IN THE HIGH COURT OF MALAYA
IN THE STATE OF PENANG
[CRIMINAL TRIAL NO. 45-3-2012 & NO. 45-4-2012]

PUBLIC PROSECUTOR

AND

1. SOMASUNDRAM RAJASEGARAN
2. YOGANATHAN KRISHNAN

CRIMINAL LAW: *Firearms (Increased Penalties) Act 1971 - Sections 4 & 8 - Unlawful possession of pistol and cartridge as well as bullets - There was no one else in premise except accused at time of arrest - Pistol and ammunition were exposed and fairly visible to accused - Whether there was unlawful possession of pistol and bullets*

CRIMINAL LAW*: Dangerous drugs - Trafficking - Possession - Drugs found in premise - There was no one else in premise except accused at time of arrest - Drugs were exposed and fairly visible to accused - Whether there was possession of dangerous drugs - Whether drugs found were for purpose of trafficking*

CRIMINAL LAW*: Poisons Act 1952 - Section 30(3) - Possession - Poison chemicals found in premise - Accused was alone in premise at time of arrest - Chemical and substances were exposed and fairly visible to accused - Whether there was possession of poison chemicals*

CRIMINAL LAW: *Common intention - Section 34 of Penal Code - Accused persons were in premise at time of raid where incriminating drugs, poison chemicals, pistol and bullets were found - Several implements and processing equipment for drugs and other substances*

were visibly exposed - Exhibits seized during raid were in close proximity to both accused - Whether there was prior meeting of minds between both accused persons - Whether common intention was proven

***CRIMINAL PROCEDURE**: Exhibit - Break in chain of evidence - Discrepancies of weight of exhibits - Non-calling of laboratory assistant - Whether there was doubt with regard to identity of exhibit - Whether difference in weight of drugs could ipso facto cast any doubt as to identity of exhibits - Whether there was break in chain of exhibits - Whether failure to call laboratory assistant could cause any infirmity to prosecution's case*

***CRIMINAL PROCEDURE**: Defence - Denial - Accused was found in premise during raid - Allegation that presence of accused in premise was by way of invitation of owner of premise - Whether defence raised reasonable doubt in prosecution's case*

[Both accused were discharged and acquitted from all five charges.]

Case(s) referred to:

Azhar Lazim v. PP [2012] 1 LNS 262 CA ***(refd)***

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

DA Duncan v. Public Prosecutor [1980] 1 LNS 12 FC ***(refd)***

Hasbala Mohd Sarong v. PP [2013] 6 CLJ 945 FC ***(refd)***

Ilham Saputra Zainal Abidin v. PP [2013] 1 LNS 1259 CA ***(refd)***

Khoo Hi Chiang v. Public Prosecutor And Another Case [1994] 2 CLJ 151 SC ***(refd)***

Lee Boon Siah & Ors v. PP [2014] 3 CLJ 584 CA ***(refd)***

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

Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***

Md Zainudin Raujan v. PP [2013] 4 CLJ 21 FC ***(refd)***

Mohd Shamsul Abdul Aziz v. PP & Another Appeal [2016] 1 CLJ 713 CA ***(refd)***

Mohamad Radhi Yaakob v. Public Prosecutor [1991] 1 CLJ Rep 311 SC ***(refd)***

Munusamy Vengadasalam v. Public Prosecutor [1987] CLJ Rep 221 SC ***(refd)***

Pang Chee Meng v. PP [1992] 1 CLJ Rep 265 SC ***(refd)***

PP v. Abuchi Ben James [2015] 8 CLJ 1011 CA ***(refd)***

PP v. Chia Leong Foo [2000] 4 CLJ 649 HC ***(refd)***

PP v. Dato' Seri Anwar Ibrahim (No.3) [1999] 2 CLJ 215 HC ***(refd)***

PP v. Iskandar Mohamad Yusof [2006] 6 CLJ 379 HC ***(refd)***

PP v. Lee Jun Ho & Ors [2009] 4 CLJ 90 HC ***(refd)***

PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***

Prasit Punyang v. PP [2014] 7 CLJ 392 CA ***(refd)***

Public Prosecutor v. Lam San [1991] 1 CLJ Rep 391 SC ***(refd)***

Public Prosecutor v. Lim Bong Kat & Anor [1992] 3 CLJ Rep 380 HC ***(refd)***

Public Prosecutor v. Michael Anayo Akabogu [1995] 4 CLJ 79 HC ***(refd)***

Public Prosecutor v. Mohd Jamil Bin Yahya & Anor [1993] 1 LNS 95 HC ***(refd)***

Public Prosecutor v. Saimin & Ors [1971] 1 LNS 115 HC ***(refd)***

Sahri Tahe v. PP & Another Appeal [2016] 1 LNS 179 CA ***(refd)***

See Kek Chuan v. PP [2013] 6 CLJ 98 CA ***(refd)***

Zaifull Muhammad v. PP & Another Appeal [2013] 2 CLJ 383 FC ***(refd)***

PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***

Yee Wen Chin v. PP & Another Appeal [2008] 6 CLJ 773 CA ***(refd)***

Legislation referred to:

Dangerous Drugs Act 1952, ss. 2, 39B(2), First Schedule

Evidence Act 1950, ss. 32(1) (i), 114(g)

Penal Code, s. 34

Criminal Procedure Code, ss. 34(2), 35, 36, 47, 111(1), (2), 112, 118, 180(1), 182A

Firearms (Increased Penalties) Act 1971, ss. 4, 8(a)

Poisons Act 1952, s. 30(3), (5), First Schedule

GROUNDS OF JUDGEMENT

A) INTRODUCTION

[1] Both accused above named were charged with the following:

First Charge

"Bahawa kamu bersama-sama pada 22.10.2010 jam lebih kurang 11.45 pagi di rumah beralamat No. 1-03-09, The Spring Condominium, Lebuh Sungai Pinang 2, George Town, Dalam Daerah Timur Laut, Dalam Negeri Pulau Pinang telah didapati dalam milikan kamu sepucuk pistol jenis P. Berreta M45038Z dan satu kelopak pistol tanpa kebenaran dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 8 Akta

Senjatapi [Penalti Lebih Berat] dan dibaca bersama Seksyen 34 Kanun Keseksaan."

Second Charge

"Bahawa kamu bersama-sama pada 22.10.2010 jam lebih kurang 11.45 pagi di rumah beralamat No. 1-03-09, The Spring Condominium, Lebuh Sungai Pinang 2, George Town, Dalam Daerah Timur Laut, Dalam Negeri Pulau Pinang telah didapati dalam milikan kamu 13 butir peluru 9mm Luger tanpa kebenaran dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 4 Akta Senjatapi dan boleh dihukum di bawah Seksyen 8[a] Akta yang sama dan dibaca bersama Seksyen 34 Kanun Keseksaan."

Third Charge

"Bahawa kamu bersama-sama pada 22.10.2010 jam lebih kurang 11.45 pagi di rumah beralamat No. 1-03-09, The Spring Condominium, Lebuh Sungai Pinang 2, George Town, Dalam Daerah Timur Laut, Dalam Negeri Pulau Pinang telah didapati mengedar dadah berbahaya jenis heroin dan monoacetylmorphines sejumlah 2,562.9 gram dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 39B Akta Dadah Berbahaya1952 dan boleh dihukum di bawah Seksyen 39B[2] Akta yang sama, dibaca bersama Seksyen 34 Kanun Keseksaan."

Fourth Charge

"Bahawa kamu bersama-sama pada 22.10.2010 jam lebih kurang 11.45 pagi di rumah beralamat No. 1-03-09, The Spring

Condominium, Lebuh Sungai Pinang 2, George Town, Dalam Daerah Timur Laut, Dalam Negeri Pulau Pinang telah didapati memiliki racun berjadual di dalam kawalan dan simpanan serta pengetahuan kamu tanpa sebarang permit atau kebenaran dari pihak berkuasa di bawah Akta Racun 1952, iaitu 89,140 gram Caffeine yang di senaraikan di dalam Jadual Pertama Akta Racun dan dengan itu kamu telah melakukan kesalahan di bawah Seksyen 30[3] Akta Racun dan boleh dihukum di bawah Seksyen 30[5] Akta yang sama dan dibaca bersama Seksyen 34 Kanun Keseksaan."

Fifth Charge

"Bahawa kamu bersama-sama pada 22.10.2010 jam lebih kurang 11.45 pagi di rumah beralamat No. 1-03-09, The Spring Condominium, Lebuh Sungai Pinang 2, George Town, Dalam Daerah Timur Laut, Dalam Negeri Pulau Pinang telah didapati memiliki racun berjadual di dalam kawalan dan simpanan serta pengetahuan kamu tanpa sebarang permit atau kebenaran dari pihak berkuasa di bawah Akta Racun 1952, iaitu 2,110 gram Chloroquine yang di senaraikan di dalam Jadual Pertama Akta Racun dan dengan itu kamu telah melakukan kesalahan di bawah Seksyen 30[3] Akta Racun dan boleh dihukum di bawah Seksyen 30[5] Akta yang sama dan dibaca bersama Seksyen 34 Kanun Keseksaan."

B) PROSECUTION CASE

[2] The pertinent facts as disclosed by the prosecution case was that on 21.10.2010, SP9 assembled two teams in order to carry out a raid in Penang in respect to drug trafficking activities. SP9 and his team headed for Penang and after arrival carried out preliminary

observation on the target location at 1-03-09, The Spring Condominium, Lebuh Sg. Pinang, George Town, Penang ("said premises") at around 10.30p.m. After the said observation, which lasted for about 15 minutes, headed back to their accommodation.

[3] On 22.10.2010 at around 9.30 a.m. SP17 and a team were briefed by SP19 regarding a raid to be carried out on the said premises. After the briefing, at around 10.30 a.m., teams headed by SP17 and SP19 respectively headed toward the premises in two departmental vehicles.

[4] At around 11.00 a.m., both teams arrived in front of the target premises and observation was carried out using binoculars for around 15 to 20 minutes. As a result of the observation, SP17 saw the silhouettes of people moving around the target premises. SP17 then informed the results of his observation to SP19.

[5] SP19 then instructed a raid to be carried out on the said premises. Upon arrival at level 3 of the building, SP17 found unit no.9 and shouted for the occupants to open the door for inspection in the premises but there was no response. SP17 found that the front grill of the premises was locked and padlocked.

[6] The front wooden door was also locked. SP17 knocked the grill using the padlock but there was still no response. SP17 shouted "police" and instructed the door to be opened but there was still no response. SP17 then instructed D/L Kpl Zulkifli to cut open the padlock on the grill. The grill was then forced opened. After the grill was prised open, SP17 instructed Konst. Adli Hafiz to break open the wooden door using a "door ram".

[7] After the wooden door was forced opened, SP17, SP19 and the police team entered the premises and found at the end of the passageway to a room, two male Indians in the master bedroom. SP17

witnessed the first accused standing while the second accused was mixing a powdery substance in a basin with both his hands.

[8] SP17 and his team arrested both accused who attempted to unsuccessfully flee toward the direction of the door to the room. SP17 explained to both accused his reasons for their arrest but they just remained silent. SP17 carried out a physical examination on both accused.

[9] Witnessed by both accused, SP17 and his team together with SP19 carried out an examination in the room where the accused were arrested. They found various equipment and chemical believed to be used to process drugs. Drugs and other substances of various types as per the third to the fifth charge were also found there. Also found were a P.Berreta M45038Z pistol, an empty bullet cartridge and 13 9MM Luger bullets as per the first and second charges.

[10] After SP17 seized the exhibits, he made markings on all the exhibits and listed all the exhibits in a police report, search lists and handover of exhibits acknowledgment lists respectively. SP17 handed over all the exhibits relating to the narcotics found to SP25 while he handed over the exhibits relating to the pistol, cartridge and ammunition to SP20.

[11] SP17 also found two set of keys in the living room. SP21 then carried out further investigation and found the following:

i) Keys marked 1, 2, 5, and 6 (Yale) fitted the doors to the 4 rooms;

ii) Key marked 3 (Honda) fitted the letter box to no.1-03-09 located at the end of the block;

iii) Key marked 4 (AB Tools) fitted the yellow padlock to the grill. Keys marked 1 until 6 were found on the key chain which had No.1-03-09 written;

iv) Key marked 7 (Yale) fitted the wooden door of the premises;

v) Key marked 8 (St Gucchi Italy) fitted the front iron grill;

vi) Key marked 9 fitted the padlock Richdoor Top. Keys marked 7 until 9 were found on a metal red key chain.

[12] All the exhibits were received by SP25 were sent to the chemist for analysis.

Prosecution's application under section 32 Evidence Act 1950

[13] During the course of its case, the prosecution applied to admit the statement of one Caroline a/l Patrick (Caroline) recorded under section 112 Criminal Procedure Code (CPC) pursuant to section 32 Evidence Act 1950. Results of investigation conducted by SP21 revealed that the said Caroline Patrick is the wife of the first accused.

[14] After I heard submissions from parties, I disallowed the application by the prosecution under section 32 Evidence Act 1950. The reasons now follow.

[15] SP21 testified that he had met with Caroline on 24.10.2010 at 11.30 p.m. in order to return certain belongings of the first accused. SP21 also said that after this, he was still able to contact Caroline in 2011. Despite this however, after 2011 he had not maintained contact with Caroline for the next 3 years.

[16] After 3 years had elapsed, in October 2013, SP21 tried to contact Caroline through her mobile number 012-438 5123 but failed.

He then went to her last known address at B-12 Taman Free School, Jalan Terengganu, Pulau Pinang but found an unoccupied house. No evidence was adduced from any telecommunications company with respect to the ownership of the mobile phone number 012-438 5123. After this, there was a hiatus for 1 year until September 2014 when SP21 decided to advertise in the local daily newspapers as to the whereabouts of the said Caroline. One advertisement was placed in the Harian Metro on 4.10.2014 and one in the Star Online web site dated 30.9.2014.

[17] SP21 also said that he obtained another address from the Inland Revenue Department under the name of Caroline in Pulau Jerejak, Penang. Upon checking, this address was also found to be unoccupied. However, no official correspondence by the Inland Revenue Department was produced in respect of the address at Pulau Jerejak.

[18] SP21 further testified that he had met up with Caroline's son and was informed by him that his mother had moved to Johor. However, there were no details forthcoming as to the identity of Caroline's son, the particulars of the meeting between SP21 and Caroline's son, whether a statement was recorded from him nor his particulars nor contact number. SP21 the said that the last occasion he attempted to locate Caroline's whereabouts was in 2014 in anticipation of securing her presence at the hearing but to no avail.

[19] Now Section 32(1) (i) of the Evidence Act 1950 reads as follows:

> *"32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant*
>
> *(1) Statements, written or verbal, of relevant facts made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance*

cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases:

(i) when the statement was made in the course of, or for the purposes of, an investigation or inquiry into an offence under or by virtue of any written law"

[20] It has been held that a person whose whereabouts are unknown despite a proper search made is a person who "cannot be found". See *Public Prosecutor v. Lim Bong Kat & Anor* [1992] 4 CLJ 2173. The application of the section is not automatic and sufficient evidence must be adduced to show that despite all efforts made the person could not be traced. See *DA Duncan v. Public Prosecutor* [1980] 2 MLJ 195. The provision in the section was also considered in the case of *Public Prosecutor v. Lee Jun Ho & Ors* [2009] 3 MLJ 400 where the level of diligence expected on the part of the prosecution before the section could be invoked was stated in no uncertain terms as follows:

"Section 32 of the Evidence Act 1950 is an exception to the general rule that hearsay evidence is inadmissible. Under s. 32(1) of the Act, one of the circumstances under which such a statement becomes admissible is where the person who made the statement 'cannot be found'. This was the basis upon which the prosecution tried to invoke when they attempted to produce and tender ID66 and ID67. For a witness to be clothed as 'who cannot be found' within the meaning of s. 32(1) of the Evidence Act 1950, such determination is a finding of fact, of which the onus is upon the prosecution to prove.

From facts adduced, I find that the police has failed to take all reasonably practicable steps to trace the witnesses. In fact there

was not a single proactive effort by the police to procure the attendance of such material, relevant and important eye-witnesses.

There was no attempt to fully utilise the prevailing and available provisions of the Criminal Procedure Code, in order to secure the attendance of the witnesses. The police failed to invoke the provisions of Criminal Procedure Code; which empowers the court to issue a warrant in lieu of or in addition to summoning a witness and to require that person to execute a bond for his appearance in court. The police also failed to invoke the provisions of s. 118(1) of the Criminal Procedure Code whereby the police officer who desires any person, who is acquainted with the circumstances of a case, to be present in court, shall require that person to execute a bond to appear at the trial court. The prosecution also failed to utilise the provisions of s. 396 of the Criminal Procedure Code whereby the public prosecutor may apply to court for any witness of any sizeable offence that intends to leave Malaysia and that witness's presence at the trial to give evidence is fatal for the trial, to be committed to the civil prison until trial or until he shall give satisfactory security that he will give evidence at the trial.

…….

In view of the above circumstances especially of the omissions by the police to take all reasonably practicable steps in tracing the witnesses, and guided by the following cases (on s. 32(1) of the Evidence Act):

(i) Public Prosecutor v. Mohamed Said [1984] 1 MLJ 50;

(ii) Public Prosecutor v. Mohd Jamil bin Yahya & Anor [1993] 3 MLJ 702; [1994] 1 CLJ 200;

(iii) Public Prosecutor v. Gan Kwong [1997] MLJU 144; [1997] 2 CLJ Supp 433;

(iv) Public Prosecutor v. Chow Kam Meng [2001] MLJU 386; [2001] 7 CLJ 387;

(v) Public Prosecutor v. Mogan Ayavoo [2004] 3 CLJ 623; and

(vi) Public Prosecutor v. Norfaizal bin Mat (No 2) [2008] 7 MLJ 792.

I hold that the prosecution has failed to meet the requirements and the prerequisites of s. 32(1) of the Evidence Act 1950. I accordingly ruled that the statements, ID66 and ID67 are inadmissible, as evidence for the prosecution."

[21] The case makes it clear that the section is an exception to the hearsay rule and that the onus to prove that a person cannot be found rests squarely upon the shoulders of the prosecution.

[22] The case of *Public Prosecutor v. Mohd Jamil Bin Yahya & Anor* [1993] 3 MLJ 702, held as follows:

"*The scope of the first principle may be briefly indicated by terming it the necessity principle. The person whose assertion is offered may now be dead, or out of the jurisdiction, or insane, or otherwise unavailable for the purpose of testing.*

The second principle which is termed circumstantial guarantee of trustworthiness, is in the nature of a practical substitute for the ordinary test of cross-examination. We see that under certain circumstances the probability of accuracy and

trustworthiness of statement is practically sufficient, if not quite equivalent to that of statements tested in the conventional manner."

[23] In the case of *Public Prosecutor v. Michael Anayo Akabogu* [1995] 4 CLJ 79, it was held:

"*The scope of the first principle may be briefly indicated by terming it the necessity principle. The person whose assertion is offered may now be dead, or out of the jurisdiction, or insane or otherwise unavailable for the purpose of testing. The second principle which is termed circumstantial guarantee of trustworthiness, is in the nature of a practical substitute for the ordinary test of cross-examination.*

We see that under certain circumstances the probability of accuracy and trustworthiness of statement is practically sufficient, if not quite equivalent to the statements tested in the conventional manner."

[24] Applying the tests above to the facts of the case, the necessity principle entails asking the question, have the police taken all necessary steps to ascertain the whereabouts of the maker of the statement, which in this case is the said Caroline?

[25] There are several measures at the disposal of the prosecution through the police in securing the presence of important witnesses at trial. Among these are the following:

a) Issuing a summons under Section 34(2) of the Criminal Procedure Code (CPC) or request such a summons through the court;

b) Resort to Section 111(1) CPC in ordering a witness or potential witness to report to the nearest police station once a week or fortnightly as the case may be;

c) Issuance of a warrant to secure the attendance of that person as required by such order under Section 111(2) CPC;

d) Issuance of summons under Section 35 CPC even before suspects are charged in court;

e) Affixing a copy of the summons to some conspicuous part of the house or other place in which the person summoned ordinarily resides when personal service cannot be effected under Section 36 CPC;

f) Issue of warrant of arrest *in lieu* of or in addition to summons under Section 47 CPC if the Court has reason to believe that he has absconded or will not obey the summons or if at such time he fails to appear and the summons is proved to have been duly served in time to admit of his appearing in accordance therewith and no reasonable excuse is offered for such failure;

g) Advertising in the local newspapers under Section 118 CPC.

[26] It can be seen at once that apart from advertising as to information of the whereabouts of Caroline in the newspapers, none of the other measures were resorted to. In light of the principles espoused in the authorities on the point alluded to above and combined with the available provisions under the CPC, I find that the measures undertaken by the police here are woefully inadequate to satisfy the necessity principle. That being the case, there was no need

to go further and consider the *circumstantial* guarantee of trustworthiness test, the prosecution having failed at the very first hurdle. I therefore, as stated earlier, disallowed the application by the prosecution.

C) DUTY OF THE COURT AT THE END OF THE PROSECUTION CASE

[27] Section 180(1) of the Criminal Procedure Code (CPC) stipulates that when the case for the prosecution is concluded the Court shall consider whether the prosecution has made out a *prima facie* case against the accused.

[28] The duty of the court at that stage has also been the subject of judicial consideration in the cases of *PP v. Dato' Seri Anwar Bin Ibrahim (No.3)* [1999] 2 AMR 2017; [1999] 2 MLJ 1, *Looi Kow Chai &Anor v. PP* [2003] 2 AMR 89, *Balachandran v. PP* [2005] 1 CLJ 85 and *PP v. Mohd Radzi Bin Abu Bakar* [2005] 6 AMR 203 respectively. They all adopt the stand that the evidence at the close of the case for the prosecution must be subjected to maximum evaluation in order to determine whether a *prima facie* case is made out that would justify a court in calling for the defence of the accused.

[29] The phrase "*prima facie* case" itself has not been statutorily defined in the above section. However, it has been the subject of judicial pronouncement. In the case of Dato' Seri Anwar bin Ibrahim (supra), His Lordship Augustine Paul J (as he then was) had this to say on the meaning of the phrase "*prima facie* case":

> "*The meaning of prima facie case in s. 180(1) of the Criminal Procedure Code must be understood in the context of a non-jury trial.* ***A prima facie case arises where the evidence in favour of a party is sufficiently strong for the opposing party***

to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence by the other side. Taken in its totality, the force of the evidence must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. *As this exercise cannot be postponed to the end of the trial a maximum evaluation of the credibility of the witnesses must be done at the close of the case against the prosecution before the court can rule that a prima facie case has been made out in order to call for defence. Be that as it may, I am unable to agree with the defence submission that this means that the prosecution must prove its case beyond reasonable doubt at that stage. A case is said to have been proven beyond a reasonable doubt only upon a consideration and assessment of all the evidence (see Canadian Criminal Evidence (3rd Ed)....**thus, a prima facie case as prescribed by the new section 180(1) of the Criminal Procedure Code must mean a case which if unrebutted would warrant a conviction***." (Emphasis added)

[30] In *Looi Kow Chai v. Public Prosecutor* [2003] 2 MLJ 65, Gopal Sri Ram JCA (as he then was) speaking for the Court of Appeal had this to say:

> *"It therefore follows that there is only one exercise that a judge sitting alone under s. 180 of the CPC has to undertake at the close of the prosecution case. He must subject the prosecution evidence to maximum evaluation and ask himself the question: if I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no prima facie case*

has been made out and the accused would be entitled to an acquittal."

[31] It is therefore evident that the expected standard which a trial court should hold the prosecution to is that of a maximum evaluation of the evidence of all their witnesses. This exercise necessarily involves the court in subjecting all the evidence of the prosecution witnesses to strict curial scrutiny. The credibility of the testimony of all the witnesses for the prosecution must be scrutinised and evaluated with a fine toothcomb. Should more than one inference arise as a result of this exercise, the one favourable to the accused must be adopted.

D) ANALYSIS OF THE PROSECUTION CASE

[32] In order for the prosecution to make out a *prima facie* case in respect of the first and second charge against the accused persons, it is incumbent on them to prove that both accused were in unlawful possession of the said pistol and the cartridge as per the first charge and the bullets as per the second charge respectively.

[33] In respect of the third charge, the prosecution has to prove the following ingredients. Firstly, that the drugs are dangerous drugs within the meaning and definition of the Dangerous Drugs Act 1952 (DDA). Secondly, that the accused was trafficking in the drugs.

[34] In respect of the fourth and fifth charge, the prosecution has to prove that chloroquine and caffeine are as defined and listed under the First Schedule to the Poisons Act 1952 and that both accused were in unlawful possession of the same.

i) Possession of the pistol, cartridge and bullets

[35] The evidence disclosed that nobody else besides both accused were present at the premises at the time of the raid. The pistol, magazine (kelopak) and bullets were also not concealed in a manner and place that would make it difficult to view if one had wanted to. These items were also in close proximity to both accused. It was also in evidence that the pistol, the magazine and bullets were tested by SP9 and SP11 and found to be serviceable and functioning well. There was no evidence that any of the accused persons had any permit or licence to keep the said pistol, magazine and bullets.

[36] This would constitute sufficient evidence to infer that both accused knew of the whereabouts of these items and therefore it is safe to make the fair inference that both accused persons had unlawful possession of the pistol, magazine and the bullets found in the premises at the time of the raid.

[37] The prosecution had therefore proven a *prima facie* case against both accused in respect of the first and second charges.

ii) <u>The Heroin and Monoacetylmorphines were dangerous drugs within the meaning and definition of the DDA and the Caffeine and Chloroquine respectively were as defined and listed under the First Schedule to the Poisons Act 1952.</u>

[38] SP7, the chemist, testified that there were traces of caffeine on the walls, floor, electrical fan, gas cylinder, and metal protector found at the premises. The drug exhibits after analysis, was found to contain Heroin and Monoacetylmorphines. The chemical substances analysed turned out to be Chloroquine, Caffeine, Chloroform, and colouring agents. Also found there were metal basins, wooden stirrers, blenders, spoons, glass bottles, cups, and a bag containing powdery and granular substances.

[39] After analysis carried out, SP7 confirmed that the exhibits analysed were Heroin and Monoacetylmorphines weighing 2,562.9 grams and as listed under the First Schedule to the DDA, while the 2,110 grams Chloroquine, and 89,140 grams of Caffeine were as listed under the First Schedule to the Poisons Act 1952.

[40] The Federal Court case of *Munusamy Vengadasalam v. PP* [1987] CLJ (Rep) 221 held as follows:

> "*We are therefore of the view, that in this type of cases where the opinion of the chemist is confined only to the elementary nature and identity of the substance, the Court is entitled to accept the opinion of the expert of its face value, unless it is inherently incredible or the defence calls evidence in rebuttal by another expert to contradict the opinion. So long as some credible evidence is given by the chemist to support his opinion, there is no necessity for him to go into the details of what he did in the laboratory, step by step.*"

[41] I find that the evidence of SP7 was not inherently incredible. Although a challenge was mounted as the methods of his analysis, in all the circumstances of the case and guided by the authority referred to, I find that the prosecution had proven that the drugs seized were of the type, nature and weight as testified to by PW7 and as confirmed in the Chemist report, (P87). PW7 had also confirmed that Heroin and Monoacetylmorphines were as listed under the First Schedule of the DDA. I therefore accepted the evidence of the Chemist, PW7 as proving the nature and weight of the drugs.

[42] In respect of the Chloroquine, and Caffeine, SP7 had also confirmed that they were as listed under the First Schedule to the Poisons Act 1952. I also accepted the evidence of SP7 in this respect.

[43] The prosecution had therefore proven the first ingredient in respect of the third, fourth and fifth charges against the accused persons.

iii) <u>The accused persons were in possession of the Heroin and Monoacetylmorphines and Caffeine and Chloroquine, and were trafficking in the said Heroin and Monoacetylmorphines</u>

[44] SP7 testified that from the implements and articles found in the premises, they were being used to conduct a "heroin cutting process" which was described as a process where drugs containing pure content was mixed with other chemicals known as "cutting agents" in order to reduce the purity of content but increase the quantity.

[45] Section 2 defines trafficking as follows:

> *"trafficking"*
>
> *includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug otherwise than under the authority of this Act or the regulations made under the Act*

[46] The word manufacture is defined as follows:

> *"manufacture",*
>
> *in relation to a dangerous drug, includes—*
>
> *(a) the making, producing, compounding and assembling of the drug;*

(b) the making, producing, compounding and assembling a preparation of the drug;

(c) the refining or transformation of the drug into another dangerous drug; and

(d) any process done in the course of the foregoing activities;

[47] From the testimony of SP7, the implements and substances found there would indicate that what was being carried out was manufacturing as defined under section 2 of the DDA.

[48] As far as possession is concerned, the case of *Public Prosecutor v. Chia Leong Foo* [2000] 6 MLJ 705, it was held:

> *"It must be observed that most of the acts that constitute 'trafficking' as defined in s. 2 of the Act like, for example, keeping, concealing, storing, transporting and carrying dangerous drugs involve the prerequisite element of possession unlike, for instance, the sale and supply of dangerous drugs which need not necessarily involve possession as demonstrated by Pendakwa Raya v. Mansor bin Mohd Rashid & Anor [1996] 3 MLJ 560. It follows that a person cannot keep, conceal, store, transport or carry dangerous drugs within the meaning of 'trafficking' in the Act without being in possession of them. Proof of further facts to establish any one of these acts is therefore sufficient to make out a case of trafficking."*

[49] In *Azhar Lazim v. PP* [2012] 1 LNS 262, it was held:

> *"There are eighteen different acts stipulated in s. 2 of the DDA that constitute the offence of trafficking. And before the "trafficking" definition of s. 2 of the DDA can be invoked, the prosecution must prove possession of the dangerous drugs by the appellant. Here, the High Court rightly held that the*

appellant had exclusive possession of the cannabis in question. In short, the appellant cannot be said to sell, transport or distribute the dangerous drugs within the meaning of the word "trafficking" in s. 2 of the DDA unless the appellant was in possession of the dangerous drugs. In our judgment, it is sufficient to prove one of the acts in s. 2 of the DDA to make out a case of trafficking against the appellant."

[50] However with respect to manufacturing, in the case of *Lee Boon Siah & Ors v. PP* [2014] 3 CLJ 584, it was held:

"For the proper determination of this issue, it must be borne in mind that, as stated in s. 2 of the DDA, the term 'manufacture' includes numerous and diverse processes or procedures namely making, producing, compounding, assembling, refining or transformation of the offending drugs. For that reason, in our judgment, unlike for example the act of keeping, concealing, storing, transporting and carrying dangerous drugs which constitute 'trafficking' as defined in s. 2 of the DDA that involve the requirement of possession, the manufacturing of dangerous drugs as in the present case does not involve possession (see: PP v. Chia Leong Foo [2000] 4 CLJ 649; [2000] 6 MLJ 705 and Public Prosecutor v. Mansur Md Rashid & Anor [1997] 1 CLJ 233; [1996] 3 MLJ 560). In other words, possession of the impugned drugs need not be proven in a case involving 'manufacturing' before the trafficking definition in s. 2 of the DDA can be invoked."

[51] From a distillation of the above-mentioned authorities, unlike those cases which involve the act of keeping, concealing, storing, transporting and carrying dangerous drugs which constitute 'trafficking' as defined in s. 2 of the DDA that involve the requirement of possession, in the case of manufacturing under section

2, it is unnecessary for the prosecution to prove possession. In any event, possession could be inferred from the circumstances of the case.

[52] What is evident from the facts of the case, was that there was no one else besides both accused who were in the premises at the time of the raid by the police. The prosecution evidence also indicated that there ensued a scuffle before both accused were arrested by the police.

[53] The exhibits including the drugs, other chemical and substances and the pistol and ammunition were exposed and would have been fairly visible to both accused. SP7 testified that there emanated a strong odour from the master bedroom where the implements and equipment employed in manufacturing drugs and substances were found. This would not have escaped the olfactory senses of anyone the premises in a situation where the doors were opened.

[54] Both accused according to the evidence of prosecution witnesses were also said to be involved in the act of manufacturing with the second accused mixing some powdery like substance in a basin while the first accused was standing near to him.

[55] Under all the circumstances therefore, I find that the prosecution has proved that both accused were in possession of the Heroin and Monoacetylmorphines and Caffeine and Chloroquine respectively, and were trafficking in the said Heroin and Monoacetylmorphines.

iv) Common intention pursuant to section 34 Penal Code

[56] Section 34 of the Penal Code reads as follows:

> *34. Each of several persons liable for an act done by all, in like manner as if done by him alone.*

> *When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.*

[57] In *Mohd Shamsul bin Abdul Aziz @ Abdul Azis v. Public Prosecutor and another appeal* [2016] 3 MLJ 215, it was held:

> *"**[21]** The notion behind this provision as contained under s. 34 of the Penal Code has been a subject of much deliberation both, by the numerous learned judges in their reported decisions as well as by learned commentators in their authoritative books, on the subject of common intention and what it entails.*
>
> ***[22]** In the case of Mahboob Shah v. Emperor AIR 1945 PC 118 the Law Lords in the Privy Council had this to say when dealing with an appeal where s. 34 of the Penal Code was invoked, in aid by the prosecution: ' ...To invoke the aid of s. 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any of the persons in the same manner as if the act were done by him alone'. Their Lordships then went on to state the need to establish that there was a prearranged plan among all of the accused persons to commit the crime. Once that is established, then any act by any of them is done in furtherance of their common intention. The act would translate into the execution of the common intention.*
>
> ***[23]** In the case of Shaiful Edham bin Adam & Anor v. Public Prosecutor [1999] 2 SLR 57 it was ruled that '... the*

plan could develop on the spot. What was enquired was a meeting of the minds or acting in concert'.

[24] *The learned authors of Ratanlal and Dhirajlal on The Indian Penal Code (34th Ed) at p 51 have this to say on the workings of s. 34 of the Penal Code:*

The essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. It must be shown that the criminal act complained against was done by one of the accused persons in furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone.

[25] *As such, to our mind, once common intention is shown to exist, thereby connoting a prearranged plan among the accused persons, then, any act however small done by any one of them, as long as it is done in furtherance of a common intention, he is liable for the offence, as if the offence is committed by him alone. That is the process under s. 34 of the Penal Code in order to determine liability of persons acting in furtherance of a common intention. The issue of whether an accused person is a primary or a secondary participant on account of his degree of participation in the commission of the offence does not, with respect, arise at all in such determination. All of them are equally as guilty as long as they contribute acts which are done in furtherance of their common intention. In that regard, it must be reiterated that common intention has been established to have existed among them. Once that pre-condition is fulfilled, then any act done by any of them in furtherance of that common intention, is*

deemed as 'shared' among them. If at all, the different degrees of participation among the accused persons may be considered by the court, in passing sentence, if they are found guilty and are convicted by the court. In other words, it may be relevant in mitigation. But in terms of attaching liability, a consideration of the degree of participation by the various accused persons in the commission of the offence, with respect, ought not to happen.

[58] In *Sahri Tahe v. Public Prosecutor and other appeals* [2016] 4 MLJ 69, the court of appeal in expounding on section 34 held:

> *"The section is intended to make a person liable for the commission of an offence not committed by him, but by another person with whom he shared the common intention. It is also to deal with cases in which it is difficult to prove exactly what part was played by each of them in the commission of the offence or in cases where it is difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all – see Hari Ram v. State of Uttar Pradesh (2004) 3 LRI 523 (SC)."*

[59] The evidence here disclosed that at the time of the raid, both accused were at the scene the premises. Besides them, no one else was there. The evidence also disclosed that the second accused was mixing a substance in a basin while the first accused was standing close by and watching.

[60] Several implements and processing equipment for drugs and other substances were also visibly exposed. The pistol, cartridge and the bullets were also in close proximity to the accused. In light of the above, it can be inferred that there was a prior meeting of minds between both accused persons to meet at the said premises for the

purpose as disclosed by the prosecution evidence and therefore common intention has been proven by the prosecution.

v) Break in the chain of exhibits

[61] The defence during the course of submissions at the end of the prosecution case submitted that there was a break in the chain of exhibits. The defence submitted that there has been a mix up in the samples. They submitted that according to exhibit P109, samples "D1" and "D2" was listed as samples obtained from the second accused. However, according to the evidence of SP21, it was stated that "D1" and "D2" are envelopes containing the blood and hair samples belonging to the first accused instead. In addition, in form Pol 31 (P107), samples "D1" and "D2" were listed as belonging to the first accused and not the second accused, contrary to what was stated in P109.

[62] Notwithstanding this, SP8, the government chemist had positively identified P102 and P102a containing these exhibits in court as belonging to the second accused and this evidence had not been challenged by the defence. In any event, in light of the direct evidence that placed both accused in the premises on the day of the raid, any possible mix up in the exhibits, if at all there were, would not prejudice the prosecution case as these exhibits serve to merely confirm the presence of both accused at the premises that day.

[63] The defence further contended that there was a huge and material discrepancy in the weight of the exhibits. They submitted that according to P146 at page 3 a white plastic gunnysack containing white powdery substance marked as E27 weighs 17,286 grams. However in P87 at page 7, the same gunnysack marked as A27 contained white powdery substance weighing 1,730 grams. They

therefore submitted that this is a huge and material discrepancy of 15,556 grams.

[64] The defence also submitted that according to P146 at page 1, a plastic package containing white powdery substance suspected to be drugs and marked as E5 weighs 11,160 grams whereas in P87 the same plastic package marked as A5 contained white powdery substance weighing 1,280 grams. There was thus a huge material discrepancy of 9,880 grams. The inference to be drawn from the above material discrepancies, they submitted, was that the drugs analysed by the chemist were not the same drugs seized during the raid.

[65] SP21, the investigating officer testified during re-examination that with respect to the difference in the weight of the drugs, in respect of the items as listed in P146, he saw Inspector Gan, (SP17), use a digital weighing scale to weigh P146 from which he obtained the gross weight. SP21 testified that with regard to exhibit P87 (chemist report) and its contents, the weight stated therein was obviously the nett weights derived by the chemist. A perusal of P146 indicate that the weights obtained are gross weights from the use of the phrase “keseluruhan”.

[66] The difference between the digital weighing scale used by SP17 to obtain the gross weight and the weighing instruments used by the chemist which must have been calibrated in all probability to obtain the nett weights, would sufficiently account for the discrepancies in the weight of the exhibits. There was no evidence that the weighing scale used by SP17 had been calibrated. In this regard there was therefore an explanation advanced during the course of the prosecution case to explain such discrepancies and I accept the explanation.

[67] The case of *Hasbala Mohd Sarong v. Public Prosecutor* [2013] 6 CLJ 945, had held that a difference in weight, on its own, is no sufficient ground to hold that there were doubts with regard to the identity of the drugs. In *Lew Wai Loon v. Public Prosecutor* [2014] 2 CLJ 649, it was held that discrepancies in weight alone should not *ipso facto* cast doubt on the identity of the exhibits. In *Lew Wai Loon v. Public Prosecutor* the case of *Zaifull Muhammad v. PP & Another Appeal* [2013] 2 CLJ 383, was distinguished on the ground that there no explanation was available, offered or could be inferred from the facts and circumstances available as to the discrepancies in the weight of the drugs. Under the circumstances therefore, I find that the difference in the weight of the drugs *ipso facto* does not cast any doubt as to the identity of the exhibits in this case.

[68] With regard to the non-production of the 100 plus tin canned drink from which a swab was taken said to contain the DNA of the second accused, again I find that this omission does not prejudice the case for the prosecution in view of the direct evidence that the second accused was in the premises at the time of the raid. In any event, this piece of evidence was only to confirm the presence of the second accused at the premises at the time of the raid and is therefore merely corroborative in nature.

vi) Non calling of the laboratory assistants

[69] The defence further raised the fact that from the evidence, the chemist (SP7) was assisted by laboratory assistants in the course of her analysis and the fact that these officers were not called was fatal to the prosecution.

[70] In *Public Prosecutor v. Abuchi Ben James* [2015] 8 CLJ 1011, cited by learned counsel for the accused, the sole determination for the court was whether the nature of the drugs and the weight as stated

in the charge had been proven by the prosecution. It was the testimony of the chemist that she had the assistance of two science officers. The methodology adopted was that the two officers would accept samples from the chemist and place them in the GCMS and the GCFID machine respectively.

[71] The samples were put in several vials and the results were in the form of computer print outs. The chemist admitted that during the time the vials were in the equipment she was not present. The High Court held that it was pertinent for the prosecution to prove that the equipment was in proper working order and properly calibrated.

[72] It also held that the final findings as to the nature and weight of the drugs were dependent on the accuracy of the results produced by the equipment. In the premises it was held that the non-calling of the two officers were fatal and the accused was accordingly acquitted without his defence being called. The Court of Appeal found that from the evidence adduced, the High Court was correct in acquitting the accused without calling for defence. The reason given by the Court of Appeal was that as only the print out from the machines was given to the chemist, there remained a doubt whether the analysis was done by the science officers or by the chemist.

[73] However, it is also in evidence in the instant case that SP7 testified that although the laboratory assistants assisted her in the analysis of the GCMS and GCFID, it was under her supervision. SP7 also testified that it was she who had interpreted the results of the analysis.

[74] There has been a consistent trend of cases since the Supreme Court case of *Munusamy v. Public Prosecutor* [1987] 1 MLJ 492, that the court is entitled to accept the evidence of the chemist at face value unless it is inherently incredible. It was held there as follows:

".....in this type of cases where the opinion of the Chemist is confined only to the elementary nature and identity of the substance, the court is entitled to accept the opinion of the expert on its face value, unless it is inherently incredible or the defence calls evidence in rebuttal by another expert to contradict the opinion. So long as some credible evidence is given by the Chemist to support his opinion, there is no necessity for him to go into details of what he did in the laboratory, step by step;"

[75] In *Public Prosecutor v. Lam San* [1991] 3 MLJ 426, it was held:

"..... that in regard to the evidence of the chemist, unless the evidence is so inherently incredible that no reasonable person can believe it to be true, it should be accepted as prima facie evidence. As long as the evidence is credible, there is no necessity for the chemist to show in detail what he did in his laboratory."

[76] In the Court of Appeal case of *Ilham Saputra bin Zainal Abidin v. Public Prosecutor*[2014] 3 MLJ 419, it was held:

"[5] On the issue of the identity of the drugs, the crux of the submission is based on the fact that the chemist (PW2) was assisted by one Sabri. It was argued by counsel that since the drugs were not analysed by the chemist, the chemist will not be in a position to identify the drugs. In support for her contention, learned counsel relied on the authority of Khoo Hi Chiang v. Public Prosecutor and another appeal [1994] 1 MLJ 265; [1992] 1 LNS 318.

[6] Upon perusal and analysis of the evidence of the chemist (PW2), we found that the so-named Sabri only assisted the

chemist in conducting the GCMS analysis. The material part of the evidence can be seen in the cross-examination of SP2 (at p 12 of the appeal records) which reads as follows:

PEMERIKSAAN BALAS

Q: Ada pembantu bantu kamu melakukan ujian ini?

A: Ada pembantu

Q: Berapa orang pembantu?

A: 2 orang

Q: Siapa nama mereka?

A: Encik Sabri bin Tajudin iaitu Penolong Pegawai Sains dan Umi Hanani binti Wahab seorang Pembantu Makmal Kanan

Q: Jelaskan apakah tugas yang dilakukan oleh kedua-dua pembantu kamu untuk ujian ini?

A: Puan Umi Hanani bantu saya dalam menyediakan peralatan seperti mesin pengisar, radas kaca dan bahan kimia untuk saya jalankan analisa. Manakala Encik Sabri membantu saya menjalankan analisis GCMS.

[7] It is trite law that identification of drugs is a question of fact, which like any other conclusion of fact, can either be by direct or circumstantial evidence. A chemist will be able to identify the drugs by conducting various tests and observing the result. In this case, the chemist conducted the test and observed the result and concluded by identifying the type and nature of the drugs. The chemist's evidence can be seen at p 8 of the appeal records, which reads as follows:

... Saya telah mengisar kesemua bahan kristal jernih tersebut supaya menjadi serbuk yang homogen. Seterusnya saya telah mengambil sedikit sampel perwakilan secara rawak untuk menjalankan ujian warna iaitu ujian marquis. Ujian ini telah memberikan keputusan yang positif. Ini menunjukkan bahawa bahan tersebut berkemungkinan mengandungi methamphetamine.

Seterusnya saya mengambil sedikit lagi sampel perwakilan secara rawak untuk menjalankan ujian GCMS. Ujian ini juga telah memberikan keputusan yang positif. Ini mengesahkan bahawa bahan tersebut mengandungi methamphetamine.

Saya telah mengambil 21 sampel perwakilan secara rawak untuk menjalankan ujian GC bagi menentukan peratus kandungan methamphetamine dalam bahan tersebut.

Ujian ini juga sekali lagi mengesahkan bahawa bahan tersebut mengandungi methamphetamine. Dari ujian ini saya dapati bahan tersebut mengandungi 71.3944% methamphetamine.

Setelah dikira peratusan tersebut berdasarkan berat bersih bahan yang saya terima iaitu 133.50g, saya dapati bahan tersebut mengandungi 95.31g methamphetamine.

[8] *Based on the evidence above, we find that there is no merit on the issue of identity of the drugs."*

[77] The Court of Appeal also referred to *Munusamy v. Public Prosecutor (supra) and Public Prosecutor v. Lam San* (*supra*) in succession in support of their findings.

[78] The cases emanating from the apex court above including the Court of Appeal decision in Ilham Saputra and the decision of the apex court in *Khoo Hi Chiang v. Public Prosecutor* [1994] 1 MLJ 265 to similar effect were not brought to the attention of the Court of Appeal in Abuche's case and the result might well have been different if it had. This court is bound by the aforementioned decisions of the apex court. Unless the evidence shows that there has been a break in the chain of exhibits as a result of the handling of the exhibits by these officers, I find that it was not incumbent upon the prosecution to call each and everyone involved in the handling of the exhibits as witnesses. On the facts, I do not find that there has been any such break in the chain of exhibits and therefore the failure to call the officers did not cause any infirmity nor did it result in a gap in the prosecution case in that regard or result in the necessity to invoke section 114(g) Evidence Act 1950 against the prosecution. See *Munusamy v. Public Prosecutor* [1987] 1 MLJ 492.

vii) Non-calling of Vincent Iskandar Shah

[79] Despite the persuasion of counsel for both accused to invoke the adverse presumption under section 114 (g) of the Evidence Act 1950 for the non-calling of the said Vincent, I declined to do so. The reason being that SP21 had testified that he had made attempts to locate the said Vincent without success. Furthermore, exhibits P143 and P145 were handed over to the defence before the commencement of the trial. Under all the circumstances therefore, I did not find any element of withholding or suppression of evidence on the part of the prosecution as to the calling of the said Vincent. See *Munusamy v. Public Prosecutor* [1987] 1 MLJ 492.

[80] Based upon all of the foregoing, I therefore find that the prosecution had succeeded in proving a prime facie case against both

accused persons in respect of all five charges and I accordingly ordered them to enter their defence.

[81] After all the alternatives consequent upon such finding was informed to both accused persons, they elected to give evidence on oath.

E) DEFENCE CASE

[82] The defence of both accused essentially was that their presence at the premises at the time of the raid was at the invitation of one Vincent Iskandar Shah and that they happened to be there for the purpose of certain works which the said Vincent had requested them to do.

[83] The first accused gave evidence that at the time of the arrest, he was residing at B12 Taman Free School Flats, George Town with his wife and two sons. His wife's name is Caroline a/p Patrick. He works as a contractor doing renovation work, buying and selling scrap and does cleaning jobs. The first accused had registered a company at the end of 2008 called Somasundram Enterprise and at the time he was its sole owner.

[84] In 2010, he had transferred the ownership of the company to his wife and ceased being the owner from 21.7.2010. The new owner was Caroline a/p Patrick. He said that from then on he had no dealings with the company and did not have the power to sign any cheques. He denied that he had instructed Caroline a/p Patrick to issue any cheques. He denied any knowledge of the photocopy of the Maybank cheque exhibit (P144).

[85] The first accused said that he did not rent the premises at Unit No. 1-03-09 Spring Condominium. After he left Somasundram Enterprise he operated on his own in performing the works described above.

[86] The first accused testified that on 21.10.2010, he received a phone call from someone who introduced himself as Vincent. The said Vincent told him that he had rented the premises and that he required the first accused to do some wiring and cleaning work in the premises. The first accused told him that he could perform the cleaning work but not the wiring work. The first accused told him that his friend named Yoga (second accused) could do the wiring works. An appointment was made to meet at the Spring Condominium the next day at around 10.30 a.m.

[87] According to the first accused the said Vincent asked him to bring Yoga with him and after he ended his conversation with Vincent, he called Yoga and the latter said he was free. The next day i.e. 22.10.2010 around 10.30 a.m. the first accused went to the guard house at the said condominium and Vincent arrived in a white Proton car and told him to go to the premises and that he would inform the guard to let him in.

[88] Vincent drove his car into the car park as the first accused proceeded in the direction he was shown and along the way he met Yoga. Vincent then came to them and introduced himself. Both the first accused and the second accused (Yoga) followed Vincent into the premises. Once they entered Vincent switched on the light and fan and told them it is not functioning. He also said that he required some cleaning works to be done. He told the second accused that he wanted to install additional power points and two lighting points in the living room.

[89] Vincent then received a phone call and proceeded some distance away from them to conduct his tele conversation. Vincent then asked both accused to provide their quotes for the work. Vincent then said that he wanted to go out to buy some food for himself and the accused. Both accused replied that they did not want any food but

would only want some drinks. After that, Vincent told the accused that he would be back and he went out and closed the door.

[90] According to the first accused, after Vincent left, the second accused carried out checks on why the light was not functioning. The first accused said that the lights and fan that the second accused was checking was located in the living room. The first accused testified that the doors to the rooms were closed and he and the second accused did not know what were in the rooms. The first accused said that as the second accused was taking some measurements for an extra power point, they heard a loud bang on the door. They took a few steps towards the door when the door broke open and they saw a lot of people wearing masks with guns and laser lights who shouted to them not to move.

[91] They were then arrested and assaulted by these persons. According to the first accused, the men who they later learned were police brought in one male and one female Malay. The female was a security guard while the male was a person to whom he had given his NRIC to. Both these persons told the police that they did not know him while they said that they knew the second accused. The first accused denied any involvement with the drugs and ammunition found the premises.

[92] He also said that he had no keys or access card to the premises. He also denied any knowledge of the Tenancy Agreement (P142). He said that Vincent did not inform him what kind of cleaning services he wanted him to perform. He said that he was not told whether to clean the whole premises or merely to just clean the living room.

[93] The first accused said that they waited in the living room of the premises after Vincent had left to buy some food and drinks. The first accused said that Vincent had offered to buy him and the second accused some food but they refused the offer except that they agreed

to Vincent buying them some drinks. During cross examination, the first accused testified that on the day of the incident, he did not bring any tools with him to the premises as he was only there to provide a quote for the work to be done.

[94] The second accused testified that he was staying at the Spring Condominium at 1-19-03 with his wife and child. He said that he worked as an electrician. The second accused testified that he was requested by the first accused to do wiring works at the said premises to which he agreed.

[95] He met with the first accused in the morning of 22.10.2010. He brought some tools with him including a test pen, screwdriver, plier, cutter and measuring tape. The first accused introduced him to a male Indian and the first accused told the male Indian that he would be doing the wiring work. This male Indian was Vincent.

[96] The second accused then followed the said Vincent together with the first accused into the said premises. The rest of the evidence given by the second accused to a large extent mirrored that of the first accused.

[97] The second accused said that day was the first time that he had been to the premises. The second accused also testified that he went there that day to provide a quotation only and that he had not brought any tools to do wiring works.

[98] Both the accused denied that they were at the premises for the purpose of manufacturing drugs. They said that the premises belonged to Vincent and their presence at the premises during the time of the raid was because they had gone there to either do certain work at the request of Vincent or to provide a quotation for the works requested by Vincent. They denied any connection to the premises.

F) DUTY OF THE COURT AT THE CONCLUSION OF THE TRIAL

[99] The duty of a trial court at the conclusion of the defence case is set out in section 182A of the Criminal Procedure Code which reads as follows:

> *182 A - Procedure at the conclusion of the trial*
>
> (1) *At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.*

[100] In *Md Zainudin bin Raujan v. Public Prosecutor* [2013] 3 MLJ 773, the Federal Court observed as follows:

> "*At the conclusion of the trial, s. 182A of the Criminal Procedure Code imposes a duty on the trial court to consider all the evidence adduced before it and to decide whether the prosecution has proved its case beyond reasonable doubt. The defence of the accused must be considered in the totality of the evidence adduced by the prosecution, as well as in the light of the well - established principles enunciated in Mat v. Public Prosecutor [1963] 1 MLJ 263 with regard to the approach to be taken in evaluating the evidence of the defence.*"

[101] In *Prasit Punyang v. Public Prosecutor* [2014] 4 MLJ 282, it was held the emphasis must be on the word "all" employed in section 182A, CPC.

[102] What amounts to a "reasonable doubt "itself is not defined in section 182A of the Criminal Procedure Code. However, in *Public Prosecutor v. Saimin* [1971]2 MLJ 16, it was held by Sharma J that:

"*It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge*."

[103] Aside from the above, the correct thought process and stages that should be followed by a trial court in the assessment and evaluation of the defence evidence is that as encapsulated in the time honoured decision of *Mat v. Public Prosecutor 1963 29 MLJ 263,* where it was held by Suffian J (as he then was) as follows:

"*The position may be conveniently stated as follows:–*

(a) If you are satisfied beyond reasonable doubt as to the accused's guiltConvict.

(b) If you accept or believe the accused's explanation Acquit.

(c) If you do not accept or believe the accused's explanation Do not convict but consider the next steps below.

(d) If you do not accept or believe the accused's explanation and that explanation does not raise in your mind a reasonable doubt as to his guilt Convict.

(e) If you do not accept or believe the accused's explanation but nevertheless it raises in your mind a reasonable doubt as to his guilt Acquit."

[104] The approach in *Mat v. Public Prosecutor* was judicially endorsed by the Federal Court as being the correct one to adopt when evaluating the evidence of the defence case in *Public Prosecutor v. Mohd Radzi Bin Abu Bakar* [2005] 6 MLJ 393.

G) ANALYSIS OF DEFENCE CASE

[105] Apart from the duty imposed by a trial court at the conclusion of the whole case as described already, a trial court must carry out a maximum re-evaluation of the prosecution's case but this time considered and tested as against the sworn evidence given by the accused. This was of course, something that was not possible to do at the close of the prosecution case.

[106] In *Public Prosecutor v. Iskandar bin Mohamad Yusof* [2006] 5 MLJ 559, it was held by Suriyadi J (as he then was):

> *"**[10]** As said above when I called the defence I was satisfied that a prima facie case had successfully been established by the prosecution. Factually and legally the prosecution had satisfied all the ingredients and requirements of s. 180 of the Criminal Procedure Code. Before arriving at that conclusion as required by the latter section, and as stated earlier, a maximum evaluation of the evidence was conducted by me. Needless to say that evaluation was totally one sided, in that it was substantially the evidence adduced by the prosecution, though peppered by the accused person's suggestions and answers elicited from witnesses in the course of the cross examination. Naturally, at that stage, no sworn testimony of the accused person was made available that could prematurely punch holes in the prosecution's story. Naturally too, whatever was suggested by the accused person that could be helpful to him inevitably would*

receive unhelpful answers. With such a scenario, the prosecution literally sauntered into the defence stage.

[11] At the defence stage, a different scenario expressed itself. The prosecution's story had to be re-evaluated maximum-like, but this time padded by the additional defence's version, which was given under oath. At the end of the accused person's case, unless the prosecution succeeded at convincing me beyond reasonable doubt, he must be acquitted. *All the latter needed to do was to weaken the prosecution's case on a balance of probability."* (emphasis added)

[107] The main plank of the defence led by both accused is that the premises where they were found in at the time of the raid on 22.10.2012, belonged to someone by the name of Vincent Iskandar Shah ("Vincent"). Their defence therefore by way of extension is that the drug exhibits and the pistol and ammunition found in the premises do not belong to them but may have belonged instead to the said Vincent.

[108] In the evaluation of the defence case, it is also important to consider whether the version given is an afterthought or plain and deliberate lies. In so doing the court must consider whether the version as contended for by the defence with respect to matters material to their defence are raised for the first time during the defence case thus leaving the prosecution witnesses no opportunity of either admitting or denying the same or whether the defence version was put during the course of the prosecution case itself.

[109] The practice of raising matters or putting one's case during the prosecution case whether arising out of matters contained in the cautioned statement or otherwise is commonly referred to as the *Alcontara Notice*. The *"Alcontara Notice"* is the furnishing of details in support of an accused's defence which is normally given in his or

her cautioned statement. It must be borne in mind however, that this may or may not involve the actual tendering of the cautioned statement itself in evidence. Even if the cautioned statement was not tendered, the court must nevertheless consider such version as put during the course of the prosecution case. Once such a notice is given, investigation must be carried out on the disclosure given and the onus is then shifted to the prosecution to rebut the *"Alcontara Notice"*.

[110] The shifting of the burden however, to the prosecution after the giving of the *"Alcontara Notice"*, as of necessity presupposes that sufficient particulars or reasonable details are furnished in order for the police to carry out a meaningful investigation in respect of the information. Therefore, should the details furnished be insufficient, that will amount to an insufficient *"Alcontara Notice"*. In those circumstances, the burden cannot be then said to shift to the prosecution to rebut the notice. Whether the disclosure is sufficient is a question of fact to be gathered from the evidence.

[111] It is apposite to now consider the evidence led by both accused in order to evaluate whether their evidence can be so categorised as afterthoughts or deliberate lies. It is also necessary to sift through the evidence in particular to consider whether the personality of the said Vincent Iskandar Shah was a mere invention or whose identity was deliberately used in order to escape culpability.

[112] Further, from the nature of the defence raised here, the court also have regard for what is known as the *"Radhi Direction"*. This is so because the defence has contended that the said premises belong to a Vincent Iskandar Shah and therefore it is he that is the real trafficker in this case.

[113] The *"Radhi Direction"* is so named after the case bearing its name cited as *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073. The

"Radhi direction" was explained by Gopal Sri Ram JCA (as he then was) in the case of *Yee Wen Chin v. PP* [2008] 6 CLJ 773 as follows:

> *"**[12]**The section is relevant to the present case in the following way. In the course of cross-examining the prosecution witnesses it was extracted from PW5 that the information he had received was that Woo Kok Meng was trafficking in drugs at the place in question. The defence quite properly took advantage of this fact to demonstrate that Woo was the real trafficker and that the accused was entirely innocent. The accused was clearly entitled to do this in view of the decision in Mohamad Radhi v. Public Prosecutor [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC.* ***That case is authority for the proposition that a person charged with trafficking is entitled to an acquittal on that charge by showing that he was a mere possessor of the drugs whilst another was the true trafficker. Whenever such a defence is taken two separate exercises must be carried out by the trial judge. He must first determine as a fact whether that other is a real person or a mere figment of the accused's imagination invented for the purpose of the trial. Next, if he finds that other person to be real the judge must then determine whether that other person is the real trafficker.*** *This is called the Radhi direction and must be administered by a court unto itself when such a defence is taken. See, Sochima Okoye v. Public Prosecutor [1995] 3 CLJ 371 CA."* (emphasis added)

[114] With some modifications (as the accused are not contending that they are mere possessors), the said *"Radhi Direction"* as alluded to assumes relevancy here for reason that the defence contended that they were mere invitees to the premises at the invitation of Vincent. To support this, the defence alluded to a tenancy agreement (P142) together with a copy of a National Registration Identity Card (NRIC)

(P143) in the name of the said Vincent which was tendered in evidence by the prosecution during their case. The defence therefore submitted that this provided evidence that the said premises were in fact occupied by the said Vincent and that the drug exhibits and the pistol together with the ammunition that formed the subject matter of the charges against them in fact belonged to Vincent.

[115] As against this, the prosecution relied upon the evidence of two witnesses, namely, SP15 who was the landlord of the premises and SP16 who was in charge of maintenance at the condominium and the middleman involved who transacted on behalf of the landlord (SP16) in respect of tenants. SP15 testified that SP16 had brought a lady to meet him. He could not remember this lady's name. SP15 said that SP16 told him that the lady wanted to rent the premises.

[116] SP15 himself prepared three copies of a tenancy agreement in the name of Vincent Iskandar Shah to that end which he handed to SP16. He got the NRIC of Vincent from SP16. He said that the monthly rental was RM1,500.00 He said he took RM3,500.00 as deposit. He said initially he also received a CIMB cheque (ID144) for RM3,500.00 from SP16. He did not know who made out the cheque. He said that he handed 4 sets of keys to SP16. He did not know both accused. He does not know who occupies the premises or who signed the cheque.

[117] SP16 on the other hand testified that a male Indian by the name of Mr Soma whom he met twice wanted to rent the premises. He identified Mr Soma who he had met as the first accused. More interestingly, he said that he meet with Soma together with SP15. After introducing Soma to SP15, he said SP15 agreed to rent the premises. He also said that Mr Soma had made payment to SP15. SP16 said that SP15 met the said Mr Soma while in his presence once.

[118] The prosecution contended that the said Mr Soma was the first accused. This therefore proved that it was the first accused who had rented the said premises. SP16 had also identified the first accused at an identification parade.

[119] The defence however, alluded to what they described as material contradictions between the evidence of SP15 and SP16 which demolish the prosecution contention. They submitted that while SP16 had said that SP15 had met with the first accused, SP15 himself said that he had never met the first accused. SP15 only remembers having met a lady. SP16 also denied receiving copies of the tenancy agreement said to have been given to him by SP15. Further, while SP16 said that SP15 handed the access card to the premises to the first accused, SP15 denied having met the first accused.

[120] Several questions arise as a result of the above testimony. Did the first accused rent the premises from SP15 or could it possibly have been someone else? If SP15 is to be believed, there is no evidence that the first accused rented the premises and had the access card to the premises and therefore could not have had access to the premises. If SP16 is to be believed, then there is evidence that the first accused rented the premises.

[121] In the light of this contradiction, this court is necessarily confronted with two pieces of conflicting evidence from the prosecution evidence. This contradiction was never explained by the prosecution save for a submission that perhaps due to the lapse of the intervening time, SP15 may have forgotten that he had met the first accused.

[122] As against this, is the evidence of both accused that the premises were occupied by Vincent and that they were only there for purposes of work related matters at the invitation of Vincent. In the face of two possible versions, it is trite that any resulting benefit must be resolved

in favour of the accused persons. No doubt, it was given in evidence that SP16 had identified the first accused at an identification parade.

[123] As against this is the evidence by way of admission from the officer who conducted the parade (SP13) that the parade was wrongly conducted, contrary to procedure as being in contravention of the Inspector General of Police Standing Orders (IGPSO) and therefore unfair. The defence therefore contends that the said identification parade was therefore vitiated and no reliance can be placed on it.

[124] Coupled with this is the testimony of SP16 that he was instructed by the police to identify the first accused by touching his arm. Two possible inferences arise out of this, the first is that the police told SP16 that he had to identify the person he met by physically touching the person, thereby merely indicating the manner in which proper identification should be done, or that the police had actually told SP16 to identify the first accused by touching him and thus had pointed out beforehand the first accused to SP16. As with all other inferences, any resulting benefit must go the way of the accused.

[125] SP16 further said that he knew that the second accused was residing on the 16th floor as he was part of the management and he works there. However, SP16 testified that he did not know who stayed at Unit 1-03-09 (the said premises). Given that SP16 was familiar with the tenants and occupiers of the condominium, and he did not testify that the first accused occupied the premises, the benefit of this must undoubtedly also be resolved in favour of the first accused that he was not the occupier of the said premises.

[126] The prosecution also contended that payment for the tenancy was made through a cheque (P144) issued by a Somasundram Enterprise in an attempt to prove that the first accused had rented the said premises. The first accused testified that while he was the owner

of the said entity at one time, he had since registered his withdrawal from the said entity the reason being that he decided as a result of some issues of financial misunderstanding with his wife (Caroline Patrick), to transfer the ownership of the entity to her.

[127] More crucially, at the time the said cheque was issued, the first accused was no longer the owner of the entity. A Suruhanjaya Syarikat Malaysia (SSM) search (P196) in respect of the said Somasundram Enterprise confirmed that on the date the said cheque was issued, the first accused was no longer the owner of the entity. The first accused also said that he had never instructed Caroline Patrick to issue any cheques. The one person of course who could have confirmed beyond doubt the actual status of the entity was the said Caroline Patrick who unfortunately was nowhere to be found.

[128] It must also be remembered that SP16 had said that he had received deposit payments for rental of the premises by way of cash and not by way of cheque. This raises further doubt as to whether or not it was the first accused who in fact rented the said premises.

[129] There was also in evidence a motor vehicle ("car") bearing registration number PCQ 9676 found in the parking bay reserved for the tenant of the said premises, which according to a search conducted at the Jabatan Pengangkutan Jalanraya (JPJ) (P172), was registered in the name of the said Vincent.

[130] The prosecution submitted that just because the car was registered in Vincent's name does not mean that other persons could not have used the car. In the same vein, it was also argued by them that the premises did not contain any evidence of Vincent's occupancy. It was submitted by the prosecution that from the photographs produced at the trial, pictures of Hindu deities could be seen and articles of Hindu worship was also found. This proved that

the said Vincent, who by his very name indicated that he was of the Muslim faith could not be staying there.

[131] By the same token, it can also be argued that apart from the evidence of Hindu worship (which is at best neutral) as it was never asked during cross examination, of what faith the accused persons were, there was no evidence of any items to connect the accused persons to the premises or the said car. No identification documents linking the accused were found, no personal belongings or photographs were also found nor was any clothing found in the premises at the time of the raid to connect either of the accused to the premises. It was also in evidence that the second accused resided elsewhere on an upper floor in the said condominium.

[132] Clothings were however curiously discovered in the premises on 27.10.2010 while the raid was conducted on 22.10.2010, some 5 days after. This anomaly was never explained and neither were there evidence of any clothes fitting exercise conducted in respect of both accused. The discovery of the clothes 5 days after also raised the issue of whether someone else had access to the said premises.

[133] Perhaps the most inexplicable part of the case given the testimony of the prosecution witnesses, is that the second accused was seen mixing with his hands (there being no evidence that gloves were used) some powdery substance while the first accused was standing next to him.

[134] This forensic part of the case tends to support the version of the defence and needs to be carefully considered. SP17 testified that when both accused were arrested, there were traces of powdery substances on both of the accused person's body and clothings. It is also not in dispute that after the arrest of the accused, swabs were taken from the right and left hands and the fingernails of both accused.

[135] Curiously though, the results of the analysis of these swabs revealed in report (PP) FOR 4049/10-5 (P110) were negative. Therefore contrary to the evidence of SP17, there were in fact no traces of any drugs or psychotropic substances found on the accused person's hands and fingernails.

[136] Further, the clothings of both accused worn by them that day were also seized and sent to the chemist by way of form Pol 31 (P82) for analysis of traces of drugs. The results of the analysis based on chemist report (PP) FOR 4049/10-1 (P84) was again negative for any traces of drugs or psychotropic substances.

[137] It defies reasonable belief that if the accused were in fact engaged in the very act of manufacturing drugs as contended by the prosecution, not a single trace of drugs or similar substances were detected from their person and clothings. There was no evidence that the accused were wearing gloves at the time. If as the evidence revealed, the second accused was mixing a powdery substance with his bare hands, it is difficult to fathom that there was not a trace of such substances detected.

[138] This all the more so in light of the fact that traces of drugs were found on the floor and the walls of the master bedroom. There may have been an altogether plausible explanation for this anomaly but none was advanced by the prosecution save for the submission that the forensic evidence is only corroborative in the light of the direct evidence given. In a case involving capital punishment, such a contradiction or anomaly cannot be lightly dismissed without more. Once again, whatever inferences that may arise from this has to be resolved in the accused person's favour. This further tends to support the version of the accused that they may have in fact been in the living room for the purpose they testified to when the police raided the premises.

[139] Still on the subject of forensic evidence, there were 4 fingerprint traces discovered on several items recovered from the master bedroom namely, a red cover plastic container, a Sunkist box, a blender and a small plastic container. The outcome of the analysis on these fingerprints revealed negative results in respect of both accused.

[140] To further exacerbate the case for the prosecution, although they had obtained a copy of Vincent's identity card (P172) from the National Registration Department which also contained his fingerprint, the prosecution had never bothered to conduct a possible match with the prints recovered from the said 4 items found in the master bedroom. This resulted in a failure to exclude the possibility that the said Vincent might have handled those items and thus raising the possibility that the accused persons may have been telling the truth. There was also no evidence of any fingerprints of either of the accused on the pistol, cartridge or bullets recovered so as to link them to those items.

[141] Further, the evidence of SP17 was that before the raid, they conducted an observation on the said premises and observed through the thinly veiled curtains in the living room what was described as the silhouettes or shadows of persons moving about in the living room. This raises the probability that what the accused had said about them waiting in the living room for Vincent to return, may have well been true or at the very least have raised doubt in the prosecution's version.

[142] Although the evidence of SP7 was that a foul smelling odour emitted from the master bedroom, if the version of the accused persons that the doors to the rooms at the said premises were closed were true, this could possibly account for the version of the accused that they did not detect any such odour. In any event, such doubt in the two possible versions must favour the accused.

[143] The second accused had further identified some of the tools from the photographs he said he had brought with him to the premises including a measuring tape for the purpose of the work he said Vincent had asked him to do.

[144] In respect of the efforts made to trace the whereabouts of the said Vincent, although SP21 admitted that he was an important witness, the efforts made to locate him were woefully inadequate. SP21 went to the National Registration Department on 28.10.2010 and obtained Vincent's address as per P172. However, SP21 did not conduct any investigation at the said address. Instead SP21 informed the Dang Wangi Police Station to investigate Vincent at the said address.

[145] Other than the fact that SP21 said that the Vincent could not be found at the address in Klang, there were no details forthcoming as the results of the investigation. A further feeble attempt was made some 4 years after the incident to advertise for information as to the whereabouts of Vincent. The accused ought not to be prejudiced for the lack of investigation as to the said Vincent who was the principal player in this episode according to the accused. This omission must also be resolved against the prosecution and in favour of the accused.

[146] The lack of closed circuit camera television (CCTV) recordings further does not in any way assist the prosecution in proving the guilt of both accused beyond a reasonable doubt. The prosecution witnesses had said that there were CCTVs on every floor and yet no attempt was made to obtain them. It may be that in most situations, lack of CCTV recordings may only amount to corroborative evidence at best. However, this is not the case in every situation. In cases where there exists a divergence in the versions of the prosecution on the one hand, and the defence, on the other, the importance of CCTV evidence

cannot be underestimated. See *Pang Chee Meng v. PP* [1992] 1 CLJ 265 and *See Kek Chuan v. PP* [2013] 6 CLJ.

[147] The prosecution pointed out several contradictions between the evidence as put by both accused during the course of the prosecution case as compared to the evidence given by them during the course of the defence case. The prosecution contends that these contradictions are material.

[148] During the course of the prosecution case, it was suggested that the condominium unit was rented as a homestay while during the defence case, there was no evidence given that the said unit was a homestay. It was suggested during the prosecution case that the said Vincent had asked both accused to move some things into the unit on the day of the incident whereas during the defence case evidence was led that Vincent has asked the accused persons to perform cleaning works and electrical wiring works at the unit.

[149] During the prosecution case, it was suggested that both the accused told the police that they were waiting for Vincent to have a meal with him whereas during the defence case, the evidence was that Vincent had offered to buy food but both accused had turned down the offer and only asked for a drink instead.

[150] A further contradiction submitted the prosecution, was that during the prosecution case, it was suggested that the second accused told the police that he was at the said unit as he had been invited for a meal whereas during the defence case, the second accused testified that he was asked by the first accused to go to the unit to do wiring work. The second accused had also refused Vincent's offer to buy food for him.

[151] In the course of the prosecution case, it was put that this was not the first occasion that the second accused had been to the unit but had

been there one to two days before the day of the incident to do electrical works. In contrast, during the defence case, evidence was however led by the second accused that the day of the incident was the first occasion he had been to the unit.

[152] Notwithstanding the apparent contradictions as submitted by the prosecution, it is evident that the essence of the defence case was that they were there at the invitation of Vincent when the raid occurred. The possibility that Vincent was occupying the premises cannot in light of the evidence considered above be altogether discounted. It must also be remembered that on the available evidence, the involvement of Vincent as the tenant and occupier of the premises were not altogether excluded by the prosecution.

[153] Therefore whether the accused had said they were there in order to merely provide a quotation or actually do the work and the other matters highlighted by the prosecution, cannot be considered material in light of the other evidence establishing the possibility of Vincent being the occupier of the premises. This is further supported by the damning lack of forensic evidence to link both accused to the incriminating exhibits.

[154] Upon considering the manner in which the defence case was conducted right from the prosecution case itself, it is evident that they had contended that the said Vincent was not a figment of their imagination but a real person and the one who occupied the premises. The defence version was put to several prosecution witnesses during the course of the prosecution stage. Coupled with their sworn evidence, I find that the defence had given a sufficient "Alcontara Notice" which the prosecution has failed to rebut.

[155] I also find that upon application of the "Radhi Direction", Vincent was not a fictitious person, as also admitted to by prosecution witnesses, and that his involvement as the true trafficker in this case

has not been altogether excluded by the prosecution and coupled with the defence evidence, could have well been the person occupying the said premises and hence the owner of the drugs as well as the implements found there along with the pistol and the ammunition. A consideration of all the circumstances leads me to conclude that a conviction against both accused would be unsafe.

[156] With respect to the reaction by both accused in engaging in a scuffle with the police, their evidence was that men wearing masks broke the premises. That being the case, their reaction may be altogether understandable as they were unsure of who these men were at the time.

[157] It must also importantly be remembered that the prosecution case was premised upon the act of trafficking as defined by section 2 DDA and in particular, the specific act of manufacturing. This fact was fairly evident also from their opening statement (annexure A). No presumptions under the DDA were therefore in operation or had arisen against the accused persons. This being the case, all the defence had to do was to merely raise a reasonable doubt in the prosecution case. The defence of the accused persons therefore need not have to be believed in order for them to earn an acquittal. See *Mat v. Public Prosecutor* (*supra*) and *Public Prosecutor v. Mohd Radzi Bin Abu Bakar* (*supra*).

[158] Upon a consideration of all the evidence and upon a re-evaluation of the prosecution case as tested against the defence version, I find that the version of the defence that they were in fact at the premises at the invitation of Vincent for the purpose of certain work he had inquired of them, and that while he exited the premises, the raid occurred while they waited for Vincent's return, to have raised a reasonable doubt in the prosecution case in respect of all the

five (5) charges against them. I therefore acquit and discharge both accused of the all the five (5) charges against them.

Dated: 19 SEPTEMBER 2016

(COLLIN LAWRENCE SEQUERAH)
Judicial Commissioner
High Court of Malaya
Penang

COUNSELS:

For the prosecution - Siti Fatimah Talib & Lim Cheah Yit, Deputy Public Prosecutor; Penang Legal Advisor Office

For the 1st accused - Hussaini Abdul Rashid; S Rethimakumar & Associates
Penang

For the 2nd accused - S Rethinakumar; M/s Hussaini & Co
Penang

Muhammad Shafee Md Abdullah; M/s Shafee & Co
Kuala Lumpur