MALAYSIAN JUDGMENTS

IN THE COURT OF APPEAL OF MALAYSIA

Coram: Mohtarudin Baki, JCA; Abdul Karim Abdul Jalil, JCA; Kamaludin Md Said, JCA

Vania Osman v Public Prosecutor

Citation: [2018] MYCA 254 **Suit Number:** Criminal Appeal No. P-05(SH)-418-11/2016

Date of Judgment: 06 August 2018

Criminal law – Trafficking in dangerous drugs – Appellant found guilty – Appellant a child under the Child Act 2001 – Appellant ordered to be detained in a prison during the pleasure of the Penang Governor – Appeal

Criminal procedure – Whether the trial judge erred in ruling that the prosecution had proven a prima facie case of trafficking against the appellant – Whether the trial judge erred in not invoking section 114(g) presumption against the prosecution for failing to call or offer a material witness – Whether the trial judge failed to appreciate the defence case – Whether conviction safe – Whether appellate intervention warranted

JUDGMENT

Introduction

[1] The appellant, a Malawi national, was charged and tried in the High Court at Penang with an offence of trafficking in dangerous drugs under section 39B(1)(a) of the **Dangerous Drugs Act, 1952 ('the Act')** and punishable under section 39B(2) of the same Act. The charge reads:

> *"Bahawa kamu pada 15.10.2013 jam lebih kurang 10.20 pagi, di ruang ketibaan Antarabangsa Lapangan Terbang Antrabangsa bayan Lepas, di Dalam Daerah Barat Daya, di Dalam Negeri Pulau Pinang telah didapati mengedar 1775.4 gram dadah berbahaya jenis methamphetamine dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama".*

[2] At the end of the trial, the appellant was found guilty of the charge by the learned Judicial Commissioner ("JC"). The Appellant was 17 years and 11 months old at the time of the commission of the offence and was a 'child' under the **Child Act 2001**. Although the appellant was found guilty of the offence under section 39B of **the Act** which carries a mandatory death sentence, the Child Act

2001 prohibits the death sentence being carried out on the appellant who was a child at the time of commission of the offence. The appellant was ordered to be detained in a prison during the pleasure of the Yang di-Pertua Negeri (Governor) of the state of Penang by the learned JC.

[3] Aggrieved with the conviction and sentence, the appellant appealed to this Court. We heard the appeal on 4.7.2018 and after hearing the parties, we unanimously dismissed the appellant's appeal. We now furnish our reasons in dismissing the appellant's appeal.

The Prosecution's Case

[4] On 5.10.2013, D/Kpl. Abd. Wahab bin Abd. Kadir (SP4) with 9 officers were carrying out observation and examination of passenger duties at Penang International Airport (PIA) from 8.00 a.m. until 4.00 p.m. At 10.20 a.m. a Silk Air aircraft arrived from Singapore. After the arrival of the said aircraft, SP4 conducted monitoring and observed a foreign woman at counter no. 14. This woman was the appellant. From the counter no. 14, the appellant proceeded to the baggage carousel and was behaving in a suspicious manner by looking at the surroundings and at the customs examination area. SP4 found that the appellant had retrieved a trolley bag (P9) which was wrapped in blue plastic (P12). The appellant took some times to retrieve the said trolley bag although the bag had passed along the carousel several times.

[5] The appellant retrieved the said bag along with another blue bag. She then dragged the bag to the scanning machine. While the appellant was proceeding to the scanning machine, SP4 and 4 other officers introduced themselves as police officers and requested for her identification. While under detention, the appellant was agitated. SP4 together with other officers proceeded to scanning machine no. 7. The appellant herself brought the said bag to the scanning machine. SP4 instructed the appellant to place both bags into the scanning machine.

[6] When the bags passed through the scanning machines, SP5 informed SP4 that there was a suspicious looking image in the black trolley bag (P9). SP4 discovered that the image was green in colour. SP4, the appellant and the rest of the officers proceeded to the narcotic office at PIA for further examination. The appellant herself brought the said bag along to the narcotics office.

[7] SP4 carried out an examination of the said bag and found the name Randall Derrick on the tag to the bag (P10). The said tag was clearly visible. SP4 tore open the blue plastic around the bag (P9) and instructed the appellant to open the bag. The appellant opened the combination lock to the bag using the combination number 000.

[8] Examination of the bag revealed the presence of male clothing. In the bag there was also another smaller unbranded bag (P11) and there appeared a suspicious stitching around this unbranded bag. An examination conducted on the said unbranded bag (P11) after it was opened resulted in 2 packages (P18 and P19) wrapped with black cellophane tape were found.

[9] SP4 and the other officers opened the packages and it was found to contain drugs suspected to be “syabu” (P20A and P21A). At this point, the appellant burst into tears and denied ownership of the

packages and their contents. An examination on a pink coloured hand bag (P48) revealed a British Airways boarding pass in the name of Randall Derrick (P56(c)).

[10] P/K Mohd Azmel bin Mustafar (SP9) testified that there was another arrest carried out that day by customs department on one Derrick Randal carrying a bag with a tag bearing the appellant's name.

[11] SP4 placed markings on the exhibits seized, lodged a police report and prepared search and handover lists. SP4 handed over all the exhibits to the investigation officer SP10. The exhibits suspected to be dangerous drugs were sent to the Chemistry Department Penang and was confirmed by the chemist Siti Aishah binti Che Ani (SP3) to contain Methamphetamine weighing 1775.4 grams and as listed under the First Schedule to **the Act**.

Findings at the end of the prosecution case

[12] The learned trial judge had considered and accepted the testimony of SP3 on the drugs analysis undertaken by the witness. The learned JC held that the evidence of SP3 was not inherently incredible and the prosecution had proven that the drugs seized were the type, nature and weight as testified by SP3 in her oral testimony and as well as in her report (P24).

[13] As for the element of possession, the learned JC held that there was established evidence from SP4 proving that the appellant had custody and control of the impugned drugs as the appellant was seen by SP4 proceeding to the baggage carousel and took the black trolley bag P9 after some amount of time had elapsed. Before the retrieving the said bag, the appellant was seen behaving suspiciously by looking at her surroundings as well as in the direction of the customs area. The appellant delayed in retrieving the bag (P9) and only did so after the bag had revolved two or three times around the carousel.

[14] The appellant finally retrieved the said bag P9 from the carousel without examining the tag attached to the said bag. The appellant herself took the bag (P9) to the scanning machine. The appellant placed the black trolley bag in the scanning machine after being instructed by SP4. The result was a suspicious looking image appearing on the scanner screen. The appellant thereafter brought the black trolley bag to the narcotics department at the airport upon instructions from SP4. The appellant herself opened the black trolley bag (P9) without hesitation using the combination 000. The appellant was alone at the time of arrest.

[15] It is also established evidence from SP9 that another person by the name of Derrick Randall was arrested by the custom department on that very day carrying a bag with a tag in the name of the appellant. Both bags carried by the appellant and the said Derrick Randall were identical and also bore the same type of blue plastic wrapping.

[16] In the bag carried by the said Derrick Randall were found dangerous drugs similar in nature to the drugs found in the bag carried by the appellant, namely methamphetamine. The bag carried by the said Derrick Randall also contained women's clothing. The clothes in this bag when tested by way of clothes fitting on the appellant was found to fit her while the clothes in the bag carried by the

appellant (P9) was found to fit Derrick Randall. Both bags carried by the appellant and Derrick Randall in which the drugs were found were black in colour and of the same brand i.e. “Zhonghuang import & export Bella”. Both bags were found to contain another smaller bags containing dangerous drugs. The drugs in both of these smaller bags were found in two black colour packets.

[17] Based on the evidence, the learned JC made an inference that the appellant and the said Derrick Randall had devised a clever scheme and modus to evade detection and to exculpate themselves should they be found out. The further inference made is that the appellant did not take the bag (P9) by mistake but rather deliberately and with intent.

[18] Having found that the appellant had custody or control of the P9 containing the impugned drugs brilliantly concealed in the smaller unbranded bag (P11) in the black colour bag (P9), the learned JC invoked the statutory presumption under section 37(d) of **the Act** that the appellant was/is deemed to have in her possession the impugned drugs and to have known the nature of such drugs until the contrary is proved. Therefore, the learned trial judge found that the prosecution had proven that the appellant had possession of the impugned drugs.

[19] As for the element of trafficking, the net weight of the drugs discovered was 1775.4 grams found by the learned JC militates against any argument that the drugs were for personal consumption of the appellant. The weight of the drugs raises the justifiable inference that the drugs were meant for trafficking. The evidence also revealed that the appellant was a national of Malawi based on her passport. The passenger booking revealed that the appellant boarded a Singapore Airlines flight from Johannesburg, South Africa to Singapore Changi Airport and thereafter a connecting flight to Penang. The acts of the appellant in retrieving and carrying the black trolley bag constitute an act of trafficking as defined under section 2 of **the Act**. The learned JC found that the prosecution had proven direct trafficking as defined under section 2 of **the Act** for "trafficking".

[20] After being satisfied that all the elements of the charge had been established, the learned JC found that the prosecution had proven a *prima facie* case against the appellant. Thus, the appellant was called upon to enter her defence.

The Defence

[21] The appellant elected to give evidence under oath. The appellant testified that on 4.10.2103, she travelling from Johannesburg, South Africa to Changi, Singapore on transit and onwards to Penang. In Johannesburg, she checked in 2 bags. She did not collect the 2 bags while on transit in Singapore. The appellant in cross examination said that this was not the first time she came to Malaysia. She brought with her 1 handbag, 1 dark blue luggage and 1 black suitcase. The black suitcase was wrapped in plastic. She said both bags had her name on it when she checked them in. Upon arrival at Penang International Airport, she walked to the carousel where she retrieved 2 bags.

[22] The appellant said she did not linger or delay while around the carousel area. She said that she waited at the carousel and retrieved the bag. She said that the time that elapsed between her arrival at the carousel area and the time she picked up the bag was 2 minutes.

[23] The appellant said that she did not check the name tags on the bags that she picked up. She said that she picked the bags by description. After retrieving the bags, she walked toward the customs clearance. She said that before she got there, someone asked for her passport. She obliged and said that this person accompanied her to the scanning machine where she scanned the bag. After that she was asked to proceed to a room nearby. In the room, the man introduced himself to her and cut open the wrapping on the bag and asked her to open the bag. She once again obliged this request and opened the bag (P9). When the bag was opened, she discovered male clothing inside. The appellant testified that upon seeing men's clothing inside the bag, she told the man accompanying her that she was not sure that was her bag but the man replied "no, but you took the bag". She said that the persons present then started going through the bag.

[24] She said that in the bag, they found another smaller bag. The man then opened the smaller bag and she was shown 2 black plastic bags in the smaller bag. In these plastic bags there were crystal-like substance. She said that the man showed her the substance and said that they were found in her bag and that they were methamphetamine. She then started to cry.

[25] The appellant testified that the bag containing the substance was not the bag that she had checked in at Johannesburg. She maintained that the drugs found in that bag did not belong to her and she had no knowledge that the drugs were hidden in the bag. She said that the owner of the bag was Derrick Randall and that the bag (P9) was identical to the bag that she checked in. She said that the numbers on the combination lock on the bag was 000 and she just pressed the button to unlock. She said that the plastic wrapper around the bag was similar to the wrapper around the bag which she had checked in at Johannesburg. She said the bag had no identifying features. She testified that she did not know Derrick Randall. She said that she had taken the bag (P9) by mistake and not intentionally.

Findings at the end of the defence case

[26] After considering the defence, the learned trial judge found that the appellant had not succeeded in raising reasonable doubt on the prosecution's case. The defence put up by the appellant was that she had taken or retrieved the black trolley bag (P9) containing the incriminating drugs which formed the subject matter of the charge by mistake. The defence therefore, contended that the appellant had no knowledge of the drugs in the said bag.

[27] The learned JC had considered some conflicting evidence as to the length of time the appellant had taken or retrieved the said bag from the carousel. The prosecution evidence was that the appellant had delayed taking the bag after looking around her in a suspicious manner. However, the appellant herself said that she did not delay in taking the said bag from the carousel. The learned JC found that there is no evidence that the appellant, a foreigner, was known by SP4 or other prosecution witnesses. Therefore, there was no motive or reason for SP4 to concoct or fabricate evidence against the appellant. There was no plausible reason to doubt the testimony of SP4 that the said bag had passed by the appellant a total of 3 to 4 times before the appellant finally retrieved the bag from the carousel.

[28] The learned JC had also considered the conduct of the appellant that justified the strong inference that the appellant had knowledge of the contents of the said bag and had delayed in retrieving the bag until she was sure that it was safe for her to do so without inviting suspicion and unwanted attention. This inference to the learned JC is fortified by the action of the appellant in furtively glancing and surveying her surroundings before retrieving the said bag. This again shows that there was no plausible reason to doubt the evidence of SP4. The learned JC held that if the appellant's defence is that she had mistakenly taken the bag, she would have more than enough time to ascertain whether that was her bag or not. Since she hesitated to retrieve the bag at the first opportunity, what could have possibly possessed her to afterward claim that it was hers without bothering to examine the tag on the bag first? This clearly showed that the appellant had the requisite knowledge of the contents of the bag. It also entitled a fair inference to be made that she knew exactly that the tag on the bag displayed the name of Derrick Randal. It was also in evidence that the tag on the bag was visible. SP6 earlier testified that the tag of the bag has to be on the outside of the wrapping in order for the airlines to properly scan the bag.

[29] The evidence that after the appellant had retrieved the bag from the carousel, the bag was with her while she took it to the customs scanning machine and thereafter to the narcotic department was also considered by the learned JC. The photographs P3(4) and P3(8) and the marking (X) shown, it is evident that there was some distance between the carousel and the scanning machine. This to the learned JC means that there was some amount of time that elapsed between the appellant retrieving the bag from the carousel and bringing it to the scanning machine. The learned JC believed that there was ample time as well as opportunity for the appellant to realize that the bag was not hers and even if the bag was, as contended by her, identical to the one she had checked in, there would have been sufficient opportunity to inspect the name displayed on the bag tag. The failure of the appellant to inspect the tag at the earliest opportunity despite the tag was clearly visible, pointed to knowledge on her part of the incriminating contents in the bag. The learned judge held that the fair inference to be made is that the appellant had deliberately intended to assume control and custody of the bag and that it was not a mistake on her part.

[30] The learned JC had also considered the e-ticket with the appellant's name and the British Airways Boarding Pass of flight BA 6414 (P56(c)) in Derrick Randall's name dated 3.10.2013 amongst the contents found in the pink hand bag carried by the appellant. Inside the hand bag, amongst other things, are women's accessories, make up, currency and a Blackberry hand phone belonged to the appellant. This prompted the learned JC to raise a question as to what was the boarding pass in the name of Derrick Randall doing there?. The learned JC found there was no explanation forthcoming from the defence save that the said exhibit was inadmissible. Still on exhibit P56(c), the learned JC held that it was admissible not for the truth of their contents but for the fact that they disclosed the facts contained therein. It was not hearsay evidence. The learned JC found support in the case of **Subramaniam v PP** [1956] 1 WLR 965. Alternatively, the said exhibit is relevant under section 9 of the **Evidence Act 1950** as facts necessary to explain or introduce relevant facts, the relevant fact being that the said Derrick Randall and the appellant were known to each other.

[31] The evidence of SP9 that Derrick Randall was arrested on the very same day having taken the same flight route as the appellant and the exhibit P56(c) in the hand bag of the appellant showed there was an obvious connection between the appellant and the said Derrick Randall. The learned JC held that the fact that the said exhibit was British Airways Boarding Pass when in fact both of them travelled on Singapore Airlines does not diminish the force of the strong inference that they knew each other and had acted in concert in an attempt to evade and deceived the authorities by bringing in dangerous drugs into the country. The learned JC was satisfied that there was no explanation from the appellant. Therefore, it strengthened the prosecution case that the appellant had knowledge of the drugs in the bag.

[32] The learned JC also held that the bag contained men's clothing was not unexplained coincidence but was indicative of deliberate design. The prosecution evidence revealed that the said Derrick Randall had also boarded the same flight as the appellant on 4.10.2013 from Johannesburg to Penang with a transit in Singapore. It was however in evidence that they were not seated together. This purposeful separation being no doubt an attempt to conceal any connection between the two of them. The fact that Derrick Randall had also been arrested and had in his possession a bag containing women's clothing with the tag in the name of the appellant showed that this was a clever devised plan in order to evade detection by the authorities with the intention to bring drugs into the country coupled with an insurance that should detection nevertheless occur, the defence of mistakenly taking another's bag might afford an ironclad defence. The learned JC believed it would have amounted to an ingenious modus operandi of trafficking if not for the detection.

[33] In summing up the defence case, the learned JC held that it was not a coincidence that both the bags were identical and wrapped in similar fashion with blue plastic wrapping and contained dangerous drugs of a similar type and nature. It was also not a coincidence that the bag with a tag bearing the name of Derrick Randal was found in the possession of the accused and vice versa. There being male clothing in the bag carried by the appellant and female clothing in the bag carried by Derrick Randall is evidence of clear intention to evade detection coupled with an attempt to throw off the scent of the authorities. Furthermore, the female clothing fitted the appellant and the male clothing fitted Derrick Randall. It is also in evidence that the bags carried by the appellant and Derrick Randall were also similar i.e. both black bags with the brand "Bella Zhonghuang import and export".

[34] The act of the appellant in opening the combination lock with the code 000 is also indicative of knowledge on her part. The reasonable instinctive reaction of someone who claimed that the bag did not belong to them, would be to indicate that they had no knowledge of the combination numbers required to open the bag. The learned JC did not believe the evidence of the appellant that she merely opened the button as the combination number was 000. The learned JC held that there was no good reason for the prosecution witnesses to concoct or fabricate evidence against the appellant for no good reason. The instantaneous reaction of the appellant in using the combination numbers 000 enabled the inference to be made that she knew the required numerical combination to open the bag. The learned JC held that combination number 000 does not negate in any way knowledge on her part as the number 000 in fact operated as the combination code required to open the said bag. Or else

how would one know that the number code is 000? In other words, the code 000 used by the appellant was known to her as the combination to open the bag.

[35] The type of drugs found in in the possession of Derrick Randall was also methamphetamine weighing a total 1,525 gram net. He was arrested on the same day as the appellant on 5.10.2013 at Penang International Airport after transiting at Singapore from a flight originating from Johannesburg in South Africa. He was later charged for trafficking. The learned JC found that the parallels in this case cannot be explained as sheer coincidence but as indicative of careful design on the part of the appellant and the said Derrick Randall, the obvious purpose being to throw off the scent of detection by the authorities.

[36] The learned JC held that the drugs were cleverly, carefully and deliberately concealed in the smaller bag found in P9, which only through removal of the stiches by cutting them open managed to them. This provided further evidence of knowledge of the drugs by the appellant. The belated action of the appellant in only informing the authorities that the bag did not belong to her when the impugned drugs were discovered reflected a last gasp attempt to extricate herself from the predicament when she found herself in knowing fully well of the drugs.

[37] Based on the defence evidence, the learned JC held that the appellant had failed to rebut on a balance of probabilities the statutory presumption of possession and knowledge under section 37(d) of **the Act**. The appellant had further failed to raise a reasonable doubt in the prosecution case of trafficking in dangerous drugs as defined under section 2 of **the Act**.

[38] The appellant was thus convicted and sentenced to the mandatory death penalty as provided under section 39B(2) of **the Act**. Hence the appeal before us.

The Appeal

[39] Before us, learned counsel for the appellant canvassed the following three (3) grounds of appeal, namely:

(a) The learned JC erred when his Lordship ruled that the prosecution has proven a prima facie case of trafficking against the appellant;

(b) The learned JC erred when his Lordship did not invoke the s. 114(g) presumption against the prosecution for failing to call or offer Derrick Randall to the defence; and

(c) The learned JC erred when his Lordship failed to appreciate the defence case.

Our Deliberation and Decision

[40] Grounds (a) and (b) were submitted together by the appellant's counsel. It was the counsel's submission that based on the evidence adduced, the prosecution cannot be said to have proved a prima facie case of trafficking against the appellant. Counsel argued that the finding of fact by the learned JC based on the following evidence is insufficient to make up a case for the prosecution:-

(i) the evidence of SP4 that the appellant behaving suspiciously by looking around her surroundings and had delayed in retrieving her bag (P9) after the bag went 2 or 3 times past the appellant;

(ii) the evidence of appellant retrieving the bag (P9) and took the bag to the scanning machine to scan.

[41] Counsel submitted that the abovesaid evidence cannot carry weight for reason that firstly, the bag (P9) that contained the drugs was registered in the name of Derrick Randall. Secondly, that the clothes found in the bag (P9) were men's clothes which fitted Derrick Randall. Thirdly, the appellant did not check-in P9 at Johannesburg as confirmed by the evidence of SP6 at pg. 82 AR Vol 2 and exhibit P65 at pg. 96 of AR Vol 3 which showed that it was that Derrick Randall was checked-in P9 at Johannesburg. Fourthly, evidence of SP4 that the appellant burst into tears the moment she was told that the bag she was carrying contained drugs and she protested her innocence. Fifthly, evidence of SP9 that one Derrick Randall was also arrested. Drugs were found in the bag he carried. It was similar to P9. The said bag was registered in the appellant's name. Finally, the prosecution did not call Derrick Randall as a witness or offer to the defence.

[42] We understood what learned counsel was trying to say. Based on the evidence pointed to us in the above paragraph, in other words, the learned JC did not conduct a maximum evaluation of the evidence adduced by the prosecution. Counsel submitted that the prima facie finding by the learned JC is very much influenced by the conduct of the appellant as narrated by SP4. The suspicious conduct as alleged by SP4 that the appellant was looking around her surroundings and the delayed retrieval her bag, after according to counsel was accepted at face value without considering the defence on these points. Firstly, it was submitted that there is nothing sinister about the fact that the appellant looking around her surroundings because a foreigner upon arrival will look around for various signage's like checking out where the carousel was located, the exit entrance and/or the customs area. Counsel submitted that this conduct is natural conduct. He found support in the case of **Parlen Dadeh v PP** [2009] 1 CLJ 717 where the Federal Court made it clear that even for conduct like stunned or nervous could not amount to suspicious conduct unless there is something more to it. Therefore, it was submitted that the learned JC erred when he did not appreciate that SP4's version of the appellant delaying her retrieval of the bag (P9) was contradicted by the prosecution's own evidence.

[43] It was also submitted that the CCTV photographs tendered by the prosecution show that the appellant arrived at the carousel at 10:10:52 a.m. and she left at 10:12:10 a.m. after the appellant had retrieved her second bag. This shows that the appellant was at the carousel for only 2 minutes. Therefore, counsel submitted that this piece of evidence did not show that the appellant delayed or was hesitant in retrieving both her bags. These photos also do not show the appellant acted suspiciously. This evidence according to counsel contradicts SP4' evidence that the bag (P9) passed her 2 or 3 times before the appellant retrieved it. Further, SP4's evidence contradicts the evidence of SP8 the officer who printed the CCTV photograph exhibit P67 and confirmed that the appellant was at the carousel for about 2 minutes to retrieve the 2 bags and that the CCTV did not show her looking

around suspiciously. Therefore, it was the counsel submitted that the appellant was at the carousel for about 2 minutes to retrieve the two bags and the 2 minutes do not support the allegation of SP4 that the bag (P9) had passed the appellant 2 or 3 times and that the appellant refused to retrieve it.

[44] The Learned Deputy Public Prosecutor ("DPP") in reply to this point submitted that, the learned JC had considered the evidence of the appellant's conduct in retrieving the bag (P9) in his grounds of judgment. The evidence of SP4 is at pg. 23 AR vol. 2 where SP4 clearly said that-

> *"Dalam pemerhatian saya, saya tengok beg tersebut, bagasi yang hendak diambil oleh OKT sedang memusing dua tiga kali dan begnya tak diambil oleh OKT. Memakan masa yang panjang baru dia ambil kemudian beg tersebut". "OKT ambil beg tersebut. Dia ambil terus saja".*

The learned DPP submitted that the conduct of the appellant is inconsistent with her defence that she had taken the bag (P9) by mistake.

[45] Having considered this issue raised by the appellant's counsel and the reply by the learned DPP, firstly, we think it is not correct for the counsel to say that the learned JC failed to appreciate this point whether there was delay or not when the appellant retrieved the bag (P9) from the carousel and whether SP4's evidence of the appellant delaying her retrieval of the bag (P9) was contradicted by the prosecution's own evidence. Having read the learned JC's grounds of judgment, at pg. 19, the learned JC in fact had given due consideration on the evidence of SP4 against the CCTV images. The learned JC had held that-

> *"It is to be noted that the CCTV images (P67) were still and not moving images. In that sense these images cannot be totally relied upon in order to construct what happened that day in real time. In this respect, it cannot be said that what SP4 had witnessed and testified to was not credible. Under the circumstances, I do not find any contradiction in the prosecution evidence in this respect as contended".*

[46] We agreed with the finding of the learned JC. The evidence by SP4 at pg. 23 AR vol. 2 as alluded earlier clearly said *"dalam pemerhatian saya"* therefore, what SP4 saw or witnessed on that day is more credible than the still and not moving images of the CCTV. In the case of **Ediawe Eshilama Clinton v PP** [2015] 9 CLJ 169 it was held that:-

> *"[26] As we have earlier alluded to, in essence the defence raised by the appellant was that of an innocent carrier. We do not find merits in this ground because the appellant had every opportunity to check for himself what he was carrying with him in P29 (see Hoh Bon Tong v PP [2010] 5 CLJ 240). The learned trial judge had correctly made finding of fact that the bag P29 was caught with the appellant thus with or without CCTV recording the fact of possession was proved".*

[47] In our view, the learned JC had considered the evidence of SP4 on the delay by the appellant in retrieving the bag (P9) which the appellant counsel submitted that there was no such delay. The learned JC had made a finding of fact that there was no contradiction in the prosecution's evidence in

respect of the contradiction as contended by the appellant's counsel. The learned JC had also made the finding that there was no motive or reason for SP4 to concoct or fabricate evidence against the appellant. There was no plausible reason to doubt the testimony of SP4 that the said bag had passed by the appellant 3 to 4 times before the appellant finally retrieved the bag from the carousel.

[48] SP4 also in his evidence at pg. 23 AR vol. 2 said that-

> *"Saya lihat OKT sedang berdiri di situ dan pada pemerhatian saya dia dalam keadaan meragukan". "Saya maksudkan keraguan ini adalah kerana dia sedang melihat pihak kastam, dari sana pandangan dia, liar mata dia, pandang sana, pandang sini dan sebagainya".*

The learned JC had also considered the conduct of the appellant that justified the strong inference that the appellant had knowledge of the contents of the said bag and had delayed in retrieving the bag until she was sure that it was safe for her to do so without inviting suspicion and unwanted attention. This inference to the learned JC is fortified by the action of the appellant in furtively glancing and surveying her surroundings before retrieving the said bag. This again shows that there was no plausible reason to doubt the evidence by SP4.

[49] Be that as it may, in this case, the appellant was seen retrieving the bag (P9) and was arrested with that bag by SP4. The learned judge found that the appellant had deliberately intended to assume control and custody of the bag. Coupled with other evidence as explained by the learned JC in the grounds of judgment, he found that the appellant had the requisite knowledge of the contents of the bag.

[50] Moving on to the second issue where the learned counsel submitted that the bag tag (P10) was in the name of Derrick Randall and there was evidence that Derrick Randall checked in P9 which was registered in Johannesburg. The clothes, no personal document of the appellant was found in P9, no forensic evidence in the form of DNA or fingerprints to connect the appellant with the drugs and Derrick Randall was on the same flight as the appellant was also arrested and he had in his physical possession of the bag similar to P9 and drugs were also found to be contained in the said bag. Counsel also submitted that SP10 in cross-examination agreed that the appellant had mistakenly retrieved the bag (P9) belonging to Derrick Randall and that Derrick Randall was not produced as a witness or was offered to the defence for cross-examination. Therefore, counsel submitted that by reason of the aforesaid factors, even if the appellant was in physical custody of the said bag (P9) that attracted the presumption under s. 37(d) of the said Act, the said presumption would have been rebutted and the learned JC failed to recognize this.

[51] We did not agree with the submission of counsel. We noted that the learned JC had considered the points raised by the defence. The defence's contention had been rejected by the learned JC. It was not a case of the appellant taking the bag (P9) by mistake. The learned JC had found that it was not a coincidence that both the bags were identical in nature and wrapped in similar fashion with blue plastic wrapping and contained dangerous drugs of a similar type and nature. It was also not a coincidence that the bag with a tag (P10) bearing the name "Derrick Randall" was found in the possession of the accused and vice versa. There being male clothing in the bag carried by the

appellant and female clothing in the bag carried by Derrick Randall is evidence of clear intention to evade detection coupled with an attempt to throw off the scent of the authorities. It is also in evidence that the bags carried by the appellant and Derrick Randall were also similar i.e. both black bags with the brand "Bella Zhonghuang import and export". The learned JC had also considered the e-ticket with the appellant's name and the British Airways Boarding Pass of flight BA 6414 (P56(c)) in Derrick Randal's name dated 3.10.2013 amongst the contents found in the pink hand bag carried by the appellant. We agreed with the learned JC's finding and the issue raised by counsel has no merit.

[52] We were also of the view that without DNA or fingerprints to connect the appellant with the drugs contained in the said bag (P9) as contended by counsel, it does not affect the prosecution's case because the evidence is very clear that the appellant had custody and control of the bag (P9) which she retrieved from the carousel, took the bag (P9) to the scanning machine, thereafter brought P9 to the narcotics department at the airport and opened P9 without hesitation using the combination 000 where the drugs were found in P9. Therefore, in this case fingerprints evidence assumes little value or significance (see: **PP v Mansor Md. Rashid & Anor** [1997] 1 CLJ 233).

[53] The final ground raised by counsel is that the failure of the prosecution to call or offer Derrick Randall had compromised its case and s. 114(g) of **the Act** can be invoked. It was submitted that Derrick Randall is the most material witness and the prosecution ought to have called him or offer him to the defence for the purpose of cross-examination. Counsel submitted that for the defence case, Derrick Randall is the trafficker because the said bag was checked in by him, the bag tag was in his name and the clothes in the bag belonged to him and fitted him. At the material time Derrick Randall was in the country and no reason was proffered why he could not be called. Counsel referred to **Ghasem Hozouri Hassan v PR** [2018] MYFC 13 and **Nanda Kumar Kunyikanan & Anor** [2011] 8 CLJ 406. Counsel argued that certainly it will make a difference because he could confirm that he checked in the bag, he was in possession of the bag and its contents including the drugs and that the appellant had no nexus with the drugs in the bag. Therefore, it was submitted that for the prosecution to prove its case beyond reasonable doubt, the prosecution must rebut or negate the defence case. The failure to call Derrick Randall not only has acted unfairly but also failed to discharge the onus of proof. The appellant relied on the cases of **Ooi Chee Seong & Anor v PP** [2014] 3 MLJ 593 and **R v Russell-Jones** [1995] 3 ALL ER 239.

[54] The learned DPP had submitted that the non-calling of Derrick Randall in this case did not give rise to an adverse inference to the prosecution' case. She referred to the case of **Dwi Supriyatno Meo v PP & Another cases** [2016] 1 LNS 242 that to call or not to call three persons to testify was the prerogative of the prosecution. The learned DPP submitted that SP9 who is the investigation officer in Derrick Randall's case was called by the prosecution. His evidence is at pg. 86 to 88 AR Vol 2. He said that Derrick Randall was arrested by customs officer. Therefore, if any information and confirmation with regard to the bag (P9) and other things that belonged to Derrick Randall is required the defence could cross-examine SP9 and obtain such information or confirmation. The non-calling of Derrick Randall therefore is non-issue.

[55] Further, it was submitted that the bag tag (P10) was clearly visible of which she had the opportunity to ascertain whether the bag belonged to her or not. In this case the appellant defence is that she had mistakenly taken the bag. The learned DPP relied on the case of **Tan Khee Wan v Public Prosecutor** [1995] 2 SLR 63 which held *that*-

> *"The test of whether a mistake was made in good faith is not whether the mistake was an easy one to make or whether a reasonable person could make the mistake. The mistake may be a natural one to make and it may be one which reasonable persons often make, Nevertheless, the defence is not made out, unless it is shown on a balance of probabilities that the appellant exercised due care and attention".*

[56] We agreed with the learned DPP's submission that the calling of witness or witnesses for the prosecution is the prerogative of the prosecution. In this case, the non-calling of Derrick Randall had been considered by the learned JC. At pg. 19 of his grounds of judgment the learned JC held that-

> *"The defence raised that the adverse inference under section 114(g) of the Evidence Act 1950 ought to be invoked against the prosecution for their failure to call Derrick Randall. The issue to be determined at this stage of the close of prosecution case is one of possession. As alluded to earlier, possession and knowledge was deemed by reason of the operation of section 37(d) of the Act after the prosecution had successfully proven custody and control of the bag (P9).*
>
> *The issue of ownership of the bag does not therefore arise and is irrelevant in this context. Therefore, the failure to call Derrick Randall did not result in adverse inference arising against the prosecution nor did such failure result in a gap in the unfolding of the narrative of the prosecution case.*
>
> *From a consideration of the facts and authorities referred to, I find that the prosecution has succeeded in proving a prima facie case against the accused. I therefore called upon the accused to make her defence".*

[57] We agreed with the reasoning and finding of the learned JC. The learned JC held that the issue of ownership of P9 is irrelevant. The relevant issue is that the appellant had possession and knowledge of the said drug (See: **Aida Dizon Garcia v PP** [2015] 1 LNS 141; **Ali Hosseinzadeh Bashir v PP** [2015] 1 CLJ 918). The learned JC had made his finding that the belated action of the appellant in only informing the authorities that the bag did not belong to her when the impugned drugs were discovered reflected a last gasp attempt to extricate herself from the predicament when she found herself in knowing fully well of the drugs. Based on the defence evidence, the learned JC held that the appellant had failed to rebut on the balance of probabilities the statutory presumption of possession and knowledge under section 37(d) of **the Act**. The appellant had further failed to raise a reasonable doubt in the prosecution's case of trafficking in dangerous drugs as defined under section 2 of **the Act**.

Conclusion

[58] We were satisfied that the learned JC had not misdirected himself in any way to occasion an error either on the law or the facts to warrant appellate intervention.

[59] Having regard to the totality of the evidence, the surrounding circumstances and the probabilities of the case, it is our unanimous finding that the charge had been proven beyond reasonable doubt against the appellant.

[60] For all the reasons above stated, we hold that the conviction is safe and amply supported by cogent and overwhelming evidence on record. Therefore, the appellant's appeal is dismissed and the conviction and sentence of the High Court was hereby affirmed.

Dated this 6th August 2018

Signed

KAMALUDIN MD. SAID
Judge
Court of Appeal Malaysia
Putrajaya

COUNSEL

For the Appellants: Hisyam Teh Poh Teik and Datin Kharen Jit Kaur (Messrs Teh Poh Teik & Co.)

For the Respondent: Zaki Asraf Zubir, Deputy Public Prosecutor (Attorney General Chambers)

LEGISLATION REFERRED TO:

Child Act 2001

Dangerous Drugs Act 1952, First Schedule; Sections 2, 37(d), 39B, 39B(1)(a), 39B(2)

Evidence Act 1950, Sections 9, 114(g)

JUDGMENTS REFERRED TO:

Aida Dizon Garcia v PP [2015] 1 LNS 141

Ali Hosseinzadeh Bashir v PP [2015] 1 CLJ 918

Dwi Supriyatno Meo v PP & Another Cases [2016] 1 LNS 242

Ediawe Eshilama Clinton v PP [2015] 9 CLJ 169

Ghasem Hozouri Hassan v PR [2018] MYFC 13

Nanda Kumar Kunyikanan & Anor [2011] 8 CLJ 406

Ooi Chee Seong & Anor v PP [2014] 3 MLJ 593

Parlen Dadeh v PP [2009] 1 CLJ 717

PP v Mansor Md. Rashid & Anor [1997] 1 CLJ 233

R v Russell-Jones [1995] 3 ALL ER 239

Subramaniam v PP [1956] 1 WLR 965

Tan Khee Wan v Public Prosecutor [1995] 2 SLR 63