

Zulkifli Bin Abdullah

AND

Public Prosecutor

**(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 13 of 2007)**

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

4th November, 2008.

Appeal against convictions for possession of Methylamphetamine and Cannabis, the former for the purpose of trafficking. Appellant and wife disbelieved. Failure to rebut presumptions of possession and purpose. Relevance of section 117 of Criminal Procedure Code.

Mr Daud Bin Ismail of Messrs. Daud Ismail & Co. for the Defendant/Appellant.
DPP Hj Nabil Daraina bin PD Hj Badaruddin for the Public Prosecutor/Respondent.

Davies, J.A.:

On 1 October 2007 the appellant was convicted in the High Court on the following charges:

"1st Charge:

That you, on the 28th February 2005 at about 1900 hours, inside a vehicle bearing registration no. BY2393 parked in the vicinity of D'Rimba Department Store, Kg Rimba in Brunei Darussalam, not being a person authorised by the Misuse of Drugs Act, (Cap27) or the Regulations made thereunder, did have in your possession for the purpose of trafficking Class A controlled drug, to wit, 59.731 grams of crystalline substances containing 47.63 grams of METHYLAMPHETAMINE in contravention of section 3A of the Misuse of Drugs Act (Cap 27) and you have thereby committed an offence punishable under section 29 read with the Second Schedule of the said Act.

2nd Charge:

That you, on the 28th February 2005 at about 1900 hours, inside a vehicle bearing registration no. BY2393 parked in the vicinity of D'Rimba Department Store, Kg Rimba in Brunei Darussalam, not being a person authorised by the Misuse of Drugs Act, (Cap 27) or the Regulations made

thereunder, did have in your possession a Class B controlled drug, to wit, 3.297 grams of dried plant parts containing CANNABIS, in contravention of section 6 (a) of the Misuse of Drugs Act (Cap 27) and you have thereby committed an offence punishable under section 29 read with the Second Schedule of the said Act.

....."

He pleaded guilty to two other offences but defended these charges and was convicted after a trial. He now appeals to this Court against his conviction.

The undisputed facts before the Court at his trial were as follows:

1. He was the driver of a silver Audi motor vehicle which he had brought to a halt outside the Rimba Department Store.
2. He was there apprehended and a search was conducted of the motor vehicle which revealed, amongst other things:
 - (a) various plastic packets containing crystalline substances totalling 59.731 grams;
 - (b) a plastic packet containing 3.297 grams of dried plant parts;
 - (c) a quantity of plastic straws;
 - (d) a quantity of empty plastic packets;
 - (e) B\$4547.00 in cash;
 - (f) the appellant's passport in a pouch which also contained a quantity of empty plastic packets.

None of these were hidden, a point relied on by the appellant in this appeal.
3. Analysis of the crystalline substances and the dried plant parts found in the vehicle revealed:
 - (a) that the crystalline substances were found to contain, in total, 48.462 grams of methylamphetamine; and
 - (b) that the dried plant parts were cannabis.

On these undisputed facts the appellant was faced with two rebuttable presumptions. The first is contained in section 19 of the Misuse of Drugs Act which 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."

The appellant, being the driver of the vehicle at the relevant time was plainly "in charge of" it, within the meaning of section 19, as his counsel appears to concede before this Court. Consequently, unless the contrary is proved on the balance of probabilities, the appellant was presumed to have been in possession of the methylamphetamine and of the cannabis at the time of his apprehension.

The second presumption is relevant only to the first charge and arises only if the appellant fails to prove, on the balance of probabilities, that he was not in possession of the methylamphetamine. It is contained in section 15 of the Act which relevantly provides:

"15. Any person who is proved or presumed to have had in his possession more than –

.....

(g) 20 grammes of methylamphetamine;

.....

whether or not contained in any substance, extract, preparation or mixture shall, unless 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."

Consequently, if the appellant failed to prove, on the balance of probabilities, that he was not in possession of the methylamphetamine, he was presumed also to have had it in his possession for the purpose of trafficking unless he proved, on the balance of probabilities, that he did not have it for that purpose.

The principal questions for the trial judge were therefore whether the appellant rebutted the presumption that he had these drugs in his possession and, if not in the case of the methylamphetamine, whether he rebutted the presumption that he had it in his possession for the purpose of trafficking.

That these were the principal questions cannot be overstated because it appears to have been misunderstood by counsel for the appellant at trial, in the grounds of appeal and in the appellant's argument before this Court where, in each case, the appellant has contended that his evidence raised a reasonable doubt on these questions when the correct test was whether he had discharged his burden of proof, in each case, on the balance of probabilities. Moreover, the right to silence, on which the appellant relied in grounds 2, 3 and 4, is of no more than marginal relevance, given the burdens of proof upon him on each of these questions, as we will show.

We turn now to those principal questions.

Did the appellant prove, on the balance of probabilities that he was not in possession of the methyamphetamine or the cannabis notwithstanding that he was in charge of the motor vehicle in which they were found?

The appellant's explanation for the presence of these drugs in the motor vehicle was inherently incredible as the learned trial judge found. It may be accepted that the motor vehicle was not his; it belonged either to Rosmawati Bte Hj Awg Damit, in whose name it was registered, or to her brother, Roslan Hj Damit, neither of whom, it was suggested by either side, was involved in either of these offences. The former gave evidence but was unable to explain how the vehicle came into the possession of the appellant.

The appellant, in giving evidence, said that one Manap Ibrahim, a friend, arrived at the appellant's home in the vehicle on the afternoon of 28 February. The appellant and his wife were, at the time, caring for one of Manap's children. Manap spent some time at the home and then left with a friend, leaving the vehicle and its keys with the appellant. Later that afternoon, according to the appellant, Manap rang him and asked him to pick him, Manap, up at the Rimba Department Store. He said that that is how he came to be apprehended in the vehicle at that location.

Notwithstanding the burdens of proof to which we have referred, the appellant did not call Manap as a witness or explain his absence. Nor did he explain the presence of his passport in the vehicle or his failure to notice the presence of the drugs, or the other items of a suspicious nature, in the vehicle, notwithstanding their ready visibility.

The learned trial judge said this about the appellant's evidence:

"I find that the defendant testimony not to be credible and I have difficulty in believing his version of the story. Throughout the case and from the period he was arrested to the time until he was brought to NCB for further investigation, he had done nothing to show to the court to justify that he does not own the seized drugs or for that matter they belong to someone else.

As far as his testimony regarding the existence of "Manap" and "Alus", I believe they exist. However I find it difficult to believe the defendant relationship with Manap. He said he was not close with Manap and yet the former took the responsibility of looking after the latter's son "Alus"."

The appellant's wife gave evidence which was generally supportive of that of her husband. However the learned trial judge said of this:

"As for the testimony of DW2, the defendant's wife I believe she was too eager to come to the aid of her husband and find her testimony tainted."

The learned judge concluded, accordingly, that the appellant was not able to rebut the presumption against him. On the above findings, which we think fully justified, we agree with that conclusion.

Did the appellant prove, on the balance of probabilities, that he was not in possession of the methylamphetamine for the purpose of trafficking?

In ground 5 of his grounds of appeal the appellant contends that the learned trial judge had failed to direct his mind to the question whether the appellant had possession of the methylamphetamine "for the purpose of trafficking". We do not think that that is correct. The learned judge referred specifically to section 15 (g) and consequently, we think, must be taken to have applied it. While it is unfortunate that he did not specifically say so, his rejection of the appellant's testimony as not credible is sufficient to justify the inference that he concluded that the appellant had not discharged the burden of proof which that section imposed on him.

The relevance of section 117 of the Criminal Procedure Code

This section relevantly provides:

"117 (1) in any criminal proceedings any statement made by any person including a person in the custody of a police officer, whether it amounts to a confession or not or is oral or in writing, made at any time, whether before or after the person is charged and whether in the course of a police investigation or not, by that person to or in the hearing of any police officer shall be admissible in evidence and, if that person tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit.

.....

(3) where any person who is charged with an offence or officially informed that he may be prosecuted for it, he shall be served with a notice in writing, which shall be explained to him, to the following effect -

"You have been charged with/informed and you may be prosecuted for –

(set out the charge)

Do you wish to say anything in answer to the charge? If there is any fact on which you intend to rely in your defence in court, you are advised to mention it now. If you fail to do so before your trial, the court may draw such inferences, adverse to you, as it may think proper. If you wish to mention any fact now, and you would like it written down this will be done."

....."

Section 117 and its application were referred to at some length by the learned trial judge and is the basis of grounds 2, 3 and 4 of this appeal. However it is, in our opinion, of little relevance to its resolution. Indeed its only relevance appears from a statement of the learned trial judge that it *"provides a credibility test for the accused which either goes against him or for him"*. This statement appears to indicate that the

learned judge may have used this section to assist him in reaching his conclusion on credibility.

To the extent that he may have done this we do not think that he was in error though, as he had already recognized the appellant's evidence was inherently incredible and it was, accordingly, unnecessary for him to rely on any inconsistency between his statement to the police and his evidence in court.

On being served with a notice in accordance with section 117(3), the appellant said merely that he would give his explanation in court. So while it is true that his failure then to mention the involvement of Manap might be later used to impeach his credit, such failure was not of much weight in the overall assessment of the appellant's credibility. But that does not mean that the judge was wrong to take it into account.

For the reasons already given we are of the view that this appeal must fail and therefore should be dismissed.

Order

Appeal dismissed.

Power, P.

Mortimer, J.A.

Davies, J.A.