DI DALAM MAHKAMAH TINGGI DI ALOR SETAR
DI DALAM NEGERI KEDAH DARUL AMAN
[PERBICARAAN JENAYAH NO: 45A-15-04/2013]

DI ANTARA

PENDAKWA RAYA

LAWAN

1. MOHD HISHAMMUDIN MOHD RAZAK
2. AZRUL ANUAR OSMAN

CRIMINAL LAW: *Dangerous drugs - Trafficking - Offence under s. 39B(1)(a) of Dangerous Drugs Act 1952 ('DDA') - Possession - Drugs in black plastic bags found in a car where accused persons were caught - Accused persons not owners of car - Inference from surrounding circumstances - Whether element of possession was proven - Whether there was evidence from surrounding circumstances that could strongly suggest an inference of knowledge on part of accused*

CRIMINAL LAW*: Common intention - Trafficking - Participation in crime - Inference from surrounding circumstances - Presence of accused persons at crime scene - Whether element of common intention proven - Whether presence of accused persons at crime scene sufficient to raise implication of pre-planning - Whether there was evidence of communication between accused persons before commission of crime*

CIRIMINAL PROCEDURE: *Prosecution - Prima facie case - Offence of trafficking in dangerous drugs - Drugs found in a car - Proof of common intention - Existence of more than one inference - Unsatisfactory explanation pertaining to discrepancies in charge - Contradictory evidence of prosecution's witnesses - Whether prosecution was able to produce direct or presumptive evidence to prove prima facie case - Whether prosecution was able to produce evidence to show existence of common intention among accused in participation of commission of offence - Whether inference most favourable to accused should be accepted when there was more than one inference which could reasonably be drawn from a set of facts in a criminal case*

[Prosecution failed to prove prima facie case. First and second accused discharged and acquitted from charges.]

Case(s) referred to:

Chan Pean Leon v. PP [1956] 1 LNS 17 HC ***(refd)***

Ho Seng Seng v. Rex [1951] 1 LNS 25 HC ***(refd)***

Ibrahim Mohamad & Anor v. PP [2011] 4 CLJ 113 FC ***(refd)***

Khairuddin Hassan v. PP [2010] 7 CLJ 129 FC ***(refd)***

Law Sie Hoe v. PP [2014] 1 LNS 269 CA ***(refd)***

Lee Kwai Heong & Anor v. PP [2006] 1 CLJ 1043 CA ***(refd)***

Low Thiam Teck v. PP [2014] 1 LNS 1104 CA ***(refd)***

Mimi Wong & Anor v. Public Prosecutor [1972] 1 LNS 88 HC ***(refd)***

Muhammed Hassan v. Public Prosecutor [1998] 2 CLJ 170 FC ***(refd)***

Namasiyiam Doraisamy v. Public Prosecutor [1987] CLJ Rep 241 SC ***(refd)***

Ong Chee Hoe & Anor v. PP [1999] 4 SLR 688 ***(refd)***

Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***

PP v. Ang Kian Chai [2012] 1 LNS 389 CA ***(refd)***

PP v. Azilah Hadri & Anor [2015] 1 CLJ 579 FC ***(refd)***

PP v. Denish Madhavan [2009] 2 CLJ 209 FC ***(foll)***

PP v. Kua Tiong Ann [2009] 1 LNS 195 HC ***(refd)***

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

Public Prosecutor v. Kasmin Bin Soeb [1974] 1 LNS 116 HC ***(refd)***

Rina Simanjuntak v. PP [2015] 2 CLJ 912 CA ***(refd)***

Siew Yoke Keong v. PP [2013] 4 CLJ 149 FC ***(refd)***

Suresh v. State of Uttar Pradesh AIR [2001] SC 1344 ***(refd)***

Tai Chai Keh v. Public Prosecutor [1948] 1 LNS 122 CA ***(refd)***

Toh Ah Loh & Mak Thim v. Rex [1948] 1 LNS 72 HC ***(refd)***

Yeo Boh Suat & Ors v. Rex [1948] 1 LNS 150 ***(refd)***

Legislation referred to:

Criminal Procedure Code, ss. 180(2), (3), (4)

Dangerous Drugs Act 1952, ss. 2, 37(d), (da), 37A, 39B(1)(a), (2)

Evidence Act 1950, s. 9

Penal Code, s. 34

Other source(s) referred to:

Ratanlal & Dhirajlal's, *Law of Crimes,* 24th ed, Bharat Law House: New Delhi, Vol. 1, 123

JUDGMENT

Introduction

[1] Mohd Hishamuddin Bin Mohd Razak ("the first accused") and Azrul Anuar Bin Osman ("the second accused") were jointly charged with one Ridzuan bin Yahya ("the deceased") with trafficking 13,995 grams of cannabis in contravention of s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("DDA") read together with section 34 of the Penal Code. The offence is punishable under s. 39B(2) of the same Act, which carries a mandatory death sentence upon conviction.

[2] The charge is as follows:

> *Bahawa kamu bersama-sama seorang lagi yang telah meninggal dunia bernama Ridzuan bin Yahya (No. K/P 730427-02-5851) pada 1 Ogos 2012, jam lebih kurang jam 9.30 malam, di hadapan rumah No. 8/90, Ladang Victoria, Padang Serai, di dalam Daerah Kulim, di dalam Negeri Kedah Darul Aman, telah didapati mengedar dadah berbahaya iaitu Cannabis seberat 13,995 gram. Oleh yang demikian, kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B Akta yang sama di baca bersama seksyen 34 Kanun Keseksaan.*

The Salient Facts in the Prosecution's Case

The Prosecution's Witnesses

[3] The prosecution called 11 witnesses, namely, the Chemist ("SP1"), 2 public witnesses ("SP2" and "SP3") and 8 police officers - they were:

i. Photographer ("SP4");
ii. Store-keeper ("SP5");
iii. Officer Johari (the agent provocateur ("AP") / "SP6");
iv. Officer Mohd Razi (the first arresting officer ("AO") / "SP7");
v. Officer Raja (the second arresting officer / "SP8");
vi. Narcotic officer ("SP9");
vii. ASP Muhamad Saharan (narcotic officer from IPK, Kedah / "SP10"); and
viii. Officer Raja Hafiz (the investigating officer ("IO") / "SP11").

Based on Information Received

[4] On 18.7.2012, based on information received, ASP Saharan (SP10) ordered Officer Johari (SP6) to act as an agent provocateur to make contact with a Malay man (who was the deceased) believed to be involved in drug trafficking, particularly in cannabis, in the area of Sg. Petani. SP10 also ordered officer Ajib to assist SP6 in the operation. SP10 then contacted the informer to arrange a meeting with the deceased. The deceased agreed to meet at Restoran Dinaz in Sg. Petani, Kulim at 5.00 p.m. on the same day.

***(NOTE:** During the trial, the words 'suspect', 'target' and 'Wan' were used interchangeably, and they all were referring to the deceased - Ridzuan bin Yahya)*

The First Meeting

[5] Around 3.00 p.m., SP6 and officer Ajib went to Sg. Petani to meet the deceased. The informer was there when they arrived at the restaurant at 5.00 p.m. The informer contacted the deceased. Shortly, a Honda Odyssey pulled up in front of the restaurant. The deceased alighted from the vehicle and went straight to where the informer and SP6 were sitting. The informer introduced SP6 as 'Abang Jep' and officer Ajib as 'Abang Long' to the deceased. After the introduction, the informer left the restaurant.

[6] SP6 began talking to the deceased about buying cannabis from him. Throughout the conversation, they used the word 'buah' to refer to cannabis. They discussed for a while and SP6 left his contact number

with the deceased before leaving. The meeting ended around 6.00 p.m. SP6 went back to headquarters and reported to SP10 about what had transpired in that meeting.

The Second Meeting

[7] On 26.7.2012 around 10.00 a.m., the deceased called SP6. The deceased wanted to meet SP6 at a petrol station in Lunas at 7.00 p.m. the same day. SP6 informed SP10 about the meeting. SP10 then ordered two officers to follow him to tail SP6 to the meeting place. They went in different cars.

[8] Around 7.00 p.m., SP6 arrived at the petrol station. The deceased told SP6 to follow his car from behind to a restaurant in Lunas. Meanwhile, SP10 and his officers were observing them from a distance.

[9] When they were at the restaurant, SP6 again discussed with the deceased about buying cannabis from him. This was the second time they met. SP6 told the deceased that he wanted 15 packets of cannabis (1 kilogram per packet). The deceased agreed to supply the cannabis at a price of RM2,200.00 per packet. They agreed that the total transaction price was RM33,000.00. They also agreed to meet on 1.8.2012 at 7.30 p.m. at Restoran Al-Amin in Padang Serai to conclude the transaction. SP6 reported the outcome of the meeting to SP10 the same day.

The Briefing

[10] On 1.8.2012 around 5.00 p.m., a briefing, led by Officer Mohd Razi, SP7, was held at the narcotic investigation headquarters, Kedah.

The briefing, codenamed *"Operasi Kapas",* was for the arrest of a drug trafficker, and a drug transaction that would be taking place in the evening. 22 officers attended the briefing. The officers were later divided into 6 teams; each team was provided with a walkie-talkie. Firearms were also provided to the officers. The officers were instructed to gather at the Padang Serai Police Station at 6.30 p.m., and from there they will go to the location where SP6 and the deceased were supposed to meet.

The Final Meeting

[11] Around 7.30 p.m., SP6 (together with officer Ajib) arrived at the Restoran Al-Amin in Padang Serai. The deceased was expecting SP6. It was the month of Ramadhan for the Muslims; SP6 and the deceased broke fast together at the restaurant. Meanwhile, the raiding parties were within the vicinity of the restaurant observing SP6 and the deceased.

[12] After dinner, the deceased made a phone call. SP6 told the Court that he heard the deceased said: *"OK, Din, kami boleh bertolak mei. Nanti sampai di Victoria Estate, kamu nampak kami parkir kereta 2 biji."* The deceased told SP6 to follow his car from behind. According to the prosecution's narrative, the deceased was driving a white colour Perodua Alza; whereas, SP6 was driving a Honda Accord.

[13] Around 8.30 p.m., they arrived at Victoria Estate. They pulled over at the road side, next to a building, a kind of community hall, known as *Dewan Muhibbah Victoria Estate.* The raiding parties tailed the deceased to Victoria Estate from the restaurant.

[14] Upon reaching Victoria Estate, SP7 instructed his officers to stand-by and keep a close watch over SP6 and the deceased. The distance was approximately 20 to 25 meters between SP6 and where SP7 stopped his car. SP7 testified that he could see SP6 clearly from where his position was.

[15] SP6 testified that he stopped his car at the back of the deceased's car. SP6 also testified that the deceased came out from his car and went into SP6's car. Officer Ajib showed the deceased the money in SP6's car. SP6 further testified that the deceased counted the money in the car. The deceased then made a phone call while he was still inside SP6's car. He heard the deceased said: *"Din, payment ada. OK, nanti sampai di Victoria Estate, bersebelahaan ada kereta 2 biji. Depan kereta saya Alza putih, dan kereta Honda Accord. Bila sampai nanti, buat U-turn parkir di belakang Honda Accord."*

The Ambush

[16] Around 9.00 p.m., a silver colour Kancil, bearing registration number PFF 7415, arrived at the scene. The Kancil stopped at the back of SP6's car. The deceased said to SP6: *"Abang Jep, buah sudah sampai, ada di Kancil kereta belakang."*

[17] SP6 alighted from his car and went to the Kancil. SP6 saw two persons in the Kancil. He asked the driver in the Kancil: *"Mana barang?"* The driver replied: *"Barang ada dalam sarung plastik hitam di cushion belakang."* SP6 then went into the Kancil through the back passenger's door. SP6 found two layers of black plastic bag containing packets of

compressed substances. SP6 was positive that those substances in the plastic bags were cannabis because of the smell coming out from the plastic bags when he opened it. He then came out from the Kancil. Immediately after that, he removed his cap and shouted "Police". The gesture of removing his cap was a signal for the raiding parties to take action and make arrest.

[18] When SP7 saw SP6's signal, he ordered his men to take swift action. SP7 and officer Saiful ambushed the Kancil. They apprehended the person sitting next to the driver, who was later identified as the second accused. SP7 told the Court that he saw the driver in the Kancil fleeing from the scene.

[19] SP8 testified that he saw the driver in the Kancil running towards a nearby housing estate. SP8 and officer Abdullah bin Hamazah chased after the Kancil's driver. They successfully apprehended the driver after an approximately 100 meters chase. The driver was later identified as the first accused. SP8 brought the first accused back to the place where the Kancil was. The deceased had apparently fled the scene with his Perodua Alza amid the commotion.

Incriminating Drug Found

[20] SP7 searched the Kancil in the presence of the accused persons. He found 15 pieces of compressed substances which were believed to be cannabis contained in black plastic bags at the rear seats. SP7 took the accused persons and the seized incriminating substances back to Kulim police station. They were later handed to SP11, officer Raja

Hafiz, the investigating officer, to follow up with the necessary investigation.

[21] The incriminating substances were later sent to the Jabatan Kimia Malaysia for analysis. The government chemist, SP1, in her chemist report (AS)FOR 2261/12-0 dated 27.1.2013 (exhibit P4) confirmed that those substances submitted for analysis were cannabis as defined under s.2 of the DDA. The nett weight of the seized cannabis was 13,995 grams.

At the Close of Prosecution's Case

A Prima Facie Case

[22] Pursuant to s. 180(1) of the Criminal Procedure Code (CPC), it is incumbent upon this Court to consider at the conclusion of the prosecution's case whether the prosecution has made out a *prima facie* case against the accused persons. If the prosecution has made out a *prima facie* case, pursuant to s. 180(3) of the CPC, the Court is required to call upon the accused persons to enter defence. Conversely, if the prosecution has not made out a *prima facie* case, the Court shall record an order of acquittal (see s. 180(2) of the CPC).

[23] Section 180(4) of the CPC explains "a *prima facie* case is said to have been made out when the prosecution has adduced ***credible evidence proving each ingredient of the offence*** in which if unrebutted or unexplained would warrant a conviction." In other words, the prosecution has to lead evidence which is so sufficiently strong

against the accused person that if this evidence is not rebutted or explained, then the trial judge is left with no option but to record a conviction.

[24] It is trite law that a criminal trial judge is tasked with applying the maximum evaluation test (positive evaluation) on the prosecution's evidence at the close of prosecution case. The Federal Court in *PP v. Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393, pp 399-400 / [2006] 1 CLJ 457, pp 465-7 held that the exercise of maximum evaluation test should involve "an assessment of the credibility of the witnesses called by the prosecution and the drawing of inferences admitted by the prosecution evidence." It further held that "if the prosecution evidence admits of two or more inferences, one which is in the accused's favour, then it is the duty of the court to draw the inference that is favourable to the accused."

[25] Assessing the credibility of the prosecution's witness means weighing the prosecution's evidence. The weight of the evidence goes to support the quantum of proof, and the quantum of proof that is required from the prosecution to prove is to establish a *prima facie* case. Hence, the exercise of maximum evaluation by the trial judge on the prosecution's evidence is a *sine qua non* before holding whether a *prima facie* case is made out at the close of prosecution case.

The Offence of Trafficking - s. 39B(1)(a) of the DDA

[26] The definition of 'trafficking' under s. 2 of the DDA covers extensive situations where an act could be regarded as 'trafficking' within the meaning of the Act. It includes 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 the Act or the regulations made under the Act.

[27] The act of trafficking can be proved by direct and/or circumstantial evidence, which means to prove the existence of one or combination of any of the acts mentioned in s. 2 of the DDA. 'Trafficking' can also be established by way of statutory presumption under s. 37(da) of the DDA. In the former, the quantum of proof required to rebut the physical and fault elements of trafficking is on the standard of reasonable doubt. Whereas, in the later, the quantum of proof required to rebut the compelling statutory presumption is on balance of probabilities, a standard which is higher than raising a reasonable doubt.

[28] The ingredients of s. 39B(1)(a) of the DDA are as follows:

(i) the accused person was in **possession** of the incriminating drugs at that material time; and

(ii) the accused person was in the **act of trafficking** the incriminating drug at that material time.

(see *Pendakwa Raya v. Kua Tiong Ann* [2009] 7 AMR 788, p 795)

[29] 'Possession' is the chief element leading to the offence of trafficking in the DDA. In the absence of proof of 'possession', the prosecution's case collapses. 'Possession' can be proved by direct and/or circumstantial evidence. Alternatively, it also can be proved by statutory presumption under s. 37(d) of the DDA. Section 37(d) of the

DDA is a compelling statutory presumption in which both the physical and fault elements are deemed proved upon establishing the accused person was either in custody or control of the incriminating substance at the material time. The quantum of proof to rebut the latter is on the balance of probabilities.

[30] In *Toh Ah Loh and Mak Thim v. Rex* [1949] 15 MLJ 54, the appellate court affirmed the direction given by the trial judge to the jury on the meaning of 'possession'. It was said:

> *"Possession, in order to incriminate a person, must have the following characteristics. The possessor* ***must know the nature*** *of the thing possessed, must have in him a* ***power of disposal*** *over the thing, and lastly must be* ***conscious of his possession*** *of the thing. If these factors are absent, his possession can raise no presumption of mens rea, without which (except by statute) possession cannot be criminal."*

[31] The above proposition was followed in Y*eo Boh Suat & Ords v. Rex* (1948-49) MLJ Supp 105, and it was later further expounded in *Ho Seng Seng v. Rex* [1951] 17 MLJ 225, wherein Brown, Ag. CJ had explained the meaning of and differences between 'custody' and 'control' lucidly. In gist, he said that 'custody' means 'the possessor must be conscious of his possession of the thing'; and 'control' means 'the possessor must be conscious of his possession of the thing' as well as 'he must have the power of disposal over the thing'.

[32] Section 37(d) of the DDA, in effect, the presumption works in the following manner:

i. Once the prosecution has proved ***custody,*** ie, 'the possessor must be conscious of his possession of the thing'*, a fortiori,* 'the possessor must have the power of disposal over the thing' and 'the possessor must know the nature of the thing possessed'; OR

ii. Once the prosecution has proved ***control,*** ie, 'he must be conscious of his possession of the thing' and 'must have the power of disposal over the thing', *a fortiori,* 'the possessor must know the nature of the thing possessed.'

[33] Once it is proven that the possessor is in *custody* or *control* of anything containing the incriminating substances, until the contrary is proven, the possessor is deemed to have been in possession of such incriminating substances, and shall, until the contrary is proven, also be deemed to have known the nature of such thing possessed.

[34] It is instructive to note that in the event the prosecution chooses to rely on s. 37(d) of DDA to establish 'possession', the prosecution is precluded from further invoking the statutory presumption of trafficking under s. 37(da) of DDA. This is the rule of against double presumption or presumption upon presumption. This rule was propounded in the Federal Court decision in *Muhammed Hassan v. PP* [1998] 2 CLJ 170. This rule became inapplicable after Parliament inserted s.37A in the DDA which allows the application and operation of presumption upon presumption for offences charged under the Act. This enabling section came into force on 15.2.2014. However, cases where the offence was committed before the effective date are not caught under the enabling section. The Court of Appeal in *Rina Simanjuntak v. PP* [2015] 2 CLJ 912, p. 917, has made this proposition very clear.

[35] In this instant case, the accused persons were alleged to have committed the offence on 1.8.2012 which was prior to the date the enabling section came into the force. Therefore, based on the decision of *Rina Simanjuntak*, s. 37A of DDA is not applicable in this instant case. The law in *Muhammed Hassan* is still relevant.

The Findings of the Court

KNOWLEDGE AND POSSESSION

[36] In order to prove possession, this Court refers to the Federal Court decision in *PP v. Denish Madhavan* [2009] 2 CLJ 209 for guidance. At pages 217-8, the apex court cited the case of *Chan Pean Leon v. PP* [1956] 1 LNS 17 with approval. It is also instructive to refer to the decision of the Court of Appeal in *Law Sie Hoe v. PP* [2014] 1 LNS 269, wherein it was held that the incriminating act of possession must contain three characteristics: Firstly, the person in possession must have knowledge of the thing in his possession; secondly, he must have in him a power of disposal over the thing; and thirdly, he must be conscious of the possession of the thing. The legal proposition in *Law Sie Hoe* encapsulates the principles that were propounded in earlier cases with approval.

[37] Based on the above Federal Court's and Court of Appeal's decisions, it is judicious for this Court now to ask itself the following question: Whether the accused persons were so situated with the black plastic bags which contained the incriminating drugs found in the Kancil

that they had the power to deal with the black plastic bags as owners to the exclusion of all other persons, and when the circumstances were such that they could be presumed to intend to do so in case of need. In other words, the accused persons must be so situated that they could deal with the black plastic bags which contained the incriminating drugs as if they belonged to the accused persons, and it must be shown that the accused persons had the intention of dealing with them as if they belonged to the accused persons should they see any occasion to do so (they had *animus possidendi*) (see also the decision of the Federal Court in *Siew Yoke Keong v. PP* [2013] 4 CLJ 149, p.).

The Need to Exclude

[38] The incriminating drug (in the black plastic bags) was found in the Kancil, and the accused persons were not the owners of the Kancil. Hence, according to *Ang Kian Chai v. PP* [2012] 4 MLRA 456 (see also *Ibrahim Mohamad & Anor v. PP* [2011] 4 CLJ 113), it is necessary for the prosecution first to adduce evidence to exclude the possibility of others who could have access to the car prior to the arrest of the accused persons.

[39] The Kancil belonged to SP2. Sometime in year 2010, SP2 passed the Kancil to SP3 for him to use. SP2 and SP3 are siblings. Based on the prosecution's evidence, on 1.8.2012, the first accused came to SP3's house. The first accused wanted to borrow SP3's Kancil. SP3, without hesitation, agreed to lend his car to the first accused. The incriminating drugs were later found at the back seat of the Kancil. The first accused was the driver, whereas the second accused was seated next to the driver.

[40] Based on the testimonies of SP2 and SP3 and after having observed their demeanours in Court, I was satisfied that they were truthful and honest witnesses. Hence, this Court found no villainy on their part, or that the incriminating drugs could have been placed in the car before the first accused took the car from SP3. The possibility of others who could have access to the vehicle prior to the arrest of the accused persons could be said to have been excluded.

[41] The learned counsel for the first accused suggested to SP3 that the reason why the first accused borrowed the car was to let his friend Ridzuan bin Yahya (the deceased) to use the car that evening, but SP3 could not agree with that.

The Surrounding Circumstances

[42] The incriminating drugs in the black plastic bags were found in the Kancil where the accused persons were caught. The close proximity between the accused persons and the incriminating drugs found could not conclusively prove *'that the accused persons were so situated with the incriminating drugs that they could deal with them as if the incriminating drugs belonged to the accused persons'* or in other words, that the accused persons have the power to dispose or deal with the incriminating drugs to the exclusion of others at that material time.

[43] The prosecution must prove the accused persons had the knowledge of the incriminating drug inside the black plastic bags; and must have had **the intention** and **power** to dispose the incriminating drugs if necessary to do so. It is said that intention is a matter of fact

which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether the surrounding circumstances make out such intention is a question of fact in each individual case. (*Chan Pean Leon v. PP (supra)*).

[44] At this juncture, the evidence of SP7 and SP8 in relation to the surrounding circumstances on that evening is important to determine whether the accused persons had or had not the intention to dispose the incriminating drugs if necessary to do so. That intention could possibly be formed only when they had knowledge the incriminating drugs were in their possession. If the accused persons did not have the knowledge of the incriminating drugs which were in their possession, it could not be possible to establish the intention and power to dispose the incriminating drugs.

[45] In examination-in-chief, SP7 told the Court that upon seeing SP6 alight from the Kancil and also seeing SP6's signal to the raiding parties to take action, SP7 and his officers swiftly ambushed the accused persons in the Kancil.

[46] It is important to note that, first, it was said the distance between SP7's car and the SP6's car (where the Kancil was at behind) was approximately **20 to 25 meters**. Secondly, according to the evidence of SP6 in cross-examination, he told the Court that it took approximately **2 minutes** after he had given his signal for the raiding officers to arrive at the scene. Thirdly, SP6 admitted that he shouted the word "Police" loudly. The shouting of "Police" could have alerted the accused persons that they had been surrounded by policemen.

(i) The First Accused - Facts Inferring Knowledge and Intention

[47] In evidence, it was said that the first accused fled from the Kancil and ran to a nearby housing estate. He was arrested by SP8 and officer Abdullah bin Hamazah about 100 meters away from the scene. It is probable that within 2 minutes one could run a distance of approximately 100 meters. This Court was of the opinion that the act of running away could be an impulsive act and that it was relevant; and that act could give rise to an inference that the first accused must have had knowledge of the incriminating drugs in the car. Otherwise, why should he flee leaving his friend and the car behind?

[48] The decision of the Federal Court in *Khairuddin bin Hassan v. PP* [2010] 6 MLJ 145 is relevant. It was held that "the appellant's act of running away had a direct bearing on the offence he faced, he had to satisfy the court as to why he had reacted in such manner." The decision of the Federal Court made a strong inference on the knowledge of the appellant in the appellant's act of running away. It was held at pages 151-3 as follows:

> *[7] The conduct of one suspected of an offence is a relevant fact which may be considered and evaluated by the court in coming to a conclusion on whether the suspect perpetrated the offence. Section 8(2) of the Evidence Act 1950 states that:*
>
> > *(2) The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceedings, is relevant if the conduct*

> *influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.*

The act of running away from the scene of an offence is certainly a relevant fact as can be seen from this illustration under that subsection:

> *(f) The question is whether A robbed B.*
>
> *The facts that after B was robbed, C said in A's presence: 'The police are coming to look for the man who robbed B' and that immediately afterwards A ran away are relevant.*

[8] Since the appellant's act of flight had a direct bearing on the offence he faced, he must satisfy the trial court why he reacted in that manner. The trial court, having had the advantage of seeing and hearing the appellant's explanation is the best forum for determining whether such an explanation is credible or believable….

[9] In Parlan Bin Dadeh v. Public Prosecutor [2008] 6 MLJ 19, the Federal Court explains the need for this explanation of an accused person's conduct in this manner:

> *In this case the reaction of the appellant in looking stunned or shocked upon being approached by the police is clearly admissible under s. 8 since it has a direct bearing on the fact in issue as the drugs found were tucked away in the front of the jeans worn by him. This explanation for his reaction must therefore be offered by he himself as required by s. 9. The court cannot, on its own, offer an explanation for his reaction…(Emphasis added).*

[10] In this case, the learned trial judge had made a finding of fact that the appellant, and he alone, was in physical possession of the bag containing the drugs. The appellant's conduct of running away has a nexus to what is now a fact in issue, viz that he was in physical possession of that bag. This in turn gives rise to an inference that he had knowledge of the

> *drugs in the bag. It is thus up to the appellant himself to explain his conduct, and not for the court to offer or suggest one. Chan Kwok Keung & Anor v. The Queen [1990] 1 CLJ 411; [1990] 3 CLJ 386 (Rep) is authority for the proposition that an act of running away may be view as an admission of guilt. The learned trial judge was therefore not wrong in making that inference in the circumstances of this case, where the drugs was found to be in the appellant's physical possession.*
>
> *[11] ....*
>
> *[12] As regards the proximity of the drugs to the appellant, this too is a relevant fact. This principle is derived from this passage in Public Prosecutor v. Foo Jua Eng [1966] 1 MLJ 197; [1965] 1 LNS 137, where HRH Raja Azlan Shah stated:*
>
> > *With regard to the mental element, the learned magistrate rightly directed his mind that knowledge or consciousness would depend on the surrounding circumstances. However, he failed to direct his mind adequately on the facts. He directed his mind to the circumstances when the respondent tried to close the door on PW1. But he failed to consider the other circumstances which, taken together, may well be that the element of possession was proved. That circumstance is the physical proximity of the respondent to the exhibit in question.*
>
> *[13] As such we cannot find fault with the finding of the learned trial judge that, based on both the elements of the conduct of the appellant and his proximity to the recovered drugs, coupled with his failure to give any satisfactory explanation, he was in means rea possession of the drugs. This was an inference made by the learned trial judge based on sound factual findings which is now confirmed by the Court of Appeal. We find no justification in disturbing those findings.*

[49] Based on the above excerpt and given the fact that the first accused ran away from the scene, this Court was minded to consider

the following: Firstly, the act of running away was a relevant fact. Secondly, the first accused must satisfy the trial court why he reacted in that manner. Thirdly, 'his explanation to rebut any inference detrimental to his defence became relevant fact under s. 9 of the Evidence Act, and necessary for the trial court in its evaluation of the case in totality.' Lastly, the explanation, therefore, must come from the first accused person himself, and it is not for the trial court to offer an explanation for his reaction or to suggest one.

[50] The learned counsel for the first accused submitted that the place of incident was quiet, dim and obscure and it is located at an oil palm estate. The raiding parties had drawn their firearms during the ambush, and they were not in police uniform. Upon seeing people holding guns and running towards the car where the first accused was in, it was not unusual for the first accused to panic and flee the scene. The reason given for the first accused's act of fleeing from the scene in the given circumstances was not incredibly unbelievable. Though these facts had been suggested in the prosecution case, yet, based on the decision of the Federal Court in *Khairuddin bin Hassan v. PP*, the Court was inclined to hear his story and explanation. Be that as it may, this Court was minded to exercise a maximum evaluation of the prosecution's case, which means to assess all other evidence from the prosecution's witnesses as well, before it could decide whether a *prima facie* case has been made out against the first accused and to call the first accused to enter his defence.

(ii) The Second Accused – Facts Inferring Knowledge and Intention

[51] The second accused was arrested by SP7 and officer Saiful. SP7 remarked that the second accused looked *'terperanjat'* (which means 'surprise') when he was apprehended. The fact that he looked surprised could infer that he could have knowledge of the incriminating drug in the car (see *Parlan bin Dadeh v. PP* [2008] 6 MLJ 19).

[52] However, the fact that the second accused looked 'surprise' could not irresistibly point to only one conclusion, which is the second accused had knowledge of the incriminating drugs. Given the surrounding circumstances, anyone could be surprised upon seeing men holding guns running towards him. The Court of Appeal in *Low Thiam Teck v. PP* [2015] 3 MLJ 134 accepted the fact that raiding officers drawing their firearms while making an arrest could result in an accused looking surprised. It was held at para 22 as follows:

> *"Reverting to the issue of the appellant's conduct, we agreed with the learned counsel that the learned judge had erred in evaluating the evidence of SP5 and in disbelieving the appellant's evidence when it was obvious that the evidence of SP5, who admitted drawing his firearm at the time he effected arrest on both the appellant and the second accused, supported the appellant's evidence. We agreed with the learned counsel that the appellant's look surprise was a reasonable reaction in the circumstances."*

[53] Based on *Low Thiam Teck v. PP*, this court was entitled to form an opinion that it was entirely reasonable for second accused to react with surprise upon seeing men withdrawn guns.

[54] Amid the commotion, the second accused sat in the car for two minutes before the raiding officers arrived, and he did not do any overt act. SP7 confirmed in cross-examination that he was not sure whether the second accused knew of the incriminating substance that was at the rear seats of the Kancil. However, SP7 did not agree to the suggestion the reason that the second accused did not run was because he did not know there was incriminating substance in the car. In re-examination, SP7 explained that the reason the second accused did not run, though he looked surprised, could be because of his physical size.

[55] SP7 remarked that the second accused was much bigger in size at the time of his arrest as compared to his size now (referring to second accused in the dock). SP7 said the reason why the second accused did not run could be because he could not have easily alighted from the car judging from his size at that time. This means he would have run if not because of his size. This assumption, in my opinion, could not make an inference that he had knowledge of the incriminating drug in the car. A person's lack of physical agility should not be taken into account in the making of an inference of knowledge of any incriminating substance found near him. He should not be prejudiced based on his lack of agility.

[56] In fact, the inaction of the second accused when ambushed by the policemen could only benefit the second accused's case as it negatives any inference of knowledge of the incriminating substances in the car. In criminal proceedings, when there are two inferences that could be drawn on the same fact, the one favourable to the accused should be drawn (see *PP v. Kasmin Bin Soeb* [1974] MLJ 230; *Tai Chai Keh v. PP* (1948-49) MLJ Supp 105).

[57] In SP7's police report (exhibit p35), one part of it stated as follows:

> *"...KEDUA-DUA LELAKI YANG BERADA DIDALAM KERETA TERSEBUT CUBA MELARIKAN DIRI TETAPI BERJAYA DITANGKAP SETELAH BERLAKU PERGELUTAN...."*

[58] In evidence, SP7 testified that the second accused did not run nor did he put up a struggle. This part of SP7's oral evidence was in direct conflict with his own report in relation to the second accused. The discrepancy between the oral evidence and the report is far from trivial; it goes to the inference of knowledge of the accused person. It is said that when 'the prosecution has led two conflicting versions on a particular material aspect, each striking out the other, then the evidence is unreliable or untrustworthy'. (see *Pendakwa Raya v. Kua Tiong Ann (supra*, p. 808))

[59] Based on the above findings, and based on the principle enunciated in *Chan Pean Leon (supra),* this Court was of the considered view that there was no evidence from the surrounding circumstances that could strongly suggest an inference of knowledge on the part of the second accused that he knew of the incriminating drugs found in the car, much less that he had the power and intention to dispose the incriminating drugs if necessarily to do so.

[60] Could s. 37(d) of the DDA be invoked against the second accused? Could he be in custody or control of the incriminating drugs? As explained earlier, at the minimum the prosecution has to prove the second accused was conscious of the thing possessed - the element of

custody. Whether a person is said to be conscious of something can be proved only by inference deduced from the surrounding circumstances. In the entire prosecution's case, there is not an iota of evidence that could suggest that the second accused knew of the incriminating substance was in the car. No evidence has been led to suggest the second accused knew the deceased. SP6 (as an agent provocateur) said he could smell the scent of the cannabis when he opened the plastic bags. He also said he could not sense any smell of cannabis until the plastic bags were open. This suggests that the second accused, while in the car, could not be aware of the substances, because at all material times the plastic bags were not open until SP6 went into the Kancil to inspect the plastic bags. This Court could not find any fact from the surrounding circumstances that could raise an inference that the second accused was conscious of having in possession the incriminating substance. There is also no evidence that could suggest the second accused was in a situation where he had deliberately turned a blind eye to the obvious.

[61] Based on the above analysis, this Court finds the prosecution has failed to prove the element of **possession** on the part of the second accused either by direct evidence or by statutory presumption s. 37(d) of the DDA.

COMMON INTENTION

[62] Section 34 of the Penal Code states as follows:

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

> *34. 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."*

[63] The crucial element to prove common intention is ''the existence of pre-concert or pre-planning which 'may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence'" (*Lee Kwai Heong & Anor v. PP* [2006] 1 CLJ 1043, at p.1064).

[64] In *Suresh v. State of Uttar Pradesh* AIR [2001] SC 1344 (cited in *Lee Kwai Heong* with approval) the court therein had eloquently explained the connotation of s. 34 of the Indian Penal Code which is *pari materia* to our s. 34 of the Penal Code. In the judgment of Sethi J, his Lordship said:

> *"Section 34 of the Indian Penal Code recognises the principle of* ***vicarious liability*** *in the criminal jurisprudence.* ***It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention.*** *It is a rule of evidence and does not create a substantive offence. The section gives statutory recognition to the common sense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. There is no gain saying that a common intention pre-supposes prior concert, which requires a pre-arranged plan of the accused participating in an offence. Such a pre-concert or pre-planning may develop on the spot or doing the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence. Common intention can be formed previously*

> *or in the course of occurrence and on a spur of moment. The* ***existence of a common intention is a question of fact*** *in each case* ***to be proved mainly as a matter of inference from the circumstances of the case.****"*

[65] Based on the above passage, it can be said that the occurrence of any pre-plan among the accused persons must come first before the criminal act.

[66] It is also said direct evidence of a prior plan to commit an offence is not necessary in every case because common intention may develop on the spot and without any long interval of time between it and the doing of the act commonly intended. In such a case, common intention may be inferred from the facts and circumstances of the case and the conduct of the accused (see *Namasiyam & Ords v. PP* [1987] 2 MLJ 336, at p. 344, where this case was cited by the Federal Court in *Public Prosecutor v. Azilah bin Hadri & Anor* [2015] 1 AMR 641, p. 667, with approval).

[67] The prosecution relied on the principles in *Namasiyam & Ords (supra)* and urged this Court to raise an inference from the surrounding circumstances that the accused persons together with the deceased had at some point in time pre-planned to commit the offence charged. The prosecution submitted that the fact that the presence of the accused persons at the scene found together with the incriminating drugs was not mere coincidence. They were in fact under the direction of the deceased to deliver the incriminating drugs to the place of incident in order to conclude the deal with SP6 (the agent provocateur).

[68] This Court was not convinced by the prosecution's submission that the prosecution has proved the crucial element of common intention in this case.

[69] Firstly, it is said that 'where the prosecution case rests on circumstantial evidence, the circumstances which are proved must be such as necessarily lead only to that inference' (*Namasiyam & Ords (supra),* p. 344). It is my considered view that the circumstances which were proved in this case not necessary lead to only one inference.

[70] The mere presence of the accused persons at the scene of the crime was not sufficient for there to be implied that a pre-concert or pre-planning had occurred. The prosecution was required to establish that there was a pre-concert or pre-planning, even at the spur of moment, before the commission of the offence. Throughout the prosecution's narrative, no evidence has been led to suggest there was any pre-concert or pre-planning among the accused persons and the deceased. SP7 agreed that there was no surveillance carried out against the first or second accused prior to their arrival at the scene. In fact, SP6, the agent provocateur, met the accused persons for the first time on the day of arrest.

[71] There was also no evidence that could suggest that the accused persons met or contacted each other before the commission of the crime. The evidence that could possibly link the deceased to the first accused was the two calls the deceased made, one at the restaurant and the other one in SP6's car on the evening of 1.8.2012. The name "Din" was mentioned in both tele-conversations. Presumably, at the other end of the line was a person by the name of "Din", which could be

the nickname or short form of "Hishamuddin". However, this evidence could not prove the first accused was in participation of the commission of the offence in furtherance of that common intention. As regard to the second accused, the prosecution did not lead any evidence to suggest there was any nexus between the deceased and the second accused.

[72] The prosecution argued that it was the first accused who told SP6 that the incriminating drugs were at the back seat of the Kancil. As such, the first accused must have had at one point in time planned with the deceased how, when and where to deliver the incriminating drug. This fact, in my opinion, could not raise an inference that the first accused had pre-planned in furtherance of the common intention in committing the criminal act in question. I was not convinced that this fact could prove or raise an inference the first accused had pre-planned the commission of the criminal act with the deceased.

[73] In evidence, SP6 testified that he asked the first accused: *"Mana barang?"* The first accused answered: *"Barang ada dalam sarung plastik hitam di cushion belakang."* One could not conclusively construe that the word *'barang'* in the conversation was uttered in reference to mean 'cannabis'. The words 'cannabis' or *'buah'* was clearly not used in the conversation. The word *'barang'* (thing) could mean anything. One 'must not take the form of a bare surmise or conjecture or suspicion' from the circumstances to assume common intention has been proven (see Ratanlal & Dhirajlal's, *Law of Crimes,* 24th ed., Bharat Law House: New Delhi, Vol. 1, 123).

[74] The conversation could only prove that the first accused knew something was inside the plastic bags. The learned counsel for the first

accused alluded that it was at the behest of the deceased the first accused sent the *barang* to the scene of the crime. It was not inherently incredible that the first accused could have been doing his friend a favour. The burden was not on the first accused to prove this, but for the prosecution to prove otherwise. The prosecution also has to prove that the first accused knew what was inside the plastic bags. The conversation between SP6 and the first accused could not affirmatively prove he knew what was inside the plastic bags. Following from there, an inference that common intention had been proved could not be established.

[75] The above discussion raises several conceivable inferences which run counter to an irresistible inference that the first accused knew of the incriminating drugs or that common intention within the meaning of s. 34 of the Penal Code had been established. It is trite law that when there is more than one inference which can reasonably be drawn from a set of facts in a criminal case, the inference most favourable to the accused should be adopted and accepted (see *Yeo Boh Suat & Ors v. Rex* (1948-49) MLJ Supp 105; *PP v. Kasmin Bin Soeb* [1974] 230; *PP v. Mohd Radzi bin Abu Bakar (supra))*.

[76] In the meetings between SP6 and the deceased, the first accused and the second accused were not present and their names were not mentioned. The accused persons were not the target of arrest at the briefing held on 1.8.2012. The target of arrest was the deceased.

[77] Based on the above discussion, this Court was unable to find any evidence that could raise an inference that common intention was proved.

[78] Secondly, in *Ong Chee Hoe & Anor v. PP* [1999] 4 SLR 688, the Court of Appeal in Singapore stated as follows:

> *"It was well-settled law that the prosecution did not need to show that the common intention of the accused persons was to commit the crime for which they were charged.* ***It was the intention of the actual doer of the criminal offence charged that was in issue, and the application of s. 34 made the others vicariously liable for the same offence****...."*

[79] In *Mimi Wong & Anor v. PP* [1972] 2 MLJ 75, p. 76 (followed in *Ong Chee Hoe)*, it was held as follows:

> *"In a criminal prosecution where section 34 of the Penal Code is invoked and the nature of the offence depends on a particular intention,* ***the intention of the actual doer of the criminal act has to be considered. What this intention is will decide the offence committed by him and then section 34 applies to make the others vicariously or collectively liable for the same offence. The intention that is an ingredient of the offence constituted by the criminal act is the intention of the actual doer and must be distinguished from the common intention of the doer and his confederates.*** *It may be identical with the common intention or it may not. Where it is not identical with the common intention, it must nevertheless be consistent with the carrying out of the common intention, otherwise the criminal act done by the actual doer would not be in furtherance of the common intention."*

[80] The entire prosecution's case centred on the meetings and negotiations between SP6 and the deceased. This evidence clearly

postulates that the **actual doer of the criminal act** (ie, trafficking) was the deceased. The deceased together with the accused persons were named in the charge, this presupposes that they had in concert committed the criminal act. However, the actual doer, the deceased, has passed away, and therefore, there was *nolle prosequi* against the deceased. What the deceased's intention was would decide the offence committed by him, section 34 shall then follow and be applied to make the first and second accused persons vicariously or collectively liable for the same offence. Since the criminal proceeding against the deceased has been abandoned because the deceased has passed away, how an inference could now be made out that there was a common intention when the actual doer's intention (the deceased's intention) of committing the criminal act has been abandoned. As such, the accused persons could not be vicariously or collectively liable when the proving of the actual doer's intention in committing the offence in question has been abandoned. On this premise, it is unsustainable for the prosecution to claim s. 34 has been established.

[81] Could the first accused now be the actual doer since the prosecution has abandoned the prosecution against the deceased? The answer to this question must be in the negative. Throughout the entire prosecution's narrative, the first accused was merely a secondary character. There was no evidence led to suggest he had played an active role in the meetings or negotiations or he was within the radar of the police as a suspected person from the outset.

[82] Unlike s. 34 of the Penal Code where there is need for the intention of the actual doer of the criminal act to be considered, in cases of a charge for murder, the requisite in determining the intention of the actual

doer (who actually or ultimately caused the death of a deceased) of the offence in question is unnecessary (see *PP v. Azilah Bin Hadri & Anor (supra)* at p. 667).

[83] Lastly, the role of the deceased was highly questionable. The evidence of SP7 and SP8 with regard to the role of the deceased was in direct contradiction. SP7 testified that the deceased was not a target to be arrested on that evening; whereas, SP8 told the Court the deceased was a target to be arrested.

[84] SP6, SP8 and SP10 who attended the briefing on 1.8.2012 confirmed that they were told by SP7 that the target of arrest on that evening was a person by the named 'Wan' (the deceased). But, SP7 in his testimony claimed that he only mentioned several persons as the target to be arrested and did not mention any name. SP7 told the Court the deceased was not a target to be arrested, because he was merely a 'middle-man' in the transaction. He also said that at that material time, he was not sure who the target was.

[85] SP10 was the one who started the police case which eventually led to the arrest of the accused persons. He was the one who instructed the informer to arrange a meeting with the deceased. He was the one who ordered SP6 to be the agent provocateur. In re-examination, he changed his story. He stated that the role of the deceased was not important because the deceased had sent someone else to deliver the incriminating drugs. The deceased was merely a 'middle-man', he claimed. The testimony of SP10 had raised a serious question in my mind - what was the actual role of the deceased in the prosecution case?

[86] In the event the deceased was a middle man in the dealing, he would still be criminally liable for the offence of trafficking. He ought to have been arrested that evening. SP6, in cross-examination, agreed that the deceased ought to have been arrested and charged. The deceased was charged eventually. SP6 told the Court that the deceased was not a middle-man, he ought to be arrested. The evidence of SP6 clearly contradicted with what SP7 and SP10 have alluded.

[87] If the policemen had let the deceased go in the belief that he was a middle man, this connotes the deceased was actually working with the police. Since he had actively participated in the police case leading to the arrest of the accused persons, he had played the role of an agent provocateur, besides SP6, and his evidence would become highly relevant in the prosecution's case. Unfortunately, according to the police, he has passed away. There is a serious gap in the prosecution's case. The evidence of SP6 could not be used to fill this gap. If this was allowed, the trial of the accused persons would be seriously compromised.

[88] If SP7's and SP10's narrative was true, it would be an irony that a 'middle man' was charged together with the accused persons. And, an accused person could not be alleged to be in furtherance of the common intention with a 'middle man' who had acted as an agent provocateur in committing a criminal act.

[89] Based on the above analysis, this Court found the crucial element of common intention was not established.

MALA FIDE PROSECUTION?

[90] The credibility of SP7's and SP10 was in doubt. Following from SP7's and SP10's statements pertaining to the role of the deceased in the prosecution's narrative, this Court viewed with concern an issue raised by the second accused's counsel in the cross-examination of SP11, the investigating officer.

[91] The learned counsel raised the issue that in the witness statement of SP11 (exhibit P38), he stated, from the outset, the deceased was under investigation of the criminal act in question. This means the deceased was supposed to be prosecuted together with the accused persons right from the beginning. However, in the initial charge against the accused persons dated **23.2.2014**, the deceased was not charged. The initial charge (exhibit D1B) states as follows:

> *"Bahawa kamu bersama-sama pada 01hb Ogos 2012 jam lebih kurang 9.30 malam, di hadapan rumah No. 8/90, Ladang Victoria, Padang Serai, di dalam Daerah Kulim, di dalam Negeri Kedah Darul Aman telah didapati mengedar dadah berbahaya iaitu Cannabis seberat 13,995 gram. Oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama dibaca bersama Seksyen 34 Kanun Keseksaan."*

[92] The initial 'Izin' dated **3.4.2013** was also produced (exhibit D1A) in Court. The 'Izin' did not mention the deceased or that the deceased was still at large. A copy of the undated earlier Deputy Public Prosecutor's Opening Speech Statement (exhibit D1C) was also produced in Court. The statement did not mention the deceased was involved or that he

was still at large. These documents show that the deceased was not implicated to have committed the criminal act in question together with the accused persons. However, upon the death of the deceased, sometime in **September 2014,** the prosecution changed the initial charge to the present charge dated **25.2.2015**. The prosecution inserted the wordings for the deceased to be charged together with the accused persons in the present charge.

[93] In re-examination, SP11 attempted to explain that, initially, he was under the impression that the deceased was an informer (source) in his initial investigation. After he had discussed with the former deputy public prosecutor, he discovered the deceased was involved in the criminal act in question. He then instructed SP6 to obtain further information on the deceased, but was unable to make an arrest. SP11 failed to explain why the he took so long to rectify the mistake, if that was true. No explanation was given as to why the amendment was done only after the death of the deceased.

[94] If the deceased was with the police, as advanced earlier, the failure to call him to give evidence is fatal. If the deceased was to be charged, but was not charged earlier, this indicates that the present charge could be tainted with question of *mala fide* prosecution. In either scenario, the right of the accused persons to defend themselves has been compromised.

EVIDENCE IN THE PROSECUTION'S CASE

[95] There were many discrepancies found in the prosecution's evidence. Some of these discrepancies were trivial, the Court had

considered these minor inconsistencies and disregarded them because they did not discredit or create a doubt in the prosecution's case. However, there were several discrepancies which were a cause for concern for the Court in its assessment of the credibility of the prosecution's witnesses.

[96] First, an agent provocateur's evidence needs no corroboration unless it is inherently incredible. In this instant case, SP6, as an agent provocateur, testified that after he had shouted "Police", within 10 to 15 seconds, he had left the scene with officer Ajib. He also testified that he was not present when SP7 searched the Kancil. However, paragraph 3 of the search list (exhibit P36), listed all the officers who were present at the time the search was conducted, and it stated SP6 (police number 116541) and officer Ajib (police number 91817) were present. Contrary to that, SP7 in cross-examination told the court that when he was searching the Kancil for incriminating drugs at that material time, SP6 had left the place. Ironically, the search list was prepared by SP7 himself.

[97] Secondly, SP6 also testified that he did not witness the ambush took place. However, SP7 told the Court, during cross-examination, SP6 was around when he and his officers arrived at the scene, which means SP6 was present at the time of the ambush. SP7 said approximately a minute later SP6 left the scene. In the testimony of SP8, during cross examination, he testified that SP6 was still at the scene after the second accused was arrested. In re-examination, he testified that when he handed the first accused to SP7, SP6 was still around at the scene. This means SP6 was still at the scene after both

accused persons were arrested, which also means SP6 was at the scene for more than 2 minutes after he had shouted "Police".

[98] Thirdly, SP8 told the Court that he saw both SP6 and the deceased talking outside their cars. However, SP7 said he saw the deceased go into SP6's car, and later SP6 go into the Kancil not long after the Kancil arrived. Neither the evidence of SP6 nor SP7 supported what SP8 saw. Clearly, the evidence of SP6 and SP7 were inconsistent with the evidence of SP8.

[99] Lastly, the contradictory evidence pertaining to the role of the deceased as highlighted above is so serious that it struck the core of the prosecution's case as to who was the actual doer of the criminal act in question. This conflicting evidence goes to the root of proving common intention within s. 34 of the Penal Code. This contradictory evidence has led the Court to question the credibility of the prosecution's witnesses.

[100] In summary, the evidence from the prosecution's witnesses pertaining to what had transpired on that evening was clearly contradictory. The contradictory evidence of SP6, SP7, SP8 and SP10 had resulted in a serious doubt in the prosecution's case. The contradictory evidence has affected the weight to the evidence relied on by the prosecution in support of proving the ingredients of the offence. It also affected the ability of the Court to use such evidence to draw any credible inferences in support of the prosecution's case.

Decision

[101] This Court, after having sieved through the prosecution's evidence and after having exercised a maximum or positive evaluation of the prosecution's case, found the following serious gaps or contradictions in the prosecution's evidence disquieting: Firstly, the role of the deceased as ventilated above. Secondly, the unsatisfactory explanation pertaining to the discrepancy of the initial charge and the present charge. Thirdly, the serious discrepancies of evidence in regard to what had transpired on that evening of 1.8.2012. Fourthly, the failure to prove common intention within the meaning of s. 34 of the Penal Code. Fifthly, the evidence of SP6, SP7, SP8 and SP10 in regard to their accounts of the prosecution's narrative was questionable. Lastly, all the above issues affected the Court's assessment of the credibility of the prosecution's witnesses. The prosecution's evidence in support of the quantum of proof to establish a prima facie case was unreliable. Hence, the Court was not convinced to rely on the prosecution's evidence to raise an inference of knowledge of the accused persons of the incriminating drugs. On a maximum evaluation of the prosecution's evidence, the ingredients of the offence of trafficking under s. 39B(1)(a) of DDA was not established by the prosecution at the close of the prosecution's case.

[102] Based on the above, this Court was of the considered view that the prosecution has failed to make out a *prima facie* case. Hence, according to s. 180(2) of the CPC, this Court was required to record an order of acquittal against the accused persons.

[103] On 13.7.2015, this Court thereby ordered the first accused, Encik Mohd Hishamuddin Bin Mohd Razak, and the second accused, Azrul Anuar Bin Osman, be discharged and acquitted forthwith from the charge against them.

Dated: 15 JULY 2015

(CHOO KAH SING)
Judicial Commissioner
High Court, Alor Setar.

Counsel:

For the deputy public prosecutor - Naizatul Zima Tajudin; DPP Negeri Kedah

For the first accused - Ali Munawar Razak; M/s Ali & Fariz

For the second accused - Rahamathullah Baharudeen; M/s Rahamat & Mashuri