

**IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
(CRIMINAL DIVISION)**

IN THE STATE OF WILAYAH PERSEKUTUAN, MALAYSIA

CRIMINAL TRIAL NO. WA – 45A – 11 – 06/2020

PUBLIC PROSECUTOR

VS

1. MEHDI EBRAHIMKHANI

2. HAMIDREZA GHANATIASLKAMARI

3. MOJTABA

JUDGMENT

Introduction

[1] All three accused were charged under section 39B of the Dangerous Drugs Act 1952 ('DDA 1952'). The charge read as follows:-

"Bahawa kamu bersama-sama pada 02/07/2019 jam lebih kurang 5.30 petang di rumah alamat A-28-3A Seri Rania, Jalan Wangsa Delima 7, dalam Daerah Wangsa Maju, Wilayah Persekutuan, bagi mencapai niat bersama-sama telah mengedar dadah berbahaya Methamphetamine berat bersih 441.5 gram dan dengan itu telah melakukan satu

kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama dan dibaca bersama Seksyen 34 Kanun Keseksaan.”

- [2] They were in essence charged with trafficking in 441.50 gram of methamphetamine on 2 July 2019 at an apartment identified as A-28-3A, Seri Riana, at Jalan Wangsa Delima 7, Wangsa Maju, Kuala Lumpur (‘the apartment’). All three accused claimed trial.

The prosecution’s case

- [3] The prosecution called seven witnesses to testify. They were:

SP1 - Steven Chooi Wai Choong
(Landlord for the apartment)

SP2 - L/Cpl Jasli bin Jahrin
(Police Photographer)

SP3 - Mohd Azhan bin Md Deros
(Chemist)

SP4 - Superintendent Mohd Azam bin Ab Razak
(Raiding & Arresting Police Officer)

SP5 - Inspector Mohd Faizol bin Ismail
(Police Forensic Officer)

SP6 - Nor Ummiza binti Kamaruzaman
(Chemist)

SP7 - Inspector Shogi a/l Arumugan
(Police Investigating Officer)

- [4]** Acting on a tip-off, SP4 and his team of about ten police officers went to the apartment. This was at 5.30 p.m. on the 2 July 2019. The tip-off came from an Iranian man named Ebrahim Shamsi who was arrested earlier. He had informed SP4 that he obtained his drug supplies from the apartment and had led them there.
- [5]** The apartment's door and grill were locked when SP4 and his team arrived. SP4 knocked on the door a few times before it was opened by the first accused, Mehdi Ebrahimkhani ('first accused'). SP4 introduced himself as a police officer and asked the first accused to open the door. The first accused however was panicky and did not accede to SP4's request. He had instead gone back in.
- [6]** SP4 claimed to have heard the sound of the toilet being flushed and the smell of chemicals permeating the air. The first accused came out about three minutes later to open the door. SP4 claimed that the first accused was trembling and that the second accused, Hamidreza Ghanatiaslkamari

(‘second accused’) was standing in front of the first room looking nervous. SP4 and his team then went in and accosted both men. They were however overcome with fumes with an overbearing smell of chemicals. Their eyes teared from the fumes. SP4 and his team then chose to wait outside the apartment with the first and second accused. They waited for ten minutes for the fumes to dissipate before going back in with both accused.

[7] SP4 went into the first room and found paraphernalia that he suspected were used to process drugs. Amongst the paraphernalia seized were two white and black containers containing liquids, one black pot, a weighing scale, a lamp, and some filter papers. He also found one transparent plastic containing crystal substances that he suspected were methamphetamine in a cupboard in the first room. He claimed that the door to the cupboard was ajar. SP4 then prepared a search list of the items seized. The items seized from the first and second accused were then brought to the police station and handed over to the Investigating Officer, Inspector Shogi a/l Arumugam (‘SP7’).

[8] The third accused, Mojtaba, was arrested three days later by SP4 on 5 July 2019. He was found in a terrace house in Sunway Damansara. His arrest was based on the information given by the first and second accused and also the apartment’s tenancy agreement. SP4 did not find any incriminating evidence in SP4’s house. The third accused too was brought to the police station and handed over to SP7.

- [9]** The owner of the apartment, Steven Chooi Wai Choong ('SP1'), was called to testify. SP1 had through a tenancy agreement dated 29 October 2018 rented the apartment to the third accused of a one-year tenancy from 10 July 2018 to 9 July 2019. He had only met the third accused once when signing the tenancy agreement and had never visited the apartment since, as the rental was paid into his bank account monthly.
- [10]** SP7 and another police officer from the forensic department, Inspector Mohd Faizol bin Ismail ('SP5'), had before the third accused's arrest went to the apartment on 3 July 2019. A few items in the apartment were seized by SP5, which were toothbrushes, towels and some clothing items. These items were on the 12 July 2019 forwarded to Nor Ummiza Binti Kamaruzaman ('SP6'), a Chemist at the Chemist Department of Malaysia's forensic Deoxyribonucleic Acid ('DNA') department for analysis. SP6 had prepared a report of her analysis and findings. She had in the report stated that the DNA traces of the first and third accused were found on some of the items. Her report was tendered by the prosecution as evidence.
- [11]** SP7 had also handed over the seized drugs to Mohd Azhan bin Md Deros ('SP3'), a chemist at the Chemical Department of Malaysia. This was on the 5 July 2019. The seized drugs were analysed and found to be methamphetamine weighing

441.50 grams. SP3's report on the analysis and findings was prepared and tendered as evidence by the prosecution.

The court's duty at the end of the prosecution's case

- [12]** The court will need to conclude whether the prosecution has made out a prima facie case against the accused at the end of the prosecution's case; section 180(1) Criminal Procedure Code ('CPC'). The accused will only be called to enter their defence if a prima facie case has been proven against them, and that they would be entitled to an acquittal if it was otherwise; section 180(2) and (3) CPC.
- [13]** The prosecution would need to adduce sufficient evidence to prove each element of the offence alleged to establish a prima facie case, which if not rebutted or unexplained, will result in a conviction; section 180(4) CPC, *Balachandran v PP* [2005] 1CLJ 85 (FC).
- [14]** The prosecution's evidence will also be subjected to a maximum evaluation; *PP v Mohd Radzi Bin Abu Bakar* [2005] 6 AMR 203 (FC). If there is more than one inference, the one favourable to the accused must be given for their benefit.
- [15]** The crucial task for a trial judge at the end of the prosecution's case is to ask the question of whether he is prepared to convict the accused, should the accused opt to remain silent if the defence is called. If the answer is

negative, then no prima facie case should be made out against the accused, and he should then be acquitted; *Looi Kow Chai & Anor v PP* [2003] 1 CLJ 734 (CA).

Findings of the prosecution's case

[16] The prosecution would need to establish the following elements, to establish a prima facie case under section 39B DDA 1952:

- (i) That the drugs are scheduled as dangerous drugs under DDA 1952;
- (ii) That the accused were in possession of the drugs; and
- (iii) That the accused were trafficking in the drugs.

Whether the drugs are scheduled as dangerous drugs under DDA 1952

[17] SP3 in his report concluded that the drugs seized were 441.50 grams of methamphetamine. He also concluded that these drugs are categorised as dangerous drugs within the definition of section 2 DDA 1952, and listed in the First Schedule of DDA 1952.

[18] The Federal Court in *Balachandran v PP* (supra), held that the evidence of the chemist can be accepted at face value and that the chemist does not have to go into the details of

what he did in the laboratory, unless it is inherently incredible, or where the defence has called evidence in rebuttal through another expert.

[19] I am satisfied that SP3's evidence as set out in his comprehensive report is not inherently incredible, and that the drugs seized from the accused were of the type and weight as set out in his report, and as set out in the charge against the accused. I therefore find that the prosecution has proven that the drugs seized are scheduled as dangerous drugs under the DDA 1952.

Whether the accused were in possession of the drugs

[20] The prosecution will need to prove possession first to succeed in a charge for trafficking. Possession can either be by way of direct evidence, or by relying on the presumption under section 37(d) DDA 1952. The prosecution contended that all three accused had control and custody of the drugs found in the house.

[21] The two elements required to prove possession are physical control and knowledge; *PP v Abdul Rahman Akif* [2007] 5 MLJ 1 (FC). Thomson J. in *Chan Pean Leon v PP* [1956] 22 MLJ 237 (HC), had termed them as the physical and mental element. To satisfy the physical element, Thomson J. explained that the accused must be shown to be in proximity to the drugs to enable him to deal with it as if it belonged to

him. As for the mental element, or mens rea, it must be shown that the accused had the intention of dealing with it.

- [22] Thomson J. appreciated the difficulty of proving intention by direct evidence, and in his wisdom stated that it can also be proven by way of inference derived from the surrounding circumstances in each case. The salient part of the judgment is as follows:

“To put it otherwise, there is physical element and a mental element which must both be present before possession is made out. The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example have it in his pocket or have it lying in front of him on a table. It must also be shown that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some animus possidendi. Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case.” (page 239) (emphasis added)

- [23] His lordship went on to elaborate some of the circumstances that this can be applied:

“If a watch is in my pocket then in the absence of anything else the inference will be clear that I intend to deal with it as

if it were my own and accordingly I am in possession of it. On the other hand, if it is lying on a table in a room in which I am but which is also frequently used by other people then the mere fact that I am in physical proximity to it does not give rise to the inference that I intend to deal with it as if it belonged to me. There must be some evidence that I am doing or having done something with it that shows such an intention. Or it must be clear that the circumstances in which it is found show such an intention. It may be found in a locked room to which I hold the key or it may be found in a drawer mixed up with my own belongings or it may be found, as occurred in a recent case, in a box under my bed. The possible circumstances cannot be set out exhaustively and it is impossible to lay down any general rule on the point. But there must be something in the evidence to satisfy the court that the person who is physically in a position to deal with the thing as his own had the intention of doing so.” (page 239) (emphasis added)

- [24] Possession, therefore, requires a finding of fact. It must be proven that the accused had physical control over the drugs and that he had the requisite intention to deal with them. The mere fact that the accused knew about the drugs is insufficient to incriminate him; *Husin Sitorus v PP* [2012] 7 CLJ 205 (CA).
- [25] There is no necessity to establish exclusive possession. The Federal Court in *Public Prosecutor v Denish a/l Madhavan* [2009] 2 MLJ 194 (FC) held that possession does not need

to be exclusive to an accused alone, and that two or more persons can be found to be jointly in possession. The apex court further held that the exclusivity in possession denotes that the person or person in possession had the power to exclude others from the enjoyment of the property concerned.

[26] I will firstly deal with the third accused, Mojtaba. It was revealed during the course of the trial that the apartment was initially rented to the third accused. This fact is not disputed. The third accused however was not in the apartment when SP4 and his team raided it. Only the first and second accused were in the apartment at the material time. The third accused was arrested three days after the raid. The landlord, SP1, could not verify whether the third accused had continued to stay at the apartment, as he had never visited the apartment after signing the tenancy agreement. There were no items seized from the third accused's house that could relate him to the apartment, such as the access card or keys to the apartment. The only evidence that could link the third accused to the apartment was the tenancy agreement and traces of his DNA on some of the items seized from the apartment. The prosecution had also tendered some still images of the third accused captured from the close circuit television camera at the Seri Rania apartment's car park. The images of what it claimed to be the third accused were captured on 1 July 2019, a day before the raid.

[27] I am firstly unable to accept the still images as proof that it was the third accused. There were no witnesses called to credibly identify the person in the still image as the third accused. In any event, even if the image was that of the third accused and that he was at the car park a day before the raid, this factor does not incriminate him. There are far too many explanations that could explain his presence.

[28] I have come to the inevitable conclusion that the prosecution has failed to prove a prima facie case against the third accused. The mere fact that he was not in the apartment where the drugs were found negates any claim of knowledge and possession to satisfy this crucial element under section 39B DDA 1952. It is wholly insufficient for the prosecution to merely rely on the tenancy agreement or traces of his DNA on some of the items found in the apartment to implicate the third accused. There must be cogent evidence produced and relied on in order to prove possession against him. It is settled law that the court could not simply call upon the third accused to enter his defence to merely hear his explanation. I am satisfied that the third accused could not be convicted should he chose to remain silent if his defence is called.

[29] I now turn to the first and second accused.

[30] It is not disputed that the first accused, was the one that opened the door to the apartment. From the testimony of SP4, one could only access the lifts to the apartment by using an access card, which was one of the many items

seized from the apartment. That the first accused was the one that opened the door meant that he had control over the apartment. This could only mean that he lived there and had unrestricted access. The fact that his DNA was found on some of the items in the house also infers that he is an occupant.

[31] The drugs were found in an open cupboard in one of the rooms wrapped in transparent plastic. The room was unlocked. The transparent plastic of methamphetamine was in clear sight, and easily accessible to the first and second accused, as they were both in the same apartment and were in close proximity to the methamphetamine when the police raided the apartment. The fact that the packet of methamphetamine was placed in an open cupboard in an open room, and in close proximity to them, infers knowledge on their part, as the drugs were visible and accessible to both of them.

[32] I have also taken into consideration the first and second accused's conduct during the raid. I accept SP4's testimony that the first accused did not open the door immediately and had stalled for a few minutes by going back into the apartment. The sound of the toilet flushing and the overwhelming fumes that permeated the apartment suggests that they had attempted to dispose of incriminating evidence. The first accused was also trembling when opening the door. Both first and second accused according to SP4 were panicky throughout the raid. Their reaction and conduct are

relevant factors and can be used to infer knowledge under section 8 of the Evidence Act 1950 and as established by the Federal Court in *Parlan Dadeh v PP* [2009] 1 CLJ 717 (FC). One of the issues raised by the defence counsel is that the prosecution should have called more officers from the raiding team to testify and not merely rely on SP4's lone testimony. I take the view that having more witnesses testifying will not necessarily result in improving a case. Quantity does not equate to quality. I have found no reason to doubt SP4's testimony as he was merely carrying out his duties as a police officer; see *PP v Mohamed Ali* [1962] 1 MLJ 257 (HC) and *PP v Teh Cheng Poh* [1979] 1 LNS 82 (HC). I therefore find the first and second accused's conduct and reaction during the raid amounts to an inference that they had knowledge of the drugs in the apartment.

[33] One of the issues raised by the defence counsel is that others had access to the apartment, as SP1 had testified that he had given two sets of keys to the apartment and that only one set was seized from the apartment. I do not see how the absence of another set of keys could give rise to an inference that others could have access to the apartment. The critical issue here is who was in the apartment at the time that the raid was done.

[34] The drugs were visible and accessible. The inevitable conclusion is that the first and second accused had the knowledge and unrestricted access to the drugs. I am of the view that both the first and second accused had control over

the methamphetamine as they were the only known occupants of the apartment during the raid.

[35] I therefore find that the prosecution has established actual possession of the drugs under the charges against the first and second accused.

Whether the accused were trafficking in the drugs.

[36] The prosecution had sought to rely on the statutory presumption under s. 37(da)(xvi) DDA 1952, to establish the element of trafficking against the accused in respect of the first charge. The provision under s. 37(da)(xvi) DDA 1952 reads as follow:-

Any person who is found in possession of-

.....

(xvi) 50 grammes or more in weight of Methamphetamine;

.....

Otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug;

[37] As it has been decisively established, that the drugs seized were methamphetamine, and weighed more than 50 grams, I therefore find that the presumption under s. 37(da)(xvi) DDA 1952 is applicable against the first and second accused, and that they are therefore deemed to be trafficking as stated in the charge.

Common intention

[38] The Supreme Court in *Namasiyam v PP* [1987] 2 MLJ 336 (SC), held that common intention must be proved either by direct or circumstantial evidence, that there was first, a common intention to commit the offence, and secondly the participation of the accused in furtherance of that common intention. The Court of Appeal in *Sahri Tahe v PP* [2016] 4 MLJ 69 in referring to section 34 of the Penal Code held as follows:

"This section is intended to make a person liable for the commission of an offence not committed by him, but by another person with whom he shared the common intention. It is also to deal with cases in which it is difficult to prove exactly what part was played by each of them in the commission of the offence or in cases where it is difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all..."

[39] In *Dato Mokhtar Hashim v PP* [1983] 2 MLJ 232 (HC), the court held:

"Under section 34 of the Penal Code, to succeed the prosecution must prove that the criminal act was done in concert pursuant to the prearranged plan or arrangement. In practice it is of course difficult to produce direct evidence to prove the intention of an individual. In most cases, however,

it can be inferred from his act or conduct or other relevant circumstances of the case. See Mahbub Shah v. King Emperor. The doctrine of common intention is an expressed in section 34 of the Penal Code, itself which reads-

'When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for the act in the same manner as if the act were done by him alone'." (page 267)

The court also added that the leading feature of section 34 PC is the element of participation in action.

[40] It is undisputed that the first and second accused were in the apartment, and that there were no other persons there during the raid. The drugs found were also in close proximity to them. There were no protests made by either of them during the raid and arrests. I am of the view that there is sufficient evidence to infer that there was a prior meeting of minds between the first and second accused and that there was therefore common intention.

Decision at the end of the prosecution's case

[41] I had in giving the prosecution's case the maximum evaluation and based on the reasons set out, find that the prosecution had succeeded in proving a prima facie case against the first and second accused in respect of the charge against them, as required under section 180(4) CPC. The

first and second accused were therefore called to enter their defence following section 180(3) CPC. Both of them have elected to give evidence on oath and tendered their witness statements under section 402B CPC.

[42] I have however found that the prosecution has failed to prove a prima facie case against the third accused. He is therefore acquitted and discharged from the charge without being called for his defence.

Dated: 25 May 2021.



Mohamed Zaini Mazlan
Judge
High Court of Malaya
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