

# Drug Offences and the Death Penalty in Malaysia: Fair Trial Rights and Ramifications

Report Briefing

## Innocent Couriers: The Overrepresentation of Foreign Nationals and Women Prisoners on Death Row

Foreign nationals are overrepresented in the Malaysian death row population. Amnesty International reports that 44% of persons sentenced to death are foreign nationals and, of those foreign nationals 49% have been convicted of drug-related offences.<sup>1</sup>

Whilst women only comprise 11% of Malaysia's total death row population, Amnesty International reports that 95% of females on death row have been sentenced for a drug-related crime and 86% of women on death row are foreign nationals.<sup>2</sup> Importantly, it must be recognised that '[d]rug war discourse is profoundly gendered' whereby the 'drug war discourses establish the state as paternalistic protector'.<sup>3</sup> In the context of 'the female drug mule', women traffickers are prima facie seen as 'potential villains' despite that 'as women, they are potential victims'.<sup>4</sup>

In this context, there is a defence commonly raised by accused persons, that is, the defence of innocent carrier. A creature of the Malaysian common law, the defence is defined as 'a state of affairs where an accused person acknowledges carrying for example a bag or a box ... containing the dangerous drugs but disputes having knowledge of the drugs'.<sup>5</sup> However, it appears Malaysian courts are often reluctant to accept the defence of innocent carrier suggesting that the defence is a 'mere afterthought', or that the conduct of the accused gives rise to wilful blindness.

Whether the defence is successful is dependent upon the facts of each case. However, our analysis of cases for the report illuminated some common themes amongst those decisions within which the accused raised the defence of innocent carrier. Typically, the focus is on the fact that the accused was that a 'drug mule/carrier'; conduct that is presented by defence counsel as mitigating. The defence is particularly prevalent amongst those vulnerable members of the death-row population, notably foreign nationals who are female (e.g. female migrant workers). These people are targeted by drug-trafficking syndicates 'because they are typically poor and uneducated, but hold passports'.<sup>6</sup> In fact, it is estimated that at least 30% of persons arrested for suspected drug-trafficking globally are women, 'usually for low-level involvement, including as drug couriers/mules'.<sup>7</sup> It should be noted that the defence is rarely accepted by trial judges in Malaysia in the context of drug trafficking and the death penalty.

The following are some examples of such decisions:

### PP v Winfred To Make [2019] 1 LNS 1168

Pursuant to s.39B DDA, the accused who was a Kenyan national was convicted for trafficking 818g of methamphetamine. The accused was arrested at Kuala Lumpur International Airport and argued that he had no knowledge of the drugs contained in the seized luggage. He submitted that his friend, Sharon, had asked him to do her a favour by delivering the luggage to her. He had no reason to be suspicious, particularly since the drugs were concealed and not visible to the naked eye. However, the Court found the defence was without merit and that the concealment of the drugs could not be considered in the defence in drug cases. This would enable those accused of drug trafficking to evade prosecution. The Court held that Sharon was a fictitious character and rejected the accused's argument that he did not know Sharon well and that he did not receive compensation from Sharon. The Court did not accept the defence of innocent carrier finding instead that the accused was guilty of wilful blindness.

# 44%

of persons sentenced to death in Malaysia are foreign nationals

# 49%

of the foreign nationals sentenced to death have been convicted of drug-related offences

# 95%

of women sentenced to death have been convicted of drug-related offences

# 86%

of women sentenced to death in Malaysia are foreign nationals

1. Amnesty International, *Fatally Flawed*, 19-20.
2. Amnesty International, *Fatally Flawed*, 19-20.
3. Jennifer Fleetwood and Lizzie Seal, 'Women, Drugs and the Death Penalty: Framing Sandiford' (2017) 56(3) *Howard Journal of Crime and Justice* 358, 360.
4. Jennifer Fleetwood and Lizzie Seal, 'Women, Drugs and the Death Penalty: Framing Sandiford' (2017) 56(3) *Howard Journal of Crime and Justice* 358, 360.
5. *Venkatesan Chinnasami v PP* [2011] 1 LNS 1736
6. Cornell Centre on the Death Penalty Worldwide, 'Judged for More than Her Crime: Global Overview of Women Facing the Death Penalty' (Report of the Alice Project, September 2018) 12.
7. Mohamed Elewa Badar, *The Concept of Mens Rea in International Criminal Law: The Case for a Unified Approach* (Hart Publishing, 2013) 178.

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### PP v Huang Ziling [2017] MLJU 1582

The accused, Huang Ziling ('Ziling'), was a female Chinese national charged with trafficking 1.4kg of methamphetamine under s.39B DDA. Ziling elected to give evidence on oath and stated that she was an unmarried girl from the Chinese Guangxi province. She submitted that her presence in Malaysia was her first overseas trip, prior to which she worked as a waitress in Guangzhou. She claimed that one of her customers was a Nigerian male called 'She Be' who, in or about November 2013, offered her a job with a monthly salary of 10,000 yuan to transport children's items and clothing outside of China. In or about January 2014, She Be gave Ziling a luggage bag and instructed her to travel to Malaysia. She Be opened a small hole in the bag revealing a box of stationery but otherwise did not show Ziling what was inside the bag. She Be did not accompany Ziling to the airport.

Ziling's main defence was that she was merely an innocent carrier who, given the nature of her employment and the description of her tasks by She Be, had no reason to suspect that the luggage contained illicit drugs. However, the Court found this to be a bare denial and that Ziling's explanation was not credible. The defence did not raise a reasonable doubt in the prosecution case despite the fact that burden upon which Ziling was to rebut the statutory presumption of trafficking was on the balance of probabilities.

### Samim Sainsha (India) v PP [2019] MLJU 243

The appellant, an Indian national, was convicted of trafficking 746g methamphetamine pursuant to s.39B DDA. The Court rejected the defence of innocent carrier finding that the appellant had failed to rebut the presumption of knowledge under s.37(d) DDA. The appellant had argued that she was recruited by an employment agent named Abdullah who had promised her a job in Malaysia. She did not deny taking the bag containing the drugs from the luggage carousel at Kuala Lumpur International Airport, but did submit that she had done so mistakenly. She also submitted that whilst the bag was being examined by the Customs Officer, a contact of Abdullah's had called her. The trial judge said that this defence was a mere afterthought and fabrication since the appellant never lodged a report of mistaken luggage with the police or Airport Authority.

On appeal, the appellant said that the trial judge erred in finding that the chemist was an expert since the 'expertise' had not been proven. The chemist had failed to adhere to s.45 Evidence Act which required that she give details of her background. However, the Court found this was not fatal to the prosecution case since the required identification of the substance was an opinion of chemists which was merely elementary in nature. The appellant also submitted that she had raised a reasonable doubt as to her knowledge of the drugs. However, the Court simply found that there was no coincidence that the bag collected was similar to the bag the appellant owned and highlighted that the contents of the bag contained traditional female Indian clothes which all fitted the appellant. Ultimately, it was found that even if Abdullah was not fictitious, this makes little difference to the defence of innocent carrier since the appellant had taken the bag containing the drugs.

#### Further information about this report

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