DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

DALAM WILAYAH PERSEKUTUAN KUALA LUMPUR

PERBICARAAN JENAYAH NO.WA-45A-(12-13)-02/2021

PENDAKWA RAYA

LAWAN

1.MUHAMMAD HAZIQ IRFAN BIN MOHD ZAMRY

2.AMIRUL IMAN BIN AZHAR

JUDGMENT

[1] Muhammad Haziq Irfan bin Mohd Zamry, (the "**1st accused**") was charged together with Amirul Iman bin Azhar, (the "**2nd accused**") for trafficking in dangerous drugs to wit., 209.1g of cannabis, an offence under section 39B of the Dangerous Drugs Act 1952 ("**DDA**"). The 2nd accused faced another charge for possession of 166.7g of cannabis, an offence under s.6 DDA.

[2] The charges are as follows:

First Charge (against both the accused persons)

> "*Bahawa kamu bersama-sama pada 25 Jun 2020 jam lebih kurang 7.50 malam, di kawasan jalan belakang Bangunan Regalia Residences Jalan Anjung Putra, Off Jalan Sultan Ismail, dalam Daerah Dang Wangi, Wilayah Persekutuan Kuala Lumpur telah mengedar dadah berbahaya iaitu cannabis seberat 209.1g dan dengan itu telah melakukan satu 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*."

Second Charge (against the 2nd accused):

"*Bahawa kamu bersama-sama pada 25 Jun 2020 jam lebih kurang 7.50 malam, di unit B-6-3A, Regalia Residences Jalan Anjung Putra, Off Jalan Sultan Ismail, dalam Daerah Dang Wangi, Wilayah Persekutuan Kuala Lumpur telah memiliki dadah berbahaya iaitu cannabis seberat 166.7g dan dengan itu telah melakukan satu kesalahan di bawah seksyen 6 Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39A (2) Akta yang sama*."

[3] Four (4) witnesses were called to testify for the prosecution and they are:

PW1 - ASP Mohd Haszaruddin bin Kamaruzzaman (Arresting Officer);
PW2 - Gaureswaran a/l Shanmugam (Chemist);
PW3 - Muhammad Aliff Zulfaqqar bin Abdullah (a friend to both the accused persons);
PW4 - Inspector Nurhafizah binti Samat (Investigating Officer)

Narrative of the Prosecution Case

[4] On 27 June 2020 at around 7.50 p.m. acting on information received, PW1 together with a raiding team from the Narcotic Crime Investigation Division IPD Dang Wangi, headed to a road behind a building known as the Regalia Residence, Jalan Anjung Putra, Off Jalan Sultan Ismail Kuala Lumpur (hereinafter referred to as "**the first crime scene**") and made observation for 10 minutes.

[5] During the observation, PW1 saw the two accused persons walking along the road at the first crime scene.

[6] According to PW1, he saw the 1st accused holding a transparent plastic bag in his right hand. PW1 approached the two accused persons and introduced himself as a police officer. PW1 testified that at the same time, the 1st accused dropped the transparent plastic bag near the 2nd accused feet. PW1 picked up the transparent plastic bag and upon examining the contents, he found twelve (12) silver colour plastic packages therein containing dried leaves suspected to be cannabis.

[7] PW1 then conducted a body search on both the accused persons and found nothing incriminating on them. However, PW1 found that the 2nd accused was holding an access card written on it, "Regalia Service Apartment Unit No. B-6-3A" (hereinafter referred to as "**the second crime scene/unit"**). PW1 seized the access card together with the key to the unit and headed to the unit together with his team and both the accused persons.

[8] Using the key seized from the 2nd accused and upon entering the unit, PW1 and his team saw PW3 sitting on a chair at the dining area. According to PW1, upon being questioned as to whether both the accused persons and PW3 have kept any contraband, the 2nd accused was said to have led PW1 to the room in the unit and took out from the drawer in the cupboard a transparent bag with ten (10) silver-coloured plastic packages therein containing dried leaves suspected to be cannabis.

[9] Both the accused persons together with PW3 and the drugs found at both the crime scenes were then taken to the IPD. Both the accused

persons and the seized items were handed over by PW1 to the Investigating Officer, PW4.

[10] The drugs found at the first and second crime scenes are the impugned drugs stated in the charges.

[11] Since PW3 who was arrested at the second crime scene/unit and was called by the prosecution as their witness, it is apposite at this juncture to highlight his evidence, as it forms part of the prosecution's narrative.

[12] According to PW3, both the accused persons and him are close friends and that it was the 2nd accused who rented the unit through the residential-rent online marketplace, Airbnb. PW3 went over to the unit to meet the 2nd accused one week after the latter's return from Qatar. PW3 stated that the 1st accused came over to the unit on 25.6.2020 bringing along a backpack (beg sandang) with him as he wanted to leave for Johor Bahru with his girlfriend to visit her parents on the same day.

[13] It was not disputed that in the backpack there was a bus ticket (D11) and the 2nd accused's clothing. There was no transparent plastic bag with silver packets in the backpack.

[14] At about 7 p.m. when the 1st accused was about to leave the unit to meet his girlfriend, the 2nd accused had asked the 1st accused to wait as he too wanted to go down to meet his friend. PW3 saw the 1st accused carrying his backpack which he had brought along with him earlier. According to PW3 he did not notice whether the 1st accused was carrying anything in his hands before leaving the unit.

[15] Eventually, while having his food at the dining table with his earphone on, PW3 then heard the door to the unit being opened. Eleven (11) police personnel entered the unit with both the accused persons. One of the police personnel took off PW3's earphone and both the accused persons and PW3 were made to sit in the living room with their hands, handcuffed.

[16] It is PW3's testimony that one of the police personnel had asked who amongst them is Prof Q. PW3 testified that the 2nd accused admitted that he is Prof Q. According to PW3, when the police personnel asked the 2nd accused if there were more drugs in the unit, the 2nd accused answered in the affirmative, led the police to his room and came out with the drugs.

Analysis and Findings

[17] Anchored on the fundamental rule of criminal law and pursuant to s.180 of the Criminal Procedure Code ("**CPC**"), it is the duty of the Court as a trier of fact to scrutinise the evidence adduced by the prosecution on a maximum yardstick to determine whether the strands of evidence laid down before the Court satisfy the legal requirements to support a finding of a prima facie case. The Court will have to determine whether the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction. It is instructive upon the Court to consider the gaps and inferences that arose from the circumstantial evidence in accordance with the principles of law.

[18] It is incumbent that at this stage too, the Court must consider and evaluate the defence put forward by the accused persons. On the totality of the evidence adduced by the prosecution, the Court must then ask

whether it would be prepared to convict the accused persons if it were to decide to call upon them to enter their defence and they elect to remain silent. If the answer to that question is in the negative, then no prima facie case would have been made out and the accused persons are entitled to an acquittal (see: **Looi Kow Chai v PP [2002] 2 MLRA 383**; **[2003] 2 MLJ 65**; **[2003] 1 CLJ 734**; [**2003] 2 AMR 89** and **Balachandran v PP [2004] 2 MLRA 547**; **[2005] 2 MLJ 301**; **[2005] 1 CLJ 85**; **[2005] 1 AMR 321**).

[19] In order to establish a prima facie case against both the accused persons for the offence under s.39B (1) DDA read together with s.34 of the Penal Code the prosecution has to prove the following essential ingredients:

i. The impugned drugs are dangerous drugs listed in the First Schedule of the DDA with net weight as specified in the charge;
ii. The accused persons have possession of the impugned drugs at the relevant time
iii. The accused persons committed the offence of trafficking in the dangerous drugs in furtherance of their common intention pursuant to s.34 of the Penal Code.

[20] In regards to the offence under s. 6 DDA against the 2nd accused, the prosecution has to prove that;

i. the impugned drugs are dangerous drugs listed in the First Schedule of the DDA with net weight as specified in the charge;
ii. the impugned drugs were found in possession of the 2nd accused at the relevant time

The 1st Ingredient- Identity of the Impugned Drugs

[21] In regards to the first ingredient of the charge, it is the contention of learned counsel for the 2nd accused that the analysis conducted by PW2, (the chemist) is not in accordance with law.

[22] The learned counsel argued that since cannabis is defined as "*any part of any plant of the genus cannabis from which there is found to be present resin irrespective of its quantity and by whatever name the plant may be designated*:", therefore any part of the genus cannabis where no resin is found does not fall under the definition of cannabis under s.2 DDA.

[23] Learned counsel for the 2nd accused argued further that in determining the type and weight of the drugs in accordance with s.2 DDA, PW2 ought to have separate the plant of the genus cannabis where resin is found from the part where no resin is found and take into account part of the plant that only contains resin in his report.

[24] Learned counsel took issue on the fact that PW2 admitted that he had taken both the dry leaves which contain resins as well as the stems (which do not contain resins) as samples in his examination and analysis and found that the plant (in the form of loose dry leaves together with the stems) is cannabis under s.2 DDA. According to learned counsel, by taking the stems which do not contain resins as part of the samples, the net weight of the drugs is compromised.

[25] PW2 in this case had categorically stated that from his visual examination, he found all the plant materials belong to one of the same plant. It is of the considered view that this would mean that apart from the

leaves (where resins were found), the stems (although do not contain resins) form part of the plant.

[26] According to PW2, he had carried out the following four tests on the plant material submitted to him:

(1) A physical examination of the plant material with the naked eye, as a result of which he observed that the plant materials was all of the same type;

(2) A microscopic examination of the plant, as a result of which he observed simple hair, cystolith hair, glandular hair and globular resin with morphological features characteristic of cannabis;

(3) A Duquenois-Levine test which gave a positive reaction (purple colour), indicating the presence of active cannabinoids containing resins brown in colour;

(4) A thin layer Chromatography (TLC) test ('TLC') confirming the presence of three types of cannabinoids: (Cannabidiol), THC (Tetrahydrocannabinoil) and CBN (Cannabinol).

[27] It must be noted that PW2 had concluded that with the combination of all the four tests and not by individual test alone, the plant material was cannabis '*from which there is found to be present resin irrespective, and by whatever name the plant may be designated*' (see. S.2 of the DDA). It must be noted further that PW2 stated the following in his written statement PSP-2:

> *"(*Sampel perwakilan adalah sampel yang diambil secara rawak bagi mewakili keseluruhan bahan tumbuhan di mana keputusan analisis bagi sampel*

perwakilan ini adalah juga merupakan keputusan analisis bagi keseluruhan tumbuhan tersebut)"

[28] At one point of time 'cannabis' was defined by s.2 of the DDA to mean '*any part of any plant of the genus cannabis from which the resin has not been extracted, by whatever name it may be designated*'. Subsequently, with effect from 4 September 1992, cannabis has been redefined by Act A334, that is to say, the Dangerous Drugs (Amendment) Act 1992, to mean '*any part of any plant of the genus cannabis from which there is found to be present resin irrespective of its quantity and by whatever name the plant may be designated*:'

[29] This Court is of the considered view that with the amendment and the present definition of cannabis under s.2 DDA, it is practical to avoid the word "*from which the resin has not been extracted*" as in the old definition of cannabis. It means that so long as resin is found in any part of any plant of the genus cannabis, the ingredient being a matter of science, then the essential ingredient of the charge that the plant material seized was cannabis as defined under the governing definition of s.2 DDA is made out by the prosecution at the close of the prosecution case. It does not matter for the chemist to take the representative sample consisting of both the dry leaves together with the stems. So long as resin is present in any part of the plant of the genus cannabis irrespective of its quantity and by whatever name the plant may be designated, it will make the entire plant falls under the definition of cannabis in s.2 DDA. Any part of the genus cannabis or any part thereof comes within the definition of cannabis as dangerous drugs together with its leaves, stem, stalk, fibre and seed. All these constitute the plant of the genus cannabis. The

chemist was therefore right in weighing the plants sent for his examination and analysis.

[30] There is no error on the part of PW2 to conclude that upon being satisfied with the results of the four tests which he conducted, the plant in the form of loose leaves together with the stems sent to him by PW4 for examination and analyses is cannabis as defined under s.2 DDA.

[31] This Court finds nothing is inherently incredible in respect of PW2's evidence relating to the identity of the impugned drugs stated in the charges, that they are cannabis as defined under s.2 DDA and they are dangerous drugs listed in the First Schedule of the DDA with net weight as specified in the charge.

[32] However, this Court finds that there is merit in the contention made by the defence as to the chain of evidence relating to the impugned drugs.

[33] The impugned drugs in the instant matter were found in 12 silver colour plastic packages (**P4A (1-12)**) which were said to be found at the first crime scene. Whilst at the second crime scene, the impugned drugs were found in 10 silver colour plastic packages (**P5A (1-10)**).

[34] P14 is the report lodged by PW1, the raiding/arresting officer where the location of and the weight of the impugned drugs were stated. In P14, PW1 stated that the weight of the impugned drugs in P4A (1-12) is 250g. It must be noted that the net weight of the impugned drugs in P4A (1-12) is 209.1g as per the chemist's report.

[35] Apparently, on each of the packets P4A (1-12), the weight of the drugs was stated. When asked to calculate the total weight of P4A (1-12) as stated on each of the packets, PW4 testified that the total weight is 210g. Therefore, there is a difference of about 40g of the total weight of P4 (1-12).

[36] Likewise, in relation to P5 (1-10), the weight stated by PW1 in his report P14 is 200g. Upon calculating the total weight as stated on each of the silver colour packages of P5 (1-10) the total weight is 150g, a difference of 50g.

[37] This court agrees with the submission by learned defence counsel that the difference of almost 90g in weight for both P4A (1-12) and P5 (1-10) is significant in the sense that it could trigger a different offence and punishment under the DDA. Even if the difference is argued to be non-significant but reasonable doubt arises when P13A being the plastic bag wherein the impugned drugs (P4A (1-12) and P5A (1-10)) were kept after the arrest, the total packets are stated to be 26 packets instead of 22 packets produced in court. Therefore, there are 4 packets of the impugned drugs that were missing. So, if one were to take the weight stated by PW1 in his report P14 that is, 250g for P4A (1-12) and 200g forP5A (1-10), then it is possible that the difference of almost 90g in weight for both P4A (1-12) and P5A (1-10) could be the weight of the 4 missing packets. No explanation was proffered by the prosecution relating to this issue.

[38] The prosecution case is further weakened by the fact that PW4 agreed that with the difference in the weight and the missing 4 packets of the impugned drugs, there is tampering of evidence relating to the impugned drugs. Therefore, reasonable doubt arises as to whether the

drugs that were seized on the date and places stated in the charge is the same drugs with the ones adduced in court. In **Teoh Hoe Chye v Public Prosecutor & Another Case [1986] 1 MLRA 387**, the then Supreme Court stated:

> "*We would observe at this point that the law is clear in that "it is unnecessary to call evidence to ensure there is no break in the chain of evidence (see Ah Ping v PP [1987] 1 MLJ 75). But where a doubt as to the identity of an exhibit arises, a failure to produce evidence to provide the necessary link in the chain of evidence would be fatal to the prosecution stage*."

[39] The requirements of strict proof in a criminal case cannot be relaxed to bridge any material gap in the prosecution evidence and it is the finding of this Court that there is already a reasonable doubt in the prosecution's case at this prima facie stage in light of the patent and unexplained significant difference in the weight of the drugs and the probability of missing exhibits resulting to the identity of the drugs seized is doubted.

The Second Ingredient- possession of the impugned drugs

[40] In regards to the second ingredient, it is trite law that there can be no possession of the dangerous drugs without knowledge and some power of disposal of the same on the part of the accused persons. In other words, both physical and mental elements must be present before possession under the law is made out. It must be shown that the accused persons have the *animus possidendi*, the intention of dealing with the dangerous drugs as if it belonged to him should he see any occasion to do so (see: **Chan Pean Leon v PP [1956] 1MLJ 237**).

[41] Custody and control over the dangerous drugs are insufficient to establish possession. The physical act or custody must be accompanied with evidence that the accused had knowledge of the said drugs and in the absence of any statutory presumption, knowledge has to be proved either by direct or circumstantial evidence. Mere knowledge alone without exclusivity of either physical custody or control or both is insufficient in law to constitute possession, let alone trafficking (see: **Ibrahim Mohamad & Anor v PP [2011] 4 CLJ 113 FC**).

[42] In the instant matter, PW1 as the raiding officer testified that he and his team made observation at the first crime scene for 10 minutes. PW1 testified that he saw both the accused persons were walking out from the basement parking area. PW1 testified that he saw the 1st accused was holding a transparent plastic bag in his right hand.

[43] The 1st accused denied the above testimony of PW1. It is the 1st accused's defence that he was not holding anything in his right hand when he was walking out of the basement car park and that he was only carrying his backpack with his personal belongings. It is the 1st accused's version, that it was the 2nd accused who was holding a packet in his hand at the time they were stopped by PW1 and his team.

[44] In challenging PW1's version and after being served with the documents pursuant to s.51A of the CPC by the prosecution, the 1st accused lodged a police report, D20 on 1.3.2022 (approximately 1 ½ years after the arrest) stating that the contents of P14 (the arrest report lodged by PW1) are untrue. The 1st accused through his solicitor had further written to the Head of Narcotic Crime Investigation, IPD Dang

Wangi requesting a thorough investigation to ascertain the veracity of P14 (D28).

[45] On the other hand, it is the 2nd accused's defence that he was just accompanying the 1st accused to buy some food and this fact was affirmed by PW4, the investigating officer. The 2nd accused argued, the fact that he was not holding anything when he was walking out from the basement with the 1st accused was never challenged by the prosecution. The 2nd accused relied on PW1's testimony which exonerate him from being the one who had held anything in his hands at the second crime scene.

[46] Here is the case where the court is confronted with not two but three versions of the case. The question is, whose version is to be believed? It must be borne in mind that the burden is on the prosecution to negate all reasonable doubts and to rebut all challenges against their case but until the close of the prosecution's case, neither PW1 nor PW4 have rebutted D20 and D28.

[47] The prosecution argued that D20 and D28 are afterthought as they were made long after the arrest. However, this court finds that D20 and D28 cannot be gainsaid to be an afterthought as the 1st accused would not have known of P14 until the document was served on him through his solicitors. In any event, it is apposite to note that D20 and D28 were brought to the attention of PW1 and PW4 before the trial commenced. PW1 merely stated that he was unaware of D20 and D28 whilst PW4 agreed that she had knowledge of both D20 and D28. According to PW4 she had informed PW1 regarding D20 and D28 before PW1 was transferred out from IPD Dang Wangi.

[48] Further, upon realizing the defence mounted by the 1st accused, the prosecution for that matter saw it fit not to call other witnesses especially the raiding team personnel to corroborate the evidence of PW1. Having confronted with the 1st accused's defence as stated in the above, this court is of the considered view that this is where the prosecution ought to have exercised their discretion to call material witnesses to prove the truth of their case since the court will have to decide whether the prosecution has led credible and sufficient evidence in proving a prima facie case. In **Hassan Nawali v PP [2018] MLRAU 11**, the Court of Appeal had held:

> "[10] *It is important to note that in the instant case that only PW2 gave evidence in respect of arrest and receipt of drug as well as the appellant had ran and subsequently was detained by two other team members. There was no other witnesses of the team who gave evidence to say that the appellant was not incapacitated as alleged by the defence. It must be asserted here that courts generally have taken the position that evidence of police officers are worthy of belief with a caveat to say that Malaysian jurisprudence does not entertain pure self-serving evidence of a police officer's oral testimony without sufficient corroborative evidence. In the instant case, for example, if PW2 evidence is expunged the prosecution case would collapse as there was no credible nexus to the drug and appellant*."

[49] To add further, PW4 as the investigating officer did not deny that there were CCTV in the lift, at the basement carpark and outside the building of the first crime scene which can be seen in D12 (1-14). PW4 agreed that if only CCTV recordings from the lift, basement carpark and

outside the building of the first crime scene are taken and observed, it would prove or disprove P14 or D20 for that matter. In light of the serious attack on PW1's evidence and his report P14, this court finds that PW1's evidence alone is insufficient to prove a prima facie case. The availability of the CCTV footage at the various places where both the accused persons were at, at the material time and the failure to produce them to corroborate PW1's evidence constitute a gap and fatal to the prosecution case.

[50] The prosecution's case is weakened by the fact that the 1st accused's version that he was only carrying his backpack with his personal belongings as he was on his way to meet his girlfriend because both of them was planning to visit the latter's parents in Johor Bahru is fortified by the fact that a bus ticket (D11) to Johor Bahru on that material date was found in the backpack belonging to the 1st accused together with his clothes.

[51] The 1st accused's version is further corroborated by the prosecution's witness PW3. It is pertinent to note that PW3 affirmed that the 1st accused had brought a bag when he came to visit the 2nd accused. There was no transparent plastic bag with silver packets and at all material times when the 1st accused was in the unit. PW3 and the 1st accused were at the living room. According to PW3, as the 1st accused wanted to leave the house to meet his girlfriend, the 2nd accused had asked the 1st accused to wait because the 2nd accused also wanted to go down to meet his friend. PW3 saw the 1st accused carrying his backpack which he had brought earlier and nothing else. PW3 was not sure whether the 2nd accused was carrying anything.

[52] It must be noted that the drugs seized from the first (P4A [1-12]) and the second crime scenes (P5A [1-10]) are of the same type, similarly packed and with the same typewriting on each of the packets. Now, at the second crime scene, it was the second accused instead of the 1st accucsed that was asked about and was said to have led PW1 to the drugs found in the room. In light of the evidence of PW3 and the defence of the 1st accused together with the uncorroborated evidence of PW1, questions arise as to where did the plastic packets seized at the first crime scene came from and who in actual fact was carrying them? Was it the 1st accused or the 2nd accused? This is where this Court finds that PW1's testimony ought to have been corroborated by either calling one of his raiding team or by the production of the CCTV recordings at the first crime scene to show who in actual fact was carrying the drugs.

[53] Further, this court finds that the credibility of PW1 and PW4 are unsatisfactory. The fact that they are both police officers did not per se entitled their evidence to greater weight than that of the accused's version. Their evidence must be subject to a maximum evaluation.

[54] PW4 for instance was not truthful as to the existence of CCTV outside the first crime scene. Initially she testified that there were no CCTV at the first crime scene where the arrest took place but when the defence showed D12 namely the photographs of the first crime scene (page 7) she agreed that there was CCTV and that she saw it on the day when she went to the first crime scene.

[55] The defence had successfully elicited from PW4 that she has not obtained the CCTV recording despite knowing the existence of the CCTV on the walls outside the building at the first crime scene. She had also

agreed with the defence that if the CCTV footage from the camera located outside the building were to be taken, it will show who was carrying the plastic packets.

[56] This court is of the considered view that there ought to have been no obstacle for PW4 to conduct a diligent investigation to ascertain the truth as the accused persons are entitled to a fair trial. This court finds that the incomplete investigation conducted by PW4 had created gaps in the unfolding of the prosecution's case in its entirety. With the existence of D20 and the failure to counter D20 by PW1 upon being informed by PW4 as well as the failure to produce CCTV recordings of the accused persons movement at the first crime scene at the material time inevitably attracts the invocation of s 114 (g) of the Evidence Act 1950 in that evidence which could be and is not produced would if produced is unfavorable to the prosecution.

[57] In regards to PW1, this court had to scrutinize his evidence carefully as it contradicts the evidence of PW3, another prosecution's witness. In one instance, PW1 positively testified that the 1st accused was not carrying a backpack and there was no bus ticket to Johor Bharu found in the same bag, contrary to PW3's testimony who stated that the 1st accused was carrying a backpack. The fact is, the backpack, the bus ticket to Johor Bahru on the material date (these items were produced in court) and the 1st accused's wallet were confiscated (affirmed by PW4) but nowhere did PW1 recorded them in any of the search lists.

[58] PW1 was also evasive when asked as to why it took him 5 hours to lodge the arrest report P14. PW3 had stated that whilst both the accused persons and him were handcuffed and made to sit in the living room, PW1

and his team had helped themselves to the food found in the kitchen. According to PW3, PW1 and his team even took the liberty to cook in the apartment and all these were not challenged by the prosecution.

[59] In undertaking a maximum evaluation of the prosecution evidence and where it involves an assessment of the credibility of the witnesses called by the prosecution as well as the drawing of inferences arising from it, this court finds that it is unsafe to accept the uncorroborated and inconsistent evidence of PW1 and PW4. With the evidence given by PW3 which very much contradict the evidence given by PW1, there exist two versions of evidence before this court. Thus, if the prosecution evidence admits of two or more inferences, one of which is in the accused's favour, then it is the duty of this court to draw inference that is favourable to the accused. In the instant matter, the testimonies of PW1 and PW4 with regards to the 1st accused being in possession of the drugs said to have been seized at the first crime scene are therefore doubted and do not tantamount to a prima facie case.

[60] This court further finds that the evidence adduced by the prosecution relating to common intention of both the accused persons in trafficking in the dangerous drugs at the first crime scene is far from satisfactory.

[61] S.34 of the Penal Code states:

> "*Where a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone"*

[62] In the oft-quoted case of N**amasiyam Doraisamy v PP & Other case [1987] 1 MLRA 73**, the then Supreme Court had explained:

> *"[36] In law, common intention requires a prior meeting of the minds and presupposes some prior concert. Proof of holding the same intention or of sharing some other intention, is not enough. There must be proved either by direct or by circumstantial evidence that there was (a) a common intention to commit the very offence of which the accused persons are sought to be convicted and (b) participation in the commission of the intended offence in furtherance of that common intention*."

[63] 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. The fact that both the accused persons were seen walking together at the first crime scene, and with the evidence of PW3 that the 1st accused left the apartment as he was leaving for Johor Bahru with his girlfriend, carrying only a backpack with him as well as his evidence that the 2nd accused left the apartment together with the 1st accused to buy food, it cannot be said that there was a common intention to traffic in dangerous drugs on the part of both the accused persons as intended by s.34 of the Penal Code. What more when there is doubt as to who carried the plastic bag containing the drugs. At best the evidence could only show one of the accused persons must have had custody and control of the drugs but the question is, who? In the circumstances, this court finds that there is no evidence to support that there was a prearranged plan or prior concert of both the accused persons to commit the offence of trafficking in the dangerous drugs as stated in the first charge.

[64] This court now comes to the second crime scene. It must be repeated that it is the 2nd accused alone who was charged with possession of the drugs found at the second crime scene/ unit. The drugs were said to have been found in the cupboard in the room of the unit.

[65] Apparently, the 2nd accused was not the only one who had access to the unit. PW3 in his evidence stated:

> "*Q: Rumah ini juga katakan sebenarnya ramai kawan-kawan lain ada keluar masuk ke rumah ini?*
> *A: Betul*
> *Q: Antara lain ada juga rakan-rakan seperti nama Ashraf?*
> *A: Betul*
> *Q: Kamu setuju secara kasar lebih daripada 10 orang yang keluar masuk dari rumah ni?*
> *A: Betul"*

[66] The evidence of PW3 in the above confirmed that the 2nd accused is not the 'exclusive occupier' of the unit being the second crime scene herein. The 2nd accused was not the only person who had access to the unit and according to PW3, one day before the arrest, one of their friends by the name of Ashraf came to the apartment bringing along a bag with him. In cross-examination, PW3 further stated:

> "*Q; Ashraf ini ada di mana?*
> *A: Tak pasti tapi dia hilang macam tu je*
> *Q: Dia hilang atau lari dari polis?*
> *A: Tak pasti*
> *Q: Ada cuba hubungi dia?*

A: Dah contact tapi semua nombor dah tukar

Q: Setuju dia menghilangkan diri sebab tak mahu terlibat dengan tangkapan polis ni?

A: Setuju

Q: Dia ada datang Regalia

A: Sehari sebelum dia ada

Q: Dia ada bawa satu beg kan?

A: Ya."

[67] There was no challenge by the prosecution that the apartment was accessible to many people including Ashraf.

[68] In regards to the cupboard in the room of the unit where the drugs were found, PW1 had admitted that anyone who was in the unit could access the cupboard situated in the room as the room and the cupboard were not locked.

[69] PW4 in her evidence testified that based on her investigation, the unit was accessible to others and that whoever had access to the unit would also have access to the room and the cupboard where the drugs were found. PW4 testified as follows:

"Q: Saya katakan orang yang ada dalam rumah ini, semasa ketiadaan OKT 1 dan OKT2 bebas untuk keluar masuk dalam bilik dan almari yang terdapat dalam bilik tersebut?

A: Setuju

Q: Selain daripada orang yang berada dalam rumah tersebut, orang lain yang ada akses, yang pernah

masuk dan keluar, boleh bebas untuk masuk ke bilik yang ada almari tersebut?

A: Setuju

Q: Dalam erti kata lain, bahagian dalam rumah ini dan rumah ini sendiri adalah accessible, boleh diakses oleh ramai orang?

A: Boleh diakses oleh ramai orang yang mempunyai kunci"

[70] It is therefore safe to conclude that although the 2nd accused was the tenant of the unit, there are other persons who had access and was free to enter and leave the same. In fact, these persons such as Asyraf for that matter could also leave their bag in the apartment unit. Not forgetting on the day when PW1 raided the unit, there was PW3 who came over to the unit to meet the 2nd accused one week after the 2nd accused return from Qatar. PW3 was eating alone at the dining table at the time when PW1 raided the unit.

[71] It is important to note that PW3 was arrested together with both the accused persons and he was found positive with the same type of drugs found in the unit. In fact, the address stated in the charge preferred against PW3 at the lower court is the same as the address of the unit.

[72] Of course, PW3 did not admit knowledge on his part in regards to the drugs found in the cupboard in the room. According to PW3, he was handcuffed and made to sit at the living area together with both the accused persons. Ironically, having said that he did not know of the drugs found in the cupboard, PW3 could easily identified and made a marking as to where the drugs were found in the room on the photographs

tendered in court. It must be borne in mind that the marking by PW3 in court was made pursuant to the prosecution's request. It must be borne in mind too that when both the accused persons left the apartment unit together and was later arrested at the first crime scene, it was PW3 alone who was in the apartment unit and it cannot be denied that he was free to deal with anything in the unit apartment as the cupboard and the room were accessible to him too.

[73] So here is a case where the proverbial cap which might have fitted not just the head of the 2nd accused but that of others as well, exists (see **Gooi Loo Seng v PP [1993] 1 MLRA 227**). The prosecution did not call the owner of the apartment to testify as to how many sets of keys were given to the 2nd accused. Apart from Asyraf, PW3 who obviously had access to the apartment unit could fit into the proverbial cap. It is of the considered view that even if the 2nd accused had known of the presence of the drugs in the room, that by itself would not have been sufficient to establish that he was in possession or in control of it given the fact that others too, and certainly PW3 had access to the room and the cupboard and could have concealed the drugs therein. In **PP v Loke Kah Choong [2020] 4 MLRH 44**, Mohd Nazlan Mohd Ghazali J (as His Lordship then was) observed:

> "[*73] It is now settled law that exclusive possession does not mean that possession needs to be exclusive to the accused only – in the sense that the prosecution must prove that only the accused must be in possession – because there can be joint possession, as many prosecutions have been pursued on that basis. I should emphasise at this juncture that the prosecution in the instant case chose only to prefer charges

against the accused and not similarly against the other four who were also present in the same condominium unit (and arrested) at the material time or even any one of them.

[74] ***The idea of exclusivity of possession is that the accused or more than one accused have the power to exclude other parties form access to the proscribed drugs.*** *That is why for better understanding, the concept has also been instead of asserted to be more accurately described as exclusive access, to the exclusion of others of the drugs in question (see for example the High Court's decision in PP v Lingeswaran Nagasamy [2018] MLRHU 270 270; [2018] 10 MLJ 158*." [Emphasis added]

[74] Additionally, although fingerprint evidence are mere corroborative in value, P26 being the fingerprint analysis report does not show any reference to the 2nd accused being the person who had handled the drugs.

[75] Based on the circumstances above, again the prosecution evidence admits of two or more inferences of which one is in favour of the 2nd accused and it is the duty of this court to draw inference favourable to the 2nd accused.

[76] Further, PW1 testified that immediately after both the accused persons were arrested at the first crime scene, they were handcuffed and taken to the unit, being the second crime scene. Upon entering the unit, PW1 stated that he questioned whether there were drugs being kept therein and that the 2nd accused had answered in the affirmative that he had kept "ganja". The 2nd accused was stated to have pointed to the cupboard inside the room and had taken out one transparent plastic bag

containing the impugned drugs and handed over to PW1. It is perplexing how the 2nd accused is said to be the one who took out the drugs from the cupboard when his hands were handcuffed. No explanation was elicited by the prosecution as to how the 2nd accused was handcuffed and how he was able to take out the drugs from the cupboard despite being handcuffed. No question was asked as to whether the handcuff was released when the 2nd accused was said to have decided to show and took out the drugs from the cupboard in the room.

[77] It is the finding of this court that as far as the 2nd accused is concerned, the only evidence that the prosecution adduced and perhaps relied on is the fact that the 2nd accused is said to be a person with the nickname of "Prof Q", a drug trafficker. According to PW1, when both the accused persons were questioned, the 2nd accused was said to have admitted to be Prof Q.

[78] It was PW1's testimony that the arrest herein was as a result of information received regarding drug trafficking activity at the first crime scene involving Prof Q. This court rejects this piece of evidence as it tantamount to hearsay. It is not the best evidence and prejudicial to the 2nd accused. Further, PW1 did not elaborate as to how the information was received and although an informer is protected under s.40 DDA, the fact remains that the gist of the information must be made available and could still be subjected to examination under the Evidence Act 1950.

[79] The prosecution relied on P25, the booking form of the apartment unit through Airbnb made by the 2nd accused wherein the 2nd accused had used the name of "Amirul Qatar". So, if the 2nd accused is "Amirul Qatar" then is he also Prof Q? Further, PW3's evidence contradict the evidence

of PW1 because according to PW1, the question as to who is Prof Q was asked during the arrest at the first crime scene. If indeed PW1 had asked earlier as to who is Prof Q and the 2nd accused was said to admit that he is Prof Q, why should PW1 be asking again who is Prof Q at the second crime scene?

[80] The 1st accused for that matter in D20 had also stated that the 2nd accused admitted that he is Prof Q. But nowhere in P14 did PW1 mentioned anything about Prof Q. In fact, PW4 when shown with D20 testified that she had shown D20 to PW1 and according to PW4, PW1 denied any question relating to Prof Q as stated by the 1st accused in paragraph 3 of D20. But despite such denial, PW1 suddenly raised story of Prof Q at the end of his testimony in court. The court is therefore left in doubt as to whether the story of Prof Q is true or otherwise. What more when PW4 admitted in re-examination that the name Prof Q never came up during investigation. PW4 stated as follows:

> "*Q*: *Seterusnya isu Prof Q, apa yang kamu maksudkan semasa siasatan tak timbul tentang Prof Q*
> *A:* *Saya telah menyoal siasat pengadu, pengadu tidak menyatakan tentang nama Prof Q mewujudkan nama Prof Q sepanjang rakaman daripada pihak pegawai tangkapan*
> *Q:* *Pernah timbul tak nama Prof Q sepanjang siasatan?*
> *A:* *Tidak ada"*

[81] PW1 made it clear in court that no caution was administered to the 2nd accused when the latter was questioned. During cross examination, PW1 testified that upon seeing both the accused persons walking at the

first crime scene, PW1 and his team surrounded both the accused persons. PW1 and his team members were carrying firearms. PW1 then introduced himself as a police officer and had shown his authority card (see arrest report P14). Premised on this background, it is of the considered view that any answers said to have been given by the 2nd accused upon being questioned by the police are inadmissible as he was already arrested at the first crime scene (see s. 37A (1) (b) DDA) and therefore the 2nd accused alleged admission that he is Prof Q is inadmissible. Even if the 2nd accused is Prof Q, it does not assist the prosecution case as this court finds that the prosecution has failed to prove that the 2nd accused had custody and control as well as knowledge of the impugned drugs.

[82] In view of the above analysis and premised on the maximum evaluation of the totality of the evidence adduced, this court finds that the ingredient of possession of the dangerous drugs under s. 39B and s.6 DDA either on the basis of direct possession or in reliance on the presumption of possession under s 37(d) DDA on the part of both the accused persons has not been proved by the prosecution.

The 3rd Ingredient- Common Intention in Trafficking of the Dangerous Drugs.

[83] Given that possession being an important ingredient of an offence under s 39B and s 6 DDA has not been established it follows that the prosecution has failed to prove that the accused was trafficking in the impugned dangerous drugs as stated in the first charge. In order to invoke the presumption of trafficking under s 37 (da) DDA relied upon by the prosecution, an affirmative finding of possession must first be made out. Since this is not the case herein, this court further finds that the

prosecution has thus failed to rely upon the statutory presumption of trafficking in s 37 (da) DDA.

Conclusion

[84] Premised on the above, this court finds that this is not the case where upon maximum evaluation of all the evidence at the close of the prosecution stage, the court is prepared to convict both the accused persons if they were to elect to remain silent if this court were to call for their defence.

[85] The prosecution has failed to prove a prima facie case against both the accused persons and as such they were acquitted and discharged without calling for their defence on all the charges.

Dated: 27.3.2024

[NOORIN BINTI BADARUDDIN]
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