COURT OF APPEAL MALAYSIA

(APPELLATE JURISDICTION)

CRIMINAL APPEAL NO: B-05-20-05

BETWEEN

DIANA NELSON TANOJA ... APPELLANT

AND

PUBLIC PROSECUTOR ... RESPONDENT

CORAM: Tengku Dato' Baharudin Shah bin Tengku Mahmud, JCA

Datuk Sulong Matjeraie, JCA

Dato' Ahmad Haji Maarop, JCA

JUDGMENT OF THE COURT

(1) This is the judgment of this Court.

(2) The appellant, Mr. Diana Nelson Tanoja, a Filipino, was convicted and sentenced to death by the High Court at Shah Alam, Selangor Darul Ehsan after a full trial where he was found guilty of trafficking in 508.6 gm of cocaine at 7.45 a.m. on 22nd August, 2002. The Appellant is now appealing against the conviction and the mandatory sentence imposed.

FACTS OF THE CASE

(3) The Appellant was on the flight from Amsterdam reaching Kuala Lumpur International Airport (KLIA) at the early hours of the morning of 22nd August, 2002. He collected his luggage at KLIA Carousel 'D' at the baggage collection area. He was observed to be carrying a black brief case (Exhibit P7) in his right

hand and a paper-bag in his left hand together with a back-pack (P14) on his shoulder. The Appellant was detained for a random check by ASP Maidu bin Abu Bakar (PW3) who escorted him to the Narcotics Office at Level 3 KLIA. In the presence of the Appellant, his brief case, back-pack and the paper bag were examined at the said Narcotics Office. When the back-pack and the paper bag were being examined, the Appellant appeared normal and composed. Nothing incriminating was however found therein. In his possession, the Appellant also had his passport (P26), his air ticket (P27) and a Customs & Excise Department's declaration form (P28).

(4) The Appellant's black brief case (Exhibit P7) was examined and in it clothing such as 'T' Shirt, stockings and underwear were found (exhibits P8, P9, P10, P11, P12 and P13). The Appellant was queried as to why those items were not placed in the back-pack. No logical answer was given by the Appellant who began to turn pale making the

examining officer suspicious. This resulted in PW3 making a more thorough examination of the brief case.

(5) PW3 found stitches sewn untidily at the bottom of the brief case. He cuts open the said stitches and found 2 compartments on both sides of the brief case into which had been packed whitish powdery and lumpy substance (see photographs marked P15A and P15C) suspected to be drugs.

(6) The exhibits were seized and a search list prepared and served on the Appellant (P17). The exhibits were subsequently handed over to the Investigating Officer of this case, Inspector Wan Mazlan (PW5).

(7) Acautioned statement (P38) was recorded from the Appellant on the same day at 3.45 p.m. by Chief Inspector Lee Chee Yong (PW6). P38 was admitted as part of the prosecution's evidence after a *voire*

dire was held to determine its admissibility. The learned High Court Judge, in his Ground of Judgment, said that he was entirely satisfied that P38 was made voluntarily by the Appellant and that there was no inducement, threat or promise for making the statement.

(8) The whitish powdery and lumpy substance was sent by PW5 to the Chemist, Nazarudin (PW4) on 26th August 2002 for analysis. PW4 confirmed, upon analysis that the said whitish powdery and lumpy substance was found to be cocaine with a net weight of 508.6 gm.

FINDING OF THE HIGH COURT JUDGE

(9) At the close of prosecution case, the learned trial Judge was satisfied that the prosecution had proved a *prima facie* case on the charge and called upon the Appellant to enter his defence.

(10) The Appellant gave his evidence under oath in the witness box. Based on the testimony of the Appellant in cross examination and his admission in his statement made in exhibit P38, it was the finding of fact made by the learned trial Judge that the Appellant had at all material times full knowledge of the drugs in P7 and the nature of the drugs, in that they were prohibited drugs, even though he might not have knowledge as to the type of drugs in his possession, that is, whether it was cocaine or otherwise.

(11) Therefore it was the finding of the learned trial Judge that actual possession of the drug has been established beyond a reasonable doubt by the prosecution without having to invoke the presumption under s. 37(d) Dangerous Drugs Act 1952.

(12) The quantity of cocaine in the possession of the Appellant is large; 508.6 grammes. It is more than 12 times the minimum rebuttable presumption of

trafficking of 40 grammes or more of cocaine as prescribed under s. 37(da)(ix) Dangerous Drugs Act 1952.

(13) The Appellant has not produced any evidence to rebut the presumption on the balance of probabilities. Neither did the Appellant testify that he was a drug addict nor did he say that the cocaine was for his own consumption. On the contrary, the Appellant testified that the drug was meant for one "Alhadjie" in Bangkok from whom he will be receiving US$3,000.- to US$4,000.- upon delivery of the same.

(14) He failed to rebut the presumption under s. 37(da)(ix) Dangerous Drugs Act 1952.

(15) The significant point to note here is that the Appellant brought the drug from Amsterdam to Kuala Lumpur in P7 on a MAS flight with custody, control and actual knowledge of the drug.

PETITION OF APPEAL

(16) The Appellant filed his petition of appeal on 15th March 2006. There were 11 grounds included in the petition of appeal but at the hearing on 17th June, 2008 learned counsel for the Appellant filed into this Court an undated but duly signed skeletal submission. In it only three broad points were raised, *viz*:-

(i) Admissibility of Statement made under s. 37A(1) Dangerous Drugs Act 1952;

(ii) Possession;

(iii) that the learned trial Judge had prejudged the issue before hearing the submission.

(17) In his argument before us, learned counsel condensed his argument in the three broad points outlined above. We shall deal with these three broad points separately.

(i) ADMISSIBILITY OF CAUTIONED STATEMENT

UNDER THE PROVISION OF S.37A DANGEROUS DRUGS ACT 1952

(18) It is the contention of the learned counsel of the Appellant that there was nothing in the record to say that his client was offered or given a Tagalog' (the mother-tongue of the Appellant) Interpreter before the cautioned statement was recorded. In fact it was argued that the Appellant's request for a Tagalog' Interpreter was never entertained. Learned counsel suggested that the Appellant did not speak good English for he could not even understand the words "not obliged" and "whether". Hence it was argued that the issue of the utmost importance is the "understanding of the caution".

(19) Secondly it was alleged that when the Appellant was inside the Kuala Lumpur International (KLIA) Office for three (3) hours no drink or food was given to him.

(20) Firstly we will deal with the question pertaining to

language used. This argument is a non starter. Chief Inspector Lee Chee Yong, the first witness in the Trial within a Trial (TWT.PW1) told the Court at page 75 of the Appeal Record as follows:-

> "Saya berkomunikasi dengan saspek dalam Bahasa Inggeris. Dia faham apa yang saya maksudkan. Beliau faham apa saya cakapkan. Saya ada tanya pada saspek samada beliau mahu seorang jurubahasa Filipina. Beliau kata tidak perlu kerana beliau fasih cakap Bahasa Inggeris."

(Our translation):

> "*I communicated with the suspect in the English language. He understood what I meant. He understood what I said. I did ask the suspect whether he wanted a Filipino Interpreter. He said no need as he speaks fluent English.*"

(21) From the above it is very clear that the Appellant has

confirmed that he can understand and speak the English language fluently.

(22) The fact that the Appellant could communicate in English was further confirmed by ASP Maidu bin Abu Bakar of the *Unit Operasi Urusetia KPN Tatatertib* who also gave evidence in the Trial within a Trial as Prosecution Witness No. 2 - (TWT.PW2). At page 91 of the Appeal Record it reads:-

> "Saya tidak tanya saspek samada beliau perlu Jurubahasa Tagalog oleh kerana saspek dan saya bercakap dalam Bahasa Inggeris dan dia fasih Bahasa Inggeris."

(Our translation):

> *"I did not ask the suspect if he needed a Tagalog Interpreter as we spoke in English and he is fluent in the English language."*

(23) It can also be seen in the cautioned statement (P38) found at page 676 of the Appeal Record that at page

677 the appellant chose to speak in English when asked as to what language he would like to speak. An excerpt of the accepted cautioned statement at page 2 shows as follows:-

> "Q - In what language would you like to speak?
>
> A - English."

(24) Further in the cross examination during the Trial within a Trial, the Appellant told the trial Court that when he was in Amsterdam he spoke in "Broken English". This suggests that the Appellant can understand and speaks English.

(25) The learned trial Judge in accepting the cautioned statement said at page 638 of his Grounds of Judgment:

> *"The cautioned statement (P38) was received as part of the prosecution's evidence, after a trial within trial to determine whether it had been*

made voluntarily by the accused. On the evidence before me, I was entirely satisfied the said statement was voluntarily made by the accused. I was entirely satisfied there was no inducement, threat or promise for making the statement. I was also satisfied that the accused was indeed able to communicate with SP6 in English, and the absence of a Filipino interpreter did not render the statement of the accused inadmissible in law."

(26) This is a finding of fact by the learned trial Judge. The purpose of having a trial within a trial is to determine if the alleged statement was made voluntarily with no possible inducement, threat or promise. If a trial Judge has, after hearing all the testimony, come to a conclusion that the statement was made voluntarily, an appellate Court should be slow in interfering with such finding unless it can be shown that such finding was flawed with a distinct material error of principle. Having regard to the general principles applicable to *voire dire* hearing and in the absence of a distinct

and material error of principle we are reluctant to interfere with the finding of fact by the learned trial Judge. It is therefore our considered view that the ruling on the admissibility of the cautioned statement (P38) by the learned trial Judge was a correct one.

(27) There is not even an iota of truth on the allegation by the Appellant that he was not given food or drink during the three-hour period he was at the KLIA. Inspector Wan Mazlan bin Wan Abdul Rahman (TWT.PW3) has testified at page 93 of the Appeal Record that the Appellant was given food and drink which the Appellant duly consumed. This evidence though challenged, albeit casually, remained intact.

(ii) POSSESSION

(28) It is common ground that the Appellant had three pieces of luggage including P7. Learned counsel for the Appellant was quick to remind this Court that for possession to be proved, knowledge must be proved

as well. The Appellant testified that when the police were checking his luggage they discovered white powder in P7 which was given to him at Amsterdam airport. He claimed that he did not know what the white powder was.

(29) The Appellant testified that he frequently travelled overseas. In one of his travels he met Ali Haji ('Alahadjie') for the first time in Bangkok on 7th August 2002. Alahadjie bought him an air ticket to tour Ecuador and asked him to go to Amsterdam to meet two black guys and 2 Caucasians. Alahadjie told the Appellant that a bag would be given to him at the Amsterdam airport but did not say what the contents of the bag were. In return Alahadjie would give him between US$3000/- and US$4000/- if he met the 2 black guys and two Caucasians.

(30) On 7th August 2002 the Appellant left Bangkok for Amsterdam from where he took a flight to Ecuador and returned to Amsterdam on 20th August 2002.

(31) On 21st August 2002 at about 8 a.m. the Appellant was at the Amsterdam airport, on transit from Ecuador to Bangkok. His flight to Kuala Lumpur was scheduled at 12 noon. At about 10.30 a.m. he met 2 black guys and 2 Caucasians at the airport and after few formalities he was given P7. Upon being asked as to the contents of the bag, they told the Appellant to just take P7 and pass it to Ali Haji (‘Alahadjie) in Bangkok. They stayed together at the airport until the Appellant boarded the plane at 11.45 a.m.

(32) There is no dispute that P7 was in the custody and control of the Appellant from Amsterdam airport right up to the time of his arrest at the baggage collection area at Carousel D, KLIA on 22nd August 2002 at about 7.45 a.m.

(33) Further there is also no dispute that 508.6 grammes of cocaine were found concealed in two compartments,

one on each side of P7 upon examination of the same by PW3.

(34) With the cautioned statement (P38) being held admissible by the learned trial Judge, the argument of learned counsel that the Appellant had no knowledge of the incriminating items sewn inside P7 cannot therefore stand. Further, the Appellant said he knew that there was drug inside P7 (at page 136 Appeal Record Vol. 1). Consequently there is neither the need to secure the finger nail clipping of the Appellant nor is it *sine qua non* to dust the items for fingerprints around the sewn area of the bag as contended by his learned counsel.

(iii) LEARNED COUNSEL ALLEGED THAT THE LEARNED TRIAL JUDGE HAD PREJUDGED THE ISSUE BEFORE HEARING THE SUBMISSION

(35) Learned counsel for the Appellant contended that the

learned trial Judge had prejudged the issue even before hearing submission. He alleged that grounds of judgment was written was 18th January 2005 as reflected at the foot of page 648 of the Appeal Record Vol. 2. But the judgment was only handed down on 26th January 2005. Counsel argued that the learned Judge had made up his mind well before hearing the submission of counsel. The Appellant was consequently prejudiced. Therefore learned counsel for the Appellant asked this Court to declare that the trial before the High Court Judge as a mistrial and urged this Court to remit this case back to the High Court for a retrial.

(36) The date of 18th January 2005 must be a typing error. Even if, for a moment that, we say that the judgment was dated 18th January, 2005, s. 181 (1) of Criminal Procedure Code does not require submission.

(37) For ease of reference s. 181(1) of the Criminal Procedure Code says:

"When the accused is called upon to enter his defence he or his advocate may then open his case, stating the facts or law on which he intends to rely and making such comments as he thinks necessary on the evidence for the prosecution. He may then examine his witnesses (if any) and after their cross-examination and re-examination (if any) may sum up his case:..."

(38) The word "may" indicates a discretion. Therefore it could be seen that submission at the end of the defence case is discretionary and not mandatory. The learned trial Judge could if he wanted to, decide without having the need to hear submission from the learned defence counsel. Submission is not evidence and hence the judgment is not defective.

(39) After perusing the grounds of judgment, it could be observed that the learned Judge did consider the submission of learned counsel when he said at page 643 of the Appeal Record as follows:-

"The defence claims there is no evidence of trafficking and the prosecution have not proved trafficking but merely possession, at the very most, as they have not proved the accused had knowledge of the drugs in P7."

(40) This, in our view, shows that the learned trial Judge have taken into consideration the submission of the learned counsel for the defence and lends credence to the date of 18th January 2005 being a typographical error.

(41) For the reasons given earlier, this appeal failed and was dismissed. The conviction and sentence imposed by the learned High Court Judge were affirmed.

Original signed by:

DATUK SULONG MATJERAIE
Judge, Court of Appeal Malaysia.

9th JULY 2009

Counsel for the Appellant:
Mr Sreekant Pillai
Mr Paul Fernandez
M/s Lim Sreekant & Co

Counsel for the Respondent:
Ms Mangaiarkarasi a/p Krishnan
Timbalan Pendakwa Raya
Jabatan Peguam Negara