Okonkwo Ugochukwu Stephen v Public Prosecutor

[2019] MLJU 175

Malayan Law Journal Unreported

COURT OF APPEAL (PUTRAJAYA)

KAMARDIN HASHIM, STEPHEN CHUNG AND MOHAMAD ZABIDIN JJCA

CRIMINAL APPEAL NO B-05(M)-547-11 OF 2017

27 February 2019

Rozal Azimin bin Ahmad (Luqman bin Mazlan with him) (Shamsuddin & Co) for the appellant.
Faizah bt Mohd Salleh (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Kamardin Hashim JCA:

JUDGMENT OF THE COURT

[1]The appellant, a Nigerian national, was charged and tried in the High Court at Shah Alam with an offence of trafficking in dangerous drugs under the Dangerous Drugs Act, 1952 ('the Act'). The charge reads as follows:

> *"Bahawa kamu pada 12 April 2014, jam lebih kurang 10.05 pagi, bertempat di alamat No: D13A-10, Domain 3 Neo Cyber, Lingkaran Cyber Point Barat, Cyberjaya, di dalam Daerah Sepang, di dalam Negeri Selangor Darul Ehsan telah didapati memperedarkan dadah berbahaya sejumlah berat 6,532.3 gram jenis Methamphetamine dan dengan itu kamu telah melakukan satu kesalahan di bawah* seksyen 39B(1)(a) Akta Dadah Berbahaya, 1952 dan boleh dihukum di bawah seksyen 39B(2) *Akta yang sama."*

[2]At the conclusion of the trial, the learned High Court Judge ('learned trial judge') found the appellant guilty and convicted him on the charge. The appellant was thus sentenced to the mandatory death penalty as mandated under section 39B(2) of the Act.

[3]Aggrieved with the conviction and sentence, the appellant appealed to this Court. We heard the appeal on 15.2.2019, wherein at its conclusion, we unanimously dismissed it. We now give the reasons for our dismissal.

The Prosecution's case in brief

[4]Brief facts of the prosecution's case had been well encapsulated in the learned trial judge judgment. We reproduce briefly the important facts just for the disposal of the appeal.

[5]Acted on the information received, on 12.4.2014 circa 10.05 a.m., ASP Ikhwan Hilmi bin Ismail (PW2) led a team of narcotics officers from Bukit Aman to conduct a raid at a house No. D13A-10, Domain 3 Neo Cyber, Lingkaran Cyber Point Barat, Cyberjaya, Sepang ('the said house').

[6]Upon reaching the said house, PW2 discovered both the front door and the grill were locked with padlocks. PW2 instructed his men to break open the doors to gain entry into the said house. Upon entering the said house, PW2 saw the appellant standing near a bed inside the first room ('the said room') and appeared to be frightened.

[7]PW2 and his team approached the appellant and administered a caution as provided under section 37A(1)(b) of the Act in English. The appellant understood the caution. PW2 make a physical search on the appellant but did not discover anything incriminating. When requested, the appellant was unable to produce his passport except he mentioned his name to be 'Ugochukwu Enyi'.

[8]On examination of the said room, PW2 discovered one 'Body Glove' bag (P17). Upon further checking, PW2 discovered 9 plastic packages inside P17 each containing crystalline substance suspected to be dangerous drugs [P18 (1-9)]. Inside P17, PW2 recovered two electronic digital scales (P19 and P20).

[9]Inside the said room and not far from P17, PW2 discovered a box (P30), inside were two plastic packages containing crystalline substance suspected to be dangerous drugs each hidden in a “Nestle Golden Mom” blue coloured plastics (P31A and P32A).

[10]PW2 took all the items seized and the appellant to Sepang Police Headquarters where he prepared a search list (P8) and served a copy of it to the appellant. PW2 then lodged a police report (P9). Later on the same night, PW2 handed over the appellant and the exhibits to the Investigating Officer, Inspector Amrin bin Mohd Arif (PW5).

[11]On 15.2.2014, PW5 sent all the exhibits suspected to be dangerous drugs to the Chemistry Department. The Chemist, Ahmad Dahalan bin Ubaidah (PW3) confirmed that he had received all the exhibits for analysis. Upon his analysis, PW3 confirmed that the crystalline substance contained in P18 (1-9), P31A and P32A which he received from PW5 were Methamphetamine with a combined weight of 6,532.3 grammes. They were the subject matter of the charge under appeal before us. PW3 also confirmed that Methamphetamine is listed under the First Schedule of the Act. PW3’s Chemist Report was tendered and marked as P14, which can be found at pp. 42-43, Appeal Record, Volume 3.

Findings of the learned trial judge at the end of the prosecution’s case

[12]The learned trial judge had considered and accepted the evidence adduced by the prosecution as to the type and weight of the drugs, the subject matter as stated in the charge. The learned trial judge held that the appellant had custody and control of the bag (P17) and the box (P30) containing the impugned drugs. The learned trial judge accepted the evidence as to the conduct of the appellant looking agitated and frightened, under section 8 of the Evidence Act, 1950 to infer knowledge on the part of the appellant of the impugned drugs.

[13]As for the element of trafficking, the learned trial judge invoked the statutory presumption under section 37(da)(xvi) of the Act based on the weight of the impugned drugs involved which is more than 50 grammes of Methamphetamine to trigger the statutory presumption.

[14]After being satisfied that all the elements of the charge had been established, the learned

trial judge held that the prosecution had proven a *prima facie* case against the appellant. Thus, the appellant was called upon to enter his defence on the charge.

The Defence

[15]The appellant elected to give evidence under oath. The appellant was the sole witness for the defence. In his evidence, the appellant stated that he was from Nigeria. He came to Malaysia in March 2013 to study on the invitation by his friend, by the name of "Odobu". Before being arrested by the police for this case, he stayed with another friend in Lagoon Perdana Apartment, Bandar Sunway. Whereas his friend's "Odobu" stayed in the said house in Cyberjaya together with the girlfriend, "Anuthida" and her 2 children.

[16]The appellant further testified that a day before the arrest, he came to the said house and stayed there overnight upon invitation by his friend "Odobu". At the said house, he met Odobu's friends named Mbamalu, John Sesay, Ike Chris, Dollina, Okeye and Anuthida. He only know Mbamalu and John Sesay as he had met the duo by chance at a church in Puchong.

[17]The next morning, the appellant was left alone in the said house. "Odobu" told him that they were going out to buy provisionaries at the market nearby and had asked him to look after the said house. He remained in the said house and waited at the living hall while reading a magazine when suddenly the police came in after ramming the front door.

[18]He was assaulted and arrested after the police showed him the bag and the box containing the drugs. He was taken to the police station and on the way, the police took him to an apartment where he saw Mbamalu, John Sesay, Ike Chris, Okeye and Dollina had been arrested by the police.

[19]Finally, the appellant deny any knowledge of the impugned drugs found by the police in the bag (P17) and in the box (P30).

[20]After considering the appellant's version, the learned trial judge found that the appellant had not succeeded in raising a reasonable doubt on the prosecution's case. The learned trial judge also found that the appellant had failed to rebut the statutory presumption of trafficking under section 37(da)(xvi) of the Act on a balance of probabilities. The learned trial judge was satisfied

that the prosecution had proven beyond reasonable doubt the case of trafficking against the appellant as per the charge.

[21]The appellant was thus convicted and sentenced to suffer the mandatory death penalty under section 39B(2) of the Acct. Hence, the appellant's appeal before us.

The Appeal

[22]Before us, learned counsel for the appellant posited the following three (3) grounds of appeal:

(a) the element of possession was not proven by the prosecution against the appellant;

(b) failure of the learned trial judge to adequately consider the appellant's defence; and

(c) the learned trial judge erred in law and fact when his Lordship had prejudged the defence of the appellant.

Our Deliberation and Decision

[23]We had the opportunities of perusing the appeal records which include the learned trial judge's grounds of judgment and the relevant exhibits. We agreed with the learned counsel that in his judgment, the learned trial judge relied on three prime undisputed facts to fastened custody and control as well as knowledge on the part of the appellant of the impugned drugs. The facts were: (i) that the appellant appeared frightened; (ii) the appellant was all alone in the said house; and (iii) that the appellant was in close proximity to the impugned drugs in the said room of the said house.

[24]The crux of the learned counsel's complaint was mainly centered on the failure of the learned trial judge to consider other factors such as that there were others who had access to the said house, the appellant was not a tenant to the said house and failure by prosecution to call the Thai lady, "Anuthida", who was the tenant of the said house to testify in Court.

[25]The learned trial judge's analysis of the evidence of the prosecution can be found at pages 15-18, Appeal Record, Volume 1, as follows:

"12. Berbalik kepada kes semasa, pada masa SP2 memecah masuk ke dalam rumah tersebut, beliau mendapati OKT sedang berada di dalam bilik pertama berseorangan. OKT juga sedang berdiri berdekatan dengan dadah tersebut. Menurut SP2, OKT pada masa itu dilihat berada dalam ketakutan.

13.Di dalam meneliti fakta ini, saya terikat dengan keputusan Mahkamah Rayuan di dalam kes ***Mazlani Bin Mansor v. Pendakwa Raya (di atas)*** *yang berbunyi "In our judgment, the correct irresistible inference to be drawn from the circumstances just mentioned is that the 3 Appellants were so situated to the cannabis that they had the power to deal with the drugs as owners to the exclusion of all other persons and intended in case of need".*

14.Fakta bahawa OKT pada masa berkenaan berada di dalam ketakutan juga adalah boleh diterima sebagai keterangan terhadap OKT di bawah seksyen 8 Akta Keterangan 1950. *OKT hendaklah menjelaskan reaksi beliau itu di bawah* seksyen 9 Akta Keterangan 1950. *Saya merujuk kepada kes Parlan Dadeh vs PP* [2009] 1 CLJ 717.

15.Peguambela berhujah bahawa, premis tersebut boleh diakses dan/atau telahpun diakses oleh individu-individu lain selain OKT, keterangan SP2 semasa disoal balas bersetuju bahawa bilik kedua rumah itu ada orang yang menghuninya, kerana terdapat pakaian wanita dan kanak-kanak di dalamnya, tetapi tiada sesiapa di dalam bilik itu pada masa serbuan, bilik kedua itu pada masa berkenaan adalah berkunci.

16.Peguambela juga merujuk kepada Tenancy Agreement yang ditandatangan di antara tuan rumah SP4 dengan seorang perempuan bernama Anuthida Soparat dan satu orang lagi.

17.Peguambela seterusnya berhujah bahawa pihak pendakwaan gagal membuktikan yang OKT adalah penyewa tempat kejadian dan premis tersebut boleh diakses oleh individu-individu lain, maka OKT bukan merupakan satu-satu individu yang mendiami premis tersebut, dan OKT tidak mempunyai kawalan terhadap premis tersebut seterusnya OKT tidak mempunyai kawalan dan jagaan ke atas dadah yang dijumpai di bilik pertama di mana OKT berada pada masa serbuan.

18.TPR terpelajar pula berhujah bahawa pada masa SP2 masuk ke bilik tersebut dan menjumpai dadah tersebut, OKT tidak pernah mengatakan yang beliau tidak mengetahuinya, begitu juga OKT tidak pula membuat penafian kepada Pegawai Penyiasat SP5. TPR merujuk kepada kes PP vs Badrulsham bin Baharom [1988] 2 MLJ 585, *Teng Howe Sing vs PP* [2009] 3 MLJ 46 *(Mahkamah Persekutuan).*

19.Berdasarkan kepada fakta-fakta di dalam kes ini, saya bersetuju dengan peguambela bahawa akses kepada premis ini telah dan boleh diakses oleh individu-individu lain, bilik kedua juga memang dihuni oleh seseorang. Bagaimanapun fakta-fakta ini tidak boleh menafikan kawalan dan jagaan OKT ke atas dadah tersebut. Saya membuat kesimpulan ini memandangkan pada masa serbuan oleh SP2, hanya OKT yang berada di dalam rumah tersebut khususnya di bilik pertama di mana dadah tersebut dijumpai oleh SP2. OKT juga dilihat di dalam ketakutan pada masa itu.

20.OKT juga tidak menafikan kepada Pegawai Serbuan, SP2, bahawa dadah tersebut adalah miliknya. Kes-kes yang dirujuk oleh TPR di atas adalah menyokong hujahan TPR tersebut.

21.Peguambela terpelajar juga telah membawa satu isu bahawa terdapat tangkapan-tangkapan lain, iaitu seramai 6 orang

warganegara Afrika, yang menurut peguambela ada kaitan dengan tangkapan ke atas OKT. Bagaimanapun menurut SP5 tangkapan tersebut beliau terima daripada hasil tangkapan di tempat-tempat yang lain bukan di premis yang diserbu oleh SP2. Oleh itu, saya menyimpulkan bahawa tangkapan-tangkapan itu sememangnya tiada kaitan dengan tangkapan ke atas OKT ini. Percubaan peguambela untuk menggunapakai seksyen 114(g) Evidence Act *adalah tidak relevan.*

22.Berdasarkan kepada alasan-alasan di atas tadi, saya berpuashati bahawa pihak pendakwaan telah berjaya membuktikan elemen jagaan dan kawalan OKT terhadap dadah tersebut pada tahap prima facie."

[26]After reading and considering the learned trial judge analysis as above, we were unable agree with the learned counsel's complaint that his Lordship had failed to consider those three factors complained of. We observed that all factors complained of had been duly considered by the learned trial judge before he concluded that custody and control plus knowledge of the impugned drugs had been proven by the prosecution as against the appellant.

[27]On the issue of access by others and exclusive possession, we are of the considered view that there is no necessity for the prosecution to prove exclusive possession. Our view is fortified by the decision of the apex court in *Siew Yoke Keong v. PP* [2013] 4 CLJ 149 wherein Ahmad Maarop, FCJ (as His Lordship then was) stated at PP. 173-175:

"[32] This is regurgitation by learned counsel of the ground he submitted in the courts below. Learned counsel capitalized on the fact that Chantana was arrested in the second house. She was remanded but was later released. Learned counsel also pointed out the some ladies' clothings were found in the first house. He therefore contended that Chantana had access to the first house in which the proscribed drugs were found. He argued that if Chantana was in the first house, she could be the culprit. He contended that the prosecution should have called her to exclude her as having access to the house and that the failure by the prosecution to do so resulted in its failure to prove exclusive possession or occupation of the first house by Siew resulting in the failure to prove exclusive possession of the proscribed drugs by Siew. We are unable to agree with the submission. The submission by learned counsel raised the issue whether Siew was in possession of the proscribed drugs at the material date and time. It has been said that the word "possession" is one of the most difficult of the English words and that it is a vague and general word which cannot be closely defined (see *Leow Nghee Lim v. Regina* [1955] 1 LNS 200; [1956] 22 MLJ 28, per Taylor J). In *PP v. Denish Madhavan* [2009] 2 CLJ 209, this court had occasion to explain again the meaning of "possession". In that case this court held that it was inappropriate to speak of possession of an article in criminal law as exclusive possession. One is either in possession or not in possession, and that one could be in possession jointly with another or others. The court also held that to say that the prosecution of a drug case fails because there has been no proof of exclusive possession is apt to convey the wrong impression that it is only in cases where possession is entirely with one person that a conviction is possible. Explaining this Abdul Aziz Mohamad FCJ speaking for the court said at p. 217:

It is inappropriate to speak of possession of an article in criminal law as exclusive possession. *One is either in possession or not in possession, although one could be in possession jointly with another or others. To say that the*

prosecution of a drug case fails because there has been no proof of exclusive possession is apt to convey the wrong impression that it is only in cases where possession is entirely with one person, - that is, 'exclusive' that a conviction is possible. When the learned trial judge said 'The accused sought to negative the proof of exclusive possession….', *we take it that he meant no more than that the respondent sought to show that he was not in possession of the drugs because he had no knowledge of their existence and that the drugs could have been placed in his bags by some other person or persons*.

The idea of exclusivity features in the meaning of 'possession' in criminal law as one of the elements necessary to constitute possession. As Taylor J said in *Leow Nghee Lim v. Regina* [1956] MLJ 28 p. 201; [1955] 1 LNS 53:

> … It is often said that 'possession must be exclusive'. This is ambiguous. *Possession need not be exclusive to the accused. Two or more persons may be in joint possession of chattels, whether innocent or contraband. The exclusive element of possession means that the possessor or possessors have the power to exclude other persons from enjoyment of the property.*
>
> Custody likewise may be sole or joint and it has the same element of excluding others. The main distinction between custody and possession is that a custodian has not the power of disposal. The statement that 'possession must be exclusive' is often due to confusion of the fact to be proved with the evidence by which it is to be proved. It is essential to keep this distinction clearly in mind, especially when applying presumptions.

Thomson J, in *Chan Pean Leon v. Public Proseccutor* [1956] MLJ 237;; [1956] 1 LNS 17, said that 'possession' for the purposes of criminal law involves possession itself which some authorities term 'custody' or 'control' - and knowledge of the nature of the thing possessed. As to possession itself he cited the following definition in Stephen's Digest (9th edn) at p. 304, in which the exclusive element mentioned by Taylor J appears:

> *A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may by presumed to intend to do so in case of need.*

Once the elements needed to constitute possession are established, including the element of exclusive power to deal, then what is established is possession, not exclusive possession. So much for exclusive possession. (emphasis added)"

[28]Similar issue had been ventilated before the Federal Court in the often-cited case of *PP v. Denish Madhavan* [2009] 2 CLJ 209;; [2009] 2 AMR 757, where it was held:

"[14] The respondent's defence was that he had no knowledge of the presence of the cannabis in his room and therefore in law he was not in possession of it. He sought to establish his defence by relying on or resorting to evidence to show that Boy was still in occupation of the other room at the time of the raid and that another person, known as Razali or Botak, had a set of keys of the house and therefore had access to it and to the respondent's room.

[15] The question of others having access to the respondent's room was considered by the learned trial judge both after the close of the case for the prosecution and in evaluating the case after hearing the defence. The learned trial judge said that the matter of access by others was "to negative the proof of exclusive possession". Before us the respondent's counsel was candid enough as to what the respondent's aim was in seeking to show the probability of access by others as a matter negativing exclusive possession: it was to assert that the cannabis in the three bags under the bed could have been concealed or planted there by these other persons. The learned trial judge did not allow himself to be distracted by this suggestion of access by the others from the evidence that he found to exist of "exclusive" possession of the cannabis on the part of the respondent. He did, nevertheless, make findings on the evidence relating to access by others. He found on the evidence that Boy had already ceased living at the house when it was raided. As regards Razali, he found there was no evidence that Razali had a set of the keys of the house although there was evidence that Razali had been entering the house to care for a hamster that was in a cage in the common or guest area.

[16] Before proceeding to consider the reasons for the Court of Appeal's decision, we will say a few words about "exclusive" possession. It is inappropriate to speak of possession of an article in criminal law as exclusive possession. One is either in possession or not in possession, although one could be in possession jointly with another or others. To say that the prosecution of a drug case fails because there has been no proof of exclusive possession is apt to covey the wrong impression that it is only in cases where possession is entirely with one person, - that is, "exclusive" - that a conviction is possible. When the learned trial judge said "The accused sought to negative the proof of exclusive possession ….", we take it that he meant no more than that the respondent sought to show that he was not in possession of the drugs because he had no knowledge of their existence and that the drugs could have been placed in his bags by some other person or persons.

[17] The idea of exclusivity features in the meaning of "possession" in criminal law as one of the elements necessary to constitute possession. As Taylor J said in *Leow Nghee Lim v. Reg.* [1955] 1 LNS 53:

> … It is often said that 'possession must be exclusive'. This is ambiguous. Possession need not be exclusive to the accused. Two or more persons may be in joint possession of chattels, whether innocent or contraband. The exclusive element of possession means that the possessor or possessors have the power to exclude other persons from enjoyment of the property.
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> Custody likewise may be sole or joint and it has the same element of excluding others. The main distinction between custody and possession is that a custodian has not the power of disposal. The statement that 'possession must be exclusive' is often due to confusion of the fact to be proved with the evidence by which it is to be proved. It is essential to keep this distinction clearly in mind, especially when applying presumptions.

[18] Thomson J, in *Chan Pean Leon v. Public Prosecutor* [1956] 1 LNS 17, said that "possession" for the purposes of criminal law involves possession itself - which some authorities team "custody" or "control" - and knowledge of the nature of the thing possessed. As to possession itself he cited the following definition in *Stephen's Digest* (9th edn, p. 304), in which the exclusive element mentioned by Taylor J appears:

> A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the

power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.

[19] Once the elements needed to constitute possession are established, including the element of exclusive power to deal, then what is established is possession, not exclusive possession. So much for exclusive possession."

[29]It was the learned counsel's contention that mere presence and close proximity alone was not sufficient to fasten possession and knowledge on the appellant. Generally, we do not agree with learned counsel contention. In *Tan Yew Choy v. PP* [2009] 4 CLJ 245, the Federal Court observed:

[9] In relation to the cannabis charge which the prosecution relied on in s. 37(da) of the Act, we find that the learned trial judge was justified in making a factual finding of possession as understood in criminal law, based on the evidence before the court. (See the case of *Muhammed bin Hassan v. PP* [1998] 2 CLJ 170). In the present case the amount of dangerous drugs (the cannabis) exceeded the quantity specified in s. 37(da) of the Act thereby attracting the presumption of trafficking. As for physical possession, the learned trial judge accepted the evidence of PW7 that the proscribed drug was only a foot away from the appellant. On this point in the case of *Public Prosecutor v. Foo Jua Eng* [1965] 1 LNS 137 where the accused was found by the police who raided the premises to be seated in close proximity to the offending exhibit, it was held that such close proximity was sufficient to find a case to answer. As for *"mens rea"* possession the learned trial judge concluded that the appellant knew the nature of the drug. This is a finding of fact. This court will not differ from the view formed by the learned trial judge upon such an issue. In relation to the drugs (methamphetamine) found in the trouser's pocket of the appellant, it is to be noted that the said drugs were found to have been placed inside a cigarette box. The learned trial judge was therefore justified in invoking the presumption under s. 37(d) of the Act to find that the appellant was in possession of the said drugs."

[30]Coming back to the instant appeal before us, the facts that the appellant was present alone in the said house, his close proximity with the impugned drugs, his state of fear and agitated when the police found him in the room and his personal passport pictures found in the same room coupled with incriminating evidence from the landlord, Tay Kim Seng (PW4) which amounted to the irresistible conclusion that the appellant was the *de facto* tenant of the said house which justified the learned trial judge's decision in holding that a *prima facie* case had been proven against the appellant. The circumstances we just mentioned showed that the appellants' claimed ignorance of the impugned drugs in P17 and P30 could not hold waters and not credible.

[31]The evidence of PW4 was not highlighted by the learned trial judge. Nevertheless, we are of

the view that the evidence of PW4 goes to strengthen the prosecution's case and merited reproduction as follows:

"S : Berdasarkan Tenancy Agreement tersebut siapa tenant kamu?

J : Tenant ialah Anuthida Soparat dan ada satu lagi orang.

S : Siapa satu lagi orang tersebut?

J : Saya tidak tahu nama dia.

S : Kamu panggil dia macam mana?

J : Saya biasa panggil dia "Bro".

S : Lelaki?

J : Ya. Anuthida ini perempuan.

S : "Bro" ini orang apa?

J : Dia Nigerian, kulit hitam.

S : Lelaki yang kamu panggil "Bro", orang kulit hitam, dalam mahkamah ini dia ada?

J : Ya, ada.

S : Boleh tunjukkan?

J : Dalam kandang Tertuduh, baju warna putih.

S : Kamu kata ada seorang bernama "Bro" datang dengan perempuan bernama Anuthida, dan sekarang kamu camkan mana?

J : Yang baju warna putih itu.

Mah : OKT dicamkan.

……..

S : Sekarang boleh jelaskan, kamu kata kamu telah sewakan kepada Anuthida dan satu lagi orang. Bila pertama kali kamu jumpa lelaki baju putih dengan Anuthida?

J : Pada hari pertama kami sign Tenancy Agreement. S : Kunci kepada rumah ini kamu serah kepada siapa? J : Tenant directly.

S : Perempuan tersebut?

J : Ya.

S : Setelah kamu serahkan kunci ini kepada tenant tersebut kamu sewa, sebagai owner rumah kamu ada pergi melawat rumah tersebut?

J : Ya, ada.

S : Kamu kata kamu sewakan 1 Ogos 2013, sehinggalah rumah kena pecah semua, berapa kali kamu pernah lawat?

J : 2-3 kali.

S : Sepanjang kamu pergi ke rumah kamu, kamu masuk dalam rumah atau dari luar sahaja?

J : Saya hanya berdiri di luar, sebab saya hanya kutip sewa, so saya hanya berdiri di luar sahaja.

S : Bagaimana pembayaran sewa ini?

J : Kebanyakan bank-in, kalau tidak saya akan pergi sana ambil sendiri juga.

S : Siapa yang membayar duit sewa ini kepada kamu?

J : Tenant.

S : Siapa yang kamu maksudnya tenant ini?

J : Yang pakai baju putih.

S : Kamu kata ada juga instances yang akan bank-in, siapa yang akan bank-in?

J : Biasanya selepas tenant bank-in, dia akan SMS saya dia telah bank-in.

S : Siapa SMS?

J : Tenant saya.

S : Perempuan atau lelaki baju putih?

J : Lelaki.

S : Macam mana kamu pasti?

J : Saya hanya deal directly dengan dia seorang sahaja.

S : Sepanjang kamu pergi ke rumah tersebut 2-3 kali, kamu hanya nampak lelaki yang baju putih di rumah tersebut, selain daripada lelaki yang pakai baju putih ini, ada kamu jumpa orang lain dalam rumah tersebut?

J : Tiada.

S : Kamu pernah bertanya kepada beliau baju putih, tenant perempuan di mana dia?

J : Saya tak ingat, samada saya pernah tanya atau tidak.

S : Selepas kamu berjumpa dengan Anuthida pada pertama kali untuk sign Tenancy Agreement, selepas itu kamu pernah jumpa dia lagi?

J : Tidak pernah.

S : Semasa kamu buat Tenancy Agreement kamu tahu siapa yang akan tinggal di rumah tersebut?

J : Yang beritahu ialah Anuthida dan lelaki baju putih itu, 2 orang."

[32]Based on the testimony of the landlord (PW4) above quoted, we could confidently hold that the appellant was in fact the *de facto* tenant of the said house. Furthermore the set of five keys plus the access card given by PW4 to the tenant were recovered from the said house during the raid when the undisputed fact was that the front door was locked and the appellant was found alone in the said house. We are of the considered view that base on the foregoing, the issue of access by third party raised by the appellant was bereft of any merit.

[33]Coming back to the conduct of the appellant in agitating and look frightened, the learned trial judge was right when his Lordship accepted it as relevant under section 8 of the Evidence Act, 1950 which goes to impute knowledge on the part of the appellant of the impugned drugs. On

this issue of conduct and knowledge, we stand guided from the decision of the Federal Court in *Parlan Dadeh v. PP* [2009] 1 CLJ 717 wherein the apex court made the following observations:

> "[36] The law relating to evidence of conduct is thus patent. If there is no evidence to show that the conduct is influenced by any fact in issue or relevant fact as required by s. 8 then it is not admissible as it would then be an equivocal act justifying inferences favourable to the accused being drawn. If it satisfies the requirement of s. 8 it is admissible. It must be observed that the degree of proof required to establish evidence of conduct would depend on the nature of the conduct. Conduct like the flight of an accused is a more positive act and is easily established. On the other hand conduct like the accused looking stunned, nervous, scared or frightened is very often a matter of perception and more detailed evidence may be required. Once admitted the court cannot resort to any other explanation for the conduct or draw inferences on its own accord to render it inadmissible. The onus is on the accused to explain his conduct pursuant to s. 9. Such explanation must not be in their barest possible form, but with a reasonable fullness of detail and circumstance (see *R v. Stephenson* [1904] 68 JP 524). The onus may be discharged even in the course of the case for the prosecution, for example, by way of cross-examination of relevant witnesses. If not so done it can be discharged only at the defence stage. However, the evidence admissible under the section must be confined to what is necessary for the purposes enumerated. Illustration (c) to s. 9 explains the operation of this principle. It provides that when A is accused of a crime the fact that soon after the commission of the crime he absconded from his house is relevant. But the fact that at the time when he left home he had sudden and urgent business at the place to which he went, is relevant, as tending to explain the fact that he left home suddenly. The details of the business on which he left, however, are not relevant, except in so far as they are necessary to show that the business was sudden and urgent. If the explanation is accepted by the court then the inference arising from the conduct is rebutted. If it is not accepted or if the accused does not explain his conduct the inference remains unrebutted.
>
> [37] It is now appropriate to consider the rationale of the court in explaining the conduct of the accused in running away in *Abdullah Zawawi Yusoff v. PP* [1993] 4 CLJ 1 which formed the basis of the submission of the appellant. In that case the drugs were found in a house occupied by the accused, his wife and a third person. The court considered the evidence of possible access to the house by others, and in distinguishing the case from *DPP v. Brooks* [1974] 2 All ER 840, held that the conduct of the accused in running away was equally consistent with him having been in a state of pure panic even though he did not offer any explanation himself. On the other hand in *DPP v. Brooks* [1974] 2 All ER 840 the accused was in the driver's seat of a stationary van with several others. There were drugs in the van. When the police approached the van all of them ran. The conduct of the accused in running away was held against him. The difference in both the cases is that in *Abdullah Zawawi Yusoff v. PP* [1993] 4 CLJ 1 there was no evidence to show that the act of the accused in running away was influenced by any fact in issue or relevant fact within the meaning of s. 8 in view of the possibility of access to the house by others. It is therefore not admissible on this ground as it is equivocal thereby justifying an inference in favour of the accused being drawn and ought to have been so ruled at an earlier stage of the trial. The case of *Abdullah Zawawi Yusoff v. PP* [1993] 4 CLJ 1 is therefore authority only to this extent. On the other hand in *DPP v. Brooks* [1974] 2 All ER 840 there was evidence to show that the drugs were in the physical custody and control of the accused and his conduct of running away thus comes, in the Malaysian context, within the meaning of s. 8. It is therefore admissible and cannot be explained away by the court itself by offering an explanation which is consistent with the innocence of the accused. The explanation must be offered by the accused himself as required by s. 9.
>
> [38] In this case the reaction of the appellant in looking stunned or shocked upon being approached by the police is clearly

admissible under s. 8 since it has a direct bearing on the fact in issue as the drugs found were tucked away in the front of the jeans worn by him. The explanation for his reaction must therefore be offered by he himself as required by s. 9. The court cannot, on its own, offer an explanation for his reaction. However, in his defence the appellant did not offer any explanation at all for his reaction upon being approached by the police. It can therefore be validly used as evidence against him. The inference to be drawn from the evidence of conduct of the appellant against the background of the other evidence is that he knew what he was carrying (see *DPP v. Brooks* [1974] 2 All ER 840). It follows that the stand taken by the appellant in relation to the evidence of conduct is not sustainable. Be that as it may, the evidence of conduct in this case is not very significant in view of the manner in which the appellant carried the drugs on his person from which it an reasonably be inferred that he had knowledge of the drugs in his possession (see the cases referred to earlier, and, in particular, *Tunde Apatira & Ors v. PP* [2001] 1 CLJ 381 and *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337)."

[34]The appellant's explanation of his impugned conduct was that he thought the police team were robbers. This explanation by the appellant was rejected by the learned trial judge. This was due to the unchallenged evidence of PW2 that even after PW2 introduced himself as a police officer and before the discovery of the impugned drugs, the appellant was still in the state of agitated and frightened.

[35]Still on the issue of possession, learned counsel submitted that no DNA profiling and finger printing lifting was done on the drugs exhibits and other incriminating items. We hold the view that DNA and finger prints evidence is only supportive in nature and not much weight can be attached to such evidence. What is more important is the fact that the appellant was found alone and so situated to the impugned drugs that he has the power to deal with it as owner to the exclusion of all other persons, which is the case here. We find no basis of the learned counsel's complaint.

[36]On the issue that the learned judge failure to adequately evaluate the appellant's defence, we will discuss it together with the learned counsel allegation that the learned trial judge had prejudged the appellant's defence. Learned counsel argued that section 182A of the Criminal Procedure Code had not been complied with by the learned trial judge in that it was incumbent for the court to consider all evidence before it.

[37]We did not agree with the learned counsel's complaint of the two issues. We had the opportunity to perused the judgment and we observed that all the issues raised by the defence had been considered by the learned trial judge as evinced from his Lordship judgment we reproduce as follows:

28. Peguambela terpelajar berhujah bahawa pembelaan atas sumpah OKT telah berjaya menimbulkan keraguan yang munasabah terhadap kes pendakwaan, ini kerana alasan-alasan berikut:

(a) *Pembelaan OKT adalah konsisten dan benar bahawa OKT bukanlah penghuni di rumah tersebut. Perkara ini telah dibangkitkan semasa kes pendakwaan lagi. OKT berkata dia tidak mengenali orang-orang Afrika yang tinggal di rumah itu kecuali Odobu, maka pembelaan OKT bukanlah satu "bare denial" ataupun "afterthought".*

(b) *Menurut peguambela juga, adalah satu fakta yang tidak disangkal iaitu, rumah tersebut boleh diakses oleh individu- individu yang lain, selain daripada OKT, begitu juga dengan beg P17.*

(c) *Barang-barang peribadi OKT tidak pernah dibuktikan telah diambil daripada rumah tempat kejadian dan dikemukakan kepada Mahkamah, maka anggapan di bawah* seksyen 114(g) Evidence Act 1950 *adalah terpakai terhadap pendakwaan.*

29. Peguambela seterusnya merujuk kepada kes Pendakwa Raya vs Ang Kian Chai [2012] MLJU 158 *. Kerana faktor kewujudan individu-individu lain selain OKT di premis itu tidak dapat disangkal. Menurut peguambela ini bukanlah rekaan OKT semata-mata, kerana saksi-saksi pendakwaan juga bersetuju mengenai isu ini. Maka saran peguambela lagi, OKT tidak mempunyai kawalan dan jagaan eksklusif terhadap dadah yang dirampas di rumah tersebut.*

30. Menurut peguambela lagi, tiada satupun barang-barang peribadi OKT yang dirampas di premis tersebut. Barang-barang ini, menurut peguambela adalah "Independent Evidence". Selain itu juga tiada sebarang profil DNA OKT dijumpai, lalah tidak pernah dibuat oleh pihak pendakwaan.

31. Maka, tegas peguambela, tiada dibuktikan elemen possession oleh pendakwaan, oleh itu inferen di bawah seksyen 37(d) *tidak boleh digunapakai di dalam kes ini terhadap OKT.*

32. Timbalan Pendakwa Raya terpelajar pula berhujah bahawa pembelaan OKT di atas adalah bersifat penafian kosong dan "afterthought", di mana beberapa bahagian di dalam pembelaannya tidak pernah ditimbulkan atau dicabar kepada saksi-saksi pendakwaan semasa kes pendakwaan dulu.

33. Menurut TPR lagi keterangan membela diri OKT juga tidak menimbulkan keraguan yang munasabah sepertimana dijelaskan melalui kes PP vs Saimin & Ors [1971] 2 MLJ 16*. Menurut TPR lagi adalah tidak munasabah bagi OKT untuk mengatakan bahawa dadah yang sebanyak hampir 7 kilo yang bernilai beratus ribu ringgit boleh dibiarkan di rumah itu dengan hanya OKT seorang berada di dalam rumah.*

34. TPR sekali lagi mengulangi bahawa pada masa serbuan itu dibuat, hanya OKT yang berada di dalam bilik pertama rumah dan beg tersebut juga berada di dalam bilik itu juga dalam jarak 1-2 meter dengan OKT. Beg dan kotak itu juga mudah dilihat dan senang untuk dibuka.

35. Mengenai akses oleh orang-orang lain kepada rumah itu, TPR berhujah bahawa ia adalah "purely speculative" pada masa sekarang. TPR merujuk kepada kes Hooman Khanloo vs PP [2015] 5 MLJ 199 *di mana diputuskan dengan merujuk kepada PP vs Denish Madhavan* [2009] 2 MLJ 194 *bahawa "proof of possession need not be exclusive to the accused".*

Oleh itu jika possession kepada dadah tidak perlu eksklusif, maka penggunaan eksklusif kepada bilik hotel tidak perlu dibuktikan sebagai eksklusif. Seterusnya Mahkamah Rayuan memutruskan berikut:

> *"... **If exclusive use of a hotel room were a relevant factor in considering whether possession is established, it will virtually be impossible for the authorities to enforce the drug laws as it will always be open to the defence at point out, and rightly so, that at one point or another, someone else would have had prior access to the room**. Surely the hotel management itself would have had access to the room."*

36. Rakaman percakapan tangkapan-tangkapan lain di bawah seksyen 112 *juga menurut TPR tidak perlu memandangkan bahawa kesemua mereka itu bukanlah ditangkap di rumah di mana OKT ditangkap tetapi di tempat-tempat yang lain. TPR juga telah merujuk kepada kes Pendakwa Raya vs Chinemelu Chekwube Sampson* [2016] 4 MLJ 757 *di mana fakta-fakta kes adalah lebih kurang bersamaan dengan kes ini. Mahkamah Rayuan memutuskan bahawa OKT di dalam kes itu ditangkap bukan bersama-sama dengan tangkapan- tangkapan yang lain, maka tiada kelompongan diputuskan di dalam kes itu, seterusnya mensabitkan Perayu.*

……..

42. Samada pembelaan yang diberikan oleh OKT di atas telah berjaya menimbulkan satu keraguan yang munasabah di dalam ertikata prinsip-prinsip kes yang dirujuk di atas? Undang-undang tidak meletakkan apa-apa beban ke atas OKT untuk membuktikan bahawa dia tidak bersalah, jika pun terdapat beban ke atasnya, bebannya adalah ringan dan hanya pada tahap imbangan-imbangan kebarangkalian sahaja. Saya merujuk kepada kes-kes Saminathan vs PP [1955] 21 MLJ 121, *Yau Heng Fang vs PP* [1985] 2 MLJ 335 *dan Wong Chooi vs PP* [1967] 2 MLJ 180.

43. Setelah meneliti hujah peguambela terpelajar, saya mendapati isu- isu yang ditimbulkan oleh beliau itu telahpun saya putuskan di akhir kes pendakwaan yang lalu, khususnya mengenai isu kawalan dan jagaan OKT ke atas dadah tersebut. Isu berkenaan dengan DNA dan cap jari juga adalah isu remeh yang telah diputuskan di dalam kes Mazlani bin Mansor vs PP and Other Appeal (di atas), sepatutnya tidak boleh dititikberatkan secara berlebihan.

44. Manakala pembelaan OKT pula pada keseluruhannya adalah "highly improbable" dan sukar untuk dipercayai dan bersifat penafian semata-mata. Ini berdasarkan kepada alasan-alasan berikut:

(a) *OKT berkata dia baru pertama kali pergi ke rumah tersebut tetapi beliau tahu yang Mbamelu dan John Sesay tinggal di rumah itu.*

(b) *Adalah tidak logik, jika dadah itu kepunyaan orang lain, dadah itu akan ditinggalkan begitu sahaja, di tempat yang mudah dilihat dan terbuka.*

45. Saya tidak dapat menolak keterangan SP2 yang mengatakan semasa serbuan dibuat ke atas rumah itu, beliau melihat OKT sedang berada di bilik pertama seorang diri di dalam keadaan ketakutan, di mana berdekatannya terdapat beg dan kotak yang berisi dadah tersebut. Turut dijumpai juga ialah alat timbang.

46. Saya mempercayai keterangan SP2 ini sebagai keterangan yang kredibel. Tiada sebab untuk SP2 bercakap bohong

tambahan lagi di dalam kes yang membawa hukuman mati. Di dalam isu ini, saya merujuk kepada kes State of Kerala vs M.M. Mathews [1978] SCC 65*:*

> *"Court of law should judge evidence by applying the well recognised test of basic human probabilities, the observation that the evidence of officers constituting the inspecting party is highly interested because they want the accused to be convicted runs counter to the recognised principle that prima facie public servants must be presumed to act honestly and conscientiously. Their evidence has to be assessed on tis intrinsic worth, it cannot be discarded merely on the ground that being public servants they are interested in the success of their case."*

47. Saya bersetuju dengan hujahan oleh TPR secara keseluruhannya, oleh itu saya menolak pembelaan OKT di atas, dan mendapati bahawa OKT telah gagal untuk menimbulkan keraguan yang munasabah terhadap kes pendakwaan.

48. OKT dengan ini didapati bersalah dan disabitkan kesalahannya seperti di dalam pertuduhan."

[38]From our reading of the judgment, we are of the considered view that the learned trial judge had considered all the evidence and defences put forth by the appellant. We find the complaint by the learned counsel on this issue devoid of any merit.

[39]On the issue of the learned trial judge had prejudged the appellant's defence, learned counsel referred us to the grounds of judgment at page 28, Appeal Record, Volume 1, as follows:

> *"43. Setelah meneliti hujah peguambela terpelajar, saya mendapati isu- isu yang ditimbulkan oleh beliau itu telahpun saya putuskan di akhir kes pendakwaan yang lalu, khususnya mengenai isu kawalan dan jagaan OKT ke atas dadah tersebut. Isu berkenaan dengan DNA dan cap jari juga adalah isu remeh yang telah diputuskan di dalam kes* ***Mazlani bin Mansor vs PP And Other Appeal*** *(di atas), sepatutnya tidak boleh dititikberatkan secara berlebihan."*

[40]We disagree with the learned counsel submission simply because the finding of the learned trial judge was made after the defence closed its case. We observed that the defence raised during their case was nothing new than what was put forth during the prosecution's case. All the defences raised during the prosecution's case had been considered by the learned trial judge. At the close of the defence, no new issues were raised that required the learned judge to write but relying on his earlier findings on the issues raised at the end of the prosecution's case to avoid writing a lengthy judgment and repetition. We would say that it was the learned judge own style in writing his judgment and he did not err in his finding and decision on the appellant defence.

Conclusion

[41]Having regard to the totality of the evidence, the surrounding circumstances and the probabilities of the case, it was our finding that the trafficking charge had been proven beyond reasonable doubt against the appellant.

[42]For all the reasons above stated, we hold that there is no merit in the appeal. The conviction is safe and amply supported by the evidence on record. Therefore, the appellant's appeal is dismissed and the conviction and sentence of the High Court was affirmed.

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