A **RAHMANI ALI MOHAMAD**

v.

PP

B COURT OF APPEAL, PUTRAJAYA
AZAHAR MOHAMED JCA
ROHANA YUSUF JCA
TENGKU MAIMUN JCA
[CRIMINAL APPEAL NO: B-05-164-06-2012 (IRN)]
C 10 JUNE 2014

CRIMINAL PROCEDURE: *Defence - Evidence - Whether accused defended himself at earliest opportunity - Whether evidence of prosecution witness fitted with defence of accused - Whether trial judge considered* D *defence objectively and from all angles - Failure to investigate and verify appellant's version of facts - Effect - Whether compromising appellant's right to fair trial - Whether there was serious non-direction amounting to misdirection*

E ***CRIMINAL PROCEDURE:*** *Appeal - Decision of trial judge - Whether trial judge misdirected himself - Whether appellant rebutted presumption of knowledge on balance of probabilities - Whether there was serious non-direction amounting to misdirection - Whether appellate intervention warranted - Dangerous Drugs Act 1952, s. 37(d)*

F The appellant was originally charged and tried together with another accused, one Ebrahim, under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') for common intention of trafficking in 14,654g of methamphetamine. However, at the close of the prosecution's case, Ebrahim was acquitted of the charge G and no appeal was filed by the prosecution against the decision. Whereas, the trial judge, having found that the prosecution had made out a *prima facie* case against the appellant, called upon him to enter his defence. At the end of the case, the appellant was found guilty and was convicted and sentenced to death. Hence, H this appeal. The central ground raised for the appellant in the appeal was that the trial judge had misdirected himself when he failed to rule that the appellant had successfully rebutted the presumption of knowledge on a balance of probabilities. It was the appellant's case that he did not know the two bags that he and I Ebrahim were carrying ('P19A and P19B') contained the impugned drugs and that he had never seen the two bags before arriving at

KLIA, where both he and Ebrahim were arrested. The appellant maintained that the bags belonged to one Mohd Reza, who had travelled with him from Iran.

Held (allowing appeal; acquitting and discharging appellant) Per Azahar Mohamed JCA delivering the judgment of the court:

(1) The defence of the appellant that the two bags belonged to Mohd Reza was not something that was sprung for the first time in the defence case. From the evidence, it was clear that the appellant, at the earliest possible opportunity, had given his defence to the investigating officer ('PW8') that he had no knowledge of the drugs concealed inside P19A and P19B. A detailed and careful scrutiny of the evidence of PW8 fitted in with the defence of the appellant that although he had control and custody of the two bags, he had no knowledge of the impugned drugs. (para 13)

(2) The trial judge had failed to direct his attention to the defence of the appellant, particularly in the evidence of PW8 that was favourable to the appellant resulting in insufficient judicial appreciation of the defence case. The trial judge had failed to view the defence of the appellant objectively and from all angles. The omission had seriously prejudiced the appellant as it was an error on a very crucial point directly relevant to the defence. Hence, it was a serious non-direction which amounts to a misdirection by the trial judge warranting appellate intervention. (para 14)

(3) There was no investigation carried out by PW8 to disprove the appellant's version of facts, particularly concerning Mohd Reza, which was given by the appellant at the earliest possible opportunity. The appellant could not be penalised for lack of ingenuity, negligence or inadvertence on the part of the investigator depriving him. Based on the omission, an inference in favour of the appellant ought to have been drawn by the trial judge at the close of the prosecution's case. (para 15)

(4) The appellant's right to a fair trial had been compromised as a result of the failure by PW8 to carry out investigations to verify the appellant's version of facts. The appellant may thereby have lost a chance which was fairly opened to him of being acquitted and there had been a failure or a miscarriage

of justice. On the totality and prevailing circumstances, the appellant had rebutted the presumption under s. 37(d) of the DDA and had cast a reasonable doubt on the prosecution's case. The appellant had been consistent from the time of his arrest and throughout the trial that he had no knowledge of the drugs; at most the appellant was only an innocent carrier. (paras 16 & 17)

***Bahasa Malaysia** Translation Of Headnotes*

Perayu pada asalnya dituduh dan dibicarakan bersama-sama dengan seorang lagi tertuduh, Ebrahim, di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') bagi pengedaran dengan niat bersama sejumlah 14,654g methamphetamine. Walau bagaimanapun, di akhir kes pendakwaan, Ebrahim dilepaskan daripada pertuduhan dan tiada rayuan difailkan oleh pihak pendakwaan terhadap keputusan tersebut. Manakala, hakim bicara, setelah mendapati bahawa pihak pendakwaan telah membuktikan kes *prima facie* terhadap perayu, memanggil perayu untuk membela diri. Di akhir kes, perayu didapati bersalah dan disabitkan dan dijatuhkan hukuman mati. Dengan itu, rayuan ini. Alasan utama yang dibangkitkan bagi perayu dalam rayuan adalah bahawa hakim bicara telah tersalah arah apabila gagal membuat arahan bahawa perayu telah berjaya mematahkan anggapan pengetahuan atas imbangan kebarangkalian. Adalah kes perayu bahawa dia tidak mengetahui bahawa kedua-dua beg yang dibawa olehnya dan Ebrahim ('P19A dan P19B') mengandungi dadah yang dipersoalkan dan bahawa dia tidak pernah melihat kedua-dua beg tersebut sebelum tiba di KLIA, di mana dia dan Ebrahim ditangkap. Perayu menyatakan bahawa beg-beg tersebut adalah milik Mohd Reza, yang datang bersamanya dari Iran.

Diputuskan (membenarkan rayuan; melepaskan dan membebaskan perayu)
Oleh Azahar Mohamed HMR menyampaikan penghakiman mahkamah:

(1) Pembelaan perayu bahawa kedua-dua beg tersebut adalah milik Mohd Reza bukanlah sesuatu yang timbul pertama kali dalam kes pembelaan. Daripada keterangan, jelas bahawa perayu, pada peluang yang paling awal, telah menyatakan pembelaannya kepada pegawai penyiasat ('PW8') bahawa dia tidak mempunyai pengetahuan tentang dadah yang tersembunyi di dalam P19A dan P19B. Penilaian yang teliti dan berhati-hati terhadap keterangan PW8 berpadanan dengan pembelaan

perayu bahawa, walaupun dia mempunyai kawalan dan jagaan kedua-dua beg tersebut, dia tidak mempunyai pengetahuan mengenai dadah yang dipersoalkan.

(2) Hakim bicara telah gagal mengarahkan perhatiannya kepada pembelaan perayu, khususnya dalam keterangan PW8 yang memihak kepada perayu, mengakibatkan kekurangan penilaian kehakiman kes pembelaan. Hakim bicara telah gagal menilai kes pembelaan perayu secara objektif dan dari semua sudut. Peninggalan tersebut telah menjejaskan perayu secara serius kerana ia adalah kekhilafan pada satu titik yang sangat genting yang berkait langsung dengan pembelaan. Dengan itu, ia adalah ketidakarahan yang serius yang terjumlah kepada salah arahan oleh hakim bicara yang mewajarkan campur tangan peringkat rayuan.

(3) Tidak ada siasatan yang dilakukan oleh PW8 untuk menyangkal versi fakta perayu, khususnya berkaitan dengan Mohd Reza, yang diberikan oleh perayu pada peluang terawal yang mungkin. Perayu tidak boleh dihukum bagi kekurangan kepintaran, kecuaian atau kelalaian pihak penyiasat yang memudaratkannya. Berdasarkan ketinggalan, suatu anggapan yang memihak kepada perayu wajar dibuat oleh hakim bicara di akhir kes pendakwaan.

(4) Hak perayu untuk perbicaraan adil telah terjejas disebabkan oleh kegagalan PW8 menjalankan siasatan untuk mengesahkan versi fakta oleh perayu. Perayu dengan itu telah kehilangan peluang seadilnya yang terbuka kepadanya untuk dilepaskan dan telah wujud kegagalan atau salah laksana keadilan. Atas keseluruhan dan keadaan sedia ada, perayu telah mematahkan anggapan di bawah s. 37(d) ADB dan telah membangkitkan keraguan munasabah atas kes pihak pendakwaan. Perayu adalah konsisten dari masa dia ditangkap dan sepanjang perbicaraan bahawa dia tidak mempunyai pengetahuan tentang dadah tersebut; paling tidak, perayu hanyalah pembawa tidak bersalah.

Case(s) referred to:
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Chan Pean Leon v. PP [1956] 1 LNS 17 HC ***(refd)***
Fadil Bachok v. PP [2012] 9 CLJ 65 CA ***(refd)***
Gooi Loo Seng v. PP [1993] 3 CLJ 1 SC ***(refd)***
Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC ***(refd)***
Leow Nghee Lim v. Regina [1955] 1 LNS 53 HC ***(refd)***

A *Lim Hock Boon v. PP [2007] 4 CLJ 114 CA* ***(refd)***
Mraz v. The Queen [1955] 93 CLR 493 ***(refd)***
Pang Chee Meng v. PP [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265 SC ***(refd)***
PP v. Chia Leong Foo [2000] 4 CLJ 649 HC ***(refd)***
B *PP v. Lin Lian Chen [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC* ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37(d), 39B(1)(a), (2)
Penal Code, s. 34

C *For the appellant - Geethan Ram Vincent (Mohd Norazihan Adnan with him); M/s Salehuddin Saidin & Assocs*
For the prosecution - Samihah Rhazali; DPP

[Appeal from High Court, Shah Alam; Criminal Trial No: 45A-203-2009]

D *Reported by S Barathi*

JUDGMENT

E **Azahar Mohamed JCA:**

[1] In the High Court, the second accused, Rahmani Ali Mohamad ("the appellant") was charged and tried together with the first accused, one Ashrafi Ebrahim Hamdollah ("Ebrahim") for
F the common intention of trafficking in 14,654g of methamphetamine, an offence in contravention of s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("DDA"), and punishable with mandatory death penalty prescribed under s. 39B(2) of the DDA read with s. 34 of the Penal Code. Both the appellant and Ebrahim are Iranian
G nationals.

[2] The offence was said to have been committed on 6 June 2009 at around 4.15pm at kaunter pemeriksaan kastam A, Unit Khas Pemeriksaan Penumpang 1, arrival hall of the main terminal,
H Kuala Lumpur International Airport ("KLIA"). It was the case of the prosecution that the appellant and Ebrahim were in physical custody and control of two bags, which were later found to contain the impugned drugs.

I **[3]** As it turned out, at the close of the prosecution case, Ebrahim was acquitted of the trafficking charge by learned High Court Judge without his defence being called. No appeal has been filed by the prosecution against that decision.

[4] However, learned High Court Judge came to a finding that the prosecution had made out a *prima facie* case against the appellant and therefore called upon him to enter his defence. At the conclusion of the case, the appellant was found guilty by learned High Court Judge. The appellant was convicted of the trafficking charge and was sentenced to death. The appellant then appealed to this court. We heard his appeal and we unanimously allowed it. We now give our reasons.

[5] The essential prosecution evidence adduced at the trial, which learned High Court Judge held made out a *prima facie* case against the appellant is as follows. At the material time and place, two customs officers namely, Nor Azlina bt Zainal Abidin ("PW5") and Lim Yii Chan ("PW6") while on duty at the Bahagian Pemeriksaan Penumpang KLIA had seen Ebrahim and the appellant heading out from carousal A pulling one bag each. PW5 called Ebrahim and the appellant and asked them to scan their bags. Ebrahim was seen pulling bag P19B while the appellant was seen pulling bag P19A.

[6] Upon conducting a scan, PW5 noticed that there was a green image from both P19A and P19B. PW5 then asked PW6 to conduct a physical examination on P19A and P19B. PW6 instructed Ebrahim to open P19B. At that moment, Ebrahim signalled and pointed to the appellant. PW6 then instructed the appellant to open both the bags. After the bags were opened by the appellant, PW6 noticed that the bags had a "compartment". It was at this time, PW5 instructed PW6 to refer the matter to their immediate supervisor, Tiew Hai Kin ("PW7"). PW7 then asked PW5 and PW6 to bring Ebrahim and the appellant together with P19A and P19B to his office. Subsequently PW7 contacted Cawangan Narkotik Kastam Diraja Malaysia. The investigating officer, Samsuri bin Ibrahim ("PW8") then arrived at PW7's office. Upon examination, PW7 found both the bags to contain a total of four plastic bags filled with drugs. The drugs were found in sealed compartment in the two bags.

[7] The four plastic bags were later sent to the chemistry department for chemical examination and analysis. The chemist, Hjh Shadiah bt Mohamad ("PW1") confirmed that the four plastic bags contained a total of 14,654g of methamphetamine.

A [8] On being called to make his defence, the appellant elected to give evidence under oath. The gist of his evidence is well summarised by learned High Court Judge in his judgment as follows:

B Pembelaan OKT2/Perayu datang dari Iran untuk melancong ke Malaysia bersama OKT1 atas tajaan rakan beliau bernama Mohsein. OKT2/Perayu hanya membawa beg galas P30 mengandungi sedikit pakaian sahaja, begitu juga OKT1 membawa beg galas P29.

C Urusan daftar masuk di Lapangan Terbang Tehran dilakukan oleh Mohsein, Amir dan Mirza Sadeghi. Apabila tiba di KLIA, "Mirza Sadeghi" memberitahu bahawa beliau ada membawa dua beg di conveyor belt bagasi. Mirza Sadeghi memberitahu bahawa 2 beg tersebut berisi barang "cenderahati". Perjalanan mereka dari Teheran - Shiraz - Dubai - Kuala Lumpur.

D

OKT2/Perayu telah mengambil troli apabila tiba di conveyor belt kerana OKT1 menyuruh beliau berbuat demikian untuk meletakkan beg-beg mereka. Apabila Mirza Sadeghi mengambil dua beg beliau dari "carousel" bagasi, beliau telah meletakkan kedua-dua beg ke
E atas troli yang sama. OKT2/Perayu hanya bantu menolak troli untuk keluar.

Apabila melalui lorong keluar, mereka dipanggil oleh SP5 untuk mengimbas bagasi mereka. Pada masa yang sama Mirza Sadeghi memberitahu beliau keluar dahulu untuk mengambil teksi.

F

Menurut OKT2/Perayu, ketika itu hanya satu mesin pengimbas yang beroperasi, semua penumpang terpaksa melalui lorong tersebut; sebelum OKT1 dan OKT2/Perayu terdapat penumpang-penumpang lain di hadapan mereka.

G Apabila sampai giliran mereka, setelah beg P19A dan P19B diimbas, satu daripadanya dibuka oleh Pegawai Kastam yang bertugas di situ dan bukan oleh OKT2/Perayu, beg itu tidak berkunci. Malah beliau telah memberitahu Pegawai Kastam berkenaan bahawa P19A dan P19B adalah kepunyaan Mirza Sadeghi serta meminta Pegawai Kastam tersebut mencari Mirza
H Sadeghi. Pada masa yang sama, Mirza Sadeghi ada menelefon OKT2/Perayu bertanya kenapa lama sangat, OKT2/Perayu ada meminta Mirza Sadeghi untuk datang ke kaunter kastam kerana pihak kastam ingin membuka P19A dan P19B, tetapi Mirza Sadeghi tidak datang.

I

[9] It should be pointed out that learned High Court Judge had invoked s. 37(d) of the DDA to find knowledge of the appellant of the drugs concealed in the bags. Before this court, the central ground raised by learned counsel for the appellant was that learned High Court Judge had misdirected himself when he failed to rule that the appellant had successfully rebutted the presumption of knowledge on a balance of probabilities.

[10] In considering whether the appellant had successfully rebutted the presumption of knowledge, learned High Court Judge had to scrutinise the evidence as to what the appellant said contemporaneously with the act or omission and also the surrounding circumstances under which the appellant acted or failed to act (see: *Chan Pean Leon v. PP* [1956] 1 LNS 17; [1956] 1 MLJ 237, *Leow Nghee Lim v. Regina* [1955] 1 LNS 53; [1956] 1 MLJ 28 and *PP v. Chia Leong Foo* [2000] 4 CLJ 649; [2000] 6 MLJ 705).

[11] Now, it was the appellant's case that he did not know P19A and P19B contained the impugned drugs and that he had never seen the two bags before arriving at KLIA. The appellant maintained that both the bags belonged to Mirza Sadeghi Mohammad Reza ("Mohd Reza"). According to the appellant, P19A and P19B were not checked in by him at Teheran Airport. Upon arrival at KLIA, Mohd Reza had collected P19A and P19B from the carousal and placed them on the scanner before heading out to get a taxi. According to the appellant, he had informed the customs officers at KLIA that the bags belonged to Mohd Reza. In order to appreciate the defence of the appellant, it is necessary to reproduce the material part of his evidence:

> I also told the officer that 2 bags were not mine. I did not touch the bags. Yes, I was standing side by side with OKT1.
>
> Then, Mohd Reza called us through handphone and asked why we was late. I told him to come back. I told something wrong with his bags. At this time P19A and P19B had been opened by a lady officer contents in the bags. We told her, it was not ours.
>
> Mohd Reza told me through the phone that he will come. Then, they brought us into a room. There, they told us, they want to break the bags. I told it was not our bags. Then my handphone rang. Then I gave my handphone to the officer to show that the owner of the bag is on the phone and please talk to him. The officer did not talk through the phone. I tried very hard in sign

A language about Reza went out to get a taxi. I do not know whether the officer understand or not. I told them Mohd Reza's name.

My phone rang about 2-3 times, 2 times at the scanner. We asked Mohd Reza to come and Ebrahim also talked to him. Inside the room, I told him to speak to the officer through the handphone.

[12] This then brings into focus the evidence of the investigating officer, PW8. From PW8's evidence, the following was established during the prosecution's case itself:

(i) The defence of the appellant was not a bare denial.

(ii) The existence of Mohd Reza cannot be doubted.

(iii) PW8 produced the Flight Manifest, exh. D56 (see pp. 388 and 389 of appeal record jilid 4) which proved that Mohd Reza travelled on the same flight as the appellant.

(iv) The appellant informed PW8 that he did not know P19A and P19B contained drugs.

(v) When the appellant was with PW8, the appellant received a number of calls on his hand phone.

(vi) PW8 did not allow the appellant to answer the calls.

(vii) The appellant had informed PW8 in broken English that someone was waiting for him outside.

(viii) PW8 went to Gate 6 to look for the person. The appellant was not brought along. PW8 could not find the person.

(ix) P19A and P19B did not contain any personal items belonging to the appellant.

[13] The evidence above makes it patently clear that the defence of the appellant that the two bags belonged to Mohd Reza was not something that was sprung for the first time in the defence case (see: *Public Prosecutor v. Lin Lian Chen* [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285; [1992] 2 MLJ 561). From the evidence, it is clear that the appellant at the earliest possible opportunity had given his defence to PW8 that he had no knowledge of the drugs concealed inside P19A and P19B. One of the tests for accepting or rejecting the evidence of a witness is how far it fits

in with the rest of the evidence and the circumstances of the case (see: *Fadil Bachok v. PP* [2012] 9 CLJ 65; [2013] 2 MLJ 391). In our judgment, a detailed and careful scrutiny of the evidence of PW8 fits in with the defence of the appellant that although he had control and custody of the two bags, he had no knowledge of the impugned drugs.

[14] This leads on to the argument of learned counsel that the defence of the appellant had not received any, or any sufficient attention from learned High Court Judge. To undertake a judicial appreciation and maximum evaluation, learned High Court Judge must apply his mind to all the relevant evidence. Nonetheless, a perusal of his judgment shows that learned High Court Judge failed to direct his attention to the defence of the appellant; particularly in the evidence of PW8 that was favourable to the appellant that we have highlighted in para. 12 above. There was therefore insufficient judicial appreciation of the defence's case as contended by learned counsel of the appellant. Learned High Court Judge had failed to view the defence of the appellant objectively and from all angles. In our judgment, this omission had seriously prejudiced the appellant. This was an error on a very crucial point directly relevant to the defence. Learned High Court Judge failed to give judicious consideration to this critical aspect of the defence. In our view, this is a serious non-direction which amounts to a misdirection by learned trial judge warranting appellate intervention (see: *Gooi Loo Seng v. Public Prosecutor* [1993] 3 CLJ 1).

[15] Even more, no investigation at all was carried out by PW8 to disprove the appellant's version of fact, particularly concerning Mohd Reza, which was given by the appellant at the earliest possible opportunity. In this regard, PW8 said that he did not investigate the appellant's handphone because "saya terlepas pandang". PW8 also said, "saya tak periksa rekod-rekod panggilan keluar masuk OKT 2. Jika disiasat mungkin boleh dapat maklumat lanjut". The appellant cannot be penalised for lack of ingenuity, negligence or inadvertence on the part of the investigator depriving him of the time honoured benefit of doubt (see: *Pang Chee Meng v. PP* [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265; [1992] 1 MLJ 137). The manner in which PW8 had conducted his investigations left many stones unturned and material gaps exists. Based on this omission, an inference in the appellant's favour ought therefore to

have been drawn by learned High Court Judge at the close of the prosecution case (see: *Lee Kwan Woh v. PP* [2009] 5 CLJ 631 and *Alcontara Ambross Anthony v. Public Prosecutor* [1996] 1 CLJ 705; [1996] 1 MLJ 209).

[16] In our judgment, the appellant's right to a fair trial has been compromised as a result of the failure of PW8 to carry out investigation to verify the appellant's version of fact. The appellant may thereby have lost a chance which was fairly opened to him of being acquitted and that there had been occasioned a failure or a miscarriage of justice (see: *Mraz v. The Queen* [1955] 93 CLR 493 quoted with approval in *Lim Hock Boon v. PP* [2007] 4 CLJ 114; [2007] 1 MLJ 46).

[17] In our judgment, on the totality and prevailing circumstances of the present case, the appellant had rebutted the presumption under s. 37(d) of the DDA and that the appellant had cast a reasonable doubt on the prosecution case. The appellant had been consistent from the time of his arrest and throughout the trial that he had no knowledge of the drugs; at most the appellant was only an innocent carrier.

[18] The upshot of all this was that the appellant's conviction was wholly unsafe. This appeal was, therefore, allowed. Accordingly, we quashed and set aside the conviction and sentence against the appellant. He was acquitted and discharged.