable who had rented the house.

[18]Second, four individuals, Poen Thiam Choy, Yeong Woon Huei, Ting Chong Fui and Chew Ah Ang @ Chew Teck Ming are the ones involved in drugs trafficking in the house. Further, there is also no evidence to conclude that all four accused were trafficking the drugs.

[19]The defence also argued that the four accused persons did not have the knowledge about the drugs found. Essentially it is argued that the four accused were unaware of the drugs in the house. They were invited to the house by Poen Thiam Choy and were not aware of the drugs or the items for drug making in the house.

[20]It is also contended there is no evidence to indicate all four accused were engaged in trafficking the drugs.

[21]The defence further argued all the four accused have not been proven to have common intention to traffic the drugs.

[22]The presumption of trafficking cannot be used against the four accused.

[23]The contention of the defence is that it is not safe to call for the defence of the four accused as others might be involved in the manufacturing and trafficking of the drugs.

Court's FindingsA. Manufacturing of drugs

[24]The prosecution's case is that the drugs found were manufactured by the four accused persons. This is asserted by the prosecution in its own written submission. Therefore, relying on the Court of Appeal's case of *Lee Boon Siah & Ors v PP* [2014] 3 MLJ, the prosecution contended there is no duty to even prove possession. This Court of Appeal’s case essentially held that for manufacturing of drugs cases, there is no obligation to prove that the accused had possession of the same. Be that as it may, the prosecution still has the duty to prove all four accused did manufacture the drugs. Since the items and apparatus for the manufacturing of drugs and the drugs itself found have not been challenged by the defence, it is appropriate to look at the definition of manufacturing as indicated in s. 2 of the DDA. It states as follows:

> *Manufacturing*
>
> *In relation to a dangerous drug, includes-*
>
> (a) *the making, producing, compounding and assembling of the drug;*
>
> (b) *the making, producing, compounding and assembling a preparation of the drug;*
>
> (c) *the refining or transformation of the drug into another dangerous drug; and*
>
> (d) *any process done in the course of the foregoing activities.*

[25]There is no dispute that there is no direct evidence brought by the prosecution in any of the acts mentioned above. As such at best, the prosecution would have to rely on circumstantial evidence. Is there then circumstantial evidence to prove the manufacturing of the drugs? It is said the first circumstantial evidence is the presence of the four accused in the house. I am of the considered view that the presence of the four accused in the house alone would not be justifiable reason to call for the defence of the four accused in saying they had manufactured the drugs. Second circumstantial evidence is the fact according to the prosecution, they attempted to run away when the house was raided. It is also not safe to call their defence merely because they were said to attempt to run away. I shall explain this later in this judgment. However basically I concluded that I have serious doubt that others not charged for the offences might be the real culprits. Note the used of the word "might". I am not saying indeed others were the real culprits. I state my reasons for this serious doubt in the ensuing paragraphs.

B. Potential involvement of others

[26]First, the house where the lab was or where the drugs were said to be manufactured was rented by one man called "Apai". This was adduced by the prosecution through its own witness,

PW 8 Ten Sor Har Chai, the owner of the house. None of the accused had rented the house. PW 8 said Apai rented the house for his employer. PW 8 identified PW 11, Chew Ah Ang @ Chew Teck Mingas Apai. His evidence is supported by another Investigation Officer, PW 13 ASP Ayob Masid. But when PW 11 testified in court, the prosecution itself suggested to him that the real Apai is one Yeong Woon Huei. PW 11 also denied he is Apai. The prosecution called two different witnesses P8 and PW 11 contradicting one another on a very important matter i.e. who is Apai.

[27]Can the denial of PW 11 that he is not Apai be safely accepted by this court? Is there a doubt about this evidence? Yes, there is reasonable doubt on this because PW 11 himself was detained for two years under s. 6 (1) Dangerous Drugs (Special Preventive Measures) Act 1985.For the uninitiated this statute allows for the detention of persons suspected of involvement in the trafficking of drugs without trial. There is an exhibit D164, which is the Detention Order of PW 11. He was detained because he was involved in the trafficking of the drug, Methamphetamine at the very premise where the four accused were arrested and where the lab was. The same address as in the charges narrated earlier. The Detention Order states PW 11from December 2015 until January 2016 was involved in trafficking of drugs. This covers the date of the offence against the four accused for the same drug, Methamphetamine.

[28]Thus, at this stage alone, I am in serious doubt about two very relevant matters. First, who is Apai who rented the house? Apai who had rented the house is an important potential witness who could shed some light why he rented the house. What went on in the house particularly whether it was used as a drug lab and the extent of the four accused involvement in the same could potentially also be obtained from Apai. In addition, whether Apai himself is also involved in the manufacturing of the drugs. Second is it safe to conclude that PW 11 cannot be involved at all in the offences charged? The evidence adduced as I narrated above does not allow me to make that conclusion. PW 11 at the very least, could be involved considering the factual matrix as noted. There is as stated a Detention Order against PW 11. Note again that I am not saying PW 11 is indeed involved, I am only saying he might be involved. That creates at the very least a reasonable doubt on the case of the prosecution.

[29]That is not the end of the serious doubt that I have regarding this case. This is because the prosecution itself added to that doubt by suggesting to PW 11 that Apai is actually someone by the name Yeong Woon Huei. The evidence adduced on this is by the examination of the prosecution on PW 11 which is as follows:

> Q: Uncle pernah dengar tak nama Yeong Woon Huei ataupun Apai?
>
> A: Saya tidak tahu, saya tidak pernah dengar nama itu.

[30]It turns out that this gentleman, Yeong Woon Huei is also involved in drug trafficking at the same address in the charges for Methamphetamine, again the same drug as in the charges. This fact is reflected in a Restriction Order (exhibit D 127).

[31]The contradiction in the evidence about Apai affects the root of the prosecution case as decided similarly in the Federal Court's case of *Gunalan Ramachandran v PP* [2006] 1 CLJ 857.

[32]To make matter worse there are two other individuals Poen Thiam Choy and Ting Chong Fui who are also said to be involved in the trafficking of drugs at the same address in the

charges for the same type of drug, Methamphetamine. This is proven through exhibits D 126 and 128, two Restriction Orders in respect of both.

[33]The details in exhibits D 126 in respect of Poen Thiam Choy creates a serious doubt on the prosecution case as he could be involved in the manufacturing of the drugs too. It is stated in D 126 as follows:

> *Bahawa kamu didapati terlibat dengan aktiviti pengedaran dadah jenis Syabu yang mengandungi dadah berbahaya jenis Methamphetamine sejak awal bulan Oktober 2015 hingga bulan Januari 2016 secara tidak berterusan di sekitar kawasan beralamatNo 198, Jalan Mantin, Kampong Baru Mantin, Negeri Sembilan.*
>
> *Bahawa kamu didapati terlibat dengan aktiviti pengedaran dadah jenis Syabu yang mengandungi dadah berbahaya jenis Methamphetamine dengan mengendali, menerima, membawa dan menyimpan bahan kimia bagi tujuan memproses dadah jenis Syabu yang mengandungi dadah berbahaya jenis Methamphetamine.*

[34]The involvement of others aside from the four accused is akin to the facts of the Court of Appeal's case of *Ooi Chee Seong v Public Prosecutor* [2014] 3 MLJ 593 where the following is said:

> *DW4 testified that, at the material time, he was with the Home Affairs Ministry and he confirmed that* ***two detention orders*** *were issued against Ang and he produced and tendered the detention order and allegations of facts dated 5 December 2003 as per exhs 'D90A' and 'D90B' at p 436 of the appeal record at Jilid 3.*
>
> *At pp 343-344 of the appeal record at Jilid 3, DW4 testified in examination-in-chief that the date 7 October 2003 as referred to in exh 'D89B' at p 433 of the appeal record at Jilid 3 would usually refer to the date where the detainee was arrested. In its original text, this was what DW4 testified in examination-in-chief at pp 343-44 of the appeal record at Jilid 3:*
>
> *Tarikh 7 Oktober 2003 yang terdapat di para (1) adalah tarikh yang saya dapatkan dari laporan polis yang KDN terima. Saya tidak ingat jika tarikh 7 Oktober 2003 itu adalah tarikh Ang Kim Hock ditangkap. Adalah kebiasaan yang disebutkan dalam pengataan fakta alasan tahanan adalah tarikh orang tahanan itu ditangkap.*
>
> ***It must be recalled that the date 7 October 2003 was the day where both the appellants were arrested. It corroborated the appellants' version that Ang was also arrested on that very day. And it is this aspect of the case that the learned High Court judge failed to appreciate. His Lordship was bound to objectively view the whole case from all angles so that both the appellants have a fair chance of being acquitted*** *(per Edgar Joseph Jr SCJ in Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137 p 144 (MLJ); [1993] 2 AMR 1135 (SC), *at p 1141 (AMR)).*
>
> *The appellants' version in regard to Ang was rather simple. That Ang as the occupier of the condominium unit had invited both the appellants to the condominium unit as visitors. That being the case, Ang is the trafficker. It is trite law that the prosecution, in order to establish its case beyond reasonable doubt, must proceed to disprove or negate the defence version.*
>
> *[Emphasis Added]*

[35]I am also guided by the Court of Appeal's case of *Sochima Okoye v Public Prosecutor* [1995] 1 MLJ 538 where it is said as follows:

> *The learned judge, having found the appellant's story about the existence of James Smith to be true, ought to have addressed his judicial mind to the further question as to whether there was any reasonable doubt raised that Smith was the real trafficker. Had he done so he may well have held that he was not, in which event our task would have been made that much easier. Unfortunately, he did not and it is our view that the failure by the learned judge to administer unto himself the Radhi direction renders his ultimate conclusion fatally flawed.*

C. Invitation

[36]The contention of the defence is that all four accused only went to the house because they were invited by Poen Thiam Choy and they were not aware of the condition of the kitchen where the drugs and drugs making items were found. They had only moved to the kitchen when they heard noises when they were confronted by the police officers. This is consistent with the evidence of the prosecution own witness PW 8, the owner of the house. He told the court that he had not seen the four accused at the house at any point of time. This includes the time he went to the house to collect the rent from Apai. In fact, instead he gave evidence that he saw Yeong Woon Huei and Ting Chong Fui at the house. PW 8's evidence here is consistent with his evidence there were workers seen at the premise. This is consistent too with the fact that Yeong Woon Huei and Ting Chong Fui could be involved in the trafficking of drugs as reflected in the Restriction Orders against both, Exhibits D 127 and D 128.

D. Personal items of the accused

[37]PW 3 Azmi Bin Ramli, the police chief raiding officer said there were no personal items of the accused found in this house except their identity cards and handphones. This is consistent with their assertions that they were there in the house merely because of the invitation of Poen Thiam Choy.

[38]Further, after the four accused were arrested they were taken back to their houses where their personal belongings were found. This also showed the likelihood of them being in the address in the charges was merely because of the invitation Poen Thiam Choy. In fact, the cash and jewellery found in their own houses were seized under the Dangerous Drugs (Forfeiture of Property) Act 1988. If they were in fact in control of the house where the drugs and drugs making items were found, all four accused personal belongings would also be found there. This is not the case. Hence, this supported their contention they were there only as guests on the invitation of Poen Thiam Choy.

E. No traces of drugs on the four accused

[39]PW 3 gave evidence the four accused were arrested at the kitchen where there were two boiling glass jars containing liquid. The chemist PW 4 Dr Vanitha Kunalan, testified drugs can be transmitted on to the clothes and body under this circumstance. If it is true that the four accused were involved in the manufacturing of drugs, there would have been traces of drugs on the nails, fingers and clothes of the four accused. However, these traces were not found because the hand swab done on the four accused turned out negative. This was confirmed by PW 13, the Investigating Officer.

[40]This is also consistent with their assertion that they were in the living room only and not at the kitchen before the police raided the house. They were there as guests to the house. PW 4 told the court there were no drugs or traces of drugs found in the living room. This supports their assertion they did not have any knowledge about the drugs and drugs making items in the kitchen.

F. No charges for possession of guns, bullets and hand grenade

[41]The police also found guns, bullets and grenade at the premise. But none of the four accused were charge for the possession of these. Of course, it is trite that charging anyone for a criminal offence is the prerogative of the prosecution. But the prosecution chose not to charge

anyone here for the possession of these because it was highly likely it was not certain who had the custody and control of these arms. Likewise, the prosecution cannot be certain as to whether the four accused were involved in the charges for the drugs because there are several individuals who are said to be involved with drugs trafficking apart from the four accused at the same premise.

G. Running away

[42]Even if it is true that the four accused attempted to run away when the house was raided by the police, I cannot find that this is circumstantial evidence to prove the charges against the four accused. I am conscious of the possibility it may be quite natural that the presence of several police officers in different teams in the circumstances of this case could alarm anyone at that point of time. That act to run away is a common instinct considering the facts of this case.

[43]I am guided in this regard by the Court of Appeal's case of *Ahmad Azhari Ahmad Zaini v PP* [2015] 1 CLJ 171 the following is said:

> *Whilst the conduct of the accused fleeing the scene may be a relevant factor to be considered, such a conduct however must be weighed against the circumstances of the case. This is because even an innocent man may feel panicky and try to evade arrest when wrongly suspected of committing a crime. It is a common instinct of self-preservation…*
>
> *In the present case both the first accused and the second accused had testified that they heard the prosecution witnesses saying "ada ganja" during the inspection of the vehicle and it was only at that moment that both of them ran away. The mere act of them running away from the scene after they heard the word "ganja" cannot be interpreted to mean that they had prior knowledge of the said drugs. This is because the conduct is also equally consistent with the act of an innocent man who was in the state of panic and trying to evade arrest when wrongly suspected of committing a crime.*

H. Seven other arrests

[44]PW 13, the Investigating Officer testified that on the same day as the arrests of the four accused, there were seven other arrests pertaining to the same case. Therefore, it is crucial to note that these seven others could be the ones really involved in the manufacturing and trafficking of the drugs as in the charges. None of these seven were called to court except PW 11, Chew Ah Ang @ Chew Teck Ming. The other six are Poen Thiam Choy, Ting Chong Fui, Yeong Woon Hui, Sunthereson a/l Krishnan, Low Mo Fun and Lew Kong Loy.

[45]The prosecution sought to introduce three police recorded statements out of these seven. One is the statement of Poen Thiam Choy (Exhibit ID 161), another is the statement of Ting Chong Fui (Exhibit ID 162) and the other the statement of Yeong Woon Huei (Exhibit ID 163) at the last minute. As said, all three were not called by the prosecution. To make matter worse, there is no effort whatsoever to trace the whereabouts of Low Mo Fun and Lew Kong Choy.

[46]For me to admit the recorded statements of the three not called as witnesses above (Exhibits IDs 161, 162 and 163) I must consider s. 32 (1) of the Evidence Act 1950 that states as follows:

> *Statements, written or verbal, of relevant facts made by a person who is dead or* ***who cannot be found,*** *or who has become incapable of giving evidence,* ***or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable****, are themselves relevant facts…*

[Emphasis Added]

[47]As seen above, the provision lays down several conditions in the alternatives before a statement could be considered as relevant in order to be admitted. In this case, the prosecution must first satisfy the conditions all three, Poen Thiam Choy, Ting Chong Fui and Yeong Woon Huei cannot be found or their attendance cannot be procured without an amount of delay or expense. See the case *Sim Tiew Bee v PP* [1973] 2 MLJ 200. The prosecution is not relying on the other two conditions i.e. of them being dead or they have become incapable of giving evidence, presumably because these conditions cannot be proven.

[48]As such can the prosecution prove they cannot be found or their attendance cannot be procured without an amount of delay or expense? With respect, this has not been proven as there is a lack of effort by the police and hence prosecution to find the three. I say this because it was not denied by PW 12, the other Investigation Officer that the police only tried to find the three at the last minute i.e. one year and three months after the trial of this case had begun. PW 12 testified further that effort was only made to trace and locate the three, two weeks before the prosecution closed its case. Further no advertisement was placed in the Chinese newspaper to notify that the police was searching for them. Had the police made a better effort than the ones narrated, they could have found these individuals who are material to this case. Besides, they could have been easily found because all three were served with Restriction Orders. Therefore, I could not simply accept the evidence of PW 12 that they could not be found. Hence, these statements (Exhibits IDs 161, 162 and 123) are not admitted. I am supported by the decision of *Public Prosecutor v Lee Jun Ho & Ors* [2011] 6 MLJ 220 that states as follows:

> *The statements of the two key witnesses could not be admitted under* s 32(1)(i) *of the Act because of the absence of effort to secure their attendance on such a serious charge. The basis upon which the prosecution tried to invoke that section was that the witnesses could not be found. However, actions to trace the witnesses were only taken in 2008 in the midst of the trial and five years after the statements were recorded.*

And *Public Prosecutor v Norfaizal bin Mat (No 2)* [2008] 7 MLJ 792 that explains:

> *It was necessary for the prosecution and the police to make diligent search and reasonable exertion in order to procure Azril. Mere ignorance of the whereabouts of Azril was not sufficient to invoke* s 32(1)(i). *Alternatively, there must be evidence that Azril could not be procured as a witness without an amount of delay or expense which, under the circumstances of the case, appeared to the court unreasonable. On the facts, the efforts expended by the prosecution and the police were somewhat lackadaisical and lacklustre and therefore ID26 was inadmissible as evidence.*

[49]Consequently, this shows the presence of all six, Poen Thiam Choy, Ting Chong Fui, Yeong Woon Hui, Sunthereson a/l Krishnan, Low Mo Fun and Lew Kong Loy are of vital importance as witnesses so that this court is not left with serious doubt as to their involvement in this case *vis-a-vis* the assertion of the four accused. The failure to locate and call the six would justify this court to invoke adverse inference against the prosecution under s. 114 (g) of the Evidence Act 1950.

I. DNA of Poen Thiam Choy and Ting Chong Fui

[50]To make matter worse for the prosecution, it is not denied that the DNA of Poen Thiam Choy and Ting Chong were found in the house. This is shown in the Chemist Report (Exhibit P9). This proves that they were there in the house. This is agreed by the Investigating Officer

PW 13, when he was cross-examined. It again raises the reasonable doubt that at least both of them (if not all six) might be involved in this case and that the four accused were merely there as guests on the invitation of Poen Thiam Choy.

J. No investigation who is the occupier of the house

[51]There is no investigation done by the police as to who is the actual occupier of the house. This was admitted by the Investigation Officer PW 13 in his evidence as follows:

> YA: Bukan itu soalannya. Pada Januari 2016, adakah awak siasat siapa yang tinggal dalam rumah itu? Itu soalannya.
>
> A: Taka ada.
>
> Q: I just want to confirm. Hari ini bila rakan saya tanya, kamu boleh ada peluanglah untuk terangkan. Setakat ini saya hanya nak mengesahkan semalam ASP tidak buat siasatan terhadap siapa yang sebenarnya tinggal di rumah tersebut, betul?
>
> A: Betul.

[52]This evidence also raises a reasonable doubt on the case of the prosecution as against all four accused. It seems there is a strong possibility that others could be involved in the drugs and drugs making items found in the house.

K. No investigation on the six others by the chemist

[53]PW 4, the chemist reported that there was no investigation done on the blood samples and nails for traces of the drugson the six others despite them being arrested. Had there been an investigation done, it could have revealed the possibility of the others being involved in this case. It would also assist in understanding whether the version of the four accused that they were there but were not aware of the drugs and drugs making items could be more readily accepted.

[54]With regard to this, it became more suspicious because PW 13, the Investigating Officer testify that the blood samples and nails were sent to the chemist for analysis but this was denied by PW 4 the Chemist herself.

L. Common intention not proven

[55]The four charges made reference to common intention by all four accused in the commission of the offences. However common intention is not proven as there is reasonable doubt that they were actually involved in the manufacturing of the drugs. Their purported involvement is highly suspect as there were others also potentially involved. In addition it supports the possibility the four were merely in the house as guests on the invitation of Poen Thiam Choy. Hence there is no common intention by all four to manufacture the drugs. There is no evidence to that effect.

M. The onerous duty of the prosecution

[56]The prosecution wanted to make its duty much easier by saying it need not prove possession since this is a manufacturing of drugs case. And it has the case *Lee Boon Siah* to support its contention.

[57]But it means on the other hand its duty became more onerous because it then had to prove all four accused did manufacture the drugs. As explained with reasons, there is a reasonable doubt that they were the ones manufacturing the drugs.

N. End of prosecution's case

[58]It is trite that at the end of the prosecution's case, the prosecution would need to establish that there is a prima facie case for the defence to be called. Based on the Federal Court's case of *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457, at the end of the prosecution case, I had subjected the evidence of the prosecution on maximum evaluation. The maximum evaluation even at that stage indicates that there is a reasonable doubt on the case of the prosecution.

[59]In another Federal Court's case of *Balachandran v. Public Prosecutor* [2005] 2 MLJ 301it is said as follows:

> *The test at the close of the case of the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative, then a prima facie case has been made out.* ***This must of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If there is any such doubt there can be no prima facie****.*
>
> *[Emphasis Added]*

[60]Having in mind the passage above, in this case I have already explained the reasons why I have reasonable doubt on the prosecution's case. Hence there is no prima facie case proven at the end of the prosecution's case for the defence of all four accused to be called.

Conclusion

[61]As explained, there is reasonable doubt at the end of the prosecution's case. There is no *prima facie* case established at that stage. Hence, the four accused are acquitted and discharged.

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