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PP v. POH CHEE HUONG

COURT OF APPEAL, PUTRAJAYA
ZAKARIA SAM JCA
IDRUS HARUN JCA
HASNAH MOHAMMED HASHIM J
B [CRIMINAL APPEAL NO: N-05-07-01-2015]
5 APRIL 2016

CRIMINAL LAW: *Trafficking in and possession of dangerous drugs – Sections 6 & 39B Dangerous Drugs Act 1952 – Identity of drugs – Contradictory evidence of*
C *prosecution witnesses – Whether discrepancies existed in prosecution's evidence relating to exhibits seized by police – Whether contradictions explained – Whether there was break in chain of evidence – Whether drugs seized were the same drugs sent to chemist for analysis – Whether prosecution gave acceptable explanation for contradictory statements of witnesses – Whether prima facie case established*

D

EVIDENCE: *Witness – Interested witness – Prosecution witness – Contradiction of evidence with other prosecution's material witnesses – Whether witness' credit impeached – Whether witness' testimony fatal to prosecution's case*

The accused was charged with two counts of trafficking in and possession of
E dangerous drugs. The facts revealed that a police team led by PW3 approached the accused when the latter stepped out from his car. PW3 and his officer, PW4 and PW2 conducted a body search on the suspect and recovered a Dunhill cigarette packet from the right front pocket of the accused's trousers. PW3 found six cigarettes from the cigarette packet which
F he suspected to contain cannabis. PW3 then searched the boot of the car and found a red plastic bag underneath the boot's carpet. Upon further examination, PW3 found two packages each tied with rubber bands. The first package contained a compressed slab suspected to be cannabis wrapped in Chinese newspaper with one rubber band around it and the second package also contained a compressed slab suspected to be cannabis wrapped in
G aluminum foil and sellotape and wrapped in Chinese newspaper with two rubber bands around it. PW3 handed over the seized items, a police report and a search list to the investigating officer, PW6. PW6 thereupon marked the items and thereafter, placed the items into an envelope which she had sealed and kept in her cabinet. On the next day, PW6 took the exhibits out
H again and instructed PW2 to take photographs of the seized items including the drugs. The vegetative substances were then sent to the chemist, PW1, and her report confirmed that the substances were cannabis. The prosecution also adduced evidence that the car belonged to the accused's wife ('PW5'). In her testimony, PW6 testified that PW3 handed over to her, among others, the
I six cigarettes, the Dunhill cigarette packet and the two packages containing the vegetative substances. However, during examination in chief, PW6 could not identify the rubber bands and the red plastic bag containing the two

packages which contained the impugned drugs. The trial court found, among others, that when PW1 received the sealed envelope and opened it, the rubber bands and the red plastic bag were also found in the sealed envelope. By the time the prosecution closed its case, these two items were not tendered as exhibits. At the close of the prosecution's case, the trial judge found that the prosecution failed to prove a *prima facie* case against the accused and accordingly acquitted him from both the charges. Hence, this appeal.

Held (dismissing appeal; affirming decision of the High Court)
Per Idrus Harun JCA delivering the judgment of the court:

(1) In order to prove the offence under s. 39B of the Dangerous Drugs Act 1952 ('the Act'), the following essential elements had to be proved, *ie*, (a) that the impugned drug is comprised in the First Schedule of the Act with the net weight as specified in the charge; (b) the drug was in the possession of the accused at the relevant time; and (c) the accused committed the act of trafficking at the relevant time. For the offence of possession of cannabis under s. 6 of the Act, the prosecution was required to establish the elements in (a) and (b) above. (para 6)

(2) There was a break in the chain of evidence relating to the drugs in question which naturally raised a doubt on whether it was the same exhibits analysed by PW1. On the facts, there was utter confusion in the evidence of PW3 and PW6. On the one hand, PW3 said that there were the red plastic bag, three rubber bands and sellotape but PW6 could not identify these items which were not tendered as exhibits. On the other hand, PW6 testified that there was the transparent plastic which wrapped the compressed slab of cannabis apart from the aluminium foil, yet PW3 did not mention of it in his evidence. The description on the nature and types of exhibits varied when it changed hands from PW3 to PW6. There was no explanation which was forthcoming from the prosecution. (paras 10 & 14)

(3) *Vide* her evidence, PW6 testified that she marked the exhibits after it was handed over to her by PW3 after which she put it in an envelope and kept the same in a steel cabinet. On the next day, she took the exhibits out again and instructed PW2 to take photographs of the seized items including the drugs in question and the place of incident. There was no evidence led to show where these exhibits were kept after the photographs were taken. Further, PW1's evidence contradicted PW6's testimony. PW6 did not say that the rubber bands and the red plastic bag were put in the envelope. She could not identify these two items when she gave her evidence. However, these items were found in the envelope. PW6 offered no explanation as to how these items were found in the envelope sent to PW1. In the circumstances, there were clear discrepancies in the prosecution's evidence relating to the exhibits seized by PW3, sent to the chemist by PW6 and analysed by PW1.

A Thus, PW1, PW3 and PW6's testimonies were so conflicted that, in the absence of any acceptable explanation by the prosecution, it was hardly known whether the exhibits sent to PW1 were the same ones which were seized by PW3. (paras 15 & 16)

B **(4)** The red plastic bag, rubber bands and the sellotape were not tendered by the prosecution as exhibits. Therefore, these items undoubtedly did not become part of the prosecution's evidence. Further, the discrepancies in the prosecution's evidence had thus remained unexplained creating a break in the chain of evidence relating to the manner in which the exhibits seized by PW3 at the scene of crime were C handled by both PW3 and PW6 and consequently creating a doubt as to the identity of the drugs sent to PW1. This unsatisfactory feature of the prosecution's evidence had inevitably raised an inference of the probability that there could have been a tampering of these exhibits before it was sent to PW1. (para 17)

D **(5)** The prosecution failed to tender the remnant of the cannabis that was left after the analysis by PW1. It should have been tendered through PW1 lest it would not have become part of the prosecution's evidence. Further, PW6 did not identify the remnant of the cannabis. The production of the cannabis as exhibit and the positive identification of E the same by PW6 were necessary in order to prove that the dangerous drugs analysed by PW1 were the same drugs sent to her by PW6 and specified in both charges. The failure to do so would be fatal to the prosecution's case. (para 18)

F **(6)** Once the identity of the drug exhibits was challenged by the defence, it would be incumbent on the prosecution to ensure that there were no gaps in the chain of evidence and to adduce evidence that the drug exhibits which were recovered from the accused were the same drug that he was charged with. Thus, even though PW1 had confirmed that the drugs she had analysed were cannabis as listed in the First Schedule of G the Act, a doubt as to the identity of the exhibits sent to her had inevitably led the court to find that there was also a doubt as to whether the drugs sent for analysis were in fact the same drugs which were seized by PW3. In the circumstances, the first element of the offence was not proved by the prosecution. (para 19)

H **(7)** When the police arrested the accused, PW5 was in the car with her child. However, this evidence was in direct contradiction with the evidence of PW3 and PW4 which revealed that the accused was alone at the time of his arrest. Further, the name of the first owner of the car was Loke Kim Chiew which was different from the full name of I Ah Lam given by PW5, namely Lian Weng Lam. The failure to investigate whether Ah Lam was or was not a fictitious person would also mean that the prosecution's version that the impugned drugs belonged to the accused probably might not be true. (paras 21 & 23)

(8) PW5 was the prosecution's witness. The prosecution took the risk when it chose to call PW5 to testify on its behalf. It would be wrong for this court to completely disregard PW5's evidence purely on the basis that she was an interested witness for it is now obvious that such witness is, in law, a competent witness. Her evidence had obviously contradicted the evidence of the other prosecution's material witnesses. Firstly, her testimony in relation to the drugs found in the car boot which according to her belonged to Ah Lam had contradicted with the evidence of other prosecution witnesses that the drugs belonged to the accused. Secondly, her evidence that the Dunhill cigarette packet was found on the dashboard of the car had run counter to the evidence of PW3 that it was found in the pocket of the accused's trousers. There was no impeachment of PW5's credit at the earliest opportunity. Thus, her version remained on record as the prosecution's evidence which in the result led to two diametrically opposed versions in the prosecution's case. In a situation where the prosecution's evidence admits of two or more inferences, one of which was in the accused's favour, it was the duty of this court to draw the inference that was favourable to the accused (*PP v. Mohd Radzi Abu Bakar*; refd). (para 24)

(9) The likelihood of one being set up or the drugs belonged to Ah Lam could not be ruled out. Hence, it would be the duty of the investigating officer to eliminate any doubt that might have arisen in this case when the issue of Ah Lam was raised. Further, an important element which the prosecution was required to prove for the offence of trafficking in the impugned drugs under s. 39B of the Act was that the appellant had possession of the said drugs at the material time. A finding of possession could be made if from the surrounding circumstances of the case, it could be inferred that the accused had knowledge of the drugs found in the car boot and on his person. On the facts, the prosecution's case against the accused had become doubtful. As such, the second and third elements of the offence under s. 39B of the Act were not proved. The same goes to the offence under s. 6 of the Act. (paras 25 & 26)

(10) The prosecution's case falls due to the evidence of the investigating officer, PW6 who could not identify the exhibits which she recovered from PW3 and subsequently sent to PW1 for analysis and the ones tendered before the court of first instance. This failure had consequently left serious gaps in the continuous chain of evidence relating to the exhibits which in turn had created serious doubts on the identity of the exhibits sent for analysis and raised an inference that the same could have been tampered with. The prosecution also failed to prove possession of the impugned drugs by the accused at the material time. Unless it could be shown that such findings by the trial judge suffered from some serious errors or against the weight of evidence or unless it

could find substantial or compelling reasons for disagreeing with the findings, this court shall not interfere with such findings of facts by the trial judge. In the circumstances, there was no such errors in, nor reasons to disagree with the trial judge's findings. (para 28)

Case(s) referred to:
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Dato' Yap Peng v. PP [1993] 2 CLJ 181 HC ***(refd)***
Gunalan Ramachandran & Ors v. PP [2004] 4 CLJ 551 CA ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Nasaruddin Daud & Anor v. PP [2010] 8 CLJ 21 CA ***(refd)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(refd)***
PP v. Lim Hock Boon [2009] 3 CLJ 430 FC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP v. Munusamy [1980] 1 LNS 63 FC ***(refd)***
PP v. Vijaya Raj [1980] 1 LNS 188 ***(refd)***
Sia Pang Liong v. PP [2011] 6 CLJ 759 CA ***(refd)***
Timhar Jimdani Ong & Anor v. PP [2010] 3 CLJ 938 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 180(1)
Dangerous Drugs Act 1952, ss. 2, 6, 39B

For the appellant - Jean Sharmila Jesudason; DPP
For the respondent - Saranjeet Kaur Sidhu; M/s S Sidhu & Co

[Editor's note: Appeal from High Court, Seremban; Criminal Trial No: 45A-23-09-2014 (affirmed).]

Reported by Kumitha Abd Majid

JUDGMENT

Idrus Harun JCA:

The Charges

[1] The accused was charged on two counts of trafficking in and possession of dangerous drugs in the following terms:

First Charge

Bahawa kamu pada 20 April 2014 jam lebih kurang 6.10 petang, bertempat di hadapan rumah No. 183, Lorong 7, Taman ACBE Bahau, dalam Daerah Jempol, dalam Negeri Sembilan, didapati mengedar dadah berbahaya mengandungi 229 gram dadah "Cannabis". Oleh itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B (2) Akta yang sama.

Second Charge

Bahawa kamu pada 20 April 2014 jam lebih kurang 6.10 petang, bertempat di hadapan rumah No. 183, Lorong 7, Taman ACBE Bahau, dalam

Daerah Jempol, dalam Negeri Sembilan, telah ada di dalam milik kamu dadah berbahaya mengandungi 0.78 gram dadah "Cannabis". Oleh itu kamu telah melakukan suatu kesalahan boleh dihukum di bawah seksyen 6 Akta Dadah Berbahaya 1952.

Case For The Prosecution

[2] On 20 April 2014 at approximately 5.45pm, based on an information received, Detective Sub-Inspector Mustafa bin Ibrahim (PW3), leading a team of police officers, left Bahau Police Station in two vehicles for Taman ACBE, Bahau, Negeri Sembilan in search of a male Chinese driving a silver-coloured Nissan Cefiro bearing registration number PER 1835 in the said housing area. At about 6.10pm, PW3 and his raiding team saw the suspect's car, the silver Nissan Cefiro stopped by the road side in front of a house at No. 138, Lorong 7, Taman ACBE. The driver of the car, a male Chinese, was seen stepping off the car and heading towards the gate of the house. PW3 and his officers stopped their vehicles and approached the suspect, the accused in this appeal. After introducing himself as police officer, PW3 and his officers namely Sergeant Major Md Rosli bin Admin (PW4) and Detective Corporal Kamarudin bin Leman (PW2) conducted a body search on the suspect and recovered from the right front pocket of the suspect's trousers, a Dunhill cigarette packet (exh. P9A(i)(b)) from which PW3 found six cigarettes (exh. P9A(i)(b)(1-6)) suspected to contain cannabis. Subsequently, PW3 searched the boot of the car and found a red plastic bag underneath the boot's carpet. Upon further examination of the plastic bag, PW3 found two packages each tied with rubber bands. The first package contained a compressed slab which PW3 suspected to be cannabis wrapped in Chinese newspaper with one rubber band around it. The second package also contained a compressed slab which PW3 suspected to be cannabis wrapped in aluminium foil and sellotape and then wholly wrapped in Chinese newspaper with two rubber bands around it. The combined weight of these vegetative substances was 302g.

[3] PW3 seized these substances together with a handphone (exh. P15), wallet (exh. P14), and cash of RM820 found on the accused's person. These seized items, the car and the accused were brought to Bahau Police Station. At around 9.30pm, PW3 handed over the seized items, a police report (exh. P12), a search list (exh. P13) and the accused to the investigating officer namely Inspector Jamatul Akmar (PW6). PW6 thereupon made markings on the items handed over to her which she did by marking 'J' for the trousers, 'JJ' for the red plastic bag, 'JJ' for the Dunhill cigarette packet, 'J1-J6' for the six cigarettes, 'JJJJ' for one piece of news paper, 'JJJJJ' for one big compressed slab of cannabis and, 'JJJJJ' for one package. She subsequently placed the items into an envelope which she had sealed and kept it in her cabinet. On the next day, PW6 took the exhibits out again and instructed Corporal Kamaruddin bin Leman (PW2) to take photographs of the items seized including the drugs. The vegetative substances were subsequently sent

to the Chemistry Department in an envelope sealed with PDRM 746 (exh. P9A) for analysis. The evidence of Suhara bt Ismail, the chemist (PW1) and her report (exh. P8) irrefutably showed that on analysis these substances were confirmed to be cannabis with the net weight of 299g in respect of the cannabis specified in the first charge and 0.78g in respect of the cannabis specified in the second charge. Cannabis is comprised in the First Schedule of the Dangerous Drugs Act 1952 (Act 234) and therefore is dangerous drug as defined in s. 2 thereof.

[4] The car belonged to the accused's wife namely Leeu Moi Fong (PW5). Based on the Certificate of Registration (exh. P19), the first owner of the car was one Loke Kim Chiew. The car was subsequently transferred to the accused on 27 September 2004. However, on 3 February 2010 the car was transferred to PW5.

[5] At the close of case for the prosecution, the learned trial judge found that the prosecution failed to prove a *prima facie* case against the accused as required under s. 180(1) of the Criminal Procedure Code and accordingly acquitted the accused from both the charges. The prosecution appealed against the decision.

[6] The learned judge correctly stated that the prosecution had to prove the following essential elements in order to prove the offence under s. 39B of Act 234:

(a) the impugned drug is comprised in the First Schedule of Act 234 with net weight as specified in the charge;

(b) the drug was in the possession of the accused at the relevant time; and

(c) the accused committed the act of trafficking at the relevant time.

It is legitimate at this stage to have regard to the second charge with respect to which we would say that for the offence of possession of cannabis under s. 6 of Act 234, the prosecution is required to establish the elements in (a) and (b) above.

[7] The learned judge found as regards the first element, that the evidence of PW1 confirmed that the vegetative substances which she received and analysed were cannabis as listed in the First Schedule in Act 234 as such were dangerous drugs as defined in s. 2 of the same Act.

[8] It will be recalled that PW3 in his evidence testified that when he searched the boot of the car, he found underneath the carpet one red plastic bag which contained two packages. The learned judge noted that the first package contained one compressed slab of cannabis wrapped in Chinese newspaper with rubber band around it while the second package contained another compressed slab of cannabis wrapped in aluminium foil and sellotape and then wholly wrapped in a Chinese newspaper with two rubber bands around it.

[9] However, Her Ladyship emphasised that the investigating officer, PW6, testified that she put in the sealed envelope (exh. P9A) one Dunhill cigarette packet containing the six cigarettes, two Chinese newspaper packages, aluminium foil and a transparent plastic. During examination-in-chief, PW6 made no mention of the rubber bands (ID9A(i)(d) and ID9A(i)(f) and the red plastic bag (ID9A(i)). In fact, the red plastic bag and the rubber bands were put in front of PW6 who however did not say anything about it. She subsequently could not identify both items which were placed before her during the trial. On the contrary, the learned judge found, when PW1 received the sealed envelope and opened it, the rubber bands and the red plastic bag were also in the sealed envelope. PW6 was recalled by the Deputy Public Prosecutor (the DPP). However, she was adamant that her earlier evidence was correct, that she had tendered all the exhibits in court and nothing was left out. Thus at the point of being recalled, PW6 still could not identify the red plastic bag and the rubber bands. These two items, by the time the prosecution closed its case, were not tendered as exhibits. The red plastic bag was only marked as ID9A(i) while the rubber bands were respectively marked as ID9A(i)(d) and ID9A(i)(f) and (g).

[10] The learned judge, understandably enough, raised a pertinent question, that is, who put the red plastic bag and the rubber bands in the sealed envelope when it was sent to PW1. If it was not PW6, who then put these two items into the said sealed envelope (exh. P9A). This defect in the evidence of PW6, according to Her Ladyship, had created a doubt in the continuous chain of evidence relating to the impugned drugs before it was sent to PW1 for analysis. The learned judge rightly found that there was a break in the chain of evidence relating to the drugs in question which naturally raised a doubt on whether it was the same exhibits which were analysed by PW1. The judge had also considered that the remnant of the cannabis that was left after PW1's analysis were not tendered by the prosecution as an exhibit though it was identified by PW1 adding that the same should have been tendered through PW1.

[11] Before us, the learned DPP submitted that there was no break in the chain of evidence that had consequently raised a doubt in the identity of the impugned drugs as PW6 asserted in her evidence that the exhibits which were surrendered to her by PW3 and thereafter sent to PW1 were the same exhibits. The issue of the chain of evidence became the main plank in learned counsel's forceful attack on the evidence relating to the first requisite element of the offence which the prosecution was required to prove in the court below. Learned counsel strenuously argued that there was a doubt as to the identity of the drugs cannabis which were seized by PW3 from the accused.

[12] It would be desirable, therefore, to examine closely the evidence of PW3 and PW6 relating to the chain of evidence in connection with the manner in which the drugs were handled right from the point it was seized from the accused until the time the same was sent to PW1 for analysis. We

would start off by considering the evidence of PW3. At the risk of repeating the evidence at this point, according to PW3 he found the Dunhill cigarette packet (exh. P9A(i)(b)) with six cigarettes (exh. P9A(i)(b)(1-6)) therein from the right front pocket of the trousers which the accused wore at the material time. The drugs found underneath the carpet that covered the floor of the car boot were wrapped in Chinese newspaper (exhs. P9A(i)(c) and P9A(i)(e)) in two packages which were kept in the red plastic bag (ID9A(i)). The first compressed slab of cannabis was wrapped in the Chinese newspaper with the rubber band around it. The second compressed of cannabis was wrapped in aluminium foil which was wrapped in the sellotape and wholly wrapped in the Chinese newspaper with two rubber bands around it. PW3 marked all the seized items with his signature and the date '20 April 2014' written thereon. He subsequently handed all these items to PW6.

[13] In her testimony, PW6 testified that PW3 handed over to her the six cigarettes, the Dunhill cigarette packet, the two packages containing the vegetative substances, the accused's trousers, wallet, a handphone and the car. During examination-in-chief, PW6 could not identify the rubber bands (ID9A(i)(d) and ID9A(i)(f) and (g) and the red plastic bag (ID9A(i)) which contained the two packages containing the impugned drugs. There was another red plastic bag (exh. P16) which PW6 explained she used to put the accused's trousers. We are satisfied that this is not the same red plastic bag (ID9A(i)) that PW3 had seized from the accused. According to PW6 she took exh. P16 when the accused was in the lock-up which she used to put the trousers in. PW3 moreover, confirmed that exh. P16 was not the one he seized from the accused. It was also in PW6's testimony that the transparent plastic (exh. P9A(i)(h)) was found wrapping the compressed slab of cannabis together with the aluminium foil (exh. P9A(i)(i)). PW3 on the other hand, did not mention anything about the transparent plastic. Significantly, PW6 on her part did not mention about the sellotape. We would assume that PW6 was referring to the package marked as exh. P9A(i)(e) which according to PW3 consisted of the Chinese newspaper (exh. P9A(i)(e)), the aluminium foil (exh. P9A(i)(i)) and the sellotape. Despite PW3's evidence, we do not find from the notes of evidence that the sellotape was tendered by the prosecution as exhibit.

[14] There was thus utter confusion in the evidence of PW3 and PW6. On the one hand PW3 said that there were the red plastic bag, the rubber bands and the sellotape but PW6 could not identify these items which were not tendered as exhibits. On the other hand, PW6 testified that there was the transparent plastic which wrapped the compressed slab of cannabis apart from the aluminium foil, yet PW3 made no mention of it in his evidence. Obviously, the description on the nature and types of exhibits varied when it changed hands from PW3 to PW6. There was no explanation which was forthcoming from the prosecution.

[15] It will be recalled that PW6 in her evidence testified that she marked the exhibits after it was handed over to her by PW3 after which she put it in an envelope and kept the same in a steel cabinet. On the next day she took the exhibits out again and instructed PW2 to take photographs of the items seized including the drugs in question and the place of incident. There was no evidence led to show where were these exhibits kept after the photographs were taken. It is to be noted that the Dunhill cigarette packet, the two packages wrapped in the Chinese newspaper, the aluminium foil and the transparent plastic were put by PW6 in the envelope sealed with PDRM 746 (exh. P9A) and sent to the Chemistry Department on 22 April 2014. PW1's evidence on this aspect showed that she received the Dunhill cigarette packet together with the six cigarettes. She also received the red plastic bag, marked 'JJJ' which contained one package wrapped in newspaper marked 'JJJJ' containing one slab of compressed vegetative substance and one package wrapped in newspaper marked 'JJJJJ' containing one slab of compressed vegetative substance wrapped in aluminium foil which in turn was wrapped in the transparent plastic reinforced by the sellotape. PW1 also confirmed that she received the rubber bands as well.

[16] Obviously, PW1's evidence had contradicted PW6's testimony. PW6 did not say that the rubber bands and the red plastic bag were put in the envelope. She could not identify these two items when she gave her evidence. Yet these items were found in the envelope. There was no explanation by PW6 as to how these items were found in the envelope sent to PW1. Even if she attempted to explain, PW6 would not have been able to do so in view of her earlier evidence which clearly manifested her insistence that she only sent these exhibits save the red plastic bag and the rubber bands. There were clearly discrepancies in the prosecution's evidence relating to the exhibits seized by PW3, sent to the chemist by PW6 and analysed by PW1. Thus, PW1's, PW3's and PW6's testimonies were so conflicted that, in the absence of any acceptable explanation by the prosecution, we hardly know whether the exhibits sent to PW1 were the same ones which were seized by PW3.

[17] We would also mention that the red plastic bag, the rubber bands and the sellotape were not tendered by the prosecution as exhibits. Therefore, these items undoubtedly do not become part of the prosecution's evidence. When PW6 was recalled by the learned DPP, obviously to explain the contradictions and to repair the damage caused to the prosecution's case, the red plastic bag and the rubber bands were placed in front of PW6, she confirmed that she put the Dunhill cigarette packet, the six cigarettes, the two packages containing the two slabs of compressed cannabis in the envelope and sent to the Chemistry Department. She responded with unhesitating confidence that she did not leave out any other exhibits. In answer to a question asked by the learned judge whether she would like to refer to any other exhibits or she had omitted other exhibits, PW6 said there was none. Here, these facts clearly suffice to say that PW6's insistence on maintaining

her earlier testimony had stultified the prosecution's attempt to explain the discrepancies in the evidence. The discrepancies in the prosecution's evidence had thus remained unexplained creating in the process a break in the chain of evidence relating to the manner in which the exhibits seized by PW3 at the scene of crime were handled by both PW3 and PW6 and consequently creating a doubt as to the identity of the drugs sent to PW1. This unsatisfactory feature of the prosecution's evidence has inevitably raised an inference of the probability that there could have been a tampering of these exhibits before it was sent to PW1.

[18] The prosecution had also failed to tender the remnant of the cannabis that was left after the analysis by PW1. In our judgment, it should have been tendered through PW1 lest it would not have become part of the prosecution's evidence. PW6 we observe, did not identify the remnant of the cannabis. The notes of evidence revealed that the learned judge had remarked during PW6's examination-in-chief that PW6 did not identify the remnant of the compressed slabs of cannabis even though she could identify the Chemistry Department's plastic packets (exhs. P9A(i)(b)(7) and (8)) which were use to keep the cannabis when PW1 returned it to PW6. The production of the cannabis as exhibit and the positive identification of the same by PW6 are necessary in order to prove that the dangerous drugs analysed by PW1 are the same drugs sent to her by PW6 and specified in both charges. The failure to do so would, in our view, was fatal to the prosecution's case.

[19] It would be a salutary reminder that, once the identity of the drug exhibit was challenged by the defence, it would be incumbent on the prosecution to ensure that there were no gaps in the chain of evidence and to adduce evidence that the drug exhibits which was recovered from the accused were the same drug that he was charged with (*Sia Pang Liong v. PP* [2011] 6 CLJ 759; [2011] 1 MLRA 808). Thus, even though PW1 had confirmed that the drugs she had analysed were cannabis as listed in the First Schedule of Act 234, a doubt as to the identity of the exhibits sent to her has inevitably led us to find that there was also a doubt as to whether the drugs sent for analysis were in fact the same drugs which were seized by PW3. We hold that the first element of the offence was not proved by the prosecution.

[20] We shall move on to consider the next issue which is related to the question whether the accused was in possession of the drugs, the second requisite element of the offence. The learned judge considered the evidence of PW5, the accused's wife and in the process had exercised caution with regard to her testimony even though she was the prosecution's witness. In her final evaluation of the evidence, the learned judge held that PW5's evidence taken together with the other evidence, did create a doubt in the prosecution's case.

[21] According to PW5, the car belonged to her but it was used by her, the accused and his friends including one by the name of Ah Lam. On 19 April 2014, Ah Lam borrowed the car from her and returned the car in the morning of 20 April 2014. PW5 had seen the red plastic bag in her car when she checked the boot. She then contacted Ah Lam to find out whether he had left it in the car to which Ah Lam said he did and would be coming to pick it up at night on the same day. PW5 had also testified that the Dunhill cigarette packet was found on the car dashboard not from the accused's person. In fact, when the police arrested the accused, PW5 was in the car with her child as before that the accused went to her sister's house to fetch her to her mother-in-law's house. This evidence, we find, was in direct contradiction with the evidence of PW3 and PW4 which revealed that the accused was alone at the time of his arrest. Further in her evidence, PW5 testified that she had provided information relating to Ah Lam to PW6 including his full name namely Lian Weng Lam, his identity card number 860818-33-5959, his handphone number 013-513223 and Ah Lam place of abode in Triang which was near the accused's and PW5's house. However PW6 in her evidence, asserted that Ah Lam was the previous owner of the car before it was sold to the accused. PW6 did not see any need to investigate the person by the name of Ah Lam as the said name was in the Certificate of Registration of the car which had changed ownership to the accused and subsequently PW5.

[22] We would interpose here that PW5 in this regard did not say that Ah Lam was the previous owner of the car. In fact, the name of the first owner of the car as shown in exh. P19 was Loke Kim Chiew which was different from the full name of Ah Lam given by PW5 namely Lian Weng Lam. The evidence of PW6 on this issue would, therefore, be somewhat doubtful and we do not think that anything material turns upon this evidence.

[23] The fact that PW5 said she called Ah Lam when she saw the red plastic bag in the car boot, would mean that the truth of the alleged telephone call would never be known. The failure to investigate whether Ah Lam was or was not a fictitious person would also mean that the prosecution's version that the impugned drugs belonged to the accused probably might not be true. We cannot ignore that this is not a case where only a name was mentioned, in fact, PW5 had even provided Ah Lam's full name, his place of residence, his identity car, his handphone number and his description. The learned judge was fully cognizant that the issue of Ah Lam was raised as early as at the point when the accused was arrested and also by PW5, yet there was no investigation. We agree with Her Ladyship that Ah Lam might or might not exist, but until and unless the fact was investigated we would never know. In our opinion, we would be hazarding a guess that Ah Lam did not exist should we be minded to find that the prosecution had established a *prima facie* case against the accused. It cannot be gainsaid that such a recourse would be clearly wrong.

[24] The learned judge had expressly stated that she had to exercise caution when dealing with PW5's evidence as she was the accused's wife. However, the fact remains that we cannot ignore her evidence completely when she insisted that she was with the accused when the latter was arrested and that the Dunhill cigarette packet was found on the dashboard of the car. We bear in mind that PW5 was the prosecution's witness. The prosecution had taken the risk when it chose to call PW5 to testify on its behalf. Her evidence had obviously contradicted the evidence of the other prosecution's material witnesses at least in two fundamental aspects. Firstly, her testimony relating to the drugs found in the car boot which according to her belonged to Ah Lam had contradicted with the evidence of other prosecution's witnesses that the drugs belonged to the accused. Secondly, her evidence that the Dunhill cigarette packet was found on the dashboard of the car had run counter to the evidence of PW3 that it was found in the pocket of the accused's trousers. There was no impeachment of PW5's credit at the earliest opportunity. Thus, her version remained on record as the prosecution's evidence which in the result led to two diametrically opposed versions in the prosecution's case. In a situation where the prosecution's evidence admits of two or more inferences, one of which is in the accused's favour, it is the duty of this court to draw the inference that is favourable to the accused (*PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 at p. 466). It would be wrong for this court to completely disregard PW5's evidence purely on the basis that she is an interested witness for it is now obvious that such witness is, in law, a competent witness. Neither could we, on the other hand, make light of the fact that there were contradictions in the prosecution's case.

[25] The learned judge had correctly considered the issue on Ah Lam by looking at the evidence that the police raiding party was on the look out for a male Chinese who was driving a Silver Nissan Cefiro in the vicinity of the shops at Taman ACBE suspected to be in possession of drugs. A pertinent question therefore would be, could this male Chinese be Ah Lam or the accused. Was it the accused who was actually trafficking in the impugned drugs or was it a coincidence that he was driving the said car and subsequently nabbed by PW3 at that point of time when the drugs were found in the car. The likelihood of one being set up or the drugs belonged to Ah Lam could not be ruled out. Hence, it would be the duty of the investigating officer to eliminate any doubt that might have arisen in this case when the issue of Ah Lam was raised.

[26] One important element which the prosecution is required to prove for the offence of trafficking in the impugned drugs under s. 39B of Act 234 is that the appellant had possession of the said drugs at the material time. We can make a finding of possession if from the surrounding circumstances of the case it can be inferred that the accused had knowledge of the drugs found in the car boot and on his person (*Gunalan Ramachandran & Ors v. PP* [2004] 4 CLJ 551; [2004] 4 MLJ 489, *PP v. Lim Hock Boon* [2009] 3 CLJ 430 and *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337). The prosecution's evidence, we

should say, is so irreconcilable and ambivalent that in our judgment, her evidence would have a significant bearing on the outcome of the case in that it has rendered the prosecution's case against the accused to become doubtful. We are therefore driven to the inevitable conclusion that the second and third elements of the offence under s. 39B of Act 234 are not proved. The same goes to the offence under s. 6 of Act 234.

[27] At the end of the prosecution's case, it is the duty of the prosecution to prove a *prima facie* case as is required under s. 180(1) of the Criminal Procedure Code. What constitutes a *prima facie* case has been clearly and amply explained by the Federal Court in the case of *Balachandran v. PP* [2005] 1 CLJ 85 as follows:

> A *prima facie* case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal. The phrase "*prima facie* case" is defined in similar terms in *Mozley and Whitely's Law Dictionary*, 11th edn as:
>
> > A litigating party is said to have a *prima facie* case when the evidence is in his favour is sufficiently strong for his opponent to be called on to answer it. A *prima facie* case, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence by the other side.
>
> ... the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established ... The test at the close of the case for the prosecution, would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative, then a *prima facie* case has been made out.

[28] The law as explained by the Court of Appeal in *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734; [2003] 2 AMR 89, requires a judge, in determining whether a *prima facie* case has been established, to subject the prosecution's evidence to maximum evaluation and ask himself whether he would be prepared to convict the accused on the totality of the evidence contained in the prosecution's case if he were to decide to call upon the accused to enter his defence and the accused has elected to remain silent. If the answer to that question is in the negative, then no *prima facie* case would have been made out and the accused would be entitled to an acquittal. In our judgment, this is the threshold of proof which requires the prosecution to prove to the satisfaction of the court, the trier of fact, at the end of the prosecution's case. Upon careful and critical analysis of the evidence in its entirety, we agree with the learned judge that the case for the prosecution falls due to the evidence of the investigating officer, PW6 who could not identify the exhibits which she received from PW3 and subsequently sent to PW1 for analysis and the ones tendered before the court of first instance. This failure

had consequently left serious gaps in the continuous chain of evidence relating to the exhibits which in turn had created serious doubt on the identity of the exhibits sent for analysis and raised an inference that the same could have been tampered with. The prosecution had also failed to prove possession of the impugned drugs by the accused at the material time. Unless it can be shown that such findings by the learned judge suffer from some serious errors, or against the weight of evidence or unless we can find substantial or compelling reasons for disagreeing with that findings, this court shall not interfere with such findings of facts by the learned trial judge (*Dato' Yap Peng v. PP* [1993] 2 CLJ 181; [1993] 1 MLJ 337, *PP v. Munusamy* [1980] 1 LNS 63; [1980] 2 MLJ 133; *PP v. Vijaya Raj* [1980] 1 LNS 188; [1981] 1 MLJ 43; *Timhar Jimdani Ong & Anor v. PP* [2010] 3 CLJ 938; *Nasaruddin Daud & Anor v. PP* [2010] 8 CLJ 21). We find no such errors in, nor reasons to disagree with, the learned judge's findings.

[29] In conclusion, upon subjecting the prosecution's evidence to maximum evaluation, we find that the prosecution failed to prove a *prima facie* case against the accused on both charges in accordance with s. 180 of the Criminal Procedure Code. We affirm the decision of the High Court and the accused's acquittal and discharge from the charges. The appeal is dismissed.