

PUBLIC PROSECUTOR v RUDOLF TSCHERNEZOW

CaseAnalysis

[2016] MLJU 1603

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Malayan Law Journal Unreported

HIGH COURT (JOHOR BAHRU)

DATO' MOHD SOFIANB IN TAN SRI ABD RAZAK, J

CRIMINAL TRIAL NO: 45A-21-07-2014

24 March 2016

Dato' Mohd Sofian bin Tan Sri Abd Razak J:

JUDGMENT

The accused, a German national was charged with trafficking in a dangerous drug and the charge was as follows:

That you, on 19th January, 2014 on or about 4.00 pm at the Special Passenger Inspection Unit, International Airport Senai, in the District of Kulaijaya, in the State of Johor Oarul Takzim was found to be trafficking in dangerous drugs to viz. 896.3 grams of Methamphetamine and thereby you have committed an offence under Section 39B (1) (a) Dangerous Drugs Act, 1952 and punishable under Section 39B (2) of the same Act.'

At the conclusion of the trial, the prosecution had called 11 witnesses and for the defence the accused gave sworn evidence together with two other prosecution witnesses offered to the defence.

The prosecution's case can be summarised as follows:

On 19.1.2014 **SP3 (Noraida binti Husin)** was on duty at the scanning machine at the arrival hall at the Senai International Airport, Senai. At about 4 pm a fair skinned male passenger later identified as the accused walked towards the scanning machine where SP3 was on duty. The accused had just arrived from Hong Kong and had transit at KLIA before taking a connecting flight to Senai airport. SP3 had scanned the luggage bag belonging to the accused and saw of suspicious images on one of the luggage bag which was purple in colour on the scanner

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machine. The suspicious images she could see from the scanning machine was green colour images. She then instructed her supervisor SP4 (Yusnizam bin Masro) to inspect the accused luggage bag. The accused had 3 bags with him.

In **cross-examination** the witness said that she had scanned 4 handbags on the scanning machine on the instruction of SP6 (Anis bin Bengan) her supervisor.

SP4 (Yusnizam bin Mastro) was on duty on 19.1.2014 at the Passenger Inspection section at the Senai airport. The witness said on the day in question he was asked by SP3 to inspect 3 pieces of luggage belonging to the accused. The witness proceeded to open one of the luggage which was purple in colour and also had instructed the accused to open the purple bag. The facial expression of the accused showed that he was apprehensive and was slightly shivering. After the purple bag was opened, SP4 saw 6 handbags inside the purple bag. The witness was asked to open one of the handbags. SP4 had asked the accused the handbags were meant for whom to which the accused answer that the handbags were purchased at the night market in Hong Kong as souvenirs for his friends. The witness further stated that on both sides in the handbags there were stashed powdery substance. At the side of the handbag the witness could see a folded and not sew. The accused was asked to remove the content and it was a rectangular packet wrapped with a blue carbon paper. The witness said when the blue carbon paper was opened, there was a brown wrapper and inside the brown wrapper was a transparent plastic packet which contained crystalline powdery substance. The handbags were then put back in the accused's purple luggage bag and the accused was asked to proceed to the passenger inspection room at the airport to wait for the personnel from the narcotics section to arrive. The witness described the handbags as silver in colour. The personnel from the narcotics arrived at 6 pm whereupon SP6 handed over the accused and the exhibits to SP9 (Khairulanuar bin Ishak).

SP6 (Anis bin Bengan) was the supervisor on duty at the Senai airport and he was notified by SP4 of suspicious item inside the luggage bag of the accused. The witness upon been informed of the suspicious items, instructed SP4 to scan the 4 handbags. The 4 handbags were scanned and showed suspicious green images. The 4 handbags were then put back in the luggage bag and brought to the Passenger Inspection room at the airport. The accused too was asked to wait in the said room for the narcotics personnel to arrive. Upon the arrival of the narcotics personnel, the accused and the exhibits were handed over to SP9.

In **cross-examination** the witness testified that he only saw 6 handbags and he agreed that he only asked SP4 to scan 4 handbags instead of 5 or 6 handbags. The handbags when they were handed over to the witness all were wrapped neatly with plastics and were not opened. The witness further said he overheard SP4 said that the accused said that the handbags were brought from Hong Kong for his friend's wife.

SP9 (Khairulannuar bin Ishak) from the narcotics unit of Customs testified that on 19.1.2014 he was informed that SP6 had detained the accused on suspicion of trafficking in drug. The witness proceeded to the airport and arrived thereat at about 6 pm in the afternoon. The witness then went to the Special Passenger Inspection room where in the said room the witness saw SP6 and 2 trolley bags, a sling bag and the accused. SP6 handed to the witness the accused and a passport. The witness introduced himself and made some preliminary inquiries on the accused. The accused admitted that both the bags were carried by the accused. The witness inspected a bag with the brand Polo and found no incriminating exhibits in it. The witness then opened the purple bag and found that there was a blue carbon wrapper and when it was opened the witness saw a package and inside it was a silver handbag. The witness was informed that the blue wrapper was removed by the personnel from the passenger inspection unit as the witness could see the sign that it had been torn and when the wrapper was lifted a brown folded wrapper could be seen. The witness then asked customs officer, Prem Ananth to conduct an initial analysis using a test kit on the powdery substance in the wrapper was positive methamphetamine. The witness explained the result of the initial test on the powdery substance which was positive drug methamphetamine and then read the caution to the accused. The witness said on the 4 plastic wrappers he placed tape on them and marked them A1(1)(a), A1(1)(b), A1(1)(c) and A1(1)(d) respectively. On the 5 other wrappers the witness marked them as A2, A3, A4 and A5 respectively. The witness put his markings on the clothes found in the purple bag and for the white Adidas bag he marked it as 'C'. The witness said that from the yellow bag which he marked as A2, he removed 5 red handbags and marked it as A2 (1) (a), A2 (1) (b), A2 (1) (c), A2 (1) (d) and A2 (1) € respectively. On all the handbags the witness had put his signatures and the date. He had also asked the investigating officer (SP 11) to put his signatures and date on all the 5 handbags. On the remaining red handbags in the 3 other yellow bag, the witness had marked them in sequence from A3(1)(a) to A3(1)(e), A4 (1)(a) to A4(1)(e), A5(1)(a) to A5(1)(e) respectively. The investigating officer (SP11) had also placed his signatures and date on all the exhibits referred to above. All the exhibits were marked as follows:

(1) Purple bag was marked as P5 (1)(A).

The 5 yellow bags in P5A (1)(A) were marked as follows:

- i. P5 (1)(A)(1);
- ii. P5 (1)(A)(2);
- iii. P5 (1)(A)(3);
- iv. P5 (1)(A)(4);
- v. P5 (1) (A)(5).

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The Court marked the 24 wrappers as P10(1)A, P10(1)(C), P10(1) (E), P10(1)(G), P10(1)(1), P10(1)(K), P10(1)(M), P10(1)(O), P10(1)(Q), P10(1)(S), P10(1)(U), P10(1)(W), P10(1)(Y), P10(1)(AA), P10(1)(AC), P10(1)(AE), P10(1)(AG), P10(1)(A1), P10(1)(AK), P10(1O)(AM), P10(1)(AO),P 10(1)(AQ), P10(1)(AS), and P10(1)(AU).

The witness said in the purple bag marked as P5 (1)(A) he found clothes white long pants which he marked as A7 and placed his signature and date. The witness also found a white long sleeve sweater brand Sunnis and a blue floral lady's sleepwear brand Aocaiman, red long pant brand Lian Cai 4XL and a short sleeve T shirt brand Polo. The witness also seized other items such as laptop brand Eee; charger for laptop; charge for hp Nokia; hp Nokia and a Taser. The luggage claim and boarding pass MH0079 from Hong Kong to KLIA and boarding pass MH1051 from KLIA to Johor Bahru in the name of the accused was also seized. The witness also seized \$2000 HK dollars from the accused. The witness handed over the exhibits to the investigating officer (SP11) at about 10.45 pm at the narcotics office at Larkin. The handing over of exhibits between the witness and I.O was tendered as P30. The witness confirmed that at the material the accused and the exhibits were in his custody he had never lost sight of the exhibits in his custody.

In **cross-examination**, the witness said SP6 did not tell him that SP6 was told by SP4 that the purple bag was meant for the accused friend's wife. The witness said the accused did mention in the Passenger Inspection room that the purple bag did not belong to him after the drugs were found in the purple bag. The witness said he had made an opening on the 3 wrappers from the handbags and saw there were already an opening and the witness tear slightly to ascertain the colour of the powdery substance inside. On the 3 plastic wrappers there were already sign which had an opening made earlier. The witness disagreed that all the 24 plastic wrappers were opened by the accused. The witness agreed that in the purple bag were some female clothes and to a hypothetical question by learned counsel that if that were the case, that the bag could be handed over to a female owner. The witness said upon a cursory look at the purple bag one cannot tell that it contained drugs.

In **re-examination** the witness disagreed that the notation in the request form for forensic analysis stating that all the 24 plastic wrappers had been opened.

SP11 (Muhammad Asri bin Yahya) stated that on 19.1.2014 he was directed to be the investigating officer (I.O) of the case by SP9. He arrived at the narcotics office at Larkin at about 7 pm and at about 7.30 pm the narcotics team arrived together with the accused and the exhibits. At 7.45 pm the witness carried out the process of inspection on the exhibits on the same night but the markings on the loose exhibits were made the following morning i.e on 20.1.2014. The witness was able to identify the exhibits based on his signatures and date

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however the witness said he overlook to mark the search list marked as P26 and also item marked as A2(1)(B). The witness completed his inspection on all the exhibits at about 10.30 pm. The witness put the 24 plastic wrappers in a box with the Custom's seal and wrapped with a brown paper and sent the box to the chemistry department to be analysed. The witness handed over the box containing the 24 plastic wrappers to the chemist SP8 (Sfti Zubaidah Hanapi). An official receipt acknowledging the receipt of the box was issued by the chemistry department and tendered as P24. The witness received the exhibits and a copy of the chemist report from the chemistry department on 11.3 2014. On the same day at about 4.15 pm the witness sent the box containing the exhibits to the Custom's store at Larkin. On 21.1. 2014, the witness sent several items from the bags marked A and B respectively including a trouser marked F and a shirt marked E to the chemistry department for DNA analysis. The witness also sent a blood specimen of the accused to the chemistry department for purposes of DNA analysis and was received by SP5 (Aedrienne Reeza bin Alwi). On 20.4.2014, the witness collected the exhibits which were sent for DNA analysis from SP5 and the chemist report tendered as P20. The witness also conducted a fitting exercise of the clothes found in the luggage bag on the accused and thereafter photographs were taken. The witness also said that he found in the call log of the accused hand-phone, a Malaysian number and when he called that number there was no answer. The witness then sent the accused hand-phone to the forensic section of the Custom's department for forensic analysis of the numbers in the accused hand-phone. The witness said the Malaysian number which he made the call was a DIGI number 0162805917.

In **cross-examination**, the witness disagreed that the contents of the exhibits in the box as shown in the photograph marked P15 had been tampered with. The witness agreed that the result of the DNA analysis on the samples sent to the chemistry department were negative. The witness also agreed that the clothes wore by the accused at the time he was arrested was loose and photographs of the fitting looked hght fit. The witness a so agreed that the accused after h[s arrest did say that the purple bag was to be handed over to his friend's wife. The learned counsel referred the witness to the accused cautioned statement and was marked as D18. The witness agreed that in D18 the accused did mention that the purple bag was to be handed over to friend's wife. This was stated in answer to question 6 that the bag was meant for a wife of a Nigerian. The witness disagreed that in the contact number in the accused hand-phone was a name Felix Nigeria. The witness could not remember whether the contact number of Felix Nigeria was 2347069257131. The witness denied that on 24.1.2014 he did make a call to Felix Nigeria. However learned counsel referred to the list of call which showed that on 24 .1. 2014 a callwas made to a number of Felix Nigeria at about 12.17 pm. The learned counsel said during the material time the hand-phone was in the possession of SP11. The witness have no knowledge that the person whose hand-phone number was 016-2805917 was to collect the purple bag the accused had carried from Hong Kong. The witness agreed that based on the call log that upon arrival at KLIA on 19.1. 2014 the accused did make a call to hand- phone 016-2805917 at about 12.58 pm. The witness however agreed to the learned counsel's suggestion that there were specific information on the telephone number which could have assisted in the investigation but no further investigation on the telephone number was carried out on the said number was not a Malaysian registered number. In any event the accused did not mention the name Felix Nigeria in the course of the investigation.

In **re-examination** the witness agreed that he did not cut open all the 24 plastic wrappers because he did not want to tamper with the contents in the wrappers.

The evidence of the chemist was through **SP8 (Siti Zubaidah binti Ishak)** who testified by reference to her witness statement read in Court pursuant to Section 402B of the Criminal Procedure Code and tendered as PSSP8. The witness testified that on 22.1. 2014 she was on duty and at about 12.44 pm had received a package marked as 'MAY1' with the Customs seal 112558 from SP11. The witness then issued an acknowledgement receipt with the laboratory number 14-FR-J-01114 and tendered as P24. The witness examined the package and found that the content was a box with the words 'TOYOTA GENUINE MOTOR OIL' written on it and inside the said box were 24 plastic wrappers wrapped in blue carbon paper with marking A1(1) to A1(1)(d), A2(1)(b) to A2(1)(e), A3(1)(b) to A3(1)(e), A4(1)(b) to A4(1)(e), A5(1)(b) to A5(1)(e), A6(1)(b) to A6(1)(e). Each plastic wrapper contained whitish crystalline substance. The witness said that before she carried out the analysis, she had homogenised all the impugned drugs. She carried out the analysis by in the following manner:

- i) By Marquis and Simon to entertain the active ingredient in the drug and it gave a positive result.
 - a) Simon test gave a blue colour which showed the presence of Methamphetamine;
 - b) Marquis test gave an orange colour which showed the presence of Methamphetamine.
- ii) Gas Chromatography -Mass Spectrometer (GCMS) analysis was to find out the type of drug in the drug substance and the result was positive Methamphetamine.
- iii) Gas Chromatography- Flame Ionization Detector (GC-FID) was to find out the quantitative of Methamphetamine in the drug substance.

The witness prepared a chemist report of her analysis on the impugned drugs on 10.3.2014 and tendered as P25. The witness also stated that the balance of the drugs substance after analysis, she put back in the same plastic packages and marked them as CT1 to CT24 together with the chemistry department label bearing the same laboratory number. On 11.3.2014 at 3.50 pm, the witness handed over the exhibits together with the chemist report to SP11. The witness confirmed that the result of the analysis that the homogenised drug substance was methamphetamine weighing 896.3 grams, a dangerous drug which is listed in the 1st Schedule of the Act.

The evidence of **SP5 (Aedriane Reeza binti Alwi)** confirmed that no DNA profile was detected on the specimen sent for analysis.

Decision at the close of prosecution case:

It is imperative for the Court to consider at the close of the prosecution's case whether the prosecution has made out a *prima facie* case against the accused. This entails the trial judge evaluating the prosecution evidence on a maximum evaluation. In Section 180(4) of the Criminal Procedure Code (hereinafter called 'the CPC') states that '*a prima facie case is made out against the accused when the prosecution has adduced credible evidence proving each ingredient of the offences which if unrebutted or unexplained would warrant a conviction*'.

In *PP v Ong Cheng Heong* (1998) 6 MLJ 678 the Court held that '*credible evidence is evidence which has been filtered and which has gone to process of evaluation. Any evidence which is not safe to be acted upon should be rejected.*'

The prosecution in order to prove a *prima facie* case against the accused must prove the following ingredients namely that:

- a) That the impugned drugs were in the possession, custody and control of the accused;
- b) That the impugned drugs were listed as dangerous drugs within Section 2 of the Act or within the 1st Schedule of the Act;
- c) That the accused was trafficking in dangerous drugs.

Evidence of possession, custody and control of drugs:

The evidence of possession, custody and control can be proved by direct evidence or with the aid of the presumptions available under Section 37(d) of the Act. It is trite law that possession in order to incriminate the accused must have the following characteristics namely that (a) the possessor must know the nature of the thing possessed; (b) he must have the power of disposal over it and (c) he must be conscious of his possession of the thing. The word possession has been discussed in a number of cases dated back to pre-merdeka day which is still good law till today. To quote a few are the cases of *Toh Ah Loh & Mak Thim v Rex* (1949) MLJ 54; *Leow Ngee Lim v Rex* (1956) 1 MLJ 28. In *PP v Abdul Rahman Akif* (2007) 4 CLJ 337, the Federal Court held inter alia that mere custody and control is not sufficient to establish possession for the purpose of the Act, there has to be established knowledge of such drug by the prosecution. The Court went further to state that '*Here again knowledge cannot be proved by direct evidence, it can be proved by inference from the surrounding circumstances. Again the possible variety of circumstances which will support such an inference is infinite.*'

The evidence showed that SP3 was on duty at the Senai airport on the day of the incident

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19.1.2014 and had conducted an inspection on the luggage belonging to the accused a transit passenger from Hong Kong. She asked for the passenger's passport and found that he was a German national named Rudolf Tschernozow whom she recognised as the accused in this case. She found the purple luggage bag locked and asked for the key. She saw on the scanning machine suspicious images. SP3 then asked SP4 to inspect the accused purple bag. SP4 who was also on duty on the day in question had inspected the 3 luggage bags of the accused. Upon a thorough inspection on the purple bag revealed that there handbags stashed with drug methamphetamine. The Court was of the opinion that since the drugs were found in 24 plastic wrappers stashed in the luggage which has a name tag of the accused, it follows that the accused has had the possession, custody and control of 24 plastic wrappers containing the drugs. That being the case the Court was satisfied that the 1st ingredient of the offence has been proved by the prosecution.

With regard to the 2nd ingredient that the prosecution must prove that the drug Methamphetamine is a dangerous drug as defined and listed in the Dangerous Drugs Act, 1952. In this respect the Court was satisfied that the evidence of SP8 the chemist from the chemistry department has certified in her chemist report P25 that the whitish crystalline substance she analysed was methamphetamine which is listed in the 1st Schedule of the Act as a dangerous drug.

As to the evidence of trafficking, in *PP v Abdul Manaf Muhamad Hassan* (2008) 2 CLJ 129, the apex court held that the presumption under section 37(d) can be used to prove trafficking independent of the presumption under section 37(da). Arifin Zakaria FCJ (as His Lordship then was) said in delivering the judgment of the court:

*'It ought to be stated at the outset that the decision in Muhammed Hassan only prohibits the use of double presumption under sections 37(d) and 37(da) of the Act. It is therefore open to the prosecution to rely on either of the presumptions. In other words, the prosecution may positively prove possession without relying on the presumption under section 37(d) of the Act and go on to rely on the presumption of trafficking under s. 37(da) of the Act to support a charge under s. 39B of the Act. See Tunde Aparta & Ors v PP (supra) ; Msimanga Lesaly v PP (2005) 1 CLJ 398 (a decision of the Court of Appeal confirmed by the court in Federal Court Criminal Appeal No: 05-27-2004(K). **Conversely, the prosecution may rely on the .presumption under s.31 (d) to prove possession and seek to prove by affirmative evidence (independent of the presumption under s.37 (da) that the accused was in fact trafficking in the dangerous drug' (emphasis added).***

For the presumption under Section 37(d) to apply, the prosecution must first establish custody or control of 'anything whatsoever containing any dangerous drug'. In the instant case, the purple bag tendered as P5 (1)(A) which contained 6 handbags marked as P5(1)A(2); P5(1)A(3)(i)a; P5(1)A(4)(i)a; P5(1)A(5)(i)a; P5(1)A(6)(i)a and P5(1)A(?) (i) respectively, the contents therein

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were crystalline substance of methamphetamine in 24 plastic wrappers were in the custody and control of the accused. The Court in the instant case and on the direct evidence that the accused had in his possession of 896.3 grams methamphetamine in the purple bag marked as P5(1)(A) can rely on the following acts of trafficking in Section 2 which includes carrying and concealing and held that the accused was trafficking in dangerous drug. Alternatively, the Court could invoke the presumption as listed under Section 37(da) (xvi) of the Act which states that any person who is in possession of 50 grams or more in weight of methamphetamine, otherwise than in accordance with the authority of this Act, or any other written law shall be presumed, until the contrary is proved, is trafficking in the said drug. The Court with the aid of the presumption under Section 37(da) (xvi) of the Act held that the accused was trafficking in 896.3 grams of methamphetamine.

The Court upon a maximum evaluation of the evidence adduced by the prosecution witnesses, found that the prosecution had succeeded in proving a *prima facie* case against the accused based on the original charge of trafficking under Section 39B (1) (a) and call upon the accused to enter his defence. The 3 options were explained to the accused and the accused opted to give sworn evidence from the witness box.

The defence evidence can be narrated as follows:

The accused worked as a shift leader at McDonalds and took 1or 2 months break to go on a backpack holiday tour. The accused said that on 24.12.2013 he was on holiday in Phuket, Thailand. In Phuket he stayed at Patong Pearl Resort. The accused had with him roughly about 2500 Euro. At Phuket, the accused did sightseeing and clubbing and planned to meet his friend name Felix C Nnadi. The accused said Felix knew that he was in Phuket because he told Felix when he booked his flight to Phuket. Felix had agreed to meet him in Phuket. The accused said upon his arrival at Phuket he tried calling Felix but he did not answer the call. On 24.12.2013 the said that he was robbed by a Thai policeman in Phuket. The accused said he knew the robber was a Thai policeman because he was wearing a police uniform. The accused said that had with him about 2000 Euro when he was robbed. He wanted to make a police report of the robbery but the Thai police refused to accept his report as they did not believe his story. The accused was left with some money but not much and he tried to contact his friend Felix to help him. The accused tried to contact Felix through Facebook at a cybercafe but he receive no reply. The accused had sought his friends help in trying to get in touch with Felix and 2 days later Felix replied. The accused was referred to Facebook messages between him and Felix and it showed that on 25.12.2013 at about 3.55 pm the accused had sent a message to Felix. The accused said that Felix got in touch with him on 5.1.2014. In the Facebook message the accused described himself as 'Rudik' instead of 'Rudolf' which was his nickname. The accused further said that in the Facebook message he had mentioned about the fact he was robbed and had about 5000 baht left. The Facebook message also mentioned about the fact that his father had a heart attack on 6.1.2014. The Facebook messages between the accused and Felix from 25.12.2013 until 22.2.2014 were tendered as defence exhibit and upon the certificate pursuant to Section 90A EA been tendered and marked as D36. The accused said that looking at the Facebook messages on 22.1.2014 it appears that there was a message from Felix and at the material time the accused was in remand. The message on 25.12.2013 was sent by the accused to Felix and he received a reply from Felix on 5.1.2014. The accused further stated that after he was robbed he went back to his hotel and pay for the last night with the balance money

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he had. The accused then decided to look for a cheaper hotel to stay and he met a white man who was an Italian who offered the accused to stay at the Patong Sub Inn which was a cheap hotel. The accused referred to a calling card which was written on it Patong Sub Inn. The accused said when he stayed at the Patong Sub Inn, the accused contacted his common friends namely Rosalina from Indonesia and Veronica Tejada Jardeloza from the Philippines. The accused said he contacted his common friends when he could not get in touch with Felix and they promised the accused to get in touch with Felix. In the Facebook message marked D38 the accused said he mentioned to Veronica that the Thai police had robbed him and he had no money. In exhibit D36 the accused said on 5.1.2014 was the first time that Felix had replied to his message. Once Felix contacted the accused, the accused told Felix that he was robbed and had little money and had wanted to borrow some money from Felix to enable him to pay his hotel bills. The accused said Felix did not reply to his message and he tried to contact Ritha and Veronica and I told them that I was robbed and his father was at the hospital and requested them to get in touch with Felix. A few days later Ritha contacted the accused and gave him a Nigerian telephone number and managed to call Felix directly from a public phone and told him about his father's health, that he was robbed and had no money. He also had asked to lend him some money so that he could get a ticket back to Germany. The witness was also referred to another Facebook message marked as 037 where at page 4 showed the conversation with Ritha and the telephone number was +2347069257131 which belonged to Felix. The accused said that after he had got in touch with Felix, Felix had agreed to help him to get a ticket to Germany and he said to the accused when the accused reached Germany he could pay back the money. The accused said Felix contacted him a few days later and told him that the ticket from Phuket to Germany was very expensive as it was a peak season and Felix told him to travel to Hong Kong and from there tried to get a ticket for him from Hong Kong back to Germany. Felix gave the accused a booking number and then he went to Air Asia office to print out the itinerary of the ticket which was an E-ticket. The flight from Phuket to Hong Kong was on 14.1.2014 and marked as exhibit 039. The accused said Felix did send some money to him in the sum of USD500 through Western Union and the accused collected the money in Thai Baht.

On 14.1.2014 the accused flew from Phuket to Hong Kong and upon arrival thereat, the accused looked for a cheap accommodation nearby the airport. The accused said at the time he landed at Hong Kong airport he had with him about USD100. The accused then asked Felix to send some more money and he was running out of money. The accused asked Felix to send another USD500 through Western Union and Felix had asked him to buy a hand-phone so that they could get in touch with each other. Felix sent another USD500 to the accused through Western Union and he collected in HK\$. With the money he received, the accused bought a Nokia handphone which was like the handphone in P15 photograph number 97.

The accused said when he landed in Hong Kong he had one black bag and one white Adidas sling bag. The accused also had a black backpack which he kept in the suitcase. The accused called Felix and asked him when will his flight from Hong Kong to Germany be? Felix said that I had to travel Malaysia because the ticket was cheaper there. Felix bought a ticket to Malaysia from Hong Kong by Malaysia Airlines on 19.1.2014 and to Johor Bahru through E-ticket, tendered and marked as exhibit 040. The accused said on 19.1.2014 when he was on his way to the airport, he received a call from Felix and had asked the accused to do him a favour. The

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accused said he saved Felix's number under Felix Nigeria. The accused said Felix called to ask him to pick up something from a Chinese lady at the airport in Hong Kong and bring it to Malaysia and to pass it to Felix's wife. Felix had described briefly the Chinese lady whom he will collect the things from. He was supposed to meet her at the check in counter at the airport. At the check in counter the accused said he was approached by a Chinese lady whom asked me whether I was Felix's friend. The accused described the Chinese lady in her late 30s and was 170 cm tall and a bit plump and wore a black T -shirt and a blue jeans. She spoke with broken English and then she gave the accused a purple suitcase and asked me to give it to Felix's wife. The accused said when he received the purple suitcase he opened it, looked inside and he saw some woman's clothes. He saw a few things wrapped in yellow bags. The accused further said that the Chinese lady said to him that there were a few handbags inside the yellow wrappers. The accused did not open to check the contents because they were not his things. The purple bag the accused received was not locked but it was zipped up. The accused checked in two bags one his own black bag and the other the purple bag and he received two boarding bags to KLIA and to Johor Bahru. The accused said after he had received the purple suitcase, Felix called him to ask whether he had received the suitcase and to inform him that his wife would be waiting for him at the exit area of the airport. The accused said Felix gave him his wife phone number and he saved it under the name "Hong Kong" and he believed the phone number had the prefix '016'. The accused said he landed at Senai airport around 4 pm in the afternoon and he planned to call Felix's wife after he had collected the purple bag. The accused had 3 bags namely his own black bag, the purple bag and the white Adidas bag.

The accused said at the airport he was stopped by a female officer who told me to place all his luggage on the scanning machine. The accused said SP4 got to the scanner machine and asked me to open the purple suitcase. The accused followed the instruction and opened the purple suitcase and saw the contents in the purple suitcase the same as when I received it in Hong Kong. The accused recalled inside the purple bag he saw 6 yellow wrappers but he did not see that in the 6 wrappers were handbags. The accused said he was asked to take one of the yellow plastic wrappers from the purple bag and opened it. When the accused opened the yellow wrapper, inside it was a silver handbags. The accused told SP4 that he did not buy the handbags but they were in the purple bag which he has to deliver to his Nigerian friend's wife. The accused denied that he had told the prosecution witness that he bought the handbags at a night market in Hong Kong. The accused said when he was asked by SP4 to put his hand in the handbag to take out something from inside the handbag and he took out one blue wrapper which had an opening. Inside the blue wrapper was another blue wrapper and inside it was a substance like salt. The blue wrapper inside the blue wrapper could not be taken out because it was glued.

The accused said SP11 after conducting a body search, had asked the accused to wear some of the clothes found in the purple suitcase and they did not fit the accused. The accused said SP11 did ask him for the particulars of his Nigerian friend and the accused said that he did not give the full particulars but just told him that his Nigerian friend had helped him a lot. This was told to SP11 a day after his statement was made i.e after 23.1.2014. In the cautioned statement the accused said he could not give the full name of Felix and will do so after the accused had been talked to the German Embassy. The accused he later found out that there was no direct

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flight Senai airport to Germany after he had talked to the Customs officer. When the accused landed at Senai airport he had with him about USD100 -USD200 only. The accused said that he actually opened the purple bag but did not open and checked anything in the handbags. The accused said that when he arrived at Phuket on 24.12.2013 it was his second trip to Phuket.

The accused said he left Germany in September 2013 and his first destination was Brazil and stayed there for 2 weeks and from Brazil the accused flew to Phuket and then to Bangkok. From Bangkok he went to Kuala Lumpur and that was in the month of November, 2013. In Kuala Lumpur the accused stayed at the Corona Inn and from KL flew back to Bangkok and then flew to Brazil for the second time. He said that the second trip to Brazil was because a girl who he had known in Brazil had asked him to come back to Brazil and spend some time with her. During the 2nd trip to Brazil the accused spent about a month there. The accused informed the Court that his girlfriend was Larissa Gonzales.

The accused said he had trusted his Facebook friends at the material time as he had no choice. I wanted to get help from my parents but found out that my father was hospitalised and decided better to get help from Felix.

In **cross-examination**, the accused stated that he had no documentary proof that he worked at McDonalds as a shift manager and also he had no proof that he had applied for 1 or 2 months leave for his job. The accused reiterated that he knew Felix through his Facebook friends namely Veronica and Ritha. The accused said since he was robbed by the Thai police and lost his hand-phone, his only means to contact Felix was through Facebook message. The accused said he had sent a message to Felix as stated in 036 where he stated as follows:

'My problem is that, the police has robbed my money. I just have little bit of money now but not enough for hotel. I need some money after I pay bag you know how and I need the ticket back to Germany. You can send some please thank you write later I am in an internet shop after I come back and check my messages.'

The accused said as evidence that he stayed at Patong Sub Inn in Phuket, the manager gave him a business card but he has no receipts to prove it. The accused said he did not check the price of the ticket from Phuket to Germany while he was in Phuket because he felt that since Felix was the one who was to help him he trusted Felix will check the air ticket and buy the ticket for him. Most importantly he trusted Felix will help him. The accused said it was Felix who had asked the accused to fly to Hong Kong from Phuket as the cost of the ticket to Germany according to Felix would be much cheaper. The accused received an Air Asia ticket from Phuket to Hong Kong through E-ticket. the accused said that Felix had told him that once he arrive in Malaysia he would get his ticket and stay a night in Malaysia. The accused said that when he

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was on his way to the airport, Felix had called him and asked him to do a favour in that a friend of his wife had bought things for her in Hong Kong which Felix described as woman things. The accused said he had never met Felix's wife before. The accused said he trusted Chinese lady and when he opened the purple bag he saw some woman clothes inside it. The accused agreed that he did not mention to any customs officers that Felix's wife was waiting for you at the exit of the airport. The accused disagreed that he had told SP4 that he bought the handbags at the night market in Hong Kong as souvenirs for his friends. The accused said that the 24 wrappers were taken out from the 6 handbags at the customs office at the airport and disagreed that the 24 wrappers were taken out at the Larkin customs office. The accused used disagreed that he did not tell SP4 and SP11 about his hand-phone numbers being inside his hand-phone. He said he told SP11 of Felix's wife number on the same day he was arrested and Felix name on the following day. The accused said he did mention about his Nigerian friend whose name was Felix. The accused said he did not tell SP11 of Felix's name after 3 days he was arrested because he was not sure who of the three persons namely Felix, his wife or the Chinese lady who got him into the mess. The accused said he did not want to implicate the wrong person especially it was Felix who had helped him when he was in trouble in Phuket and Hong Kong. The accused said that he did open the purple but he did not open the handbags in the purple bag. The accused disagreed that he knew what he was carrying from Hong Kong to Malaysia.

The evidence of **SD2 (Prem Ananth a/l Damodaran)** stated that he was present at the Senai airport on 19.1.2014 the day the accused was arrested. He was present in the Special Passenger Inspection room together with SP2, SP9 and SD3. The witness stated that when he was in the said room he heard the accused told SP9 that the purple bag was meant for his friend's wife.

SD3 (Vikneswary a/p Arumugam) stated that she too was in the Special Passenger Inspection room on 19.1.2014 together with SP2, SP9 and SD1. The witness said that she was aware that the accused had informed SP9 that the purple bag he was carrying was meant for his friend's wife. She also said she saw the accused and SP9 talking to each other.

Close of defence case observation and finding:

The duty of the trial court at the conclusion of the trial as enshrined in Section 182A of the CPC is to consider all the evidence adduced before it and to decide whether the prosecution has proved its case beyond reasonable doubt. If the court finds that the prosecution has proved its case beyond reasonable doubt, the court shall find the accused guilty and he may be convicted on it. If the court finds that the prosecution has not proved its case beyond reasonable doubt, the court shall record an order of acquittal. The defence of the accused must be considered in the totality of the evidence adduced by the prosecution, as well as in the light of the well-established principles enunciated in *Mat v PP* (1963) MLJ 263 with regard to the approach to be taken in the evidence of the defence.

In gist the Court observed that the crux of the defence case was premised on the defence of

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innocent carrier. What it means is that the accused did not deny that he carry the purple bag marked as P5 (1)(A) from Hong Kong to Johor Bahru but denied having knowledge of the contents in the 6 handbags which contained the drugs. The accused said in evidence although he opened the purple bag and saw inside it were some woman clothes and something wrapped in yellow bags. The accused said he did not open as he felt it was not proper for him to open someone bag. The accused thought the contents were clothes belonging to Felix wife and for him to carry the purple bag to Johor Bahru. The bag P5 (1)A was to be collected by Felix's wife upon his arrival in Johor Bahru.

In so far as the defence of innocent carrier is concerned, in the recent case of *Munuswamy Sundar Raj v PP* (2015) 6 AMR 405 **the Federal Court held that the defence of innocent carrier is a valid defence and whether it will succeed or not would very much depend on the facts of each case. The Federal Court cited with approval a passage in Hoh Bon Tong v PP** (2010) 4 AMR 681 when discussing the defence which held as follows:

'The defence of innocent carrier must necessarily bring into picture the concept of wilful blindness. And according to Yang Pung How CJ (Singapore) in *PP v Hla Win* (1995) 2 SLR 424 (at page 438), "the concept of wilful blindness qualifies the requirement of knowledge" And His Lordship continued further by saying (at the same page).

"As Professor Glanville aptly remarked in his Textbook on Criminal Law at page 125:

'.....the strict requirement of knowledge is qualified by the doctrine of wilful blindness. This is meant to deal with those philosophy is: Where ignorance is bliss, 'tis folly to be wise.' To argue away inconvenient truth is human failing. If a person deliberately 'shuts his eyes' to, the obvious, because he 'doesn't want to know,' he is taken to know'.

Continuing at the same page, His Lordship said:

'In Ubaka v PP (1999) 1 SLR 267, the principle laid down in *Warner v Metropolitan Police Commissioner* (1980) 2 ALLER 356; and modified in *Tan Ah Tee v PP* (1980) 1 MLJ 49 were applied by the trial judge. In his grounds of judgment, this court quoted the following passage by the trial judge:

'Ignorance is a defence when there is no reason for suspicion and no right and opportunity of

examination and ignorance simpliciter is not enough.'

In *Ahmad Ibrahim v PP* (2012) 7 CLJ 445, the Court of Appeal held inter alia that ' a defence of innocent carrier refers .to a state of affairs where the accused person acknowledges carrying, for example a bag as in the case before us, containing the dangerous drugs but disputes having knowledge of the drugs. Whether it will succeed or not would very much depend on the facts of each case.'

Reverting to the facts of the instant case, assuming that the lady who had given him the purple bag P5A (1) and he had willingly taken custody and was in control of the bag at the material time. He did have ample opportunity to look into the luggage bag P5A (1) before he made or continued his journey to Johor Bahru. He had opened the purple bag and saw some woman's clothes also saw a few things wrapped in yellow bags. The Chinese lady also told the accused that there were a few handbags inside the yellow wrappers. The accused did not open to check the contents inside the handbags because they were not his things. Furthermore the drugs were in the handbags which were cunningly concealed by Chinese lady and could not be detected and visible with the naked eyes.(see the case of *Mohammad Reza Lajevardi Taghi v PP* (2015) 4 CLJ 186).

The Court has analysed the evidence of the accused as to how he came to be in possession to the purple bag P5 (1) A The accused narrated in his evidence that he was on holiday at Phuket, Thailand when on 24.12.2013 he was robbed of his belonging by someone whom he recognised to be Thai police. He was robbed of his wallet which contained his money. He tried to lodge a police report but the police refused to accept his report and furthermore they did not believe him.

The accused said he had his own bag which was a black bag m-arked as P6 (1) A Given the scenario that the accused had no money, he had no alternative but to seek help from someone whom he knew through Facebook by the name of Felix whom at the material time the accused thought Felix was in Phuket by sending a message on 25.12.2013 but Felix only replied to the accused message on 5.1.2014. The accused contact his mother for help but was told that the accused . father was admitted to the hospital because of a stroke and that worried him a lot. A copy of confirmation letter from Hospital Medistar Germany showing that the accused's father was warded on 30.12.2013 to 7.1.2014 and tendered as exhibit 035. The accused decided not to trouble his mother by asking her to send some money to him so that he could purchase an air ticket and fly home to Germany. After there was no response from Felix, the accused sought help from his Facebook friends namely Ritha and Veronica to get in touch with Felix. An excerpt of the Facebook messages between the accused and Ritha Rosalina dated 26.12.2013 to 11.1.2014 were tendered as exhibit 037 and similarly an excerpt of Facebook messages between the accused and Voronica Tejada Jardeloza was tendered as exhibit 038.

The Court has perused and analysed the accused cautioned statement tendered as 018 which was made 4 days after he was arrested ie on 22.1.2014 and found that the accused had stated in answer to question 6 *'Can you explain to me what exactly happen to you on 19.1.2014?* The accused in his answer to the said question had substantially stated the same in his oral testimony with regard to the fact that he was robbed of his wallet containing his money and his hand- phone. That he had contacted his friend name Felix, however in 018 the accused did not mention Felix's name but mere stated that he was a Nigerian whom the accused had sought help from.

The Court was of the view that the accused evidence that he was robbed and had sought the help of his Nigerian friend and his flight to Hong Kong from Phuket and from Hong Kong to KLIA and then to Senai airport had been consistent throughout the trial and not an afterthought and a bare denial. He had mentioned it in his cautioned statement 018 how he came to be in possession of the purple bag P5A(1) which were cunningly concealed with stashed of drugs in the 6 handbags by the Chinese lady whom Felix had asked the accused to bring the purple bag to Johor Bahru and to be given to Felix wife in Johor Bahru. The evidence showed that upon arrival at KLIA the accused tried calling the Malaysian number 016-2805917 but there was no reply. SP11 the investigating officer had also tried calling this number although it was denied by him. He too did not get any reply. SP11 did not inquire further as to the ownership of the said number. Had SP11 conducted a thorough check on the said number perhaps it belongs to Felix's wife. That will substantiate the accused version of his evidence that he was merely doing a favour for Felix in return for Felix to get a return ticket to Germany. The accused said there was no reason not to trust Felix at that moment in time as Felix had demonstrated that he was willing to assist the accused to get back to Germany to see his father. Felix earlier on had sent money and purchased a ticket via E-ticket from Phuket to Hong Kong and from Hong Kong to KLIA and to Senai airport.

The Court had perused the defence exhibits namely, D18, D35 D36, D37, D38, D39, and D40 and taking into consideration all these exhibits and the accused oral testimony, and was convinced that Felix was not a fictitious character. Its existence could be gleaned from the Facebook messages between the accused and Felix in D36. The Facebook messages between the accused Facebook friends namely - Ritha in D37 and Veronica in D38 and the confirmation ticket by Air Asia in D39 and E-ticket in Malaysia Airlines in D40. The accused in a desperate situation and eager to fly home to see his sick father was willing to do anything so long as Felix was willing to assist him to get to Germany. The Court was also of the view that the accused had convinced the Court that under the circumstances that he had examined the purple bag P5A (1) and found inside some woman's clothes and plastic wrappers which contained the 6 handbags. Inside the 6 handbags were cunningly concealed the impugned drugs and could not be seen by the *'naked eyes'*. In this respect, the Court was of the view that the accused had succeeded in his defence of innocent carrier in the circumstances of the case.

had stated as follows:

'To resume our discussion regarding the important point of misdirection as regard the burden of proof especially the burden on the defence, we must point out, with respect that it was wrong for the judge to have criticised the defence for having failed to put to the investigating officer the name of Che Mat or the latter's telephone number or his place of abode, for the simple reason that those particulars had been disclosed in the cautioned statement of the appellant made the day after the arrest so that the police had all the time in the world to check their veracity. That being the case, the onus was on the prosecution to check on whether the appellant's version of the facts as they appeared in his cautioned statement and to which we have referred was true or false. In other words, the onus was upon the prosecution to disprove the important part of the appellant's version of facts. The defence were therefore under no duty to put the matters as aforesaid to the investigating officer having regard to their prior disclosure in the cautioned statement in holding to the contrary, the judge had undoubtedly overlooked the material portions of the cautioned statement touching on Che Mat, reversed the onus and placed it on the defence, so that on this further ground also the conviction had to be quashed.'

In the instant case, the version of the accused was put to the prosecution witnesses and the cautioned statement of the accused in 018 was consistent with that version. Turning to the conduct of the accused prior and subsequent to the arrest, the accused did not display in the Court's view guilt or at the very least there was sufficient doubt to the same. The accused did not attempt to flee when approached by the Customs officers.

In *Ibrahim Mohamad & Anor* (2011) 4 CLJ 113 Zulkefli Makinuddin FCJ (as his lordship then was) said and I quote, the *'fair and just assessment' approach to the defence case which would require the learned judge in all relevant aspects of the defence case to be weighed. The court must undertake a weighing exercise and evaluate from all angles approach.*

In *Ghasem Gharezadehsharbani Hassan v PP* (2014) 1 LNS 752 where the Court of Appeal held that as follows:

'The important point to make is this: In the cautioned statement which was recorded on 10.11.2010, the appellant denied any knowledge of the presence of drugs inside the bag and he gave an explanation as to why he had no such knowledge. The contents of the cautioned statement represented the early disclosure of the defence of the appellant. The cautioned statement was given about 3 days after the appellant was arrested. Indeed, he had stated his version of events at a very early stage of the investigation against him. The contents of the cautioned statement were consistent with his oral evidence in Court, hence the defence of the

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appellant was not something that was sprung for the first time in the defence case.'

It has been held in *Prasit Punyang v PP* (2014) 1 MLR that *'it is true that generally a self-serving cautioned statement is not in itself evidence of the truth asserted therein. But then it is the duty of the learned trial judge to consider and to analyse the cautioned statement that has been tendered as evidence by the appellant in support of his defence that he had no prerequisite knowledge about the impugned drugs found in the bag. In accordance with the provisions of section 182A (1) of the CPC, it is the duty of the learned trial judge at the conclusion of the trial to consider the cautioned statement of the appellant and decide whether the prosecution has proved its case beyond reasonable- doubt. The learned trial judge must consider carefully whether the cautioned statement is capable of raising a reasonable doubt on the prosecution case. The learned trial judge has a duty and obligation to fairly and justly weigh the defence version and evidence (including the cautioned statement of the appellant) to reach a just result (see Ahmad Mukamal Abdul Wahab & Ors v PP (2013) 4 CLJ 949).'*

In conclusion, the Court after evaluating and examining the entirety and totality of the evidence adduced by both the prosecution and the defence witnesses was of the considered opinion that the defence had succeeded in raising a reasonable doubt in the prosecution case and the prosecution had failed to prove its case beyond reasonable doubt. The accused had succeeded in his defence of innocent carrier and also that the Court accepts and believes the accused explanation. (see *Mat v PP* (1963) MLJ 263). The Court hereby acquit and discharge the accused from the charge of trafficking of 896.3 grams of methamphetamine pursuant to Section 39B (1)(a) of the Act.

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