IN THE COURT OF APPEAL MALAYSIA

(APPELLATE JURISDICTION)

COURT OF APPEAL CRIMINAL APPEAL NO. S-05(SH)-298-08/2023

BETWEEN

AHMAD FARIZUL BIN ISMAIL

(NRIC NO. 900325-12-6335) ... APPELLANT

AND

PUBLIC PROSECUTOR ... RESPONDENT

(In the matter of Criminal Case No. BKI-45A-2/2-2021

In the High Court of Sabah and Sarawak at Kota Kinabalu)

BETWEEN

PUBLIC PROSECUTOR ...COMPLAINANT

AND

AHMAD FARIZUL BIN ISMAIL

(NRIC NO. 900325-12-6335) ... ACCUSED

KORAM

RAVINTHRAN A/L N. PARAMAGURU, JCA.

COLLIN LAWRENCE SEQUERAH, JCA.

AHMAD KAMAL BIN MD. SHAHID, JCA.

GROUNDS OF JUDGEMENT

A) INTRODUCTION

[1] This case, we were given to understand, is the first case of its kind to be tried in this jurisdiction and there are no precedents.

[2] The case therefore raises a novel point and is unlike any other drug trafficking case previously brought for trial before the courts in this country.

[3] This appeal by the accused (Appellant) is against the decision of the High Court of Sabah and Sarawak at Kota Kinabalu where he was convicted of a charge under Section 33 of the Dangerous Drugs Act 1952 ("DDA") read together with section 39B(1)(a) DDA and sentenced to life imprisonment and twelve strokes of whipping.

[4] Section 33 DDA is the charge of an attempt to traffic drugs. The section reads as follows:

> "*33. Abetments and attempts punishable as offences*
>
> *Any person who abets the commission of, or who attempts to commit, or does any act preparatory to or in furtherance of the commission of, any offence under this Act shall be guilty of such offence and liable to the punishment provided for such offence.*"

[5] The amended charge against the Appellant in the High Court was as follows:

> "*Bahawa kamu, pada 24 Februari 2020, jam lebih kurang 3.30 petang, di UTS Logistics, Warehouse No. 1, Jalan Kolombong, Kampung Nountun, dalam daerah Kata Kinabalu, dalam negen· Sabah telah cuba mengedar dadah berbahaya iaitu Cannabis seberat 942.2 gram dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 33 Akta Dadah Berbahaya 1952 dibaca bersama Seksyen 39B(1)(a) Akta yang sama yang boleh dihukum di bawah Seksyen 398(2) Akta yang sama.*"

[6] The English translation of the charge reads:

"That you, on 24 February 2020, at approximately 3:30 PM, at UTS Logistics, Warehouse No. 1, Jalan Kolombong, Kampung Nountun, in the district of Kota Kinabalu, State of Sabah, did attempt to traffic in a dangerous drug, to wit, Cannabis weighing 942.2 grams, and thereby committed an offence under Section 33 of the Dangerous Drugs Act 1952, read together with Section 39B(1)(a) of the same Act, which is punishable under Section 39B(2) of the said Act."

B) PERTINENT FACTS

[7] The prosecution led evidence through testimonies of relevant witnesses which reveal that on 22.2.2022, at approximately 10:30 a.m., Customs Officer Nuridah Binti Juslee (PW2), stationed at Gudang Raya Airways, detected a suspicious image while scanning a parcel couriered via ABX Express.

[8] PW2 instructed the ABX Express agent to open the parcel, whereupon a compressed square package, suspected to contain illicit drugs, was discovered. PW2 promptly reported the matter to her superior, Customs Officer Diana. Subsequently, the Narcotics Unit at Kota Kinabalu International Airport was notified, and PW2 was instructed to secure the parcel for further examination.

[9] At around 1:30 p.m. the same day, members of the Narcotics Unit, namely Customs Officers Palladius Quadra (PW3) and Salestine bin Sujah (PW10), arrived at Gudang Raya Airways accompanied by a drug detection dog (Anjing Pengesan Dadah - APD).

[10] A screening of the parcel was conducted through the APD, which revealed a positive indication for the presence of dangerous drugs. The parcel was then taken into custody by PW3 and, along with his team, transported to the MAS Cargo Customs Office for safekeeping.

[11] On 24.2.2022, at approximately 8:00 a.m., Muhammad Nurhisham bin Ramli (PW6), a Raiding Officer with the Enforcement Division of the Customs Department, was instructed to carry out a controlled delivery operation involving the suspicious parcel. By 11:00 a.m. that day, he managed to assemble his team and conducted a briefing on the execution of the control delivery operation.

[12] At about 11:30 am that day, and under the direction of PW6, Customs Officer Osmund Julidih (PW4) and ABX Express staff member Muhd Aminuddin bin Matneh (PW8) arrived at the MAS Cargo Customs Office to collect the impugned parcel. Initially, the parcel was taken to the ABX Express premises at Gaya Street. Kota Kinabalu. However, it was later redirected and brought to UTS

Logistic in Kolombong, Kota Kinabalu, at approximately 1:10 p.m.

[13] On the same day, the Appellant arrived at UTS Logistics, Kolombong, at around 3:25 p.m. to collect the impugned parcel. He approached Stephanie Joyce binti Junop (PW7), a staff member of ABX Express stationed at the counter, and handed her a slip of paper bearing the tracking number DCHX3512021345 (Exhibit P20), corresponding to the impugned parcel. The Appellant informed PW7 that he was there to collect the parcel on behalf of an individual named Yohan.

[14] While PW7 was in the process of verifying the tracking number in the computer system and generating the necessary documentation for the Appellant to sign upon collection, the Appellant answered a phone call on his mobile device. Shortly thereafter, he abruptly left the premises without completing the collection process.

[15] After leaving the premises, the Appellant fled on foot towards the main road. Mohd Fadly bin Mat Sani (PW5), a Customs Officer, along with his team, pursued the Appellant in their vehicle and successfully apprehended him approximately 70 meters from the entrance of UTS Logistics, Kolombong.

[16] Both the Appellant and the impugned parcel were transported to the Customs Office at Wisma Customs Sabah, Kata Kinabalu for further investigation and processing.

[17] At the Customs Office, PW6 conducted an inspection of the impugned parcel bearing tracking number DCHX3512021345. Upon examination, PW6 discovered a transparent plastic package containing compressed organic lumps, which raised suspicion of it being dangerous drugs.

[18] Following the seizure, the substance contained in the impugned parcel was sent to the Chemistry Department for detailed analysis. The results confirmed that the substance was a dangerous drug, specifically cannabis, with a total weight of 942.2 grams.

[19] At the conclusion of the prosecution case, the learned High Court Judge ("HCJ"), after conducting a maximum evaluation of the evidence of the prosecution case in accordance with section 180 of the Criminal Procedure Code ("CPC"), found that the prosecution had successfully established a prima facie case against the Appellant and called for the Appellant to make his defence.

[20] The Appellant elected to testify under oath and called one witness, DW2, to give evidence on his behalf.

[21] The Appellant testified that on 14-2-2020, he was at home caring for his pregnant wife until approximately 2:30 p.m. Thereafter, he went to a shop located at Block B, Taman Puri Warisan, to purchase cigarettes. Subsequently, he proceeded to Block C to meet a friend named "Asi" in order to borrow a motorcycle for the purpose of taking his wife to the clinic.

[22] The Appellant said that a person named Yohan (also known as "Askar") called him while Yohan was at the parking lot in Taman Puri Warisan. He said that he had only known Yohan for about a month at work, where Yohan was a customer.

[23] The Appellant claimed that he did not know Yohan lived in Blok C, Taman Puri Warisan, and that this was his first meeting with Yohan at the parking lot. According to the Appellant, Yohan requested his assistance in collecting a parcel from ABX Kolombong.

[24] When the Appellant inquired about the parcel, Yohan informed him that it was sent by his family. The Appellant did not make any further inquiries regarding the contents of the impugned parcel.

[25] The Appellant testified that Yohan handed him a piece of paper to be used for claiming the parcel. He stated that although Yohan was in a hurry to leave for his forklift work in Kolombong, Yohan nevertheless handed him a quantity of a drug substance (syabu), which the Appellant admitted to consuming. The Appellant further stated that he informed Yohan that he was too lazy to walk.

[26] The Appellant did not mention making any inquiry as to Yohan's address or exact location within Taman Puri Warisan.

[27] After consuming the drug, the Appellant stated that he returned home, took a shower, and got ready. He then took a bus to the Inanam bus station to collect the impugned parcel, despite having earlier indicated a need to borrow a motorcycle from "Asi" to take his wife to the clinic.

[28] The Appellant denied any involvement with drugs and claimed not to know Yohan's phone number. He referred to printed materials obtained from the internet, produced by DW2 and marked as exhibits D3, D4, and D5, which contained photographs of an individual he identified as Yohan, in an effort to demonstrate that Yohan was not a fictitious character.

[29] The Appellant claimed that while he was on the bus travelling to the bus station in Inanam, Yohan called him and instructed him to send the parcel to the Tawau terminal after collecting it. The Appellant further stated that he informed Yohan he had no money.

[30] The Appelant testified that upon his arrival at ABX, he informed the female staff at the counter that he intended to collect the parcel on behalf of his friend. He provided the female staff with the name "Yohan" from a piece of paper Yohan had given him and handed the paper to the ABX staff.

[31] The Appellant further claimed that after handing the paper to the ABX staff, he noticed two male customers, one of whom he believed resembled a Penampang narcotics police officer. He then pretended to be on the phone and left the ABX office, feeling that the individual he suspected to be a police officer was staring at him.

[32] The Appellant claimed that he wanted to avoid encountering the person who resembled the Penampang narcotics officer because he had been pursued by them in Penampang two weeks earlier for using drugs (syabu).

[33] The Appellant claimed that after leaving ABX Kolombong, he was chased by a car. A man wearing slippers and a

black-and-white striped shirt approached him, which led the Accused to fear a robbery.

[34] Subsequently, customs officers arrested him. The Appelant said that he had explained that he was only asked by Yohan to pick up a parcel at ABX Kolombong, shipped from Yohan's family. He said that he had directed the officers to where Yohan was supposed to be, but Yohan's car was not there.

[35] The Appellant stated that the customs officers then took him to the Customs Enforcement office in Kota Kinabalu, where his photographs were taken.

[36] The Appellant alleged that a customs officer physically assaulted and coerced him into admitting ownership of the parcel. However, he failed to provide the name of the officer who allegedly assaulted and coerced him, nor did he identify any officer involved.

[37] The Appellant called Elayantty Misancalled (DW2), a clerk at his solicitor's firm. DW2 testified only regarding her role in downloading printed materials from the internet on her computer, which were marked as exhibits D3, D4, and D5. These materials included images of a person allegedly identified as Yohan, along with correspondence she had with U-Mobile Sdn. Bhd. concerning the call list and the registered owner of the phone number 0183980904,

marked as exhibits D6 and D7, which were not provided by U-Mobile.

[38] DW2 did not provide any evidence explaining how she knew the individuals depicted in the printed materials (exhibits D6 and D7) she downloaded from the internet were the same person the Appellant recognized as Yohan.

[39] She also did not testify to having met the Appellant previously, nor did she explain how the Appellant had described the person to her, enabling her to locate and download the printed materials from the internet and print them out from her computer.

[40] Apart from DW2's assertion that, on 12-7-2022, she was instructed to print certain photographs from social media, she failed to provide any details as to who gave her the instructions to download and print the material in question.

[41] During cross-examination, DW2 also admitted that she could not be certain whether the owner of the social media account "yohannsalleh" was the same "Yohan" referred to by the Appellant.

[42] At the end of the trial, the HCJ found that the prosecution had proven its case beyond a reasonable doubt and

convicted the Appellant and sentenced him to life imprisonment and twelve (12) strokes of whipping.

C) PARTIES SUBMISSIONS

Appellant

[43] Learned counsel for the Appellant submitted that the factual matrix of the case resulted in the prosecution not having proved the offence of attempt to traffic drugs.

[44] It was submitted that the four stages of crime as set out in **Thiangiah & Anor v PP [1977] 1 MLJ 79**, were not met. They are, he submitted, the following;

(a) An intention to commit the offence;

(b) The preparation for its commission;

(c) Attempt to commit it; and

(d) Actual commission of the offence.

[45] It was submitted that the Appellant had merely handed over the airway bill to PW7 after which he picked up his mobile phone and left the premises. Learned counsel pointed out the testimony of PW7 during examination in chief as follows:

"*Q: Bagaimana kamu memastikan itu adalah barang yang ingin diambil?*

A: Customer datang, dia bagi saya satu kertas A4 yang diprint berserta Airway bill nombor. Selepas itu, customer yang datang itu dia terus beritahu saya "saya adalah wakil untuk ambil".

Q: Selepas diserahkan dengan airway bill ini, apakah tindakan kamu?

A: Ketika saya terima airway bill ini, saya terus check dalam system.

Q: Apa yang puan dapati setelah semak dalam system?

A: Ketika saya semak dalam system, ternyata barang yang ada di tepi saya adalah sama dengan airway bill. Masa check system, customer tiba-tiba jawab call. Customer keluar, so barang itu tertinggal."

[46] Counsel for the Appellant said that the act of the Appellant answering the phone call and leaving the premises constituted an intervening act which resulted in the offence of an attempt being incomplete and devoid of intention to commit the offence on the part of the Appellant.

[47] It was further submitted that a few more steps or processes were required to be taken for the offence to be complete even assuming the Appellant had not left the premises after he handed over the airway bill to PW7.

[48] In so submitting, learned counsel referred to the portion of PW7's testimony during cross examination as follows:

"*Q: Tadi kamu ada beritahu SOP ABX untuk mengambil barang di mana kamu akan meminta nombor IC dan nama penuh. Selepas itu, apa lagi?*

A: Selepas kami dapat nama dan IC tersebut, kami ada satu system di mana customer kena sign itu kertas ataupun form.

Q: Apakah nama kertas ataupun form di mana customer kena sign itu?

A: Kita panggil dia DRS (Delivery Record Service).

Q: Adakah DRS ini akan ditandatangani selepas parcel diserahkan kepada customer?

A: Ya.

Q: Untuk kes yang sekarang ini, saya merujuk kepada parcel sekarang ini, adakah kamu menerima nama penuh dan juga nombor IC daripada tertuduh sesudah ID20 diserahkan kepada kamu?

A: Tidak.

Q: Maknanya, tertuduh keluar daripada premis tanpa memberikan nama penuh beliau dan juga nombor IC beliau kepada kamu?

A: Ya.

Q: Itu juga bermakna bahawa tertuduh belum lagi menerima parcel tersebut daripada kamu, setuju?

A: Ya.

Q: Dan DRS juga belum lagi ditandatangani oleh tertuduh, betul?

A: Ya."

[49] Learned counsel explained that the reason why the mere handing over of the airway bill to PW7 was far too remote to constitute an attempt to commit the offence of drug trafficking is that even if the parcel was given to him after all the prior processes as described by PW7 above were taken, mere delivery of the parcel to him would still not amount to committing the offence of drug trafficking.

[50] Counsel placed reliance upon the case of **Simon Savarimuthu Thevarajah v. PP [2020] 5 CLJ**, which relied in turn upon the English case of **Warner v Metropolitan Police Commissioner (1968) 2 All ER 356**, where Lord Morris stated as follows:

> "*If there is some momentary custody of a thing without any knowledge or means of knowledge of what the thing is or contains then, ordinarily, I would suppose that there would not be possession.*"

[51] Learned counsel's point being that even a case of momentary physical possession would not qualify as legal possession, what more a case where physical possession did not even take place, in which case the prosecution would be hard pressed to prove intention of an attempt to commit trafficking as charged here.

[52] It was also submitted that there was a contradiction between the testimony of PW7 who said that the behaviour of the Appellant when he walked out of the said premises was relaxed as compared to PW4 who described the exit of the Appellant out of the premises as "tergesa-gesa" or in a hurry.

[53] This contradiction, it was submitted, did not entitle the court to rely upon section 8 of the Evidence Act 1950 as to conduct sufficient to infer knowledge on the part of the Appellant.

[54] The next issue raised was the alleged tampering of the parcel in the form of evidence that PW2 Nuridah Binti Juslee, the customs officer who first suspected that the parcel contained the drugs on the morning of 22.02.2020 (2 days before the controlled delivery), instructed one ABX agent to open and unwrap the parcel before PW3 Paladius Quadra and PW10 Selestine bin Sujah came together with K9 (Anjing Pengesan Dadah or APD).

[55] PW2 confirmed that the parcel remained open whilst K9 did the APD searching, and it was only after the APD process was completed that PW2 instructed the ABX agent to re-wrap the parcel.

[56] Learned counsel said that this goes to the issue as to the genuineness (contents or weight) of the exhibit, as to whether the exhibit was tampered during the process of opening or unwrapping the parcel by the ABX agent, as instructed by PW2, and during the re-wrapping of the parcel after the process of APD search by K9 was completed.

[57] It was further submitted that both PW2 and PW9 agreed that when the parcel was opened for the first time on the morning of 22.02.2022, there were no markings or pictures taken to the parcel and its contents.

[58] Counsel submitted that the failure of the prosecution to call the ABX agent during the particular process was fatal with regard to the integrity of the incriminating exhibit and further raised the adverse inference under section 114(g) of the Evidence Act 1950.

[59] Taking the point further, it was also submitted that the raiding officer PW6 confirmed that the parcel was wrapped with two pieces of ABX Plastic coloured in orange but upon re-examination, he changed his

testimony by saying that the ABX orange plastic looked like two plastics, when in fact, it was obvious to the observer during the trial that the ABX orange plastic when shown to him, did not look like 2 pieces of orange plastics.

[60] Counsel said that the Investigating Officer PW9 also confirmed that the ABX orange plastic did not look like 2 pieces of orange plastic bags.

[61] Next, learned counsel submitted that the lack of investigation regarding the named recipient of the parcel as stated on the airway bill to the parcel had caused prejudice to the Appellant.

[62] This arose, it was submitted, when PW7 had confirmed that when the Appellant handed over the airway bill to her, the Appellant told her that "... *Selepas itu, customer yang datang itu dia terus beritahu saya "saya adalah wakil untuk ambil*".

[63] The name stated on the airway bill was Yohan Erwan bin Salleh and during the recording of his section 112 statement, the Appellant had explained to the Investigating Officer PW9 as to how he came to know of Yohan Erwan Bin Salleh and where he lived and worked.

[64] Notwithstanding, the Investigating Officer did not investigate the personality of Yohan Erwan Bin Salleh

other than by merely conducting a search with JPN and Immigration Department even though he acknowledged that without the NRIC number of Yohan Erwan Bin Salleh, both the JPN and the Immigration Department would not be able to make any confirmation as to his identity or travelling status.

[65] Learned counsel for the defence also submitted that such a charge as proffered by the prosecution would open the floodgates for charging accused persons for an offence that falls short of trafficking but would fail to satisfy the elements of possession, custody or control as would be required under a charge under section 39B DDA.

[66] It was further contended that as the sentence for such an offence could be effectively the same as for the main offence albeit where the mode of proof is much lesser, that would amount to a deprivation of the rights of an accused under the provisions of article 5 and 8 of the Federal Constitution.

Respondent

[67] The prosecution submitted that although the Appellant claimed he had no knowledge of the drugs in the parcel, stating that he was merely following instruction from an individual named "Yohan" to collect and send the parcel to "Yohan's family" in Tawau, this version was never put

to key prosecution witnesses PW4, PW6 and PW9 during cross-examination, and was only raised for the first time during the defence stage.

[68] The prosecution also pointed out that there was also no suggestion of what Yohan had allegedly instructed the Appellant to do after collecting the parcel during Prosecution's case.

[69] It was also submitted by the Learned Deputy Public Prosecutor (DPP) that while the name of "Yohan" was mentioned in the Appellant's section 112 statement (D1), no further particulars such as Yohan's full name, contact number, vehicle registration, or exact address were provided to PW9 for the purposes of investigation.

[70] This resulted, it was submitted, in an insufficient "Alcontara Notice" where the police could not faulted for conducting investigation based upon incomplete particulars.

[71] The prosecution further submitted that the essential element in the offence is that of the Appellant's intention upon arriving at the parcel hub namely, whether he intended to receive or procure the parcel containing the drugs.

[72] They submitted that if such intent was proven to exist, the offence is made out once there are acts in furtherance of that intent and it is immaterial that the parcel was not actually collected, or that customs / police intervened, or feared the consequences of his conduct at the last minute or that the drugs were later found not to be cannabis.

[73] The prosecution submitted that there are no Malaysian authorities that have specifically addressed the elements or principles of the offence of attempted trafficking under section 33 of the DDA 1952.

[74] The prosecution referred to some authorities emanating from foreign jurisdictions, namely from Australia and Singapore.

[75] The prosecution submitted that the leading authority is the Australian case of the Supreme Court of Victoria in **Britten v Alpogut [1987] VR 929**, where the Australian position is that impossibility is not a valid defence to a charge of criminal attempt, except where the intended act does not constitute an offence known to law.

[76] In determining criminal attempt, the focus therefore is on what the accused intended to do. If the intended act amounts to a criminal offence, and the accused has performed sufficient acts demonstrating both the requisite

intent and substantial steps towards its commission, the offence of attempt is made out.

[77] The prosecution said that the legal principles laid down in Britten (supra) were affirmed by the decision of the Singapore Court of Appeal in **Han Fang Guan v PP [2020] 1 SLR 689** where a two-stage framework was set out for determining whether an offence of attempt under section 12 of the Misuse of Drugs Act 1972 has been established, focusing primarily on the accused's intention.

[78] It was submitted that applying the two-stage test, the prosecution must establish, firstly, the intention or men rea and secondly, the actus reus which is, were there sufficient acts by the Appellant in furtherance of the specific intention to commit the criminal act.

[79] The prosecution then submitted that the Appellant's act of collecting the parcel from PW7 fell within the definition of an act of trafficking under section 2 of the DDA.

[80] Had he successfully collected the parcel, it was submitted that the Appellant would have been in possession of a sufficient amount of cannabis, 942.2 grams in this case, that would be of a sufficient quantity to support the inference of trafficking.

[81] It was also submitted that the specific act that the Appellant intended to carry out was the collection of the parcel which the Appellant had himself admitted when he went to the counter at the Parcel Hub in Kolombong at around 3.25 p.m.

[82] The prosecution submitted that the Appellant's act of bringing P20 and handing it over to PW7 constitutes a primary and essential step in the process of receiving or procuring the parcel.

[83] The prosecution submitted that the act of the Appellant in answering a phone call and then abruptly leaving the parcel hub without completing the collection process after having already handed over P20 to PW7, constitutes conduct that is relevant under section 8 of the Evidence Act 1950 and which conduct supports the inference that the Appellant had knowledge of the incriminating nature of the parcel's contents.

[84] In answer to the version of the Appellant that he left the premises because he noticed two (2) male customers, one of whom he believed resembled a Penampang Narcotics officer and that he pretended to be on the phone and exited the premises because he felt that the individual was starting at him, it was submitted that the version was never suggested to any of the prosecution witnesses.

[85] The prosecution also pointed out an inconsistency between the version of the Appellant as stated above and his testimony under cross examination when he admitted that he neither saw nor could recognise the face of the officer who had allegedly pursued him earlier.

[86] The Appellant raised allegations of tampering of the incriminating exhibits, namely, whether the ABX plastic wrapping (P7) containing the impugned drugs was opened during the K9 screening and whether the parcel was wrapped in one or two layers of ABX plastic.

[87] In response, the prosecution submitted that there was no break in the chain of exhibits and that the handling and security of the drug exhibits were adequately explained by PW1, PW2, PW4, PW5, PW6 and PW9.

[88] The prosecution further pointed out that at no point in time was any challenge mounted as to the integrity of the contents of the packages.

D) ANALYSIS AND FINDINGS

[89] As stated at the outset, this particular case presents a novel situation in that there are no known authorities in our jurisdiction that deal specifically with an attempt to commit the offence of trafficking.

[90] The starting point therefore must be drawing from sources of authorities in other jurisdictions and also examining analogous provisions in our jurisdiction.

Australia

[91] The leading authority in Australia on this point is the Supreme Court of Victoria case of Britten v Alpogut (supra) where Murphy J stated as follows:

> ***"It will be seen that in the law of attempt the emphasis lies on the criminal intent of the actor, rather than on the patent criminality of the act which he performed.*** *The act itself may be innocuous.*
>
> ***The intention which the Crown must prove is an intention to bring about each element of the crime alleged to be attempted, and it must be proven that this intention is accompanied side by side by an act sufficiently proximate to the offence attempted to take it out of the class of mere preparatory acts.***
>
> ...
>
> *The English Law Commission in its report on "Criminal Law: Attempt and Impossibility in Relation to Attempt Conspiracy and Incitement" (Report No 102 (1980), p 6, reported that "the main justification for the retention of*

inchoate offences is the need to permit the law to impose criminal sanctions in certain cases where a crime has been contemplated but not in fact committed".

But this view was expressed after the decision in Haughton v Smith [1975] AC 476 .

...

In my opinion, it can be said that before Haughton v Smith the law of attempt punished a manifest criminal intention to commit a crime which was not accomplished.

For some inexplicable reason the law of attempt became involved with the question whether or not the crime attempted could have been in fact accomplished by the accused.

It was thought by some that the accused could not be convicted of an attempt to commit a particular crime, when on the facts of the case it would not have been possible for the accused to commit the crime in question.

Immediately, there was a confusion demonstrated between a relevant step in the commission of a possible crime and a relevant step in the commission of an intended crime, but one not capable of being accomplished.

Courts began to ignore the importance of the intention of the accused and tended to concentrate on the question whether what was done was a step towards a crime, which if uninterrupted, would have been committed: cf R v Percy Dalton (London) Ltd (1949) 33 Cr App R 102 at 110 . It was at this stage that the embryo of the heresy in Haughton v Smith was conceived.

...

Attempts are crimes because of the criminal intent of the actor. A man who intends to kill V, and who picks up a gun believing it to be loaded, and who points it at V, and who pulls the trigger is guilty of an attempt to murder V, even if it transpires that the gun was not loaded. Why is this an attempt? Because if the facts had been as the actor believed them to be, he would have committed the intended crime; he intended to murder V, but failed because of a mistake of fact. He is punishable for an attempt, not because of any harm that he has actually done by his conduct, but because of his evil mind accompanied by acts manifesting that intent. ***The criminality comes from the conduct intended to be done. That conduct intended must amount to an actual and not an imagined crime,*** *but if it does, then it matters not that the gun is in fact unloaded, or the police intervene, or the victim is too far away, or the girl is in fact over 16, or the pocket is empty, or the safe is too strong, or the goods are not cannabis.*

It would also be to recognise that at common law a criminal attempt is committed if it is proven that the accused had at all material times the guilty intent to commit a recognised crime and it is proven that at the same time he did an act or acts (which in appropriate circumstances would include omissions) which are seen to be sufficiently proximate to the commission of the said crime and are not seen to be merely preparatory to it. The "objective innocence" or otherwise of those acts is irrelevant.

Impossibility is also irrelevant, unless it be that the so-called crime intended is not a crime known to the law, in which case a criminal attempt to commit it cannot be made."

(emphasis added)

[92] It is apparent from the analysis in Britten that impossibility in the commission of the offence does not constitute a valid defence to a charge of criminal attempt save and except where the act intended does not amount to an offence known to the law.

[93] It is also clear from the analysis that the accused must have performed sufficient acts which manifest both the required intent and taken substantial steps towards the

commission of the offence in order for the offence of attempt to be made out.

Singapore

[94] The Singapore position postulated nothing novel except to draw upon the Australian jurisprudence and to restate the principle as a two-stage framework.

[95] In the case of Han Fang Guan v PP (supra), in determining whether an offence of attempt under section 12 of the Misuse of Drugs Act 1972 had been established, the Singapore Court of Appeal speaking through Sundaresh Menon CJ had this to say:

> "*[108] In that light,* ***we turn to what we regard to be the correct approach, which, in our judgment, is, in broad terms, to align with the Australian jurisprudence*** *and our own decision in Mas Swan.* ***We approach impossible attempts through a two-stage framework that examines the intention of the accused person and whether there were sufficient acts that manifested that intention and the embarkation towards its consummation*** *("the Framework"). We elaborate on each of these as follows:*
>
> *(a)****Intention – Was there a specific intention to commit a criminal act?***

(i)***The key questions*** *in this regard* ***are, in our judgment****:*

(A)***What was the act that the accused person specifically intended to do?***

(B)***Was that intended act criminal, either on its face or by reason of some mistaken belief harboured by the accused person?*** *Thus, the intended act of taking an umbrella may be criminal either because the accused person knows that the umbrella belongs to another or because he mistakenly believes it to be so.*

(ii)***The inquiry only proceeds to the second stage if the answer to (B) above is "yes". This would sieve out situations where what the accused person intended to do was not an offence at all****, meaning cases of no-offence impossibility, which, as we have noted, is commonly accepted not to give rise to criminal liability for attempt.*

(b)***Actus reus – Were there sufficient acts by the accused person in furtherance of the specific intention to commit the criminal act found under (a)?*** *The inquiry here is directed at whether there were sufficient acts to reasonably corroborate the presence of that intention and demonstrate substantial movement towards its fulfilment.* ***A conviction may only be arrived at if the answer to***

this is "yes". This inquiry also serves to avoid penalising mere guilty intentions."

(emphasis added)

[96] The Singapore position, as reasoned above, operates on a two-stage basis and can conveniently be reduced to the following:

a) Intention (mens rea)

(i) What was the specific act the Appellant intended to carry out?

(ii) Does the intended act, if carried out, constitute a criminal offence?

[97] Only if both questions are answered in the affirmative, will the Court proceed to consider the actus reus element.

(b) Actus Reus

(i) Were there sufficient acts by the Appellant in furtherance of the specific intention to commit the criminal act i.e. did the Appellant demonstrate substantial movement towards the commission of the intended criminal act?

Section 511 of the Penal Code (Malaysia)

[98] Section 511 of the Penal Code imposes punishment for attempts to commit certain offences. They are however, confined to offences committed under the Penal Code and in cases where no express provision is made by other written law. It reads as follows:

> *"511. Punishment for attempting to commit offences punishable with imprisonment*
>
> *Whoever attempts to commit an offence punishable by this Code or by any other written law with imprisonment or fine or with a combination of such punishments, or attempts to cause such an offence to be committed, and in such attempt does any act towards the commission of such offence, shall, where no express provision is made by this Code or by such other written law, as the case may be, for the punishment of such attempt, be punished with such punishment as is provided for the offence:*
>
> *Provided that any term of imprisonment imposed shall not exceed one-half of the longest term provided for the offence.*

ILLUSTRATIONS

(a) A makes an attempt to steal some jewels by breaking open a box, and finds after so opening the box that there is no jewel in it. He has done an act towards the commission of theft, and therefore is guilty under this section.

(b) A makes an attempt to pick the pocket of Z by thrusting his hand into Z's pocket. A fails in the attempt in consequence of Z's having nothing in his pocket. A is guilty under this section."

[99] The illustrations to the section indicate that the actus reus is complete when sufficient acts are committed towards the furtherance of the offence. The mens rea is, as is commonly the case, to be inferred from the conduct of the accused and surrounding circumstances.

[100] The purpose of making mention of section 511 Penal Code is to merely demonstrate that the framer of the Code did recognise the significance of the jurisprudence related to the punishment of attempts to commit crimes to wit, that a man who had every intention to commit a crime and had taken substantial steps toward its commission ought not to escape accountability or liability just because the crime turns out to be inchoate.

Application to the facts

[101] Even before embarking upon the two-stage analysis set out in Han Fang Guan (supra), it is necessary to determine whether the act of the Appellant, if carried out to its successful conclusion, would have constituted an offence?

[102] The facts show that the Appellant had attempted to collect a parcel containing 942.2 grams of Cannabis which is classified as a dangerous drug under the DDA 1952.

[103] The act of the Appellant in attempting to collect the parcel would clearly fall under the various acts of "trafficking" under section 2 of the DDA, which in this case, would easily involve "receiving", "carrying", "procuring", "transporting" or "delivering".

[104] Had the Appellant successfully collected the parcel, he would have been in possession of 942.2 grams of cannabis, a quantity that would support the reasonable inference that the drugs were intended for distribution rather than personal consumption.

[105] It is therefore far from being in dispute that the act of collecting the parcel, if completed, would have been for the purpose of drug trafficking.

[106] The next part of the inquiry to establish a case of attempt to traffic would be to ask the following:

(i) <u>What was the specific act the Appellant intended to carry out?</u>

[107] This can be gleaned from the testimony of the Appellant himself who said that he went to the counter at the Parcel Hub in Kolombong at approximately 3.25 p.m. as follows:

> *12. Sampai sahaja di ABX, saya memberitahu bahawa saya ingin mengambil kiriman bagi pihak kawan saya. Saya memberitahu penjaga perempuan di kaunter nama yang ada pada kertas yang Yohan bagi dan kemudian, saya menyerahkan kertas yang Yohan bagi kepada staff ABX tersebut.*

[108] The manifest intention of the Appellant was thus laid bare when he admitted that the specific act that he intended to carry out was the collection of the parcel.

[109] The Appellant also brought with him a printed airway bill (P20) which he handed over to PW7 and said that he was there to receive and collect the said parcel on someone else's behalf.

[110] This further raises the strong inference that the Appellant was unmistakably present there to collect the impugned parcel.

[111] The material particulars evident upon the face of P20 showed an unmistakable link to to the impugned parcel containing 942.2 grams of cannabis thus evidencing the Appellant's intention to take into possession the parcel for the purpose of trafficking in its illicit contents.

[112] The specific act thus, as can be gathered from the pieces of evidence as related to above, was that the Appellant intended to collect the said parcel for the purposes of trafficking in the 942.2 grams of cannabis contained therein.

[113] The Appellant was also observed answering a phone call afterwhich he abruptly left the parcel hub without collecting the parcel. This was further admitted by the Appellant in his cautioned statement (D1).

[114] His conduct of leaving in that manner, after having already handed over P20 to PW7, constitutes conduct that is relevant under section 8 of the Evidence Act 1950. This conduct supports the inference that the Appellant had knowledge of the incriminating nature of the parcel's contents.

[115] The Appellant, in the course of the defence stage, explained that he left the premises because he noticed two (2) male customers, one of whom he believed resembled a Penampang Narcotics officer. He further claimed he pretended to be on the phone and exited the premises because he felt that the individual was staring at him. According to the Appellant, he wished to avoid any confrontation as he had previously been pursued by Penampang narcotics officer for suspected syabu use.

[116] This version of events by the Appellant however, although contained in his section 112 CPC statement, was never suggested to the prosecution witnesses.

[117] This ommission rightfully entitled his defence in that respect to be justifiably characterised as an afterthought and devoid of credibility.

[118] The Appellant further contradicted himself when during the course of examination in chief he claimed to have recognised one of the customers as a narcotics officer from Penampang that he had previously encountered whereas during cross examination he admitted that he had neither seen nor could he recognise the face of the officer who had allegedly pursued him two weeks earlier.

[119] This begs the question of how could the Appellant indentify an individual that he himself admitted he could not recognise?

[120] All the pieces of evidence in this regard supports the more likely inference that the reason for the Appellant's abrupt departure is that he was tipped off regarding the presence of enforcement officers in the vicinity.

[121] The question of whether or not the intended act, if carried out to its conclusion would amount to an offence, has already been answered above.

(ii) <u>Were there sufficient acts by the Appellant in furtherance of the specific intention to commit the criminal act i.e. did the Appellant demonstrate substantial movement towards the commission of the intended criminal act?</u>

[122] The fact that the Appellant went to the Parcel Hub, brought along P20 bearing the same tracking number as the parcel, handed it to PW7, and explicitly informed PW7 that he was there to collect the parcel on behalf of someone else, clearly demonstrate substantial movement toward the commission of the offence, namely, the attempted possession of the parcel for the purpose of trafficking.

[123] The parcel was also designated for self-collection and the fact that P20 bore the same tracking number as the parcel, also clearly demonstrate substantial movement toward the commission of the offence, namely, the attempted possession of the parcel for the purpose of trafficking.

[124] All the above pieces of evidence, taken cummulatively, demonstrate that although actual possession of the parcel did not materialise, the Appellant had taken all necessary steps to procure the same, until he abruptly left the premises after answering a phone call.

[125] The Appellant had thus, from the totality of evidence, demonstrated substantial movement towards the commission of the intended criminal act.

[126] The prosecution therefore had in all the circumstances, proven the offence as charged agaisnt the Appellant.

Other issues

Tampering of exhibits-74

[127] Learned counsel for the Appellant submitted that the integrity of the exhibits had been compromised due to the following:

(a) Whether the ABX plastic wrapping (P7) containing the impugned drugs was opened during the K9 screening; and

(b) Whether the parcel was wrapped in one or two layers of ABX plastic?

(a) Whether the ABX plastic wrapping (P7) containing the impugned drugs was opened during the K9 screening

[128] Learned counsel for the Appellant submitted that there existed a discrepancy between the testimony of PW2 and that of PW3 regarding whether the ABX plastic flyer courier bag parcel (P7) was opened during the K9 screening.

[129] In the course of the trial, both PW6 and PW9, who marked and identified the drug exhibits in Court, confirmed that the drugs that were produced in Court were the same as those originally seized by PW6 and subsequently handed over to PW9. They each verified the markings they had made on the exhibits.

[130] PW1 also confirmed that the drugs produced in court were the same as those received and analysed by him in the Chemistry Department.

[131] Although there was a discrepancy between the testimony of PW2 and PW3 as to whether the ABX plastic flyer courier bag parcel (P7) was opened during the K9 screening, this did not fundamentally affect the integrity of the drug exhibits nor did the challenge by the defence go to the root of the identity of the drug exhibits.

[132] There was no evidence to suggest or support that the drugs or contents of the parcel had been tampered with and no suggestion was made to the Prosecution witnesses regarding any improper handling or storage of the parcel up to the point when the drug exhibits produced in Court.

[133] There was also no challenge was made to the fact that the drug exhibits, which was wrapped in four (4) layers, remained sealed and intact.

[134] It was also never suggested that the drug exhibits seized differed in any way from what was sent to PW1 for analysis or identified in Court.

[135] The identity of the drug exhibits therefore was never in dispute.

[136] The evidence revealed that the drug exhibits were wrapped in four (4) layers, and there was no evidence

from the Appellant to suggest that any of those layers were torn, unsealed, or exposed.

[137] The Appellant did not in particular suggest that the drugs were never in P7, and that the exhibits had been removed and replaced, or that they were planted by enforcement officers.

[138] Therefore the Appellant's allegation on whether the outer plastic courier bag (P7) was opened during the K9 screening is immaterial, given that no challenge was raised as to the integrity of the contents inside.

[139] In any event, PW2 confirmed that P7 was rewrapped after the screening and PW4 and PW5 further confirmed that at the time the Appellant attempted to collect the parcel, the parcel was in sealed and intact.

[140] We found therefore, on the totality of the evidence that there was no break in the chain of evidence, and the identity of the drug exhibits remain intact and undisputed.

[141] We also found no merit to the contention raised by learned counsel that the ABX agent who opened the parcel upon PW2's instruction ought to be called, as he could confirm whether P7 was opened during the K9 screening.

[142] We were however of the view that there was no necessity to call the ABX agent, as the identity and integrity of the drugs contained in P7 was never seriously disputed.

[143] The Prosecution had also called PW2 and PW3, who witnessed the parcel from the point of detection, through the K9 screening, until it was rewrapped and handed over to MAS Cargo.

[144] The law is also trite and settled that there is no requirement to call every person who may have handled an exhibit, unless the identity of the exhibit is in issue which was not the case here. See **Abdul Rahman Mohd v PP [2021] CLJU 804**.

[145] It was sufficient for the Prosecution to establish that there was no break in the chain of evidence concerning the handling and movement of the drug exhibits, which has been adequately demonstrated here.

(b) Whether the parcel was wrapped in one or two layers of ABX plastic?

[146] The Appellant also raised the alleged discrepancy in PW6's testimony regarding P7 when during cross-examination, PW6 observed what appeared to be an additional layer of ABX plastic flyer courier bag in Exhibit

P6, which were photographs taken by PW10 and which led PW6 to initially believe that two ABX plastic flyer bags may have been involved.

[147] This was however, clarified during re-examination where it was confirmed that only one ABX plastic courier bag was used for the parcel. This clarification was consistent with the testimonies of both PW9 and PW10 who both confirmed that only one ABX plastic flyer bag was in existence.

[148] In any event, the HCJ found that this was a minor discrepancy arising from PW6's initial interpretation of the photographs and where the HCJ had noted that PW6 subsequently corrected himself and clarified that only one ABX plastic flyer courier bag enclosed the parcel.

[149] In any event, the Appellant's allegation, in focusing on the outer plastic packaging, does not compromise the identity or integrity of the contents within P7. In all the circumstances, there was therefore no break in the chain of evidence, nor any suggestion of tampering with the drug exhibits found in the parcel.

Whether there was incomplete investigation in relation to the failure of PW9 to investigate the existence of a personality by the name of "Yohan"?

[150] The Appellant contended that he had no knowledge of the contents of the parcel and was merely instructed by an individual named "Yohan" to collect it from the Parcel Hub. In support of the existence of "Yohan", the Appellant, through SD2, produced several images (D3, D4 & D5) as evidence of "Yohan's identity".

[151] It is however pertinent to note that at no time did the Appellant provide any detailed or adequate particulars of the said "Yohan" to the investigative agencies quite apart from the name and an address that only read "Blok C, Taman Puri Warisan".

[152] Nontheless, according to the testimony of PW9, efforts were made to trace the wherabouts of the said "Yohan" when PW9 conducted searches with the JPN (P29) and the Immigration Department (P31).

[153] However, both agencies confirmed that no such individual could be found in their records due to the lack of sufficient particulars (P30 & P32).

[154] PW9 in his testimony said that the information provided by the Appellant was vague and lacking in specificity, rendering it insufficient to assist in any meaningful investigation.

[155] Given that efforts were made by the prosecution to detect the whereabouts of the said "Yohan" albeit with very scant particulars, the police investigation cannot be said to be deficient especially in the light of an insufficient "Alcontara notice".

[156] Even if the said "Yohan" does exist and is not a mere figment of imagination by the Appellant, it is implausible that he would entrust the Appellant whom he had only known for barely a month with the collection of a parcel of such significant value without proper coordination.

[157] The conduct of a reasonable person in the shoes of the said Yohan would be to arrange for the collection himself or at the very least have informed the courier company that the Appellant would be collecting the parcel on his behalf.

[158] It it implausible that the said Yohan would delegate the task of collection of this precious cargo to someone with whom he shared no verifiable residential address.

[159] The version by the Appellant during the defence stage that he met Yohan at Taman Puri Warisan on the day of the incident and was requested to collect the parcel for delivery to Yohan's family in Tawau and was handed P20 for that purpose was never put to any of the Prosecution's witnesses during their testimonies.

[160] The Appellant also did not allude to what were the instructions from Yohan as to what he was to do with the parcel after collection were also never suggested during the Prosecution's case.

[161] These notable ommisions served to further undermine the credibility of the Appellant's defence.

[162] In the attempt to establish the existence of "Yohan", the Appellant, through SD2, produced D3, D4 and D5 respectively, while alleging that the individual depicted there was the said "Yohan".

[163] SD2 was the Appellant's solicitor's clerk and in her testimony, expressly confirmed that she did not know"Yohan" and could not verify whether the individual shown in D3, D4 and D5 was the same person the Appellant identified as Yohan.

[164] A perusal of the photographs D3, D4 and D5, will show that the names appearing on the social media accounts are "Yohannsalleh" and "Yohan Salleh".

[165] However, the mere production of photographs of individuals bearing that name does not by any means go to establish that the said "Yohan" referred to by the Appellant actually exists.

[166] It is to be further noted that exhibits D3, D4 and D5 were never produced by the Appellant during the investigation or during the Prosecution's case and only surfaced during the defence stage.

[167] In all the circumstances, the evidence tendered by the defence did not give rise to the existence of the said "Yohan" and in any event would not have exonerated the Appellant from liability in his actions in attempting to retrieve the impugned parcel containing the dangerous drugs.

Whether an adverse inference ought to have been drawn against the Prosecution for not calling the officer from ABX who had communicated with the named consignee in the airway bill (P20)?

[168] The Appellant submitted that the HCJ erred in failing to draw an adverse inference under section 114(g) of the Evidence Act 1950 against the Prosecution for not calling the ABX staff member who contacted the named consignee in the airway bill (P20) to inform him to collect the parcel at ABX Jalan Gaya but was informed that the customer intended to collect at the Parcel Hub.

[169] The testimonies of PW4, PW5, PW6 and PW7 confirmed that the parcel was initially to be collected at ABX Jalan

Gaya, but the location was later changed at the request of the customer to the Parcel Hub.

[170] Given the undisputed fact that it was the Appellant himself who physically showed up at the Parcel Hub to collect the said parcel, no purpose would have been served in calling the ABX staff member.

[171] In any event, even if the ABX staff had been called, he would not, in the absence of anything more, been able to identify or confirm the identity of the caller.

[172] In all the circumstances therefore, the ABX staff was not a material witness to the unfolding of the prosecution narrative against the Appellant. There was also no suppresion of evidence in this respect and the allegation of there being any adverse inference under section 114(g) of the Evidence Act 1950 is without merit.

[173] Furthermore, the intended recepient would have been immaterial to the prosecution case given that the charge here was against the Appellant was one of attempt to traffic in dangerous drugs.

E) DECISION

[174] Based upon the reasons expressed above, we are of the view that there is no merit in the arguments canvassed

that there cannot be any control or custody as the impugned drugs were not taken into possession as section 33 of the DDA was specifically enacted to criminalise an attempt to commit the offence of trafficking in dangerous drugs.

[175] We also find that there is no merit to the argument by the defence that such a charge as proffered by the prosecution would open the floodgates for charging accused persons for an offence that falls short of trafficking but would fail to satisfy the elements of possession, custody or control as would be required under a charge under setcion 39B DDA.

[176] Consequently, we further found no merit to the submission that as the sentence for such an offence could be the effectively the same as for the main offence albeit where the mode of proof is much lesser, that that would amount to a deprivation of the rights of an accused under the provisions of article 5 and 8 of the Federal Constitution.

[177] We find that the HCJ was, based upon the evidence adduced, correct in finding that the prosecution had made out a prima facie case against the Appellant and that the defence had failed to raise a reasonable doubt in the prosecution case after the conclusion of the case.

[178] We find the conviction in all the circumstances of the case to be safe and we therefore dismiss the appeal against both conviction and sentence.

[179] My learned brothers, Justice Ravinthran N. Paramaguru as Chairman of the panel and Justice Ahmad Kamal Bin Md. Shahid have seen and approved this judgement in draft.

Dated : 26 February 2026

(COLLIN LAWRENCE SEQUERAH)
Judge
Court of Appeal, Malaysia

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