

Masoumeh Gholami Khaveh v Public Prosecutor

A

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO
B-05-213-08 OF 2011

ABDUL MALIK ISHAK, AZAHAR MOHAMED AND BALIA YUSOF
JJCA

B

31 MAY 2013

*Criminal Law — Dangerous drugs — Trafficking in dangerous drugs —
Trafficking in 2865.6g of methamphetamine — Appeal against — Conviction and
sentence — Absence of witness — Prosecution failed to secure attendance of witness
— Whether witness important and material for defence's case — Whether witness
evidence could raise reasonable doubt on prosecution's case — Whether appellant
deprived of fair trial — Whether there had been miscarriage of justice — Whether
conviction and sentence unsafe — Whether appeal ought to be allowed —
Dangerous Drugs Act 1952 ss 37 & 39B(1)(a)*

C

D

The appellant, an Iranian national, was convicted for trafficking in 2865.6g of dangerous drugs, namely methamphetamine. The trial judge sentenced her to the mandatory death penalty prescribed by the Dangerous Drugs Act 1952 ('DDA'). The salient facts of this case were that SP2, and his police party followed the appellant, who had taken two bags from the baggage claim area of KLIA to One World Hotel in Bandar Utama. The appellant went to her room with another male ('Amin'), while SP1, the bellman of the hotel, pushed the trolley with the bags belonging to the appellant to the appellant's room. He was followed by SP2. Almost immediately after the bags were delivered, SP2 and his police party came into the room. The appellant was directed by SP2 to open the bags. At the bottom of each of the bags, SP2 found a plastic packet with crystal substances which was subsequently confirmed by SP4, the chemist, to contain methamphetamine weighing in total 2865.6g. After the drugs were recovered from the two bags, SP2 prepared a search list (exh P8). Both the appellant and Amin then placed their signatures on P8. Amin was never charged in court together with the appellant. Instead, he was detained under the Dangerous Drugs (Special Preventive Measures) Act 1985. The detention order (exh D35) revealed that Amin was involved in drug activities since early 2007. The appellant was arrested by the police only after Amin appeared at One World Hotel and entered the same room as the appellant. At the trial, the appellant did not dispute that she had carried the two bags from Iran to Kuala Lumpur. However, the appellant alleged that she had absolutely no knowledge about the drugs inside the said bags as she was merely carrying them for a friend by the name of Shila to be delivered to Shila's friend by the name of Amin in Kuala Lumpur. Further, the appellant denied any knowledge of the presence of drugs concealed in the two bags. It was the finding of the trial judge that the

E

F

G

H

I

- A appellant had custody and control of exhs P6A and P6B in which the offending drugs were hidden, invoking the statutory presumption under s 37(d) of the DDA. The appellant was therefore deemed to have been in possession of the drugs, and deemed to have known the nature of the drugs. The appellant contended, inter alia, that the trial judge erred in law in failing to appreciate
- B that Amin's presence in court was important to the defence of the appellant. It was further contended that there had been a miscarriage of justice given that the prosecution had failed to produce Amin at the trial although Amin was offered as a witness to the defence. After the defence closed its case, the prosecution had tried to remedy the said failure by recalling SP3, the
- C investigating officer, to provide an explanation to the court on the various steps taken to secure the attendance of Amin.

Held, allowing the appeal, setting aside the conviction and sentence:

- D (1) Effort to trace Amin was only conducted after SP3 was instructed to do so by the court. There was no effort whatsoever by SP3 to find out the whereabouts of Amin before the commencement of the trial. The conduct of SP3 as the investigating officer of the case was most unsatisfactory and unacceptable. SP3 ought to have conducted a search for Amin to secure his attendance before the trial started and certainly
- E before he was offered to the defence (see para 15).
- (2) Even though Amin was not an important witness in the unfolding of the narrative of the prosecution's case, that did not relieve the trial judge from determining whether Amin was in point of fact an important and
- F material witness as far as the defence was concerned. The learned trial judge misdirected herself in that she overlooked and failed to appreciate the importance of Amin to the defence's case as he was the one who could raise a reasonable doubt on the prosecution's case. This was never considered by the learned trial judge. In the light of this unsatisfactory
- G feature, the appellant had been seriously prejudiced. It was true that if Amin was produced in court, he might not be able to give favorable evidence for the appellant, but that did not detract from the prosecution's duty to produce him in court. The appellant could not be deprived of Amin's attendance in order to prove her innocence (see para 18).
- H (3) The appellant's right to a fair trial had been compromised as a result of the failure on the part of the prosecution to secure the attendance of Amin which had the effect of rendering the conviction very unsafe. The appellant might thereby have lost a chance which was fairly opened to her of being acquitted and that there had been occasioned a failure or a
- I miscarriage of justice (see para 19).

[Bahasa Malaysia summary]

Perayu, rakyat Iran, disabitkan kerana mengedar dadah berbahaya sebanyak 2865.6g, iaitu methamphetamine. Hakim perbicaraan menghukumnya

dengan penalti kematian mandatori yang ditetapkan oleh Akta Dadah Berbahaya 1952 ('ADB'). Fakta penting kes ini adalah bahawa SP2, dan sepasukan polisinya mengikuti perayu, yang mengambil dua beg daripada bahagian tuntutan bagasi KLIA ke Hotel One World di Bandar Utama. Perayu masuk ke biliknya dengan seorang lelaki lain ('Amin'), sementara SP1, hotel bellman, menolak troli dengan beg kepunyaan perayu ke bilik perayu. Dia diikuti oleh SP2. Sebaik saja beg dihantar, SP2 dan pasukan polisinya memasuki bilik tersebut. Perayu diarah oleh SP2 membuka beg. Di bahagian bawah setiap beg, SP2 menjumpai paket plastik dengan bahan kristal yang kemudiannya disahkan oleh SP4, ahli kimia, mengandungi methamphetamine yang berat keseluruhannya 2865.6g. Selepas dadah diperolehi daripada kedua-dua beg, SP2 menyediakan senarai pemeriksaan (eksh P8). Kedua-dua perayu dan Amin kemudiannya menandatangani P8. Amin tidak pernah dituduh di mahkamah bersama dengan perayu. Sebaliknya dia ditahan di bawah Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985. Perintah penahanan (eskh D35) menunjukkan Amin terlibat di dalam aktiviti dadah semenjak awal tahun 2007. Perayu ditangkap oleh polis hanya selepas Amin muncul di Hotel One World dan memasuki bilik tersebut bersama perayu. Pada masa perbicaraan, perayu tidak mempertikaikan yang dia membawa kedua-dua beg tersebut daripada Iran ke Kuala Lumpur. Walau bagaimanapun, perayu mendakwa yang dia tidak mempunyai pengetahuan tentang dadah di dalam beg tersebut kerana dia hanya membawa beg-beg tersebut untuk kawan yang bernama Shila untuk dihantar kepada kawan Shila yang bernama Amin di Kuala Lumpur. Selanjutnya, perayu menafikan apa-apa pengetahuan mengenai kehadiran dadah yang disembunyikan di dalam kedua-dua beg. Ia adalah dapatan hakim perbicaraan bahawa perayu mempunyai jagaan dan kawalan terhadap eksh P6A dan P6B di mana dadah tersebut disembunyikan, membangkitkan anggapan statutori di bawah s 37(d) ADB. Perayu dengan itu dianggap memiliki dadah tersebut, dan dianggap mengetahui sifat dadah tersebut. Perayu berhujah, antara lain, bahawa hakim perbicaraan tersilap dari segi undang-undang untuk mempertimbangkan bahawa kehadiran Amin di mahkamah adalah penting kepada pembelaan perayu. Ia selanjutnya diujahkan bahawa terdapat ketidakadilan bahawa pihak pendakwaan telah gagal untuk mengemukakan Amin pada masa perbicaraan walaupun Amin telah ditawarkan sebagai saksi kepada pembelaan. Selepas pembelaan menutup kesnya, pihak pendakwaan telah mencuba unruk meremedikan kegagalan tersebut dengan memanggil semula SP3, pegawai penyiasat, untuk memberikan penjelasan kepada mahkamah atas pelbagai langkah untuk menjamin kehadiran Amin.

Diputuskan, membenarkan rayuan, mengetepikan sabitan dan hukuman:

- (1) Usahan untuk menjejak Amin hanya dijalankan selepas SP3 diarahkan untuk berbuat demikian oleh mahkamah. Tiada apa-apa usaha yang dibuat oleh pihak SP3 untuk mencari di manakah Amin berada sebelum

- A mulanya perbicaraan. Tingkah laku SP3 sebagai pegawai penyiasat amat tidak memuaskan dan tidak boleh diterima. SP3 sepatutnya menjalankan pencarian untuk Amin untuk menjamin kehadiran sebelum perbicaraan bermula dan sebelum dia ditawarkan kepada pembelaan (lihat perenggan 15).
- B (2) Walaupun Amin bukan saksi yang penting di dalam pendedahan naratif kes pihak pendakwaan, ianya tidak melepaskan hakim perbicaraan daripada menentukan sama ada Amin sebenarnya saksi penting dan material setakat berkenaan pembelaan. Hakim perbicaraan yang bijaksana telah terlepas perhatian dan gagal untuk mempertimbangkan
- C pentingnya Amin kepada kes pembelaan kerana dia yang satu-satunya yang dapat membangkitkan keraguan munasabah ke atas kes pihak pendakwaan. Ini tidak pernah dipertimbangkan oleh hakim perbicaraan yang bijaksana. Berdasarkan ciri yang tidak memuaskan ini, perayu telah
- D diprejudiskan secara serius. Ia adalah benar jika Amin dikemukakan di mahkamah, dia mungkin tidak dapat memberikan keterangan memihak perayu, tetapi itu tidak bermaksud pihak pendakwaan tidak perlu untuk mengemukakannya di mahkamah. Perayu tidak boleh dinafikan dengan kehadiran Amin untuk membuktikan yang dia adalah tidak bersalah (lihat perenggan 18).
- E (3) Hak perayu kepada perbicaraan adil telah dikompromi akibat kegagalan oleh pihak pendakwaan untuk menjamin kehadiran Amin yang mana mempunyai kesan menyebabkan sabitan tidak selamat. Perayu oleh itu mungkin hilang peluang yang telah terbuka secara adil kepadanya untuk
- F dibebaskan dan bahawa terdapat kegagalan atau ketidakadilan (lihat perenggan 19).]

Notes

- G For cases on trafficking in dangerous drugs, see 4(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 301–302.

Cases referred to

- Lim Hock Boon v PP* [2007] 1 MLJ 46, CA (refd)
Mraz v The Queen (1955) 93 CLR 493 (refd)
 H *PP v Abdul Manaf bin Muhamad Hassan* [2006] 3 MLJ 193, FC (refd)
PP v Asnawi bin Yusuf [2011] 4 MLJ 16, CA (folld)

Legislation referred to

- I Dangerous Drugs Act 1952 ss 2, 37(d), 37(da), 39B(1)(a), (2), (3)
 Dangerous Drugs (Special Preventive Measures) Act 1985

Appeal from: Criminal Trial No 45A-33 of 2010 (High Court, Shah Alam)

N Sivananthan (Tina Ong with him) (Sivananthan) for the appellant.

Tetralina bt Ahmed Fauzi (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent. A

Azahar Mohamed JCA (delivering judgment of the court):

[1] Masoumeh Gholami Khavesh ('the appellant'), an Iranian national, was charged and tried before the Shah Alam High Court for trafficking in 2865.6g of dangerous drugs, namely methamphetamine, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'), and punishable under s 39B(2) of the DDA. The offence was said to have been committed on 15 November 2009 at about 8.10am at Room No 2306, One World Hotel, First Avenue, Bandar Utama City Centre, in the District of Petaling, in the State of Selangor Darul Ehsan. B C

[2] At the conclusion of the trial, the learned trial judge convicted the appellant and sentenced her to the mandatory death penalty prescribed by the DDA. The appellant then appealed to this court. We heard her appeal, wherein at its conclusion we unanimously allowed it. As a result, the conviction was quashed and the sentence set aside. We now give our reasons. D E

[3] The salient facts adduced by the prosecution at the trial in the High Court had been fully and well set out in the judgment of the learned trial judge (see pp 371–379 of Vol 4 of the appeal record). Here, we will only highlight in the following paragraphs, very briefly, the relevant facts in so far as they are relevant to the issue which arises for decision in this appeal before us. F

[4] On 15 November 2009 at about 5.15am, Inspector Zahril Asri bin Mohd Zain ('SP2') and a police party comprising of nine other police personnel were on duty at the Kuala Lumpur International Airport ('KLIA'). In particular, SP2 and his police party kept a close surveillance at the baggage claim area. At about 6.15am, SP2 saw the appellant taking two bags (exhs P6A and P6B) from the baggage claim area and then she boarded a taxi. The two bags were placed in the boot of the taxi. The taxi then left KLIA. G

[5] SP2 and his police party followed the taxi from KLIA to One World Hotel, First Avenue, Bandar Utama City Centre. At the hotel, the appellant alighted from the taxi and the taxi driver took both the bags out of the taxi and handed them to Ahmad Syafiq bin Hassan ('SP1'), the bellman of the hotel who next placed the bags on a trolley. The appellant went into the lobby followed by SP1 with the bags. The appellant then sat down whilst the bags were placed at the side of the registration counter. Afterward, a male whom SP2 believed to be a foreigner went towards the appellant. The male then went to the registration counter followed by the appellant. H I

- A [6] After that, both of them proceeded towards the lift lobby and went into one of the lifts. SP2 then saw SP1 pushed the trolley to the lift. SP2 followed SP1. In the lift, SP1 pressed for floor 23. As soon as the lift door opened at the said floor, SP1 went out of the lift. SP2 followed SP1 who pushed the trolley to Room 2306. There, SP1 knocked on the door. Once the door was opened, SP1
- B entered the room to deliver the two bags. Almost immediately, SP2 and his police party came into the room. SP2 introduced himself by showing his authority card to both the appellant and the male individual. The male individual was identified as Amin Barghjel Veh Majid ('Amin'). We will say more about Amin later in this judgment.
- C
- D [7] SP1 was then asked to leave the room. Subsequently, SP2 directed the appellant to open the bags. The first bag which was opened by the appellant was exh P6B. The appellant herself took out the contents of the bag. Once it was empty, SP2 examined the bag. SP2 felt that the bottom of the bag appeared to contain something as there were marks of bulges. SP2 then pierced the cover and there he found one plastic packet containing crystal substances, suspected to be dangerous drugs, namely methamphetamine.
- E [8] The second bag opened by the appellant was exh P6A. The appellant was directed to empty it after which SP2 examined the bag. SP2 also felt that the bottom of the bag appeared to contain something as there were marks of bulges and there SP2 also found one plastic packet containing crystal substances, suspected to be methamphetamine.
- F
- G [9] The two packets were then sent to the Chemistry Department for chemical examination and analysis. The two packets were later confirmed by the chemist, Zulkfeli bin Mohd Edin ('SP4') to contain methamphetamine weighing in total 2865.6g.
- H [10] After the conclusion of the case for the prosecution, the learned trial judge came to the finding that the prosecution had made out a prima facie case against the appellant and therefore called upon the appellant to enter on her defence in respect of the offence charged. It was the finding of the learned trial judge that the appellant had custody and control of exhs P6A and P6B in which the offending drugs were hidden and invoking the statutory presumption under s 37(d) of the DDA, the appellant was therefore deemed to have been in possession of the drugs, and deemed to have known the nature of the drugs.
- I Having regard to the definition under s 2 of the DDA, which defines trafficking to also include 'transporting' and 'carrying', the learned trial judge then made a finding that the appellant was in fact trafficking in the dangerous drugs. Based on the authority of *Public Prosecutor v Abdul Manaf bin Muhammad Hassan* [2006] 3 MLJ 193, the learned trial judge was entitled and correct in making

a finding that a prima facie case of trafficking in the said offending drugs had been made out against the appellant without invoking the presumption under s 37(da) of the DDA.

A

[11] The appellant elected to give sworn evidence. The appellant did not dispute that she had carried the two bags from Iran to Kuala Lumpur. However, it was her testimony that she had no knowledge at all about the drugs inside the said bags as she was merely carrying them for a friend by the name of Shila to be delivered to Shila's friend by the name of Amin in Kuala Lumpur. The appellant denied any knowledge of the presence of drugs concealed in the two bags.

B

C

[12] In the petition of appeal, the appellant attacked the judgment of the learned trial judge on a number of grounds. In the light we took of this appeal, we are of the view that it is unnecessary to deal with all of them in this judgment. Before us, what turned out to be the most important point raised by learned counsel for the appellant concerned the learned trial judge's observation in her grounds of judgment to the effect that the prosecution did not rely on Amin to prove its case against the appellant, and since it was the defence that required Amin's presence in court, therefore his absence had not injured or prejudiced the prosecution's case. Learned counsel for the appellant argued that the learned trial judge made an error in law in that she failed to appreciate that Amin's presence in court was important to the defence of the appellant. He then argued that there had been a miscarriage of justice given that the prosecution had failed to produce Amin at the trial even though Amin was offered as a witness to the defence. On the facts of the present case, we find there is much force in this argument.

D

E

F

[13] To appreciate the point raised by learned counsel, we think it is useful to state briefly the pertinent factual background. It will be recalled that both the appellant and Amin were in Room 2306 when SP2 and his police party came in and examined the two bags. More significantly, after the drugs were recovered from the two bags, SP2 prepared a search list (exh P8). Both the appellant and Amin then placed their signatures on P8. Amin was never charged in court together with the appellant but he was detained under the Dangerous Drugs (Special Preventive Measures) Act 1985 at the Muar Rehabilitation Centre for two years from 24 January 2010. The next point which we think has a very strong bearing on the issue is the detention order (exh D35) which revealed that Amin was involved in drugs activities since early January 2007. It is important to note that the allegation of fact at para 8 in exh D35 states that Amin was the person responsible in the delivery of the Methamphetamine drugs weighing 4kg from KLIA to One World Hotel. It is also relevant to note that the appellant was arrested by the police only after Amin appeared at the One World Hotel and entered the same room as the

G

H

I

- A appellant. Even more to the point, the appellant could have been arrested at KLIA when she was seen taking the two bags from the baggage claim area. Another point that must be mentioned here is that in the consent to prosecute under s 39B(3) of the DDA (exh P1), it is stated that the appellant was charged with a common intention to traffic in dangerous drugs. The significant point
- B here is that in the charges (exhs P2 and P3), the appellant was the only person named.

- [14] At this juncture, it is imperative that we should highlight a crucial fact. It is this. As can be seen in exh P4, at the end of the prosecution case, Amin was
- C one of the prosecution witnesses who were offered to the defence. This then brings into sharp focus the appellant's intention to call Amin to testify which was duly informed to the prosecution before the commencement of the defence's case. However, as it turned out, until the close of the defence case, the
- D prosecution had failed to produce Amin in court as requested by the defence.

- [15] Continuing with the sequence of events at the trial before the learned trial judge, after the defence closed its case, the prosecution had tried to remedy the said failure by recalling the investigating officer, Chief Inspector Azizan bin Ganti ('SP3') to give an explanation to the court on the various steps taken to
- E secure the attendance of Amin. According to SP3, he had contacted the Detention Centre at the Narcotics Department, Bukit Aman on 30 May 2011 to obtain clarification regarding Amin's status in the light of the detention order, exh D35. SP3 then contacted the Muar Rehabilitation Centre and was
- F informed that Amin was sent to the detention centre on 24 January 2010, but he had been released via a Writ of Habeas Corpus dated 8 February 2011 (exh P49). Subsequently, on 16 June 2011, SP3 contacted the Muar Immigration Department where he was informed that Amin had been deported back to his home country on 16 March 2011, which was approximately a month before
- G the commencement of the trial before the learned trial judge. It is the testimony of SP3 he had only realised on 16 June 2011 that Amin had in fact been deported to his home country. SP3 also said that his effort to trace Amin was only conducted on 30 May 2011 after he was instructed to do so by the court. It is quite important to note that there was no effort whatsoever by SP3 to find
- H out the whereabouts of Amin before the commencement of the trial on 11 April 2011. In our view, the conduct of SP3 as the investigating officer of the case is most unsatisfactory and unacceptable. SP3 ought to have conducted a trace on Amin to secure his attendance before the trial started and certainly before he was offered to the defence.

- I
- [16] Against the backdrop of the above, five important points should now be highlighted here. First, the appellant has forwarded a defence of innocent carrier in that she never at anytime denied that she carried the two bags but disputed having knowledge of the drugs hidden in them. Secondly, the

existence and involvement of Amin in this case cannot be disputed. Thirdly, at the close of the prosecution case, the prosecution offered Amin but could not make him available at the trial. Fourthly, the appellant's counsel at the trial had informed the prosecution that he intended to call Amin as a defence witness. Fifthly, the testimony of Amin might well have established that the appellant had no prerequisite knowledge of the drugs hidden in the two bags.

A

B

[17] Therefore, under such circumstances, in our judgment, the pertinent issue which the learned trial judge had to decide was whether the appellant's right to a fair trial had been compromised. In this regard, the learned trial judge had this to say in her grounds of judgment:

C

In the case before me, the prosecution need not rely on Amin at all and it was the defence that required him. Therefore Amin's absence had not injured or prejudiced the prosecution's case. Further, Amin was not 'important and material witness' as stated in the case.

D

[18] In our judgment, in the context of the present case, this is a serious misdirection. Even though Amin was not an important witness in the unfolding of the narrative of the prosecution case, that did not relieve the learned trial judge from determining whether Amin was in point of fact an important and material witness as far as the defence was concerned. The learned trial judge misdirected herself in that she overlooked and failed to appreciate the importance of Amin to the defence case as he was the one who could raise a reasonable doubt on the prosecution case. This was never considered by the learned trial judge. In the light of this unsatisfactory feature, in our judgment, the appellant had been seriously prejudiced. In *Public Prosecutor v Asnawi bin Yusuf* [2011] 4 MLJ 16, this court held that it is the bounden duty of the prosecution to secure the attendance of witnesses once they were offered as witnesses to the defence. Likewise, in the present case the prosecution has the bounden duty to secure the attendance of Amin. The appellant may waive the attendance of Amin. It is true that if Amin was produced in court, he might not be able to give favorable evidence for the appellant, but that did not detract from the prosecution's duty to produce him in court. The appellant cannot be deprived of Amin's attendance in order to prove her innocence.

E

F

G

H

[19] In our judgment, on the facts and the prevailing circumstances of this case, the appellant's right to a fair trial has been compromised as a result of the failure on the part of the prosecution to secure the attendance of Amin, which has the effect of rendering the conviction very unsafe. The appellant may thereby have lost a chance which was fairly opened to her 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*

I

A *v Public Prosecutor* [2007] 1 MLJ 46). This appeal was, therefore, allowed on this ground alone. Accordingly, we quashed and set aside the conviction and sentence against the appellant. The appellant was acquitted and discharged.

B *Appeal allowed, conviction and sentence set aside.*

Reported by Ashgar Ali Ali Mohamed

C

D

E

F

G

H

I