

**DALAM MAHKAMAH RAYUAN MALAYSIA DI PUTRAJAYA  
MAHKAMAH RAYUAN RAYUAN JENAYAH NO: P-05-55-04**

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**ANTARA**

**SOORYA KUMAR A/L NARAYANAN @  
NARAYANASAMY**

...

**PERAYU**

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**DAN**

**PENDAKWA RAYA**

...

**PENENTANG**

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**[DI DALAM PERKARA MAHKAMAH TINGGI PULAU PINANG  
KES JENAYAH NO. 45-10-2001**

**Antara**

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**PENDAKWA RAYA**

**LWN**

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**SOORYA KUMAR A/L NARAYANAN @ NARAYANASAMY]**

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**CORAM: SURIYADI HALIM OMAR, JCA  
ABU SAMAH NORDIN, JCA  
AHMAD HAJI MAAROP, JCA**

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## JUDGMENT

[1] The accused (the appellant before us) was charged with trafficking in dangerous drugs, namely, 138,936 grammes of cannabis under section 39(B)(1)(a) of the Dangerous Drugs Act 1952 (“the Act”) in the Penang High Court. He was found guilty, convicted and sentenced to death. He appealed to this court. Hence, the appeal before us.

[2] The brief facts of the case are these. On 11/6/1997 between 1 am to 7 am, L/Kpl Lee Sai Aun (PW9) was on patrol duty in a police patrol car driven by Cpl Haslan B. Abu Bakar (PW11). At about 5 am on that date, they spotted two motorcars being driven in a suspicious manner. The boot of both cars appeared to them to be sagging. PW9 and PW11 followed both the cars. At a place called Taman Riong Mas, one of the cars, a white Proton Wira no. WDX 5463 (the first car) stopped on the left side of the road and the other car, a Proton Iswara no. WCX 8977 (the second car) stopped on the right. PW11 stopped the patrol car at the centre of the road between the two cars. The first car then attempted to make a gateway but PW11 moved the patrol car and blocked it. PW9 then alighted from the patrol car and asked the driver of the first car for his driving licence and identity card. There was nobody else in the first car. The driver of the first car handed to PW9 his driving licence and the receipt for renewal of identity card. PW9 ascertained that the driving licence (P22) and the identity card

belonged to one Soorya Kumar A/L Narayanasamy. When PW9 asked the driver of the first car why the driver of the second car did not switch off the engine and alight from the car, PW9 was told that the driver of the second car did not possess a driving licence. At the same time PW9 directed the driver of the first car to get out of the car and to open its boot so that he could make his inspection. As soon as the driver of the first car opened the boot of the first car, the driver of the second car accelerated and sped off. The driver of the first car also ran away. PW9 and PW11 were not able to detain him. However, since there was sufficient light from the street lights and shops nearby, PW9 saw the face of the driver of the first car clearly. PW9 confirmed that the photograph of the person in P22 was the same person who drove the first car. PW9 identified the accused in the dock as the driver of the first car. After the accused ran away, PW9 opened the boot of the first car and found in it 73 packages suspected to be ganja. Upon analysis, the chemist (PW1) confirmed that the 73 packages contained a total of 138,936 grammes of cannabis, a dangerous drug under the Act.

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[3] To complete the narration of the facts, it must also be added that the owner of the first car was one Balan A/L Letchumanan (PW4). Sometime in May 1997, PW4 handed the car over to his brother, Subramaniam A/L Letchumanan (PW10) who was then running a car rental business registered as SJP Services. On 6/6/97, at about 3 pm, Vellumany A/L Perumal (PW12), a part time

rental representative working for SJP Services, received a telephone call from a lady named Devi to rent a car, pursuant to which at about 6 pm on that date, PW12 drove the first car to Devi's house, delivered the car to her and collected RM900.00 being deposit for rental of the car from her. Devi wanted to use the car for one week or more. According to PW12, if the person who rented the car or who paid for the rental of the car did not have a driving licence, SJP Services would require the additional driver to be named in the rental document. In the case of Devi, since she did not have a driving licence, each time she rented a car from SJP Services, she would give the name Soorya Kumar as the additional driver. PW12 testified that he knew Devi because each time she came to SJP Services, she would come with Soorya Kumar whom she identified as her husband. PW12 identified the accused in court as Soorya Kumar. On 16/6/97 PW12 received a telephone call from a person named Soorya who informed him that the first car was at Nibong Tebal Police Station.

[4] Some 3 years later, on 26/8/2000, at about 3.30 a.m the accused was arrested by Chief Inspector Radzi Ismail (PW13).

### **SUBMISSION BY LEARNED COUNSEL FOR THE ACCUSED**

[5] In his submission before us learned counsel for the accused relied only on one point. His complaint was that nowhere in his judgment did the learned trial judge consider the element of

possession or trafficking at the close of the case for the prosecution. He submitted that at the close of the prosecution's case, the learned trial judge did not make an affirmative finding of possession. Reinforcing his point, learned counsel submitted that at the close of the prosecution's case the learned trial judge must make an affirmative finding of possession and only then could he rely on the presumption under section 37 (da) of the Act. He contended that the learned judge's failure to do so amounted to a very serious misdirection which warranted appellate interference. In support of his submission, learned counsel relied on *Abillah Labo Khan v. PP* (2002) 3 CLJ 521, *Haryadi Dadeh v. PP* (2000) 4 MLJ 71 and *Adzhaar B. Ahmad and Anor v. PP* (1996) 4 MLJ 85.

[6] Continuing his submission, learned counsel also contended that the learned trial judge erred when he considered the element of possession only at the defence stage. Learned counsel argued that the learned trial judge misdirected himself further when he referred to "presumed transportation" which learned counsel pointed out was not provided for under the Act.

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### **SUBMISSION BY THE LEARNED DPP**

[7] In his submission in reply, the learned DPP urged us to consider the accused's flight from two uniformed policemen (PW9-PW11) and the fact that large amount of cannabis was found in the boot of the first car. He contended that the accused was

transporting 138,936 grammes of cannabis. He submitted that on the facts, this case fell squarely within the decision of the Privy Council case of Ong Ah Chuan v. PP (1980 – 1981) SLR 48. Thus, he argued there was no question of sections 37 (d) and (da) of the Act being invoked.

## DECISION

[8] In Muhammed B. Hassan v. PP (1998) 2 CLJ 170, the Federal Court held that where a presumption of possession under section 37 (d) of the Act had been invoked, then the presumption of possession under section 37(da) of the Act could no longer be invoked to support a conviction under section 39B of the Act. Explaining the reason for the said principle, Chong Siew Fai CJ (Sabah dan Sarawak) said :

*“..... 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. 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, of course, to proof of the*

*relevant minimum quantity specified). In view of the above differences, it would be unduly harsh and oppressive to construe the automatic application of presumption upon presumption as contended by the learned deputy public prosecutor – a construction that ought to be adopted only if, upon the wordings of the two subsections, such an intention of the Parliament is clear, which, in our opinion, is not”.*

The Federal Court also held that, 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.

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[9] What the rule in *Muhammed B. Hassan v. PP* (supra) requires is that a trial judge should carry out a separate exercise under section 37(da) when determining whether an accused is found in possession of the proscribed drugs. In other words, the presumption of possession under section 37(d) is separate and distinct from the phrase ‘found in possession’ appearing in the presumption under section 37 (da) of the Act. [See *Sharif B. Kadir v. PP* (2003) 2 MLJ 203 CA, at 207, per Gopal Sri Ram JCA].

[10] We turn to the judgment of the learned trial judge. In his judgment, the learned trial judge’s finding at the close of the

prosecution's case appears under the heading, "Submission of no case". From the judgment, it seems to us that at the close of the case for the prosecution the issue of identity of the accused was foremost in the learned judge's mind and that he accepted the evidence of identification given by PW9 and PW11 that the accused in the dock was the person who handed to PW9 the driving licence (P22) and the receipt for renewal of identity card, and then ran away. In doing so, the learned trial judge rejected the learned counsel submission that P22 was a forgery. He also did not accept learned counsel's contention that the receipt acknowledging a request for renewal of identity card could not be accepted since the person who signed the official receipt was not called to give evidence.

[11] Then the learned judge said that he was satisfied that that the prosecution had proved a prima facie case :

*"I was satisfied upon giving a maximum evaluation to the evidence before me that the prosecution had indeed established a prima facie case against the accused that warranted him entering into his defence. The two officers who stopped his car clearly identified him. He handed SP10 his driving licence and the receipt for the renewal of his identity card. He was asked to open the booth of the car that he was driving. He alighted from the car after having opened the booth from the inside. At that moment the other car sped*

off and the accused ran. The address stated in the receipt for renewal of the identity card is the same address given by his wife who hired the car WDX 5463. Evidence was led through SP12 that since the hirer could not drive, the accused's name was endorsed as the additional driver. Even in the car rental form the accused's name was endorsed. Both witnesses SP10 & SP11 clearly identified the accused as the person who ran. Why did he run. Should he not at least explain that. I therefore called upon him to enter into his defence. The matter was adjourned to the next day for the accused to enter into his defence. The three alternatives were explained. The accused elected to give a statement from the dock". (Emphasis added)

[12] Thus, the learned judge's conclusion that the prosecution had established a prima facie case was based on the following findings. First, his finding that the accused was the driver of the first car when it was stopped by PW9 and PW11, and that the accused had, on request by PW9, produced the driving licence (P22) and the receipt of renewal of identity card, alighted from the first car and opened its boot. Secondly, his finding that the accused ran away as soon as the second car sped off from the scene. Having regard to the circumstances of this case, these are all appropriate findings which the learned trial judge was entitled to make at the end of the prosecution's case. However, a very crucial finding which must be made by the learned trial judge at the close of the

prosecution's case in a trafficking trial of the kind under appeal is nowhere to be found in his judgment. We find that in his judgment the learned trial judge did not make the vital express affirmative finding of possession of the proscribed drug by the accused to trigger the presumption under section 37 (da) of the Act. In our view this failure on the part of the learned judge is a serious misdirection sufficient to warrant our interference. [See *Muhammed B. Hassan v. PP (supra)*, *Abillah Labo Khan v. PP (2002) 2 MLJ 521, CA*]. Further, we find that the learned judge also did not make a specific finding that the accused did any of the acts of trafficking as defined under section 2 of the Act.

[13] That however is not the end of the matter. As we will demonstrate shortly there are other parts in his judgment in respect of which we find that the learned trial judge had erred. After setting out the substance of the accused's defence which was given as a statement from the dock, under the heading "Finding of the Court", the learned trial judge began by overruling the learned DPP's objection that since the accused had not given evidence but had only made a statement from the dock, he had no right to make any submission. That objection was based on the decision in *Wong Hing Fatt v. PP (1959) MLJ 20*. In allowing the learned counsel for the accused to submit, the learned trial judge said he could not in all conscience follow the decision in *Wong Hing Fatt*. The learned trial judge then dealt with the only issue of substance raised by the learned counsel for the accused in his final submission, namely

that there was no evidence that the accused hired the car. The learned trial judge dismissed that submission as a simplistic approach to a serious issue. This is what his lordship said :

5           *“Even if the car was a stolen car and so long as the driver was unable to or did not explain that when he drove the stolen car he was unaware that the booth contained drugs, as defined under the Dangerous Drugs Act 1952, the driver would be presumed to be transporting the said drugs”.*  
 10           *(Emphasis added).*

[14] That in our view is clearly a misdirection because there is no presumption of transporting under the Act.

15 [15] Next, the learned judge set out the defence of the accused which he found to be a mere denial and then proceeded to discuss the element of knowledge. His lordship said :

20           *“In this case the defence was a mere denial. On the other hand two witnesses clearly identified him as the transporter. As for knowledge of the contents, the accused ran away and was caught 3 years later for another offence and from the particulars in his identify card he was traced to this offence. He had not explained why he had run away. I have no*  
 25           *reason to doubt the evidence of SP10 & SP11. In fact he ran away before the booth of the car was fully opened by SP10.*

He knew what was in the booth and is therefore presumed to have knowledge that the booth contained the prohibited drugs. Further, the large quantity of the drugs carried in the car causing the said car to sag, which in fact tipped off the patrol car officers to stop the car for inspection, would also give rise to the presumption that the accused knew what he was transporting. I find that the defence had failed to rebut the presumption of trafficking under Section 37(da)(vi) of the Dangerous Drugs Act 1952. Further, D31 which exhibit the accused tendered to Court, showed clearly that one of the items recovered was an ATM Public Bank Card belonging to Devi although in his statement from the dock he had said that he had separated from Devi since February 1997. I therefore found the accused guilty of the charge and convicted him". (Emphasis added).

[16] The reference by the learned trial judge to presumption of knowledge on the part of the accused that the boot contained the prohibited drugs and the presumption that the accused knew what he was transporting is inappropriate as there are no such presumptions under the Act.

[17] We come to a more serious misdirection. This occurred when the learned judge found that the defence had failed to rebut the presumption of trafficking under the section 37(da)(vi) of the Act. On the basis of the law as stated in Muhammed B. Hassan v.

PP (supra), this finding presupposes that the learned judge was satisfied that the said presumption had arisen in the first place. The question is when was he so satisfied?. We have said earlier that before the presumption under section 37(da) of the Act can arise, there must be an affirmative finding of possession. As we have demonstrated, the learned judge did not make any affirmative finding of possession at the close of the prosecution's case. So, his finding regarding the defence's failure to rebut the presumption under section 37(da) of the Act is really bewildering. Perhaps in considering the question of trafficking the learned judge relied on the definition of trafficking under section 2 of the Act. The learned judge's use of the term "transporting", and his remarks about the accused being identified as "the transporter" and that the accused knew what he was transporting seem to support the possibility that he had adopted such an approach. The submission of the learned Deputy also seemed to suggest that was the approach taken by the learned trial judge. Indeed in this case the learned Deputy contended that there was no question of sections 37 (d) and (da) of the Act being invoked. With respect we find it difficult to accept the learned Deputy's submission. In the first place, at the close of the prosecution's case, the learned trial judge did not make any specific finding that the accused had committed any of the acts which constitute trafficking as defined under section 2 of the Act. Secondly, if the learned judge was indeed relying on the definition of trafficking under section 2 of the Act to find a prima facie case against the accused, he could not and should not make the finding

that the accused had failed to rebut the presumption under section 37 (da) of the Act. From the Appeal Record in this case, we find that in the court below the prosecution had elected and prosecuted its case relying on the statutory presumptions under section 37 of the Act. In such a case the prosecution cannot at a later stage seek to rely on the definition under section 2 of the Act. In this regard in *Lim Hock Boon v. PP* (2007) 4 CLJ 224, at 124, this court said :

10        *“The principle to be extracted from Chia Leong Foo is that once the prosecution elects to rely on one of the statutory presumptions in s. 37 of the Act, it cannot at a later stage of the trial seek to rely on the very general definition of s. 2 of the Act. That is exactly the position here. Throughout its case, the prosecution proceeded on the basis that it was relying on s. 37(da). The accused also presented his case along the lines that the prosecution was relying purely on s. 37(da) of the Act. That much is clear from the appeal record. To resort to the wide and untrammelled definition in s. 2 of the Act at the end of the case, being quite ineffective as a matter of law, would be unfair and unjust to the accused”.*

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[18] At the conclusion of his submission before us, commenting on the judgment in the court below, the learned counsel for the accused said that the learned trial judge was confused. We agree. The learned judge seriously misdirected himself and leaves us in

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serious doubt as to whether at the close of the prosecution's case he was relying on the statutory presumptions under section 37 of the Act or on the proof of actual act of trafficking as defined under section 2 of the Act. In our view, the benefit of the doubt must  
5 given to the accused.

[19] In his valiant effort in defending the conviction under section 39B, the learned Deputy urged us to consider the totality of the evidence in this case particularly the large quantity of the  
10 proscribed drugs found in the boot of the first car and implored us to uphold the said conviction. In *Alcontara v. PP* (1996) 1 CLJ 705, the Federal Court said at page 720 :

*“There may well be cases where because of the absolutely  
15 overwhelming nature of the affirmative evidence led by the prosecution, there is no need for resort to be had to the statutory presumptions aforesaid, but even in such a case, we consider that trial court should specifically so find.”*  
*(Emphasis added).*

20 [20] Earlier, in *Muhammed Hassan v. PP* (supra) in response to somewhat similar submission as in the instant appeal, the Federal Court said :

25 *“As regards the alternative submission of the learned Deputy Public Prosecutor that, independently of s. 37(d), there was*

*sufficient evidence of possession of the cannabis on the part of the appellant, all we need to say is that on the evidence the learned trial judge did not make a finding of possession (ie, possession as understood in criminal law) either factually or by way of inference. We, at the appellate stage, not having had the opportunity of observing the witnesses in giving evidence, did not consider it appropriate and safe to arrive at any conclusion in this regard”.*

10 In that case the Federal Court quashed the conviction under section 39B(1)(a) of the Act and set aside the death sentence. In substitution therefor, the Federal Court convicted the appellant under section 6 of the Act and sentenced him to 16 years imprisonment with effect from the date of his arrest and 10 strokes  
15 of whipping.

[21] So too here. The trial judge did not, on the evidence led before him at the close of the prosecution’s case, make an express affirmative finding of possession of the proscribed drug by the  
20 accused. Further, he also did not make a specific finding of an act of trafficking of the proscribed drug being committed by the accused as defined in section 2 of the Act. Not having the opportunity of observing the witnesses in giving evidence, we did not consider it appropriate and safe to arrive at any such finding.

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[22] In the result we allowed the appeal, quashed the conviction under section 39B of the Act and set aside the death sentence. In substitution therefor, we convicted the accused of the offence of possession of dangerous drugs under section 6 of the Act, read with section 39A (2) of the Act and sentenced him to 20 years imprisonment to be effective from the date of his arrest and 15 strokes of whipping.

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**(DATO' AHMAD BIN HAJI MAAROP)**

Judge  
Court of Appeal  
Malaysia.

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Date : 3 Jun 2009

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