IN THE HIGH COURT OF MALAYA

IN THE STATE OF PERAK DARUL RIDZUAN

CRIMINAL TRIAL NO: 45A-8-11/2015

BETWEEN

PUBLIC PROSECUTOR

AND

KHEE THUAN GIAP

JUDGMENT

[1] The accused person Khee Thuan Giap ("the accused") was charged for the offence of trafficking under section 39B (1) (a) of the Dangerous Drugs Act 1952 ('the DDA')

[2] The said charge reads as follows:

> *Bahawa kamu, pada 10 hb 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".*

[3] The accused claimed trial to the said charge. The trial of this case commenced on 1st August 2016 with seven (7) prosecution witnesses called throughout the trial to prove the said charge and at the end of the prosecution case, on maximum evaluation, I found that the prosecution had succeeded in establishing a prima facie case and on 26th October 2016 the accused was called to enter his defence on the said charge.

[4] On 1st December 2016, the accused presented his case and had called nine (9) witnesses. At the conclusion of the trial on 21st September 2017, on maximum evaluation of the evidence I have before me, I found the defence had failed to raise reasonable doubt in the prosecution case and I find the prosecution had succeeded in proving their case beyond reasonable doubt. In the circumstances, I convicted the accused on the charge so preferred against him under section 39B(1)(a) and punishable under s.39B (2) of the DDA 1952. As there is only one mandatory sentence provided by the law for this offence, I therefore sentenced the accused to death by hanging. On 21st September 2017, the accused filled an appeal against the said decision. My reasons are as follows:

THE PROSECUTION CASE

[5] On 10th August 2015, Insp G/19576 Insp Nazrul Hisham bin Musa ("SP5") headed a team consisting of D/SM 88770 Rahman bin Hassan (not

called as a witness), D/Sjn 108042 Munusamy a/l Subramaniam (not called as a witness), D/Kop 143926 Yusrizal bin Yahya (not called as a witness), L/Kop 177608 Mohamad Ashraf bin Baba ("SP6") conducted an operation named "Ops Tapis" in Pantai Remis, Perak. After a short briefing (*taklimat ringkas*), at about 4.30pm, SP5 and his team left for Taman Bintang, Pantai Remis in a car ("the said car") and a van ("the said van"). Upon reaching Taman Bintang 1, Pantai Remis at about 05.15 pm, SP5 and his team saw a Chinese man ("the accused") standing alone in front of his house at No 107, Jalan Besar, Taman Bintang 1, Pantai Remis, Perak ('the said house') acting in a suspicious manner.

[6] According to SP5, upon seeing the team (with no chance to introduce themselves as policemen), the accused who was at that time approximately 10 meters away, tried to run into the said house but the team managed to apprehend the accused at the porch of the said house even though the accused had put up a struggle (*pergelutan*). SP5 (who confirmed that he did not received any prior information regarding the said drugs) then introduced himself and the team as policemen and conducted a body search on the accused and from the right-hand side front pocket of the accused's Levi's Strauss & Co branded jeans [(exhibit P5(A) – identified by SP5], SP5 found a packet of translucent plastic tied with a rubber band [(exhibit P5(B) - identified by SP5) which contained the following:

(a) a big translucent plastic which contained 11 (eleven) packets of translucent plastic which contained substances suspected to be methamphetamine;

(b) a packet of translucent plastic which contained 8 (eight) packets of translucent plastic which contained substances suspected to be methamphetamine; and

(c) a packet of translucent plastic which contained 6 (six) packets of translucent plastic which contained substances suspected to be methamphetamine.

[7] P5 then explained to the accused, the purpose of the arrest in an easy to understand Bahasa Malaysia (*Bahasa Malaysia yang mudah difahami*) and the accused nodded his head. SP5 and his team then arrested the accused and the translucent plastics and its contents (substances suspected to be methamphetamine) were seized by SP5 and the team. SP5 had also seized the jeans the accused was wearing (exhibit P5(A)) where the said plastic packets and its contents were found.

[8] SP5 and his team by using the key found on the accused, opened the grille to the said house (SP5 denied ever cutting the padlock ear of the grill door (*telinga grill*)) to gain entry and found the sliding door was not locked, entered and searched the entire said house but found nothing incriminating and there was no one else in the said house. While investigating and searching the said house, SP5 heard a motorcycle (“the said Kriss Motorcycle”) which had stopped in front of the said house with two (2)

Chinese men as rider and pillion rider. SP5 together with D/SM 88770 Rahman bin Hassan (not called as a witness) and D/Kop Yusrizal bin Yahya (not called as a witness), introduced themselves as policemen and apprehended the said two (2) Chinese man named Khee Thong Khok (brother of the accused, later known as "SD6") and Tan Poh Cheok (SD6's friend, "later known as "SD7") in front of the said house and brought them into the said house. SP5 then introduced himself and the team as policemen and SP5 instructed D/SM 88770 Rahman bin Hassan to conduct body search on the two (2) Chinese men but found nothing incriminating on them. While inside the said house, SP5 and his team heard a motorcycle which had stopped at the back of the said house and SP5 instructed D/Kop Yusrizal bin Yahya and L/Kop Mohamad Ashraf bin Baba ("SP6") to investigate the back lane of the said house. After a minute or two, they returned and informed SP5 that there was no one at the back lane and no arrest or seizure was done from the back lane. Before leaving for *Bahagian Siasatan Jenayah Narkotik Daerah Manjung (*BSJND*),* SP5 had locked the said house using the keys SP5 found (earlier) on the accused. SP5 and D/SM 88770 Rahman bin Hassan, together with the accused and the items seized travelled together in the said car while the two (2) Chinese, travelled with the rest of the team in the said van. The accused, the two (2) Chinese men and the seized item were later handed over to the Investigating Officer, Inspector G 20191 Anis binti Awang (SP7) at the BSNJD. SP5 then lodged

a police report regarding the said arrest and seizure (Pantai Remis Report No. 1243/15 – exhibit P23) and house investigation (Pantai Remis Report No. 1244/15 – exhibit P24) respectively.

[9] SP5 then marked and identified the following:

(i) an empty packet of translucent plastic marked "S" [(dated 10/08/2015 with SP5's signature) – (exhibit P5(C)]

(ii) a packet of translucent plastic which contained substances suspected to be methamphetamine marked "S1" [(dated 10/08/2015 with SP5's signature) - (exhibit P6(A)(1)]

(iii) an empty packet of translucent plastic marked "S2" [(dated 10/08/2015 with SP5's signature) – (exhibit P5(D)]

(iv) 11 (eleven) packets of translucent plastic which contained substances suspected to be methamphetamine marked "S2(1)-(11)" [(dated 10/08/2015 with SP5's signature) - (exhibit P6(A)(2) - (12)]

(v) an empty packet of translucent plastic marked "S3" [(dated 10/08/2015 with SP5's signature) – (exhibit P5(E)]

(vi) 8 (eight) packets of translucent plastic which contained substances suspected to be methamphetamine marked "S3(1)-(8)" [(dated 10/08/2015 with SP5's signature) - (exhibit P6(B)(1) - (8)]

(vii) an empty packet of translucent plastic marked "S4" [(dated 10/08/2015 with SP5's signature) – (exhibit P5(F)]

(viii) 6 (six) packets of translucent plastic which contained substances suspected to be methamphetamine marked "S4(1)-(8)"

[10] The evidence of SP5 was corroborated by SP6. SP6 also saw SP5 apprehended the accused and seized the said plastic packet that was tied with a rubber band which contained several plastic packets. SP6 however

can't remember how many plastic packets were seized because it was done by SP5. SP6 also confirmed that while inside the said house, SP6 had also heard a motorcycle which had stopped at the back of the said house and upon instruction by SP5, SP6 together D/Kop Yusrizal bin Yahya, by riding the said Kriss Motorcycle went to investigate the back lane of the said house and found no one was there (no arrest nor seizure was done) and it only took them a minute or two before they were back at the said house. SP6 and the rest of the team with the two (2) Chinese men then went back to BSJND in a van. The suspected drugs were later sent to the Chemist Department, government Chemist (SP3), who after having examined and analysed the same, had found the impugned substances to be Methamphetamine, a scheduled dangerous drug as listed under the Dangerous Drugs Act, 1952 ('the DDA'). SP3 had prepared a chemist report (exhibit 11).

[11] The evidence of SP5 and SP6 were corroborated by SP7, who is the Investigation Officer (IO). On 10th August 2015, around 7.30 pm, SP7 confirmed that she received an arrest by the name Khee Thuan Giap (the accused) and seized items from SP5 as stated in the *Laporan Pemeriksaan/Rampasan* (exhibit P15), *Perakuan Serah Menyerah OKT Dan Barang kes* (exhibit P16) and arrest report P23. SP7 then kept the seized items in a locked metal cabinet where she alone had access. On

11th August 2015 at around 12.45 pm, SP7 together with police photographer D/Kop RF 152932 Muhamad Faizal bin Abdullah (SP4) and SP5, went to the said house to take photographs. SP7 explained that the reason she has brought along SP5 was for him to show her the place where the arrest and the seizure was made. SP7 had instructed SP4 to take two (2) photographs of the said house (exhibit P18 (1 & 2) and she had prepared a draft sketch plan of the said house and "*tempat kejadian*" which she later sketched it again by using the computer in her office (exhibit P27 (1 & 2)). On the same day at about 7.00 pm she took out the seized items from the metal cabinet and re-arranged it on a table and then instructed SP4 to take photographs of the "*barang kes"*, twelve (12) photographs all together (exhibit P14(1-12)). Once the photographs were taken, SP7 took the seized items and kept it back in the metal cabinet in her office. On the same day at about 7.30pm, she instructed the accused person to wear the said Levi's jeans (*acu pakai*) and found that the jeans fit the accused person perfectly and she had instructed SP4 to take photographs of the "*acu pakai"* (exhibit P19 (1 & 2)). On 12th August 2015 at about 9.30am, SP7 took out the said plastics and the seized substance suspected to be drugs [(S1- (a plastic packet)], [S2(1-11) - (11 plastic packets)], [S3(1-8) – (8 plastic packets)] and [S4(1-6) – (6 plastic packets)] and place it in a big envelope which SP7 marked as "Y" and seal with PDRM 275. On 12th August 2015, at about 11.07 am she delivered the said envelope marked "Y" to the

Chemist at Jabatan Kimia Malaysia, Puan Siti Hajar bt Mohd Khamsi (SP3). On 20th August 2015 at about 3.45pm, SP7 brought an envelope marked as "Y" with report number 1243/2015 No IP JSJN/ADB/0655/15 [which contained the said Levi's jeans (marked "SS"), the empty plastic packets (marked "S"), the empty plastic packets marked "S2", "S3" and "S4" and rubber band] related to police report P23, to be registered and kept at the *Setor Barang Kes* at BSJND Manjung and given to Sjn Abd Radzi Sadran (SP2) and was given the registration number 506/15. On 16th October 2015, SP7 received the envelope marked "Y" with seal from the Chemist Department, and the chemist report (exhibit P11) where the impugned drug was confirmed to be 76.79 gram Methamphetamine, SP7 kept the said envelope marked "Y" in the metal cabinet in her office where she alone had access. And on 20th October 2015 SP7 brought an envelope marked as "Y" with seal from the Chemist Department, to be registered and kept at the *Setor Barang Kes* at BSJND Manjung and was given the same registration number 506/15. The evidence of SP7 is corroborated by SP1 who confirmed that he received the envelope marked "Y" from SP7 and SP2 confirmed that registration number given for the said envelope "Y" is 506/15.

[12] SP7 in her evidence confirmed that only the accused was involved (with the offence) and that Khee Thong Kok and Tan Poh Cheok were not

involved with the offence related to the police report P23. The impugned drugs were found and seized from the right-hand side front pocket of the Levi's jeans worn by the accused person on the day of the raid and arrest and nothing incriminating was found and seized from the back lane of the said house. SP7 gave evidence that she didn't send the empty plastic packets exhibit P5 and exhibit P5 (A-F) to the Chemist Department because it is not the material to be tested but it is the drugs that's needed to be tested and confirmed for the purpose of the prosecution.

[13] SP3, who after having examined and analysed the same, had found the impugned substances to be Methamphetamine weighing 76.79 grams, a scheduled dangerous drug as listed under the Dangerous Drugs Act, 1952 ('the DDA'). SP3 then prepared a chemist report to confirm the same (exhibit P11). The defence did not dispute the procedure and findings of SP3.

THE LAW

[14] Section 180 of the CPC provides that when the case for the prosecution is concluded, the Court must consider whether the prosecution has made out a prima facie case against the accused. And if the Court finds that the prosecution has not made out a prima facie case against the accused, the Court shall record an order of acquittal. If the Court finds that

a prima facie case has been made out against the accused on the offence charged the Court shall call upon the accused to enter his defence. A prima facie case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction. Based on the established principle of law, before the Court can rule that a prima facie case has been made out, a maximum evaluation of the credibility of the witnesses must be done at the close of the case for the prosecution **(Balachandaran v. PP [2005] 1 CLJ 85; Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734; [2003] 2 MLJ 65 and PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457).**

[15] Maximum evaluation means the assessment process for the essential purpose of analysing the credibility and reliability as well as trustworthiness of the evidence of the prosecution. Credible evidence is evidence which had been filtered and which had gone through the process of evaluation and any evidence which is not safe to be acted upon should be rejected (see **PP v. Ong Cheng Heong [1998] 4 CLJ 209**). Thus, what is required by a trial Court is to test the evidence of a witness from all angles as well as its reliability and credibility by considering the entire evidence placed before the Court. The evidence must not be accepted at face value but must be tested and evaluated before reliance can be placed on each piece of

evidence adduced. Further, the trial Court has the duty to consider the evidence which favours the defence. This requires a consideration of the existence of any reasonable doubt in the case for the prosecution and if there is any such doubt, there can be no prima facie case **(Balachandran v. PP (supra)).**

[16] The above principle of law on maximum evaluation should be read together with the principle relating to judicial appreciation of evidence which is set out in the following words of Gopal Sri Ram JCA in **Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19; [2003] 2 MLJ 97.** A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness's evidence, runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case, the approach to judicial appreciation of evidence is the same.

THE COURT'S FINDINGS AT THE PROSECUTION STAGE

[17] The essential ingredients of the charge against the accused that must be established by the prosecution at the close of the prosecution's case are as follows:

(i) the drugs are 'dangerous drugs' as defined in the Schedule to the Dangerous Drugs Act 1952;

(ii) the accused had knowledge of the said drugs;

(iii) the said drugs were in the custody and control of the accused; and

(iv) the accused was 'trafficking' the said drugs (presumption under section 37(da) of DDA 1952.

[18] On a maximum evaluation of the evidence adduced by the prosecution, I found that there was nothing incredible in the evidence so adduced for it not to be believed. Firstly, there was no reason to doubt the evidence of SP5 and SP6, the police personnels involved in the said raid at the said house on 10th August 2015 and SP7 who is the Investigating Officer. As stated in the case of **PP v Mohamed Ali [1962] 28 MLJ 257:**

> *"When a Police witness says something that is not inherently improbable his evidence must in the first instance be accepted. If he says he saw a cow jumping over the moon his evidence is, of course, not to be accepted, but if he says he saw a cow wandering along one of the main streets of Kuala Lumpur (the sort of thing we all see every day of our lives) there is not the slightest justification for refusing to believe him. Of course, if his evidence is contradicted by other evidence or is shaken by cross-examination then it becomes the business of the Magistrate to decide whether or not it should be accepted. In the absence of contradiction, however, and in the absence of any element of inherent probability the evidence of any witness, whether a Police witness or not, who gives evidence on affirmation, should normally be accepted."*

[19] The evidence of SP5, SP6 and SP7 corroborate each other and the combination of their evidence in entirety had proven that the accused was alone during the arrest and the said drugs were found in the right front pocket of the Levi's jeans worn by the accused and I agree with the

prosecution's submission that there was direct possession of the drugs as the drugs were found on the accused where he was caught red-handed.

[20] According to SP5, the accused looked shock (*terkejut*) and ran away when he saw him and his team before SP5 could introduce himself as a policeman. The accused ran towards the said house, but he failed as SP5 managed to apprehend him. The fact that the accused ran when he saw SP5 and his team clearly demonstrated guilty knowledge on the part of the accused as provided for under section 8 of Evidence Act. The Federal Court in **Parlan Bin Dadeh [2008] 6 MLJ 19**) said that proof of knowledge is very often a matter of inference which varies from case to case. It would be sufficient for the prosecution to prove facts from which it could properly be inferred that the accused had the necessary knowledge. The accused's expression of shock 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.

[21] I agree with the submission by the learned DPP that there is no legal requirement for the accused to have exact knowledge of the said drugs in his possession. From the facts of the case, I can infer that the accused knew that he had the prohibited drugs in his possession (see **PP v Abdul Rahman Akif [2007] 4 CLJ 337**). It is sufficient for the prosecution to make inference that the accused knew that the said drugs was in his possession without having to prove knowledge of the said drugs specifically.

[22] There were no cogent reasons to doubt SP5, SP6 and SP7 and the evidence of other prosecution witnesses in entirety after having subjected them to the maximum evaluation test as enunciated by the Federal Court case of **Balachandran v PP [2005] 1 CLJ 85**. In the case of **Balachandran v PP** (supra) the Federal Court stated a prima facie case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal.

[23] This Court found that the prosecution had successfully established a prima facie case against the accused. The evidence adduced had proven that the accused had the custody and control of the impugned drugs as the accused was caught in-front of his house with the said translucent plastic packets containing the said drugs in the right front pocket of his Levi's

Strauss branded jeans that the accused was wearing at the material time. No other persons were there with him. I find as a fact and as a matter of law, that the prosecution has succeeded in proving that the accused had actual possession of the impugned drugs independent of the provisions of presumed possession under s. 37(d) of the DDA 1952.

[24] Based on the celebrated cases of **Chan Pean Leon [1956] MLJ 237**, **Wong Nam Loi v PP [1997] 4 AMR 3603** and **PP v Badrulsham Bin Baharom [1988] 2 MLJ 585,** I am also satisfied that the accused had the requisite knowledge of the drugs which were in his custody and control and in his possession. In the case of **Chan Pean Leon** (supra) the Court stated that knowledge cannot be proved by direct evidence and it can only be proved by inference from the surrounding circumstances. Likewise, in the case of **Wong Nam Loi v PP** (supra), His Lordship Shaik Daud JCA stated:

> *"to constitute possession, there must be knowledge. Knowledge cannot be adduced by direct or tangible evidence but only by inference from the surrounding circumstances"*

[25] Based on the facts and evidence adduced, the conduct of the accused coupled with the evidence of him being in direct possession of the said drugs, were corroborative of the fact that the accused had the *mens rea* in the sense that he knew what was in the said plastic packets that he was carrying. The learned defence counsel's argument that the conduct of the

accused cannot be said to be evidence of knowledge could not with respect hold. The fact that the accused had looked shock, was caught red handed and apprehended while trying to run into the said house was sufficient and is corroborative of the fact that he had this knowledge. In the case of **PP v Mardani Hussin [2005] 7 CLJ 495**, His Lordship Abdul Hamid Embong J concluded that where the accused was caught literally red-handed with the impugned drugs and had looked scared, and that the accused's expression of shock and fear when confronted by the police is corroborative of the fact that he had this knowledge.

[26] SP5's evidence need not be corroborated, by calling another witness as contended by the learned defence counsel, as his evidence was straight forward and nothing incredible was found in his evidence. It was after all the quality of the evidence that I should assess and not the quantity. Section 134 of the Evidence Act 1950 stated that no specific number of witnesses shall in any case be required for the proof of any fact. In the case of **Aziz Muhamad Din v PP [1997] 1 CLJ Supp 523 at page 540,** the Court stated, *"This section enshrines the well-recognised maxim that "evidence has to be weighed and not counted".*

[27] The learned defence counsel also raised another issue, in relation to the statutory declaration marked as exhibit IDD 28-31 (later marked as D28-

31). It was put to the prosecution witness SP7 that she failed to further investigate the SD and it prejudiced the accused. I disagree with the submission of the learned defence counsel because SP7 did investigate the SD when SP7 together with SP4 and SP5 went to the said house and the back lane on the 10th May 2016 and photographs P36(1-13) were taken by SP4 upon instruction from SP7. I am also of the considered view, the fact that Lim Boon Seng's (later known as "SD10") statement was not taken further because she believed it was not necessary to further record the statement by Lim Boon Seng. I am also of the considered view that SP7 and the prosecution could not be faulted. Regarding the photographs P36(1-36), even though it was not given earlier to the defence and was only tendered through SP7 to my mind is not in any manner prejudicial to the defence because the defence were given sufficient time to reassess the said photographs and in fact SP4 was recalled as a witness. I refer to **PP v Mohd Fazil Awaludin [2009] MLJU 2** where Zawawi J said "…the word "shall" in subsection 51A of the CPC means directory…in applying and administering s.51A of the CPC, the Court should keep in mind not only to the technical non-compliance of the section but also to the justice of the particular case." In the present case I have granted adjournment for the defence to inspect the photographs and have in-fact allowed the application to recall SP4 which to my mind had satisfied the provision of the section

s.51A and to the justice of this case and therefore P36(1-13) can be relied upon by this Court.

[28] Further issue raised by the defence was on the translucent plastic packet, the failure of the SP7 to conduct a fingerprint test on it to show that the accused have been in the possession of it and was held by the accused when he was arrested. SP7 admitted that the jeans/empty plastics (exhibit P5(A-F) were not sent for fingerprint testing. I am of the considered view that the failure of SP7 to send the above for fingerprint lifting could not negate the obvious fact that the said drugs that was discovered in the accused right front pocket of his Levi's jeans that he was wearing at the material time. There have been numerous cases where some exhibits were sent for fingerprint analysis by some diligent investigating police officer, but no positive uplifting of the fingerprint could be obtained due to many reasons. I am of the considered view that the failure of SP7 in not sending the empty packets for the fingerprint analysis is of little significance in the light of the entire evidence of the prosecution witnesses.

[29] In the case of **Public Prosecutor v Mansor Md Rashid & Anor [1996] 3 MLJ 560** Chief Justice Chong Siew Fai (Sabah and Sarawak) had the occasion to say the following:

"Where the identity of a culprit is in question or is required to be proved, fingerprint evidence will be of great significance and value. In the instant case, however, the charge alleged trafficking in the form of a 'sale' and there was evidence indicating the identities of the alleged offenders and the sale transaction. Fingerprint evidence, therefore, assumed little value or significance."

[30] As stated earlier, I find as a fact and as a matter of law that the prosecution had succeeded in proving the ingredients of the charge with no break of chain in the evidence, the element of actual possession with *mens rea* from evidence adduced through witnesses and independent of the provisions on presumed possession under section 37(d) of the DDA 1952. Further, as the accused was found to be in actual possession of more than 50 grams of the scheduled dangerous drugs Methamphetamine, the prosecution is perfectly placed to invite this Court to invoke the presumption of trafficking against the accused under section 37(da) of the DDA, 1952. I therefore called the accused to enter his defence.

THE DEFENCE

[31] The accused elected to give his evidence on oath and had also called nine (9) supporting witnesses i.e.

(i) SD2, Lim Ying Kuan (neighbour);

(ii) SD3, Low Huey Theng (took photographs exhibit D39 & D41);

(iii) SD4, the accused's wife

(iv) SD5, Ladda Songsai (neighbour)

(v) SD6, Khee Thong Khok (accused's brother)

(vi) SD7, Tan Poh Cheok (SD6's friend)

(vii) SD8, Yeong Poh Tik (neighbour)

(viii) SD9, Ch'ng Kai Seng (the locksmith)

(ix) SD10, Lim Boon Seng (neighbour)

[32] According to the accused, on 10th August 2015 at about 2.30 pm, he came back from work and he went into his house, locked the grille door with a padlock, saw his brother SD6, and went upstairs to take a nap. At around 5 pm upon hearing some strange noise, he opened his bedroom door and he was immediately arrested. There were 3 policemen and one of them was SP5. He was informed of the reason of the said arrest and a search was conducted in the said bedroom. The police found nothing incriminating and they went downstairs where he saw SD6 and SD7 in the hall of the said house. The accused then saw two policemen (SP6 and Kop Yusrizal) left his house using SD7's motorcycle and returned with a yellow plastic bag which contained 2 transparent packets believed to be drugs which was shown to the accused and he was told the said drugs belongs to him. The evidence of the accused person is supported by SD6 and SD7 who claimed they were at the said house during the arrest and they too were arrested. After the arrest of the accused, upon information from a neighbour, SD4

went to the house to lock up the house and SD6 confirmed that the grille to the said house was chained and pad locked. SD8 claimed to have seen the policemen break open the grilled door of the accused's house and SD9 was the lock smith who had repaired the broken padlock ear of the grille door (*telinga grill*), SD10 saw two policemen picked up a blue plastic bag from the drain (*longkang*) behind the house of the accused's but SD10 didn't lodge any police report in that regard. Statutory Declarations of SD6, SD7, SD8 and SD10 were tendered to support the accused's version of the alleged facts (exhibit D30, D31, D29, respectively). Obviously, the defence put forward by the accused was consistent with his defence at the prosecution stage and it cannot be treated as an afterthought. There were two versions of the story in this case. Question was, which version should this Court believe and whether the defence had raised reasonable doubt in the prosecution case?

THE LAW

[33] Before going into the detail of the defence put forward by the accused, at this stage I must reiterate that the burden to prove the guilt of the accused is always with the prosecution and that burden is beyond reasonable doubt. The burden never shifts to the accused. However, since in this case the presumption of trafficking operated against the accused, the evidential burden placed on the accused can be rebutted by him adducing

evidence to discharge that burden on balance of probabilities as enumerated in the case of **PP v Yuvaraj [1969] 2 MLJ 89 PC and Mohd Radzi v PP [2006] 1 CLJ 457**. That evidential burden on the part of the accused relates only to the presumption of trafficking. The accused needed only to raise a reasonable doubt on the rest of the prosecution case for him to earn an acquittal. In this respect I must evaluate the defence in the light of the prima facie evidence already proved at the prosecution stage. To earn an acquittal, it is incumbent on the accused person to raise reasonable doubt as to the truth of the prosecution's case.

[34] Section 182A CPC set out the procedure and duty of a trial Court at the conclusion of the defence case that 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. If the Court finds that the prosecution has proved its case beyond reasonable doubt, the Court shall find the accused guilty and he may be convicted on it. If the Court finds that the prosecution has not proved its case beyond reasonable doubt, the Court shall record an order of acquittal.

[35] In **Md Zainudin bin Raujan v. Public Prosecutor [2013] 4 CLJ 21**, the Federal Court observed as follows:

"*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*"

[36] Section 182A states that "all" evidence must be considered by the Court. It is to be noted that emphasis has been laid on the phrase "all". In **Prasit Punyang v. Public Prosecutor [2014] 7 CLJ 392; [2014] 4 MLJ 282, i**t was held as follows:

"*In accordance with the provisions of s. 182A(1) of the Criminal Procedure Code, it is the bounden duty of the learned JC, at the conclusion of the trial, to consider all the evidence adduced before him and shall decide whether the prosecution has proved its case beyond reasonable doubt. The legislature has advisedly used the term all the evidence. The emphasis must be on the word all*."

[37] What amounts to a "reasonable doubt" itself is not defined in section 182A of the Criminal Procedure Code. However, there is a plethora of case law as to its meaning. In **Public Prosecutor v. Saimin [1971] MLJ 16,** it was held by Sharma J that:

"*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 charge. "

[38] In the case of **Public Prosecutor v. Datuk Haji Harun bin Haji Idris & Ors [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.* "

[39] It can be summarised therefore that the phrase "reasonable doubt" excludes fanciful or imaginary doubts or stories that are so obviously conjured up so as not to be in accord with the ordinary course of nature or human conduct when viewed and appraised from the test of reasonableness. The foregoing of course, are only guidelines and the Court must apply these according to all the circumstances of the case at hand.

[40] The approach in **Mat v. Public Prosecutor** was judicially endorsed by the Federal Court as being the correct one to adopt when evaluating the evidence of the defence case in **Public Prosecutor v. Mohd Radzi Bin Abu Bakar [2006] 1 CLJ 457; [2005] 6 MLJ 393**, when it held:

"*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;

(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."

[41] Following from the above, if the Court does not accept or believe the defence raised by the accused it must not convict but must proceed a stage further by considering whether the defence evidence has raised in the mind of the Court a reasonable doubt as to the guilt of the accused. If it does, then the accused is nevertheless entitled to an acquittal.

THE COURT'S FINDINGS AT THE DEFENCE STAGE

[42] The prosecution's version was that the accused was arrested at the car porch of the said house. The police found a packet of drugs in the front right pocket of his Levi's jeans and keys (which were later returned to the accused) to the accused's house. The police entered the house of the accused using the said key. Upon receiving all the SD's, SP7, SP4 and accompanied by SP5 went to the scene for further investigation.

[43] The accused's story obviously was to say he was framed by the police which I am of the considered view to be unreasonable. Nowhere in the evidence of the accused is to be found that he said the police were out to frame him by seizing the plastic bag containing the impugned drugs from behind his house.

[44] I hold, anchored on the prosecution evidence that the accused in fact had the said drugs on his person, inside the pocket of the Levi's jeans he was wearing on the day he was arrested. If the accused was innocent, he could have asked and insisted to lodge a police report which to my mind can be done at any stage, as in this case even during the proceeding of the trial. The accused had ample opportunity to inform the IO either on the day he was arrested as well as when his statement was recorded. At this stage, I take note that SP5 was honest and forth coming when he said he knew the accused before this arrest, however this fact was never challenged, and

neither was SP5 cross examined on this. No plausible material of probative value was adduced by the accused that could and would lead to an inference that SP5 or the police was going all out to frame the accused.

[45] I also find that there are 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. During cross examination the accused admitted that he didn't informed the IO that he was arrested in his house because he was not asked by the IO, and neither did he inform the IO that the said drugs was not found on his person and neither did the accused informed the IO that the said drugs was brought by policeman name Ashraff. There were no cogent reasons for SP7 to have ignored the information given by the accused if that information mentioned above was in fact given. This same view is applied to SP5 as well. It is my considered view that the evidence given by SP5 was straight forward and plausible. Nothing inherently incredible was found in his evidence and consequently therefore, there was no reason for me to disbelieve him. SP5 could not be said to have any ill-intention to frame the accused which goes to show that this case was not an entrapment nor a frame-up. I find support in cases below where the Court of Appeal in **Hafedz Saifol v PP [2017] 1 LNS 977** had referred to the Federal Court decision in **Teng Howe Seng v. PP [2009] 3 CLJ 733** where it was stated by the Federal Court that all crucial

information's beneficial to the defence must be disclosed at the earliest possible time to enable a thorough investigation to be carried out by the police. Any undue delay would entitle the sitting judge to disbelieve the evidence of the accused.

[46] I find the defence forwarded by the accused was one of mere denial, an invention of his own and failed to raise reasonable doubt on the truth of the prosecution's case, i.e., that the accused was in fact arrested at the porch of his house with the impugned drugs found in the front pocket of the Levi's jeans he was wearing and so too the keys to his house which the police had used to enter his house. It was the accused who had the custody and control of the impugned drugs found in his jeans and he had the knowledge that it is dangerous drugs. As such the presumption under s. 37(da) DDA 1952 was applicable and that the accused was trafficking the drug pursuant to the said Act.

[47] As stated earlier, the accused had called nine witnesses to corroborate his defence. Question was, whether the evidence of all these witnesses have successfully raised reasonable doubt on the truth of the prosecution's case?

[48] SD4 is the estranged wife of the accused who had been separated from the accused for 3-4 years. She claimed to have come to the said house to lock the grille door of the said house with chains and a padlock when she was informed by the accused neighbour that the said grille door was left opened after the arrest of the accused. In the circumstances of the case, I find the story of SP4 to be in possession of the keys to the house when she had already been separated from the accused for 3-4 years prior to the arrest of the accused to be not reliable. SD6 is the brother of the accused who claimed to be in the house when the accused was arrested. SD7 is the friend of SD6, whose motorcycle (Kriss) the policemen allegedly used to retrieve the said yellow plastic bag from the drain behind the house of the accused. SD5, SD8 and SD10 are neighbours. SD8 saw few Malay man allegedly trying to cut open the grille door of the house of the accused person and SD10 is the star witness (as submitted by the prosecution) who claimed to have observed the policemen allegedly picking up the said blue plastic bag. Both SD8 and SD10 did not call the police to report the unusual activity of a few plain clothes Malay men trying to cut and open the grille door of the accused house and neither did any of them tried to call or informed the accused person of such activities. Instead both went back to their house after witnessing the alleged incident. This conduct is contrary to reasonable and normal behaviour and clearly does not reflect the act of a concerned neighbour in the circumstances of the case as claimed. It is only

when they were shown the arrest report (exhibit P23) by the learned counsel for the accused that they agreed to affirm their SD, but still they did not elect to lodge any police report in that regard notwithstanding the alleged importance of their evidence. Nevertheless, the IO (together with the photographer) investigated the alleged facts and found it to be unsustainable allegations of facts as contained in the evidence of the IO that D28-31(the SD) were not true and that evidence was not challenged. It could not be denied that SD8 and SD10 are the closest neighbour to the accused, but it beats reason that the moment SD8 and SD10 saw about 5-6 Malay men broke into the house of the accused, they elected not to call the police and/or call the accused to warn/alert him of what was happening. I find this not to be factually plausible in the circumstances of the case. SD10 allegedly saw two (2) men took a motorcycle and went to the back of the house and he allegedly had observed two (2) Malay men picking up a blue plastic bag from the drain of the house of the accused. Rather than lodging a police report about what he had saw in the circumstances of the case, SD10 chose to just prepare and submitted an SD in regard to it considering the degree of importance of such an evidence. In the circumstances of the case, I could not afford to treat the evidence given by SD8 and SD10 without suspicion. SD9 was the one who claimed to have repaired the padlock ear of the grille door ("*telinga grill*"). During cross examination, SD9 informed that the said "telinga grill" was found on the inside part of the grille

(*bahagian dalam grill*). I wish to refer to the evidence of SD10 who claimed that he saw 5-6 Malay men used big scissors (*gunting besar*) cutting the lock to the grille of the said house. According to the accused it was the padlock that was cut whereas SD4, SD6 and SD9 maintained that the padlock ear on the inside part of the grille door was cut. SD10 on the other hand claimed that the police cut the top part of the grille while in D29, he alleged that padlock was cut by the police. 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 is 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 grill door design were tendered to prove the same considering the importance of such an evidence if it is to be true. I refer to 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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[49] I find that the defence witnesses were conveniently very well moulded to tally with the evidence of the accused and I agreed 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 735 prosecution's case.

[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 740 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.

THE STATUTORY DECLARATIONS OF SD6, SD7, SD8 and SD10

745 **[51]** For completeness, I wish to elaborate (briefly) on the SD's of SD6 (dated 17th April 2016), SD7 (dated 15th April 2016), SD8 (dated 15th April 2016) and SD10 (dated 15th April 2016), all were done almost eight (8) months after the arrest of the accused (10th August 2015). SD is governed by the Statutory Declarations Act 1960 (Act 13) and section 3 of Act 13 750 provides that false declaration is punishable under the Penal Code. A

statutory declaration is a legal document defined under Act 13. Statutory declarations are commonly used to allow a person to declare something to be true for the purposes of satisfying some legal requirement or regulation when no other evidence is available, but what weight is given to the declaration is a matter for the Court to decide. Intentionally making a false statement as a statutory declaration is a crime equivalent to perjury, and punishable by fines and/or a prison sentence.

[52] It is my considered view there was no necessity at all for the said witnesses to have gone to the trouble of affirming those SD's. Notwithstanding, it is a statement made under oath, the evidence of the defence witnesses would still have to go through the scrutiny of the Court and it processes in the filtering of the said evidence. Just because the information are given in a statutory declaration does not make the information's contained therein to be true per se. It is subject to legal scrutiny just as in an affidavit evidence. The said SD cannot in the circumstances of the case be used to corroborate the evidence of the maker. It still requires independent verification. Therefore, I place no importance on the statutory declaration as the same evidence were orally given in Court by the maker which was cross examined and re-examined. SD6, SD7, SD8 and SD10 claimed to have allegedly seen the policemen took the plastic bag back from the back lane, then in such circumstances

they should have lodged a police report against the said two (2) policemen and/or come forward to lodge a complaint as concerned citizen to enable further investigation to be carried out to rule out the possibility of criminal entrapment of an innocent person with a crime which carries a capital punishment. But such evidence was not treated with urgency as such evidence should be and was only elected to be produced in a statutory declaration form for the trial at the defence stage. I find the evidence to be far-fetched from the circumstances of the case and a concoction lacking in probative value in an attempt to secure an acquittal by the accused. I find that the evidence of SD6, SD7, SD8 and SD10 were negated during cross examination where they failed to affirm that the said yellow/blue plastic bag was the same with the said plastic packets that was found and seized from the accused person. SD10 in his evidence said that he was forced by the police to stand near the door (reference to photograph P36(10) but he failed to lodge any report in regard to it. SD10 also said he was threatened by a policeman by the name of Insp Hisham but he still didn't lodge any complaint and/or police report thereto. By referring to said photograph exhibit D39(5-6), SD10 agreed with the suggestion from the learned DPP, that the woman in the said photographs (re-enactment of the position of the two policemen allegedly picking up the plastic bag at the back lane of the house by the defence) was not with SD10 when he claimed to have seen the two Malay men allegedly pick-up up the yellow plastic bag. SD10

agreed when it was put to him that what the woman in the photograph did was not the same as what the two Malay men did at the back lane. I find the evidence as contained in the said statutory declarations not reliable and failed to raise reasonable doubt as to the prosecution case. To reiterate, obviously the said SD's were concocted to avoid the accused from being connected with the impugned drugs.

CONCLUSION

[53] Since I am satisfied that the accused had failed to raise a reasonable doubt on the truth of the prosecution's case as to his possession and knowledge, the presumption of trafficking applied against the accused by virtue of the fact that he was found to be in actual possession of more than 50 grams of Methamphetamine. In this case, the nett weight amount of Methamphetamine was 76.79 grams.

[54] The accused did not put up any defence that the said drugs were meant for his consumption. The accused's defence was a complete denial and such defence had fallen short of rebutting the presumption of trafficking that operated against the accused on balance of probabilities and as such, no reasonable doubt was raised as to the accused's guilt which the prosecution had established beyond reasonable doubt.

[55] Based on the above, I convicted the accused on the charge so preferred against him under s. 39B(1)(a) and punishable under s.39B(2) of the DDA 1952. As there is only one mandatory sentence provided by the law for this offence, I sentenced the accused to death by hanging.

Dated 7th November 2017.

[HAYATUL AKMAL ABDUL AZIZ]
Judicial Commissioner
High Court of Malaya In Ipoh,
Perak Darul Ridzuan.

Parties:

Puan Naidatul Athirah binti Azman
Deputy Public Prosecutor for the Prosecution.

Datuk N. Sivanathan
Messrs Sivanathan
Counsel for the Accused.