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PP v. MOHD ISHAMMUDIN ISMAIL

HIGH COURT MALAYA, KOTA BHARU
AHMAD BACHE JC
[CRIMINAL APPEAL NO: 41LB(A)-18-04-2016]
30 AUGUST 2017

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CRIMINAL LAW: *Dangerous Drugs – Trafficking – Possession of dangerous drugs – Accused detained together with another in car during raid – Drugs found in car compartment where accused was seated as passenger – Car belonged to accused's father – Whether accused had exclusive custody and control of car compartment where drugs were found – Whether accused had knowledge of drugs found in car compartment – Whether others had access to car compartment – Whether non-exclusive custody and control of compartment negated guilt of accused – Whether mere proximity to drugs equated with custody or control – Dangerous Drugs Act 1952, s. 12(2)*

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CRIMINAL PROCEDURE: *Appeal – Appeal against acquittal and discharge – Appeal by prosecution – Offence of possession of dangerous drugs – Accused detained together with another in car during raid – Drugs found in car compartment where accused was seated as passenger – Car belonged to accused's father – Whether accused had exclusive custody and control of compartment where drugs were found – Whether non-exclusive custody and control of compartment negated guilt of accused – Whether accused had knowledge of drugs found in compartment – Whether order of discharge and acquittal ought to be upheld*

E

EVIDENCE: *Adverse inference – Non-calling of witness – Accused detained together with another in car during raid – Drugs found in car compartment where accused was seated as passenger – Car belonged to accused's father – Failure to call owner and driver of car – Possession of dangerous drugs – Whether existence of others could be connected with drugs – Whether evidence of driver and owner essential to prosecution's case – Whether adverse inference could be invoked against prosecution – Evidence Act 1950, s. 114(g)*

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EVIDENCE: *Witness – Accomplice – Whether an accomplice charged together with accused (as a co-accused) could be a prosecution witness – Whether accused would be prejudiced*

A police inspector ('SP2') was manning a roadblock assisted by 12 police personnel in front of R&R Gemang, Jeli, Kelantan. At about 4.30am, SP2 stopped a Proton Saga car ('the car'). As SP2 was approaching towards the car, he saw the front passenger alighting from the car and throwing out an object. SP2 then picked up the said object and found that it was a Thailand Passport bearing the name of Miss Mai Mi Noh Noi So. As that discovery gave rise to suspicion in the minds of SP2, he and his team made an

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inspection on the car. He found that the driver of the car was one Zulkarnain, and the accused was the passenger who sat at the front passenger seat. Upon inspection of the glove compartment of the dashboard of the car, SP2 found one pink-coloured hand phone casing which, upon being opened, revealed a blue-coloured straw and two straws with blue stripes containing drugs. Upon analysis, it was confirmed that the drugs were 0.24 methamphetamine. Both the accused and Zulkarnain were then arrested. The accused was charged together with another person at large under s. 12(2) of the Dangerous Drugs Act ('the Act'), punishable under s. 12(3) of the same Act, and read together with s. 34 of the Penal Code. During trial, six witnesses were called to testify, amongst others, father of the accused/owner of the car ('SP5') Zulkarnain, however, was not called to testify. It was the Magistrate's finding that the car in question was accessible to many people and not accessible to the accused alone but to Zulkarnain and SP5. Hence, at the end of the prosecution's case, the accused was acquitted and discharged by the Magistrate without his defence being called. Dissatisfied, the Public Prosecutor filed the present appeal. The prosecution also raised an issue, namely, whether an accomplice who was charged together with the accused, as a co-accused could be a prosecution witness as well.

Held (confirming order of acquittal and discharge; dismissing prosecution's appeal):

(1) To prove that a person was in custody or possession of something incriminating, three elements must be present. Firstly, he must have knowledge of the thing in his possession. Secondly, he must have in him a power of disposal over that incriminating thing and thirdly, he must be conscious of the possession of the thing. It is also trite that in order to prove exclusive custody or possession of the drugs in question, it was the incumbent duty of the prosecution to exclude others who might have access to those drugs. Such failure of the prosecution to do so was fatal. (paras 19 & 20)

(2) The drugs were found in the car of which the accused was not the owner of and was driven by Zulkarnain. Zulkarnain was not called. It was not known whether he was the person intended to be jointly charged by the prosecution. His whereabouts was not made known by the prosecution. Whether his statement was recorded by the police was also not made known. What was apparent was that his witness statement was also not tendered in court. He might well be the owner of the drugs. Without calling him to give evidence to the contrary, this fact of his accessibility and ownership of the drugs remained unrebutted. (para 26)

A **(3)** The possibility of Miss Mai Mi Noh Noi So, whose passport was found in the car, was in the car prior to the incident could not possibly be discounted. The drugs found might well be hers either. The Magistrate failed to make an observation on this fact. Such failure was fatal as the prosecution failed to exclude her accessibility and perhaps ownership of
B the drugs in question. Therefore, the prosecution's failure to exclude others who might have access to the drugs in question, rendered the prosecution's case to collapse and a *prima facie* case not proven. (para 27)

(4) It was incumbent upon the prosecution to call Miss Mai Mi Noh Noi So and Zulkarnain as witnesses, as such failure would also create a gap
C in the prosecution's case and would amount to a suppression of evidence and hence an adverse inference under s. 114(g) of the Evidence Act could be invoked against the prosecution. The non-production of both these witnesses gave rise to an irresistible inference that if both had been called, their evidence would be unfavourable to the prosecution. Such
D benefit of the failure of the prosecution must be given to the accused. The prosecution's failure to exclude others having access to the drugs in question was sufficient to acquit and discharge the accused without his defence being called. (paras 28 & 34)

(5) The prosecution failed to prove knowledge of the accused of the drugs
E in question. SP2 agreed under cross-examination that the drugs were found concealed, and could not be easily seen and was found amongst other things, in the glove compartment of the dashboard. The fact that the accused did not make any attempts to run away and cooperated with SP2 when the drugs were discovered even though he was not handcuffed
F yet, added cogency to the argument that the accused had no knowledge of the drugs but Zulkarnain, the driver, had such knowledge. (para 36)

(6) An accomplice or a co-accused could not be a prosecution witness at the same time. If the prosecution had wanted him to be a witness, this should have been made known and decided earlier by the prosecution
G before the start of the trial so that the prosecution could opt not to charge him in the first place as he would be made a prosecution witness. To allow an accomplice or a co-accused to be both a prosecution witness and an accused will run foul of the law and cause gross injustice to the other co-accused, as this change of stance will greatly prejudice the co-
H accused. The Criminal Procedure Code and the Evidence Act had systematically made specific distinction regarding the roles and rights of an accused and witnesses. (paras 44 & 45)

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Case(s) referred to:
Ahmad Azhari Ahmad Zaini v. PP & Other Appeals [2015] 1 CLJ 157 CA ***(refd)***
Azizan Yahaya v. PP [2012] 8 CLJ 405 CA ***(refd)***
Azmer Mustafa v. PP [2014] 8 CLJ 413 CA ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Formi Afta Ahmad & Anor v. PP [2013] 9 CLJ 183 CA ***(refd)***
Husin Sitorus v. PP [2012] 7 CLJ 205 CA ***(refd)***
Ibrahim Mohamad & Anor v. PP [2011] 4 CLJ 113 FC ***(refd)***
Kobra Taba Seidali v. PP [2014] 2 CLJ 12 CA ***(refd)***
Law Sie Hoe v. PP [2014] 1 LNS 269 CA ***(refd)***
Lean Siew Boon & Anor v. PP & Another Case [2013] 1 LNS 979 CA ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Mirza Murtala v. PP [2010] 4 CLJ 150 CA ***(refd)***
Mohamad Abdul Rahman v. PP [2013] 7 CLJ 843 CA ***(refd)***
Ooi Chee Seong & Anor v. PP [2014] 7 CLJ 505 CA ***(refd)***
PP v. Dato' Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 215 HC ***(refd)***
PP v. Lin Lian Chen [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC ***(refd)***
PP v. Mohd Noor Shafie [2016] 1 LNS 1229 HC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP lwn. Nor Alip Mohd Khandar [2009] 1 LNS 612 HC ***(refd)***
PP v. Paosi Arong & Anor [2010] 7 CLJ 1049 HC ***(refd)***
Rohaida Ahmad Basri v. PP [2017] 8 CLJ 63 HC ***(refd)***
Roslan Hanapi v. PP [2015] 6 CLJ 464 CA ***(refd)***
Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC ***(refd)***
Toh Ah Loh & Mak Thim v. Rex [1948] 1 LNS 72 HC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 50(2)
Criminal Procedure Code, s. 112
Dangerous Drugs Act 1952, ss. 12(2), (3)
Evidence Act 1950, s. 114(g)
Penal Code, s. 34

For the prosecution - Shaharaliza Ab Razak; DPP
For the accused - Ahmad Nuri Khairuddin; M/s Nurie Khairuddin & Co

Reported by Sandra Gabriel

JUDGMENT

Ahmad Bache JC:

Background

[1] The respondent/accused was charged together with another person at large for an offence of having in their custody dangerous drugs ie, 0.24g of methamphetamine, an offence under s. 12(2) of the Dangerous Drugs Act 1952, punishable under s. 12(3) of the same Act, and read together with s. 34 of the Penal Code. At the end of the prosecution's case, the respondent/accused was acquitted and discharged by the learned Magistrate without his defence being called.

[2] Dissatisfied, the Public Prosecutor filed an appeal to this court. After hearing submissions by both parties, this court affirmed the decision of the learned Magistrate, and affirmed the discharge and acquittal.

[3] Dissatisfied with that decision, the Public Prosecutor filed an appeal against the decision of this court.

[4] These are the grounds for the decision.

The Charge

[5] The charge against the respondent/accused was as follows:

> Bahawa kamu bersama-sama seorang lagi yang masih bebas pada 06/06/2013, jam lebih kurang 4.30 pagi, bertempat di SJR KM 91.3 Jalan Hadapan R&R Gemang, Ayer Lanas, di dalam Daerah Jeli, dalam Negeri Kelantan, telah didapati dalam kawalan kamu dadah berbahaya jenis methamphetamine, berat bersih 0.24 gram. Oleh yang demikian itu, kamu telah melakukan satu kesalahan di bawah Seksyen 12(2) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 12(3) akta yang sama dan di baca bersama Seksyen 34 Kanun Keseksaan.

The Fact Of The Case

[6] On 6 June 2013, Inspektor Mohd Afif Farhan bin Mohd Nor (SP2) was manning a roadblock assisted by 12 police personnel in front of R&R Gemang, Jeli, Kelantan.

[7] At about 4.30am, SP2 stopped a Proton Saga car with the registration number WCS 6961. The car then pulled over to the left side of the road and stopped. As SP2 was approaching towards the car, he saw the front passenger alighted from the car and threw out an object. SP2 then picked up the said object and found that it was a Thailand passport bearing the name of Miss Mai Mi Noh Noi So.

[8] As that discovery gave rise to suspicion in the minds of SP2, he and his team made an inspection of the car. He found that the driver of the car was one, Zulkarnain, and that the respondent/accused was the passenger who sat at the front passenger seat.

[9] Upon inspection of the glove compartment of the dashboard of the car, SP2 found one pink coloured handphone casing (P2) which upon being opened, SP2 found one blue coloured straw (P6) and two straws with blue stripes containing drugs (P7 A and B).

[10] Both the respondent/accused and Zulkarnain was arrested and surrendered to SP6 (IO) by SP2. The analysis of the drugs by the chemist found that P6 and P7 contained dangerous drugs ie, methamphetamine. Hence the charge against the appellant/accused.

[11] It is pertinent to mention here that during the trial, six witnesses were called as follows:

SP1 (photographer), SP2 (arresting officer), SP3 (chemist), SP4 (store keeper), SP5 (father of the accused/owner of the car) and SP6 (investigating officer). Zulkarnain was not called to testify.

Question Of Law Posed

[12] As required under s. 50(2) of the Courts of Judicature Act 1964, the Public Prosecutor had posed the following questions of law:

a) Sama ada seorang rakan sejenayah yang merupakan tertuduh di bawah seksyen 34 Kanun Keseksaan boleh dijadikan saksi pendakwaan.

b) Sama ada cabaran kepada keterangan saksi pendakwaan adalah satu keterangan afirmatif yang setaraf dengan keterangan tertuduh sendiri, dan ia boleh dijadikan asas untuk satu dapatan tiada kes *prima facie* terhadap tertuduh.

Findings Of The Magistrate

[13] The learned Magistrate had made an observation that the owner of the car was SP11 who is the father of the accused. Apart from him and the accused, Zulkarnain had been using the car since four days before the incident ie, since 2 June 2013.

[14] At p. 11 of the appeal record, this was what the learned Magistrate said:

> Di dalam kes ini jelas daripada keterangan yang ada bahawa semasa kejadian berlaku OKT telah di tangkap bersama seorang lagi didalam kereta tersebut yang di kenali sebagai Zulkarnain yang juga merupakan pemandu kenderaan tersebut.
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> SP5 pula didalam keterangannya mengakui bahawa beliau adalah pemilik kenderaan tersebut. Pada tarikh kejadian beliau telah membenarkan anaknya iaitu OKT bersama Zulkarnain untuk mengunakan kenderaan tersebut untuk pulang ke Kedah dari Terengganu. Beliau juga mengatakan sebelum tarikh kejadian tersebut OKT bersama Zulkarnain telah berada di rumahnya di Terengganu selama 4 hari. Dimana sepanjang tempoh tersebut OKT dan Zulkarnain ada mengunakan kenderaan tersebut.
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> Soalan: Dalam tempoh 4 hari sebelum 6.6.2013 kawan OKT ada mengunakan kenderaan tersebut?
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> Jawapan: Pernah.
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> Soalan: Berapa kali kawan OKT pakai?
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> Jawapan: Ada beberapa kali saya Nampak.
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> Soalan: Sewaktu itu dia pandu seorang atau dengan OKT?

A Jawapan: Kadang-kadang ada dia pandu seorang dan kadang-kadang ada mereka berdua.

Soalan: Zulkarnain minta kebenaran awak untuk guna?

Jawapan: Kereta itu boleh digunakan bila-bila masa.

B **[15]** Hence the learned Magistrate made a finding of fact that the car in question was accessible to many people and not accessible to the accused alone but to Zulkarnain and SP5. However Zulkarnain was not called to give evidence.

[16] At p. 12 of the appeal record, this was what the learned Magistrate C said:

> Ia adalah jelas dari keterangan yang ada OKT bukan seorang sahaja yang mempunyai akses terhadap kenderaan tersebut tetapi juga oleh Zulkarnain dan SP5 sendiri. Oleh itu .Mahkamah mendapati intipati pemilikan eksklusif ini gagal dipenuhi.
>
> D Disamping itu didalam kes ini pihak pendakwaan juga gagal memanggil Zulkarnain sebagai saksi pendakwaan mahupun menawarkan beliau kepada pihak pembelaan, walaupun segala keterangan yang ada jelas menunjukan bahawa OKT ditangkap bersama Zulkarnain di dalam kereta tersebut. Beliau merupakan saksi yang penting bagi kes ini ketiadaan beliau mencacatkan kes pendakwaan.
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Analysis And Findings Of This Court At The End Of Prosecution's Case

The Prima Facie Test

[17] It is trite that this court is to subject the case of the prosecution to a F maximum evaluation of the evidence of all their witnesses at the end of the prosecution's case. This exercise necessarily involves subjecting all the evidence of the prosecution witnesses (including the credibility of its witnesses) to strict scrutiny (*PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457, *Balachandran v. PP* [2005] 1 CLJ 85, *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734 and *PP v. Dato' Seri Anwar Ibrahim (No. 3)* [1999] 2 CLJ 215). If there G are any infirmities in the prosecution's case, then the benefit of the prosecution's failure should be given to the defence. Hence, as could be seen in the following paragraphs, this court too had applied the aforementioned principles in the analysis that it had carried out at the end of the prosecution's case.

H **[18]** The learned Magistrate was right when he followed this path. This was what he said at pp. 9 and 10 of the appeal record:

> Tangungjawab mahkamah di akhir kes pendakwaan adalah untuk menilai secara maksima keterangan yang ada sebelum OKT di panggil membela diri. Di dalam kes *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 telah diputuskan: I

> After the amendments to ss. 173(f) and 180 of the CPC, the statutory test has been altered. What is required of a Subordinate Court and the High Court under the amended sections is to call for the defence when it is satisfied that a *prima facie* case has been made out at the close of the prosecution case. This requires the court to undertake a maximum evaluation of the prosecution evidence when deciding whether to call on the accused to enter upon his or her defence. It involves an assessment of the credibility of the witnesses called by the prosecution and the drawing of inferences admitted by the prosecution evidence. Thus, if the prosecution evidence admits of two or more inferences, one of which is in the accused's favour, then it is the duty of the court to draw the inference that is favourable to the accused.

The Prosecution's Case

[19] It is trite that to prove that a person is in custody or possession of something incriminating, three elements must be present. First, he must have knowledge of the thing in his possession. Secondly, he must have in him a power of disposal over that incriminating thing and thirdly, he must be conscious of the possession of the thing as propounded by Justice Gorden Smith in *Toh Ah Loh & Mak Thim v. Rex* [1948] 1 LNS 72; [1949] 1 MLJ 54 and followed by the Court of Appeal in *Law Sie Hoe v. PP* [2014] 1 LNS 269.

[20] It is also trite that in order to prove exclusive custody or possession of the drugs in question, it was the incumbent duty of the prosecution to exclude others who might have access to those drugs. This court had on few occasions referred to the many instances where such failure of the prosecution to exclude others who might have access to the drugs in question was fatal.

[21] In the case of *Rohaida Ahmad Basri v. PP* [2017] 8 CLJ 63, this court had ruled that the prosecution's failure to call her son to exclude the possibility of access by him, who was arrested together with her in the house and the failure to tender his police statement (s. 112 statement) CPC, was fatal. In the case of *PP v. Mohd Noor Shafie* [2016] 1 LNS 1229 this court had found that the failure of the prosecution to call Zahid to exclude the possibility of him having access to the drugs, who was found to have been in the house before the raid but had made a quick escape before the police managed to enter the house, was fatal.

[22] In deciding those cases, this court had found support from many high authorities including the following.

[23] In *Husin Sitorus v. PP* [2012] 7 CLJ 205 the prosecution did not exclude the three men who were sleeping in the wheelhouse of the boat at the time of the police raid. The Court of Appeal had ruled that there was no *prima facie* case, and on the need to exclude, Azhar Ma'ah JCA (as he then was) said:

A [15] There is a welter of authoritative precedents which have held that for possession to be established, accessibility by others to the place where the drugs are found should be excluded by evidence by the prosecution *PP v. Kang Ho Soh* [1991] 3 CLJ 2914; [1991] 3 CLJ (Rep) 557 HC, *PP v. Tang Chew Weng* [1969] 1 LNS 141 HC. The onus is not on the defence to prove possibility of access by others but on the prosecution to exclude
B such possibility and the issue must be answered in favour of the appellant if there were more than one way in which the evidence adduced by the prosecution might be viewed such as in the present case, implicating the appellant or the other persons who were present in the boat (*Abdullah Zawawi Yusoff v. PP* [1993] 4 CLJ 1 SC). In other words exclusivity of custody and control of the drugs ought to be established by the
C prosecution.

[24] In the case of *Azizan Yahaya v. PP* [2012] 8 CLJ 405, the illegal drugs were found in the room occupied by the appellant and his wife. At the same time, the said room was also accessible to the other occupants of the house who were the appellant's children. The prosecution did not call them but
D offered them to the defence. On the need to exclude Aziah Ali JCA, said:

[8] We find from the evidence adduced by the prosecution that though the room where the drugs were found was occupied only by the appellant and SP4 but it is pertinent to note that evidence also showed that the room was accessible to all the other occupants in the house. SP4 testified
E that she and the appellant occupied the main bedroom and the children occupied the other two rooms. In cross-examination SP4 agreed that everybody in the house had access to the room (p. 28 appeal record). The room was unlocked. Thus whilst the occupants of the room were the appellant and SP4 both of whom would have had complete access to the
F room, it is also apparent that their three children too had access to the room. Yet SP4 was not charged although she was remanded.

[9] We find that the testimony of SP4 regarding access to the room was hardly challenged. SP5 under cross-examination had also agreed that the appellant's children probably had access to the appellant's room. He was not re-examined on this issue. We agreed with learned counsel that the
G learned judge had failed to analyse or assess these testimonies. The prosecution has failed to discharge its bounden duty of excluding access to the appellant's room by others.

[25] Similarly in *Mohamad Abdul Rahman v. PP* [2013] 7 CLJ 843 where the room where the drugs were found was not locked and was accessible to
H all, the Court of Appeal said:

[25] We find that in the instant appeal the prosecution had failed to discharge that duty. We are reminded of the Federal Court's decision in *Ti Chuee Hiang v. PP* [1995] 3 CLJ 1; [1995] 2 MLJ 433 and wish to reiterate what was stated by Edgar Joseph Jr FCJ at pp. 6-7 (CLJ), p. 440 (MLJ):

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> ... while the prosecution has a complete discretion as to the choice of witnesses to be called at the trial ... it also has a duty to call all of the necessary witnesses to establish proof against the accused beyond all reasonable doubt, and if, in the exercise of its discretion, it fails to fulfil this obligation, which is nothing less than a statutory duty, the accused must be acquitted.
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> [26] Likewise, the appellant in the instant appeal ought to have the benefit of the prosecution's failure.

[26] Back to the case in hand, the drugs were found in the car of which the accused was not the owner and was driven by one, Zulkarnain. Zulkarnain was not called. It was not known whether he was the person intended to be jointly charged by the prosecution. His whereabouts was not made known by the prosecution. Whether his statement was recorded by the police was also not made known. What was apparent was that his witness statement was also not tendered in court. He might well be the owner of the drugs. Without calling him to give evidence to the contrary, this fact of his accessibility and ownership of the drugs remains unrebutted.

[27] It is to be noted here that the possibility of Miss Mai Mi Noh Noi So, whose passport was found in the car, was in the car prior to the incident cannot possibly be discounted. The drugs found might well be hers either. The learned Magistrate failed to make an observation on this fact. In the case of *Lean Siew Boon & Anor v. PP & Another Case* [2013] 1 LNS 979; [2014] 2 MLJ 572, the prosecution failed to call one, Koay Gim Bee whose insurance policy was found in the condominium unit where the drugs were found. The court ruled that it was fatal. Similarly, in this case, such failure is fatal as the prosecution failed to exclude her accessibility and perhaps ownership of the drugs in question.

[28] Further, it is incumbent upon the prosecution to call Miss Mai Mi Noh Noi So and Zulkarnain as witnesses, as such failure would also create a gap in the prosecution's case and would amount to a suppression of evidence and hence an adverse inference under s. 114(g) of the Evidence Act 1950 can be invoked against the prosecution. If both of them were called, they could have shed some light on the ownership of the drugs and could give evidence exculpating the respondent/accused. The non-production of both these witnesses gave rise to an irresistible inference that if both had been called, their evidence would be unfavourable to the prosecution.

[29] In the case of *Ooi Chee Seong & Anor v. PP* [2014] 7 CLJ 505; [2014] 3 MLJ 593, the Court of Appeal opined that the failure by the prosecution to exclude one Ang Kim Hock who was the actual occupier of the condo in which the drugs were recovered also had created a gap in the prosecution's case and s. 114(g) of the Evidence Act can be invoked.

[30] Moreover, the failure of the prosecution to tender the statements recorded from both of them crippled further the prosecution's case.

[31] The Court of Appeal in *Azmer Mustafa v. PP* [2014] 8 CLJ 413 said:

> (3) It is purely a question of fact on whether a particular witness is material or otherwise. What is of importance is to consider whether the material witness is essential to the unfolding of the narratives on which the prosecution's case is based. The prosecution failed to secure Yana's attendance in court and the failure to tender Yana's statement recorded under **s. 112 of the Criminal Procedure Code** crippled the prosecution's case. Further, the non-production of Yana gave rise to the adverse inference that if she had been called, her evidence would be unfavourable to the prosecution. That being the case, the presumption under **s. 114(g) of the Evidence Act 1950** must be invoked against the prosecution.

(See also the case of *Kobra Taba Seidali v. PP* [2014] 2 CLJ 12.)

[32] In the case of *Ti Chuee Hiang v. PP* [1995] 3 CLJ 1, the Federal Court said:

> It is clear law that while the prosecution has a complete discretion as to the choice of witnesses to be called at the trial, it also has a duty to call all of the necessary witnesses to establish proof against the accused beyond all reasonable doubt, and if, in the exercise of its discretion, it fails to fulfil this obligation, which is nothing less than a statutory duty, the accused must be acquitted.

[33] In the Federal Court case of *Ibrahim Mohamad & Anor v. PP* [2011] 4 CLJ 113 the court said:

> We find on a proper perusal of the evidence it would show that the prosecution had failed to exclude the possibility of others having access to the said vehicle. No evidence whatsoever was adduced by the prosecution to exclude the possibility that Zainuddin and/or other individuals had access to the vehicle prior to the date of arrest. This is further compounded when the courts below erroneously took the position that the failure to call Zainuddin is not fatal as he was not together with both the accused when they were arrested. We also noted even Zainuddin's statement that was taken from him was not adduced and tendered as evidence pursuant to s. 32(1)(i) of the Evidence Act 1950 if at all for some valid reasons Zainuddin could not be called to give evidence.

[34] This court opined that such benefit of the failure of the prosecution must be given to the respondent/accused. On this ground alone of the prosecution's failure to exclude others having access to the drugs in question is sufficient to acquit and discharge the respondent/accused without his defence being called.

[35] Other relevant authorities on this point where drugs were found in the car include *PP v. Paosi Arong & Anor* [2010] 7 CLJ 1049; *Ahmad Azhari Ahmad Zaini v. PP & Other Appeals* [2015] 1 CLJ 157; *Formi Afta Ahmad & Anor v. PP & Another Appeal* [2013] 9 CLJ 183.

[36] This court also found that the prosecution had failed to prove knowledge of the respondent/accused of the drugs in question. SP2 (raiding/arresting officer) agreed under cross-examination that the drugs were found concealed (in a telephone casing – P2), and cannot be easily seen and was found amongst other things in the glove compartment of the dashboard. Further, the fact that the respondent/accused did not make any attempts to run away and cooperated with SP2 when the drugs were discovered even though he was not handcuffed yet, added cogency to the defendant's argument that the accused had no knowledge of the drugs but Zulkarnain, the driver had such knowledge.

[37] Further, mere proximity to the drugs cannot be equated with custody or control, what more was that the car was not his and it was driven by Zulkarnain. It must further be shown, which the prosecution had not, that the respondent/accused either had physical care of the casing (P2) which contained the drugs or had dominion over it (see *Roslan Hanapi v. PP* [2015] 6 CLJ 464).

[38] This court also found that the infirmities in the prosecution's case were further compounded by the poor investigation by the investigating officer (SP6). No evidence was led by him as to why Zulkarnain was not brought to court to testify and if absconded, what were the efforts made to trace him and the outcome of it. No evidence was adduced to explain whether his statement was ever recorded, and no explanation was given as to why his statement was not tendered. All this had undermined the prosecution's case.

[39] Having subjected all the evidence to strict scrutiny (on maximum evaluation) and this court having asked itself this question: if I decide to call 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? This court answers in the negative.

[40] Having answered in that manner, this court rules that the prosecution had failed to make out a *prima facie* case, and thereby confirmed the order of acquittal and the discharge by the Magistrate.

Conclusion

[41] In the upshot, the appeal by the Public Prosecutor was dismissed and the finding of the Magistrate was affirmed.

[42] For completeness, this court will now answer the questions of law posed.

[43] The first question is as to whether an accomplice who was charged together with the accused (as a co-accused) can be a prosecution witness as well?

[44] The answer is absolutely in the negative and is unprecedented. An accused person cannot be a prosecution witness at the same time. If the prosecution had wanted him to be a witness, this should have been made known and decided earlier by the prosecution before the trial starts so that the prosecution can opt not to charge him in the first place as he will be made a prosecution witness.

[45] To allow an accomplice or a co-accused to be both a prosecution witness and an accused will run foul of the law and cause gross injustice to the other co-accused, as this change of stance will greatly prejudice the co-accused. Further, the Criminal Procedure Code and the Evidence Act had systematically made specific distinction regarding the roles and rights of an accused and witnesses. For example, an accused if he becomes a prosecution witness has no right to remain silent but as an accused he has such right.

[46] Regarding the second question of law, this court is of the considered opinion that any challenges mounted by the defence in the form of cross-examination against the prosecution's witness at prosecution stage may or may not amount to a failure to prove a *prima facie* case by the prosecution. This is because it all depends on the facts and circumstances of each case. For example, if the defence merely suggest or put a proposition into the mouth of a prosecution witness, that is not evidence (see *PP lwn. Nor Alip Mohd Khandar* [2009] 1 LNS 612, *Mirza Murtala v. PP* [2010] 4 CLJ 150 (CA). It just merely acts as a notice by the defence to challenge the fact established by the prosecution. The defence still has a duty to establish that fact or raise a reasonable doubt on that fact, when defence is called, unless that prosecution witness answered affirmatively in favour of the accused/defence which evidence may culminate in the failure of the prosecution to prove a *prima facie* case.

[47] However, the defence has all the right to raise his defence at the earliest possible time, that is at the prosecution's stage, as affirmed in the Supreme Court case of *PP v. Lin Lian Chen* [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285; [1992] 2 MLJ 561 SC, where the exculpatory cautioned statement of the accused was tendered at the prosecution's stage as part of the defence evidence.

[48] Whilst a challenge on the prosecution witness by the defence at the prosecution stage might not carry the same weight as the affirmative evidence of the accused himself at defence stage (as the burden lies on the prosecution to prove its case beyond reasonable doubt throughout, until the end of the trial), any infirmities or shortcomings by the prosecution especially at prosecution stage will have the benefit shifted in favour of the defence, as can be seen in the case at hand. Sometimes, a challenge can be sufficient enough to raise a reasonable doubt on the prosecution's case culminating in the failure of the prosecution to prove a *prima facie* case too.

[49] This is evident in this case at hand where the prosecution's failure to exclude others who might have access to the drugs in question, rendered the prosecution's case to collapse and a *prima facie* case not proven.