

**DALAM MAHKAMAH PERSEKUTUAN MALAYSIA
(BIDANG KUASA JENAYAH)**

RAYUAN JENAYAH NO. 05-31-06 (P)

ANTARA

PARLAN BIN DADEH

... PERAYU

DAN

PENDAKWA RAYA

... RESPONDEN

**(Dalam Mahkamah Rayuan Malaysia
Rayuan Jenayah No. P-05-43-2003)**

KORAM

**ZAKI BIN TUN AZMI, PMR
NIK HASHIM BIN NIK AB. RAHMAN, HMP
AUGUSTINE PAUL, HMP**

19 September 2008

Judgment of Nik Hashim bin Nik Ab. Rahman, FCJ

1. I find myself in complete agreement with the opinions expressed by my learned brother, Augustine Paul, FCJ and I concur that the appeal be dismissed and the conviction and sentence imposed on the appellant are hereby confirmed.
2. However, I wish to add a few words on **Toh Su Kuan v Public Prosecutor (2005) 3 CLJ 740** which was relied upon by the appellant to support his appeal.
3. In that case, the accused was convicted under section 39B of the Dangerous Drugs Act 1952 (the Act) for trafficking in 1,584.93 grams of heroin and sentenced to death.
4. The facts of that case are that the accused was arrested at a bus station and escorted to a police station, whereupon, he was searched and 356 small packets were found on different parts of his body. 62 packets were found in his left shoe; 60 packets in his right shoe; 57 packets were found strapped to his left shin and an equal number tied to his right shin. 60 packets were found tied to his waist in the front and an equal number fastened to his waist at the back. At the trial, the prosecution sought to establish 'trafficking' under section 37(da)(i) of the Act by way of direct and/or circumstantial evidence of 'possession'. The statutory presumption of possession under section 37(d) of the Act was not relied upon. At the conclusion of the trial, the learned trial judge expressed the view that the manner in which the packets were concealed pointed to the accused having

knowledge that the packets contained heroin. The Court of Appeal ruled otherwise, holding that mens rea possession had not been established and thereby acquitted the accused.

5. With respect, I am unable to agree with the Court of Appeal in that case. In my judgment, the learned High Court judge there on the facts correctly found that the accused had knowledge of the heroin. The manner in which 356 small packets were found on different parts of his body irresistibly supports the conclusion that the accused was having mens rea possession of the drugs at the time of his arrest. Likewise in the present appeal, it was none other than the accused in that case who could have concealed the drugs on his body. Therefore, a reasonable tribunal armed with the same facts and properly directing itself would have concluded that the accused was having mens rea possession of the drugs, independently of the presumption of possession under section 37(d) of the Act. Thus, the Court of Appeal's decision in **Toh Su Kuan** was erroneous and should be overruled (see **Tunde Apatira & Ors v Public Prosecutor (2001) 1 MLJ 259 FC**).

19 September 2008

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

Counsel:

For the appellant	:	Gurbachan Singh
Solicitors	:	Bachan & Kartar
For the respondent/ Public Prosecutor	:	Manoj Kurup Deputy Public Prosecutor