MALAYSIAN JUDGMENTS

IN THE COURT OF APPEAL OF MALAYSIA

Coram: Mohtarudin Baki, JCA; Rhodzariah Bujang, JCA; Kamaludin Md Said, JCA

Felix King v Public Prosecutor

Citation: [2018] MYCA 299 **Suit Number:** Criminal Appeal No. B-05(M)-139-03/2017

Date of Judgment: 18 September 2018

Criminal law – Trafficking in dangerous drugs – Conviction – Mandatory death sentence – Appeal

Criminal law – Whether the trial judge erred in properly considering the cautioned statement of the appellant – Whether the trial judge had misdirected herself when she applied the presumption under section 37(da) of Dangerous Drugs Act 1952 at the end of the prosecution's case, and found that the appellant had failed to rebut the presumption under section 37(d) of Dangerous Drugs Act 1952 at the end of the defence case

JUDGMENT

Introduction

[1] The appellant, a Sierra Leone national, was charged and tried in the High Court at Shah Alam, Selangor 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 20.11.2011 jam lebih kurang 7.45 malam, di Cawangan Pemeriksaan Penumpang 1 (CPP1), Balai ketibaan Antarabangsa Terminal Utama, Lapangan Terbang Antrabangsa Kuala Lumpur di dalam Daerah Sepang, dalam Negeri Selangor Darul Ehsan telah didapati mengedar dadah berbahaya iaitu methamphetamine seberat 442.4 gram, dan 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 of trafficking against him and sentenced to suffer the mandatory death penalty by the learned High Court Judge ('learned trial judge').

[3] Aggrieved with the conviction and sentence, the appellant appealed to this Court. We heard the appeal on 31.7.2018 and after hearing the parties, we unanimously allowed the appellant's appeal. We now furnish our reasons in allowing the appellant's appeal.

The Prosecution's Case

[4] On 20.11.2018, at the about 7.45 p.m. at counter A, Custom Officers Kasnaim bin Kassim (SP5) who was on duty with Norazoha bin Salim (SP4) and Ramis A/L Manikam (SP8) directed the appellant to scan his brown bag (P8) at counter A. The scan revealed a suspicious green image at the side of the bag. SP8 took out all the appellant's clothes from the bag. The bag was scanned again and the same green image still appears at the side of the bag. SP8 then directed SP4 and SP5 to accompany the appellant to the examination office CPP1. SP8 asked for the appellant's passport and found his name is 'Felix King'. SP8 contacted the Enforcement Unit KLIA for further action. At about 9.00 p.m. the officers from the Enforcement Department KLIA arrived at the examination office and SP8 briefed the Investigation Officer, Muhammad Yusaimi bin Mohamad Yusoff (SP9) about the case.

[5] SP8 made a search and marked the appellant's bag as P8. All the things in the said bag were taken out. SP8 sliced open the side of the bag and found 2 thick papers, pink in color and marked as A1 (P9). SP8 opened the package and the contents of A1 (P9) were marked as A1 (1) (P9A). SP8 opened the plastic of A1, took out a bit of its contents for testing and the result was positive that it was the drug Methamphetamine. The gross weight of the drugs was 700 grams. After preparing the search list (P18) and the delivery of exhibits form (P22), the appellant together with the exhibit were handed over to SP9 for his further action.

[6] On 22.11.2011, SP9 sent the exhibit to the Chemist Department for analysis. The analysis on the exhibits was done by chemist Zulkefli bin Edin (SP3) and confirmed the clear crystal substance was Methamphetamine weighing 442.4 grams and is listed under the First Schedule to **the Act**. SP3's report was marked as P16.

Findings at the end of the prosecution case

[7] The learned trial judge had considered and accepted the testimony of SP3 on the drugs analysis undertaken by the witness. The learned trial judge 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 his oral testimony and as well as in his report (P16).

[8] As for the element of possession, the learned trial judge held that there was established evidence from SP5 and SP8 proving that the appellant had custody and control of the impugned drugs. The learned trial judge was satisfied that upon examination on the bag (P8), SP8 had found a plastic package inside P8 wrapped up with strong masking tape. The drugs Methamphetamine were neatly concealed in both compartments of the bag. The learned trial judge found that there was direct evidence to show that the appellant had custody and control of the bag (P8) and the contents including P9B together with the drugs.

[9] As for the element of knowledge, the learned trial judge found that the appellant had knowledge about the drugs. She referred to the case of **PP v Abdul Rahman Akif** [2007] 4 CLJ 337. The learned trial judge also found that the manner the drugs were neatly concealed in the bag (P8) showed that the appellant had knowledge that the dangerous drugs were hidden inside the bag (P8) to avoid detection from the authority. There was evidence from SP8 that during examination on P8, he could smell a strong smell of glue at the bottom lining of the bag and the glue was still wet. This shows that the appellant had knowledge of the drugs inside the bag.

[10] For the element of trafficking, the learned trial judge agreed with the prosecution that there was direct evidence that the appellant's conduct constituted an act of trafficking as defined under section 2 of **the Act**. The evidence proved that the element of "concealing" was present where the appellant had concealed the drugs neatly inside P8. Evidence of "transportation" was also proven where the drugs were transported from Cairo to Malaysia. The appellant was 'carrying' the drugs concealed inside the bag. The learned judge found that the prosecution had proven direct trafficking as defined under section 2 of **the Act** for "trafficking".

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

The Defence

[12] The appellant elected to give evidence under oath. The appellant was a Diploma of Accounting student at a high institution called Frobah College, in Freetown. The appellant came to Malaysia for a holiday cum study tour and planned to visit Lim Kok Wing University and UIA for further education. The appellant stated that his travelling business including stay in Malaysia was arranged by his friend Chidi whom he met in Freetown, Sierra Leone. Chidi lent him a bag because he did not have a suitable bag. He had checked every compartment of the bag and found nothing inside the bag. He then put in his clothes, shoes and documents inside the bag. The appellant planned to stay in Malaysia for 3 days at Istana Hotel. The appellant took a flight from Accra to Malaysia and hand carried the bag with him. He arrived at KLIA at about 6.00 p.m. on 20.11.2011. He bought a Sim card and proceeded to register his arrival at the Immigration check point. He was detained by the Customs Officers and they examined his bag and took him to the Customs Examination office where the bag was examined again.

[13] The appellant admitted that when the bag was searched in his presence and he did not see anything until the customs officers sliced open the side of the bag and found one package containing a white powder substance suspected to be Methamphetamine. The appellant denied having knowledge of the said drugs and informed the officers that the drugs belonged to Chidi. The appellant stated that the Customs Officers had used his hand phone (P8C) to contact Chidi but was unsure what was the conversation between the Customs Officers with Chidi.

[14] During examination of the defence case, the appellant told the court that the officer who spoke

with Chidi was not in Court. He further informed the court that he kept Chidi's telephone number in his diary which was confiscated by the Customs Officer. The appellant stated that he had no knowledge of the drugs found inside the bag (P8) by the Customs Officers. The appellant had given a cautioned statement to the officers which was marked as exhibit D30.

Findings at the end of the defence case

[15] After considering the defence, the learned trial judge found that the appellant had not succeeded in casting reasonable doubt on the prosecution's case. The defence put up by the appellant was found by the learned trial judge to be no merit. She found that the prosecution's evidence showed that the appellant carried the bag (P8). The appellant defence was difficult to believe. The appellant had told the Court that he and his brothers and sisters were still studying and depended on his parents' pension. This evidence according to the learned judge showed that the appellant did not come from a well to do family that can afford him to travel for a holiday to a very far country which was expensive. The learned judge found that it was illogical to travel to such a very far country which is expensive when the appellant depended on his parents' pension. The appellant had told the Court that his friend Chidi had lent him the brown bag (P8) because he did not have a suitable bag. However, the learned trial judge held that there was no evidence to prove that Chidi exists. The appellant in his evidence also stated that Chidi did not direct him to give the bag to anybody when he arrived in Malaysia and the bag was to be given back to Chidi after he returned from Malaysia. Based on the appellant's evidence, the learned trial judge was of the opinion that if the drugs belonged to Chidi, then Chidi would have directed the appellant to give the bag to somebody and would not have directed the bag to be given back to Chidi when the appellant returned from Malaysia.

[16] The learned trial judge did not believe the defence story that he came to Malaysia familiarized himself with the higher institutions in Malaysia when further information about the institutions can be obtained by browsing through the internet. The learned trial judge rejected the evidence by the appellant as she felt strange that the appellant did not know about the 2 hotel rooms booked by Chidi. The Court also found that the appellant admitted in cross examination that the bag was, at all times, with the appellant who placed it on the shelve above the passenger's seat.

[17] Based on the defence by the appellant at the defence stage, the learned trial judge concluded that the appellant's defence that he did not know the content inside the bag that he borrowed from Chidi was a very unreasonable defence and that he came for a holiday alone to Malaysia was a story created by the appellant.

[18] The weight of the drugs found inside the bag (P8) was 442.4 grams and this shows that the drugs was meant for trafficking as defined under section 2 of **the Act**. The Appellant was alone and this was the first time he entered Malaysia. The reason for coming to Malaysia for a holiday and surveying and visiting Lim Kok Wing University and UIA was found to be not the actual reason but for the purpose of trafficking in the dangerous drugs into Malaysia.

[19] The learned trial judge also found that there is no evidence by the appellant to support his defence regarding his friend Chidi. The purpose of raising Chidi's name in his defence was an attempt

to show his innocence. Information on Chidi's existent was not produced before the Court. In fact, Chidi was never called by the appellant to show that Chidi exists. The appellant had failed to create any doubt at the defence stage. Therefore, the learned trial judge found that Chidi did not exist and was a fictitious person.

[20] Based on the defence evidence, the learned trial judge held that the appellant had failed to rebut the statutory presumption under section 37(d) of **the Act** on the balance of probabilities. The leaned trial judge found that the appellant had direct possession and knowledge of the said drugs carried in the bag (P8). She made a finding that based on the totality of the evidence and the principles of law that were applicable, the prosecution had successfully proved the charge for trafficking in dangerous drugs beyond reasonable doubt against the appellant.

[21] 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

[22] At the outset, the appellant's counsel informed us that he had no issue with the prosecution's case and the prima facie finding of the learned trial judge at the close of the prosecution's case. However, his main argument focused on the finding of the learned trial judge at the close of the defence case which according to counsel was flawed because of her failure to consider and evaluate the cautioned statement (D30) produced at the defence stage and the inconsistent finding of the learned trial judge of actual possession under section 37(da) of **the Act** at the prosecution's case and presumed possession under section 37(d) of **the Act** at the defence case.

[23] For the purpose of proper argument, learned counsel for the appellant canvassed the following two (2) grounds of appeal, namely:

(a) The learned judge erred when her Ladyship failed to consider the cautioned statement of the appellant (D30);

(b) The learned judge erred when her Ladyship misdirected herself when she applied the presumption under section 37(da) of **the Act** at the end of the prosecution's case and at the end of the defence case found that the appellant had failed to rebut the presumption under section 37(d) of **the Act**.

[24] With regards to the first issue, the opening words of counsel in his written submission is by referring to section 182A of the **Criminal Procedure Code (CPC)** which says that-

"(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."

[25] Counsel submitted that in the present case, the learned trial judge failed to comply with the above provision. This is because exhibit D30 is the appellant's cautioned statement tendered by the defence through SP9. It contained the core or basic defence of the appellant which is consistent with his oral evidence in Court. The learned trial judge seriously erred when she did not consider it. The analysis of the defence can be found from pg. 33-37 AR Vol. 1. According to counsel, exhibit D30 was never considered at all. This non-direction had prejudiced the appellant and as such the conviction was not safe and ought to be set aside. Counsel submitted that had the cautioned statement of the appellant been considered it will certainly add to credibility of the appellant's defence. It was the appellant's case that he had protested his innocence at the time of his arrest. The appellant protested that he had mentioned Chidi and showed the Customs Officer Chidi's phone number in his mobile phone (pg. 112 AR Vol. 2 (B)) and Chidi was the one who gave him the bag (pg. 112-113 AR Vol. 2 (B)).

[26] In essence, the appellant had complied with the advice in **Teng Howe Seng v PP** [2009] 3 CLJ 733. It was submitted that the appellant had disclosed his defence and protested his innocence at the very first opportunity available, that is, at the time of the arrest and at the time of his investigation. Therefore, counsel submitted that the learned trial judge failed to appreciate the defence of the appellant fairly and justly. Counsel also referred to cases of **Azmer bin Mustafa v PP** [2014] 3 MLJ 616, **Prasit Punyang v PP** [2014] 1 MLRA 387, **Derrick Randal v PP** [2018] 3 CLJ 212 and **Zulkefly bin Had v PP** [2014] 6 CLJ 64 to support his argument.

[27] On the other hand, the learned Deputy Public Prosecutor ("the leaned DPP") submitted that the issue raised by the appellant's counsel was devoid of merit because if the court were to read the learned trial judge's grounds of judgment carefully, the learned trial judge had in fact considered and gave weight to the cautioned statement of the appellant D30. The learned DPP referred us to page 31 and page 33 of the learned trial judge's grounds of judgment and at the second paragraph of page 31 she said as follows-

"SP9 (Pegawai Penyiasat) memberitahu bahawa Chidi memesannya untuk mencari peguambela untuk membela Tertuduh. Kandungan percakapan beramaran Tertuduh (Ekshibit D30) mengesahkan keseluruhan pembelaan Tertuduh. Pembelaan Tertuduh diterangkan sepenuhnya di dalam kandungan surat-surat representasi Tertuduh kepada Pendakwaraya."

At issue (e) page 33 she said as follows-

"Peguam berhujah bahawa pembelaan Tertuduh bukanlah penafian semata-mata ("bare denial"), rekaan dan/atau merupakan sesuatu yang baru terfikir ("afterthought"). Pembelaan Tertuduh disokong oleh keterangan saksi-saksi pendakwaan sendiri, percakapan beramarannya (ekshibit D30) dan keterangan bersumpah beliau yang tidak dicabar oleh pihak pendakwaan semasa soal balas. Pembelaan Tertuduh adalah dan konsisten dan telah dicadangkan kepada saksi-saksi utama pendakwaan SP8 (Pegawai Tangkapan) dan SP9 (Pegawai Penyiasat) pada

"first available opportunity".

[28] Therefore, the learned DPP submitted that the learned trial judge had considered the cautioned statement of the appellant. Further, the learned trial judge finding of the defence case were on the same facts revealed in the cautioned statement of the appellant. The learned DPP referred us to the case of **Ong Hooi Beng & 2 lagi v PP** (MRRJ: K05-298/299/300-12/12) where the Court of Appeal held as follows-

"[45] ...We agree that the learned trial judge did not consider the cautioned statements of the 2nd and 3rd appellants but we do not find the omission to be fatal because even if the learned trial judge had considered the statements he would have arrived at the same verdict of guilty. It is clear that on at least one material issue, what they say in their cautioned statements and what they said in court was contradictory and irreconcilable."

[29] On the second ground, the appellant counsel submitted that the learned trial judge had confused herself by invoking actual possession under section 37(da) of **the Act** with presumed possession under section 37(d) of **the Act** at the close of defence case. Counsel referred to page 25 AR Vol 1, where the learned trial judge invoked the trafficking presumption under section 37(da) of **the Act**.

"Selain daripada itu, memandangkan jumlah 442.4 gram, ianya melebihi had berat minima 50-gram yang ditetapkan di bawah seksyen 37(da)(xvi) ADB 1952, maka Tertuduh dianggap memiliki dadah tersebut untuk tujuan pengedaran. Kes ***Ng Tian Kok & Yong Lian v PP [2013] 1 CLJ 633*** *adalah dirujuk. Beban adalah ke atas Tertuduh untuk menyangkalnya".*

However, at the end of the defence case the learned judge criticized the defence for failing to rebut the presumption of possession under section 37(d) of **the Act**-

"Pembelaan gagal menyangkal anggapan yang telahpun dibuktikan di bawah seksyen 37(d) ADB 1952 serta fakta bahawa Tertuduh sememangnya mempunyai milikan yang khusus dan pengetahuan terhadap dadah dibawa di dalam beg P8 tersebut"

[30] The appellant's counsel submitted that the stance taken by the learned trial judge is totally inconsistent and had prejudiced the appellant as the conviction was not in accordance with the law and is contrary to Article 5 of the **Federal Constitution**. The appellant's counsel contended that what the learned trial judge ought to have done was to make a finding whether presumption under section 37(da) had been rebutted. It was incumbent for the learned trial judge to do so. The appellant relied on the cases of **Alcontara a/l Ambross Anthony v PP** [1996] 1 CLJ 705, **PP v Ku Yahya Ku Bahari & Anor v PP** [2002] 1 CLJ 113, **Bahram Nikkhouyangram Nayeb v PP** [2013] 6 CLJ 702, **Ooi Hock Kheng v PP** [2014] 5 MLJ 585 and **Soorya Kumar Narayanan v PP** [2009] 6 CLJ 257. Finally, there is a further infirmity. At the end of the prosecution's case the learned judge found that it was a case of direct trafficking (under s. 37(da) of **the Act**). This approach was clearly wrong. The appellant relies on **Mohamad Hanafi bin Mohamad Hashim v PP** [2016] 6 CLJ 378. By reason of the many infirmities, the appellant's counsel submitted that the conviction cannot be sustained and the appellant should be acquitted and discharged.

[31] The learned DPP took an easy approach that it was clearly a typographical error that the alphabet "a" was accidently omitted from the section. He submitted that the omission did not prejudice the appellant because the learned trial judge was not confused when she clearly stated the words "*mempunyai milikan yang khusus dan pengetahuan*" which refers to actual possession under section 37(da) of **the Act**. In fact, according to the learned DPP, from the beginning until the end the learned judge's mind in this case was that the prosecution had proved that the appellant had direct possession and knowledge that the drugs which was brought into Malaysia were for the purpose of trafficking in Malaysia. The learned DPP referred us to page 35 of AR Vol. 1 where the learned judge held as follows-

> *"Kuantiti berat dadah jenis Methamphetamine seberat 442.4 gram yang terdapat di dalam beg Tertuduh menunjukkan bahawa dadah yang berada di dalam beg tersebut adalah bagi tujuan pengedaran ke Malaysia sepertimana yang didefinasikan di bawah seksyen 2 Akta Dadah Berbahaya 1952. Tertuduh yang hanya seorang diri ke Malaysia dan hanya kali pertama masuk ke Malaysia untuk tujuan bercuti hanyalah semata-mata alasan yang diberikan oleh Tertuduh selain daripada meninjau Universiti Lim Kok Wing dan UIA sebenarnya tujuan beliau tersebut ke Malaysia bagi tujuan pengedaran."*

[32] Therefore, the learned DPP urged this court not to disturb the finding of the learned trial judge because there was no prejudice to the appellant. It was merely a typographical error for in substance the evidence was very clear that the learned judge had found that the appellant had actual possession and knowledge that the drugs were for the purpose of trafficking as defined under section 2 of **the Act**. Therefore he submitted that the conviction was safe.

Our Deliberation and Decision

[33] On the first ground raised by the appellant's counsel, our first and foremost attention was the decision of the latest case of **Derrick Randal v PP** [2018] 3 CLJ 212 where the Court of Appeal held as follows:

> *"**[36]** Adalah jelas bahawa kandungan rakaman percakapan perayu adalah konsisten dengan keterangan lisannya di mahkamah. Justeru, pembelaan perayu di mahkamah bukanlah sesuatu yang ditimbulkan secara tiba-tiba untuk memerangkap pihak pendakwaan. Adalah menjadi tanggungjawab hakim bicara untuk mempertimbangkan dakwaan-dakwaan perayu yang terkandung dalam rakaman percakapan beramarannya bersekali dengan kesemua keterangan lain yang dikemukakan sesuai dengan kehendak s. 182A(1) KTJ, khususnya, bahawa beliau telah tersilap mengambil beg orang lain dan bahawasanya beliau tidak mempunyai sebarang pengetahuan tentang dadah yang terkandung dalam beg milik orang lain tersebut. Dari situ hakim bicara hendaklah mempertimbangkan rakaman percakapan beramaran tersebut dengan teliti sama ada ianya berkeupayaan untuk menimbulkan keraguan ke atas kes pihak pendakwaan. Mahkamah ini dalam kes **Ghasem Gharezadehsharbiani Hassan v. PP [2014] 1 LNS 752** telah memutuskan:*

*[13]... In accordance with the provisions of section 182A(1) of the CPC, it is the bounden duty of the learned trial judge at the conclusion of the trial, to consider the cautioned statement of the appellant and decide whether the prosecution has proved its case beyond reasonable doubt. The learned trial judge must consider carefully whether the cautioned statement is capable of raising a reasonable doubt on the prosecution case. The learned trial judge has a duty and obligation to fairly and justly weigh the defence version and evidence (including the cautioned statement of the appellant) to reach a just result (see: **Ahmad Mukamal Abdul Wahab & Anor v. Public Prosecutor [2013] 4 CLJ 949**).*

*[14] However, the learned trial judge had failed to consider and appreciate the cautioned statement which supported the appellant's oral testimony. The learned trial judge failed to consider and scrutinize the cautioned statement and to make his own findings why even if he did not believe the cautioned statement, it did not raise a reasonable doubt on the prosecution's case as a whole (see: **Ganapathy a/l Rengasamy v. Public Prosecutor [1998] 2 CLJ 1**; [1998] 2 MLJ 577 and **Tan Ewe Huat v. PP [2004] 1 CLJ 521**). In our view, this is a serious non-direction which amounts to misdirection by the learned trial judge warranting appellate intervention (see: **Gooi Loo Seng v. PP [1993] 3 CLJ 1; [1993] 2 AMR 1135**).*

***[37]** Selanjutnya, mahkamah ini dalam kes **Chukwudi Hassan lwn. PP [2015] 8 CLJ 353** telah memutuskan:*

(1) Sekiranya kenyataan beramaran perayu diterima sebagai benar oleh hakim bicara, sudah tentu perayu berhak mendapat perintah pembebasan dan pelepasan kerana tanpa bukti pengetahuan, perayu tidak melakukan apa-apa kesalahan. Dalam hubungan ini, adalah tidak dipertikaikan bahawa hakim bicara gagal mengambil kira isi kandungan kenyataan beramaran perayu. Kegagalan ini mendatangkan ketidakadilan serius kepada perayu kerana beliau terlepas peluang untuk didapati tidak bersalah atas pertuduhan. (perenggan 12 & 13)

(2) Kenyataan perayu di dalam kenyataan beramarannya adalah sama dengan kenyataan perayu dalam pembelaannya di mahkamah yang ditolak oleh hakim bicara. Oleh yang demikian, mungkin boleh dihujahkan bahawa keputusan hakim bicara tetap akan sama, iaitu menolak kenyataan beramaran perayu. Walau bagaimanapun, adalah tidak wajar untuk mahkamah rayuan membuat spekulasi bahawa sekiranya hakim bicara telah mengambil kira kenyataan beramaran perayu, hakim bicara tetap akan menolak penjelasan perayu di mahkamah. Ini adalah persoalan fakta untuk ditentukan oleh hakim bicara dan ia melibatkan isu kredibiliti. (perenggan 13 & 14).

(3) Pihak pendakwaan dalam pemeriksaan balas gagal mencabar kenyataan perayu di dalam kenyataan beramarannya. Walaupun apa yang dinyatakan oleh perayu di dalam kenyataan beramarannya tidak semestinya benar, tanpa cabaran, adalah tidak wajar untuk mahkamah rayuan membuat andaian bahawa ia sememangnya tidak benar. Dari segi undang-undang, kegagalan mencabar keterangan yang memihak kepada tertuduh boleh dianggap sebagai pengakuan bahawa keterangan tersebut tidak dipertikaikan. Oleh itu, sabitan yang direkodkan ke atas perayu adalah tidak selamat. (perenggan 16 & 17)

[38] *Dengan demikian, kami mendapati bahawa kegagalan hakim bicara yang bijaksana untuk mempertimbangkan semua keterangan yang dikemukakan di hadapannya sebelum memutuskan bahawa pihak pendakwaan telah berjaya membuktikan kesnya melampaui keraguan yang munasabah, bertentangan dengan kehendak s. 182A(1) KTJ, adalah terjumlah dalam salah arahan ('misdirection') serius yang mewajarkan campur tangan kami.*

[39] *Atas alasan ini sahaja kami telah membenarkan rayuan perayu. Dengan itu, sabitan dan hukuman gantung sampai mati yang dikenakan ke atas perayu diketepikan dan digantikan dengan perintah pembebasan dan pelepasan dari pertuduhan yang dijatuhkan ke atas beliau".*

[34] We were informed by counsel that **Derrick Randall'** case (supra) had been affirmed by the Federal Court.

[35] Coming back to our case, we have read the learned trial judge's grounds of judgment. Her finding at the end of defence case is at pages 33 to 37 AP Vol. 1. After as careful reading of that part of the judgment, we failed to see that the appellant's cautioned statement D30 had been deliberated and considered. There was no mention of the appellant's cautioned statement at all. (Exhibit D30 is at page 73 to 78 of AR Vol. 1). Although the learned DPP submitted that the finding of the learned trial judge at the close of defence case was the reflection of what was stated in the cautioned statement, and that the learned trial judge in fact had considered the appellant's cautioned statement, we disagreed with him because there is nothing in that part of the judgment that the learned trial judge had said so. The learned judge had only stated that her finding was based on the evidence produced before the Court and that the appellant had failed to raise any reasonable doubt against the prosecution's case.

[36] The appellant's counsel argument in our view have some merit. In **Teng Howe Seng v PP** [2009] 3 CLJ 733 it was held that-

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

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

[37] In the above case the appellant failed to provide information about "Ho Seng" but in the present case, the appellant had provided information about "Chidi" in his cautioned statement (D30).

Therefore, it was the counsel's argument that the learned trial judge should have considered the appellant's information about Chidi and the appellant's defence that the drugs belonged to Chidi. The evidence of the prosecution witness SP9 in the Notes of Evidence at page 106 AR Vol. 1 is as follows-

> S: Di dalam percakapan beramaran teruduh, tertuduh ada menyatakan tentang seorang bernama Chidi. Setuju?
>
> J: Ya. Setuju
>
> S: Nama Chidi ini boleh dilihat di m.s. 3 D30, J19, J25 dan J26. Watak Chidi ini, saya cadangkan kepada Tuan bahawa orang bernama Chidi memang telah diberitahu kepada Tuan sejurus selepas OKT telah diserahkan kepada kamu?
>
> J: Ya
>
> S: Saya cadangkan kepada Tuan, tertuduh telah memberitahu bahawa nombor telefon dan contact Chidi berada di dalam telefon bimbitnya yang dirampas daripadanya. Setuju?
>
> J: Setuju
>
> S: Bolehkah Tuan beritahu sama ada pihak Tuan ada memanggil, telefon nombor Chidi tersebut?
>
> J: Ya, nombor Chidi yang ditunjukkan dalam handset milik OKT adalah nombor yang menunjukkan International Number.
>
> S: Adakah Tuan membuat apa-apa siasatan nombor tersebut?
>
> J: Tidak ada
>
> S: saya cadangkan kepada Tuan bahawa tertuduh telah memberi tahu Tuan bahawa Chidi adalah orang yang telah memberikannya beg P8 untuk dibawa ke Malaysia. Setuju?
>
> J: Setuju
>
> S: Tertuduh juga, justeru itu telah memberitahu bahawa kawannya, Chidi telah meminta beliau menghantar atau menyerah kembali beg ini kepada seorang kawannya yang akan berjumpa dengan tertuduh di hotel Istana, Kuala Lumpur setelah beliau landing atau sampai di hotel.
>
> J: Ya. OKT pernah menyatakan hal berkenaan ketika mula-mula dia ditangkap dan ditahan di airport pada hari kejadian.

[38] The appellant's counsel at page 117 of his written submission AR Vol. 4(B) at ISSUE (E) did raise this point that the appellant's defence is not a bare denial, or an afterthought but supported with the evidence of the prosecution's witness, cautioned statement (D30) and his evidence on oath which was not challenged by the prosecution during cross examination. The relevant part of the appellant's

cautioned statement (D30) reads as follows-

> S: On 20.11.2011 at 7.45 pm in KLIA airport customs found drugs in a plastic with 2 pink paper being concealed in your hand carry bag. How you want to explain this?
>
> J: It is beyond my knowledge. I bring the bag from my country and the bag was empty and just my clothes I was surprise when the customs officer told me that they find drugs in my bag. I told them I never see drugs before, I am not smoking, I am not taking drugs even in my country I never heard about it. So I do not know what to do.
>
> S: How many bag you bring with you to Malaysia?
>
> J: One.
>
> S: Is that bag is your own?
>
> J: The bag was borrowed by me from Chidi.
>
> S: Why you borrow that bag from Chidi?
>
> J: Because I have another bag, normally I put my books in that bag. The bag is so small so he borrowed me the bag and he asked me to return the bag once I return back from Malaysia.
>
> S: What kind of things that you put in that bag?
>
> J: Just my clothes and one of my shoes.
>
> S: Where you put your bag in the airoplane?
>
> J: I put my bag in shelve. The shelve above the sitting chair.
>
> S: Have you came to Malaysia before?
>
> J: This is my first time.

[39] However, the learned trial judge at the close of the defence case as stated in her judgment held as follows-

> "...mengenai isu yang dibangkitkan oleh pembelaan, saya tidak bercadang untuk membincangkannya semula sebab ianya telah dibincangkan semasa kes pendakwaan. Saya berpendapat isu-isu ini tidak bermerit".

[40] Clearly, the learned trial judge had failed to consider the appellant's cautioned statement. What the appellant said need not be true. However, without it being challenged, it was not proper for the learned judge to assume that the statement was not true and/or the issue raised about the appellant's cautioned statement (D30) has no merit. We agreed with the appellant's counsel that the learned trial judge should have considered the appellant's cautioned statement in the manner as decided in

Derrick Randall's case (supra). Based on this reason alone we would not hesitate to allow the appeal.

[41] On the second ground, the issue raised is that the learned judge had confused herself by invoking actual possession under section 37(da) of **the Act** at the close of the prosecution's case and presumed possession under section 37(d) of **the Act** at the close of the defence case. The learned DPP submitted that there was an omission of the word 'a'. It should have read as section 37(da) of **the Act**. His submission was that the Court must read the grounds of judgment in its entirety. The prosecution's case is that the appellant was found to have actual possession and knowledge about the drugs in P8. Therefore, section 37(da) of **the Act** was the correct section. The learned trial judge did not confuse her mind about this but it was unfortunate that the typographical error had allowed the appellant to raise this point. The Court must hold the issue raised as having no merit.

[42] As much as we wish to believe the learned DPP, however, we think that this was not the case of a mere typographical error. The learned trial judge in her grounds of judgment at page 24 AR Vol. 1, had agreed with the prosecution that there was direct evidence that the appellant's conduct was trafficking as defined under section 2 of **the Act**. She also found that the weight of the drugs exceeded the minimum weight of 50 gram as stated under section 37(da)(xvi) of **the Act**. In other words, the learned trial judge had invoked a presumption of trafficking under section 37(da) of **the Act**. She held that the burden is on the appellant to rebut the presumption.

[43] We noted that at the close of the defence case, the prosecution in their written submission at the trial had submitted that the appellant must give evidence on the balance of probabilities to rebut the presumption under section 37(d) of **the Act** (see page 57 and 61 AR Vol. 4A). The learned DPP submitted that the appellant had failed by his own defence to cast any doubt and rebut the presumption under section 37(d) of **the Act** (see page 66 and 89 AR Vol. 4A). At the end of the defence case, the learned trial judge held that the defence had failed to rebut presumption proven under section 37(d) of **the Act**. In other words, the learned trial judge agreed with the written submission of the learned DPP.

[44] We agreed with the appellant's counsel that in the Federal Court cases of **Ibrahim Mohamad v PP** [2011] 4 CLJ 113 and **Muhammed Hassan v PP** [1998] 2 CLJ 170 the pre-condition to activate the presumption under section 37(da) of **the Act** is that the prosecution must produce evidence (beyond reasonable doubt) that the accused "is found in possession" of the drugs. In **Ibrahim Mohamad**, it was held that-

> *"**[6]** It is trite law that possession is an important ingredient in the charge of trafficking. Unless there is direct evidence of trafficking, the prosecution must prove the ingredient of "possession" and the trial judge must make an affirmative finding of "possession" before the presumption of trafficking under s. 37(da) of the Act can be invoked."*

[45] In **Muhammed Hassan**'s case, it was held that-

*"**[5]** There is a clear distinction between the word "deemed" used in s. 37(d) and the word "found" employed in s. 37(da) of the Act.*

__[5a]__ The "deemed" state of affairs in s. 37(d) (ie, deemed possession and deemed knowledge) is by operation of law and there is no necessity to prove how that particular state of affairs is arrived at. There need only be established the basic or primary facts necessary to give rise to that state of affairs ie, the finding of custody or control. The word "found" in the operating phrase of s. 37(da), on the other hand, connotes a finding after a trial by the court.

__[5b]__ Further, the basic or primary facts needed to raise "deemed" possession and "deemed" knowledge under s. 37(d) of the Act and those required to raise "presumed... trafficking" under s. 37(da) are different. And thus, to come to the presumptions of possession and knowledge under s. 37(d), one need only to arrive at a finding of having had "in custody or under...control anything whatsoever containing" the drug (as opposed to the drug itself), whereas to arrive at the presumption of "trafficking" under s. 37(da), a finding of being "in possession" of the drug is necessary, in addition to proof of the relevant minimum quantity specified.

***[6]** The word 'found' in s. 37(d) must bear the same meaning as the word 'found' in s. 37(da). Both require evidential materials in attaining proof thereof and are vastly different from the word 'deemed' employed in the said s. 37(d). In the circumstances, to constitute "possession" under s. 37(da) of the Act, so as to be capable of forming one of the ingredients thereunder thereby giving rise to the presumption of trafficking, there must be an express affirmative finding (as opposed to legal presumption) of possession as understood in criminal law, based on evidence."*

[46] We agreed with the appellant's counsel that if the prosecution chose to rely to presumption under section 37(d) of **the Act** to prove 'presumed possession', the prosecution is prohibited to apply presumption under section 37(da) of **the Act** on the principle of 'double presumption'. Clearly, at the close of the prosecution's case the prosecution had applied the presumption under section 37(da) of **the Act** but at the close of the defence case, the prosecution applied the presumption under section 37(d) of **the Act** as found in the prosecution's written submission. The learned trial judge agreed with the prosecution's submission. We cannot accept the learned DPP' contention that it was a mere typographical error because when we read the whole context of the impugned sentence by the learned trial judge, we believed the learned trial judge had intended it to be the presumption under section 37(d) of **the Act** and the fact that section 37(da) carries different meaning, the learned judge must have been confused with the presumptions in section 37(da) and section 37(d) of **the Act**. Therefore, we accepted that the appellant's counsel submission on this issue had some merit.

Conclusion

[47] For all the reasons above stated, we were unanimous in our decision that the conviction was not safe. Therefore, the conviction and sentence to death imposed by the learned trial judge against the appellant was set aside and substituted with an order that the appellant be acquitted and discharged of the charge made against him.

Dated this 18th September, 2018

Sgd

KAMALUDIN MD. SAID
JUDGE
COURT OF APPEAL MALAYSIA
PUTRAJAYA

COUNSEL

For the Appellants: Hisyam Teh Poh Teik (Messrs Teh Poh Teik & Co.)

For the Respondent: Ahmad Sazilee bin Abdul Khairi, Deputy Public Prosecutor (Attorney General Chambers)

LEGISLATION REFERRED TO:

Criminal Procedure Code, Section 182A

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

Federal Constitution, Article 5

JUDGMENTS REFERRED TO:

Alcontara a/l Ambross Anthony v PP [1996] 1 CLJ 705

Azmer bin Mustafa v PP [2014] 3 MLJ 616

Bahram Nikkhouyangram Nayeb v PP [2013] 6 CLJ 702

Derrick Randal v PP [2018] 3 CLJ 212

Ibrahim Mohamad v PP [2011] 4 CLJ 113

Mohamad Hanafi bin Mohamad Hashim v PP [2016] 6 CLJ 378

Muhammed Hassan v PP [1998] 2 CLJ 170

Ong Hooi Beng & 2 lagi v PP (MRRJ: K05-298/299/300-12/12)

Ooi Hock Kheng v PP [2014] 5 MLJ 585

PP v Abdul Rahman Akif [2007] 4 CLJ 337

PP v Ku Yahya Ku Bahari & Anor v PP [2002] 1 CLJ 113

Prasit Punyang v PP [2014] 1 MLRA 387

Soorya Kumar Narayanan v PP [2009] 6 CLJ 257

Teng Howe Seng v PP [2009] 3 CLJ 733

Zulkefly bin Had v PP [2014] 6 CLJ 64