

PP
v.
TEO KIAN CHUN & ANOR

High Court Malaya, Johor Bahru
Collin Sequerah J
[Criminal Trial No: 45A-43-12-2016]
10 July 2018

Case(s) referred to:

Alma Nudo Atenza v. PP [2017] MLRAU 253 (refd)
Balachandran v. PP [2004] 2 MLRA 547; [2005] 2 MLJ 301; [2005] 1 CLJ 85;
[2005] 1 AMR 321 (refd)
Chew Sam Poh v. PP [2015] MLRAU 31; [2015] 4 MLJ 252; [2015] 3 CLJ 318
(refd)
Gunalan Ramachandran & Ors v. PP [2004] 2 MLRA 180; [2004] 4 MLJ 489;
[2004] 4 CLJ 551; [2004] 6 AMR 189 (refd)
Hasbala Mohd Sarong v. PP [2013] 6 MLRA 1; [2013] 6 MLJ 636; [2013] 6 CLJ
945; [2013] 6 AMR 324 (refd)
Leow Nghee Lim v. Reg [1955] 1 MLRH 614; [1956] 1 MLJ 28 (refd)
Lew Wai Loon v. Public Prosecutor [2014] 3 MLRA 9; [2014] 3 MLJ 325; [2014]
2 CLJ 649 (refd)
Looi Kow Chai & Anor v. PP [2002] 2 MLRA 383; [2003] 2 MLJ 65; [2003] 1
CLJ 734; [2003] 2 AMR 89 (refd)
Mat v. PP [1963] 1 MLRH 400; [1963] 1 MLJ 263 (refd)
Md Zainudin Raujan v. PP [2013] 3 MLRA 351; [2013] 3 MLJ 773; [2013] 4 CLJ
21; [2013] 3 AMR 480 (refd)
Muhammad Hassan v. PP [1997] 2 MLRA 311; [1998] 2 MLJ 273; [1998] 2 CLJ
170; [1998] 1 AMR 829 (refd)
Neo Koon Cheo v. Reg [1959] 1 MLRH 532; [1959] 1 MLJ 47 (refd)
PP v. Dato' Seri Anwar Ibrahim (No 3) [1999] 1 MLRH 59; [1999] 2 MLJ 1;
[1999] 2 CLJ 215; [1999] 2 AMR 2017 (refd)
PP v. Kau Joo Huat [1988] 1 MLRA 137; [1988] 2 MLJ 91; [1988] 1 CLJ (Rep)
258 (refd)
PP v. Mohd Radzi Abu Bakar [2005] 2 MLRA 590; [2005] 6 MLJ 393; [2006] 1
CLJ 457; [2005] 6 AMR 203 (refd)
PP v. Muhammad Nasir Shahrudin [1992] 2 MLRH 390; [1994] 2 MLJ 576;
[1992] 3 CLJ 408 (refd)
PP v. Yuvaraj [1968] 1 MLRA 606; [1969] 2 MLJ 89 (refd)
Prasit Punyang v. PP [2014] 1 MLRA 387; [2014] 4 MLJ 282; [2014] 7 CLJ 392
(refd)
Sabarudin Non & Ors v. Public Prosecutor [2004] 2 MLRA 441; [2005] 4 MLJ 37;
[2005] 1 CLJ 466; [2005] 1 AMR 4 (refd)
Suresh v. State of Uttar Pradesh AIR [2001] SC 1344 (refd)
Toh Ah Loh And Mak Thim v. Rex [1948] 1 MLRH 143; [1949] 1 MLJ 54 (refd)



Legislation referred to:

Criminal Procedure Code, ss 180(1), (3), 182A, 277

Dangerous Drugs Act 1952, ss 37(d), (da)(xvii), 37A(1), 37B, 39B(1)(a), First Schedule

Penal Code, s 34

Poisons Act 1952, s 30(3), (4), First Schedule, Second Schedule

Counsel:

For the plaintiff: Mohd Yazid Sairi (together with Syamimi Farhana Muhammad A Aziz); DPPs

For the 1st accused: KL Chee; M/s KL Chee & Co

For the 2nd accused: Noman Mohd Nasir; M/s Norman & Co

[Both accused to be hanged by the neck until they are dead.]

JUDGMENT

Collin Sequerah J:

A) Introduction

[1] The accused person's abovenamed were charged with the following:

First Charge

"Bahawa kamu bersama-sama pada 24 Mei 2016, lebih kurang jam 16:15 hrs di pejabat Unit Khas Pemeriksaan Penumpang, Jabatan Kastam Diraja, Malaysia, Balai Ketibaan Lapangan Terbang Antarabangsa Senai dalam Daerah Johor Bahru di dalam Negeri Johor telah mengedar dadah berbahaya iaitu 3, 4-Methylenedioxymethamphetamine (MDMA) seberat 227.19 gram dan dengan itu kamu telah melakukan satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah s 39B(2) Akta yang sama dan dibaca bersama-sama s 34 Kanun Keseksaan."

Second Charge

"Bahawa kamu bersama-sama pada 24 Mei 2016, lebih kurang jam 16:15 hrs di pejabat Unit Khas Pemeriksaan Penumpang, Jabatan Kastam Diraja, Malaysia, Balai Ketibaan Lapangan Terbang Antarabangsa Senai dalam Daerah Johor Bahru di dalam Negeri Johor telah didapati di dalam milikan kamu racun iaitu Fenazepam seberat 1829.61 gram dan dengan itu kamu telah melakukan kesalahan di bawah s 30(3) Akta Racun 1952 dan dihukum di bawah s 30(5) Akta yang sama dibaca bersama-sama s 34 Kanun Keseksaan."

B) Prosecution Case

[2] A summary of the prosecution case revealed that on 24 May 2016 at



around 4.15 pm, the Second Accused was seen bringing a black trolley bag with the brand "Lotus Master" (P27) ("the said bag") and a white paper bag heading for the check-in counter for departure. At the time, the First Accused was with him but was not carrying anything. The Second Accused placed the said bag into the scanning machine on the instructions of SP5 who was on duty there at the time.

[3] SP5 discovered that there was a suspicious looking image in the bag and asked both the accused what was in the bag.

[4] The First Accused replied that it was only a hamper. Not satisfied with the reply from the First Accused, SP5 instructed that the said bag be opened. At that time the First Accused quickly took the said bag and hastily proceeded in the direction heading out of the aero mall. At the same time, the Second Accused took the white paper bag and also proceeded hastily out of the aero mall.

[5] As both the accused proceeded out of the aero mall, they were followed by SP5 who also sought the assistance of SP6 and SP8 to arrest the accused persons. At the time, SP9 and his colleague from the Customs Department, SP7, also happened to be present and together with the auxiliary police, detained both accused persons together with the said bag (P27).

[6] SP5, SP6, SP7, SP8 and SP9 who were involved in the arrest of the accused persons confirmed that that the First Accused was holding the said bag while the Second Accused at the time was carrying a paper bag brand "Emporio Armani" and a carry bag brand "Mona Lisa". Both accused were brought to the Branch Examination Office "Pejabat Cawangan Pemeriksaan" at the Senai International Airport.

[7] An examination of the said trolley bag (P27) revealed the presence of a number of pills which upon subsequent analysis by SP3, the Chemist, was found to contain the substances 3, 4- Methylenedioxymethamphetamine (MDMA) weighing 227.19 grams nett including 9960 pills containing the poison Fenazepam weighing 1829.61 grams nett.

[8] This was confirmed in a Chemist Report P23A and P23B respectively.

C) Duty Of Court At The End Of The Prosecution Case

[9] The duty of the court at the end of the prosecution case is set out in s 180(1) of the Criminal Procedure Code (CPC) which stipulates that when the case for the prosecution is concluded the Court shall consider whether the prosecution has made out a *prima facie* case against the accused.

[10] The cases of *PP v. Dato' Seri Anwar Ibrahim (No 3)* [1999] 1 MLRH 59; [1999] 2 MLJ 1; [1999] 2 CLJ 215; [1999] 2 AMR 2017, *Looi Kow Chai & Anor v. PP* [2002] 2 MLRA 383; [2003] 2 MLJ 65; [2003] 1 CLJ 734; [2003] 2 AMR 89, *Balachandran v. PP* [2004] 2 MLRA 547; [2005] 2 MLJ 301; [2005] 1 CLJ 85; [2005] 1 AMR 321 and *PP v. Mohd Radzi Abu Bakar* [2005] 2 MLRA



590; [2005] 6 MLJ 393; [2006] 1 CLJ 457; [2005] 6 AMR 203 respectively lay down the proposition that at the end of the case for the prosecution, their evidence must be subject to maximum evaluation in order to determine whether a *prima facie* case is made out.

[11] In *Looi Kow Chai v. Public Prosecutor (supra)*, the Court of Appeal held:

"It therefore follows that there is only one exercise that a judge sitting alone under s 180 of the CPC has to undertake at the close of the prosecution case. **He must subject the prosecution evidence to maximum evaluation and to ask himself the question: if I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no *prima facie* case has been made out and the accused would be entitled to an acquittal**".

[Emphasis Added]

[12] Should a statutory presumption arise against the accused persons, it is incumbent upon them to rebut such presumption on a balance of probabilities. See *PP v. Yuvaraj* [1968] 1 MLRA 606; [1969] 2 MLJ 89.

D) Analysis Of The Prosecution Case

[13] In order for the prosecution to make out a *prima facie* case against the accused in respect of the charge under s 39B(1)(a) Dangerous Drugs Act 1952 (DDA) and also the charge under s 30(3) of the Poisons Act 1952, they must prove the following:

- i) The substances containing the dangerous drugs and the 9960 pills containing the poison comprising the subject matter of both charges were in the possession of both accused persons;
- ii) The substances found are dangerous drugs and poison as listed in the First Schedule in the DDA and the relevant schedules in the Poisons Act 1952 respectively; and
- iii) The accused persons were trafficking in the said dangerous drugs.

i) The Dangerous Drugs And The 9960 Pills Containing The Poison Were In The Possession Of Both Accused Persons

[14] Possession can be either actual or presumed. Presumed possession and knowledge is upon the invocation of s 37(d) DDA by proof of custody or control.

[15] Possession has nowhere been statutorily defined. However in *Toh Ah Loh And Mak Thim v. Rex* [1948] 1 MLRH 143; [1949] 1 MLJ 54, the court observed:



"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."

[16] However, following the decision in *Public Prosecutor v. Kau Joo Huat* [1988] 1 MLRA 137; [1988] 2 MLJ 91; [1988] 1 CLJ (Rep) 258, the power of disposal is no longer an ingredient to support a conviction in a case involving dangerous drugs.

[17] The requirement of the possessor to have knowledge of the thing possessed however, is still an essential ingredient of possession. In *Leow Nghee Lim v. Reg* [1955] 1 MLRH 614; [1956] 1 MLJ 28, the phrases custody, control and possession was explained as follows:

"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]

[18] In *Neo Koon Cheo v. Reg* [1959] 1 MLRH 532; [1959] 1 MLJ 47, the phrases custody, control and possession were discussed as follows:

"What does the word "custody" mean? According to the view expressed by Brown, Ag CJ, in *Ho Seng Seng v. Rex* [1951] 1 MLRH 561; [1951] 1 MLJ 225, it means watching over or keeping safe. With



great respect to the learned Judge, I am unable to agree with his view that the difference between "control" and "custody" is that "control" implies a power of disposal while "custody" does not.

I have given the most careful consideration to the meaning of the word "custody" in s 37(d) of the Ordinance under consideration and have come to the conclusion that it means actual physical control. The word "control" in the same section must, therefore, be construed to mean any form of control other than actual physical control. Other names for "custody" are "physical possession," "*de facto* possession" and "detention." It is referred to in 25 *Halsbury's Laws* (2nd Edn) 194, para 327, in these terms:

"The word 'possession' may mean effective, physical or manual control, or occupation, evidenced by some outward act, sometimes called *de facto* possession or detention."

I would adopt the following definitions of "custody" and "possession" given by the eminent American jurist, Roscoe Pound, in his "Introduction to American Law":

"Custody is a mere condition of fact, a mere physical holding of or physical control over the thing."

Where custody (exercised by oneself or by another) is coupled with the mental element of holding for one's own purposes, there is possession."

Support for my view that "custody" means actual physical control is to be found in reg 6(2)(b) of the Dangerous Drugs Regulations, 1951, which provides as follows:

"For the purposes of these Regulations: - a person shall be deemed to be in possession of a drug or preparation if it is in his actual custody or is held by any other person subject to his control or for him or on his behalf."

From this it follows that under this Regulation a drug is in a person's actual custody if it is held by him and not by someone else, ie if it is in his actual physical control."

[Emphasis Added]

[19] In the case of *Public Prosecutor v. Muhammad Nasir Shaharudin* [1992] 2 MLRH 390; [1994] 2 MLJ 576; [1992] 3 CLJ (Rep) 408, it was held:

Possession is not defined in the DDA. However, it is now firmly established that to constitute possession, it is necessary to establish that: (a) the person had knowledge of the drugs; and (b) that the



person had some form of control or custody of the drugs. To prove either of these two requirements, the prosecution may either adduce direct evidence or it may rely on the relevant presumptions under s 37 of the DDA.

In *Chan Pean Leon v. Public Prosecutor* [1956] 1 MLRH 44; [1956] 1 MLJ 237, possession was defined in the following terms:

"Possession" itself as regards the criminal law is described as follows in *Stephen's Digest* (9th Edition, p 304):

"A moveable thing is said to be in the possession of a 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."

To put it otherwise, there is a physical element and a mental element which must both be present before possession is made out. The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example have it in his pocket or have it lying in front of him on a table. It must also be shewn that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some *animus possidendi*.

Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case. If a watch is in my pocket then in the absence of anything else the inference will be clear that I intend to deal with it as if it were my own and accordingly I am in possession of it. On the other hand, if it is lying on a table in a room in which I am but which is also frequently used by other people then the mere fact that I am in physical proximity to it does not give rise to the inference that I intend to deal with it as if it belonged to me. There must be some evidence that I am doing or having done something with it that shews such an intention. Or it must be clear that the circumstances in which it is found shew such an intention. It may be found in a locked room to which I hold the key or it may be found in a drawer mixed up with my own belongings or it may be found, as occurred in a recent case, in a box under my bed. The possible circumstances cannot be set out exhaustively and it is impossible to lay down any general rule on the point. But there must be something in the evidence to satisfy the Court that the person who is physically in a position to deal with the thing as his own had the intention of doing so."

[Emphasis Added]

[20] An examination of the circumstances would show that both accused were



together at the Senai International airport and while the Second Accused who was carrying the said bag at the time, placed it on the scanning machine, it was the First Accused who after replying to a question by SP5 that the contents of the bag was a hamper, immediately took the bag and headed out of the aero mall.

[21] Both accused then exited out of the aero mall with haste and were promptly arrested. The evidence surrounding the above account came from SP5, SP6, SP7, SP and SP9 respectively. This constituted direct evidence. I also found these witnesses accounts of the events that unfolded to be credible. The evidence was also supported by the CCTV recording at the airport. The evidence was therefore sufficient to prove that both the accused had custody and control of the said bag (P27).

[22] The circumstances show that after SP5 asked for the said bag to be opened, the First Accused took the bag and promptly headed out of the aero mall followed by the Second Accused. Both accused then ran away before being apprehended. The circumstances show that they acted in concert. Based on the cited authorities above, I find therefore that the prosecution evidence had clearly proven as a fact that both the accused persons were in custody and control of the said bag.

[23] Thus the deeming provision of the statutory presumption under s 37(d) of the DDA of possession and knowledge of the drugs in the said bag forming the subject matter of the First Charge arose against both the accused persons.

[24] The statutory presumption under s 37(d) reads as follows:

37. Presumptions

In all proceedings under this Act or any regulation made thereunder-

(d) any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug

[25] As the accused persons had in their custody or control "anything whatsoever containing dangerous drugs", namely the said bag, I find that they are deemed to be in possession of the drugs and to have knowledge of the nature of such drugs.

[26] The burden upon both the accused persons is to now rebut on a balance of probability such presumption. See *PP v. Yuvaraj* [1968] 1 MLRA 606; [1969] 2 MLJ 89.

[27] The prosecution has therefore proven the first ingredient of the offence in respect of the First Charge.



[28] In respect of the Second Charge under s 30(3) of the Poisons Act 1952, I also found from the circumstances of the case that both accused were in custody and control of the said bag and therefore the statutory presumption of possession and knowledge under s 30(4) of the Poisons Act 1952 had arisen against both accused persons. The said subsection reads:

30. Control of import, export, manufacture, sale, etc., of psychotropic substances

(1).....

(2).....

(3).....

(4) In any prosecution for an offence under this section, any person who is found to have in his custody or under his control any psychotropic substance shall be deemed to have been in possession of the substance and to have known the nature of the substance, until he proves to the contrary.

[29] The prosecution has therefore also proven the first ingredient of the offence in respect of the Second Charge.

[30] The burden upon the accused persons is to now rebut on a balance of probability such presumption. See *PP v. Yuvaraj (supra)*.

ii) The Drugs Are Dangerous Drugs As Listed In The First Schedule In The DDA While The 9960 Pills Are Listed Under The Schedules To The Poisons Act 1952

[31] The evidence to prove this ingredient came from the evidence of SP3, the Chemist. SP3 testified that the results of analysis carried out on the substances contained in the said bag revealed that they contained 3, 4-Methylenedioxymethamphetamine (MDMA) weighing 227.19 grams nett and 9960 pills containing the poison Fenazepam weighing 1829.61 grams nett. These results were also confirmed in a Chemist Report (P23A & B).

[32] SP3 further testified that 3, 4- Methylenedioxymethamphetamine (MDMA) is a dangerous drug as listed under the First Schedule to the DDA while Fenazepam (which structurally is a product of 1,4-benzodiazepine) is as defined in the First Schedule and Second Schedule to the Poisons Act 1952. The Chemist Report (P23A & B) further reinforced these findings.

[33] In the case of *Balachandran v. PP* [2004] 2 MLRA 547; [2005] 2 MLJ 301; [2005] 1 CLJ 85; [2005] 1 AMR 321, the Federal Court held:

It has been held by the trilogy of the (then) Supreme Court cases of *Munusamy v. PP* [1986] 1 MLRA 292; [1987] 1 MLJ 492; [1987] CLJ



(Rep) 221, *PP v. Lam San* [1991] 1 MLRA 219; [1991] 3 MLJ 426; [1991] 1 CLJ 391 (Rep) and *Khoo Hi Chiang v. PP* [1993] 1 MLRA 701; [1994] 1 MLJ 265; [1994] 2 CLJ 151; [1994] 1 AMR 323 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* [1993] 1 MLRA 701; [1994] 1 MLJ 265; [1994] 2 CLJ 151; [1994] 1 AMR 323 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 tests conducted by him in arriving at his conclusion. The evidence of the chemist is therefore sufficient.**

[Emphasis Added]

[34] See also the case of *Gunalan Ramachandran & Ors v. PP* [2004] 2 MLRA 180; [2004] 4 MLJ 489; [2004] 4 CLJ 551; [2004] 6 AMR 189.

[35] In any event, SP3 did testify in some detail as to the methods of her analysis in coming to her conclusion. I was therefore satisfied that the prosecution had proven both the nature and weight of the dangerous drugs and the poisons comprising the subject matter of both charges.

[36] The prosecution had therefore proven the second ingredient in respect of both charges to satisfaction.

iii) The Accused Persons Were Trafficking In The Said Dangerous Drugs

[37] It has been proven that both accused persons were in possession of the dangerous drugs by virtue of the deeming provision in s 37(d) DDA.

[38] As far as the First Charge under s 39B(1)(a) of the DDA is concerned, the evidence of SP3, as has been seen, had proven that the dangerous drugs found in the said bag contained 3, 4- Methylenedioxymethamphetamine (MDMA) weighing 227.19 grams nett.

[39] This is above the statutory minimum as stated in s 37(da) of the DDA which reads:

Presumptions

In all proceedings under this Act or any regulation made thereunder-

(da) any person who is found in possession of-

(xvii) 50 grammes or more in weight of 5-Methoxy-3, 4-Methylenedioxyamphetamine (MMDA)



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.

[40] I therefore find in light of the fact that the said substance 3, 4 Methylenedioxymethamphetamine (MDMA) weighed 227.19 grams nett, the statutory presumption under s 37(da)(xvii) of the DDA has arisen against both accused persons in respect of the charge under s 39B(1)(a) DDA.

[41] The burden upon the accused persons is to now rebut on a balance of probability such presumption. See *PP v. Yuvaraj (supra)*.

Application Of Double Presumptions

[42] It is to be noted that this court has made the finding that in respect of the First Charge under s 39B(1)(a) DDA, both the statutory presumptions under s 37(d) and s 37(da) DDA respectively had arisen against both accused.

[43] In making such a finding I am aware that pursuant to an amendment to the DDA made in 2014, the usage of a presumption in conjunction with another presumption is now permissible.

[44] The said amendment under s 37A(1) of the DDA which came into force on 15 February 2014 vide the Dangerous Drugs (Amendment) Act 2001 (Act A1457) reads as follows:

37A. Application of presumptions

Notwithstanding anything under any written law or rule of law, a presumption may be applied under this Part in addition to or in conjunction with any other presumption provided under this Part or any other written law

[45] The offence committed by the accused person's took place on 24 May 2016. This is therefore post amendment. The result of the amendment is to effectively overrule the effect of the decision in *Muhammad Hassan v. PP* [1997] 2 MLRA 311; [1998] 2 MLJ 273; [1998] 2 CLJ 170; [1998] 1 AMR 829 with regard to the prevention of the application of double presumptions.

[46] Since the coming into effect of the amendment, it has been held that the presumption of knowledge under s 37(d) can now be invoked to presume trafficking under s 37(da) of the DDA.

[47] This was made clear in the case of *Chew Sam Poh v. Public Prosecutor* [2015] MLRAU 31; [2015] 4 MLJ 252; [2015] 3 CLJ 318 which held as follows:

With this amendment, the presumption of knowledge under s 37(d)



can now be invoked to presume trafficking under s 37(da). The amendment however does not affect that part of the decision in Muhammed bin Hassan which decided that the court must invoke the presumption of knowledge under s 37(d) once custody or control is established.

[48] As far as the constitutionality of the said amendment is concerned, the Court of Appeal in the case of *Alma Nudo Atenza v. Public Prosecutor* [2017] MLRAU 253, held:

The onus of proving the guilt of the appellant beyond reasonable doubt is still on the prosecution. The presumptions under ss 37(d) and 37(da) of the Act is a rebuttable presumption. Before a presumption can safely be invoked, it is incumbent upon the prosecution to adduce positive evidence of facts from which the presumption can be relied on. It is the common task of the trial judge to make a finding of fact before a presumption or an inference can safely be invoked. Thus it is clear to us that there are pre-conditions to satisfy in order for the presumptions to be invoked. The rights of the defence were maintained and the appellant was given an opportunity to rebut the presumptions on the balance of probabilities. In *Gan Boon Aun (supra)*, the Federal Court held:

"There was a presumption and reverse onus clause in s 122(1). But the substance and effect of the presumption was reasonable and was not greater than was necessary. The rights of the defence were maintained. The statutory defence provided the opportunity to an accused to rebut the presumption. It was only right that an accused should prove the matters set out in statutory defence. Fairly said, there was balance between the general interest of the community and the protection of fundamental rights. There is no basis to hold that s, 122(1) was unconstitutional.

Applying the above reasoning, **we are of the view that s 37A of the Act is not unconstitutional. We further hold that the double presumptions allowed under s 37A of the Act did not violate the doctrine of presumption of innocence as alleged by learned defence counsel.**

Reverting back to the instant appeal, we find no error of law or fact by the learned JC in invoking the presumptions under s 37(d) and s 37(da) of the Act as we found that this was supported by proved facts. The learned JC had considered the facts that the appellant was in custody and/or control of the bag P7 which contained the impugned drugs as well as the fact that the appellant carried the drugs which was more than the minimum weight of 50 grams stated under s 37(da)(xvi) which automatically triggered the presumption of trafficking, from Hong Kong into Malaysia.



[Emphasis Added]

[49] The presumption under s 37(d) and that under s 37(da) of the DDA therefore can be and is hereby invoked together.

Other Issues

Failure To Administer A Caution To The Accused Persons

[50] Learned counsel for the accused persons submitted that there was no caution administered to the accused persons during the arrest. Therefore, whatever said and done by the accused persons including placing their signatures on certain exhibits are rendered inadmissible.

[51] From a perusal of the evidence however, I find that the requisite caution under s 37B DDA was in fact administered by SP10 after which he instructed both the accused to be handcuffed.

[52] I therefore find no merit in the submission raised by learned counsel in respect of this issue.

Break In The Chain Of Evidence Of The Drug And Other Exhibits

[53] Counsel for the accused submitted that as those involved in the arrest of the accused persons, namely, SP5, SP6, SP7, SP8 and SP9 had failed to lodge any police report, failed to prepare a search list and document of handover of exhibits, did not know the contents of the said bag and could not identify the exhibits in the bag, there arose a doubt as to the identity of the exhibits.

[54] As correctly pointed out by the learned Deputy Public Prosecutor (DPP) however, there was no requirement of procedure or law that mandated that these witnesses lodge police reports or prepare search lists or documents evidencing handover of exhibits.

[55] The reason is that none of these witnesses were tasked as raiding officers and therefore were not responsible for carrying out the search and placing of markings on the exhibits. This task belonged to and was in fact carried out by SP10 before he handed over the case to the investigation officer, SP12.

[56] The evidence revealed that at all material times the accused persons as well as the exhibits were under the charge and care of SP7 and SP9 before they were handed over to SP10. This is evident from the testimony of SP10 who said that when he and Desmond Tero (SP2) arrived at the Pejabat Cawangan Pemeriksaan Penumpang (CPP) Senai he saw three bags including the said bag branded "Lotus Master".

[57] SP9 testified that when he arrived at the Customs Examination room at the airport "cawangan pemeriksaan Kastam LTA Senai", he instructed PIKT Basar to bring both the accused persons in and sit on a sofa while the said bag



was placed in front of them.

[58] SP9 then asked one of the accused regarding the bag and was informed that it was a hamper. SP9 said that he, namely, the First Accused, raised his voice and said that he did not commit any offence. SP9 also testified that he requested PIKT Basar to ask one of the accused persons to open the said bag while he instructed a customs officer on duty to contact the Customs Narcotics Division.

[59] SP9 said that one of the accused opened the said bag which was found to contain packets of food, cloth and a box filled with pills.

[60] SP9 also said that at the same time the Customs Narcotics Division headed by PPK (P) Khairulanuar Bin Ishak (SP10) arrived there and proceeded to conduct a thorough examination of the bag witnessed by both accused which uncovered the incriminating items

[61] The evidence of SP9 therefore clearly showed that both the accused and the exhibits were under the care and custody of SP7 and SP9 at all material times.

[62] This piece of evidence also sufficiently answers the submission of learned counsel that it was not known who had opened the said bag before the arrival of SP10. The evidence of SP9 was clear that it was one of the accused who had opened the bag before the arrival of SP10.

[63] There was no necessity for SP5, SP6, SP7, SP8 and SP9 to identify the contents of the said bag because these witnesses only acted in the capacity of arresting the accused. They were not involved in the task of the search and marking of the exhibits. This was carried out by SP10 and the members of the Customs Narcotics team and they had duly identified the exhibits.

[64] I was satisfied therefore that there was no fatal break in the chain of exhibits.

No Standard Search List

[65] Learned counsel for the defence submitted that the search list (P34) did not contain certain particulars such as the names of the suspects, date and time of the inspection and the names of the persons carrying out the inspection. In the premises it was contended that this was not a standard search list but merely a list of exhibits and did not establish a link to the accused persons.

[66] A perusal of the search list (P34) will reveal that a detailed list of all the exhibits contained in all the bags ie the said bag, the paper bag, brief case, a Louis Vuitton carry bag, wallet and on the person of both accused were enumerated.

[67] A NRIC "identity card" and driving licence in the name of the First Accused was found in the wallet while an Air Asia boarding pass dated 24



May 2016 in the name of the Second Accused was found in the brief case. The search list (P34) was signed above the stamp with the name of SP10. In the light of this there was no doubt that the exhibits listed in P34 were in connection with the arrests of both accused in this case.

Alleged Tampering With Exhibits

[68] Learned counsel on the defence submitted that according to the evidence of SP10, SP12 and the search list (P34), there were found 10 transparent plastic packets containing 983 red pills. However, when the Chemist, SP3, gave evidence, she said the 10 plastic packets marked X1(3) (1) until X1(3) (10) contained 984 red pills.

[69] This, it was contended, raised the question of where the extra pill came from. It was thus submitted that there was tampering with the exhibits. It was further submitted that this was not explained.

[70] It was contended by the prosecution however that the crucial period of time with regard to the chain of exhibits is from the time of the discovery of the exhibits by SP10, its handing over to SP12 and subsequent handing over to the Chemist (SP3).

[71] I tend to agree with the prosecution's submission on this point. The main persons and witnesses who handled the exhibits were SP10, SP12 and SP3. Each one of them identified the exhibits based upon the markings and with reference to the search list (P34), acknowledgement of handover list, the receipt from the Chemistry Department and the Chemist Report.

[72] Further, the case of *Gunalan Ramachandran & Ors v. PP* [2004] 2 MLRA 180; [2004] 4 MLJ 489; [2004] 4 CLJ 551; [2004] 6 AMR 189, held as follows:

In a drug trafficking case, the chain of evidence is more important for the period from the time of recovery until the completion of the analysis by the chemist. Even then it does not necessarily mean that if the exhibit is passed from one person to another, every one of them must be called to give evidence of the handing over from one person to another and if there is a break, even for one day, the case falls. There should be no confusion between what has to be proved and the method of proving it. What has to be proved is that it is the substance that was recovered that was analysed by the chemist and found to be heroin, cannabis etc, and it is for the trafficking of that same substance that the accused is charged with. The proof of the chain of evidence is only a method of proving that fact. The fact that there is a gap does not necessarily mean that that fact is not proved. It depends on the facts and circumstances of each case.

[Emphasis Added]

[73] I find therefore that there was no possibility of tampering of the exhibits and that the relevant witnesses had affirmatively identified the exhibits in this



case and accordingly there was also no break in the chain of exhibits. The discrepancy in the number of the pills therefore did not prejudice the prosecution case. See *Hasbala Mohd Sarong v. Public Prosecutor* [2013] 6 MLRA 1; [2013] 6 MLJ 636; [2013] 6 CLJ 945; [2013] 6 AMR 324 and *Lew Wai Loon v. Public Prosecutor* [2014] 3 MLRA 9; [2014] 3 MLJ 325; [2014] 2 CLJ 649.

Failure To Prove Place Of Commission Of The Offence As Per The Charge

[74] The defence contended that as both accused persons were arrested outside the aero mall and the said bag seized at that point of time, the accused persons cannot be said to have trafficked in the drugs as per the charge as they were no longer in possession of the said bag at the time when the drugs were discovered at the "pejabat unit khas pemeriksaan penumpang, Jabatan Kastam Di Raja Malaysia, Balai Ketibaan Lapangan Ternag Antarabangsa Senai, Johor" or Customs Examination room.

[75] There was direct evidence that both the accused were seen with the said bag while at the scanning machine and thereafter while they proceeded in unison and with haste until they were arrested.

[76] The drugs and other incriminating exhibits were only discovered by the authorities while at the said "pejabat unit khas pemeriksaan penumpang, Jabatan Kastam Di Raja Malaysia, Balai Ketibaan Lapangan Ternag Antarabangsa Senai, Johor", Customs Examination room. Hence the place stated in the charge.

[77] This however does not mean that the prosecution had failed to prove the ingredients of the charge as contended by the defence in the light of the overwhelming evidence of both the accused persons being with the bag from the time at the scanning machine until they were arrested. The bag did not cease by some manner of legal gymnastics to be in the possession of the accused persons just because they were not physically holding it at the time when the drugs were discovered by the authorities.

[78] Any contrary view is devoid of common sense and will if adopted result in many cases of those guilty of drug trafficking being let off with impunity. There is therefore no merit in the submission of the defence in respect of this issue.

Common Intention Under Section 34 Penal Code

[79] The essence of the concept of common intention was explained in the Court of Appeal case of *Sabarudin Non & Ors v. Public Prosecutor* [2004] 2 MLRA 441; [2005] 4 MLJ 37; [2005] 1 CLJ 466; [2005] 1 AMR 4 by referring to what was said by Sethi J in the Indian case of *Suresh v. State of Uttar Pradesh* AIR [2001] SC 1344 as follows:

Section 34 of the Indian Penal Code recognises the principle of vicarious liability in the criminal jurisprudence. It makes a person



liable for action of an offence not committed by him but by another person with whom he shared the common intention. It is a rule of evidence and does not create a substantive offence. The section gives 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. There is no gain saying that a common intention pre-supposes prior concert, which requires a pre-arranged plan of the accused participating in an offence. Such a pre-concert or pre-planning may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence. **Common intention can be formed previously or in the course of occurrence and on a spur of moment. 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.**

[Emphasis Added]

[80] The above passage can succinctly be summarised as follows:

- i) It is the application of the principle of vicarious liability in criminal law;
- ii) It is a rule of evidence;
- iii) It is the recognition of 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;
- iv) It pre-supposes prior concert;
- v) This however can not only be formed previously but also during the course of occurrence and on a spur of moment; and
- vi) Whether there is common intention is a question of fact to be proved mainly by way of inference from circumstances.

[81] Both accused were seen together as they approached the scanning machine.

[82] As seen earlier, while the Second Accused placed the said trolley bag he was carrying in the scanner, it was the First Accused who responded that the contents was a hamper upon being questioned by SP5 and took the bag off the scanner.

[83] After that both accused proceeded with haste and then ran away heading out of the aero mall. Such circumstances were sufficient to infer that there was a prior meeting of minds between them to traffic the said drugs within the meaning of s 34 of the Penal Code.



Decision At The End Of The Prosecution Case

[84] Upon a maximum evaluation of the evidence, and for the reasons expressed above, I found that the prosecution had proven a *prima facie* case against both accused in respect of both charges as preferred pursuant to s 180(3) Criminal Procedure Code (CPC) and I called upon them to enter on their defence.

[85] After the three alternatives consequent upon such finding were explained to them, both accused elected to give sworn testimony.

E) The Defence Case

[86] The First Accused testified that the Second Accused called him on 23 May 2016 by phone and said that he wanted to meet him. When the Second Accused arrived at Johor from Kuching on 24 May 2016, they met up at a Chinese Restaurant in Johor Jaya at about 1.00 pm. They conversed with each other about a few things and the Second Accused requested the help of the First Accused to find a job for him.

[87] After the meal, the Second Accused asked the First Accused to send him to Senai International Airport. The Second Accused told the First Accused that he wanted to fly back to Kuching, Sarawak that very day itself. The First Accused then sent the Second Accused to Senai International Airport in the First Accused's car. The First and Second Accused arrived at Senai International Airport at about 4.00 pm. and the First Accused parked his car by the side of the road in front of the main entrance to the terminal.

[88] The First Accused then alighted from the car and accompanied the Second Accused into the terminal building. The First Accused said that he saw the Second Accused carrying 3 bags - 1 black trolley bag, 1 shoulder bag and 1 white paper bag. The First Accused did not carry any bags.

[89] Only at that time did the Second Accused inform the First Accused that he had not bought a flight ticket yet. The First Accused was annoyed with the Second Accused for not informing him of this earlier as he had parked his car by the side of the road and was afraid of receiving a summons.

[90] The Second Accused then proceeded to the AirAsia ticket counter. At the counter, the person manning the counter informed the Second Accused that tickets to Kuching, Sarawak were sold out. However, she suggested to the Second Accused to go to the check-in counter and to register his name on the waiting list there if he still wanted to go back on that day. During this period, all 3 bags were in the care of the Second Accused.

[91] The Second Accused then proceeded to the Air Asia check-in counter to register his name on the waiting list while the First Accused followed him. To get to the check-in counter, the Second Accused had to pass through a baggage scanner. As the Second Accused did not have a ticket yet and only wanted to register his name on the waiting list, he walked right past the baggage scanner



without scanning his bags. An auxiliary police officer then asked the Second Accused where he wanted to go.

[92] Meanwhile, an auxiliary police officer manning the baggage scanner stopped the Second Accused and instructed him to turn back and place his black trolley bag into the baggage scanner to be scanned. The Second Accused without hesitation immediately turned back and placed his black trolley bag into the baggage scanner as instructed. After doing so, the Second Accused then waited in line to pass through the baggage scanner area. The First Accused was beside the Second Accused at that time.

[93] The Second Accused had to wait in line because the line was held up by a Chinese woman in front of him. According to both the First and Second Accused, the holdup was due to an auxiliary policeman inspecting a black bag belonging to the Chinese woman. The said Chinese woman had with her two black bags.

[94] Both accused said that while the auxiliary policeman was inspecting the Chinese woman's bag, the Second Accused's black bag was still inside the baggage scanner. The bag had not moved as the conveyor belt was stopped while the auxiliary policeman inspected the Chinese woman's bag.

[95] The conveyor belt started to move again after 2 Malay women behind the First and Second Accused placed their bags inside the baggage scanner machine. The Second Accused then received a phone call. At that time, the First Accused saw 2 black bags make their way out of the baggage scanner. According to the First Accused, when the 2 black bags came out of the baggage scanner, the Chinese woman was still at the front of the line, followed by the First Accused and the Second Accused and finally the 2 Malay women.

[96] According to the First Accused, the line in front of the baggage scanner was a bit chaotic. When a black bag made it out from the baggage scanner, the First Accused saw that the Second Accused was on the phone. The First Accused also saw the Second Accused signal with his hands to him to help him with his bag as the Second Accused was on the phone. The First Accused without hesitation then took a black trolley bag that had made its way out of the baggage scanner.

[97] The First Accused had spontaneously taken the black trolley bag, not realizing that the black trolley bag was not the one belonging to the Second Accused but to the Chinese woman instead.

[98] The First Accused was understandably apprehensive as he had parked his car by the side of the road in front of the main entrance to the terminal as he had honestly believed that he would not take long to send the Second Accused off.

[99] The First Accused honestly believed that he would park the car, accompany the Second Accused to check in the latter's bags, send him off to the departure gate, and return back to his car and go home. Instead, because



the Second Accused had not purchased a ticket, it took much, much longer than he had anticipated. The First Accused was very worried that he might be slapped with a hefty fine because he had parked his vehicle in a no parking zone.

[100] The First Accused also stated that he had held the trolley bag for a mere few seconds only before he handed it over to the Second Accused while they were walking back to the car. The Second Accused confirmed the First Accused's version in this respect.

[101] Not long after, both accused stated that they saw some Customs officers and also auxiliary policemen approaching them and instructing them to cooperate with them. The First and Second Accused denied that there was a struggle when the officers tried to apprehend them. Both accused also denied that they had attempted to flee.

[102] According to both accused, they were then brought to an inspection room by a Customs officer who had detained them. In that room, a Customs officer proceeded to open and ransack the black trolley bag which the Second Accused had been pulling. Both denied that one of them had opened the black trolley bag.

[103] After a few minutes, a Customs Officer instructed both accused to be taken out of the inspection room. The Second Accused then wanted to go to the men's room and both accused were brought there. Both accused were brought back into the inspection room after they had returned from the men's room. PW10 then inspected the bag and found drugs. The Second Accused tried to tell the Customs Officers that the black trolley bag was not his but was ignored.

[104] Both accused also stated that during their interrogation and also when their cautioned statements were recorded, no Mandarin translator was present to translate for them. Hence, they were not able to understand the questions posed to them by the Customs officer.

[105] Instead, both accused were instructed to sign some documents without knowing what those documents were or having those documents explained to them. In their worried and confused state of mind, both accused signed the documents as instructed.

[106] Both accused contended that the CCTV recording shown in court had not covered a "blind spot" which would have shown the presence of the Chinese woman together with them and an auxiliary policeman. A CCTV recording from the opposite direction would have revealed what actually happened.

F) Duty Of The Court At The Conclusion Of The Trial

[107] The duty of a trial court at the conclusion of the defence case is set out in s 182A of the Criminal Procedure Code (CPC) which imposes an obligation



upon the court to consider all the evidence to decide whether the prosecution has proved its case beyond reasonable doubt.

[108] See also *Prasit Punyang v. Public Prosecutor* [2014] 1 MLRA 387; [2014] 4 MLJ 282; [2014] 7 CLJ 392 and also *Md Zainudin Raujan v. Public Prosecutor* [2013] 3 MLRA 351; [2013] 3 MLJ 773; [2013] 4 CLJ 21; [2013] 3 AMR 480.

[109] Aside from the above, the correct thought process and stages that should be followed by a trial court in the assessment and evaluation of the defence evidence is that as encapsulated in the time honoured decision of *Mat v. Public Prosecutor* [1963] 1 MLRH 400; [1963] 1 MLJ 263, where it was held by Suffian J (as he then was) as follows:

"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."

[110] The approach in *Mat v. Public Prosecutor* was judicially endorsed by the Federal Court as being the correct one to adopt when evaluating the evidence of the defence case in *Public Prosecutor v. Mohd Radzi Abu Bakar* [2005] 2 MLRA 590; [2005] 6 MLJ 393; [2006] 1 CLJ 457; [2005] 6 AMR 203.

[111] However, where a statutory presumption has arisen against an accused or accused persons, the burden upon him or them is to rebut such presumption on a balance of probabilities. See *PP v. Yuvaraj (supra)*.



G) Analysis Of The Defence Case

[112] An examination of the testimony by both accused persons will reveal that the essence of the defence is that it is a case of mistakenly taking a wrong bag. The defence contended that the said trolley bag containing the impugned exhibits actually belonged to a Chinese woman who was in the queue at the scanning machine just ahead of the Second Accused.

[113] Although the crux of the defence is that the trolley bag (P27) containing the incriminating items belonged to a Chinese woman, an examination of the contents of the said bag did not reveal any women's clothing, women's undergarments or women's cosmetic items

[114] Now, it is only common sense that a bag belonging to a woman would contain her personal effects including women's clothing's. However, to the contrary, the trolley bag (P27) contained men's clothing's instead.

[115] A perusal of the photographs in exh P24 (85-88) confirms this to be so. In addition, a clothes fitting exercise conducted by the authorities will reveal that some of the clothing's fitted the Second Accused comfortably. This can be gathered from the photographs in exhibit P24 C (1-3).

[116] It is inconceivable that the said Chinese woman who it is alleged had taken the Second Accused's bag by mistake would not have realised that the feel and weight of the bag was different assuming as alleged, that the two bags were similar in colour, shape and size.

[117] It is also inconceivable that the said Chinese woman upon realising that her bag was missing had made no attempt whatsoever to retrieve the said bag especially given the fact that the concealed and illicit contents no doubt would have attracted more than minimal market street value.

[118] It is also the defence case that the Second Accused had come to Johor Bahru (JB) from Kuching, Sarawak because he needed the assistance of the First Accused to look for a job for himself.

[119] Now, it was admitted by both accused that they often communicated with each other over the phone by conversing and also through the Wats App application. Common sense itself will dictate that this exercise could have been done as easily over the phone by way of a conversation as well as through the Wats App application.

[120] So, why the need to come all the way from Kuching just to achieve this objective bearing in mind the prohibitive costs involved, more especially so given that the purpose of the Second Accused was to look for a job?

[121] The defence version also is that the Second Accused had decided to go back to Kuching that very same day. If the purpose of the Second Accused in coming to JB was to look for a job, why decide to return the very same day?



There was no evidence forthcoming that his quest to look for a job was successful in which case, it would then have made sense for him to return.

[122] If it was indeed the intention of the Second Accused to come only for the day, why bring with him a bag of that size ? The defence also contended that the CCTV recording was doctored and edited resulting in not being able to view the events as actually transpired and especially the fact that the presence of the said Chinese woman was unable to be seen.

[123] There was no evidence that had emerged or was adduced that the accused persons and the arresting team had known each other previously. It therefore does not stand to reason why the authorities would want to frame or "fix up" the accused persons in the absence of any axe to grind by editing the CCTV recording.

[124] I find therefore that the contention on the part of the defence that the CCTV recording was edited to be wholly without basis and merit. Furthermore and in any event, the evidence of CCTV recordings are merely corroborative and cannot prejudice the prosecution case in the light of the direct evidence available.

[125] I also find the contention that an adverse inference ought to be raised against the prosecution for failure to call an auxiliary policewoman to be untenable. There was no evidence to suggest that the auxiliary policewoman was directly involved in the arrest or handling of exhibits.

[126] I similarly find the contention of the defence that the Chemist Reports were inadmissible for failure to tender her qualification to be without basis. A perusal of the Witness Statement of SP3 will show that her qualifications were clearly stated.

[127] The defence version also was that after the conveyor belt at the scanning machine started to move again and when a black bag made it out of the baggage scanner, the First Accused noticed that the Second Accused was talking on the phone. The First Accused then saw the Second Accused motion with his hands for the former to help him with the bag and he promptly took the said bag without realising that the bag did not belong to the Second Accused.

[128] Now, this is at variance with the prosecution version that after SP5 noticed that there was a suspicious looking image on the screen during the scan, had asked both accused what the contents of the bag were to which the First Accused replied that it was just a hamper. When SP5 was dissatisfied with this answer, he requested that the said bag be opened. It was at this juncture that the First Accused took the bag and headed out of the aero mall.

[129] As indicated earlier, there was absolutely no reason whatsoever for the prosecution witnesses to deliberately implicate the accused persons by fabricating false testimony. During the evidence given by the prosecution witnesses, I found their testimonies to be credible and their overall demeanour



did not display anything that might have led me to suspect that they were untruthful.

[130] The version of the defence that when the First Accused saw the Second Accused busy on the phone and when indicated to by the Second Accused, the First Accused took the bag without realising that it did not belong to the Second Accused, is untenable.

[131] I find instead that the action of the First Accused in refusing the request to open the bag and taking the bag out of the scanner and heading with haste out of the aero mall to be indicative of knowledge of the incriminating exhibits on his part. The act of the Second Accused in following after him equally indicated that he too had knowledge of the incriminating exhibits. This also pointed to the fact that they possessed common intention to traffic the drugs in accordance with s 34 Penal Code.

[132] The fact that the First Accused replied that the bag only contained a hamper was also indicative of his knowledge of the incriminating exhibits as he was hoping that this answer might allay the suspicions of SP5 and dissuade the latter from pursuing his request to open the bag. Faced with the request to open the bag, the First Accused then reacted by taking the bag and heading out of the aero mall.

[133] I find that the defence version that the reason the First Accused proceeded with haste in the direction heading out of the aero mall because he was afraid his vehicle would be summoned to be a convenient excuse for his real intention which by way of reasonable inference from the circumstances, was to make a speedy getaway with the said bag without being detained by the authorities.

[134] The contradiction that arose when the First Accused said that he was afraid his vehicle would be issued with a summons and the Second Accused in saying that the vehicle was already issued with a summons did not assist in their endeavour to explain away their actions.

[135] The version of the defence does not therefore rebut the statutory presumption of possession, knowledge and trafficking under s 37(d) and s 37(da) of the DDA respectively for the reasons given above.

[136] The prosecution in their submissions also alluded to several matters which they contended the defence had only raised for the first time during the defence case.

[137] Among these is the fact that the Second Accused's intention in coming to JB was to get help from the First Accused to find work for him. As alluded to, the reasons why the defence version in this respect is unreasonable is the fact that this exercise could be done easily over the phone, secondly, if this was the avowed intention of the Second Accused, why did he suddenly change his mind and decide to return to Kuching the same day, thirdly, if he intended to only come for a day trip, why did he bring so many bags and why did the



trolley bag contain so many clothing's and finally, if he only intended a day trip, why did he not buy a return ticket?

[138] I do not therefore in the light of the above, find that the purpose of the Second Accused in coming to JB was in order to request the First Accused for assistance in finding a job. All the inferences drawn point to the fact that the sole purpose of the Second Accused in coming to JB was to carrying the trolley bag with its incriminating contents back to Kuching.

[139] The prosecution also submitted that the fact the bags were delayed in coming out of the scanning machine because the conveyor belt of the machine was stuck was never put during the course of the prosecution case. Again, a perusal of the evidence reveals this to be so.

[140] The prosecution submitted further that while waiting for the bag to come out at the scanning machine, the fact that the Second Accused received a phone call and requested for the First Accused's assistance in taking the said bag was never put in the case for the prosecution.

[141] As alluded to before, I found the version of the prosecution that upon being asked to open the bag, the First Accused hastily took the bag and began to walk out of the aero mall to be more probable. Combined with the omission to suggest the above during the prosecution case means that the defence version in this respect was an afterthought and deliberately designed to explain away the reason why the First Accused took the bag and headed out of the aero mall quickly.

[142] Among the other facts relied on by the defence but not suggested during the prosecution case is that the First Accused headed in the direction out of the aero mall because he was worried his vehicle might be issued with a summons, the fact that the trolley bag (P27) was opened by the Customs while both accused were ordered to stand outside the room where the inspection took place and the fact that the accused persons did not understand Bahasa Malaysia and there were no interpreters made available to assist them.

[143] Now, the matters referred to above are central to the defence case. While minor omissions can be explained away as being too obvious to suggest to the prosecution, omission to suggest or to put matters that form the central basis of the defence case during the prosecution case but only raised during the defence, can justifiably be entitled to be characterised as an afterthought which I so find to be the case here.

[144] The prosecution still further submitted that the fact the Second Accused had attempted to inform the investigating officer of the Chinese woman in front of him but was ignored was also not suggested or put during the prosecution case.

[145] Now, this is in fact the crux and core of the defence case, namely that they had taken a bag belonging to a Chinese woman by mistake. As indicated previously, if the bag did belong to the said Chinese woman, why were there



not found any ladies clothing's or personal effects in the bag? It also seemed strange that the said Chinese woman made no attempt to recover her bag given the fact that the illicit contents would have been worth quite a lot of money.

[146] Any reasonable person or persons falsely accused would no doubt have taken pains to protest their innocence by availing themselves at the first opportunity to bring to the attention of the authorities the fact that the bag in fact belonged to the Chinese woman and in "striking the iron while it is still hot", so to speak, have pointed the said Chinese woman out to the authorities immediately.

[147] Alternatively, a reasonable accused person would have informed about the existence and role of the said Chinese woman during the course of the investigations. This was also not however done.

[148] This omission also means that no sufficient "Alcontara Notice" was given by the accused persons, contrary to the contention of the defence. The authorities, namely, the Customs or police, cannot therefore be faulted for failing to investigate this allegation. The allegation by the accused persons that they had tried to inform the authorities about the Chinese woman but were ignored, flies in the face of the evidence given by the prosecution witnesses. There having been no axe to grind, I therefore do not believe the version by the accused persons in this respect.

[149] Coupled with the notable omission above mentioned, the only reasonable conclusion is that the suggestion that the said bag belonged to the Chinese woman was conveniently created by the accused merely to exculpate themselves from the precarious position they found themselves in. As I said earlier, there was no reason for the prosecution to edit or doctor the CCTV recordings.

[150] From a consideration of the circumstances as a whole and for the reasons given above, I therefore find that the defence has failed to rebut on a balance of probabilities, the statutory presumption of trafficking under s 37(da) and also the presumption of possession and knowledge under s 37(d) of the DDA in respect of both accused in relation to the First Charge for trafficking under s 39B(1)(a) DDA. See *PP v. Yuvaraj (supra)*.

[151] In respect of the Second Charge for possession under s 30(3) Poisons Act 1952, I also find, for the reasons given above, that the defence has failed to rebut on a balance of probabilities, the statutory presumption of possession and knowledge of the nature of the substances under s 30(4) of the Poisons Act 1952 in respect of both accused persons. See *PP v. Yuvaraj (supra)*.

[152] I therefore find that the prosecution had successfully proven their case beyond reasonable doubt pursuant to 182A(2) CPC against both accused persons in respect of both charges against them.

[153] I therefore convict both the First and the Second Accused for the offence



of trafficking under s 39B(1)(a) DDA and for possession under s 30(3) Poisons Act 1952.

[154] Before I passed the sentences, I invited submissions in respect of mitigation for the charge under 30(3) Poisons Act 1952 and also in respect of the recently amended s 39B DDA and especially to sub-section (2A).

Sentence For The Offence Under Section 30(3) And Punishable Under Section 30(5) Of The Poisons Act 1952

[155] Learned counsel for the accused persons prayed by way of mitigation for a lenient sentence as both accused have families to support. It was also submitted that they had cooperated with the police from the time of arrest. It was also urged upon the court to impose sentence from the date of arrest.

[156] The learned DPP submitted that the public interest ought to be taken into account and prayed for an appropriate sentence to reflect the seriousness of the crime.

[157] After hearing mitigation and aggravating factors from respective parties, I imposed a term of imprisonment of one year on both accused to run from date of arrest.

Sentence Under Section 39B(1)(a) DDA

[158] Section 39B of the DDA was amended vide the Dangerous Drugs (Amendment) Act 2017 [Act A1558] and came into effect on 15 March 2018 PU (B) 127. The amended s 39B reads:

39B. Trafficking in dangerous drug

(1) No person shall, on his own behalf or on behalf of any other person, whether or not such other person is in Malaysia-

(a) traffic in a dangerous drug;

(b) offer to traffic in a dangerous drug; or

(c) do or offer to do an act preparatory to or for the purpose of trafficking in a dangerous drug.

(2) Any person who contravenes any of the provisions of subsection (1) shall be guilty of an offence against this Act and shall be punished on conviction with death or imprisonment for life and shall, if he is not sentenced to death, be punished with whipping of not less than fifteen strokes.

(2A) In exercising the power conferred by subsection (2), the Court in imposing the sentence of imprisonment for life and whipping of not less than fifteen strokes, may have regard only to the following



circumstances:

- (a) there was no evidence of buying and selling of a dangerous drug at the time when the person convicted was arrested;
- (b) there was no involvement of agent provocateur; or
- (c) the involvement of the person convicted is restricted to transporting, carrying, sending or delivering a dangerous drug; and
- (d) that the person convicted has assisted an enforcement agency in disrupting drug trafficking activities within or outside Malaysia.

(2B) For the purposes of subsection (2A), "enforcement agency" means-

- (a) the Royal Malaysia Police;
- (b) the National Anti-Drugs Agency;
- (c) the Royal Malaysian Customs Department;
- (d) the Malaysian Maritime Enforcement Agency; or
- (e) any other enforcement agency as may be determined by the Minister.

[159] Learned counsel for both accused submitted that there was no evidence of buying and selling of drugs on the facts. There was also no involvement of any agent provocateur. It was thus submitted that this enabled the court to exercise its discretion in favour of the accused persons.

[160] Learned counsel further submitted that para (d) in s 2A is not to read as mandatory. It was submitted that paras (c) and (d) were to be read conjunctively but that paras (a) and (b) were disjunctive. As para (a) was satisfied here, it was therefore urged upon me to impose the sentence of life imprisonment and whipping.

[161] The learned DPP submitted that the court must only have regard to the matters enumerated in paras (a) to (d) in s 2A and no other. It was submitted that paras (a), (b) and (c) were disjunctive while para (d) ought to be read as conjunctive and mandatory in nature.

[162] The learned DPP also said that in this case the defence was a bare denial and that no information was given to disrupt any drug trafficking activity. Therefore no assistance could be said to have been rendered under para (d).

[163] The attention of learned counsel for the accused persons were also



directed to the Hansard of 30 November 2017.

[164] In the relevant Parliamentary Debate, this was what the Honourable Minister Dato' Sri Azalina said in response to a question posed:

"Yang Berhormat tanya saya tentang perkataan 'and' dalam hujung s 39B(2A)(d). Dasar yang telah ditentulah ialah supaya perenggan (d) menjadi sesuatu yang kehendak kepada mandatori iaitu perlu dipenuhi sekiranya mahkamah ingin mempertimbangkan untuk menjatuhkan hukuman penjara seumur hidup. Dalam hal ini, (a), (b) dan (c) - (a), (b), (c) dibaca secara (*sic*) injunctive tetapi akan dibaca secara conjunctive dengan (d). Maknanya (d) itu adalah keperluan utama untuk hakim menggunakan kuasa budi bicara."

[165] Continuing in the same vein, the Honourable Minister continued:

" Kerajaan tidak bersetuju dengan penggantian perkataan 'and' dengan perkataan 'or' di akhir frasa (2A)(c). Diperhatikan bahawa terletaknya perkataan 'and' di akhir fasal (2A)(c) bermaksud mahkamah hendaklah mengambil fasal (2A)(d) secara bersama atau conjunctive dengan salah satu daripada (2A)(a), (b) atau (c) atau mana-mana kombinasi daripada ketiga-tiganya. Dalam kata lain, pertimbangkan terhadap fasal (2A)(d) adalah wajib dalam setiap kes di mana mahkamah membuat pertimbangan sama ada hendak menjatuhkan hukuman penjara seumur hidup dengan sebatan."

[166] The Hansard also reveals the following, also from the same Minister as follows:

" Kerajaan tidak bersetuju dengan cadangan untuk mengeluarkan perkataan 'only' dalam fasal (2A) dan juga tidak bersetuju dengan pindaan hukuman yang dicadangkan. Kerajaan berpandangan bahawa pengeluaran perkataan 'only' tersebut akan membuka luas faktor-faktor yang boleh diambil kira oleh mahkamah dalam memutuskan hukuman. Keadaan ini juga akan membawa kepada situasi ketidakseragaman dalam hukuman sebagaimana berlakunya sebelum tahun 1983."

[167] Finally, the Honourable Minister also said:

"Diperhatikan di sini bahawa faktor-faktor (a), (b) dan (c) berkaitan dengan kesalahan spesifik yang telah pun dilakukan oleh tertuduh. Hanya factor (d) yang berkaitan dengan satu kelebihan yang boleh diperolehi agensi penguatkuasaan dalam usaha mengendalikan pengedaran dadah. Oleh itu, factor (d) harus wajib dipertimbangkan oleh mahkamah jika niat dan semangat di sebalik pindaan ini hendak dizahirkan iaitu memperkasa agensi penguat kuasa dalam memerangi pengedaran dadah dan melindungi kepentingan masyarakat."



[168] A plain reading of section (2A) will indicate that paras (a) to (c) are meant to be read disjunctively while para (d) must be read conjunctively with either of the requirements in (a) to (c). The phrase 'and' just before para (d) makes this clear. The requirement under para (d) is therefore mandatory.

[169] It is also clear that the phrase 'only' in the opening words of section (2A) means the court can only consider the matters enumerated in paras (a) to (d) in deciding whether to exercise the discretion. The Hansard references further reinforces this view.

[170] There was no evidence to show that the accused persons had assisted an enforcement agency in disrupting drugs trafficking activities.

[171] Having heard submissions from respective parties, I found nothing in the evidence to suggest that the requirement under para (d) was satisfied.

[172] Having considered the submissions of all parties, I found that there was no material upon which I could have exercised such discretion. In accordance with s 277 CPC, I therefore sentenced both accused to be hanged by the neck until they are dead.

