

Public Prosecutor

AND

Mohammad Yusop Bin Haji Abdul Raub

**(High Court of Brunei Darussalam)
(Criminal Trial No. 26 of 2009)**

Steven Chong, Ag. C.J.

2 January 2014

Criminal law – Trafficking and import of cannabis – Whether defendant had knowledge the drug was in the backpack he was carrying.

DPP Suriana Bte Hj Radin for the Public Prosecutor.
Defendant unrepresented.

Steven Chong, Ag. C.J.

Introduction

The defendant initially pleaded not guilty to four counts under the Misuse of Drugs Act: import into Brunei Darussalam from Malaysia of 439.227 gs of cannabis contrary to section 5 (1st Charge); trafficking by transporting from Malaysia to Brunei Darussalam the same cannabis contrary to section 3(a) (2nd Charge); consuming cannabis contrary to section 6(b) (3rd Charge); and possession of apparatus intended for consuming a controlled drug contrary to section 7 (4th Charge).

Before the commencement of the trial the defendant pleaded guilty to the 3rd Charge and the prosecution withdrew the 4th Charge. The trial proceeded on the 1st Charge and the 2nd Charge.

The defendant was represented by counsel at the start of the trial. Unfortunately, during the course of the trial when 13 prosecution witnesses had given evidence, counsel for the defendant found himself in the embarrassing situation of having his practising certificate suspended following a receiving order made against him in bankruptcy proceedings. The defendant nevertheless insisted that counsel continue to represent him. Counsel sought an adjournment to put his affairs in order so that his suspension from practise could be set aside.

Mindful of the gravity of the offences and that the defendant should be afforded every opportunity to be legally represented, adjournment after adjournment was granted. Regrettably, after over one year, counsel remains suspended from practising, the defendant has not engaged another counsel to act for him, no counsel has offered to appear on behalf of the defendant pro bono and the trial resumed with the defendant unrepresented.

Prosecution case

On 27 June 2009 at about 2.50 pm the defendant arrived at Serasa Terminal from Labuan on board the Duta Muhibbah 2 ferry boat. Officers of the Narcotics Control Bureau (*"the NCB"*) and Royal Customs and Excise Department were on the lookout for the defendant that afternoon. The defendant was seen carrying a blue backpack (*"the backpack"*) over his shoulder and another bag in his hand.

After clearing immigration the defendant walked towards the customs inspection counter manned by Customs Officer Jaafar Bin Haji Yaakub (*"CO Jaafar"*) and Customs Officer Mohd Den Bin Saruji (*"CO Mohd Den"*) both of whom recognized the defendant as the man the NCB were interested in. The defendant upon being questioned by CO Jaafar told the customs officers that he came from Kuala Lumpur via Labuan and he was carrying his clothes. CO Jaafar and CO Mohd Den took the defendant to a *"special room"* to conduct a search of his bags and body. Acting Customs Officer-in-Charge Yassin Bin Junit (*"COC Yassin"*) also entered the room.

CO Mohd Den examined the defendant's wallet first. During this examination several narcotics officers entered the *"special room"* to witness the search. They were Assistant Narcotics Officer Anuar Bin Hj Abdul Razak (*"ANO Anuar"*), Assistant Narcotics Officer Ahmad Sukarni Bin Hj Awang Umar (*"ANO Sukarni"*), Assistant Narcotics officer Mohd Firdaus Bin Mohd Zulhilmi (*"ANO*

Firdaus”) and Assistant Narcotics Officer Muhammad Hidayatullah Bin Zahari (“*ANO Hidayatullah*”).

Unrecorded admissions

After examination of the wallet CO Mohd Den asked the defendant to open the backpack he was carrying. CO Mohd Den said he took out the items that were in the backpack “*one by one*” for examination; in the middle of the examination the defendant admitted that he had “*cannabis weighing half a kilo*”; he did not say anything to the defendant before the admission was made (but CO Jaafar said the defendant made the admission after CO Mohd Den asked him if he was carrying any “*illegal items*” and he answered “*no*”); he asked the defendant where the cannabis was kept and the defendant replied that it was “*inside a jeans trousers on the right side*” and pointed to a pair of folded jeans in the backpack.

The admission made by the defendant that he had “*cannabis weighing half a kilo*” and that this was “*inside a jeans trousers on the right side*” was not recorded.

There was evidence from CO Jaafar, COC Yassin, ANO Hidayatullah and ANO Sukarni to the effect that they also heard the defendant admit that he was in possession of cannabis albeit there were variations as to the precise words used by him. ANO Anuar, who was present at the material time, said he did not see the defendant talking to the customs officers but conceded he was “*not always*” observing.

Returning to the evidence of CO Mohd Den, he said he took the jeans trousers, which the defendant had pointed to, out of the backpack for examination. He found a package which was wrapped with brown tape in the right front pocket of the jeans. After removing the package from the jeans, he slit it open with a cutter and discovered that it contained dried leaves.

Shortly after the defendant’s admission to possession of the cannabis, ANO Sukarni asked Assistant Narcotics Officer Rosdiana Binti Hj Hamdan (“*ANO Rosdiana*”) and Assistant Narcotics Officer Didi Hamdillah Bin Untong (“*ANO Hamdillah*”), who were waiting outside the “*special room*”, to enter .

The defendant together with the backpack and its contents were handed over to ANO Sukarni by the customs officers upon completion of the search. ANO Hamdillah took photographs of the package containing the dried leaves whilst ANO Rosdiana labelled all the items seized from the defendant. The package of dried leaves was labelled E1(a).

Recorded admissions

In the “*special room*” ANO Sukarni asked the defendant a number of questions about the package of dried leaves to which the defendant answered. ANO Sukarni recorded the questions and answers in his pocket diary at pages 105, 106, 107, 111 and 112. ANO Sukarni said he read the entries to the defendant and asked him to sign them if he agreed with what had been recorded. The defendant signed these entries. ANO Sukarni said that when pages 105 to 107 were recorded, ANO Hamdillah, ANO Rosdiana, ANO Firdaus and ANO Hidayatullah were present whilst only ANO Hamdillah and ANO Rosdiana remained in the “*special room*” when pages 111 and 112 were recorded. In cross-examination ANO Sukarni said he was not sure whether ANO Hidayatullah was present when pages 105 to 107 were recorded.

The defendant challenged the recorded answers given by him on the ground that they were not given voluntarily and were therefore inadmissible. I adopted the alternative procedure to determine this issue.

ANO Sukarni, ANO Hidayatullah, ANO Hamdillah, ANO Rosdiana, Assistant Narcotics Officer Mohd Saufi Bin Talip, Senior Narcotics Officer Yahya Bin Budin and Narcotics Officer Ali Iskandar Bin Mustapha all gave evidence that no threats or promises were made to the defendant by them to induce him to answer the questions.

I was satisfied all these witnesses were telling the truth.

The defendant gave evidence that he was forced to give his answers by ANO Sukarni, ANO Hamdillah and ANO Firdaus. They went in and out of the room and repeatedly told him to just admit. He was “*scolded*” and thought something would happen to him. ANO Firdaus said that as the drug was found in his bag he would go straight to prison if he did not admit.

I did not believe the allegations made by the defendant.

I was satisfied the answers given by the defendant were voluntary and therefore admissible in evidence.

The relevant questions and answers recorded in the pocket diary of ANO Sukarni are as follows:

“Page 105.

Q: *Who owns this item (E1(a)).*

A: *Mine.*

Q: *What is this item (E1(a)).*

A: *Cannabis.”*

“Page 106 to 107.

Q: *Where did u get it.*

A: *From KL Malaysia.*

Q: *How come this item is here (E1(a)).*

A: *I brought it from KL Malaysia to Labuan and here.*

Q: *Do you know it is an offence to bring drugs into this country.*

A: *Know.”*

“Pages 111 to 112.

Q: *Who conducted the examination just now.*

A: *Customs.*

Q: *What did customs find.*

A: *Cannabis.*

Q: *Where did customs find the said ganja.*

A: *Inside my trousers in the blue bag.*

Q: *Who owns the blue bag.*

A: *Myself.”*

The dried leaves

In the “*special room*” at Serasa Terminal ANO Rosdiana took custody of the package of dried leaves seized from the backpack carried by the defendant. After ANO Rosdiana had labelled the package of dried leaves she put it in an exhibit bag. She brought the package of dried leaves to the NCB office and handed it over to Narcotics Officer Masmegawati Binti Mahmud Besiuni (“*NO Masmegawati*”).

NO Masmegawati weighed the package of dried leaves before handing it over to Assistant Narcotics Officer Madhlana Kuil Anak Grai (“*ANO Madhlana*”) for storage in the Temporary Exhibit Storeroom.

On 1 July 2009 NO Masmegawati took the package of dried leaves to the Narcotics Laboratory of the Department of Scientific Services where she handed it over to the analyst Mr. Lim Swee Chin (“*Mr. Lim*”).

Upon analysis Mr. Lim found the package of dried leaves which weighed 439.227 gs after removal of the bare branches and seeds to contain cannabis.

Senor Narcotics Officer Muhd Efan Al-Iman Bin Eloj Abdullah estimated the street value of the cannabis to be over \$43,000 on the basis that 0.5 gs of the drug is sold for \$50.

Defence case

The defendant gave evidence that on 19 June 2009 he went to Kuala Lumpur with his girlfriend Hajah Bibi and several friends for a holiday. In Kuala Lumpur they went sightseeing and shopping. He stayed with his cousin in his house in Kuala Lumpur.

On 27 June 2009 the defendant took an Air Asia flight to Labuan. He had the backpack and a black bag with him. Arriving in Labuan he went to the ferry boat terminal and bought a boat ticket to Brunei Darussalam. He left the backpack in the bag deposit area in the ferry boat terminal and went sightseeing carrying the black bag with him.

Returning to the ferry boat terminal the defendant met a few friends from Brunei Darussalam who had just arrived in Labuan. After collecting the backpack from the bag deposit area he boarded the boat to Brunei Darussalam

at about 1.30 pm. In the boat he left the backpack near the exit/entrance door and sat at the back as the front seats were all occupied. He slept during the journey.

Arriving in Serasa the defendant went straight to the terminal. He noticed that the bags in the boat had been taken out and placed on trolleys. After stamping his passport at the immigration counter he collected the backpack from the trolley near the customs counter. He proceeded to the customs counter for bag inspection.

I pause here to observe that in the Agreed Statement of Facts admitted in evidence under section 117C of the Criminal Procedure Code by counsel on behalf of the defendant in the early part of the trial it was agreed that:

- “4. The defendant disembarked from the Duta Muhibbah 2 ship and the defendant proceeded to the Immigration Control Post to stamp his passport.*
- 5. The defendant amongst other things was carrying a blue backpack labeled “BODYPAC”.*
- 6. Afterwards the defendant proceeded to go to one of the customs examination counters for his bag to be examined.”*

During the inspection of the backpack a customs officer informed the defendant that a “*random check*” was to be conducted and he was taken into a special room. Several officers not in uniform were present and one of them approached the backpack. A customs officer proceeded to take the contents out of the backpack and the black bag.

The defendant was shocked to see a plastic package which he was unaware of within a pair of folded jeans on the very top of the backpack. The plastic package was not in the pocket of the jeans. He kept silent. A narcotics officer told the customs officers to put all the contents back into the backpack and the black bag. He saw them mixing up the contents.

Once again it is to be noted that in the Agreed Statement of Facts it was agreed that:

“8. During the examination on the defendant’s blue backpack a package wrapped with brown tape was found inside the front right pocket of a blue jeans trouser.”

The defendant was questioned about the plastic package when it was taken out of the backpack. He said he did not know anything about it. The narcotics officers became angry and several of them approached him with *“angry faces”* and *“showed their anger”* and they said he should be punched. He kept silent and was afraid. But he never admitted knowledge of the plastic package in the backpack. He was *“furious”* that although the inspection of his bags did not take a long time he was not given a chance to read or sign what was recorded by a narcotics officer.

In the NCB office the defendant was made to sit alone in a room. He was asked to sign several documents including a pocket diary. He was not given the opportunity to read what he had signed. The answer recorded at page 106 of the pocket diary, *“I brought it from KL Malaysia to Labuan and here”*, is not true. He was *“taught”* to say this. It was impossible for him to bring the cannabis on Air Asia because of the security measures in place. He had to make up stories because he was forced to make admissions.

Ordinary statement

This statement was tendered in evidence on the application of the defendant. The statement was made by the defendant on 28 June 2009 in the NCB office. It was recorded by NO Masmegawati and witnessed by Assistant Narcotics Officer Marlinna Binti Ibrahim (*“ANO Marlinna”*).

In the course of cross-examination the defendant suggested to NO Masmegawati that he did not make any admissions in the statement. NO Masmegawati disagreed.

The defendant then asked for the statement to be admitted in evidence. I gave the defendant the opportunity to read the statement and having done so he confirmed that he wanted the statement to be admitted in evidence. It was therefore admitted as Defence Exhibit No. 1.

In the statement which is in question and answer form the defendant said he went to Kuala Lumpur on 19 June 2009 for a holiday; on 27 June 2009 he returned to Brunei Darussalam via Labuan; when the customs officers

searched his bag upon his arrival at Serasa Terminal he *“admitted to bringing cannabis”* which he had *“wrapped”* with his jeans; the cannabis was for his own use; he bought the cannabis from a friend named Ganish who was a bartender at the Laundry Club in Kuala Lumpur for RM1,000; he had been *“involved”* in cannabis since 2007 and syabu since the early 90s; he only smoked cannabis and never sold the drug; he smoked cannabis to *“find inspiration”* when designing clothes; and in Brunei Darussalam he obtained his cannabis supply from E-Wan and Dodi and paid them \$50 to \$150.

It was the evidence of the defendant that ANO Marlinna had a copy of the pocket diary with her and she told him what to say in this statement. Further, it was the defendant’s evidence that although he had mentioned about leaving the backpack in the bag deposit area at the Labuan ferry boat terminal this was not recorded in the statement.

The salient points of the evidence of Hajah Siti Zahriah Binti Haji Abdul Ghafar (known as Hajah Bibi to the defendant) were that she accompanied the defendant and a few friends to Kuala Lumpur on 19 June 2009. She returned to Brunei Darussalam on 26 June 2009, a day earlier than the defendant. Whilst in Kuala Lumpur she was *“always”* with the defendant. They went sightseeing, shopping and met up with friends.

On the evening of her departure from Kuala Lumpur she helped the defendant to fold some of his clothes which he then put into his bag. She did not see the defendant placing any package into his bag apart from his clothes, toiletries and *“other personal belongings”*.

Review of the evidence

At the close of the case it is the duty of the court to review all the evidence in its totality to see whether the prosecution has proved the elements of the charge against the defendant beyond reasonable doubt.

I set out the relevant provisions of the Misuse of Drugs Act which fall to be considered for convenience.

Section 2 states that *“traffic”* means –

“(a) to sell, give, administer, transport, send, deliver or distribute; or

- (b) to offer to do anything mentioned in paragraph (a) above, otherwise than under the authority of this Act or the regulations made thereunder.....”*

Section 15 states:

“Any person who is proved or presumed to have had in his possession more than -(d) 15 grammes of cannabis.....whether or not contained in any substance, extract, preparation or mixture shall, until the contrary is proved, be presumed to traffic in that controlled drug or have that controlled drug in his possession for the purpose of trafficking therein, as the case may be.”

Section 16 states:

“(1) Any person who is proved to have had in his possession or custody or under his control – (a) anything containing a controlled drug;shall, until the contrary is proved, be presumed to have had such drug in his possession.

(2) Any person who is proved or presumed to have a controlled drug in his possession shall, until the contrary is proved, be presumed to have known the nature of such drug.

There is no definition of the word “import” in the Misuse of Drugs Act. However, section 3(1) of the Interpretation and General Clauses Act provides that “import” means: *“to bring or cause to be brought into Brunei by land, sea or air.”*

The evidence that the package of dried leaves found by CO Mohd Den in the backpack that the defendant was carrying on the afternoon of 27 June 2009 at the Serasa Terminal contained 439.227 gs of cannabis is uncontroversial. I am satisfied on the evidence of ANO Rosdiana, NO Masmegawati, ANO Madhlana and Mr. Lim that the package of dried leaves seized from the backpack the defendant was carrying was the package of dried leaves analysed by Mr. Lim and found to be cannabis weighing 439.227 gs.

On the defendant’s own evidence he was carrying the backpack when he proceeded to the customs counter for bag inspection. Since he was in possession of the backpack containing the package of cannabis the

presumption arises under section 16(1) of the Misuse of Drugs Act that he had the drug in his possession. This in turn triggers the presumption under section 16(2) that the defendant knew the nature of the drug in his possession, i.e. that it was cannabis.

The onus is on the defendant to rebut the double presumptions of possession and knowledge of the nature of drug on a balance of probabilities by proving that he did not know that the package of dried leaves was in the backpack and he did not know that it was cannabis.

By virtue of section 15 of the Misuse of Drugs Act as the defendant was found in possession of over 15 gs of cannabis he is also presumed to traffic in the drug.

I found CO Mohd Den to be a truthful and reliable witness and I accept his evidence that: (1) during his search of the defendant's backpack the defendant admitted that he had *"cannabis weighing half a kilo"*; (2) when he asked the defendant where the cannabis was kept the defendant answered that it was *"inside a jeans trousers on the right side"* and pointed to a pair of folded jeans in the backpack; and (3) he found the package of cannabis in the right front pocket of the jeans pointed out by the defendant.

CO Jaafar, COC Yassin, ANO Hidayatullah and ANO Sukarni also impressed me as truthfull witnesses and I accept their evidence to the effect that they heard the defendant admit to possession of cannabis at the material time.

I accept ANO Sukarni's evidence of the admissions made by the defendant which were recorded in his pocket diary at pages 105, 106, 107, 111 and 112 which can be summarized as follows: (1) the defendant said the package of dried leaves found in his backpack was cannabis and it was his; (2) the defendant said he got the cannabis from Kuala Lumpur and; (3) the defendant said he brought the cannabis into Brunei from Kuala Lumpur via Labuan.

Having had the benefit of seeing and hearing the defendant giving his evidence I have to say he did not impress me as a truthful witness and I reject his evidence in essential details.

I disbelieve the defendant's evidence that he had left the backpack at the bag deposit area of the Labuan ferry boat terminal when he went sightseeing and also in the bag deposit area of the boat on the journey to Brunei Darussalam,

that upon arrival at Serasa terminal the backpack was unloaded from the boat into a trolley and he picked it up near the customs counter, that the package of cannabis was found not in the pocket of the jeans but within it and the jeans was on the very top of the backpack, and that he was shocked to see the package of cannabis as he had no knowledge it was in the backpack.

I believe the defendant concocted this evidence to persuade the court that it is possible someone planted the cannabis in the backpack on the occasions when it was not in his custody or under his control.

Furthermore, I disbelieve the defendant's evidence that he merely kept silent when the cannabis was found in the backpack, that when questioned about the cannabis he denied knowledge about it although he was afraid, that several narcotics officers had approached him with "*angry faces*" and threatened to punch him, that he had been coached to say that he had transported the cannabis from Kuala Lumpur to Labuan and finally to Brunei Darussalam which was recorded in ANO Sukarni's pocket diary, that he had to make up stories because he was forced to make admissions and that ANO Marlinna told him what to say in his ordinary statement made on 28 June 2009 and she failed to record that he said he left the backpack in the bag deposit area at the Labuan ferry boat terminal.

The evidence of the defendant's girlfriend is of no assistance to his defence since he had ample opportunity to obtain the cannabis and conceal it in his backpack after she had left Kuala Lumpur on the evening of 26 June 2009.

Conclusion

The defendant has failed to discharge the burden of rebutting the presumptions of possession and knowledge of the nature of the drug and of trafficking in the drug.

In summary, even without any reliance on the admissions of the defendant recorded in the diary of ANO Sukarni and in the ordinary statement of the defendant which he says he was coached into making, on the evidence, I am satisfied that:

1. the defendant was in possession of the cannabis when he entered Brunei Darussalam from Labuan as he knew he was carrying the cannabis in his backpack;

2. the defendant did import the cannabis by bringing the drug from Kuala Lumpur into Brunei Darussalam via Labuan; and
3. the defendant did traffic in the cannabis by transporting the drug from Kuala Lumpur to Brunei Darussalam via Labuan.

Accordingly, the defendant is convicted on both charges.

DATO PADUKA STEVEN CHONG
Acting Chief Justice