

**IN THE COURT OF APPEAL , MALAYSIA AT PUTRAJAYA
(APPELLATE JURISDICTION)
CRIMINAL APPEAL NO: B-05(LB)-285-10/2015 (IND)**

BETWEEN

PUBLIC PROSECUTOR

... APPELLANT

AND

NI KOMANG YUNINGSIH

...RESPONDENT

AND

**[IN THE MATTER OF THE HIGH COURT OF MALAYA AT SHAH ALAM
CRIMINAL NO. 45A-85-04/2013]**

BETWEEN

PUBLIC PROSECUTOR

AND

NI KOMANG YUNINGSIH

CORAM:

1. MOHTARUDIN BIN BAKI, JCA
2. ZAKARIA BIN SAM, JCA
3. ABDUL KARIM BIN ABDUL JALIL, JCA

GROUND OF JUDGMENT

[1] The respondent, an Indonesian woman, was charged with the following offence:

“Bahawa kamu, pada 19 Oktober 2012, lebih kurang jam 1.30 pagi bertempat di Cawangan Pemeriksaan Penumpang 2 (CPP2), Terminal Pengangkutan Tambang Murah (LCCT), Lapangan Terbang Antarabangsa Kuala Lumpur, di dalam Daerah Sepang, dalam negeri Selangor Darul Ehsan, telah didapati mengedar dadah berbahaya iaitu Methamphetamine seberat 1728.2 gram, dan dengan itu kamu 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”.

[2] A total of nine (9) witnesses were called by the prosecution to prove the charge against the respondent. The learned trial judge was satisfied that a prima facie case had been established against her for the offence under section 39B(1)(a) of the Dangerous Drugs Act 1952 (“the Act”). Accordingly, the respondent was called upon to enter her defence.

[3] At the end of the defence case, the trial judge decided that the respondent had successfully raised reasonable doubts on the

prosecution's case. Thus, she was acquitted and discharged. Dissatisfied with this decision, the prosecution appealed to this court. We heard the appeal and after due consideration of the issues raised, we unanimously allowed the appeal by the prosecution. The respondent was then convicted for the offence under section 39B(1)(a) of the Act and sentenced to suffer death.

THE PROSECUTION'S CASE

[4] On 19th October 2012 at about 1.30 am, a custom officer, Amir Zakwan bin Mohd Kassim (SP6) was on duty at the international arrival hall of LCCT. He saw the respondent with two trolley bags (P4 and P5) and a pink color handbag (P6). He instructed the respondent to scan both her P4 and P5 bags. Upon scanning those bags, a suspicious image appeared inside P4. SP6 checked the respondent's passport (P8) for the purpose of identification. He then proceeded to the inspection counter together with the respondent to check bag P4 thoroughly. Respondent looked restless and worried when she was asked to open the said bag and uttered words such as "*mengapa mahu buka beg saya?*". SP6 conducted physical search on P4 and noticed both the left and right side walls of the bag were bulging from inside.

[5] Respondent and her belongings were then brought to CPP2 office for further inspection. At CPP2, raiding officer, Nur Maidizah binti Maidin (SP8) instructed the respondent to empty the bag. SP8 also found both the side walls of the bag were bulging and unusually thick. The empty P4 bag was rescanned and the same image reappeared. SP8 contacted the Enforcement Division, Customs and Excise Department and gave briefing to Keith Jonathan (SP9), the Investigating Officer of this case,

Mohd Aminuddin bin Abu Bakar (SP5) the photographer, Amirul Asraf, Rahi Samsudin and Nurfaliza. SP8 proceeded to cut open the cloth that was covering the side walls of the bag in the presence of respondent, SP9 and his team. A black color package was seen attached to the left side wall of the bag. Similar package was also found hidden behind the cloth cover of the right side wall of the bag. Both packages contained powdery substance suspected to be drugs.

[6] Thereafter, SP8 lodged a police report. She then handed over all the exhibits and the respondent to SP9. Norhaya binti Jaafar (SP7), a government chemist, analysed and confirmed that substances recovered from P4 to be Methamphetamine weighing 1728.2 grams.

FINDINGS OF TRIAL JUDGE

[7] At the close of prosecution case, the learned trial judge was satisfied that the prosecution had successfully established a prima facie case against the respondent. Respondent was found to have had the control and custody of P4 based on SP6's and SP8's evidence. She was seen alone while pulling the trolley bag from which the dangerous drug was found. The baggage tag for P4 was registered in her name. These facts were not disputed by the respondent's counsel. Consequently, with the presumption of law under section 37(d) of the Act invoked, the respondent was presumed to have possession and knowledge of the drugs in P4. In this respect, the learned trial judge held that the respondent knew the nature of the contents of 2 plastic packages found in P4. The drugs were carefully concealed at both the side walls of the bag and transported from Delhi to Chennai, India and subsequently to Malaysia. Therefore, the learned trial judge referred to section 2 of the

Act and made finding of trafficking of the said drugs which includes the act of carrying. It was also held that the quantity of the drugs indicated that they were meant to be trafficked into this country.

[8] At the trial stage, the defence counsel's arguments were as follow:-

- (a) The respondent had no knowledge about the existence of drugs in P4;
- (b) She had given full cooperation during the inspection of P4 and she did inquire why the enforcement officers checked her bag thoroughly;
- (c) When the inspection was done, the respondent had told SP8 that the bag was not hers but that of her friend's;
- (d) There was a print-out of conversation in "Yahoo messenger" and exchange of emails between the respondent and one by the name of John Amadi who was claimed to be the respondent's lover;
- (e) The said John Amadi was the one who persuaded the respondent to come to Malaysia and had promised to marry her;
- (f) The investigation was alleged to be incomplete as the respondent did inform SP9 of the name and provide the contact number of John Amadi who would be waiting for the respondent at LCCT; and
- (g) There was no DNA test, finger print dusting or nail clippings test done.

[9] However, the trial judge held that the concerns raised by the defence are better left to be addressed during the defence case rather at this juncture. Subsequently, it was decided that the prosecution had

succeeded in proving a prima facie case and the respondent was called upon to enter her defence. The respondent gave evidence on oath.

THE DEFENCE

[10] The respondent was from Jawa, Indonesia and worked as a supervisor in a clothing boutique since year 2011. She met a Nigerian man through Yahoo messenger website in September 2012. Yahoo Messenger is a desktop computer application that allows someone to chat with friends online through a free text messaging network. Each user has a unique Yahoo Messenger identification, referred to as a chat ID that is linked to their Yahoo profile. The Nigerian man used a chat ID as, "small Amadi", whilst the respondent used her real name, "Ni Komang Yuningsih". After knowing each other through the website for some time, respondent was invited by John Amadi to come to Malaysia to talk about their wedding. Before the respondent come to Malaysia, John Amadi had asked her to go to India to meet his brother and discuss about their wedding which would be held in Malaysia. John Amadi booked the respondent's flight ticket to India, sent the flight itinerary to her email address, arranged her lodging in India and also sent USD 450 for her to get her passport done.

[11] On 14.10.2012, the respondent left for India and was received by John Amadi's brother, Prince. Prince took the respondent for sightseeing during her 4 days stay in India. She communicated with John Amadi through SMS. On 18.10.2012, as the respondent was leaving for Indira Ghandi International Airport, Prince gave her one luggage bag to be given to John Amadi. Prince opened the said luggage bag in the taxi and respondent saw some Indian clothing and shoes in it.

Subsequently, on 19.10.2012 the respondent was arrested at LCCT for allegedly carrying a bag containing drugs. The respondent did inform to the arresting officers that the bag was given by one by the name of Prince in New Delhi to be given to her boyfriend, John Amadi in Malaysia. She also provided them the hand phone numbers of John Amadi and Prince. At CPP2 office, the respondent's hand phone rang once whereby she informed the officers that her Nigerian boyfriend was the one who called. She was then allowed to answer the second call from him. John Amadi informed her that he is waiting for her outside LCCT and after a while had asked her to meet him at KLCC. However the custom officers did not allow her to do so.

FINDINGS OF THE TRIAL JUDGE AT THE END OF TRIAL

[12] The trial judge found that the defence posited all the similar facts that were raised during prosecution stage. The defence maintained to be consistent throughout the trial that the respondent was an innocent carrier. The trial judge found merits in the argument by the learned counsel for the respondent that the calm and normal behaviour of the respondent when she was apprehended showed her lack of knowledge of the said drugs recovered from the bag. She had given full cooperation during the inspection of P4 and she did inform the enforcement officers that the bag was given to her by Prince in New Delhi. SP8 had confirmed the respondent did indeed tell him that the bag P4 belongs to her friend. Bag P4 also looked normal and there was no room for the respondent to be aware of the drugs hidden in it. There was no discovery of respondent's personal belongings in P4.

[13] The trial judge had also decided the respondent's testimony in court, particularly on the existence and role of John Amadi was consistent with her cautioned statement (exhibit D31), which was recorded on the same day of her arrest. It was held by the trial judge that John Amadi and Prince are not fictitious characters but they do exist based on a print-out of yahoo messenger chat (exhibit D33), which was tendered by the defence. The tendering of D33 was not objected by the prosecution. After perusing through 195 pages of D33 carefully, the learned trial judge came to a conclusion that the respondent was influenced to come to Malaysia by John Amadi and Nana who was also an Indonesian woman and wife of John Amadi's brother. Initially, the respondent appeared to be very hesitant to accept John Amadi's suggestion to come to Malaysia. She was convinced by Nana, who used chat ID as Sabrina_glade in yahoo messenger. Exhibit D33, comprising 195 pages was held to be impossible to be created by the defence at a very short period of time to strengthen its case and it also has a convincing story line. Besides these, the incomplete investigation by SP9 on John Amadi and Prince despite having their details and contact numbers, had rendered the prosecution's case weak. Thus, the trial judge decided that the respondent's plausible testimony, exhibits D31 and D33 had successfully rebutted the presumption of knowledge under section 37(d) of the Act. The respondent was held to be an innocent carrier. Therefore she was discharged and acquitted.

THE APPEAL

[14] Before us, the thrust of learned Deputy Public Prosecutor's submission was that the respondent had knowledge of the illicit drugs recovered from bag P4 and the learned trial judge had erred in finding

the respondent as an innocent carrier. The prosecution referred to ***Teh Hock Leong v Public Prosecutor [2010] 1 MLJ 741*** and argued that there was a positive finding on the mens rea possession of the drugs at the prima facie stage. Invocation of presumption of knowledge was specifically made under section 37(d) of the Act. The learned trial judge had eventually found the respondent to be trafficking in the impugned drugs by the act of carrying it as defined under section 2 of the Act.

[15] From the factual background of this case and the respondent's testimony, there are many questions and doubtful situations that require serious attention, i.e. the respondent barely knew John Amadi and what was the necessity for her to go all the way to India to meet his brother, Prince, to discuss about her marriage with John Amadi when she herself had not met John Amadi? Why did not John Amadi follow her to India? Why did not John Amadi ask his brother to come to Malaysia instead of sending the respondent, who is a lady, all alone to India to meet his brother? Nowhere in her cautioned statement did the respondent mention about the purported discussion of marriage between her and John Amadi with his brother, Prince.

[16] The respondent's evidence was also inconsistent when she said John Amadi was the only son in his family and she had conveniently forgot this fact when he asked her to meet his so called blood brother, Prince in India. The involvement of the respondent in this entire transaction of trafficking in the dangerous drugs can be seen from D33 when sabrina_glade said that the respondent would be paid handsomely if she agrees to bring something from India. Flight ticket itinerary to India was sent to the respondent's email by a tour agent and not by John Amadi. The prosecution had also complained that learned trial judge had

placed heavy emphasis on the print-out of Yahoo Messenger chat on the existence of John Amadi and Prince to justify the acceptance of innocent carrier defence by the respondent. Be it as the case maybe, in any given circumstances the respondent had been guilty of wilful blindness when she had ample time and opportunity to check P4 and its contents which she did not do. In addition, it was also submitted that the alleged incomplete investigation on the hand phone numbers and failure to do finger print lifts, DNA test and nail clipping test are insignificant and have no impact on the prosecution's case as the respondent was caught red handed carrying the illicit drugs.

[17] The defence counsel on the other hand submitted that there is no appealable error in the decision by the trial judge. The trial judge had correctly decided the respondent to be an innocent carrier. The prosecution was well aware of the defence of innocent carrier that was raised since the date of arrest. Respondent's testimony was corroborated by D33 and there was no cross examination done on the contents of D33. In view of the defence advanced denying that the drugs belonged to the respondent or that she had knowledge of the same, SP9 should have investigated and brought to light any evidence to connect the respondent with the impugned drugs. Respondent was seriously prejudiced by the investigating officer's lackadaisical attitude and in the circumstance of the case it cannot be said that the prosecution had proved its case beyond reasonable doubt as they failed to negate the defence version involving "John Amadi". In short, it was suggested by the learned counsel that there was no evidence to show any nexus between the respondent and the impugned drugs concealed in bag P4.

OUR FINDINGS

[18] It was never disputed by the respondent that she was in physical custody and control of the bag at the time of her arrest. The defence proceeded along the line of 'innocent carrier' to qualify the mental element that the respondent had no knowledge that she was carrying drugs in P4 given by Prince. She supported her argument by saying that the drugs were hidden from naked eye's view in the bag, thus would not alert her to notice that there was something amiss. The learned trial judge had accepted the respondent's explanation and concluded as follows (page 32 Appeal Record, Vol.1):

"Berdasarkan keterangan pembelaan OKT dan saksi pendakwaan SP6 dan SP8, P4 sememangnya mengandungi pakaian dan kasut baru dari India. Mahkamah bersetuju dengan pihak pembelaan bahawa secara kasarnya beg P4 kelihatan normal dan hanya apabila semua isi kandungan beg telah dikeluarkan, bonjolan sisi beg yang luar biasa baru kelihatan."

[19] Having considered the respondent's explanation at the end of defense case, the learned trial judge found that the appellant had raised a credible doubt in her mind as to whether the respondent had knowledge of the drugs. We unanimously agreed that the trial judge had erred on this issue. Reference made to the case of **Zulfikar bin Mustaffah v. PP [2001] 1 SLR 633** where it was held that:

"While the fact that the contents of the bundles were hidden from view may have been relevant in determining whether the requisite knowledge was absent, this factor should still not be given too much weight. Otherwise, drug peddlers could escape liability simply by ensuring that any drugs coming into their possession are first securely sealed in opaque wrappings. Rather the court appraise the entire facts of the case to see if the accused's claim to ignorance is credible."

[20] In our assessment, looking at the evidence in totality, we disagree with the learned trial judge and found that the respondent's exculpatory statement that she had no knowledge of the seized drugs does not carry much weight to support the defence case. The respondent offered no plausible explanation as to why she had voluntarily agreed to bring P4 which was given to her at the 11th hour by someone she had only known for four days. She also failed to explain why she did not examine the said bag when she had all the time at Chennai airport during the transit. Based on these facts we are of the opinion that the respondent's deliberate omission to exercise a reasonable level of diligence in making sure that P4 carries no incriminating items is an act of wilful blindness. To fortify this finding, we can do no better than referring to the recent Federal Court decision in ***Public Prosecutor v Herlina Purnama Sari [2017] 1 MLRA 499***, where the then PCA, Mohd Raus Sharif had laid down the position in a great detail as follows:

“Wilful blindness necessarily entails an element of deliberate action. If the person concerned has a clear reason to be suspicious that something is amiss but then embarks on a deliberate decision not to make further inquiries in order to avoid confirming what the actual situation is, then such a decision is necessarily a deliberate one. The key threshold element in the doctrine of wilful blindness itself is that of suspicion followed by (and coupled with) a deliberate decision not to make further investigations. Whether the doctrine of wilful blindness should be applied to any particular case would be dependent on the relevant inferences to be drawn by the trial judge from all the facts and circumstances of the particular case, giving due weight, where necessary, to the credibility of the witnesses. (see PP v Tan Kok An [1995] 4 MLRH 256).

“The concept of wilful blindness had been discussed in a number of local cases but it seems to have its genesis in the dissenting judgment of Yong Pung How CJ (Singapore) in the case of Public Prosecutor v Hla Win [1995] 2 SLR 424. The doctrine of wilful blindness can be summarised to be applicable to a situation where the circumstances are such as to raise suspicion

sufficient for a reasonable person to be put on inquiry as to the legitimacy of a particular transaction. To put another way, if the circumstances are such as to arouse suspicion, then it is incumbent on a person to make the necessary inquiries in order to satisfy himself as to the genuineness of what was informed to him. Should he fail to embark upon this course of action, then he will be guilty of “wilful blindness”. In other words he is taken to know the true situation. He then cannot be said to have either rebutted the presumption of knowledge or have raised a reasonable doubt as to his knowledge of the situation”.

“Most of cases where the concept was held to apply concerned cases in which the accused was asked to carry certain articles, or a package, or a bag, or to swallow certain items. In these circumstances, where the request to do any of those things mentioned would be such as would arouse the suspicion of a reasonable person as to the contents, it was upon the accused to make sufficient inquiries so as to dispel or set straight such suspicions. Should the accused not make any or any sufficient inquiries under those circumstances, the concept of wilful blindness would apply so as to fasten upon him or her the necessary knowledge as to the nature of those contents. In other words, if he deliberately ‘shuts his eyes’ to the obvious, because he ‘doesn’t want to know’, he is taken to know.”

[21] It is obvious that the respondent in the present case had deliberately shut her eyes to the obvious and refrained from inquiring about the contents of P4 because she knew about the impugned drugs placed in the said bag. Thus, she cannot be held as an innocent carrier.

[22] The basis of accepting the existence of John Amadi and Prince was grounded upon D33, a print-out of yahoo messenger chat that suggests the respondent was made use as a mule to traffic in drugs by the said two individuals. She claimed to be emotionally driven or blinded

by love for John Amadi and therefore did not suspect that her lover or his brother would exploit her in this crime. However, we are of the considered view that it is very unlikely for the respondent who is a diploma holder and a 28 years old woman can place herself in a situation where she can be exploited to commit a crime in the name of love. In fact, in D33, the respondent had expressed her fear for scams, human trafficking and many other illegal activities that are happening through cyber space. In any event, when the custody and control is established (which is not disputed by the respondent), knowledge is presumed by section 37(d) of the Act. It is the burden of the respondent to rebut knowledge by virtue of section 37(d) of the Act at the close of the trial, which she had failed to do on the balance of probability. The evidence advanced by the prosecution is overwhelming, unshaken and potent to prove that the respondent knew about the drugs in P4.

[23] It was also urged upon us that there was a gap in the prosecution's case as they have failed to investigate the telephone numbers, messages and did not do finger print test, DNA test or nail clippings test. Such investigations, if had been done, would have shown that the respondent is an innocent carrier. SP9 had explained that he did look for the said John Amadi at the arrival hall of LCCT with 4 other officers but to no avail. Efforts taken by SP9 to investigate the telephone numbers and the email address of John Amadi turned out to be futile. The DNA evidence or fingerprint lifting are only corroborative in nature when all other important ingredients of the offence, i.e. custody and control, and knowledge are proven. There are ample evidence implicating the respondent with the commission of the offence and rendering the DNA evidence or fingerprint lifting to be of little relevance (see **Yeo Kwee Huat v Public Prosecutor [2011] 5 CLJ 630**).

[24] In order to determine whether the learned trial judge was right in law to have found the respondent was not guilty of an offence, due consideration ought to be given to all the material evidence at the conclusion of the trial as provided under section 182A(1) of the Criminal Procedure Code. This provision requires the trial judge to not only consider the accused's explanation, but also to test it against the evidence established by the prosecution at the close of prosecution's case. In view of the above, we find it unbelievable that the respondent had no knowledge of the offending exhibits found in P4 which had subsequently entitled her to be set free as decided by the learned trial judge.

CONCLUSION

[25] Having regard to the totality of the evidence and the circumstances of the case, it is our finding that the respondent had failed to cast a reasonable doubt in the prima facie case that was established against her. For the reasons aforesaid, we allowed the appeal by the prosecution, set aside the order of acquittal and discharge and substituted it with an order that the respondent to be convicted under section 39B (1)(a) of the Act. We ordered her to be sentenced to death by hanging pursuant to section 39B (2) of the Act.

t.t.

(MOHTARUDIN BIN BAKI)

Judge,
Court of Appeal Malaysia.

Dated: 8 June 2017

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