IN THE HIGH COURT OF MALAYA IN KUALA LUMPUR

IN THE FEDERAL TERRITORY OF MALAYSIA

CRIMINAL TRIAL NO: WA-45A-77-11/2017

PUBLIC PROSECUTOR

AND

MEHANDRAN A/L KANDAIAH

GROUNDS OF DECISION

A) INTRODUCTION

[1] The accused was charged with the following.

> "*Bahawa kamu pada 29/07/2017 jam lebih kurang 06.50 petang, di kawasan tempat letak kereta PV13 Condominium, Setapak, di dalam Daerah Wangsa Maju, Wilayah Persekutuan Kuala Lumpur, telah mengedar dadah berbahaya Metamphetamine seberat 183.2 gram, oleh yang demikian kamu telah melakukan suatu kesalahan di bawah Seksyen 39B (1) (a) Akta Dadah Berbahaya 1952 dan boleh dihukum dibawah Seksyen 39B(2) Akta yang sama*."

B) PROSECUTION CASE

[2] The pertinent facts as adduced by prosecution witnesses reveal

that on 29.7.2017 at around 6.50p.m., the accused was arrested while sitting in the driver's seat of a black Hyundai Accent registration no. BHS 2335 ("car") in a car park at PV13 Condominium, Setapak, Kuala Lumpur.

[3] Prior to the arrest of the accused and based on information received, a police team from the Anti-Narcotics Criminal Investigation Division, IPD, Wangsa Maju led by Inspector Pathmanathan a/l Balakrishnan (SP3) and Lieutenant Corporal Mohd Salehuddin (SP4) conducted an observation for about 30 minutes on the PV13 Condominium ("Condominium") while positioned on the opposite side of the road.

[4] After a while, SP3 and SP4 observed the said car which was driven by the accused enter the Condominium area. As soon as the car came to a halt in the car park of the said Condominium, SP3 and SP4 conducted a raid.

[5] At the time of the raid, the accused was the only one present in the said car. After SP3 introduced himself to the accused as a police,

the accused was asked to alight from the said car which he duly did.

[6] SP4 conducted an examination of the said car and discovered one transparent plastic bag with gold writing (P11) which contained one whisky box “Johnny Walker Platinum Label Blended Scotch Whisky” (P12) located on the front passenger seat of the said car.

[7] SP4 upon the instructions of SP3 opened the box (P12) and found inside one transparent plastic packet containing a powdery and crystal granular substance suspected to be dangerous drugs. The reaction of the accused upon arrest was said to be uncooperative and one of shock.

[8] The said plastic packet (P11) and (P12) was seized by SP3 and SP4 and marked as (PT) (“P13”). The accused and the exhibits were taken back to the Anti-Narcotics Criminal Investigation Division, IPD, Wangsa Maju.

[9] Upon reaching the IPD, SP3 handed over the exhibits P11, P12 and P13 to the investigating officer, Inspector Shahibul Najib

(SP6). SP6 received the exhibits together with the search list (P10) and the handover of exhibits acknowledgement list (P14).

[10] SP6 kept the exhibits in a locked cupboard in his room until he sent it to the Chemistry Department for analysis. The exhibits were then handed back to SP6 who kept it in his cabinet before handing them over to the store.

C) DUTY OF COURT AT THE END OF PROSECUTION CASE

[11] The duty of the court at the end of the prosecution case is set out in Section 180(1) of the Criminal Procedure Code (CPC) which stipulates that when the case for the prosecution is concluded the Court shall consider whether the prosecution has made out a prima facie case against the accused.

[12] The cases of **PP v Dato' Seri Anwar Bin Ibrahim (No.3) [1999] 2 AMR 2017**; **[1999] 2 MLJ 1**, **Looi Kow Chai &Anor v PP [2003] 2 AMR 89**, **Balachandran v PP [2005] 1 CLJ 85** and **PP v Mohd Radzi Bin Abu Bakar [2005] 6 AMR 203** respectively lay down the proposition that at the end of the case for the prosecution, their

evidence must be subject to maximum evaluation in order to determine whether a prima facie case is made out.

[13] In Looi Kow Chai v Public Prosecutor (supra), the Court of Appeal held:

"*It therefore follows that there is only one exercise that a judge sitting alone under s 180 of the CPC has to undertake at the close of the prosecution case. He must subject the prosecution evidence to maximum evaluation and to ask himself the question: if I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no prima facie case has been made out and the accused would be entitled to an acquittal*". (Emphasis added)

D) ANALYSIS OF THE PROSECUTION CASE

Ingredients of the offence of trafficking

[14] In order for the prosecution to make out a prima facie case in respect of the charge against the accused, it is incumbent on them to prove the following ingredients. Firstly, that the drugs are dangerous drugs within the meaning and definition of the

Dangerous Drugs Act 1952 ("DDA"). Secondly, that the accused was in possession of the impugned drugs. Thirdly, that the accused was trafficking in the drugs.

i) <u>The drugs are dangerous drugs within the meaning and definition of the DDA</u>

[15] The chemist, Encik Abdul Rahman Bin Mamat (SP5) testified that upon analysis of the drug exhibits handed to him, he found them to be 183.2 grams net of the substance Methamphetamine.

[16] The Chemist Report tendered and marked as exhibit P17 also confirmed these findings and additionally stated that Methamphetamine is listed in the First Schedule to the Dangerous Drugs Act 1952 (“DDA”).

[17] The cases of **PP v Lam San [1991] 1 CLJ (Rep) 391**; **[1991] 3 MLJ 426**, **Munusamy Vengadasalam v PP [1987] CLJ (Rep) 221** and **Balachandran v PP [2005] 1 CLJ 85** respectively all held that the court is entitled to accept the testimony of the chemist at face value without the necessity of him or her going into the details of their analysis unless it is inherently incredible.

[18] I found nothing in the evidence of SP5 to come to the conclusion that his testimony was inherently incredible. In any event, there was no cross examination conducted in respect of the evidence of SP5 and thus his testimony went unchallenged. I therefore find that the prosecution had proven the nature and weight of the impugned drugs forming the subject matter of the charge.

Chain of exhibits

[19] The evidence revealed that from the time the impugned drugs were recovered by SP3 and SP4, they were kept in safe custody of SP3 who had charge of the exhibits and marked them before handing them over to the investigating officer ("IO"), SP6. This handover was evidenced by the search list (P10) and the handover of exhibits acknowledgement list (P14) respectively.

[20] Evidence was also adduced that SP6 kept the exhibits in a locked cupboard in his room until he sent it to the Chemistry Department for analysis. After the analysis conducted by SP5, SP6 after receiving back the exhibits from Inspector Shogi, kept it in the same cupboard in his room until he handed it over to the store for safekeeping.

[21] I found from the combined testimonies of SP3, SP4 and SP6 that the prosecution had proven that the chain of exhibits was unbroken and were successfully accounted for from the time of the seizure of the exhibits until their production in court.

[22] I also find that the drugs exhibits were satisfactorily identified by the witnesses as being the very same exhibits seized and produced in court. I was therefore satisfied that there was no break in the chain of exhibits.

ii) <u>The accused was in possession of the impugned drugs</u>

[23] Possession can be either actual or presumed. Presumed possession and knowledge is upon the invocation of section 37(d) DDA by proof of custody or control.

[24] Possession has nowhere been statutorily defined. However in **Toh Ah Loh And Mak Thim v Rex [1949] 1 MLJ 54**, the court observed:

"*Possession, in order to incriminate a person, must have the following characteristics. The possessor must know the nature of the thing possessed, must have in him a power of disposal over*

the thing, and lastly must be conscious of his possession of the thing."

[25] The requirement of the possessor to have knowledge of the thing possessed is therefore an essential ingredient of possession. In **Leow Nghee Lim v Reg [1956] 1 MLJ 28**, the phrases custody, control and possession was explained as follows:

"***Custody means having care or guardianship; goods in custody are in the care of the custodian and, by necessary implication, he is taking care of them on behalf of someone else. You cannot take care of goods unless you know where they are and have the means of exercising control over them. Custody therefore implies knowledge of the existence and whereabouts of the goods and power of control over them, not amounting to possession.***

Control must be proved as a fact and it must arise from the relation of the person to the goods, irrespective of whether they are contraband.

Probably the most helpful definition of possession is:—

***"The relation of a person to a thing over which he may at his pleasure exercise such control as the character of the thing admits, to the exclusion of other persons*."**

This definition does not express, but it does imply that the meaning of the word includes some element of knowledge.

A man must know of the existence of a chattel and have some idea of its whereabouts before he can exercise any control over it. ***The word possession therefore implies some knowledge but not necessarily full or exact knowledge***."(Emphasis added)

[26] In **Neo Koon Cheo v Reg [1959] 1 MLJ 47**, the phrases custody, control and possession were discussed as follows:

"***What does the word "custody" mean?*** *According to the view expressed by Brown, Ag. C.J., in Ho Seng Seng v Rex (1951) MLJ 225,* ***it means watching over or keeping safe****. With great respect to the learned Judge, I am unable to agree with his view that the difference between "control" and "custody" is that "control" implies a power of disposal while "custody" does not.*

I have given the most careful consideration to the meaning of the word "custody" in section 37(d) of the Ordinance under

consideration and have come to the conclusion that it means actual physical control. The word "control" in the same section must, therefore, be construed to mean any form of control other than actual physical control. *Other names for "custody" are "physical possession," “de facto possession" and "detention." It is referred to in 25 Halsbury's Laws (2nd Edn.) 194, para. 327, in these terms:*

"The word 'possession' may mean effective, physical or manual control, or occupation, evidenced by some outward act, sometimes called de facto possession or detention."

I would adopt the following definitions of "custody" and "possession" given by the eminent American jurist, Roscoe Pound, in his "Introduction to American Law":

*"**Custody is a mere condition of fact, a mere physical holding of or physical control over the thing**.*

Where custody (exercised by oneself or by another) is coupled with the mental element of holding for one's own purposes, there is possession."

Support for my view that "custody" means actual physical control is to be found in Regulation 6(2)(b) of the Dangerous Drugs Regulations, 1951, which provides as follows:—

"For the purposes of these Regulations: — a person shall be deemed to be in possession of a drug or preparation if it is in his actual custody or is held by any other person subject to his control or for him or on his behalf."

From this it follows that under this Regulation a drug is in a person's actual custody if it is held by him and not by someone else, i.e. if it is in his actual physical control."(Emphasis added)

[27] In the case of **Public Prosecutor v Muhammad Nasir bin Shaharudin [1994] 2 MLJ 576**, it was held:

"*Possession is not defined in the DDA. However, it is now firmly established that to constitute possession, it is necessary to establish that: (a) the person had knowledge of the drugs; and (b) that the person had some form of control or custody of the drugs. To prove either of these two requirements, the prosecution may either adduce direct evidence or it may rely on the relevant presumptions under s 37 of the DDA.*"

[28] In **Chan Pean Leon v Public Prosecutor [1956] 1 MLJ 237**, possession was defined in the following terms:

"*Possession" itself as regards the criminal law is described as follows in Stephen's Digest (9th Edition, page 304):—*

*"**A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need**."*

***To put it otherwise, there is a physical element and a mental element which must both be present before possession is made out**. The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example have it in his pocket or have it lying in front of him on a table. It must also be shewn that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some animus possidendi. **Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case**. If a watch is in my pocket then in the absence of anything else the inference will be clear that I intend to deal with it*

as if it were my own and accordingly I am in possession of it. On the other hand, if it is lying on a table in a room in which I am but which is also frequently used by other people then the mere fact that I am in physical proximity to it does not give rise to the inference that I intend to deal with it as if it belonged to me. There must be some evidence that I am doing or having done something with it that shews such an intention. Or it must be clear that the circumstances in which it is found shew such an intention. It may be found in a locked room to which I hold the key or it may be found in a drawer mixed up with my own belongings or it may be found, as occurred in a recent case, in a box under my bed. The possible circumstances cannot be set out exhaustively and it is impossible to lay down any general rule on the point. But there must be something in the evidence to satisfy the Court that the person who is physically in a position to deal with the thing as his own had the intention of doing so."(Emphasis added)

[29] The facts of the case disclosed reveal that the accused was arrested while in a car seated in the driver's seat. The said car was not registered in the name of the accused. However, the accused was the only person in the car at the time of the arrest.

[30] The whisky box (P12) in which the packet containing the impugned drugs were found was recovered from the front passenger seat of the car in which the accused was in of which he was the driver at the material time. The accused therefore, being the only one present in the car at the material time, was most proximate to the impugned drugs.

[31] The proximity of the accused to the impugned drugs is a relevant factor to consider. In the Federal Court case of **Khairuddin Hassan v PP [2010] 7 CLJ 129**, it was held as follows:

"***As regards the proximity of the drugs to the appellant, this too is a relevant fact****. This principle is derived from this passage in PP v. Foo Jua Eng [1965] 1 LNS 137, where HRH Raja Azlan Shah stated:*

"***With regard to the mental element, the learned magistrate rightly directed his mind that knowledge or consciousness would depend on the surrounding circumstances****. However, he failed to direct his mind adequately on the facts. He directed his mind to the circumstances when the respondent tried to close the door on PW1. But* ***he failed to consider the other circumstance***

which, taken together, may well be that the element of possession was proved. That circumstance is the physical proximity of the respondent to the exhibit in question." (Emphasis added)

[32] The apex court also held in that case:

"*The trial judge's finding that the appellant was in mens rea possession of the drugs, based on the appellant's conduct, his proximity to the recovered drugs and his failure to offer a satisfactory explanation, could not be faulted*."

[33] It is thus clear that the physical proximity of the Accused in this case to the impugned drugs was relevant to establish knowledge of the impugned drugs on the part of the accused. The circumstances show that the accused being proximate to the box (P12) necessarily also had physical control of the box (P12) containing the impugned drugs.

[34] In addition, SP3 said that when the accused was arrested he did not give his cooperation while SP4 said the accused's reaction was one of shock. This was sufficient to infer knowledge on the

part of the accused. See **Parlan Dadeh v PP [2009] 1 CLJ 717** and section 8 of the Evidence Act 1950.

[35] These circumstances taken as a whole were thus sufficient to conclude that accused had custody and control of P12. With custody and control having been proven, this therefore gave rise to the statutory presumption of possession and knowledge of the nature of the impugned drugs under section 37(d) DDA.

[36] The statutory presumption under section 37(d) reads as follows:

37. Presumptions

In all proceedings under this Act or any regulation made thereunder—

(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

[37] It is important to appreciate that on the facts of this case, it is not

the said car that falls within the definition of the phrase "*anything whatsoever containing dangerous drugs*" in section 37(d) DDA.

[38] Here the accused person had in his custody or control the said box (P12) said to contain a whisky bottle. On the particular facts of the case therefore it is the said whisky box which constitutes "*anything whatsoever containing dangerous drugs*" within the definition and meaning of section 37(d) of the DDA.

[39] It has been previously held in **Tong Peng Hong v PP [1955] MLJ 232** and **Syed Ali Bin Syed Abdul Hamid & Anor v PP [1982] 1 MLJ 132** that a car does not constitute "*anything whatsoever containing dangerous drugs*" within the definition and meaning of section 37(d) of the DDA.

[40] In the latter case, the Federal Court said:

"*The presumption under paragraph (d) says: —*

"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."

In our view this presumption has no application in the present appeal because the car in which the opium was found cannot be held to be "anything whatsoever" within the meaning of paragraph (d). ***This expression "anything whatsoever" may appear to have a wide import, but its scope and extent is limited by the word "containing" which qualifies it. A car cannot be said to contain drugs nor could it be said to be a container of drugs although opium was found in it****. To hold that the car contains drugs would be, in our view, to twist and overstretch the language beyond its common usage. Thomson J., as he then was, in Tong Peng Hong v Public Prosecutor [1955] MLJ 232 made a thorough analysis of the scope and application of the presumption under paragraph (d). It is sufficient for us here to refer to that part of the judgment where he said: "Both by derivation and by ordinary usage the word 'containing' implies some measure of holding or restriction" or, if we may add, some measure of confinement. That being the case the presumption under paragraph (d) is irrelevant*."(Emphasis added)

[41] Subsequent cases however have taken a different view of this position. In **PP v Tan Tuan Seng v PP [1993] 2 CLJ 557**, it was held:

"*Therefore, from the summary above, **it appears to me on a fair interpretation of the section, that in certain circumstances a bag may fall within the scope of the word "anything" in s. 37(d), even though it would lead to the anomalous situation where the presumption would not apply if the drugs were found just lying in the car without being contained in a bag**. But it must be emphasised that for the presumption under s. 37(d) to apply, the prosecution must first prove that the accused had exclusive custody or control of the bag. The presence of a bag in a vehicle, without any other evidence is insufficient to establish conclusively that the bag was in the custody and/or control of the person present in the vehicle*." (Emphasis added)

[42] Similarly in **Surentheran a/l Selvaraja v PP [2005] 2 CLJ 264**, the Court of Appeal held:

"***The inescapable inference from the position of the bag found in the car was that the appellant willed it to be there so that he***

could guard it. Thus, he was in custody or in control of the bag. *Further, the fact that he was driving his own car and that there was no one else in the car meant that he alone was concerned with the presence of the bag in the car. The fact that he needed to guard it showed that he knew the bag contained packets of the dangerous drugs****. Even if the proven circumstances were insufficient as proof of knowledge, the presumption of s. 37(d) DDA was applicable. As such, the conviction should be upheld***."(Emphasis added)

[43] Although the factual matrix may be different, the point to note is that the statutory presumption under section 37(d) DDA was held to apply notwithstanding that the impugned drugs were found in a car.

[44] In **PP v Letchumanan Suppiah [2006] 1 CLJ 557,** the Court of Appeal held:

"***The facts revealed that at the material time, the orange plastic packet was in the carrier basket of the motorcycle right in front of the accused, placed between the handle of the***

vehicle and between his legs when he was riding it*. Further, it could even be seen by PW5, one of the arresting police officers, from a distance of about six to seven feet away. So,* ***it was beyond dispute that the accused must have known of the existence of the plastic packet and, therefore, must have had in his custody or under his control the orange plastic packet that subsequently was established to contain the dangerous drugs. From the facts, the statutory presumption under s. 37(d) of the Act would operate against the accused*** *who, until the contrary was proved, would be deemed to have been in possession of such drugs and would, until the contrary was proved, be deemed to have known that the drugs were heroin and monoacetylmorphines, the subject matter of the charge*."(Emphasis added)

[45] Section 37(d) DDA was also held to apply in a situation where the drugs were found in a package in the carrier basket located below the handle bars of the motorcycle ridden by the appellant in **Arumugam Periasamy v PP [2005] 3 CLJ 685**.

[46] Similarly, on the facts of this case, I find that by having custody

and control of the box (P12) containing the impugned drugs, the accused is deemed to be in possession and deemed to know the nature of the drugs under section 37(d) DDA.

[47] As the statutory presumption of possession under section 37(d) DDA has arisen against the accused, the burden upon the accused person is to now rebut such presumption on a balance of probabilities. See **PP v Yuvaraj [1969] 2 MLJ 89**.

iii) <u>The accused was trafficking in the drugs</u>

[48] The definition of trafficking in section 2 of the DDA reads as follows:

"trafficking"

"*includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug otherwise than under the authority of this Act or the regulations made under the Act*"

[49] The definition above as can be seen is very wide.

[50] The accused was observed here driving the said car into the car park at the PV3 Condominium. The box (P12) containing the impugned drugs were recovered from the front passenger seat next to the accused.

[51] Pursuant to section 2 DDA, it can be concluded that the accused was in the act of transporting, carrying, sending or delivering the impugned drugs and thus engaged in the act of trafficking in the drugs.

Decision at the end of the prosecution case

[52] Upon a maximum evaluation of the evidence, and for the reasons expressed above, I found that the prosecution had proven a prima facie case against the accused in respect of the charge as preferred pursuant to section 180(3) Criminal Procedure Code (CPC) and I call upon him to enter on his defence.

[53] After the three alternatives consequent upon such finding were explained to them, the accused elected to give sworn testimony.

E) THE DEFENCE CASE

[54] The accused testified that he was arrested at around 6.50p.m. on 29.07.2017 while he was in the process of delivering hard liquor. The accused testified that his job was to deliver hard liquor to customers of one Tharmarajah a/l Jeyapalan who according to the accused was his boss. The accused said this is only his part time job and that his permanent job was as a lorry conductor.

[55] The said Tharmarajah was trading under the name of Saphire Fine Enterprise. On the day of the arrest, the accused received a whisky box (P12) in a plastic from Tharmarajah at PV 128 Shopping Centre in Setapak, KL.

[56] According to the accused, all the persons to whom he made delivery to were customers of Tharmarajah and he did not know any of them. The accused said that he only received instructions from Tharmarajah about where the customers would await for the delivery of the liquor.

[57] The accused said that on the day he was arrested, he was instructed by the said Tharmarajah to drive along the road until he saw the PV13 Condominium. The accused said that he was told to

enter the said condominium and wait at the guard house where the customer would wait for him.

[58] When the accused arrived at the scene of arrest that day, he saw a person waving to him and so he parked the car in the car park. As soon as the car stopped, all of a sudden a motorcycle also stopped and the pillion rider got off and opened the car door.

[59] The pillion then turned off the car engine and seized exhibit P12 together with the plastic which was placed on the carpet on the floor of the front passenger seat. The accused denied having any knowledge of the drugs concealed in P12 that was handed to him by Tharmarajah.

[60] The accused said that the whisky bottle box (P12) found beside him in the car was handed over to him by one Tharmarajah a/l Jeyapalan who was his boss.

[61] The accused said that before and after he was arrested he received several calls from Tharmarajah and also tried to call Tharmarajah as evidenced in IDD5.

[62] The accused also said that one of the persons who arrested him asked him to call Tharmarajah and to ask him for RM50,000.00 in order that he be released. The accused said that he called Tharmarajah and asked him for the money for the purpose stated and that Tharmarajah said he would arrange for the money.

[63] The accused said that he called Tharmarajah at around upon the instructions of the police but he got no answer.

[64] The accused also tendered in evidence a police report lodged by him on 11.10.2017, namely Setapak Report 016196/17 (D3) in which he gave an account of the events that led to his arrest.

[65] The contents of this police report among other matters stated that on 29.7.2017 he received a phone call from Tharmarajah at around 1700 hours asking him to come to the PV 128 Shopping Centre Setapak in order to receive and send a bottle of Black Label Platinum Whisky to a client of Tharmarajah.

[66] The accused stated in D3 that when he arrived at the PV 128 Shopping Centre Setapak he called Tharmarajah's mobile number

01125179648 and Tharmarajah asked him to come to a condominium near to PV 13 by the side of the road to take the bottle.

[67] The accused stated in D3 that he met the said Tharmarajah at the side of the road as requested and he gave the accused the box containing the bottle of Black Label Platinum Whisky.

[68] Tharmarajah asked the accused to send the box to a client of his at a nearby condominium who was waiting at the security post. The accused stated in D3 that he then drove to the condominium car park and saw a male Malay who requested him to park his car which he did and was then ambushed by the police.

[69] The accused finally stated in D3 that he was set up or framed by the said Tharmarajah.

[70] SD2 is the brother of the accused and he testified that before his arrest the accused was involved in lorry transportation which was a family business, as well as doing a part time job which was as a despatch for duty free liquor.

[71] SD2 said this part time job was performed by the accused on weekends. SD2 said that the accused performs the part time business for a person named Tharmarajah who was the boss.

[72] SD2 said that the accused uses his (SD2's) car which is a Hyundai Ascent the registration number of which he could not quite remember now to deliver the liquor. SD2 however identified the car from the photographs (P8) (3) and (4) shown to him. SD2 also identified the car grant shown to him.

[73] SD2 said that he has met this Tharmarajah who has been his brother's friend since they were young. SD2 testified that he has never accompanied the accused when the latter delivered liquor.

[74] While under cross-examination, SD2 said that the accused would normally use his car on weekends. SD2 said while under cross-examination that the said Tharmarajah resided in Wangsa Maju.

[75] SD2 said that he tried to call Tharmarajah many times but to no avail. SD2 denied that Tharmarajah did not exist and that there was no such liquor despatch business.

Application by the defence to re-call SP5 (Chemist)

[76] After this court delivered its decision to call for the defence of the accused, his then counsel applied to discharge himself citing the reason that he was unable to secure the co-operation of the family members of the accused.

[77] I allowed the application by defence counsel and adjourned the case for case management in order for a new counsel to be appointed to act for the accused.

[78] When the new counsel, Mr K.K Mak appeared for the accused, he made an application to re-call the chemist (SP5) for cross-examination on the ground that he wished to challenge the evidence of the chemist because previously there was no cross-examination directed to the chemist during the course of the prosecution case.

[79] The learned Deputy Public Prosecutor (DPP) unsurprisingly, objected to this application.

[80] The application made is pursuant to the provisions of section 425

of the Criminal Procedure Code (CPC) which reads as follows:

425. Power of Court to summon and examine persons

Any Court may at any stage of any inquiry, trial or other proceeding under this Code summon any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined, and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.

[81] In this case based upon learned defence counsel's application, it is obvious that the application is made pursuant to the last limb of the section which is to recall SP5 on the grounds that his evidence appears to it essential to the just decision of the case.

[82] In **(The Criminal Procedure Code, A Commentary) 2nd Edn by Srimurugan Alagan, Sweet & Maxwell**, at para 425-3 pg 705, the learned author states that the section (section 425) is divided into two parts, the first part which confers on the trial judge discretionary powers to, firstly, summon any person as a witness

or secondly, examine any person in attendance although not called as a witness, and thirdly, recall and re-examine any person already examined.

[83] The learned author goes on to state that while the first part of the section is permissive, the second part imposes a mandatory obligation on the part of the trial judge to summon any person as a witness or recall and re-examine any witness, where his evidence appears to be “essential to the just decision of the case”.

[84] It was further stated that the mandatory obligation of the court to recall a witness is reflected by the words” Court shall summon and examine or recall and re-examine”, appearing in the latter part of the section.

[85] **Mallal’s Criminal Procedure 7th Edn, Lexis Nexis** at para 2004 at pg 751 states that the mandatory part of the section compels the court to take any of the above steps if the new evidence appears to be essential to the just decision of the case. It also stated that the discretion to call should be exercised with great care and the duty to call arises where it is necessary for a just decision.

[86] See also the cases of **Ramli Bin Kechik [1986] 1 CLJ 308** and **PP v Phon Nam [1988] 3 MLJ 415** which enunciated these principles.

[87] It will be recalled that the accused had had a change of counsel. When the current counsel Mr K.K Mak went on record, he submitted that he wished to challenge the evidence of SP5, the Chemist in this case although the application was made during the defence case. This was because Mr K.K Mak had only come on record after defence was called.

[88] Mr K.K Mak submitted that there was no cross examination at all conducted by the former counsel in respect of SP5's evidence during the course of the prosecution case. The issue arises now of whether such application ought to be allowed as being essential to the just decision of the case.

[89] Undoubtedly, if the defence wishes to challenge the findings of the chemist, it would be incumbent upon defence counsel to cross examine him as to his methods of analysis and his subsequent findings.

[90] If counsel were not allowed to avail himself of this opportunity, the ultimate effect would be that the findings of the chemist would be unchallenged and therefore unimpeached resulting in the substance analysed being conclusively proven to be Methamphetamine, undoubtedly, an essential ingredient in the charge against the accused.

[91] I found therefore under all the circumstances, not the least of which is that the ultimate penalty in this case upon conviction is death by hanging, including the fact that there had been a change of counsel mid-stream, that this was a fair application and one that was essential to the just decision of the case.

[92] I therefore allowed the application by the defence to recall SP5 for the purposes of cross examination under the second limb of section 425 CPC.

Evidence of SP5 upon recall

[93] The cross-examination of SP5 by the defence centred on the importance of the Gas Chromatography–Mass Spectrometer

("GCMS") test which is the qualitative test that confirms the substance analysed to be Methamphetamine.

[94] SP5 agreed that the GCMS test is the conclusive qualitative test as compared to the colour tests i.e. the Marquis test and the Simon test. SP5 agreed under cross-examination that a sample of the drug would be subject to the GCMS test and that eventually, it would produce a result.

[95] SP5 also agreed that the result would be in the form of a graph. The results however, would only be confirmed after a comparison with the Library reading which also would be in the form of a graph.

[96] SP5 agreed that different type of drugs have different graph readings. SP5 agreed that it was only after the GCMS graph reading is compared to the Library would a substance be confirmed as Methamphetamine. SP5 agreed therefore that the GCMS results were important. SP5 also said that he forwarded his findings to his supervisor Wan Rahimah (SD3).

[97] When it was put to him by learned counsel for the defence that his evidence did not assist in determining that the substance analysed was Methamphetamine, he categorically denied this.

[98] Under re-examination by the DPP, SP5 said that he believed that the processes he employed did assist the court in determining the substance to be Methamphetamine.

Evidence of SD3 Puan Wan Rahimah

[99] SD3 is a Chemist from the Chemistry Department of Malaysia and the supervisor of SP5. SD3 testified that in respect of Methamphetamine, the tests used are in accordance with the United Nations guidelines for drug testing.

[100] SD3 said that they comprise of the colour test which are presumptive tests, the GCMS which is the qualitative test and the Gas Chromatography-Flame Ionization Detector ("GCFID") test which is the quantitative test.

[101] SD3 explained that for the GCMS test, the substance would be blended in order to homogenise it and then injected into the GCMS

machine which would then be compared with a standard which is the Library reading.

[102] Should the GCMS test differ from the Library reading, this would mean that the substance analysed was not Methamphetamine. SD3 agreed that the GCMS print out of the results were important.

F) DUTY OF THE COURT AT THE CONCLUSION OF THE TRIAL

[103] The duty of a trial court at the conclusion of the defence case is set out in section 182 A of the Criminal Procedure Code (CPC) which imposes an obligation upon the court to consider all the evidence to decide whether the prosecution has proved its case beyond reasonable doubt.

[104] See also **Prasit Punyang v Public Prosecutor [2014] 4 MLJ 282** and also **Md Zainudin bin Raujan v Public Prosecutor [2013] 3 MLJ 773**. In the former case, the Court of Appeal speaking through Azahar Mohamed JCA ("as His Lordship then was"), held:

"*In accordance with the provisions of s 182A(1) of the Criminal Procedure Code, it is the bounden duty of the learned JC,* ***at the conclusion of the trial, to consider all the evidence adduced***

before him and shall decide whether the prosecution has proved its case beyond reasonable doubt*. The legislature has advisedly used the term all the evidence.* ***The emphasis must be on the word all***."(emphasis added)

[105] Aside from the above, the correct thought process and stages that should be followed by a trial court in the assessment and evaluation of the defence evidence is that as encapsulated in the time honoured decision of **Mat v Public Prosecutor 1963 29 MLJ 263**, where it was held by Suffian J (as he then was) as follows:

"*The position may be conveniently stated as follows: –*

(a) If you are satisfied beyond reasonable doubt as to the accused's guilt

Convict.

(b) If you accept or believe the accused's explanation

Acquit.

(c) If you do not accept or believe the accused's explanation

Do not convict but consider the next steps below.

(d) If you do not accept or believe the accused's explanation and that explanation does not raise in your mind a reasonable doubt as to his guilt

Convict.

(e) If you do not accept or believe the accused's explanation but nevertheless it raises in your mind a reasonable doubt as to his guilt

Acquit."

[106] The approach in Mat v Public Prosecutor was endorsed by the Federal Court as being the correct one to adopt when evaluating the evidence of the defence case in **Public Prosecutor v Mohd Radzi Bin Abu Bakar [2005] 6 MLJ 393**.

[107] If a statutory presumption has arisen as it has here, it is incumbent on the Accused to rebut such presumption on a balance of probabilities in order to secure an acquittal. See **PP v Yuvaraj [1969] 2 MLJ 89**.

G) ANALYSIS OF THE DEFENCE CASE

[108] The crux of the defence case is that the accused was only carrying out the act of delivering liquor to customers on the instruction of a person named Tharmarajah for whom he worked for on a part time basis on weekends.

[109] The accused therefore said that he did not know that the contents of the box he was carrying contained dangerous drugs. In other words, the defence of the accused is that of an innocent carrier.

[110] There is established authority for the proposition that where a defence of innocent carrier is led, it necessarily raises the issue of "wilful blindness".

[111] In the case of **PP v Klong K'Djoanh & Another Appeal [2016] 5 CLJ 533**, it was held;

"*It is the principle of the law that the defence of innocent carrier should be taken into account with the principle of wilful blindness*."

[112] See also **Unegbe Azuka Sunday v PP [2016] 1 LNS 423**, to similar effect.

[113] The concept of 'wilful blindness' originates from the dissenting judgement of Yong Pung How CJ (Singapore) in the case of **Public Prosecutor v Hla Win [1995] 2 SLR 424** where his Lordship said as follows:

"*At this juncture, I emphasize that* ***where the accused, who is not an innocent custodian in the sense that the drugs were planted in his bag without his being aware of them, accepted the goods in circumstances which rendered the taking of the precaution of satisfying himself that the goods were what they purported to be and were not drugs an imperative, then, if he did not take the trouble to inspect them, but merely relied on another person's assurance, he would not rebut the statutory presumption of knowledge. In fact, he would be guilty of wilful blindness to the obvious truth of the matter****.*

In the end, the finding of the mental state of knowledge, or the rebuttal of it, is an inference to be drawn by a trial Judge from all the facts and circumstances of the particular case, giving due weight to the credibility of the witnesses." (Emphasis added)

[114] Yong Pung How CJ further referred to Glanville Williams' Textbook on Criminal Law at p 125 as follows:

"*As Professor Glanville Williams aptly remarked in his Textbook on Criminal Law, at p 125:*

… the strict requirement of knowledge is qualified by the doctrine of wilful blindness. This is meant to deal with those whose

philosophy is: Where ignorance is bliss, 'tis folly to be wise.' ***To argue away inconvenient truths is a human failing. If a person deliberately 'shuts his eyes' to the obvious, because he 'doesn't want to know,' he is taken to know***". (Emphasis added)

[115] The concept of 'wilful blindness' has also been given exhaustive consideration in the well written book by En Hisyam Abdullah @ Teh Poh Teik entitled **"Drugs Trafficking And The Law"** at pages 1 to 20, where Public Prosecutor v Hla Win (supra) was cited, and the concept given detailed consideration and lucidly explained.

[116] The concept of 'wilful blindness' has also received judicial consideration by our courts in the cases of **Roslan bin Sabu @ Omar v Public Prosecutor [2006] 4 AMR 772** and more recently, in the case of **Jeanette Congcan Opena v Public Prosecutor [2014] 1 LNS 508**.

[117] In the latter case, it was observed that the appellant had deliberately shut her eyes to the obvious and refrained from inquiry because she knew about the cocaine in the towels.

[118] From the foregoing, the doctrine of ‘wilful blindness’ can be summarised to be applicable to a situation where the circumstances are such as to raise suspicion sufficient for a reasonable person to be put on inquiry as to the legitimacy of a particular transaction.

[119] To put it another way, if the circumstances are such as to arouse suspicion, then it is incumbent for a person to make the necessary inquiries in order to satisfy himself as to the genuineness of what was informed to him.

[120] Should he fail to embark upon this course of action, then he will be guilty of ‘wilful blindness’ to what can be said to be fairly obvious. In other words he is then taken to know what the contents are.

[121] He then cannot be said to have either rebutted the presumption of knowledge or have raised a reasonable doubt as to his knowledge of the drugs in question.

[122] It will be also observed that depending on the precise factual matrix of the case, where it is shown that the accused does make

inquiries, it is necessary to consider whether the inquiries are merely token or whether further inquiries ought to have been made given the circumstances.

[123] A perusal of the evidence led by the accused was that he had been working at this part time job for quite a while. This obviously meant that he was also familiar with the normal weight of a bottle of liquor.

[124] Although there was no cross-examination on this point, looking at the photographs of the impugned drugs in P8 (1), it is not probable or possible that the plastic bag containing the drugs would have weighed quite nearly the same as compared to a bottle of whisky. Common sense will also dictate that a bottle of whisky would certainly weigh more than the packet of drugs shown in the photographs.

[125] This is all the more so, as I observed earlier, that this was not the first time the accused had handled these liquor bottles. He therefore would have been fairly familiar with the weight of these bottles.

[126] Under the circumstances, the weight of the box ought to have aroused his suspicion as to its true contents. It ought to have struck him that something was amiss the minute he was handed the box. Despite this, the accused did not make inquiries of Tharmarajah as to the contents of P12 and neither did he conduct inspection of the box.

[127] Under all the circumstances, I find that the accused either knew that what he was carrying was illicit drugs or that he refrained from asking questions to the person who handed him the box and refrained from inspecting the contents because he knew that it contained dangerous drugs.

[128] With regard to the police report lodged by him on 11.10.2017, namely Setapak Report 016196/17 (D3) in which he gave an account of the events leading to his arrest, it must be firstly noted that the accused only lodged D3 some two months or so after his arrest.

[129] The accused said that the reason he lodged D3 was on the advice of a lawyer. Even allowing for the fact that being in custody, there

may have been difficulties in lodging a police report, there was nothing in the evidence to indicate that the accused had informed the prison authorities that he wished to lodge a report at the earliest opportunity.

[130] If he had indeed made such attempt, he could then have given evidence that his request nonetheless went unheeded. The delay in lodging the report entitles this court to infer that the reason was due to an afterthought.

[131] Secondly, the accused stated in D3 the following, "*Dia bagi saya satu kotak black label platinum dan suruh saya hantar kepada pelanggan di kondominuim berdekatan ……*".

[132] It is to be noted that the phrase used was "*kondominuim berdekatan*" or nearby condominium. Even assuming the contents of D3 are true, the question to be asked is why would there arise a need for the said Tharmarajah to ask the accused to deliver the box to a nearby condominium when the said Tharmarajah could have done this himself at no cost to himself?

[133] This also ought to have prompted the accused to at least inquire as to why Tharmarajah could not deliver the box himself, another indicator of 'wilful blindness' on his part. This would also rule out the accused's evidence that Tharmarajah framed him.

[134] The accused also said that he received several phone calls from Tharmarajah but he was prevented by the police from answering these calls. At best this shows that a person had called the accused and this person might have been the said Tharmarajah.

[135] This does nothing however to assist the defence in light of the fact that the accused had failed to inspect the box which under the circumstances made him guilty of wilful blindness.

[136] I find that while there was in existence a person whether named Tharmarajah or otherwise, who did give instructions to the accused to carry the box (P12), the accused knew or had reason to know that the contents of the said box (P12) contained dangerous drugs.

[137] I also find no cause to believe the accused's testimony that said

the police requested for a sum of money to be paid in order to have him released in light of there being no prior relationship between members of the raiding party and the accused thus ruling out motive to frame him up.

[138] Under all circumstances therefore and for the reasons given, the defence of the accused has failed to rebut the statutory presumption of possession and knowledge of the nature of the drugs under section 37 (d) DDA on a balance of probabilities. See PP v Yuvaraj (supra).

[139] The accused was also arrested in the car transporting the impugned drugs in a box. Under section 2 DDA, the definition of trafficking is wide enough to encompass the act of transporting, carrying, sending or delivering the said drugs.

[140] The defence of the accused has under the circumstances and for the reasons expressed above also therefore failed to raise a reasonable doubt as to trafficking in the impugned drugs.

Non-production of the GCMS Report and Library Reading

[141] Learned counsel for the accused submitted that the prosecution had failed to prove that the drugs recovered were dangerous drugs. The reason is because the GCMS results must be compared with the Library readings in order to confirm that the substance analysed is Methamphetamine and these were not produced.

[142] Both SP5 and his superior, SD3, testified that both of these readings are important in order to confirm the nature of the substance analysed. Accordingly, because the GCMS results and the Library readings were not produced, this resulted in a gap in the prosecution case.

[143] This gap, it was argued, could only be closed by the production of the GCMS results and the Library reading. The adverse presumption under section 114(g) of the Evidence Act 1950 ("EA") would also therefore arise against the prosecution.

[144] Learned counsel for the accused also argued that in light of the challenge mounted in respect of the nature of the drugs, the omission to produce the GCMS results and the Library reading

resulted in the evidence of SP5 and the Chemist Report (P17) being rendered insufficient to show that the substance analysed was in fact Methamphetamine.

[145] The issue to be now determined is whether in light of this challenge by the defence, the prosecution has succeeded in proving that the drugs were in fact Methamphetamine.

[146] The case of Munusamy v Public Prosecutor (supra) provides that there are two situations where the chemist evidence ought to be accepted at face value, the first being where the evidence of the chemist was not inherently incredible and secondly, unless the defence called rebuttal evidence to challenge the evidence of the prosecution chemist.

[147] As I indicated during the course of analysing the prosecution evidence, I did not find the evidence of SP5 to be inherently incredible at that stage more so when there was no challenge to his evidence mounted then.

[148] However, the defence did mount a challenge to the chemist

evidence after defence was called by making an application to recall SP5 for cross-examination which I allowed. The defence also called rebuttal evidence in the form of SD3, who was a Government chemist and in fact was the supervisor of SP5.

[149] The issue now before me at this stage is to determine firstly, whether the evidence adduced has done anything to displace my earlier findings that the testimony of SP5 was not inherently incredible and secondly, whether SD3's testimony has resulted in the prosecution failing to prove that the subject matter of the charge was in fact Methamphetamine.

[150] The summary of the testimony of SD3 was that if the GCMS results differed from the Library reading, this would mean that the substance was not Methamphetamine. In that context, SD3 agreed that the GCMS results print out was important.

[151] SP5 testified upon recall for purposes of cross-examination that the colour test is inconclusive and that it was the GCMS test that was the conclusive test. He agreed that the GCMS test results were in the form of a graph and it was only when this reading was

compared to the GCMS Library reading could a substance be confirmed to be Methamphetamine.

[152] SP5 also agreed that the GCMS test result was an important document. SP5 further agreed that this document should be sent to his supervisor, SD3.

[153] In conclusion however, SP5 disagreed with the suggestion put to him that his evidence did not assist the court in determining the substance in this case to be Methamphetamine.

[154] The question to be asked in light of the above is whether or not the failure to produce the GCMS test results and the Library reading results in a gap in the prosecution case and also whether the non-production warrants the invocation of the adverse inference under section 114(g) of the Evidence Act 1950 ("EA").

[155] The cases of Munusamy v Public Prosecutor (supra) and **Public Prosecutor v Lam San [1991] 3 MLJ 426** both enunciated the proposition that the evidence of the chemist must be taken at face

value save where it is inherently incredible or where rebuttal evidence is called.

[156] Now, what does it take for the evidence of a chemist to be categorized as inherently incredible? I do not think that any form of generalisation can be made here and it must necessarily depend upon the facts of each individual case.

[157] An examination of the following passage in the case of Public Prosecutor v Lam San (supra) will perhaps best illustrate the manner in which the evidence of the chemist is to be treated:

"*As to how a trial court should approach the evidence of a chemist, we wish to advert to the judgment of this court in Munusamy v PP [1987] 1 MLJ 492 where in a passage at p 496F, Mohamed Azmi SCJ on behalf of the court put in focus the function of the chemist in a trial of this nature:*

We are therefore of the view, that in this type of cases where the opinion of the chemist is confined only to the elementary nature and identity of substance, ***the court is entitled to accept the opinion of the expert on its face value, unless it is***

inherently incredible or the defence calls evidence in rebuttal by another expert to contradict the opinion. So long as some credible evidence is given by the chemist to support his opinion, there is no necessity for him to go into details of what he did in the laboratory, step by step*.*

Two things are implicit in that passage. ***First, unless the evidence is so inherently incredible that no reasonable person can believe it to be true, it should be accepted as prima facie evidence. Secondly, so long as the evidence is credible, there is no necessity for the chemist to show in detail what he did in his laboratory.***

In our view, the evidence of the chemist in this case was more than sufficient as basis to call for the defence, granted that all the other ingredients of the offence had been successfully proved.

The evidence of the chemist must be looked at in its totality. Seen in its totality, the evidence of the chemist in this case is not sketchy at all. There is no need for him to say what instrument he used for the purpose of the analysis or that the instrument was in good working condition as we have to assume until the contrary is shown that he had the proper instrument to carry out his work*. In this case he had even gone*

to the extent of giving a margin of error and had given the benefit of the doubt to the respondent."(Emphasis added)

[158] In light of the above passage, the question to be considered is, whether the evidence is so inherently incredible that no reasonable person can believe it to be true and is the evidence given credible.

[159] The substance of SP5's testimony is contained in his Witness Statement ("WSSP 4") where he first stated his qualifications. SP5 then explained his methods of analysis in which he stated that he performed the colour tests comprising the Marquis test and the Simon test.

[160] SP5 then explained that he performed the Gas Chromatography–Mass Spectrometer ("GCMS") test which is the qualitative test that confirms the substance analysed to be Methamphetamine.

[161] SP5 also explained that he performed the Gas Chromatography-Flame Ionization Detector ("GCFID") test which is the quantitative test. SP5 then explained that he was satisfied that all the three (3)

tests carried out by him enabled him to come to the conclusion that the substance analysed was Methamphetamine.

[162] SP5 further stated that Methamphetamine is listed under the Dangerous Drugs Act 1952. He also stated that the analysis he conducted was based upon the Standard Operating Procedures ("SOP") of the Chemistry Department of Malaysia and recognised by the United Nations Office on Drugs and Crime ("UNODC").

[163] A combined consideration of both the cases of Munusamy v Public Prosecutor and Public Prosecutor v Lam San lead me to conclude that the issue of whether the evidence of the chemist can be considered inherently incredible or not, is at the end of the day a question of credibility. In other words, the non-production of the GCMS test results and the Library readings would only go to SP5's credibility.

[164] Therefore the testimony of SP5 must be evaluated in order to determine this. After considering and evaluating the testimony of SP5 and also that of SD3, I do not find that SP5's evidence on the whole was inherently incredible for the reasons that follow.

[165] SP5 in his witness statement (WSSP4) by way of examination in chief did explain the tests he conducted in the laboratory during the course of his analysis.

[166] He went into some amount of detail explaining these tests. He said that after conducting these tests, he came to the conclusion that the substance was Methamphetamine. Although it was put to him that his evidence did not assist the court in determining that the substance analysed was Methamphetamine, he denied this.

[167] I find that the explanation given by SP5 regarding how he came to the conclusion that the substances analysed was Methamphetamine to be satisfactory.

[168] An almost similar situation arose in the case of **Yu Guihua (W/China) lwn Pendakwa Raya [2019] MLJU 1560** where the Court of Appeal held:

"[*49] Berhubung isu kedua iaitu* ***pihak pendakwaan dikatakan telah gagal membuktikan kes pada tahap tanpa keraguan munasabah kerana gagal menandakan keputusan GCMS, menjadi hujah Perayu bahawa hasil ujian GCMS adalah***

penting dikemukakan di Mahkamah untuk membolehkan Mahkamah membuat keputusan bahan yang dirampas adalah Methamphetamine*.*

[50] Hujahan ini bersandarkan kepada keterangan seorang ahli kimia yang dipanggil sebagai saksi oleh Perayu semasa memberi pembelaan (SD3). Peguam terpelajar berhujah bahawa ***keterangan SD3 menunjukkan:***

a)Setiap dadah mempunyai "library reading" yang berbeza;

b)Hasil ujian GCMC akan menghasilkan satu "graf";

c)Graf tersebut akan dibandingkan dengan "library reading" untuk mengenal pasti kehadiran jenis dadah;

d)SD3 tidak mampu membuat kesimpulan berdasarkan P33, iaitu laporan kimia yang disediakan oleh SP8;

e)SD 3 memerlukan hasil GSMS untuk dibandingkan dengan "library reading" sebelum mampu membuat dapatan fakta bahawa dadah yang dianalisis adalah dadah berbahaya; dan

f)Tanpa keputusan GCMS SD3 tidak boleh mengesahkan dadah dalam kes ini adalah dadah methamphetamine*.*

[51] Berdasarkan keterangan SD 3 seperti di atas, Peguam terpelajar berhujah bahawa memandangkan SD3 iaitu seorang saksi pakar yang dipanggil oleh Defendan tidak boleh membuat

keputusan bahan yang dianalisis adalah dadah berbahaya, maka Mahkamah juga tidak boleh membuat keputusan bahawa bahan yang dirampas adalah dadah berbahaya tanpa hasil GCMS dikemukakan di Mahkamah.

[52] ***Secara ringkasnya, pendirian Perayu ialah, Mahkamah perlu membanding "worksheet" yang merangkumi graf kromatografi dari mesin GCMS dengan "library reading" dan seterusnya membuat keputusan dadah yang dirampas dalam kes ini adalah Methamphetamine. Tanpa "worksheet" dari mesin GCMS Mahkamah, seperti SD3, tidak dapat berbuat demikian****.*

[53] ***Setelah alasan penghakiman diamati, kami dapati persoalan mengenai jenis dadah yang dirampas dan kegagalan pendakwa mengemukakan hasil GGCMS sebagai eksibit telahpun di beri pertimbangan oleh Hakim bicara bijaksana dalam penghakimannya****. Di muka surat 23 Jilid Satu Rekod Rayuan (Muka surat 18 alasan penghakiman) Hakim bicara bijaksana menulis:*

"

*1.****Mahkamah ini tidak mempunyai keraguan sama sekali bahawa dadah yang dirampas daripada beg eksibit P5 dan yang dianalisis oleh SP8 adalah dadah jenis***

methamphetamine *seberat 730.40 gram* ***seperti mana yang jelas dinyatakan oleh SP8 di dalam laporan kimianya*** *yang ditandakan sebagai eksibit P33.*

*2.****Kegagalan pihak pendakwaan mengemukakan hasil GCMS berserta dengan library reading tidak memudaratkan kes pendakwaan. Ini adalah kerana ujian-ujian yang dijalankan oleh SP8 seperti ujian warna, GCMS dan GC-FID adalah memadai untuk membuktikan bahawa dadah yang dirampas tersebut adalah jenis methamphetamine****. Keterangan SP8 ini diperkuatkan lagi dengan keterangan SD3 yang mana SD3 menyatakan bahawa keputusan GCMS yang dikemukakan di dalam bentuk worksheet oleh SP8 telah dihantar kepadanya untuk disemak dan telah diluluskan oleh SD3 sendiri. Kelulusan yang diberikan oleh SD3 tersebut jelas menunjukkan bahawa tiada kecacatan di dalam analisis yang telah dijalankan oleh SP8. Oleh itu isu yang dibangkitkan oleh pihak pembelaan bahawa kegagalan pihak pendakwaan mengemukakan worksheet yang merangkumi graf kromatografi dari mesin CGMS sebagai eksibit tidak mempunyai merit dan sewajarnya ditolak."*

[54] Setelah kami meneliti keterangan SP8 dan juga SD3 secara keseluruhannya, kami dengan hormat bersetuju dengan

penemuan Hakim bicara bahawa isu ini yang dibangkitkan oleh Perayu tidak mempunyai sebarang merit. SP8 dengan jelas menerangkan bahawa analisis yang dijalankannya bermula dengan pemeriksaan isi kandungan P8 dan SP8 mendapati 5 bungkusan kertas karbon biru berisi kandungan bahan kristal jernih disyaki dadah P8(1) - P(5) yang didapati berat bersihnya adalah 972.5 gram. Penimbangan adalah menggunakan penimbang elektronik yang telah dikalibrasi. Bahan kristal kemudian dijadikan serbuk homogen.

[55] ***SP8 seterusnya telah menjalankan 3 ujian iaitu Ujian Warna (Marquis dan Simon); Ujian Gas Chromatography Mass Spectometer (GCMS); dan Ujian Kromatografi Gas Chromatography (GCFID). SP8 mendapati, hasil ketiga-tiga ujian tersebut di atas telah menunjukkan bahawa serbuk homogen yang diuji mengandungi 730.40 gram Methamphetamine dan Methamphetamine disenaraikan dalam Jadual Pertama Akta 234****.*

[56] Dari keterangan SP8 ini, kami bersetuju dengan hujah Timbalan Pendakwa Raya terpelajar bahawa analisis yang telah dijalankan oleh SP8 telah dengan konklusifnya mengenal pasti bahan-bahan tersebut adalah dadah berbahaya seperti yang

didefinisikan dalam Seksyen 2 Akta 234. Jenis dadah berbahaya ada disenaraikan dalam Jadual Pertama Akta 234 dan Methamphetamine adalah termasuk dalam senarai ini. ***Tiada keperluan untuk "worksheet" yang merangkumi graf kromatografi dari mesin CGMS dikemukakan sebagai eksibit bagi menentukan dadah yang dirampas adalah Methamphetamine****.*" (Emphasis added)

[169] It will be noticed that the defence in the above mentioned case mounted an almost similar challenge to the one taken here except that it was the non-production of the worksheet there which became an issue.

[170] In the instant case, it is the non-production of the GCMS test results and the Library result that was taken as an issue. It will be noticed that in the case before the Court of Appeal similar tests were performed there as it was here.

[171] In the case before the Court of Appeal, it will also be noticed that the trial judge was satisfied that the tests performed left no doubt in his mind that the substances analysed were Methamphetamine.

Against that backdrop, the Court of Appeal agreed with the findings of the trial judge there.

[172] Here, SP5 explained in detail the various tests he carried out and based on these tests, he concluded that the substances analysed were Methamphetamine. The summary of the evidence of SD3 as a whole was that if the GCMS test results differed from the Library reading, this meant that the substance was not Methamphetamine.

[173] In that context, SD3 agreed that the GCMS test results printout and the Library reading were important in order to determine the nature of the substance. I find that SD3's evidence did not add anything more to what SP5 had already testified to.

[174] After considering the testimony of SP5 as a whole and for the reasons expressed above, I find that the prosecution had proven beyond reasonable doubt that the substances analysed were Methamphetamine.

[175] The mere non-production of the GCMS test results and the Library

readings did not under the circumstances result in a gap in the prosecution case and also did not raise the adverse inference under section 114 (g) EA.

Decision

[176] After considering all the evidence and for the reasons given above, I find that the prosecution had successfully proven their case beyond reasonable doubt pursuant to 182A (2) CPC against the accused.

[177] I therefore convicted the accused of the charge of trafficking under section 39 B (1) (a) DDA.

Submissions in respect of sentence

[178] Before I proceeded to sentence the accused, I invited the defence and the prosecution to submit on the provisions of section 39B sub-section (2A) DDA.

[179] Learned counsel for the accused submitted by way of general mitigation that the accused is 39 years of age and is one among 6 siblings. Before his arrest he was supporting his parents.

[180] In respect of section 39B (2A), learned counsel submitted that there was no evidence to show that the accused did not render cooperation to the police but on the contrary he gave his full cooperation.

[181] It was also submitted that the accused had lodged a police report Setapak Report No: 016196/17 on 11.10.2017 in which he had narrated the events that led to his arrest.

[182] Counsel also submitted that in doing so he had assisted the police in combating drug trafficking activities. The accused also did not attempt to flee during arrest.

[183] The learned DPP submitted that from the evidence adduced there was nothing to show that the requirements in paragraphs (a) to (d) to section 39B (2) A were satisfied.

<u>The Amended Section 39B DDA</u>

[184] Section 39B of the DDA was amended vide the Dangerous Drugs (Amendment) Act 2017 [Act A1558] and came into effect on 15th

March 2018 P.U. (B) 127. The amended section 39B in so far as is relevant reads:

39B. Trafficking in dangerous drug

(1) No person shall, on his own behalf or on behalf of any other person, whether or not such other person is in Malaysia—

(a) traffic in a dangerous drug;

(b) offer to traffic in a dangerous drug; or

(c) do or offer to do an act preparatory to or for the purpose of trafficking in a dangerous drug.

(2) Any person who contravenes any of the provisions of subsection (1) shall be guilty of an offence against this Act and shall be punished on conviction with death or imprisonment for life and shall, if he is not sentenced to death, be punished with whipping of not less than fifteen strokes.

(2A) In exercising the power conferred by subsection (2), the Court in imposing the sentence of imprisonment for life and whipping of not less than fifteen strokes, may have regard only to the following circumstances:

(a) there was no evidence of buying and selling of a dangerous drug at the time when the person convicted was arrested;

(b) there was no involvement of agent provocateur; or

(c)the involvement of the person convicted is restricted to transporting, carrying, sending or delivering a dangerous drug; and

(d) that the person convicted has assisted an enforcement agency in disrupting drug trafficking activities within or outside Malaysia.

(2B) For the purposes of subsection (2A), "enforcement agency" means—

(a) the Royal Malaysia Police;

(b) the National Anti-Drugs Agency;

(c) the Royal Malaysian Customs Department;

(d) the Malaysian Maritime Enforcement Agency; or

(e)any other enforcement agency as may be determined by the Minister.

[185] A perusal of the Hansard of 30.11.2017 will reveal that in the relevant Parliamentary Debate, the then Honourable Minister Dato' Sri Azalina said in response to a question posed;

"*Yang Berhormat tanya saya tentang perkataan 'and' dalam hujung seksyen 39B(2A) (d). Dasar yang telah ditentulah ialah supaya perenggan (d) menjadi sesuatu yang kehendak kepada mandatori iaitu perlu dipenuhi sekiranya mahkamah ingin mempertimbangkan untuk menjatuhkan hukuman penjara seumur*

hidup. Dalam hal ini, (a), (b) dan (c) – (a), (b), (c) dibaca secara (sic) injunctive tetapi akan dibaca secara conjunctive dengan (d). Maknanya (d) itu adalah keperluan utama untuk hakim menggunakan kuasa budi bicara."

[186] Continuing in the same vein, the Honourable Minister continued;

"*Kerajaan tidak bersetuju dengan penggantian perkataan 'and' dengan perkataan 'or' di akhir frasa (2A)(c). Diperhatikan bahawa terletaknya perkataan 'and' di akhir fasal (2A) (c) bermaksud mahkamah hendaklah mengambil fasal (2A)(d) secara bersama atau conjunctive dengan salah satu daripada (2A) (a), (b) atau (c) atau mana-mana kombinasi daripada ketiga-tiganya. Dalam kata lain, pertimbangkan terhadap fasal (2A)(d) adalah wajib dalam setiap kes di mana mahkamah membuat pertimbangan sama ada hendak menjatuhkan hukuman penjara seumur hidup dengan sebatan*."

[187] Hansard also reveals the following, also from the same Minister as follows;

"*Kerajaan tidak bersetuju dengan cadangan untuk mengeluarkan perkataan 'only' dalam fasal (2A) dan juga tidak bersetuju dengan*

pindaan hukuman yang dicadangkan. Kerajaan berpandangan bahawa pengeluaran perkataan 'only' tersebut akan membuka luas faktor-faktor yang boleh diambil kira oleh mahkamah dalam memutuskan hukuman. Keadaan ini juga akan membawa kepada situasi ketidakseragaman dalam hukuman sebagaimana berlakunya sebelum tahun 1983."

[188] Finally, the Honourable Minister also said;

"*Diperhatikan di sini bahawa faktor-faktor (a), (b) dan (c) berkaitan dengan kesalahan spesifik yang telah pun dilakukan oleh tertuduh. Hanya factor (d) yang berkaitan dengan satu kelebihan yang boleh diperolehi agensi penguatkuasaan dalam usaha mengendalikan pengedaraan dadah. Oleh itu, factor (d) harus wajib dipertimbangkan oleh makhamah jika niat dan semangat di sebalik pindaan ini hendak dizahirkan iaitu memperkasa agensi penguat kuasa dalam memerangi pengedaran dadah dan melindungi kepentingan masyarakat*."

[189] A plain reading of section (2A) will indicate that paragraphs (a) to (c) are meant to be read disjunctively while paragraph (d) must be read conjunctively with either of the requirements in (a) to (c). The

phrase ‘and’ just before paragraph (d) makes this clear. The requirement under paragraph (d) is therefore mandatory.

[190] It is also clear that the phrase ‘only’ in the opening words of section (2A) means the court can only consider the matters enumerated in paragraphs (a) to (d) in deciding whether to exercise the discretion. The Hansard references further reinforces this view.

Sentence

[191] The fact that the accused had placed the blame on someone else for his arrest does not constitute grounds for contending that he had assisted an enforcement agency in disrupting drug trafficking activities.

[192] In the final analysis, such a defence was also rejected by this court. Neither does the fact that he had lodged a police report (D3) assist him in this endeavour for the reasons expressed in my analysis of the defence case.

[193] Every drug trafficker will no doubt contend that if it were not for his

arrest the drug trafficking activity of which he was a part of would not have been disrupted.

[194] I hardly think that this was what was envisaged by the legislature when the section was passed.

[195] Having heard submissions from respective parties, I found nothing in the evidence to suggest that the requirement under paragraph (d) to section (2A) was satisfied.

[196] There was no evidence to show that the Accused had assisted an enforcement agency in disrupting drugs trafficking activities.

[197] Having considered the submissions of all parties, I found that there was no material upon which I could have exercised such discretion under section 39B (2) and (2A) DDA to pass a sentence of life imprisonment and whipping.

[198] I therefore sentenced the Accused to be hanged by the neck until he was dead.

Dated: 03rd March 2020

sgd.

(COLLIN LAWRENCE SEQUERAH)

Judge

High Court of Malaya

Kuala Lumpur

Counsels:

For the Prosecution	…	Tn. Mohd. Radzi bin Abdul Razak Public Prosecutor [Attorney General's Chambers]
For the Respondent	…	En. K. K. Mak [Messrs. K. K. Mak & Co.]