Public Prosecutor v Ong Swee Keat & Anor [2021] MLJU 646

Malayan Law Journal Unreported

HIGH COURT (JOHOR BAHRU)

SHAHNAZ SULAIMAN JC

CRIMINAL TRIAL NO JA-45A-26-07 OF 2018

26 April 2021

Nor Azizah bt Muhammad (Timbalan Pendakwa RayaPejabat Penasihat Undang-Undang Negeri Johor) for the prosecution.
N Sivananthan (Low Huey Theng with him) (Sivananthan) for the first accused.
Mohd Radzi bin Yatiman (Rahim & Lawrnee) for the second accused.

Shahnaz Sulaiman JC:

GROUNDS OF JUDGEMENTINTRODUCTION

[1]The first accused and second accused in this case were charged for an offence under section 39B (2) of the Dangerous Drugs Act 1952 read together with section 34 of the Penal Code. At the end of the prosecution case, this court found that the prosecution had established a *prima facie* case. Consequentially, both the accused were ordered to enter their defence. At the end of the trial,

this court acquitted and discharged the first accused and second accused. These grounds expound the decision of this court in acquitting and discharging both the accused.
THE CHARGE

[2]The charge proffered against the first accused and second accused read as follows:

> "Bahawakamubersama-sama pada 04/02/2018 jam lebihkurang 12.15 malam di sebuahrumahberalamat No. 20-08 D' Esplanade KSL Resort, Jalan Seladang, Taman Abad di dalam Daerah Johor Bahru, di dalam Negeri Johor, telahmengedardadahberbahayaiaituMethamphetamine seberat 69.32 gram dan denganitukamutelahmelakukansatukesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan bolehdihukum di bawah seksyen 39B(2) Aktayang sama dan dibacabersama seksyen 34 Kanun Keseksaan."

THE PROSECUTION CASE

[3]On 3 February 2018 at about 9.15am, based on information that the first accused was involved in drug trafficking, Insp Mohd Nasiruddin bin Adnan (SP3) and a team from JabatanSiasatanJenayahNarkotik

IPK Johor stopped the first accused at the road side of Jalan Persiaran Perling. The first accused was in his Mercedes Benz bearing registration number JSN 8772. A physical examination was conducted on the first accused and a set of keys and 2 access cards were seized.

[4]On 4 February 2018 at approximately 12.15am, SP3 and a team fromJabatanSiasatanJenayahNarkotik IPK Johor were led by the first accused to the address at No 20-08 D'Esplanade KSL Resort, Jalan Seladang, Taman Abad, Johor Bharu ("the place of incident").

[5]SP3 used the access card seized from the first accused to make their way to the 3rd floor parking. The first accused then led SP3 and his team to the place of incident. SP3 opened the door to the place of incident with the key seized from the first accused. Once SP3 opened the door, he found the second accused seated on a sofa next to the bed. The place of incident is a studio apartment.

[6]On a table in front of the second accused, SP3 saw a brown bag which was open and contained 16 translucent packets containing what was suspected to be syabu. SP3 seized the 16 translucent packets and the brown bag. The first accused and second accused together with the items were taken to JabatanSiasatanJenayah IPK Johor for further action.

[7]The exhibits were taken to Jabatan Kimia Malaysia for analysis. The chemist confirmed the exhibits to be Methamphetamine weighing 69.32 grammes.
CONCLUSION OF PROSECUTION CASE

[8]The procedure at the end of the case for the prosecution is provided for in section 180 of the Criminal Procedure Code. The court is required to consider whether the prosecution has proven a *prima facie* case against the accused at the end of the case for the prosecution.

[9]Before deciding if the prosecution has made out a *prima facie* case against the accused, it is necessary to comprehend what amounts to a *prima facie* case. Black's Law Dictionary (4th edition) states "A litigating party is said to have a *prima facie* case when the evidence in his favour is sufficiently strong for his opponent to be called to answer it. A *prima facie* case, then, is one which established by the sufficient evidence, and can be overthrown only by rebutting the evidence adduced on the other side."

[10]Decided case law will shed light on what amounts to a *prima facie* case. In *Balachandran v PP* [2005] 1 CLJ 85, the Federal Court held:

> "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**… The result is that the force of the evidence adduced must be such that, **if unrebutted, it is sufficient to induce the Court to believe in the existence of the facts stated in the charge** or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other had if a *prima facie* case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier. In order to make a finding either way the **Court must**, at the close of the case for the prosecution, **undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established**."
>
> [Emphasis added]

[11]In the case of *Public Prosecutor v Tan Sri KasitahGaddam* [2009] 6 MLJ 494the court stated:

> "**A *prima facie* case arises when the evidence in favour of a party is sufficiently strong for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence by the other side.** Taken in its totality, the force of the evidence must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. **As this exercise cannot be postponed to the end of the trial, a maximum evaluation of the credibility of**

every prosecution witnesses must be done at the close of the case for the prosecution before the court can rule that a *prima facie* case has been made out in order to call for the defence."

[Emphasis added]

[12]Therefore, in order to determine a *prima facie* case, a judge is required to conduct a maximum evaluation of all the evidence before him. This includes a positive evaluation of the credibility and reliability of all evidence adduced in order to establish if the ingredients of the offence have been established.

ANALYSIS OF THE PROSECUTION CASE

[13]It is incumbent upon the prosecution to prove the ingredients of the offence for the purposes of establishing a *prima facie* case. In this instant case for an offence under section 39 B (1)(a) of the Dangerous Drugs Act 1952, the ingredients are:

(i) drugs are dangerous drugs within the meaning and definition of the Dangerous Drugs Act 1952 (DDA);

(ii) the first accused and second accused were in possession of the disputed drugs; and

(iii) the first accused and second accusedwere trafficking in the drugs.

[14]This court will now proceed to consider whether the prosecution had fulfilled a *prima facie* case.

The drugs are dangerous drugs within the meaning and definition of the DDA.

[15]The chemist, Puan Nur Hafiza binti Md Yusof (SP2) testified that the drugs and respective weight as per the charge is Methamphetamine with a weight of 69.32grammes. SP2further testified and confirmed that the drugs were dangerous drugs listed in the First Schedule to the DDA. SP2 stated this in the Chemist Report [Exhibit P 10].

[16]Relating to the evidence of a chemist, the court is allowed to accept the opinion of the expert when the opinion of the chemist is limited to the nature and identity of the substance. Allusion is made to the Federal Court case of *MunusamyVengadasalam v PP* [1987] CLJ (Rep) 221which stated:

"We are therefore of the view, **that in this type of cases where the opinion of the chemist is confined only to the elementary nature and identity of the substance, the Court is entitled to accept the opinion of the expert of its face value, unless it is inherently incredible or the defence calls evidence in rebuttal by another expert to contradict the opinion**. So long as some credible evidence is given by the chemist to support his opinion, there is no necessity for him to go into the details of what he did in the laboratory, step by step."

[Emphasis added]

[17]Moreover, in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301 the court held that the evidence of the chemist is to be taken at face value. The court was held as follows:

"It has been held by the trilogy of the (then) Supreme Court cases of *Munusamy v. PP* [1987] 1 MLJ 492, *PP v Lam Sam* [1991] 3 MLJ 426 and *Khoo Hi Chiang v. PP* [1994] 1 MLJ 265 that **the court is entitled to accept the evidence of the chemist on its face value without the necessity for him to go into details of what he did in the laboratory step by step unless it is inherently incredible or the defence calls evidence in rebuttal by another expert. The rationale of this view is lucidly explained in** *Khoo Hi Chiang v. PP* [1994] 1 MLJ 265 **where it was held that the evidence of a chemist on dangerous drugs analysed by him is one of fact and not of opinion. In the circumstances the evidence of a chemist is not controlled by** s. 51 of the Evidence Act 1950 **thereby making it unnecessary for him to testify on the test conducted by him in arriving at his conclusion. The evidence of the chemist is therefore sufficient.** The trial judge had accepted it. Thedefence did not seriously challenge the evidence beyond merely putting to the chemist that his analysis was improper and inadequate. The chemist disagreed with the suggestion. This submission of counsel cannot therefore be sustained."

[Emphasis added]

[18]Based on the evidence of SP2, Exhibit P10 and the authorities referred to, this court finds that the prosecution has proven the nature and weight of the impugned drugs which is the subject matter of the charge. This court henceforth finds the prosecution has fulfilled the first ingredient of the offence.

[19]Pertaining to the movement of the exhibits from the time the exhibits were recovered until the time the exhibits were produced in court, this court found no fatal break in the chain of evidence of the exhibits and is therefore satisfied that the drugs produced in court were the same drugs seized by the police during the raid. In this regard, this court alluded to the Court of Appeal case of *Christopher UchennaEfogwo v Public Prosecutor* [2017] 1 LNS 1479where the court held:

"[24] In our view, in a drug trafficking case, the prosecution must, as far as is practically possible, establish the chain of custody as follows:-

(a) the seizure and marking of the dangerous drug recovered from the accused by the arresting officer;

(b) the handover of the dangerous drug from the arresting officer to the investigating officer;

(c) the handover by the investigating officer of the dangerous drug to the Chemist for chemical analysis; and

(d) the production of the said dangerous drug seized in court as exhibits. In our view, these links in the chain of custody were adequately established by the testimonies of the prosecution witnesses and the documentary records of the case."

[20]This court is satisfied that the drugs produced in court were the same drugs seized by the police. This court consequentially finds no fatal break in the chain of evidence of exhibits.
The first accused and second accused were in possession of the disputed drugs.

[21]The next ingredient is that the accused had possession of the disputed drugs. 'Possession'is the ingredient which is essential for the prosecution to prove. To prove the accused had possession, the prosecution is required to prove that the accused was in 'custody or control' of the said drugs and that the accused had knowledge of the said drugs.

[22]Possession was defined in the case of *Chan Pean Leon v. PP* [1956] MLJ 237, as follows:

" 'possession' for the purposes of criminal law involves possession itself – which some authorities term 'custody' or 'control' – and knowledge of the nature of thing possessed. As to possession itself he cited the following definition in Stephen's Digest (9th Ed p. 304), in which the exclusive element mentioned by Taylor J appears. **A moveable thing is said to be in the possession of person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need**."

[Emphasis added]

[23]Possession can either be actual or presumed. Presumed possession and knowledge is upon the invocation of section 37(d) of the Dangerous Drugs Act 1952 by proof of custody and control.

[24]The court in the case of *Toh Ah Loh And MakThim v Rex* [1949] MLJ 54stated:

"Possession, in order to incriminate a person, must have the following characteristics. The possessor must know the nature of the thing possessed, must have in him a power of disposal over the thing, and lastly must be conscious of his possession of the thing."

[25]The requirement of knowledge of the thing possessed is an essential ingredient of possession. In *LeowNghee Lim v Reg* [1956] 1 MLJ 28, the meaning of the "custody'', "control" and "possession" were elaborated as reproduced below:

> "Custody means having care or guardianship; goods in custody are in the care of the custodian and, by necessary implication, he is taking care of them on behalf of someone else. You cannot take care of goods unless you know where they are and have the means of exercising control over them. Custody therefore implies knowledge of the existence and whereabouts of the goods and power of control over them, not amounting to possession.
>
> Control must be proved as a fact and it must arise from the relation of the person to the goods, irrespective of whether they are contraband.
>
> **Probably the most helpful definition of possession is:-**
>
> **"The relation of a person to a thing over which he may at his pleasure exercise such control as the character of the thing admits, to the exclusion of other persons."**
>
> **This definition does not express, but it does imply that the meaning of the word includes some element of knowledge.**
>
> **A man must know of the existence of a chattel and have some idea of its whereabouts before he can exercise any control over it. The word possession therefore implies some knowledge but not necessarily full or exact knowledge."**
>
> [Emphasis added]

[26]The authorities quoted above suggest that possession is when a person is in a position that he has the power to deal with it as the owner to the exclusion of all others, and when the circumstances are that he may be presumed to intend to do so.

[27]Custody is defined as having care or guardianship over the goods. By implication this means that the person is keeping the goods on behalf of someone else. This infers that the person had knowledge of the existence and location of the goods and has power of control over them short of having possession.

[28]From the cases quoted above, the prosecution must prove that the accused had the requisite knowledge or mental element of the exhibits so as to be in possession. Moreover, knowledge in the absence of a confession cannot be proven by direct evidence but by way of inference from the surrounding circumstances.

[29]The circumstances reveal that the police stopped the first accused in his Mercedes Benz bearing registration number JSN 8772 at the side of Jalan Persiaran Perling, Taman Perling. A physical examination on the first accused was conducted and no illegal items were recovered. The police discovered that the first accused is an Indonesian citizen. The police seized 2 keys and 2 access cards from the first accused. The first accused was taken to PejabatNarkotik, IbuPejabat Polis Johor Bahru Utara.

[30]Subsequently, the first accused led the police to D'Esplanade KSL Residence. Using the access card seized from the first accused, SP3 and the team went to the third-floor parking of D'Esplanade KSL Residence. Thereafter, SP3, the police team and the first accused went to apartment number 20-08. SP3 opened the apartment door using the keys seized from the first accused.

[31]Upon entering the apartment, the police team found a Vietnamese woman, the second accused seated on a sofa next to the bed. SP3 saw a brown bag which was opened containing 16 translucent packets containing what was suspected to be syabu. SP3 seized the said items.

[32]Chia Wei Sun (SP 4), the landlord of the place of incident gave evidence that he had rented the studio apartment to the first accused in 2017. The crux of SP4's evidence is that he had met with the tenant about three to four times. The rental for the D'Esplanade KSL Residence apartment was paid with cash. SP4 identified the first accused as the tenant and said he, SP4 had gone to the first accused's house in Zenith and was informed that the first accused lived there. SP4 did not know the second accused.

[33]Insp Wan Nur Munirah Binti Wan Ruslan (SP5), the investigating officer informed the court that she did not seize any men's clothing from the apartment. She further informed the court that the CCTV footage was not seized. SP5 reasoned that she did not seize the CCTV footage as the location of the CCTV camera did not face the apartment 20-08 D'Esplanade KSL Residence. Hence, SP5 was of the view that the CCTV did not record the movement of persons in and out of the place of incident.

[34]The evidence before this court disclosed that the first accused rented the apartment 20-08 D'Esplanade KSL Residence. SP4, the landlord confirmed this. While it was argued by defence counsel that the first accused did not stay in apartment 20-08 D'Esplanade KSL Residence, the evidence before this court reveals that the first accused had the keys and access card to apartment 20-08 D'Esplanade KSL Residence. In this instance, the first accused rented the said apartment. He was the tenant of the place of incident. The first accused had the keys and access card to apartment 20-08 D'Esplanade KSL Residence. In such an instance, this court finds the first accused would have the power to exclude others from the enjoyment of the property.

[35]According to SP3, when SP3 introduced himself to the first accused, the first accused seemed frightened and starting perspiring. Can the conduct of an accused person be considered?

[36]In this regard, allusion is made to section 8 of the Evidence Act 1950 states as follows:

> "
>
> (1) Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.
>
> (2) The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.
>
> Explanation 1 - The word "conduct" in this section does not include statements unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Act.
>
> Explanation 2 - When the conduct of any person is relevant any statement made to him or in his presence and hearing which affects his conduct is relevant."

[37]While conduct of an accused may be relevant and admissible, it must be seen in the totality of the evidence adduced before the court. Hence while an accused may be seen to be frightened when the police introduced themselves, the conduct of an accused may be due to the fright of being stopped by the police. It is therefore sensible to consider the conduct of an accused in the totality of the evidence presented before this court.

[38]In the case of *PP v Chia Leong Foo* [2000] 6 MLJ 705, the court held:

> "I must add that evidence of conduct which allows inferences to be drawn, as in the two cases referred to, is admissible under s 8 of the Evidence Act 1950. A typical example of such conduct is the absconding or flight of a person after the commission of an offence. But evidence of mere absconding or flight is not such a vital circumstance which can be considered to show that the absconder was having any guilty mind (see *Bhagat Bahadur v State* 1996 Cri LJ 2201). **Such conduct must be considered in the totality of the evidence adduced (see *Mansor bin Mohd Rashid's* case). For it to be capable of amounting to an admission of guilt there must be a nexus between his conduct, his flight and the offence in question**."
>
> [Emphasis added]

[39]In this instant case, the first accused's conduct may be considered with the evidence that the first accused had the keys and access card to apartment 20-08 D'Esplanade KSL Residence. It was the first accused who had rented the said apartment as confirmed by the landlord SP4. It is noteworthy to observe

that the tenancy agreement [Exhibit P17] was in the name of Ng SweeKiat, the tenant. The first accused is Ong SweeKeat. Nonetheless, the landlord SP4 identified the first accused as the tenant to whom SP4 had let apartment 20-08 D'Esplanade KSL Residence to.

[40]Other evidence adduced before this court is the fact that the first accused had led the SP3 and the police team to apartment 20-08 D'Esplanade KSL Residence where the impugned drugs were recovered. This court finds that had the first accused not led SP3 and his team to the said apartment, it would have been difficult if not impossible for SP3 and the police team to identify which apartment the keys and access card belonged to.

[41]As to the second accused, she was found by SP3 and the raiding team facing the impugned drugs. The disputed drugs were in front of the second accused when the police team raided apartment 20-08 D'Esplanade KSL Residence. SP3 gave evidence that the impugned drugs were not concealed and could be visibly seen. As the disputed drugs were situated before the second accused, it is the view of this court that it would be incomprehensible for the second accused to state that she had no knowledge of the disputed drugs which were placed in front of her.

[42]In the case of *Badrulsham bin Baharom* [1988] 2 MLJ 585, the court held:

> "a. I believe it is well settled at least by our courts that to **establish possession by an accused person of any dangerous drugs or to impute to him possession of the said drugs it must be first shown that he had knowledge of the drugs which were found to be in his possession**. The earliest authority, which I could find, that expounded this principle is the case of *Chiah Tian v Rex* the then Chief Justice of Singapore said at p 106:
>
> > "In my opinion, possession to be an offence must be possession under such circumstances that a court is justified that the accused (or the servant in cases of constructive possession) was conscious of the possession. **As Pollock C.B put it in** *The Queen v Woodrow* 16 L.J. M.C 122, **'a man can hardly be said to be in possession of anything without knowing it' and I think that a person is not guilty of the offence of possession if he is not aware of the possession.**"
>
> [Emphasis added]

[43]Based on the evidence presented before this court, and for the reasons aforesaid, this court finds that the first accused and second accused had and custody, control of the impugned drugs. This court further finds that the first accused and second accused had knowledge of the impugned drugs. As such, this court finds that the prosecution has made out the elements of possession.
The first accused and second accused were trafficking in the drugs.

[44]In this case, the prosecution relied on the statutory presumption of trafficking of drugs for the charge. To this effect, the prosecution relied on section 37(da) of the Dangerous Drugs Act 1952.

[45]The accused was charged with trafficking of 107grammes of Methamphetamine. Section 37(da) of the Dangerous Drugs Act 1952 provides:

> "In all proceedings under this Act or any regulation made thereunder –
>
> …
>
> (da) any person who is found in possession of-
>
> …
>
> > (xvi) 50 grammes or more in weight ofMethamphetamine;
> >
> > …otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug.

…"

[46]The Federal Court in the case of *PP v Zulkifli Arshad* [2010] 6 CLJ 121stated:

> "We are of the view that having been established as a fact by the trial judge that there was actual possession of the drugs by the respondent, the weight of which exceeded 200 grams of cannabis, **then the statutory presumption under** s.37(da) **must come into play** since it provides:
>
> (da) any person found in possession of …
>
> (vi) 200 grams or more in weight of cannabis;
>
> other than in accordance with the authority of this Act or any other written law, **shall be presumed, until the contrary is proved, to be trafficking** in the said drug.
>
> The same applies to the failure of the Court of Appeal for not applying the presumption under section 37(da)(vi). Be that as it may, we feel that on the evidence adduced by the prosecution, and upon the failure by the learned trial judge as well as the Court of Appeal to invoke the presumption, it is incumbent upon us to do so in accordance with the provision of s.37 (da)(vi) of the Act."
>
> [Emphasis added]

[47]In this case, the prosecution has established the possession of the impugned drugs. I therefore find that the prosecution has succeeded in invoking the statutory presumption of trafficking against the first accused and the second accused under section 37 (da) (xvi) of the Dangerous Drugs Act 1952.

[48]The net weight of the drugs was above the statutory minimum provided in section 37(da) (xvi) of the Dangerous Drugs Act 1952. This court therefore holds that the statutory presumption under Section 37(da) of the Dangerous Drugs Act has arisen against the first accused and the second accused.

[49]Upon the maximum evaluation of the evidence, this court finds that the prosecution has successfully proven a *prima facie* case against the both the accused. The first accused and second accused are hereby called to make theirdefence.

[50]The three alternatives were explained to both the first and second accused and both the accused chose to give sworn evidence.

THE DEFENCE CASE

[51]The SD1, the first accused gave evidence under oath. In his testimony, the SD1 stated that his girlfriend, Trinh lived in the place of incident. According to SD1, he had previously, on occasion, spent the night at the No 20-08 D'Esplanade KSL Resortapartment. He admitted that he used a fake identity card for purposes of renting the apartment as the owner of the apartment did not want to let the apartment to foreigners.

[52]According to SD1, the second accused (SD2) is Trinh's friend. SD1 did not know how SD2 got into the No 20-08D'Esplanade KSL Resort apartment. SD2 did not live in the No 20-08 D'Esplanade KSL Resort apartment. SD2 was not SD1's girlfriend, and SD1 further stated that he did not know if the impugned drugs belonged to SD2. The apartment No 20-08 D'Esplanade KSL Resort where the incident occurred was not rented out to SD2.

[53]Pertaining to his background, SD1 informed the court that he had been living in Johor Bharu since 2017. He was originally from Indonesia and had moved to Singapore in 1980. In Singapore, SD1 worked at a furniture factory. SD1 was not working when he was arrested by the police. His siblings send him money each month to support him in Johor Bahru.

[54]According to SD1 he had a nerve problem and needed medical treatment which was expensive in Singapore. He came to Johor Bahru to seek medical treatment.

[55]Pertaining to the individual named Trinh, SD1 stated that she was his girlfriend. However, SD1 did not know her full name. The No 20-08 D'Esplanade KSL Resort apartment was rented by SD1 for Trinh to stay. SD1 said he informed he police about Trinh when he was arrested.

[56]The second accused (SD2) gave evidence under oath. SD2 is a Vietnamese national. According to SD2, she went to the No 20-08D'Esplanade KSL Resort apartment to meet her friend Trinh. SD2 stayed in Hotel Eleventh Century with her boyfriend. According to SD2, she was watching the television with Trinh when Trinh suddenly left the apartment in a hurry. SD2 waited at the apartment for Trinh to come back. She fell asleep and then later heard someone opening the door (SP3). SD2 found it was the police who had entered the apartment with SD1.

[57]In her testimony, SD2 said she had met SD1 twice before the day of the incident. SD2 did not know who the brown bag belonged to nor did she know about the impugned drugs. According to SD2, the impugned drugs were all over the D'Esplanade KSL Resort apartment and it was the police who put the impugned drugs into the brown bag.

[58]According to SD2, her boyfriend is Tan Wee Kin. SD2 said that Trinh is SD1's girlfriend. SD2 informed the court that she had met Trinh in prison while waiting for her trial. Trinh has since returned to Vietnam. SD2 said she had informed the police about Trinh.

DUTY OF COURT AT THE END OF DEFENCE CASE

[59]Section 182A of the Criminal Procedure Code sets out the duty of a trial court at the conclusion of the defence case. The section states:

> "Section 182A. **Procedure at the conclusion of the trial.**
>
> (1) At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.
>
> (2) If the Court finds that the prosecution has proved its case beyond reasonable doubt, the Court shall find the accused guilty and he may be convicted on it.
>
> (3) If the Court finds that the prosecution has not proved its case beyond reasonable doubt, the Court shall record an order of acquittal."

[60]Section 182A of the Criminal Procedure Code does not define what is meant by reasonable doubt. However, in *Public Prosecutor v Saimin* [1971] 2 MLJ 16**,** Sharma J held:

> "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.
>
> It has again been said that **'reasonable doubt' is the doubt which makes you hesitate as to the correctness of the conclusion which you reach. If under your oaths and upon your consciences, after you have fully investigated the evidence and compared it in all its parts, you say to yourself I doubt if he is guilty, then it is a reasonable doubt. It is a doubt which settles in your judgment and finds a resting place there.** Or as sometimes said, it must be a doubt so solemn and substantial as to produce in the minds of the jurors some uncertainty as to the verdict to be given. A reasonable doubt must be a doubt arising from the evidence or want of evidence and cannot be an imaginary doubt or conjecture unrelated to evidence."
>
> [Emphasis added]

[61]The thought process and stages that a trial court should follow in the assessment and evaluation of the defence evidence was set out by His Lordship Suffian J (as His Lordship then was) in the case of *Mat v Public Prosecutor* [1963] 29 MLJ 263. His Lordship stated:

> "The position may be conveniently stated as follows: -
>
> (a) If you are satisfied beyond reasonable doubt as to the accused's guilt
>
> Convict.
>
> (b) If you accept or believe the accused's explanation
>
> Acquit.
>
> (c) If you do not accept or believe the accused's explanation
>
> Do not convict but consider the next steps below.
>
> (d) If you do not accept or believe the accused's explanation and that explanation does not raise in your mind a reasonable doubt as to his guilt
>
> Convict.
>
> (e) If you do not accept or believe the accused's explanation but nevertheless it raises in your mind a reasonable doubt as to his guilt
>
> Acquit."

[62]Having regard to the duty of the court at the end of the trial, this court will now proceed to consider the defence case.

EXAMINATION OF THE DEFENCE CASE

[63]The duty of the court at the end of the trial is to consider all the evidence adduced before the court. From the facts adduced before this court, the defence of both the accused is that neither of them stayed in the apartment where the impugned drugs were recovered. The first accused admitted to renting the said D'Esplanade KSL Resort apartment. He managed to rent the said premises using a fake identification card. SP4, the landlord, identified the first accused as the person who rented theNo 20-08 D'Esplanade KSL Resort apartment from him. The fact that the first accused rented the No 20-08 D'Esplanade KSL Resort apartment where the impugned drugs were recovered is not in dispute.

[64]For both the first accused and second accused, their defence revolves around the person by the name of Trinh. Trinh is the girlfriend of the first accused and is a friend of the second accused. Both the accused said they had informed the police about the existence of Trinh. Nonetheless, this court finds that the name Trinh was only raised at the defence stage. Trinh's name was not raised during the prosecution case by the defence counsel. While this court is aware that the defence counsel conducting this case during the prosecution case and the defence counsel conducting this case during the defence stage are different, this court finds that the Trinh's name was not raised during the prosecution case. Trinh's name was raised during the defence stage of this case. There was no challenge by the prosecution that Trinh did not exist.

[65]Both the accused stated that neither of them lived in the No 20-08 D'Esplanade KSL Resort apartment. The evidence before this court disclosed that there were no personal items of the first accused in No 20-08 D'Esplanade KSL Resortapartment. The apartment had only woman's clothing. This is

consistent with the first accused's version that the No 20-08 D'EsplanadeKSL apartment was rented for Trinh.

[66]The evidence further reveals that there were 2 sets of keys for the D'EsplanadeKSL apartment. SP4 had stated this fact. From the evidence before this court, the first accused had one set of keys. The second accused did not have the other set of keys. SP4 had stated this fact. The fact that the second accused did not have keys to the apartment was not challenged by the prosecution.

[67]The question before this court is, who therefore had the other set of keys? The whereabouts of the other set of keys was not explained. Hence, this court finds that it could be possible that someone else had access to theNo 20-08 D'EsplanadeKSL apartment other than the first accused and the second accused that was physically in the No 20-08 D'Esplanade KSL apartment.

[68]SP3 stated that at the Balai Polis, the first accused said" sayaadasedikitsejuk di rumahpertama". Exhibit D23 and Exhibit D24 does not reflect or state this. Exhibit D23 relates to the incident where the first accused was detained at Jalan Pesiaran Perling where no *barang salah* was found on the first accused. Exhibit D24 relates to the first accused leading the police to the No 20-08D'EsplanadeKSL apartment and finding the second accused and the disputed drugs there. There was nothing to support the evidence of SP3 as what the first accused had allegedly said to SP3.

[69]This court found that the second accused did not sign the *borangbongkar* as the clothes in the apartment were not hers but Trinh. This too was not challenged by the prosecution. There was evidence before this court which was not challenged by the prosecution.

[70]What is the position of the law pertaining to evidence which is not challenged? In the case of *Christopher UchennaEfogwo v Public Prosecutor* [2017] 6 MLJ 696 the Court of Appeal held:

> "[21] It is pertinent to note that learned counsel had failed to cross-examine SP4 on the accuracy of the fact that the 44 capsules found from the appellant's body contained 509.2 gram of Methamphetamine. **Failure to cross-examine on a vital issue may be deemed to be an acceptance of the same unless there is other compelling evidence to show otherwise.** (See *Wee See Chin v PP* [1981] 1 MLJ 213; *Aik Ming (M) SdnBhd&Ors v Chang Ching Chuen&Ors& Another Case* [1995] 3 CLJ 639). it is important to reiterate that what matters most is the weight of the dangerous drugs which formed the subject matter of the charge i.e the corpus delicti of the offence."
>
> [Emphasis added]

[71]In another Court of Appeal case, *CheuKokChoon v PP* [2017] MLJU 1216 it was stated:

> "We shall not delve on the issue in contention in this appeal, but for completeness, **we ought to mention that it is apparent on our careful perusal of the notes of evidence, that the appellant failed to cross-examine the prosecutions witnesses in connection with the identity and the evidence relating to the movement and custody of the drug exhibits. Therefore such failure goes to the credibility of the appellant and amounts to an acceptance of the prosecution's witnesses evidence."**
>
> [Emphasis added]

[72]To answer the question posed earlier, the failure to challenge the witness means that the evidence is accepted. Hence, in this case, the failure of the prosecution to challenge the defence witness would mean that the evidence of the defence witness is accepted.

[73]As the prosecution failed to challenge the defence witness on several issues, the evidence of the defence witness is accepted. This includes the fact that Trinh exists, that SD2 did not have keys to the No 20-08 D'Esplanade KSL apartment and that the clothes in the place of incident did not belong to the second accused.

[74]In this regard, this court referred to the case of *Mohd Hazrin Md Sari v PP* [2008] 5 CLJ 361 where the Court of Appeal held:

> "…when the appellant gave his evidence about Badrol Hisham it was never put to him that such a person did not exist and that he was a figment of the appellant's imagination…
>
> …In the present case the added fact that it was never put to the appellant under cross-examination that Badrol Hisham did not exist must also be taken into account when assessing the credibility of the defence case…"

Common Intention

[75]Counsels for both the first accused and second accused raised the issue of common intention pursuant to section 34 of the Penal Code. It was submitted that the prosecution had failed to prove the common intention between the first and second accused.

[76]In this regard, section 34 of the Penal Code provides:

> **"**Section 34**. Each of several persons liable for an act done by all, in like manner as if done by him alone.**
>
> When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone."

[77]The provision of section 34 of the Penal Code places a burden on the prosecution to show that the crime was in furtherance of the common intention which presupposes permutation or pre-concept of mind. To arrive at this decision, this court is required to consider all the evidence before this court.

[78]The Federal Court in the case of *Krishna Rao a/l Gurumurthi v Public Prosecutor & Another Appeal* [2009] 3 MLJ 643 held:

> "[60] It is settled law that s 34 is a rule of evidence and does not create a substantive offence. Simply put it is a statutory recognition to the common sense principle that if more than two persons intentionally do a thing jointly it is just the same as if each of them had done it individually. It is an embodiment of the concept of joint liability in doing the criminal act based on common intention. Hence, an accused person is made responsible for the ultimate criminal act done by several persons in furtherance of the common intention of all irrespective of the role he played in the perpetration of the offence. The section does not envisage the separate act by all the accused persons for becoming responsible for the ultimate criminal act.
>
> [61] **The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case. It has been said that as common intention essentially being a state of mind direct evidence as proof is difficult to procure. Invariably inferences have to be relied upon arising from such acts or conduct of the accused, the manner in which the accused arrived at the scene, the nature of injury caused by one or some of them or such other relevant circumstances available. Indeed the totality of the circumstances must be taken into consideration in arriving at a conclusion whether there was common intention to commit the offence for which the accused can be convicted. The facts and circumstances of each case may vary. As such each case has to be decided based on the facts involved. Whether an act is in furtherance of the common intention is an incident of fact and not of law.**
>
> [62] For a charge premised on common intention to succeed it is essential for the prosecution to establish by evidence, direct or circumstantial, that there was a plan or meeting of mind of all the accused persons to commit the offence for which they are charged with the aid of s 34 notwithstanding that it was pre-arranged or on the spur of the moment provided that it must necessarily be before the commission of the offence."
>
> [Emphasis added]

[79]The ingredients of section 34 of the Penal Code was expounded in Ratanlal&Dhirajlal's Law of Crimes (28th edition) as reproduced below:

"8. Common intention, essential ingredient – The consensus of minds of person to bring about certain result having criminal propensity and participation in criminal act in some manner is essential ingredient of common intention. To attract Section 34 of the Code, no overt act is needed on the part of the accused if he shares the common intention with others in respect of the ultimate criminal act, which may be done by anyone of the accused sharing such intention.

Under the provision of s.34 the essence of liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. Section 34 **is applicable even if no injury has been caused by the particular accused himself. For applying** Section 34 **it is not necessary to show some overt act on the part of the accused.**

In case of participation without overt act Section 34 can be invoked. For invoking section 34 (i) common intention and (ii) participation of an accused in commission of an offence are required. The overt act is not necessary to be proved when common intention has already been proved as it involves vicarious liability. Further common intention is to be inferred from facts and circumstances of each case when there is absence of direct evidence."

[Emphasis added]

[80]In the case of *Ahmad Azhari Ahmad Zaini v PP & Other Appeals* [2015] 1 CLJ 157, the Court of Appeal stated:

"In any event, **mere presence without more will not be sufficient to fasten liability of the second appellant under** s. 34 of the Penal Code**. There must be some facts and circumstances from which an inference could be drawn on the meeting of minds or the pre-arranged plan between the appellants to traffick in dangerous drugs, which in this case, there was none** (see *State of Orissa v Raghuram Sahu&Ors* [1979] CriLJ 502; *Krishna Rau Gurumurthi v PP and Another Appeal* [2009] 2 CLJ 603*)…"*

[Emphasis added]

[81]Based on the authorities quoted, the prosecution is required to prove there is common intention to commit the crime. This implies a pre-arranged plan. Common intention is to be inferred from facts and circumstances of each case when there is absence of direct evidence. The prosecution is also required to establish that the criminal act was done in furtherance of the common intention pursuant to a pre-arranged plan.

[82]The evidence before this court do not disclose that there was a pre-arranged plan between the first accused and the second accused in furtherance of a common intention.

[83]This court finds that there was no evidence of a pre plan or a meeting of minds before this court that both the accused intended to committed the offence for which they are charged with. As common intention is one of the ingredients of the charge, this court is of the view that the failure to prove common intention is fatal to the case.

DECISION

[84]In *PP v Saimin&Ors* [1971] 2 MLJ 16, Justice Sharma held:

"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 evidence leaves the minds of jurors in that condition to a moral certainty of the truth of the charge."

[85]Having examined all the evidence before this court, and for the reasons aforesaid mentioned, this court finds that the first accused and second accused have raised a reasonable doubt as to the prosecution's case. I therefore find that the prosecution had failed to prove their case beyond reasonable doubt against both the accused.

[86]Hence, for the charge under paragraph 39B (1) (a) of the Dangerous Drugs Act 1952, I find the first

accused and second accused not guilty. In accordance with subsection (3) of section 182A of the Criminal Procedure Code, I acquit and discharge both the accused.

End of Document