DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANG KUASA RAYUAN)
RAYUAN JENAYAH: W-05(M)-616-12/2019

ANTARA

ZULZAMRI BIN ZULKIFLI
(NO. K/P: 830527-09-5011) **… APPELLANT**

DAN

PENDAKWA RAYA **… RESPONDENT**

JOINTLY HEARD WITH

DALAM PERKARA RAYUAN MAHKAMAH RAYUAN MALAYSIA
DI PUTRAJAYA
RAYUAN JENAYAH: W-05(M)-617-12/2019

ANTARA

ZULZAMRI BIN ZULKIFLI
(NO. K/P: 830527-09-5011) **… APPELLANT**

DAN

PENDAKWA RAYA **… RESPONDENT**

JOINTLY HEARD WITH

DALAM PERKARA RAYUAN MAHKAMAH RAYUAN MALAYSIA
DI PUTRAJAYA
RAYUAN JENAYAH: W-05(M)-618-12/2019

ANTARA

NUR SYAFIQAH BINTI MOHAMMAD BAKRI … APPELLANT
(NO.KP: 921010-01-6070)

DAN

PENDAKWA RAYA … RESPONDENT

CORAM:

KAMALUDIN BIN MD. SAID, JCA

LEE HENG CHEONG, JCA

HASHIM BIN HAMZAH, JCA

GROUNDS OF JUDGMENT

1. Zulzamri Bin Zulkifli ("1st Appellant") and Nur Syafiqah Binti Mohammad Bakri ("2nd Appellant") were charged with 6 charges in the High Court and the 6 charges are as follows:-

1ST CHARGE

"BAHAWA KAMU BERSAMA-SAMA PADA 5 *JANUARI 2017 JAM LEBIH KURANG JAM 11.30 PAGI DI DALAM KERETA PROTON SATRIA WARNA SILVER BERNOMBOR PENDAFTARAN WES 1692, DI LOT 501 PARKING ARAS 1, REGALIA SERVICE APARTMENT, NO. 2, JALAN ANJUNG PUTRA OFF JALAN SULTAN ISMAIL, DALAM DAERAH DANG WANGI, DALAM WILAYAH PERSEKUTUAN KUALA LUMPUR BAGI MENCAPAI NIAT BERSAMA KAMU TELAH MEMPEREDARKAN DADAH BERBAHAYA IAITU*

CANNABIS SEBERAT 54,215 GRAM DAN DENGAN ITU KAMU TELAH MELAKUKAN KESALAHAN DI BAWAH SEKSYEN 39B(1)(a) AKTA DADAH BERBAHAYA 1952 YANG BOLEH DIHUKUM DI BAWAH SEKSYEN 39B(2) AKTA YANG SAMA DIBACA BERSAMA SEKSYEN 34 KANUN KESEKSAAN." ("1st Charge")

THE 2ND CHARGE

"BAHAWA KAMU BERSAMA-SAMA PADA 5 *JANUARI 2017 JAM LEBIH KURANG JAM 9.45 PAG/ DI PREMIS B-16-10, REGALIA SERVICE APARTMENT, NO. 2, JALAN ANJUNG PUTRA OFF JALAN SULTAN ISMAIL, DALAM DAERAH DANG WANGI, DALAM WILAYAH PERSEKUTUAN KUALA LUMPUR BAGI MENCAPAI NIAT BERSAMA KAMU TELAH MEMPEREDARKAN DADAH BERBAHAYA IA/TU METHAMPHETAMINE SEBERAT 269.21 GRAM DAN DENGAN ITU KAMU TELAH MELAKUKAN KESALAHAN DI BAWAH SEKSYEN 39B(1)(a) AKTA DADAH BERBAHAYA 1952 YANG BOLEH DIHUKUM DI BAWAH SEKSYEN 39B(2) AKTA YANG SAMA DIBACA BERSAMA SEKSYEN 34 KANUN KESEKSAAN." ("2nd Charge")*

THE 3RD CHARGE

"BAHAWA KAMU BERSAMA -SAMA PADA 5 *JANUARI 2017 LEBIH KURANG JAM 9.45 PAG/ DI PREMIS B-16-10, REGALIA SERVICE APARTMENT, NO. 2, JALAN*

ANJUNG PUTRA OFF JALAN SULTAN ISMAIL, DALAM DAERAH DANG WANGI, DALAM WILAYAH PERSEKUTUAN KUALA LUMPUR BAGI MENCAPAI NIAT BERSAMA KAMU TELAH ADA DALAM MILIKAN KAMU DADAH BERBAHAYA SEJUMLAH BERAT 17.60 GRAM NIMETAZEPAM DAN DENGAN ITU KAMU TELAH MELAKUKAN SUATU KESALAHAN DI BAWAH SEKSYEN 12(2) AKTA DADAH BERBAHAYA 1952 YANG BOLEH DIHUKUM DI BAWAH SEKSYEN 12(3) AKTA YANG SAMA DAN DIBACA BERSAMA SEKSYEN 34 KANUN KESEKSAAN." ("3rd Charge")

THE 4TH CHARGE

"BAHAWA KAMU BERSAMA -SAMA PADA 5 JANUARI 2017 LEBIH KURANG JAM 9.45 PAGI DI PREMIS B-16-10, REGALIA SERVICE APARTMENT, NO. 2, JALAN ANJUNG PUTRA OFF JALAN SULTAN ISMAIL, DALAM DAERAH DANG WANGI, DALAM WILAYAH PERSEKUTUAN KUALA LUMPUR BAGI MENCAPAI NIAT BERSAMA KAMU TELAH ADA DALAM MILIKAN KAMU DADAH BERBAHAYA SEJUMLAH BERAT 0.23 GRAM HEROIN DAN DENGAN ITU KAMU TELAH MELAKUKAN SUATU KESALAHAN DI BAWAH SEKSYEN 12(2) AKTA DADAH BERBAHAYA 1952 YANG BOLEH DIHUKUM DI BAWAH SEKSYEN 12(3) AKTA YANG SAMA DAN DIBACA BERSAMA SEKSYEN 34 KANUN KESEKSAAN." ("4th Charge")

THE 5TH CHARGE

"BAHAWA KAMU BERSAMA-SAMA PADA 5 JANUARI 2017 LEBIH KURANG JAM 9.45 PAGI DI PREMIS B-16-10, REGALIA SERVICE APARTMENT, NO. 2, JALAN ANJUNG PUTRA OFF JALAN SULTAN ISMAIL, DALAM DAERAH DANG WANGI, DALAM WILAYAH PERSEKUTUAN KUALA LUMPUR BAGI MENCAPAI NIAT BERSAMA KAMU TELAH ADA DALAM MILIKAN KAMU DADAH BERBAHAYA SEJUMLAH BERAT 0.03 GRAM MONOACETYLMORPHINES DAN DENGAN ITU KAMU TELAH MELAKUKAN SUATU KESALAHAN DI BAWAH SEKSYEN 12(2) AKTA DADAH BERBAHAYA 1952 YANG BOLEH DIHUKUM DI BAWAH SEKSYEN 12(3) AKTA YANG SAMA DAN DIBACA BERSAMA SEKSYEN 34 KANUN KESEKSAAN." ("5th Charge")

THE 6TH CHARGE

"BAHAWA KAMU BERSAMA-SAMA PADA 5 JANUARI 2017 LEBIH KURANG JAM 9.45 PAGI DI PREMIS B-16-10, REGALIA SERVICE APARTMENT, NO. 2, JALAN ANJUNG PUTRA OFF JALAN SULTAN ISMAIL, DALAM DAERAH DANG WANGI, DALAM WILAYAH PERSEKUTUAN KUALA LUMPUR BAGI MENCAPAI NIAT BERSAMA KAMU TELAH ADA DALAM MILIKAN KAMU DADAH BERBAHAYA SEJUMLAH BERAT 2.15 GRAM KETAMINE DAN DENGAN ITU KAMU TELAH

MELAKUKAN SUATU KESALAHAN DI BAWAH SEKSYEN 12(2) AKTA DADAH BERBAHAYA 1952 YANG BOLEH DIHUKUM DI BAWAH SEKSYEN 12(3) AKTA YANG SAMA DAN DIBACA BERSAMA SEKSYEN 34 KANUN KESEKSAAN." ("6th Charge")

2. At the end of the Prosecution's case, the learned High Court Judge ("learned High Court Judge") found that the Prosecution has proven a prima facie case against the 1st Appellant and ordered him to enter his defence in respect of the 6 charges preferred against him. In respect of the 2nd Appellant, the learned High Court Judge called the 2nd Appellant to enter her defence in respect of 2nd to the 6th charges and acquitted her, of the 1st Charge.

3. At the end of the defences' cases, the learned High Court Judge convicted the 1st Appellant, on all the 6 Charges while 2nd Appellant was convicted on the 2nd Charge to the 6th Charge. The learned High Court Judge then sentenced the 1st and 2nd Appellants to death on the 2nd charge under **Section 39B(1)(a) of Dangerous Drugs Act 1952** ("**DDA 1952**"), 3 years' imprisonment for the 3rd charge and 1 year's imprisonment for the 4th to 6th charge under **Section 12(2) of DDA 1952** and **Section 12(3) of the same Act.**

4. Being aggrieved, both the 1st and 2nd Appellants appealed against the convictions and sentences imposed by the learned High Court Judge. The 6 charges formed the subject matter of

the 3 appeals which are jointly heard before us.

5. We heard the above 3 appeals of the 1st and 2nd Appellants on 12.1.22. After perusing through the Appeal Records and after hearing submissions from all parties, we find no appealable errors in the decision of the learned High Court Judge. We, unanimously dismissed the 3 appeals of the 1st and 2nd Appellants and we affirmed the convictions and sentences imposed by the learned High Court Judge. Herein below are our grounds for the dismissal of the 3 Appeals.

THE FACTS OF THE PROSECUTION'S CASE

6. On 5.1.2017, at about 9.30am, one Inspector Murugan a/l Suppiah (SP6) together with a team of policemen from the Narcotics Criminal Investigation Department, Ibu Polis Daerah Dang Wangi ("IPD Dang Wangi") raided a premise located at Apartment B-16-10, Regalia Service Apartments, No. 2, Jalan Anjung Putra, Off Jalan Sultan Ismail, Kuala Lumpur ("the Apartment") for suspected drugs activities.

7. SP6 and the raiding team arrived at the scene at about 9.40am and went to the Apartment, assistedby the chief security guard of the Regalia Service Apartments, SP4, Mohammad Faizal bin Abdullah because SP6 and the raiding team do not have the access card to enter the Apartment.

8. When they arrived at the Apartment, SP6 found the door of the Apartment locked. SP6 then knocked at the door of Apartment

and the 2nd Appellant opened the door. Then SP6 and the raiding party entered the Apartment and arrested the 2nd Appellant. At that point of time, SP6 saw that the 1st Appellant was seated at the living hall of the Apartment.

9. SP6 detained the 2nd Appellant after introducing himself, as a senior police officer, by showing his police authority card. SP6 did a bodily search on the 2nd Appellant and found nothing.

The kitchen of the Apartment

10. Then in the presence of the 1st and 2nd Appellants as well as another police witness, SP6 inspected the kitchen of the Apartment ("Kitchen") and have found 1 large blue plastic bag with the following words "*AEON* Go *Green With Us"* written on it, located in the cabinet under the sink in the Kitchen. Inside the large blue plastic bag, there are 2 colored plastic bags with the words "PIAU SIANG" written in yellow red.

11. In the 1st "PIAU SIANG" plastic bag, there are 12 bond foil pill *Erimin*_5, and each bond foil contains 25 *Erimin foils* 5. Each piece of foil contains 10 pills. The total amount is as many as 3000 pills, weighing 17.60 grams of *Nimetazepam.* Inside the 2nd plastic bag with the words "PIAU SIANG", he found 2 packages of transparent plastic bags which contained drugs, weighing 269.1 grams of *Methamphetamine.*

The Living Hall of the Apartment

12. Further inspection of the living hall area of the Apartment ("Living Hall"), resulted in the discovery of 1 yellow/black coloured box with the words written "COHIBA" on it, on the small table, containing the followings:

(a) 1 small package of transparent plastic containing 8 pills "WY" weighing 0.11 grams of Methamphetamine;
(b) 2 transparent plastic packages containing drugs to wit: 0.23 grams of Heroin and 0.03 grams of Monoacetylmorphines; and
(c) 1 plastic transparent plastic package containing drugs weighing 2.15 grams of Ketamine.

The Guest room of the Apartment

13. Further inspection and examination of the guest room in the Apartment ("Guest Room"), resulted in the discovery of the following equipment:

(a) 1 impulse tool sealer;
(b) 1 bottle glass tool for inhaling drugs;
(c) 1 burner - "HONEST" brand;
(d) 1 house key with the words "St. Guchi"
(e) 2 units of house access cards – with the words, "Regalia 8-16-10" on them;

(f) 1 parking card for Regalia Apartments; Mixed cash – total RM27,656.00;an agreement dated 1.6.2016 between Wan Norashikin Binti David and Nur Syafiqah Bt Mohammad Bakri;

(g) 2 sets of car keys together with the car alarm control which were hanging on the wall of the of the living room;

(h) 1 green coloured shirt with the following words “PDI” written on it;

(i) 2 pairs of red coloured women’s blouses;

(j) 1 pair of jean pants which is blue with the brand “Nudie jeans co”; and

(k) 1 bond empty transparent plastic.

14. As a result of interrogation and with the guidance of the 1st Appellant and the 2nd Appellant, SP6 and the raiding team were taken to Car Park Lot 501, at Parking Level 1, Regalia Service Apartments (“Car Park Lot 501”). Upon arrival, the 2nd Appellant showed SP6, a Proton Satria car, bearing registration number, WES 1692 (“Proton Satria”). SP6 then inspected the car and found all the car doors and windows in good condition and locked. SP6 then opened the door of the Proton Satria, using the car alarm control confiscated from the Apartment.

<u>In the Proton Satria Car</u>

15. In the presence of the 1st and 2nd Appellants, as well as members of the police raiding party, SP6 discovered an umbrella with the

words “KotaSAS” written on it which is opened up, at the Proton Satria’s footwear area of the rear passenger’s seat. SP6 took the umbrella and saw 1 bag which is a large black colored plastic bag containing 10 lumps of compressed plastic containing *Cannabis.*

16. After that, the SP6 checked the boot of the Proton Satria and found 2 black plastic bags which contained the followings:

(a) 1 of the plastic bags contained 22 lumps of big compressed plastic containing *Cannabis;* and

(b) the other plastic bag contained 25 lumps of big compressed plastic containing Cannabis.

The nett weight of all 47 pieces of the Cannabis totaled 54,215 grams.

17. SP6 then confiscated all the case items and contacted the Investigating Officer, ASP Rosian bin Tambi (SP7) and the police Forensic Officer. SP6 then proceeded to prepare a Search List (Exhibit P96 and Exhibit P97) at the scene. SP7 and the Forensic Officers went to the Apartment and to Car Park Lot 501. After the forensic officers have checked and processed fingerprints on all the relevant case items, SP6 then seized all case items and arrested both the 1st and 2nd Appellants. In addition, SP6 also made a marking on all the case items found at the Apartment and at Car Park Lot 501. Having made the markings, at about 5.30pm, both the 1st and 2nd Appellants were detained and taken away to IPD Dang Wangi for further investigation.

18. Upon arrival at IPD Dang Wangi at about 6 pm, SP6 weighed all the case items seized. Apart from that, SP6 also made two (2) separate police reports namely Police Report Chow Kit 127/17 (Exhibit P95) for the raid and the drugs seized at the Apartment and another Chow Kit Police Report No. 129/17 (Exhibit P96) for the raid and the seizures of drugs from the Proton Satria at Car Park Lot 501. SP6 also took a urine test of both the 1st and 2nd Appellants and prepared the Handing Over Forms (Exhibit P99 and Exhibit P100) between SP6 and SP7.

19. From an investigation of SP7 on SP1, it showed that SP1 is the owner of the Apartment and the Apartment was rented to the 2nd Appellant through a real estate agent, Lee Yek Goh (SP3). While Car Park Lot 501, at Level 1 of the Regalia Service Apartments was rented by Che Wan Nadilah Binti Che Wan Nadzamuddin (SP2) to the 2nd Appellant. The Proton Satria which was confiscated by the police, was purchased by the 1st Appellant but registered in the name of the 1st Appellant's younger brother, Mohd Nor Shawal Bin Zulkifli (SP8). SP8 just use the car for a month and later, the car was handed back to the 1st Appellant.

20. On 6.1.2017, at 2.30pm, SP7 instructed the police photographer, Corporal Jalil came to the SP7's office to take photographs of the case items. Then all drug case items received by SP7 from SP6 were put into 5 case goods boxes and one (1) goods case envelope. Every box and envelope of case items was duly marked by SP7 and submitted to the Department of Chemistry Malaysia in Petaling Jaya, for analysis on the same date, at 4.33

pm. On the same day, at about 6pm, SP7 along with the SP6 and the police photographer went back to the Apartment and the Car Park to take photographs.

21. On 11.4.2017, SP7 received the drugs case items which have been analyzed by the Chemist, Wan Rahimah Binti Wan Ahmad (SP5) along with chemistry report numbers No. 17- FR-B-00512 (Exhibit P14) and 17-FR-B-00515 (Exhibit P30). The Results analysis of SP5 confirmed that the case items are drugs as follows:

(a) 54,215 grams of Cannabis seized from the Proton Satria which formed the subject matter of the 1st Charge;

(b) 269.21 grams of Methamphetamine seized from the Apartment which formed the subject matter of the 2nd Charge;

(c) 17.60 grams of Nimetazepam seized from the Apartment which formed the subject matter of the 3rd Charge;

(d) 0.23 grams of Heroin seized from the Apartment which formed the subject matter of the 4th Charge;

(e) 0.03 grams of Monoacetylmorphines seized from the Apartment which formed the subject matter of the 5th Charge; and

(f) 2.15 grams of Ketamine seized from the Apartment which formed the subject matter of the 6th Charge.

22. The various drugs found at different locations of the Apartment and in the Proton Satria formed the subject matter of the 6 charges.

FINDINGS OF THE HIGH COURT

23. The learned High Court Judge found inter alia as follows:-

(a) That the 1st and 2nd Appellants have exclusive access and possession of the Apartment;

(b) That from the evidence, a man named Murugan a/l Subramaniam (“Murugan”) existed but on the day of the incident the 2nd Appellant agreed during cross-examination that Murugan did not bring any items with him to the Apartment that morning;

(c) That the 2nd Appellant also said that Murugan, did not bring the " Aeon Go Green" bag or the "Cohiba " box which both contained the drugs;

(d) That the 2nd Appellant did not state or saw Murugan putting an “Aeon Go Green” bag or a Cohiba Box or any other drugs on a table in the living room;

(e) That the existence of the "Aeon Go Green" and "Cohiba" bags are indeed already stored in the places where the bags were found;

(f) That the position of the "Aeon Go Green" bag which contained the drugs hidden under the kitchen sink and the 1st Appellant admitted that the drugs were found in the Apartment;

(g) That the 1st and 2nd Appellants did not provide any explanation as to the existence of the “Aeon Go Green” bag and that it is unreasonable for the 1st and 2nd Appellants, not to know about the bag when the Apartment is completely under their control;

(h) That the 1st and 2nd Appellants’ defences are mere denials of the existence of drugs found in the Apartment;

(i) That the evidences of the 1st and 2nd Appellants failed to raise a reasonable doubt as to the prosecution's case;

(j) That the 1st and 2nd Appellants had exclusive control or custody and knowledge of the drugs. Therefore the 1st and 2nd Appellants had exclusive possession and knowledge of the drugs found in the Apartment;

(k) That the 1st and 2nd Appellants in their defences failed to rebut the presumption of trafficking under **Section 37 (d) (xvi) of DDA 1952** on a balance of probabilities;

(l) That the inferences that can be drawn from the circumstances and facts of the case that there was common intention between the 1st and 2nd Appellants as

they lived together in the Apartment where the drugs were found under the sink in the kitchen, a place which is often used every day;

(m) The main thrust of the defence of the 1st Appellant was that he had no full possession of the Proton Satria and denied possession of the drugs found in the Proton Satria. The Proton Satria was borrowed by his friend named Murugan and the car key and the car alarm control were with Murugan. Murugan did exist and was arrested but has not been called by the Prosecution as a witness; and

(n) That the investigating officer, SP6 has managed to trace Murugan and after remand and interrogation, Murugan released.

THE 1ST APPELLANT'S CONTENTIONS

24. Before us, the 1st Appellant contended inter alia as follows:-

(a) That the learned High Court Judge failed to assess and take into account the defence of the 1st Appellant properly or at all;

(b) That the learned High Court Judge convicted the 1st Appellant based on the evidence of SP6 which is not corroborated by other witnesses of the prosecution;

(c) That the conviction is unsafe as there are 2 different versions of events, firstly the prosecution's evidence which is primarily based on the uncorroborated SP6 and the 1st Appellant's evidence/defence which is supported by the evidence of SP1 and SP8;

(d) That the learned High Court Judge failed to invoke an adverse inference under **Section 114 (g) Evidence Act 1952** as the prosecution failed to call one, Murugan and further he is also not on the list of any Prosecution witnesses as Murugan also had access to the Apartment where the drugs were found; and

(e) That in fact, the drugs were not found by SP6 himself because he was not the one who made the search in the apartment. Thus, SP6's evidence is hearsay evidence which is not being supported or corroborated by other officers present during the search who were not called. **Section 114 (g) Evidence Act** should be invoked.

THE 2ND APPELLANT'S CONTENTIONS

25. Before us, the 2nd Appellant contended inter alia as follows:-

(a) That the learned High Court Judge in making her decision, erred in invoking the double presumptions, which had been ruled unconstitutional in the case of

Almanudo Atenza V. Public Prosecutor and Another Appeal [2019] 4 MLJ 1;

(b) That the learned High Court Judge in her decision, has misdirected herself, in invoking double presumptions on knowledge and trafficking under **Section 37(d) of DDA 1952** and **Section 37(da)(xvi) OF DDA 1952**;

(c) That the Prosecution has failed to prove that any common intention under **Section 34 of the Penal Code** in respect of the 6 Charges as they showed that there was some sort of participation either actively or passively on the 2nd Appellant's part; and

(d) That the learned High Court Judge had misdirected herself, in failing to give due consideration or evaluation of the 2nd Appellant's defence.

OUR ANALYSIS AND DECISION

26. In the 3 appeals before us, there are 3 common issues raised by the 1st and 2nd Appellants namely:-

(a) The issue of **section 34 of the Penal Code**;

(b) That the testimony of SP6 was not corroborated and therefore not safe. The 1st and 2nd Appellants did not

lead the police to the Proton Satria. The police knew about the existence of the Proton Satria and the drugs found in the Proton Satria was not theirs; and

(c) That the Proton Satria was lent to Murugan who had the car key and the car alarm control and the Appellants did not know how the door of the Proton Satria was opened by SP6. Thus, Murugan should be called.

CONSIDERATION OF THE COMMON ISSUES RAISED BY THE 1st and 2nd APPELLANTS

The issue of section 34 of the Penal Code

27. It is trite law that **section 34 of the Penal Code** is a rule of evidence and does not create a substantive offence.

28. In the Federal Court case of **Krishna Rao Gurumurthi v. PP AND Another Appeal [2009] 2 CLJ 603**, Richard Malanjum CJ (Sabah & Sarawak) (as he then was) held inter alia as follows:-

"[61] The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case. It has been said that as common intention essentially being a state of mind direct evidence as proof is difficult to procure. Invariably inferences have to be relied upon arising from such acts or conduct of the accused, the manner in which the accused arrived at the scene, the nature of injury caused by one or

some of them or such other relevant circumstances available. Indeed the totality of the circumstances must be taken into consideration in arriving at a conclusion whether there was common intention to commit the offence for which the accused can be convicted. The facts and circumstances of each case may vary. As such each case has to be decided based on the facts involved. Whether an act is in furtherance of the common intention is an incident of fact and not of law.

[62] For a charge premised on common intention to succeed it is essential for the Prosecution to establish by evidence, direct or circumstantial, that there was a plan or meeting of mind of all the accused persons to commit the offence for which they are charged with the aid of ***s. 34*** *notwithstanding that it was pre-arranged or on the spur of the moment provided that it must necessarily be before the commission of the offence."*

29. The 1st and 2nd Appellants were charged for committing all the 6 Charges with read with **section 34 of the Penal Code**. The learned High Court Judge found at the end of the Prosecution's case that there was a common intention between the 1st and 2nd Appellants in respect of the commission of the 2nd to 5th Charges. This is what she said at para [28] of her Grounds of Judgment which states as follows:

"[28] Dari keterangan adalah jelas "jagaan dan kawalan" dibuktikan secara terus. Bukti keterangan yang dikemukakan adalah cukup untuk menunjukkan bahawa OKT1 dan OKT2 secara niat bersama mempunyai milikan ke

atas dadah-dadah tersebut. Saya juga mendapati terdapatnya "irresistible inferences" yang mana OKT1 dan OKT2 mempunyai pengetahuan terhadap dadah-dadah dan peralatan berkaitan yang dijumpai bahagian dapur dan ruang tamu rumah tersebut untuk pertuduhan Kedua hingga ke Enam."

30. Further at the end of the Defences' cases, the learned High Court Judge, after having re -evaluated the evidences adduced by the Prosecution with the evidence of the Defences, still found that there was the requisite common intention. This is what the learned High Court Judge said at paragraphs [60] and [65] of her Grounds of Judgment:

"[60] OKT1 tidak semestinya secara langsung melakukan perbuatan jenayah itu, tetapi cukup dengan penglibatannya dalam siri-siri perbuatan OKT2 menunjukkan bahawa mereka mempunyai niat bersama untuk melakukan perbuatan jenayah sebagaimana yang disebut dalam kes Ghazalee Kassim & Ors v. PP [2009] 4 CLJ 737 "it is sufficient that the participated jointly with the other".

...

[65] Oleh yang demikian inferens yang boleh dicapai yang boleh mengaitkan niat bersama OKT1 dan OKT2 adalah mereka tinggal bersama di apartmen dimana dadah tersebut dijumpai di dapur di bawah sinki iaitu di mana tempat tersebut sering digunakan setiap hari. Tambahan pula apartmen tersebut secara eklusifnya didiami oleh OKT1 dan

OKT2. Daripada keterangan SP6 juga menyatakan bahawa selain dari Aeon beg yang dijumpai di bawah sinki dalam cabinet, SP6 juga menjumpai satu kotak tulisan COHIBA yang didalamnya mengandungi dadah berbahaya di atas meja kecil di ruang tamu. Pemeriksaan lanjut di ruang tamu juga menjumpai satu sealent, pemetik api, satu botol kaca yang diubahsuai untuk menghisap dadah dan paket plastik. Pada pendapat saya agak mustahil OKT1 dan OKT2 tidak mempunyai pengetahuan terhadap semua barang tersebut yang berkaitan dengan dadah dan termasuk penemuan dadah berbahaya itu sendiri. Saya tidak dapat menerima alasan OKT1 dan OKT2 bahawa sealent dan paket plastik ada untuk kegunaan persiapan perkahwinan mereka kerana tiada sebarang barangan perkahwinan dikemukakan di mahakamah ini untuk menyokong alasan tersebut. Adalah bahawa sealent dan paket plastik ada untuk kegunaan persiapan perkahwinan mereka kerana tiada sebarang barangan perkahwinan dikemukakan di Mahkamah ini untuk menyokong alasan tersebut. Adalah mustahil juga OKT1 dan OKT2 tidak mempunyai pengetahuan mengenai dadah yang dijumpai secara terbuka di atas meja di ruang tamu."

31. Reverting to the present case, the learned High Court Judge held that that common intention had been established relying on the inferences gathered from the various facts and circumstances proved.

32. We are of the view that the learned High Court Judge had carefully and meticulously examined each and every piece of circumstantial evidence adduced before her, drawing the appropriate inferences and findings of facts and applying the legal principles associated with **section 34 of the Penal Code** before concluding that the 1st and 2nd Appellants had acted with common intention in the trafficking and possession of the drugs which formed the subject matter of the 2nd to the 6th Charges.

33. We are of the considered view that from the various inferences drawn, from the fact that the 1st and 2nd Appellants were staying together in the Apartment or at least the 1st Appellant had access to the Apartment and the 1st and 2nd Appellants had exclusive access to the Apartment. Besides the discovery of drugs in the cabinet under the sink in the kitchen of the Apartment, a place which is often used daily, SP6 also found a paper box "COHIBA" which contained dangerous drugs on a small table in the living room. Further examination of the living room also found an impulse tool sealer, cigarette fire, a bottle of glass was modified for drugs and plastic package.

34. We find that such open display of the above items showed that the 1st and 2nd Appellants should have knowledge of all that is associated with drugs. Further, the learned High Court Judge found that the impulse tool sealer and packets of plastic are not the type used for the preparation of the wedding of the 1st and 2nd Appellants as there is no evidence that there was a pending marriage. It is also impossible for the 1st and 2nd Appellants, not

have to knowledge of the drugs found in the open, on a table in the living room of the Apartment.

35. Thus, we are of the considered view that there is no error in the finding and conclusion of the learned High Court Judge which warrants our intervention.

36. Accordingly, we find no merit in the submissions of learned counsels for the Appellants that the elements of **section 34 of the Penal Code** have not been established by the prosecution.

The issue of non -corroborration of SP6's evidence

37. The Appellants contended that the testimony of SP6 was not corroborated and therefore not safe. The Appellants further contended that the Appellants did not lead the police to drugs found in the sink in the kitchen, to the Proton Satria and the police already knew about the existence of the Proton Satria and the drugs found in the Proton Satria were not theirs.

38. We are of the considered view that the learned High Court Judge have correctly found that the Prosecution have proven that the 1st Appellant and the 2nd Appellant has control, custody and knowledge of drugs found in the following areas, in the Apartment namely in the cabinet under the sink in the kitchen, in the living room and in the guest room:

(a) During the raid, the 1st Appellant was in the living hall of the Apartment and the 2nd Appellant opened the

door of the Apartment after SP4 knocked on the door;

(b) The Apartment was rented by the 2nd Appellant from the owner of the apartment namely SP1, since 1.6.2016 through the introduction of SP3, the real estate agent;

(c) The keys to the Apartment and two (2) access card were given to the 2nd Appellant by SP3;

(d) SP4, the Chief Security Guard confirmed that the Proton Satria belonged to the 1st Appellant and was parked in Car Park Lot 501 which showed the 1st Appellant come and/or live in the Apartment with the 2nd Appellant;

(e) SP8, the younger brother of the 1st Appellant stated that the 1st Appellant did not live with him or with their mother and SP8 did not know where he stay. The 2nd Appellant stated that she had given one key of the Apartment to the 1st Appellant;

(f) The 1st Appellant and 2nd Appellant were engaged and they admitted that the Apartment is for them to stay after getting married. The 1st Appellant also paid the rent of the Apartment.

Drugs in the Proton Satria

39. The evidence adduced and the findings of the learned High Court Judge showed that the 1st Appellant have custody, control and knowledge of the drugs found in the Proton Satria namely:

(a) SP8, the younger brother of the 1st Appellant confirmed that the Proton Satria was purchased by the 1st Appellant, in November 2016 under his name and the 1st Appellant used the Proton Satria. Further, SP8 did not make any duplicate car key;

(b) SP4 confirmed that the Proton Satria was parked in Car Park Lot 501 and the 1st Appellant was identified as the person who parked the car;

(c) SP6 stated that the 1st and 2nd Appellants guided them to the Proton Satria and the car door was opened with the car alarm control found in the Apartment;

(d) The 1st Appellant admitted that the Proton Satria was bought by him;

(e) The drug was found on the floor in the leg area of the rear passenger seat and also in the boot of the Proton Satria. In this case, the drug can be seen clearly; and

(f) The car key and car alarm control of the Proton Satria were seized in the Apartment in the presence of the Appellants who were present at the time when the raid was conducted by SP6.

40. We are of the considered opinion that properly made factual findings are something which should not be disturbed by an appellate court and in in the present case, we affirm the factual findings of the learned High Court Judge (See **Tan Kim Ho & Anor v PP [2009] 3 CLJ 236).**

Drugs found at different locations in the Apartment namely below the cabinet under the sink in the Kitchen and at guest room

41. We are of the considered view that from the evidence adduced and the findings of the learned High Court Judge, they correctly showed that the 1st and 2nd Appellants have custody, control and knowledge of the drugs found inside the Apartment namely:

(a) During the raid, the 2nd Appellant opened the door of the Apartment after SP4 knocked;

(b) The evidence showed that other than the 1st and 2nd Appellants, no one else inhabits or had access to the Apartment;

(c) The 'irresistible inferences' is that the 1st Appellant

and 2nd Appellant have custody, control and knowledge of the drugs and related equipment found in the kitchen and living room of the Apartment which formed the subject matters of the 2nd Charge to the 6th Charge;

(d) The drugs found at the Guest Room can easily be seen;

(e) The drugs were found together with other things which were connected or related to drugs trafficking; and

(f) The drugs found in the plastic bag in the cabinet under the sink in the Kitchen sink were hidden or concealed to avoid detection and from being seen. In **Zulfikar Bin Mustaffah v PP[2001] 1 SLR 633,** the court held as follows:-

> *"While the fact that the contents of the bundles were hidden from view may have been relevant in determining whether the requisite knowledge was absent, this factor should still not be given too much weight. Otherwise, drug peddlers could escape liability simply by ensuring that any drugs coming into their* possession *are first securely sealed in opaque wrappings. Rather the court appraise the*

entire facts of the case to see if the accused's claim to ignorance is credible."

42. We are of the considered view that the Prosecution have adduced credible evidence to show that the 1st and 2nd Appellants have control, custody and possession of drugs found in the Apartment and that the 1st Appellant had control, custody and possession of drugs found in the Proton Satria and such evidence have not been rebutted by the 1st and 2nd Appellants.

43. In specific consideration of the Appellants' contention that SP6's evidence was uncorroborated and therefore unsafe, we are of the considered opinion that in the light of the learned High Court Judge's finding that SP6 was a credible witness and that his evidence was also credible, we see no good reason to interfere with the credibility of SP6 as he is a competent witness and his evidence need not be corroborated.

Trafficking

44. In the light of the weights of the dangerous drugs in respect of the 1st and 2nd Charges, which exceeded the amounts stated in **section 37 (da) (vii) DDA 1952** - for cannabis (exceeding over 200 grams) and in **37 (da) (xvi) DDA 1952** for Methamphetamine (exceeding over 50 grams), the learned High Court judge, having found that the 1st and 2nd Appellants had actual possession of the drugs, rightfully invoked the presumption under **section 37(da) of the DDA 1952** and the 1st and 2nd Appellants are presumed to be

trafficking in following dangerous drug namely, Methamphetamine weighing 269.21 grams and for the 1st Appellant, he is also presumed to be trafficking a dangerous drug namely Cannabis weighing 54, 215 grams.

Issue of Section 114(g) Evidence Act 1950

45. The Appellants contended that the Proton Satria was lent to Murugan who had the car key and the car alarm control before the police raid and the 1st and 2nd Appellants did not know how the door of the Proton Satria can be opened by SP6. Thus, Murugan should be called but he was not. Thus, The Appellants contended that an adverse inference under **section 114(g) EA 1950** ought to drawn against the Prosecution for failing to call or offer him to the Appellants.

46. During SP6's and SP7's testimonies, they confirmed that Murugan was arrested on 5/1/2017 at approximately 11.00 pm in the swimming pool area of Regalia Service Apartments. According to SP7, after Murugan arrested, he was released after an investigation was made into the alleged car key of the Proton Satria which was supposed to be with Murugan. SP7 also confirmed that there is no Proton Satria's keys seized from Murugan who was released on the instructions of the Deputy Public Prosecutor.

47. During his cross examination, SP7 did not agree that the key of the Proton Satria was with Murugan. SP7 confirmed that the

Proton Satria's car alarm control was seized in the Apartment and was used to open the doors of the Proton Satria. SP7 also admitted that the Proton Satria's car alarm control was not stated in the Search Lists namely, Exhibits P97 and P98 but it was stated in the Handing Over form between SP6 and he (Exhibit P100), at item 7.

48. In the cross examination of SP6, he did not agree that the car alarm control of the Proton Satria was confiscated from Murugan. During re -examination, SP6 stated that there was an error in the Search Lists (Exhibit P96 and Exhibit P97) as he did not state that there are two sets of car keys with alarm controls seized.

49. At the end of the Prosecution's case, even though Murugan was not offered to the defense, there was no concealment or suppression of evidence on the part of the Respondent. Thus, we are of the view that that **section 114 (g) EA 1950** does not apply. See **Munusamy v PP [1987] 1 MLJ 492.**

50. Further, the Respondent had succeeded in proving all the essential elements of all the Charges and there was no be void or gap in the Respondent's case in the absence of Murugan as their witness. In **Siew Yoke Keong v. Public Prosecutor [2013] 3 MLJ 630** at p. 661, the Federal Court held as follows:

> ***"[42]*** *In connection with his submission on the adverse inference under* ***s 114(g) of the Evidence Act,*** *learned counsel* also *contended that the prosecution should have called Chantana to exclude her* as *having* access *to the first*

house, and that the failureby the prosecution to do so *resulted in its failure to prove exclusive possession or occupation* of *the first house by Siew resulting in the failure to prove exclusive* possession *of the proscribed drugs by Siew. As would be recalled, this point was also raised by learned counsel when he submitted on the failure by the prosecution to prove exclusive possession of the proscribed drugs. We have dealt with this point. We have said that we were unable to agree with the submission and we have set out the reasons for the* same *at length. Anyway, in the context of* ***s 114(g) of the Evidence Act****, learned counsel's submission brought into focus the issue of the prosecutorial discretion in the calling of witnesses in* a *criminal prosecution. It is well settled that in* a *criminal* case, *the prosecution, provided that there* is *no wrong motive, has* a *discretion* as *to what witnesses should be called by it. (see K****hoon Chye Hin v Public Prosecutor [1961) 1 MLJ 105b (CA), Adel Muhamed El Dabah v Attoney General of Palestine [1944] AC 168, Public Prosecutor v Datuk Seri Anwar Ibrahim (No 3) [1999] 2 MLJ 1****). **However, that prosecutorial discretion must be subject to the most basic limitation that it has to produce all the necessary evidence to prove the case against the accused beyond reasonable doubt** (see **Abdullah Zawawi v Public Prosecutor [1985] 2 MLJ 16 at p 19, (SC)). Thus, inTeoh Hoe Chye v PP Yeap Teong Tean v PP [1987] 1 MLJ 220***, Abdul Hamid CJ (Malaya) (as he then was) said at p 229:*

Nevertheless, the decision whether to call or not to call a witness including a witness from whom a statement has been taken is always the right of the prosecution (Abdullah Zawawi v Public Prosecutor). In so far as the trial court is concerned, its duty is essentially to decide whether on the evidence before it the prosecution has proved its case, and if there are unsatisfactory features in the prosecution case to determine whether, in the light of such features, the prosecution case fell short of proof beyond reasonable doubt (Abdullah Zawawi's case).

[43] *In other words, in the end it is the sufficiency of the evidence that matters. In the present appeal, we find no such unsatisfactory features or gap in the prosecution's case. Indeed,* as *is clear in this judgment and for reasons which we have explained we are satisfied that the learned trial judge* was *right in holding that* a *prima facie* case *of trafficking in dangerous drugs had been made out against Siew"*

(Emphasis Added)

51. In **PP v Chia Leong Foo [2000] 4 CLJ 649** at pg 673-674, the Federal Court held:

"Thus, the question to be asked in each case is whether the prosecution has proved its case even without calling some other witnesses who are available. An adverse inference cannot be drawn for failure to call a witness when the prosecution has discharged its burden *(see* ***Namasiyiam & Ors v Public Prosecutor (1987] 2 MLJ***

336:Kadir Awang v Public Prosecutor [1989] 2 MLJ 33; Jazuli Mohsin v Public Prosecutor [1990] 2 MLJ 190; Lim Young Sien v Public Prosecutor [1994] 2 SLR 257*). As Yong Pung How CJ said in* ***Chua Keem Long v Public Prosecutor (1996] 1 SLR 510*** *at pp 523-524:*

> *The appellant's contention* was *that the failure of the prosecution to adduce the evidence of those other gamblers meant that the court could presume that the evidence would have gone against the prosecution, that is there were no such visits.*
>
> *Such arguments are commonly made. Commonly too, such arguments are without merit. The court must hesitate to draw any such presumption unless the witness not produced* is *essential to the prosecution's* case. *Any criminal transaction may be observed by* a *number of witnesses.* ***All the prosecution need to do is to produce witnesses whose evidence can be believed*** **so as** ***to establish the*** **case** ***beyond a reasonable doubt. Out of*** **a** ***number of witnesses, it may then only be necessary to bring in one or two;*** **as***long as those witnesses actually produced are able to give evidence of the transaction, there is no reason why all of the rest should be called, nor why any presumption should be drawn that the evidenceof those witnesses not produced would have been against the prosecution.***

In such circumstances it* is also *not necessary for the prosecution to offer or make available the remaining witnesses to the defence. *As Yong Pung How CJ said in* ***Satli Masot v Public Prosecutor [1999] 2 SLR 637*** *at p 649:*

> *We were of the view that when* s *116 illustration (g) (our s.114(g))* is *sought to be invoked on account of the prosecution's failure to offer particular witnesses to the defence, the rule should be no different from* a *case where the contention is that the prosecution has failed to call particular witnesses.* ***In both* cases, *whether an adverse inference should be drawn should depend on the materiality of the witness not called/offered and whether the failure to do* so *constitutes* a *withholding of evidence from the court or the accused. On our facts, just* as *there* was *no basis for drawing an adverse inference against the prosecution on account of their failure to call the two named CNB officers* as *witnesses, we were of the view that there* was *similarly no basis for drawing an adverse inference against the prosecution on account of their failure to offer the two officers to the defence.***

This principle has been recognised by our Federal Court in ***Pendakwa Rava v Mansor Mohd Rashid (1996) 3 MLJ 560*** *and the Court of Appeal in* ***Lee Lee Chonag v Public Prosecutor [1998] 4 MLJ 697*** *where it* was *held, on the facts*

of the cases, that the failure by the prosecution to call witnesses or to make them available to the defence at the close of its case was *not fatal at that stage.,,"*
(Emphasis Added)

52. We are in agreement with the learned High Court Judge's finding that that there was no basis to draw an "adverse inference" under **section 114 (g) Evidence Act 1950** against the Respondent for not calling Murugan to testify. We are of the considered view that Murugan is not relevant or material to the Prosecution's case. In any event, the Defence could always call Murugan in support of their case. We are also of the opinion that there was no suppression of evidence on the part of the Prosecution and that the Prosecution have adduced sufficient evidence to prove their cases against the 1st and 2nd Appellants.

Double Presumptions

53. The 2nd Appellant contended that the learned High Court Judge erred in using double presumptions as stated in **section 37 (d)** and **section 37 (da) DDA 1952**, as decided in the case of **Alma Nudo Athens v PP & Another Appeal [2015] 5 CLJ 780.**

54. From our perusal of the Grounds of Judgment of the learned High Court Judge, in particular paragraph [32] of the Grounds of Judgment as alleged by the Appellants, we are of the considered view that the learned High Court Judge did not invoke any double presumption.

55. The same goes for the drugs found in Proton Satria where the learned High Court Judge held at paragraph [29] of her Grounds of Judgment that the 1st Appellant had control and custody of the Proton Satria. Similarly, the learned High Court Judge also did not invoke the presumption under **section 37 (d) of DDA 1952**.

56. In the premises, we are of the view that there are no merits in the Appellants' contention.

The defences of 1st and 2nd Appellants

57. In the light of various adduced by the Respondent and the Appellants, we are of the considered view that the learned High Court Judge was correct when she found that the defenses of the 1st and 2nd Appellants are mere denials of the existence of the drugs found in the Apartment and in the Proton Satria and did not manage to create any reasonable doubt in the Respondent's case and rebutted the presumption of trafficking under **section 37 (da) of the DDA 1952**.

58. Having read the learned HCJ's grounds of judgment, we are of the view that the learned HCJ had adequately and in fact, had thoroughly assessed the defence's cases before coming to his findings.

CONCLUSION

59. In her Grounds of Judgment, the learned HCJ held that the Appellants failed to rebut the statutory presumption under **s.37(d) of the DDA** on a balance of probability. Hence, from the evidence and the findings of the learned High Court Judge, we are in agreement with the learned High Court Judge that the 1st and 2nd Appellants to raise a reasonable doubt on the case of the prosecution.

60. Based on the aforesaid reasons, we found no merit in the grounds of appeal canvassed before us and we unanimously find that the sentences and convictions against the 1st and 2nd Appellants are safe and as such we unanimously dismiss the 1st and 2nd Appellants' respective appeals against sentence and conviction. The learned High Court Judge's decisions on the respective convictions and sentences of the 1st and 2nd Appellants are affirmed.

Dated this 11th day of October, 2022

SGD

……..…..……

(LEE HENG CHEONG)
JUDGE
COURT OF APPEAL

For The 1st Appellant	:	Mr. Hasnan Bin Hamzah (together with Qushwa)
For The 2nd Appellant	:	Mr. M. Manoharan
For The Respondent	:	Ms. Nahra Binti Dollah, Deputy Public Prosecutor

Notice: *This copy of the Court's Grounds of Judgment is subject to formal revision*.