IN THE COURT OF APPEAL MALAYSIA AT PUTRAJAYA
[APPELLATE JURISDICTION]

CRIMINAL APPEAL NO: W-05(M)-458-12/2016

BETWEEN

VIGNESWARAN A/L RAJAMANIKAM ...APPELLANT

AND

PUBLIC PROSECUTOR ...RESPONDENT

HEARD TOGETHER WITH

CRIMINAL APPEAL NO: W-05(M)-460-12/2016

BETWEEN

PRABAGARAN A/L APPU ...APPELLANT

AND

PUBLIC PROSECUTOR ...RESPONDENT

[In the Matter of the High Court at Kuala Lumpur
Criminal Trial No: 45B-05-03/2014

Between

Public Prosecutor

And

1. **Vigneswaran a/l Rajamanikam**
2. **Prabagaran a/l Appu**
3. **Yuvarajan a/l Govindasamy]**

CORAM:

MOHD ZAWAWI SALLEH, JCA
AHMADI HAJI ASNAWI, JCA
KAMARDIN HASHIM, JCA

JUDGMENT OF THE COURT

Introduction

[1] The appellants, together with another person, were jointly charged and tried in the High Court at Kuala Lumpur with offences of trafficking in and possession of dangerous drugs and poison under the Dangerous Drugs Act, 1952 ('the Act') and under the Poison Act, 1952 read with section 34 of the Penal Code ('the Code').

[2] There were altogether five (5) charges preferred against all the three accused persons. The charges read as follows:

First Charge:

"Bahawa kamu bersama-sama pada 20.5.2015 jam lebih kurang 2.40 petang di alamat No. 23 Lorong Rahim Kajai 10 Taman Tun Dr. Ismail dalam daerah Brickfields, Wilayah Persekutuan Kuala Lumpur dalam melaksanakan niat bersama, telah didapati

mengedar dadah jenis Methamphetamine seberat 875 gram. Oleh itu, kamu telah melakukan kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dibaca bersama Seksyen 34 Kanun Keseksaan dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.".

Second Charge:

"Bahawa kamu bersama-sama pada 20.5.2015 jam lebih kurang 2.40 petang di alamat No. 23 Lorong Rahim Kajai 10 Taman Tun Dr. Ismail dalam daerah Brickfields, Wilayah Persekutuan Kuala Lumpur dalam melaksanakan niat bersama, telah didapati ada dalam milikan kamu dadah berbahaya iaitu 6.58 gram Monoacetylmorphines. Oleh itu kamu telah melakukan kesalahan di bawah Seksyen 12(2) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39A(2) Akta yang sama dibaca bersama Seksyen 34 Kanun Keseksaan.".

Third Charge:

"Bahawa kamu bersama-sama pada 20.5.2015 jam lebih kurang 2.40 petang di alamat No. 23 Lorong Rahim Kajai 10 Taman Tun Dr. Ismail dalam daerah Brickfields, Wilayah Persekutuan Kuala Lumpur dalam melaksanakan niat bersama, telah didapati ada dalam milikan kamu dadah berbahaya iaitu 30.08 gram Ketamine. Oleh itu, kamu telah melakukan kesalahan di bawah Seksyen 12(2) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 12(3) Akta yang sama dibaca bersama Seksyen 34 Kanun Keseksaan.".

Fourth Charge:

"Bahawa kamu bersama-sama pada 20.5.2015 jam lebih kurang 2.40 petang di alamat No. 23 Lorong Rahim Kajai 10 Taman Tun Dr. Ismail dalam daerah Brickfields, Wilayah Persekutuan Kuala Lumpur dalam melaksanakan niat bersama, telah didapati ada dalam milikan kamu dadah berbahaya iaitu 4.98 gram Methamphetamine. Oleh itu kamu telah melakukan kesalahan di bawah Seksyen 12(2) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 12(3) Akta yang sama dibaca bersama Seksyen 34 Kanun Keseksaan.".

Fifth Charge:

"Bahawa kamu bersama-sama pada 20.5.2015 jam lebih kurang 2.40 petang di alamat No. 23 Lorong Rahim Kajai 10 Taman Tun Dr. Ismail dalam daerah Brickfields, Wilayah Persekutuan Kuala Lumpur dalam melaksanakan niat bersama, telah didapati ada dalam milikan kamu bahan beracun 295.58 gram yang disahkan caffeine. Oleh itu, kamu telah melakukan kesalahan di bawah Seksyen 30(3) Akta Racun 1952 dan boleh dihukum di bawah Seksyen 30(5) Akta yang sama dibaca bersama Seksyen 34 Kanun Keseksaan.".

[3] At the end of the prosecution's case, the learned High Court Judge ('learned trial judge') found that the prosecution had proven a *prima facie* case against both the appellants in respect of the first charge only and no *prima facie* case has been established against them on the second to the fifth charges. Consequently, both the appellants were ordered to enter upon their defence in respect of the first charge and were acquitted and

discharged in respect of the second to the fifth charges without calling for their defence.

[4] At the conclusion of the trial, the learned trial judge found that both the appellants guilty and convicted them on the first charge. They were then sentenced to the mandatory death penalty prescribed by the Act.

[5] Aggrieved with the conviction and sentence, the appellants appealed to this Court. We heard their appeals on 23.1.2018, wherein at its conclusion we unanimously allowed it. We set aside the convictions and sentences of death imposed by the learned trial judge upon both the appellants. We now give the reasons for our decision.

The prosecution's case in brief

[6] The factual matrix of the prosecution's case may be summarized as follows. Based on information received, on 20.5.2015 at about 2.40 p.m., Inspector Prabu a/l Avadiappan (PW4) led a police party to conduct a raid at house No. 23, Lorong Rahim Kajai 10, Taman Tun Dr. Ismail, Kuala Lumpur ('the said house'). The said house is a double storey terrace house. It has three (3) rooms on the upper floor and no room downstairs. The three (3) rooms are described as Room 1, Room 2 and Room 3. Before entering the said house, ASP Ahmad Mohsin bin Md Rodi (PW5) and his men were put on the look out at the rear of the said house.

[7] PW4 and his men forcibly entered the said house when there was no response from the occupants to open the door to the said house.

Evidence was led that the third accused, Yuvarajan a/l Govindasamy, was arrested in Room 1 by one KpL. Syakirah. Drugs were found in Room 1.

[8] PW4 and one KpL. Najmi entered Room 2 and it was the evidence of PW4 that he saw both the appellants escaped through the window but eventually got arrested by PW5 and his men who were stationed at the back of the said house. Drugs were found in Room 2 and they formed the subject matter of the trafficking charge (the first charge). The drugs were found in the following place in Room 2:

(i) On top of a cupboard was a "candylicious" paper bag. Inside the paper bag were:

(a) a transparent plastic packet containing 126.7 grams of Methamphetamine [after the exhibit was analysed by Chemist, Mohamad Hanif bin Omar (PW3)];

(b) a newspaper package containing a plastic packet. Inside it was 375.8 grams of Methamphetamine (after the exhibit was analysed by PW3); and

(c) a newspaper package containing a plastic packet. Inside it was 372.5 grams of Methamphetamine (after the exhibit was analysed by PW3).

[9] Three (3) other persons were detained in Room 3. They were Tharmaraj, Shaamilah and a child. But nothing incriminating was found in Room 3.

Findings at the end of the prosecution's case

[10] As we alluded to earlier, the learned trial judge, after considering the evidence adduced by the prosecution witnesses, had accepted the testimony of PW3 on the drugs analysis undertaken by the witness. The learned trial judge found that the prosecution had proven that the drugs seized from the Room 2 of the said house were of the type, nature and weight as stated in the first charge and the drugs were as listed under the First Schedule of the Act.

[11] As for the element of possession, the learned trial judge relied on the fact that both the appellants were earlier seen by PW4 escaping from Room 2 before their arrest at the rear of the said house by PW5 and his team. The learned trial judge further relied on the conduct of both the appellants under section 8 of the Evidence Act 1950 to infer knowledge of the impugned drugs by the appellants.

[12] As for the element of trafficking, based on the weight of the impugned drugs, the learned trial judge held that the statutory presumption under section 37(da)(xvi) of the Act was applicable.

[13] The findings of fact by the learned trial judge were as follows:

> *"[88] Semasa serbuan oleh SP4 di Bilik Kedua hanya dilihat dua tertuduh sahaja di dalam bilik tersebut iaitu T1 dan T2 dan mereka semasa itu sedang melarikan diri melalui tingkap bilik tersebut ke bahagian belakang rumah. Sejurus selepas itu, T1 dan T2 dilihat oleh SP5 dan pasukannya yang berkawal di bahagian belakang*

rumah berkenaan. T1 dan T2 walapun mendengar amaran SP4 'POLIS' dan melihat anggota beruniform polis dan SP5 memakai vest 'POLIS' masih cuba melepaskan diri sehingga hujung deretan rumah.

[89] T1 dan T2 melompat dari bumbung rumah berkenaan hanya setelah bahagian hujung deretan rumah berkenaan mempunyai pagar yang menyekat pergerakan mereka.

[90] Dengan kata lain 'conduct' atau perbuatan melarikan diri oleh T1 dan T2 dan terjumpanya dadah di dalam beg "candylicious" yang berisi 875 gram methamphetamine itu adalah perlu dijawab oleh T1 dan T2 kenapa mereka lari. Walhal semasa itu dadah belum lagi dijumpai dan diketahui oleh SP4 berada di dalam beg di atas almari tersebut.

[91] Seksyen 8(2) Akta Keterangan 1950 dan misalan (f) adalah relevan. Kes tersohor yang memutuskan akan kelakuan adalah relevan adalah di dalam kes ***Parlan Dadeh v. PP*** *[2009] 1 CLJ 717 dinyatakan bahawa:*

> "In this case the reaction of the appellant in looking stunned or shocked upon being approach by the police is clearly admissible under s.8 since it has a direct bearing on the fact in issue as drugs found were tucked away in the front of the jeans worn by him. The explanation for his reaction must therefore be offered by himself as required by s.9. The court cannot, on its own, offer an explanation for his reaction.".

*[92] Di dalam kes **1. IBRAHIM MOHAMAD 2. AZHAR MAHAMAT v. PP** [2011] 4 CLJ 113 diputuskan:*

"[20] Based on the above s. 8(2) of the Evidence Act 1950, there are two types of conduct which is relevant, namely prior and subsequent conduct. Evidence of conduct is an equivocal act and is capable of more than one interpretation. Accordingly, evidence of conduct must not be referred to in isolation. Instead, conduct must be considered with other evidence or circumstances. In the present case it can be argued that both the accused had no knowledge about there being the said drugs in the vehicle. This is because they had not attempted to escape when they were in a position to do so upon seeing the existence of a police road block. Apart from that both the accused did not portray any form of suspicious behavior. All these are indication of their state of mind, namely that they had no knowledge about the presence of drugs in the vehicle. On this point a comparison can be made with the factual circumstances as in the case of **Ridwan v. PP** [2010] 4 CLJ 570. In that case, the appellant was charged for the offence of drug trafficking. The appellant was seen behaving suspiciously and upon approaching the custom checkpoint, the appellant started retreating and running towards the immigration counter before he was eventually apprehended by security officers. The court found the prior conduct of the appellant before being arrested showed he was behaving suspiciously and therefore it can be inferred that he had the mens rea to commit the offence.".

[93] Manakala jumlah yang begitu banyak melebihi berat anggapan minima pengedaran maka di bawah s. 37(da)(xvi) Akta Dadah Berbahaya diguna pakai.

> "Milikan adalah satu ingredient penting bagi pertuduhan pengedaran. Kecuali jika keterangan terus mengenai pengedaran dikemukakan, pendakwaan mestilah membuktikan "milikan" dan hakim bicara mestilah membuat dapatan afirmatif "milikan" sebelum anggapan pengedaran di bawah s. 37(da) Akta boleh digunakan".
> IBRAHIM MOHAMAD & 1 LAGI [supra].

[94] Mahkamah juga merujuk kepada seksyen 180 Kanun Acara Jenayah untuk penelitian maksima di akhir kes pendakwaan dan juga rujukan juga kepada kes-kes tersohor. Antara kes-kes berkenaan ialah, ***Balachandran v. PP*** *[2004] 2 MLRA 547; [2005] 2 MLJ 301;*

> "Since the court, in ruling that a *prima facie* case has been made out, must be satisfied that the evidence adduced can be overthrown only by evidence in rebuttal it follows that if it is not rebutted it must prevail. Thus if the accused elects to remain silent he must be convicted. The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a *prima facie* case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable

doubt in the case for the prosecution. If there is any such doubt there can be no *prima facie* case.".

[95] Dengan ini Mahkamah atas penelitian maksima membuat dapatan yang afirmatif bahawa T1 dan T2 sahaja mempunyai milikan atas dadah di dalam Pertuduhan Pertama dan secara niat bersama mereka serentak dan bersama bukan sahaja dilihat berdua di dalam bilik tersebut malah melarikan diri secara serentak tanpa hiraukan amaran pihak 'POLIS'.".

[14] After being satisfied that all the elements of the first charge had been established, the learned trial judge held that the prosecution had proven a *prima facie* case against both the appellants. Thus, the appellants were called upon to enter their defence on the first charge.

The Defence

[15] Both the appellants elected to give evidence under oath. Besides the appellants and the third accused, five (5) other witnesses were called to testify during the defence case.

[16] The first appellant, Vigneswaran a/l Rajamanikam (SD4), testified that he got married in 1996 and he subsequently got a divorce early in 2013. He had lived in the said house since 2008 for 4½ years with his wife and two (2) daughters until he got divorced. After the divorce, he moved out of the said house and rented a room from Rajagopal a/l Hari Krishna (SD5) with a rental of RM400 a month in an apartment located at B 4-2, Sri Tanjung Apartment, USJ 16/7, UEP Subang Jaya, Selangor.

[17] After he moved out of the said house in 2013, he rented the said house to one Dara Singh a/l Karam Singh ("Dara Singh") with the rental price being RM2,500 per month. According to the first appellant, Dara Singh has been his friend since both of them were children. Dara Singh started living in the said house (Room 3) together with his wife, Shaamilah a/p Muniandy ("Shaamilah") and their daughter Sharanjit Kaur Gill ("Sharanjit"), who at that time was about 6 years old. Subsequently, Dara Singh rented out a room (Room 1) in the said house to one Tharmaraj a/l Maheandran ("Tharmaraj"). Both Shaamilah and Tharmaraj were arrested by the police in the said house on the same day and they were at first charged together as the 5th and the 4th accused respectively but were subsequently discharged unconditionally.

[18] The first appellant further testified that on the day of the arrest, Dara Singh had called him in the morning and invited him over to the said house to hang out. The said house was a hang out place for Dara Singh's group of friends including both the appellants and one Dr. Sri Shan Nair a/l Madawannayar (SD8). He testified that while he was on the way to the said house, he called the second appellant. The second appellant told him that he was on leave on that day, so the first appellant picked him up and together they went to the said house. They arrived at the said house between 1.00 to 1.30 p.m. On arrival, they saw the third accused had already arrived at the said house and was watching television in the hall. Later, the third accused felt tired and Tharmaraj told him to sleep in his room (Room 1).

[19] The first appellant also stated that when they first arrived at the said house, Dara Singh, Shaamilah, their daughter Sharanjit and Tharmaraj

were in the said house. They then proceeded to eat some food which they had bought and watched television for a while. SD8 who had stayed the night before went out in the morning and came back to the said house at approximately 1.00 p.m. and left the house with Dara Singh to buy some house appliances and medication for Sharanjit who was suffering from a runny nose.

[20] Thereafter, the appellants felt tired and wanted to rest. As the third accused was using Tharmaraj's room, the appellants asked permission from Shaamilah to use Sharanjit's room (Room 2) to rest. While they were resting, they both heard the sound of a window being broken downstairs. The first appellant went down the staircase half way and saw someone trying to break the door using a long object. He also saw many Malay men outside the house carrying guns. At that time, it occurred to the first appellant that those men might be gang members of the group "Geng 3 Line". He was once a member of that gang and that there was hostility between him and members of the gang when he left the gang.

[21] Upon seeing that group of men, the first appellant immediately ran back into Room 2 and asked the second appellant to follow him and climb out from the window of Room 2. The first appellant then climbed out from the window first followed by the second appellant. Once outside the window, both the appellants ran towards the left side because they saw two (2) police officers in the police uniform. The first appellant's respond as to why they ran towards the two (2) uniformed police officers was that: *"Disebabkan saya berasa akan diancam oleh orang yang memecahkan pintu itu so saya menyelamatkan diri saya dan saya telah ke tempat polis"*. Whereas the second appellan'st respond was that: *"Disebabkan di luar*

pagar ada 2 anggota polis. Mereka berpakaian seragam polis. Kami berdua berlari dan terus lompat di hadapan mereka. Selepas kami melompat ke bawah berdekatan dengan polis, mereka telah menangkap kami."

[22] The second appellant's (SD1) version was similar and supporting the version what was given by the first appellant. Before his arrest, he worked as a crane operator for a company called Syarikat RS Mani Crane Service. He had attended many courses related to his field of work and was awarded a crane operator's license. Due to the fact that his company was involved in an MRT project in Sg. Buloh Depot, he came to Kuala Lumpur in the year 2014 and he stayed with his cousin, Aravinthan a/l Munusamy (SD2)'s house at No. 17, Lorong Batu Nilam 17, Bandar Bukit Tinggi, Klang.

[23] After a careful analysis of the entire evidence given by the prosecution witnesses as well as the defence witnesses, the learned trial judge concluded that the appellants had not succeeded in raising a reasonable doubt on the prosecution's case. The learned trial judge also found that the appellants had failed to rebut the statutory presumption of trafficking under section 37(da) of the Act on a balance of probabilities. In rejecting the defence's version, the learned trial judge relied heavily on the Federal Court decisions in **Ibrahim Mohamad & Anor v. PP** [2011] 4 CLJ 113; **Ridwan v. PP** [2010] 4 CLJ 570; **Parlan Dadeh v. PP** [2009] 1 CLJ 717 and **Miller v. Minister of Pensions** [1947] 2 All ER 372.

[24] Both the appellants was thus convicted and sentenced to suffer the mandatory death penalty. Hence, their appeals before us.

The Appeal

[25] Before us, learned counsel for both the appellants raised only one main ground of appeal, namely, that the learned trial judge erred when His Lordship ruled that there was a *prima facie* case for the offence of trafficking. Learned counsel argued that possession, custody and/or control had not been proven against both the appellants. Thus, it was perversed on the part of the learned trial judge when His Lordship invoked the section 37(da) presumption without making a finding of possession.

[26] The learned counsel argued that from the *prima facie* ruling, it was clear that the learned trial judge called for the defence of both the appellants primarily based on their conduct of flight as reflected in His Lordship's written judgment. The learned trial judge, however, failed to consider other relevant factors such as:

(i) that there was no evidence that the appellants were occupiers of the said house and that others, too, had access to the said house;

(ii) the failure of the prosecution to tender the section 112 CPC statement of the owner of the said house, one Murithi;

(iii) the failure of the prosecution to produce Tharmaraj and Shaamilah; and

(iv) the issue of section 114(g) of the Evidence At 1950 raised by the defence on the failure to produce the section 112 CPC statements of Murithi, Tharmaraj and Shaamilah.

[27] It was further argued that even though the aforesaid issues had been raised by the learned counsel in his oral and written submissions in the court below, the learned trial judge did not consider any of the above issues. Learned counsel submitted that this omission amounts to a failure of justice and on this point alone the convictions and sentences cannot be sustained. Learned counsel relied on the decision of this Court in **Lim Pah Soon v. PP** [2013] 8 CLJ 800 per Azahar Mohamed, JCA (now FCJ).

Our Deliberation and Decision

[28] We had the opportunity of perusing the appeal records including the learned trial judge's grounds of judgment. We agreed with the learned counsel that in his judgment, the learned trial judge had placed undue emphasized on the conduct of flight to fasten knowledge and possession on the part of the appellants of the impugned drugs recovered in Room 2. At pages 219-220 of the Appeal Record Volume 2B, this is what the learned trial judge said in his *prima facie* ruling:

> ***"Pertuduhan 1 (P2)***
> *Ke atas OKT 1 dan OKT2 untuk dadah yang dijumpai di bilik kedua di dalam beg "candylicious" iaitu Pertuduhan P2 di bawah seksyen 39B(1)(a) kesalahan mengedar dadah jenis Methamphetamine seberat 875 gram [P2] pihak pendakwaan berjaya membuktikan sesuatu kes prima facie dengan itu OKT1 dan OKT2 dipanggil*

membela diri dan anggapan pengedaran di bawah s. 37(da)(xvi) diguna pakai ***apabila melalui conduct dapat secara prima facie knowledge*** *dan hanya OKT1 dan OKT2 sahaja berada di dalam bilik 2 tersebut dan membuktikan control and custody ke atas beg "candylicious" yang berada di atas almari tersebut."* [emphasis ours]

[29] Similarly, in his grounds of judgment, this is what the learned trial judge said (pages 62-63 of the Appeal Record Volume 1):

"[88] Semasa serbuan oleh SP4 di Bilik Kedua hanya dilihat dua tertuduh sahaja di dalam bilik tersebut iaitu T1 dan T2 dan mereka semasa itu sedang melarikan diri melalui tingkap bilik tersebut ke bahagian belakang rumah. Sejurus selepas itu, T1 dan T2 dilihat oleh SP5 dan pasukannya yang berkawal di bahagian belakang rumah berkenaan. T1 dan T2 walaupun mendengar amaran SP4 'POLIS' dan melihat anggota beruniform polis dan SP5 memakai vest 'POLIS' masih cuba melepaskan diri sehingga hujung deretan rumah.

[89] T1 dan T2 melompat dari bumbung rumah berkenaan hanya setelah bahagian hujung deretan rumah berkenaan mempunyai pagar yang menyekat pergerakan mereka.

[90] Dengan kata lain 'conduct' atau perbuatan melarikan diri oleh T1 dan T2 dan terjumpanya dadah di dalam beg "candylicious" yang berisi 875 gram Methamphetamine itu adalah perlu dijawab oleh T1 dan T2 kenapa mereka lari. Walhal semasa itu dadah belum lagi

dijumpai dan diketahui oleh SP4 berada di dalam beg di atas almari tersebut.".

[30] After a careful analysis of the entire Appeal Records, it is clear to us that there were merits in the complaint of the learned counsel that the learned trial judge had failed to consider other relevant factors urged upon us by the learned counsel. We agreed with the submission of the learned counsel that all the relevant factors raised by the learned counsel in his complaint and raised in his written submission were ignored or not at all considered by the learned trial judge. We were of the considered view that had the learned trial judge considered those relevant factors before coming to his *prima facie* ruling, His Lordship would have come to a different findings i.e. that there is no *prima facie* case been made out against the appellants on the charge preferred.

[31] In **Lim Pah Soon**, supra, concerning the same issue, Azahar Mohamed, JCA (now FCJ) explained in the following words:

"[13] It is well settled rule that the onus of proving everything essential to the establishment of a charge is upon the prosecution. Now, in the context of the present case, it is trite law that one of the essential ingredients of the offence which the prosecution must prove is that the offending drugs exhibits that were actually seized from the car were the very same exhibits that were analysed by SP1 and confirmed to be dangerous drugs and it was for the trafficking of the same drugs that the appellant was charge with (see: **Gunalan Ramachandran & Ors v. PP** [2004] 4 CLJ 551). This is a question of fact. Ultimately, for the purpose of s. 180(1) and (4) of the CPC, the learned judge was under a legal obligation to arrive at, and make

the necessary finding on this factual issue on the basis of the evidence tendered and the submissions made by the parties before him. It follows from this that once the evidence had been place and submissions made, there was a statutory duty cast on the learned judge to make a specific finding of facts on the material discrepancy issue raised by the appellant. These are deep-seated expectations not only from the appellant but also from the prosecution before the learned judge. This is acutely important in a case that attracts the mandatory death penalty prescribed by the DDA as in the present case. For that reason, the duty of the learned judge as a trial judge is to ensure that this legal obligation is complied with so as to avoid 'failure of justice' situations. However, as we indicated earlier, the learned judge never addressed or commented on this issue in his judgment. This was never considered by the learned judge and he failed to direct his mind on this point. In our judgment, the failure on the part of the learned judge to take the evidence regarding the material discrepancy into consideration amounted in effect to a failure to consider a defence which had been put forward (see: **Er Ah Kiat v. PP** [1965] 1 LNS 37; [1965] 2 MLJ 238). It was the duty of the learned trial judge to consider that defence, no matter how weak it may be (see: **Davendar Singh Sher Singh v. PP** [2012] 1 LNS 261; [2012] 3 AMR 489). In our view, this is a serious non-direction which amounts to a misdirection by the learned trial judge warranting appellate intervention (see: **Gooi Loo Seng v. PP** [1993] 3 CLJ 1; [1993] 2 AMR 1135). The learned judge misdirected himself in that he overlooked and failed to appreciate the importance of this issue as it could raise a reasonable doubt on the identity of the offending drugs and hence could consequently raise a reasonable doubt on the prosecution's case.".

[32] On the facts of the present case, we agreed that there is not an iota of evidence that the appellants were occupiers of the said house. The learned trial judge in holding that the appellants were the occupiers of the said house and therefore had custody and control of the said house hence the impugned drugs, solely relied on the evidence of the investigating officer (PW6). PW6's investigation refers to the statements recorded from Murithi, the owner of the said house and the neighbours of the said house. Nevertheless, Murithi was not called as a witness nor his s. 112 CPC statement produced by the prosecution. The prosecution could have also called the neighbours but did not do so. Therefore, we agreed that the evidence of PW6 is a bold statement with nothing to support. In any event, it is hearsay and clearly inadmissible. What is left is just a letter (P22) addressed to the first appellant recovered from the said house produced by the prosecution to show occupation against the first appellant. Was this good enough?

[33] In **PP v. Tan Ah Ling** [1990] 2 CLJ (Rep) 839, KC Vohrah, J (as he then was) had the occasioned to consider whether an electricity and telephone bills in the name of the accused is sufficient to hold that the accused was the occupier. We agreed with the view of KC Vohrah when His Lordship answered it in the negative, and held that:

> "It was clear on the evidence that at the time of the recovery of the raw opium in its five boxes stored in three different places in the kitchen area of the house, the wife of the accused was actually the only adult person in physical occupation of the premises and she therefore was the person who appeared at the material time to have the custody and control of the raw opium. Although the electricity bill P28 and the telephone bill P27 did state that the accused was

the consumer of the electricity and hirer of the telephone at the house these facts by themselves, in my view, did not afford sufficient ground for the operation of the presumption under s. 37(b) of the Dangerous Drugs Act as no evidence was adduced to indicate that it was not she who had care and management of the house or control of the incriminating items so that either the one or the other could have been the occupier of the premises. Even if the facts did establish ground for the operation of the presumption against the accused, the fact that the cardboard boxes containing the slabs of raw opium, according to the evidence, were not concealed but were open to sight and easily retrievable would prevent the operation of s. 37(g) of the Act so that the accused even as occupier could not be presumed to have had knowledge of the drugs for the presumption under s. 37(d) to apply.

I agreed with Counsel for the accused that as a matter of law no *prima facie* case had been made out against the accused. Accordingly I acquitted and discharged the accused.".

[34] Likewise, in **PP v. Chong Wei Kian** [1990] 3 MLJ 165 where the facts of the case was that keys to the room were recovered from the pocket of the accused. In the room were his passport and a bank book. The court was still not prepared to trigger the occupier presumption as they do not amount or not sufficient enough to prove custody and control. James Foong, JC (as he then was) said at page 166:

"Section 37(b) requires evidence to show that the accused was an occupier of room X or had or appeared to have had the care and management of the said room. The mere presence of the keys obtained from his pocket, the passport and the bank book bearing

his name found therein are insufficient evidence to activate this presumption without further evidence being adduced by the prosecution.".

[35] We noted that Tharmaraj and Shaamilah were also arrested in the said house and subsequently charged together with the appellants and the third accused with the same offence. The charge against Tharmaraj and Shaamilah was subsequently withdrawn. They were arrested in the Room 3 and they too could have access to Room 2 and concealed the impugned drugs. Room 2 was not locked at the time of the police raid. The accessibility of Room 2 by Tharmaraj and Shaamilah was not negated by the prosecution. We were of the view that there was a gap in the prosecution's case. As such the appellants could not be said to have possession of the impugned drugs recovered from Room 2.

[36] Both Tharmaraj and Shaamilah, and Murithi were not produce by the prosecution. The three witnesses were material witnesses to unfold the narrative of the prosecution's case. The prosecution even failed to produce their s. 112 CPC statements. We agreed with the learned counsel's submission that the effect of it would be:

(i) it has breached the rule in **Ti Chuee Hiang v. PP** [1995] 2 MLJ 433;

(ii) that s. 114(g) of the Evidence Act, 1950 can be invoked against the prosecution;

(iii) that the defence had been prejudiced or disadvantaged; and

(iv) that there exists a gap in the prosecution's case.

[37] In **Mohd Nazri Bin Omar & 3 Ors v. PP** [2014] 1 LNS 576, Umi Kalthum, JCA, in delivering the judgment of this Court said:

> "19. It was also submitted that there was absolutely no consideration by the learned trial judge on this issue of Long Chai and the consequence of the failure to produce him or his section 112 statement. This had prejudiced all the Appellants. This non-direction amounted to a serious misdirection and had given rise to a miscarriage of justice.
>
> 20. It was the Respondent's/prosecution's submission that there was no need to call Long Chai to give evidence as he was not a material witness to the prosecution's case. That the evidence given by SP6 was sufficient to prove the involvement of all the appellants. If Long Chai had been called as a witness, he would be in the position to further fortify the prosecution's case as he was with SP6 at the material time. Moreover, it was submitted that Long Chai was not present at the car, when SP6 and the 4th Appellant had entered the car driven by the 1st appellant with 2nd appellant as his passenger.
>
> 21. We had perused the grounds of judgment of the trial Judge and we found that he had failed to give any consideration on this issue. Even though Long Chai was not an informer, based on the evidence of his role in the sting operation as elucidated by learned counsel in paragraph 17 above, we were of the view that Long Chai was a material witness who should have been called as a witness by the prosecution. We could not accept the submissions of the

learned deputy that the prosecution did make an effort to produce Long Chai but that the effort was to no avail, seeing that on 24.10.2011 Long Chai came to court to be identified by SP4. As the learned trial judge had failed to consider this issue and had failed to invoke section 114(g) of the Evidence Act against the prosecution for failing to produce Long Chai or his section 112 statement, we agreed with the submissions of the Appellants that there was a non-direction by the learned trial judge which had amounted to a serious misdirection and thereby gave rise to a miscarriage of justice.".

[38] We turn next to the ground raised by learned counsel that the learned trial judge's failure to find possession before invoking the trafficking presumption. The learned trial judge invoked the presumption under section 37(da)(xvi) of the Act for the element of trafficking based on custody and control as we alluded to earlier. In our considered view, the learned trial judge committed a serious error of fact and law in his ruling. There was no affirmative finding of possession at the close of the prosecution case (**Soorya Kumar Narayanan v. PP** [2009] 6 CLJ 257).

[39] We observed that the act of flight by the appellants does not amount to possession. Neither mere presence in the Room 2 afford prove that they had custody and control to the room to the exclusion of others. The evidence showed that at the very least, Tharmaraj and Shaamilah only had access to Room 2. The act of flight by the appellants at the highest showed that the appellants had knowledge of the presence of the impugned drugs in the "candylicious" bag on top of the cupboard. It is trite that knowledge on its own cannot amount to possession without the physical element of custody or control.

Conclusion

[40] For all the reasons above stated, we held that there were merits in the appeal. The conviction is not safe. Therefore, we allowed both the appellants' appeal. The convictions and sentences of the High Court were set aside and the appellants were acquitted and discharged forthwith.

[41] We are so ordered.

Dated: 14 March 2018

signed
(KAMARDIN BIN HASHIM)
Judge
Court of Appeal
Malaysia

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