IN THE HIGH COURT OF MALAYA AT SHAH ALAM
IN THE STATE OF SELANGOR, MALAYSIA
[CRIMINAL TRIAL NO : 45A-140-12/2016]

BETWEEN

PUBLIC PROSECUTOR

AND

MOHAMMAD ZOHAIB KHAN
(WARGA PAKISTAN NO PASSPORT: TIADA)

JUDGMENT

1. The accused, Mohammad Zohaib Khan, a male Pakistani national, was charged with trafficking in 3956 grammes of cannabis under section 39B (1)(a) of the Dangerous Drugs Act 1952 ("the Act") and punishable under section 39B (2) of the Act.

2. The amended charge against him read:

> Bahawa kamu pada 4 Ogos 2016, jam lebih kurang 3 petang bertempat di alamat Jalan SS14/8E, SS14, Subang Jaya di dalam Daerah Petaling, di dalam Negeri Selangor telah di dapati mengedar dadah berbahaya jenis Cannabis seberat 3956 gram. Oleh yang demikian itu, kamu telah melakukan suatu kesalahan di bawah Seksyen 39B (1) (a)Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B (2) Akta Dadah Berbahaya."

3. The prosecution called 4 witnesses. According to the prosecution evidence, on 4 August 2016, acting on a tip off, a team of narcotics officers led by Inspector Mohd Fahmmi (PW1) proceeded to Jalan SS14/8E, SS14, Subang Jaya, Selangor. The tip off related to an impending cannabis transaction that was to take place and the drug trafficker was believed to be a Pakistani national who would be travelling in an orange Ford Fiesta car bearing registration number WCP 5437P.

4. As the police team approached Jalan SS14/8E, Subang Jaya, they spotted an orange stationary car ("the car") with its engine on. It fitted the description given by the informer. It was about

2.45 pm. The police team kept the car under observation. The accused was seated in the front passenger seat with one Fahim Tazwar Hossain ("Tazwar'), at the driver seat. Some 15 minutes later, the accused alighted from the car and walked towards the boot and opened and closed it. He then walked towards Syed Ammar Daniel bin Syed Mohd Amjat (PW3) who was standing in front of his (PW3's) house, a short distance away from the car.

5. At this juncture, Inspector Mohd Fahmmi and his team approached the accused and PW3 who were talking and detained them. Following that, Tazwar, the driver of the car was also detained. The accused, PW3, and Tazwar were searched but nothing incriminating was found on them. Inspector Mohd Fahmmi next searched the boot of the car and found a red/white bag (exhibit P14) ("the bag") with the words "Coca Cola FIFA World Cup Brazil "printed on it. The bag was unzipped and it contained four compressed slabs of dried leaves (exhibits P16 to P19) wrapped in clear plastic. A small piece of paper was found in each compressed slab. Suspecting the dried leaves to be cannabis, Inspector Mohd Fahmmi arrested the accused, Tazwar and PW3 and seized the items in the car.

6. The arrestees were taken to IPD Subang Jaya with the items seized. There, Inspector Mohd Fahmmi labelled the items and prepared a search list. At about 8.10 pm, he handed the accused and the seized items over to Inspector Aziman bin Anas (PW4), who was the investigating officer in charge of this case.

7. The investigating officer confirmed receiving the exhibits from Inspector Mohd Fahmmi. He testified that he made his own markings on the exhibits after receiving them. On 10 August 2016, the drug exhibits were sealed in a box and sent to the government chemist, Dr Saravanan Kumar (PW2) for chemical analysis. On 25 October 2016, he received the exhibits back from the Chemistry Department together with the chemist report dated 9 September 2016 confirming that the dried leaves contained cannabis, a dangerous drug listed in the First Schedule of the Act.

8. I must now touch on PW3's evidence. He said that his family operated a business to help students renew their visas from their home. According to him, on the date in question, the accused approached him and asked if he could help him to renew his visa when the police appeared suddenly and arrested him and the accused. He said he had not seen the accused before that date.

9. The above, in essence, formed the basis of the prosecution's case against the accused.

Ingredients of the offence

10. To prove the charge against the accused, it was incumbent on the prosecution to prove:

i. that the substance found in the bag recovered from the boot of the car was dangerous drugs within the definition of section 2 of the Act; and

ii. that the accused person had mens rea 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

Finding at the end of prosecution's case

11. At the close of the prosecution's case, after hearing submissions from both sides, I found that the prosecution had failed to prove the first two ingredients. My reasons for doing so were as follows.

Whether the accused had possession of the drugs

12. Taking the ingredient of possession, first. The question as to what constitutes possession under the Act has been considered in numerous cases. It is clear from these cases, that to prove possession it must not only be shown that the accused had physical control or custody of the drugs at the relevant time, but the prosecution must also prove that the accused possessed the requisite knowledge as to the contents of what was in his custody.

13. Reverting to the undisputed evidence in the instant case. The cannabis was found in the boot of the car. The accused was not the owner nor the driver of the car. It will therefore be useful to examine three cases to see what is the approach of the Courts when drugs are found in a car.

14. In the first case, *PP v. Lin Lian Chen* [1992] 4 CLJ 2086, the facts were these. On information received, a party of police officers laid an ambush and waited at a car park. Some twenty five minutes later, a Honda motor car driven by the respondent, who was the sole occupant in the car arrived there. The respondent was arrested while he was still seated in the driver's seat. The car was searched and the police found drugs in his car. In dismissing the prosecution's appeal against the acquittal of the respondent, the Supreme Court observed:

> Turning to the evidence, although it is true that the respondent was the sole occupant of the Honda, being the driver and therefore in charge of it, the fact remains, that he was not its owner and, there was no evidence from which it could be reasonably inferred that he must have been in custody or control of the seven newspaper packages or the cigarette packet, which contained the offending exhibits.
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> In this context, mere knowledge of the presence of the seven newspaper packages or the cigarette packet in the Honda without more would not be sufficient to constitute custody or control thereof though it would constitute an essential step in that direction. But the position here was that there was not even proof of such knowledge much less proof of knowledge of the presence of the offending exhibits in the seven newspaper packages or the cigarette packet. For example, there was nothing to indicate for how long in all the respondent had been in charge of the Honda and such evidence as had been adduced indicated that he was seen only briefly at the wheel. No evidence was adduced as to whether the seven packages or the cigarette box had been dusted for fingerprints or as to whether the respondent's hands or fingernail clippings were examined for traces of heroin nor was there anything even suspicious about the behaviour of the respondent before or at the time of his arrest; for example, he made no difficulties when arrested

15. In *Ibrahim v. PP* [2011] 4CLJ 113, the police acting on a tip-off. Apprehended the first and second accused at a road block during the inspection of a vehicle driven by the first accused. The police found drugs in the car. The Federal Court set aside the conviction of the accused persons for trafficking and substituted it with one of possession under section 6 of the Act. It was explained:

> It is our finding that there is no evidence to prove that both the accused were exclusively in custody and control of the vehicle prior to their arrest. There are so many favourable inferences that can be made from the existing factual matrix of this case...
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> The mere fact that the second accused was found in the vehicle and that he was previously summoned for driving the vehicle somewhat approximately six months prior to the date of arrest are insufficient for the court to make an inference that he had exclusive custody or control over the vehicle. Even if the learned trial judge was correct in deciding that both the accused were in custody or control of the vehicle when they were stopped by the police party, this could not be translated into having custody or control over the said drugs in the absence of other incriminating evidence against them. It could not have given rise to the inference that the said drugs belonged to them.

16. In the third case, *Ahmad Azhari Ahmad Zaini v. PP* [2015] 1 CLJ 157, the Court of Appeal held at paras 24 and 26:

> On the first charge, apart from the fact that immediately prior to the arrests, the first appellant was seen driving the Mercedes with the second appellant as the passenger and the fact that both of them later went to the boot of the Mercedes from the Kelisa, there was no other evidence or circumstances from which knowledge of the drugs in the boot of the Mercedes could be inferred against the appellants. In our view, the case of *Ibrahim Mohamad & Anor (supra)* applies to the facts of the present case.
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> The mere fact that the appellants were in the Mercedes was insufficient to prove knowledge, custody and control and to constitute possession of the drugs.

17. It is clear from the foregoing cases that there is no principle or presumption of law that a person by his mere presence in the car has ownership or custody of drugs carried in it. There must be other credible evidence to implicate him with the drugs in the car. There was no evidence here as to who had put the drugs in the boot of the car. It may have been either the accused or Tazwar or someone else who had access to the car. As Taswar was not charged together with the accused, the prosecution had to prove that the Taswar had nothing to do with the drugs and it was the accused who had sole or exclusive custody or control of the drugs.

18. The only circumstantial evidence that the prosecution relied on to establish that the accused had exclusive custody or control was the fact that the accused had opened and closed the boot. It was said that as the bag was not zipped up, the accused must have known of the presence of cannabis in the boot.

19. It is clear from the three cases discussed above that the opening and closing of the boot was insufficient to establish custody or control. In any event, I could not fathom how the opening and closing of the booth could be translated to mean that the accused had exclusive custody or control over the cannabis. The act of the accused in opening and closing the boot, at best showed that the accused may have had knowledge of the presence of the cannabis in the car. It is a principle of law that mere knowledge alone without exclusivity of either physical custody or control or both is insufficient in law to constitute possession. There is abundant authority reiterating that principle. See *Chan Pean Leon v. PP* [1956] 1 MLJ 237, *Gooi Loon Seng v. PP* [1993] 2 MLJ 137 and *Choo Yoke Choy v. PP* [1992] 2 MLJ 632.

20. In *Choo Yoke Choy v. PP (supra)*, the Supreme Court in this connection observed:

> It is trite law that mere knowledge is not sufficient to constitute possession: see *PP v Lai Ah Bee*, 4 followed by Edgar Joseph Jr J in *PP v. Khoo Boo Hock & Anor* 5 at p 975. It is merely one of the ingredients of possession. Without the evidence of custody or control, the presumption of possession under s. 37(d) of the Act cannot arise.

> In order to found a conviction, the prosecution must establish not only that the appellant had knowledge of the existence of the drugs but that he also had exclusive custody or control of them.

21. At this juncture, I will briefly deal with an application made by the learned deputy public prosecutor to admit the statement of Tazwar made under section 112 of the Criminal Procedure Code under section 32(1)(i) of the Evidence Act 1950. It is clear from the wording of this section, that to admit a statement under section 32(1)(i), the prosecution must show Tazwar cannot be found or his attendance cannot be procured without an unreasonable amount of delay or expense. Section 32 in so far as material reads:

> (1) Statements, written or verbal, of relevant facts made by a person who ... cannot be found ... 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 in the following cases:
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> a...
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> b..
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> ...
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> i. when the statement was made in the course of, or for the purposes of, an investigation or inquiry into an offence under or by virtue of any written law;

22. To satisfy the pre conditions stipulated in section 32(1)(i) of the Evidence Act, the prosecution relied on the oral testimony of the investigating officer who said that he had been informed by the surety that Tazwar had returned to Bangladesh. There was no evidence led as to whether the investigating officer took any steps to verify this information and, if Tazwar had in fact returned to Bangladesh, and whether he had made attempts to contact the latter by phone. Nor was there any evidence to indicate if the police had kept in contact with Tazwar as he was an important witness for their case, and the reason for this failure. The law pertaining to section 32(1)(i) is well settled. The prosecution must show that it had conducted a diligent

search or expended sufficient effort to locate the witness before his statement can be admitted. In particular for cases involving the capital punishment, a high degree of effort must be displayed. See *PP v. Chow Kam Meng* [2001] 7 CLJ 387 and *Norfaizal bin Mat (no 2)* [2008] 7 MLJ 792.

23. The evidence adduced here was insufficient to establish that Taswar cannot be found or his attendance cannot be procured without an unreasonable amount of delay or expense. I therefore ruled that the prosecution was precluded from relying on section 32 (1)(i) of the Evidence Act to admit Tazwar's statement.

24. Tazwar was an important witness for the prosecution to exclude the possibility of him having had custody or possession of the cannabis. The failure to call him created a serious doubt as who had possession of the drugs. In the absence of any other incriminating or forensic evidence or linking the accused to the cannabis found in the car, it could not be safely said that the accused had custody or control of it.

25. I therefore found that the prosecution had failed to prove that the accused had possession of the cannabis found in the car.

Whether the substance found in car was dangerous drugs

26. Next, I turn to deal with the first ingredient. In a drug trafficking charge, it is essential for the prosecution to prove that the drugs analysed and confirmed by the chemist to be dangerous drugs were the drugs recovered from the accused. In this case there was a serious discrepancy in the evidence of PW1, the raiding officer and the chemist report (exhibit P11) regarding the description of the wrappings in which the drugs were found. It will be recalled that according to PW1 the cannabis was found wrapped in clear plastic. This was confirmed by the investigating officer, but the chemist report indicated that the four compressed slabs the chemist received from the investigating officer were wrapped in aluminium foil and strengthened with clear cellophane tape. No aluminium foil or clear cellophane tape were produced in Court.

27. The chemist when referred to the discrepancy, explained that he had checked his notes again and ascertained that there was a

mistake in his report. The slabs were not wrapped in aluminum foil as noted in his report. He explained that this was a cut and paste error and sought permission to correct his report. This was strenuously objected by the defence.

28. It is imperative to mention here that the report prepared by the chemist was a report that came within the scope of section 399 of the Criminal Procedure Code. The question arises whether it is permissible for a chemist to amend his report in view of sections 91 and 92 of the Evidence Act 1950. Section 91 states that no evidence can be given in proof of any matter which is required by law to be reduced to a form of a document. And, section 92 prohibits the giving of oral evidence to contradict, vary or explain the contents of such document. It has been held that sections 91 and 92 of the Evidence Act apply both to criminal and civil trials. See *Inspector General of Police v. Alan Noor bin Kamat* [1988] 1 MLJ 260 and *Ah Mee v. PP* [1967] 1 MLJ 220.

29. The effect of sections 91 and 92 of the Evidence Act has been considered in numerous cases. See *PP v. Sulaiman bin Mohamad Noor* [1996] 1 MLJ 196 [HC], *PP v. Lam Peng Hoa* [1996] 5 MLJ 405 [HC] and *PP v. Poh Ah Kwang* [2003] 2 CLJ 722[HC]. It has been established in these cases that the prohibition in section 92 of the Evidence Act precluded a chemist from correcting the contents of his report by way of oral evidence.

30. It would be sufficient for the purposes of this issue to refer to *PP v. Lam Peng Hoa (supra)*, where it was observed:

> It is trite law that if a chemist is called as a witness to testify on matters pertaining to his analysis of the drug, the chemist report prepared by him would not be admissible, save that it may be tendered not as substantive evidence of its contents, but as corroboration of his oral evidence in court under s. 157 of the Evidence Act (see *Saw Thean Teik v. R* [1953] MLJ 124 followed in *PP v. Lin Lian Chen* [1992] 2 MLJ 561). Conversely, if the chemist report has been tendered as substantive evidence under s. 399 of the CPC, it follows that no oral evidence can be given by the chemist in respect of his analysis of the drug. To allow the chemist to give such evidence would tantamount to allowing the

admission of two sets of substantive evidence from the same witness, which the prosecution would not have otherwise been entitled to do, had they called the chemist to give oral evidence.

A chemist report is not per se a 'matter' required by law to be in the form of a document as in the case of a police report under s 107 of the CPC and a statement under s. 112 of the CPC. But once the chemist report has been admitted as substantive evidence under s 399 of the CPC, it falls squarely in that class of matter 'required by law to be reduced to the form of a document' under s. 91 of the Evidence Act. It would not therefore be permissible by the operation of s. 91 of the Evidence Act, for the prosecution to give any other evidence in proof of the matter except the document (the chemist report) itself.

31. I agree with the view expressed in the three cases. Applying the aforesaid principle to the present case, it was clear that the chemist was not entitled to correct or depart from his report. He was bound by it. As there was a serious discrepancy in the evidence as to the description of the wrappings, it could not be said that the prosecution had established that the drugs seized from the car were the drugs analysed by the chemist.

Conclusion

32. For the reasons given, I found that the prosecution had failed to establish a *prima facie* case against the accused, and I accordingly acquitted and discharged him without calling upon him to enter his defence.

Dated: 20 MARCH 2018

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

Date of Decision : 2 February 2018

Counsel:

For the Accused - Sivananthan Nithyanantham & Low Huey Theng; M/s Sivananthan

For the Public Prosecutor - Aidatul Azura Zainal Abidin; Deputy Public Prosecutor of Selangor