



Public Prosecutor

AND

Jusca Millicent Ojwang

**(High Court of Brunei Darussalam)
(Criminal Trial No. 27 of 2012)**

**Steven Chong, J. and Hairol Arni Majid, J.
21 August 2014**

Criminal Law – Import of methylamphetamine – Whether minimum quantity of sample of substance required for analysis – Whether demeanour of defendant under investigation reflected innocence – Whether presumptions of possession and knowledge rebutted.

DPP Suriana Bte Hj Radin and DPP Yvonne Lim for the Public Prosecutor.
Mr Daud Hj Ismail of M/S Daud Ismail and Company for the Defendant.

Cases cited:

Chu Tak Fai v Public Prosecutor [2001] 1 MLJ 201.
Ko Mun Cheung v Public Prosecutor [1992] 1 SLR (R) 887.
Leong Bon Huat v Public Prosecutor [1993] 3 MLJ 11.
Public Prosecutor v Alex Bin Hamzani [1995] 3 CLJ 102.
Public Prosecutor v Saad Mat Takraw & Anor [1998] 3 CLJ.

Steven Chong, J.:

The charge

Jusca Millicent Ojwang, the defendant, is charged as follows:

“That you, Jusca Millicent Ojwang, on the 7th day of March 2012, at the Brunei International Airport, Bandar Seri Begawan, Negara Brunei Darussalam, not being



a person authorized by the Misuse of Drugs Act, Chapter 27, or the regulations made thereunder, did import a Class 'A' controlled drug, to wit, 3,019.56 grams of Methylamphetamine contained in a total of 3,956.59 grams of crystalline substances, into Negara Brunei Darussalam, in contravention of section 5 of the Misuse of Drugs Act, Chapter 27 and you have thereby committed an offence punishable under section 29 read with the Second Schedule of the said Act."

Prosecution case

On 7 March 2012 at about 10.36 am the defendant, a Kenyan national, arrived at the Brunei International Airport on a Royal Brunei Airlines flight from Dubai. Earlier on, the defendant had travelled from Addis Ababa, Ethiopia, to Dubai on Ethiopian Airlines.

The defendant was carrying a handbag and a jacket. After clearing immigration the defendant proceeded to the luggage conveyor belt where she collected a black "*Pierre Cardin*" suitcase which had a tag attached to it with her name, an address and a telephone number ("*the suitcase*"). The defendant then walked to customs with the suitcase.

At customs the suitcase was scanned twice, the first scan with its contents inside it and the second scan after it was emptied of its contents. Prior to the second scan, the plastic wrap on the exterior of the suitcase had to be removed with the use of a cutter and the defendant had to unlock a padlock with a key which she took out from her handbag. Suspicious images having been detected in the second scan, customs officers decided that a further inspection of the suitcase was necessary and this would be conducted in the customs office.

In the customs office EO Hjh Azimah asked the defendant: "*Are you sure you don't know anything inside your bag?*" The defendant responded by "*shaking*" her head. EO Hjh Aminah told the defendant that the suitcase would be inspected again because the scan had revealed a suspicious image. The defendant said: "*Okay*".

Discovery of the crystalline substances

The search carried out in the customs office in the present of the defendant yielded four aluminium laminated plastic packets containing crystalline substances concealed under the lining of the suitcase: two of them in a false compartment at the bottom and the other two on the sides.



After the discovery of the two packets of crystalline substances hidden in the false compartment at the bottom of the suitcase, and before the defendant was physically searched, EO Hjh Aminah showed the suitcase to the defendant and asked her: *“Do you know anything about that?”*

The defendant answered: *“No, I don’t know anything about it because it is not my bag. It belongs to my friend in Ethiopia. I borrowed [it] from her since the traditional dress I bought in Ethiopia [did] not fit with [the] luggage that I brought from Kenya.”*

Samples of the crystalline substances were taken from one of the four packets for analysis with a drug scanner by ANO Jamarul and found to contain methylamphetamine.

Custody of the exhibits

Upon completion of the inspection of the suitcase in the customs office, the defendant together with the suitcase and its contents, including the four packets of crystalline substances (collectively referred to as *“the exhibits”*), were handed over by CO Dk Harlizan to ANO Pg Seri Saiful Bahri.

The exhibits were carried by ANO Jackson Gelawat from the customs office to a Narcotic Control Bureau (NCB) vehicle to be taken to the NCB office. ANO Pg Seri Saiful Bahri took possession of the exhibits in the vehicle.

Arriving at the NCB office, ANO Pg Seri Saiful Bahri prepared the Exhibit Label List and the Seizure List in respect of the exhibits. ANO Pg Seri Saiful Bahri then handed over the exhibits to NO Fauziah. ANO Pg Seri Saiful Bahri then handed over the exhibits to NO Fauziah. ANO Pg Seri Saiful Bahri also prepared an Acknowledgment and Handing Over Form in relation to the exhibits.

On the same night NO Fauziah handed over the exhibits, with the exception of the cash, to NO Hj Ramli to be kept in the Strong Room. The storage of the exhibits in the Strong Room was recorded in the Strong Room Book.

The next day, on 8 March 2012, the suitcase and the four packets of crystalline substances were taken out of the Strong Room by ANO Didi Hamdillah who handed them over to NO Fauziah.

NO Fauziah then took the suitcase and four packets of crystalline substances to the Department of Scientific Services where she handed them over to the analyst Mr. Lim Swee Chin.

Analysis

Mr. Lim in his statement made under section 117B of the Criminal Procedure Code gave the following description of the analysis he carried out on the four packets of crystalline substances which he received from NO Fauziah and the results he obtained:

- “7. **On 10 Mar 2012**, I began to analyse the exhibit items for the presence of any drugs of abuse. The analysis process consisted of exhibit item documentation, weighing, sampling, qualitative analysis which included Colour Test, identification and confirmation by Gas Chromatography Mass Spectrometry (GCMS), quantitative analysis using Gas Chromatography-Flame Ionization Detection (GC-FID), validation of results and reporting.*
- 8. Exhibit **E6A (E6(a))** as stated in the report) was one aluminium laminated plastic packet labeled ‘A’ containing crystalline substances weighing **1509.42 grams** in total. **E6B (E6(b))** as stated in the report) was one aluminium laminated plastic pocket labeled ‘B’ containing crystalline substances weighing **1493.13 grams**. **E6C (E6(c))** as stated in the report) was one aluminium laminated plastic packet labeled ‘C’ containing crystalline substances weighing **492.44 grams** **E6D (E6(d))** as stated in the report) was one aluminium laminated plastic packet labeled ‘D’ containing crystalline substances weighing **461.60 grams**.*
- 9. All the crystalline substances in **E6A (E6(a))** as stated in the report), **E6B (E6(b))** as stated in the report), **E6C (E6(c))** as stated in the report) and **E6D (E6(d))** as stated in the report) were homogenized and reduce to smaller manageable weight by corning and quartering technique. **42.7512 grams** was sampled from exhibit **E6A** after **Five (5)** times of corning and quartering. **42.8716 grams** was sampled from exhibit **E6B** after **Five (5)** times of corning and quartering. **31.8012grams** was sampled from exhibit **E6C** after **Four (4)** times of corning and quartering. **31.6179 grams** was sampled from exhibit **E6D** after **Four (4)** times of corning and quartering.*
- 10. From both the qualitative and quantitative analysis results concluded that the crystalline substances from exhibit **E6A (E6(a))** as stated in the report) were to found to contain **1093.06 grams** of **METHYLAMPHETAMINE**. The crystalline substances from exhibit **E6B (E6(b))** as stated in the report) were found to contain **1191.37 grams** of **METHYLAMPHETAMINE**. The crystalline substances from exhibit **E6C (E6(c))** as stated in the report) were found to contain **375.36** of **METHYLAMPHETAMINE**. The crystalline*



*substances from exhibit E6D (E6(d) as stated in the report) were found to contain **359.77 grams of METHYLAMPHETAMINE.***

11. *The results and Findings were stated in the analyst report reference no. **KMN/024/12** which I have made and signed on the **12 Apr 2012.**"*

Mr. Lim also gave the following evidence. The crystalline substances had to be homogenized with a mechanical blender *"to reduce the crystals to smaller particle size so that it represents the whole bulk of the exhibit"* and after homogenization the crystalline substances was in powder form.

There are two types of qualitative test. The colour test was the first qualitative test conducted. It indicated the presence of methylamphetamine in all the four packets of crystalline substances.

GCMS was the second qualitative test conducted to identify and confirm the presence of the *"actual chemicals"* in the crystal. The GCMS result showed all the four packets of crystalline substances to be methylamphetamine.

Next, a GC-FID test was conducted to determine the purity of the methylamphetamine present in the crystalline substances. The percentage purity for E6A is 72.42%, for E6B it is 79.79%, for E6C it is 76.22% and for E6D it is 77.94%.

In Brunei Darussalam there is no minimum standard amount of sample to be used for analysis. For E6A the sample amount is *"around"* 3%, for E6B it is 3.2%, for E6C it is 6.5% and for E6D it is 6.9%.

The gross weight of all the four packets of crystalline substances is 3,956.59 grams. The total methylamphetamine content of all the four packets of crystalline substances is 3,019.56 grams.

NO Mohd Efan Al-Iman estimated that the street value of the drugs was over \$2.8 million.

Defendant's written statements

The defendant made four written statements to the NCB which were recorded on 8 March 2012, 14 March 2012, 11 September 2012 and 26 September 2012. No allegation was made by the defendant that these statements were not given voluntarily.



The statements are exculpatory in nature. The defendant denied knowledge of the existence of the four packets of crystalline substances in the suitcase.

We do not think it is necessary to set out the contents of the statements in detail save for the parts where the defendants explained how and why she came into possession of the suitcase in which the four packets of crystalline substances were hidden. The defendant's explanation can be found in the "Notice of Warning Statement" of 8 March 2012 and the "Ordinary Statement" of 14 March 2012.

Notice of Warning Statement

In this statement the defendant said:

"I have a green bag which is smaller and uncomfortable to carry, so I asked my friend, Hirut Bekela, who lives in Addis for a bag. She offer [ed] me this bag (referring to picture number 12) [the suitcase] and I use [d] it to travel to Kuala Lumpur. I borrow [ed] the bag on the 4th of March 2012. I left Addis on the 5th of March 2012 for transit in Dubai. I was in Dubai for 7 to 8 hours but I didn't leave the airport. The bag seem [ed] like a normal bag to me, so I put my things [in] it and travel [led] to Dubai. I [have] known my friend Hirut Bekela for 2 years. She is a woman and own [s] a business. She stay [s] in Ethiopia and she usually stay [s] with me when she come [s] to Kenya. The bag was tagged and boarded for Brunei. It did not leave the airport when I arrived in Dubai. I did not see the bag until I arrive [d] in Brunei. I did not know there was drug in the bag.

In Brunei the customs officer asked me to open the bag and I allowed them. They open [ed] the bag in my presence. I was there when they opened it. They found silver packet and I was shocked and wonder [ed] what it [was]. I asked the airport personnel what it [was]. They said they [were] not sure about it and [had] to run some test. Personally I do not know what it is. I have the picture of my friend in my camera and I may have her number in my mobile phone."

During the recording of the statement the defendant was shown the four packets of crystalline substances and asked whether she had any explanation. The defendant said:

"I saw them first when they opened the bag at the airport. I don't know what it is. I didn't know they existed. When I first received the bag I found it to be a bit heavy and I asked my friend about this. She mentioned that this is how bags are in Ethiopia. I did not suspect anything. She only suggested for me to wrap the bag because she said people can put things inside the bag if it [is] not wrapped."



Ordinary statement

In this statement the defendant repeated what she said in the Notice of Warning Statement: she borrowed the suitcase from her friend Hirut Bekela in Ethiopia on 4 March 2012 because she had a green bag that was *“not comfortable for travelling”*.

DNA

Swabs were taken from the exterior and interior of the suitcase and from the packaging of the four packets of crystalline substances for DNA analysis in the Department of Scientific Services.

The report of the Forensic Biology/DNA Laboratory dated 9 June 2012 states that (1) no DNA profiles were obtained from the swabs taken from the interior of the suitcase and from the packaging of the four packets of crystalline substances; and (2) the DNA profiles obtained from the exterior of the suitcase were *“inconclusive”*.

Fingerprints

NO Fauziah, the investigating officer, gave evidence that the defendant’s fingerprints were taken by the NCB; she was not sure of any fingerprints were lifted from the packaging of the four packets of crystalline substances; and there were no fingerprints from the defendant found on the packaging of the four packets of crystalline substances.

Urine analysis

The defendant’s urine sample was collected after the arrest and upon analysis in the Department of Scientific Services was found to be negative for amphetamines, opiates, benzodiazapines and cannabis.

Demeanour and conduct

The customs and narcotics officers involved in the surveillance of the defendant upon her arrival at the airport and the investigations relating to the suitcase described her to be normal, calm and co-operative.



Hirut Bekela

NO Fauziah said the Intelligent Unit of the NCB was tasked to investigate the existence of Hirut Bekela. There is no result.

The defendant's camera, mobile phone and SIM card were investigated. NO Fauziah looked at the photographs, messages and contact numbers retrieved. Nothing incriminating was found.

Defence case

The defendant's evidence in her statement made under section 117B of the Criminal Procedure Code is as follows:

- "1. I am 43 years old. My residential address was at E4-DR 11, Mbagathi Way Highrise, Nairobi City, Kenya. This was a rented flat which I paid US\$200.00 (KSH15,000) per month.*
- 2. I am a single mother by choice and I have two sons aged 12 and 7 years. Presently both of my sons are under the care of my sister named SCHOLASTIKA OJWANG who lives in Komarock Estate, Nairobi, Kenya.*
- 3. Both of my parents have passed away. My father died in 1996 whilst my mother died in 1997.*
- 4. I am the eldest of 7 siblings (2 sisters and 4 brothers).*
- 5. I completed my tertiary education at Chandigarh University in India in Business Administration in 1994 (while on my study leave for 2½ years).*
- 6. In 1991, I was employed with the Government of Kenya under Teachers Service Commission working as a clerical officer. I resigned in the year 2001.*
- 7. After my resignation, I started my own small business trading in clothing, shoes, accessories, suitcases, sandals, fabrics, which requires myself to travel to Uganda, Tanzania, Ethiopia, Rwanda, South Sudan, Burundi and Zanzibar to obtain supplies and selling the products of Kenya. Whilst travelling, I am not required to use my passport as I am allowed to use temporary pass within East Africa.*



8. *During that time since 2011, I also worked part-time as a Sales and Marketing Executive for Scalian Enterprises, Bruce-Caxton House, Kenyatta Avenue, Nairobi, Kenya. The company was selling office supplies like stationery, furniture and equipment. I warned commission based on the sales I made which is around US\$400-500 per month (KSH32,000-40,000).*
9. *In the course of my business I became a member of Micro-Finance Groups in Kenya called Kenya Women Finance Trust, Faulu Kenya and Tumaini which are organized by the Government of Kenya. These Groups empower women doing business who are unable to obtain loans from the banks and other financial institutions.*
10. *I am also a member of Couch Surfing, a worldwide Club which allows its registered members to travel cheaply. Subsequently, I have hosted a few members who visited Kenya from Europe, Asia, US, parts of Africa and acted as their tourist guide. Reciprocally, I have visited other countries and had been hosted by members of the same Club in the countries that I had visited.*
11. *Sometime in 2010, through this Club, I became acquainted with a lady by the name of Hirut Bekela (Hirut) from Ethiopia. She is also running a business of selling Ethiopian clothing and accessories. When she visited me in Kenya, she stayed at my flat and used a hand-phone No. +254733877767. Her Ethiopian hand-phone No. 77442900 is recorded in my hand-phone under the tag 'Princess'.*
12. *My initial plan was to depart from Douala, Cameroon on the 29th February 2012 but due to some unavoidable circumstances I had to delay my trip. I left for Addis Ababa, Ethiopia on 4th March 2012.*
13. *When I arrived in Addis Ababa, Ethiopia on the 4th March 2012, I was met by my friend Hirut and her companion. They took me to Hirut's house. After we had dinner and since my hand-carried bag had become very heavy and uncomfortable after some shopping, I requested to borrow a suitcase from Hirut as I had bought some African fabrics for myself in Douala, Cameroon.*
14. *Hirut offered to lend me a suitcase with trolley. There were 6 suitcases to choose from at that time, and the one I borrowed from Hirut was the smallest. My hand-carried bag (to be used as hand-carried bag) was*



placed in Hirut's suitcase together with my other personal belongings. I found the suitcase to be very strong and slightly heavy and I had asked Hirut about it, and she told me that was how the suitcases were in Ethiopia. I have checked the interior of the suitcase and found nothing inside.

15. *I stayed with Hirut for two (2) days even though I had booked a hotel room at Mimosa Hotel. I was to travel to Dubai, United Arab Emirates (UAE) onwards to Bandar Seri Begawan, Brunei Darussalam on the 5th March 2012 at 10.55 a.m. But to my mistake, I thought the flight was to be at 10.55 p.m. I missed that flight and had to pay a fine of US\$25 to Ethiopian Airlines so as to get another reservation on the 6th of March 2012 on the 10.55 a.m. flight.*
16. *I left Addis Ababa on the 6th March 2012 for Dubai on transit to Bandar Seri Begawan and was later to fly to Kuala Lumpur. The suitcase went through airport scan at Bole International Airport, Addis Ababa. It was then tagged to be sent directly to Bandar Seri Begawan, Brunei Darussalam. My purpose of travelling to Kuala Lumpur was to do some shopping for my business.*
17. *As I had missed the earlier flight, I had to pay US\$100 to Royal Brunei Airlines to get another reservation on the flight. I boarded Royal Brunei Airlines on the 6th March 2012 and arrived in Bandar Seri Begawan on the 7th March 2012 at 10.36 a.m.*
18. *Upon my arrival at the Brunei International Airport, I applied for a Transit Visa (Visa upon Arrival) at the Immigration Counter where I was to pay B\$5.00 for the Visa. I subsequently went to the Money Changer within the Arrival hall and changed US\$100 (B\$116 equivalent). I then paid B\$5.00 for my Visa. I then picked-up the suitcase from the conveyor belt. This was the first time I saw the suitcase after checking it in at the airport in Addis Ababa. I then handed-in my Customs Declaration Form and proceeded to the x-ray counter to scan the suitcase as instructed by the Custom Officers on-duty.*
19. *Before the scanning of the suitcase, I was asked by the Custom Officer on-duty whether I had anything to declare, to which I replied "I had none". After the suitcase was scanned, I was asked to proceed to another x-ray counter which I did so willingly as I believed it was a normal procedure.*



The Custom Officer then asked me to open-up the suitcase for a physical check. I then opened the padlock on the suitcase. The Custom Officers then took everything out from the suitcase and the suitcase was scanned again. While the suitcase was being scanned, I did not observe any of the scanning images of the suitcase while the suitcase was scanned both during the 1st and 2nd scanning procedures.

20. *I was then asked to go to the Custom Office with the suitcase. Once in the Custom Office I was told that the suitcase had a hidden compartment. This surprised me as the suitcase looked like any other normal suitcase at the time I borrowed it from Hirut. The Custom Officers then asked me to remove all my personal belongings from the suitcase so that the suitcase could be checked again. I did this without any complaint or protest and I gave my fullest co-operation as requested by the Custom Officers.*
21. *Then then dismantled the suitcase and at that point of time, I saw 2 silver packets. Upon the discovery of the said silver packets, I was then taken to another room for a complete body search. During the body search, the female Custom Officer asked if I knew about the silver packets. I informed her that I did not know as the suitcase was borrowed from a friend from Addis Ababa. After the body search, I was asked to sit and witness the listing of all my belongings. At that time I was having my menses and I requested for the use of the toilet for change and clean-up. I was accompanied by three (3) ladies whom I later came to know at trial as two Custom Officers named Hjh Azimah (PW2) and Dk Harlizan (PW3) and one NCB Officer named Jawharti. All of them entered the toilet while I attended to myself. While in the toilet, I asked Dk Harlizan “what is that in the suitcase?” to which Dk Harlizan replied that she was not sure and that, they had to run some test on the silver packets.*
22. *My Defence Counsel during his cross-examination put the question to Dk Harlizan regarding the conversation at the toilet where she agreed to my Defence Counsel’s question. This conversation was recorded in my Notice of Warning Statement recorded on the 8th March 2012 at 10.50 a.m. by SNO Mohammad Khairul Azmi Bin Zakaria (at page 4 line 13): “They found silver packet and I was shocked and wondering what it is. I asked the airport personnel what it is, they said they not sure about it and have to run some test.”*



23. *After the toilet break I was taken back into the Custom Office where further examination was made on the suitcase. During the examination, I saw another two silver packets found at the side of the suitcase. I was never asked regarding the discovery of these newly found silver packets.*
24. *I had no knowledge at all about the silver packets and their contents, as I had never seen them before, until they were found during the airport search by the Custom Officers. I did not know they were hidden within the suitcase, and I did not know what was inside them.*
25. *Upon the completion of the search on the suitcase, the Custom Officer prepared a List of Seizure of all the seized items. I was then handcuffed and surrendered to the NCB Officers for further investigation.*
26. *Throughout the search and examination of my suitcase by the Customs Officers, I had fully cooperated with them. I never protested and had complied to the best of my knowledge with whatever requests they had made upon me. I acted normally and calmly since I believed that I had nothing to hide and that I had done nothing wrong.*
27. *During the Custom's search and examination of my suitcase, I did not notice any fingerprinting done on the silver packets. However at the NCB office my fingerprints were taken by the NCB officers. I had no knowledge of the purpose of taking my fingerprints at that time.*
28. *When I arrived at the NCB office, I was taken into a room and I saw one of the NCB Officers prepare Further List of Seizure of all the items seized and I was asked to sign which I did except for Exhibits E3, E4 and E5 which I had refused to sign as those items did not belong to me.*
29. *I had also given my full cooperation while I was being investigate by the NCB Officers including the taking of my Statements as well as providing my blood and urine samples as requested by the NCB Officers.*
30. *In respect of the Statements which have been tendered as Prosecution Exhibits, in which I had stated that the said suitcase was lent to me by a friend named Hirut who lived in Addis Ababa, Ethiopia. I did not know the contents of the suitcase since the suitcase was empty at that time when I received it from Hirut. My explanation that I knew nothing about the suitcase can be found in the Notice of Warning Statement (at page 4)*



recorded by SNO Mohammad Khairil Azmi Bin Zakaria on 13th March 2012 and tendered as Annexure B Tab N as follows:

“Q6: Explain about the storyline of the suitcase from the beginning (refer to picture 12).

A: I have a green bag which is smaller and uncomfortable to carry. So I asked my friend Hirut Bekela who lives in Addis for a bag. She offered me this bag (referring to picture number 12) and I use it to travel to Kuala Lumpur. I borrow the suitcase on the 4th of March 2012. I left Addis on the 6th March 2012 for a transit in Dubai. I was in Dubai for about 7-8 hours but I didn't leave the airport. The bag seem like a normal bag to me, so I put my things in it and travel to Dubai. I known my friend, Hirut Bekela for 2 years, she is a woman and owned a business. She stays in Ethiopia and she usually stays with me when she comes to Kenya. The bag was tagged and boarded for Brunei, it did not left the airport when I arrived in Dubai. I did not see the bag until I arrived in Brunei. I did not know there was drug in the bag. In Brunei, the custom officer asked me to open the bag and I allowed them. They opened the bag in my presence. I was there when they opened it. They found silver packet and I was shocked and wondering what it is, I asked the airport personnel what it is, they said they are not sure about it and have to run some test. Personally I do not know what it is. I believe I have the picture of my friend in my camera and I may have her number in my mobile phone.

Q7: Can you explain about Exhibit E6 (a) (b) (c) (d) (referring to picture No. 4, 5, 6, 7 and 8)?

A: I saw them first when they opened the bag at the airport. I don't know what it is. I do not know they existed. When I first received the bag I found it to be a bit heavy and I asked my friend about it, she mentioned that this is how bags are in Ethiopia. I did not suspect anything. She only suggested for me to wrap the bag because she said people can put things inside the suitcase if not wrapped. And I did wrap the bag (referring to picture number 1).

31. *In my Ordinary Statement recorded on 14th March 2012 by NO Pg Othman and tendered as Annexure B Tab O, the following "Questions and Answers" were recorded:*

Q32: What happened after the scan?

A: After the scan, the officer told me that the bag had another compartment. So they asked me whether they can tear it up and I agreed because nothing to hide.

Q33: When the officer tear it up what was found in your suitcase?

A: When they tore it up there were two (2) silver packets beneath the suitcase.

Q34: Did the officer ask you about that?

A: I told them I didn't know because I had borrowed the suitcase from a friend.

Q35: What is the name of your friend?

A: My friend name is Hirut Bekela.

Q36: Was your friend travelling with you at the time?

A: No.

Q37: Were you travelling alone from Ethiopia to Dubai (i.e. transit) and to Brunei?

A: Yeah I was alone.

Q38: When did you borrow the suitcase from your friend Hirut Bekela?

A: 4th March 2012.

Q39: Where did you meet her when you want to borrow the suitcase?

A: In Ethiopia.



Q40: *When?*

A: *On the 4th March 2012.*

Q41: *Why do you want to borrow the suitcase from her?*

A: *Because I had a green bag that was not comfortable for travelling.*

Q42: *When you travelled from Ethiopia to Dubai and then to Brunei, was the suitcase locked and secured by you?*

A: *Yes it was locked and wrapped with plastic that is used for a traveller which was done at Bole Airport, Ethiopia. Addis is the capital of Ethiopia.*

Q43: *Were you aware of the two silver packets that was found by the officer?*

A: *No I'm not aware about that and it was my 1st time to see them i.e. the two packets.*

Q44: *Do you know that it's against the law in Brunei or any other countries that in possession of a controlled drugs or any illegal item would be facing the punishment?*

A: *Yeah, even in Kenya, it's not allowed.*

Q45: *Refer to your passport that you are travelling to Douala, Cameroon on the 25th February 2012, what's the purpose?*

A: *To buy fabrics for my business.*

Q46: *You depart from Douala on the 4th March 2012 and went to Ethiopia where you met Hirut?*

A: *Yeah I met Hirut and I stay with Hirut for 2 days in her house. And that is the time I borrowed the bag from her.*

Q47: *As you mentioned earlier in para "26" page 6 that you only come to Brunei to transit?*



A: *Yes I am on transit for two (2) days and I did book through internet a hotel i.e. Radisson Hotel because I want to discover about Brunei. This was booked by my travel agent in Nairobi, Kenya.*

Q48: *I refer to my Question No. 33 on page 7, and by looking at the picture, what was found on both side of the suitcase?*

A: *Later on I discover two (2) more silver packets on both sides of the suitcase when I was brought to the Narcotic Office inside the Investigation Room 1.*

Q49: *How and when did you discover with regards to the two silver packets which was kept at both side of the suitcase?*

A: *When they asked me to witness the suitcase being weighed by the officer.*

Q50: *DO you have the knowledge about the item seized which was inside your suitcase i.e. four (4) silver packets?*

A: *No I had no knowledge at all.*

Q51: *Do you have any criminal records?*

A: *No I have never been arrested before even in my country.*

Q52: *Do you have anything to add on to your statement?*

A: *I believe it's a big mistake that I borrowed the suitcase.*

Q53: *After you read the contents of the statement and then you sign, do you agree and are you satisfied with whatever is recorded in your statement?*

A: *Yes.*

32. *When the NCB requested for my blood sample, I complied willingly to their request. My blood sample was taken at the Jerudong Prison. Later, I came to know that the blood sample was for the purpose of obtaining the DNA Report and the Report is also tendered by the Prosecution and the result of*



the Report is inconclusive. In the Report it appeared that there are 3 persons who had handled the suitcase while placing of the drugs inside the suitcase. The DNA Report have been obtained from and given by the Scientific Officer named Paul Liew Yun Onn on the 9th June 2012. The DNA Report pertaining to the drugs found inside the suitcase did not implicate me at all. The DNA Report had been tendered as 'Annexure B Tab P – Agreed Facts 'P1'.

- 33. The Report states at page 4 headed "Conclusions": "No DNA profiles were obtained from the swabs taken from the surface of the lining and compartments inside suitcase labeled "E6" (including inside of the lining where the drugs were allegedly hidden) and from all surface of the plastic packaging marked 'A', 'B', 'C' and 'D'. The DNA profile extracted from the swabs taken from the front and back exterior surfaces of the suitcase labeled 'E6' including all zippers and handles were found to be mixture profiles of at least three unknown individuals. The donor of blood reference sample 'BRN003829' cannot be included as a contributor for the two separate mixtures obtained above as there were insufficient matching alleles. Hence the DNA profiles obtained are inconclusive".*
- 34. From the evidence of the Prosecution witnesses there have been no fingerprints lifted in respect of the seized drugs which would have implicated me to the seized drugs in question.*
- 35. I have also provided my urine sample for examination by the Scientific Services and the result of the analysis did not state any presence of drugs-related substances. My urine analysis report is marked as Prosecution Exhibit Annexure B Tab M.*
- 36. With regards to my travel itinerary I wish to provide the following explanation. I had initially planned to go to the Philippine but had changed my mind, instead, I booked myself to travel to Kuala Lumpur with transit in Brunei. My detailed explanation on my travel itinerary is found in my Further Statements recorded by SNO Mohammad Khairil Azmi on the 11th September 2012 at Jerudong Prison and tendered as 'Annexure B Tab Q'.*
- 37. I wish to state that the suitcase did not belong to me. It belonged to my friend Hirut Bekela from whom I had borrowed while I was staying with her in Addis Ababa.*



38. *I did not know the contents of which was eventually suspected to be drugs.*
39. *I made my Statement denying any knowledge of the drugs found in the suitcase. This can be found in Paragraph 1 at Page 4 of my Notice of Warning Statement: "...I did not know there was drug in the bag....Personally I do not know what it is...."*
40. *The photographs from my camera and my hand-phone have been investigated. The Investigating Officer, PW10 during cross-examination by my Defence Counsel confirmed that there were no incriminating evidence against me from the photos in my camera and hand-phone. My Defence Counsel had shown me the photographs from my camera provided by the Prosecution and having seen the photographs I can confirm that Photo No. 118 (at page 24) is the photo of Hirut Bekela. From the telephone records at page 56, I can confirm that the hand-phone No. 77442900 belongs to Hirut Bekela which was tagged as 'Princess' (which I used to refer to her)."*

In examination-in-chief the defendant further explained why she borrowed the suitcase from Hirut Bekela. She said that when she left Nairobi she had only a hand carry bag which contained a bottle of lotion and a bottle of perfume. She experienced difficulty in bringing these items into the cabin as they were liquids. In Douala she had checked the prices of suitcases and they were expensive. She therefore decided to borrow a suitcase from Hirut Bekela.

The defendant said: *"After I was in her house for a few days I asked her to lend me a suitcase because it would make my travel easier. She had six suitcases. She lent me the smallest one. It was heavy. I asked her about it. She said that is how they are because they produce their own suitcases. During that time I checked the other five suitcases. They were also very strong and heavy. When I realized they were all like that I transferred all my personal belongings to the suitcase I borrowed. I checked the suitcase but there was nothing inside. I told Hirut I would take the smallest suitcase.*

We had a discussion about returning the suitcase. She said on my return from Kuala Lumpur I could return it to her. I said it would be easier for me to check it in a Kuala Lumpur for Nairobi. She agreed the next time she came to Nairobi she would pick it up from me."

Under cross-examination the defendant said she had intended to buy a bigger bag at her final destination. In Cameroon she had sent the fabrics she bought for her business to Kenya by cargo. But the fabrics purchased for her personal use made her hand carry bag

heavy and uncomfortable. It was uncomfortable because (1) she had to carry it into the cabin and it took up a lot of space; (2) she had perfume in it and liquids are prohibited in the cabin; and (3) she had to spend a few hours in Dubai Airport and the weight of the hand carry bag would make her tired.

The defendant denied that: (1) the reason why she had only a hand carry bag with her when she left Nairobi was because she knew the suitcase containing the drugs would be given to her; (2) the money in her possession was given to her to deliver the suitcase containing the drugs; (3) she went to Cameroon to pick up the suitcase containing the drugs; (4) the reason why she had no hotel reservation in Kuala Lumpur was because she would be met by someone there and; (5) this person was to receive the suitcase containing the drugs from her.

Review of the evidence

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

Before embarking on a review of the evidence, however, we should set out the relevant provisions in the Misuse of Drugs Act and the Interpretation and General Clauses Act which fall to be considered for convenience.

Section 5 of the Misuse of Drugs Act states:

“Except as authorized by this Act or the regulations made thereunder, it shall be an offence for a person to import into Brunei Darussalam or export from Brunei Darussalam a controlled drug.”

The word “import” is not defined in the Misuse of Drugs Act. It is necessary to rely on section 3(1) of the Interpretation and General Clauses Act which provides that “import” means “to bring or cause to be brought into Brunei Darussalam”.

Giving the word “import” its ordinary and natural meaning, in the context of section 5 of the Misuse of Drugs Act, it means knowingly bringing or causing to be brought a controlled drug into Brunei Darussalam, whatever the purpose may be and whether or not it is the ultimate destination: *Ko Mun Cheung v Public Prosecutor* [1992] 1 SLR (R) 887.



Section 14(1) of the Misuse of Drugs states:

“Notwithstanding any provision of any written law to be contrary, a certificate purporting to be signed by an analyst and purporting to relate to a controlled drug shall be admitted in evidence in any proceedings for an offence against this Act, on its production by the prosecution without proof of signature and, until the contrary is proved such certificate shall be prima facie evidence of all matters contained therein.”

Presumptions

Section 16 of the Misuse of Drugs Act insofar as it is material to this case 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;

(b) the keys of anything containing a controlled drug;

(c)

(d)

shall, until the contrary is proved, be presumed to have has such drug in his possession.

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

(3) The presumption provided for in this section shall not be rebutted by proof that the accused never had physical possession of the controlled drug.”

The chain of evidence relating to the custody of the four packets of crystalline substances found in the suitcase from the time of seizure to analysis was unbroken. On the evidence of the customs officers and narcotics officers involved in the seizure, handling, storage and delivery to the Department of Scientific Services for analysis of the four packets of crystalline substances, we are satisfied that the integrity of these



exhibits was safeguarded and that the exhibits seized were the exhibits analysed by Mr. Lim.

In submitting no case to answer at the close of the case for the prosecution Mr. Daud on behalf of the defendant challenged the validity of Mr. Lim's analysis that the four packets of crystalline substances contained 3,019.56 grams of methylamphetamine. Relying on the decision of the Malaysian Supreme Court in *Leong Bon Huat v Public Prosecutor* [1993] 3 MLJ 11 (and the decisions of the Malaysian High Court in *Public Prosecutor v Alex Bin Hamzani* [1995] 3 CLJ 102 and *Public Prosecutor v Saad Mat Takraw & Anor* [1998] 3 CLJ, which adopted the approach of the court in *Leong Bon Huat*), Mr. Daud contended that as the samples of crystalline substances analysed by Mr. Lim were less than 10 per cent of the whole amount ("*the 10 per cent requirement*") the court cannot be satisfied beyond reasonable doubt that it is methylamphetamine.

The submission is incorrect. Firstly, Mr. Daud has misunderstood the reasoning of the Malaysian decisions. The cases concern the trafficking of cannabis in Malaysia. What the cases say is not as Mr. Daud has contended but that the sample amount of the substance for analysis must not be less than 200 grams, this being the quantity required for invoking the presumption of trafficking under the Dangerous Drugs Act 1952 in Malaysia.

Furthermore, the reference to the 10 per cent requirement in the Malaysian cases relates not to the quantity of the sample of the substance for analysis but to the number of receptacles containing a suspected drug and the presumption in section 37(j) of the Dangerous Drugs Act 1952 which provides:

"When any substance suspected of being a dangerous drug has been seized and such substance is contained in a number of receptacles, it shall be sufficient to analyse samples of the contents of a number not less than 10 per centum of such receptacles and if such analysis establishes that such samples are presumed, until the contrary is proved, that the contents of all the receptacles were of the same nature and description as the sample so analysed and if such analysis establishes that such samples consist of or contain a dangerous drug, it shall be presumed, until the contrary is proved, the contents of all the receptacles consist of or contain the same proportion of such drug."

There is no equivalent provision in the Misuse of Drugs Act.

Secondly, even applying the reasoning in the Malaysian cases, insofar as it relates to the minimum quantity of the sample of the substance to be analysed, to the facts in this



case, the amount of the samples of the substance in total used for analysis is 157.0419 grams which far exceeds 50 grams, this being the quantity where upon conviction for import of methylamphetamine the penalty is death.

Thirdly, Mr. Daud does not appear to be aware of the decision of the Federal Court of Malaysia in *Chu Tak Fai v Public Prosecutor* [2001] 1 MLJ 201, where Nik Hashim FCJ delivering the judgment of the court said at p.218:

"..... There is no requirement for the amount or the weight of the samples of the drug to be taken for the purpose of analysis by the chemist. It is up to the chemist to determine the adequacy of samples for the purpose of analysis. If the defence wished to challenge the sufficiency of the weight of the drug analysed the chemist's evidence must be challenged and evidence in rebuttal must be led, if necessary."

Nik Hashim FCJ then said (*ibid.*, at p. 218):

".....Loo Kia Meng, insofar as it holds that a minimum of 10% of the drug must be taken for analysis and Leong Bon Huat, supra, insofar as it holds that the chemical tests must be carried out on adequate quantities (samples) of the drug, are decisions with which we are unable to agree and they should not be followed."

We respectfully agree with the approach of the Federal Court. There is no requirement in the Misuse of Drugs Act for a minimum quantity of sample of a substance for the purpose of analysis. The evidence of Mr. Lim on the samples he used for analysis was unchallenged. It was never put to Mr. Lim that the quantity of the samples was inadequate. On Mr. Lim's evidence of the steps he took and the method he used in the analysis of the four packets of crystalline substances we are satisfied that the crystalline substances which weighed a total of 3,956.59 grams contained a total of 3,019.56 grams of methylamphetamine.

The defendant did not dispute that she brought the suitcase containing the four packets of methylamphetamine into Brunei Darussalam. The question is whether she knew the four packets of methylamphetamine were in the suitcase and that the drug was methylamphetamine.

Since the defendant was found in possession of the suitcase containing the four packets of methylamphetamine, and the key to the suitcase, the presumption arises under



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

Consequently, the onus is on the defendant to rebut the double presumptions of possession and knowledge of the nature of the drug, on a balance of probabilities, by proving that she did not know the suitcase contained the four packets of methylamphetamine and that the drug was methylamphetamine.

The defendant's case in essence is that she had no knowledge of the existence of the four packets of methylamphetamine hidden under the lining of the suitcase. The suitcase belonged to her friend Hirut Bekela and she had borrowed it from her in Ethiopia.

In considering this defence we think it is instructive to refer to the following passage in the speech of Lord Pearce in *Warner v Metropolitan Police Commissioner* [1960] 2 AC at 305-306:

"If a man is in possession of the contents of a package, prima facie his possession of the package leads to the strong inference that he is in possession of its contents. But can this be rebutted by evidence that he was mistaken as to its contents? As in the case of goods that have been planted in his pocket without his knowledge, so I do not think he is in possession of contents which are quite different in kind from what he believes. Thus the prima facie assumption is discharged if he proves (or raises a real doubt in the matter) either (a) that he was a servant or bailee who had no right to open it and no reason to suspect that its contents were illicit or were drugs or (b) that although he was the owner he had no knowledge of (including a genuine mistake as to) its actual contents or of their illicit nature and that he received them innocently and also that he had no reasonable opportunity since receiving the package of acquainting himself with its actual contents."

We accept that the four packets of methylamphetamine were elaborately hidden under the lining of the suitcase and were not easily seen or readily accessible. We acknowledge that the defendant was co-operative throughout the investigations into the four packets of methylamphetamine and she consistently denied knowledge of their existence whilst maintaining that she had borrowed the suitcase from her friend Hirut Bekela in Ethiopia. We realize that neither the defendant's DNA profile nor her



fingerprints were found on the four packets of methylamphetamine. And we are conscious that the defendant's urine sample was found to be negative for drugs and nothing incriminating was found in her camera and mobile phone.

Having seen and heard the defendant testify, and balancing this observation of her demeanour against the body of evidence in totality, we have come to the conclusion that she was not a truthful witness and that she lied on the material issues. We disbelieve the defendant's evidence that she borrowed the suitcase from her friend Hirut Bekela and she did not know the four packets of methylamphetamine were hidden inside it.

Much was made by Mr. Daud in his submissions about the defendant's demeanour when she was investigated by customs and narcotics officers: that she was normal, calm and co-operative. This demeanour, it is contended, reflects innocence.

We disagree. In our view the demeanour of the defendant, by itself, does not unequivocally show innocence or guilt. The demeanour of the defendant must be considered with reference to the evidence in totality. We do not find the evidence that the defendant was normal, calm, and co-operative in the course of investigations as indicative of her innocence when considered with the evidence in totality. In this connection we do not accept the defendant's evidence that she acted "*normally and calmly*" because she believed she had nothing to hide and had done nothing wrong. We believe that although the defendant knew she was carrying the four packets of methylamphetamine hidden in the suitcase, she had the strength of character to maintain her composure under investigations.

Although the defendant's out of court explanation, and evidence, as to how she came into possession of the suitcase was consistent – she borrowed the suitcase from her friend Hirut Bekela in Ethiopia – the same cannot be said for her explanation as to why she borrowed the suitcase. The defendant's first explanation differs from her subsequent explanations.

At the airport, according to EO Hjh Aminah, the defendant explained that she borrowed the suitcase from her friend because the "*traditional dress*" she bought in Ethiopia did "*not fit*" into the bag she had brought with her from Kenya. This part of the evidence of EO Hjh Aminah was unchallenged. This was the first explanation given by the defendant for borrowing the suitcase from Hirut Bekela.

However, the defendant then said she borrowed the suitcase from Hirut Bekela because (1) her "*green bag*" was "*smaller and uncomfortable to carry*" (in her Notice of Warning



Statement); (2) her *“green bag”* was *“not comfortable for travelling”* (in her Ordinary Statement); and (3) her *“hand-carried bag”* had become very heavy and uncomfortable after some shopping (in her statement made under section 117B of the Criminal Procedure Code). No mention was made by the defendant in any of these statements, nor in her two other written statements given to the NCB, nor in her oral evidence in court, that she borrowed the suitcase from Hirut Bekela because the *“traditional dress”* she bought in Ethiopia did *“not fit”* into her own bag.

We find the defendant’s evidence that she borrowed the suitcase from Hirut Bekela and she did not know the four packets of methylamphetamine were hidden inside it wholly unconvincing and we reject it. We believe the defendant concocted this story in order to dissociate herself from the four packets of methylamphetamine found concealed in the suitcase.

Concerning the weight of the suitcase, it was the defendant’s evidence that she found the suitcase *“slightly heavy”* and she asked Hirut Bekela about this and was told this was *“how bags were in Ethiopia”*; she did not find anything in the suitcase when she checked it and the other five suitcases were also *“strong and heavy”*.

This was an explanation by the defendant as to why she did not suspect there was anything hidden in the suitcase despite finding it *“slightly heavy”* and we find it quite disingenuous. The defendant is after all a businesswoman with a tertiary education. She did not appear to us to be a naïve and ignorant woman. She was an alert, intelligent and confident witness. We find it inconceivable that the defendant would accept such an implausible assurance as that alleged to have been given to her by Hirut Bekela.

We find it incredible that Hirut Bekela, whom the defendant claimed was her friend, would lend her a suitcase containing a substantial quantity of methylamphetamine with a street value of over \$2.8 million hidden inside it. The defendant gave no explanation why her friend would do such a thing.

In our judgment the defendant has failed to discharge the burden of rebutting the statutory presumptions of possession and knowledge. On the evidence the inescapable inference is that the defendant knew the four packets of methylamphetamine were hidden in the suitcase and she was a knowing and willing drug courier for profit.

Conclusion

We are satisfied the prosecution has proven beyond reasonable doubt on the evidence in totality that the defendant did import 3,019.56 grams of methylamphetamine by



knowingly bringing the drug into Brunei Darussalam on 7 March 2012 and we convict her on the charge.

As there is no evidence that the defendant is pregnant the sentence we are obliged to pass is death and we order that the sentence be in accordance with section 239 of the Criminal Procedure Code.

DATO PADUKA STEVEN CHONG
Judge, High Court

DATO PADUKA HAIROL ARNI MAJID
Judge, High Court