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Khee Thuan Giap v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO A-05(M)-445–09 OF 2017
MOHTARUDIN BAKI, AHMADI ASNAWI AND STEPHEN CHUNG JJCA
13 MAY 2019

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Criminal Procedure — Trial — Cross-examination of accused's witnesses — Whether prosecution's failure to challenge accused's witnesses on their version of the events amounted to an acceptance of their evidence — Whether proper approach was for trial court to undertake careful evaluation of the totality of the evidence tested against the probabilities of the case to determine cogency/weight to be given to testimonies of the witnesses — Whether testimonies of defence witnesses riddled with inconsistencies and therefore not credible — Whether no material of sufficient probative value to negate prosecution's case was advanced — Whether issues raised by defence were not brought up at earliest available opportunity to enable police to check on their veracity but were only raised for first time at trial — Whether such approach showed lack of credibility and invited inference that defence was a recent invention/afterthought — Whether accused failed to show police witnesses had any motive to falsely implicate him with the commission of the offence

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The appellant was convicted and sentenced to death by the High Court on a charge of trafficking in 76.79g of methamphetamine. According to the prosecution's narrative, a five-member police party led by SP5 on crime prevention rounds saw the appellant standing alone outside his double-storey house. As SP5 approached him, the appellant tried to run into the house but he was caught. From a search on the appellant's person, SP5 found several plastic packets containing the methamphetamine in his trouser pocket. Using keys recovered from the appellant, the police party entered and searched the house but did not find any occupants or any incriminating matter inside. While the search was going on, the appellant's brother ('SD6') and his friend ('SD7') arrived at the house on a motorcycle. Both of them were questioned by the police and were arrested. In his defence to the charge of trafficking in the drug, the appellant claimed that the police party had cut open the padlock to the front grille door of the house before gaining entry. He said he was asleep at the time in his bedroom upstairs when the police woke him up. The appellant said SD6 and SD7 were in the hall of the house at the time. The appellant claimed that two of the policemen took SD7's motorcycle and returned within a short time with a plastic bag containing the drugs and the appellant was told that the drugs belonged to him. The appellant's testimony was corroborated by SD6

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and SD7, a locksmith (SD9) who claimed he repaired the broken padlock ear of the grille door, and two immediate neighbours (SD8 and SD10) — one of whom said he saw the policemen breaking the front grille door of the house while the other said he saw two policemen picking up a plastic bag from a drain behind the house. The trial court held that the defence was a bare denial and failed to either rebut the presumption of trafficking invoked against the appellant or to cast a reasonable doubt on the prosecution's case. The court found the defence witnesses were not credible and that their evidence was concocted to help the appellant avoid the charge. In the instant appeal against his conviction and sentence, the appellant submitted, inter alia, that he was entitled to an acquittal as the prosecution's failure to challenge the corroborative testimonies of SD6, SD7, SD8, SD9 and SD10 amounted to an admission that the defence's version of the events was true, or at the very least, had cast a reasonable doubt on the prosecution's case.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) The mere failure to cross-examine did not necessarily mean the defence's version of events had to be taken as accepted. There were circumstances where failure to cross-examine did not necessarily mean that adverse inferences must be drawn as a matter of course. Rather, the proper approach was for the court to undertake a careful evaluation of the totality of the evidence in order to determine the cogency and weight of such testimony. The failure to cross-examine should be tested against the probabilities of the case (see paras 35 & 37).

(2) The testimonies of both SP5 and SP6 were uncontroverted and were fundamentally intact in respect of the factum of the recovery of the impugned drugs, the appellant's mens rea possession and knowledge of the said drugs and the trafficking elements of the offence in spite of the intensity of the scrutiny mounted by the defence in cross-examining them. The testimonies of SP5 and SP6 accorded well with the probabilities of the case. It would be a serious misdirection to give little or no weight to their evidence (see paras 38–39).

(3) The trial judge found that there were inconsistencies appearing consistently throughout the testimonies of the witnesses for the defence and she correctly concluded that the defence was a mere denial with no material of sufficient probative value that negated the prosecution's case. In all the circumstances of the case, the prosecution's failure to put the desired 'put' questions to challenge the evidence of the relevant defence witnesses could not amount to an acceptance of their testimonies. Such an approach had no basis in law (see paras 40 & 42–43).

(4) The appellant failed to disclose his defence at the earliest possible opportunity, either at the point of his arrest or to the investigating officer (SP7) during the latter's investigation. That failure would detract the

A weight to be accorded to his subsequent testimony in court as the prosecution was not in a position to check on whether the appellant's version of the events was true or false. The appellant's failure rendered the defence's evidence as lacking in credibility and attracted the adverse comment that it was a recent invention or afterthought as it was only
B revealed for the first time when it was mounted in court (see paras 45–46).

(5) The appellant failed to show any motive on the part of SP5, SP6 and D/Kpl Yusrizal bin Yahya to falsely implicate him with the commission of
C the offence in this case. The evidence revealed that the said three witnesses were total strangers to the appellant and that there was nothing inherently improbable in their evidence (see paras 48–49 & 51).

[Bahasa Malaysia summary

D Perayu telah disabitkan dan dihukum mati oleh Mahkamah Tinggi atas pertuduhan mengedar 76.79g methamphetamine. Berdasarkan naratif pendakwaan, pasukan lima anggota polis diketuai oleh SP5 dalam rondaan pencegahan jenayah telah melihat perayu berdiri seorang diri di luar rumah dua tingkatnya. Apabila SP5 menghampirinya, perayu cuba melarikan diri ke
E dalam rumahnya tetapi dia ditangkap. Daripada pemeriksaan ke atas badan perayu, SP5 menjumpai beberapa bungkusan plastik mengandungi methamphetamine dalam poket seluarnya. Dengan menggunakan kunci yang didapati daripada perayu, pasukan polis telah memasuki dan memeriksa rumah itu tetapi tidak menemui penghuni atau apa-apa perkara yang
F mencurigakan di dalamnya. Semasa pemeriksaan dibuat, abang perayu ('SD6') dan kawannya ('SD7') tiba di rumah itu dengan motorsikal. Kedua-dua mereka disoal oleh polis dan telah ditangkap. Dalam pembelaan terhadap pertuduhan pengedaran dadah itu, perayu mendakwa bahawa pasukan polis itu telah memotong untuk membuka kunci mangga gril pintu depan rumah
G itu sebelum dapat masuk. Dia mengatakan dia sedang tidur pada masa itu di dalam bilik tidurnya ti tingkat atas apabila polis mengejutkannya. Perayu mengatakan SD6 dan SD7 berada di ruang tamu rumah itu pada masa tersebut. Perayu mendakwa dua polis itu mengambil motorsikal SD7 dan memulangkannya sejurus selepas itu dengan beg plastik mengandungi dadah
H dan perayu diberitahu bahawa dadah itu miliknya. Keterangan perayu telah disokong oleh SD6 dan SD7, tukang kunci ('SD9') yang mendakwa dia membaiki cangkuk kunci mangga gril pintu itu, dan dua jiran bersebelahan (SD8 dan SD10) — salah satunya mengatakan dia melihat polis itu memecah gril pintu rumah itu manakala seorang lagi mengatakan dia melihat dua polis
I itu mengutip beg plastik daripada longkang di belakang rumah itu. Mahkamah perbicaraan memutuskan bahawa pembelaan itu hanya penafian biasa dan telah gagal untuk mematahkan andaian pengedaran yang digunakan terhadap perayu atau pun menimbulkan keraguan munasabah ke atas kes pendakwaan. Mahkamah mendapati saksi-saksi pembelaan tidak boleh dipercayai dan

bahawa keterangan mereka digunakan untuk membantu perayu mengelak daripada pertuduhan itu. Dalam rayuan ini terhadap sabitan dan hukumannya, perayu berhujah, antara lain, bahawa dia berhak mendapat pelepasan kerana kegagalan pendakwaan mencabar keterangan sokongan SD6, SD7, SD8, SD9 dan SD10 yang merupakan pengakuan bahawa versi pembelaan berhubung kejadian tersebut adalah benar, atau sekurang-kurangnya, mempunyai keraguan munasabah ke atas kes pendakwaan.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Hanya kegagalan untuk memeriksa balas tidak semestinya bermaksud versi pembelaan tentang kejadian itu perlu diambil sebagai diterima. Terdapat keadaan di mana kegagalan untuk memeriksa balas tidak semestinya bermaksud bahawa inferens bertentangan perlu dibuat berhubung perkara itu. Sebaliknya, pendekatan wajar adalah untuk mahkamah membuat penilaian teliti tentang keseluruhan keterangan bagi tujuan menentukan keterangan yang jelas dan kukuh. Kegagalan memeriksa balas patut diuji terhadap kebarangkalian kes (lihat perenggan 35 & 37).

(2) Keterangan kedua-dua SP5 dan SP6 tidak bercanggah dan selari berkaitan fakta penemuan dadah yang dipersoalkan, mens rea perayu tentang milikan dan pengetahuan dadah tersebut dan elemen-elemen pengedaran berhubung kesalahan itu meskipun pemeriksaan teliti dibuat ke atas pembelaan dalam pemeriksaan balas mereka. Keterangan-keterangan SP5 dan SP6 selari dengan kebarangkalian kes. Ia adalah salah arah serius jika keterangan mereka tidak diberikan pertimbangan sewajarnya (lihat perenggan 38–39).

(3) Hakim perbicaraan mendapati bahawa saksi-saksi tidak konsisiten semasa memberi keterangan-keterangan mereka untuk pembelaan dan beliau adalah betul untuk membuat kesimpulan bahawa pembelaan merupakan penafian semata-mata tanpa nilai probatif mencukupi yang material untuk menggagalkan kes pendakwaan. Berdasarkan keseluruhan keadaan kes tersebut, kegagalan pendakwaan untuk mengutarakan persoalan 'put' yang diingini bagi mencabar keterangan saksi-saksi pembelaan yang relevan tidak merupakan penerimaan keterangan-keterangan mereka. Pendekatan sedemikian tidak mempunyai asas undang-undang (lihat perenggan 40 & 42–43).

(4) Perayu telah gagal untuk menunjukkan pembelaannya pada peluang paling awal yang mungkin, sama ada semasa tangkapannya atau kepada pegawai penyiasat (SP7) semasa siasatan SP7. Kegagalan tersebut menjejaskan beban yang sewajarnya untuk keterangan selanjutnya di mahkamah kerana pendakwaan bukan dalam kedudukan untuk memeriksa sama ada versi perayu berhubung kejadian itu adalah benar

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atau palsu. Kegagalan perayu menyebabkan keterangan pembelaan tidak boleh dipercayai dan mewujudkan inferens bertentangan bahawa ia adalah suatu yang baru direka atau suatu yang telah difikirkan kemudian kerana ia hanya didedahkan buat kali pertama apabila ia dikemukakan di mahkamah (lihat perenggan 45–46).

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(5) Perayu telah gagal untuk menunjukkan apa-apa motif di pihak SP5, SP6 dan D/Kpl Yusrizal bin Yahya telah secara palsu menuduhnya telah melakukan kesalahan dalam kes ini. Keterangan menunjukkan bahawa ketiga-tiga saksi tersebut saling tidak mengenali perayu dan bahawa tiada apa-apa yang tidak mungkin semula jadi dalam keterangan mereka (lihat perenggan 48–49 & 51).]

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Notes

For cases on cross-examination, see 5(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5860–5864.

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Cases referred to

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209; [1996] 1 CLJ 705, FC (refd)

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Dickson Levy a/l Maria George v PP [2018] MLJU 98; [2018] 1 LNS 135, CA (refd)

Liza bte Ismail v PP [1997] 2 SLR 454, HC (refd)

Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)

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Legislation referred to

Dangerous Drugs Act 1952 ss 37(da), 39(B)(2)

Appeal from: Criminal Trial No 45A-8–11 of 2015 (High Court, Ipoh)

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N Sivananthan (Low Huey Theng with him) (Sivananthan) for the appellant.

Hanim Mohd Rashid (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Ahmadi Asnawi JCA:

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[1] The appellant was found guilty and was convicted and sentenced to suffer the death penalty upon the following charge:

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> Bahawa kamu pada 10hb. Ogos 2015, jam lebih kurang 5.30 petang, di hadapan rumah No. 107 Jalan Besar, Taman Bintang 1, Pantai Remis di dalam Daerah Manjung, dalam negeri Perak, telah didapati mengedar dadah 'METHAMPHETAMINE' sejenis dadah berbahaya anggaran berat 76.79 gram. Dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a), Akta Dadah Berbahaya 1952, dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] The appeal before us was in respect of the said conviction and sentence.

THE CASE FOR THE PROSECUTION

[3] The appellant was arrested by SP5 (Insp Nazrul Hisham bin Musa) while standing alone outside his house at No 107, Jalan Besar, Taman Bintang 1, Pantai Remis, Perak ('the said house') at about 5.30pm on 10 August 2015.

[4] SP5 came with a team comprising of four other officers, then conducting 'Ops Tapis' in Pantai Remis.

[5] According to SP5, the appellant who was about ten meters away from him, bolted and tried to run inside the said house upon seeing him, even before he had the chance to introduce himself as a police officer to the appellant. Nevertheless the appellant was subdued after a brief struggle.

[6] SP5 conducted a body search upon the appellant and found, tucked inside the right hand side front pocket of the appellant's Levi's Strauss & Co branded jeans (exh P5(A), a translucent plastic packet (exh P5(B)) tied with a rubber band containing the following exhibits when opened, in the presence of the appellant:

(a) a translucent plastic packet further containing 11 smaller translucent plastic packets. Each of the 11 packets contained substances suspected to be methamphetamines;

(b) a translucent plastic packet further containing eight smaller plastic packets, each containing substances suspected to be methamphetamines; and

(c) a translucent plastic packet, further containing six smaller plastic packets, each containing substances suspected to be methamphetamines.

[7] SP5 and his team proceeded to enter into the said house using the house keys recovered from the appellant. They searched the entire house and found nothing incriminating and noted that no one else was in the said house.

[8] SP5 denied ever cutting the padlock ear of the grille door to gain entry into the said house.

[9] While searching the said house, SP5 heard a motorcycle stopping in front of the said house. The rider and pillion (SD6, Khee Thong Khok and SD7, Tan Poh Cheok) were questioned and subsequently arrested.

A [10] A while later, SP5 and his team yet again heard a motorcycle stopping at the back of the said house. Two officers were despatched to investigate the same. They returned only to report that there was no one at the back lane and no seizure or arrest was effected at the back lane.

B [11] The appellant, SD6, SD7 and the incriminating exhibits were later handed to the investigating officer, SP7 (Insp Anis bt Awang), at the BSJND.

C [12] The incriminating exhibits were later handed to the chemist, SP3 (Siti Hajar Aisah bt Mohd Khamis), who after having examined and analysed the same, had found the said substances to be methamphetamines weighing 76.79g ('the impugned drugs'), a schedule drug as listed under the Dangerous Drugs Act 1952 ('the DDA'). Her report of her analysis is exh P11.

D [13] At the end of the prosecution's case, the learned judicial commissioner ('JC') found that the evidence adduced had proven that the appellant had the custody and control of the impugned drugs as he was caught alone in front of his house with the impugned drugs in the right front pocket of his Levi's Strauss jeans that he was wearing at the material time.

E [14] The learned JC also found that in all the circumstances of the case and coupled with the fact that he was caught red handed, appeared shocked and attempted to run into the said house before being apprehended, showed by way of inference, that the appellant had the requisite knowledge of the drugs or F nature of the drugs in his custody or control. Hence, mens rea possession of the impugned drugs was proven.

G [15] Further, the learned JC found that as the appellant was proven to be in possession of more than 50 grams of the impugned drugs, the prosecution is entitled to invoke the presumption of trafficking against the appellant under s 37(da) of the DDA.

[16] Consequently, the learned JC ordered the appellant to enter his defence.

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THE APPELLANT'S DEFENCE

I [17] According to the appellant, on the day in question, he came home (the said house) from work at about 2.30pm, locked the grille door and went upstairs to take a nap.

[18] At about 5pm, he opened his bedroom door when he heard strange noises. He was immediately arrested upon opening his bedroom door.

[19] There were three policemen and one of them was SP5. He was informed of the reason of his arrest and a search was conducted in the said bedroom.

[20] The police found nothing incriminating. They went downstairs where he saw SD6 and SD7 in the hall of the said house.

[21] The appellant then saw two policemen, SP6 (L/Kpl Mohammad Ashraf bin Baba) and D/Kpl Yusrizal bin Yahya, leaving his house using SD7's motorcycle and returned with a yellow plastic bag, which contained two transparent packets believed to be drugs, which were shown to him and was told that the said drugs belonged to him.

[22] The evidence of SD6, the appellant's brother and SD7, a friend of SD6, apparently corroborated the testimony of the appellant. Both had claimed that they were at the said house during the arrest and they too were arrested.

[23] The appellant's estranged wife (they have not lived together for the past 3–4 years), SD4 (Eich Mee Chee), said that she went to the said house after being informed of the appellant's arrest by a neighbour. She went there at about 8.30pm, after the police left with all the arrested persons, to lock up the house.

[24] SD6 further confirmed that the grille to the said house was chained and padlocked.

[25] SD8 (Yeong Poh Tik), a neighbour, claimed to have seen the policemen broke the grille door of the said house.

[26] SD9 (Chin Kai Seng) claimed to be the locksmith who had repaired the broken padlock ear of the grille door.

[27] Meanwhile, SD10 (Lim Boon Seng), also a neighbour, claimed to have seen two policemen picked up a blue plastic bag from the *longkang* behind the said house, but he didn't lodge any police report in respect of the same.

[28] At the end of the trial, the learned JC was satisfied that the appellant had failed to raise a reasonable doubt on the truth of the prosecution's case in respect of his possession and knowledge of the said drugs. The appellant's defence was a complete denial and such defence had fallen short of rebutting the presumption of trafficking that operated against him on a balance of probabilities. On the other hand, the prosecution had established its case beyond a reasonable doubt.

[29] Hence, the appellant was found guilty and convicted of the charge

proffered against him and was accordingly sentenced to death under s 39(B)(2) of the DDA.

THE APPELLANT'S APPEAL

[30] The defence had called ten witnesses to the stand and their version of the facts and evidence were at variance with that adduced by the prosecution. Learned counsel submitted that the learned JC had failed to properly appreciate the evidence of these witnesses, in particular, upon the following issues:

(i) the appellant, upon being brought downstairs saw two policemen leaving his house on SD7's motorcycle and came back with a yellow plastic bag containing two transparent plastic packets believed to contain drugs. SD6 also said that he saw the policemen bringing a yellow plastic packet into the house. Likewise SD7 also alluded to the existence of the yellow plastic packet brought by the police. Nevertheless, it was never put to these witnesses that the police did not bring the yellow plastic packet into the house. It was also not put to them that there was no such yellow plastic packet. These then would amount to an admission by the prosecution that the said yellow plastic packet did exist and that the police had indeed brought the yellow plastic packet into the appellant's house;

(ii) the prosecution also did not put to SD10 that no plastic packet was picked by two policemen when SD10 claimed that he saw two policemen picking up a blue plastic bag from the *longkang* behind the appellant's house. This would also amount to an admission by the prosecution that such event did indeed had taken place;

(iii) the prosecution's version that SP5 took the keys to enter the said house from the appellant was contradicted by SD8 who claimed to have seen several Malay men cut opened the grille door. The cross-examination mounted against SD8 revolved around the Malay men and not the denial of the policemen's involvement in cutting opened the grille door. It was submitted that the line of questioning of this defence witness confirmed the version that the police had cut opened the grille door to gain entry into the said house;

(iv) SD9 gave evidence that he was the locksmith who had come to the said house to repair the grille door that was cut opened. Learned counsel submitted that there was no suggestion from the prosecution that SD9 never went to the said house nor repaired the grille in question. This would support the defence's version that the police had indeed cut opened the grille door to gain entry into the said house; and

(v) SD10 also alluded that the police cut opened the grille door. Learned counsel submitted that SD10's testimony was not challenged. Nor was there any suggestion that SD10 was lying.

[31] Learned counsel finally submitted that these were the peculiar aspects of the defence case that the learned JC had failed to appreciate. Since the prosecution did not dispute the existence of the yellow plastic packet and that the grille door was cut opened to gain entry into the said house, and the prosecution had failed to cross-examine the defence's witnesses on crucial parts of the case, thus this would amount to an acceptance of the defence case pursuant to *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212, ie the impugned drugs were found in a yellow plastic packet which was recovered in the *longkang* outside the rear of the appellant's house which was later taken into the appellant's house and that the appellant was never arrested outside his house but inside his house after the police had gained entry by cutting open the grille door. The evidence adduced by the defence had indeed created a reasonable doubt upon the prosecution's case to warrant the complete acquittal of the appellant.

OUR DECISION

[32] The defence of the appellant was anchored upon the following:

(i) that the appellant was arrested in his bedroom;

(ii) that the front grille door was cut opened by the police to gain entry into the said house;

(iii) that SP6 and D/Corp Yusrizal Yahya left the appellant's house on SD7's motorcycle and came back a while later with a yellow plastic packet containing the impugned drugs; it was shown to the appellant; and possession of the said drugs was allegedly fasten upon the appellant; and

(iv) that the impugned drugs were from the yellow plastic packet which, according to of SD10, was picked by two policemen from the *longkang* outside the back of the appellant's house.

[33] On the issues raised by learned counsel (enumerated in para 30(i)–(v) and para 31 above), we were of the considered view that such failures by the prosecuting counsel is no ground to suggest the acceptance of the defence's case that the impugned drugs were found in a yellow plastic packet, recovered from inside the *longkang* outside the rear of the appellant's house and later taken into the appellant's house, and that the appellant was never arrested outside his house but in his house after the police had gain entry by cutting open the grille door.

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[34] Equally, such failures provided no ground to suggest that the defence had successfully raised a reasonable doubt on the issue of possession and knowledge of the impugned drugs nor did they suggest that the appellant had succeeded to rebut the statutory presumption of trafficking in the said drugs invoked against him under s 37(da) of the DAA.

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[35] The celebrated case of *Wong Swee Chin v Public Prosecutor* made it clear that there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony. That is about all, only a general rule. It follows through that a mere failure to cross-examine as such does not necessarily mean that it must be taken as being accepted. Equally, there are circumstances where failure to cross-examine does not necessarily mean that adverse inferences must be drawn as a matter of course. Rather, the proper approach is that the court must necessarily undertake a careful evaluation of the totality of the evidence in order to determine the cogency and weight of such testimony.

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[36] We were thus in agreement with Yong Pung How CJ, sitting at the High Court in *Liza bte Ismail v Public Prosecutor* [1997] 2 SLR 454, that:

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> Although the general proposition is that testimony not subjected to contradiction in cross-examination may be treated as unchallenged and thus accepted by the opposing party, the court is still entitled to reject such testimony: *Paric v John Holland Constructions Pty Ltd* [1984] 2 NSWLR 505 per Samuels JA at p 507; see also Hunt J's observation at in *Allied Pastoral Holdings*. A careful evaluation of the totality of the evidence must still be undertaken to determine the cogency and weight of such testimony.

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[37] Hence, such failures to cross-examine should be tested against the probabilities of the case and a careful evaluation of the totality of the evidence adduced in court.

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[38] Now, we have the uncontroverted evidence of SP5 and SP6, both of whom had unequivocally testified that the appellant was arrested outside his house after his failed attempt to escape/run back into his house; that the impugned drugs were recovered from inside the appellant's front right side pocket of the jeans worn by him; that the keys to the said house were recovered from the appellant's same front right side pocket of the jeans worn by the appellant; that the police team used the keys recovered from the appellant to open the door, entered the house and conducted a thorough search of the house; that the police team did not break or cut the grille door of the said house to gain entry into the said house; and, that SP6 and D/Corp Yusrizal bin Yahya did not go to the back lane of the appellant's house to retrieve a yellow plastic packet containing the impugned drugs and later accused the appellant of having possession and/or of trafficking the same.

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[39] The testimonies of both SP5 and SP6 were fundamentally intact in respect of the factum of the recovery of the impugned drugs, the appellant's mens rea possession and knowledge of the said drugs and the trafficking elements of the offence, in spite of the intensity of the scrutiny mounted by the defence in cross-examination. The testimonies of these two witnesses accorded well with the probabilities of the case. It would be a serious misdirection to give little or no weight of such evidence in the light of the evidence adduced by the witnesses for the defence which the learned JC had concluded in the following fashion (at p 40, *Jld* 1, *RR*):

> [49] I find that the defence witnesses were conveniently very well moulded to tally with the evidence of the accused and I agree with the submission of the learned DPP that the accused defence was basically one of mere denial with no materials adduced of sufficient probative value to negate the prosecution's case.
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> [50] All in all, I find the defence witnesses were not credible witnesses. It was glaring before this court that their evidence was concocted to help the accused and to avoid the accused from being connected with the impugned drugs. I find their evidence in the circumstances of the case to be not plausible as a consequence thereof. I am unable to accept the version of the accused and neither had his version succeeded in creating a doubt on the prosecution's case.

[40] The primary consideration taken into account by the learned JC in arriving at such a conclusion was the apparent inconsistencies appearing consistently throughout the testimonies given by the said witnesses for the defence.

[41] In brevity, the evidence adduced by the witnesses for the defence revealed the following:

(a) the appellant testified that only the padlock (*mangga*) was cut. The grille door was left intact;

(b) SD4, SD6, SD7 and SD9 testified that the padlock ear *(telinga grill)* on the inside part of the grilled door was cut. Meanwhile SD10 claimed that the police cut the top part of the grille door while in his SD (exh D19) he alleged that the police cut the padlock. The learned JC commented at p 39, *Jld* 1, *RR*:

> The accused and his witnesses seem to have materially contradicted each other and could hardly be accepted without suspicion. At this stage, I find the evidence of the defence witnesses to be inconsistent and unacceptable because if it was true that the policemen had indeed cut the telinga grill that was repaired by SD9, such a contention would not have been possible looking at the design of the grille door (P36(10)), where the said design would not permit a big scissor or cutter to pass through to allegedly cut the said padlock ear on the inside part of the said grille door. No evidence of intrusive marks or damage to the said grille door design were tendered to prove the same considering the importance of such an evidence if it is to be true. I refer to

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photographs exhibit P36 (1 & 2) especially exhibit P36(2). At this stage, I find the evidence of SP5 supported by SP6 and SP7 is more credible in that they did not cut the telinga grill to enter the said house. SP5 had used the keys found on the accused to unlocked and opened the grille of the said house.

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(c) SD8 and SD10 both claimed to have seen a few male Malays trying to cut open the grille door of the appellant's house. SD10 also claimed to have seen two policemen picking up a blue plastic packet from the *longkang* behind the appellant's house. However, although both of them were the appellant's immediate neighbours, they did not call the police or attempted to inform the appellant of such activities. Instead they went back inside their respective houses. The learned trial judge correctly found that their conduct is contrary to reasonable and normal behaviour and does not reflect the act of a concerned neighbour as they both claimed to be;

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(d) as reiterated earlier, SD10 testified that he saw two Malay men picking up a blue plastic bag from the *longkang* at the rear of the appellant's house. However, instead of lodging a police report of what he had seen and transpired, which is the most reasonable thing to do, SD10 chose to prepare a SD many months later. The learned JC opined that she could not afford to treat the evidence given by SD10 (and also SD8) without suspicion in the whole circumstances of the case; and

E

(e) SD4 (the appellant's estranged wife) testified that she came to the appellant's house to lock the door. She said she had 'guna kunci biasa untuk kunci grill dan bukan guna mangga ...' (see — p 199, *Jld* 2A, *RR*). On the other hand, SD6 (the appellant's elder brother) said '... saya perasan di pintu grill satu rantai besi dan mangga berkunci.... Ini kerana telinga pintu grill telah putus kemudian isteri adik saya telah bawa rantai dan mangga untuk kunci pintu tersebut ...'.

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[42] Such was the evidence adduced by defence witnesses. Verily, the learned JC was correct when she classified that the defence posited by the appellant was a mere denial with no material adduced of sufficient probative value to negate the prosecution's case.

H

[43] In our view, for all the reasons given and in all the circumstances of the case, the failure of the prosecuting counsel to put the desired 'put' questions to challenge the evidence of the defence witnesses cannot amount to an acceptance of the witnesses testimonies. Such an approach has no basis in law.

I

[44] The prosecution's alleged failure to cross-examine the defence's witnesses on crucial parts of the case must also be evaluated in the light of the fact that the thrust of the appellant's defence as in paras (i), (ii) and (iii) of para 32 (above) was never an issue with the investigating officer, SP7, when the

appellant was handed to SP7 by SP5. Going by the evidence, the same was revealed for the first time only during the hearing of the charge that commenced on 1 August 2016, almost a year later (see p 5 *Jld* 2, *Rekod Rayuan* (RR)). Meanwhile, the versions given by SD6, SD 7, SD8 and SD10 were disclosed about 8 months after the appellant's arrest and seizure of the impugned drugs through their statutory declarations ('SD'), exhs D28, D29, D30, D31 and D38 and dated 17 April 2016, 15 April 2016, 15 April 2016 and 15 April 2016 respectively. The appellant admitted in cross-examination that he did not inform SP7 that he was arrested in his house because he was not asked by SP7. He also did not inform SP7 that the impugned drugs was not found on his person and did not either inform SP7 that the said drugs was brought into the house by SP6 and D/Kpl Yusrizal bin Yahya.

[45] It is thus apparent that the appellant had failed to disclose his defence at the earliest possible opportunity, either at the point of his arrest or through SP7 when he was handed to SP7 or soon after in the course of SP7's investigation. His cautioned statement was not tendered in court. It provides no clue either.

[46] The consequence of the appellant's failure to disclose his defence at the earliest possible opportunity would detract the weight to be accorded of his subsequent testimony in court as the prosecution was not in position to check on whether the appellant's version of the facts was true or false and which attracted the adverse comment that the defence was a recent invention as it was only revealed for the first time when he mounted his defence in court — see *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209; [1996] 1 CLJ 705. Apart from detracting the weight to be accorded therein, it would equally render the said evidence lacking in credibility.

[47] In all the circumstances of the case, we were of the view that the belated disclosure of the appellant's defence would effectively restrict the efficacy of the police investigation of the alleged roles played by SP5, SP6 and D/Kpl Yusrizal bin Yahya in the mess the appellant is now in. The course of events in the narrative of the appellant's defence would freely invite the suggestion that the defence was tainted with elements of afterthought.

[48] Now, it would also appear that the appellant was accusing SP5, SP6 and D/Kpl Yusrizal bin Yahya of fixing or framing the appellant with the commission of a capital offence by fabricating and manufacturing evidence against him. Hence, of relevant consideration were the motive or motives propelling these witnesses to embark upon such an endeavour.

[49] The evidence revealed that SP5, SP6 and D/Kpl Yusrizal bin Yahya were total strangers in relation to the appellant. The burden is always upon the appellant to prove their motive or motives in fixing the appellant with the

commission of the said offence. In our view, the appellant had miserably failed to show that they have an axe to grind against the appellant to propel them to fabricate and manufacture evidence and to testify adversely against the appellant in the trial. The appellant had equally failed to show that the said prosecution witnesses had harboured a motive to falsely implicate the appellant with the commission of the offence.

[50] This court in *Dickson Levy a/l Maria George v Public Prosecutor* [2018] MLJU 98; [2018] 1 LNS 135 had reiterated that:

> [47] Also, there was no rhyme nor reason for the police officers in this case to frame up the appellant with the impugned drugs, as they were just performing their duty (see the cases of *Mohd Ali Jaafar v Public Prosecutor* [1998] 4 MLJ 210; [1998] 4 CLJ Supp 208 and *Goh Han Heng v Public Prosecutor* [2003] SGHC 226; [2003] 4 SLR 374).
>
> [48] In *Goh Han Heng v Public Prosecutor*, Yong Pung How CJ (Singapore) had this to say:
>
>> I disagreed with counsel. All that the passage means is that where the accused can show that the complainant has a motive to falsely implicate him, then the burden must fall on the prosecution to disprove that motive. This does not mean that the accused merely needs to allege that the complainant has a motive to falsely implicate him. Instead, the accused must adduce sufficient evidence of this motive so as to raise a reasonable doubt in the prosecution's case. Only then would the burden of proof shift to the prosecution to prove that there was no such motive. To hold otherwise would mean that the prosecution would have the burden of proving a lack of motive to falsely implicate the accused in literally every case, thereby practically instilling a lack of such a motive as a constituent element of every offence.
>
> [49] The appellant failed to demonstrate to us any evidence to show that the police had harboured a motive to falsely implicate the appellant.

[51] It is apparent that the testimonies of both SP5 and SP6 were grounded upon the factual seizure of the impugned drugs from the right front side pocket of the jeans worn by the appellant upon his arrest outside his house. In our view SP5, SP6 and D/Kpl Yusrizal bin Yahya were mere police officers executing their onerous duties with no reason to fabricate and manufacture evidence against the appellant in the manner as contended by the appellant and his witnesses. There was equally nothing inherently improbable in their evidence.

[52] The learned JC found that *no plausible material of probative value was adduced by the accused (appellant) that could and would lead to an inference that SP5 or the police was going all out to frame the accused.* The learned JC also found *that there was no plausible reasons for SP5 and his team to have any ill-design or mala fide intention to frame the accused with the crime he was charged with* — see

p 35, *Jld* 1, *RR*. We were in full agreement with the learned JC's findings and would add nothing more to it.

[53] The failure of the prosecuting counsel to put the desired 'put' questions to challenge the evidence of the defence witnesses must also be seen in the light of SP7's investigation of the said SDs. SP7 found that there was no sign of any 'disturbance' (*kacau ganggu*) to the grille door and the 'telinga' grille to hook the padlock. SP7 also testified that from where SD10 was at the material time, he could not have seen the 2 policemen picking up the blue plastic bag from the *longkang* behind the appellant's house. In essence, the defence, adduced through its witnesses, was a sham.

CONCLUSION

[54] For all the reasons given, we dismissed the appellant's appeal without more and thereafter affirmed both the conviction and sentence handed down by the High Court upon him.

Appeal dismissed; conviction and sentence of the High Court affirmed.

Reported by Ashok Kumar