[10]

IN THE HIGH COURT OF MALAYA AT PULAU PINANG

IN THE STATE OF PULAU PINANG

CRIMINAL TRIAL NO: 45A-24-06/2016

PUBLIC PROSECUTOR

V

LOPATKINA KLAVDIA

GROUNDS OF JUDGEMENT

INTRODUCTION

[1] Lopatkina Klavdiia ('Accused'), a citizen of Ukraine was charged and tried for the offence of trafficking dangerous drugs pursuant to Section 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA 1952'). The charge against the Accused reads as follows:-

> *"Bahawa kamu pada 31/12/2015, jam lebih kurang 11.00 pagi, di ruang ketibaan domestic Lapangan Terbang Antarabangsa Bayan Lepas, di dalam Daerah Barat Daya, di dalam Negeri Pulau Pinang, telah mengedar dadah berbahaya iaitu Kokain seberat 1541.80 gram dan oleh itu*

[11]

kamu 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."

[2] The prosecution called witnesses to prove the case as follows:-

a) PW1 - Kpl 148125 Wassdih bin Awang Tahir;

b) PW2 - D/Kpl 143699 Mohd Rozif bin Rozemi;

c) PW3 - En. Khairuzzaman bin Mustafa;

d) PW4 - Kpl Norazlan bin Ibrahim;

e) PW5 - En Ahmad Mohaiyeedin Abu Bakar;

f) PW6 - D/Sjn RF 94435 Ghazali bin Abdullah; and

g) PW7 - Insp G 20967 Mohd Sahizal bin Ahmad Zaki.

THE PROSECUTION'S CASE

[3] Based on the oral testimony and documentary evidence tendered by the prosecution, the prosecution's case can be briefly summarized as follows:-

(i) On 31.12.2015, at around 11.00am, D/Sjn Ghazali bin Abdullah (PW6) noticed the Accused who was standing at the bottom of the escalator in the Domestic Arrival Hall of Lapangan Terbang Antarabangsa Bayan Lepas ('LTAB') acting in an agitated and suspicious manner where the Accused's movement thereafter also appeared to be agitated and she was looking to the left and right as she approached the exit. As the Accused approached Customs Counter No. 1, she was observed to be on her own with no other passengers next to her.

(ii) As the Accused approached PW6 who was at Customs Counter No. 1, she was stopped by PW6 who observed that the Accused was carrying a black bag (P76) with her right hand and 2 plastic bags with the words "Dubai Duty Free Alokozay" (P21 and P35) with her left hand.

(iii) PW6 introduced himself as a police officer to the Accused and asked her to produce her passport for inspection. Upon checking her passport, the Accused was positively identified as Lopatkina Klavdiia holding Ukrainian Passport No. FB469853 born on 10.8.1993 and the validity of the passport was up to 8.5.2025.

(iv) PW6 instructed the Accused to take out all the items from P76 and PW6 found that P76 contained clothing items and cosmetics and also 2 tins of chocolate with the brand 'Lindor' (P77) and 'Nadiya (P78) respectively. No incriminating items were found in P76.

(v) PW6 then instructed the Accused to take out the items in P21 and P35 and found that P21 contained 2 tins of chocolate which PW6 marked as A (P22) and B (P29) respectively. P35 on the other hand also contained 2 tins of chocolate which PW6 marked as C (P36) and D (P41) respectively.

[14]

(vi) The content of tins A, B, C and D respectively can be summarised as follows:-

Tin A	30 multi coloured plastic packages each containing a hard substance marked as P23(1-30) and 6 other plastic packages.
Tin B	27 multi coloured plastic packages each containing a hard substance marked as P30(1-27), 3 silver plastic packages containing a hard substance marked as P31(1-3) and 7 other plastic packages.
Tin C	26 multi coloured plastic packages each containing a hard substance marked as P37(1-26) and 6 other plastic packages.
Tin D	22 multi coloured plastic packages each containing a hard substance marked as P42(1-22) and 7 other plastic packages.

(vii) According to PW6, the contents of P23(1-30), P30(1-27), P31(1-3), P37(1-26) and P42(1-22) were suspected to be dangerous drugs and that the Accused looked agitated

and was crying in a fearful manner when the said items were discovered.

(viii) The seized items were marked by PW6 and the Accused and the seized items were taken by PW6 to the Narcotics Office in LTAB and the Accused and the seized items were then handed over to the Investigating Officer, Inspector Mohd Sahizal bin Ahmad Zaki (PW7).

(ix) Subsequently, on 4.1.2016, at 3.55pm, PW7 sent the seized items in a box marked as "MSZ" (P11) to the Chemist, i.e. PW3 for the seized items to be analysed. The items sent are as stated in the Pol 31 (P17) which was also given to PW3 by PW7. PW3 confirmed that the solid substance analysed is cocaine and that the total weight of cocaine present is 1541.80 grams and that cocaine is a dangerous drug listed in the First Schedule of the DDA 1952 as defined in Section2 of the DDA 1952.

The Defence Submissions at the end of the Prosecution's Case [16]

[4] The defence had raised the following issues as the basis for stating that the prosecution had failed to prove a prima facie case against the Accused as follows:-

(i) Serious doubts as to the identity of the drug exhibits [P23(1-30), P30(1-27), P31(1-3), P37(1-26) and P42(1-22)];

(ii) The Accused person had no knowledge as to the actual contents of the 4 tins (P22, P29, P36 and P41);

(iii) Inconsistent evidence as to the actual demeanour of the Accused;

(iv) Shoddy, incomplete and selective investigation by PW7 which had prejudiced the Accused and deprived her an opportunity to demonstrate her innocence.

[5] The prosecution has submitted that the prosecution has successfully proven the ingredients of the offence as follows:-

[17]

(i) The items seized are dangerous drugs as defined in the DDA 1952;

(ii) The Accused had custody and control of the said drugs;

(iii) The Accused had knowledge of the drugs applying the presumption under section 37(d) of the DDA 1952 and was also guilty of trafficking applying the definition in section 2 of the DDA 1952.

[6] It was also submitted that any inconsistencies or failure to investigate is not material to the extent that it damages the prosecution's case.

FINDINGS AT THE END OF PROSECUTION CASE

[7] At the end of the prosecution's case, it was my finding that the prosecution had failed to prove a prima facie case against the Accused and had thereby acquitted and discharged the Accused.

[8] On appeal, the Court of Appeal had however found that the prosecution had successfully established prima facie case against

the Accused. This matter was therefore reverted to this court for further determination of the defence case. I am thus compelled to call upon the Accused to enter her defence.

THE DEFENCE CASE

The Accused (DW1)

[9] The Accused is a 24 year old Ukrainian national. Prior to her arrest, she was living with her mother, younger sister and younger brother. When the Accused came to Malaysia on 31.12.2015, she was only 22 years old. She worked as a trainee electrician in Odessa and she also worked as a waitress in a part time job.

[10] The Accused entered into a relationship with Anton Vitaliovych Markevich ("Anton") since June 2015. Their relationship went well in the beginning until the Accused got pregnant in mid of November, 2015. When the Accused told Anton that she got pregnant, Anton was very depressed and he didn't want the Accused to keep the baby. Anton even told the Accused to go for an abortion. After 1-2 weeks, Anton told the Accused that since he had completed his studies in Odessa, he had to go back to Rivne

for good as per his parents' instruction. They broke up after Anton went back to Rivne. Before Anton left, Anton gave the Accused UAH 5,000 and he asked the Accused to look for his friend, Ivan if she needed additional funds since she was going to keep the baby.

[11] In the middle of December 2015, the Accused realised that her current income was not enough to sustain herself and her family especially since she would be a single mother. She then contacted Ivan and told him about the problem that she was facing. Ivan then offered help and he requested the Accused to meet him personally with her passport.

[12] During the meeting, Ivan told the Accused that his friend was looking for someone to transport drugs abroad. The wages that would be paid is USD 1,000. However, the Accused immediately rejected Ivan's offer. Then Ivan came up with another offer, which was to transport jewellery and the wages would be USD 2,000.

[13] The Accused was curious about the latter's offer as to why Ivan's friend had to arrange someone to transport jewellery instead of sending the jewellery by courier. The Accused was told by Ivan

[20]

that the reason for arranging someone to transport jewellery was to avoid paying unnecessary tax and if Ivan's friend couriered the jewellery, Ivan's friend had to declare it on the consignment form and the request to courier could be rejected. Ivan also said that the reason why the wages to transport jewellery is higher than the wages to transport drugs is because the value of jewellery is higher.

[14] The Accused told Ivan that she had to consider the offer first. Ivan then asked for the Accused's permission to pass her mobile number to his friend, Igor Huslo ("Igor") and he also gave Igor's contact to the Accused as well. The Accused then contacted Anton to ask for his opinion about the offer. Anton supported the Accused and asked the Accused to go ahead as he did not see any problem with the offer given regarding the transportation of jewellery.

[15] The Accused then decided to take up the offer to transport the jewellery. The Accused called Ivan to inform him about the decision but she was asked to contact Igor directly. Therefore, the Accused contacted Igor and Igor requested to meet up in order to discuss in detail about the job scope.

[21]

[16] During the meeting, the Accused told Igor that she would only accept the job if it was to transport jewellery. Igor assured the Accused about the job and Igor told the Accused that her flight ticket and accommodation would be covered by him and the wages of USD 2,000 would be given to her after she returned to Ukraine. The Accused then agreed to the job, which was to transport jewellery.

[17] Three (3) days after the meeting (28.12.2015), Igor contacted the Accused to tell the Accused that he had booked a flight for her to go to Malaysia the next day. On 29.12.2015, Igor sent the Accused to Odessa Airport. In the airport, Igor gave the Accused a return flight itinerary to and from Dubai via Kiev (Exhibits P73 and P74), return flight itinerary to and from Penang via Kuala Lumpur (Exhibit P75), hotel booking confirmation in Dubai (Exhibit P71) and Penang (Exhibit P72), and allowance of USD 300. The Accused asked Igor since she was scheduled back to Odessa on 7.1.2016 from Penang, why the hotel booking confirmation in Dubai (Exhibit P71) was until 6.1.2016 and the hotel booking confirmation in Penang (Exhibit P72) was only until 3.1.2016. Igor told the Accused that initially he wanted the Accused to transport jewellery to Dubai but he then decided to send her to Penang. Igor told the

[22]

Accused that she could travel around after she delivered jewellery to his contact in Penang but he was not sure if she only wanted to travel in Penang, so he only booked the hotel for her until 3.1.2016. Igor asked the Accused to extend the stay if she decided to stay in Penang until 7.1.2016. However, Igor asked the Accused to keep the hotel booking confirmation in Dubai (Exhibit P71), in case there was any change of plan again.

[18] The Accused also asked Igor where was the jewellery that she had to bring, but she was told by Igor that his friend would be contacting her when she transited in Dubai to give the jewellery to her. The Accused was also asked to keep Igor posted once she arrived in Dubai, Kuala Lumpur and Penang.

[19] Once the Accused arrived at Dubai International Airport, she contacted Igor and Igor told her that everything was as planned and she was also asked to wait for the call from his friend. 3 – 4 hours before the next flight, the Accused received a call from a man and the man was speaking to the Accused in English. The Accused then contacted Igor as she could not understand the man at all. Igor asked the Accused to look around and tell him where she was. The Accused told Igor that there was a duty free and a

[23]

McDonald's close to her boarding gate (probably C1). Igor then asked the Accused to meet his friend at the McDonald's and he would relay the message to his friend.

[20] As requested, the Accused went to the McDonald's. Suddenly, a black man came to the Accused and asked her if she is "Cartier/Kaja" and he said "hello from Igor". The black man had a backpack and a Dubai Duty Free plastic bag in his hand. He then took out another Dubai Duty Free bag from his backpack. He gave the two (2) Dubai Duty Free plastic bags to the Accused and the Accused saw each Dubai Duty Free plastic bag contained two (2) sealed Tins.

[21] The Accused took out all the chocolate Tins and she found that all the Tins were sealed by cellophane tape. The Accused didn't remove the cellophane tape since they were well packed and they did not belong to her. The Accused then proceeded to the boarding gate.

[22] Once the Accused arrived at Kuala Lumpur International Airport, the Accused passed through the Immigration Counter and had her passport stamped. She then proceeded to the departure hall to

[24]

check in for her next flight to Penang since Kuala Lumpur was her final destination with Emirates Airlines and her flight to Penang was via Malaysia Airlines.

[23] After she checked in at the departure hall, she entered the domestic departure gate and went through the customs check. She placed her bag and the two (2) Dubai Duty Free plastic bags on the scanning machine and had all the items scanned but nothing incriminating was found on her. The Accused felt secure as this confirmed that she did not bring any illegal items to Malaysia.

[24] After arriving at Penang International Airport, the Accused went to Starbucks to have a coffee to freshen up herself since it was a long flight. When she came down from the escalator, she was stopped by a police officer. She was instructed to place her bag and the two (2) Dubai Duty Free plastic bags on the inspection table for inspection. The Accused was instructed to take out the chocolate Tins from the Dubai Duty Free plastic bags and to open the Tins. After the Accused removed the cellophane tape and opened the Tins, the Accused saw candies and chocolates in the Tins.

[25]

[25] The police officer asked the Accused a few questions but she did not understand. She told the police officer that she did not know and these were not hers using the hand gestures. The police officer then removed the wrapper of one candy and told the Accused that drugs were found inside.

[26] At that point in time, the Accused was shocked. She could not believe that they were drugs instead of jewellery. She was then brought to the inspection room for further investigation. She kept asking the police in Russian and some basic and broken English what was wrong actually but nobody seemed to understand her. The police inspected the contents in all the four (4) Tins and they told the Accused that most of them were drugs and she would be arrested. The Accused cried because she could not believe that she was trapped by Igor and Ivan and she didn't know why they did this to her.

[27] The Accused also claimed that her phone kept ringing in the inspection room and the police officer only allowed her to pick up one call. The Accused heard a man saying hello then the line was cut off because her phone ran out of credit since that was an international call.

[26]

[28] The Accused was then arrested and charged under **Section 39B of the DDA 1952**. In August 2016, the Accused delivered a baby girl.

COURT'S DUTY AT THE END OF TRIAL

[29] At the end of trial, the Court is placed under the duty to consider all evidence adduced before it and decide whether the prosecution had proved its case beyond reasonable doubt as provided for under s. 182A CPC as follows:-

> *"(1) At the conclusion of the trial, the court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.*
>
> *(2) 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*

[27]

(3) If the court finds that the prosecution has not proved its case beyond reasonable doubt, the court shall record an order of acquittal."

[30] In **Md Zainudin bin Raujan v. Public Prosecutor [2013] 4 CLJ 21**, the Federal Court made the following observation:-

"At the conclusion of the trial, s. 182A of the Criminal Procedure Code imposes a duty on the trial court to consider all the evidence adduced before it and to decide whether the prosecution has proved its case beyond reasonable doubt. 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. Public Prosecutor [1963] 1 LNS 82; [1963] 1 MLJ 263 with regard to the approach to be taken in evaluating the evidence of the defence."

[31] The phrase "reasonable doubt" was explained in the case of **PP v. Saimin & Ors [1971] 1 LNS 115**; **[1971] 2 MLJ 16** by Sharma J (as he then was) as follows:-

[28]

"It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the change.

...A reasonable doubt must be a doubt arising from the evidence or want of evidence and cannot be an imaginary doubt or conjecture unrelated to evidence."

[32] Also in the case of **Public Prosecutor v. Datuk Haji Harun bin Haji Idris & Ors [1977] 1 LNS 92; [1977] 1 MLJ 180**, Abdoolcader J, explained the phrase reasonable doubt as follows:

"It is not necessary for the defence to prove anything and all that is necessary for the accused to do is to give an explanation that is reasonable and throws a reasonable doubt on the case made out for the prosecution. It cannot be a fanciful or whimsical or imaginary doubt, and in considering the question as to whether a reasonable doubt has been

raised, the evidence adduced by and the case for the defence must be viewed in at least some amount of light, not necessarily bright sunlight, but certainly not against the dark shadows of the night."

[33] The Federal Court had in the case of **PP v. Mohd Radzi Abu Bakar** (**supra**) judicially approved the steps adopted in case of **Mat v. Public Prosecutor [1963] 1 LNS 82; [1963] MLJ 263** in the evaluation of the defence case as follows:-

"For the guidance of the courts below, we summarise as follows the steps that should be taken by a trial court at the close of the prosecution's case:

(i) the close of the prosecution's case, subject the evidence led by the prosecution in its totality to a maximum evaluation. Carefully scrutinise the credibility of each of the prosecution's witnesses. Take into account all reasonable inferences that may be drawn from that evidence. If the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused;

[30]

(ii) ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent am I prepared to convict him on the evidence now before me? If the answer to that question is 'Yes', then a prima facie case has been made out and the defence should be called. If the answer is 'No' then, a prima facie case has not been made out and the accused should be acquitted;

(iii) after the defence is called, the accused elects to remain silent, then convict;

(iv) after defence is called, the accused elects to give evidence, then go through the steps set out in Mat v. Public Prosecutor [1963] 1 LNS 82; [1963] MLJ 263."

[34] Upon a successful invocation of the presumption 37(da) of the DDA by the prosecution, the burden now shifts to the defence to disprove or rebut the said presumption on the balance of probabilities. Reference was made to the case of **Mohamed Radhi bin Yaakob v. PP [1991] 1 CLJ Rep 311; [1991] 3 CLJ 2073; [1991] 3 MLJ 169** where it was held as follows:-

"In the course of the prosecution case, the prosecution may of course rely on available statutory presumptions to prove one or more of the essential ingredients of the charge. When that occurs, the particular burden of proof as opposed to the general burden, shifts to the defence to rebut such presumptions on the balance of probabilities which from the defence point of view is heavier than the burden of casting a reasonable doubt but it is certainly lighter than the burden of the prosecution to prove beyond reasonable doubt."

"To earn an acquittal at the close of the case for the prosecution under s. 173(f) or s. 180 of the Criminal Procedure Code, the court must be satisfied that no case against the accused has been made out which if unrebutted would warrant his conviction (Munusamy v. Public Prosecutor). If defence is called, the duty of the accused is only to cast a reasonable doubt in the prosecution case. He is not required to prove his innocence beyond reasonable doubt."

[35] Bearing the above principles in mind, it is incumbent upon me at this juncture to consider and critically analyse all evidence

[32]

adduced by the defence in order to determine whether the defence had successfully raise a reasonable doubt as to the truth of the prosecution case in respect of the issue of possession and knowledge of the impugned drugs by the Accused and whether the defence had on the balance of probability successfully rebut the presumption of trafficking of the impugned drugs under s.37(da) of the DDA.

ANALYSIS OF EVIDENCE

[36] It was not in dispute that the Accused had carried with her the 2 duty free plastic bags (Exh P21 & P35) with 4 chocolate Tins containing the impugned drugs when she was arrested at the Pulau Pinang Airport. She was caught red handed carrying the 2 duty free plastic bags (Exh P21 & P35) with 4 chocolate Tins containing the impugned drugs which goes on to prove that the Accused had direct control and custody over the impugned drugs found in the Tins. The impugned drugs were cunningly and carefully concealed in the guise of chocolates and candies in the chocolate Tins so as to avoid detection leading to the strong inference that she had knowledge of the impugned drugs in the said Tins. From the evidence of PW6, it was clear that little effort

[33]

was required for the Accused to uncover what was contained in the 4 Tins.

[37] On the facts and circumstances of the present case before me, the irresistible inference that may be drawn in the circumstances is that the Accused knew that she was transporting drugs all along. There was sufficient evidence to make an affirmative finding that the Accused had possession of the impugned drugs independent of the statutory presumption under s. 37(d) of the DDA. The Accused was found to be carrying in the 2 duty free bags cocaine drugs weighing 1541.80 grammes which was more than the minimum weight of 40 grammes stated under s. 37(da)(ix) of the DDA, this automatically triggered the presumption of trafficking under s.37(da) of the DDA.

[38] The Accused's defence in the present case was centred upon her lack of knowledge about the impugned drugs contained in the 4 chocolate Tins. The Accused in her defence did not deny that she had carried P21 and P35 but claimed that she was under the impression that she was carrying jewelleries as per Igor's instruction instead of drugs. It was the Accused's defence that she

[34]

was deceived and manipulated by Igor and Ivan into trafficking in drugs.

[39] It was submitted by the Counsel for the Accused that the defence was not an afterthought or a recent invention as the crux of the defence had been put to the prosecution witnesses throughout the trial and it was also supported by her cautioned statement (Exh D90), her written statement (Exh D91) and the petition that was filed by the Prosecutor General's Office of Ukraine (Exh D93) and that the Accused's evidence was further corroborated by documentary evidence and the evidence given by the Consul of the Embassy of Ukraine Malaysia (DW2).

THE DEFENCE OF INNOCENT CARRIER

[40] The gist of the defence of the Accused was that she was an innocent carrier. It is well settled that a discussion on the defence of innocent carrier would naturally attracts the concept of wilful blindness. The concept of wilful blindness was succinctly explained by our Court of Appeal in the case of **Hoh Bon Tong v. PP [2010] 5 CLJ 240 CA** with reference to the dissenting judgment of Yong

[35]

Pung How CJ (Singapore) in the case of **PP v Hla Win [1995] 2 SLR 424** as follows:-

*"**[73]** The defence of innocent carrier must necessarily bring into the picture the concept of wilful blindness. And according to Yong Pung How CJ (Singapore) in Public Prosecutor v. Hla Win (supra) at p. 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 Williams aptly remarked in his Textbook on Criminal Law, at p. 125:

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

***[74]** Continuing at the same page, his Lordship said:*

[36]

In Ubaka v. PP [1995] 1 SLR 267, the principles laid down in Warner v. Metropolitan Police Commissioner [1968] 2 All ER 356; [1968] 2 WLR 1303 and modified in Tan Ah Tee v. PP [1978] 1 LNS 193; [1980] 1 MLJ 49 were applied by the trial judge. In its 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."

[41] Further reference was made to a more recent decision of the Federal Court in the case of **PP v. Herlina Purnama Sari [2016] 1 LNS 6; [2017] 1 MLRA 499**, where Raus Sharif, PCA (as his Lordship then was) had elaborated on the issue of wilful blindness as follows:-

"42. In our judgment, that the manner in which the impugned drugs, were concealed in the two boxes which were found in the Respondent's luggage goes to show that the Respondent knew the contents of the two boxes. It is not enough for the Respondent to merely assert absence of knowledge. On the

[37]

facts, there are many reasons for the Respondent to be suspicious that the luggage she was carrying contained impugned drugs. But she wilfully shut her eyes. It is preposterous to accept the Respondent's defence that she had agreed to carry something in the luggage to help Jo, a total stranger, to have the two boxes delivered to Jo's friend in Laos.

43. In our assessment, looking at the evidence in totality, the Respondent could not exculpate herself from her involvement in the trafficking of the seized drugs by saying that she had not knowledge or that she was an 'innocent' when she voluntarily agreed to hand over the boxes to a third party that she hardly knew in another country without enquiring further as to the contents of the said boxes. The Respondent, without any such inquiry, which she wound have been reasonable expected to make in any event, had agreed to give the boxes to someone just as a favour for her friend Vivian. The Respondent should have refused to carry out such an assignment if no satisfactory explanation as to their contents was forthcoming from Vivian whom she was in

contact with. Her failure to do so makes her guilty of wilful blindness.

44. Wilful blindness necessarily entails an element of deliberate action. If the person concerned has a clear reason to be suspicious that something is amiss but then embarks on a deliberate decision not to make further inquiries in order to avoid confirming what the actual situation is, then such a decision is necessarily a deliberate one. The key threshold element in the doctrine of wilful blindness itself is that of suspicion followed by (and couplet with) a deliberate decision not to make further investigations. Whether the doctrine of wilful blindness should be applied to any particular case would be dependent on the relevant inferences to be drawn by the trial judge. From all the facts and circumstances of the particular case, giving due weight, where necessary, to the credibility of the witnesses. (see PP v. Tan Kok An [1996] 2 CLJ 96; [1995] 4 MLRJ 256).

45. The concept of "wilful blindness" had been discussed in a number of local cases but it seems to have had its genesis in the dissenting judgment of Hong Pung How CJ (Singapore)

[39]

in the case of Public Prosecutor v. Hla Win [1995] 2 SLR 424. The doctrine of "wilful blindness" can be summarized to be applicable to a situation where the circumstances are such as to raise suspicion sufficient for a reasonable person to be put on inquiry as to the legitimacy of a particular transaction. To put it another way, if the circumstances are such as to arouse suspicion, then it is incumbent on a person to make the necessary inquiries in order to satisfy himself as to the genuineness of what was informed to him. Should he fail to embark upon this course of action, then he will be guilty of 'wilful blindness'. In other words he is then taken to know the true situation. He then cannot be said to have either rebutted the presumption of knowledge or have raised a reasonable doubt as to his knowledge of the situation.

46. Most of the cases where the concept was held to apply concerned cases in which the accused was asked to carry certain articles, or a package, or a bag, or to swallow certain items. In these circumstances, where the request to do any of those things mentioned would be such as would arouse the suspicion of a reasonable person as to the contents, it was upon the accused to make sufficient inquiries so as to

dispel or to set straight such suspicions. Should the accused not make any or any sufficient inquiries under those circumstances, the concept of wilful blindness would apply so as to fasten upon him or her the necessary knowledge as to the nature of those contents. In other words, if he deliberately 'shuts his eyes' to the obvious, because he 'doesn't want to know' he is taken to know.

47. In the present case, based on the evidence, it is our view that the Respondent is not an innocent carrier but a trafficker. As we have alluded to earlier, in essence the defence of innocent carrier raised by the Respondent has no merit because the Respondent had every opportunity to check for herself what she was carrying. In our judgment any reasonable person similarly circumstanced would have asked what were in those boxes. The respondent here is not a hapless victim caught in the web of inevitable circumstances beyond her control. We find no ring of truth in her story."

[42] It is clear from the above authority that ignorance simpliciter is not sufficient to rebut the inference of knowledge on the part of the

[41]

Accused, she must go further and show that she did not suspect and had no reason to be suspicious of the contents of the Tins. The defence of innocent carrier cannot stand in isolation and must be determined by reference to the facts and circumstances prevailing in each particular case (**Ridwan v. PP [2010] 4 CLJ 570; Hoh Bon Tong v. PP [2010] 5 CLJ 240; and Wong Vui Chin v. PP [2011] 3 CLJ 383**).

[43] It was odd that the Accused was not suspicious of the contents of the Tins. It was patently clear from the Accused's evidence that Ivan and Igor were not someone she was close to. She had no reason to blindly trust them. The fact that Ivan at first instance proposed for the Accused to transport drugs into another country should have caused the Accused to be more suspicious and warier of the circumstances she was in. Additionally, the instruction given by Igor that she will only receive the items for delivery from his friend at the airport should have further aroused her suspicion.

[44] Furthermore, the manner in which the drugs were concealed in the present case would not in the absence of a plausible explanation, deny the existence of knowledge on the part of the Accused of the impugned drugs. The Federal Court in **PP v. Abdul Rahman Akif**

[42]

[2007] 4 CLJ 337; [2007] 5 MLJ 1 adopted the approach that the fact that an incriminating article was found concealed is no ground for saying that an inference of knowledge of the drug could not be drawn against the respondent. Ariffin Zakaria, CJ (as he then was) had in the said case stated as follows:-

> *"[17] Therefore, the presence of the three packages in the car without a plausible explanation from the respondent could give rise to a strong inference that he had knowledge that the packages contained drug or things of similar nature (see also Lim Beng Soon v Public Prosecutor [2000] 4 SLR 589). We further agree with the prosecution that the fact that the drug was found wrapped in newspaper is no ground for saying that an inference could not be drawn against the respondent that he had the requisite knowledge. In this regard it is pertinent to refer to the observation of the Singapore Court of Appeal Zulfikar bin Mustaffah v Public Prosecutor [2001] 1 SLR 633, at p 639:*
>
> *21. For the element of 'possession' (within the meaning of s. 17 of the Misuse of Drugs Act) to be established, it must not only be shown that the accused had physical control of the*

[43]

drugs at the relevant time; the prosecution must also prove that the accused possessed the requisite knowledge as the contents of what he was carrying: see Warmer v. Metropolitan Police Commissioner [1969] 2 AC 256; Tan Ah Tee & Anor v. PP [1978-1979] SLR 211; [1980] 1 MLJ 49. In the course of the appeal before us, counsel for the appellant relied heavily on the fact that the contents of the bundles were securely wrapped in newspaper and could not be identified. We were accordingly invited to draw the inference that the appellant had no knowledge of the contents of the bundles.

22. We were unable to accede to this request. While the fact that the contents of the bundles were hidden from view may have been relevant in determining whether the requisite knowledge was absent, this factor should still not be given too much weight. Otherwise, drug peddlers could escape liability simply by ensuring that any drugs coming into their possession are first securely sealed in opaque wrappings. Rather, the court must appraise the entire facts of the case to see if the accused's claim to ignorance is credible. As

[44]

Yong Pung How CJ remarked in PP v. Hla Win [1995] 2 SLR 424 (at p 438):

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

[45] Further reference on this point may also be made to the case of **Teh Hock Leong v. PP [2008] 4 CLJ 764** where the Court of Appeal said as follows:-

"[8] Turning to the facts of the present instance, we agree with the learned trial judge that the method employed to bring the drugs in question from Thailand into Malaysia was done in most cunning fashion to escape detection by the authorities. The method employed to convey or transport a drug may sometimes furnish evidence of knowledge. For example, an attempt to carefully conceal a drug may indicate an intention to avoid detection and thereby point to knowledge. Of course it all depends on the facts of each individual case."

[45]

[46] It was also the Accused's further defence that there was no overt act on the part of the Accused from which an inference of knowledge could be drawn as confirmed by PW6 in his testimony at trial where he stated that he had ordered the Accused to open the Tins for inspection and she had no qualms about and heeded to his instruction. PW6 further stated that the Accused was anxious and started crying when she realised that in fact drugs were disguised as candies / chocolate in all the chocolate Tins (Exhibits P22, P29, P36 and P41). It was further confirmed by PW6 and PW7 that when the drugs were found in the chocolate Tins, the Accused immediately said "it is not mine" using the hand gestures to show that all the chocolate Tins did not belong to her.

[47] It has timeously been emphasised that whilst evidence of conduct may be relevant factor to be considered by the court, the conduct of the accused is not to be taken in isolation but together with all the other circumstances of the case as was decided in the case of **Public Prosecutor v. Tan Tatt Eek [2005] 4 CLJ 460,465-466** where the Federal Court had stated as follows:-

> *"In this case, the respondent was seen and found to be carrying the orange plastic bag in his right hand and having*

dropped the bag he reacted with shock when he was arrested by the police. The learned trial judge held that the respondent had physical custody and control of the bag, and we see that he was right in coming to that conclusion. However, he went further to find by inference from the respondent's conduct and appearance that the respondent had knowledge of the drugs in the bag. To our minds, such a finding was not justified on the evidence before him.

The factum of the respondent having dropped the bag and displayed reaction of shock can be facts upon which the prosecution can invite the trial court to infer guilt on part of the respondent over the presence of the drugs in the bag. But such conduct is equally consistent with an innocent man who is in a state of pure panic reacts in that way (see Abdullah Zawawi bin Yusoff v. Public Prosecutor [1993] 4 CLJ 1)"

[48] Similarly, in the Federal Court case of **Ibrahim Mohamad & Anor v. PP [2100] 4 CLJ 113**, Zulkefli Makinududin FCJ (as he then was) in delivering the decision of the majority had states as follows:-

[47]

*"**[17]** Whilst the conduct of the accused fleeing the scene may be a relevant factor to be considered, such a conduct however must be weighed against the circumstances of the case. This is because even an innocent man may feel panicky and try to evade arrest when wrongly suspected of committing a crime. It is a common instinct of self-preservation. As regards the present case it is noted that the road leading to the "road block" is a straight road and therefore the first accused being the driver of the vehicle could have easily seen the "road block" miles away. The fact that the first accused did not make a u-turn or attempt to run away before approaching the "road block" can give rise to an inference that both the first accused and the second accused had no knowledge of the drugs in the vehicle.*

...

***[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*

[48]

interpretation. Accordingly, evidence of conduct must not be referred to in isolation. Instead, conduct must be considered with other evidence or circumstances."

[49] In the case of **Parlan Dadeh v PP [2009] 1 CLJ 717**, the Federal Court had held as follows:-

"the Federal Court explained the connection between the conduct and knowledge of an accused person in relation to the offending exhibits found in his possession and the need for him to offer an explanation as follows: The reaction of the appellant in looking stunned or shocked upon being approached by the police was clearly admissible under section 8 of the Evidence Act 1950 ("the Act") since it has a direct bearing on the fact in issue as the drugs found were tucked away in the front of the jeans worn by him. The explanation for his reaction must therefore be offered by the appellant himself as required by section 9 of the Act. However, as the appellant did not offer any explanation for his reaction upon being approached by the police, it could be validly used as evidence against him. In the circumstances,

the inference to be drawn from the evidence was that he knew what he was carrying."

[50] It is in my considered view that the docile conduct of the Accused from the time she was detained until the time the impugned drugs were found did not necessarily infer absence of knowledge of the impugned drugs as was pointed out by the Federal Court in the case **Teh Hock Leong v. PP (supra)** as follows:-

"...in order to draw a favourable inference from the appellant's contemporaneous conduct, his action or inaction must be examined in the light of the situation at the material time. The area where the appellant was confronted by PW5 was the arrival gate of an incoming flight in the KLIA. This was the only exit point where passengers disembarking the plane can enter the KLIA terminal. It is common knowledge that the area was tight and restricted with hardly any room for the appellant to make a successful escape even if he had tried. From here the appellant was then taken by PW5 and his men to PW5's office in the KLIA.

[50]

The approximate walking distance was 600–800 meters. Here again the appellant's chances of a quick getaway were minimal since he was escorted and was within the restricted vicinity of the KLIA building. And, if the appellant were to attempt to throw away or disassociate himself with the backpack during this entire duration described it would evidently be noticeable. Of course, since the drugs were so cunningly concealed, there could be no necessity to take such drastic actions which may attract instant suspicion.

So, against these circumstances, the appellant's docile conduct throughout the period described could not have inferred an absence of knowledge of the said drugs. For this reason, there is no misdirection by the courts below."

[51] The factual matrix of the case was such that the Accused ought to have known that the Tins contained drugs and that she was asked to be a drug courier. The Accused failed to make further inquiries and/or to check the content of the Tins even though she had ample opportunity to do so. If she had opened the Tins, she would have realised that the content were not jewelleries as per Igor's instruction. The candy and chocolate wrappings found in the Tins

[51]

would have alerted the Accused that something other than jewelleries were concealed in them.

[52] It was upon the Accused to make sufficient, inquiries so as to dispel or to set straight the suspicions. I found that the proper inference to be drawn from the facts and circumstances of this case before me was that the Accused had wilfully shut her eyes to the obvious truth of the matter and merely relied on the assurance given by Ivan and Igor, both of whom she hardly knew. Despite all the opportunities available for her to check the Tins and despite the suspicious circumstances surrounding the whole scheme of events, the Accused chose to turn a blind eye. She did not want to know and chose not to find out that she was carrying drugs. Her lack of compulsion in ascertaining the contents of the Tins demonstrated that she knew they contained drugs and accepted the task assigned to her fully aware of the consequences of her conduct. I am thus of the considered view that the conduct of the Accused in the present case amount to wilful blindness.

[52]

EVIDENCE ON 'IGOR' AND 'IVAN'

[53] Counsel for the Accused submitted that based on Exh D90, D91 and D93 together with all the documents received from the Prosecutor General's Office of Ukraine and National Police of Ukraine, that it was apparent that the Accused was manipulated by Igor and that she was duped to travel to Malaysia. This has been further confirmed by the Official Consul of the Embassy of Ukraine in Malaysia (DW2) where from the investigation that has been conducted in Ukraine, DW2 was made to understand that Igor has also confirmed that the Accused was merely asked to bring jewellery to Malaysia.

[54] Effectively, the issue raised by the learned counsel concerned with what is commonly known as the 'Alcontara Notice' which is the furnishing of sufficient particulars and reasonable details in support of the Accused's defence during the course of investigation. Such notice if sufficiently given would shift the burden to the prosecution to rebut the same. On this point, the Court of Appeal in the case of **Phiri Mailesi (Zambian) v. PP [2013] 1 LNS 391**; **[2013] 5 MLJ 780**, through Hamid Sultan bin Abu Backer JCA, had this to say:-

[53]

"It is pertinent to note that the 'Alcontara Notice' must have sufficient particulars in the right perspective and not a vague notice where the prosecution will not be able to advance their investigation to rebut the defence story or version. It must also be given at the earliest opportunity at the material time of the arrest or at least upon counsel taking instruction from the accused to conduct its defence. In addition, the defence's version should be put at the prosecution stage and the story must be maintained at the defence stage. These will be a duty placed on the judge even at the prosecution stage to positively evaluate the story of the accused relating to 'Alcontara Notice' before evaluating the prosecution case and applying the maximum evaluation as Alcontara case places the onus on the prosecution to rebut or sufficiently explain that they have discharged that onus. In the instant case evidence will show that the defence has not given an 'Alcontara Notice' in the right perspective."

[55] Having thoroughly analysed the Accused's cautioned statement, all the documentary evidence as adduced before me as well as her testimony at trial, I find that the Accused was consistent in her defence with regard to the carrying of jewelleries as opposed to

[54]

the impugned drugs. However, a mere consistency of the defence in the cautioned statement with the oral testimony do not prove the truth therein as held in the case of **Msimanga Lesaly v. PP [2005] 1 CLJ 398** wherein Gopal Sri Ram JCA (as he then was) said:-

> *"The degree of credence that a court is reasonably expected to assign to a particular version of events depends on the facts and circumstances of each case. And, the mere fact that an accused's evidence is consistent with his earlier out of court statements does not require a court in every case to hold that he or she is a witness of truth. Were it otherwise, the assessment of oral testimony would become a robotic function. But the judicial appreciation of evidence is a human and not a robotic function. There are no fixed rules about it: only general guidelines. That much is made clear by numerous judgments of our courts. But we would in the context of this case cite Lim Yow Choon v. PP [1971] 1 LNS 181; [1972] 1 MLJ 205 where it was held that:-*
>
> *notwithstanding that the cautioned statement was part of the evidence for the prosecution and that there were facts in the cautioned statement which appeared to contradict other parts*

of the evidence led by the prosecution, it was open to the trial judge as a judge of facts to assess the evidence and in so doing accept part of it and reject the rest."

(emphasis added)

[56] Returning to the present case before me, an examination of the Accused cautioned statement (Exh D90) revealed that other than the name 'Alex', the Accused did not in her cautioned statement mentioned any other names such as 'Igor' and 'Ivan'. It is well settled that the duty rests upon the defence to ensure that all crucial information beneficial to the defence must be disclosed at the earliest possible opportunity to enable a thorough investigation to be carried out by the police. Failure by the Accused to inform earlier of the existence of Igor and Ivan tantamount to an afterthought. Reference was made to the Federal Court case of **Teng Howe Sing v PP [2009] 3 CLJ 733** where it was held as follows:-

*"**[31]** In Badrulsham 's case, the court was of the view that the failure of the accused to inform the raiding officers that the white plastic bag belonged to Noor Azlan at the time of*

[56]

his arrest and only revealing this information during the interrogation two hours after his arrest, goes some way to support the case for the prosecution.

[32] *Applying the principle in Badrulsham 's case to the facts of the instant case, the learned trial Judge was correct to conclude that the appellant had two opportunities to provide information about "Ho Seng", ie, at the time of his arrest and five days later during recording of his cautioned statement but he failed to do so. We are therefore of the view that in the circumstances, the appellant's failure to provide relevant information about "Ho Seng" for the police to carry out a thorough investigation into the probability of his defence, entitled the learned trial judge to disbelieve him."*

(see also cases of **Hafedz Saifol v. PP [2017] 1 LNS 977**; **PP v. Badrulsham bin Baharom [1987] 1 LNS 72, [1988] 2 MLJ 585**)

[57] The Alcontara Notice given by the Accused was bereft of any details or particulars to facilitate any meaningful investigation on Igor and Ivan and thus was not an effective Alcontara Notice.

[57]

Failure of the Accused to inform PW6 about Ivan and Igor at the time of her arrest goes some way to support the prosecution's case and that on the contrary it goes on to show that less weight ought to be attached to the Appellant's defence which therefore entitled me to disbelieve the Accused. Reference was made to the Federal Court case of **Teng Howe Sing v. PP [2009] 3 CLJ 733** where the Federal Court had alluded to the decision in **PP v. Badrulsham Baharom [1987] 1 LNS 72; [1988] 2 MLJ 585** on this issue and stated as follows:

> *"[30] With regard to the above contention of the appellant it is our judgement that it is misconceived. By commenting on the failure of the appellant to provide all relevant information regarding "Ho Seng" to the police at the time of his arrest or when his cautioned statement (D2) was recorded five days after his arrest does not mean that the learned trial Judge had imposed on the appellant a duty a speak/disclose them in his cautioned statement nor did he draw any adverse inference against the appellant. The learned trial judge's comments on the late disclosure of the real identity of "Ho Seng" at the defence stage merely goes to show the weight that the court attached to the appellant's defence which is*

permitted by the law. On this point we would like to refer to the case of PP v. Badrulsham bin Baharom [1987] 1 LNS 72; [1988] 2 MLJ 585, wherein Lim Beng Choon J at p. 591 said that:

... So we are left with nothing more than the bare oral assertion of the accused that it was Noor Azlan who asked him to collect the bag on behalf of the former and that the accused himself had no knowledge of the contents of P3. If that be the case, one would hardly imagine that he would not have told either PW3 or PW5 at the railway station at Alor Setar at the time of his arrest that P3 belonged to Noor Azlan instead of saying that there was nothing in P3.

[31] In Badrulsham's case, the court was of the view that the failure of the accused to inform the raiding officers that the white plastic bag belonged to Noor Azlan at the time of his arrest and only revealing this information during the interrogation two hours after his arrest, goes some way to support the case for the prosecution.

[59]

[32] Applying the principle in Badrulsham 's case to the facts of the instant case, the learned trial judge was correct to conclude that the appellant had two opportunities to provide information about "Ho Seng", ie, at the time of his arrest and five days later during recording of his cautioned statement but he failed to do so. We are therefore of the view that in the circumstances, the appellant's failure to provide relevant information about "Ho Seng" for the police to carry out a thorough investigation into the probability of his defence, entitled the learned trial judge to disbelieve him."

(emphasis added)

[58] On the evidence of DW2, I am of the considered view that evidence of DW2 rendered little assistance, if any, in support of the defence case. DW2 was not involved in the investigation of the individual named Igor and had basically derived her information from the correspondence letters between the authorities in Ukraine and Malaysia without having conducted any independent investigation into the matter relating to Igor, thus DW2's evidence had not in any way affirmed the truth of the defence case.

[60]

[59] The defence had in this case further relied on the evidence of the letter of the Prosecutor General's Office of Ukraine (Exh D99) to show the existence of Igor. There was not an iota of evidence adduced to show the existence of Ivan. While I agree that based on Exh D99 Igor is not a fictitious character, this does not disprove the Accused's knowledge of the impugned drugs inside the Tins, it does not change the fact that it was the Accused herself whom was found to be in possession with knowledge of the impugned drugs. The issue of ownership of the impugned drugs is irrelevant, the relevant issue to be determined by this court is confined to the issue of custody, control, possession and knowledge of the impugned drugs by the Accused. Reference was made to the case of **Ali Hosseinzadeh Bashir v. PP [2015] 1 CLJ 918** where it was held by the Court of Appeal as follows:-

> *"[27] Even assuming it is true that Ashgar does exist and that he did ask the appellant to carry the bag to Malaysia, the question for the trial court to consider was whether the accused had knowledge of the drugs. To prove trafficking knowledge must of course be established but that is a matter for the appellant to disprove by virtue of section 37(d) of the*

DDA and not for the prosecution to establish at the close of its case once custody or control had been established. Thus, whether he was asked by someone to carry the bag is irrelevant in any event.

[28] Further, if in fact the appellant had knowledge of the drugs, the fact that he was asked by Ashgar to carry the drug, even if true, will not exonerate him of the offence charged unless he can bring himself within the protection accorded by section 94 of the Penal Code, which reads:

"94. Except murder, offences included in Chapter VI punishable with death and offences included in Chapter VIA, nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence: Provided that the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint."

[62]

[29] It certainly is not the defence case that the appellant was under threat of instant death when he agreed to carry the bag to Malaysia for Ashgar. Furthermore, the appellant's claim that he was asked by Ashgar to carry the bag to Malaysia is highly improbable. To recapitulate, what he told SP6 was that Ashgar asked him to carry the bag to Malaysia. Note that he did not mention any other item other than the bag, which means his claim of lack of knowledge was only in relation to the drugs in the bag and not the drugs found elsewhere."

(see also the case of **Le Ngoc Thu v. PP [2018] 1 LNS 984**)

[60] In view of my findings above and based on the evidence so adduced, I found that the defence adduced by the Accused was one of bare denial and an afterthought. It was also my finding that the Accused in this case was guilty of "wilful blindness". I am satisfied that the defence had failed to raise a reasonable doubt against the prosecution's case that the Accused had mens rea possession of the impugned drugs by virtue of the following fact:-

(i) That the Accused was caught red handed carrying the two duty free plastic bags with chocolate Tins containing the impugned drugs;

(ii) The Accused overt act in concealing the impugned drugs in chocolate and candy wrappings in the chocolate Tins to avoid detection give rise to a strong inference of knowledge on the part of the Accused;

(iii) the Accused had ample opportunity to check on the content of the chocolate Tins but chose not to do so which leads to irresistible conclusion that the Accused had knowingly carried the impugned drugs fully aware of the consequences of her conduct.

[61] Having made the affirmative finding of possession, I am also satisfied that the defence had failed to rebut the presumption of trafficking under s. 37(da) of the DDA. The defence did not put up any defence to negate the element of trafficking, the defence raised by the Accused was complete denial and as such had fallen short of rebutting the presumption of trafficking, it is my finding that the presumption of trafficking under s. 37(da) of the DDA invoked against the Accused stands unrebutted.

[64]

SENTENCE

[62] With regard to the charges under s. 39B of the DDA, I am mindful of the amendment made to the said section through the Dangerous Drugs (Amendment) Act 2017 (DD(A)A) which had come into force on 15.3.2018 read as follows:-

"Section 39B(2) Any person who contravenes any of the provisions of subsection (1) shall be guilty of an offence against this Act and shall be punished on conviction with death or imprisonment for life and shall, if he is not sentenced to death, be punished with whipping of not less than fifteen strokes.

Section 39B(2A) In exercising the power conferred by subsection (2), the Court in imposing the sentence of imprisonment for life and whipping of not less than fifteen strokes, may have regard only to the following circumstances:

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

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

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

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

Section 39B(2B) For the purposes of subsection (2A), "enforcement agency" means -

(a) the Royal Malaysia Police;

(b) the National Anti-Drugs Agency;

(c) the Royal Malaysian Customs Department;

(d) the Malaysian Maritime Enforcement Agency; or

(e) any other enforcement agency as may be determined by t

Minister."

[66

[63] In view of the above provision, I had conducted a thorough scrutiny on the totality of evidence adduced by the prosecution as well as the defence. Based on evidence adduced by the defence, the Accused had identified the first man in the picture attached on page 16 of the petition that was filed by the Prosecutor General's Office of Ukraine (Exhibit D93) as Igor. Documentary evidence were adduced to establish knowledge on the part of the prosecution, the Attorney General's Chambers ("the AGC") in Malaysia and the Investigating Officer (PW8) that this case is related to an arrest that was made in Ukraine, i.e. Igor. Based on Exhibit D99 i.e. the investigation of the National Police of Ukraine, Igor had been arrested and detained in the prison of the city of Odesa.

[64] In view of the above evidence, I am of the considered view that the prerequisites under section 39B(2A)(d) had been complied with by the Accused in affording her the life imprisonment sentence.

[67]

CONCLUSION

[65] Having conducted maximum evaluation of all evidence produced before me and for the foregoing reasons, it is in my finding that the defence had failed to cast a reasonable doubt as to the truth of the prosecution's case. I am satisfied that the prosecution had succeeded in proving the charge beyond reasonable doubt against the Accused. The Accused persons was thus found guilty and convicted of the charge against her under s. 39B(1)(a) of the DDA punishable under s. 39B(2) of the same Act for the trafficking of 1541.80 grams of Cocaine and was therefore sentenced to life imprisonment.

ABDUL WAHAB BIN MOHAMED
JUDICIAL COMMISSIONER
HIGH COURT OF MALAYA PENANG

Dated: 5 November 2018

[68]

Public Prosecutor:

TPR Naizatul Zima binti Tajudin

Counsel For Accused:

Dato' Sivananthan a/l Nithyanantham &
Cik Low Huey Theng