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*1 Ali Hosseinzadeh Bashir v Public Prosecutor

Court of Appeal

5 January 2014

[2015] AMEJ 45

Criminal Appeal No. B-05-36-211 (IRN)

Mohtarudin Baki, Zakaria Sam, Abdul Rahman Sebli JJCA

High Court, Shah Alam - Criminal Trial No. 45A-42/2010

Representation

N Sivananthan (Sivananthan) for appellant

Azlina Rasdi, DPP (AG's Chambers) for respondent

JUDGMENT

Abdul Rahman Sebli JCA

[1] The appellant, an Iranian national was charged in the High Court at Shah Alam with trafficking in a dangerous drug and the charge against him is as follows:

> "Bahawa kamu pada 26 Disember 2009, lebih kurang jam 2.45 petang di Kaunter Pemeriksaan Kastam "D", Cawangan Pemeriksaan Penumpang 1 (CPP1), Balai Ketibaab Antarabangsa, Terminal Utama Lapangan Terbang Antarabangsa Kuala Lumpur, di dalam daerah Sepang, dalam negeri Selangor Darul Ehsan, telah didapati mengedar dadah berbahaya iaitu Methamphetamine seberat 540.9 gram, dan dengan itu kamu telah melakukan suatu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama."

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[2] At the conclusion of the trial he was found guilty and sentenced to death. This is his appeal against the conviction and sentence. The salient facts are as follows. On 26.1.2009 at about 2.45 p.m. on his arrival at the Kuala Lumpur International Airport from Doha, Qatar the appellant was asked by Customs Officer Mokhadinil Akma bin Mokhtar (SP3) to have his bag scanned. He did as told and as he was bending down to lift the bag, SP3 noticed a bulge on the back of the jacket that he was wearing. After getting the appellant's permission, SP3 touched the bulge with his hand and it felt like sand.

[3] At the same time SP3 was informed by Customs Officer Nur Shakirah binti Zulkifli (SP4) who was operating the scanning machine that a suspicious green image was detected inside the appellant's bag. The appellant was then asked to go to another room at the airport for a further check. Both the bag and the jacket were checked. The appellant himself opened the bag by turning the combination numbers of the lock.

[4] When the bag was opened and the contents removed, Senior Customs Officer Elangovan a/l Rethnesamy (SP5) found two packets of crystalline substances hidden in two secret compartments on the right and left walls of the bag. A check on the jacket also revealed a hidden packet containing crystalline substances. SP5 had to make a small cut at the bulging section of the jacket to retrieve the packet.

[5] The crystalline substances found in the appellant's bag and jacket were sent for analysis and were

confirmed by the Chemist to contain ***3** 540.9 grams of Methamphetamine. Possession without lawful authority of 50 grams or more of this drug attracts the presumption of trafficking under section 37(da)(xvi) of the Dangerous Drugs Act 1952 ('the DDA').

[6] On these facts the learned trial judge was satisfied that a *prima facie* case had been established against the appellant and he then called upon the appellant to enter his defence. Having heard the defence he found that the appellant's explanation failed to cast any reasonable doubt in the prosecution case. Accordingly he found the appellant guilty as charged.

[7] Before us the verdict was attacked on the following grounds:

(1) No written grounds of judgment were given by the learned trial judge.

(2) Failure by the police to investigate the information given by the appellant of the role played by Asghar Zabzali whom the appellant claimed was the person who gave the bag to him to be brought to Malaysia.

(3) No fingerlifting done by the Investigating Officer.

(4) Failure by the trial judge to consider the conduct of the appellant which was indicative of his innocence. ***4**

(5) The drugs were hidden and therefore the appellant could not have been aware of them.

Ground (1)

[8] The point raised was that without the written grounds of judgment this court would indirectly act as the trial court. According to counsel this would deprive the appellant of the first stage of the appeal at the Court of Appeal and would limit him to only the last stage of appeal to the Federal Court. It was submitted that this was a breach of Article 8 of the Federal Constitution (equality before the law). It was further submitted that if every other person is entitled to two chances of appeal, then the appellant should not be left with only one chance of appeal.

[9] We found no substance to the argument as it is factually wrong. It is true that the learned trial judge did not provide any written grounds of judgment as is normally done after a notice of appeal is filed but in this case the learned judge had given his grounds both at the end of the prosecution case (page 125-128 of the record of appeal) and at the close of the defence case (page 137-138 of the record of appeal).

[10] The record shows that at the conclusion of the trial the learned trial judge had properly directed his mind to the requirements of section 182A(1) of the Criminal Procedure Code and this can be seen at page 137 of the record of appeal where he said: ***5**

> "Pada peringkat ini, Mahkamah mempunyai tugas untuk melihat semula pada segala keterangan yang telah dikemukakan termasuk keterangan oleh pihak pendakwaan dan menilai dan menganalisa serta membuat keputusan berlandaskan keterangan-keterangan yang telah dikemukakan oleh kedua-dua pihak."

[11] He then went on to deal with the defence case, which was a defence of no knowledge. He concluded that the defence was a total fabrication ("*satu rekaan semata-mata*"). And he continued to say at page 138 of the record of appeal:

> "Mahkamah telah melihat balik kepada keterangan pendakwaan dan melihat balik keterangan yang diberi oleh OKT, Mahkamah berpuas hati bahawa pendakwaan di peringkat kes pendakwaan telah membuktikan satu kes prima facie terhadap OKT atas

> pertuduhan dan telah membuktikan bahawa OKT mempunyai pengetahuan selain daripada control dan custody terhadap the offending exhibit 3 bungkusan tersebut. Di peringkat pembelaan, Mahkamah mendapati pihak pembelaan telah gagal menimbulkan keraguan munasabah dalam kes pendakwaan."

[12] Clearly this is not a case where the learned trial judge merely delivered his decision without giving any reason. What he did was to deliver his grounds *ex tempore.* In our view the grounds that he delivered *ex tempore* are as good as written grounds provided after a notice of appeal was filed. As for the merits of the case, we are firmly of the view that on the evidence before him the learned trial judge was correct in finding the appellant guilty of the offence charged. Ground (1) of the appeal must therefore fail.

Ground (2) **6*

[13] It was submitted that the failure by the Investigating Officer (SP6) to investigate the information given by the appellant on the role played by one Ashgar Zabzali ('Ashgar') had created a "huge lacuna" in the prosecution's case as the existence of Ashgar was undeniable. The information that the appellant gave to SP6 in the course of the investigation was that he (the appellant) was asked by Ashgar to carry the bag to Malaysia.

[14] The sheet anchor of counsel's argument is that since Ashgar's name had been brought up by the defence during the prosecution case the role of this person must be investigated, failing which an inference favourable to the appellant must be drawn, a reverse way of saying that an adverse inference must be drawn against the prosecution. Reliance was placed on the decision of the Federal Court in Lee Kwan Woh v PP [2009] 5 MLJ 301. In his written submissions counsel reproduced part of headnote (3) of the report, which reads:

> "The investigating officer's failure to investigate this allegation despite being informed of this fact during investigation was a serious omission. An inference in the accused's favour ought to have been drawn by the trial judge at the close of the prosecution case when the investigating officer's failure was brought to light. If so, doubt would have been cast upon the evidence of the investigating officer."

[15] To put the matter in perspective we reproduce below what the Federal Court said at page 316 of the judgment:

> "[21] There are three important evidential points. We take the first. The appellant's case as put to the relevant prosecution witnesses was that he was not ****7*** apprehended the moment he emerged from the car. He was arrested in the compound of house No 52. PW3, the investigation officer confirmed under cross examination that the appellant had, during investigations, informed her of this fact. She however failed to investigate this allegation at all. This is a serious omission. In Public Prosecutor v Lim Ah Bek [1989] 2 CLJ 1090 there was a doubt whether the investigating officer in that case had investigated the defence of alibi mentioned by the accused in his cautioned statement. Based on this possible omission, Gunn Chit Tuan J (as he then was) drew an inference in favour of the accused in that case. The present case is much stronger in that there was no investigation at all. An inference in the appellant's favour ought therefore to have been drawn by the learned judge at the close of the prosecution case. Had that been done, doubt would have been cast upon the evidence of PW4 and PW8. Unfortunately this point was missed by the learned trial judge, no doubt because of his ruling. If he had heard the submission of no case by the appellant, he may perhaps have not acted on the evidence of these two witnesses."

[16] It is important to understand the context in which the above pronouncement was made. As every lawyer knows a decision is only authority for what it decides. What we can gather from the judgment is that at the trial prosecution witnesses PW4 and PW8 had testified that the appellant was arrested the moment he emerged from the car, carrying a white plastic bag containing the drug. This evidence

was contradicted by the defence by way of 'putting' to PW4 and PW8 in cross examination that the appellant was in fact arrested at the compound of house No. 52 and not as he emerged from the car.

[17] In delivering the judgment of the court Gopal Sri Ram FCJ held the view that since the appellant had informed the investigating officer his version of the incident during the investigation and before he was ***8*** charged in court, the investigating officer ought to have investigated which version was the true version. In other words she should have investigated whether it was true that the appellant was arrested at the compound of house No. 52 and not as he emerged from the car as claimed by PW4 and PW8.

[18] There is no doubt in our view that the reason why the Federal Court considered it important for the investigating officer to verify this fact was because the credibility of PW8 was in issue. The following passage at page 317 of the judgment may shed some light:

> "The public prosecutor relies on the testimony of PW8 who in his evidence denied that such recovery or arrest had taken place. But this overlooks the real issue. At issue was PW8's credibility."

[19] Having gone through the judgment carefully we are unable to see how the decision supports the appellant's contention. The case is not authority for saying that when a crime suspect mentions names during the course of an investigation, the police must in all cases investigate the role played by the named persons. In any event the facts in that case are poles apart from the facts of the present case. In that case it is clear that the prosecution and the defence version on a very material fact in issue was in conflict. That was the reason why the Federal Court considered the failure by the investigating officer to investigate the appellant's version to be a serious omission. ***9***

[20] In the present case there is no conflict between the evidence of the prosecution witnesses and what the appellant told the investigating officer with regard to the role played by Ashgar. The defence version that was 'put' to SP6 during cross examination was a repeat of what the appellant told him during the investigation, i.e. that he was asked by Ashgar to carry the bag to Malaysia. This was readily admitted by SP6, so the issue of conflict of evidence does not arise at all. SP6 was also asked in cross examination whether the appellant told him that the bag only contained diamonds. SP6 said the appellant did not tell him that.

[21] Since there was no conflict of evidence on any material fact in issue which had a bearing on the credibility of any of the prosecution witnesses, the necessity for SP6 to investigate the information given by the appellant with regard to the role played by Ashgar likewise does not arise.

[22] If at all any inference is to be drawn in favour of the appellant in terms of Lee Kwan Woh v PP (supra), it is the inference that he was told by the appellant that he was asked by Asghar to carry the bag to Malaysia. As this was not disputed by the prosecution and in fact admitted by SP6, we fail to see how this 'favourable inference' could result in a gap in the prosecution case. More importantly since the appellant was alone when he was caught with the drugs, there is no question of the involvement of any other person.

[23] It must be understood that what counsel puts or suggests to a witness in cross examination is not evidence. They are merely ***10*** suggestions and to give notice to the prosecution that the defence has a different version of the events. They prove nothing and will remain nothing unless confirmed by the witness or by the party on whose behalf the suggestions are made when his turn comes to give evidence.

[24] The rule that the defence case must be put to the prosecution witnesses stems from the need to prevent surprises at the trial. Mukharji J in AEG Carapiet v AY Derderian [1961] AIR Cal 359 explained the position thus:

> "The law is clear on the subject. Wherever the opponent has declined to avail
>
> himself of the opportunity to put his essential and material case in cross-examination, it must follow that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprises at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose

> behalf the cross-examination is made comes to give evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much counsel is bound to do when cross examining that he must put to each of his opponent's witnesses in turn, **so much of his own case as concerns that particular witness or which that witness had any share**. If he asked no question with regard to this, then he must be taken to accept the plaintiff's account in its entirety. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he has finished the evidence of his witnesses and when he has no further chance to meet the new case made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated."
>
> (emphasis ours)

***11**

[25] It is a misconception however to think that the entire defence case must be put to the prosecution witnesses. What needs to be put are only those parts of the defence case which the witness or witnesses had any share in. For example, if the prosecution's version is that the drug was carried by the accused at the time of his arrest but the defence version is that it was carried by another person, what needs to be put to the relevant prosecution witness is that the drug was carried by that other person and not by the accused. That will be sufficient to lay the groundwork for that aspect of the defence case.

[26] It is improper and in fact futile to put to the witness something which the witness had no share in or which he is in no position to confirm or deny. An example of such improper question is, "I put it to you that the accused was asked by Idi Amin to carry the drug to Malaysia" when there is no basis whatsoever to imply knowledge of such fact to the witness other than what the accused told him. That is a fact within the special knowledge of the accused and therefore for him to establish in his defence, if called. It is not for the witness to answer such question. The question would be proper though if it is put to the witness, "I put it to you that the accused told you he was asked by Idi Amin to carry the drug to Malaysia."

[27] Even assuming it is true that Ashgar does exist and that he did ask the appellant to carry the bag to Malaysia, the question for the trial court to consider was whether the accused had knowledge of the drugs. To prove trafficking knowledge must of course be established but that is a matter for the appellant to disprove by virtue of section 37(d) of the DDA ***12** and not for the prosecution to establish at the close of its case once custody or control had been established. Thus, whether he was asked by someone to carry the bag is irrelevant in any event.

[28] Further, if in fact the appellant had knowledge of the drugs, the fact that he was asked by Ashgar to carry the drug, even if true, will not exonerate him of the offence charged unless he can bring himself within the protection accorded by section 94 of the Penal Code, which reads:

> "94. Except murder, offences included in Chapter VI punishable with death and offences included in Chapter VIA, nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence:
>
> Provided that the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint."

[29] It certainly is not the defence case that the appellant was under threat of instant death when he agreed to carry the bag to Malaysia for Ashgar. Furthermore, the appellant's claim that he was asked by Ashgar to carry the bag to Malaysia is highly improbable. To recapitulate, what he told SP6 was that Ashgar asked him to carry the bag to Malaysia. Note that he did not mention any other item other than the bag, which means his claim of lack of knowledge was only in relation to the drugs in the bag and not the drugs found elsewhere. ***13**

[30] But the fact is he was also carrying a packet of drug hidden in his jacket and it was not his case that he was also asked by Ashgar to wear the jacket on his trip to Malaysia. To our mind the presence

of the same type of drug in the appellant's jacket dispels any doubt as to his knowledge about the drugs in the bag. The learned trial judge was therefore right in finding that the appellant had knowledge of the drugs. This finding by necessary implication means that the appellant had failed to rebut the presumption of knowledge. Failure to rebut the presumption means that he had knowledge of the drugs.

[31] As to the question of whether the appellant was carrying the drugs for the purpose of trafficking, this is a matter of inference taking into account the definition of trafficking under section 2 of the DDA and the surrounding circumstances of the case: Ong Ah Chuan v PP [1981] 1 MLJ 64. The following passage is relevant (per Lord Diplock):

> "Proof of the purpose for which an act is done, where such purpose is a necessary ingredient of the offence with which an accused is charged, presents a problem with which criminal courts are very familiar. Generally, in the absence of an express admission by the accused, the purpose with which he did an act is a matter of inference from what he did. Thus, in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he was transporting them for the purpose of trafficking in them would, **in the absence of any plausible explanation by him,** be irresistible — even if there were no statutory presumption such as is contained in section of the Drugs Act."
>
> (emphasis ours)

***14**

[32] In view of the large quantity of the drugs and the clever way they were hidden from view to avoid detection, an inference of trafficking (as opposed to a presumption of trafficking) can be drawn against the appellant. The onus was thus on him to give a plausible explanation on

the lower burden of casting a reasonable doubt in the prosecution's case

as to whether the drugs were for the purpose of trafficking or otherwise.

[33] Since the appellant in his defence did not say anything on the purpose for which he was carrying such large amount of drug, his defence being a defence of no knowledge (and not that he was not trafficking), there was no material before the learned trial judge for him to consider whether the appellant's explanation had cast a reasonable doubt in the prosecution case as to whether he was carrying the drug for the purpose of trafficking or otherwise. In the circumstances the learned trial judge was right in finding that the charge had been proved beyond reasonable doubt. We do not therefore find anything in counsel's contention that SP6's failure to investigate the role played by Ashgar had affected the prosecution's case.

[34] Additionally and for completeness we need to mention that the truth of what Ashgar told the appellant had not even been established since he was not called to give evidence. The evidence is clearly hearsay and has no evidential value as the object of adducing the evidence was to establish the truth of what Ashgar told the appellant: see Subramaniam v PP [1956] MLJ 220 P.C. It is trite law that the court must disregard all inadmissible evidence irrespective of whether any objection ***15** was raised when it was sought to be admitted: see Malaysia National Insurance Sdn Bhd v Malaysia Development Corp [1986] 2 MLJ 124 F.C.

[35] If we were to accede to counsel's contention it would mean that every time an accused person drops names in the course of investigation, the investigating authority will have to look for these people, even if it means going to the edge of the world on a wild goose chase. That will not be to carry out investigation with a view to prove the case beyond reasonable doubt but to prove the case beyond the ghost of a doubt.

Ground (3)

[37] Under this ground the contention is that SP6 ought to have lifted fingerprints from the drug exhibits in the light of what the appellant told him regarding Ashgar. It was argued that if SP6 had managed to lift fingerprints from the drug exhibits, the fingerprint analysis might have shown that the

appellant was telling the truth that Ashgar was the real trafficker. Our short answer to the argument is that the learned trial judge would have erred in law if he had faulted SP6 for failing to lift the fingerprints: PP v Mansor Md Rashid & Anor [1997] 1 CLJ 233 F.C.

Ground (4)

[38] It was argued that the conduct of the appellant at the airport shows his innocence rather than his guilt. Counsel pointed out that the appellant showed no fear when asked by SP3 to scan his bag and to produce his travel documents. He also allowed SP3 to check his jacket without kicking a fuss. According to counsel, if indeed the appellant knew about the drugs he would have run away to save his life when SP3 ***16*** called him over to have his bag scanned or at the very least would look drained or frightened.

[39] We were unable to accede to the argument. Evidence of innocent conduct is neither here nor there because if it were so, all that a suspect needs to do to avoid liability is to act innocent, the better he is at it the more chances that he will get away with the crime. This ground also fails.

Ground (5)

[40] The argument is that since the drugs were hidden from view the appellant could not have known of their presence. The answer to this contention is the familiar decision of the Singapore Court of Appeal in Zulfikar bin Mustaffah v PP [2001] 1 SLR 633 which the Federal Court cited with approval in PP v Abdul Rahman Akif [2007] 4 CLJ 337. We are quite surprised that counsel had pursued this line of argument. We reproduce below what the Court of Appeal said at page 639:

> 21. For the element of 'possession' (within the meaning of the Misuse of Drugs Act) to be established, it must not only be shown that the accused had physical control of the drugs at the relevant time; the prosecution must also prove that the accused possessed the requisite knowledge as to the contents of what he was carrying: see Warner v. Metropolitan Police Commissioner [1969] 2 AC 256; Tan Ah Tee & Anor v. PP [1978-79] SLR 211; [1980] 1 MLJ 49. In the course of the appeal before us, counsel for the appellant relied heavily on the fact that the contents of the bundles were securely wrapped in newspapers and could not be identified. We were accordingly invited to draw the inference that the appellant had no knowledge of the contents of the bundles. ***17***
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> 22. We were unable to accede to this request. While the fact that the contents of the bundles were hidden from view may have been relevant in determining whether the requisite knowledge was absent, this factor should still not be given too much weight. Otherwise, drug peddlers could escape liability simply by ensuring that any drugs coming into their possession are firstly securely sealed in opaque wrappings. Rather the court must appraise the entire facts of the case to see if the accused's claim to ignorance is credible. As Yong Pung How CJ remarked in PP v. Hla Win [1995] 2 SLR 424 (at p. 438):
>
> In the end, the finding of the mental state of knowledge, or the rebuttal of it, is an inference to be drawn by a trial judge from all the facts and circumstances of the particular case, giving due weight to the credibility of the witnesses.

[41] Aside from the factual question of whether an inference of knowledge can be drawn where the drugs were hidden from view, it is important to remember that the presumption of knowledge under section 37(d) of the DDA is a presumption of law and as such the court has no discretion not to invoke it upon proof of custody or control: see Muhammed bin Hassan v PP [1998] 2 CLJ 170 F.C. which was followed by another Federal Court decision in PP v. Zulkifli Arshad [2010] 6 CLJ 121. In

the former case Chong Siew Fai CJ (Sabah and Sarawak) delivering the judgment of the court said at page 190:

> "The deemed state of affairs in s. 37(d) (ie, deemed possession and deemed knowledge) is by operation of law and there is no necessity to prove how that particular state of affairs is arrived at. There need only to be established the basic or primary facts necessary to give rise to that state of affairs ie, the finding of custody or control. *Such presumptions under* s.37(d) *(and for that matter, the one under* s.37(da)*) are sometimes described as "compelling presumptions" in that upon proof* ****18*** *of certain facts by a party (in our present case, proof of custody or control in* s.37(d) *by the prosecution), the court* **must** *in law draw a presumption in its favour (ie, presumptions of possession and knowledge) unless the other party proves to the contrary. Such a presumption has the compelling force of law. It is a deduction which the law requires the trial court to make."*
>
> (emphasis ours)

[42] For reasons aforesaid were unanimous in our finding that the conviction is safe and we therefore dismissed the appeal and affirmed the death sentence.