TONG KAM YEW & ANOR A

v.

PP

COURT OF APPEAL, PUTRAJAYA B
MOHAMED APANDI ALI JCA
LINTON ALBERT JCA
HAMID SULTAN ABU BACKER JCA
[CRIMINAL APPEAL NO: B-05-63-2011]
20 MARCH 2013 C

CRIMINAL PROCEDURE: *Charge - Alternative charge - Duty of court when faced with alternative charge of possession to main charge of trafficking - Whether in absence of direct evidence of trafficking court should not readily rely on presumption of trafficking - Whether court* D *should deliberate on issue of possession first before considering issue of trafficking - Whether at end of defence's case court must consider both issues of trafficking and possession - Whether calling of defence on trafficking charge did not mean alternative charge of possession need not be dealt with - Whether impeachment of witnesses while giving evidence* E *procedural flaw curable under s. 422 Criminal Procedure Code or s. 60 Courts of Judicature Act 1964*

CRIMINAL PROCEDURE: *Trial - Alternative charge - Alternative charge of possession and main charge of trafficking - Miscarriage of* F *justice - Whether trial process compromised by perverse findings of trial judge - Provisions of Criminal Procedure Code - Whether breached - Whether constitutional rights of accused violated - Whether factual matrix of case warranted acquittal*

This was the appellants' appeal against their conviction and G sentence by the High Court on a drug trafficking charge. Both appellants had faced two principal joint charges of trafficking under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') – one with respect to 143.8g methamphetamine ('the first charge') and the other with regard to 12g nimetazepam ('the second charge'). H The appellants were also charged with two alternative charges under s. 12(2) of the DDA *ie*, for jointly having possession of the drugs stated in the two principal charges at the same place and time. At the end of the prosecution's case, the trial judge found that a *prima facie* case on the two principal trafficking charges had I been made out. No mention was made about the alternative

charges. At the close of the defence's case, the trial judge held the prosecution had only proved the first charge against the appellants. They were found guilty and sentenced to death. No mention was made either about the second charge or about the alternative charges. In their appeal, the appellants argued that because the prosecution had preferred an alternative charge of possession, because it was unsure of whether the evidence could establish a case for trafficking, the court should give reasons when it decided to convict on either the trafficking or the possession charge. If the court was in doubt between the two, the accused should be have been convicted of the less serious of the two offences. The appellants also submitted that the trial judge prematurely and wrongly impeached two witnesses, SP2 and SD2, while they were giving evidence. SP2, according to the prosecution's narrative, had driven the first appellant in a car to a restaurant. While SP2 waited in the car, the first appellant went into the restaurant and, while there, met the second appellant who passed a bag to the first appellant. At that juncture, a police party lying in ambush arrested both appellants as well as SP2. SP2 was impeached by the trial judge simply because he was unable to recall the name of the restaurant. In his defence, the first appellant relied on the evidence of three witnesses who were at the restaurant at the material time – a Myanmar national who worked as a waiter, a lady who ran a satay stall at the premises and SD2, who was a cashier there. The trial judge disbelieved the testimonies of the first appellant and his witnesses and refused to admit in evidence the witness statement of the Myanmar national, who had by the time of the trial left the country, on the ground that the defence had failed to take sufficient steps to secure that person's attendance.

Held (unanimously allowing appeal; setting aside conviction and sentence; acquitting and discharging appellants of all charges)

Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

(1) The judgment of the trial court was inchoate and not focused and the grounds of judgment showed that the integrity of the decision-making process had been compromised without adherence to the strict provisions of the Criminal Procedure Code ('CPC') and, that too, in a capital punishment case

where the constitutional provisions were clear that the court could only take the life of a person according to law (art 5(1) of the Federal Constitution). (para 9)

(2) The factual matrix of the case did not warrant a retrial but only an acquittal as miscarriage of justice had set in at the prosecution stage as well as at the end of the trial and the integrity of the whole trial process had been compromised. (para 20)

(3) By calling for the defence on the two trafficking charges and finding only one of them had been proved without explaining the reason for such a finding had indeed compromised the decision. The decision was also in conflict in that both types of drugs in the charges were seized at the same time yet one charge of trafficking was proved while the other was not. There was also no order for acquittal in respect of the second charge which technically would be hanging over the heads of the appellants. Such a decision was not only perverse but in breach of s. 182A of the CPC. (para 10)

(4) The trial court had readily applied the presumption of trafficking without addressing its mind to the fact that the prosecution was not sure whether it was a case of trafficking or possession. On the factual matrix of the case, the court should have deliberated on the issue of possession before applying its mind to trafficking. In all capital punishment cases where there was no direct evidence of trafficking, it did not fall upon the court to rely on the presumption of trafficking to pave the way for the accused to be convicted and hanged when the prosecution had readily offered an alternative charge. (paras 11 & 12)

(5) Just because the accused was called to enter his defence for trafficking did not necessarily mean that the issue of possession should not be considered at all. At the close of the defence's case, the court must deal with both the issues of trafficking and possession. At the end of the case, the accused might be acquitted of trafficking but where the charge for possession could be sustained, he must be convicted and sentenced accordingly. (paras 13 & 14)

(6) The issues relating to impeachment were not purely procedural and could not be cured under s. 422 of the CPC or s. 60 of the Courts of Judicature Act 1964 ('CJA 1964'). The impeachment of SP2 and SD2 and the refusal to admit the statement of the Myanmar national were perverse to the defence to rebut the presumption of trafficking. It was like tying the hands of the defence in all aspects and inviting it to rebut the presumption, that too, on the required standard of balance of probabilities. (para 30)

(7) There was a duty and obligation on the part of the trial judge to consider the evidence of the defence justly and fairly, whether it be hearsay or dock statement, with no obligation to believe same save as to the requirement to give reasons why the court rejected the evidence. (para 13)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan perayu-perayu terhadap sabitan dan hukuman mereka oleh Mahkamah Tinggi. Kedua-dua perayu dihadapkan dengan dua pertuduhan secara bersama mengedar dadah di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') – satu berhubungan 143.8g methamphetamine ('pertuduhan pertama') sementara yang satu lagi berkaitan 12g nimetazepam ('pertuduhan kedua'). Perayu-perayu juga dituduh dengan dua pertuduhan alternatif di bawah s. 12(2) ADB, iaitu kerana secara bersama memiliki dadah-dadah yang dinyatakan dalam pertuduhan-pertuduhan utama di tempat dan masa yang sama. Di akhir kes pendakwaan, hakim bicara mendapati bahawa satu kes *prima facie* telah dibuktikan terhadap kedua-dua pertuduhan pengedaran utama. Tiada apa yang dikatakan oleh hakim mengenai pertuduhan-pertuduhan alternatif. Di akhir kes pembelaan, hakim bicara memutuskan bahawa pendakwaan hanya berjaya membuktikan tuduhan pertama terhadap perayu-perayu dan dengan itu mereka disabitkan dan dijatuhkan hukuman mati. Tiada apa-apa pun dikatakan oleh hakim mengenai pertuduhan kedua atau pertuduhan-pertuduhan alternatif. Dalam rayuan mereka, perayu-perayu menghujahkan bahawa oleh kerana pendakwaan telah menawarkan pertuduhan alternatif milikan, dan oleh kerana pendakwaan juga tidak pasti sama ada keterangan akan membuktikan suatu kes pengedaran, maka mahkamah harus memberikan sebab-sebab apabila memutuskan untuk mensabit atas salah satu daripada kesalahan mengedar atau milikan. Dan seterusnya, jika mahkamah

berasa sangsi antara keduanya, maka tertuduh harus disabitkan dengan kesalahan yang kurang serius daripada kedua-dua kesalahan tersebut. Perayu-perayu juga menghujahkan bahawa hakim bicara telah secara pra-matang dan salah mencabar kebolehpercayaan dua orang saksi, SP2 dan SD2, sewaktu mereka memberi keterangan. SP2, menurut naratif pendakwaan, telah membawa perayu pertama ke sebuah restoran dengan sebuah kereta. Sementara SP2 menunggu di dalam kereta, perayu pertama telah memasuki restoran dan, semasa di situ, menemui perayu kedua yang memberikannya sebuah beg. Ketika itu, sepasukan polis, yang sedang melakukan serang hendap, telah menangkap kedua-dua perayu serta SP2. SP2 dicabar kebolehpercayaannya oleh hakim bicara semata-mata kerana dia gagal mengingati nama restoran tersebut. Dalam pembelaannya, perayu pertama bersandarkan pada keterangan tiga orang saksi yang berada di restoran pada waktu material, iaitu seorang rakyat Myanmar yang bekerja sebagai pelayan restoran, seorang peniaga warung wanita yang berniaga sate di situ dan SD2, juruwang restoran. Hakim bicara tidak mempercayai testimoni perayu pertama dan saksi-saksinya dan enggan menerima masuk kenyataan saksi rakyat Myanmar, yang telah meninggalkan negara ini semasa perbicaraan dijalankan, sebagai keterangan, atas alasan pembelaan gagal mengambil langkah-langkah munasabah untuk memastikan kehadirannya di mahkamah.

Diputuskan (membenarkan rayuan; mengenepikan sabitan dan hukuman; membebaskan perayu-perayu dari semua pertuduhan)

Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Penghakiman hakim bicara adalah tidak lengkap dan tidak fokus. Alasan penghakiman menunjukkan bahawa integriti proses membuat keputusan telah dikompromi tanpa mematuhi peruntukan-peruntukan ketat Kanun Tatacara Jenayah ('KTJ') dan, itu juga, dalam satu kes hukuman mati di mana peruntukan-peruntukan perlembagaan adalah jelas bahawa mahkamah hanya boleh mengambil nyawa seseorang mengikut undang-undang (fasal 5(1) Perlembagaan Persekutuan).

A **(2)** Matriks fakta kes tidak mewajarkan suatu perbicaraan semula tetapi suatu pembebasan. Ini kerana salah bawa keadilan telah berlaku di peringkat kes pendakwaan dan di akhir perbicaraan, dan integriti keseluruhan proses perbicaraan telah dikompromi.

B **(3)** Dengan memanggil pembelaan atas dua pertuduhan mengedar dan mendapati hanya salah satu daripadanya telah dibuktikan tanpa menjelaskan alasan-alasan bagi dapatan tersebut, maka keputusan telah dikompromi. Keputusan juga bercanggah dalam ertikata kedua-dua jenis dadah dirampas pada masa yang sama
C tetapi hanya satu pertuduhan pengedaran dibuktikan sementara yang satu lagi tidak. Tambahan lagi, tiada perintah pembebasan dibuat bagi pertuduhan kedua, yang bererti pertuduhan tersebut, secara teknikalnya, masih tergantung atas perayu-perayu. Keputusan sedemikian bukan sahaja bertentangan
D tetapi juga melanggar s. 182A KTJ.

(4) Mahkamah bicara telah mengguna pakai anggapan pengedaran tanpa mengarahkan mindanya kepada fakta bahawa pihak pendakwaan tidak pasti sama ada ia adalah satu kes
E pengedaran atau milikan. Atas matriks fakta kes, mahkamah sepatutnya mengupas isu milikan sebelum mengarahkan mindanya kepada pengedaran. Dalam semua kes hukuman mati, yang mana tiada keterangan pengedaran secara langsung, mahkamah tidak boleh bergantung kepada anggapan
F pengedaran bagi membuka jalan agar tertuduh disabitkan dan digantung sedangkan pendakwaan dengan rela menawarkan pertuduhan pilihan.

(5) Hanya kerana tertuduh dipanggil untuk membela diri kerana mengedar tidak semestinya bermakna isu milikan langsung tidak
G perlu dipertimbangkan. Di akhir kes pembelaan, mahkamah harus menangani kedua-dua isu pengedaran dan milikan. Di akhir kes, tertuduh mungkin dibebaskan atas pertuduhan pengedaran tetapi di mana pertuduhan milikan boleh dipertahankan dia hendaklah disabitkan dan dihukum
H sekadarnya.

(6) Isu-isu berhubung pencabaran kebolehpercayaan bukan berbentuk prosedur semata-mata dan adalah tidak boleh dipulihkan di bawah s. 422 KTJ atau s. 60 Akta Mahkamah
I Kehakiman 1964. Pencabaran kebolehpercayaan SP2 dan SD2 dan keengganan menerima masuk kenyataan warga Myanmar adalah bertentangan bagi pihak pembelaan untuk menyangkal

anggapan pengedaran. Ia seolah-olah mengikat tangan pembelaan dalam segala aspek dan kemudian memintanya mematahkan anggapan, itu pun berdasarkan keperluan standard imbangan kebarangkalian.

(7) Wujud tanggungjawab dan obligasi di sisi hakim bicara untuk menimbang keterangan pembelaan dengan adil dan saksama, sama ada ianya keterangan pandang dengar atau kenyataan dari kandang. Apapun, tiada obligasi untuk mempercayai keterangan-keterangan tersebut kecuali setakat keperluan memberi sebab mengapa mahkamah menolak keterangan berkenaan.

Case(s) referred to:
Crane v. Director of Public Prosecutions [1921] 2 AC 299 ***(refd)***
King Seng Hock & Anor v. PP (Jenayah No: J-05-68-2009) (Unreported) ***(refd)***
Leong Bon Huat v. PP [1993] 3 CLJ 603 SC ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
Muthusamy v. PP [1947] 1 LNS 71 HC ***(refd)***
PP v. Ang Soon Huat [1990] 1 LNS 103 HC ***(refd)***
R v. Gee, Bibby and Dunscombe [1936] 2 All ER 89 ***(refd)***
Sochima Okoye v. PP [1995] 3 CLJ 371 CA ***(refd)***
Subramaniam v. PP [1956] 1 LNS 115 PC ***(refd)***
Tunde Apatira & Ors v. PP [2001] 1 CLJ 381 FC ***(refd)***
Yee Wen Chin v. PP & Another Appeal [2008] 6 CLJ 773 CA ***(refd)***
Yusof A Samad v. PP [2004] 4 SLR 58 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 60
Criminal Procedure Code, ss. 182A, 422
Dangerous Drugs Act 1952, ss. 12(2), 39A(2), 39B(1)(a)
Federal Constitution, art. 5(1)
Penal Code, s. 34

For the appellant - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co
Amirul Ridzuan Hanif; M/s Hanif & Co
For the respondent - Mohamad Abazafree; DPP

[Editor's note: For the High Court judgment, please see PP v. Tong Kam Yew & Anor [2011] 1 LNS 1839].

Reported by Ashok Kumar

A

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] Both the appellant/accused's appeal against conviction and sentence came up for hearing on 25 January 2013 and upon hearing we were unanimous in allowing the appeals. My learned brothers Mohamed Apandi bin Haji Ali JCA and Linton Albert JCA have read the draft judgment and approved the same. This is our judgment.

[2] At the outset we must say this is a classic case of mistrial as well as miscarriage of justice. The judgment reflects that the learned trial judge had not directed her mind to the criminal procedure code, practice and procedure relating to criminal jurisprudence. Such a judgment is unusual in capital punishment cases. We will elaborate this issue in later part of the judgment.

[3] The first and the second appellant are represented by different solicitors. The learned counsel for the second appellant by and large adopts the submission of the first appellant. The learned counsel for the first appellant summarises the complaints to four issues which is reflected in the petition of appeal. They are as follows:

(a) The learned trial judge misdirected herself when she failed to direct her mind to the alternative charges preferred. Further, at the end of the defence case Her Ladyship failed to rule whether the prosecution had proved the trafficking charge in respect of the 12g of nimetazepam (P5) has been proven by the prosecution beyond reasonable doubt;

(b) The learned trial judge erred in law and in fact when she prematurely and/or wrongly impeached both SP2 (Taj Malaysia Singh) and SD2 (Lim Sek Yee);

(c) The learned trial judge misdirected herself when she found that there was *mens rea* for possession proven and in any event she erred in invoking the trafficking definition under s. 2 to rule that there was a *prima facie* case of trafficking and;

(d) The learned trial judge erred when she failed to appreciate the defence of the first appellant.

Brief Facts Of The Charge And Judgment

[4] Both the appellant's as per exh. P4 (charge) were charged for trafficking in 143.8g of methamphetamine under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (DDA 1952) to be read with s. 34 of the Penal Code. Similarly they were also charged as per exh. P5 (charge) for trafficking 12g of nimetazepam.

[5] As alternative to both the charges, they were charged for possession, as per exhs. P6 and P7 under s. 12(2) of DDA 1952 to be sentenced under s. 39A(2) to be read with s. 34 of the Penal Code. Exhibits P4 to 7 *inter alia* read as follows:

P4

Bahawa kamu bersama pada 3hb Februari 2008, jam lebih kurang 6.30 petang di kawasan Restoran Hwa Keng, Jalan Kenari 6, Bandar Puchong Jaya, Puchong, di dalam Daerah Petaling di dalam Negeri Selangor Darul Ehsan dalam melaksanakan niat bersama, kamu telah memperedarkan dadah berbahaya jenis Methamphetamine seberat 143.8 gram dan dengan itu telah melakukan suatu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama yang dibaca dengan Seksyen 34 Kanun Keseksaan.

P5

Bahawa kamu bersama-sama pada 3hb Februari 2008, jam lebih kurang 6.30 petang di kawasan Restoran Hwa Keng, Jalan Kenari 6, Bandar Puchong Jaya, Puchong, di dalam Daerah Petaling di dalam Negeri Selangor Darul Ehsan dalam melaksanakan niat bersama, kamu telah memperedarkan 2000 biji pil yang mengandungi dadah berbahaya jenis Nimetazepam seberat 12.0 gram dan dengan itu telah melakukan suatu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama yang dibaca dengan Seksyen 34 Kanun Keseksaan.

Alternative charges:

P6

Bahawa kamu pada 3hb Februari 2008, jam lebih kurang 6.30 petang di kawasan Restoran Hwa Keng, Jalan Kenari 6, Bandar Puchong Jaya, Puchong, di dalam Daerah Petaling di dalam Negeri Selangor Darul Ehsan, lanjutan dari niat bersama kamu, didapati telah ada dalam milikan kamu dadah berbahaya jenis

A Methamphetamine seberat 143.8 gram dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah Seksyen 12(2) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39A(2) Akta yang sama yang dibaca dengan Seksyen 34 Kanun Keseksaan.

B P7

Bahawa kamu pada 3hb Februari 2008, jam lebih kurang 6.30 petang di kawasan Restoran Hwa Keng, Jalan Kenari 6, Bandar Puchong Jaya, Puchong, di dalam Daerah Petaling di dalam
C Negeri Selangor Darul Ehsan, lanjutan dari niat bersama kamu, didapati telah ada dalam milikan kamu dadah berbahaya jenis Nimetazepam seberat 12.0 gram dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah Seksyen 12(2) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 12(3) Akta yang sama yang dibaca dengan Seksyen 34 Kanun
D Keseksaan.

[6] The learned judge at the end of the prosecution case says that the prosecution had succeeded in establishing a *prima facie* case against the two accused persons as per the two counts of
E drug trafficking. That part of the judgment reads as follows:

The prosecution called 7 witnesses in order to establish a *prima facie* case against the 2 accused persons. At the close of the prosecution case the court was satisfied that the prosecution had succeeded in establishing a *prima facie* case against the 2 accused
F persons as per the 2 counts of drug trafficking pursuant to s. 180 of the Criminal Procedure Code (the "CPC") (the "first decision").

[7] The two counts referred to must have been exhs. P4 and P5, ie, trafficking in methamphetamine and other nimetazepam. No
G mention was made about the alternative charges in the judgment. However, at the close of the defence case the learned judge says that the prosecution had proved the first charge as per exh. P4 against the two accused persons and sentenced them to death without mentioning anything about the second charge relating to
H exh. P5 and no mention at all of the exhs. P6 and P7. That part of the judgment reads as follows:

At the close of the defence case, the court did not believe the testimonies of the 2 accused persons and their 3 witnesses. The court was also satisfied that the defences of the 2 accused persons
I were not consistent, might not reasonably be true, had failed to rebut the meaning of "trafficking" as contained in s. 2 of the DDA and also the statutory presumption of "trafficking" on the

balance of probabilities, did not cast a doubt on the prosecution case and that the prosecution had proved the 1st charge as per P4 against the 2 accused persons beyond reasonable doubt.

[8] In conclusion the judgment says:

In view of the reasons as set out above, the court was satisfied that the prosecution had proved beyond reasonable doubt that the 2 accused persons were trafficking in the 143.8 grammes of methamphetamine as per the charge in P4. The court, therefore, found the 2 accused persons guilty of trafficking in the 143.8 grammes of methamphetamine as per the charge in P4. The court convicted them and imposed on each of them the mandatory death sentence pursuant to s. 39B(2) of the DDA.

[9] It must be stated from the above sequence and judgment, the judgment of the trial court is inchoate, not focused and the grounds of the judgment shows that the integrity of the decision making process has been compromised without adhering to the strict provision of the Criminal Procedure Code and that too in a capital punishment case where the constitutional provisions are clear that the court can only take the life of a person according to law. And that art. 5(1) of the Constitution reads as follows:

(1) No person shall be deprived of his life or personal liberty save in accordance with law.

[10] It must be noted here that the prosecution has preferred two charges for trafficking and in the alternative possession which carries lesser sentence and the law at the end of trial requires the court to consider the relevant charges as well as the evidence. By calling defence for two charges and finding only one charge has been proved when both types of drugs were seized at the same time with no explanation, compromises the decision and is also in conflict, ie, one charge trafficking proved and the other charge not proved. And there was also no order for acquittal in respect of the second charge which technically will be hanging over the heads of the appellants and such a decision is not only perverse but also in breach of s. 182A of CPC which states as follows:

(1) At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.

(2) If the Court finds that the prosecution has proved its case beyond reasonable doubt, the Court shall find the accused guilty and he may be convicted on it.

A (3) If the Court finds that the prosecution has not proved its case beyond reasonable doubt, the Court shall record an order of acquittal.

[11] Further, in the instant case the court readily went and applied the presumption of trafficking without addressing its mind to the fact that the prosecution *per se* was not sure whether it was a case of **trafficking or possession** (emphasis added). On the factual matrix of the case the court should have deliberated on the issue of possession before applying its mind to trafficking which at the end of the day may result in capital punishment. Support for similar proposition can be found in a number of cases. To name a few are as follows:

(i) In *PP v. Ang Soon Huat* [1990] 1 LNS 103; [1991] 1 MLJ at p. 13, Chan Sek Keong J had on the facts this to say:

> In the circumstances of the present case, we have decided that the proper course for this court to take is not to accept the suggestion of counsel for the accused as it lacks both logic and rationality, but to apply the principle that where the court is, on the evidence, left in doubt as to whether the accused has committed an offence in a lower or a higher degree of seriousness, the court should make a finding in the lower degree, particularly in a case in which a finding in a higher degree will give rise to a mandatory sentence of death. Accordingly, we find the accused guilty of trafficking in not less than 10g and not more than 15g of heroin at the time and date stated in the charge. We convict him accordingly.

(ii) The case of *Ang Soon Huat* was followed in *Leong Bon Huat v. PP* [1993] 3 CLJ 603; [1993] 3 MLJ 11 where the Supreme Court at p. 606 (CLJ); p. 15 (MLJ) stated:

> We note that in the Singapore case of *PP v. Ang Soon Huat*, where one of the contentions advanced by counsel for the accused was similar to that advanced in the present appeal, and where the contention was upheld, the court having reminded itself of the criminal standard of proof, had concluded that where the court was left in doubt as to whether the accused has committed an offence in a lower or higher degree of seriousness, the court should make a finding in the lower degree, particularly where a finding in a higher degree will give rise to a mandatory sentence of death.

> The result, therefore, was that so far as the charge of trafficking in cannabis in contravention of s. 39B was concerned, 'the case against the appellant was not proved with the certainty which is necessary in order to justify a verdict of guilty' (Per Lord Hewart CJ in *R v. Wallace* applied by Thomson CJ in *Jubri v. PP*).
>
> Accordingly, we have no option but to allow the appeal, to quash the conviction for trafficking in cannabis, to set aside the sentence, and to substitute *in lieu* thereof, a conviction for possession of cannabis in contravention of s. 39A of the Act and a sentence of life imprisonment to take effect from the date of arrest, with the mandatory ten strokes of the rotan.

[12] We must caution here that it all depends on the factual matrix of the case or relating to capital punishment cases only and must not be taken in isolation to say if alternative charge is not considered it amounts to mistrial or the accused must be convicted for a lesser charge. What needs to be asserted here is in all capital punishment cases where there is no direct evidence of trafficking, it does not fall upon the court to rely on the presumption of trafficking to pave way for the accused to be convicted and hanged for trafficking when the prosecution has readily offered an alternative charge.

[13] In addition we must say that the learned judge did not deliberate on the issue of possession before convicting on the charge of trafficking (see *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311). It must be said here that just because the accused has been called to enter defence for trafficking does not necessarily mean the issue relating to possession should not be considered at all. There is duty and obligation on the part of the trial judge to hear what the accused or his witness has to say in relation to their defence notwithstanding the evidence adduced may be hearsay or even dock statement or even a statement which can be perceived to be self serving statement. It is well settled that it is the duty of the prosecution to prove its case beyond reasonable doubt without reliance of any hearsay statement unless the law allows it to be admitted. Such strictures are not placed for the defence. (see *Subramaniam v. PP* [1956] 1 LNS 115; [1956] MLJ 220). The court is obliged to consider the evidence of the defence justly and fairly whether it be hearsay or dock statement with no obligation

to believe the same save as to the requirement to give reasons only why the court rejects the evidence of the accused. In *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311, the Supreme Court held:

> Whenever a criminal case is decided on the basis of the truth of the prosecution case as against the falsity of the defence story, a trial Judge must in accordance with the principle laid down in *Mat v. PP* [1963] 1 LNS 82 examine whether even though the Court is not satisfied with the defence story, to ask whether in spite of this, the defence story casts a reasonable doubt on the prosecution case. To satisfy this test, of importance is not the words used by the Judge but rather the actual application of the test to the facts of the case. In this case, the learned Judge offered practically no reason why the defence notwithstanding its falsity and unconvincing nature, had failed to cast a reasonable doubt on the prosecution case, other than to state by way of lip service the duty placed by the law on the defence to earn an acquittal.
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> Unless the evidence in a particular case does not obviously so warrant, it is incumbent for the Court to consider whether on a balance of probability on the evidence the defence has rebutted the statutory presumption of trafficking under s. 37(da) of the Act as a separate exercise even though the Court is satisfied on a balance that the presumption of possession under s. 37(d) of the Act has not been rebutted. In this case, the failure to do so was a material misdirection and was fatal to the conviction.

[14] In essence at close of the defence case the court must deal with the issue of trafficking as well as possession. It may be at the end of the case either acquit where the issue of trafficking has been rebutted but where the charge for possession can be sustained the accused must be sentenced accordingly. (see *Yee Wen Chin v. PP & Another Appeal* [2008] 6 CLJ 773). Support for the above proposition is found in a number of cases. In *Sochima Okoye v. PP* [1995] 3 CLJ 371; [1995] 1 MLJ 538, Gopal Sri Ram JCA (as he then was) held:

> (1) In a criminal case, the prosecution bears a general burden of proof to prove beyond reasonable doubt the guilt of the accused. The prosecution may rely on available statutory presumptions to prove the essential ingredients of the charge. When that occurs, the particular burden of proof shifts to the defence to rebut such presumptions on the balance of probabilities.

(2) In the present case, merely because the defence had failed to rebut the presumption of possession under s. 37(d) of the Act did not mean that the presumption of trafficking under s. 37(da) of the Act would become irrebuttable. Unless the evidence in a particular case did not so warrant, the court must consider whether on a balance of probabilities the defence had rebutted the statutory presumption of trafficking under s. 37(da) as a separate exercise even though it was satisfied on balance that the presumption under s. 37(d) had not been rebutted.

(3) Reading the judgment of the trial judge as a whole, it was clear that no such separate exercise had been carried out. The use of the expression 'presumptions' by the trial judge did not amount to sufficient compliance with the aforesaid requirement.

(4) The judge, having found the appellant's story about the existence of Smith to be true, ought to have addressed his mind to the further question as to whether there was any reasonable doubt raised that Smith was the real trafficker, but did not do so.

(5) The failure of the judge to properly direct himself rendered his ultimate conclusion fatally flawed. A miscarriage of justice might well have occurred and the court had no alternative but to set aside the death sentence and enter a conviction for possession under s. 39A(2) of the Act. The appellant was sentenced to life imprisonment and 12 strokes of the rotan.

[15] The learned counsel for the appellant in respect of the above issues submits as follows:

Ground One - No consideration of the alternative charges and no ruling/finding on the alleged trafficking of 12 grams of Nimetazepam [P5]

The complaint is regard to the approach taken by the learned trial judge. This complaint is in two parts. They are:

(i) No consideration of the alternative charges, and

(ii) No ruling at end of defence case whether the prosecution has proved its case of trafficking of the 12 grams of Nimetazepam (P5) beyond reasonable doubt.

No consideration of the alternative charges

This is a point of law. Apart from the principal charges of trafficking the prosecution also on the commencement of the trial tendered 2 separate alternative charges of possession in respect of the methamphetamine and nimetazepam punishable under sections 39A(2) and 12(3) respectively.

It is respectfully submitted that the learned trial judge, did not consider, at the end of the prosecution's case as to whether a *prima facie* case of mere possession has been proven by the prosecution. In short the learned trial judge should have asked why the case against both the Appellants cannot be a case of possession instead of trafficking.

By reason of the stance taken by the prosecution, the learned trial judge is put to consider the evidence adduced and then elect whether this is a case of possession or trafficking and in the event of an election being made, to give reasons.

In this regard, both the Appellants have been seriously prejudiced in that had the court considered the two scenarios and should the court be doubtful, then it is trite law that an accused person ought to be penalized to an offence that is of the lower degree, in this case possession.

The 1st Appellant relies on the following authorities to support his position:

(a) *PP v. Ang Soon Huat* [1991] 1 MLJ 1

(b) *Leong Boon Huat v. PP* [1993] 3 MLJ 11

This omission or non-direction amounts to a serious miscarriage of justice and on this ground alone the convictions against the Appellants cannot stand.

It must be appreciated that in making this submission the 1st Appellant is not conceding that possession had been proven by the prosecution.

No ruling at the end of the defence case whether the prosecution had proved beyond reasonable doubt the trafficking of 12 grams of nimetazepam (P5)

This is another point of law. At the end of the prosecution's case the court found that a *prima facie* case of trafficking has been proven in respect of both the trafficking charge (P4) with regard to the methamphetamine charge. It is very clear that at the end

of the prosecution's case the learned trial judge only found that there is a *prima facie* case of trafficking in respect of P4 and both Appellants were ordered to enter defence only in respect of this charge. There is no ruling or finding with regard to P5, the other trafficking charge involving 12 grams of nimetazepam. We do not know what has happened to the other charge.

However in her written grounds the learned trial judge found a *prima facie* case in respect of both the trafficking charges. This can be seen at p. 465 of the AR Vol 5 where she said:

> ... At the close of the prosecution case the court was satisfied that the prosecution had succeeded in establishing a *prima facie* case against the 2 accused persons as per the 2 counts of drug trafficking pursuant to s. 180 of the Criminal Procedure Code (the "CPC") (the "first decision").

There is confusion again when at the end of her written grounds, after the defence case, the learned trial judge again did not rule whether the prosecution had proven its case of trafficking against both the Appellants in respect of the 12 grams of nimetazepam. This can be seen at her Conclusion at p. 528 of the AR Vol. 6 where reference was made only to the methamphetamine charge.

This is a further added reason why the convictions cannot stand.

[16] We find the submission has merits even though the appellants or respondents were not able to support it with authorities for or against, except the two decisions cited above. However, we must say the learned Deputy Public Prosecutor was magnanimous to say that the grounds of judgment does not deal with the complaints raised by the first appellant but says that as the learned judge has dealt with the main charge and in consequence the alternative charge need not be considered and asserts in any event it can be cured by s. 60 of Courts of Judicature Act 1964 which reads as follows:

> (1) At the hearing of an appeal the Court of Appeal shall hear the appellant or his advocate, if he appears, and, if it thinks fit, the respondent or his advocate, if he appears, and may hear the appellant or his advocate in reply, and the Court of Appeal may thereupon confirm, reverse or vary the decision of the High court, or may order a retrial or may remit the matter with the opinion of the Court of Appeal thereon to the trial court, or may make such other order in the matter as to it may seem just, and may by that order exercise any power which the trial court might have exercised:

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> Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

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> (2) At the hearing of an appeal the Court of Appeal may, if it thinks that a different sentence should have been passed, quash the sentence passed, confirmed or varied by the High Court and pass such other sentence warranted in law (whether more or less severe) in substitution therefore as it thinks ought to have been passed.

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[17] On the issue of the second charge (exh. P5) was not dealt by the learned judge. The learned Deputy Public Prosecutor invites us to re-evaluate the evidence as a whole and convict and sentence the accused for the second charge (exh. P5) for

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trafficking and for this purpose relies on the case *Tunde Apatira & Ors v. PP* [2001] 1 CLJ 381; [2001] 1 MLJ 259.

[18] We do not think we can accede to the invitation of the learned Deputy Public Prosecutor as it is a clear case of *inter alia*

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statutory as well as constitutional breach which we have adumbrated earlier and a classic case of mistrial and miscarriage of justice.

[19] In *Crane v. Director of Public Prosecutions* [1921] 2 AC 299

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the House of Lords on the facts of the case asserted that mistrial amounted to no trial. When it is a case of mistrial the court has two options. One to order for retrial and the other to order an acquittal where the contests of justice requires. Support for the proposition is found in the case of *R v. Gee, Bibby and Dunscombe*

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[1936] 2 All ER 89 where it was stated:

> … The result is that there has been what is sometimes called a mistrial; in this case it would perhaps be more correct to say that there had been no trial at all. Under the decision in *Crane v. Director of Public Prosecutions*, this court has power to order that a

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> proper trial should take place; as it was put in that case, "that the proceedings should re-commence from the point where they broke down". Therefore this court has power to order that these men should be taken back and that the proceedings should be re-commenced *de novo*, that the depositions be properly taken and

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> the men brought before the court of quarter sessions.

> But this court has also power, where it thinks the interests of justice require it, to order that a verdict of acquittal should be entered and to allow the prisoners to be discharged. In the circumstances of this case the court thinks that is a proper order to make here, because these men were in custody three months before trial. They were then held to bail with this charge hanging over them for another three months. They were then tried and convicted on 13 March. They have been in custody another two months, and if this court were to order a new trial and the proceedings had to begin again, they would have to wait for trial before quarter sessions, which would probably be in July. It would be oppressive to commit them for retrial. In the circumstances, therefore, the court has come to the conclusion that the conviction should be quashed and that the men should be discharged. We also express the hope that, if this procedure obtains elsewhere, the magistrates will comply strictly with the requirements of the Act. The order of the court is therefore that the conviction be quashed and the prisoners be discharged.

[20] The factual matrix of the case does not warrant a re-trial but only an acquittal as miscarriage of justice has set in at the prosecution stage as well as at the end of trial and the integrity of the whole trial process has been compromised for reasons we have stated earlier.

[21] Leaving aside the issue of mistrial and miscarriage of justice, we think it is also appropriate to address the other grievances raised by the appellants. For this purpose we need to set out the brief facts.

Brief Facts

[22] The facts of the case as per prosecution as well as the appellants version had been well articulated by the learned judge and it needs no repetition and it is sufficient if it is summarised as follows:

(i) A raiding party consisting of SP3 saw the first appellant coming in a Proton Wira driven by SP2;

(ii) The first appellant came out of the car and went to a nearby restaurant;

(iii) About 15 minutes later a Kancil car came and parked next to the Proton Wira;

(iv) The first appellant went to the Kancil and a red bag through the driver's window was handed over to the first appellant by the second appellant;

(v) First appellant then walked to the restaurant and sat at the table which he had previously occupied and at that point of time SP3 gave instructions to his men to arrest the first appellant;

(vi) The first appellant was arrested and it was said to have been a struggle and the red bag was seized;

(vii) Meanwhile SP2 and the second appellant were arrested;

(viii) The red bag contained drugs which are the subject matter of the respective charge;

(ix) No drugs were recovered from both the cars;

(x) The search list was signed by the appellants as well as SP2;

(xi) The solicitor's had written a letter to the office of the Deputy Public Prosecutor to record statements from three witnesses, one Myanmar national working as a waiter and the other who was selling satay nearby and Lim Sek Hee (SD2) who was in the restaurant and who gave evidence for the defence and was impeached by the learned judge at cross-examination stage itself.

[23] The defence's version has been summarised by the learned counsel for the first appellant and reads as follows:

> The defence of the 1st Appellant can be summarised as follows: the 1st Appellant is a motor mechanic and it was his version the Proton belonged to one Ah Soon who had sent the car to the 1st Appellant for repairs. The 1st Appellant then asked SP2, his colleague, to help repair the car as he was busy with Chinese New Year preparations. On the day in question Ah Soon phoned him at about 4 pm and told the 1st Appellant to drive his Proton to the restaurant between 6 to 7 pm for the return of his car. At about 5 pm Ah Soon called him again and asked him to help pick up a Chinese New Year present from Ah Soon's friend, Ah Girl. The 1st Appellant agreed and he then asked SP2 to drive the Proton to the restaurant. When the 1st Appellant arrived at the restaurant he went and sat at a table at its five foot way while

SP2 waited in the Proton. The 1st Appellant then ordered food. It was his evidence that later Ah Soon called him again and told him that Ah Girl had asked a person by the name of Ah Ken to deliver the present to him. The 1st Appellant said that he was seated at the table with two of Ah Soon's friends. While he was waiting and having food Ah Ken (later identified as the 2nd Appellant) came, identified himself and handed the present to the 1st Appellant by placing the bag under the table. Soon after the 2nd Appellant left and when he wanted to order a drink for SP2 he was suddenly pushed down by 7-8 persons and was immediately handcuffed. He saw both the 2nd Appellant and SP2 were also arrested.

At the Subang Police Station the 1st Appellant said he told the police about Ah Soon and Ah Girl and the bag. The 1st Appellant called SD2 (Lim Sek Yee) and SD3 (Halimah) who were present at the restaurant that evening as his witnesses. SD2 was impeached. The learned trial judge did not believe the 1st Appellant.

[24] It must be noted from the factual matrix of the case the only persons who will be able to corroborate the evidence of the appellant and was at the scene was SP2 and three witnesses from whom the solicitors had informed the Deputy Public Prosecutor to take the witness statement. It is found at pp. 473 and 474 of the judgment and reads as follows:

On 27 August 2008, as a result of a letter written by K.L. Chee to the DPP, the DPP had directed him to record statements from 3 witnesses, namely, Aung Zaw Min, a Myanmar national, who was working as a waiter in the restaurant on the day in question, Halimah Binti Soleh, the woman who was selling satay at the satay stall at the 5-foot way of the restaurant at the material time and the cashier who was working in the restaurant at the material time. He had visited the restaurant on 17 September 2008. He had recorded the statements of the 3 alleged witnesses at the restaurant.

[25] The irony in the instant case was that SP2 evidence was impeached while he was giving evidence and one of the three witnesses (SD2) stated above who gave evidence at the defence stage was also impeached while giving evidence. And the other two potential witnesses for the defence case, the prosecution did not produce. In addition the learned trial judge refused to allow the witness statement of one of the three persons who was a

A Myanmar national working in the restaurant and who had left the country to be tendered in court, on the grounds the defence did not take sufficient steps to secure the witness that too to a person who had left the country.

B **[26]** The learned counsel for the first appellant says the impeachment of SP2 for a trivial memory lapse of the name of restaurant was unwarranted and the memory lapse could be overcome by refreshing his memory and relies on the case of *Muthusamy v. PP* [1947] 1 LNS 71; [1948] MLJ 57 to drive C home the point.

[27] In addition asserts the learned counsel that it was plainly wrong for the learned judge to impeach while SP2 was giving evidence and should have waited until the end of the prosecution D stage and relies on the Court of Appeal decision in *King Seng Hock & Anor v. PP* Jenayah No. J-05-68-2009 (Unreported).

[28] On similar note the learned counsel says SD2 should not have been impeached while giving evidence and the impeachment should have taken place at the end of the case. And concludes E that both the impeachments have prejudiced the defence case.

[29] The learned Deputy Public Prosecutor concedes that impeachment should not have been done while the witness is giving evidence. However, the learned Deputy proceeds to argue F that the procedural irregularity can be cured. And relies on a Singapore case cited as *Yusof A Samad v. PP* [2004] 4 SLR 58, where it was stated:

> … Thus, the procedural objection raised by the appellant's counsel was well-founded. Nevertheless, this procedural irregularity was a G minor one, and it did not cause any prejudice to the appellant. Section 396 of the CPC states:
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> > Subject to the provisions hereinbefore contained, no finding, sentence or order passed or made by a court of competent jurisdiction shall be reversed or altered on account of: H
> >
> > (a) Any error, omission or irregularity in the complaint, summons, warrant, charge, judgment or other proceedings before or during trial or in any inquiry or other proceeding under this Code;

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> In addressing the question whether there was any failure or miscarriage of justice or whether a conviction was unsafe, the court will ask itself the subjective question of whether it was content to allow the verdict to stand, or whether there was some lurking doubt that an injustice had been done to the appellant: *Tan Choon Huat v. PP* [1991] SLR 805. I had no doubt whatsoever that the procedural irregularity had not occasioned a failure of justice in the present case. As such, it was appropriate for me to overlook it.

[30] We do not think the issues relating to impeachment are purely procedural and can be cured under s. 422 of the CPC or s. 60 of CJA 1964. These two witnesses as well as the statement of the Myanmar national which was not allowed to be admissible on the grounds the defence did not take steps to trace the witness when the evidence is that the Myanmar national has left the country is perverse to the defence to rebut the presumption of trafficking which carries the penalty of death. It is like tying the hands of the defence in all aspect and inviting the defence to rebut the presumption that too on the required standard of balance of probabilities, a conduct which no criminal court ought to be a party to in the administration of criminal justice.

[31] The instant facts also demonstrates a clear case of miscarriage of justice and we like to make it clear that we would have allowed the appeal independent of the mistrial issue, adumbrated earlier. On the totality of the case, there are serious errors and most of the errors related to non direction which amount to misdirection making the conviction unsafe.

[32] For reasons stated above, the appeal by the appellants are allowed. Conviction and sentence of the High Court set-aside. The appellants are acquitted and discharged of all charges.

We hereby order so.