IN THE COURT OF APPEAL MALAYSIA

(APPELLATE JURISDICTION)

CRIMINAL APPEAL NO: B-05(M)-187-05/2017 (CHN)

BETWEEN

LIANG YOUMEI (W/CHINA) **… APPELLANT**
(NO PASSPORT: E02139854)

AND

PUBLIC PROSECUTOR **… RESPONDENT**

IN THE HIGH COURT OF MALAYA AT SHAH ALAM
IN THE STATE OF SELANGOR
CRIMINAL TRIAL NO. 45A-78-08/2014

BETWEEN

PUBLIC PROSECUTOR

AND

LIANG YOUMEI (W/CHINA)
(NO PASSPORT: E02139854)

CORAM:

MOHTARUDIN BIN BAKI, JCA

ABDUL KARIM BIN ABDUL JALIL, JCA

RHODZARIAH BINTI BUJANG, JCA

GROUNDS OF JUDGMENT

Introduction

(1) The appellant in this appeal is a Chinese national, who was 29 years old according to her international passport, when she was caught with 1,529.7 grams of Methamphetamine at Kuala Lumpur International Airport's Low Cost Carrier Terminal ("Airport" for short) in Sepang. She was charged and convicted of the charge under section 39B of the Dangerous Drugs Act 1952 ("DDA" for short) by the Shah Alam High Court and her appeal against the said conviction and sentence was dismissed by us on 4/12/2018. The reasons for doing so are as follows but first we would reproduce the charge which is in Bahasa Malaysia and outline briefly the evidence adduced by the parties before the learned High Court Judge.

The charge

Bahawa kamu pada 16 Disember 2013, lebih kurang jam 2.30 pagi di Cawangan Pemeriksaan Penumpang 2 (CPP2), Low Cost Carrier

Terminal (LCCT), Balai Ketibaan Antarabangsa, Lapangan Terbang Antarabangsa Kuala Lumpur, di dalam daerah Sepang, di dalam negeri Selangor Darul Ehsan telah mengedar dadah berbahaya iaitu Methamphetamine berat bersih 1,529.7 gram dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

The prosecution's case

(2) The facts leading to the discovery of the impugned drugs were not disputed. The salient facts show that the appellant was on board Air Asia flight number AK 1655 from Hong Kong to Kuala Lumpur. Upon her disembarkation from that flight, she went to the Passengers Examination Unit 2 carrying a trolley bag (ExP29) which was not locked and a hand luggage (ExP30). These two bags were scanned by a Customs Officer on duty (PW 11) who noticed a suspicious green image on her screen monitor for the trolley bag. Even when the contents of the trolley bag (that is, woman's clothings which was subsequently tried on by the appellant and fitted her) were emptied and the said bag re-scanned, the greenish substance remained. A preliminary physical examination of the trolley bag by PW 11 also revealed something at the bottom of the trolley bag. The suspicion of PW11 was justified when upon a further and more thorough

examination by another Customs Officer (PW10), that is, by cutting open the bag's bottom, revealed a package containing crystaline substance found hidden in a secret compartment at the bottom of the bag. The chemist (PW6) confirmed that substance to be the drug and of the amount as stated in the charge. Based on these salient facts and the trite law on possession which the learned High Court Judge had listed in paragraph 12 of Her Ladyship's judgment, to wit, **Chan Pean Leon** v. **Public Prosecutor** [1956] 22 MLJ 237; **Muhammad Bin Hassan** v. **Public Prosecutor** [1998] 2 MLJ 273; **Parlan Bin Dadeh** v. **Public Prosecutor** [2008] 6 MLJ 19; **Public Prosecutor** v. **Abdul Rahman bin Akif** [2007] 4 CLJ 337; [2007] 5 MLJ 1 and **Public Prosecutor** v. **Abdul Manaf Muhammad Hassan** [2006] 2 CLJ 129, the appellant was obviously in possession of the said drugs as she had custody and control of the same.

(3) The learned High Court Judge also found that the accused had mens rea possession of the drug because it was in her luggage and based on the above consideration, she ruled that a prima facie case has been made out against the appellant and for which she had to answer. It is a finding which we need not dwell upon at length in this appeal because although the first ground in the petition of appeal states that the learned High Court Judge erred in finding a prima facie case against appellant without subjecting the evidence of the prosecution to a maximum

evaluation, that general accusation was only one of two grounds canvassed by the appellant on the said finding. The other was Her Ladyship's assumption made in paragraph 17 of the judgment that the appellant *"must have known there is something else inside P29 by virtue of the secret compartment which caused the trolley bag to have an unusual thickness."* The rest of the grounds were more focused on the defence and this is exemplified by the oral submission of learned counsel for the appellant at the hearing before us which raised three issues:

(i) The existence of the secret compartment.

(ii) Shoddy investigation.

(iii) The defence of innocent carrier and corollary thereto, the concept of wilful blindness.

We are in total agreement with Her Ladyship that indeed a prima facie case has been made out against the appellant for the unusual thickness of the bottom of the trolley bag shows concealment of the illegal substance and without hearing her defence, one would not be able to tell that she was unaware of it for that fact of concealment invites the sole and irresistable inference that she, the possessor of the trolley bag, knew its illegal content.

The defence

(4) The main thrust of the appellant's defence, which rested solely on her sworn evidence for she was the sole witness, lies with this character,

a lady called Chai Hong whom the appellant said she befriended about 6 to 7 months before her trip to Malaysia. It was this Chai Hong, said the appellant, who offered her a job as a masseur in Malaysia and who made all the appellant's travel arrangements as well as giving her the trolley bag right before her departure for her to put her personal effects in as a replacement for a hand luggage which she had wanted to use to carry them. As noted by the learned High Court Judge in her judgment at paragraph 24 thereof, the appellant claimed that it did not occur to her to examine the said bag which she decided to use because it was a trolley bag and easier for her to handle and nor did she notice that the trolley bag was heavy because it was her first time travelling out of China.

(5) Learned counsel for the appellant made much of that last contention, submitting that the appellant was a village girl who did not know that to work in Malaysia she needed a work permit and totally trusted Chai Hong who told her that upon her arrival here she was to call her and she would then tell the appellant who would fetch her from the Airport. However, the name and contact details of that person was not given to her by Chai Hong. The appellant's accommodation as arranged by Chai Hong would be at "*NILAI spring gilf and country club hotel*" with the address given as per a message sent to her handphone by Chai Hong which the appellant said she could not understand because the name was written in

Roman alphabet but Chai Hong instructed her to just show that message to the taxi driver. A subsequent message corrected the word 'gilf' to 'golf' (see page 201 of Volume 3C of the Appeal Record). We noted that there is a contradiction in her evidence here because earlier she said a contact person appointed by Chai Hong would fetch her from the Airport. In cross-examination she also said if that contact did not turn up she would look for her own accommodation and employment here. We must also state at the outset that for a village girl who has never been out of China, such a statement shows confidence which was more in sync with a seasoned overseas traveller.

(6) The defence also tendered her caution statement (Ex D35) through the Investigating Officer (PW13) and this was recorded just two days after her arrest. In that statement she said basically the same thing, that is, that Chai Hong passed her the trolley bag but she never mentioned her by name in that statement and only referred to her as a friend although she said in her evidence in court that she did mention that name during its recording. However we noted that the Recording Officer was never called by the defence to confirm that this was so. Most tellingly she said in the said statement that the purpose of coming here was to visit, not to work. When we examined her booking with Air Asia (ExP21 at page 329 volume 3D of the Appeal Record) her flight back to Hong Kong was on the

19/12/2013. This shows that her trip here was only for 4 days and therefore she was obviously lying when she said in her sworn evidence that her purpose of coming here was to work. Another point, though not a major one, raised in her defence is that the appellant first said in her examination in chief there were two of Chai Hong's telephone numbers stored in her handphone but later in cross-examination said there were three. From these evidence it is obvious that the appellant was raising the defence of an innocent carrier and it is trite law that such a defence must be examined together with the concept of wilful blindness (see for instance, **Hoh Bon Tong** v **Public Prosecutor** (2010) 5 CLJ 240, **Aminata Sanoh** v **Public Prosecutor** (2015) 1 LNS 247).

(7) Having examined her oral testimony, the comments we made above and considering the contradiction in the oral evidence vis a vis the caution statement as well as the omission to state in the latter Chai Hong's name, the defence of innocent carrier was rightfully rejected by the learned High Court Judge. It is patently clear to us that the appellant was being wilfully blind for no one would have given an all expenses trip to Malaysia for a holiday or even for work (which we had said was improbable because her trip here was for 4 days) without any strings attached. Even if it was true that she was just a village girl who never travelled overseas, that alone makes scant difference to the above

conclusion because she was no country bumpkin as she was gainfully employed as a factory worker albeit with just a primary education as claimed by her in her caution statement. The fact that she was willing to travel all the way to Malaysia shows confidence which belies her contention of being a village simpleton. Furthermore, as stated by the Federal Court in **Munuswany Sundar Raj** v **Public Prosecutor** (2016) 1 CLJ 357 ignorance simpliciter is not sufficient to let an accused person off the hook as otherwise every other accused person will allude to that defence. The mere fact, as rightly raised by the learned High Court Judge that the appellant was calm or never tried to escape upon the discovery of the drug was of no value to her defence of being an innocent carrier because the place where she was detained was a highly-monitored area where escape was virtually impossible (see **Teh Hock Leong** v **Public Prosecutor** (2010) 1 MLJ 741). What is also glaring in its absurdity is that despite never being trained as a masseur she decided to come here to work as one for the appellant admitted that she had no such experience as one. Further, the weight of the drug was not just a few grams. The nett weight alone was more than a kilogram and a half. Surely when she was given the empty bag she could tell that it was heavier than it should be and thus should have been alerted or suspected that something was amiss. Again this shows wilful blindness on her part even if we could excuse the fact that she did not make a thorough physical examination of

the trolley bag. As for the point raised by counsel to dispute her knowledge of the drug by reason of the fact that the trolley bag was not locked, we say that it takes more than just an unlocked bag to show absence of knowledge. Otherwise drug peddlers or drug syndicates would simply take their chances by bringing or getting their drug mules to bring drugs into our country in unlocked bags to escape convictions.

Before concluding, we would in fairness to the defence consider the other points raised in the submission of learned counsel for the appellant and the first of that relates to the alleged shoddy investigation in this case.

Shoddy investigation

(8) There were two Customs officers assigned to investigate this case. The first was PW13 and the second, PW14, who took over the duty after PW13's transfer to Sabah. However PW13 agreed in his cross-examination that he was in charge of the overall investigation into the case. He only handed over his duty to PW14 on 2/11/2015 which was about 7 months before the trial commenced on 29/6/2016. There are a few aspects to this allegation of shoddy investigation and one of it is that PW13 did not investigate whether there was indeed a reservation for the appellant at the said Hotel. We do not find merit in this contention because the fact about the reservation only emerged in the sworn testimony of the appellant and it being a point raised in her defence, there was absolutely

no hindrance for the defence itself to subpoena a relevant witness from the Hotel to tender evidence of such reservation, if indeed there was one. In this regard a salutary point to remember is that the prosecutions duty is only to adduce evidence essential to the unfolding of the prosecution's case and the said reservation definitely does not fit into that category of evidence. The aforesaid position of the law has been reiterated by the Federal Court in **Ghazen Hozouri Itassan** v **Public Prosecutor** (2018) 6 CLJ 111 at paragraph 49 of the judgment which is reproduced below together with paragraphs 48 and 50 for a better understanding of the context in which it was said:

> *[48] The law pertaining to s. 114(g) of the Evidence Act is settled. Under s. 114(g) of the Evidence Act 1950, the court may presume that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it. The usage of the word 'may' gives the discretion to the court whether or not to invoke the adverse inference to a given set of facts. It is not a mandatory inference. To draw an adverse inference against the prosecution, the court must be satisfied that the witness, the prosecution purposely withholds evidence which is possessed and which was always available, and that what the prosecution did was done with an ulterior motive to frustrate the defence. (Nanda Kumar Kunyikanan & Anor v. PP [2011] 8 CLJ 406).*

[49} The aforesaid authority above set out is the correct position of the law, that is, court will not invoke an adverse inference against prosecution if it believes that the facts and/or the prosecution's reasons for not calling the supposed material witnesses show no cause for it. Moreover, the prosecution only needs to produce witnesses who are necessary in the unfolding of its complete narrative, that is, to prove the essential elements of the crime and in this case, custody, control, and knowledge. Applying the above principles to present case, we are satisfied that there were not evidence to suggest even the slightest inkling that the prosecution withheld testimonies by Javad @ Hasan Tiren and Samaneh Momen in a deliberate scheme to impair the truth or frustrate the appellant's defence.

[50] Further, in the case of Siew Yoke Keong v. PP (supra) this court had succinctly laid down that witnesses for prosecution are indispensable only insofar as they are necessary in establishing a prosecution's case beyond a reasonable doubt. Thus, any calling of witness beyond that minimum requirement is within prosecutorial discretion. In the end, it is the sufficiency of the evidence that matters. As long as there are no unsatisfactory features or gaps in the prosecution's case, an order of adverse inference is not imperative. It is our view, on the facts of this case,

adverse inference under s. 114(g) of the Evidence Act, could not be invoked against the prosecution. (emphasis added)

(9) The other aspect is the Investigating Officer's failure to investigate with the Chinese Embassy whether Chai Hong is a genuine person. With respect, when there was just a name (not even a full name) given, without any other personal details such as address, work place and given the population of China (not just a small village in Malaysia), as well as the discrepancy in evidence of whether she had two or three handphone numbers such a failure is not just excusable but is infact not even fit to be categorised as one. Thirdly, it was also submitted that the Investigating Officer failed to give a translation of Lampiran C to ExP18 which is the 494 messages in the appellant's handphone which was in Mandarin (pages 199 to 258 of Vol 3C until page 325 of Vol 3D of the Appeal Record). Again with respect, the defence itself never pointed to any of the messages that supports its defence of innocent carrier and likewise there was nothing stopping them from providing their own translation of the messages at the defence stage, even if it is true that the defence was not served with the report before trial for the absence of the translation per se does not in our view created a gap in the prosecution case as submitted by learned counsel before us. Surely, if it is indeed true as submitted by learned counsel that there maybe messages favourable to the appellant,

there was nothing to stop the appellant from highlighting the same in her evidence in court. This was definitely not done.

(10) Furthermore, and this is the crucial rebuttal to that contention, a Custom's Officer Lim Kee Yee (PW12) was called to testify about the contents of the messages and in his evidence at page 68 of the Appeal Record Vol 2A, he said what he could deduce from the said messages was that the appellant had a lot of family problems such as her offspring moving away from home as well as marital ones. The defence had the golden opportunity to cross examine the witness as to the so called favourable messages but did not. He was instead asked about Lampiran B to the forensic report (Ex P18) which report was based on the examination of the appellant's handphone seized during the arrest. Lampiran B is the data on the outgoing and incoming calls from the said handphone and PW12 said there was a name 'Chai Hong' stated therein (at page 191 of AR Vol 3C) and another name Hong Jie (at page 193 of AR Vol 3C) which the appellant said was one and the same person. The fact that the witness said that he had focused on that Lampiran C and not Lampiran B cannot be prejudicial to the appellant as submitted by the learned counsel because that was just the log data on the calls. PW13 admitted in cross-examination that he did not investigate on the calls which was made or received by the appellant two to three days before her

arrest but he did explain in re-examination that these were international numbers without any caller identification. PW14 in turn said he did not investigate on the details in the forensic report because the appellant never mentioned any name to him during the course of his investigation and likewise the said investigation on the data was hampered because these were international telephone numbers. PW13 also confirmed in his re-examination that the appellant never mentioned the name Chai Hong or Hong Jie during his investigation and the truth of this evidence can be gleaned from the fact, as stated earlier, that the appellant never mentioned these two names in her caution statement. After all the handphone number belonging to Chai Hong was pointed out by PW12 in his testimony.

(11) For the record PW13 did also say in re-examination that he did not investigate the names of the contact in the appellant's handphone because he said there were just numbers without any names. There was therefore no issue of drawing an adverse inference against the prosecution for failure to provide the translation. To accede to the argument of learned counsel that the Investigating Officer must investigate all the contact numbers in the forensic report would be to place an impossibly high burden on the prosecution – it would be proof beyond a shadow of a doubt and not beyond a reasonable doubt! We must also

say that even if Chai Hong is not a fictitious person, it does not mean on the facts of this case and given the weak defence raised (for the reasons as discussed earlier) that the appellant had no knowledge of the drugs that was concealed in the trolley bag she was carrying.

(12) As for the element of trafficking, her counsel had also submitted that the mere act of carrying does not constitute the offence. In this regard, the learned High Court Judge had used the definition of trafficking under the DDA, which includes 'carrying' as the reason for finding that the appellant was trafficking in the drug. Learned counsel submitted that this finding was wrong, citing the decision of the Privy Council in **Ong Ah Chuan** v **Public Prosecutor** (1981) 1 MLJ 64. This decision was in respect of Singapore's Misuse of Drugs Act 1973 in which the word 'traffic' is defined under section 2 thereof but does not include the word çarrying'. The section reads as follows:

> *'traffic' means –*
>
> *(a) to sell, give, administer, transport, send, deliver or distribute; or*
>
> *(b) to offer to do anything mentioned in paragraph (a) above, otherwise than under the authority of this Act or the regulations made thereunder, and ' trafficking' has a corresponding meaning.* (emphasis added)

The Privy Council held that 'transport' is not used in the sense of mere conveying or carrying or moving from one place to another but in the

sense of doing so to promote the distribution of the drug to another. It also held that:

> *" As a matter of common sense the larger the quantity of drugs involved the stronger the inference that they were not intended for the personal consumption of the person carrying them, and the more convincing the evidence needed to rebut it.*

Of course the definition under our DDA of 'trafficking' also includes the word 'transporting' besides 'carrying' but in the context of this case the appellant was not just transporting the drug but carrying it in the trolley bag. And the common sense approach in **Ong Ah Chuan's** case (**supra**) as held above applies for the large quantity of the drug found gave rise to an inference that it was not for her own consumption, which inference she has failed to dislodge. Furthermore, in **Munuswamy's** case (**supra)** where the appellant, an Indian national, was also caught with drugs at Kuala Lumpur International Airport which he carried in two boxes from Chennai on a flight from New Delhi Airport, the Federal Court said in no uncertain terms at paragraph 14 held that:

> *"[14] The ingredient of trafficking was established when the appellant carried the drugs from New Delhi airport to Kuala Lumpur (see s.2 of the Act)."*

We also drew strength for the conclusion above from the Federal Court's decision in **Public Prosecutor** v **Herlina Purnama Sari** (2017) 1 MLRA 499 where the respondent was similarly caught with dangerous drug in her luggage at the Airport and where her earlier conviction and sentence under section 12(2) of the DDA entered by the High Court and affirmed by the Court of Appeal was reversed by the Federal Court. She was convicted and sentenced as originally charged under 39B of DDA by the Federal Court. Given the similarity in the facts, we are moved to reproduce the relevant excerpt of the said judgment of the apex court below to end this judgment of ours:

> *"We are of the view that whether or not a person is a trafficker within the definition of section 2 of the Act is dependent on the facts and circumstances of a given case. In this case, it is not in dispute that when the respondent was arrested she was carrying the luggage bag which amongst other things contained the impugned drugs. The respondent was apprehended in the act of carrying from one place to another a large amount of dangerous drugs. It is in evidence that the respondent was unaccompanied by any person when she carried the luggage bag. The luggage bag was registered in the respondent's name when she checked in at the Air Asia check-in counter. The impugned drugs were found hidden in the two boxes. We are of the view that the manner in which the impugned*

drugs were concealed in the luggage bag showed that the respondent knew the existence of the drugs there, and evinced the intention of and careful planning by the respondent to conceal the impugned drugs to avoid and escape detection (PP v. Abdul Rahman Akif (2017) 1 MLRA 568 and Teh Hock Leong v. PP (2008) 1 MLRA 548."

Thus, based on the strength of these cases and the ones cited earlier as well as the considerations made above, we are of the view that the learned High Court Judge had rightly found the accused to have mens rea possession of the drug and was trafficking in the same. Her appeal was therefore dismissed for she was rightly convicted and sentenced to death by hanging for the said offence.

Date : 23 January 2019

signed
RHODZARIAH BINTI BUJANG
Judge
Court of Appeal Malaysia
Putrajaya

Note: This copy of the Court's Grounds of Judgement is subject to editorial revision.

Parties appearing:

For the Appellant:

Encik V. Jayamurugan
Messrs Jayamurugan Vadivelu & Partners

For the Respondent:

TPR Dhiya Syazwani Izyan binti Mohd Akhir,
Jabatan Peguam Negara

Cases Referred to :

1. Chan Pean Leon v. Public Prosecutor [1956] 22 MLJ 237

2. Parlan Bin Dadeh v. Public Prosecutor [2009] 1 CLJ 717; [2008] 6 MLJ 19

3. Public Prosecutor v. Abdul Rahman bin Akif [2007] 4 CLJ 337; [2007] 5 MLJ 1

4. Public Prosecutor v. Abdul Manaf Muhammad Hassan [2006] 2 CLJ 129

5. Muhammad Bin Hassan v. Public Prosecutor [1998] 2 MLJ 273

6. Hoh Bon Tong v Public Prosecutor (2010) 5 CLJ 240

7. Aminata Sanoh v Public Prosecutor (2015) 1 LNS 247

8. Munuswany Sundar Raj v Public Prosecutor (2016) 1 CLJ 357

9. Teh Hock Leong v Public Prosecutor (2010) 1 MLJ 741

10. Ghazen Hozouri Itassan v Public Prosecutor (2018) 6 CLJ 111

11. Ong Ah Chuan v Public Prosecutor (1981) 1 MLJ 64

12. Public Prosecutor v Herlina Purnama Sari (2017) 1 MLRA 499