IN THE HIGH COURT OF MALAYA
IN THE STATE OF PENANG
[CRIMINAL TRIAL NO: 45A-43-12/2014]

BETWEEN

PUBLIC PROSECUTOR

AND

SITI NURHIDAYAH
[Passport No: A6679560]

CRIMINAL LAW: *Dangerous drugs - Trafficking - Possession - Methamphetamine weighing 1204.5g - Drugs found in baggage carried by accused at arrival hall - Bag opened using key provided by accused - Whether presumption of possession and knowledge of drugs on part of accused under s. 37(d) Dangerous Drugs Act 1952 had arisen - Whether drugs was for purpose of trafficking*

CRIMINAL PROCEDURE*: Defence - Innocent carrier - Accused was charged for trafficking dangerous drugs - Drugs were found in baggage carried by accused - Accused alleged she was employed to deliver goods from one country to another - Alcontara notice - Accused's cautioned statement consistent with sworn evidence in court relating to certain material particulars - Whether accused was a mere innocent carrier - Whether Alcontara notice sufficient - Whether accused was guilty of wilful blindness - Whether accused had succeeded in rebutting statutory presumption of possession and knowledge of impugned drugs under s. 37(d) Dangerous Drugs Act 1952 - Whether defence had raised reasonable doubt in prosecution's case*

[Prosecution failed to prove charge beyond reasonable doubt. Accused was discharged and acquitted from charge.]

Case(s) referred to:

Ajeng Yulia v. PP [2016] 1 LNS 302 CA ***(refd)***

Alcontara Ambross Anthony v. Public Prosecutor [1996] 1 CLJ 705 FC ***(refd)***

Amith Karinja v. PP [2016] 1 LNS 420 CA ***(refd)***

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

Chan King Yu v. PP [2009] 1 CLJ 601 FC ***(refd)***

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

Dal Bahadur v. Bijai Bahadur, AIR, [1930] ***(refd)***

Deon Jacobus Alfred Cornelius v. PP [2016] 1 LNS 354 CA ***(refd)***

Ferry Linnbark v. PP [2016] 1 LNS 227 CA ***(refd)***

Jeanette Congcan Opena v. Public Prosecutor [2014] 1 LNS 508 CA ***(refd)***

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

Mat v. Public Prosecutor [1963] 1 LNS 82 HC ***(refd)***

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

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

Mohamed Yazri Minhat v. PP [2003] 2 CLJ 65 CA ***(refd)***

Munuswamy Sundar Raj v. PP [2016] 1 CLJ 357 FC ***(refd)***

Munusamy Vengadasalam v. PP [1987] CLJ Rep 221 FC ***(refd)***

Ong Ah Chuan v. PP & Koh Chai Cheng v. PP [1980] 1 LNS 181 PC ***(refd)***

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

PP v. Forster Frank Edald Heinrich [1987] CLJ Rep 872 HC ***(refd)***

PP v. Klong K'Djoanh & Satu Lagi Rayuan [2016] 5 CLJ 533 CA ***(refd)***

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

PP v. Yuvaraj [1968] 1 LNS 116 PC ***(refd)***

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

Public Prosecutor v. Hla Win [1995] 2 SLR 424 ***(refd)***

Public Prosecutor v. Lin Yu Choy [2010] 1 CLJ 94 CA ***(refd)***

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

Roslan Bin Sabu @ Omar v. Public Prosecutor [2006] 1 LNS 56 CA ***(refd)***

Tan Kiam Peng v. Public Prosecutor [2008] 1 SLR 1 ***(refd)***

Unegbe Azuka Sunday v. PP [2016] 1 LNS 423 CA ***(refd)***

Wjchai Onprom v. PP [2006] 3 CLJ 724 CA ***(refd)***

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

Legislation referred to:

Criminal Procedure Code, ss. 180(1), 182A

Dangerous Drugs Act 1952, ss. 2, 37(d), First Schedule

Evidence Act 1950, s. 32(c)

Misuse of Drugs Act 2001, s. 7

BEFORE YA TUAN COLLIN LAWRENCE SEQUERAH
JUDICIAL COMMISSIONER, HIGH COURT MALAYA,
PENANG
IN OPEN COURT

GROUNDS OF JUDGEMENT

A) THE CHARGE AGAINST THE ACCUSED

[1] The accused, an Indonesian national, was charged with the following:

> "Bahawa kamu pada 6.11.2013 jam lebih kurang 7.40 petang di ruang ketibaan International Lapangan Terbang Antarabangsa Bayan Lepas, Pulau Pinang, di dalam Daerah Barat Daya, di dalam Negeri Pulau Pinang telah di dapati mengedar dadah berbahaya iaitu Methamphetamine sejumlah 1204.5 gram dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya dan boleh di hukum di bawah seksyen 39B(2) Akta yang sama."

B) PERTINENT FACTS ADDUCED BY THE PROSECUTION

[2] On 6.11.2013 at about 7.40 p.m. while SP11 was on duty together with narcotic officers at the Penang International Airport (P.I.A), she saw the accused carrying a sling grey coloured bag and proceeding in the direction of conveyor belt B in order to retrieve her baggage.

[3] The accused was said to have behaved in a suspicious manner and looked hesitant. SP11 then saw the accused take a brown coloured bag (P15) and pull it with her to the scanning machine. SP11 then detained the accused and introduced herself as a police.

[4] SP11 requested from the accused identification documents and the accused handed over her passport to her. SP11 then instructed the accused to place the brown bag (P15) into the scanning machine.

While the bag was being scanned, SP9 informed SP11 that there appeared a suspicious image in the said bag.

[5] The said bag (P15) was zipped and locked with both a padlock as well as a combination lock. SP11 then instructed the accused to take the bag (P15) to the examination area and the accused obliged. SP11 instructed the accused to open the bag. The accused was said to have looked agitated and anxious when she was requested to open the lock to the bag.

[6] SP11 then saw the accused take a key from her front pocket of the shorts she was wearing and use the key to open the said brown bag (P15). SP11 then instructed the accused to empty the contents of the bag. After the bag was emptied of its contents, SP11 instructed the accused to bring the bag to the scanning machine for a second scan.

[7] After being scanned a second time, SP9 informed SP11 that the same suspicious green coloured image appeared inside the bag. SP11 then herself witnessed the said image on the scanner. The image was located near the upper part of the handle of the said bag. SP11 then instructed the accused to put all the contents back into the bag. The accused was then brought to the narcotics office for further investigation. In the narcotics office, the accused opened the said bag and SP11 conducted an examination of the bag.

[8] As a result of the examination of the bag, SP11 discovered a bulge in the upper section of the bag near the handle. After SP11 opened the zip of the bag, she saw the bulge was taped with cardboard. SP11 pulled the cardboard and discovered inside it a plastic package wrapped with aluminium foil containing a crystal like substance that subsequently turned out to be Methamphetamine. The accused's reaction at that point was described to be agitated, anxious and quiet.

[9] SP11 seized all the exhibits and handed them over to the investigating office (I.O), SP13. SP13 sent all the exhibits recovered to the chemist at the chemistry department for analysis. The result of the said analysis carried out by the chemist, SP4 revealed the exhibits contained Methamphetamine weighing 1204.5 grams nett and as listed in the First Schedule to the Dangerous Drugs Act 1952 (DDA).

[10] SP13 also handed over to the forensic chemist, SP8, the clothing's seized from the accused for analysis. The results showed the clothing's to contain the accused's own DNA.

[11] SP6, an officer employed with Cathay Pacific confirmed that all baggage would be assigned a baggage tag with a barcode. SP6 confirmed that baggage on Cathay Pacific flights from Hong Kong to Penang would go through an electronic system according to the passenger's destination. This process would not involve any human intervention.

[12] The baggage tag (P28) found on the bag (P15) was registered in the name of the accused and was consistent with the baggage tag on the sling bag carried by the accused as well as the flight manifest with the name of the accused and the baggage tag number. The CCTV recordings also showed the accused bringing the said bag (P15) with her.

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

[13] 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.

[14] The duty upon 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 state 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.

[15] 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)

[16] 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 to 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*".

[17] The maximum evaluation 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

Ingredients of the offence of trafficking

[18] In order for the prosecution to make out a *prima facie* case in respect of the charge of trafficking against the accused, it is incumbent on them 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 in possession of the impugned drugs. Thirdly, that the accused was trafficking in the drugs.

i) The drugs are dangerous drugs within the meaning and definition of the Dangerous Drugs Act 1952 (DDA)

[19] The chemist (SP4), confirmed that the drugs found in the bag (P15), contained Methamphetamine weighing 1204.5 grams. Despite a sustained challenge mounted as to the methods of analysis by SP4, his evidence emerged largely unscathed. SP4 had testified in detail as to the methods adopted and the process of his analysis. SP4 also under challenge from learned counsel for the accused, confirmed that the analysis conducted in respect of the impugned drugs were at all times done under his supervision. SP4 had further testified that methamphetamine was listed under the First Schedule of the Dangerous Drugs Act 1952.

[20] 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."

[21] Upon an analysis of the evidence of SP4, I do not find on the evidence, that the testimony of SP4 was inherently incredible. I therefore accepted the evidence given by SP4 as sufficiently proving the nature and weight of the drugs seized in respect of the charge. Evidence was also led by the prosecution of the movement of the exhibits from the time of its recovery until its production in court for the hearing. I therefore find that there was no break in the chain of exhibits from the time they were seized right up to the time they were produced in court and duly identified. I was satisfied that the exhibits which formed the subject matter of the charge recovered during the arrest were therefore the same exhibits produced in court.

ii) The accused was in possession of the impugned drugs

[22] In a charge of trafficking in dangerous drugs, possession is the most important ingredient. Unless there is direct evidence of trafficking, it is a necessary step towards proving trafficking. In *Chan Pean Leon v. PP* [1956] MLJ 237, possession was defined as follows:

"possession" for the purposes of criminal law involves possession itself - which some authorities term 'custody' or 'control' - and knowledge of the nature of thing possessed*. As to possession itself he cited the following definition in Stephen's Digest (9th Ed p. 304), in which the exclusive element mentioned by Taylor J appears.* ***A moveable thing is said to be in the possession of person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion***

of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.

(Emphasis added)

[23] The prosecution can prove "possession" either by direct evidence or by employing in aid the presumption under section 37(d) of the DDA. The presumption under section 37(d) reads as follows:

"*any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug*"

[24] In *Public Prosecutor v. Lin Yu Choy* [2010] 1 CLJ 94, the Court of Appeal explained the manner in which the presumption under section 37(d) operates in the following passage:

"***Presumptions in the form of deeming provisions are creations of statutes, such as s. 37(d) which creates the presumption of possession*** *in the instant appeal in the following words :*

(d) any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug.

[21] Chong Siew Fai CJ (SS) (as he then was) in Muhammed bin Hassan, supra, at p 190 illustrated that:

… ***the 'deemed' state of affairs in s. 37(d) (ie, deemed possession and deemed knowledge) is by operation of law and there is no necessity to prove how that particular state of***

affairs is arrived at. There need only to be established the basic or primary facts necessary to give rise to that state of affairs, ie, the finding of custody or control. Such presumptions as under s. 37(d) (and, for that matter, the one under s. 37(da)) are sometimes described as 'compelling presumptions' in that upon proof of certain facts by a party (in our present case, proof of custody or control in s. 37(d) by the prosecution) the court must in law draw a presumption in its favour (ie, presumptions of possession and knowledge) unless the other party proves the contrary. Such a presumption has the compelling force of law*. It is a deduction which the law requires the trial court to make...*

[22] In trafficking cases, possession is an element which must be proved before one proves trafficking. ***The presumption in 37(d) merely requires proof of custody or control. With proof of custody or control including any inference arising from the known fact to arrive at custody or control, the law allows the element of possession to be arrived at by way of a deeming provision****.*

[23] Phipson on Evidence, 16th edn, at p 135 para 6-16 explains that the effect of a presumption may be to require less evidence than would otherwise be necessary, or to make it unnecessary to call any evidence at all.

[24] ***In our view, a presumption is one provided by law. It involves a situation where the law provides proof of a fact in issue when basic evidence is available. When a presumption is invoked, the burden on the accused is discharged by rebutting it on a balance of probabilities, whereas an inference of fact is rebutted by creating a reasonable doubt****.*

[25] The inference relates to the element of knowledge based on the conduct of the accused in running away and throwing the plastic bag. The invoking of the statutory presumption of possession was derived from custody or control to enable the deemed possession to be triggered under s. 37(d)." (Emphasis added)

[25] As seen from the above therefore, upon proof of certain primary facts i.e. custody or control, the presumption under section 37(d) will trigger to deem possession on the part of the accused. The primary facts in this case were as follows. The accused was observed retrieving the brown bag (P15) from the carousel and bring it along with her to the scanning machine.

[26] When instructed to open the said bag, the accused produced a key to the padlock to the bag from her front trouser pocket and opened the bag. The name tag (P28) attached to the bag (P15) was in the name of the accused. Besides this the bag tag (P28) recorded the flight details of the accused from the commencement of her journey from Hong Kong until Penang. The accused was alone at the time of her arrest. These facts entitled the finding to be made that the accused had custody and control of the said bag (P15) in which the impugned drugs were found.

[27] The presumption of possession and knowledge of the drugs on the part of the accused under section 37(d) DDA had therefore arisen against her. It was now upon the accused to rebut the presumption on a balance of probabilities in order to secure an acquittal. See *PP v. Yuvaraj* [1969] 2 MLJ 89.

iii) The accused was trafficking in the dangerous drugs

[28] Trafficking is defined in section 2 of the DDA 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

[29] The nett weight of the drugs discovered here was 1204.5 grams of methamphetamine. This fact alone would militate against any argument that the drugs were for the personal consumption of the accused. The weight of the drugs raise the justifiable inference that the drugs were meant for trafficking.

[30] This conclusion finds support in the observation of Lord Diplock in *Ong Ah Chuan v. PP* [1981] 1 MLJ 64 where His Lordship said as follows:

"*Proof of the purpose for which an act is done, where such purpose is a necessary ingredient of the offence with which an accused is charged, presents a problem with which criminal courts are very familiar.* ***Generally, in the absence of an express admission by the accused, the purpose with which he did an act is a matter of inference from what he did. Thus, in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he was transporting them for the purpose of trafficking in them would, in the absence of any plausible explanation by him, be irresistible****...." (Emphasis added)

[31] To similar effect is the excerpt from the case of *Mohamed Yazri Minhat v. PP* [2003] 2 CLJ 65 as follows:

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

[32] The act of the accused in carrying the said bag with her while on a journey by plane from Hong Kong to Penang also amounted to an overt act and within the definition of trafficking as defined under section 2 DDA. See *Wjchai Onprom v. PP* [2006] 3 CLJ 724.

[33] From the above analysis, I therefore found that the prosecution had proven all the ingredients of the offence of trafficking in the dangerous drugs. I therefore found that they had successfully made out a *prima facie* case against the accused and I accordingly called for

her defence. After the three alternatives were explained to her, the accused elected to give sworn testimony.

E) DEFENCE CASE

[34] The accused said that her hometown is Jawa Tengah in Indonesia. She is married to Andi Suhendi (SD3) and they have a son. The accused testified that before her arrest, she had not been working for about a year.

[35] In October of 2013, she became acquainted with an Indonesian woman by the name of Tina whose actual name is Titin Sukmawati (SD2). Tina was introduced to the accused by Andi who came to know Tina through another Indonesian named Ilham Firmanshah. At the material time, the accused was looking for a job and Andi was informed by the said Ilham Firmanshah that Tina might be able to assist the accused in that endeavour. Toward that end, Andi and the accused approached Tina.

[36] The accused said that Tina told her that she was looking for someone who would be able to deliver goods from one country to another. These goods were said to be clothing and accessories. The remuneration for these services according to Tina was Indonesian Rupiah 3,000,000 which according to the exchange rate in November 2013 was around RM840.

[37] As the accused was unemployed at the material time, she accepted the said job from Tina. Tina also gave the accused the assignment because the accused was conversant in Mandarin. The assignment was for the accused to take delivery of clothes from Guangzhou, China.

[38] On 1.11.2013, the accused and Andi met Tina in a "nasi liwet" restaurant at Jalan Raya Bandung, Jawa Barat, Indonesia where she

received the booking documents for her flight to Kuala Lumpur and Hong Kong and her passport together with her visa to China from Tina.

[39] The following day at around 8.00 a.m. Andi took the accused to the airport at Jakarta, Indonesia and the accused departed for Kuala Lumpur, Malaysia at around 11.00a.m. local Indonesian time. The accused arrived at Kuala Lumpur around 2.30p.m. local Malaysian time for transit to Hong Kong. The accused arrived at Hong Kong at around 8.00 p.m. local Hong Kong time. At around 9.30p.m. , the accused left for Guangzhou, China by bus. The accused arrived at Guangzhou, China at around 1.00 a.m. local China time the following day i.e. 3.11.2013 and she then checked into a nearby hotel for the night.

[40] The accused informed Tina that she had arrived and was in the hotel. Tina then requested the accused to wait in the hotel and told her that an African by the name of Destiny would contact her at a later time. The accused also informed Andi about her arrival in Guangzhou.

[41] On the same day namely, 3.11.2013, at around 11.30 a.m., the accused received a telephone call from a man identifying himself as Destiny, informing the accused that he would fetch her from the hotel. Destiny arrived at the hotel after a few minutes. After the accused had checked out from the hotel, the said Destiny took her to another hotel which was about 10 minutes away.

[42] After the accused checked in and made all the necessary payments for the accommodation, Destiny requested the accused to stay in the hotel while waiting for the clothes to be delivered which was supposed to arrive in a few days. The accused stayed in the said hotel for three days. On 5.11.2013 at around 8.00p.m., Destiny came over to the hotel and handed over the accused a brown-coloured luggage bag.

[43] After she received the said bag, the accused informed Tina and Tina requested the accused to examine the contents of the said luggage bag. The accused examined the said bag and found the bag to be heavy and packed with clothes, shoes and handbags. The clothes were all new and still had the price tags attached to it. The accused accordingly informed Tina (SD2) regarding the contents of the said bag.

[44] On 6.11.2013 at around 6.00a.m., Destiny took the accused from the hotel to a bus terminal at Guangzhou. Destiny gave the accused a flight ticket from Hong Kong to Penang while on the way. The accused then boarded the 6.30 a.m. bus from Guangzhou and arrived at the Hong Kong International Airport at around 10.00a.m. Tina had previously told the accused that she would contact her upon the latter's arrival at Penang.

[45] The accused departed from Hong Kong International Airport at around 3.30p.m. and arrived at Penang International Airport at around 7.00 p.m Malaysian time. The accused was then arrested at Penang International Airport. The accused said that after she was arrested, she had still received a few telephone calls from Tina but she was unable to answer them as she was not permitted to do so by the police.

[46] The accused's evidence regarding the impugned drugs found in the luggage bag (P15) was that she had examined the contents of the said bag after she received it from the said Destiny and she was certain that there were no illegal substances or drugs contained in there.

[47] Her evidence also was that the said bag was scanned and passed through the security examination at Hong Kong International Airport without any problems. The accused denied that she had behaved suspiciously when she was stopped and arrested by the airport police

or that she looked worried and nervous (cemas dan gelisah) when she was instructed to open the said bag.

[48] She said that it was only when she was informed that there were dangerous drugs in the bag did she express shock. The accused said that at that juncture, she told the police that the said luggage bag did not belong to her but that she had carried it on Tina's behalf and she did not have any knowledge of the drugs concealed in there.

[49] The accused said that under the circumstances, there was no reason to suspect that there were dangerous drugs in the said bag. She denied that she was involved in trafficking of dangerous drugs. The said Tina (SD2) testified that she became acquainted with the accused in October of 2013 through the said Ilham Firmansyah and Andi (SD3) and both the accused and Andi approached her for work. At the material time, according to SD2, Tina's ex-boyfriend by the name of Andrew was looking for people to deliver clothes, shoes and accessories from one country to another.

[50] Tina said that over the course of one year, she had engaged 19 other persons to deliver goods for Andrew and she had received a remuneration of USD100 from Andrew for each of the carriers engaged by Andrew through her.

[51] Tina (SD2) said that because the accused was conversant in the Mandarin language, she assigned her the task to take delivery of the said clothes, shoes and accessories from China. Tina informed Andrew regarding the assignment and she was told by Andrew to apply for a visa for the accused. The accused and Tina then went to the Chinese Embassy in Jakarta Indonesia to apply for the said visa. One day before the scheduled departure of the accused to China, Tina met the accused and Andi at a "nasi liwet" restaurant where she handed over to the accused all the necessary documents for the flight

to Kuala Lumpur and Hong Kong along with the passport and visa to China.

[52] Tina said that after she received a short message service (SMS) from the accused informing her that she had arrived in Guangzhou, China, she informed Andrew who then told her to inform the accused that an African man named Destiny would pick her up from the hotel. In order to enable the said Destiny to contact the accused, Tina had given the accused's telephone number to Andrew. Tina said that all instructions regarding the said luggage bag were given by Andrew and the accused did not know of Andrew's existence as all instructions conveyed to the accused were given through her.

[53] Tina said that she was informed by the accused regarding her meeting with the said Destiny. Tina said that after the accused had been in China for three days, the accused informed her that she had received a bag from the said Destiny and she then instructed the accused to examine the contents of the bag in order to ensure that it contained no illegal or proscribed articles. The accused, she said informed her that after examining the bag, she found it to contain only clothes, shoes and accessories.

[54] Tina then said that the accused informed her that Destiny told her to go to Penang. Tina said she re-confirmed this with Andrew. Tina also said that the accused was supposed to inform her once she arrived in Penang. Tina said that she however, did not receive any further news from the accused and several telephone calls made to the accused went unanswered.

[55] Tina said that she heard nothing more about the accused until a month later when the said Andi informed her that the accused had been arrested for a drugs offence in Malaysia. Tina confirmed that the accused was only assigned to collect and deliver clothing's and that she was not a drug trafficker.

[56] Andi Suhendi (SD3), gave evidence that the accused is his wife and said that he had sought help from someone named Illham Firmanshah in order to find a job as he and the accused were unemployed at the time. The said Illham Firmanshah then introduced them to Tina (SD2).

[57] SD3 said that he and the accused met with Tina at a "nasi liwet" stall on 1.11.2013 where a discussion was held regarding an assignment the accused was to embark upon and where the accused was given USD200 in order to fly from Jakarta to Hong Kong. SD3 said that before that day they had also met up with the said Tina.

[58] SD3 said that the accused was given the assignment to go to China as she was conversant in Mandarin. The agreed fee for the said assignment, he said, was three million Indonesian Rupiahs. SD3 said that he sent the accused to the airport at Jakarta for her to board her flight. He said that the accused had informed him on her arrival in China and that she would meet with an African person. SD3 said that his wife did not return to Indonesia after that.

[59] SD3 said that he later discovered that the accused was arrested for a drug related case. He said that the accused was not a drug trafficker.

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

[60] 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.*

[61] 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*."

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

[63] What amounts to a "reasonable doubt "itself is not defined in section 182 A 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*."

[64] 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 guilt*
>
> *Convict.*
>
> *(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*."

[65] 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.

[66] Should a statutory presumption arise against the accused, it is incumbent for such a presumption to be rebutted on a balance of probabilities. See *PP v. Yuvaraj*.

G) ANALYSIS OF THE DEFENCE CASE

[67] It is clear from the line of the defence taken that the accused was a mere innocent carrier and that another or others were the actual traffickers, namely, Tina (SD2) and/or Andrew, who was not called to testify.

[68] Where such a defence is led, there is authority for the proposition that there is necessity imposed upon a trial court to follow the "Radhi Direction". 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)

[69] The first exercise to be embarked upon is then to determine the question of whether Tina was a product of the imagination of the accused and a fictitious figure. In order to support her defence, the accused called one Titin Sukmawati (SD2) to testify. SD2's nickname was "Tina".

[70] SD2 said that she was the "Tina" referred to by the accused. She testified as to how she came to be introduced to the accused. She testified as to how the accused came to embark upon the assignment that ended with the arrest of the accused.

[71] Upon a consideration of the combined testimony of the accused and SD2, I was satisfied that there was credible evidence that the said "Tina" was not a figment of the accused's imagination but a real person.

[72] The next exercise to be conducted is whether or not the said "Tina" was the real trafficker in this case. The testimony of Tina (SD2) in summary, was that the accused was picked by her for the assignment as she was conversant in Mandarin. The accused thus had gone to China at the initiation of SD2 and that SD2 had conveyed whatever instructions given by Andrew to the accused.

[73] Whatever the role of Andrew as testified to by SD2, what is evident is that SD2 had in fact admitted to sending the accused to China. This raises the question of whether SD2 would have made such an admission and exposed herself to the risk of prosecution, had her account not been reasonably true.

[74] It can hardly be disputed that the risk that SD2 had taken could have led to the ultimate outcome of being faced with a death penalty if convicted. There was nothing to stop the prosecution from embarking upon this course of action had they so wished. It is reasonable to hold the view that the risk of literally putting her neck on the line could not have been lost on SD2.

[75] In this context, the submission of learned defence counsel resonates when he quoted the *dicta* of Lord Buckmaster in the case of *Dal Bahadur v. Bijai Bahadur, AIR*, [1930] to the following effect:

> "*…in the ordinary course of affairs a person is not likely to make a statement to his own detriment unless it is true*."

[76] I also tend to agree with the submission of learned counsel for the accused when he cited the analogy with the case of *PP v. Forster Frank Edald Heinrich* [1988] 2 MLJ 594. In that case, the defence of the accused that he did not know about the drugs in his bag was supported by two affidavits affirmed by two of his friends (admitted under the provisions of section 32(c) of the Evidence Act 1950) that effectively took upon themselves the blame for the presence of the incriminating drugs found in the bag of the accused. The accused as a result was acquitted.

[77] The analogy with the facts of the instant case is quite apt. Tina (SD2) had here come forward at great personal risk to effectively testify that it was upon her instructions that the accused went to China. I am not at liberty to dismiss the testimony of SD2 as nothing

more than mere invention or fabrication merely for the purpose of assisting the accused, her fellow country woman from Indonesia, without considering the enormity of the risk undertaken by her.

[78] It must be remembered that SD2 was subjected to rigorous cross examination and on the whole her testimony emerged largely unscathed. More importantly, it bears recollection that the accused upon or as soon after her arrest had stated in her cautioned statement certain material particulars that were consistent with her sworn evidence in court. This emerged through the evidence of SP13. This raises the issue of what is known as the "Alcontara Notice" given by the accused with respect to the essential parts of her defence.

[79] The "Alcontara Notice" so described after the case which bears its name, 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. See *Alcontara A/L Ambross Anthony v. Public Prosecutor* [1996] 1 MLJ 209.

[80] 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". 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.

[81] 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.

[82] The Alcontara case further underscores the necessity of putting ones case to the prosecution witnesses at the earliest opportunity in order to avoid the danger of the defence afterwards being characterised as a recent invention. The following except from the said case makes this point abundantly clear.

> *Speaking generally, in a criminal trial, the whole point and purpose of the defence having to put its case to such of the prosecution witnesses as might be in a position to admit or deny it, is to enable the prosecution to check on whether an accused's version of the facts is true or false, and thus avoid the adverse comment, that the defence is a recent invention — in other words, 'kept up its sleeve', as it were — and revealed for the first time when the accused makes his defence from the witness box or the dock, thus detracting from the weight to be accorded to the defence.*

[83] The pertinent facts revealed by the accused in her cautioned statement as testified to by SP13, was that she had gone to Guangzhou, China in order to collect clothing upon the instructions of Tina. The accused also disclosed that she received the flight ticket to Hong Kong from the said Tina and that from Hong Kong, she went to Guangzhou by bus.

[84] The accused further disclosed that while in Guangzhou, she met an African man by the name of Destiny who on 5.11.2013 gave her a brown coloured luggage bag. She said that she examined the said luggage bag and discovered that it only contained clothes, shoes and handbags. The said Destiny also gave her a flight ticket from Hong Kong to Penang.

[85] The accused disclosed that she took a bus from Guangzhou to Hong Kong and then boarded a flight to Penang. She said in her cautioned statement that she had examined the said luggage bag and

was certain that there were no drugs. She also disclosed that after her arrest, she had still received phone calls from Tina but was not in a position to answer the phone calls as she was already detained.

[86] There is authority for the proposition that failure to consider the contents of the cautioned statement amounts to a serious misdirection warranting appellate intervention. See *Prasit Punyang v. PP* (*supra*). This is so whether or not the cautioned statement itself is tendered in evidence.

[87] Once such a disclosure is made, it is then incumbent upon the prosecution to check the veracity of the facts disclosed and to negate the facts disclosed. In fact, as the following except from the case of *Chan King Yu v. PP* [2009] 1 CLJ 601, indicates, there arises an obligation on the prosecution to disprove the version of the accused as follows:

> *[78] As regards the material particulars relating to the existence of Man Chai which had been disclosed by the appellant in his cautioned statement exh. D29 which was made on the day after his arrest,* ***I am of the view that the police had all the time to check as to their veracity. The burden was on the prosecution to check whether the appellant's version of the facts as they appeared in the cautioned statement was true or false. The onus was upon the prosecution to disprove this important part of the appellant's version of facts.*** *The appellant was under no duty to put to the investigation officer the aforesaid material particulars in view of their prior disclosure in the cautioned statement. (See the case of Alcontara Ambross Anthony v. PP (supra))*. (Emphasis added)

[88] I am satisfied upon the evidence by the defence and as supported and indeed admitted by the prosecution through SP13 that the accused had divulged the material parts of her defence at the earliest

opportunity available. The defence version cannot therefore be justifiably characterised or dismissed as an afterthought.

[89] In the same vein, I find that although a sufficient 'Alcontara Notice" had been given by the defence, the prosecution had not successfully rebutted the said notice. The hand phone of the accused had been seized by the police. In her evidence the accused had alluded to the fact that she had received several calls from Tina which she could not answer as she was already arrested. There was however no evidence that revealed that the police had undertaken any investigation to check the veracity of the accused's version.

[90] The prosecution submitted that the failure of the accused to mention the involvement of Andrew during the course of her giving evidence meant that it was therefore an afterthought. In this respect, SD2 had testified that there were there were nineteen persons sent by Tina to collect clothing before the accused. She said that there were times when Andrew would give instructions himself and times when SD2 herself would issue such instructions.

[91] SD2 also testified that as far as the accused was concerned, the instructions to collect the items from China had been issued by her and not Andrew. This therefore would account for a reasonable explanation as to why the accused was unaware of the existence of Andrew as her instructions had emanated from SD2.

[92] The prosecution submitted that the circumstances in which the accused came to have with her the said luggage bag raised the issue of wilful blindness. The concept of 'wilful blindness' originates from the dissenting judgement of Yong Pung How CJ (Singapore) in the case of *Public Prosecutor v. Hla Win* [1995] 2 SLR 424 where his Lordship said as follows:

"*At this juncture, I emphasize that where the accused, who is not an innocent custodian in the sense that the drugs were planted in his bag without his being aware of them, accepted the goods in circumstances which rendered the taking of the precaution of satisfying himself that the goods were what they purported to be and were not drugs an imperative, then, if he did not take the trouble to inspect them, but merely relied on another person's assurance, he would not rebut the statutory presumption of knowledge. In fact, he would be guilty of wilful blindness to the obvious truth of the matter.*

In the end, the finding of the mental state of knowledge, or the rebuttal of it, is an inference to be drawn by a trial Judge from all the facts and circumstances of the particular case, giving due weight to the credibility of the witnesses."

[93] Yong Pung How CJ further referred to Glanville Williams' Textbook on Criminal Law at p 125 as follows:

"*As Professor Glanville Williams aptly remarked in his Textbook on Criminal Law, at p 125:*

... the strict requirement of knowledge is qualified by the doctrine of wilful blindness. This is meant to deal with those whose philosophy is: Where ignorance is bliss, 'tis folly to be wise.' To argue away inconvenient truths is a human failing. If a person deliberately 'shuts his eyes' to the obvious, because he 'doesn't want to know,' he is taken to know".

[94] The concept of 'wilful blindness' has also been given exhaustive consideration in the well written book by En Hisyam Abdullah @ Teh Poh Teik entitled "**Drugs Trafficking And The Law**" [2014] where the above case was cited, and the concept given detailed consideration and lucidly explained.

[95] The concept of 'wilful blindness' has also received judicial consideration by our courts in the cases of *Roslan bin Sabu @ Omar v. Public Prosecutor* [2006] 4 AMR 772 and more recently, in the case of *Jeanette Congcan Opena v. Public Prosecutor* [2014] 1 LNS 508. In the latter case, it was observed that the appellant had deliberately shut her eyes to the obvious and refrained from inquiry because she knew about the cocaine in the towels.

[96] From the foregoing, the doctrine of 'wilful blindness' can be summarised to be applicable to a situation where the circumstances are such as to raise suspicion sufficient for a reasonable person to be put on inquiry as to the legitimacy of a particular transaction. To put it another way, if the circumstances are such as to arouse suspicion, then it is incumbent for a person to make the necessary inquiries in order to satisfy himself as to the genuineness of what was informed to him.

[97] Should he fail to embark upon this course of action, then he will be guilty of 'wilful blindness' to what can be said to be fairly obvious. In other words he is then taken to know what the contents are. He then cannot be said to have either rebutted the presumption of knowledge or have raised a reasonable doubt as to his knowledge of the drugs in question. It will be also observed that depending on the precise factual matrix of the case, where it is shown that the accused does make inquiries, it is necessary to consider whether the inquiries are merely taken or whether further inquiries ought to have been made given the circumstances.

[98] Learned counsel for the defence urged this court to hold that the concept of wilful blindness has to be assessed according to subjective and not objective standards. The prosecution to the contrary submitted that the objective standard of assessment ought to apply. It was also submitted that the question of whether the concept of wilful blindness

ought to be assessed according to subjective or objective standards had yet to be addressed by any court in our jurisdiction.

[99] In the Singapore case of *Tan Kiam Peng v. Public Prosecutor* [2008] 1 SLR 1 the appellant was convicted in the High Court in Singapore under section 7 of the Misuse of Drugs Act 2001 for importing heroin. He was sentenced to death.

[100] On appeal to the Court of Appeal, it was held that the main issue in that case was whether or not the trial judge was correct in holding that the appellant had clearly understood that "number 3" was the street name for heroin and that, in the circumstances, the appellant knew that he was carrying heroin.

[101] In a lengthy but erudite judgement, Andrew Phang JA expounded on the concept of wilful blindness as being equivalent to actual knowledge. With respect to the applicable standard to be used in assessing whether an accused was guilty of wilful blindness, the issue was nowhere directly addressed. The learned judge in the course of his analysis had however alluded to two contrasting but hypothetical examples as the following passage will indicate:

> *To reiterate an obvious (but important) example,* ***where the accused has had the controlled drugs slipped into a bag without his or her knowledge, it is clear that no offence under the Act would have been committed*** *(see, once again, the passage by Lord Parker CJ in Lockyer v. Gibb (set out at [35] above) as well as the GD at [12]).* ***Where, to take another example, the accused is asked by a close family member to carry a box containing controlled drugs on the understanding that the box (wrapped up, say, in ribbons) contains a cake which is to be delivered to another close relative, there might be a strong case for arguing that the accused could not be said to be wilfully blind because the circumstances ought not to***

> ***have aroused his or her suspicions, let alone entailed further investigation***. *Again, however, much would (to reiterate an extremely important point) depend on the precise facts, evidence as well as credibility of the witnesses (especially the accused).*
>
> (emphasis added)

[102] The examples given in the above passage may perhaps give the impression that the nature of such inquiry must be inherently subjective.

[103] This subjective element may be discerned if one were to take the hypothetical accused who accepts a parcel from a stranger without making any or any adequate inquiry as to the nature of the contents. It may be well justified in that case to hold that wilful blindness would attach to him.

[104] However, should it be a request from a close relative as given in the second example in the above case, the same hypothetical accused may well be justified in not making any inquiry at all and to take whatever was told to him at face value. He then cannot be held to have been guilty of wilful blindness and therefore be affixed with actual knowledge of the drugs in question. This analysis must surely emanate from a subjective approach for in each example, the circumstances of the hypothetical accused are different.

[105] To take the argument one step further, an educated person living or brought up in an urban environment may rightfully pose searching questions of any requests by friends or even family members (other than perhaps immediate family) to carry on their behalf any package. Such a person would make at least minimal inquiries as to the contents.

[106] A person on the other hand, with minimal education and living in a rural environment where most transactions are conducted based upon trust, may accept without question any similar requests.

[107] It is not altogether out of place to observe that while urban living results in greater affluence, its downside may manifest in higher crime rates and therefore an increased level of suspicion on the part of its inhabitants of each other. This would be all the more so when most urban dwellers would be possessed of the knowledge that the penalty for drug trafficking carries the death sentence. While accepting the fact that rural dwellers may possess similar knowledge, the percentage of these people may be much lower. The gist of the matter being that urban dwellers and rural dwellers may react very differently to similar requests.

[108] That notwithstanding, to apply the subjective standard in assessing wilful blindness could result in extreme practical difficulty as not only must the court then consider the educational and environmental background of an individual accused but also will have to take into account cultural norms or mores as in some societies, it may be considered altogether impolite to question the request of a fellow villager to assist in ferrying a package to someone. As alluded to earlier, while it may be considered impolite to make such inquiries in a rural or even tribal setting, this may not be so in an urban setting.

[109] There is also a case for arguing that adopting a subjective approach may well lead to different treatment of individuals depending upon their respective background, education, cultural or societal norms and therefore offend the sacrosanct provision of Article 8 of the Federal Constitution that all persons are equal before the law and entitled to the equal protection of the law.

[110] The question of whether or not an accused person is guilty of wilful blindness is directly relevant to the issue of whether or not he

has successfully rebutted the statutory presumption of knowledge. See *Public Prosecutor v. Hla Win* (*supra*). The statutory presumption of knowledge in our jurisdiction is contained in section 37(d) DDA.

[111] Article 8 states that all persons are equal before the law and entitled to the equal protection of the law.

[112] To therefore hold an urban dweller or a "street-wise" person to a higher standard with regard to whether or not the circumstances ought to have put him on a train of inquiry failing which he is to be held to be "wilfully blind" and therefore have failed to rebut the statutory presumption of knowledge in section 37(d) DDA, would be to unfairly discriminate against him. It will also result in applying the provision in Section 37(d) differently depending on who the accused person is.

[113] The legislature in its wisdom, cannot have intended such a result. The courts would therefore be failing in its duty to extend to all accused the equal protection of the law according to Article 8 if this were the position.

[114] Therefore, the court must necessarily ask the objective question, would a reasonable person, similarly circumstanced, make inquiries as to the contents of a package or bag he or she was asked to carry on anothers behalf.

[115] The judgment in Tan Kiam Peng's case implicitly recognised that the standard of assessment must necessarily be objective in nature as the following except will indicate:

> *However,* ***given the objective approach that this (indeed, any) court must adopt*** *as well as the very factual nature of the inquiry itself, we should emphasise that there might be occasions when the line between actual and constructive*

knowledge might be blurred (this may particularly be the case in so far as (in the nature of things) the application of the doctrine of wilful blindness is concerned).

(Emphasis added)

[116] I find therefore that the standard by which wilful blindness is to be assessed is the objective standard.

[117] The accused testified that she did not suspect anything amiss when she received the said luggage bag from Destiny. She said that she was certain that there were no drugs in it.

[118] Learned counsel for the accused submitted that the issue of wilful blindness does not arise upon the factual matrix of this case because there was nothing about the luggage bag to excite suspicion on the part of the accused. The essence of the doctrine of wilful blindness as evident from the above quoted authorities, is that where circumstances are such as to invite reasonable suspicion, and the accused deliberately shuts his or her eyes to the obvious or had refrained from making inquiries because he or she suspected the truth but did not want to confirm the same, he or she is guilty of wilful blindness.

[119] The accused testified that after she informed Tina about the fact that Destiny had handed the bag (P15) to her, she said Tina informed her to examine the contents of the said bag. The accused duly complied and found it to contain clothes, shoes and handbags. The clothing's were new and still bore their price tags. She said that she then informed Tina regarding the contents. The examination of the contents of the bag would reasonably account for the presence of the accused's DNA on the clothings in the bag.

[120] On the facts and apart from the testimony of the accused that she did not suspect anything amiss about the luggage bag, it bears recollection that SP11 also testified that to the naked eye there was nothing to indicate anything suspicious. Quite apart from that, it is also in evidence that the said luggage bag (P15) had been scanned and passed the security inspection at Hong Kong airport. It is the evidence of SD2 also that upon being informed by the accused that she had received the luggage bag, she asked the accused to examine the contents to ensure there were no prohibited substances, which the accused duly did.

[121] Whether or not the concept of wilful blindness arises, is an intensely fact sensitive matter. There cannot be a rigid definition as to what constitutes or does not constitute a situation in which the concept applies. However, in the case of *PP v. Klong K'Djoanh & Another Appeal* [2016] 5 CLJ 533, it was held:

> "*It is the principle of the law that the defence of innocent carrier should be taken into account with the principle of wilful blindness*."

[122] See also *Unegbe Azuka Sunday v. PP* [2016] 1 LNS 423, to similar effect. On the facts, the circumstances in which the accused acquired the said bag would give rise to a situation where at the very least, an examination of the contents of the bag was necessary in order to ensure the legitimacy of the transaction. I therefore find that this was a case which brought into play the concept of wilful blindness.

[123] Although I agree with the contention of the prosecution that this was a case where the circumstances were such that necessitated the accused taking steps to examine the contents of the bag, which she did, *albeit* at the behest of SD2, upon the facts, the accused cannot be

said to have been guilty of wilful blindness so as to impute knowledge of the dangerous drugs on her part.

[124] Based upon the factual matrix of the case as a whole, there was nothing to excite the suspicions of the accused to do more than she already did in inspecting the bag when asked to do so by SD2. The said bag to all external appearances seemed like a normal bag containing clothing's, shoes and handbags. There was nothing at least externally to suggest anything amiss with the bag, for example, bulges or protrusions or any signs of tampering to indicate that other substances could be concealed in it. To all external appearances, the impugned drugs were carefully and professionally concealed in the said bag. To someone without knowledge of this fact, there would be nothing to arouse any suspicion that the bag contained anything other than clothing's, shoes and handbags.

[125] It is necessary to emphasise here that the onus which lies upon the prosecution is to prove that its case is true whilst, that on the defence, is merely to offer an explanation which might reasonably and probably be true. See *Public Prosecutor v. Yuvaraj* (*supra*).

[126] In the cases cited by the learned *Deputy Public Prosecutor, namely, PP v. Klong K'Djoanh & Another Appeal* (*supra*), *Ajeng Yulia v. PP* [2016] 1 LNS 302, *Ferry Linnbark v. PP* [2016] 1 LNS 227, *Deon Jacobus Alfred Cornelius v. PP* [2016] 1 LNS 354, *Amith Karinja v. PP* [2016] 1 LNS 420, *Unegbe Azuka Sunday v. PP* (*supra*) and *Munuswamy Sundar Raj v. PP* [2016] 1 CLJ 357 respectively, I agree with the submission of learned defence counsel that these cases can be distinguished on their facts.

[127] The crucial distinction is that while in the cases cited, the masterminds were mere assertions on the part of the accused without more, in the instant case, the character of the said Tina was disclosed at the first available opportunity to SP11 coupled with the disclosure

in the accused's cautioned statement. The accused had given sworn evidence to similar effect while the said Tina (SD2) had also corroborated the version of the accused in material aspects of the case.

[128] Andi Suhendi (SD3), who testified that he is married to the accused, also corroborated in material particulars the fact that on 1.11.2013, he and the accused had met Tina (SD2) at a "nasi liwet' stall at around 4.00 p.m. where preparations for the accused to travel from Jakarta to Hong Kong were discussed as well as the handing over of the sum of USD200 to the accused.

[129] SD3 had also testified that the accused was unemployed at the material time and he had requested the said Illham Firmanshah for work on her behalf and that the assignment was for the accused to go to China as she was proficient in Mandarin. SD3 also testified that he had sent the accused to the airport to take her flight.

[130] On the facts, the accused had taken all reasonable and necessary steps in order to ascertain that the bag contained nothing illegal. SD2 had supported her evidence on this material aspect. On the facts, the probability that Tina (SD2) who I hold was not a figment of imagination, was in fact the true trafficker and/or acting in concert with the said Andrew, whose existence and role in this case on a preponderance of evidence cannot be excluded, dismissed or altogether ruled out.

[131] Although the accused had not known prior to her trip from whom she was supposed to receive the bag from and did not ask Tina (SD2) regarding this, it is not altogether unusual that a person in the shoes of the accused had just followed instructions given to her by SD2 without inquiring further as she was desperate for a job, evidence having being led by both the accused herself and SD3 that she was unemployed at the time and desperately needed work. The same

reason would hold true in response to the prosecution's submission that it did not make much sense for such clothing to be collected in this manner while a cheaper alternative was to courier the said clothing's.

[132] I agree with the contention of learned counsel for the accused that this is a rather unique case where the true trafficker or the person who had in fact requested the accused to receive and carry the bag containing the drugs had in fact showed up in court and testified. Her evidence, as I have held earlier, was given at great personal cost and risk and cannot be readily dismissed as concoction or fabrication. The accused had therefore successfully raised the defence of her being an innocent carrier.

[133] Based upon all the circumstances of the case and assessed on an objective basis, I therefore find that the accused was not guilty of wilful blindness so as to tantamount to actual knowledge.

[134] Upon a consideration of the evidence therefore, I find that the accused had succeeded in rebutting on a balance of probabilities the statutory presumption of possession and knowledge of the impugned drugs under section 37(d) DDA. She had also succeeded in raising a reasonable doubt in the prosecution case for trafficking as defined in section 2 DDA. I therefore acquitted the accused of the charge against her.

Dated: 18 JANUARY 2017

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

COUNSELS:

For the prosecution - Siti Fatimah Talib, Nor Fazreen Othman & Lim Cheah Yit, Deputy Public Prosecutor; Penang Legal Advisor Office
Aras 10, Bangunan Persekutuan
Jalan Anson
10400 Pulau Pinang

For the accused - Choong Kak Sen; M/s Gooi & Azura
No. 12-1 & 14-1, Jalan Serkut,
Taman Pertama, Cheras,
56100 Kuala Lumpur