SHANMUGAM RAMALINGAM v. PP & OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
AHMADI ASNAWI JCA
AB KARIM AB JALIL JCA
[CRIMINAL APPEALS NO: K-05-103-04-2015, K-05-104-04-2015 & K-05-105-04-2015]
27 NOVEMBER 2017

CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Accused persons convicted for offence of drug-trafficking and sentenced to death – Whether there was common intention between accused persons to commit offence – Whether there were discrepancies in drugs seized by police, analysed by chemist and tendered in court as exhibits – Whether same drugs – Whether there was break in chain of evidence – Whether conviction and sentence safe – Whether ought to be set aside – Dangerous Drugs Act 1952, s. 39B(1)(a) – Penal Code, s. 34*

CRIMINAL LAW: *Common intention – Drug-trafficking – Accused persons convicted for trafficking in dangerous drugs and sentenced to death – Appeal against conviction and sentence – Whether there was common intention between accused persons to commit offence – Dangerous Drugs Act 1952, s. 39B(1)(a) – Penal Code, s. 34*

EVIDENCE: *Admissibility – Evidence of chemist – Written statement by chemist not read aloud during trial – Whether breach of procedure – Whether an illegality – Whether non-compliance mere irregularity – Whether curable – Whether fatal to prosecution's case – Criminal Procedure Code, ss. 402B & 422*

Acting upon information that a certain drug trafficking activity would be carried out, police officer SP3, playing the role of an agent provocateur, contacted the second appellant and arranged for a meet-up. On the same day, SP3 met up with the second appellant, who came with the first appellant, and agreed to purchase half a pound of heroin at the price of RM5,200. They met up again about ten days later at an oil palm estate after SP3 received a telephone call from the second appellant saying that the drugs were with him. The second and third appellants arrived together at the scene while SP3 came with another police officer. The police officer handed the money to the second appellant. After counting the money with the third appellant, the second appellant made a telephone call and, soon after, the first appellant came with a plastic bag. The first appellant showed the contents of the plastic bag which were three plastic packets containing powdery substance. SP3 shouted 'polis!' and arrested the first appellant. The raiding party sprang into action and arrested the second and third appellants. The three plastic packets were later confirmed by the chemist ('SP1') to contain 15.6g of heroin and 1.5g of monoacetylmorphines. The appellants were subsequently charged at the High Court for trafficking in dangerous drugs, an offence under

s. 39B(1)(a) of the Dangerous Drugs Act 1952, read together with s. 34 of the Penal Code. Having found that the appellants' defence failed to raise reasonable doubt on the prosecution's case, the trial judge convicted the appellants for the offence and sentenced them to death. Hence, the present appeals by the appellants against the conviction and sentence. The issues that arose for the court's adjudication concerned (i) the common intention to commit the crime; (ii) SP1's written statement which was not read aloud at the trial and whether this was in breach of s. 402B(6) of the Criminal Procedure Code ('the CPC'); (iii) the nature, type and description, *ie*, colour, of the drugs; (iv) the failure of the prosecution to produce the appellants' handphones and the call log; and (v) the evidence of the defence witness, SD4, was not considered by the trial judge.

Held (dismissing appeals; affirming conviction and sentence of High Court)

Per Ahmadi Asnawi JCA delivering the judgment of the court:

(1) The existence of a common intention is a question of fact to be proved mainly as a matter of inference from the surrounding circumstances of the case. In all circumstances of the case, it could safely be inferred that the third appellant had equally harboured the common intention to commit the offence and participated in the commission of the offence when he came to the scene with the second appellant and counted the money with the latter. The common intention of the appellants to commit the crime was further made apparent by the fact that, after the second and third appellants completed counting the money, the second appellant made a telephone call to someone and this was shortly followed by the arrival of the first appellant with the said drugs. (paras 30 & 31)

(2) SP1's written statement was properly admitted under s. 402B of the CPC as (i) she had signed it; (ii) it contained her declaration that the statement was true to the best of her knowledge and belief; and (iii) the appellants had no objection and consented to it during the proceedings for the written statement to be tendered in court and marked as an exhibit. The only non-compliance with s. 402B of the CPC was that the written statement was not read aloud at the trial, in breach of sub-s. 402B(6) of the CPC. However, the said provision is only directory and its non-compliance was a mere irregularity, not an illegality, and was curable under s. 422 of the CPC. (para 40)

(3) When SP1 was cross-examined on the nature of the drugs, she answered that the drugs were identified as diacetylmorphines which was the technical term for heroin. The burden was on the appellants to procure its own expert evidence if they were challenging SP1's testimony or if they were suggesting that diacetylmorphines and heroin were two distinct types of drugs. However, none were forthcoming from the appellants. Therefore, this became a non-issue in the absence of any

evidence to the contrary that diacetylmorphines and heroin were two distinct drugs. The discrepancies in the description of the drugs was a matter of one's perception. SP1 perceived it as yellow in colour while the investigating officer saw it as orange. There was no doubt at all that the drugs exhibits tendered as evidence in the court were the same drugs seized at the crime scene notwithstanding the discrepancies in the perception of colours between SP1 and the investigating officer. (paras 41, 42, 45 & 47)

(4) The evidential value of the existence and tendering in evidence of the handphones, telephone bills or call logs were only corroborative in nature. The substantive evidence must come from the oral testimonies of the principal witnesses involved in the case. It was apparent that the evidence of SP3, the principal witness of the case, regarding the telephone call from the second appellant in respect of the delivery of drugs was well-supported by the evidence of the sequence of events that took place at the crime scene. There was no need to produce the handphones, call logs, telephone bills or recordings of the conversations between SP3 and the second appellant or between the first and second appellants as corroborative evidence. (paras 51, 54 & 55)

(5) The trial judge did not evaluate or consider SD4's testimony. The court invoked the powers under s. 60 of the Courts of Judicature Act 1964 to evaluate and consider the testimony of SD4 and found that, had the evidence of SD4 been considered by the trial judge, it would not have made any difference to the outcome of the proceedings. SD4's evidence was wholly irrelevant as (i) he was not at the scene at the time of the transaction and when the ambush took place; (ii) he was nowhere there to shed some light as to what actually happened at the scene; and (iii) it failed to raise any doubt to negate the participation of the appellants in the commission of the offence. (paras 58, 59 & 60)

***Bahasa Malaysia** Headnotes*

Bertindak berdasarkan maklumat bahawa satu aktiviti pengedaran dadah akan dijalankan, pegawai polis SP3, berperanan sebagai ejen perangkap, menghubungi perayu kedua dan merancang satu perjumpaan. Pada hari yang sama, SP3 bertemu dengan perayu kedua, yang hadir bersama-sama dengan perayu pertama, dan bersetuju membeli setengah paun dadah dengan harga RM5,200. Mereka bertemu semula kira-kira sepuluh hari kemudian di sebuah ladang kelapa sawit selepas SP3 menerima satu panggilan telefon daripada perayu kedua yang mengatakan dadah-dadah tersebut ada padanya. Perayu kedua dan ketiga tiba bersama-sama di tempat kejadian manakala SP3 hadir bersama-sama seorang lagi pegawai polis. Pegawai polis tersebut menyerahkan duit kepada perayu kedua. Selepas mengira wang tersebut dengan perayu ketiga, perayu kedua membuat satu panggilan telefon dan, sejurus selepas itu, perayu pertama tiba membawa satu beg plastik. Perayu pertama menunjukkan isi kandungan beg plastik tersebut iaitu tiga paket

plastik berisi bahan serbuk. SP3 menjerit 'polis!' dan menahan perayu pertama. Pasukan serbuan bertindak dan menahan perayu kedua dan ketiga. Tiga paket plastik tersebut kemudian disahkan oleh ahli kimia mengandungi 15.6g heroin dan 1.5g monoacetylmorphines. Susulan itu, perayu-perayu dipertuduh di Mahkamah Tinggi bagi pertuduhan mengedar dadah, satu kesalahan bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952, dibaca bersama-sama dengan s. 34 Kanun Keseksaan. Setelah memutuskan pembelaan, perayu-perayu gagal membangkitkan keraguan munasabah terhadap kes pendakwaan, dan hakim bicara seterusnya mensabitkan perayu-perayu atas pertuduhan dan menjatuhkan hukuman mati terhadap mereka. Isu-isu berbangkit bagi pemutusan mahkamah adalah berkenaan (i) niat bersama melakukan jenayah; (ii) pernyataan bertulis SP1 yang tidak dibacakan dengan kuat semasa perbicaraan dan sama ada ini melanggar s. 402B(6) Kanun Tatacara Jenayah ('KTJ'); (iii) sifat, jenis dan gambaran, iaitu warna, dadah-dadah tersebut; (iv) kegagalan pihak pendakwaan mengemukakan telefon-telefon bimbit perayu-perayu dan rekod panggilan; dan (v) keterangan saksi pembelaan, SD4, tidak dipertimbangkan oleh hakim bicara.

Diputuskan (menolak rayuan; mengesahkan sabitan dan hukuman Mahkamah Tinggi)

Oleh Ahmadi Asnawi HMR menyampaikan penghakiman mahkamah:

(1) Kewujudan niat bersama adalah persoalan fakta yang perlu dibuktikan, khususnya sebagai kesimpulan berdasarkan hal-hal keadaan yang menyelubungi kes. Berdasarkan hal-hal keadaan kes ini, boleh disimpulkan dengan selamat bahawa perayu ketiga sama-sama menyimpan niat bersama untuk melakukan kesalahan dan mengambil bahagian dalam perlakuan kesalahan apabila dia tiba di tempat kejadian bersama-sama dengan perayu kedua dan mengira wang dengannya. Niat bersama perayu-perayu untuk melakukan jenayah selanjutnya jelas kelihatan berdasarkan fakta bahawa, selepas perayu kedua dan ketiga selesai mengira wang, perayu kedua membuat panggilan telefon pada seseorang dan ini diikuti dengan ketibaan perayu pertama yang membawa dadah-dadah tersebut.

(2) Pernyataan bertulis SP1 diterima dengan betul bawah s. 402B KTJ kerana (i) dia telah menandatanganinya; (ii) mengandungi deklarasinya bahawa pernyataan tersebut benar berdasarkan pengetahuan dan kepercayaannya; dan (iii) perayu-perayu tidak membantah dan membenarkannya semasa prosiding ketika pernyataan bertulis tersebut dikemukakan di mahkamah dan ditanda sebagai ekshibit. Satu-satunya ketakpatuhan s. 402B KTJ adalah pernyataan bertulis tersebut tidak dibaca dengan kuat semasa perbicaraan, satu pelanggaran sub-s. 402B(b) KTJ. Walau bagaimanapun, peruntukan ini sekadar arahan dan ketakpatuhannya cuma satu ketakaturan, bukan ketaksahan, dan boleh diremedi bawah s. 422 KTJ.

(3) Semasa SP1 diperiksa balas tentang sifat dadah-dadah tersebut, dia menjawab bahawa dadah-dadah tersebut dicamkan sebagai diacetylmorphines iaitu terma teknikal bagi heroin. Beban dipikul oleh perayu-perayu untuk mendapatkan keterangan pakar jika mereka mencabar keterangan SP1 atau jika mereka mencadangkan diacetylmorphines dan heroin adalah dua jenis dadah berbeza. Walau bagaimanapun, ini tidak dilakukan oleh perayu-perayu. Oleh itu, ini tidak menjadi isu akibat ketiadaan keterangan bertentangan bahawa diacetylmorphines dan heroin adalah dua dadah berbeza. Kepincangan dalam penerangan tentang dadah-dadah tersebut adalah pokok perkara pendapat seseorang. SP1 berpendapat warnanya kuning manakala pegawai siasatan melihatnya sebagai jingga. Tiada keraguan sama sekali bahawa ekshibit-ekshibit dadah yang dikemukakan sebagai keterangan dalam mahkamah adalah dadah-dadah yang sama di tempat kejadian tanpa mengira kepincangan pendapat antara SP1 dan pegawai siasatan tentang warna.

(4) Nilai keterangan kewujudan dan pengemukaan keterangan telefon bimbit, bil telefon atau rekod panggilan bersifat menyokong sahaja. Keterangan substantif mestilah timbul daripada keterangan lisan saksi-saksi utama yang terlibat dalam kes. Jelas bahawa keterangan SP3, saksi utama kes, berkenaan panggilan telefon daripada perayu kedua, tentang penghantaran dadah, disokong kuat oleh keterangan babak-babak peristiwa yang berlaku di tempat kejadian. Tiada keperluan mengemukakan telefon bimbit, rekod panggilan, bil telefon atau rakaman perbualan antara SP3 dan perayu kedua mahupun perayu pertama dan kedua sebagai keterangan sokongan.

(5) Hakim bicara tidak menilai atau mempertimbangkan keterangan SD4. Mahkamah membangkitkan kuasa bahawa s. 60 Akta Mahkamah Kehakiman 1964 untuk menilai dan mempertimbangkan keterangan SD4 dan mendapati, jika pun keterangan SD4 dipertimbangkan oleh hakim bicara, tiada beza pada hasil prosiding. Keterangan SD4 tidak relevan langsung kerana (i) dia tidak berada di tempat kejadian semasa transaksi berlangsung dan semasa serang hendap dijalankan; (ii) dia tidak berada di mana-mana berdekatan di situ untuk menerangkan apa-apa yang sebenarnya berlaku di tempat kejadian; dan (iii) gagal membangkitkan apa-apa keraguan yang menidakkan penyertaan perayu-perayu dalam pelakuan jenayah tersebut.

Case(s) referred to:

Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***

Fauzi Naim Muhamad Zaki v. PP (Criminal Appeal No: 05-253-11-2015 (K)) (Unreported) ***(refd)***

Gunalan Ramachandran & Ors v. PP [2004] 4 CLJ 551 CA ***(refd)***

Lew Wai Loon v. PP [2014] 2 CLJ 649 FC ***(refd)***

Mahdi Keramatviyarsagh Khodavirdi v. PP [2015] 3 CLJ 336 CA ***(dist)***
PP v. Ong Tee [1980] 1 LNS 217 HC ***(refd)***
Rossarin Nuekaew v. PP [2017] 8 CLJ 503 FC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 60
Criminal Procedure Code, ss. 402B(2)(b), (6), 422
Dangerous Drugs Act 1952, ss. 2, First Schedule
Evidence Act 1950, ss. 114(g), 134
Penal Code, s. 34

For the 1st appellant - Geethan Ram; M/s Geethan Ram
For the 2nd appellant - Hasshahari Johar; M/s Hasshahari & Partners
For the 3rd appellant - KA Ramu; M/s KA Ramu Vasanthi & Assocs
For the respondent - Ahmad Sazilee Abd Khairi; DPP

[Editor's note: Appeal from High Court, Aloe Setar; Criminal Trial No. 45A-79-12-2012 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Ahmadi Asnawi JCA:

[1] In this judgment, the appellant in K-05-103-04-2015 shall be known as the first appellant; the appellant in K-05-104-04-2015 shall be known as the second appellant; and the appellant in K-05-105-04-2015 shall be known as the third appellant.

[2] In the court below, the three appellants were convicted and sentenced to suffer the death penalty on account of the following amended charge preferred against them:

> Bahawa kamu bersama-sama pada 5 Jun 2012, jam lebih kurang 8.00 malam, di ladang kelapa sawit, Kampong Sungai Para, Bedong, di dalam Daerah Kuala Muda, di dalam Negeri Kedah Darul Aman, telah didapati mengedar dadah berbahaya iaitu sejumlah berat 17.1 gram (iaitu 15.6 gram heroin dan 1.5 gram Monoacetylmorphines). Oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya, 1952, yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama dan dibaca bersama-sama seksyen 34 Kanun Keseksaan.

[3] The appeals before us were in respect of the said convictions and sentences.

[4] We dismissed their appeals and we now give our grounds.

The Case For The Prosecution

[5] Sometimes at the end of May 2012, SP5 (Insp Mohamed Shahran bin Haji Tarmizi, the Pegawai Operasi Narkotik, IPD Kuala Muda) had received information of a certain Indian male being involved in drug trafficking activities within the neighbourhood of his police district.

[6] On 27 May 2012, SP5 then instructed SP3 (Sjn Mohd Izahan bin Abdul Razak, from Bahagian Risikan, Jabatan Narkotik, IPK Kedah) to take the role of an agent provocateur ('AP') to negotiate for the purchase of drugs from the suspect. SP5 also gave SP3 a certain telephone number to get in touch with the suspect.

[7] SP3 next contacted the telephone number given by SP5 and managed to speak to an Indian male who had introduced himself as 'Annai'. Both SP3 and Annai later agreed to meet in person soon.

[8] Later in the late afternoon, SP3, accompanied by D/Corp Johari, met the said Annai who came with his friend. SP3 identified Annai as the second appellant and his friend was identified as the first appellant.

[9] SP3 next negotiated with them for the sale and purchase of drugs wherein SP3 finally agreed to purchase half a pound of heroin at RM5,200. The second appellant further assured SP3 that he would contact him when he had the drugs with him.

[10] On 5 June 2012, SP3 received a telephone call from the second appellant indicating that he had the drugs with him and SP3 could take delivery of the said drugs the same evening in an oil palm estate at Kampong Sungai Para, Bedong, Kuala Muda.

[11] SP3 conveyed the same to SP5. The raiding officer, SP4 (ASP Mohd Razi bin Ismail, the Pegawai Turus Risikan, Operasi dan Tahanan, Jabatan Siasatan Jenayah Narkotik, IPK Kedah) then held a briefing at IPK Kedah, Alor Setar, with his team to nab the suspect. The briefing was told that SP3 will act as an AP, assisted by D/Corp Johari, to purchase the drugs from the suspect. The team left for the designated meeting point after the briefing.

[12] SP3 and D/Corp Johari arrived at the designated location at about 7.30pm. Soon after the second appellant arrived at the scene together with the third appellant on an EX5 motorcycle bearing the registration number KCQ 3812. The second appellant then demanded to see and to count the agreed purchase money.

[13] L/Corp Johari duly handed the sum to the second appellant who then proceeded to count the money with the assistance of the third appellant. When the job was done, the second appellant next made a telephone call to someone. Soon after the first appellant arrived at the scene on a red coloured EX5 motorcycle with the registration number KCX 8213.

[14] The first appellant then requested SP3 to come to his motorcycle, which SP3 did. The first appellant then showed SP3 a plastic bag (exh. P9). The first appellant proceeded to open the said plastic bag. When the plastic bag was opened, SP3 saw three plastic packets (exhs. P10, P11, P12) containing powdery substance inside the said plastic bag.

[15] Moments later, SP3 shouted 'Polis!' and arrested the first appellant. The raiding party correspondingly sprang into action and managed to arrest the second and third appellants.

[16] SP4 also effected the seizure of the plastic bag (P9) containing the incriminating exhs. P10, P11 and P12.

[17] The three appellants together with the incriminating exhibits were subsequently brought back to IPD Kuala Muda and handed over to the investigating officer, SP6 (Insp Shahrol Ehsanizam bin Shaari).

[18] The chemist, SP1 (Norleen binti Abdul Manaf, from Jabatan Kimia Malaysia, Cawangan Kedah, Alor Setar), found the substance in the packets exhs. P10, P11 and P12 to contain 15.6g of heroin and 1.5g of monoacetylmorphines (hereinafter referred to as 'the said drugs'), both listed in the First Schedule of the Dangerous Drugs Act 1952 (hereinafter referred to as 'the DDA'). Her report is exh. P2 at p. 383 of jilid 5, rekod rayuan ('RR').

[19] At the end of the prosecution's case, the learned trial judge found that the prosecution had indeed proven that the substances seized from the appellants were heroin and monoacetylmorphines within the definition of the DDA and the drugs produced in court were the same drugs that were seized by SP4 at the scene of the crime, there being no break in the chain of the movements, custody and handling of the said drugs. The learned trial judge had also found that there was a negotiation for the sale and purchase of the said drugs between the second appellant and SP3 and the said sale was completed when first appellant delivered the drugs to SP3 at the agreed designated location. The learned trial judge also found that all the three appellants had committed an act of trafficking within the ambit of s. 2 of the DDA (act of selling) in furtherance of their common intention under s. 34 of the Penal Code.

[20] Having satisfied that the prosecution had established a *prima facie* case against the three appellants, the learned trial judge hence ordered the three of them to enter their defence.

The Defence Of The Appellants

[21] The three appellants gave evidence on oath.

[22] The first appellant testified that he worked in the estate as a security guard. On the day in question, he was on duty when he saw a group of people converging at the scene and someone shouting 'polis!'. The first appellant also claimed to have heard gunshot fire. He was overwhelmed with fear and had attempted to flee the scene. However, he was arrested by the police shortly after. He denied the narratives of the prosecution witnesses, in particular, the testimony that he had brought the said drugs to the scene on a motorcycle bearing the number KCX 8213.

[23] The second appellant stated that at the material time, he was having arak with the third appellant within the vicinity of the estate and had later requested the third appellant to come along with him to see his cattle, reared by himself. While on his way, he heard someone screaming 'polis!' and saw many people running towards him. The second appellant further said that he too had attempted to flee the scene because he had earlier consumed drugs but failed. He also denied that he had negotiated with SP3 in connection with a drug sale and purchase transaction. He also denied meeting SP3 and counting the flash money brought by SP3.

[24] The third appellant testified that he was a rubber tapper in the estate and was also working as a security guard therein. On the day in question, he had followed the second appellant to see the second appellant's cattle. Thereafter, he had requested the second appellant to go on a security patrol around the estate with him on a motorcycle. Upon arriving at the scene, he heard someone screaming 'polis!'. They then attempted to flee the scene but failed. The third appellant denied being involved in any drug transaction.

[25] The learned trial judge found the defence of the three appellants to be unbelievable and further found that it had failed to raise a reasonable doubt upon the prosecution's case. The three appellants were consequently convicted of the offence preferred against them and each of them was correspondingly sentenced to suffer the death penalty.

The Appeal

[26] Cumulatively, the appellants posited the following grounds:

(i) no common intention to commit the crime;

(ii) SP1's written statement (exh. P7) was not read aloud at the trial in breach of the statutory requirement under s. 402B(6) of the Criminal Procedure Code ('CPC');

(iii) the nature or type of the said drugs, whether it was heroin or diacetylmorphines and the description of the colour of the said drugs;

(iv) the failure of the prosecution to produce the handphones of the appellants and the call log; and

(v) the evidence of the defence witness, SD4 (Sethanbaran a/l Ramamoorthy) was not considered by the learned trial judge.

Our Decision

First Issue - No Common Intention

[27] Learned counsel for the third appellant submitted that the third appellant was merely riding pillion on the second appellant's motorcycle to the scene of crime. The third appellant denied counting the flash money

when the raid took place. The third appellant did not meet any police officer on 27 May 2012 to sell drugs or discuss with the other appellants to sell drugs and did not either bring the drugs to the scene on 5 June 2012. The third appellant also did not know the items brought by the first appellant as the items were wrapped in plastic packets in a plastic bag. Learned counsel submitted that on the facts it was wrong for the learned trial judge to find that the appellants had the common intention to commit the offence.

[28] The issue of common intention was extensively discussed by the learned trial judge. In his judgment at pp. 273 and 274 of jilid 3 RR, the learned trial judge found the following:

> [19] Pihak pendakwa bergantung kepada niat bersama di bawah seksyen 34 Kanun Keseksaan bagi membuktikan kes terhadap Tertuduh-Tertuduh kerana keterangan yang dikemukakan tidak menunjukkan kesemua Tertuduh melakukan kesemua perbuatan tersebut secara bersama. Tertuduh Ketiga terlibat di dalam kes ini pada hari kejadian sahaja. Tertuduh Ketiga tidak terlibat bersama Tertuduh Pertama dan Kedua apabila Tertuduh Pertama dan Tertuduh Kedua berjumpa SP3. Keterangan yang dikemukakan juga menunjukkan Tertuduh Kedua yang berunding dengan SP3 untuk jual beli dadah tersebut. Pada hari kejadian tersebut Tertuduh Ketiga datang bersama Tertuduh Kedua ke tempat kejadian.
>
> [20] Untuk membuktikan niat bersama ini pihak pendakwa perlu membuktikan terdapat pelan yang diatur awal (pre-arranged plan) oleh Tertuduh-tertuduh untuk melakukan kesalahan ini (lihat *Mahbob Shah v. King Emperor* [1945] LR 72). Sesuatu Mahkamah boleh membuat penilaian fakta sama ada terdapat niat bersama tersebut (*Krishna Rao Gurumurthi v. PP and Another Appeal* [2009] 2 CLJ 603). Berdasarkan keterangan yang dikemukakan oleh saksi-saksi pendakwa saya dapati telah terdapat 'pre-arranged plan' untuk melakukan kesalahan ini di antara Tertuduh-tertuduh dan kedatangan Tertuduh Kedua bersama Tertuduh Ketiga ke tempat kejadian tersebut adalah bagi meneruskan 'pre-arranged plan' tersebut. Kedatangan Tertuduh Pertama membawa dadah berbahaya ke tempat kejadian juga adalah bagi meneruskan 'pre-arranged plan' tersebut.

[29] We were completely with the learned trial judge's assessment of the evidence and the ultimate findings made by him. There is nothing inherently improbable in the evidence of SP3 that he saw the third appellant counting the flash money soon after it was handed to the second appellant by D/Corp. Johari. Hence his evidence should be accepted. The third appellant apparently knew what the issue was when the second appellant insisted upon seeing and counting the money purportedly for the purchase of the said drugs by SP3.

[30] The existence of a common intention is a question of fact to be proved mainly as a matter of inference from the surrounding circumstances of the case. It pre-supposes prior concert which requires a pre-arranged plan of the accused participating in an offence and such pre-arranged plan may develop

on the spot or during the course of the commission of the offence. Equally, common intention can be formed in the course of committing the crime or on a spur of the moment. In our view, in all the circumstances of the case, it could safely be inferred that the third appellant had equally harboured the common intention to commit the offence and had participated in the commission of the offence when he came to the scene with the second appellant and thereafter counting the flash money with the second appellant. His mere denial that he did not count the money is no ground to negate the hard evidence stacked against him that he had participated in the commission of the offence.

[31] The common intention of the appellants to commit the offence were further made apparent by the fact that after the second and third appellants had completed counting the money, the second appellant made a telephone call to someone, which was followed shortly after by the arrival of the first appellant with the said drugs to be sold to SP3.

The Second Ground - SP1's Written Statement Was Not Read Aloud At The Trial In Breach Of s. 402B(6) Of The CPC

[32] Learned counsel for the third appellant submitted that when SP1 took the stand and testified, her written statement was consequently tendered and marked as exh. P7. Thereafter, the learned Deputy Public Prosecutor ('DPP') embarked upon marking the relevant exhibits referred to by SP1 in her written statement P7. However, the written statement P7 itself was never read aloud at the trial pursuant to s. 402B(6) of the CPC. The said provision enacts that:

> (6) So much of any such statement as is admitted in evidence by virtue of this section shall, unless the Court otherwise directs, be read aloud at the trial and where the Court so directs an account shall be given orally of so much of any statement as is not read aloud.

[33] Learned counsel submitted that the failure to comply with the said statutory requirement is fatal as there is now nothing before the court to show how the analysis of the incriminating exhibits was conducted and how the results as shown in SP1's chemist report (exh. P2) were achieved. In anticipation of the learned DPP's reply that the defence had consented to the admissibility and tendering of the said written statement and had cross-examined SP1 relating to the contents of her written statement, learned counsel relied on *Mahdi Keramatviyarsagh Khodavirdi v. PP* [2015] 3 CLJ 336, to fortify his position, in particular, at held no. 2 where it was held that:

> The fact that SP1 was cross examined could not derogate from the legal position of s. 402B of the CPC. Any default, waiver or consent could not supersede the written law. Thus the inadmissible evidence of SP1 remained inadmissible notwithstanding any waiver or consent by the appellant.

[34] It is to be noted that the aforesaid authority relied by learned counsel is specifically on the non-compliance of the conditions to be complied under s. 402B(2) of the CPC and not s. 402B(6) of the same. In addition, the pertinent issue in *Mahdi Keramatviyarsagh Khodavirdi v. PP* ('*Mahdi*'s case') (*supra*) is easily distinguishable from the case before us. In *Mahdi*'s case (*supra*) the written statement was not read aloud at the trial; it did not bear the signature of the witness; it did not contain a declaration as required under sub-s. (2)(b) of s. 402B; and it was not marked as an exhibit by the court. The non-compliance of the conditions under the said provision was the reason given by the court for remitting the said case to the High Court for retrial. However, in the case presently before us, all the conditions required under s. 402B, in particular, sub-s. (2) have been complied with. The only common issue is that PW1's written statement was not read aloud at the trial. In that sense, we opined that SP1's written statement (exh. P7) was properly admitted *albeit* the written statement was not read aloud at the trial.

[35] The learned DPP however, contended that the issue now raised by the appellants is a non-issue on account of the decision of the Federal Court in *Fauzi Naim Muhamad Zaki v. PP* (Criminal Appeal No: 05-253-11-2015 (K)) whereby the same issue was raised and was held by the Federal Court that the non-compliance with the provisions of sub-s. 402B(6) of the CPC did not render the whole proceeding a nullity and that the conditions to be complied with under the said subsection are only directory and not mandatory.

[36] However, in our view, the latest decision of the Federal Court in *Rossarin Nuekaew v. PP* [2017] 8 CLJ 503 (Criminal Appeal No. 05-286-12-2015 (K)) is directly on point. In the above-said case, the appellant's learned counsel had raised as a ground of appeal pertinent issues on the application of s. 402B of the CPC relating to the tendering of the written statement of the chemist by the prosecution. The issues for determination were:

(i) whether the written statement to be admitted in evidence in court must be read aloud at the trial;

(ii) whether the court can direct otherwise for the written statement not to be read aloud at the trial;

(iii) whether the conditions to be complied with under sub-s. 402B(6) of the CPC is directory or mandatory; and

(iv) whether the non-compliance with the conditions under sub-s. 402B of the CPC is curable under s. 422 of the CPC.

[37] On whether the written statement to be admitted as evidence in court must be read aloud at the trial, Zulkefli bin Ahmad Makinudin PCA, speaking for the Federal Court, stated at the following paras. of the judgment:

> 17. We are of the view that from the wording of subsection 402B(6) of the CPC, it is clear that so much of the witness statement to be admitted in evidence must be read aloud at the trial. However, this prerequisite is not to be applied across the board and without exception. Under this

subsection there is an exception to this general rule. The exception is expressed in the use of the words 'unless the Court otherwise directs,' which means that the Court can dispense with the requirement for the witness statement to be read aloud if the Court finds it appropriate to do so.

18. ...

19. We are of the view that the Court can use its discretion when it considers appropriate and with the concurrence of all parties, to dispense with the requirement that the witness statement must be read aloud. This is to avoid an unnecessary lengthy reading of such statement in Court and so as not to defeat the purpose of the insertion of section 402B into the CPC, which is to provide a speedy disposal of criminal cases ...

[38] On whether the conditions to be complied with under sub-s. 402B(6) is directory or mandatory, His Lordship stated:

25. Applying the test and the principle laid down in *Hee Nyuk Fook*, it is our judgment that the requirement to read aloud the witness statement under subsection 402B(6) of the CPC is only directory and not mandatory. In coming to this conclusion, we have considered the subject matter of the case which was in relation to the admissibility of evidence by way of witness statement of the chemist ('SP1'). The witness statement was prepared by the maker by signing the witness statement to show that the statement made by the maker was based on truth and to his knowledge. The witness statement was duly served on the other party. We also noted from the Records of the Proceedings of the trial Court that the appellant had also agreed and had no objection to the tendering of the statement during the proceedings.

26. To further support our view that the application of subsection 402B(6) of the CPC is merely directory, we would refer to the provision of section 17A of the Interpretation Acts 1948 and 1967 [Act 388] ['the Interpretation Acts']. Section 17A of the Interpretation Acts provides:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object

27. We are of the considered view that based on the purpose or object of the insertion of the new section 402B into the CPC as shown through the explanatory statement of the Bill and the Hansard and applying the principle as laid down in section 17A of the Interpretation Acts, the requirement to read aloud the witness statement of the chemist (SP1) is not mandatory and it can be dispensed with if the Court finds it appropriate to do so and it is satisfied that no failure of justice will be occasioned by such dispensation.

[39] On whether the non-compliance of the conditions under sub-s. 402B(6) of the CPC is curable under s. 422 of the CPC, the Federal Court ruled:

> 28. Section 422 of the CPC, *inter alia*, provides that any finding, sentence or order passed or made by a court of competent jurisdiction cannot be reversed or altered on the basis of an error, omission, irregularity, want of sanction, or improper admission or rejection of evidence unless it had occasioned a failure of justice.
>
> 29 ..
>
> 30. We are of the view even assuming that the witness statement was improperly admitted due to the omission of reading the statement aloud during the trial, it nevertheless had not occasioned a failure of justice. Our view is fortified by the argument that the witness statement of SP1 contained a declaration and was signed by SP1. The statement was tendered with the agreement of the appellant during the proceedings. The defence had the opportunity to challenge SP's evidence and SP1 was under oath at all times. The procedural non-compliance of subsection 402B(6) of the CPC is merely an irregularity and not an illegality and is curable under section 422 of the CPC. The appellant cannot be said in the circumstances of the case to have been denied a fair trial.

[40] So much for the law. It is now settled. Hence, we were of the view that SP1's written statement was properly admitted under s. 402B of the CPC on account that SP1 had signed the written statement; it contained SP1's declaration that the statement is true to the best of her knowledge and belief; and the appellant had no objection and consented during the proceeding for the written statement to be tendered in court and marked as exh. P7, evinced at p. 12, jilid 1, RR. The only non-compliance with s. 402B of the CPC was that the written statement was not read aloud at the trial, in breach of sub-s. 402B(6) of the CPC. However, as decided in *Miss Rossarin Nuekaew v. PP (supra)*, the said provision is only directory and its non-compliance is merely an irregularity and not an illegality and henceforth curable under s. 422 of the CPC. The appellant had the opportunity to challenge SP1's evidence and SP1 was in fact cross-examined intensively by learned counsel for the appellants. In such event, the appellant cannot be said to have been denied a fair trial in all the circumstances of the case. Hence, we found the ground of appeal grounded upon this issue to be of no merit.

The Third Ground - The Nature Of The Said Drugs, Whether It Was Heroin Or Diacetylmorphine And The Description Relating To The Colour Of The Said Drugs

[41] Learned counsel for the third appellant submitted that when SP1 was cross-examined on the nature of the drugs, SP1 answered the drugs that were identified following her analysis according to the computer printout was diacetylmorphine and not heroin (at p. 21, jilid 1, RR). She then explained that diacetylmorphine is the technical or international term for heroin. Learned counsel, however, submitted that SP1 did not clarify whether there

is any explanation for diacetylmorphine in the DDA. SP1 did not also clarify whether diacetylmorphine is listed in the DDA. In fact, diacetylmorphine is not listed in the First Schedule of the DDA. It was thus further submitted that SP1's testimony had created doubts pertaining to the nature of the said drugs and as such, it must be resolved in favour of the appellants.

[42] SP1 had explained in her testimony that diacetylmorphine is the technical or international term for heroin. Only Malaysia used the term 'heroin' in its drug laws (at pp. 21, 22, jilid 1, RR). The learned trial judge had accepted the explanation given by SP1. The burden is now thrust upon the appellants to procure its own expert evidence if they are challenging SP1's testimony in respect of the said terms or if they are suggesting that diacetylmorphine and heroin are two distinct types of drugs. However, none were forthcoming from the appellants. Hence, in our view, this has become a non-issue in the absence of any evidence to the contrary that diacetylmorphine and heroin are two distinct drugs.

[43] The ruling by His Lordship Ajaib Singh J in *PP v. Ong Tee* [1980] 1 LNS 217 is most pertinent and directly on point. It had sufficiently answered learned counsel's contention on the issue. At p. 409, His Lordship stated:

> The position is quite different in the present case before me. Heroin is not technically defined in the Dangerous Drug Ordinance nor is it now in the Dangerous Drugs Act 1952 (Revised - 1980). It had a somewhat technical definition at one time until the First Schedule to the Dangerous Drugs Ordinance was amended on February 18, 1971 by the Emergency (Essential Powers) Ordinance No. 82 of 1971. Before the amendment heroin was listed in the First Schedule in item 11 as 'Diacetylmorphine (commonly known as diamorphine or heroin) and the other esters of morphine, and their respective salts'. After the amendment it is now just plain heroin as one of the dangerous drugs listed in the First Schedule unlike cannabis or raw opium for example which have technical definitions apart from merely being listed as cannabis and raw opium in the First Schedule.
>
> In the present case the chemist's report states that the chemist had analysed the 1.25 grammes of the light brown powder and that he had found it to contain 0.47 grammes of heroin. This in my view was sufficient and there was no need to state further in the report that the heroin as found came within the definition of the Dangerous Drugs Ordinance. Heroin is fairly well-known and it is listed as a dangerous drug. Therefore in the absence of any technical definition of heroin in the Dangerous Drugs Ordinance the chemist report stating that after analysis the chemist had found heroin in the powder without stating that it came within the definition of heroin under the Dangerous Drugs Ordinance was not fatal but was sufficient for the purpose of proving that the light brown powder found in possession of the respondent contained a dangerous drug namely heroin to the extent of 0.47 grammes.

[44] Learned counsel for the second appellant added that SP1 in her report exh. P2 stated that the incriminating exhibit (drugs) were yellow (kuning) in colour whereas the investigating officer, SP6, stated that the said exhibits were coloured orange. The photographs also showed that the exhibits were orange in colour. SP6 further admitted that he had no explanation for the difference in the said description of the colour of the exhibits. Learned counsel further submitted that the learned trial judge had failed to consider this apparent discrepancies in the testimonies of SP1 and SP6.

[45] We were of the view that the discrepancies in the description of the colour of the drugs is a matter of one's perception. SP1 perceived it as yellow in colour whereas SP6 saw it as orange in colour. None is contradicting each other because it concerned one's perception. Hence, SP6 was correct when he said that he cannot explain the discrepancy between what he saw and what was perceived by SP1. It is beyond him to explain why SP1 perceived it as yellow in colour. Nevertheless, such differential perceptions are not enough to create a reasonable doubt upon the prosecution's case, particularly in respect of the identity of the said drugs. What is of real substance is whether the said drugs seized by SP4 were the same drugs that were sent to the chemist for analysis and finally produced in evidence in court, the test applied in *Gunalan Ramachandran & Ors v. PP* [2004] 4 CLJ 551. Hence, it envisages a situation where it warrants a scrutiny of whether there is a break in the movement or the handling or the custody of the said drugs which tantamount to a break in the chain of evidence as postulated by the Federal Court in *Lew Wai Loon v. PP* [2014] 2 CLJ 649.

[46] The evidence showed that SP4 had effected the seizure of the said drugs in plastic packets exhs. P10, P11 and P12 and the plastic bag exh. P9. Thereafter, the exhibits were handed over to the investigating officer, SP6, who kept the same in his locked kabinet besi in his office. Later still, SP6 handed over the said exhibits to SP2 (Insp Mohd Zulhafiz bin Zainudin) to be delivered to the chemist, SP1, for analysis. Upon completion of her analysis, SP1 handed over the said exhibits back to SP2 and SP2 further delivered the said exhibits to SP6 on the same day, whereupon SP6 proceeded to have it registered and stored in the stor barang kes for safekeeping pending the disposal of the hearing of the charge against the appellants. The said exhibits were finally tendered in evidence in court through SP1 and marked as exhs. P10, P11 and P12. In the course of the trial, these witnesses (SP1, SP2, SP4 and SP6) had positively identified the said drug exhibits as the same drug exhibits that were seized by SP4 and later in the course of investigation had passed through the hands of SP6, SP2, SP1 and finally found its way in court. Each stage of the handing over or delivery of the drug exhibits to the respective witnesses until its production in court were also properly documented. The said documents were also positively identified by the respective witnesses.

[47] There was no challenge in respect of the movements, handling and custody of the said exhibits enumerated above. In the event, we harboured no doubt at all that the drug exhibits that were tendered in evidence in court were the same drug exhibits that were seized by SP4 at the scene of the crime notwithstanding SP1's perception that the said drug exhibits were yellow in colour or SP6's perception that the said drugs exhibits were coloured in orange. Verily, we opined that this ground of appeal in essence, has no merit at all.

The Fourth Ground - The Failure To Produce The Appellants' Handphone And Call Logs

[48] Learned counsel for the first appellant submitted that SP3 had communicated through his handphone with the second appellant at least twice (on 27 May 2012 and 5 June 2012) and the second appellant had also purportedly telephoned the first appellant on 6 June 2012 prior to the ambush by PW4's team. However, not a single handphone was recovered from any of the appellants when the facts adduced showed that the first and the second appellants had no opportunity to dispose of their handphones prior to their arrest. In the event, not a single handphone was tendered in court. SP3's handphone was also not seized nor investigated to confirm that he had made such telephone calls to the second appellant in the course of the sale and purchase transaction of the drugs. The investigating officer also did not investigate the telephone number (019-4243615) given by SP5 to SP3 in order for SP3 to contact the alleged drug trafficker (Annai/the second appellant).

[49] Hence, learned counsel submitted that the prosecution's failure to tender the handphones would warrant the invocation of the adverse inference rule under s. 114(g) of the Evidence Act 1950, to operate against the prosecution.

[50] We reckoned that the defence's insistence on the production of the handphones, call logs, bills, etc is for the purpose of corroborating SP3's evidence of his conversation and meetings with the second appellant.

[51] We were of the view that the evidential value of the existence and tendering in evidence of the handphones or telephone bills or call logs is only corroborative in nature. The substantive evidence must come from the oral testimonies of the principal witnesses involved in the case where its veracity, as a matter of course, had always been subjected to the test and vagaries of cross-examination and probabilities of the case in tandem with the entire evidence adduced during the trial.

[52] SP3, the principal witness for the prosecution herein emerged unscathed from the intensive and most thorough cross-examination mounted by the defence. He stated in very certain terms of his first meeting with the second appellant resulting from the telephone call he made from the telephone number (019-4243615) given to him by SP5. SP5 confirmed he gave the said number to SP3. This meeting with the second appellant is obviously consistent with the sequence of events narrated by SP3 that he had contacted the second appellant through the handphone and later arranged to have a meeting with him.

[53] It was also SP3's testimony that he had received a telephone call from the second appellant on 5 June 2012 indicating that he had the drugs with him and SP3 could take delivery of the drugs at about 7.30pm the same evening in an oil palm estate at Kampong Sungai Para, Bedong, Kuala Muda. What subsequently happened that led to the arrest of the three appellants and the seizure of the said drugs enumerated at length in paras. 11, 12, 13, 14, 15 and 16 above is again consistent with the testimony of SP3 and the position held by the prosecution that there was a prior arrangement between SP3 and the second appellant for the sale and purchase and subsequently for the delivery of the said drugs. The arrangement materialised when the first appellant brought the drugs after the flash money was handed over to the second appellant and the second and third appellants had counted the moneys.

[54] It is apparent that SP3's evidence of the telephone call from the second appellant in respect of the said delivery of the drugs is well supported by the evidence of the sequence of events that took place at the crime scene.

[55] On the facts, we opined that there is no need for further corroborative evidence to support SP3's testimony. There is equally no need to produce the handphones or call logs or telephone bills or recordings of conversation between SP3 and the second appellant or between the second appellant and the first appellant as corroborative evidence. Hence there is no plausible reason to invoke the adverse inference rule to operate adversely against the prosecution.

[56] In addition, we opined that the nature of the case herein does not fall within that category of cases where the nature of the testimony of a single witness itself requires that corroboration should be insisted upon. Any such requirement will conflict with s. 134 of the Evidence Act 1950, which provides that no particular number of witnesses shall, in any case, be required for the proof of any fact, meaning that the testimony of a single witness, if believed, is sufficient to establish any fact - see *Balachandran v. PP* [2005] 1 CLJ 85. We have no hesitation in agreeing with the finding of the learned trial judge that SP3 is a credible witness and his evidence ought be accepted without more.

The Fifth Ground - Non-consideration Of The Evidence Of SD4

[57] Learned counsel for the first appellant contended that the first appellant was a security guard at the said estate and was on guard duty at the material time. SD4, the contractor in charge of the security of the estate at the material time, confirmed that the first appellant was his employee, employed as a security guard, and at the material time, he was on duty/ working. Learned counsel complained that the evidence of SD4 was not evaluated and considered by the learned trial judge. Learned counsel further submitted that this omission was fatal.

[58] We were in agreement with the submission that the learned trial judge did not evaluate nor consider SD4's testimony. However, it is trite that an appeal is a continuation of proceedings by way of rehearing and a court sitting in appellate capacity is empowered to review or re-evaluate all the evidence available as adduced before it.

[59] The evidence stacked against the appellants is overwhelming. In our view, this case is a fit and proper case for us to invoke the powers under s. 60 of the Courts of Judicature Act 1964, to evaluate and consider the testimony of SD4 in the light of the entire evidence adduced before the trial, bearing always the learned trial judge's omission to do so.

[60] Having done so, we were of the view that had the evidence of SD4 been considered by the learned trial judge, it would not have made any difference on the outcome of the proceedings on account that the evidence of SD4 is wholly irrelevant. SD4 was not at the scene at the time of the transaction and when the ambush was made by SP3. He was nowhere there to throw some light as to what had actually taken place at the crime scene. Clearly, SD4's evidence had failed to raise any doubt to negate the participation of the first appellant nor the two others in the commission of the offence. Indeed, SD4's evidence has no leg to stand on in the light of the uncontroverted testimonies of SP3 and SP4.

Conclusion

[61] For all the reasons given, we dismissed the appeals by all the appellants and affirmed the convictions and sentences handed down upon them by the learned trial judge.