IVAN KIROV KOSTOV
v.
PP & ANOTHER APPEAL

Court Of Appeal, Putrajaya
Mohtarudin Baki, Tengku Maimun Tuan Mat, Ahmadi Asnawi JJCA
[Criminal Appeal Nos: J-05-276-11/2012 (BGR) & J-05-277-11/2012 (BGR)]
7 August 2015

Case(s) referred to:
Gunalan Ramachandran & Ors v. PP [2004] 2 MLRA 180; [2004] 4 MLJ 489; [2004] 4 CLJ 551; [2004] 6 AMR 189 (refd)
Mohamad Radhi Yaakob v. Public Prosecutor [1991] 1 MLRA 158; [1991] 3 MLJ 169; [1991] 1 CLJ (Rep) 311 (refd)
Yee Wen Chin v. PP & Another Appeal [2008] 2 MLRA 382; [2008] 6 MLJ 222; [2008] 6 CLJ 773 (refd)

Legislation referred to:
Dangerous Drugs Act 1952, ss 12(2), 37(d), (da), 39A(2)

Counsel:
For the appellants: Edmund Bon Tai Soon (Abdul Rashid Ismail, Thulasy Suppiah & Joshua Tay with him); M/s Rashid Zulkifli
For the respondent: Mohd Mukhazany Fariz Mohd Mokhtar; DPP

[Unanimously allowed the appeal.]

Case Progression:
Court Of Appeal: [2015] MLRAU 84

JUDGMENT

Tengku Maimun Tuan Mat JCA:

Introduction

[1] The appellants were convicted and sentenced to death by the High Court at Johor Bahru for the offence of drug trafficking. We heard their appeals against conviction and sentence, at the end of which we allowed the appeal. We set aside the conviction and sentence imposed by the High Court and substituted with a conviction under s 12(2) of the Dangerous Drugs Act 1952 (the Act) punishable under s 39A(2) of the Act. We sentenced them to 15 years imprisonment from the date of arrest and 14 strokes of whipping. Our reasons now follow.

[2] For convenience, in this grounds of judgment, the appellants in Appeal No:

J-05-276-11/2012 and J-05-277-11/2012 will be referred to as the first appellant and the second appellant respectively.

[3] The charge against the first appellant reads:

> "Bahawa kamu pada 18 Mei 2011, jam lebih kurang 4.15 petang, bertempat di perhentian bas, Lapangan Terbang Antarabangsa Sultan Ismail, Senai, Johor di dalam daerah Kulai, di dalam negeri Johor, telah didapati memiliki dadah jenis Syabu berat kasar 2.67 kilogram. Oleh yang demikian kamu telah melakukan satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s 39B(2) Akta yang sama."

[4] In respect of the second appellant, the charge contains the same particulars except the weight of the drugs was 3.01 kilogram.

The Prosecution's Case

[5] On 18 May 2011, ASP Sobri bin Baki (SP2) received information of a drug trafficking activities at Senai International Airport, Johor Bahru. A surveillance team was set up. At about 3.40 pm, flight MH 1051 arrived. Three (3) Bulgarians (the first appellant, the second appellant and one Georgiev) were seen exiting gate 2 of the arrival hall. The appellants were seen collecting 2 bags from the carousel and proceeded to the scanning machine and waited at the airport lobby. After about 5 minutes, Georgiev was seen exiting the arrival hall with 3 bags, ie a backpack, a sling bag and a luggage bag.

[6] The appellants were seen proceeding to the taxi stand as Georgiev approached the lobby. Georgiev then headed to the money changer and subsequently went over to the ticket counter to buy bus tickets to Kuala Lumpur. The appellants and Georgiev were arrested near the bus station and brought to the Senai Airport police station.

[7] Inspektor Mohd Zaidi bin Said @ Zaid (SP6) conducted physical examination on the appellants. Nothing incriminating was found on the appellants. However, the police found one plastic packet containing substances suspected to be dangerous drugs concealed inside each of the bags carried by the first and the second appellants. No drugs were found in Georgiev's bag.

[8] Upon analysis by the chemist, Muhammad Yazid bin Ibrahim (SP1), the drugs found in the appellants' bags were confirmed to be Methamphetamine, with the respective weights forming the subject matter of the charges against the appellants respectively.

[9] Whilst the appellants could not speak English and were first time visitors to Malaysia, Georgiev had entered Malaysia on a number of occasions. According to the investigating officer Inspektor Ahmad Nasaruddin bin Othman (SP10) Georgiev had entered Malaysia on 26 July 2010, 25 August 2010, 20 April 2011 and 18 May 2011 and was the only one communicating with the police in English, during investigations. Georgiev was not charged

together with the appellants but was detained under the Dangerous Drugs (Special Preventive Measures) Act 1985. Shortly after the trial against the appellants commenced, Georgiev was deported to Bulgaria.

Findings Of The Trial Judge

[10] The trial judge found that the appellants had physical and mental possession of the bags and the drugs. The learned trial judge invoked s 37(da) of the Dangerous Drugs Act 1952 (the Act) to find that the prosecution had made out a *prima facie* case of trafficking against the appellants. The appellants were thus called upon to enter their defence.

The Defence

[11] Principally the defence of the appellants was one of innocent carriers. The appellants had known each other for 20 years and had gone on holiday together in Turkey and Iraq. The appellants met Georgiev, a fellow Bulgarian in a bus on the way from Turkey to Erbil. Georgiev had convinced the appellant to visit Malaysia. Having insufficient funds to travel to Malaysia, the appellants got their family members in Bulgaria to remit some money and decided to travel with Georgiev to Malaysia.

[12] The big bags where the drugs were found, according to the testimonies of the appellants, were brought by Georgiev at Erbil Airport, Iraq. Georgiev had offered the appellants to use the big bags and had placed the appellants' belongings in the big bags.

[13] As the appellants were not conversant in English, Georgiev had also checked in the bags for himself and the appellants. The flight to Malaysia transited at Abu Dhabi airport for about 11 hours. Georgiev explained that the bags would be directly brought to Malaysia. The flight then transited at KLIA before proceeding to Senai airport. Upon arrival, Georgiev told the appellants to wait for him while he purchased the bus tickets. He also told them which bag belonged to whom and asked them to wait for him near the escalator. They then proceeded to the scanning machine and headed towards the bus station. As they were walking to the bus station all three of them were arrested by the police and were brought back to the airport.

[14] At the end of the defence case, the learned trial judge found that the defence was a mere denial and that the prosecution had proved its case beyond reasonable doubt. The appellants were thus convicted and sentenced to death, hence the appeals.

The Appeal

[15] Before us, learned counsel for the appellants raised three (3) main issues:

(i) The failure of the learned trial judge to apply the *Radhi* direction;

(ii) The evidence of the chemist; and

(iii) The failure of the trial judge to consider the defence.

Findings

[16] We will deal with the second ground first, where learned counsel's complaint was that the chemist took only 4 grammes of Methamphetamine when he needed to have 50 grammes tested. On the authority of *Gunalan Ramachandran & Ors v. PP* [2004] 2 MLRA 180; [2004] 4 MLJ 489; [2004] 4 CLJ 551; [2004] 6 AMR 189, we found this issue without merits. It should be the chemist who determines the adequate quantity for the purpose of carrying out the tests and in the absence of any other expert evidence, there was no basis for us to depart from the findings of the trial judge that the SP1 had conclusively testified as to the weight of Methamphetamine which formed the subject matter of the charge against the respective appellants.

[17] We however found favour in the ground raised by learned counsel for the appellants that the learned trial judge had failed to follow the Radhi direction. The case of *Yee Wen Chin v. PP & Another Appeal* [2008] 2 MLRA 382; [2008] 6 MLJ 222; [2008] 6 CLJ 773 explains the *Radhi* direction (which emanated from the case of *Mohamad Radhi Yaakob v. Public Prosecutor* [1991] 1 MLRA 158; [1991] 3 MLJ 169; [1991] 1 CLJ (Rep) 311) as follows:

> "[12] … That case is authority for the proposition that a person charged with trafficking is entitled to an acquittal on that charge by showing that he was a mere possessor of the drugs whilst another was the true trafficker. Whenever such a defence is taken two separate exercises must be carried out by the trial judge. He must first determine as a fact whether that other is a real person or a mere figment of the accused's imagination invented for the purpose of the trial. Next if he finds that other person to be real the judge must then determine whether that other person is the real trafficker. This is called the *Radhi* direction and must be administered by a court unto itself when such a defence is taken. See, *Sochima Okoye v. Public Prosecutor* [1995] 1 MLRA 457; [1995] 1 MLJ 538; [1995] 3 CLJ 371; [1995] 2 AMR 1069 CA.".

[18] It will be recalled that the defence of the appellants given under oath was that Georgiev had given the bags to the appellants and that the appellants did not themselves packed their belongings inside the bags. It was Georgiev who had put the appellants' belongings inside the bags containing the drugs and the drugs were cleverly concealed inside the bags. Further, it was Georgiev who had checked in the bags for the appellants.

[19] The learned trial judge had stated the following on the defence:

> "Pembelaan yang dikemukakan oleh OKT-OKT hanyalah satu bentuk penafian. Malah, tampak jelas yang kedua-dua OKT hendak memindahkan beban kesalahan itu kepada pihak ketiga, iaitu penama Georgiev yang mana menurut keterangan saksi pendakwaan, semasa

ditahan, Georgiev ini tidak ada barang salah yang ditemui padanya.

.....

Sememangnya yang menjadi pakar perancangnya ialah Georgiev, tetapi tindakannya licik, tiada dadah dijumpai di dalam bagasi diatas nama beliau. Dadah-dadah cuma dijumpai di dalam beg-beg yang didaftarkan di atas nama setiap OKT. Kedua-dua OKT ini dilihat telah mengambil beg tersebut dari carousel, di'scan', ditarik keluar, sehinggalah mereka ditahan. Ini semua disahkan melalui rakaman CCTV (eksibit P42). Perancangan mereka adalah begitu teliti. Bagasi tidak dikeluarkan di KLIA kerana mungkin diketahui yang pemeriksaan di KLIA adalah lebih ketat. Dipilihnya Johor Bahru sebagai destinasi akhir mereka, tetapi akan berpatah balik ke Kuala Lumpur dengan menaiki bas. Ini semua telah diatur dengan begitu licin, bagi mengelakkan mereka dikesan dan bagi mengaburi pihak Berkuasa. Tetapi perancangan mereka dan langkah mereka silap. Perjalanan ke Malaysia ini memang telah dirancang, diatur sedemikian rupa oleh mereka, dengan Georgiev selaku 'master-mind'nya. OKT-OKT ini tahu apa perancangan sebenar mereka, tahu apa yang dibawa didalam beg mereka serta tahu akan apakah risiko dan akibatnya jika perbuatan mereka ini berjaya dihidu oleh pihak Berkuasa. Kini mereka terpaksa menanggung akibatnya.".

[20] In our view, the defence of the appellants was not a mere denial. The appellants had explained how they came to be in possession of the bags containing the drugs and the role of Georgiev was put to the prosecution's witnesses.

[21] The learned trial judge accepted that Georgiev is not fictitious. In fact the learned trial judge went on to find that Georgiev was the master mind. Having found that Georgiev was real and was not a figment of the appellants' imagination, the learned trial judge ought to consider whether Georgiev was the real trafficker. He however failed to undertake this exercise to determine whether Georgiev was the real trafficker.

[22] The failure by the learned trial judge to follow *Radhi* direction, in our view is a misdirection which had caused miscarriage of justice to the appellants.

[23] Being the master mind, Georgiev would be in control and it was least surprising that no drugs were found in his bags. But with Georgiev being detained under the LLPK and with the finding of fact by the learned trial judge that Georgiev was the master mind, we found that there was a doubt whether the appellants were the real traffickers.

[24] We were of the view that had the learned trial judge proceeded to undertake the second part of the *Radhi* direction to determine who the real trafficker was, he would have found that the appellants had rebutted the presumption of trafficking. To recapitulate, the learned trial judge had found

that the appellants had actual possession of the drugs and had presumed trafficking under s 37(da) of the Act.

[25] On this ground, we found that the convictions of the appellants for the offence of trafficking were not safe. We therefore unanimously allowed the appeal, set aside the order of convictions and sentence of the High Court.

[26] We nevertheless found that the appellants were in possession of the bags containing the drugs and applying the presumption under s 37(d) of the Act, they were deemed to be in possession of the said drugs. Consequently, we substituted the conviction of the appellants with one of possession under s 12(2) punishable under s 39A(2) of the Act. Having heard submissions from learned counsel and learned OPP, we sentenced both the appellants to 15 years imprisonment from the date of arrest and 14 strokes of whipping.