

DALAM MAHKAMAH PERSEKUTUAN MALAYSIA

(BIDANG KUASA RAYUAN)

RAYUAN JENAYAH NO: 05-74-2005(B)

[Mahkamah Rayuan Rayuan Jenayah No. B-05-70-2004]

[Mahkamah Tinggi Shah Alam Perbicaraan Jenayah No. 47-16-2000]

ANTARA

PENDAKWA RAYA

...

PERAYU

DAN

LIM HOCK BOON

...

RESPONDEN

Coram: ZAKI TUN AZMI, CJ
ALAUDDIN MOHD. SHERIFF, PCA
NIK HASHIM AB. RAHMAN, FCJ
AUGUSTINE PAUL, FCJ
ABDUL AZIZ MOHAMAD, FCJ

JUDGMENT

of

Abdul Aziz Mohamad, FCJ

1. The facts are more or less set out in the judgment of my learned brother, Nik Hashim, FCJ.

2. In order to establish trafficking by relying on the presumption of trafficking in section 37(da) of the Act that arises from possession of the requisite amount – an amount of or above the prescribed minimum – of cannabis, the prosecution had to prove that the respondent was in

possession of the cannabis in this case. But to prove the element of knowledge that is necessary to establish possession, the prosecution could not also rely on the presumption of knowledge in section 37(d). That is because of the ruling in *Muhammed Hassan v Public Prosecutor* [1998] 2 CLJ 170. So the prosecution had to rely on evidence from which actual knowledge could be inferred.

3. At pages 11 and 12 of his grounds of judgment the learned trial judge stated his findings at the close of the case for the prosecution as to the element of knowledge and the other element that is necessary for possession, which is sometimes called “custody” or “control” and which the learned trial judge called “actual possession”. As to the latter, he said that this element was proved by the facts that the cannabis, which was wrapped in plastic and paper, was in the car belonging to the respondent and that he was alone in the car.

4. As to knowledge, the learned trial judge said that this was proved by the “surrounding circumstances”. The circumstances that he mentioned were, first, the fact that the respondent begged to be let off (*dilepaskan*), secondly, the respondent’s appearing to be in a panic and to be sweating, and, thirdly, the respondent’s leading Chief Inspector William Kuyal (PW8) to the front-passenger door of the car. At page 27 of the grounds of judgment the learned trial judge said that after hearing the evidence of the respondent he adhered to his findings at the close of the case for the prosecution, and at page 28 he summarized those findings in five points. In point (5) he said that the

respondent's knowledge was proven by "surrounding circumstances" of his conduct *before* and at the time he was restrained (*ditahan*) and arrested, but did not specify the conduct. The learned DPP argued that item (5) meant that the surrounding circumstances that the judge took into account were more than the three matters that he had specifically mentioned earlier, and included the manner in which the cannabis was hidden in the car, the amount of it, and the fact that the respondent was cruising about the petrol station, which was closed, several times at 3.00 in the night before stopping at the air-pump. This argument may be inferred from paragraphs 29.2 and 41 of the DPP's written submission dated 29 July 2008. Although unfortunately he did not specify it, by conduct *before* the respondent was restrained the learned trial judge must have meant the act of cruising about the closed petrol station several times at that hour and stopping at the air-pump.

5. With proof of actual possession, that is proof without relying on the presumption in section 37(a), and with resort to the presumption of trafficking in section 37(da), the learned trial judge said that at the close of the case for the prosecution he found that the prosecution had made out a *prima facie* case of trafficking.

6. The Court of Appeal held, as one of two grounds for finding the conviction of the respondent unsafe and allowing his appeal, that the learned trial judge had misdirected himself in relying on "incriminating statements" made by the respondent after his arrest and before being

cautioned. Proviso (3) to section 37A(1) of the Act renders a statement made in such circumstances inadmissible. The Court of Appeal held that the moment the Chief Inspector turned off the engine of the car and took possession of the keys the respondent was under arrest and those statements were made after the arrest. The Court of Appeal also said that the learned DPP conceded that the respondent was under arrest when he made the statements. It is not absolutely clear from what the Court of Appeal said whether it was in the trial court or in the Court of Appeal that the DPP so conceded. But during the trial objection had been taken to the evidence of the respondent pointing towards the place where the cannabis was found and the learned trial judge had ordered that the evidence be expunged. And before us the learned DPP said that in the High Court the prosecution conceded that the information given to the Chief Inspector was inadmissible. That must have been because the prosecution accepted that, as the Court of Appeal found, the respondent had been arrested when he made the statement or gave the information. That is why in this appeal the learned DPP did not attempt to argue that the police action of blocking the respondent's car, switching off the engine and seizing the key did not amount to an arrest.

7. The learned DPP in fact, in paragraph 30 of his said written submission, impliedly accepted that "the impugned part" of the circumstances that the learned trial judge relied on to infer knowledge was inadmissible. He, however, argued in that paragraph that the learned trial judge was entitled to infer knowledge from all the

remaining circumstances and in paragraph 41 he submitted that the only reasonable inference from those circumstances is that the respondent knew about the cannabis in the car.

8. Now the Court of Appeal did not specify what were the “incriminating statements” by relying on which the learned trial judge had misdirected himself. Was it just the third circumstance, that is, the respondent’s leading the Chief Inspector to the front-passenger door? Or was it also the respondent’s plea to be let off? The learned DPP understood it to be the third circumstance – as the respondent’s counsel also seemed to understand – and it was this that the learned DPP referred to as the “impugned part” and that he impliedly conceded was not admissible.

9. As regards the plea to be let off, the respondent’s counsel in this appeal admitted that the respondent’s counsel in the High Court unfortunately did not raise objection to it but it was raised in the Court of Appeal. And he submitted in this appeal that it was inadmissible, even as conduct, for the same reason that the third circumstance was inadmissible.

10. The learned DPP took the stand that the plea to be let off was made before the car engine was switched off, which again indicates that the learned DPP accepted that there was an arrest at that point in time. It is clear from my reading of the evidence of the Chief Inspector that the plea was made after the engine was switched off. The learned

trial judge, too, in setting out at the beginning of his grounds of judgment the facts adduced by the witnesses for the prosecution, placed the plea after the switching off of the car engine. It is true, as the learned DPP pointed out, that later in the grounds of judgment the judge said that the plea was made as soon as (*sebaik sahaja*) the Chief Inspector identified himself, but that was the place where he was setting out the “surrounding circumstances” implying knowledge. I believe that there he was merely concerned with the fact of the plea and he was not particular about the point in time because he was not considering the question whether the plea was made before or after arrest.

11. The learned DPP further submitted that the plea was not a statement but was conduct asking for help. The exact words of the Chief Inspector as to what the respondent did were “*meminta bantuan tolong untuk melepaskannya*”. In my judgment that was a statement and the conduct was in the statement. Without the statement there would have been no conduct. In my judgment the statement was inadmissible.

12. But although the learned trial judge misdirected himself, as the Court of Appeal found, in accepting and relying on the evidence of the respondent’s leading the Chief Inspector to the front-passenger door, and, as the Court of Appeal might have found and as I find, in accepting and relying on the plea to be let off, in my judgment there was enough prima facie proof of knowledge in the remaining evidence,

particularly the evidence of cruising about the closed petrol station several times and stopping at the air-pump at 3.00 o'clock in the night, which, as I said, the learned trial judge must have taken into consideration. Clearly the respondent was looking for someone. It could not have been mere coincidence that a man who was looking for someone in the vicinity of a closed petrol station at 3.00 o'clock in the night had a considerable amount of cannabis hidden under the front-passenger seat of a car which belonged to him and which he was driving with no one else in it. It must have been in connection with the cannabis that he was looking for that someone at such an hour and such a place. The irresistible inference is that he knew about the cannabis in his car.

13. In my judgment, therefore, despite the misdirection, the learned judge's finding of knowledge and of prima facie proof of trafficking by the presumption in section 37(da) was a safe finding.

14. But that was not all. The learned trial judge said that, alternatively, he found that the prosecution had established a prima facie case of actual "trafficking", as defined in section 2 of the Act, where it is defined as including the doing of any of several acts, including the "keeping" or "concealing" of any dangerous drug. For proof of the act of keeping or concealing, the learned trial judge relied on the evidence that the cannabis was found under the front-passenger seat of a car belonging to the respondent and driven by him. For actual trafficking, the amount of the drug is not material, and

therefore the prosecution did not have to rely on the presumption in section 37(da) from possession of the requisite amount of drug. As for knowledge, which is also necessary for actual trafficking, the prosecution could then rely on the presumption in section 37(d) of knowledge from custody or control of the thing in which the drug is contained.

15. In the Court of Appeal, the learned DPP argued in support of the learned trial judge's alternative finding of actual trafficking. The Court of Appeal rejected the argument. Since I find that the finding by the learned trial judge of a prima facie case of trafficking by presumption was a safe finding, I do not need to find whether his alternative finding was correct and I do not intend to adjudge that finding. But I feel constrained to nevertheless deal with this aspect of the case because I find that the Court of Appeal's reasons for rejecting the learned DPP's argument were not sound. The Court of Appeal rejected the learned DPP's argument because "both principle and authority" were against it. As for principle, the Court of Appeal said, "It is settled law that a definition section in an Act of Parliament does not create an offence". Of course it does not, but the definition of "trafficking" in section 2 of the Act defines what the offence of trafficking in section 39B is and renders any of the acts in the definition an act of trafficking for the purposes of that section.

16. As for authorities, the Court of Appeal relied on two authorities. The first is a passage from that part of the judgment of the Privy

Council in *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 67, a Singapore case, where their Lordships were dealing with the question of construction of the Misuse of Drugs Act 1973 of Singapore. I shall refer to Singapore's 1973 Act in the past tense because I have not verified the present state of Singapore's statute on the subject, it being unnecessary to do so for the purposes of this judgment. Before I quote the passage relied upon by the Court of Appeal, it is necessary to observe that the structure of Singapore's Act was different from ours in several respects. For instance, whereas the presumption in our section 37(da) from possession of a dangerous drug of or above the prescribed minimum is that of trafficking, the presumption in the Singapore Act's section 15 was that of "possession for the purpose of trafficking" in the drug. The construction of Singapore's Act that the Privy Council were concerned with was as to how that presumption worked in a situation where "an accused is proved to have had controlled drugs in his possession and to have been moving them from one place to another" [p. 69 G (right)] and that question had reference to the fact that the verb "transport" was one of the verbs included in the meaning of "traffic". The passage that the Court of Appeal relied on was part of the chain of reasoning that resulted in the answer to the question, so that to understand the real import of that part one needs to understand the whole chain of reasoning, and to do that one has to carefully read the whole of the judgment and appreciate the structure of the Singapore Act as it bore on the reasoning. The passage is not a self-contained or self-sufficient passage from which it is appropriate to

pluck a lesson to be directly applied to the judicial implementation of our Act. The passage is as follows:

“ This is a very wide description of acts that may be treated as equivalent to the substantive offence of trafficking; nevertheless, in their Lordships’ view, it is clear from the structure of the Drugs Act and the distinction drawn between the offence of having a controlled drug in one’s possession and the offence of trafficking in it, that mere possession of itself is not to be treated as an act preparatory to or in furtherance of or for the purpose of trafficking so as to permit the conviction of the possessor of the substantive offence. To bring the provisions of sections 10 and 3(c) into operation some further step or overt act by the accused is needed, directed to transferring possession of the drug to some other person; and it is a consequence of the clandestine nature of the drug trade and the means adopted for the detection of those engaged in it, that the further step that the prosecution is most likely to be able to prove in evidence is the act of the accused in transporting the drug to some place where he intends to deliver it to someone else, whether it be the actual consumer or a distributor or another dealer.”

17. To know what the “very wide description of acts” mentioned at the beginning of the passage refers to, it will be necessary to read the previous part of the judgment. My understanding from reading the previous part is that it refers to the description in the sections mentioned in the passage itself, sections 10 and 3(c), particularly section 10, which provided as follows:

“10. Any person who abets the commission of or who attempts to commit or does any act preparatory to or in furtherance of the commission of any offence under this Act shall be guilty of such offence and shall be liable on conviction to the punishment provided for such offence.”

18. In my judgment, the passage relied upon by the Court of Appeal is no authority for rejecting the DPP’s reliance on the alternative ground on which the learned trial judge in the present case found that the prosecution had made out a prima facie case of trafficking.

19. In rejecting the learned DPP’s argument in favour of the alternative finding of actual trafficking, the Court of Appeal treated it as amounting to, or arising from, a “misconception that the definition of trafficking . . . could be prayed in aid at any stage of a case to impose criminal liability on an accused”. The Court of Appeal’s second authority for rejecting the argument was *Chow Kok Keong v Public Prosecutor* [1998] 2 MLJ 337, which the Court of Appeal said had “tollled the death knell” of *Teh Geok Hock v Public Prosecutor* [1989] 3 MLJ 162 and put an end to the misconception.

20. *Teh Geok Hock* was a decision on appeal to the then Supreme Court and was about an attempt to rebut the presumption of trafficking in heroin in section 37(da)(i) by virtue of which the appellant had been called upon to make his defence. The heroin had been found in small plastic packets concealed under the front part of the appellant’s underparts. His defence was that he was a drug addict and that the

heroin was for his own consumption. The learned trial judge accepted that the appellant was a drug addict but rejected the appellant's explanation that the heroin found in his possession was for his personal consumption. The Supreme Court's understanding of the judge's decision was "that having viewed the totality of the evidence he was satisfied that the presumption of trafficking was not rebutted on the balance of probability" [p. 163 F (right)]. The Supreme Court dismissed the appeal, obviously agreeing with the trial judge.

21. At page 163 H (left), the Supreme Court said that the judge "was satisfied that the appellant was trafficking in the drugs as charged and convicted the appellant". Of course, having found that the appellant had failed to rebut the presumption of trafficking, the judge had no choice but to be satisfied that the appellant was guilty of trafficking in the drugs as charged and, I may add, as proved by the prosecution with the aid of the presumption. But – and this is the part of the Supreme Court judgment that puzzles me – the Supreme Court would appear to have thought that the learned judge, in rejecting the defence of personal consumption, found that the appellant was guilty of actual "trafficking" as defined in section 2, and the Supreme Court would appear to have thought that it was necessary for the learned judge to have so found, because the Supreme Court went on to quote the definition of "trafficking" and to then say:

"True, the definition in the Act sounds artificial and not according to the ordinary meaning of the word 'trafficking' which is normally understood to mean to trade in, buy or sell, any commodity, albeit often with sinister implication. See also the

Shorter Oxford English Dictionary. The definition of 'trafficking' in the Act is wide and includes not only buying and selling, but also carrying, concealing and keeping. It is totally different from the definition of the word 'traffic' in the Singapore Misuse of Drugs Act. In the Singapore provision to 'traffic' in a controlled drug so as to constitute an offence of trafficking involves something more than passive possession or self-administration of the drug. See *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64.

Considering this case from the evidence of both the prosecution and the defence the facts proved fall squarely into the definition of 'trafficking' in our Act. The appellant was found in possession, custody and control of the said heroin the weight of which is more than 15 gm. This invoked the presumption of trafficking under s 37 of the Act. There is the undisputed evidence of concealment (ten packets of the heroin found concealed in the underpants of the appellant). The appellant also admitted that he bought the drugs for his friends and that he would distribute the drugs to the friends. Finally in his cautioned statement he stated that he wanted to sell the drugs to one Saw Chai working in Paris Pub."

22. Be that as it may, *Teh Geok Hock* was about the defence of personal consumption of the drug that an accused was in possession of and the decision of the Supreme Court implies that the defence is available and will succeed if accepted as probable. It was not about the availability of a choice to the prosecution of proving, on the same facts, trafficking either by the presumption in section 37(da) or by

proving any of the acts encompassed by the definition of “trafficking” in section 2.

23. Before coming to *Chow Kok Keong*, I will say something about *Cohen Lorraine Philis & Anor v Public Prosecutor and another appeal* [1989] 3 MLJ 289, a decision of the then Supreme Court on appeals from the High Court, because that case was relied on in *Chow Kok Keong*. Apparently the prosecution relied on evidence of actual “trafficking” as defined. What the Supreme Court decided in that case was that in a prosecution for trafficking in a dangerous drug the defence of personal consumption was available. Among other things the Supreme Court, at page 291 B-C (right), said, “It is implicit in the judgment in *Teh Geok Hock* that the defence of own personal consumption is available but whether it will succeed would depend on the facts of each case”.

24. I come now to *Chow Kok Keong*, a decision of this court on appeal from the High Court, delivered by Edgar Joseph Jr, FCJ. The appellant had been caught carrying, while riding a motor-cycle, a plastic bag containing two packets wrapped in plastic and newspaper, which were proved to contain 86.6 grams of heroin. The learned trial judge found that the prosecution had succeeded in establishing a prima facie case of trafficking in reliance on the presumption of trafficking in section 37(da)(i). The appellant’s defence was that one Ah Seng had requested him to carry the plastic bag, saying that it contained food. The learned trial judge, for various reasons related to

the defence evidence, found the appellant's explanation unacceptable. In this respect, this court found that the learned trial judge "had erred in his handling of the facts, when considering the case for the defence" (p. 349 C).

25. Edgar Joseph Jr, FCJ said at page 345 B that in rejecting the evidence adduced by the defence and finding that it had failed to rebut the statutory presumption, the learned trial judge also drew attention to the definition of "trafficking" in section 2, and continued as follows:

"The Judge then noted that the effect of the above section, according to the Supreme Court case of *Teh Geok Hock v PP* [1989] 3 MLJ 162 (per Hashim Sani CJ at p 163), was this:

The definition of trafficking is wide and includes not only buying and selling, but also carrying, concealing and keeping.

The Judge next found that it was clear that the Appellant was carrying the bag which contained the heroin. Because the weight of the heroin was more than 15 gm, the presumption of trafficking under s 37(da) arose."

It is not clear from the judgment of this court in what way the learned trial judge, who rejected the defence on the facts and the evidence, also relied on the definition of "trafficking" and on *Teh Geok Hock* to find that the defence had failed to rebut the statutory presumption.

26. In this court, according to Edgar Joseph Jr, FCJ, the appellant's counsel conceded that at the close of the case for the prosecution it had been proved by affirmative evidence that the appellant was found

in possession of the drugs and that the judge had correctly invoked the presumption of trafficking in section 37(da), but although he maintained that the presumption had been rebutted he conceded that the appellant was in passive possession of the drugs and urged that the appellant's conviction be substituted with one for possession in contravention of section 6.

27. This court's response to that was in the following passage, which the Court of Appeal relied on in the present case, beginning at page 347 H:

“ To revert to the Grounds of Judgment, in considering and rejecting the defence of the Appellant, the Judge had, as we have said, relied on the definition of trafficking in s 2 of the Act set out earlier herein.

And, as we have also noted, the Judge had relied on the Supreme Court case of *Teh Geok Hock v PP* [1989] 3 MLJ 162, where the Court briefly considered the effect of the definition of trafficking aforesaid and, in particular the Court observed:

The definition of 'trafficking' in the Act is wide and includes not only buying and selling, but also carrying, concealing and keeping. It is totally different from the definition of the word 'traffic' in the Singapore Misuse of Drugs Act. In the Singapore provision to 'traffic' in a controlled drug so as to constitute an offence of trafficking involves something more than passive possession or self-administration of the drug. See *Ong Ah Chuan v PP* [1981] 1 MLJ 64.

The Judge, however, appears to have overlooked the later Supreme Court case of *Cohen Lorraine Philis & Anor v PP* [1989] 3 MLJ 289, where the Court (per Abdul Hamid LP) held that in a prosecution for trafficking in dangerous drugs, a defence of self-consumption might be *available* even where the quantity of drugs involved was in excess of the statutory minimum prescribed under s 37(da) of the Act, but whether it could succeed would depend upon the particular circumstances of each case. And, in the subsequent case of *Ng Chai Kem v PP* [1994] 2 MLJ 210, the Supreme Court followed *Cohen*.

In our view, both *Cohen* and *Ng Chai Kem*, have severely watered down *Teh Geok Hock* in so far as it implies that passive possession or self-administration can never be a defence to a charge of trafficking under s 39B of our Act. Having considered this point afresh, we preferred the views expressed in *Cohen* and *Ng Chai Kem* to those in *Teh Geok Hock* which we regarded as oversimplistic . . .”

28. That passage is about the defence of passive possession or self-consumption. As I understand the passage, this court understood the learned trial judge to be relying on *Teh Geok Hock* as an authority laying down that passive possession or self-consumption can never be a defence to a charge of trafficking, and this court itself understood *Teh Geok Hock* to be so implying. But as I have shown, *Teh Geok Hock* implies the contrary. Even *Cohen* itself recognized *Teh Geok Hock* as implicitly saying that the defence of own personal consumption is available. Therefore there was nothing to choose

between *Teh Geok Hock* and *Cohen*. They went in the same direction. The statement in *Chow Kok Keong* that *Cohen* had “severely watered down” *Teh Geok Hock* was unwarranted and if that was the death knell of *Teh Geok Hock* that the Court of Appeal in the present case meant, it was not – it was just a false alarm.

29. But what really is of importance for the present case is that *Chow Kok Keong* is by no means an authority that denies to the prosecution the choice of proof of actual trafficking as an alternative to reliance on the presumption of trafficking in section 37(da).

30. The Court of Appeal also said that allowing the prosecution that choice in the present case would “run foul of the requirements of fundamental procedural fairness” because, according to the Court of Appeal –

“Throughout its case, the prosecution proceeded on the basis that it was relying on section 37(da). The accused also presented his case along the lines that the prosecution was relying purely on section 37(da) of the Act. That much is clear from the appeal record. To resort to the wide and untrammelled definition in section 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.”

For this aspect of their judgment, the Court of Appeal relied on a passage in the High Court judgment in *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705, as laying down the principle “that once the prosecution elects to rely on one of the statutory presumptions in

section 37 of the Act, it cannot at a later stage of the trial seek to rely on the very general definition of section 2 of the Act". It was a judgment of Augustine Paul, J, now FCJ and a member of the present panel of this court.

31. It must, first of all, be appreciated that the learned trial judge in this case said that he found an alternative case of actual trafficking at the close of the case for the prosecution, and not, as the Court of Appeal said, "at the end of the case".

32. The judgment in *Chia Leong Foo* does not state whether the prosecution proceeded on the basis of actual trafficking only or on the basis of trafficking by presumption only, but apparently it was a case in which the prosecution sought to rely on whichever means that was available to prove trafficking, because at page 727 C-D the learned judge found that, on the evidence, the prosecution had made out a prima facie case of trafficking by transporting the 218.79 grams of heroin in the charge, and added, "I did not consider it appropriate to rely on the relevant presumptions provided by the Act in view of the evidence available to make out the charge against the accused". This means that had it been considered appropriate, the learned judge would have applied the presumptions. This further means that the learned judge recognized that the prosecution was conducted on the basis that trafficking was to be proved either as an actual act of trafficking or by the presumption in section 37(da) and that it was quite in order for the prosecution to have been so conducted.

33. The passage from *Chia Leong Foo* that the Court of Appeal relied on was the end part of a lengthy discussion of the applicability of the presumptions in the Act and the part in which the learned judge concluded, at page 725 E-G, as follows:

“... I am therefore of the view that the presumption provisions become inapplicable when there is evidence of the very fact to be presumed. They must be invoked when there is no such evidence or when the available evidence is not safe or satisfactory to be relied upon. The mandatory nature of the presumption provisions must therefore be read in that light to mean that where there is evidence only of the basic facts the presumed facts must be deemed to exist unless the contrary is proved . . .”

34. As I construe the judgment, the only purpose of the discussion and that conclusion was to pave the way for, and to justify, the basis of the learned judge’s finding at page 727 C-D, that I have set out, that the prosecution had made out a prima facie case of trafficking. I do not construe that conclusion as directed to the basis on which a prosecution is conducted and as saying that the prosecution ought not to proceed on a presumption if there exists evidence of the fact to be presumed. That would be an impracticable direction that would place the prosecution in a very difficult and awkward position. As I said, the learned judge recognized that the open basis on which the prosecution proceeded in that case was in order. Judging from his finding at page 727 C-D, it seems to me that the conclusion that I have quoted was one intended for a judge to consider in making his finding at the close of the case for the prosecution. The passage from *Chia Leong Foo*

that the Court of Appeal relied on in the present case does not, to my understanding, lay down the principle, to quote the Court of Appeal again, “that once the prosecution elects to rely on one of the statutory presumptions in section 37 of the Act, it cannot at a later stage of the trial seek to rely on the very general definition of section 2 of the Act”.

35. The Court of Appeal’s other ground for finding the conviction of the respondent unsafe was that the learned trial judge had erred in his handling of the facts relating to the defence.

36. The defence of the respondent was that the cannabis had been placed in the car by someone without the respondent’s knowledge. Since he had no knowledge of the existence of the cannabis, he was not guilty of its trafficking. By the evidence that the respondent gave in support of the defence, he sought to persuade the court that one of several persons could have placed the cannabis in the car. One was his brother Lim Hock Kee, who he said had borrowed his car in the morning of 27 January 2000. Another was Ah Heng, a workmate of the respondent’s, who the respondent said had also been using the car. Another was one Ah Ba with whom the respondent claimed he spent the evening and night of 27 and 28 January 2000 at a karaoke lounge and later at an eating place for supper and whom he drove to the petrol station to enable him to find a toilet to use at the petrol station. The respondent claimed that it was while he was waiting at the air-pump for Ah Ba to return, after cruising about the petrol station

several times to prevent engine-overheating, that the police confronted him.

37. The respondent said that while he and Ah Ba were at the karaoke lounge, Ah Ba had gone to the respondent's car after asking the respondent for the car key, saying that he wanted to get something from the car, but the respondent said that he was not certain whether Ah Ba wanted to get something from the car or to put something in it. Ah Ba did not return the key when he rejoined the respondent and it was only while they were walking to the car to leave the place that the respondent realized he did not have the key and got it back from Ah Ba.

38. The learned trial judge rejected the defence, finding that the respondent had failed to cast a reasonable doubt on the case for the prosecution. As to the story about Ah Ba, the learned trial judge found it to be a mere fabrication because he accepted the evidence of the police witnesses, who had kept surveillance about the petrol station for about one hour before the respondent first appeared there in the car, that the respondent was alone.

39. The part of the defence that involved Ah Ba was the only eventful part, a part with a story. Assuming, as the learned trial judge found, that the story was a fabrication, the only reason for fabricating the story, with the incidence of Ah Ba going to the car whether to take something from it or to place something in it, was to persuade the

court that Ah Ba was the most likely person to have placed the cannabis in the car, besides to account for the presence and conduct of the respondent at the petrol station that night. If it had been for the latter purpose only, there would have been no necessity to fabricate the story about Ah Ba asking for the car key. Assuming that Lim Hock Kee and Ah Heng did use the respondent's car, the need to fabricate the story about Ah Ba means that the respondent himself was not confident that the court would accept it as probable that Lim Hock Kee or Ah Heng had placed the cannabis in the car. The defence that sought to implicate Ah Ba was therefore the essential defence.

40. As regards Ah Heng, the learned trial judge in fact rejected the involvement of Ah Heng for the principal reason that if Ah Heng had used the car he would have removed from the car his belongings before returning it to the respondent.

41. As regards Lim Hock Kee, the respondent's wife, who was a prosecution witness (PW7), had stated in her evidence that Lim Hock Kee had been borrowing the car to convey his children to school and that the last time he had borrowed the car was on the morning of 28 January. The learned trial judge, when considering the case for the prosecution, had found that the story about Lim Hock Kee borrowing the car on the morning of 28 January was a fabrication because on the morning of 28 January the car had already been seized by the police. That reason for rejecting the evidence I find is bad because obviously the wife had confused the date. She must have meant the morning of

27 January. The learned trial judge also found that Lim Hock Kee was a fabricated character. But he went further and said that even if Lim Hock Kee existed and did use the car, for reasons that he gave but I need not set out, Lim Hock Kee could not have placed the cannabis in the car.

42. After hearing the evidence of the respondent, the learned trial judge dealt with the question of Lim Hock Kee again. Among other things he said that the respondent's failure to call Lim Hock Kee to give evidence deprived the respondent's testimony about Lim Hock Kee of weight.

43. It was in relation to Lim Hock Kee that the Court of Appeal found that the learned trial judge had erred in his handling of the facts. The Court of Appeal so found because the appeal record confirmed that the prosecution accepted the existence of Lim Hock Kee and because it was not reasonable to expect the respondent to produce him since even the police had been unable to locate him.

44. I agree with the Court of Appeal that in that respect the learned trial judge erred in his handling of the facts. But even if he had not erred in that respect, even if he accepted the existence of Lim Hock Kee and had not taken into consideration the respondent's failure to produce him, he would still, going by what he had said when he was considering the evidence of the respondent's wife, have rejected, and rightly in my judgment, the suggestion that it was Lim Hock Kee who

had placed the cannabis in the car. Furthermore, as I have said, the essential defence of the respondent was not in respect of Lim Hock Kee but was in respect of Ah Ba, and that was rightly rejected.

45. To conclude, the finding of the Court of Appeal that the conviction of the respondent was unsafe was lacking in justification. I accordingly would allow the appeal, set aside the orders of the Court of Appeal and restore the conviction and sentence of the High Court.

Dated: 20 February 2009

DATO' ABDUL AZIZ BIN MOHMAD

Judge

Federal Court, Malaysia

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Deputy Public Prosecutor

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