NOORUL SYAKIRIN BIN NORHASLAN ZACKY

AND

PUBLIC PROSECUTOR

(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 20 of 2014)

Before: Mortimer P, Leonard and Burrell JJ A.
27th of November 2014

Possession of Class A drugs for the purpose of trafficking contrary to s.3(A) CAP 27 – S.16 presumptions considered – S.114(g) Evidence Act considered – Appeals against conviction and sentence dismissed.

Mr P.Roy Rajkumar A/I C.V Prabhakaran for Appellant
DPP Pg Mohd Khairul Nizam Pg Hj Md Yassin for Respondent

Burrell, JA.:

On 19th July 2014, the appellant was convicted after trial of an offence of possession of a Class A controlled drug for the purpose of trafficking contrary to Section 3A of the Misuse of Drugs Act CAP 27 in the Intermediate Court by Judge Pg Hanani Pg Metusain. The quantity of drugs involved was 31.884 grams of Methylamphetamine. On 18th August 2014, he was sentenced to 15 years imprisonment and 10 strokes. He now appeals against both his conviction and the sentence.

It is an unfortunate feature of this case that the appellant's first appearance on this matter was on 25th January 2011 but it was 3 ½ years later before the trial finished. During that period 8 prosecution witnesses were called over 5 separate days between 2012 and 2014. The appellant was legally represented. At the conclusion of the prosecution case he elected not to give evidence in his defence.

The Prosecution Case

The following outline contains those facts upon which the judge felt able to rely having heard the witnesses and upon which she based her finding of guilt.

The incident arose out of a raid by the Narcotics Control Bureau of Room 410 of the Kiulap Plaza Hotel on 6th September 2010. 3 officers, by force, gained access to a room. At the time of entry one of the officers saw the appellant running from the bedroom area into the toilet. The appellant was naked and was carrying a red bag.

After the entry into the room the appellant was found to be in the toilet with the red bag on the floor near his feet. He was asked to whom the red bag belonged and the answered that it was his. He was asked if he knew the contents of the bag, he said that he did not. He also denied any involvement in consuming, distributing or selling drugs.

Throughout this time there was a Chinese lady on the bed in the main room. Her name was Tu Guangrong. She gave a statement at the Police Station but she was not called as a witness, she was not made available as a witness, her fingerprints were not taken, the defence did not ask to see her statement neither was it offered to them. She was not regarded as a suspect and presumably returned to China soon afterwards. In any event she played no further part in the investigation. Much of the appellant's appeal is focused on the shortcomings of the arrest and subsequent investigation insofar as it relates to this Chinese lady.

There was no dispute that the drugs were found in a plastic sachet wrapped in paper inside a sock in the red bag. Also in the red bag were items such as a mobile phone, a car key, a Bluetooth headphone, cash and a small black bag containing a digital weighing machine. The appellant denied all knowledge of the drugs and the weighing machine.

The drugs were later analysed and found to be Methylamphetamine as particularized in the charge. There was no dispute at trial, and no point is taken on appeal, that the substance seized was as particularized in the charge.

The Judge's findings

The crux of the case, and the key point taken on appeal, is that the Judge was satisfied beyond a reasonable doubt that, at the material time, the appellant was in possession of the red bag found on the toilet floor.

That finding triggered the presumptions contained in ss16(1) and 16(2) of CAP 27.

The effect of section 16 of the Misuse of Drugs Act is that anyone proved to have in his possession or custody or under his control anything containing a controlled drug or the keys of anything containing a controlled drug shall, until the contrary is proved, be presumed to have had such drug in his possession. The next presumption provided under section 16 is that 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. The presumption provided for in the section shall not be rebutted by proof that the accused never had physical possession of the controlled drug.

When considering whether or not the presumptions have been rebutted on the balance of probabilities the court must consider the whole of the evidence. If a defendant elects not to give evidence all that remains for the court to consider when making its decision on the rebuttal issue is the prosecution evidence.

On appeal the appellant has been ably represented by Mr Roy Prabhakaran who challenges the correctness of the finding of possession by reference to 5 points. We shall deal with each of them in turn.

(a) The quality of the evidence of possession

Mr Prabhakaran submits that the Judge failed sufficiently to consider a number of factual matters which could have and should have left her in doubt about the key issue of possession of the red bag.

He points out that the bag must have been in the bedroom beforehand, the same room in which "Ms Tu" had remained. He submits that, given that Tu's fingerprints were not taken and that there were unidentifiable fingerprints lifted from a piece of paper found in the bag the court should not have ruled out the possibility that Tu was the owner of the drugs in the red bag. Such a possibility would negate the finding that a prima facie case of possession had been established against the appellant.

In most cases, possession is a straightforward and common sense concept as classically referred to in the case of DPP v Brookes (1974) 2 AER 840:-

> *"in the ordinary use of the word possession, one has in one's possession whatever is to one's knowledge, physically in one's custody, or under one's physical control. This is obviously what was intended to be prohibited in the case of dangerous drugs….."*

In the present case, whether or not the appellant had exclusive possession of the bedroom, a point argued at trial, is not material. We agree with the Judge's conclusion based on the factual evidence that (a) he carried the bag into the toilet (b) it was by his feet in the toilet (c) he admitted ownership of the bag (d) he later acknowledged ownership of items in the bag such as a mobile phone and car keys and (e) the drugs were seized from inside the bag, taken together is overwhelming evidence of possession of the bag containing the drugs regardless of the shortcomings complained of and highlighted by Mr Prabhakaran concerning the police investigation of Miss Tu.

This means that (i) the presumptions were properly triggered (ii) the appellant did not avail himself of the opportunity to give evidence in rebuttal of the presumptions and (iii) on the whole of the available evidence, on the balance of probabilities, the presumptions remained unrebutted. This was the clear effect of the written judgment.

(b) Section 114(g) of the Evidence Act

This section provides as follows:

> *"114. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.*
>
> *The court may presume -*

.....(g) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it;"

Mr Prabhakaran's submission is premised on the following statement taken from his written submission namely that it was "incumbent on the prosecution to produce Tu Guang Rong as a witness in order to establish exclusive possession by the appellant and this has not been done."

The words of Sir Denys Roberts CJ in Lim Book Tak and others (CA 46, 47 and 48 of 1996) were correctly noted by the Judge.

> *"The effect of section 114(g) is a limited one. It does not mean that, if the prosecution does not call a witness, the case must necessarily fail. If the evidence which is presented is sufficient to justify a conviction, this will follow (subject of course to any defence put forward), whether or not all the witnesses who could have testified were called."*

Thus, we find this ground is without merit because (i) there *was* sufficient evidence to justify a conviction and (ii) the provision, in any event, is premised on the word "may" and not "shall". The Judge was aware of the criticism being made of the absence of Miss Tu and was aware of s.114(g). She concluded that "the decision not to call her at trial was not fatal, as the evidence presented against the defendant was sufficient to find that he was indeed in possession of the drugs in question."

This conclusion cannot be faulted.

(c) Inadmissible hearsay was relied on

Evidence was given at trial that Miss Tu had given a negative urine test, she was considered to be a prostitute and she had returned to China. Mr Prabhakaran submits that all this was hearsay evidence but was relied on by the Judge to explain why she was not called to give evidence. We reject the argument that these matters undermine the correctness of the conviction. Firstly, the fact that she had returned to China was not hearsay. Secondly, the matters came into evidence as a result of cross examination of the police witnesses and thirdly, the answers given were to explain why the girl was let go (albeit maybe prematurely) not to explain why she was not called as a witness.

(d) Fingerprint evidence

Mr Prabhakaran submits that the Judge misdirected herself on the question of fingerprint evidence, or rather the lack of it.

PW8's evidence was:-

> *"A : At first, the initial analysis it was positive, but on comparison, it was negative because of insufficient character lines.*
> *Q : So it means it was positive for fingerprint but negative to identify?*
> *A : Yes."*

The Judge said in her written reasons:

> *"The defendant admitted the red bag to be his. Apart from the digital scale and the socks, containing the drugs in question, the bag contained personal items, which he also readily admitted to be his.*
>
> *The fingerprint analysis was neutral as it came back negative due to insufficient characteritistic on the analysis material. It was not correct for the defence to contend that fingerprint analysis carried out did not match the defendant's."*

Three complaints are made. Firstly, the evidence was hearsay, secondly Ms Tu's fingerprints were not taken and thirdly, why was only a piece of paper from the red bag tested for fingerprints and nothing else?

Once again the complaints amount to criticisms of the investigation. However, they do not dilute the finding that the appellant was seen carrying the bag into the toilet. Whether or not Ms Tu's fingerprints might have been found somewhere cannot change that crucial finding.

Bearing in mind also the burden and standard of proof required to rebut the presumptions, the the absence of fingerprint evidence incriminating the appellant could not, in the context of the whole of the evidence, have any realistic effect on the Judge's decision that the presumptions had not been rebutted. The drugs were inside a sock in the appellant's red bag alongside his other belongings. An inconclusive fingerprint report advanced neither the prosecution case nor the defence case. The Judge dealt with the issue appropriately.

(5) Adverse inference against the appellant

Towards the end of her judgment the Judge said:

> *"Thus, by keeping silent at the defence stage, the defence had failed to rebut the presumption of possession on balance of probabilities, and adverse inference maybe drawn that he indeed had the offending drugs in his possession and had knowledge of its nature, beyond reasonable doubt."*

This is an entirely proper approach. The circumstances cried out for an explanation. The choice whether or not to give an explanation for the presence of drugs in his red bag is his. If he chooses to refuse to do so he cannot complain that the Judge drew an inference against him.

Mr Prabhakaran asks:

> *"Was the trial Judge right to invoke an adverse inference against the appellant when she herself clearly stated what the appellant's defence was from the line of cross examination and contents of the appellant's statement?"*

> If this question is suggesting that cross-examination and/or a written statement maybe treated, for these purposes, in the same way as sworn testimony, it is misconceived.

Our decision

We are satisfied that the decision to convict was made correctly in accordance with the law and the evidence and the appeal against conviction is dismissed.

Sentence

The Judge determined 16 years to be appropriate and reduced it by one year for the delay in the trial being concluded.

15 years would have been the minimum for 30 grams of Methylamphetamine. Mr Prabhakaran submits that when applying the guidelines in PPv Roslan Yunos (Criminal Appeal 6 of 2005) arithmetically, 16 years should only be passed when the quantity has reached 32 grams.

We do not think that a strict arithmetic approach is obligatory. The guidelines states 15 to 20 years for an amount between 30 grams and 40 grams. 16 years for 31.884 grams is plainly not wrong.

As for the delay, whilst the length of time from beginning to end was undoubtedly unsatisfactory we consider the 1 year reduction to be appropriate. Some adjournments were at the appellant's behest.

The appeal against sentence is also dismissed.

Order

The appeals against conviction and sentence are dismissed.

Mortimer, P.

Leonard, J.A. **Burrell, J.A.**