TANG KHENG TEONG v. PP
COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM, JCA; ABDUL HAMID MOHAMAD, JCA; ALAUDDIN MOHD SHERIFF, JCA
CRIMINAL APPEAL NO: P-05-21-1999
5 MAY 2003
[2003] 2 CLJ 701

***CRIMINAL LAW**: Dangerous Drugs Act 1952 - Section 39B(1)(a)- Trafficking in heroin - Drugs found in apartment occupied by accused - In basin cooking on stove and in plastic bag on top of water tank - Whether having custody and control - Whether having knowledge - Dangerous Drugs Act 1952, ss. 2, 37(d), (da), 39B(1)(a), 39B(2)*

The appellant was convicted of an offence under s. 39B (1)(a) Dangerous Drugs Act 1952for trafficking in 1689.68 grams of heroin when the dangerous drugs, together with paraphernalia related to the preparation and packing of heroin, were found in different parts of the apartment he was staying in. The facts showed that in so convicting the appellant, and finding him to have custody and control of the offensive drugs, the learned judge took into consideration *inter alia* the admission of the appellant that he was stirring the contents of the basin cooking on the stove in the apartment, the contents which were later confirmed to be heroin. The facts also showed that the appellant, when giving his defence from the dock, adverted to one Choong whom he said was the one who had rented the apartment. The learned judge found that Choong was not a fictitious figure, but ruled nonetheless that the defence had not raised any reasonable doubt as to the appellant's guilt. In this appeal, the appellant argued that the conviction was unsustainable as the learned judge was bound but had failed to make a finding of fact as to whether it was the appellant or Choong or both were the "actual traffickers". It was further argued that it was wrong of the learned judge to have found the appellant to have control and custody of the drugs when Choong too had the keys to the apartment.

Held:

Per Abdul Hamid Mohamad JCA

[1] There is no merit in the contention that the learned judge was bound to make a specific finding whether the appellant or Choong or both were traffickers. What is important is for the learned trial judge to make a finding, which he did, whether on the facts before him, the prosecution had proved that the appellant was guilty of the offence of trafficking for which he was charged.

[2]A trafficker is a trafficker and there is no such thing as "actual trafficker" or "not actual trafficker". Consequently, the learned trial judge, having found the appellant to be a trafficker, did not have to use the word "actual" and neither was there a need to make a finding whether Choong was an actual trafficker or not. Indeed, it would be wrong for the learned trial judge to do so, as Choong was not charged and his name

only appeared in the appellant's defence.

[3]It is very clear from the judgment that even after considering the defence of the appellant, the learned judge had no doubt that the appellant had the custody and control of the heroin contained in the basin on the stove and also that he knew that it was heroin. That was a definite finding that the learned judge made and the finding was not wrong on the facts. Likewise, on the facts the learned judge was not wrong in his finding that the appellant also had knowledge and custody and control of the rest of the heroin found in the apartment.

*[**Bahasa Malaysia** Translation of Headnotes*

Perayu telah disabitkan dengan kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 kerana mengedar 1689.68 gram heroin apabila dadah berbahaya tersebut, bersama dengan peralatan-peralatan bagi penyediaan dan pembungkusan heroin, telah dijumpai di beberapa bahagian apartmen yang didiaminya. Fakta menunjukkan bahawa hakim yang bijaksana, dalam mensabitkan perayu dan mendapati bahawa beliau mempunyai jagaan dan kawalan terhadap dadah berkenaan, antara lain telah mengambilkira pengakuan perayu bahawa ia ada mengacau kandungan besen yang sedang dimasak di atas dapur di apartmen tersebut di mana kandungan tersebut kemudian disahkan sebagai heroin. Fakta juga menunjukkan bahawa perayu, sewaktu memberi pembelaan dari kandang, telah bercerita tentang seorang Choong yang dikatakannya sebagai orang yang menyewa apartmen tersebut. Hakim yang bijaksana mendapati kewujudan Choong sebagai tidak direka, namun merumuskan bahawa pembelaan gagal membangkitkan apa-apa keraguan munasabah tentang kebersalahan perayu. Dalam rayuan di sini, perayu berhujah bahawa sabitannya tidak dapat dipertahankan oleh kerana hakim bertanggungan untuk tetapi gagal membuat dapatan fakta sama ada pengedar sebenar adalah perayu atau Choong ataupun kedua-duanya sekali. Disamping itu, dihujahkan juga bahawa hakim yang bijaksana adalah silap bilamana mendapati perayu mempunyai jagaan dan kawalan terhadap dadah sedangkan Choong juga mempunyai kunci kepada apartmen tersebut.

Diputuskan:

Oleh Abdul Hamid Mohamad HMR

[1] Penegasan bahawa hakim bijaksana harus membuat dapatan khusus samada ianya perayu atau Choong ataupun kedua-duanya sekali yang menjadi pengedar, adalah tidak bermerit. Apa yang penting adalah untuk hakim bijaksana membuat dapatan, sepertimana yang dibuatnya, sama ada berdasarkan fakta di hadapannya pendakwa telah membuktikan bahawa perayu bersalah melakukan kesalahan mengedar sepertimana tuduhan.

[2]Seorang pengedar adalah seorang pengedar dan tidak wujud apa yang dipanggil "pengedar sebenar" atau "bukan pengedar sebenar". Oleh itu, hakim yang bijaksana, setelah mendapati perayu sebagai seorang pengedar, tidak perlu menggunakan perkataan "sebenar" serta tidak juga perlu untuk membuat dapatan sama ada Choong adalah seorang pengedar sebenar ataupun tidak. Malah, ianya salah untuk hakim yang bijaksana berbuat demikian, oleh kerana Choong tidak dituduh dan namanya hanya timbul sewaktu pembelaan perayu.

[3]Penghakiman dengan jelas menunjukkan bahawa walaupun setelah menimbang pembelaan perayu, hakim yang bijaksana tidak ada keraguan bahawa perayu mempunyai jagaan dan kawalan heroin yang terkandung di dalam besen di atas dapur dan bahawa dia mengetahui ianya adalah heroin. Itu merupakan dapatan pasti yang dibuat hakim yang bijaksana dan dapatan tersebut tidaklah salah di sisi fakta. Begitu juga, berdasarkan fakta, hakim yang bijaksana tidak salah dalam dapatannya bahawa perayu mempunyai pengetahuan dan jagaan serta kawalan terhadap dadah-dadah heroin selebihnya yang dijumpai di beberapa tempat dalam apartmen tersebut.

[Rayuan ditolak.]

Reported by WA Sharif

Counsel:

For the plaintiff - Karpal Singh; M/s Karpal Singh & Co

For the respondent - Abdul Ghani Patail (Jagdeep Singh) Attorney General Chambers

JUDGMENT

Abdul Hamid Mohamad JCA:

The appellant was the 1st accused in the High Court. He was charged with the 2nd accused under s. 39B(1)(a) and punishable under s. 39B(2) of the Dangerous Drugs Act 1952("the Act"). At the close of the prosecution's case, the learned trial judge amended the charge to one under s. 12(2) and (3)and punishable under s. 39A(2) of the Act. Both of them pleaded guilty. The appellant was convicted and sentenced to 12 years imprisonment and 10 strokes of the rotan, the sentence of imprisonment to run from the date of arrest. The 2nd accused was sentenced to nine years imprisonment and 10 strokes of the rotan, the sentence of imprisonment also to run from the date of arrest.

The public prosecutor appealed against that decision (the first appeal). The Court of Appeal allowed the public prosecutor's appeal and directed that both the accused be called upon to enter upon their defence on the original amended charge. Both the accused appealed to the Federal Court. The Federal Court subsequently dismissed their appeals.

Subsequently, the learned trial judge continued the trial and heard the defence of both the accused. The learned judge acquitted and discharged the 2nd accused but found the appellant guilty of the original amended charged and sentenced him to death.

In this appeal (the second appeal) we are only concerned with the appeal by the appellant, the 1st accused.

The facts that had been adduced by the prosecution during the prosecution's case had been aptly summarised by the learned trial judge in his first grounds of judgment, which we now

reproduce:

> At about 6.00 pm on the 30th June 1990, Inspector Perumal a/l Alagan of the Cawangan Anti-Dadah, Bukit Aman, Kuala Lumpur, acting on information received, led a party of police officers in a raid upon an apartment, number 45-11-11, located at Green Lane Heights, Jalan Besi, Penang. When the police party arrived at the entrance to the apartment, Inspector Perumal found the outer metal grilled door to the apartment closed but not locked. The glass louvres of the front window of the apartment were closed shut. He gently pulled open the metal grilled door and attempted to open the wooden door to the apartment immediately behind the metal grilled door. However, he found it locked. He thereupon rapped on the wooden door and shouted repeatedly, "Polis! Polis! Buka pintu!" but to no avail as no one came forward to open it. All of a sudden he heard the sound of things being moved inside the apartment whereupon he managed to kick open a hole in the door and gain entry into the apartment by reaching through the hole and unlocking the door from inside.
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> Inspector Perumal and the police party then rushed into the apartment and saw two male Chinese standing there, one in the living area (identified as the first accused) and another in the kitchen area (identified as the second accused). He shouted. "Polis! Jangan bergerak!" Both the accused were clad only in their underwear. He noticed white powder and orange colouring on the tips of their fingers and on their feet. They looked shocked and pale. Inspector Perumal saw in the kitchen area two light-green basins containing orange-coloured powder in loose form.
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> He then went to the back of the apartment where there was a balcony. He saw a yellow-coloured basin containing orange-coloured powder. The basin was on a lighted gas stove. He ran and turned off the flame.
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> After identifying himself as a police officer to the two accused persons and informing them that he was arresting them on suspicion of processing drugs, Inspector Perumal and the police party carried out a search of the apartment.
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> Upon interrogation and prior to the search, the first accused led Inspector Perumal to the only toilet in the apartment where he pointed upwards with his mouth (he was already handcuffed at the time) to the water tank in the toilet. Inspector Perumal saw a white and light orange-coloured plastic bag protruding over the top of the tank. He took down the plastic bag (a "GAMA" supermarket bag) and found inside four compressed blocks of a white substance, each wrapped separately in plastic and brown paper.
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> A search resulted in the recovery of three packets of suspected heroin kept in a pail in the third room of the apartment. Inspector Perumal also recovered from a drawer of an altar in the living area six small packets of suspected heroin inside a "Fashion 20" plastic bag.
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> Besides the above items which were seized, Inspector Perumal also found and seized various other items as detailed in the search list exhibit P37. The contents of the three basins, the plastic bag recovered from on top df the tank of the water-closet and the other packets seized were, upon analysis, found to contain heroin. Swabs taken of the hands and feet of the two accused persons also revealed, upon analysis, traces of heroin. Traces of heroin were also found on their underwear. Samples of powder gathered from the floor of the kitchen and the balcony also showed the presence of heroin and caffeine.
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> The sum total of the suspected drug found in the apartment formed the subject-matter of the charge against the two accused persons of trafficking in 1,689.68 grammes of heroin and thereby having committed an offence under section 39B(1)(a) of the Dangerous Drugs Act 1952and punishable under section 39B(2) of the Act.

In his defence at the continued trial after the first appeal the appellant gave an unsworn statement from the dock which was put in writing and marked as exh. D74. His statement had also been summarised by the learned trial judge, and we now reproduce:

> ... In essence, it was his contention that he had gone to the apartment to collect overdue instalments on

an illegal money lending transaction at the behest of his employer, one Tan Bak Huat ("Tan").

To explain his presence in the apartment at the time of the police raid, the first accused gave a lengthy background statement. He said that Tan was a loan-shark for whom he worked as a debt-collector and that he received 8% of the amount of loans recovered as his commission in ordinary cases and 10% in problem cases. In September 1989, Tan had made a loan RM20,000.00 to one Choong Hock Chuan ("Choong"), an illegal bookmaker or "bookie" who operated from the Penang Turf Club, at a monthly interest rate of 20%. The first accused said he received 8% of every collection made from Choong.

During the first three months there were no problems with Choong's loan, but in January 1990 Tan told the first accused to look for Choong at the Penang Turf Club, which he did. Choong then told him that he was facing financial difficulties and would discuss his problem with Tan. At the end of February 1990, Tan told the first accused that Choong was again giving problems and asked the first accused to collect the interest due from Choong. The first accused then met Choong at the Turf Club on the 3rd March 1990 whereupon Choong told him he was facing financial difficulties and asked for a week's grace to pay up.

On the 7th March 1990, Tan summoned the first accused to his house where Choong was already present. Choong then put forth a proposal to overcome his financial difficulties by carrying out illegal gaming activities and told them that he had found a suitable place for that purpose. However, he was encountering problems with the police and, after some discussion, Choong and Tan proposed that the first accused sign the tenancy agreement to rent the place to carry out illegal gaming activities as he, the first accused, had no problems with the police. Choong also gave an assurance that, after the tenancy agreement was signed, he would repay RM12,000.00 which was then outstanding. As both Choong and Tan gave an undertaking that they would settle any fines that the first accused would have to pay and that they would also assume responsibility for all problems which arose, the first accused, after initial hesitation, was persuaded to accept the proposal as he also required the money for his father's medical treatment.

On the 7th March 1990, Choong took the first accused from his house to an office where two persons, a man and a woman, were present. On Choong's instructions, he signed the tenancy agreement and handed it over to Choong whereupon Choong gave him RM1,000.00 to pay to the woman. Choong also signed the tenancy agreement. The first accused said that he did not understand the contents of the document he signed as it was not in Chinese.

He then asked Choong about the repayment which he had promised. Choong then asked him to follow him to the apartment where Choong paid him RM12,000.00 which was the outstanding instalment.

While still at the apartment, the first accused said that the woman had come to check the particulars of his identity card and, being satisfied therewith, had gone back. He said that, because of the frequent problems he found collecting overdue instalments from Choong, he made a duplicate set of keys to the apartment and returned the original set to Choong the same day. After that, he never made any payments towards the rental of the apartment and did not have any connection with the apartment.

On the 30th June 1990 at about 4.30 p.m he received a telephone call from Tan as a result of which he went to Tan's house. Tan told him that Choong was in arrears of instalments for two months. As a result of this he proceeded to the apartment at 46-11-11 Green Lane Heights, Jalan Besi, Penang. Prior to leaving his house, he had informed the second accused as well as members of his family to contact him at the said address if there were any problems in relation to his father, because the latter was ill at that time.

When he arrived at the apartment at about 5.30 pm, he found the door locked and the windows closed. He called out Choong's name a number of times but there was no reply. He then used his duplicate set of keys to unlock the door and found Choong in the living area of the apartment and waling towards him while holding some keys.

He then asked Choong about his debt to Tan and Choong told him that he could only repay RM3,000.00 whereas the balance was RM8,000.00. Choong also told the first accused that he would

only go downstairs to collect the balance of the money and told him to wait awhile in the apartment. The first accused told Choong that he would keep Choong's keys to the apartment until his return and if he failed to make repayment, he, the first accused, would then surrender the keys to the owner of the apartment. Before going out, Choong gave him RM3,000.00. Choong also told the first accused that he would only be away for a short while to collect the balance of the money. Before leaving, Choong told him that there was a pot ("periuk") in the kitchen on the stove and asked the first accused to help stir the contents until he returned. The first accused agreed. Choong told the first accused to lock the apartment because he had gambling implements in the third room. Choong was wearing shorts at the time and went into the third room to change into a pair of trousers before leaving. The first accused noticed that Choong's hands were covered with powder.

The first accused went to the kitchen and saw a basin on the stove and proceeded to stir the contents with a wooden spoon. After about ten minutes he felt sticky and hot as the air was full of dust. Because of this he removed his clothing and kept them in the second room. When he came out of the second room, he heard knocking at the door. He used Choong's set of keys to open the door and saw the second accused who told him that their father was ill and their mother wanted him to return home. The first accused said he kept two sets of keys to the apartment in his shirt in the second room. One set was his and the other was Choong's.

He then told the second accused to enter the apartment and lock the door. He told him to wait awhile as he was waiting for his friend to bring money which was owed. The first accused then told the second accused to lock the door while he went to the back. As he was in his underwear only, the first accused told the second accused to keep the set of keys to the apartment with him.

As it was very hot inside the apartment, the second accused took off his shirt and placed it in the living area and went into the kitchen to be with the first accused. After a few minutes, the first accused excused himself to go to the toilet and asked the second accused to stir the contents of the basin with the wooden spoon that he had used. On returning from the toilet, the first accused took over the stirring of the contents of the basin from the second accused.

The second accused then told him that he was feeling hot and sticky and that he wanted to take a bath, whereupon the first accused told him that there was a towel in the second room. The second accused then went to the second room, took off his clothes, took the towel and headed towards the bathroom. Before that the first accused had grown tired of waiting for Choong and had made up his mind that after the second accused had his bath they would return home because their father was sick. He felt that Choong had deceived him and that he could not wait any longer. As soon as the second accused had entered the bathroom and hung the towel up but before he could close the door of the bathroom, they both heard kicking and loud knocking at the front door of the apartment. The first accused was startled momentarily and as he was heading towards the door to open it, he found it being broken and a hand being inserted to unlock it. At the time when the police entered the apartment he was in the living area while the second accused was in the area of the kitchen in front of the bathroom.

The police proceeded to search the apartment after which they asked him several questions to which his answer was that he did not know, in the Hokkien dialect. The first accused was then directed to go to the bathroom to carry out a search. He denied having pointed out anything with his mouth and stated that the things that were found in the bathroom were discovered by the police on their own.

After a complete search of the apartment, he and the second accused were taken to their house for a search, after which they were taken to the police station.

The first accused stated that he had no knowledge of the things found in the apartment and that he was never involved in any activity pertaining to dangerous drugs or trafficking in them. The second accused, his younger brother, had been in the apartment only for a short while, for about five or ten minutes, before the police raid and the second accused would not know anything about Choong or the things that were found in the apartment.

The learned trial judge then analysed the evidence of the appellant at length and concluded:

> I therefore find that the statement of the first accused from the dock has not succeeded in raising any reasonable doubt in my mind in the case for the prosecution. There are so many aspects in it which are unexplained, as stated earlier in this judgment. His actions cannot be accepted as those of a reasonable man in the circumstances....
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> I have considered the case for the prosecution and juxtaposed it against that of the defence and taking them together as a whole, I find that the first accused had not succeeded in raising a reasonable doubt in my mind as to his guilt. It may well be that he was in cahoots with Choong Hock Chuan in trafficking in the heroin found in the apartment but that does not detract from his guilt or absolve him from liability, in the criminal sense of that term.
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> Having regard to the definition of "trafficking" in section 2 of the Act and the presumptions in paragraphs (d) and (da)(I) of section 37 of the Act, a large quantity of heroin, as well as paraphernalia related to the preparation and packing of heroin, found in different parts of the apartment and the admission of the first accused that he did stir for some length of time the contents of the basin cooking on the stove in the apartment, I find that the first accused did have in his custody and under his control the basin which contained the heroin being cooked and that he knew that it was heroin. It is therefore only reasonable to conclude that he also had knowledge of and custody and control over the rest of the heroin found in the apartment because of his familiarity with the apartment in knowing that gambling implements were kept in the third room (although told this by Choong), in knowing that a towel was kept in the second room and to the extent of stripping himself to his underwear in order to be comfortable. Otherwise, he would have risked being surprised by visitors or occupants of the apartment besides Choong as Choong purportedly rented the apartment to carry out illegal gaming activities there. Ergo, he is deemed to have been in possession of all the heroin found in the apartment. His defence has not been able to raise any reasonable doubt in my mind as to this.
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> I have considered the submissions of the prosecution and the defence at the close of the prosecution' case as well as at the close of the defence and considered them as a whole in arriving at my decision.

Before us Encik Karpal Singh, learned counsel for the appellant argued, firstly, that the learned trial judge having found that Choong Hock Chuan was not a fictitious character had failed to make a finding of facts as to who was the "actual trafficker". He submitted that the learned trial judge must make a specific finding whether the appellant or Choong or both were traffickers. The learned counsel did not refer us to any authority for the proposition. With respect, in our view there is no merit in that argument. What is important was for the learned trial judge to make a finding, which he did, whether on the facts before him, the prosecution had proved that the appellant was guilty of the offence of trafficking for which he was charged. In law, there is no such thing as "actual trafficker" or "not actual trafficker". A trafficker is a trafficker. The question is whether the appellant was proved to be one. The learned trial judge had found him so. He did not have to use the word "actual". Neither need he make a finding whether Choong was an "actual trafficker" or not. Indeed, we do not think it is right for the learned trial judge to do so. Choong was not charged. No evidence was led against him by the prosecution. His name only appeared in the appellant's defence. Indeed it would be wrong for the learned judge to make a finding of guilt (that is what it really amounts to) of a person not charged and against whom no evidence was adduced by the prosecution.

Secondly, it was argued that the learned judge did not amend the charge. He referred us to p. 219 and p. 1 of the Appeal Record.

Page 1 contains the "pertuduhan pindaan" dated 2 August 1994 tendered by the prosecution. At p. 219, the record reads:

Court delivers written judgment.

First accused is found guilty and convicted on original amended charge dated 2.8.94.

It is very clear that that was the "original amended charge". It was under that charge that this court in the first appeal directed that the appellant be called upon to enter upon his defence. It was under that charge that the subsequent continued trial proceeded. It was under that charge that the appellant was found guilty and convicted.

With respect this ground too has no merits.

The third ground argued by the learned counsel for the appellant was that the learned trial judge had failed to consider that the presumptions under s. 37(d) and (da) are separate and that the test for the rebuttal of the presumptions are separate tests. He further argued that it was wrong for the learned trial judge to find that the appellant had control and custody of the drugs found in the other parts of the premises. Accessibility was not conclusive, he argued as Choong had the key to the premises too.

We have to look at the defence put up by the appellant, by way of an unsworn statement from the dock which was prepared before hand and tendered as an exh. D74, the content of which we have reproduced earlier. We have also reproduced the learned judge's analysis of the defence and his conclusion thereon. The learned judge found that the statement of the appellant did not raise any reasonable doubt in his mind as there were so many aspects that were unexplained, which he discussed in great detail. The learned judge then made a definite finding "that the first accused did have in his custody and under his control the basin which contained heroin being cooked **and** that he knew that it was heroin." (emphasis added).

It is very clear from the judgment that even after considering the defence of the appellant, the learned judge had no doubt that the appellant had the custody and control of the heroin contained in the basin on the stove and also that he knew it was heroin. That is a definite finding that the learned judge made. On the facts, we do not see how it can be said that he was wrong.

Regarding the heroin found in the other part of the premises, after analysing the evidence, and concluding as he did concerning the heroin in the basin on the stove, he concluded that the appellant also had knowledge of **and** custody and control of the rest of the heroin found in the apartment. We do not wish to repeat the reasons given by him, which we have already reproduced. That disposes the defence of the appellant on the heroin found in other parts of the premises. Again, on the facts, we do not see how the learned judge can be said to be wrong.

In conclusion, we do not find any error of law or facts, any miscarriage of justice or any valid reason for us to interfere with the decision of the learned judge. We therefore dismissed the appeal and confirmed the conviction and sentence.