

**IN THE COURT OF APPEAL OF MALAYSIA
(APPELLATE JURISDICTION)
CRIMINAL APPEAL NO: J-05(LB)-345-12/2015**

BETWEEN

PUBLIC PROSECUTOR ... APPELLANT

VS

RUDOLF TSCHERNEZOW ... RESPONDENT

(In the High Court of Malaya at Johor Bahru, Johor Darul Takzim
Criminal Trial No.45A-21-07-2014)

Between

Public Prosecutor

Vs.

Rudolf Tschernezow

CORUM:

**MOHTARUDIN BAKI, JCA
ZAKARIA SAM, JCA
ABDUL KARIM ABDUL JALIL, JCA**

JUDGMENT

Introduction

[1] The respondent was charged for the offence of trafficking under s.39B(1)(a) of the Dangerous Drugs Act, 1952 (the Act) as follows:

‘Bahawa kamu pada 19 Januari 2014 jam lebih kurang 4.00 petang di Cawangan Pemeriksaan Penumpang, Lapangan Terbang Antarabangsa Senai, di dalam Daerah Kulaijaya, dalam Negeri Johor Darul Takzim telah didapati mengedar dadah berbahaya, iaitu Methamphetamine seberat 896.3 gram dan dengan itu kamu telah melakukan kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 (“ADB 1952”) yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.’

[2] At the end of the prosecution’s case, the learned trial judge found a prima facie case had been established against the respondent and the respondent was called to enter his defence.

[3] Subsequently, the trial judge found that the defence had succeeded in raising a reasonable doubt on the prosecution’s case and thereafter acquitted and discharged the respondent from the charge against him.

[4] Against this decision, the prosecution filed this appeal.

Prosecution case

[5] On 19.1.2014 at about 4.00 pm the respondent who had just arrived at Senai International Airport, Johor from Hong Kong and had a transit at KLIA was seen walking to the scanning machine.

[6] A Custom officer Noraida bt. Husin (SP3) had scanned the respondent's bag and saw suspicious image in the bag. SP3 informed her supervisor, SP4 (Yusnizam b. Masro) about the finding.

[7] SP4 instructed the respondent to open the said bag. The facial expression of the respondent showed that he was apprehensive and was slightly shivering.

[8] After the respondent opened the bag, SP4 saw 6 handbags inside it. The respondent was asked to open one of the handbags. At the same time SP4 had asked the respondent, the handbags were for whom, to which the respondent answered that they were purchased at the night market in Hong Kong as souvenirs for his friends. SP4 said upon checking the bag he found on both sides in the handbags were stashed with powdery substance. The side of the handbag was only folded but not sewn.

[9] He asked the respondent to remove the content and it was a rectangular packet wrapped with a blue color carbon paper.

[10] SP4 said when the blue carbon paper was opened, there was a brown wrapper and inside it was a transparent plastic packet which contained crystalline powdery substance.

[11] The other four handbags which were scanned, also revealed the same suspicious images.

[12] SP4 handed over the respondent and the exhibits to SP9 (Khairulanuar bin Ishak). SP9 did some test on the exhibits which confirmed the powdery substance was positive for drug amphetamine. He then read the caution to the appellant.

[13] SP9 further testified the luggage claim and boarding pass MH 0079 from Hong Kong to KLIA and boarding pass MH 105 from KLIA to Johor Baru were in the respondent's name. He also seized HK2,000.00 from the respondent.

[14] Under cross-examination SP9 said only after the drugs were found in the said bag, the respondent mentioned the said bag did not belong to him.

[15] SP9 handed over the appellant and the exhibits to the investigating officer, Muhammad Asri b. Yahya (SP11).

[16] SP11 agreed that the respondent after his arrest did say that the said bag was to be handed over to his friend's wife. Under cross-examination, SP11 also agreed that in his cautioned statement (Exh. D18), the respondent did mention that the said bag was to be handed over to his friend's wife.

[17] SP11 sent the suspected drugs exhibit to the Chemistry Department. SP8 (Siti Zubaidah bt Ishak) the chemist confirmed the

drug substance was Methamphetamine weighing 896.3 grams, a dangerous drug which is listed in the First Schedule of the Act.

Decision at the close of prosecution case

[18] The court was of the opinion that since the drugs were found in 24 plastic wrappers stashed inside the handbags in the luggage which has a name tag of the respondent, it proves that the respondent had the possession, custody and control of the 24 plastic wrappers containing the drugs. Knowledge is presumed under s.37(d) of the Act. The court also relied on the acts of trafficking under s.2 of the Act which includes carrying and concealing and held that the respondent was trafficking in dangerous drugs. The court with the aid of s.37(da) of the Act held that the respondent was trafficking in 896.3 grams of amphetamine.

[19] The respondent was called upon to enter his defence.

Defence case

[20] On oath, the respondent said he was on holiday in Phuket, Thailand and planned to meet his Nigerian friend, Felix there. But he was robbed there of his money. He was left with some money but not much.

[21] Through his friends and Facebook he tried to contact Felix to help him. Eventually Felix got in touch with him on 5.1.2014 through Facebook. He told Felix that his father had a heart attack, that he was robbed and had no money. He also had asked Felix to lend him some money so that he could get a ticket back to Germany. The Facebook

messages between the respondent and Felix from 25.12.2013 until 22.2.2014 were exhibited as D36.

[22] Felix contacted him a few days later and told him that the ticket from Phuket to Germany was very expensive as it was a peak season and Felix told him to travel to Hong Kong and from there tried to get a ticket for him to go back to Germany. Felix sent him USD500. At the request of Felix, he bought a handphone so that they can keep in touch with each other.

[23] He flew to Hong Kong. Felix then told him that he had to travel to Malaysia because the ticket was cheaper in Malaysia.

[24] Felix bought him a ticket to Malaysia from Hong Kong by Malaysia Airlines on 19.1.2014 and to Johor Bahru through E-ticket (tendered and marked as exh. D40). The respondent said on 19.1.2014 when he was on his way to the airport, he received a call from Felix asking the respondent to pick up something from a Chinese lady at the airport in Hong Kong and bring it to Malaysia to be passed to Felix's wife. At the check-in counter the respondent said he was approached by a Chinese lady who asked him whether he was Felix's friend. She gave him a bag to be given to Felix's wife. The respondent said when he received the bag he opened it, looked inside and he saw some woman's clothes. He saw a few things in yellow wrappers. The Chinese lady told him that there were handbags inside the yellow wrappers. He did not open to check the contents because they were not his things. The bag he received was not locked but it was zipped up. The respondent checked in two bags, one his own black bag and the other the said bag and he received two boarding bags to KLIA and to Johor Bahru. Felix then

called to inform him that his wife would be waiting for him at the exit area of the airport. The respondent said Felix gave him his wife's phone number. The respondent landed at Senai airport around 4 pm and he planned to call Felix's wife after he had collected the bag. He had 3 bags namely his own black bag, Felix's bag and the white Adidas bag.

[25] After his bags were scanned, SP4 asked him to open the bag, which he did. The respondent recalled inside the purple bag he saw 6 yellow wrappers but he did not see what was the contents of the 6 wrappers. The respondent said he was asked to take out the yellow plastic wrappers from the Felix's bag and to open them. The yellow wrappers contained silver color handbags. The respondent told SP4 that he did not buy the handbags but he has to deliver them to his Nigerian friend's wife. The respondent denied that he had told SP4 that he bought the handbags at a night market in Hong Kong. Upon being asked by SP4 to take out something from the handbag, he took out one blue wrapper which had an opening. Inside the blue wrapper was another blue wrapper and inside it he saw salt like substance.

[26] The respondent said, SP11, after conducting a body search, had asked him to wear some of the clothes found in the bag and they did not fit him. The respondent said SP11 did ask him for the particulars of his Nigerian friend and the respondent said that he did not give the full particulars but just told him that his Nigerian friend had helped him a lot. In his cautioned statement the respondent said he could not give the full name of Felix until he can talk with the German Embassy.

[27] The respondent said he later found out that there was no direct flight from Senai airport to Germany after he had talked to the Customs

officer. When the respondent landed at Senai airport he had with him about USD100-USD200 only.

[28] This was not his first trip to Malaysia. He was in Malaysia before in November 2013.

[29] The respondent said he trusted Felix who had helped him a lot. He never met Felix's wife before. He also said he trusted the Chinese lady and when he opened the purple bag he saw women clothes inside it. He admitted that he did not mention to any Custom officers that Felix's wife was waiting for him at the exit of the airport.

[30] He did not know he was carrying drugs from Hong Kong to Malaysia.

Finding at the close of defence case

[31] The court held that the defence had succeeded in raising a reasonable doubt. The respondent had succeeded in his defence of innocent carrier. The respondent was acquitted and discharged of the charge.

The appeal

[32] Before us the learned Deputy Public Prosecutor (DPP) raised two issues.

[33] The first issue, the trial judge had acquitted and discharged the respondent at the end of defence case on the ground that *'the conduct*

of the respondent prior and subsequent to the arrest, did not display any guilty conduct and the accused did not attempt to flee when approached by the Custom Officer' (at pg 38 RR1). Learned DPP submitted that the trial judge did not explain which conduct of the respondent that did not display guilt or had created reasonable doubts in the prosecution's case.

[34] The second issue, the trial judge had failed to consider many material contradictions in the evidence of the respondent when he made a finding that the respondent succeeded in his defence of an innocent carrier.

Our decision

[35] We noticed that the learned trial judge's decision was influenced by the conduct of the respondent in not attempting to flee the scene. The trial judge was unduly concerned with the fact that since the respondent did not try to run away, it shows there was no guilty conduct on the part of the respondent. The trial judge failed to consider the fact that the security at the airport was tight and it was a restricted area with hardly any room for the respondent to make an escape when he was first stopped. The judge failed to refer to the case of *Teh Hock Leong v. PP [2010] 1 MLJ 741*, where the Federal Court held that:

[5] It is our view that in order to draw a favourable inference from the appellant's contemporaneous conduct, his action or inaction must be examined in the light of the situation at the material time. The area where the appellant was confronted by PW5 was the arrival gate of an incoming flight in the KLIA. This was the only exit point where passengers disembarking the plane can enter the KLIA terminal. It is common knowledge that the area was tight and restricted with hardly

any room for the appellant to make a successful escape even if he had tried. From here the appellant was then taken by PW5 and his men to PW5's office in the KLIA. The approximate walking distance was 600-800 meters. Here again the appellant's chances of a quick getaway were minimal since he was escorted and was within the restricted vicinity of the KLIA building...'

[36] On the finding of the trial judge that the respondent did not display guilty conduct, again, we refer to *Teh Hock Leong's* case where it was held that:

'[5]..... And, if the appellant were to attempt to throw away or disassociate himself with the backpack during this entire duration described it would evidently be noticeable. Of course, since the drugs were so cunningly concealed, there could be no necessity to take such drastic actions which may attract instant suspicion. So against these circumstances, the appellant's docile conduct throughout the period described could not have inferred an absence of knowledge of the said drugs. For this reason there is no misdirection by the courts below.'

[37] We agree with the submission of the learned DPP that the trial judge had failed to critically evaluate the conduct of the respondent before and after the drugs were found. The trial judge had failed to consider the conduct of the respondent when he was asked to open the bag and when he was asked to open the carbon paper by PW4.

[38] PW4 during his examination-in-chief (at page 66 RR1) said:

'NS : Encik Yusnizam, bagaimana reaksi tertuduh semasa diarahkan supaya begnya diperiksa?'

YM : *Keadaan tertuduh masa itu kelihatan resah dan gelisah, dan saya nampak tangannya sedikit menggigil.*

NS : *Apa yang berlaku seterusnya selepas bungkusan itu ditemui?*

YM : *Saya mengarahkan OKT untuk membuka kertas karbon tersebut. Pada mulanya dia enggan untuk membuka kertas itu tetapi saya mendesak dia supaya membuka sendiri bungkusan kertas karbon tersebut...'*

[39] PW4's evidence during cross-examination (pages 72 and 73 RR1) is as follows:

'NS : *Bilakah kamu kata saspek lihat resah, gelisah dan menggigil?*

YM : *Ketika saya mengarahkan tertuduh untuk membuka bagasi beliau.'*

[40] Further, during cross-examination (at page 73 RR)1 he said:

'NS : *Bila bungkusan dijumpai, apa reaksi OKT?*

YM : *Dia kelihatan resah, gelisah.*

NS : *Adakah Encik Yusnizam setuju, kalau kita bawa beg, tiba-tiba dalam beg itu dijumpai dadah, reaksi resah, gelisah adalah satu reaksi yang biasa, bukan satu abnormal, betul?*

YM : *Betul.*

NS : *Saya katakan kepada Encik Yusnizam, OKT hanya resah dan gelisah apabila dadah dijumpai dan bukan sebelum itu?*

YM : *Tidak setuju.'*

[41] When the respondent was asked to open the bag and when the crystalline substance was discovered, neither PW4 nor any other Custom Officer mentioned to the respondent that it was drugs. The only time that the nature of the substance was first identified as Methamphetamine was when PW9 tested the same. If the respondent was really innocent and did not know what was in his custody, there is no reason for him to be evasive and behaving nervously, when the identity of the drugs were yet to be identified. His conduct indicating his knowledge on the presence of the drugs and thereby he had a conscious sense of guilt.

[42] In *Mohd Zaiham bin Mislán v. PP [2010] 1 CLJ 1* it was held by the Federal Court that (at paragraph 22) the conduct of being uneasy, scared and nervous when asked to open the boot is relevant conduct and admissible under s.8 of the Evidence Act, 1950.

[43] The second issue relates to whether the respondent was an innocent carrier.

[44] As to the defence of innocent carrier this court in *Venkatesan Chinnasami v. PP [2011] 1 LNS 1736* had put it aptly in the following term:

‘.....A defence of innocent carrier refers to a state of affairs where an accused person acknowledges carrying, for example a bag or a box,..... containing the dangerous drugs but disputes having knowledge of the drugs. Whether it will succeed or not would very much depend on the facts of each case.’

which ratio had been cited with approval by the Federal Court in *Munuswany Sunder Raj v. PP [2015] 6 MLJ 214*.

[45] The trial judge was of the view that the respondent's evidence had been consistent throughout the trial and not an afterthought or a bare denial. He held that the respondent was an innocent carrier.

[46] If the trial judge had taken the task of evaluating critically all the evidence in totality, he would have found that the respondent story of being an innocent carrier to be highly improbable.

[47] PW4 in his evidence testified that upon finding the six handbags in the bag, he questioned the respondent as to where did he buy the bags and the respondent responded that he bought the handbags at a night market in Hong Kong as souvenirs for his friends. That was the respondent's reply before PW4 discovered the incriminating packages (see pg 66 of RR1). However, after the drugs were found he had changed his version to *'This bag I bring from Hong Kong for my friend's wife'* (see pg 73 of RR1). The trial judge had failed to consider this evasive defence.

[48] The trial judge also unduly concerned with the fact that the testimony of the respondent in Court was consistent with his cautioned statement (D18 at page 585 of RR6).

[49] We observed that when the respondent was detained and his belongings were checked by the Customs officer, he never mentioned about a Chinese lady in Hong Kong who gave him the bag containing the handbags which was later found to have contained drugs. It took four days later for him to mention to the authority about the role played by Felix and the Chinese lady in his cautioned statement.

[50] When the drugs were recovered the respondent did not immediately inform PW4, PW6 or PW9 that the bag belonged to Felix and was handed over to him by the Chinese lady for Felix's wife in Johor Bahru. This, in any event would be a normal or prudent conduct expected from an innocent person: See *Teng How Seng v. PP [2008] 5 CLJ 186*.

[51] The respondent also had given contradicting testimonies as to whether he had checked the content of the bag. At the trial he testified that he had opened the bag and found handbags in it. But in his cautioned statement he stated that he never opened the bag as 'it was not his thing'. The trial judge did not direct his mind to this point.

[52] Whether Felix is a real or fictitious character is irrelevant. What is relevant here is whether the respondent was an innocent carrier.

[53] The trial judge himself found that the respondent was in a desperate situation and eager to fly home to see his ailing father and was willing to do anything so long as Felix was willing to assist him to send him back to Germany (at pg 37 of RR1). Yet, the respondent took his time and travelled from Phuket to Hong Kong and stayed there for 5 days before flying to KLIA and then to Senai, Johor. The reason being the ticket from Malaysia to Germany was cheaper.

[54] This is not a conduct of a desperate person to get home as fast as possible to visit his ailing father. It was much easier to get a ticket to Germany from Hong Kong than Senai, Johor. The respondent is not a country bumpkin not to know this. He was a well travelled man by his

own admission. This was his second trip to Phuket. The respondent said he left Germany in September 2013 for Brazil and stayed there for 2 weeks and from Brazil he flew to Phuket and then Bangkok. From Bangkok he went to Kuala Lumpur in November 2013. From Kuala Lumpur he flew back to Bangkok and then flew to Brazil for the second time and stayed there for about a month. Being such a well travelled man, it is impossible for him not to know there was no direct flight from Senai airport to Germany. After all, he is an IT savvy person. He can check the availability of the ticket and its price on the internet.

[55] When he was detained with the drugs, he refused to divulge the role of and information on Felix to the Malaysian authority until he said he had spoken to the German Embassy first, due to his sense of trust to Felix. This is not a conduct of an innocent person who could be facing a death penalty. However, up and until the trial was over he did not divulge the information about Felix, much against the ratio in *Alcontara a/l Ambross Anthony v. PP [1966] 1 CLJ 705* on the need to reveal the information about the so called real trafficker the soonest possible.

[56] The manner in which the drugs were concealed also shows knowledge on the part of the respondent: see *Teh Hock Leong's* case (supra).

[57] The fact that the drugs were found wrapped in carbon paper is no ground for saying that an inference could not be drawn against the respondent that he had the requisite knowledge. From the evidence of PW4 it is clear that only little effort was required to uncover what was in the handbags.

[58] The respondent had every opportunity to check what he was carrying from Hong Kong to Malaysia but he chose to close his eyes on what was obvious. This is a classic case of willful blindness: ***How Bon Tong v. PP [2010] 5 CLJ 240*** ; ***Ahmad Ibrahim v. PP [2012] 7 CLJ 445*** ; ***PP v. Hla Win [1995] 2 SLR 104***.

Conclusion

[59] On the above premises, we found that there is merit in the prosecution's appeal. The trial judge had failed to consider the defence case judiciously and that the respondent's defence had failed to raise any reasonable doubt against the prosecution's case.

[60] We hereby allowed the appeal by the prosecution. The order of acquittal by the learned trial judge is set aside and substituted it with a conviction for the offence of trafficking as per the charge and sentenced the respondent to death.

Sgd.

ZAKARIA SAM

Judge

Court of Appeal Malaysia

Dated: 6th March 2017

For the appellant:

Wan Shaharuddin bin Wan Ladin
Deputy Public Prosecutor
Attorney General's Chambers

For the respondent:

Datuk N. Sivanantham
(Low Huey Theng with him)
[Messrs Sivanantham]