

NACHILONGO DOREEN

v.

PP

Court of Appeal, Putrajaya

Balía Yusof Wahi, Mohtarudin Baki, Tengku Maimun Tuan Mat JJCA

[Criminal Appeal No: B-05-157-06-2012 (ZMB)]

20 January 2014

Criminal Law: *Dangerous drugs — Trafficking — Proof of case beyond reasonable doubt — Appellant appealed against conviction of trafficking in dangerous drugs — Whether prosecution had made out a prima facie case — Whether there was any gap in prosecution's case — Whether trial judge applied correct standard of proof at conclusion of trial — Whether appellant's conviction safe*

The appellant had been arrested at the Kuala Lumpur International Airport ('KLIA') by police personnel on suspicion of trafficking in dangerous drugs. Upon an examination of the appellant's bag ("the bag"), the police found three packages, which were later confirmed by the chemist to contain methamphetamines. The trial judge found that there was no challenge on the analysis by the chemist that the chain of evidence in respect of the drugs was not broken. Based on all the evidence adduced, the trial judge found the appellant guilty of trafficking in dangerous drugs and that a *prima facie* case was proven. In her defence, the appellant claimed that the bag was not locked, and that at KLIA, she was detained by the Immigration Authority for about eight hours, before the bag was handed back to her. Having found that the appellant's defence had not raised a reasonable doubt on the prosecution's case, the trial judge convicted and sentenced the appellant to death. Subsequently, the appellant appealed against her conviction, contending that there was a break in the chain of evidence; and that at the end of the trial, the trial judge had applied the wrong standard of proof.

Held (dismissing the appellant's appeal):

(1) There was, on the facts, no evidence to establish that the appellant was in fact detained by the Immigration Authority for eight hours. Looking at the evidence in totality, the prosecution had made out a *prima facie* case against the appellant and the trial judge had rightly called upon the appellant to enter her defence. In this instance, there was no gap in the prosecution's case and the trial judge was correct in finding that the appellant had custody and control of the bag. Hence, applying s 37(d) Dangerous Drugs Act 1952 ("DDA"), the appellant was presumed to have knowledge of the drugs in the bag. Further, the trial judge was correct in finding that the appellant was trafficking under s 2 DDA where the appellant was found concealing, carrying and transporting the drugs in the bag. (paras 24 & 26)



(2) Both the legal burden on the prosecution to prove its case beyond reasonable doubt and the evidential burden of the accused to raise a reasonable doubt can only be fully discharged at the end of the whole case (*Balachandran v. PP* (refd)). In this instance, the trial judge had correctly evaluated all the evidence and had applied the correct standard of proof at the conclusion of the trial. Accordingly, the conviction against the appellant was safe. (paras 27-28)

Case(s) referred to:

Balachandran v. PP [2004] 2 MLRA 547 (refd)
Mat v. PP [1963] 1 MLRH 400 (refd)
PP v. Abdul Manaf Muhamad Hassan [2006] 1 MLRA 319 (refd)
PP v. Abdul Rahman Akif [2007] 1 MLRA 568 (refd)
Sia Pang Liong v. PP [2012] 1 MLRA 93 (refd)
Teuku Nawardin Syamsuar v. PP [2011] 1 MLRA 70 (refd)

Legislation referred to:

Criminal Procedure Code, s 182A
Dangerous Drugs Act 1952, ss 2, 37(d), 39B(1)(a)

Counsel:

For the appellant: Amrit Pal Singh; M/s Amrit & Company
For the respondent: Tetralina Ahmed Fauzi DPP

JUDGMENT

Tengku Maimun Tuan Mat JCA:

[1] The appellant was charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 for trafficking in 1327.4 grams of methamphetamine at Kuala Lumpur International Airport (KLIA) on 23 February 2011 at about 3pm.

[2] At the material date and time, Inspector Mohd Zakihani bin Ghuzali (SP3) was on observation duty with 17 other police personnel at Aras 3, KLIA when he saw the appellant 'berjalan dalam keadaan yang mencurigakan'. SP3 stopped the appellant who was pulling a black bag (exh P17) and who had on her shoulder (disandang) a white hand bag (exh P16) near Carousel F.

[3] SP3 directed the appellant to have the bag, P17 scanned at the PDRM scanner. Seeing images that aroused his suspicion, SP3 then directed the appellant to take the bag to the Narcotics Office, KLIA for further examination.

[4] At the Narcotics Office, a Lance Corporal (Wanita) 155085 was directed by SP3 to conduct a search on the appellant's body. Nothing was found on her. The hand bag, P16 was examined and except for her identity card and an e-ticket, nothing else was found in the hand bag.



[5] SP3 proceeded to examine the bag, P17. The bag was not locked and had a baggage tag in the name of the appellant. The baggage tag and the boarding pass of the appellant (exh P15) show that the appellant had travelled from Johannesburg to KLIA on flight MH204. There were clothes and books in the bag, P17.5 out of the seven books had the name of the appellant on them. Upon removing the clothes and books that were inside the bag, SP3 felt something hard at the base of the bag. Using a knife and with difficulties, SP3 removed the layer (pelapik). Attached to the layer was another black layer. SP3 had to use a knife to detach the second layer.

[6] Under both of these layers, SP3 found three packages containing 'bahan kristal jernih disyaki dadah'. Upon analysis by the Chemist (SP2), the substances were found to be methamphetamine in the total weight of 1327.4 grams.

[7] The learned trial judge found that there was no challenge on the analysis by the Chemist that the chain of evidence in respect of the drugs was not broken. Accordingly the learned trial judge ruled that there was no dispute on the identity of the drugs.

[8] The learned trial judge found that the appellant was caught red handed pulling the bag that contained the drugs. Coupled with the evidence of the baggage tag; the boarding pass and the books which had the name of the appellant, the learned trial judge found that bag P17 belonged to the appellant and that she had custody and control of the bag. And since custody and control had been proven, the learned trial judge ruled that the prosecution is entitled to rely on s 37(d) to presume that the appellant had knowledge of the drugs.

[9] Further, relying on the manner the drugs were concealed in P17 and the fact that the appellant was travelling and transporting the drugs from Johannesburg to Malaysia, the learned judge found that the act amounts to trafficking under s 2 of the Act. The cases of *Teuku Nawardin Syamsuar v. PP* [2011] 1 MLRA 70 and *Sia Pang Liong v. PP* [2012] 1 MLRA 93 were cited in support of such finding.

[10] All the ingredients required for a charge under s 39B(1)(a) of the Act having been established, the learned trial judge found a *prima facie* case proven and called the appellant to enter her defence.

The Defence

[11] The appellant gave evidence under oath. She states that it was her first visit to Malaysia and that her fare and expenses were paid for by her father. According to the appellant, in 2011, she had made plans to come to Malaysia as she was informed by her friends that there are a lot of job opportunities in Malaysia.

[12] The appellant left Zambia on 19 February 2011 for South Africa. When she reached South Africa she contacted her friend Natasha to meet her. Natasha



had arranged for the flight and hotel for her. Initially she had brought a small bag with her but after she went shopping with Natasha, her clothes could no longer fit into the small bag. Natasha then gave her a bigger bag, P17.

[13] The bag P17 was not locked. In Johannesburg, the bag was scanned at the airport prior to it being checked in and nothing suspicious was detected in P17. She departed from Johannesburg to Kuala Lumpur on 23 February 2011 and she reached KLIA at about 6.00am. At KLIA, she was detained by the Immigration Authority for about eight hours. She was only cleared at about 2pm. She then went to an office at KLIA where she had to fill up a form before the Management handed over the bag P17 to her.

[14] The learned trial judge had in her mind the principle in *Mat v. Public Prosecutor* [1963] 1 MLRH 400 that the story of the defence need not be true or be believed. The learned trial judge considered the defence of the appellant that she came to Malaysia to look for job opportunities and that within the eight hours gap before the appellant collected bag P17, someone could have opened the bag and placed the drugs inside it.

[15] The following is the finding of the learned trial judge on the defence of looking for a job:

- “3. If the accused really wanted to look for a job in Malaysia, why would she spend a lot of money for flight ticket and other expenses, to travel from Zambia to Malaysia without any preparation for job hunting, while she could save time and cost by, eg surfing the internet, make an online application or apply in writing. It is unreasonable for the accused to claim that she did not know how to do a search in the internet while at the same time she claimed to have graduated from a teaching institution and comes from a middle class family;
4. What made the accused’s story more improbable is that she claimed to be not proficient in English. However, amongst the items found in her bag (P17) were notebooks with her name written in good English by the accused herself. When the learned Deputy Public Prosecutor asked the accused to read the notebooks, the accused showed displeasure and reluctantly read the notebooks;
5. ...
6. The accused said that if she did not succeed in securing any job in Malaysia, her second choice was to enroll in a local college. However, she admitted that she did not bring any document to support her educational background or her result transcript;
7. ...
8. The accused planned to stay in Hilton Hotel during her visit to Malaysia. When the accused was arrested, she only had an equivalent sum of RM860.00 on her. Why would the accused choose to stay in a five star hotel and how was she going to pay for her expenses while she was in the process of job hunting;



9. The accused testified that her friends named Esther and David would make arrangements to pay for her expenses and hotel bill or alternatively she would stay in their house in Malaysia. The arrangement should have been made earlier ... The story became more improbable as the accused claimed that Esther and David would pay for her hotel bill, whilst they were only students; and
10. Finally, if her intention was to secure a job in Malaysia failing which she would enroll in college, why would she have a return ticket for 1 February 2010 (P16D)."

[16] On the possibility that somebody could have planted the drugs in bag P17 during the eight hours gap, the learned trial judge made the following finding:

- "1. ...
2. There is nothing in the Immigration system to suggest that the accused could be detained for eight hours by the Immigration as she was not blacklisted from entering this country and there were no problems with her passport and e-ticket;
3. ... There is no reason as to why the prosecution witnesses or anybody should go all out to fix the accused merely to get the accused convicted. What would they gain by getting an innocent visitor to the country (assuming the accused's story were to be believed) charged and if convicted hung for drug trafficking? What could be the motive? ...
4. Furthermore the drugs were hidden under "pelapik-pelapik yang dilekatkan dengan gam yang kuat." If somebody wanted to fix the accused, they could just easily put the drugs on top of the other items in the bag. There was no necessity to place the drugs well hidden/concealed at the base of the bag;
5. Even after she was arrested, the accused never made an attempt to inform the police with regards to her father or her friends, Natasha, Esther and David. If the accused was telling the truth, she would have immediately told the police about these people in order to assist in the police investigations and to prove that she is innocent."

[17] Having found that the appellant's defence had not raised a reasonable doubt on the prosecution's case, the learned trial judge convicted and sentenced the appellant to death. Hence the appeal.

The Appeal

[18] Before us, learned counsel for the appellant raised the following issues:

- (i) that there was a break in the chain of evidence; and
- (ii) that at the end of the case, the learned trial judge had applied the wrong standard of proof.



[19] The first issue is the crux of the appeal. It is not in dispute that the appellant arrived in Malaysia on 23 February 2011 at 6.10am but only cleared the Immigration at 2.27pm. It is also not in dispute that the bag, P17 was not locked.

[20] It was the submission of learned counsel that the prosecution has failed to explain what happened to this unlocked bag during the eight hours and who handled and managed this bag during the period when the appellant has yet to clear the immigration. There was also no evidence led by the prosecution to show proof of the bag's weight when the appellant checked in at Johannesburg and the weight upon arrival in Malaysia. In short the appellant's case is that the eight hours' duration had created a gap in the prosecution's case and that the prosecution has not proved custody and control of the bag P17.

[21] On the second issue, learned counsel for the appellant argued that the learned trial judge had applied the wrong standard of proof, warranting the acquittal or retrial of the appellant. Learned counsel made reference to the grounds of judgment of the learned trial judge at the conclusion of the trial wherein the learned trial judge states:

"Since the prosecution had proven a *prima facie* case against the accused and she had not been able to cast a reasonable doubt in the prosecution's case, the court found that the prosecution had proven her guilty as charged, convicted and sentenced her to the mandatory sentence of death."

[22] The basis of complaint by the appellant is that under s 182A of the Criminal Procedure Code, the test to be applied at the conclusion of the trial is whether the prosecution had proved its case beyond reasonable doubt whereas the learned trial judge had used the *prima facie* standard of proof which is the standard to be applied at the conclusion of the prosecution's case.

[23] We found both issues raised by the appellant to be without merits. On the first issue, the defence was that the appellant was detained by the Immigration Authority for eight hours. Hence, it was submitted that the appellant could not collect the bag and since the bag P17 was not in the possession of the appellant for the duration of eight hours, somebody else could have planted the drugs in the unlocked bag.

[24] Having perused the notes of proceedings, we find that there was no evidence to establish that the appellant was in fact detained by the Immigration Authority for eight hours. The Immigration Officer at KLIA (SP5), whilst agreeing that the appellant cleared the immigration point eight hours after her arrival and that she did not collect her bag until she was cleared by the Immigration, merely states:

"Tidak ada dalam system dia telah ditahan selama lapan jam. Kalau ditahan pun tidak masuk dalam system. Tidak ada sebab dia ditahan sebab semua passport complete dan tiket pun ada. Passport valid."



[25] In any event, the defence of the appellant that the drugs might have been planted by someone else (which is tied up to the issue of the eight hours gap) was duly considered by the learned trial judge.

[26] The prosecution's case is one of presumed possession under s 37(d) and of trafficking under s 2 of the Act. Looking at the evidence in totality, we agree with the learned trial judge that the prosecution has made out a *prima facie* case against the appellant and has rightly called upon the appellant to enter her defence. It is our view that there was no gap in the prosecution's case and that the learned trial judge was correct in finding that there was custody and control of the bag. Applying s 37(d), the appellant was presumed to have knowledge of the drugs in the bag (see *PP v. Abdul Rahman Akif* [2007] 1 MLRA 568). Further, the learned trial judge was correct in finding trafficking under s 2 where the appellant was found concealing, carrying and transporting the drugs from Johannesburg to Malaysia, bearing in mind the quantity of the drugs (see *PP v. Abdul Manaf Muhamad Hassan* [2006] 1 MLRA 319).

[27] On the second issue raised by the appellant, we are similarly of the view that it is without merits. Both the legal burden on the prosecution to prove its case beyond reasonable doubt and the evidential burden of the accused to raise a reasonable doubt can only be fully discharged at the end of the whole case (see *Balachandran v. PP* [2004] 2 MLRA 547). Viewed in that context and notwithstanding the words '*prima facie*' used by the learned trial judge in the last paragraph of her judgment, we find that the learned trial judge had correctly evaluated all the evidence and had applied the correct standard of proof at the conclusion of the trial, ie that the prosecution has proved its case beyond reasonable doubt, hence her conclusion that the defence has not raised a reasonable doubt on the prosecution's case.

[28] In the final analysis, it is our view that the conviction against the appellant is safe. We therefore, unanimously dismissed the appeal and affirmed the conviction and sentence by the High Court.

