

Mohammad Bin Usin

Appellant

AND

Public Prosecutor

Respondent

**(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 5 of 2006)**

Power, P; Mortimer, and Litton JJ.A.

8th May, 2007.

One offence under S. 3(a) and one under S.5 of the Misuse of Drugs Act. Cap27. Over 74.5 grammes of Class A drug. Defence advanced that Appellant was an innocent courier. Presumptions under s.16 and s. 15(a) and (b) applied. No credible explanation advanced and the Appellant was disbelieved at trial. Presumptions not disproved. Appellant convicted on overwhelming evidence and mandatory sentence of death passed.

Mr Shazale Salleh for the Appellant.
DPP Suhana Hj Sudin for the Public Prosecutor.

Mortimer, J.A.:

On 11 July 2006 the Appellant was convicted after trial before the Chief Justice and Steven Chong J of two offences under the Misuse of Drugs Act, Cap. 27 (the Act) concerning over 74.5 grams of Methylamphetamine, a Class A controlled drug. These offences were committed on 21 February 2005. The first count was trafficking by transporting the drug contrary to Section 3(a) of the Act, and the second count, on the same facts, was importing the drug into Brunei contrary to Section 5 of the Act. Both counts carry a mandatory death penalty under Section 29 and the Second Schedule. The Appellant was sentenced to death.

In his appeal to this Court he relies upon two main grounds. First, that the Judges were wrong in deciding that he had failed to rebut the presumption of trafficking under Section 16(2) of the Act and secondly, that the Judges ought to have found on the evidence that he was unaware that the package contained Methylamphetamine or “syabu”. In short, his defence was that he was acting throughout as an innocent courier.

The Facts

At the time of the offences, the Appellant lived in Sarawak but normally he worked in Brunei as a chef. He has a relative whom he calls Uncle. Uncle is known as Pian. A few weeks before the offences Pian had introduced the Appellant to a

Chinese man called Awang. On the day of the offences the Appellant received a telephone call from Awang arranging a meeting with him and Pian at the Miri Bus Station. The purpose of the meeting was to hand to Pian and the Appellant a package which he was to take to Brunei. This was the second such package that Awang had asked the Appellant to do deliver.

Pian had a motorcycle and he took the Appellant as pillion passenger to the meeting where the package containing the drugs was handed over either to Pian or the Appellant. The Appellant's instructions were to take the package across the border from Sarawak into Brunei at the Sungai Tujoh Police Control Post and deliver it to a man called Sai to whom he had delivered the previous package. He was told that Sai would telephone him with the delivery instructions. The Appellant had Sai's telephone number in his mobile phone.

The Appellant's mobile phone, taken from him on arrest, showed that during that day there had been calls or attempted calls between Pian and him at 09.41, 11.22, 13.26, 13.53 and two within seconds of each other at 14.40. He also received one telephone call from Awang at 15.05.

Later on 21 February 2005 the Appellant received a number of text messages on his phone from Sai making the arrangements. Some of these were as follows:

16:38 "You just wait at the Immigration of Malaysia, you go in after I send you SMS".

17:15 "Mat you just wait at the Immigration of Malaysia, when I arrive I'll call you, don't you go in first".

18:14 "You enter go pass the police".

18:16 "Mat I have arrived".

19:00 "Where are you now".

19:05 "Mat where are you".

There is then interposed an answer from the Appellant to Sai:

19:08 "On the way there, wait for a moment".

And finally from Sai to the Appellant:

19:21 "Don't be long as I am going home soon".

At 19:05 the Appellant kept in touch with Awang by sending one text message to him saying, "*I am with Pian now*".

Following these instructions, in the evening of 21 February 2005 the Appellant was driven to Sungai Tujoh Police Post on the back of Pian's motorcycle. On arrival at the border he was able to go through Malaysian Immigration without complying with any of the formalities. At the perimeter he made five calls to Sai on his

telephone. All failed save the last in which Sai told him that he was waiting at the garage next to the Police Control Post on the Brunei side. Following the instructions the Appellant walked towards the garage along the fence. As he walked behind the garage towards the bottom of the plan produced below Narcotics officers who were waiting in a car, arrested him at the place marked with a X. That was at about 19:45 hours.

The Appellant was handcuffed and told to kneel. According to the agreed officers' note, the Appellant was asked, "*What do you have?*" to which he replied, "*A thing like Ajinomoto to be sent to Si Sai*". At the same time he nodded down to this right side pocket. He said he had "*Two packets*". As he had indicated, the package of drugs containing two packets was found by the officers in the right inside pocket of his jacket.

The Appellant immediately cooperated with the police on his arrest and continued to do so in succeeding days. He made five statements under caution. He gave a full account of his activities concerning the package of drugs and the other people involved. It seems that as far as he was able, he gave the names and identities of the person he knows as Pian, Sai, Hj and Awang. He described his dealings with them and the drugs up to the point of his arrest. Ajinomoto is a flavour enhancer used in cooking. He said that he had been told by Awang that the package contained this substance in two separate packets.

Later it was discovered that in the archive of text messages in the Appellant's mobile phone was a list of 21 car registration numbers together with the details of the models and colours. At the end of the list were the words "*anti narcotics car nos*". Significantly, these were the numbers of cars driven by the Sarawak Anti-Narcotics Police.

The Trial

The Appellant's Evidence

The Appellant's evidence was broadly consistent with his statements and the prosecution case. There were some inconsistencies with his statements which were relied upon by the Judges to which we will refer.

The Appellant readily conceded that this was the second package of its kind which he had delivered to Sai. On the first occasion, he was paid RM\$50. He contended, but was not believed, that on the second occasion Pian was to receive the cost of the petrol but he received no payment because at the time of the arrangement with Awang he intended to travel to Brunei in any event. From beginning to end, he consistently contended that he had no knowledge of the true contents of the package which he believed to be 'something like Ajinomoto' as he had been told. He had not opened the package nor had made any further enquiries. He was shocked when he was told the packages contained drugs.

He accepted that the information obtained from his mobile phone was correct and was connected with his delivery of the package to Sai and arrangements to meet him at the Police Post. In his statements he accepted that the car registration numbers

and details were those of Narcotics officers which had been provided to him by Awang. In cross examination he accepted only that it was possible that the numbers belonged to Narcotics officers. He was not sure who sent them to him, it was possibly Awang. He denied keeping the details in his phone because he was dealing in drugs but explained that he stored the numbers as a “guide” for him to follow when buying 4 digit lottery tickets.

In one other respect the Appellant’s evidence differed from his statements. In his statement he said that the package was handed to Pian and then to him at the Miri Bus Station. In his evidence he said that the package was retained by Pian until they were near the Police Post.

The Issue below

The fact that the Appellant brought the package of drugs over the border and into Brunei was accepted by him from the moment of his arrest and throughout the proceedings. The only issue was whether he knew that the package contained drugs. If his knowledge was established a finding of guilt inevitably followed.

In these circumstances there are three relevant presumptions provided for in the Act. The first is under Section 15:

“Any person who is proved or presumed to have had in his possession more than 20 grams of Methyl amphetamine; 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 to have that controlled drug in his possession for the purpose of trafficking therein, as the case may be.”

The second and third are provided for in Sections 16(1) and (2) of the Act.

“(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.”

As we have indicated earlier the Appellant’s defence was that of innocent courier. He had been told by Awang that the package contained “something like Ajinomoto”, this he believed and he had no reason not to believe it. Consistently, from the moment of his arrest, throughout the investigations and his voluntary statements to the time when he gave evidence at trial he contended that he did not know the package contained drugs and believed it contained something like Ajinomoto as he had been told.

There is no dispute that these presumptions apply. The only issue for decision was whether the Appellant had proved to the satisfaction of the Court that on a balance of probability he did not know that the package contained drugs.

The Findings

In summary, the Judges found that the Appellant was not a truthful witness. They found it incredible that he agreed to deliver the package not knowing its contents save having been told by Awang that it was “something like Ajinomoto”. Further that it was inconceivable that the Appellant did not have any suspicion as to what the package might contain. The description he had been given was so vague as to immediately alert him to the possibility that the contents were illicit. They noted that he gave no further explanation as to what he thought the contents were. Having seen and heard him give evidence they adjudged him not a simpleton who would blindly obey instructions of Awang without question.

The Appellant’s claim that he only received the package from Pian when they reached the vicinity of the Police Control Post was contrary to his evidence in chief and his first voluntary statement. The Judges found this to be a lie to indicate a reduced opportunity of opening and examining the contents. The Appellant was also disbelieved when he gave evidence, contrary to an answer in one of his voluntary statements, that he agreed to deliver the package on this occasion without payment. The Judges found that he agreed to deliver the package for the same payment of RM\$50 that he had received on the earlier occasion.

Finally, the Judges turned to the Appellant’s explanation that he had retained the car registration numbers in his phone as a guide for buying 4 digit lottery tickets. This they found to be disingenuous and they rejected it, noting that the numbers were described in the message as “Anti-Narcotic car nos” and in his fourth statement he admitted that the numbers belonged to Malaysian Narcotics officers and were sent to him by Awang. In the same statement he said that he “felt strange” because he was unsure why Awang had given him the numbers. They also observed that he had shifted his ground in cross-examination saying that he was not sure who had sent him the numbers but Awang could have done. In these circumstances the Judges found it an inescapable inference that Awang had sent the numbers to the Appellant and that he had stored them in his mobile phone so that he could be on the lookout for Narcotics officers when he was dealing in drugs.

The Judges rejected two other submissions made at the trial. The first (repeated with a variation in this Court) was that no person knowing he was carrying drugs would make a delivery in plain sight of the police. It was such a “suicidal move” that no drug trafficker “in his right mind” would take such a risk. They found that this to be a misunderstanding of the evidence which did not show that the Appellant intended to deliver the package in full sight of the Police Booth. They noted the text message from Sai instructing him to pass the Police Control Post to meet him. Delivery was to be at the garage in the area of the Post as can be seen on the plan.

In a second submission, which is not repeated before this Court, Counsel asked the Court to infer that Sai was an agent provocateur who had lured the Appellant into a trap. This was suggested on the basis that no serious attempt had been made to locate and arrest Sai. This was rightly rejected by the Judges as a possible defence in law, but in any event there was no evidence from which it could be inferred that Sai was such an agent provocateur.

The Appeal

The Appellant's case.

Mr Shazale appears for the Appellant. Summarised, his grounds of appeal are that the Judges below erred in fact (not in law) in holding that the Appellant had failed to rebut the presumption of knowledge under Section 16(2) of the Act and that they had failed to give adequate consideration to the Appellant's explanation, taking into account all the circumstances, that he did not know at all material times that the package contained two packets of Methylamphetamine (syabu).

In support Mr Shazale submits that in rejecting the Appellant's account that he was an innocent courier the Court below overlooked, or failed to give sufficient weight, to the following matters:

- (a) That the Appellant had a basis for trusting Awang because he was a close friend of his Uncle.
- (b) That he had previously delivered a similar package for Awang to Sai in Brunei.
- (c) That the amount of RM\$50 was such a small amount as not to arouse the Appellant's suspicion. He had no idea that the value of the package was over B\$70,000.
- (d) The Appellant had no knowledge that Awang, Sai or his relative Pian were involved in the trafficking of drugs.

In support of these earlier submissions, Counsel relies, as he did below, upon the circumstances in which the drugs were to be delivered to Sai. He accepts that the Court was correct in observing that the evidence did not suggest that the Appellant intended to make the delivery in full sight of the Police Booth but argues that it was inconceivable that a person knowing that he was carrying drugs would place himself in a position making telephone calls to Sai in sight of the Police Booth as this would obviously have attracted unwanted attention of the police. These circumstances carried even greater weight because the Appellant had entered Brunei illegally.

Counsel notes that one plausible explanation of this would have been that the Appellant was unfamiliar with the area but this was not so. He was a regular traveller as he had worked in Brunei for some years and was familiar with the Control Post area.

Counsel accepts that the Court was entitled to disbelieve the Appellant's evidence but nevertheless it was bound to consider whether the explanation put forward, taking into account all the circumstances, raised a reasonable doubt as to the Appellant's guilt, or as in this case, whether the explanations were nevertheless sufficient to rebut the presumptions.

In brief he submits that if weight is given to the explanation and the circumstances the only plausible conclusion is that the Appellant was not aware of the true contents of the package and that had the Court given appropriate weight to the

whole of these circumstances, it would have been left in serious doubt and in these circumstances it ought to have acquitted.

The Grounds Considered

As we have already indicated, there is no issue that this case hinges upon the presumptions in the Act. The Appellant was carrying a package containing over 70.5 grams of the Class A drug. The burden passes to him to prove on the balance of probabilities that he did not know the nature of what he was carrying. Of course, the Judges' finding that they were unable to believe much of the Appellant's evidence including that he thought he was carrying "something like Ajinomoto" is not equivalent to a finding that he knew he was carrying an illicit substance. But an accused person's evidence in rebuttal of a presumption in this class of case must always be considered along with the circumstances in which he dealt with the drug. The circumstances are usually of great weight in the finding and may of themselves powerfully indicate whether or not the accused knew that he was dealing in drugs.

In this Appeal however Mr Shazale faced an overwhelming task and he discharged his duty in putting before the Court everything that could be said for the Appellant with dignity. In argument he was driven to concede that the Appellant had offered no explanation as to why a small amount of a commonplace product such as a flavour enhancer should require such elaborate cross-border arrangements to be made for its transport and delivery in such a clandestine manner. The submissions he advances are matters which must be taken into account and indeed were taken into account by the Judges when they considered the evidence in the case with such detailed care.

Not only did the Judges consider the evidence but also all the circumstances. These included the fact that the Appellant was holding in his mobile phone the details of the Sarawak Narcotics police vehicles. The Appellant was unable to put forward any plausible explanation of this. The one he advanced that he kept them to use as 4 digit lottery ticket numbers would be considered farcical were the situation not so serious.

Conclusion

In the result in spite of the efforts of Counsel nothing has been put before this Court which demonstrates in any way that the Judges' findings on the evidence were flawed. There was no evidence sufficient to rebut the presumptions and the circumstances otherwise indicated that this was a carefully planned clandestine operation to deliver drugs to Sai. In spite of the fact that the handover was to be at a Police Control Post the Judges' finding that Appellant knew he was carrying drugs is unassailable.

The inevitable consequence is that this Appeal is dismissed.