

Lam Ming Hua

AND

Public Prosecutor

**(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 17 of 2004)**

Cons, P.; Power and Mortimer, JJ.A.
28th November, 2005.

Conviction for possession of cannabis for the purpose of the trafficking. In the particular circumstance the conviction was found to be unsatisfactory. Conviction therefore quashed.

Mr. Roy Prabakaran of M/s Abrahams & Davidson & Co. for the Appellant.
DPP Hj Anifa Rafiza bte Hj Abdul Ghani and DPP Hj Nabil Daraina bin PUKDSSU Hj Badaruddin for the Public Prosecutor.

Case cited in the Judgment:

P.P. v Sulaiman Bin Mohammed Noor [1995] M.L.J.U. Lexis 842

Cons P.:

The Appellant, Lam Ming Hwa, was convicted on 25 October last year, after trial before the Chief Justice and Steven Chong J, of possession of cannabis, a class B controlled drug, for the purpose of trafficking. As the amount involved was as much as 992.276 grammes, the sentence was inevitably that of death.

Evidence at the trial showed, inter alia, that on the afternoon of 24 November two years earlier, i.e. in 2002, the Appellant drove a white Honda Civic car into the parking area by the Halim Plaza in Tutong. Another man, one Sylvester Anak Kuling, was in the front passenger seat of the car. The Appellant there made contact with a 3rd man, Lo Yuen Kim, who was standing outside the Plaza. A 4th man, Kwok Kwang Ming, was also present in the vicinity. All four were arrested by officers of the Narcotics Control Bureau who had been laying in wait. Beneath the front passenger seat of the Honda Civic the officers found a black plastic bag. Inside the bag was a square packet wrapped in black masking tape that was later found to contain the 992.276 grammes of cannabis. In due course, the Appellant and his passenger were charged with possession of the cannabis for trafficking, to which they pleaded not guilty. The Appellant was made the 2nd Defendant. Kwok Kwang Ming was D1. Further drug charges were made against each to which each pleaded guilty. Those latter offences are no concern of this court.

Apart from his close proximity the only evidence to connect D1 with the black plastic bag was a fingerprint found on its outer surface. He explained this as an accidental touch when he adjusted the seat backwards on entering the car. The Judges accepted this explanation as plausible, although not in those words, and accordingly acquitted D1.

The Appellant faced greater difficulty. Section 19 of the Misuse of Drugs Act provides –

19. “If any controlled drug is found in any vehicle it shall, until the contrary is proved, be presumed to be in the possession of the owner of the vehicle and of the person in charge of the vehicle for the time being.”

There can be no doubt that the Appellant was the person in charge of the white Honda Civic for the time then being. Then Section 15 provides -

15. “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.”

The Appellant’s explanation was one of complete innocence. His evidence was that he lived in Kuala Belait. On the afternoon in question he met Lo Yuen Kim, one of his neighbours outside their common building. Lo asked him to drive the white Honda Civic to Tutong with a view to its being sold and that, meeting D1 at that moment by chance, he invited D1 along for the ride. He knew nothing of the black plastic bag until it was discovered by the narcotics officers. (His then counsel suggested it might have been deliberately and surreptitiously planted there by Lo Yuen Kim and Kwok Kwang Ming when they were standing by the car before the request was made to the Appellant).

The Judges were under the misapprehension that this story was accepted by the prosecution. They said –

“It is not disputed that on the day in question D2 had seen Lo Yuen Kim (PW11) outside the building where they lived standing together with one called Kwok Kwang Ming by the driver’s door of the white Honda car. Nor is there any question that later PW11 asked D2 to drive the Honda Civic to Tutong. Also not in issue is the fact that PW11 went off ahead in his car, the red Proton Satria, to Tutong as well and parked close to the IBB Bank branch.”

It is difficult to understand how the judges came to this conclusion. The evidence of Lo Yuen Kim in no way allowed for any such meeting with or request to the Appellant and when cross-examined, he specifically rejected the suggestion. The Appellant was himself challenged upon it when cross-examined. However, unsatisfactory though it must be from the prosecution point of view, it cannot be prejudicial to the Appellant that the Judges accepted his explanation that far. Even so, he was still faced with a potentially fatal piece of evidence; his fingerprint was also found, not like that of D1 on the black plastic bag, but on the very packet of drugs that was inside the larger plastic bag. Not surprisingly, the main line of attack of this appeal, ably prepared and presented by Mr Prabhakaran, has been directed at the finger print evidence.

That evidence was given by Sgt. 167 Dk Hjh Salmah and Assistant Superintendent Hj Muhammad Liman, both of whom have received special training in the art of fingerprint examination and comparison and were accepted by the Judges as experts in their field.

The Sergeant produced in evidence a statement made by her under Section 117B of the Criminal Procedure Code to the effect, inter alia, that a finger print on the square packet wrapped in black masking tape was identical to that of the Appellant's right ring finger. The Superintendent produced a similar statement to the same effect. However there was also in evidence a report that he had made earlier and soon after the incident in which he had "no doubt to confirm" that the print was that of the left forefinger of the Appellant. In his Section 117B statement, the Superintendent recognized the mistake, which he explained in evidence as having been caused by the vast number of comparisons to be made by reason of there being 4 suspects in the investigation. The judges were satisfied by this explanation. They said –

"We have considered this issue and find that the explanation offered by PW15 was not only reasonable but was convincing as well. We have no reason to doubt that his mistake in mentioning the left forefinger of D2 instead of the correct right ring finger of D2, was accidental for the reasons that the witness has explained. Likewise we do not doubt his expertise or his honesty....."

It is now suggested that the Judges had no jurisdiction even to entertain that explanation or the variation that it would make to the original report. Reliance is placed on Sections 91 and 92 of the Evidence Act. These read –

91. "When the terms of a contract or of a grant or of any other disposition of property have been reduced by or by consent of the parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

92. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms.”

There follow provisos which are not relevant to the present circumstances.

Counsel cited a Malaysian case, *PP v Sulaiman bin Mohammed Noor* [1995] M.L.J.U. Lexis 842, in which the Judge, upon similar legislation, excluded an “amended” report of the government chemist in circumstances basically identical to the present. However, as we read the Judge’s reasons he does not ever, with respect, appear to direct his attention to the crucial question of whether the matter in hand, i.e. the chemical analysis, was, or was not, a “matter required by law to be reduced to the term of a document.”

Counsel conceded that apart from this authority he could not point to any direct requirement by law, but suggested that such requirement was indirectly brought about by the operation of Section 380A of the Criminal Procedure Code, in particular, of the proviso -

“380A. (1) Any document purporting to be a report under the hand of any of the persons mentioned in subsection (2) of this section upon any person, matter or thing examined or analysed by him may be given in evidence in any enquiry, trial or other proceeding under the Supreme Court Act (Chapter 5), the Subordinate Courts Act (Chapter 6), or the Criminal Procedure Code (Chapter 7), unless such person shall be required to attend as witness –

(a) by the Court; or

(b) by an accused upon giving notice in writing to the prosecution not less than 7 clear days before the commencement of the trial:

Provided always that in any case in which the prosecution intends to give in evidence any such report, a copy thereof shall be delivered to the accused not less than 14 clear days before the commencement of the trial, unless the Court otherwise allows.”

Subsection (2) would include the Superintendent. Thus, it was argued, to comply with the section the original would have to be in writing and was so “required by law”.

We are unable to read the provisions in that sense. The section does not require the matter in hand, i.e. the findings on the examination and comparison of fingerprints, to

be reduced to writing. It merely requires that any findings already so reduced shall be made known to an accused before they can be put in evidence.

It was then suggested that the “confusion” of the Superintendent must of itself raise doubts as to the value of the print or that indeed it might not even have been that of the Appellant at all. We are not persuaded that that necessarily follows. The Judges accepted that there was a mistake, that there was genuine cause for the mistake and that it was rectified. They also had the evidence of the Sergeant. We are satisfied that they were amply justified in their conclusion that a print of the Appellant’s right ring finger had been left on the square packet that actually contained the cannabis in question.

It may be convenient to mention here in passing two of the other arguments that were put forward on behalf of the Appellant. The first – not strongly pursued – queried whether the square packet actually produced in court was indeed the packet found in the plastic bag beneath the seat in the car. Reference was made on the one hand to the evidence of PW1, the senior officer in charge of the ambush party, who spoke of “a piece of black plastic with masking tape”; and on the other to that of the government chemist, whose report mentioned “a transparent blue plastic material internally and black adhesive tape externally”. When one looks at the exhibit itself the alleged “discrepancy” is easily explained. In any event, as was admitted in the written submission, there was a clear unbroken chain of evidence to show that the square packet examined by the fingerprint experts and later by the government chemist was indeed the selfsame packet that had been seized at the time of the arrests.

A further point, originally put as the Judges’ failure to apply the correct standard of proof when assessing the rebuttal evidence of the Appellant, came down in essence to the proposition that, as in the view of those advising the Appellant the Judges had adopted an unduly generous approach to the evidence of D1, they should adopt the same generous approach to the evidence of the Appellant.

Even were the principle behind the proposition sound, which in our view it is not, we find ourselves unable to accept the premise on which the proposition is based. The words used by the Judges with regard to the evidence of D1 were words perhaps not commonly used, but we find no reason to think that they in fact indicated the use of any standard other than that which is well established and recognized.

To return to the main question, the Appellant’s explanation of the fingerprint did not surface in the trial until he came to give evidence himself. Then, after reciting the events which led up to his arrest, as we set out earlier, he continued -

“They searched the white Honda Civic, I heard someone say they discovered something under the passenger seat.

At this time I was standing outside the driver’s door.

D1 also was standing outside the driver’s door.

After they discovered something they wound down the car's window, and pulled out the item. It was a black plastic bag.

Then, they asked me what it was. I said I did not know.

After this they pulled out something from the black plastic bag. It was something like a black object.

I am looking at Ex.P1 – the photographs. It was the object which is seen in Photo 12. They slit the object. They showed me and asked: “What is this? What is inside this?”

I was handcuffed. I touched my hands with the object. I looked inside. I said I did not know what it was.

At this time my hands were handcuffed at the front. After I opened the car door, I was handcuffed at the front.”

In the note of his cross-examination, we find this passage –

“It was never in evidence until today that you had touched the packet found in the plastic bag?

This morning my lawyer asked me after the item had been discovered, the BKN people asked, “what is this?” and after they had made the small slit they asked what was in it. So, before I answered, I wanted to look what was inside, and as my hands were in cuffs I touched the packet with both hands.

Demonstrates: both hands in cuffs – extends hands downward, putting thumbs on either side of the slit to open up the slit in order to see the contents.

After I had looked at what was inside, I said, “I don't know”.

[Note of demonstration read out.]”

That was the sum total of the evidence in this respect. No application was ever made to recall any witness. No comment was made at the time from the bench.

The Appellant's explanation was rejected by the Judges as “contrived”. They explained –

“The demonstration by D2 showed the use of only his thumbs on either side of the slit while still handcuffed, to widen the slit a little. No

thumbprint(s) was/were found on the packet. As seen already, detected on this packet was only his right ring fingerprint impression. There was nothing in the explanation or demonstration of D2 to show how his right ring fingerprint got to be where the expert discovered it on the packet.”

We do not read the final words of that passage as indicating reliance upon the exact position of the print upon the packet, there was in any event no evidence of that. But we do find in this passage cause for concern. The absence of prints from one or both thumbs, on which the Judges did clearly rely, was not supported by expert opinion. Neither expert was recalled to say whether handling the packet in the way suggested would or would not have left identifiable prints or whether the three unidentifiable prints which were in fact found on the packet were in any way consistent with the Appellant’s suggestion. Had these questions been raised at the time, they could have been adequately dealt with. In the event, they were simply left unexplored.

Further concern is raised by the continuation of the same passage –

“We would observe that the defendant’s explanation for the presence of his fingerprint was never put to any of the prosecution witnesses and none of them gave evidence that D2 had been permitted to touch the packet in the manner we described.”

Failure to put evidence to appropriate prosecution witnesses in cross-examination does not necessarily indicate that the evidence has been fabricated by an accused, recently or otherwise. If that is to be suggested prosecuting counsel would be expected to make the point clearly and unambiguously in cross-examination of the accused and subsequently to apply for the recall of the appropriate witness or witnesses. In the present instance prosecution counsel took neither course, with the consequence that at the conclusion of the trial there was in fact no evidence before the court to contradict the Appellant’s evidence in this respect. It did not necessarily follow, of course, that the Judges were therefore bound to accept his evidence as true, but we are concerned that in the circumstances they may have too readily discounted the possibility that it was.

Section 415 of the Criminal Procedure Code requires this court to allow an appeal “if it thinks that the conviction should be set aside on the ground that is unsafe or unsatisfactory.” Having regard to the concerns we have just expressed we have come to the conclusion that this conviction was unsatisfactory. Accordingly, the appeal is allowed, the conviction quashed and the sentence set aside.

Appeal allowed. Conviction quashed. Sentence Set Aside

CONS, P.

MORTIMER, J.A.

POWER, J.A.

