A

EKENE BONIFACE OCHIADA v. PP

COURT OF APPEAL, PUTRAJAYA
MOHD ZAWAWI SALLEH JCA
IDRUS HARUN JCA
KAMARDIN HASHIM JCA
B [CRIMINAL APPEAL NO: B-05(M)-264-07-2016]
27 SEPTEMBER 2017

CRIMINAL LAW: *Trafficking in – Dangerous Drugs Act 1952, s. 39B(1)(a) – Elements of offence – Drugs found concealed inside metal handles of luggage bags* C *– Whether accused had custody and control of luggage bags – Whether accused deemed to be in possession – Whether knowledge inferred from manner drugs concealed – Whether quantity of drugs larger than likely needed for personal consumption – Whether offence of trafficking was proven – Dangerous Drugs Act 1952, ss. 2, 37(d)*

D

EVIDENCE: *Exhibit – Cautioned statement – Admitted as identified document – Whether should have been admitted as defence exhibit – Failure by defence to tender cautioned statement as exhibit – Contents of cautioned statement identical to oral testimony in court – Oral testimony rejected by trial judge – Whether cautioned statement also considered to be rejected – Whether trial judge justified in ignoring* E *cautioned statement*

The appellant, who was from Lagos, Nigeria, arrived at the KLIA and was seen walking out of the baggage claim (loss and found) office pushing a trolley with two luggage bags. Sergeant Zulkefli ('PW4') who was with a team of policemen approached the appellant and examined his passport. The F appellant was then taken to the Narcotics Investigation Office where a further examination led to the recovery of powdery substances found hidden inside the metal handles of the two luggage bags. The powdery substances was analysed and was confirmed to contain 371.8g of methamphetamine. The appellant was thus charged with an offence of trafficking in dangerous drugs G under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). Having found overwhelming evidence to show that the appellant had the custody and control of the two luggage bags containing the illicit drugs, the trial judge held that the presumption under s. 37(d) of the DDA applied and the appellant was deemed to be in possession and to have known the nature of the drugs H until the contrary was proven. It was also held that since the appellant was transporting the drugs, the prosecution had proven direct trafficking as defined under s. 2 of the DDA. Further, the act of the appellant carrying or transporting the drugs in the luggage bags on an international flight was an overt act which went beyond passive possession. As the trial judge was I satisfied that the prosecution had proven the offence against the appellant on a *prima facie* basis, the appellant was ordered to enter his defence. It was the appellant's case that he came to Malaysia to survey on higher education in

Malaysia. Before his departure, he was asked by one Okechu, whom he had known for about two weeks, to bring two luggage bags to be given to Okechu's friend, Ikye, in Malaysia. The appellant stated that he did not know that there were drugs in the handles of the bags and denied that he was involved in drug trafficking. The trial judge held that there were suspicious circumstances which should have alerted the appellant to the risk involved in carrying the bags for an almost complete stranger and to hand them over to another complete stranger. Therefore, the judge rejected the appellant's story line as devoid of common sense and drew the inference that the appellant knew what he was carrying, that was, the drugs in the metal handles of the bags and that he was involved in trafficking in the dangerous drugs. On the allegation of the failure by the police to investigate the existence of Okechu and Ikye, the trial judge dismissed the appellant's complaint as baseless and misconceived since the appellant did not supply sufficient information to the police. The trial judge therefore held that the defence had failed to rebut the presumption under s. 37(d) of the DDA on the balance of probabilities and raised a reasonable doubt in the prosecution's case. On the other hand, the prosecution had successfully proven its case beyond any reasonable doubt. The appellant was thus found guilty as charged and sentenced to death. The principle grounds that were raised in this appeal were that the trial judge had erred on the facts and in law: (i) in finding that there was proven a *prima facie* case against the appellant; and (ii) in failing to consider the appellant's cautioned statement, IDD52.

Held (dismissing appeal; affirming conviction and sentence by High Court)

Per Idrus Harun JCA delivering the judgment of the court:

(1) Based on the proven facts, it was clear that the appellant had, in his custody or under his control, the two luggage bags at that material time. The evidence pertaining to custody and control of the two luggage bags was not disputed by the defence. Hence, upon proof of the element of custody or control of the two bags, pursuant to s. 37(d) of the DDA, the appellant was deemed to be in possession of the drugs concealed in its metal handles and was thus, also deemed to have known the nature of such drugs. (paras 23-25)

(2) Even if the presumption of knowledge under s. 37(d) of the DDA was not relied on, the manner in which the drugs were carefully and cleverly concealed would not, in the absence of a plausible explanation, deny the existence of knowledge on the part of the appellant. It were the appellant's mental state of knowledge that the powdery substances concealed in the metal handles of the two bags were indeed prohibited items which must be hidden at all costs in order to avoid detection by the authorities. The concealment of the impugned drugs did not reflect an innocent mind on the part of the appellant. Further, the appellant had

never denied at the initial stage of the discovery of the drugs that the bags and the drugs found inside its metal handles did not belong to him. Without such denial at the earliest opportunity, it could be inferred that the appellant actually knew about the drugs in question. (paras 26-28)

(3) Further, the failure of the appellant to inform PW4 about Okechu or Ikye at the time of his arrest supported the prosecution's case and, on the contrary, went to show that less weight ought to be attached to the appellant's defence. The defence also never suggested to PW4 that the appellant was shocked or showed other reaction when the drug was discovered that would indicate that he did not know about the drugs. The appellant only made the bare assertion, that he was shocked, when he gave his evidence during the trial. Such assertion ought to be dismissed as an afterthought. Once the element of custody or control of the two bags had been proved, the presumption of possession and knowledge of the drugs could be raised. (paras 28 & 29)

(4) The appellant was seen carrying the two bags, from which the drugs were found cunningly and carefully concealed inside its metal handles, which evinced an intention to avoid detection by the authorities. If PW4 was not vigilant or alert in carrying out this duty, in particular, whilst inspecting the two bags, the impugned drugs would have passed through customs check and therefore avoided detection at the arrival hall of the KLIA. Furthermore, the quantity of the impugned drugs could be said to be much larger than was likely needed for the appellant's personal consumption. An irresistible inference could therefore be made that when the appellant was caught in the act of transporting and carrying the drugs in quantity much larger than was needed for his personal consumption, he did so for the purpose of trafficking in. Such inference could be made even if there is no statutory presumption of trafficking in the DDA. (para 31)

(5) The act of the appellant in transporting and carrying the drugs in the two bags on an international flight from one country to another, carefully concealed as it were, was indeed an overt and not an innocent act. The court is perfectly entitled to invoke a presumption under s. 37(d) of the DDA while at the same time making a finding of direct trafficking based on any of the acts which constitutes the act of trafficking as specified in the definition of the word trafficking in s. 2 thereof. This is in order to avoid contravening the bar against the use of double presumptions. (paras 32 & 33)

(6) The appellant's cautioned statement, which should have been admitted as defence exhibit, was instead marked by the judge as IDD52 through the investigating officer. There was no request made by the defence to tender the cautioned statement as an exhibit. When the defence was called, the defence could still seek to admit IDD52. However, the

defence failed to do so and, as such, IDD52 remained as identified document only and not as evidence. The trial judge was thus justified in ignoring IDD52. (para 35)

(7) The appellant did not deny, at the earliest opportunity, that the two bags and drugs found concealed inside its metal handles belonged to him and the disclosure about Okechu and Ikye was made only three and a half days after his arrest when the cautioned statement was recorded from him. He thus had ample time to think of the invention that he had narrated in IDD52. The appellant did not say in IDD52 that he had informed PW4 about the two fictitious characters. Under the circumstances, the version of the appellant's defence was not more than a concoction which could consequently be dismissed as an afterthought or an idea occurring later. (para 36)

(8) The law is that, where the trial judge did not consider and expressly make a specific finding in rejecting the contents of the cautioned statement, but the contents thereof are more or less the same as his oral testimony and such testimony was rejected by the trial judge, it is implicit that he must in the event be taken to have rejected the contents of the cautioned statement as well. The contents of IDD52 were identical to the appellant's narrative when he gave his evidence during the defence stage. The cautioned statement did not state more than what was raised by the appellant in his narrative and throughout the trial. The argument on the second ground must therefore fail. (paras 37 & 38)

(9) The relevant information regarding Okechu and Ikye such as their addresses was not provided by the appellant. As such, the appellant failed to provide a good *Alcontara* notice. A bad *Alcontara* notice did not help the appellant at all but imposed an obligation on him to lead evidence in relation to his story to rebut the evidence of trafficking against him, which had not been discharged by the defence. The omission on the part of the police to investigate where the information given by the appellant smacks of details was not fatal to the prosecution's case, and on the other hand, any reliance by the defence on such inadequate and vague information would make their argument thereon not palatable at all. (para 40)

(10) One of the defences adopted by the appellant was that he came to Malaysia to survey the education opportunity which was suspicious as there was not even a document found on him or his bags that could prove his interest to further his education in Malaysia. The journey taken by the appellant was a long one and it was most suspicious that he did not carry any travelling bag of his own, instead, he was merely carrying the two bags containing items which 'were hardly valuable to be handed over to Ikye'. Further, the fact that the appellant could easily agree to carry the bags for Okechu to be delivered to Ikye both of whom were complete strangers to the appellant had also reasonably aroused the

court's suspicion. The defence of innocent carrier adopted by the appellant ought to be considered in the light of the doctrine of wilful blindness. (paras 42 & 43)

***Bahasa Malaysia** Headnotes*

Perayu, yang berasal dari Lagos, Nigeria, tiba di KLIA dan dilihat keluar dari pejabat tuntutan bagasi (hilang dan jumpa) menolak sebuah troli dengan dua bagasi. Sarjan Zulkefli ('PW4') yang berada dengan sepasukan polis menghampiri perayu dan memeriksa pasportnya. Perayu kemudian dibawa ke Pejabat Penyiasatan Narkotik di mana pemeriksaan lanjut menjurus pada penemuan bahan berserbuk yang disembunyikan di bahagian dalam pemegang berlogam kedua-dua bagasi tersebut. Bahan berserbuk itu dianalisis dan disahkan mengandungi 371.8g methamphetamine. Perayu oleh itu, dipertuduh dengan kesalahan mengedar dadah berbahaya bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Setelah mendapati keterangan yang cukup banyak untuk menunjukkan perayu mempunyai kawalan dan jagaan terhadap kedua-dua bagasi yang mengandungi dadah haram itu, hakim bicara memutuskan bahawa anggapan bawah s. 37(d) ADB terpakai dan perayu dianggap mempunyai milikan dan mengetahui sifat dadah tersebut sehingga dibuktikan sebaliknya. Diputuskan juga, oleh sebab perayu membawa dadah tersebut, pihak pendakwaan telah membuktikan pengedaran secara langsung seperti yang didefinisi bawah s. 2 ADB. Selanjutnya, tindakan perayu membawa dan mengangkut dadah dalam bagasi dalam penerbangan antarabangsa adalah tindakan terang-terangan yang melampaui milikan pasif. Oleh sebab hakim bicara berpuas hati bahawa pihak pendakwaan berjaya membuktikan kesalahan terhadap perayu pada asas *prima facie*, perayu diperintahkan membela diri. Kes perayu adalah bahawa dia tiba ke Malaysia untuk membuat kajian tentang pendidikan tinggi di Malaysia. Sebelum berlepas, dia diminta oleh seorang yang bernama Okechu, yang dikenalinya selama dua minggu, untuk membawa dua bagasi untuk diberikan kepada rakan Okechu, Ikye, di Malaysia. Perayu menyatakan dia tidak tahu terdapat dadah dalam pemegang beg-beg tersebut dan menafikan penglibatan dalam pengedaran dadah. Hakim bicara memutuskan bahawa terdapat hal keadaan mencurigakan yang sepatutnya memberi amaran kepada perayu terhadap risiko yang terlibat dalam membawa beg-beg tersebut bagi pihak seorang yang asing padanya dan untuk diberikan kepada seorang lagi yang juga asing padanya. Oleh itu, hakim menolak cerita perayu kerana tidak munasabah dan membuat inferens bahawa perayu mengetahui apa yang dibawanya, iaitu dadah dalam pemegang berlogam beg-beg tersebut dan bahawa dia terlibat dalam pengedaran dadah berbahaya. Atas dakwaan kegagalan polis menyiasat kewujudan Okechu dan Ikye, hakim bicara menolak aduan perayu sebagai tidak berasas dan salah tanggap kerana perayu tidak memberikan maklumat yang mencukupi kepada pihak polis. Hakim bicara oleh itu, memutuskan bahawa pihak pembelaan gagal mematahkan anggapan bawah s. 37(d) ADB atas imbangan kebarangkalian dan membangkitkan keraguan

munasabah dalam kes pendakwaan. Sebaliknya pihak pendakwaan berjaya membuktikan kesnya melampaui keraguan munasabah. Dengan itu, perayu didapati bersalah seperti yang dipertuduh dan dijatuhkan hukuman mati. Alasan-alasan utama yang dibangkitkan dalam rayuan ini adalah bahawa hakim bicara khilaf atas fakta dan undang-undang: (i) dalam mendapati bahawa kes *prima facie* dibuktikan terhadap perayu; dan (ii) apabila gagal mempertimbangkan kenyataan beramaran perayu, IDD52.

Diputuskan (menolak rayuan; mengesahkan sabitan dan hukuman Mahkamah Tinggi)
Oleh Idrus Harun HMR menyampaikan penghakiman mahkamah:

(1) Berdasarkan fakta-fakta yang dibuktikan, jelas bahawa perayu mempunyai, dalam jagaan atau bawah kawalannya, kedua-dua bagasi pada masa material. Keterangan berkaitan jagaan dan kawalan kedua-dua bagasi tersebut tidak dipertikaikan oleh pembelaan. Oleh itu, atas pembuktian unsur jagaan dan kawalan kedua-dua bagasi itu, menurut s. 37(d) ADB, perayu dianggap mempunyai milikan dadah-dadah yang disembunyikan dalam pemegang berlogam dan oleh itu, juga dianggap mengetahui sifat dadah tersebut.

(2) Walaupun anggapan pengetahuan bawah s. 37(d) ADB tidak disandarkan, cara bagaimana dadah itu disembunyikan dengan cermat dan bijak tidak akan, tanpa penjelasan munasabah, menafikan kewujudan pengetahuan oleh perayu. Perayu mengetahui mengenai bahan berserbuk yang disembunyikan dalam pemegang berlogam kedua-dua beg itu sememangnya bahan yang terlarang yang mesti disembunyikan walau apa pun berlaku untuk mengelak daripada dikesan oleh pihak berkuasa. Penyembunyian dadah yang dipersoalkan itu tidak menggambarkan perayu sebagai tidak bersalah. Selanjutnya, perayu tidak pernah menafikan pada peluang terawal semasa penemuan dadah-dadah itu, bahawa beg-beg itu dan dadah-dadah yang dijumpai di dalamnya bukan kepunyaannya. Tanpa penafian pada peluang terawal, anggapan boleh dibuat bahawa perayu sebenarnya mengetahui tentang dadah-dadah itu.

(3) Selanjutnya, kegagalan perayu memaklumkan PW4 tentang Okechu dan Ikye semasa dia ditangkap menyokong kes pendakwaan dan, sebaliknya, menunjukkan bahawa beban yang kurang perlu diberikan bagi pembelaan perayu. Pembelaan juga tidak pernah mencadangkan kepada PW4 bahawa perayu terkejut atau menunjukkan reaksi lain apabila dadah ditemui, yang menunjukkan bahawa dia tiada pengetahuan tentang dadah-dadah tersebut. Perayu hanya membuat pernyataan semata-mata, bahawa dia terkejut, semasa memberi keterangan dalam perbicaraan. Pernyataan sedemikian perlu ditolak sebagai fikiran semula. Sebaik sahaja unsur jagaan dan kawalan kedua-dua beg itu dibuktikan, anggapan milikan dan pengetahuan tentang dadah-dadah itu timbul.

(4) Perayu dilihat membawa kedua-dua beg, yang dari dalamnya dadah-dadah ditemui disembunyikan secara licik dan cermat dalam pemegang-pemegang berlogam, yang menunjukkan niat untuk mengelak pengesanan oleh pihak berkuasa. Jika PW4 tidak berjaga-jaga dalam menjalankan tugasnya, khususnya, semasa memeriksa kedua-dua beg tersebut, dadah yang dipersoalkan mungkin terlepas pemeriksaan kastam dan oleh itu terelak daripada pengesanan di balai ketibaan KLIA. Malahan, kuantiti dadah itu boleh dikatakan melebihi daripada apa yang mungkin perlu untuk kegunaan perayu sendiri. Oleh itu, inferens tak boleh sangkal boleh dibuat bahawa semasa perayu tertangkap dalam tindakan membawa dan mengangkut dadah-dadah dalam kuantiti yang lebih besar daripada apa yang diperlukan untuk kegunaannya sendiri, dia berbuat demikian untuk tujuan pengedaran. Inferens itu boleh dibuat walaupun tiada anggapan pengedaran statutori dalam ADB.

(5) Tindakan perayu membawa dan mengangkut dadah-dadah itu dalam kedua-dua beg dalam penerbangan antarabangsa dari sebuah negara ke sebuah negara lain, disembunyikan dengan teliti, jelas tindakan yang nyata dan bukan tindakan tak bersalah. Mahkamah berhak membangkitkan anggapan bawah s. 37(d) ADB dan pada masa yang sama membuat dapatan langsung pengedaran berdasarkan apa-apa tindakan yang membentuk tindakan pengedaran seperti yang dinyatakan dalam definisi perkataan mengedar dalam s. 2. Ia bertujuan untuk mengelak pelanggaran terhadap pembatasan penggunaan anggapan berganda.

(6) Kenyataan beramaran perayu, yang sepatutnya diterima masuk sebagai ekshibit pembelaan, sebaliknya ditandakan oleh hakim sebagai IDD52 melalui pegawai penyiasat. Tiada permintaan dibuat oleh pembelaan untuk mengemukakan kenyataan beramaran sebagai ekshibit. Apabila pembelaan dipanggil, pembelaan masih boleh memohon untuk memasukkan IDD52. Walau bagaimanapun, pihak pembelaan gagal berbuat demikian dan, dengan itu, IDD52 kekal sebagai hanya dokumen yang dikenal pasti dan bukan sebagai keterangan. Hakim bicara oleh itu wajar apabila tidak mengendahkan IDD52.

(7) Perayu tidak menafikan, pada peluang terawal, bahawa kedua-dua beg dan dadah-dadah yang dijumpai tersembunyi di dalam pemegang berlogamnya kepunyaannya dan pendedahan mengenai Okechu dan Ikye dibuat hanya tiga setengah hari selepas penangkapannya apabila kenyataan beramaran direkodkan daripadanya. Oleh itu, dia mempunyai masa yang banyak untuk memikirkan rekaan yang diceritakannya dalam IDD52. Perayu tidak menyatakan dalam IDD52 bahawa dia telah memaklumkan pada PW4 tentang kedua-dua watak yang direkanya. Dalam keadaan tersebut, versi pembelaan perayu tidak lebih daripada rekaan yang dengan itu ditolak sebagai fikiran semula atau idea yang timbul kemudian.

(8) Adalah undang-undang bahawa, di mana hakim bicara tidak mempertimbangkan dan membuat dapatan spesifik dalam menolak kandungan kenyataan beramaran, tetapi kandungannya adalah lebih kurang sama dengan keterangan lisannya dan keterangan itu telah ditolak oleh hakim bicara, adalah ternyata bahawa beliau dianggap menolak kandungan kenyataan beramaran. Kandungan IDD52 serupa dengan naratif semasa memberi keterangan pada peringkat kes pembelaan. Kenyataan beramaran tersebut tidak menyatakan lebih daripada apa yang dibangkitkan oleh perayu dalam naratifnya dan sepanjang perbicaraan. Hujahan bagi alasan kedua oleh itu sepatutnya ditolak.

(9) Maklumat relevan berkaitan Okechu dan Ikye seperti alamat mereka tidak diberikan oleh perayu. Oleh itu perayu gagal memberikan notis *Alcontara* yang baik. Notis *Alcontara* yang cacat tidak membantu perayu sebaliknya mengenakan kewajipan terhadapnya, yang tidak dilepaskan oleh pihak pembelaan. Peninggalan oleh polis untuk menyiasat sama ada maklumat yang diberi oleh perayu yang kekurangan butiran tidak menjejaskan kes pendakwaan, dan sebaliknya, apa-apa sandaran oleh pihak pembelaan atas maklumat yang tidak mencukupi dan samar-samar akan menjadikan hujahan mereka tidak boleh diterima langsung.

(10) Salah satu pembelaan yang ditimbulkan oleh perayu adalah dia ke Malaysia untuk meninjau peluang pendidikan, yang menimbulkan syak kerana tiada satu pun dokumen yang ditemui padanya atau dalam beg-begnya yang boleh membuktikan keinginannya untuk melanjutkan pendidikan di Malaysia. Perjalanan yang diambil oleh perayu adalah yang panjang dan mengundang syak apabila dia tidak membawa apa-apa beg untuk dirinya sendiri, sebaliknya, dia hanya membawa dua bagasi mengandungi barangan 'yang tiada nilai untuk diberikan kepada Ikye'. Selanjutnya, fakta bahawa perayu boleh mudah menyetujui untuk membawa beg-beg itu bagi pihak Okechu untuk diberikan kepada Ikye yang kedua-duanya merupakan orang yang asing bagi perayu juga secara munasabah membangkitkan syak wasangka pada mahkamah. Pembelaan pembawa tak bersalah yang digunakan oleh perayu wajar dipertimbangkan berdasarkan pada doktrin tindakan yang disengajakan.

Case(s) referred to:
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Hoh Bon Tong v. PP [2010] 5 CLJ 240 CA ***(refd)***
Kwok Weng Fatt v. PP & Other Cases [2013] 1 LNS 1304 CA ***(refd)***
Marimuthu Seringan v. PP [2016] 1 LNS 64 CA ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
Ong Ah Chuan v. PP & Another Appeal [1980] 1 LNS 181 PC ***(refd)***
Phiri Mailesi (Zambian) v. PP [2013] 1 LNS 391 CA ***(refd)***

A *PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC* ***(refd)***
PP v. Badrulsham Baharom [1987] 1 LNS 72 HC ***(refd)***
PP v. Lim Hock Boon [2009] 3 CLJ 430 FC ***(refd)***
PP v. Yuvaraj [1968] 1 LNS 116 PC ***(refd)***
Rengarajan Thangavelu v. PP [2015] 1 CLJ 993 CA ***(refd)***
Sainal Abidin Mading v. PP [1999] 4 CLJ 215 CA ***(refd)***
B *Teh Hock Leong v. PP [2008] 4 CLJ 764 CA* ***(refd)***
Teng Howe Sing v. PP [2009] 3 CLJ 733 FC ***(refd)***
Wjchai Onprom v. PP [2006] 3 CLJ 724 CA ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 37(d), 39B(1)(a), First Schedule

C *For the appellant - Ahmad Zaidi Zainal; M/s Ahmad Zaidi & Partners*
For the respondent - Norinna Bahadun; DPP

[Editor's note: Appeal from High Court, Shah Alam; Criminal Trial No: 45A-96-05-2012 (affirmed).]

D *Reported by S Barathi*

JUDGMENT

Idrus Harun JCA:

E **[1]** The appellant in the appeal before us is appealing against the decision of the High Court which convicted and sentenced him to death for an offence of trafficking in dangerous drug under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (Act 234). The charge against the appellant reads as follows:

F > Bahawa kamu pada 21.10.2011 jam lebih kurang 12.45 pagi, bertempat di Aras 3, Bangunan MTB KLIA, di dalam Daerah Sepang, di dalam Negeri Selangor Darul Ehsan, telah didapati memperedarkan dadah berbahaya iaitu seberat 371.8 gram methamphetamine dan dengan itu 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.

G **[2]** The facts of the case appear sufficiently and clearly in the grounds of judgment of the learned trial judge. We shall state relevantly the facts which the learned judge had garnered from the evidence. On 21 October 2011 at about 12 midnight, Sergeant Zulkefli bin Hj Zainal (PW4) was with a team
H of policemen observing passengers and luggage bags at level 3, MTB, Kuala Lumpur International Airport (KLIA), Sepang. Sometimes at about 12.45am, PW4 saw the appellant walking out of the baggage claim (loss and found) office pushing a trolley with two luggage bags on it. The accused was also seen holding a sling bag on his shoulder. Together with Lance Corporal
I Keneth Khana, Lance Corporal Rasmayasin and Lance Corporal Fadli, PW4 approached the appellant and identified himself as police to the appellant. PW4 then examined the passport of the accused and after identifying the accused, PW4 and his police team brought the accused to the narcotics investigation office located on the same level 3, MTB, KLIA for further

examination. The appellant brought along all his bags with the use of the trolley. In the said office, Lance Corporal Keneth Khana did a physical examination on the appellant but did not find anything incriminating on him. Thereafter, PW4 instructed the appellant to open the first luggage bag of "ECHOLACC" brand (exh. P26) with a tag bearing number QR 671614 and name Ochiada. The appellant took out three keys from his sling bag and used one of them to open the said luggage bag. When the luggage bag was opened, PW4 found some clothings and two pairs of shoes in it. He then took out the clothings and shoes and proceeded to examine the said luggage bag. PW4 examined the metal handle of the said luggage bag by tapping it and felt that there was something inside the metal handle. PW4 used a screwdriver to remove the metal handle from the luggage bag. After it was removed from the luggage bag, PW4 used a wire to probe inside the metal handle. When PW4 did it, he felt there was something inside the metal handle and he proceeded to pull out the object from inside it by using the said wire. SP4 managed to pull the object out which turned out to be transparent plastic containing white powdery substances. However, when PW4 removed the transparent plastic from the metal handle, it had broken into pieces. PW4 then removed the white powdery substances from the plastic and placed them in a plastic packet obtained from the narcotics investigation office. PW4 subsequently weighed the white powdery substances with a digital weighing machine of his office and the weight was 250g.

[3] After marking these exhibits, PW4 instructed the appellant to open the second luggage bag of "ECHOLACC" brand (exh. P38) with a tag bearing number QR 671615 and name Ochiada. PW4 took out a different set of keys from his sling bag and opened the said luggage bag with one of the keys. PW4 examined the luggage bag and found a few black plastic bags containing foodstuffs. PW4 took out the plastic bags from the luggage bag and proceeded to check the metal handle of the luggage bag. Using the same method used for the first luggage bag, PW4 used a screwdriver to dismantle the metal handle of the second luggage bag. PW4 then used the same wire to probe inside the metal handle. As a result, PW4 was able to remove several transparent plastics containing white powdery substances from the metal handle which had also broken into pieces. PW4 therefore removed the white powdery substances from all the plastic pieces and placed them into a plastic packet obtained from the narcotics investigation office. He proceeded to weigh the said substances and the weight was 260g. The exhibits were next marked by PW4. The sling bag of the accused was also examined by PW4 from which he found some personal documents of the accused, two mobile telephones and money.

[4] A search list was prepared by PW4 in the narcotics investigation office and the accused signed it. After lodging a police report, PW4 and his police team brought the appellant and all the exhibits to Sepang Police Station (IPD Sepang) whereupon PW4 handed over the appellant and the exhibits to the

A investigating officer, Inspector Mohd Zulkifli bin Rasid (PW5). Both PW4 and PW5 signed a handing over list of exhibits as proof that the exhibits were handed over by PW4 to PW5. PW5 marked the two plastic packets containing white powdery substances which were initially marked as ZZ(A) and ZZ(B) by PW4 as B1 and B2 respectively. Thereafter PW5 kept all the B said exhibits in his office steel cabinet under lock and key.

[5] On 8 November 2011, PW5 packed the two plastic packets B1 and B2 into an envelope which he marked as "ZL" and sealed it. At about 2.55pm on the same day, PW5 sent the drug exhibits to the government chemist, Dr Vanitha Kunalan (PW2) for analysis of the contents of B1 and B2. PW2 C on analysis, found the contents of the plastic packets B1 and B2 to contain 371.8g of methamphetamine. PW2 confirmed that methamphetamine is listed in the First Schedule of Act 234. PW2 prepared a chemist report (exh. P13) dated 14 February 2012. On 2 March 2012, PW5 received the drug exhibits in the envelope "ZL" and a chemist report from PW2. PW5 D then kept the drug exhibits in his office steel cabinet under lock and key. On 5 March 2012, PW5 sent the said drug exhibits in the envelope "ZL" to the police exhibits store, IPD Sepang.

[6] At the close of case for the prosecution, the learned judge accepted PW2's evidence that the powdery substances she had analysed consisted of E 371.8g of methamphetamine which was listed in the First Schedule to Act 234 and as such it is dangerous drug as defined in s. 2 of the same Act. This evidence was not disputed. Accordingly, the learned judge held that the first element of the offence of trafficking in dangerous drug was proved by the prosecution.

F **[7]** As regards the element of possession of the impugned drugs, being the second essential element of the offence, the learned judge found that from the evidence of PW4, the appellant was seen pushing the trolley with the two luggage bags on it and walking out of the baggage claim (lost and found) office all alone. This evidence, according to His Lordship, was more than sufficient G to prove that the appellant had custody and control of the two luggage bags which contained the impugned drugs in their metal handles. The learned judge also considered the evidence that the bags were opened by the appellant using the keys (exhs. P28 and P40) which he took out from his sling bag when he was instructed by PW4 to open the said bags and that there was a luggage H tag (exhs. P27 and P39) on each luggage bag in the appellant's name 'Ochiada' bearing the flight details which tallied with the details in the appellant's flight ticket (exh. P46) found from him. The overwhelming evidence showed that the appellant was caught red-handed having custody and control of the two luggage bags containing the illicit drugs. The learned judge therefore held that the presumption in s. 37(d) of Act 234 applied and I the appellant was deemed to have in his possession of such drugs and to have known the nature of the drugs until the contrary was proved.

[8] The learned judge also held that since the appellant was transporting or carrying the drugs, the prosecution had proven direct trafficking as defined under s. 2 of Act 234. It could be discerned from the evidence that the appellant had flown from Doha, Qatar to KLIA on the material date which according to the learned judge meant that the appellant was clearly and consciously carrying or transporting the drugs from Qatar to Malaysia by flight. On arrival at the KLIA, when the appellant collected and carried the two luggage bags, he was trafficking in the impugned drugs.

[9] His Lordship also drew an inference from the fact that the drugs were concealed in the metal handles of the said luggage bags stating that it was so concealed for the sole purpose of evading detection from the authorities. If PW4 and his officers were not alert enough, the learned judge emphasised, the impugned drugs so well hidden in the metal handles of the bags would not have been detected and would in the result have passed through the customs at the arrival hall of the KLIA. Hence, the learned judge held, the act of the appellant in carrying or transporting the drugs in the luggage bags on an international flight from Qatar to Malaysia concealed carefully in such a manner, was an overt act which went beyond passive possession.

[10] With regard to the issue of the chain of evidence in connection with the custody and identity of the illicit drugs, the learned judge was satisfied that the prosecution had proven overwhelmingly the continuous link of the evidence from the time of the recovery of the drugs by PW4 to the time it was finally produced in the High Court as evidence.

[11] Accordingly, after undertaking a maximum evaluation of the evidence adduced by the prosecution, the learned judge was satisfied on a *prima facie* basis, that the prosecution had proven the ingredient of possession with the utilisation of the presumption under s. 37(d) of Act 234 and direct trafficking under s. 2 thereof against the appellant of the impugned drugs specified in the charge whereupon the appellant was ordered to enter his defence on the charge preferred against him.

[12] The appellant in his defence tendered himself as a witness. Save for the appellant, no other witnesses were called to testify on behalf of the defence. On the facts of the defence evidence, the position adopted for the appellant is clearly described by the learned judge in his grounds of judgment. The appellant arrived in Malaysia on 21 October 2011. He flew from Lagos, Nigeria on 19 October 2011 to Doha, Qatar and from Doha to KLIA. But on 18 October 2011, one Okechu called and asked the appellant to meet him at Isni Hotel in Lagos. There, Okechu requested the appellant to bring the two luggage bags to be given to Okechu's friend Ikye in Malaysia. Okechu asked the appellant to take out his clothes from his small bag and put them into the second bag which had clothes inside it. The first bag had African foodstuffs. It was Okechu who gave him the two bags. Okechu gave the appellant a Malaysian sim card and USD 2,000 to be given to Ikye in

A Malaysia. The appellant himself had USD 2,000. Okechu told the appellant to call him when the appellant arrived in Malaysia and Okechu would contact Ikye who would then call the appellant to pick him up and collect the bags at the airport. When the appellant arrived at KLIA, he contacted Okechu. After a short while, Ikye called the appellant and told him that
B Okechu asked him to call the appellant to collect the two bags. Ikye told the appellant that he was waiting for him at the KLIA. The appellant came to Malaysia to survey on higher education (in particular Segi College) in Malaysia. It was his first trip here and Okechu had promised that Ikye would help the appellant while he was in Malaysia. The appellant said he knew
C Okechu about two weeks before his trip and Okechu was his cousin's friend adding that he helped Okechu to carry the bags because his cousin and Okechu were nice people.

[13] When he arrived at KLIA and having passed through the immigration control, he went to look for his two bags at the luggage carousel. Since he
D was unable to find his two bags there, he was taken by the security to the loss and found department. In the loss and found department, the appellant saw PW4 and an Indian man by the name of Keneth. The appellant told the people there that he had lost his bags and wanted to check whether his bags were there. The appellant searched around but did not see his bags there. He
E claimed that the police then brought out two bags and forced him to take them since the luggage tags had his name.

[14] Further, in his testimony, the appellant told the court that he could not recognise the two bags as each had sellotape fastened around it. The two bags were milky white and not his two black bags. The appellant denied that when
F he was detained by the police, he was pushing the trolley on which were the two bags. He said he was detained in the loss and found department. The appellant was then taken to another room and he was told by the police to bring along the two bags. The appellant carried the two bags without using the trolley. In the said room, Keneth searches the appellant's body but found
G nothing incriminating. PW4 then used a cutter to cut the sellotape fastened around the bags and asked the appellant to open the bags. The appellant used his keys to open the two bags.

[15] When the appellant opened the clothes bag first, there were clothes of Ikye and the appellant. PW4 checked inside the bag and found nothing
H unlawful inside it. PW4 then dismantled the handle of the bag and found one plastic inside the metal rod and inside the plastic, he found white powder. The plastic was torn when PW4 dug it. PW4 then took the white powder from the plastic and transferred it to another plastic. For the second bag, the same process was repeated by PW4 and white powder was found by PW4
I from the handle of the bag in the same manner as the first bag. PW4 then took the white powder from the plastic and transferred it to another plastic. As for the sling bag, PW4 found some personal documents and monies of the accused.

[16] According to the appellant, when PW4 was checking his bags, there were calls coming to his mobile telephone from Ikye who was supposed to take the bags from him and the appellant had told PW4 to answer the call and to follow the appellant to go out and meet Ikye in the arrival hall waiting to collect the bags. The appellant said that the police never allowed him to answer the call or to follow him out there to arrest Ikye and that he was very shocked when he saw PW4 take out the white powder because he did not take the drugs and did not know that the drugs were hidden in the bags. The appellant further stated that he did not know that Okechu "was doing drugs". He asserted that he did not know there were drugs in the handles of the bags and denied that he was involved in drugs trafficking.

[17] The learned judge found that it was not disputed by the defence that the two luggage bags seized by the police were the same luggage bags carried by the appellant although the appellant had initially denied they were the same bags because of the sellotape which was proven not to be true when the court examined the bags and found no traces of any sellotape on the bags. His Lordship then considered the appellant's defence that he was innocently carrying the two bags for one Okechu and to deliver them to Ikye in Malaysia and observed that the appellant only knew Okechu about two weeks before the trip yet he trusted Okechu absolutely when he agreed to carry the bags for him to be delivered to Ikye whom the appellant did not know. The bags contained some clothes, shoes and African foodstuff which did not appear to be of much value or valuable enough to be carried all the way from Lagos, Nigeria to Doha, Qatar en route to KLIA. The learned judge also noted that despite claiming that it was his own initiative to travel to Malaysia to survey on further education, the appellant did not have with him any travelling bags but undertook to carry the two bags given to him by Okechu complete with the contents.

[18] It was most suspicious that the appellant took a long journey merely to carry the two bags containing items that were hardly valuable given to him by Okechu whom he hardly knew to be handed over to Ikye in Malaysia. There were suspicious circumstances which should have alerted the appellant to the risk involved in carrying the bags for an almost complete stranger and to hand them over to another complete stranger. The learned judge therefore rejected the storyline given by the appellant as devoid of common sense for a reasonable person would not do it without any possible reason. An inference which could be drawn from these suspicious circumstances, the learned judge emphasised, was that the appellant knew what he was carrying, that is, the drugs in the metal handles of the bags and that he was involved in trafficking of the said drugs.

[19] The learned judge also found that the purpose of the appellant's visit to Malaysia to survey further education was doubtful. He did not even have a document relating to his educational background which could prove that he was interested in further education or lend credence to his assertion that he was interested to survey further education here.

[20] On the alleged failure on the part of the police for not trying to investigate the existence of Okechu and Ikye, the learned judge dismissed the appellant's complaint as baseless and misconceived since the appellant did not supply sufficient information to the police. The learned judge also dismissed the appellant's complaint that the police should have answered the incoming calls from Ikye to his mobile telephone after he was arrested as it could lead to the arrest of Ikye as an afterthought. This is because the defence failed to cross-examine PW4 and PW5 on the alleged telephone calls. The learned judge therefore held that the defence had failed to rebut the presumption under s. 37(d) of Act 234 on the balance of probabilities and raised a reasonable doubt in the prosecution's case. On the other hand, the prosecution had succeeded in proving its case against the appellant beyond any reasonable doubt. The appellant was accordingly found guilty as charged and sentenced to death.

[21] The appeal brings to a focus the principal grounds urged on behalf of the appellant that the learned judge had erred on the facts and in law when His Lordship:

(a) found that there was proven a *prima facie* case against the appellant; and

(b) failed to consider the appellant's cautioned statement IDD52.

[22] Taking the first ground, we will endeavour to confine our deliberation to the issue raised by learned counsel in his oral and written submissions. That brings us to the argument that at the conclusion of the prosecution's case, it would be incumbent on the part of the learned trial judge to undertake a maximum evaluation of all evidence adduced by the prosecution including all assumptions or inferences which arose from the evidence of the prosecution's witnesses. Learned counsel cited the Federal Court's decision in the case of *Balachandran v. PP* [2005] 1 CLJ 85 in support of this argument. It was urged for the appellant that firstly, the impugned drugs were concealed in such a manner that it was impossible for anyone to know what was hidden in the metal handles of both bags without having to prise it and secondly, the learned judge ought not to have invoked the presumption under s. 37(d) of Act 234 in an arbitrary manner where there was evidence available in the prosecution's case and that evidence could be gleaned from the appellant's cautioned statement IDD52. We were accordingly invited to hold that the learned judge erroneously held that a *prima facie* case had been proven against the appellant.

[23] The pertinent question therefore is whether the learned judge correctly invoked the presumption under s. 37(d) of Act 234. We would start off by stating that based on the proven facts that could be discerned from the evidence of PW4, it is abundantly clear that the appellant had in his custody or under his control the two luggage bags (exhs. P26 and P38) at that material time. Needless to say, custody or control of the said bags from which the dangerous drugs were found is an essential element and a primary or basic fact that the prosecution is required to prove before the appellant could be

deemed to have been in possession of such drugs and to have known the nature of the same under s. 37(d) of Act 234 (*Muhammed Hassan v. PP* [1998] 2 CLJ 170; [1998] 2 MLJ 273). The use of the word 'found' in the opening phrase of s. 37(d) suggests that the trial court has to make an express affirmative finding of this basic or primary fact before the presumption can be relied upon. The learned trial judge in this regard had undertaken a maximum evaluation of the prosecution's evidence and accepted the following evidence which proved the primary or basic facts of custody or control:

(a) the appellant was seen walking alone whilst carrying the two luggage bags of ECHOLAC brand on a trolley which he was pushing when he was stopped by PW4;

(b) the bags in question each having a luggage tag (exhs. P27 and P39) with the name of the appellant printed thereon;

(c) the bag marked as exh. P26 was opened by the appellant using one of the keys (exh. P28) which he took out from his sling bag;

(d) PW4 found the impugned drugs which were concealed inside the metal handle of the said bag;

(e) the bag marked as exh. P38 was opened by the appellant using another key (exh. P40) which he took out from his sling bag;

(f) PW4 found the impugned drugs concealed inside the metal handle of the said bag; and

(g) the boarding pass (exh. P18) and the luggage tags (exhs. P27 and P39) showed that the appellant had flown from Doha, Qatar to Malaysia carrying the two luggage bags.

[24] The above evidence clearly showed that the appellant had the two luggage bags in custody or under his control at that point of time. The facts that we gleaned from the evidence of PW4 during cross-examination patently showed that the above evidence was not disputed by the defence. There was, moreover, not even a suggestion made to PW4 that when the drugs were found the appellant denied that the two bags and the drugs did not belong to him or that it belonged to Okechu or Ikye. Based on the above evidence, there can be no doubt whatsoever that the learned judge's finding that the appellant had the bags in his custody or under his control was not a perverse decision. We fully endorse and are indeed in full agreement with the said finding which the learned judge so firmly expressed in the grounds of judgment.

[25] One thing is extremely clear, that is that, upon proof of the element of custody or control of the two bags, the appellant was, pursuant to s. 37(d) of Act 234, deemed to be in possession of the drugs concealed in its metal handles and thus was also deemed to have known the nature of such drugs. We have no reasons whatsoever to disagree with these findings and the

A invocation by the learned judge of the presumption under s. 37(d) of Act 234 as it is well-established and trite principle that the said presumption applies where the essential elements that could activate such presumption have been proven and once this is fulfilled, it behoves the defence to rebut it on the balance of probabilities. We now quote the Privy Council's decision in the B case of *PP v. Yuvaraj* [1968] 1 LNS 116; [1969] 2 MLJ 89 which lucidly explained the law as follows:

> Generally speaking, no onus lies upon a defendant in criminal proceedings to prove or disprove any fact: it is sufficient for his acquittal if any of the facts which if they existed would constitute the offence with which he is C charged are "not proved". But exceptionally, as in the present case, an enactment creating an offence expressly provides that if other facts are proved, a particular fact, the existence of which is a necessary factual ingredient of the offence, shall be presumed or deemed to exist "unless the contrary is proved". In such a case the consequence of finding that that particular fact is "disproved" will be an acquittal, whereas the absence D of such a finding will have the consequence of a conviction. Where this is the consequence of a fact being "disproved" there can be no grounds in public policy for requiring that exceptional degree of certainty as excludes all reasonable doubt that that fact does not exist. In their Lordships' opinion the general rule applies in such a case and it is sufficient if the court considers that upon the evidence before it is more E likely than not that the fact does not exist. The test is the same as that applied in civil proceedings: the balance of probabilities. This was the test which was approved by the Court of Criminal Appeal in *R v. Carr-Briant* [1943] KB 607 a case upon a provision in an English statute in similar terms to that contained in section 14 of the Malaysian Prevention of Corruption Act 1961. For the reasons already indicated their Lordships do F not think that, at any rate where such a provision is contained in an enactment, the definitions of "proved" and "disproved" contained in the Evidence Ordinance make any difference between Malaysian law and English law in this respect.

[26] Our conclusion is sufficient to dispose of this issue. Nevertheless, we G would go further to say that even if the presumption of knowledge under s. 37(d) of Act 234 is not relied on, the manner in which the drugs were carefully and cleverly concealed in this case would not in the absence of a plausible explanation, deny the existence of knowledge on the part of the appellant of the drugs in question. It instead patently indicated as it were the H appellant's mental state of knowledge that the powdery substances concealed in the metal handles of the two bags were indeed prohibited items which must be hidden at all costs in order to avoid detection by the authorities. The concealment of the impugned drugs, we would confidently say, certainly did not reflect an innocent mind on the part of the appellant. The Federal Court I in *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337; [2007] 5 MLJ 1 adopted the approach that the fact that an incriminating article was found concealed is no ground for saying that an inference of knowledge of the drug could not be drawn against the respondent. The Federal Court on this point said:

[17] Therefore, the presence of the three packages in the car without a plausible explanation from the respondent could give rise to a strong inference that he had knowledge that the packages contained drug or things of similar nature (see also *Lim Beng Soon v Public Prosecutor* [2000] 4 SLR 589). We further agree with the prosecution that the fact that the drug was found wrapped in newspaper is no ground for saying that an inference could not be drawn against the respondent that he had the requisite knowledge. In this regard it is pertinent to refer to the observation of the Singapore Court of Appeal *Zulfikar bin Mustaffah v Public Prosecutor* [2001] 1 SLR 633, at p 639:

> 21. For the element of 'possession' (within the meaning of s. 17 of the Misuse of Drugs Act) to be established, it must not only be shown that the accused had physical control of the drugs at the relevant time; the prosecution must also prove that the accused possessed the requisite knowledge as the contents of what he was carrying: see *Warmer v. Metropolitan Police Commissioner* [1969] 2 AC 256; *Tan Ah Tee & Anor v. PP* [1978-1979] SLR 211; [1980] 1 MLJ 49. In the course of the appeal before us, counsel for the appellant relied heavily on the fact that the contents of the bundles were securely wrapped in newspaper and could not be identified. We were accordingly invited to draw the inference that the appellant had no knowledge of the contents of the bundles.
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> 22. We were unable to accede to this request. While the fact that the contents of the bundles were hidden from view may have been relevant in determining whether the requisite knowledge was absent, this factor should still not be given too much weight. Otherwise, drug peddlers could escape liability simply by ensuring that any drugs coming into their possession are first securely sealed in opaque wrappings. Rather, the court must appraise the entire facts of the case to see if the accused's claim to ignorance is credible. As Yong Pung How CJ remarked in *PP v. Hla Win* [1995] 2 SLR 424 (at p 438):
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> > In the end, the finding of the mental state of knowledge, or the rebuttal of it, is an inference to be drawn by a trial judge from all the facts and circumstances of the particular case, giving due weight to the credibility of the witnesses.

[27] References in this connection may also be made to the case of *Teh Hock Leong v. PP* [2008] 4 CLJ 764 where the Court of Appeal there said:

> [8] Turning to the facts of the present instance, we agree with the learned trial judge that the method employed to bring the drugs in question from Thailand into Malaysia was done in most cunning fashion to escape detection by the authorities. The method employed to convey or transport a drug may sometimes furnish evidence of knowledge. For example, an attempt to carefully conceal a drug may indicate an intention to avoid detection and thereby point to knowledge. Of course it all depends on the facts of each individual case.

[28] As earlier stated, the defence did not suggest to PW4 that the appellant denied at the initial stage of the discovery of the drugs that the bags and the drugs found inside its metal handles did not belong to him. It could be inferred that without such denial at the earliest opportunity, the appellant actually knew about the drugs in question. Besides, at that early stage, there was no suggestion by the defence that the appellant informed PW4 about Okechu or Ikye. If it is indeed true that the bags were given to him by Okechu and to be subsequently delivered to Ikye, and that the appellant had no knowledge about the illicit drugs, we would be inclined to say that the logical thing for the appellant to do, upon the discovery of the drugs, was to have told PW4 at that time that the same did not belong to him and he had no knowledge about it. We would go further to say on this aspect that the failure of the appellant to inform PW4 about these two persons at the time of his arrest goes some way to support the prosecution's case and that on the contrary it merely goes to show that less weight ought to be attached to the appellant's defence which therefore entitled the learned judge to disbelieve the appellant. The Federal Court in *Teng Howe Sing v. PP* [2009] 3 CLJ 733 alluded to the decision in *PP v. Badrulsham Baharom* [1987] 1 LNS 72; [1988] 2 MLJ 585 on this issue and said:

> [30] With regard to the above contention of the appellant it is our judgement that it is misconceived. By commenting on the failure of the appellant to provide all relevant information regarding "Ho Seng" to the police at the time of his arrest or when his cautioned statement (D2) was recorded five days after his arrest does not mean that the learned trial Judge had imposed on the appellant a duty a speak/disclose them in his cautioned statement nor did he draw any adverse inference against the appellant. *The learned trial judge's comments on the late disclosure of the real identity of "Ho Seng" at the defence stage merely goes to show the weight that the court attached to the appellant's defence which is permitted by the law.* On this point we would like to refer to the case of *PP v. Badrulsham bin Baharom* [1988] 2 MLJ 585, wherein Lim Beng Choon J at p. 591 said that:
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> > ... So we are left with nothing more than the bare oral assertion of the accused that it was Noor Azlan who asked him to collect the bag on behalf of the former and that the accused himself had no knowledge of the contents of P3. If that be the case, one would hardly imagine that he would not have told either PW3 or PW5 at the railway station at Alor Setar at the time of his arrest that P3 belonged to Noor Azlan instead of saying that there was nothing in P3.
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> [31] *In Badrulsham's case, the court was of the view that the failure of the accused to inform the raiding officers that the white plastic bag belonged to Noor Azlan at the time of his arrest and only revealing this information during the interrogation two hours after his arrest, goes some way to support the case for the prosecution.*
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> [32] Applying the principle in *Badrulsham*'s case to the facts of the instant case, the learned trial judge was correct to conclude that the appellant had two opportunities to provide information about "Ho Seng", ie, at the time of his arrest and five days later during recording of his cautioned

statement but he failed to do so. We are therefore of the view that in the circumstances, the appellant's failure to provide relevant information about "Ho Seng" for the police to carry out a thorough investigation into the probability of his defence, entitled the learned trial judge to disbelieve him. (emphasis added)

[29] It was strenuously contended for the appellant that the learned judge failed to consider PW4's evidence that if anyone inspected the two bags, he would not have known about the drugs. With this evidence, learned counsel submitted, it was impossible for anyone to know about the drugs unless the metal handles were prised using the screwdriver in order to remove it from the bags as was done by PW4. In our judgment in this appeal, whether this argument could succeed to draw a salutary effect that could convince us to accept that the appellant had no knowledge about the drugs would require the prosecution's evidence and in particular PW4's testimony to be considered in its entirety, not just that part of PW4's testimony which learned counsel had highlighted above. It ought to be emphasised that the defence never suggested to PW4 that the appellant was shocked or showed other reaction when the drug was discovered that would indicate that he did not know about the drugs. The appellant only made this bare assertion that he was shocked when he gave his evidence during the trial. Such assertion ought, in our opinion, to be dismissed as an afterthought. In any event, we have already stated earlier that the fact that the drugs were concealed in that manner affords no ground for saying that an inference of knowledge of the drug could not be made. The learned judge had also correctly held that, once the element of custody or control of the two bags had been proved, the presumption of possession and knowledge of the drugs could be raised. Possession and knowledge are therefore presumed. It is for the defence to rebut the presumption on the balance of probabilities. This question must fall, ergo, is no longer an issue.

[30] It is necessary to draw attention to one significant aspect of the prosecution's case which the learned judge had dealt in his grounds of judgment. The learned judge in this regard, having invoked the presumption under s. 37(d) of Act 234 proceeded to consider the element of trafficking wherein His Lordship held that the prosecution had successfully proven direct trafficking within the definition of the word trafficking under s. 2 thereof. His Lordship's finding was premised on the evidence that it was the appellant who transported and carried the drug from Qatar to Malaysia by flight.

[31] There was without question, sufficient and clear evidence to support the above finding. The prosecution, in fact, led irrefragable evidence to show that the appellant had taken the flight from Lagos, Nigeria and stopped in Doha, Qatar, en route to Malaysia. This evidence could be gleaned from the electronic air ticket issued to the appellant (exh. P46) which tallied with the luggage tags issued for the two bags (exhs. P27 and P39). The appellant was seen by PW4 carrying the two bags from which the drugs were found

A cunningly and carefully concealed inside its metal handles which, in our opinion had evinced by this act an intention to avoid detection by the authorities. If PW4 was not vigilant or alert in carrying out his duty in particular whilst inspecting the two bags, the impugned drugs would have passed through customs check and therefore avoided detection at the arrival
B hall of the KLIA. Furthermore, the quantity of the impugned drugs could be said to be much larger than was likely needed for the appellant's personal consumption. An irresistible inference could therefore be made that when the appellant was caught in the act of transporting and carrying the drugs in quantity much larger than was needed for his personal consumption, he did
C so for the purpose of trafficking in it unless he could offer a plausible explanation. Such inference could be made even if there is no statutory presumption of trafficking in Act 234. The law as explained by the Privy Council in the case of *Ong Ah Chuan v. PP* [1980] 1 LNS 181; [1981] 1 MLJ 64 allows such inference of trafficking to be made where the quantity of drugs involved is large. Lord Diplock in that case said:

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> Proof of the purpose for which an act is done, where such purpose is a necessary ingredient of the offence with which an accused is charged, presents a problem with which criminal courts are very familiar. Generally, in the absence of an express admission by the accused, the purpose with which he did an act is a matter of inference from what he did. Thus, in
> E the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he was transporting them for the purpose of trafficking in them would, in the absence of any plausible explanation by him, be irresistible - even if there were no statutory presumption such as is contained in section 15 of the Drugs Act.
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> *As a matter of common sense the larger the quantity of drugs involved the stronger the inference that they were not intended for the personal consumption of the person carrying them, and the more convincing the evidence needed to rebut it*. (emphasis added)

G **[32]** On the facts of the prosecution's case, we accept that the act of the appellant in transporting and carrying the drugs in the two bags on an international flight from one country to another, carefully concealed as it were, was indeed an overt and not an innocent act. The learned judge had made a correct finding in this regard. We find support to this conclusion in the decision of this court in the case of *Wjchai Onprom v. PP* [2006] 3 CLJ
H 724:

> ... Here the appellant was caught conveying a very large quantity of cannabis from Thailand to Malaysia. In view of the amount involved, it is safe to infer that the drug was intended for a third person or persons, known or unknown. That other person or persons may, to borrow Lord
> I Diplock's words, be "the actual consumer or a distributor or another dealer". So this is not a case of mere passive possession. *There were overt acts done by the appellant, namely the active concealment of the drug on his person followed by its conveyance from Thailand into Malaysia which reasonably supports the existence of criminal purpose proscribed by the Act*. We may add that the very

same facts also give rise to a strong inference that the appellant was aware of his possession, knew the nature of the drug possessed and had the power of disposal over it. So much for the *prima facie* proof of actual trafficking. (emphasis added)

[33] It would be useful to remember that the law must now be taken to be well-settled that the court is perfectly entitled to invoke a presumption under s. 37(d) of Act 234 while at the same time making a finding of direct trafficking based on any of the acts which constitute the act of trafficking as specified in the definition of the word trafficking in s. 2 thereof. This is in order to avoid contravening the Bar against the use of double presumptions following the case of *Muhammed Hassan v. PP* [1998] 2 CLJ 170. We would rely on the Federal Court's decision in the case of *PP v. Lim Hock Boon* [2009] 3 CLJ 430 on this question:

[33] *A good example where the definition of trafficking in s. 2 of the Act was invoked is in the case of PP v. Abdul Manaf Muhamad Hassan [2006] 2 CLJ 129. There the Federal Court, in order to avoid contravening the bar against the use of double presumptions following the case of Muhammed Hassan v. PP [1998] 2 CLJ 170, substituted the presumption of trafficking under s. 37(da) of the Act relied on by the trial court, to find trafficking in the dangerous drugs by carrying under s. 2 of the Act*. The Federal Court ruled that the Court of Appeal ought to have applied the proviso to s. 60(1) of the Courts of Judicature Act 1964 and upheld the conviction and sentence notwithstanding the misdirection by the learned trial judge in applying the double presumptions under s. 37(d) and (da) of the Act to convict the accused.

[34] It is worthy of note that there is only one offence of trafficking under the Act. However, there are several acts that may constitute the offence. If the prosecution is not able to bring its case within one of the acts (see *Ong Ah Chuan v. PP* [1980] 1 LNS 181) under s. 2 of the Act, but is nevertheless able to established the existence of primary facts that draw the presumption under the Act, then the court is enjoined to draw those presumptions, subject of course to the bar as set out by *Muhammed Hassan*, *supra*. (emphasis added)

[34] It ought to be mentioned, before leaving the first ground of appeal, that the learned judge evaluated the credibility of the evidence adduced by the prosecution witnesses and was satisfied that all of them, in particular, PW4 and PW5, were witnesses of truth and reliable. We have no reasons whatsoever to disagree with the assessment made by the learned judge in regard to the witnesses credibility as His Lordship without doubt, had audio-visual advantage of watching their demeanour and listening to their testimony whilst giving their evidence. The whole argument of learned counsel on the first ground in the end in no way leaves any margin of doubt in our minds that it is unsustainable, devoid of any merit and therefore must be rejected.

[35] The second ground taken in this appeal before this court, which is the remaining issue for our determination, concerns the argument that the learned judge failed to consider the appellant's cautioned statement. Before

A we embark upon a detailed consideration of this ground, there is a preliminary matter which at this juncture, requires our attention. Learned counsel complained that the appellant's cautioned statement should have been admitted as defence exhibit. The appellant's cautioned statement was instead marked by the learned judge as IDD52 through PW5, the
B investigating officer. It is apparent, on our perusal of the notes of evidence, that there was no request made by the defence to tender the cautioned statement as an exhibit. We, therefore, hold that the learned judge was right when His Lordship merely marked the cautioned statement as identified document. Even so, in our view, when the defence was called, the defence
C could still seek to admit IDD52 in evidence through the appellant so that the same could be marked as defence exhibit. The defence failed to do so though, and as such IDD52 remained as identified document only and not as evidence. Thus, even if it is true that the learned judge did not consider IDD52, His Lordship was justified in ignoring it. Nevertheless, since the defence sought to show that the learned judge had erred in not considering
D IDD52, we shall endeavour to consider this document as if it was tendered by the defence as evidence. With this preliminary observation, we shall proceed to consider the second ground in the contention of learned counsel.

[36] We begin in dealing with this issue, by reiterating our earlier view that
E so far as the evidence showed, the appellant did not make any denial at the earliest time possible which was at the point when he was arrested by PW4 on 21 October 2011 upon the discovery of the drugs, that the two bags and drugs found concealed inside its metal handles belonged to him. Neither did he disclose to PW4 about Okechu and Ikye. The appellant only offered his
F version *circa* three and a half days after his arrest when the cautioned statement was recorded from him. It could therefore reasonably be said that he had ample time to think of his invention that he had narrated in IDD52. Be that as it may, it is clear to us that the appellant did not say in IDD52 that he had informed PW4 about these two fictitious characters. Under the circumstances, this version of the appellant's defence was never more than
G a concoction which could consequently be dismissed as an afterthought or an idea occurring later.

[37] Moreover, our perusal of IDD52 showed that the contents thereof were identical to the appellant's narrative when he gave his evidence during the defence stage as highlighted earlier in this judgment. In fact, Okechu was
H mentioned in both IDD52 and the appellant's testimony as the person who gave the two bags to the appellant to be given to one Ikye in Malaysia. The law, we apprehend, is that where the trial judge did not consider and expressly make a specific finding in rejecting the contents of the cautioned statement, but the contents thereof are more or less the same as his oral
I testimony and such testimony was rejected by the learned judge, it is implicit that he must in the event be taken to have rejected the contents of the cautioned statement as well. We would in this regard adopt the law as

explained by this court in *Sainal Abidin Mading v. PP* [1999] 4 CLJ 215; [1999] 4 MLJ 497 where in that case, as here, the defence tendered DI during the prosecution's case and hence marked as defence exhibit, Haidar JCA (as His Lordship then was) said at p. 226 (CLJ); p. 507 (MLJ):

> Though the learned judge in his judgment did not expressly made specific finding of rejecting the contents of the cautioned statement since they are more or less the same as his oral evidence and such defence was rejected by him for the reasons stated by him and that he accepted the evidence of PW4 and PW5, it is implicit that he must in the circumstances have rejected the contents of the cautioned statement as well.

[38] In this appeal, although the learned judge did not specifically consider IDD52, it is very clear in the grounds of judgment that His Lordship had considered the appellant's testimony including his evidence relating to Okechu and Ikye and rejected the same for the reasons His Lordship had given. The cautioned statement we find, did not state more than what was raised by the appellant in his narrative and throughout the trial. In *Kwok Weng Fatt v. PP & Other Cases* [2013] 1 LNS 1304, it was:

> [18] In our view, although the learned trial Judge did not elaborate on the cautioned statements in his judgment, we find no error to be of no consequence to the facts of the present case. We say so because the cautioned statements do not state more than what was raised by the appellants throughout the trial.

For these reasons, the argument of learned counsel urged for the appellant on the second ground must therefore fail.

[39] The remaining question which arose out of the cautioned statement concerns the defence argument that PW5 did not carry out any investigation on Okechu and Ikye. But may it be remembered that these two names were only mentioned three and a half days after the appellant's arrest when IDD52 was recorded from him. He did not inform such vital information to PW4 at the time of his arrest. In his defence, the appellant testified that Ikye telephoned him at the time of his arrest, however, no such question was put to PW4 when he was under cross-examination. We are convinced that the reasons why the appellant did not inform PW4 of these two persons and that PW4 was not cross-examined on this issue was because they were in actuality fictitious characters. Furthermore, PW5 in his evidence told the court that the appellant did not furnish details regarding Okechu and Ikye such as their full names, telephone numbers, addresses and the place where he was supposed to deliver the bags to Ikye.

[40] The defence contention begs the question whether the appellant's evidence concerning these two names constituted a good and sufficient '*Alcontara* notice' which upon such notice being given, the police would be obliged to track down Okechu and Ikye. It is a well-established principle that for the *Alcontara* notice to apply, the appellant must provide sufficient and good particulars in the right perspective, not insufficient or vague notice

where the prosecution in the result would not be able to carry out investigation to rebut the defence story. Having considered the above relevant evidence, we are satisfied that the relevant information regarding these persons such as their addresses was not provided by the appellant as such the appellant failed to provide a good *Alcontara* notice. A bad *Alcontara* notice did not help the appellant at all but imposed an obligation on him to lead evidence in relation to his story to rebut the evidence of trafficking against him (*Rengarajan Thangavelu v. PP* [2015] 1 CLJ 993; *Phiri Mailesi (Zambian) v. PP* [2013] 1 LNS 391, [2013] 5 MLJ 780; *Marimuthu Seringan lwn. PP* [2016] 1 LNS 64). This obligation to rebut the presumption of trafficking on the balance of probabilities had not been discharged by the defence. We would add, in any event, that the omission on the part of the police to investigate where the information given by the appellant smacks of details is not fatal to the prosecution's case, on the other hand, any reliance by the defence on such inadequate and vague information would make their argument thereon not palatable at all. We would not hesitate to also hold, on the authority of *Teng Howe Sing*, *supra*, that such failure entitled the learned judge to disbelieve the appellant.

[41] The learned judge had adequately and judicially considered the defence evidence and found that the defence had failed to rebut the presumption under s. 37(d) of Act 234 on the balance of probabilities. The appellant's defence, in essence, is that he was an innocent carrier. However, the learned judge, as we have mentioned earlier, found that the appellant was not an innocent carrier, instead he was guilty of wilful blindness. His Lordship's finding is in our judgment in line with the decision of this court in *Hoh Bon Tong v. PP* [2010] 5 CLJ 240 where at p. 272, Abdul Malik Ishak JCA dealt with the issue of wilful blindness as follows:

> [72] In the context of possession of dangerous drug, in order to prove the element of guilty knowledge or *mens rea* the duty of the prosecution is to prove that the accused knew the nature of the particular dangerous drug that he was in possession of as a dangerous drug or as a prohibited drug. There is no necessity for the prosecution to also prove knowledge pertaining to the name, type or exact qualities of the dangerous drug. Here, the prosecution has done just that and we cannot find any fault in that.
>
> [73] The defence on innocent carrier must necessarily bring into the picture the concept of willful blindness. And according to Yong Pung How CJ (Singapore) in *Public Prosecutor v. Hla Win (supra)* at p. 438, "the concept of wilful blindness qualifies the requirement of knowledge." And his Lordship continued further by saying (at the same page):
>
> > As Professor Glanville Williams aptly remarked in his *Textbook on Criminal Law*, at p. 125:
> >
> > > … the strict requirement of knowledge is qualified by the doctrine of wilful blindness. This is meant to deal with those whose philosophy is: 'Where ignorance is bliss, 'tis folly to be

> wise'. To argue away inconvenient truths is a human failing. If a person deliberately 'shuts his eyes' to the obvious, because he 'doesn't want to know,' he is taken to know.'

[74] Continuing at the same page, his Lordship said:

> In *Ubaka v. PP* [1995] 1 SLR 267, the principles laid down in *Warner v. Metropolitan Police Commissioner* [1968] 2 All ER 356; [1968] 2 WLR 1303 and modified in *Tan Ah Tee v. PP* [1980] 1 MLJ 46 were applied by the trial judge. In its grounds of judgment, this court quoted the following passage by the trial judge:
>
> > Ignorance is a defence when there is no reason for suspicion and no right and opportunity of examination, and ignorance *simpliciter* is not enough.
>
> [75] Here, we have evidence that the drugs were placed inside transparent plastic packets and the contents can be seen from outside. It was mere folly on the part of the accused not to examine what he carried in his pockets. It is a classic case of wilful blindness.

[42] One of the defences adopted by the appellant was that he came to Malaysia to survey the education opportunity which according to the learned judge was suspicious as there was not even a document found on him or his bags that could prove his interest to further his education in Malaysia. The appellant was allegedly interested to further his study in Segi College however, there were no documents or pamphlets on that college recovered from him despite saying that he had researched on the educational facilities in Malaysia whilst he was in Nigeria. Besides, the appellant only carried the two bags for Okechu. The journey taken by the appellant was a long one and it was most suspicious that he did not carry any travelling bag of his own, instead, he was merely carrying the two bags containing items which according to the learned judge "were hardly valuable to be handed over to Ikye". We agree with the learned judge that such documents would lend credence to the appellant's assertion that he was interested to further his study in Malaysia, in particular, at Segi College.

[43] Additionally, the fact that the appellant could easily agree to carry the two bags for Okechu to be delivered to Ikye both of whom were complete strangers to the appellant had also reasonably aroused the court's suspicion. We accept the learned judge's finding that the reason given by the appellant that he carried the bags for Okechu was because he was a nice man was not acceptable as a plausible reason. These suspicious circumstances should have alerted the appellant to the risk involved in carrying the bags which contained items that were hardly valuable for someone he hardly knew to be delivered to another person whom he completely did not know. The defence of innocent carrier adopted by the appellant ought to be considered in the light of the doctrine of wilful blindness. The appellant had obviously shut his eyes to and completely ignored the surrounding circumstance under which

A he was asked to carry the two bags which to our minds should have aroused his suspicion rather than trusting Okechu shortly or to be exact two weeks after he knew Okechu when he agreed to carry the bags to be given to Ikye in Malaysia. The appellant's story on how he came about carrying the two bags given by Okechu to Malaysia which the appellant was visiting for the
B first time for a dubious reason of conducting the alleged survey on educational opportunity is utter nonsense as a person in the right frame of mind would not have done it without any satisfactory reason. The logical conclusion which could be drawn from these suspicious circumstances was that the appellant did not come to Malaysia for the purpose of education but
C it was merely an excuse to cover up his unlawful activity of trafficking in the impugned drugs and that he knew that he was carrying the impugned drugs in the metal handles of the bag for the said purpose.

[44] For the reasons that we have already indicated, we find no difficulty whatsoever in holding on the strength of the prosecution's evidence
D considered in the light of the defence testimony and the well-recognised legal principles, that the findings of the learned trial judge that the defence failed to rebut the presumption of possession and knowledge of the drugs under s. 37(d) of Act 234 and raised a reasonable doubt in the prosecution's case, is unassailable. We are satisfied that the prosecution had successfully proved
E the charge against the appellant beyond reasonable doubt. The conviction and sentence by the High Court is consequently affirmed and the appeal is dismissed.

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