

Hong Teck Hock

AND

Public Prosecutor

(High Court of Brunei Darussalam)
(Criminal Appeal No 16 of 2014)

Hairol Arni Majid, J.
21st February, 2015.

Criminal law appeal – Section 3A of the Misuse of Drugs Act (MDA) – operation of section 16, section 2, and section 5 of the MDA – whether there is break in chain of evidence – application of section 114 (g) of the Evidence Act.

Mr. Rudi Lee Kim Boon (M/S Fathan, Rudi Lee, Annie Kon & Associates) for Appellant
DPP Hjh Atiyyah Azzahra POKLSDSLJ Awg Hj. Abas for Respondent

Cases cited in the Judgment:

Mohd Yusof Ahmad Rauf v Public Prosecutor
PP v Lim Book Tak & others [CA 46, 47 and 48 of 1996]

JUDGMENT

Hairol Arni Majid, J.:

On the 15th March 2014, the appellant was convicted after trial of an offence under Section 3A of the Misuse of Drugs Act Cap 27 (MDA), a charge for possession of Cannabis, a Class A control drug in the amount of 199.7993 grammes for the purpose of trafficking. He was sentenced to 8 years and 6 strokes of whipping.

Background of the case

The conviction arose out of a raid on the 31st July 2012 conducted by Narcotic Control Bureau officers on a house at Kampong Salambigar, Jalan Muara. Initially, an arrest was made on one Geok Hin Hung at the vicinity of the place but was subsequently released. The appellant was arrested inside the said house and found with the offending items and other utensils related to the items in the charge.

Laboratory analysis confirms the offending material contained inside 20 plastic packets to be cannabis. The trial court below admitted the notice of warning statement taken of the appellant under Section 117 (b) of the Criminal Procedure Code (CPC) in evidence.

In his defence, the defendant despite admitting to be in possession of the drugs refutes the contention that it was for the purpose of trafficking. Throughout, he maintains that some of the drugs were for his own consumption. He claimed it was at his friend's (Reginaldo) request that he purchased the drugs from one, Mr. Lim Kheng Huat whom Reginaldo had earlier arranged to get his supply. Having paid and collected the drug, he called Reginaldo to collect then but the latter never turned up. Instead he claimed Reginaldo asked him to repack the cannabis into 20 smaller consumption-size seal packets to facilitate consumption, preserve quality and prevent odor discharge.

Mr. Rudi Lee representing the appellant raised a number of issues in the appeal, which I would summarise into 6 parts, which are in the following terms:

1. *Operation of Section 16, Section 2 and Section 15 of the MDA.*
2. *The magistrate failure to consider the incomplete investigation of the NCB after the appellant had given 3 names who could be potential suspects in the case.*
3. *Failure of the magistrate to appreciate the importance of the inadequacy of the investigation.*
4. *Caution statement.*
5. *Break in the chain of causation.*
6. *Chemist Report.*

1. *Operation of Section 16, Section 2 and Section 15 of the MDA.*

The gist of Mr. Lee submission in this matters is that the appellant despite having physical possession of the Cannabis (20 clear plastic packages), it does not come within the ambit section 2 of the MDA, namely to trigger the presumption of trafficking albeit above the 15 grammes as provided under Section 15 of the Act. He impressed on the court that the magistrate's finding "*Possession of the drugs albeit temporarily to be given or delivered to another is already within the scope of the offence charges.*" is flawed and erred in law.

Mr. Lee argued that it was not for the appellant to give the drugs freely as he had never had the ownership of it to give in the first place given it belongs all along to Reginaldo. Rightly, he argued that it was Reginaldo who has the right and control of the drug not the appellant.

He said that while the appellant admitted to cutting the cannabis into 20 smaller pieces and sealed them into 20 clear plastic packets and hid them but they were only for his

convenience when consuming them. Mr. Lee contended that the prosecution has failed to establish that the requirement of Section 2 of the MDA.

Section 3A of the MDA provide as follows:

“Except as authorized by the Act or regulations made thereunder, it shall be an offence for a person, on his own behalf or on behalf of any other person, whether or not such other person is in Brunei Darussalam, to have a controlled drug in his possession of the purpose of trafficking.”

Section 2, Section 15 and Section 16 of the MDA provide for statutory presumption which operate against any person found to be in possession of the drugs which are in the following terms.

Section 2 of the MDA, Traffic means.

“(a) to sell, give, administer, transport, send, deliver or distribute or

(b) to offer to do anything mentioned in paragraph (a) otherwise than under the authority of this Act on this regulation’s made thereunder and trafficking, has a corresponding meaning.”

Section 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, 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 maybe.

Presumption of possession and knowledge of controlled drug.

16 (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) The keys of any place or premises or any part thereof in which a controlled drug is found; or*

(d) A document of title relating to a controlled drug or any other document intended for the delivery of a controlled drug, shall, until the contrary,

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 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 he accused never had physical possession of the controlled drug.*
- (4) Where one of two or more persons with the knowledge and consent of the rest has any controlled drug in his possession, it shall be deemed to be in the possession of each and all of them.*

As regards the construction of the Misuse of Drugs Act, all that Section 15 does is to lay down the minimum quantity of one of the eight drugs or combination thereof, which gives rise to the inference or presumption that the items were in possession of the offender for the purpose of trafficking. In the instant case the quantity involved is 199.7993 grammes which is far larger than the minimum requisite requirement. It follows therefore and as a matter of common sense that the larger the amount involved the stronger the inference they have and thus requires more convincing evidence to rebut it. Having said that, the presumption is always rebuttable on the balance of probability.

The presumption of trafficking operates once it is proved that the quantity of cannabis that the accused had in possession was 15 grammes or more. Accordingly, the proof of possession of the said controlled drug coupled with the presumption under section 15 would constitute prima facie case of trafficking which if unrebutted would warrant his convictions. At this stage the burden of proof would then shift to the defendant upon which he is obliged to rebut the case made out against him based on the balance of probability that the drug was for his consumption.

Other factors independent of the above, for example, the packaging of drugs possession of drug utensils (weighing scales) and whether or not the defendant as an addict would be relevant for or against the defendants. This evidence would have been weighed by the court in totality in arriving at the verdict.

Coming back to our case, the Magistrate had rightly found the appellants evidence in totality to be somewhat in consistence and this he is entitled to do. He analyses this in his judgment below as follows:

Looking back at his evidence given in Court, the defendant claimed that he bought the drugs at the request of his friend, Reginaldo, from a supplier known to him as Mr. Lim and wife. A different version was given and this assertion was not made in P21. In the statement, the defendant did, however, disclose that he bought the drugs from Mr. Lim but the drugs were for his own consumption together with Reginaldo. In his statement, he also told the recorder that Mr. Lim was no longer in Brunei but in Court he was confident that Mr. Lim was still around in Brunei.

Upon consideration of the defendant's testimony and his earlier statement, even if I accept that he bought P14B in the first place for Reginaldo as he claimed in Court, the drugs were of substantial monetary value and quantity to simple be dismissed as being for one's own consumption. Learned Counsel urged the Court to distinguish between "active" and "passive" possession in this case, the latter being the assertion in this case. From my reading of the definition of "possession" as defined in DPP v Brooks, there is simply no such difference – as long as it can be shown that the drugs in question were in one's physical custody or control, one is already in possession of it.

Further, even if I accept that the defendant was in possession of P14B he bought on behalf of and thereafter intending to give it to another person – this would certainly fall within the definition of traffic under Section 2 of the MDA. Possession of the drugs, albeit temporarily to be given or delivered to another is already within the scope of the offence charged. I therefore find that the prosecution has proven the charge against the defendant beyond reasonable doubt and he is accordingly convicted as charged.

Mr. Lee postulated that despite the fact the appellant does not dispute physical possession of the 20 clear plastic packages, it does not come within the ambit of Section 2 of the MDA to trigger the presumption of trafficking and that the Magistrate reasoning above was flawed.

I disagree with the contention made by Mr. Lee. The fact of the matter is that the appellant admitted to repacking the drug into 20 consumption-size seal packets which he claimed was done to preserve the quality and preserve odour discharge which the trial Magistrate disbelieve and this he is entitled to do. The admission by the appellant in the use of the digital scale to weigh the cannabis very much reflects an action of a trafficker. The appellant's action in repacking the cannabis in 20 exact, similar/ weight consumption size packets emphasis that these packets were meant to be sold.

The natural assumption is that for one to use the same for personal consumption, one would not go to such length to have the drug repackage in such elaborate manner

unless they were meant for others to consume and for sale. In not so many words, I believe this was what the Magistrate meant to say. The presence of weighing scale, packet sealer and empty plastic packets strengthen that finding.

Section 2 of the MDA could not be any clearer. Traffic means(a) to sell, give, administer, transport, send, deliver or distribute or ...(b) to offer to do anything mention in paragraph (a).

I believe that to bring the provision of Section 16 and Section 15 of the MDA into operation, some further steps or overt act by the appellant is needed, directed toward the action of trafficking. I believe that by having the utensils and repackaging the drug, the only inference that could be made by the Magistrate was that the appellant was trafficking.

2. *The Magistrate's failure to consider the incomplete investigation of the NCB after the appellant had given 3 names.*

Mr. Lee contended that the NCB failure to investigate the 3 persons named by the appellant alleged involved in the case was not considered by the trial Magistrate.

In not so many words the trial Magistrate did discuss this issues in his judgment (supra) and he dismisses the appellant's version of the story and Reginaldo, Mr. Lim and wife involvement in the case. Mr. Shazale Salleh representing the appellant in the trial below made a detail submission on this issue before the court. But it would appear that the magistrate believes the investigating officer's version of the events to the appellant's.

3. *The Magistrate's failure to appreciate the important in the lack of complete investigation of the NCB.*

Mr. Lee's submission is premised on the incomplete investigation by the NCB, this failure to call and investigate the 3 witnesses. He contended that this failure should trigger Section 114 (g) of the Evidence Act Chapter.

This issue was also submitted in great length by Mr. Shazale in the trial court below. I agree that the magistrate did not deal with this issue directly and I believe it cried out for an explanation.

Section 114 (g) of the Evidence Act reads:

"The section provides as follows:

114 the court may presume the existence of any fact which it thinks likely to have happened, regards being hand to common course of natural events, human conduct, and public and private business, in this relation to the facts of the particular case.

The court may presume –

(g) That evidence could be and is not produced would if produced be unfavorable to the person who with holds it.

Sir Denys Robert CJ in *PP v Lim Book Tak & others* [CA 46, 47 and 48 of 1996] said

“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 also could have testified were called.”

My finding is that there are minor issues, which does not go against the root of the conviction. I believe there was sufficient evidence for the magistrate to justify a conviction even if the magistrate had drawn an inference against the investigating officer.

4. Caution Notice

Mr. Lee raised the issue regarding the admissibility of the appellant's caution statement as he claimed that no caution was administered prior to the statement being taken. Mr. Lee also submitted few cases on this. While I am in agreement with the decision as the facts are totally different in those cases and the issues raised were entirely dissimilar to the present case.

The contention by the appellant here is entirely different. Save for saying he was in a state of shock, the appellant did sign the declaration in the statement and he was offered to make amendment to his statement but he did not do so.

As far as the inference made from the statement is concerned, there are finding of facts, which the trial court had made. Unless they are wrong in principle, rarely do appellate court interfere with such findings. As it is, I do not find there is anything wrong which would obliged me to interfere with the decision.

5. Break in chain of evidence

Mr. Lee's argument in this is premised on the fact that there was presence black stains found in various plastic packets containing the cannabis and no explanation was forthcoming about this. As well, Mr. Lee contended that no records of the movement of the exhibits from one destination to another to form the link in the chain of the evidence.

On record, there was a fingerprint lifting done on the exhibits as per the report prepared by PW13. PW12 the chemist confirms receipt of the exhibit and this was corroborated by PW10. The facts of the matter are that the black stains found in the various plastic packets were only recorded or found when they were produced in court. No mention whatsoever of the presence of the black stains by the chemist when he received it. I believe it safe to say that he found none at the time when the exhibits were handed to him. The chemist on record did not refused to accept the exhibits when they were sent to him. He is entitled to refuse to accept them if he felt the items either had been tempered with or contaminated in anyway. This he did not do. It is misconceived to suggest that the chemist would not address this issue in his mind when the exhibits were presented before him.

Given the assumption that the black stains were as a result of the chemist used in the fingerprints lifting protocol, I do not find that the absence of the evidence to confirm such finding in any way eroded the authenticity of the analyst report prepared by PW12.

As for the movement of the exhibits, this issue was not disputed in the trial below. No contentious submission was made in this issue.

6. The Chemist's report.

I'm in agreement with the argument raised by Miss Atiyyah Abas that for the appellant now to raise doubt as to the authenticity and accuracy of the chemist report given that the defence counsel in the trial below appear not to have disputed it, would put the appellate court in a difficult position. For once the chemist had been subjected to cross-examination. For another, the appellant was well represented by counsel.

In *Mohd Yusof Ahmad Rauf v Public Prosecutor*, the Court of Appeal stated:

"The true nature of the appeal therefore is an application to withdraw the appellant's agreement not to challenge the analysis of the drugs and the analyst's report and certification so as to have an opportunity to test its accuracy and reliability."

"We have come to the conclusion that there is no basis upon which we can accede to such an application"

“His statement that the exhibit was found to be Cannabis a Class B controlled drug under the Misuse of Drugs Act, is conclusive, comprehensive and final.”

Thus on this ground, I find the appellant’s argument in this regards is without merit.

Conclusion

I am satisfied that the conviction was correct in accordance with the principle of law and evidence and that the finding of facts is justified. Accordingly the appeal against the conviction is dismissed.

DATO PADUKA HAIROL ARNI MAJID
Judge, High Court