

**DALAM MAHKAMAH PERSEKUTUAN MALAYSIA, DI PUTRAJAYA
(BIDANG KUASA JENAYAH)**

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

ANTARA

PENDAKWA RAYA

... PERAYU

DAN

LIM HOCK BOON

... RESPONDEN

**(Dalam Mahkamah Rayuan Malaysia
Rayuan Jenayah No. B-05-70-2004)**

KORAM

**ZAKI BIN TUN AZMI, KHN
ALAUDDIN BIN DATO' MOHD SHERIFF, PMR
NIK HASHIM BIN NIK AB. RAHMAN, HMP
AUGUSTINE PAUL, HMP
ABDUL AZIZ BIN MOHAMAD, HMP**

20 Februari 2009

Judgment of Nik Hashim bin Nik Ab. Rahman, FCJ

Background facts

1. The respondent was convicted and sentenced to death by the Kuala Lumpur High Court on 23 August 2004 for trafficking in dangerous drugs, i.e. 892.4 grams of cannabis under section 39B of the Dangerous Drugs Act 1952 (the Act). On appeal, the Court of Appeal allowed the appeal and set aside the conviction and sentence imposed. The prosecution now appeals to this Court against the decision of the Court of Appeal.
2. The facts are that on 28 January 2000 at about 2.00 a.m. Chief Inspector William Kuyal (PW8) of the Narcotic Division at the Police Headquarters in Kelang together with a police party comprising six officers proceeded to a Shell petrol station at Jalan Batu Tiga Lama, Kelang. There he and his party laid an ambush. An hour later, a silver Proton Saga No. BDH 8872 came into the petrol station. It was driven three or four times through and around the forecourt of the petrol station. There was only one person in the car. It was the respondent. He was the driver. PW8 witnessed all this. When the car came to a halt, he and his party approached it. PW8 identified himself to the respondent as a police officer. The car's engine was still running. He switched it off and took possession of the ignition key. He noticed that the respondent appeared to be in a state of panic and was sweating. On realizing that they were the police the respondent pleaded for help to release him. He also made certain statements to PW8. These statements were

expunged by the trial court as being inadmissible for want of a caution. The car was searched. The police found a newspaper – wrapped package beneath the front passenger seat. Subsequent chemical examination revealed that the package contained 892.4 grams of cannabis. The respondent was later charged for trafficking in the drugs. At the end of the prosecution case, his defence was called. He gave his evidence on oath.

The Defence

3. According to the respondent, who was the sole witness in his defence, his car BDH 8872 had been borrowed by his brother, Lim Hock Kee, the day before. He had returned the car at about 8.00 p.m. on 27 January 2000. At about 9.30 p.m. the respondent used the car to pick up a friend, one Ah Ba, and together, they went to a karaoke lounge. Whilst there Ah Ba told the respondent that he wanted to take something from the car and asked the respondent for the keys. The respondent obliged. Ah Ba returned after a while. At about 1.30 a.m. on 28 January 2008 the respondent and Ah Ba left the karaoke lounge. They stopped for supper. On the way home, Ah Ba complained of stomach ache and wanted to use a toilet. The respondent stopped at the said Shell petrol station and Ah Ba alighted from the car and went to the toilet. While he was waiting for Ah Ba, the police pounced on him. However, the respondent admitted that he did circle in the vicinity of the station a few times because he said his car could not remain stationary long with the engine running as it would overheat.

The High Court's decision

4. On convicting the respondent, the learned High Court judge (Zulkefli J) (now FCJ) made the following findings :
- (i) The respondent owned the car and had used it for 1½ years prior to the arrest. He was alone in the car when he was arrested. Based on these facts the respondent had actual possession of the cannabis (p194 of the appeal record jilid 2).
 - (ii) With regard to the element of 'knowledge', this had been proved by surrounding circumstances with the respondent pleading to be released as soon as the police introduced themselves. He was also in a state of panic and was sweating.
 - (iii) The person named as Lim Hock Kee did not exist. His existence was created by PW7 (the respondent's wife) as an afterthought to help the respondent. PW7 contradicted herself by stating that this Lim Hock Kee had borrowed the car on 28 January 2000 at around 8.30 a.m. at which time the car was already in police custody.
 - (iv) The respondent failed to cast a reasonable doubt on the prosecution's case. His defence was a mere denial. The court could give little weight to the respondent's evidence that his brother Lim Hock Kee had borrowed his car earlier because he had

failed to call this person as a witness (p212 of the appeal record jilid 2).

- (v) With regard to the existence of 'Ah Ba', the learned judge said at p213 of the appeal record jilid 2 :

“Berhubung dengan isu kewujudan seorang rakan OKT bernama Ah Ba yang didakwa oleh OKT ada bersamasamanya semasa malam kejadian sebelum OKT ditahan, saya mendapati fakta ini adalah rekaan OKT semata-mata. Keterangan OKT atas isu ini adalah tidak konsisten dan saya menerima keterangan pihak serbuan polis yang tidak dicabar yang menyatakan mereka hanya melihat OKT seorang sahaja di tempat kejadian di stesyen minyak Shell berkenaan (Rujuk kes P.P v Mohamed Ali (1962) 28 MLJ 257)” (p213 appeal record jilid 2).

- (vi) The prosecution had proved actual possession of the cannabis on the part of the respondent. Thus, the presumption under section 37(da) of the Act could be invoked. Alternatively, the prosecution had proved that the respondent was trafficking in the sense that he was 'keeping' and 'concealing' the cannabis within the meaning of section 2 of the Act.

The decision of the Court of Appeal

5. Gopal Sri Ram JCA, in delivering the judgment of the Court of Appeal reported in **(2007) 4 CLJ 114**, allowed the

appeal of the respondent and quashed the conviction and sentence. Amongst the Court's findings are :

- (i) The High Court erred in finding mens rea possession based on statements made by the respondent before being cautioned. This is what the court said at p121 para 9 :

“So too here. It is clear from the evidence that the appellant was under arrest the moment PW8 turned off the engine and took possession of the keys. That is why the learned judge held these statements to be inadmissible. Unfortunately, when he came to consider the issue of mens rea possession, he relied on these excluded statements to hold that the appellant had knowledge of the nature of the drug in question and was therefore in possession of it. This is clearly a misdirection.”

- (ii) The learned judge erred in his handling of the facts in that he dismissed the existence of Lim Hock Kee as a fiction when in fact the prosecution had accepted him as a real person. Further, if the police could not locate this Lim Hock Kee, it was unreasonable for the learned judge to expect the respondent to call him as a witness. Thus, there was no judicial appreciation of the evidence.

Issues

6. Broadly, there are two issues to be determined by this Court :
- (i) Whether the learned judge used and relied upon inadmissible evidence to find 'knowledge' on the part of the respondent.
 - (ii) Whether the learned judge had erred in his handling of the facts.
7. Having heard the submissions advanced and read the authorities submitted by both parties, I find merit in the appeal.

The First Issue

8. On the first issue, I agree with the appellant that the finding of knowledge on the part of the respondent was correctly made by the trial court upon a consideration of the whole of the circumstances relating to the arrest and the finding of the cannabis. The approach taken by the learned trial judge was in line with the established method of making a finding on 'knowledge'. As Lim Beng Choon J said in **Public Prosecutor v Badrulsham bin Baharom (1988) 2 MLJ 585** at p590 para C-D left :

“....Putting it shortly, one may say that in order to arrive at a finding of knowledge the court will have to consider the totality of the evidence including any explanations and denials made by the accused and his conduct on the occasion in question.”

9. In the present case, the learned trial judge found that the respondent had the required knowledge for the following reason as at p194-195 of the appeal record jilid 2 :

“Pengetahuan (knowledge) pula pada pendapat saya telah dibuktikan melalui “surrounding circumstances” di mana tindakan OKT meminta tolong untuk dilepaskan sebaik sahaja SP8 memperkenalkan diri sebagai polis jelas menunjukkan OKT mengetahui ada barang salah di dalam kereta tersebut. Jika tidak, apa perlu OKT meminta dilepaskan setelah mengetahui SP8 ialah seorang anggota polis. OKT juga kelihatan kelam kabut dan berpeluh pada masa itu. **Tindakan OKT membawa SP8 ke pintu hadapan tempat duduk penumpang juga jelas menunjukkan pengetahuan OKT terhadap dadah tersebut kerana ia konsisten dengan keterangan bahawa dadah tersebut kemudiannya dijumpai di bawah tempat duduk di bahagian pintu tersebut.**”
(emphasis added)

10. In the above passage, the part emphasized represents the evidence ruled inadmissible by the trial judge and in respect of which the Court of Appeal ruled that the trial judge had misdirected himself. There are two things to be noted in this ruling :

- (i) Firstly, the impugned part is qualified by the word “**juga**”. In other words, the learned trial judge considered the latter evidence as ‘also’ showing knowledge. Thus the impugned part did not form the foundation for the finding of ‘knowledge’, which was dealt with in the earlier portion in the above passage.

- (ii) Secondly, it is clear that the learned trial judge had addressed his mind to all that had transpired before and at the time of arrest of the respondent to justify his finding of knowledge (see p211 (5) of the appeal record jilid 2) :

“Pengetahuan (knowledge) OKT terhadap dadah tersebut telah dibuktikan melalui “surrounding circumstances” berasaskan tindakan dan tingkahlaku OKT sebelum dan ketika OKT ditahan dan ditangkap.”

11. The respondent’s case was that he was already under arrest when he made the incriminating statements. So, the issue for determination was the point of time he was arrested. The High Court did not make a specific finding on this aspect although PW8’s evidence at p90 of the appeal record jilid 2 shows that he had ordered D/Kpl. Dumeran to handcuff the respondent upon the discovery of the cannabis in the car. According to the Court of Appeal, the respondent was under arrest the moment PW8 switched off the engine and took possession of the keys. This is what the Court of Appeal said :

“.... It is clear from the evidence that the appellant was under arrest the moment PW8 turned off the engine and took possession of the keys.”

12. As to when is a person to be regarded as being under arrest for the purpose of section 37A of the Act is a question of fact to be decided according to the circumstances of each case (see **Public Prosecutor v Kang Ho Soh (1991) 3 CLJ 2914**). As to what constitutes an arrest, Suffian LP in **Jayaraman &**

Ors v Public Prosecutor (1982) 2 MLJ 306 at p311 adopted the statement of the law on the subject by Lord Devlin in **Shaaban v Chong Fook Kam (1969) 2 MLJ 219 at p220** where he said :

“An arrest occurs when a police officer states in terms that he is arresting or when he uses force to restrain the individual concerned. It occurs also when by words or conduct he makes it clear that he will if necessary, use force to prevent the individual from going where he may want to go. It does not occur when he stops an individual to make inquiries.”

On the facts of **Jayaraman’s** case, Suffian LP said that it cannot be said that the applicants had been arrested by the corporal when he told them to wait and not to leave the temple, for he had merely stopped them to make enquiries into the attack on the temple.

13. In **Public Prosecutor v Salleh bin Said (1983) 2 MLJ 164**, Syed Agil Barakbah J (as he then was) said that the words “after his arrest” in section 37A(1) of the Ordinance meant, after actual arrest and not constructive arrest. In that case the evidence adduced by the prosecution was that on the day in question at about 7.00 a.m. on information received, Superintendent of Customs Zanzabir (PW3) accompanied by Senior Customs Officer Tee Thean Huat (PW4) and other Customs officers raided the accused’s house. PW3 and PW4 proceeded to the kitchen portion of the house where they met the accused’s wife (DW5) who on being questioned stated that the accused was in the toilet outside the house. The rest of the party surrounded the house. There was a Mercedes car parked

under the house. When the accused came out from the toilet, PW3 obtained from him the keys to the car and in the presence of the accused, his wife, children and PW4 he unlocked the front door of the car and commenced to make a search. On pulling the lever under the dashboard of the bonnet, PW3 recovered 2 sacks which contained blocks of morphine. Each sack containing the drugs was found to be placed on either side of the engine compartment under the bonnet. On being questioned by PW3 as to the contents of the two sacks, the accused replied "Morphine sembilan ketul, semuanya." PW3 noticed that the accused look frightened. The accused then pointed to a spot about 15 feet away from the car where another sack was lying among other goods on the ground floor. When PW3 asked as to the contents of the sack, the accused replied "Chandu sebelas ketul". PW3 examined the sack in the presence of the accused and PW4 and found 11 slabs of raw opium. The accused was then arrested.

An objection was raised by the defence counsel as regards the admissibility of the accused's admission having regard to the words "after his arrest" appearing in section 37A(1) of the Ordinance. In overruling the objection, the learned judge held that the words "after the arrest" appearing in the section mean after actual arrest and not constructive arrest, thereby it was unnecessary for PW3 to administer the statutory caution as required under the same sub-section to the accused. The accused's admissions were ruled admissible.

14. With regard to the present case, we have to look at the police report (P24) lodged by PW8 to find whether the oral statement made by the respondent to PW8 is admissible. P24 at p243 of the appeal record jilid 2 reads :

“Bertindak atas maklumat pada 0300 hrs 28/1/2000 saya bersama anggota Narkotik terdiri daripada D/SJN 66641, D/KPL 89619, 89195, D/L/KPL 89467 dan 92728 telah buat ambush Station Minyak SHELL Jalan Batu Tiga Lama Klang. Pada masa yang sama telah datang sebuah kereta Proton Saga warna silver No. Pendaftaran BDH 8872 dan berhenti di Station Minyak Shell tersebut. Saya bersama anggota serbu ke kereta tersebut saya dapati pintu cermin sebelah pemandu terbuka dan saya kenalkan diri Polis lalu matikan enjin kereta dan ambil kunci kereta tersebut. Dapati dalam kereta itu ada seorang lelaki cina sedang duduk ditempat pemandu dan terus minta tolong bebaskan dia dan minta selesaikan masalah dan terus saya tanya apa masalah dan dia tunjukkan satu bungkusan kertas di bawah tempat duduk depan penumpang dan beritahu ada “SAYUR” dalamnya. Saya terus bacakan kata-kata amaran dibawah seksyen 37A(1)(b) Akta Dadah Berbahaya 1952. Saya terus periksa bungkusan kertas yang ditunjukkan dan ambil pisau terus potong keratan kertas itu dapati ada balutan plastik berisi daun-daun kering disyaki daun ganja. Lelaki itu terus **minta tolong** dan saya terangkan kesalahan kepada lelaki itu. Pemeriksaan lanjut tiada jumpa apa-apa barang salah lagi dan terus saya bawa lelaki itu ke Balai Polis buat report. Butir-butir lelaki itu adalah :

1/ LIM HOCK BOON, KP.650717-10-5059,

T/Lahir : 17.7.65 @ 35 Thn

Kerja : Pemandu lori

Alamat : No.28 Jln. Beringin 6, Taman Banting,
42700 Banting.

Di Balai Polis timbang barang kes berat kasar 950 gram ganja.

Sekian, Aduan saya.”

(emphasis added)

15. Unfortunately, the Court of Appeal did not consider P24. Quite clearly, P24 disclosed what actually took place during the ambush. As stated in P24, PW8 laid the ambush as a result of an information received. However at that time, there was no evidence to show that PW8 had knowledge that the respondent had committed a crime. As such, I, with respect, do not agree that the respondent was under arrest the moment his car was blocked by the police's car as contended by the learned counsel for the respondent or the moment PW8 switched off the engine and took possession of the keys as ruled by the Court of Appeal. On the facts, it cannot be said that the respondent had been arrested by PW8 when he blocked the respondent's car and switched off the engine and took possession of the keys, for he had stopped him to make inquiries. At most the acts of blocking the car and switching off the engine and taking possession of the keys amounted to a constructive arrest. The need to administer the caution under section 37A of the Act only arises after actual arrest and not constructive arrest. Therefore, the respondent's statement seeking PW8's assistance to release him before PW8 could question him was admissible in evidence as the respondent then was not yet under actual arrest.

16. Even assuming that the respondent was already under arrest when he made the statement it is still admissible under the proviso to section 37A (1)(b) of the Act which reads as follows :

“(b) in the case of a statement made by such person after his arrest, unless the Court is satisfied that a caution was administered to

him in the following words or words to the like effect –

“It is my duty to warn you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence :

Provided that a statement made by any person before there is time to caution him shall not be rendered inadmissible in evidence merely by reason of no such caution having been given if it has been given as soon as possible.”

(emphasis added)

17. It must be observed that everything happened very fast. Immediately after the respondent made the statement the caution was administered. Thus the proviso to section 37A(1)(b) has been satisfied thereby making the statement admissible. In any event even after the administration of the caution the respondent continued pleading for help “.... minta tolong”. That being so, there was no error in the finding of fact of actual possession of the drugs by the respondent made by the learned trial judge. The learned trial judge was entitled to infer that the respondent had the required knowledge from all the circumstances of the case.
18. In support reference may be made to the judgment of this Court in **Public Prosecutor v Abdul Rahman bin Akif (2007) 5 MLJ 1** where the facts were somewhat similar. In that case, the respondent was charged with an offence of trafficking in 4,826.9 grams of cannabis under section 39B (1)(a) of the Act. A package was found under the driver’s seat and another two

packages were found under the front passenger's seat in the car driven by the accused. The packages contained cannabis. The respondent was convicted and sentenced to death by the trial court. On appeal, the Court of Appeal set aside the conviction under section 39B (2) of the Act and substituted it with an offence under section 6 punishable under section 39A (2) of the Act. It was held that there was sufficient evidence to establish beyond reasonable doubt that the respondent had custody and control of the 3 packages. In reliance on section 37(d) of the Act it was further held that there was presumed possession of the drug. The accused was sentenced to 18 years imprisonment and ordered to be given 10 strokes of the rotan. The prosecution appealed to this Court against the decision of the Court of Appeal. The prosecution contended that independent of the presumption in section 37(d) of the Act there was ample evidence for the court to draw an inference that the accused knew what was contained in the 3 packages. In allowing the appeal, Arifin Zakaria FCJ (now CJ (Malaya)) in delivering the judgment of this Court, said :

“[14] We agree with the submission of the prosecution that the proper approach to be adopted by the appellate court in the circumstances is that, having held that the cautioned statement was wrongly admitted, then it is for the court to scrutinize in totality the other evidence before it to see whether, quite apart from the cautioned statement, there is sufficient evidence to support the finding of the trial court. Regrettably the Court of Appeal failed to adopt such a course before coming to its conclusion. Hence, it falls upon this court to conduct such an exercise. The incontrovertible facts as found by the trial court was that the three packages were found in the car driven by the respondent. He was the only person in the car at the material time. One package was found under the driver's seat and two packages under

passenger's seat. PW8 gave evidence that the car was in the possession of the respondent for more than seven months prior to his arrest. In the circumstances we think the trial judge was right to hold that at the material time the three packages were in the custody and control of the respondent. Indeed the Court of Appeal agreed with the trial judge. But mere custody and control is not sufficient to establish possession for the purpose of the Act, there has to be established knowledge of such drug by the respondent. In *Chan Pean Leon v Public Prosecutor* [1956] MLJ 237 Thomson J dealt with the issue of possession under the Common Gaming Houses Ordinance 1953 and at p 239 he observed :

Possession' itself as regards the criminal law is described as follows in *Stephen's Digest* (9th Ed) 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 shown 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 shows such an intention. Or it must be clear that the circumstances in which it is found show 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.

[15] And further down on the same page, he added :

Here again knowledge cannot be proved by direct evidence, it can only be proved by inference from the surrounding circumstances. Again the possible variety of circumstances which will support such an inference is infinite.

[16] It is trite that what constitutes 'possession' under s 37 of the Act is a question of law (see *Yee Ya Mang v Public Prosecutor* [1972] 1 MLJ 120 and *Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585). It is however a question of fact whether in a given case a person can be said to be in possession of something. And in relation to drug found in a vehicle Shankar J in *Pendakwa Raya v Kang Ho Soh* [1992] 1 MLJ 360, after considering a number of authorities, at p 371 stated :

... those cases do not decide that in all cases a person who is in sole charge of a vehicle cannot be found to be in possession of articles being carried in it. As Thomson J himself said in *Chan Peng Hong v PP* at p 233 :

If something be found, for example, in a bag which I am carrying or in a box to which I hold the key it is extremely reasonable to suppose, unless I produce some satisfactory evidence to the contrary, that I know all about it ...

Again, at p 234 :

I am not saying for one moment that a drug may not be found in a vehicle in such circumstances as would in the absence of disproof or explanation lead the court to the conclusion, quite independently of any statutory presumption, that it was in the possession of the person in control of the vehicle.

[17] Therefore, the presence of the three packages in the car without a plausible explanation from the respondent could give rise to a strong inference that he had knowledge that the packages contained drug or things of similar nature (see also *Lim Beng Soon v Public Prosecutor* [2000] 4 SLR 589). We

further agree with the prosecution that the fact that the drug was found wrapped in newspaper is no ground for saying that an inference could not be drawn against the respondent that he had the requisite knowledge. In this regard it is pertinent to refer to the observation of the Singapore Court of Appeal in *Zulfikar bin Mustaffah v Public Prosecutor* [2001] 1 SLR 633, at p 639 :

21. For the element of 'possession' (within the meaning of s 17 of the Misuse of Drugs Act) to be established, it must not only be shown that the accused had physical control of the drugs at the relevant time; the prosecution must also prove that the accused possessed the requisite knowledge as to the contents of what he was carrying : see *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256; *Tan Ah Tee & Anor v PP* [1978-1979] SLR 211; [1980] 1 MLJ 49. In the course of the appeal before us, counsel for the appellant relied heavily on the fact that the contents of the bundles were securely wrapped in newspapers and could not be identified. We were accordingly invited to draw the inference that the appellant had no knowledge of the contents of the bundles.

22. We were unable to accede to this request. While the fact that the contents of the bundles were hidden from view may have been relevant in determining whether the requisite knowledge was absent, this factor should still not be given too much weight. Otherwise, drug peddlers could escape liability simply by ensuring that any drugs coming into their possession are first securely sealed in opaque wrappings. *Rather, the court must appraise the entire facts of the case to see if the accused's claim to ignorance is credible.* As Yong Pung How CJ remarked in *PP v Hla Win* [1995] 2 SLR 424 (at p 438):

In the end, the finding of the mental state of knowledge, or the rebuttal of it, is an inference to be drawn by a trial judge from all the facts and circumstances of the particular case, giving due weight to the credibility of the witnesses. (Emphasis added.)

[18] In *Ramis a/l Muniandy v Public Prosecutor* [2001] 3 SLR 534, the Singapore Court of Appeal again propounded on the question of knowledge necessary to establish possession and at pg. 541 states :

Knowledge of drugs

The starting point in the consideration of this issue was that we had already concluded that the drugs was already on Ramis's motorcycles when he entered the vicinity and that he had physical control of the drugs. In the absence of any reasonable explanation by Ramis, these facts were sufficient to lead to a strong inference that Ramis know that the bag found on his motorcycle contained drugs.

In *Tan Ah Tee*, Wee Chong Jin CJ, delivering the judgment of the court, said ([1978-1979] SLR 211 at pp 217-218; [1980] 1 MLJ 49 at p 52) :

Even if there were no statutory presumptions available to the prosecution, once the prosecution had proved the fact of physical control or possession of the plastic bag and the circumstances in which this was acquired by and remained with the second appellant, the trial judges would be justified in finding that she had possession of the contents of the plastic bag within the meaning of the Act unless she gave an explanation of the physical fact which the trial judges accepted or which raised a doubt in their minds that she had possession of the contents within the meaning of the Act.

[19] The issue of knowledge necessary to establish possession came to be considered by the English House of Lords in the case of *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356, which was considered and relied upon by the Singapore Court of Appeal in *Zulfikar bin Mustaffah v Public Prosecutor*. In *Warner* the following question was posed to their Lordships :

Whether for the purpose of s 1 of the Drugs (Prevention of Misuse) Act 1964, a defendant is deemed to be in possession of a prohibited substance when to his knowledge he is in physical possession of the substance but is unaware of its true nature.

[20] At p 367 Lord Reid addressed the issue as follows :

The object of this legislation is to penalise possession of certain drugs. So if mens rea has not been excluded what would be required would be the knowledge of the accused that he had prohibited drugs in his possession. It would be no defence, though it would be a mitigation, that he did not intend that they should be used improperly. And it is

commonplace that, if the accused had a suspicion but deliberately shut his eyes, the court or jury is well entitled to hold him guilty. Further, it would be pedantic to hold that it must be shown that the accused knew precisely which drug he had in his possession. Ignorance of the law is no defence and in fact virtually everyone knows that there are prohibited drugs. So it would be quite sufficient to prove facts from which it could properly be inferred that the accused knew that he had a prohibited drug in his possession. That would not lead to an unreasonable result.

[21] In the same case Lord Morris answered the question in following manner :

If there is assent to the control of a thing, either after having the means of knowledge of what the thing is or contains or being unmindful whether there are means of knowledge or not, then ordinarily there will be possession. If there is some momentary custody of a thing without any knowledge or means of knowledge of what the thing is or contains then, ordinarily, I would suppose that there would not be possession. If, however, someone deliberately assumes control of some package or container, then I would think that he is in possession of it. If he deliberately so assumes control knowing that it has contents, he would also be in possession of the contents. I cannot think that it would be rational to hold that someone who is in possession of a box which he knows to have things in it is in possession of the box but not in possession of the things in it. If he had been misinformed or misled as to the nature of the contents, or if he had made a wrong surmise as to them, it seems to me that he would nevertheless be in possession of them.

[22] Reverting to the present case, it is therefore incumbent upon the court to scrutinize the entire evidence before the court to see whether an inference can be drawn against the respondent that he knew about the drug in the three packages found in the car. It is not in dispute that the three packages were found hidden in the car under the driver's seat and under the front passenger's seat. He was alone in the car at the material time. One other important factor of relevance is that the car had been in his possession for the past seven months prior to his arrest.

[23] It is true that the trial judge did not make any finding on the issue of knowledge necessary to establish possession of

the drugs, as he relied on the cautioned statement in coming to his finding. The Court of Appeal on the facts correctly found that there was sufficient evidence to find the respondent to be in custody and control of the three packages found in the car and relying on the presumption under s 37(d) of the Act the Court of Appeal went on to hold that the respondent was in presumed possession of the drug.

[24] Applying the observations set out in the authorities cited above to the facts in the present case, the irresistible inference that may be drawn in the circumstances is that the respondent all along knew about the drug found in the car. The fact that they were found hidden under the seats of the car and wrapped in Chinese newspaper would not assist him to negate such an inference. From the evidence of PW5 it is clear that little effort was required to uncover what was contained in the three packages. Therefore, we are of the view that on the facts and in the circumstances of this case the learned trial judge, properly directed on the law, would have come to the finding that prima facie the respondent had possession of the drug independent of the statutory presumption under s 37(d) of the Act.”

19. So too here. The following pieces of evidence had been established and were before the court.
 - (i) The respondent was driving his car slowly in and out of an empty petrol station three or four times at 3.00 in the morning.
 - (ii) The car belonged to the respondent and he was alone at the material time.
 - (iii) The police had stationed themselves in the petrol station one hour before the respondent turned up. They saw no one alight from the car.
 - (iv) When the police identified themselves, the respondent was seen to be in a state of panic and was sweating.

- (v) The respondent pleaded to PW8 for help, asking to be released.
- (vi) Cannabis weighing 892.4 grams was found hidden under the front passenger's seat of the respondent's car.

Thus, the clear inference from the combined evidence of (i), (ii) and (iii) above would be that the respondent had custody or control over the cannabis. With the evidence of (i), (iv), (v) and (vi) above the further inference was that the respondent had mens rea possession of the cannabis found in the car. Therefore, the learned judge did not err on the first issue.

The Second Issue

20. With regard to the second issue, I agree with the learned Deputy Public Prosecutor that the trial judge did not err in his handling of the facts. The focus of the Court of Appeal's judgment was with respect to the finding of the learned trial judge on the existence of Lim Hock Kee. The Court of Appeal held that the learned trial judge had rejected the existence of Lim Hock Kee when in fact the prosecution had accepted his existence. However, the evidence led by the respondent clearly attempted to place the blame on one Ah Ba. The respondent told the court that this so-called Ah Ba had borrowed the keys of the respondent's car to take something out of it. Hence, even if the learned trial judge had accepted Lim Hock Kee as a real person, it would have made no difference to his finding, in view of the blame cast on Ah Ba. In

short, the name of Lim Hock Kee did not come up in any culpable manner.

21. In **Teh Hock Leong v PP (2008) 4 CLJ 764** the facts were that the appellant therein was arrested on arrival at KLIA from Thailand carrying a backpack which contained three wet towels and three pieces of underpants. The exhibits were seized. They were sent to the chemist for analysis and were found to contain 580.3 grams of methamphetamines. The appellant claimed that his Thai wife in Chiang Mai, whom he had visited prior to arriving in Malaysia had told him that a friend of his by the name of Ah Keong had telephoned her and asked Lim to bring back the clothes. The High Court found Ah Keong and the Thai wife to be fictitious characters. In the Court of Appeal (Gopal Sri Ram, Ahmad Maarop and Sulaiman Daud, JJCA) it was argued that there was prosecution evidence to show that the Thai wife was not fictitious and as such the trial judge had failed to appreciate the evidence. In rejecting this, Gopal Sri Ram JCA, who wrote the judgment of the Court of Appeal, said at p770 paras 9 and 10 :

“In the course of his arguments learned counsel for the appellant made a complaint about the findings of the learned judge that the existence of the appellant’s wife was a fiction. Learned counsel drew our attention to the several documents discovered from the backpack (exh. P5) which, he said plainly proved that the wife was not a fictitious person. It was emphasized that these documents were all produced by the prosecution as its exhibits and no attempt was ever made to discredit them in the course of its case. The point here made is that once the judge wrongly found the wife to be fictitious, his finding that Ah Keong was

also fictitious becomes suspect. We have given very careful consideration to this important submission. However we have come to the conclusion that there is no merit in it. We will say why this is so.

It was absolutely essential for the prosecution to introduce the documents in question as part of the unfolding of its case. However in the course of considering the defence explanation it became fairly clear that the story put forward was wholly incredible for the reasons given by the learned judge which we find unnecessary to repeat here. Once the explanation failed on its own inanity, the existence or non existence of the wife bore no relevance to the existence or otherwise of Ah Keong. The learned judge having held that Ah Keong did not exist, the defence of innocent carrier raised by the appellant fell to the ground.”

22. Applying the foregoing findings to the facts of the present case, since the respondent sought to blame only Ah Ba but not his brother Lim Hock Kee, the fact that the trial judge in the present case had found Lim Hock Kee to be fictitious had no relevance.

23. On the question of whether Ah Ba was a real person, the issue was decided purely on the facts, based on the credibility of the witnesses and the inherent probabilities of their testimonies. This is what the learned trial judge said at p213 of the appeal record jilid 2 :

“Berhubung dengan isu kewujudan seorang rakan OKT bernama Ah Ba yang didakwa ada bersama-sama semasa malam kejadian sebelum OKT ditahan, saya mendapat fakta ini adalah rekaan OKT semata-mata. Keterangan OKT atas isu ini adalah tidak konsisten dan saya menerima keterangan pihak serbuan polis yang tidak dicabar

yang menyatakan mereka hanya melihat OKT seorang sahaja di tempat kejadian di Stesyen Minyak Shell berkenaan.”

24. Indeed, the above passage clearly shows that the learned trial judge was alive to the facts and made a finding of fact based on competing versions of events by the witnesses. He could not accept the existence of Ah Ba because in the end he preferred the version given by the prosecution that the respondent was alone at all material times and no one alighted from the respondent’s car. The learned trial judge was entirely correct in the view he had expressed about the quality of the defence evidence. Therefore, there was no failure by the learned trial judge to judicially appreciate the evidence before him. He handled the facts well.

Alternative Ground

25. There is another matter that needs to be considered by this Court. The Court of Appeal had ruled that the alternative ground advanced by the learned trial judge that the respondent was guilty of trafficking because his case came within one or more of the acts set out under the definition of the word “trafficking” in section 2 of the Act is against both authority and principle. This is what it said at p123 para 15 :

“It is clear that **Chow Kok Keong v Public Prosecutor (1998) 2 CLJ 469** tolled the death knell of **Teh Geok Hock v Public Prosecutor (1989) 1 CLJ (Rep) 160**. With it came to an end to the misconception that the definition of trafficking in s.2 of the Act could be proved in aid at any stage of a case to impose criminal liability on an accused.

With respect, the learned judge in the instant case also appears to have overlooked the effect of *Chow Kok Keong*. This is a serious misdirection.”

26. On a closer examination of the two cases, I agree with the learned Deputy Public Prosecutor that the above passage does not represent a correct reading of the cases. In **Teh Geok Hock**, *supra*, the accused was caught with 36.97 grams of heroin in 10 small plastic packets stuffed down his underpants. He contended that he was a severe drug addict and the heroin found was for his own consumption. He was convicted of trafficking in the said drug. The Supreme Court, in rejecting his appeal, held at p162 as follows:

“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 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 to 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 grammes. This invoked the presumption of trafficking under s.37 of the Act. There is the undisputed evidence of concealment (10 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.”

On perusal, there is nothing in **Teh Geok Hock** to suggest that the prosecution could not rely on section 2 to establish trafficking. The case also did not hold that passive possession or self-administration could never be a defence. On the contrary, the finding of trafficking was affirmed on the facts of the case and not on the basis that self-consumption or passive possession could never be invoked as a defence.

27. In **Chow Kok Keong**, supra, the appellant was arrested while having in his custody and control a bag containing 86.6 grams of heroin and was charged with trafficking in the said drug pursuant to section 39B(1)(a) of the Act. In the court below, the appellant had put up a defence that he did not know the contents of the bag, and that the bag was given to him by one Ah Seng who told him that it contained food. The learned trial judge rejected the defence and, having examined the definition of trafficking in section 2 of the Act and the case of **Teh Geok Hock**, convicted the appellant. The appellant appealed. In allowing the appeal the Federal Court substituted the conviction with one for possession of the drug, an offence punishable under section 39A(2) of the Act, and amongst other things, it ruled :

“(5) The learned judge, in relying on the definition of trafficking in section 2 and the decision in **Teh Geok Hock v Public Prosecutor** when rejecting the

appellant's defence, had overlooked the more recent decisions in **Cohen Lorraine Philis & Anor v Public Prosecutor (1989) 1 CLJ (Rep) 18** and **Ng Chai Kem v Public Prosecutor (1994) 2 CLJ 593** 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."

28. It is clear from the above ruling that the defence of self-consumption is available in a prosecution for trafficking in dangerous drugs. But whether it will succeed or not would very much depend on the facts of each case. The then Supreme Court in **Cohen Lorraine**, supra, said at p21 :

"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."

29. Thus, the reliance placed by the Court of Appeal on **Chow Kok Keong**, supra, to hold that the definition section under section 2 of the Act could never be invoked to impose criminal liability, was, with respect, misplaced.

30. A good example where the definition of trafficking in section 2 of the Act was invoked is in the case of **Public Prosecutor v Abdul Manaf Muhamad Hassan (2006) 2 CLJ 129**. There the Federal Court, in order to avoid contravening the bar against the use of double presumptions following the case of **Muhammed Hassan v Public Prosecutor (1998) 2 CLJ 170**, substituted the presumption of trafficking under section 37(da) of the Act relied on by the trial court, to find trafficking in the dangerous drugs by carrying under section 2 of

the Act. The Federal Court ruled that the Court of Appeal ought to have applied the proviso to section 60(1) of the Courts of Judicature Act 1964 and upheld the conviction and sentence notwithstanding the misdirection by the learned trial judge in applying the double presumptions under section 37(d) and (da) of the Act to convict the accused.

31. It is worthy of note that there is only one offence of trafficking under the Act. However, there are several acts that may constitute the offence. If the prosecution is not able to bring its case within one of the acts (see **Ong Ah Chuan v Public Prosecutor (1981) 1 MLJ 64**) under section 2 of the Act, but is nevertheless able to establish the existence of primary facts that draw the presumptions under the Act, then the court is enjoined to draw those presumptions, subject of course to the bar as set out by **Muhammed Hassan**, supra.

32. In the instant case, there was an express finding of actual possession by the learned trial judge and since the weight of the cannabis exceeded the trigger amount of 200 grams or more of the drug, he applied the presumption of trafficking under section 37(da) of the Act against the respondent. The failure of the respondent to even cast a reasonable doubt over the prosecution case, when in fact he had a heavier burden i.e. on the balance of probabilities to rebut the presumption of trafficking, meant that the respondent was rightly convicted by the High Court. With this kind of evidence before the court, the Court of Appeal ought to have found that the conviction was safe.

33. Hence, the appeal is allowed. The orders of the Court of Appeal are set aside whilst the orders of conviction and sentence of the High Court are restored.
34. My learned brothers Alauddin Mohd Sheriff PCA and Augustine Paul FCJ have read this judgment and have expressed their agreement with it.

20 February 2009

(Dato' Bentara Istana Dato' Nik Hashim bin Nik Ab. Rahman)
Judge
Federal Court,
Malaysia

Counsel:

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