MUHAMMAD ZHAFRI MOHAMAD YUNUS
v.
PP

High Court Malaya, Kuala Lumpur
Collin Lawrance Sequerah J
[Criminal Appeal No: WA-41S(A)-3-09/2020]
17 May 2022

Case(s) referred to:
Ahmad Saiful Islam Mohamad v. Public Prosecutor [2021] MLRHU 1912 (refd)
Cassell & Co v. Broome [1972] AC 1027 (refd)
Dalip Bhagwan Singh v. PP [1997] 1 MLRA 653; [1998] 1 MLJ 1; [1997] 4 CLJ 645; [1997] 4 AMR 4029 (refd)
Goh Ah Yew v. PP [1948] 1 MLRA 651; [1949] 1 MLJ 150 (refd)
Miller v. Minister of Pensions [1947] 2 All ER 372 (refd)
Noor Shariful Rizal Bin Noor Zawawi v. PP [2017] MLRAU 83; [2017] 3 MLJ 460; [2017] 4 CLJ 434 (refd)
PP v. Rosman Saprey & Anor [2018] MLRAU 130; [2018] 4 MLJ 139; [2019] 4 CLJ 767 (refd)
Re Tan Boon Liat @ Allen & Anor Et Al; Tan Boon Liat v. Menteri Hal Ehwal Dalam Negeri & Ors [1977] 1 MLRA 22; [1977] 2 MLJ 108 (refd)

Legislation referred to:
Dangerous Drugs Act 1952, ss 15(1)(a), 37(k), 38B
Federal Constitution, arts 5, 8
Police Act 1967, s 97

Counsel:
For the appellant: Nur Shafiah Athirah Ahmad Shafique Selvarajah (Dato' Amirul Ridzuan Hanif and Muhammad Izzat Irfan Taib with her); M/s Hanif & Co
For the respondent: Izalina Abdullah (Mohd Isa Mohamed with her); DPPs

[Allowed the appeals.]

Case Progression:
Magistrate's Court: [2021] MLRSU 244

JUDGMENT

Collin Lawrance Sequerah J:

A) Introduction

[1] This is the appellant's appeal against the decision of the Magistrates Court in Kuala Lumpur where the Appellant was convicted for an offence under s 15(1)(a) Dangerous Drugs Act 1952 ("DDA") and sentenced to a fine of

RM5,000.00 in default 10 months imprisonment and ordered to undergo mandatory supervision for a period of two years from date of conviction at the National Anti-Drugs Agency (AADK) Dang Wangi pursuant to s 38B of the DDA.

B) Background Facts

[2] The pertinent background facts reveal that on 11 July 2018 at around 12.00 pm, SP1 received a request from Inspector Fadilah, Head of Integrity and Standards Compliance Division of the IPD Dang Wangi Police Station to conduct a preliminary urine screening test on the appellant who at the time was a civil servant stationed at the C4i unit of the IPD Dang Wangi.

[3] The preliminary urine screening test was conducted at Level 6, Narcotics Crime Investigation Department of the IPD Dang Wangi. During the said test, SP1 directed the appellant to select a urine screening test bottle from a box containing 15 other empty bottles. Pursuant to the said direction, the appellant chose one empty bottle with the serial number 1644886.

[4] SP1 then instructed Sergeant Ismail to escort the appellant to the lavatory for the purpose of collecting a urine sample. After the said urine sample was collected, the said bottle was placed on a table for the preliminary urine screening test to be conducted.

[5] SP1 conducted the test by inserting different types of test strips into the urine sample, namely, "Amp", "Meth", "Benzo", "Ketamine" and "THC" or Tetrahydrocannabinol.

[6] The result for the "THC" test turned out positive and the appellant was duly informed of this.

[7] SP1 then instructed Sergeant Ismail to place the appellant under arrest. SP1 completed all necessary procedures and documentation required before handing over the appellant together with the urine sample bottle (P2) to SP3, the Investigating Officer (IO).

[8] SP3 sealed exhibit P2 with the Royal Malaysian Police (PDRM) seal and kept exhibit P2 in a cabinet under lock and key to the exclusion of others from access at her office in I PD Dang Wangi.

[9] On 13 July 2018, at about 3.35 pm, SP3 handed over exhibit P2 to SP2, the Government Chemist, at the Pathology Department of the Kuala Lumpur General Hospital.

[10] The Pathology Report dated 17 July 2018 by SP2 confirmed the preliminary urine screening test result as positive for "THC".

[11] At the conclusion of the prosecution case, the learned Magistrate found that the prosecution had made out a *prima facie* case against the appellant and accordingly called upon him to make his defence.

[12] The appellant elected to give sworn evidence. The testimony of the appellant was that on 8 July 2018, Muhamad Firdaus Oyong (SD2) invited the appellant to go to Club 9 Karaoke Centre in Kampung Pandan, Kuala Lumpur.

[13] SD2 picked up the appellant from the latter's residence. On the way there SD2 told the appellant about the presence of an individual by the name of "Peng Chai" who would be at the club later and that he was an affluent person.

[14] The appellant and SD2 arrived at the club at about 8.30 pm and went to room number 9 for a karaoke session. The said "Peng Chai" was already there when they arrived and was seen by both of them smoking.

[15] The said "Peng Chai" later offered the appellant an expensive cigarette that he enjoyed smoking. At first, the appellant experienced giddiness and a vomiting sensation.

[16] According to the appellant, he then vomited in the wash room and went back to the car. SD2 later came to the car in an angry state and told the appellant that "Peng Chai" had placed something weird "barang pelik" in the cigarette which he suspected to be a drug.

[17] The appellant and SD2 left the club at approximately 9.30 pm. Two days later, the appellant was tested positive for drugs. The appellant also testified that the said "Peng Chai" was untraceable and that all attempts to communicate with him were futile.

[18] SD2 in substance corroborated the testimony of the appellant but added that the appellant had informed him about his criminal case and sought his assistance to locate "Peng Chai" in order to testify on his behalf.

[19] Muhammad Fuadi bin Ismed (SD3) testified that he was invited by "Peng Chai" to join a karaoke session and that upon his arrival in room number 12 of the club, there were dry green leaves on the table and that Peng Chai was laughing.

[20] SD3 suspected that the leaves might be "ganja". SD3 said that he also witnessed the appellant being offered a cigarette by Peng Chai and saw the appellant exit not long after. SD3 said that he could not remember the exact address of Peng Chai but remembered only that it was somewhere in the Sunway Batu Caves area.

[21] At the conclusion of the case, the learned Magistrate found the appellant guilty of the charge and sentenced him accordingly.

C) Analysis And Findings

[22] The appellant was charged with the following:

"Bahawa kamu pada 11 July 2018 jam lebih kurang 12.30 petang bertempat di tandas pejabat bahagian siasatan jenayah narkotik tingkat 6, IPD Dang Wangi, Wilayah Persekutuan Kuala Lumpur, telah didapati memberi kepada diri sendiri dadah berbahaya iaitu dadah jenis 11-Nor-Delta-9- Tetrahydrocannabinol-9-carboxylic acid. Oleh itu kamu telah melakukan satu kesalahan di bawah s 15(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen yang sama."

[23] As alluded to earlier, he was convicted and sentenced to a fine of RM5,000.00 in default 10 months imprisonment and ordered to undergo mandatory supervision for a period of two years from date of conviction at the National Anti-Drugs Agency (AADK) Dang Wangi.

[24] Learned counsel for the appellant raised only two issues in support of this appeal, namely;

i) The failure to take urine samples in two bottles, and

ii) That the learned Magistrate erred in describing the defence as a bare denial.

The Failure To Take Urine Samples In Two Bottles

[25] Although this ground of appeal was not stated in the appellant's petition of appeal, I nevertheless, allowed this ground to be raised in the interests of justice. To their credit, the learned Deputy Public Prosecutor did not strenuously object to this.

[26] It is not in dispute that only one bottle of the appellant's urine sample was taken for analysis. It is also not in dispute that the preliminary screening test (screening) and the chemical test (confirmation) were carried out in two different places.

[27] The issue to be determined, therefore, is whether this was in accordance with the dictates of the law or not.

[28] In the case of *Ahmad Saiful Islam Bin Mohamad v. Public Prosecutor* [2021] MLRHU 1912, I had occasion to consider and determine a similar point raised.

[29] In that case, I held, *inter alia* that the failure here to take two bottles of urine sample meant that the prosecution had failed to prove the offence against the appellant beyond a reasonable doubt and that the failure by the police to abide by the "Guidelines" in omitting to take two bottles of urine had rendered the conviction flawed.

[30] In doing so, I placed reliance upon the Court of Appeal case of *Noor Shariful Rizal Bin Noor Zawawi v. PP* [2017] MLRAU 83; [2017] 3 MLJ 460; [2017] 4 CLJ 434 ("Noor Shariful") which held that both the IGSO F103 and

the KKM Guidelines Bilangan 6/2002 ("Guidelines") had the force of law. In so deciding, the Court *inter alia*, held that the standing orders made by the Inspector- Genera! of Police, which necessarily include the IGSO F103 acquires its statutory power from s 97 of the Police Act 1967. Therefore, it has the force of law.

[31] The Court also held that the Guidelines under the caption 'Urine Collection' had made reference to the DDA. The scheme of the Guidelines was formulated in collaboration with the DDA and also the Drug Dependants (Treatment and Rehabilitation) Act 1983.

[32] As the Guidelines was formulated in line with both the aforesaid Acts, it was held, therefore, that it has the force of law.

[33] I chose to follow Noor Shariful in preference to the Court of Appeal case of *PP v. Rosman Bin Saprey & Anor* [2018] MLRAU 130; [2018] 4 MLJ 139; [2019] 4 CLJ 767 ("*Rosman Bin Saprey*"). This was in accordance to this courts right to choose which of the two Court of Appeal decisions to follow irrespective of the date of the decision in line with the well-established principle in *Dalip Bhagwan Singh v. PP* [1997] 1 MLRA 653; [1998] 1 MLJ 1; [1997] 4 CLJ 645; [1997] 4 AMR 4029 which in turn placed reliance on the English decision of the House of Lords in *Cassell & Co v. Broome* [1972] AC 1027.

[34] In Rosman Bin Saprey, the Court of Appeal took the view that the IGSO F103 and the KKM Guidelines were not legal documents which required mandatory compliance by the police or medical personnel and would not be detrimental if not complied with. IGSO F103 was made under the powers given by s 97 of the Police Act 1967.

[35] It further held that it is only administrative and is not intended to have legal effect, compared to the regulations or rules of the DDA. The IGSO F103 is issued only for the use of the police and is classified as confidential or confidential documents.

[36] The Court in *Rosman Bin Saprey* also held that the IGSO F103 is for the use of police officers while the KKM Guidelines are for the use of health and medical officers. Both instruments could not form and possess the force of law as only the Minister is authorised by the DDA to make rules and regulations pertaining to the enforcement and execution of provisions contained in both the Acts and the requirements of the gazette to be complied with.

[37] During the course of submissions, it was brought to my attention by the learned DPP that the IGSO F103 has recently been amended to allow for the use of only one urine sample. See "Arahan Pentadbiran PJSJN BIL 1/2018" dated 2 April 2018.

[38] In my view however, this amendment still leaves the prosecution to contend with the KKM Guidelines.

[39] The KKM Guidelines Bilangan 6/2002 were issued by the "Bahagian Perkembangan Perubatan Kementerian Kesihatan Malaysia". Its title and introduction read as follows:

> "GARIS PANDUAN BAGI UJIAN PENGESANAN PENYALAHGUNAAN DADAH DALAM AIR KENCING"
>
> GUIDELINES FOR TESTING DRUGS ABUSE IN URINE
>
> Introduction
>
> (a) These guidelines is intended to be used by all agencies involved in the National Drug Detection Programme and is not applicable to clinical testing;
>
> (b) It describes procedures that shall fulfil the necessary criteria in order to guarantee optimum validity of drug detection results;
>
> (c) Consideration shall be given to the procedures for collection, transportation, analysis, reporting of results, dispatching of results and storage of samples and records;
>
> (d) This guideline shall be read together with the '*Manual For The Laboratory Detection of Drugs of Abuse in Urine and Guidelines on Cold Turkey Detoxification and Treatment*' 1988, Wherever there is any discrepancy of the fact, the present guidelines shall be referred;"

[40] The material portion of the 'KKM Guidelines Bilangan 6/2002' is item (c) which reads:

> "(c) Collection Procedure
>
> (i) At least 30 ml urine sample shall be collected in one bottle or duplicate if screening and confirmation are done in two different places. The requesting officer/referring centre shall keep the second urine sample and shall send the urine sample to the confirmation centre if the screening result is positive;
>
> (ii) Both the collection personnel and the donor shall keep the urine samples in view at all times prior to it being sealed or labelled. If the second bottle cannot be provided (sample is 30 ml only), testing shall be done on the first sample. Absence of second sample shall be recorded;
>
> (Hi) At the collection site, if the volume is less than 30 ml, the donor may be given a reasonable amount of liquid to drink eg 240 ml of water every 30 minutes, but not to exceed a maximum of 720 ml. The second urine sample shall be collected and mixed with the previous

sample, by the donor himself/herself or the collection personnel in front of the donor."

[41] By way of summary, the KKM Guidelines Bilangan 6/2002 require that the urine sample must at (east contain 30 ml. and shall be collected in one bottle or duplicate if screening and confirmation are done in two different places.

[42] The first bottle is used for screening test. If the screening result is positive, the second bottle of urine sample which is kept by the requesting officer will be sent to the confirmation centre which is the Chemistry Department for a confirmation test.

[43] In Noor Shariful's case the Court of Appeal speaking through Zamani A Rahim JCA reasoned as follows:

"[40] The KKM Guidelines Bilangan 6/2002 under the caption 'Urine Collection' has made reference to the Dangerous Drugs Act 1952. The scheme of the KKM Guidelines Bilangan 6/2002 was formulated in collaboration with the Dangerous Drugs Act 1952 and also the Drug Dependants (Treatment and Rehabilitation) Act 1983."

[44] As I did in the case of Ahmad Saiful Islam, I find that as the KKM Guidelines was formulated in collaboration with the Dangerous Drugs Act 1952 and also the Drug Dependants (Treatment and Rehabilitation) Act 1983, they have the force of law.

Constitutional Dimension

[45] in Ahmad Saiful Islam, I also held that there was a constitutional dimension to the issue at hand taking the cue from what was said in Noor Shariful's case that there had been an infringement of arts 5 and 8 of the Federal Constitution for failure to adhere to the Guidelines.

[46] These articles are reproduced as follows:

Article 5(1) provides:

'No person shall be deprived of his life or personal liberty save in accordance with law'.

Article 8(1) provides:

'All persons are equal before the law and entitled to equal protection of the law'.

[47] The Court in Noor Shariful's case held:

"Following the Federal Court case of *Re Tan Boon Liat @ Allen &*

Anor Et Al; Tan Boon Liat v. Menteri Hal Ehwal Dalam Negeri & Ors [1977] 1 MLRA 22; [1977] 2 MLJ 108, **the expression 'in accordance with law' in art 5(1) of our Constitution is said to be wide enough to include procedural law**."

[Emphasis Added]

[48] The Court of Appeal in Noor Shariful's case further held:

"**[50] The appellant was deprived of the procedural law which gives him of the right of a second test - confirmation test. The magistrate and learned JC, by ruling that one bottle of the appellant's urine sample was sufficient, was contrary to the IGSO F103 and the KKM Guidelines Bilangan 6/2002. The appellant, accordingly, did not have a fair trial and arts 5(1) and 8(1) were violated. The appellant did not get what the procedural law said he should get. He had lost a chance of being acquitted which was reasonably opened to him.** Thus justice has been miscarried - commonly called 'miscarriage of justice'.**Justice is justice in accordance with law as enshrined in arts 5(1) and 8(1) of the Federal Constitution.** The High Court case of Australia in *Mraz v. The Queen* (1955) 93 CLR 493 was referred to by Gopal Sri Ram FCJ in *Lee Kwan Woh*, where Fullagar J said at p 514 in the following terms:

> … every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedures and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly opened to him of being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law."

[Emphasis Added]

[49] As I did in *Ahmad Saiful Islam*, I subscribe wholly to the approach taken in Noor Shariful's case with respect to the constitutional dimension that "life" pursuant to art 5 encompasses much more than mere "animal existence", and that procedural compliance must be taken to be an integral part of "life" within the meaning of art 5.

Possibility Of Contamination

[50] There must also have been a good and compelling reason for requiring two bottles to be taken.

[51] The first test or the "ujian saringan" or screening test taken by the police is what may be termed as a "presumptive test". On the other hand, the test taken

by the Chemist attached to the Chemistry Department or "Jabatan Kimia" is the "confirmation test".

[52] The screening test or presumptive test is done by inserting a test strip or strips into the bottle containing the urine. Foreign material is, thus, inserted into the bottle and the urine sample.

[53] The use of only one bottle, therefore, leaves open the room for the possible contamination of the sample which may impact the confirmation test undertaken by the Chemistry Department.

Penal Consequences

[54] Because the charge under the relevant provision of the DDA carry penal consequences, they must be strictly construed and the benefit of any doubt arising must be accorded to the accused person.

[55] Accordingly, as the appellant here had been deprived of his procedural rights to have two bottles of urine sample taken, and the right of a second test, he had lost a fair chance of being acquitted which was reasonably opened to him.

Operation Of Presumption

[56] The procedural requirement of having two bottles taken was all the more pertinent having regard to the presumption under s 37(k) DDA which applies to a person charged under s 15(1)(a) DDA.

[57] Section 37(k) DDA reads:

> "37. Presumptions
>
> In all proceedings under this Act or any regulation made thereunder-
> .....
>
> .....
>
> .....
>
> (k) if a person is charged for an offence of consuming a dangerous drug or administering a dangerous drug to himself or suffering any other person to administer a dangerous drug to him, and any dangerous drug is found in the urine of the person charged as a result of a urine test conducted under s 31A, the person shall be presumed, until the contrary is proved, to have consumed the drug or to have administered the drug to himself or to have suffered any other person to administer the. drug to him in contravention of this Act or its regulations."

[58] It can be discerned from a reading of the sub-section that the presumption is only activated after the outcome of a urine test conducted on the suspect.

[59] Accordingly, it is vital that the urine test is conducted in accordance with prescribed procedure and that the integrity of the sample taking process is not compromised or left to chance.

[60] As stated earlier, the taking of only one bottle of urine leaves open the possibility of contamination as the same sample is used both by the police for the "ujian saringan" or preliminary/screening test and by the Chemist for the confirmation test.

[61] It is also trite that the presumption under s 37(k) DDA needs to be rebutted on a balance of probabilities which is of a higher standard than merely to raise a reasonable doubt. See *Miller v. Minister of Pensions* [1947] 2 All ER 372.

[62] This constitutes a compelling reason why the process of taking the urine sample must be conducted with strict compliance with procedure which in this case are the "Guidelines" and that the possibility of contamination of the samples be minimised if not obliterated altogether.

Evidential Perspective

[63] There is also an evidential perspective to be considered here. The taking of two bottles of urine sample is also highly relevant to the issue of whether or not the prosecution has adduced sufficient evidence to discharge its burden of proving each and every essential ingredient of the case.

[64] Given the nature of the charge, it is imperative that the prosecution adduces cogent evidence to prove that the substance alleged to be self-administered was in fact a dangerous drug.

[65] By relying upon only one bottle of urine sample for the reasons given above, the prosecution falls short of its duty to discharge the burden placed upon it.

[66] However, in all fairness to the learned Magistrate, these issues were never raised before him. The outcome may well have been different if it had.

[67] Thus, on this ground alone, the appeal is allowed.

That The Learned Magistrate Erred In Describing The Defence As A Bare Denial

[68] Despite the fact that the point considered above effectively determined the fate of the appeal, the other point raised by the appellant also deserves consideration, namely, that the learned Magistrate had erred in describing the defence as a bare denial.

[69] The gist of the defence is that the appellant had been offered a cigarette laced with THC from a person by the name of Peng Chai and that accounts for the positive result of the urine test carried out.

[70] A perusal of the Notes of Evidence will reveal that during the cross-examination of SP1, questions were directed to him regarding the possibility of THC being inserted with cigarette tobacco and that a person who smoked the cigarette would not suspect that the cigarette was infused with drugs until they smoked it.

[71] It was accordingly incorrect to describe the defence as an afterthought or a bare denial.

[72] The learned Magistrate had accordingly erred in characterising the defence as a bare denial.

[73] The defence had successfully rebutted the presumption under s 37(k) DDA on a balance of probabilities. See *Miller v. Minister of Pensions (supra).*

[74] The learned Magistrate had also erred in holding that the defence ought to have, in addition to adducing oral evidence of witnesses, also have produced CCTV recordings, photographs, booking form and footage registration book in support of the defence in relation to the presence of the appellant at the "Club 9".

[75] The learned Magistrate had run foul in this respect of the principle enunciated in the case of *Goh Ah Yew v. PP* [1948] 1 MLRA 651; [1949] 1 MLJ 150 that there is no duty upon an accused person to call any evidence.

[76] The learned Magistrate had imposed a burden upon the appellant that the law had not.

[77] The issues raised by learned counsel for the appellant abovementioned warranted appellate intervention.

[78] In the premises, this appeal is allowed. The conviction and sentence of the appellant is hereby set aside.