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PUBLIC PROSECUTOR v CHAN KAM YOE

CaseAnalysis

[2020] MLJU 2008

Public Prosecutor v Chan Kam Yoe [2020] MLJU 2008

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

AHMAD SHAHRIR MOHD SALLEH JC

CRIMINAL TRIAL NO WA – 45A – 47 – 11/2018

29 November 2020

Fatin Hanum bt Abdul Hadi (Deputy Public Prosecutor) for the prosecution.
*Chang Kai Ping (Choo Meilin and Tan Shir Lay with him) (**David Gurupatham** & **Koay**) for the defence.*

Ahmad Shahrir Mohd Salleh JC:

JUDGMENTIntroduction

[1]The accused is charged with 2 charges under *section 39B(1)(a)* of the *Dangerous Drugs Act 1952* for trafficking in dangerous drugs. One for trafficking in 1,496.3 grammes of Heroin and the other for trafficking in 25.3 grammes of Monoacetylmorphines.
The charges

[2]The charges proffered against the accused read as follows:

First charge:

"Bahawa kamu pada 22.05.2018 jam lebih kurang 3:20 petang, di DHL Chan Sow Lin, PLT 662, Jalan 3 Off Jalan Chan Sow Lin, Sungai Besi, dalam Daerah Cheras, Wilayah Persekutuan Kuala Lumpur, telah mengedar 1,496.3 gram Heroin dan dengan itu kamu telah melakukan satu kesalahan di bawah *seksyen 39B(1)(a) Akta Dadah Berbahaya 1952* dan boleh dihukum di bawah *seksyen 39B(2)* Akta yang sama.".

Second charge:

"Bahawa kamu pada 22.05.2018 jam lebih kurang 3:20 petang, di DHL Chan Sow Lin, PLT 662, Jalan 3 Off Jalan Chan Sow Lin, Sungai Besi, dalam Daerah Cheras, Wilayah Persekutuan Kuala Lumpur, telah mengedar 25.3 gram Monoacetylmorphines dan dengan itu kamu telah melakukan satu kesalahan di bawah *seksyen 39B(1)(a) Akta Dadah Berbahaya 1952* dan boleh dihukum di bawah *seksyen 39B(2)* Akta yang sama.".

The prosecution's case

[3]Izwan Shahrulnizam bin Azizan (PW6) worked as a retail outlet officer at DHL Service Point at Bangsar, Kuala Lumpur. PW6 said that on 17.05.2018 at about 3:45 pm, 2 Chinese males came to Bangsar DHL Service Point to send a shipment to the New South Wales, Australia. The shipment consisted of 8 boxes of absorber struts.

[4]PW6 suggested to both of them to place the 8 units of absorbers struts into a DHL shipment box for the purposes of the shipment. PW6 then provided them with a big yellow-coloured DHL shipment box. Both the Chinese males took out 6 units of the absorber struts out of their respective boxes and placed them individually in the DHL box. The remaining 2 units of absorber struts could fit and so they were left in their respective boxes and put in the DHL shipment box together with the other 6 individual units.

[5]After all the absorbers struts were placed in the DHL shipment box, PW6 got them weighed. According to PW6, the DHL shipment box with the 8 units of absorber struts weighed 26 kilogrammes and the shipment cost chargeable was RM773.00. PW6 said one of the Chinese males made a telephone call and soon after the call, that Chinese male told PW6 that they were agreeable with the shipment charges.

[6]PW6 then proceeded to process the shipment and checked the completed Shipment Declaration Form ("sdf form") which was given to him by one of the Chinese males to make sure that the information in it is in order. PW6 said he found that the named sender for the shipment was a Chinese with an address in Alor Setar, Kedah. PW6 said he needed a sender's address in Kuala Lumpur and that he could not accept it for shipment if the sender's address is in Alor Setar, Kedah. One of the Chinese males then gave his identity card to PW6 and PW6 proceeded to update the sender's address in the system to generate the airway bill.

[7]PW6 said that in generating the airway bill, he did not change the name and telephone number of Jeremiah Lim Jia Shern as the sender in the completed sdf form which was given to him. The name and telephone number of the sender remained the same. PW6 only used the address in Kuala Lumpur provided by one of the Chinese males in the identity card. Once PW6 completed the airway bill, the sdf form was binned.

[8]One of the Chinese males checked the details on the printed airway bill and signed on it after verifying that the details were correct. After the shipment charges were paid, PW6 issued the tax invoice. PW6 later proceeded to repack the DHL shipment box and assigned a bar code to it. The shipment was later taken to DHL Chan Sow Lin by Selva Kanapathy a/l Bab Selvam (PW7).

[9]At DHL Chan Sow Lin, the team leader, Jai Ganesh a/l Kanvathy (PW10), proceeded on the same day at about 5:50 pm to process the shipment which has been delivered by PW7 from DHL Bangsar. PW10 opened the DHL shipment box and took out one of the individual absorber struts and placed it on the table. However, the absorber struts fell to the floor and the top cover seal came off. PW10 tried to put the cover seal back again but as he was about to do that, he saw a red-coloured plastic inside the cylinder cavity of the absorber struts. PW10 said he became suspicious and immediately called his supervisor, Yogandaran a/l Muniandy (PW9) to site. PW10 later informed PW9 about his suspicious find.

[10]PW9 told PW10 to put down the shipment box and to check other shipments first. Between 7:00 pm and 7:30 pm after all other shipments have been checked, PW10 and PW9 returned to that particular shipment and checked it again. After having it checked, they then placed the shipment in the high value cage inside the storage for dangerous goods. The high value cage was secured with a card-access lock and the cage door was secured with a padlock. It was also monitored by CCTV. At that time, it was about 7:46 pm.

[11]PW9 then informed his manager, Mr. Chong and the security manager, Faeez Rezal bin Mokhtar (PW2) about the matter and sent both of them an email about it as well. On 21.05.2018, PW2 called Inspector Lee Boon Thiam and informed him of the shipment which he found to be somewhat unusual. PW2 asked Inspector Lee Boon Thiam to come over to DHL Chan Sow Lin to have a look at the shipment.

[12]On 22.05.2018, Inspector Mohd Faizal bin Jamaludin (PW3) and his raiding team went to Pangsapuri Sri Cempaka at Bandar Puchong Jaya on 22.05.2018. They went in two separate cars. PW3 and two other policemen went in the first car and three other policemen went in the second car. They arrived at Pangsapuri Sri Cempaka at about 10:45 am.

[13]PW3 instructed his team in the second car to look for a Honda Civic bearing registration number WUK 8513 in the vicinity of the Pangsapuri Sri Cempaka. At about 10:55 am, PW3 spotted the Honda Civic. It was parked at the parking lot. PW3 instructed both cars to be parked near the Honda Civic and they later carried out an observation. There was no movement.

[14]At about 1:35 pm, PW3 instructed his team to get out of their respective cars and try to locate the accused's house. They managed to locate the accused's house and when they reached there, PW3 said he saw a lady who was hanging out clothes to dry at the verandah. PW3 approached the lady and introduced himself and his team as policemen. PW3 asked the lady about the Honda Civic at the parking lot and the lady said it was used by his son, the accused. The lady was Phang Pik Fong.

[15]PW3 asked the lady to call his son out and the lady did. Out came the accused. PW3 introduced himself and his team as policemen and arrested the accused. PW3 later called Inspector Lee Boon Thiam to inform him of the

arrest. Moments later, Inspector Lee Boon Thiam arrived at the house together with his team. PW3 and his team carried out a bodily search on the accused but nothing incriminating was found on his person. A further search was also carried out in the house as well as in the Honda Civic but nothing incriminating was found too.

[16]At about 2:15 pm, PW3, Inspector Lee Boon Thiam and their team went to DHL Service Point at Bangsar to meet the manager but they were informed by PW6 that the box they were looking for has been sent to the Chan Sow Lin branch at Sungai Besi, KL. They then made their way to DHL Chan Sow Lin and arrived there at about 3:25 pm.

[17]At DHL Chan Sow Lin, PW9 surrendered to PW3 the DHL shipment box. PW3 examined the shipment box. On the Waybill pasted on the shipment box, the name of the sender was written as “Jeremiah Lim Jia Shern” of No. 44, Jalan 79, Kepong Baru, 52100 Kuala Lumpur. The shipment box was bound for delivery to the New South Wales, Australia.

[18]The shipment box was examined in the presence of the accused. Inside the shipment box, PW3 found a total of 8 units of absorber struts. Concealed inside each strut, PW3 found white powdery substance suspected to be Cocaine wrapped in a red- coloured plastic. The accused and drugs exhibits were later taken to the Cheras Police Contingent Headquarters.

[19]The chemist, Dr, Saravana Kumar a/l Jayaram (PW4) analysed the white powdery substance found in the 8 units of absorber struts. According to PW4, he found the white powdery substance to be Heroin for the total weight of 1,496.3 grammes and Monoacetylmorphines for the total weight of 25.3 grammes. Heroin and Monoacetylmorphines are dangerous drugs as listed in the First Schedule of the Dangerous Drugs Act 1952.
Brief deliberationsContention of the prosecution

[20]In arguing that the prosecution has succeeded in establishing a *prima facie* case against the accused and urging this Court to order the accused to enter his defence, the submissions of the learned DPP may be briefly stated as follows:

(a) that the analysis carried out by PW4 on the white powdery substance found in the 8 units of absorber struts confirmed that they are 1,496.3 grammes of Heroin and 25.3 grammes of Monoacetylmorphines, respectively,

(b) the accused was in possession of the impugned dangerous drugs found in the 8 units of absorber struts which he had attempted to send over to the New South Wales, Australia using the services of DHL at Bangsar,

(c) that the accused had trafficked in the impugned dangerous drugs as he was then “sending” them within the meaning of the term “trafficking” under *section 2* of the *Dangerous Drugs Act 1952*,

(d) there was no break in the chain of evidence as the 8 units of absorber struts containing the impugned dangerous drugs had been placed in a sealed DHL shipment box. The shipment box was taken from the Bangsar branch to the Jalan Chan Sow Lin branch and placed for safe-keeping in the high value cage before it was examined by the raiding officer, Inspector Mohd Faizal bin Jamaludin (PW3). The same shipment box was then surrendered by PW3 to the investigating officer, Inspector Kalidasan a/l V. Rajakumar (PW11) who had later delivered it to PW4 for analysis.

[21]On the ingredient of possession, the learned DPP relied on the rebuttable statutory presumption under *section 37(d)* of the *Dangerous Drugs Act 1952*. The learned DPP submits that the accused had custody and control of the impugned dangerous drugs in question since the 8 absorber struts were registered under the name of the accused as the sender of the items. It was the accused who had brought the 8 absorber struts to DHL Bangsar to be sent over to the New South Wales, Australia. Since the accused had custody and control of the impugned dangerous drugs, possession and knowledge is statutorily presumed.

[22]In response to the contention of the defence that the accused no knowledge of the impugned dangerous drugs found in the 8 units of absorber struts, the learned DPP contends that the accused had refused to cooperate when asked by PW11 to reveal the identity of “Jeremiah Lim Jia Shern” which was written as the sender for the items.

[23]The learned DPP contends that for the period between the time the 8 units of the absorber struts were repacked in the shipment box at DHL Bangsar and the time the shipment box was received at DHL Chan Sow Lin, there was no break in the chain of evidence relating to the identity of the impugned dangerous drugs found stashed in the cylindrical cavity of the 8 absorber struts. The DHL shipment box containing the 8 absorber struts was sealed when it was first repacked at DHL Bangsar.

[24]The evidence shows that, in accordance with company policy, the shipment box was opened for inspection by the team leader at DHL Chan Sow Lin, Jai Ganesh a/l Kanvathy (PW10). After that, it was resealed with a notification pasted on the outer part of the shipment box to give notice to customers of the fact of the inspection. The shipment box then made its way to the high value cage for safe-keeping pending arrival of the investigating officer (PW11). The high value cage was accessible only by certain personnel of DHL, the entrance to the high value cage was secured with a padlock and the key to that padlock was kept by the security guard.

[25]With regard to the absence of any fingerprints on the absorber struts, the learned DPP contends that this was explained by PW11. In his evidence, PW11 said that there were no traceable fingerprints on the absorber struts because the surface of the absorber struts was oily.

Contention of the defence

[26]The learned counsel contends that the prosecution has failed to establish a *prima facie* case against the

accused and that the accused should be acquitted and discharged without having to enter his defence. The submissions of the learned counsel may be summarized as follows:

(a) *the accused was not in possession of the impugned dangerous drugs*

[27]It is the narrative of the prosecution's case that the 8 units of absorbers struts was brought to DHL Bangsar by the accused and another Chinese male. The learned counsel submits that the presence of the accused at DHL Bangsar to arrange for the 8 units of absorber struts to be shipped out to Australia for the sender, Jeremiah Lim Jia Shern, is not sufficient to show that the accused had custody or control of the impugned dangerous drugs. In the absence of any evidence to prove custody or control, the prosecution could not rely on the statutory presumption of possession and knowledge under *section 37(d)* of the *Dangerous Drugs Act 1952*.

(b) *the accused had no knowledge of the impugned dangerous drugs*

[28]There was no evidence to show that the accused had any knowledge that the 8 units of absorber struts were stashed with the impugned dangerous drugs. In fact, the evidence shows that the accused did not know that the absorber struts contained the impugned dangerous drugs. This is clear as the evidence showed (i) that the actual sender of the absorber struts was one Jeremiah Lim Jia Shern and not the accused, (ii) that the accused had no issues when PW6 assisted by taking out the absorber struts from their original boxes and putting them inside the DHL shipment box, (iii) that the accused did not hesitate to provide PW6 with his identity card just that Jeremiah Lim Jia Shern could have a local address instead of the address at Kedah for otherwise the absorber struts could not be shipped out, (iv) that the accused did not even fidget when PW6 inspected the absorber struts at DHL Bangsar, (v) the impugned dangerous drugs were concealed inside the absorber struts and the accused had no way of knowing it, and (vi) that the accused only became worried when he saw some substance inside the cylindrical cavity of the absorber struts during inspection by the police at DHL Chan Sow Lin.

(c) *possibility that the impugned dangerous drugs could belong to Jeremiah Lim Jia Shern or the other Chinese male who was together with the accused at DHL Bangsar*

[29]It is not in dispute that on the sdf form, the name of the sender or shipper is Jeremiah Lim Jia Shern and that the accused went to DHL Bangsar together with another Chinese male. The prosecution did not adduce any evidence to negate the possibility that the impugned dangerous drugs could very well belong to Jeremiah Lim Jia Shern or even the other Chinese male who was together with the accused. As the investigating officer, PW11 could have investigated the address of Jeremiah Lim Jia Shern as printed on the sdf form to ascertain whether or not Jeremiah Lim Jia Shern in fact stayed at the address but this was not done.

[30]At DHL Bangsar, the accused was seen using his handphone to communicate with someone, who may very well be Jeremiah Lim Jia Shern, to get confirmation as to whether the shipment charges were acceptable when PW6 told the accused that it cost RM773.00 to get the absorber struts sent to Australia. This aspect of the case too was never investigated by PW11.

(d) *break in the chain of evidence relating to the identity of the exhibits*

[31]The learned counsel argues that the prosecution did not lead any evidence to show where the DHL shipment box containing the 8 units of absorber struts were kept after PW6 received them from the accused and the other Chinese male and before it was collected by PW7 to be brought to DHL Chan Sow Lin. At DHL Chan Sow Lin, the shipment box was opened by PW2 but soon had it kept aside at the processing area the moment PW2 saw something was not quite right with that shipment. After the shipment box was placed in the high value cage, there was no evidence to show that no one had tempered with it or whether anyone was accessing the high value cage.

[32]The impugned dangerous drugs wrapped in the red- coloured plastic and stashed inside the cylindrical cavity of the absorber struts were only found by the police after the shipment box was taken out from the high value cage. That was a total of 5 days from the date the absorber struts were first brought to DHL Bangsar. It is submitted that the prosecution has failed to ensure that there was no break in the chain of evidence relating to the identity of the impugned dangerous drugs.

(e) *adverse inference under section 114(g) of the Evidence Act 1950 should be invoked against the prosecution*

[33]The prosecution did not produce any evidence to show any footage of the high value cage where the shipment box containing the impugned dangerous drugs was kept despite presence of CCTV in that area. The real possibility that anyone who had the access card to the high value cage and the key to the padlock for the cage door could temper with the exhibits cannot be ruled out unless the prosecution calls evidence in its possession to prove this fact.

[34]The exhibits were received and kept at the Cheras Police District Headquarters exhibits store by one Corporal Kong after they were taken by PW11 from the chemistry department after analysis. The learned DPP merely tendered a photocopy of the exhibits store register through PW11 and chose not to call Corporal Kong and said that Corporal Kong had since retired from service. But there was no evidence adduced by the prosecution to show that Corporal Kong had in fact retired. This amounts to withholding of evidence at the expense of the defence.

[35]PW11 did not carry out any investigation to determine whether Jeremiah Lim Jia Shern was real or fictitious. The evidence shows that the sdf form carried the address of Jeremiah Lim Jia Shern before it was changed into the accused's address. The sdf form even bore a telephone number for Jeremiah Lim Jia Shern. These are all crucial for investigations but PW11 chose to act on them.

Analysis and findingsPrima facie case

[36]In order to prove a *prima facie* case against the accused at the close of prosecution, *section 180(4)* of the *Criminal Procedure Code* requires the prosecution to adduce credible evidence to prove each and every ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

[37]It was recently observed by the Federal Court in *Abdullah Atan v. PP* [2020] 9 CLJ 151; F; *[2020] 6 MLJ 727*;

; [2020] 6 MLRA 28; ; [2020] 7 AMR 1, that in the scheme of *section 180(4)* of the *Criminal Procedure Code*, the credible evidence required to prove each and every ingredient of the offence may either be—

(a) by adducing credible direct evidence of that ingredient;

(b) by drawing inferences of fact, i.e., adducing credible circumstantial evidence, from which the ingredient can be inferred; or

(c) by invoking presumptions of law, i.e., adducing credible evidence of the relevant basic facts, to invoke a statutory presumption that the ingredient exists.

[38]With regard to evaluation of evidence at the close of prosecution, it is instructive to refer to the decision of the Federal Court in *Magendran Mohan v. PP* [2011] 1 CLJ 805; FC; *[2011] 6 MLJ 1*; ; [2012] 5 MLRA 333; ; [2011] 2 AMR 680. In delivering the decision of the apex Court, His Lordship Alauddin Mohd Sheriff PCA made the following remarks:

> "[25] The test at the end of the prosecution's case is "*prima facie* case" based on a maximum evaluation of evidence. The evidence has to be scrutinised properly and not perfunctorily, cursorily or superficially. If the evaluation of the evidence results in doubts in the prosecution's case, then a *prima facie* case has not been made out. The defence ought not to be called merely to clear or clarify such doubts.".

[39]The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative, then a *prima facie* case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If there is any such doubt, there can be no *prima facie* case. (See: *Balachandran v. PP* [2005] 1 CLJ 85 FC; ; *[2005] 2 MLJ 301*; ; [2004] 2 MLRA 547; ; [2005] 1 AMR 321).

Ingredients of the offence

[40]In a charge for trafficking in dangerous drugs under *section 39B(1)(a)* of the *Dangerous Drugs Act 1952*, it is incumbent on the prosecution to prove the following ingredients:

(a) that the subject matter of the charge is dangerous drugs as defined under the Dangerous Drugs Act 1952;

(b) that the accused was in possession of the dangerous drugs which are the subject matter of the charge; and

(c) that the accused was trafficking in the dangerous drugs.

Nature and weight of dangerous drugs

[41]It is well-established that there is no necessity for the chemist to provide detailed evidence of the analysis he carried out in determining the nature and weight of the impugned dangerous drugs. If the evidence of the chemist is

credible and in the absence of any serious challenge mounted by the defence, the Court is entitled to accept the chemist's evidence on its face value.

[42]In *Balachandran v. PP* [2005] 1 CLJ 85 FC; ; [2005] 2 MLJ 301; ; [2004] 2 MLRA 547; ; [2005] 1 AMR 321, the Federal Court held, *inter alia*, as follows:

> "It has been held by the trilogy of the (then) Supreme Court cases of *Munusamy v. PP* [1987] CLJ 221 (Rep); ; [1987] 1 CLJ 250; ; [1987] 1 MLJ 492, *PP v. Lam San* [1991] 1 CLJ 391 (Rep); ; [1991] 3 CLJ 2410; ; [1991] 3 MLJ 426 and *Khoo Hi Chiang v. PP* [1994] 2 CLJ 151 that the court is entitled to accept the evidence of the chemist on its face value without the necessity for him to go into details of what he did in the laboratory step by step unless it is inherently incredible or the defence calls evidence in rebuttal by another expert. The rationale of this view is lucidly explained in *Khoo Hi Chiang v. PP* [1994] 2 CLJ 151 where it was held that the evidence of a chemist on dangerous drugs analysed by him is one of fact and not of opinion.".

[43]In the present case, the nature and weight of the impugned dangerous drugs for both charges are not disputed by the defence. I have also considered the evidence of PW4 and found that —

(a) in respect of the first charge, the prosecution has succeeded in proving that the subject matter of the charge is Heroin weighing the total of 1,496.3 grammes; and

(b) in respect of the second charge, the prosecution has succeeded in proving that the subject matter of the charge is Monoacetylmorphines weighing the total of 25.3 grammes, and that Heroin and Monoacetylmorphines are dangerous drugs as listed in the First Schedule of the Dangerous Drugs Act 1952.

Possession

[44]In attempting to prove possession by the accused of the impugned dangerous drugs, the prosecution was not relying on direct evidence but sought to invoke the rebuttable statutory presumption under *section 37(d)* of the *Dangerous Drugs Act 1952*. In this regard, in support of her submissions the learned DPP contends that the following facts, *inter alia*, form the basis for invoking the presumption of possession as well as knowledge:

(a) that the 8 absorbers struts which was sent by the accused to DHL Bangsar for shipment to the New South Wales, Australia contained the impugned dangerous drugs;

(b) that it was the accused himself who had completed the sdf form with the name "Jeremiah Lim Jia Shern" as the sender, having an address at Alor Setar, Kedah;

(c) that the accused hesitated to hand over his identity card to PW6 to have his address in Kuala Lumpur recorded;

(d) that the accused had the power to deal with the impugned dangerous drugs;

(e) that the static snapshot images of the CCTV recording confirmed that it was the accused who had dealt with PW6 when he sent the 8 absorber struts for shipment to the New South Wales, Australia.

[45]In evaluating the evidence against the background of these primary facts as relied upon by the prosecution to prove custody or control of the impugned dangerous drugs, I made the following findings of facts:

(a) that the accused was together with another Chinese male when they both brought the absorber struts to DHL Bangsar to be sent to the New South Wales, Australia,

(b) at DHL Bangsar, PW6 took out the 8 units of absorber struts out of their respective original boxes for inspection according to DHL's policy. Both the accused and the other Chinese male did not object to it and were calm during the inspection,

(c) during the inspection, PW6 found that the absorber struts were wrapped in transparent plastic. PW6 merely carried out a visual inspection without opening up the transparent plastic wrap,

(d) at the time when PW6 examined the absorber struts, there was no evidence to show whether the transparent plastic wraps were the original packaging or whether they have been opened up,

(e) when the absorber struts were produced in Court for identification, PW6 agreed that he could only identify them because they looked the same but could not confirm whether they were the same ones which he had examined at DHL Bangsar,

(f) the sender for the absorber struts was Jeremiah Lim Jia Shern and the address of the accused was used for the shipment because PW6 said it needed a local (Kuala Lumpur) address as a matter of company policy,

(g) after PW6 informed the accused of the shipping charges, the accused made a call to someone to get confirmation as to whether the charges are acceptable and only after that call did the accused tell PW6 to proceed with the shipment,

(h) there was no investigation carried out by the investigating officer (PW11) on the name "Jeremiah Lim Jia Shern" or the original address of the sender at Alor Setar, Kedah.

[46]The presumption of possession and knowledge under *section 37(d)* of the *Dangerous Drugs Act 1952* requires the prosecution to prove the existence of certain basic facts to trigger its application. In *Muhammed Hassan v. Public Prosecutor* [1998] 2 CLJ 170; FC; *[1998] 2 MLJ 273*; ; [1997] 2 MLRA 311; ; [1998] 1 AMR 829, the apex Court reiterated this principle as follows:

> "In our view, there is a clear undeniable distinction between the word "deemed" used in *s. 37(d)* and the word "found" employed in *s. 37(da)* of the Act. The 'deemed' state of affairs in *s. 37(d)* (i.e., deemed possession and deemed knowledge) is by operation of law and there is no necessity to prove how that particular state of affairs is arrived at. There need only to be established the basic or primary facts necessary to give rise to that state of affairs i.e., the finding of custody or control. Such presumptions as under *s. 37(d)* (and, for that matter, the one under *s. 37(da)*) are sometimes described as

> "compelling presumptions" in that upon proof of certain facts by a party (in our present case, proof of custody or control in *s. 37(d)* by the prosecution), the court **must** in law draw a presumption in its favour (i.e., presumptions of possession and knowledge) unless the other party proves the contrary. Such a presumption has the compelling force of law. It is a deduction which the law requires the trial court to make. On the other hand, the word "found" in the opening phrase of *s. 37.(da)* connotes a finding after a trial by the court.".

[47]In the Singapore case of *Leow Nghee Lim v. Regina* [1955] 1 LNS 53; ; *[1956] 1 MLJ 28*; ; [1955] 1 MLRH 614, Justice Taylor explained the term "custody" in the following manner:

> "Custody means having care or guardianship; goods in custody are in the care of the custodian and, by necessary implication, he is taking care of them on behalf of someone else. You cannot take care of goods unless you know where they are and have the means of exercising control over them. Custody therefore implies knowledge of the existence and whereabouts of the goods and power of control over them, not amounting to possession.".

And further in the judgment, His Lordship illustrated the meaning of the term "control" as follows:

> "Control must be proved as a fact and it must arise from the relation of the person to the goods, irrespective of whether they are contraband. An example may make this clearer. Suppose that one of the assistants in this case smoked a particular brand of tobacco, not sold in the shop and to the knowledge of the accused, kept it in that drawer. No doubt the accused could, at any time, tell the assistant to keep his tobacco somewhere else. He could resume possession of drawer. But so long as he allowed the assistants to keep their small personal things in the drawer, the things were in their control, not his. He could not reasonably order them to throw away harmless tobacco, consistently with the existing arrangement. The argument for control is based solely on the contraband nature of the thing — not on the circumstances in which it was kept.".

[48]In analysing the evidence, I find that the accused did not object when PW6 told him that the absorber struts must be inspected first. The accused even allowed PW6 himself to take out some of the absorber struts from the boxes during the inspection. Now, if the accused knew that there were drugs concealed in the cylindrical cavity of the absorber struts, the accused would not have allowed PW6 to handle them during the inspection. Any wrong move by PW6 in handling the absorber struts may cause the hidden drugs to be accidentally exposed. The accused together with the other Chinese male can easily take them out of the boxes carefully for PW6 to inspect but this was not the case.

[49]The name of the true sender of the absorber struts remained as Jeremiah Lim Jia Shern. PW6 in his evidence said that when he generated the airway bill into the system at DHL Bangsar, he only asked from the accused for a local address as per his identity card. Once generated, PW6 said the airway bill carries the name of Jeremiah Lim Jia Shern as the sender, the telephone number of Jeremiah Lim Jia Shern (016 – 626 6274) and the address of the accused in Kuala Lumpur instead of the address of Jeremiah Lim Jia Shern in Alor Setar, Kedah.

[50]It is observed from the evidence that when asked for a Kuala Lumpur address, the accused could simply turn

around and leave the DHL premises if in fact he was in custody or control of the impugned dangerous drugs. But he did not. Instead, he gave his identity card for his address to be taken by PW6 as the address of the sender. By doing so, he was obviously leading the impugned dangerous drugs to be traceable back to him. If the accused knew what he was carrying were in fact dangerous drugs, would he give his identity card and allow his address to be taken as the address of the sender? I do not think that would be the case.

[51]The search list shows that 2 units handphone were seized from the accused when he was arrested. They are as follows:

(a) a black Nokia registered to the number 016 – 626 7082, and

(b) an iPhone registered to the number 019 – 337 5526,

but there was no handphone registered to the number 016 – 626 6274 seized. There was no evidence offered by the prosecution to show whether any investigation has been carried out to determine to whom the number 016 – 626 6274 was registered to. Despite agreeing with the suggestion of the defence that the accused did inform him that he was asked by someone to send the absorbers struts to DHL for delivery, PW11 in his evidence said that he did not carry out any investigation pertaining to Jeremiah Lim Jia Shern.

In this regard, this is the evidence of PW11 in cross-examination:

"Waybill (Eksibit P55) dirujuk.

Soalan: Siapa nama shipper dalam waybill ini?

Jawapan: Nama shipper dalam waybill ini ialah Jeremiah Lim Jia Shern.

Soalan: Jeremiah Lim Jia Shern ini merupakan shipper atau sender sebenar.

Jawapan: Tidak setuju.

Soalan: Awak tidak buat siasatan terhadap nama Jeremiah Lim Jia Shern.

Jawapan: Setuju.

Soalan: Awak tidak membuat siasatan langsung dalam sistem pihak polis.

Jawapan: Setuju.

Soalan: Sekiranya awak buat siasatan dalam sistem PDRM atau JPN, awak dapat mengesan Jeremiah Lim Jia Shern ini.

Jawapan: Tidak setuju.

Soalan: Akibat daripada awak tidak membuat siasatan dalam sistem PDRM atau JPN, siasatan awak tidak lengkap.

Jawapan: Tidak lengkap.

Soalan: Awak juga tidak siasat OKT telah buat panggilan kepada siapa semasa dalam DHL Bangsar.

Jawapan: Tidak setuju.

Soalan: OKT memang ada beritahu awak bahawa dia disuruh oleh orang lain mengepos kotak tersebut.

Jawapan: Setuju.

Soalan: Tapi awak tidak buat siasatan berkenaan maklumat ini.

Jawapan: Tidak setuju.

Soalan: Apa siasatan yang dibuat oleh awak?

Jawapan: Tiada apa-apa siasatan yang dapat dilakukan.

Soalan: Sepatutnya Jeremiah Lim Jia Shern memang wujud orang ini.

Jawapan: Tidak setuju.

Soalan: Apa bukti Jeremiah Lim Jia Shern ini tidak wujud?

Jawapan: Tiada.”.

[52]PW6 said the sdf form carried the name, address and telephone number of Jeremiah Lim Jia Shern when he received it at DHL Bangsar from the accused. When PW6 generated the airway bill, he only changed the address to that of the accused because it was the policy of DHL requiring a local address. PW6 said that the accused made a telephone call when he informed the accused that the shipping would cost RM773.00 and the accused only agreed to it after making that call. The accused did not even flinch when PW6 said he had to inspect the absorber struts.

[53]PW3 seized 2 units of handphones from the accused but none of them was registered to the number which was written on the sdf form and subsequently recorded in the generated airway bill. PW11 did not investigate whether any of the 2 units of handphones seized from the accused was in fact used to make a call to the number recorded

in the airway bill to be that of Jeremiah Lim Jia Shern (016 – 626 6274) or whether that particular number exist at all. Surely a quick check with the relevant telecommunication services provider can easily clear the air but this was not done. There was even no explanation as to why it was not done.

[54]The cumulative effect of these evidence strongly suggests the likelihood that Jeremiah Lim Jia Shern was not fictitious and could well be the true sender could not be ruled out. Further, the fact that the accused did not immediately agree to the shipping charges and had to make a call to someone before confirming the charges were acceptable and proceeded with the shipment tends to show that the accused could not deal with the impugned dangerous drugs as he deems fit.

[55]It must be remembered that PW6 in his evidence said that when he told the accused that the shipping charges was RM773.00, the accused said to him that he needed to call someone for confirmation and the accused did make that call. Only after making that call did the accused confirm that the delivery is a go. That itself, to mind, negates the element of control on the part of the accused.

[56]The person to whom the call was made by the accused could be easily checked by PW11 to alleviate any lingering doubts as to whether the accused made a call to Jeremiah Lim Jia Shern. But unfortunately, this was not done. This has a direct bearing on the question of whether the accused had custody or control of the impugned dangerous drugs. In the absence of these crucial evidence, I find that the most reasonable deduction which may be made in the sum of all the evidence in this regard is that the accused had no control over the impugned dangerous drugs. If the accused did not have control over the impugned dangerous drugs and was not in a position to deal with the impugned dangerous drugs as he wished, the necessary requirements for the application of the presumption of possession under *section 37.(d)* of the *Dangerous Drugs Act 1952* have not been established.

Trafficking

[57]The prosecution takes the position that the ingredient of “trafficking” has been established since the accused was the one who was seen carrying the boxes of absorber struts which were later found to contain the impugned dangerous drugs. To this end, the learned DPP relies on the definition of “trafficking” under *section 2* of the *Dangerous Drugs Act 1952*.

The term “trafficking” in *section 2* of the *Dangerous Drugs Act 1952* is defined as follows:

> “**Interpretation**
>
> **2.** In this Act, unless the context otherwise requires —
>
> “trafficking” includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, **carrying**, sending, delivering, procuring,

supplying or distributing any dangerous drug otherwise than under the authority of this Act or the regulations made under the Act;".

[58]The opening words of *section 2* of the *Dangerous Drugs Act 1952* begins with the words, "… unless the context otherwise requires". It has been held that this expression must be understood to mean that the foregoing part of the definition is intended to apply only if the context permits for its application. (See: *Dato Menteri Othman Baginda & Anor v. Dato Ombi Syed Alwi Syed Idrus* *[1981] 1 MLJ 29* FC). It has also been held that it is a well-established rule of construction that a material word in a statute must bear the same meaning unless the context otherwise requires. (See: *Public Prosecutor v. Tan Tatt Eek & Other Appeals* [2005] 1 CLJ 713 FC; ; *[2005] 2 MLJ 685*; ; [2005] 2 AMR 353). It has also been held that the definition of the term "trafficking" listed under *section 2* is subject to the requirement of context. If the context appears to have intended a different meaning from that appearing in the definition, the meaning given in *section 2* will not apply. (See: *Syed Ali Syed Abdul Hamid & Anor v. Public Prosecutor* *[1982] 1 MLJ 132* FC).

[59]In *PP v. Abdul Manaf Muhamad Hassan* [2006] 2 CLJ 129 FC, the Federal Court explained that the mere act of carrying is not sufficient to constitute the offence of trafficking within the meaning of *section 2* of the *Dangerous Drugs Act 1952*. In *Soorya Kumar Narayanan & Anor v. PP* [2012] 9 CLJ 141; FC; *[2013] 1 MLJ 1*; ; [2013] 1 MLRA 557, the Federal Court again reiterated the same principles of law.

[60]The Federal Court in *Abdul Manaf's* case made reference to the decision of the Privy Council in the Singapore case of *Ong Ah Chuan v. PP* *[1981] 1 MLJ 64* PC. In *Ong Ah Chuan*, the meaning of the definition "traffic" under the then *section 3* of the Misuse of Drugs Act 1973 of Singapore was considered.

[61]In *PP v. Herlina Purnama Sari* [2016] 1 LNS 1855; FC; [2017] 1 MLRA 499, the Federal Court had the occasion to deal with the definition of "trafficking" under section of the Dangerous Drugs Act 1952. In ***Herlina Purnama Sari***, it was held, *inter alia*, that it was a misconception and contrary to the definition of "trafficking" under *section 2* of the *Dangerous Drugs Act 1952* to hold the view that in order to constitute trafficking there must be an overt act in all cases. In delivering the decision of the apex Court, His Lordship Raus Sharif PCA (later CJ) said as follows:

"[37] The second error was the trial judge's finding that to constitute trafficking the *mens rea* possession must be accompanied by some overt act by the respondent. It is unfortunate that the Court of Appeal had also committed a similar error in agreeing with the finding of the trial judge by holding that "without any evidence that would show an overt act of one or other of the kind specified in the definition of trafficking in *s. 2* of Act 234 or specifically of conveying, transporting, carrying, moving or promoting from one place to another in the sense of doing so to promote the distribution of the drug to another", the respondent could not be a trafficker but merely had passive possession of the impugned drugs.

[38] With respect, the proposition that there must be in all cases an overt act in order to constitute trafficking is misconceived. It would be contrary to the definition of trafficking as provided for under *s. 2* of the Act. In the present case,

there is no dispute that the respondent did not try to do anything, when she was approached by PW4, to disassociate herself with the impugned drugs. In this type of situation, this court in *Teh Hock Leong v. PP* [2008] 4 CLJ 764; ; [2008] 1 MLRA 548 had held that:

> "[5] It is our view that in order to draw a favourable inference from the appellant's contemporaneous conduct, his action or inaction must be examined in the light of the situation at the material time. The area where the appellant was confronted by PW5 was the arrival gate of an incoming flight in the KLIA. This was the only exit point where passengers disembarking the plane can enter the KLIA terminal. It is common knowledge that the area was tight and restricted with hardly any room for the appellant to make a successful escape even if he had tried. From here the appellant was then taken by PW5 and his men to PW5's office in the KLIA. The approximate walking distance was 600- 800 metres. Here again the appellant's chances of a quick getaway were minimal since he was escorted and was within the restricted vicinity of the KLIA building. And, if the appellant were to attempt to throw away or disassociate himself with the backpack during this entire duration described it would evidently be noticeable. Of course, since the drugs were so cunningly concealed, there could be no necessity to take such drastic actions which may attract instant suspicion. So against these circumstances, the appellant's docile conduct throughout the period described could not have inferred an absence of knowledge of the said drugs. For this reason, there is no misdirection by the courts below."

[39] ***We are of the view that whether or not a person is a trafficker within the definition of s. 2 of the Act is dependent on the facts and circumstances of a given case.*** In this case, it is not in dispute that when the respondent was arrested she was carrying the luggage bag which amongst other things contained the impugned drugs. The respondent was apprehended in the act of carrying from one place to another a large amount of dangerous drugs. It is in evidence that the respondent was unaccompanied by any person when she carried the luggage bag. The luggage bag was registered in the respondent's name when she checked in at the Air Asia check-in counter. The impugned drugs were found hidden in the two boxes. In fact, the drugs were neatly and securely concealed from view in both the boxes. We are of the view that the manner in which the impugned drugs were concealed in the luggage bag showed that the respondent knew the existence of the drugs there, and evinced the intention of and careful planning by the respondent to conceal the impugned drugs to avoid and escape detection (*PP v. Abdul Rahman Akif* [2007] 4 CLJ 337; ; [2007] 1 MLRA 568 and *Teh Hock Leong v. PP* [2008] 4 CLJ 764; ; [2008] 1 MLRA 548).".

[Emphasis added]

[62] The following principles may be distilled from the case of ***Herlina Purnama Sari***:

(a) it is not necessary in all cases to prove the existence of an overt act in order to constitute trafficking within the meaning of the definition under *section 2* of the Act,

(b) whether or not a person is a trafficker within the definition of *section 2* of the Act must depend of the facts and circumstances of the case.

[63] In the present case, the accused was seen carrying the absorber struts to DHL Bangsar to be shipped out to Australia. The documented sender was Jeremiah Lim Jia Shern. The accused only provided his residential address

in Kuala Lumpur to satisfy the policy requirements of DHL, not because of the fact that he was the sender. It is accepted that he was "carrying" the absorber struts. But if that is the manner the definition under *section 2* is intended to encompass, should the word "sending" in the same definition be more appropriate? Afterall, it is not the thrust of the prosecution's case that the impugned dangerous drugs belonged to Jeremiah Lim Jia Shern or some other person.

[64]On another perspective, in order for the act of "carrying" to fulfil the intent of the definition under *section 2* to amount to "trafficking", the accused must have knowledge that what he was carrying was in fact, dangerous drugs. Now, in the present case, the accused was not caught while carrying the drugs on his way to meet his dealer. The accused was carrying the absorber struts which were found to contain the impugned dangerous drugs to a courier services provider to be sent to Australia. There was no evidence offered by the prosecution to show, either directly or circumstantially, that the accused had knowledge that the absorber struts which he was carrying in the boxes contained dangerous drugs.

[65]By comparison, the word "trafficking" also carries another meaning under different provisions of the Dangerous Drugs Act 1952. For example, under *section 37(da)*, a person is presumed to be trafficking in dangerous drugs if he is found to be in possession of the minimum statutory weight of a certain type of dangerous drugs. This provision criminalises the act of "possession" as trafficking albeit on the basis of a rebuttable statutory presumption. Still, it differentiates a situation whereby mere possession of dangerous drugs exceeding the minimum statutory weight would constitute trafficking independent of other acts of "trafficking" as listed in the definition under *section 2*. Of course, possession in this sense too requires knowledge.

[66]No doubt the Federal Court in ***Herlina Purnama Sari*** held that there is no necessity to prove an overt act in all cases where the prosecution relies on the definition under *section 2* of the *Dangerous Drugs Act 1952* to prove the element of trafficking. However, it must also be noted that the apex Court has qualified this by saying that "whether or not a person is a trafficker within the definition of *section 2* of the Act is dependent on the facts and circumstances of a given case.". If the mere act of "carrying" would be sufficient in itself to fulfil the definition in question, the facts and circumstances giving rise to the act of "carrying" would not matter then.

[67]In the circumstances of the present case and having considered the evidence relied upon by the prosecution to prove the ingredient of trafficking by way of the term "carrying" under *section 2* of the *Dangerous Drugs Act 1952*, I find that in this case, the act of "carrying" by the accused did not amount to trafficking as defined.

Break in the chain of evidence

[68]In *Mohd Osman Pawan v. Public Prosecutor* [1989] 1 CLJ Rep 108 SC; ; *[1989] 2 MLJ 110*; ; [1989] 1 MLRA 67, the Supreme Court made it succinctly clear that where there is doubt as to the identity of the exhibits, it is incumbent on the prosecution to provide evidence to show that the chain of evidence is intact. In delivering the judgment of the then Supreme Court, His Lordship Mohd Yusoff Mohamed SCJ held, *inter alia*, as follows:

"It is also observed that the law is clear that it is unnecessary to call every witness to ensure that there is no break in the chain of evidence (See: *Su Ah Ping v. Public Prosecutor* [1979] 1 LNS 100. But when there is doubt as to the identity of the exhibits, as in this case, failure to adduce evidence to provide the necessary link in the chain of evidence would be fatal to the prosecution case. (*Teoh Hoe Chye & Yap Teong Tean v. Public Prosecutor* [1987] 1 CLJ (Rep) 386 386).".

[69]In explaining the importance of the prosecution to convince the Court that there is no break in the chain of evidence relating to the identity of the exhibits and in that process proving beyond a reasonable doubt that the exhibits that were recovered are the same as the ones produced in court as evidence, the Court of Appeal in *Gunalan Ramachandaran & Ors v. PP* [2004] 4 CLJ 551 CA; ; *[2004] 4 MLJ 489*; ; [2004] 2 MLRA 180; ; [2004] 6 AMR 189, made the following remarks:

"First, by way of a general observation, I am of the view that, in a drug trafficking case what is important is that it must be proved that it is the substance that was recovered that was sent to the chemist for analysis and it is that same substance that is found to be heroin or cannabis *etc.* and it is in respect of that substance that an accused is charged with trafficking. So, the chain of evidence is more important for the period from the time of recovery until the completion of the analysis by the chemist. Even then it does not necessarily mean that if the exhibit is passed from one person to another, every one of them must be called to give evidence of the handing over from one person to another and if there is a break, even for one day, the case falls. There should be no confusion between what has to be proved and the method of proving it. What has to be proved is that it is the substance that was recovered that was analysed by the chemist and found to be heroin, cannabis *etc.*, and it is for the trafficking of that same substance that the accused is charged with.

The proof of the chain of evidence is only a method of proving that fact. The fact that there is "a gap", does not necessarily mean that that fact is not proved. It depends on the facts and circumstances of each case. There may be a gap in the chain of evidence. But, if for example, during that "gap" the exhibits are sealed, numbered with identification numbers, there is no evidence of tampering, there is nothing that would give rise to a doubt that that exhibit is the exhibit that was recovered in that case and that was analysed by the chemist, the fact that there is a gap, in the circumstances of the case, may not give rise to any doubt of that fact.

The second period is from the time that it was received back from the chemist until it is produced in court. In my view, the chain of evidence is less important during this second period. This is because, as far as I am aware, there is no law that the exhibit recovered must be produced in court and if not the prosecution's case must necessarily fall. It may or it may not, again depending on the facts and the circumstances of each case. Even in a murder trial, the dead body is not produced in court. In *Sunny Ang v. Public Prosecutor* *[1966] 2 MLJ 195* (FC) the body of the victim was not even recovered, yet the accused was convicted of murder. What the prosecution has to prove is that a particular person had died and the accused had caused his death. The death of the victim is not proved by looking at his remains in court, but by evidence of witnesses, the medical report, the identity card, the photographs and so on. Similarly, in a drug trafficking case, the drug may be lost or destroyed subsequent to it having been analysed by the chemist, there may be a gap in the chain of the people keeping custody of it subsequent to it having been analysed by the chemist until the date of trial, but so long as there is no doubt that the drug analysed by the chemist was the same one that was recovered in the case and it is in respect of that drug that the accused is charged, and there is a reasonable explanation as to how it was lost or destroyed or the reason for the gap, there is no reason why the prosecution's case should fall.".

[70]The accused sent the absorber struts for shipment to DHL Bangsar on 17.05.2018 at about 3:45 pm. After the inspection by PW6, the absorber struts were put in the DHL shipment box and sent to DHL Chan Sow Lin on the same day at about 4:17 pm. This was the first timeline.

[71]In the present case, the impugned dangerous drugs were first discovered on 17.05.2018 by PW10 at DHL Chan Sow Lin when he was inspecting the absorber struts which were due for shipment to Australia. It was about 5:50 pm then. It was at this point in time that PW10 sensed something amiss when one of the absorber struts fell to the floor causing the top cover seal to come off. PW10 could see what appeared to be a red-coloured plastic stuffed inside the cylindrical cavity of the absorber strut. PW10 then get hold of his supervisor, PW9. PW9 came over and after verifying what PW10 told him, asked PW10 to put down that absorber struts and get on with other parcels first. This was the second timeline.

[72]Later, PW10 and PW9 returned to have another look at the absorber struts. PW10 estimated the time to be between 7:00 pm to 7:30 pm on the same day (17.05.2018). Nothing much was done at that time except getting the absorber struts put back in the shipment box and then getting them stored in the high value cage. By the time they were done, it was about 7:46 pm on 17.05.2018. This was the third timeline.

[73]On 22.05.2018, Inspector Lee Boon Thiam (PW3) and their team went to DHL Chan Sow Lin to examine the shipment box. They arrived at about 2:15 pm. The examination was done in the presence of the accused. This was the first time when the white powdery substance which was later confirmed to be the impugned dangerous drugs was discovered. This was the fourth timeline.

[74]In the first timeline at DHL Bangsar, there was no evidence as to how many absorber struts were received by PW6 at DHL Bangsar. The shipping charges were calculated based on the weight of the shipment box and not the number of items shipped inside the shipment box. The second timeline at DHL Chan Sow Lin occurred about 2 hours after the first timeline. In the second timeline, the number of the absorber struts in the shipment box was not counted too. When the absorber struts examined by PW10 fell to the floor and its top cover seal came off exposing a red-coloured plastic stuffed inside the cylindrical cavity of the absorber strut, it was just put aside at the examination bay on the instructions of PW9. The third timeline occurred about 4 hours after the first timeline. Similarly, how many absorber struts were in the shipment box was not counted. The fourth timeline occurred 4 days after the first timeline. This was the first time a proper inspection was carried out and the impugned dangerous drugs was found inside the cylindrical cavity of each absorber strut.

[75]There was no evidence adduced by the prosecution as to how the shipment box containing the absorber struts were kept at the examination bay in the second timeline. In his testimony, PW10 referred to the photographs marked as Exhibit P28(37), (38), (39) and (40) as the examination bay area where the shipment box containing the

absorber struts were put down. Looking at the photographs, it was an open working area. How was the shipment box kept there? Was it attended to or was it simply left there unattended? There was no evidence to this effect.

[76]The absorber struts did not bear any distinctive marks for identification. There was no evidence to demonstrate how the shipment box which was left in the open at the examination bay for approximately 2 hours was secured to eliminate the possibility of it being messed-up or tempered with by others. The shipment box containing the absorber struts were placed in the high value cage at DHL Chan Sow Lin for a period of 4 days before PW3 and his team arrived and carried out a full inspection. There were about 100 workers at DHL Chan Sow Lin. The high value cage was accessible by other employees too who had kept shipments under their supervision there. Every access to the high value cage was recorded but the record was not produced as evidence. In this regard, the Security Manager of DHL Chan Sow Lin, Faeez Rezal bin Mokhtar (PW2), in cross-examination testified as follows:

> “Saya tidak ingat bagaimana saya minta Yogan (PW9) simpan bungkusan itu ke dalam sangkar.
>
> Saya tidak ingat sama ada saya ada minta Yogan simpan bungkusan itu ke dalam sangkar.
>
> Soalan: Dari 17.05.2018 hingga 22.05.2018 apabila polis datang ke DHL, awak tidak dapat pastikan di mana bungkusan tersebut.
>
> Jawapan: Setuju.
>
> Soalan: Berapa orang di DHL Chan Sow Lin yang ada akses kepada sangkar itu?
>
> Jawapan: Saya sendiri ada akses. Berapa ramai yang ada akses – saya tiada maklumat tersebut, sekurang-kurangnya Pengurus, Penyelia atau Ketua Kumpulan. Maklumat itu ada di sangkar.
>
> Soalan: Sekurang-kurangnya 4 orang atau lebih yang ada akses kepada sangkar itu.
>
> Jawapan: Setuju.
>
> Sangkar itu kebiasaannya diguna untuk menyimpan barang yang DHL klasifikasi sebagai barang bernilai atau barang yang perlukan siasatan lanjut.
>
> Soalan: Memang terdapat banyak barang dalam sangkar itu.
>
> Jawapan: Setuju.
>
> Soalan: Sebab ada banyak barang lain, orang lain juga akan masuk ke dalam sangkar itu untuk buat urusan lain.
>
> Jawapan: Setuju.”.

[77]I find that there is no evidence adduced by the prosecution for this Court to be satisfied that the absorber struts which were sent by the accused to DHL Bangsar on 17.05.2018 were the very ones inspected by PW3 at DHL Chan Sow Lin on 22.05.2018. The security seal tape on the shipment box could not be of assistance as one would not be able to tell whether it was the original or a re-sealed security seal tape. Even Detective Corporal Edwynsor Edward anak Enggu (PW8) who went to DHL Chan Sow Lin together with PW3 could not tell if the shipment box which was produced in Court as an exhibit was re-sealed again with the security seal tape when in fact it was re-sealed by PW10. In the circumstances, I am not satisfied that the impugned dangerous drugs produced in Court are the very same one found stashed in the cylindrical cavity of the absorber struts.

Other unsatisfactory features of the prosecution's case

[78]The accused was singly charged with the offence of trafficking whereas the evidence shows that at the material time, he had brought the absorber struts to DHL Bangsar together with another Chinese male. What happened to that Chinese male? Why was he not charged together with the accused as well? Was it because the investigating officer (PW11) could not locate his whereabouts? If that was the case, the charge against the accused should have been a joint charge together with another person still at large. Unfortunately, there was no evidence to this effect as PW11 admitted that he did not investigate the other Chinese male.

[79]It is the narrative of the prosecution that the accused was there together with another Chinese male. The primary evidence relied upon by the prosecution to prove custody and control was on a joint basis. In the circumstances, it is only fair and proper for the accused to be jointly charged together with the other person, whether with a charge of "still at large" or otherwise, or for the prosecution to offer cogent explanation as to why that person was not jointly charged.

[80]I am very much mindful of the prosecutorial powers which rest on the prosecution. However, I am also of the considered view that in the context of the present case, it is incumbent on the learned DPP to display fair prosecution and at the same time dispel any lingering doubts in the minds of a reasonable person as to the reasons why the accused was the only one who was singled out.

Conclusion

[81]It is instructive to be reminded of the principles to be applied at the close of the prosecution as reiterated by the apex Court in *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 FC; ; *[2005] 6 MLJ 393*; ; [2005] 2 MLRA 590; ; [2005] 6 AMR 203. In delivering the judgment of the Federal Court, His Lordship Gopal Sri Ram JCA (as His Lordship then was) observed as follows:

> "[12] After the amendments to *ss. 173(f)* and *180* of the *CPC*, the statutory test has been altered. What is required of a Subordinate Court and the High Court under the amended sections is to call for the defence when it is satisfied that a *prima facie* case has been made out at the close of the prosecution case. This requires the court to undertake a maximum evaluation of the prosecution evidence when deciding whether to call on the accused to enter upon his or her defence. It

involves an assessment of the credibility of the witnesses called by the prosecution and the drawing of inferences admitted by the prosecution evidence. Thus, if the prosecution evidence admits of two or more inferences, one of which is in the accused's favour, then it is the duty of the court to draw the inference that is favourable to the accused. See, *Tai Chai Keh v. Public Prosecutor* [1948] 1 LNS 122; ; [1948; -49] MLJ Supp 105; *Public Prosecutor v. Kasmin bin Soeb* [1974] 1 LNS 116; ; *[1974] 1 MLJ 230*. If the court, upon a maximum evaluation of the evidence placed before it at the close of the prosecution case, comes to the conclusion that a *prima facie* case has not been made out, it should acquit the accused. If, on the other hand, the court after conducting a maximum evaluation of the evidence comes to the conclusion that a *prima facie* case has been made out, it must call for the defence. If the accused then elects to remain silent, the court must proceed to convict him. It is not open to the court to then re-assess the evidence and to determine whether the prosecution had established its case beyond a reasonable doubt. The absence of any evidence from the accused that casts a reasonable doubt on the prosecution's case renders the *prima facie* case one that is established beyond a reasonable doubt. Put shortly, what the trial court is obliged to do under *ss. 173(f)* and *180* of the *CPC* is to ask itself the question: If the accused elects to remain silent, as he is perfectly entitled to do, am I prepared to convict him on the evidence now before me? See, *Dato' Mokhtar bin Hashim & Anor v. Public Prosecutor* [1983] 2 CLJ 10; ; [1983] CLJ 101; (Rep); *[1983] 2 MLJ 232*. If the answer to that question is in the affirmative, then the defence must be called. And if the accused remains silent, he must be convicted. If the answer is in the negative, then the accused must be acquitted.".

[82] In the upshot, in assessing and evaluating the case for the prosecution on the maximum basis and posing the ultimate question as explicated in the case of ***Mohd Radzi Abu Bakar***, I find that on the strength of the evidence thus adduced by the prosecution, I am not prepared to convict the accused if he elects to remain silent. Thus, on the basis of the reasons addressed in this judgment, I find that the prosecution has failed establish a *prima facie* case against the accused on both charges.

[83] In the circumstances, I hereby acquit and discharge the accused of both charges without ordering him to enter his defence.

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