

£MALAYSIA

@Death of an innocent?

Death penalty accused presumed guilty

Hassim Escandar was hanged on Friday morning, 30 April 1993. In one of the last of his many letters to Amnesty International on 21 March 1993, Escandar repeated that he was innocent and wrote, "I hope you could send me an information of guarantee if possible, to relieve my doubt and fear from execution. . . God always protect you from all danger. Amen. . ." It is likely that Escandar may have been innocent of the charge of drug trafficking for which he was arrested on 23 November 1985 and sentenced to death on 15 December 1989 by the High Court in Kota Kinabalu in the Malaysian state of Sabah. Escandar was tried under the Dangerous Drugs Act, 1952, according to which suspected drug traffickers are presumed guilty unless they can prove their innocence. The Dangerous Drugs Act also pronounces the death penalty as mandatory punishment for those convicted of drug trafficking. Escandar's appeal was rejected by the Supreme Court at the end of February 1992 and his plea for clemency was rejected some months later by the Sabah State Board of Pardons. Amnesty International is concerned that the Dangerous Drug Act's presumption of guilt contravenes fundamental legal safeguards laid down in international human rights law.

Escandar was convicted on the basis of two keys allegedly found on him which fitted a padlock to a bag containing about five kilograms of cannabis. The bag was found under the seat of the conductor of the bus in which Escandar, a Filipino immigrant worker, was travelling with seven other passengers, all native Sabahans. The conductor and driver of the bus were let off immediately by the anti-drugs squad of the police. Six of the passengers soon got bail and were let out of detention. The seventh passenger who was jointly charged with Escandar was freed by the High Court judge without even being called to defend himself. According to Escandar, the keys were actually found on the seventh passenger and not on Escandar.

The six passengers who were later bailed out had been initially remanded under Section 396 of the Criminal Procedure Code to be called as prosecution witnesses. None of them was called to give evidence during Escandar's trial and his defence counsel was not given the opportunity of examining the witnesses. They were released by the prosecution without pre-trial depositions being taken. Escandar was convicted on the basis of the anti-drugs squad's evidence that two keys were found on Escandar which opened the padlock to the bag containing cannabis.

The alleged possession of the two keys was sufficient evidence to hang Escandar according to the legal presumptions laid down in the Dangerous Drugs Act which are loaded against anyone arrested under it. These legal presumptions assume that the accused is guilty unless he/she can prove his/her innocence. These presumptions contradict the fundamental principle of Malaysian jurisprudence and the universal principle of "due process" which is that the accused is presumed to be innocent until proven guilty. This leads to the highly anomalous position that an alleged drug trafficker who is liable to be hanged is guilty till

he/she can prove his innocence while, for instance, an alleged pickpocket is innocent till he/she is proven guilty in court by the prosecution.

Where the drugs are found concealed in a bag, box, home, office, shop or car belonging to or being used by the accused, he/she is presumed to have had prior knowledge of the presence of the drugs in his/her container, premises or vehicle.

Even where an informer or agent provocateur has encouraged the commitment of an offence, the evidence of the informer or agent provocateur is readily admissible in court for the prosecution of the accused. It is reportedly standard practice that the police give cash rewards to informers and agents provocateurs who are able to entrap suspected drug traffickers. The inducement for informers and agents provocateurs to plant drugs on unsuspecting dupes can well be imagined.

Under Section 37 (d), (g) and (h), titled "Presumptions", of the Dangerous Drugs Act, the relevant paragraphs state:

"(d) any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;"

"(g) if any dangerous drug is found to be concealed in any premises, it shall be presumed until the contrary is proved, that the said drug is so concealed with the knowledge of the occupier of the premises;"

"(h) if any dangerous drug is found concealed in any compartment, specially constructed for the purpose, on any vehicle, it shall until the contrary is proved be deemed to have been so concealed with the knowledge of the owner of the vehicle and of the person in charge of the vehicle for the time being;"

Under Section 40A (1), titled "Evidence of agent provocateur admissible", of the Dangerous Drugs Act, the relevant paragraph states:

"(1) Notwithstanding any rule of law or provisions of this Act or any other written law to the contrary, no agent provocateur shall be presumed to be unworthy of credit by any reason only of his having attempted to abet or abetted the commission of any offence by any person under this Act if the attempt to abet or abetment was for the sole purpose of securing evidence against such person."

And, finally, under Section 37 (da) of the Dangerous Drugs Act, any person who is so found (in the circumstances stated above) in possession of 15 grammes or more of heroin, morphine or monoacetylmorphines, or 200 grammes or more of cannabis or cannabis resin, or 1,000 grammes or more of raw opium or prepared opium, is presumed to be trafficking in drugs.

Under Section 39B (2) of the Dangerous Drugs Act, the drug trafficker "shall be punished on conviction with death".

Between 1983 and the end of 1991, 142 alleged drug traffickers were hanged under these legal presumptions which are loaded against the accused from the moment of their arrest. Some of them, such as Hassim Escandar, may have been innocent of the charges brought against them.

Amnesty International considers Section 37 (d), (g), (h) and (da), and Section 40A (1) of the Dangerous Drugs Act to be in contravention of Article 11 (1) of the Universal Declaration of Human Rights under which "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence". These Sections also contravene Article 14 (2) of the International Covenant on Civil and Political Rights under which "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law". Finally, these Sections contradict the very basis of Malaysian jurisprudence which is that the accused is presumed to be innocent until proven guilty.

Amnesty International calls on the Malaysian Government to initiate suitable amendments in parliament to remove from the statute books the legal presumptions mentioned above which have demonstrably prejudiced the trial of persons accused of drug trafficking under the Dangerous Drugs Act, 1952.