IN THE HIGH COURT OF MALAYA

AT GEORGETOWN PENANG

[CRIMINAL TRIAL NO. 45A-25-062016]

BETWEEN

PUBLIC PROSECUTOR

AND

LINGESWARAN NAGASAMY

CRIMINAL LAW: *Dangerous drugs - Trafficking - Custody and control - Drugs were found in a first aid kit of an unlocked drawer in a shed where accused was caught - Drugs concealed in drawer of table - Whether custody and control of drugs involves both ability to physically deal to exclusion of others and having knowledge of presence of drugs - Whether accused had power to deal with things in unlocked drawer - Whether proof of proximity alone was adequate - Whether accused had exclusive access to shed*

[Prosecution failed to prove a *prima facie* case against accused. Accused was ordered to be discharged and acquitted.]

Case(s) referred to:

*Adhy Tedjajadi v. PP Criminal Appeal no. P-05-67-03/2014 (**refd**)*

*Ali Hosseinzadeh Basher v. Public Prosecutor Criminal Appeal no. B-05-36-211 (Unreported) (**refd**)*

*Amri Ibrahim & Anor v. PP [2017] 1 CLJ 617 FC (**refd**)*

Azizan Yahaya v. PP [2012] 8 CLJ 405 CA (***refd***)

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

Francis Abuchi Odike v. PP [2015] 1 LNS 928 CA (***refd***)

Gooi Loo Seng v. Public Prosecutor [1993] 3 CLJ 1 SC (***refd***)

Gunalan Ramachandran & Ors v. PP [2004] 4 CLJ 551 CA (***refd***)

Hendra Kozama v. PP [2018] 1 LNS 6 CA (***refd***)

Hussin Mohamad v. PP & Another Appeal [2016] 10 CLJ 59 CA (***refd***)

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

Jonaidi Mansor v. PP [2002] 1 CLJ 730 CA (***refd***)

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

Lee Ah Seng & Anor v. PP [2007] 5 CLJ 1 FC (***refd***)

Mazlan bin Mustaffa v. PP Rayuan Jenayah P-05-212-08/2012 (unreported) (***refd***)

Mazlani Mansor & Ors v. PP [2013] 1 LNS 1292 CA (***refd***)

Mohamad Abdul Rahman v. PP [2013] 7 CLJ 843 CA (***refd***)

Muhammad Nazir Jamaludin v. PP [2010] 7 CLJ 348 CA (***refd***)

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

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

Pie Bin Chin v. Public Prosecutor [1983] 1 LNS 70 HC (***refd***)

PP v. Ahmad Nashiri Abdul Razak [2014] 7 CLJ 749 CA (***refd***)

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

*PP v. Majiddi Abdul Majid [2002] 1 LNS 336 HC (**refd**)*

*PP v. Mazlan Mustaffa [2011] 1 CLJ 964 CA (**refd**)*

*PP v. Mohd Farid Mohd Sukis & Anor [2002] 8 CLJ 814 HC (**refd**)*

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

*PP v. Mohd Sairi Abdul Samat [2013] 10 CLJ 30 CA (**refd**)*

*PP v. Mohd Nizam Abdul Kassim & Anor [2016] 1 CLJ 1046 HC (**refd**)*

*PP v. Syed Muhammad Faysal Syed Ibrahim [2004] 1 LNS 159 HC (**refd**)*

*PP v. Tan Kim Piow [2006] 3 CLJ 717 CA (**refd**)*

*PP v. Wong Moy [1988] 2 CLJ 521 HC (**refd**)*

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

*Public Prosecutor v. Lee Eng Kooi [1993] 2 CLJ 534 HC (**refd**)*

*Public Prosecutor v. Lin Lian Chen [1992] 1 CLJ Rep 285 SC (**refd**)*

*Romi Amora Amir v. PP [2011] 1 CLJ 870 CA (**refd**)*

*Roslan Abdullah v. PP [2010] 1 CLJ 685 CA (**refd**)*

*Saludin Surif v. Public Prosecutor [1997] 3 CLJ 529 CA (**refd**)*

*Samundee Devan Muthu Kerishnan v. PP [2010] 3 CLJ 269 FC (**refd**)*

*Su Ah Ping v. Public Prosecutor [1979] 1 LNS 100 FC (**refd**)*

*Tarmizi Yaacob & Satu Lagi v. PP [2006] 4 CLJ 472 CA (**refd**)*

*Wong Hong v. PP [2013] 1 LNS 489 CA (**refd**)*

*Wong Swee Chin v. Public Prosecutor [1980] 1 LNS 138 FC (**refd**)*

Legislation referred to:

Criminal Procedure Code, s. 180

Dangerous Drugs Act 1952, ss. 2, 37(b) (d) (da)(xvi), 37A, 39B, First Schedule

Evidence Act 1950, ss. 8, 18

GROUNDS OF JUDGMENT

Preliminary

[1] The Accused is charged as follows:

> *"Bahawa kamu pada 08/09/2014, jam lebih kurang 02.25 petang, di bangsal tidak bernombor, Jarak Atas, 13300 Tasek Gelugor, di dalam Daerah Seberang Perai Utara, di dalam negeri Pulau Pinang, didapati telah mengedar dadah berbahaya methamphetamine berat 331.24 gram. Oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama."*

[2] The trial of the prosecution's case took 8 days on 24 January 2017, 11 and 12 May 2017, 6 June 2017, 28 and 29 September 2017, 3 October 2017 and 12 January 2018. Exhibits P1 to P52 were tendered during the course of the trial.

[3] The prosecution also called the following witnesses:

(i.) Lance Corporal Mohamad Hazwan bin Mat Radzi ("SP1"), a photographer in the Royal Malaysian Police;

(ii.) Corporal Shafee bin Che Hassan ("SP2"), a storekeeper in the Royal Malaysian Police;

(iii.) Corporal Wan Ghazali bin Ahmad ("SP3"), a storekeeper in the Royal Malaysian Police;

(iv.) Afizawati @ Halimah binti Ayub ("SP4"), a chemist in the Malaysia Chemistry Department, Penang branch;

(v.) Jacqueline Bernice John Bosco ("SP5"), a chemist in the Malaysia Chemistry Department, Penang Branch;

(vi.) Inspector Mohd. Hanaffi bin Mohd. Ngiring ("SP6"), an officer in the Royal Malaysian Police;

(vii.) Vasanthi a/p Ramalingam ("SP7"), a public witness;

(viii.) Corporal Azizi bin Ali ("SP8"), a constable in the Royal Malaysian Police;

(ix.) Kumarasen a/l Muniandy ("SP9"), a public witness; and

(x.) Inspector Anastasya binti Abd. Ghafar ("SP10"), an officer in the Royal Malaysian Police and the investigating officer of this case.

[4] After the close of the trial, both sides filed their written submissions supplemented with oral submissions on 19 January 2018 and 5 March 2018.

The Prosecution's Case

[5] Based on the evidence adduced by the prosecution, a police team headed by SP6 on 8 September 2014 on or about 2.25pm raided a house situated at 727, Jarak Atas, 13300 Tasek Gelugor,

Penang ("Premises"). The Premises is owned by the father of SP9 who lives there together with three other family members.

[6] Upon arrival at the Premises, SP6 and his team arrested the Accused outside a shed within the vicinity of the Premises. During the course of the arrest, the Accused attempted to escape but was successfully captured.

[7] On arrest of the Accused, SP6 conducted a body check on him but found nothing incriminating. Subsequently SP6 seized two Nokia mobile phones from the Accused.

[8] SP6 and his team then brought the Accused to the shed and searched the shed. He found a first aid kit in one of the drawers of the table situated in the shed. Upon opening the first aid kit, SP6 found two plastic packets of crystalline substances suspected to be Methamphetamine and two plastic packets of compacted dry leaves suspected to be Cannabis (exhibit P4 (1-18) photographs 3 and 4). He further seized several other things including a metal container labelled *"Fernando Torres"*, a blue *Aladdin* lighter, a small plastic packet of crystalline substances (exhibit P4 (1-18) photographs 17 and 18) and a straw. He also seized a pair of cream coloured *Levi's* jeans trousers, a *K-SWISS* black sweater, a *Nagata* red weighing scale and a *Kickapoo* bottle modified for smoking drugs.

[9] Subsequently, SP6 arrested SP9 who was seen near the shed. Upon the arrest of SP9, SP6 also conducted a body check on him but did not find anything incriminating too. At about 4.00pm, SP1 on the instruction of SP10 took photographs of the case materials, shed and vicinity of the Premises (exhibit P3 (1-22)).

[10] Both the Accused and SP9 were thereafter at about 8.00pm brought to the Narcotics Crime Investigation Department of the

IPD Seberang Perai Tengah. SP6 surrendered the Accused and SP9 as well as handed over the case materials that were seized to SP10. Subsequently SP6 prepared the search list (exhibit P39) and the hand over list (exhibit P40). He also lodged Tasek Gelugor police report no. 002415/14 (exhibit P37). In the meantime, SP10 marked the case materials. At about 11.00pm, SP1 again on the instruction of SP10 took photographs of the case materials (exhibit P4 (1-18)) in the IPD Seberang Perai Tengah.

[11] On 10 September 2014, SP10 handed over four packages of the case materials seized by SP6 that were marked as AT1, AT2, AT3 and AT4 to SP4 for testing and analysis. SP4 duly registered the case materials under laboratory no. 14-FR-P-06592 and issued an acknowledgment of receipt of them (exhibit P18).

[12] The suspected drugs were contained in the aforesaid packages AT1 and AT2. In package AT1, there were two plastic packets of crystalline substances and two packets of dry leaves suspected to be Methamphetamine and Cannabis respectively. As for package AT2, there was a packet of crystalline substances suspected to be Methamphetamine too.

[13] SP4 duly carried out the testing and analysis on the suspected drugs as well as the other case materials that were handed to her by SP10. In SP4's chemist report dated 4 August 2015 after testing and analysis, she confirmed that the two packets of crystalline substances and two packets of dry leaves (exhibit P4 (1-18) photographs 3 and 4) from package AT1 contained nett weight of 331.2 grams (224.1 grams + 107.1 grams) of Methamphetamine and 3.41 grams of Cannabis respectively. The packet of crystalline substances from package AT2 (exhibit P4

(1-18) photographs 17 and 18) contained 0.04 grams of Methamphetamine. These are dangerous drugs as listed/defined in the First Schedule and s. 2 of the Dangerous Drugs Act 1952 ("Act").

SP4 also found traces of Methamphetamine on the weighing scale contained in package AT3.

[14] SP4 then on 5 August returned all the case materials to SP10 who thereafter kept them in the store at the IPD Seberang Perai Tengah under the care of SP3 until production in Court as and when required for the trial.

[15] In addition on 19 September 2014, Inspector Juhaida Abd. Rahman handed to SP5 the case materials contained in packages AT5, AT6 and AT7 and two Hospital Kepala Batas plastic tubes containing blood samples marked 1 and 2 for DNA testing and analysis. SP5 duly registered them under laboratory no. 14-FR-P-06687 and issued an acknowledgement of receipt of them (exhibit P30).

[16] SP5 thereafter duly carried out the testing and analysis. As the result, she positively identified the DNA of the Accused on the jeans trousers and towel contained in package AT7 and the sweater in package AT6 in her chemist report dated 4 November 2014. She returned the case materials to SP10 on 12 January 2015 who thereafter kept them in the store at the IPD Seberang Perai Tengah under the care of SP2 until production in Court as and when required for the trial.

[17] Consequently, the prosecution submitted it has firstly proved that the drugs that were seized by SP6 from the shed in the vicinity of the Premises is 331.24 grams of Methamphetamine as affirmatively tested and analysed by SP4 who is a qualified

chemist. In this respect, reliance is made on the Supreme Court case of *Munusamy v. PP* [1987] 1 MLJ 492 as well as the Court of Appeal case of *Tarmizi bin Yaacob dan satu lagi v. Pendakwa Raya* [2006] 6 MLJ 197 and *Adhy Tedjajadi v. PP Criminal* Appeal no. P-05-67-03/2014 (unreported).

In addition, the prosecution submitted that there is no break in the chain of evidence whatsoever on the movement from the time the drugs were seized, tested and analyzed till production in Court as handled by SP6, SP10 and SP4 following the Federal Court case of *Su Ah Ping v. Public Prosecutor* [1980] 1 MLJ 75 as well as the Court of Appeal cases of *Gunalan Ramachandran & Ors v. PP* [2004] 4 CLJ 551 and *Mazlan bin Mustaffa v. PP* Rayuan Jenayah P-05-212-08/2012 (unreported).

[18] The prosecution further submitted that the drugs that were seized by SP6 were in the possession and full knowledge of the Accused. In this respect, the prosecution relied on the presumption in s. 37(d) of the Act as interpreted by the Court of Appeal in *Jonaidi Mansor v. PP* [2002] 1 CLJ 730. The aforesaid provision in the Act reads as follows:

> *"**37. Presumptions***
>
> *In all proceedings under this Act or any regulation made thereunder-*
>
> …
>
> *(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;

…"

[19] As to custody and control of the suspected drugs, the prosecution contended that the Accused is the owner of the shed as testified by SP9 where the drugs were discovered. The Accused built the shed to carry out scrap metal business about 4 months before the raid by SP6 and his team. In addition, the clothing and towel of the Accused were found in the shed on that day of the raid based on the traces of DNA of the Accused on the seized clothing and towel as tested and analysed by SP5. Thus according to the prosecution, the Accused was not merely present at the shed but an occupier thereto at the material time based on the presumption in s. 37(b) of the Act that reads:

*"**37. Presumptions***

In all proceedings under this Act or any regulation made thereunder-

…

(b) a person, until the contrary is proved, shall be deemed to be the occupier of any premises, if he has, or appears to have, the care or management of such premises;

…"

as well as the Court of Appeal case of *Wong Hong v. Pendakwa Raya* [2013] 1 LNS 489. Furthermore the Accused was proximate to the drugs found in the shed and the prosecution referred to the Court of Appeal case of *Mazlani Mansor & Ors*

v. PP [2013] 1 LNS 1292 where possession of the drugs were affirmatively found by the Court therein.

[20] As to knowledge, the prosecution contended that the Accused knew of the presence of the drugs in the shed by his attempted escape upon the arrival of SP6's raiding team as well as having requested SP6 to search the Premises instead before the shed is searched because the Accused alleged that he lived in the Premises. The Accused also looked shocked and nervous upon arrest by SP6. In this regard, reliance is made on s. 8 of the Evidence Act 1950 on conduct as interpreted by the Federal Court in *Samundee Devan a/l Muthu Kerishnan v. Public Prosecutor* [2010] 2 MLJ 607 and *Khairuddin bin Hassan v. PP* [2010] 7 CLJ 129 as well as the Court of Appeal case of *Public Prosecutor v. Tan Kim Piow* [2006] 5 MLJ 409.

The prosecution thus submitted notwithstanding that the Accused looked calm after he was arrested as testified by SP6, he is nonetheless not exonerated of his guilt when the evidence is considered in totality following the Federal Court case of *Ibrahim Mohamad & Anor v. PP* [2011] 4 CLJ 113 and the Court of Appeal case of *Francis Abuchi Odike v. PP* [2015] 1 LNS 928.

[21] Moreover the prosecution contended that the Accused admitted to the knowledge of the suspected drugs that were seized by his counsel putting to SP10 under cross examination that the drugs belonged to a person in the name of Arun. Consequently, the prosecution relied on s. 18 of the Evidence Act 1950 as interpreted in *Public Prosecutor v. Dato' Seri Anwar bin Ibrahim (No. 3)* [1999] 2 MLJ 1.

[22] Accordingly, the prosecution submitted that the Accused trafficked the suspected drugs based on the nett weight of the drugs following s. 37 (da)(xvi) of the Act that reads:

> *"**37. Presumptions***
>
> *In all proceedings under this Act or any regulation made thereunder-*
>
> *…*
>
> *(da) any person who is found in possession of-*
>
> *…*
>
> *(xvi) 50 grammes or more in weight of Methamphetamine;*
>
> *…"*

The prosecution also referred to the case of *PP v. Mohd Farid bin Mohd Sukis & Anor* [2002] 8 CLJ 814 that the Accused must be deemed to be trafficking in the drugs by the quantity of the drugs involved.

[23] In the circumstances, the prosecution submitted that a prima facie case has been made out against the Accused as charged.

Defence's Reply

[24] The defence made it clear during clarification that the identity and weight as well as the chain of evidence of the movement of the drugs are not challenged.

[25] The principal challenge of the defence at this stage of the case is that the prosecution failed to prove that the Accused was in

possession of the drugs at the material time when the drugs were found in the shed by SP6.

[26] Firstly the defence submitted that the drugs were found in the shed that is accessible to everyone. The shed was in an open space that was neither walled/fenced nor locked. SP9 also conceded that anyone could have access to the shed. In the premises, the defence contended following the Court of Appeal cases of *Azizan Yahya v. PP* [2012] 8 CLJ 405**,** *Mohamad Abdul Rahman v. PP* [2013] 7 CLJ 843 and *PP v. Mohd Sairi Abdul Samat* [2013] 10 CLJ 30 that the Accused therefore did not have custody, control and possession of the drugs at all material times.

[27] Furthermore the defence contended that the Accused never had care, management and control of the Premises which is inextricably connected with shed. There were four occupants in the Premises which included SP9. The electrical supply to the shed is tapped from the Premises. It is not a disputed fact that the Accused did not permanently reside in the Premises but elsewhere. He lived at 235, Lorong 7/3, Taman Makmur 09600 Kulim Kedah. He merely used the shed to operate his scrap metal business as acknowledged by SP6 and SP9. Hence the defence submitted that occupants of the Premises had access to the shed and could have kept the drugs there when they were found by SP6.

[28] The defence also contended that proximity of the Accused to the drugs upon arrest itself does not prove his knowledge of the presence of the drugs in the shed following *PP v. Mohd Nizam Abdul Kassim & Anor* [2016] 1 CLJ 1046.

[29] Thus as to knowledge of the presence of the suspected drugs, it is the defence's submission that the prosecution has to rely on

the conduct of the Accused in attempt to escape to impute that knowledge upon him. There is otherwise no other cogent evidence to link him with the drugs. The defence however contended that SP6's testimony is unreliable because he gave conflicting versions on the crucial fact of how he arrested the Accused. There is ambiguity as to whether the Accused was captured in the shed or whilst he was running in attempt to escape. In this regard, the defence relied on the case of *Public Prosecutor v. Lee Eng Kooi* [1993] 2 MLJ 332 as well as the later Federal Court case of *Lee Ah Seng & Anor v. PP* [2007] 5 CLJ 1 where the Court found no reliable and trustworthy evidence to convict the accused when the prosecution led two versions of evidence.

[30] According to the defence, it is plain from the Supreme Court case of *Gooi Loo Seng v. Public Prosecutor* [1993] 2 MLJ 137 that even if the Accused had knowledge of presence of the drugs, that by itself would not have been sufficient to establish that he was in possession or in control of the drugs if others had access to the shed. In addition, the prosecution failed to adduce other cogent corroborative evidence to establish knowledge on the part of the Accused such as finger-print dusting or identity of the owner of the mobile phone that was found together with the drugs in the drawer of the table in the shed. In this respect, the defence relied on the Supreme Court case of *Public Prosecutor v. Lim Lian Chen* [1992] 1 MLJ 561 as well as the case of *Public Prosecutor v. Majiddi bin Abdul Majid* [2003] 5 MLJ 76 on the former and the the Court of Appeal case of *Hussin Mohamad v. PP & Another Appeal* [2016] 10 CLJ 59 on the latter to exonerate the Accused.

[31] The defence finally contended that the reliance on s. 18 of the Evidence Act 1950 by the prosecution is misconceived because

the provision is inapplicable to illustrate the Accused knew of the presence of the drugs. It must be construed merely as a suggestion by counsel in discharge of the obligation to put the defence case to the prosecution's witnesses following the Federal Court case of *Wong Swee Chin v. Public Prosecutor* [1981] 1 MLJ 212 that the drugs belonged to Arun and nothing more.

[32] Consequently, the defence submitted that the prosecution has failed to establish a *prima facie* case against the Accused who must accordingly be acquitted and discharged without his defence called.

Findings of the Court at the Close of the Prosecution's case

[33] At the close of the prosecution's case, my duty and responsibilities are that as set out in s. 180 of the Criminal Procedure Code which states:

> *"**180. Procedure after conclusion of case for prosecution***
>
> *(1) 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.*
>
> *(2) If the Court finds that the prosecution has not made out a prima facie case against the accused, the Court shall record an order of acquittal.*
>
> *(3) If the Court finds that a prima facie case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.*

(4) For the purpose of this section, a prima facie case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction."

[34] Augustine Paul JCA (later FCJ) explained *prima facie* case as follows in the Federal Court case of *Balachandran v. Public Prosecutor* [2005] 1 AMR 321:

"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 only be overthrown by evidence in rebuttal...The result is that the force of the evidence adduced 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 exist or did happen. On the other hand if a prima facie case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier. In order to make a finding either way 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. As the trial is without a jury it is only with such a positive evaluation can the court make a determination for the purpose of s. 180(2) and (3). Of course in a jury trial where the evaluation is hypothetical the question to be asked would be whether on the evidence as it stands the accused could (and not must) lawfully be convicted. That

is so because a determination on facts is a matter for ultimate decision by the jury at the end of the trial. Since the court, in ruling that a prima facie case has been made out, must be satisfied that the evidence adduced can be overthrown only by evidence in rebuttal it follows that if it is not rebutted it must prevail. Thus if the accused elects to remain silent he must be convicted. 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. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If there is any such doubt there can be no prima facie case."

Furthermore in the subsequent Federal Court case of *Public Prosecutor v. Mohd Radzi Abu Bakar* [2005] 6 AMR 203, Gopal Sri Ram JCA (later FCJ) held as follows:

"8. For the guidance of the courts below, we summarise as follows the steps that should be taken by a trial court at the close of the prosecution's case:

(i) the close of the prosecution's case, subject the evidence led by the prosecution in its totality to a maximum evaluation. Carefully scrutinise the credibility of each of the prosecution's witnesses. Take into account all reasonable inferences that may be drawn from that evidence. If the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused;

(ii) ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent

am I prepared to convict him on the evidence now before me? If the answer to that question is 'Yes', then a prima facie case has been made out and the defence should be called. If the answer is 'No' then, a prima facie case has not been made out and the accused should be acquitted;

(iii) after the defence is called, the accused elects to remain silent, then convict;

(iv) after defence is called, the accused elects to give evidence, then go through the steps set out in Mat v. Public Prosecutor [1963] MLJ 263."

[35] Consequently, I am required to conduct a maximum evaluation test on the prosecution's evidence here including the assessment of the credibility of witnesses called by the prosecution and drawing inferences admitted by the prosecution. If the prosecution's evidence admitted two or more inferences, the one that is more favourable to the defence is generally to be accepted unless the silent or circumstantial evidence otherwise discloses a compelling inference that points to the guilt of the accused.

[36] Accordingly in *Pendakwa Raya v. Kua Tiong Ann* [2009] 7 AMR 788, Vernon Ong Lam Kiat JC (now JCA) held that it is necessary for the prosecution to prove the following ingredients to secure the conviction of an accused person in respect of a charge pursuant to s. 39B of the Act:

(i.) The drugs involved must be a dangerous drug as listed in the First Schedule of the Act;

(ii.) The drugs were in his possession; and

(iii.) He was trafficking in the drugs.

All three ingredients that constituted the offence must be proved by the prosecution *seriatim*. Otherwise, a *prima facie* case is not made out.

[37] I will deal with each of the ingredients of the offence sequentially based on the totality of the evidence adduced including the credibility of the witnesses and the submissions that were canvassed before me.

[38] As to the first ingredient of the offence on the identity of the drugs, I noted that the defence did not challenge the same as pointed out by the prosecution. That notwithstanding, I am satisfied from the evidence led by the prosecution that the drugs seized from the shed are Methamphetamine that weighed 331.24 grams from SP4's testimony. In addition, she confirmed that the drugs are dangerous drugs within the stipulations in the Act.

[39] Furthermore, I am satisfied that there is no break in the evidential chain of movement of the drugs right from the seizure in the shed until production in Court based on the collective testimony of SP6, SP3, SP4 and SP10.

[40] In the premises, I find and hold that the prosecution has proved the first ingredient of the offence under maximum evaluation.

[41] Moving on to the second ingredient of the offence on possession, I noted that the prosecution relied on s. 37(d) of the Act. It is not in dispute that the Accused was in the shed when the raid led by SP6 was about to take place in the afternoon of 8 September 2014 at the Premises. However the prosecution must prove that the Accused had custody or in his control the first aid kit and a small plastic packet that contained the drugs found in the drawer of the table in the shed. From the photographs in exhibit P3 (1-22), it is seen that the drawers of the table were

not locked. The first aid kit was also not locked. In the Court of Appeal case of *Mazlani Mansor & Ors v. PP* (*supra*), Clement Skinner JCA held as follows with emphasis added by me:

> ***"[27] In Chan Pean Leon v. PP [1956] 1 LNS 17; [1956] 22 MLJ 237 Thomson J dealt with the issue of possession by quoting this passage from Stephen's Digest 9th Edition page 304 where the word "possession" as regards the criminal law is described as:***
>
> ***"A movable thing is said to be in the possession of a 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."***
>
> ***Thomson J went on to say:***
>
> ***"Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case."***
>
> *[28] Reverting to the facts of this case, what were the circumstances surrounding the recovery of the cannabis in the house? As the learned Judge found, this was a case where at a very late hour of the night, behind the locked doors of the house which the police had to forcibly kick open to gain entry into, the 3 Appellants were found in the presence of a very large quantity of cannabis, some of which were in plastic bags and some of which were in sugar sacks. In our judgment the correct irresistible*

inference to be drawn from the circumstances just mentioned is that the 3 Appellants were so situated to the cannabis that they had the power to deal with the drugs as owners to the exclusion of all other persons and intended to do so in case of need.

[29] As regards the Appellants denial of knowledge of what was in the plastic bags and the sacks, as the contents were not visible to the naked eye, we find this factor should not be given too much weight. As was said by the Singapore Court of Appeal in Zulfikar Bin Mustaffah v. PP [2001] 1 SLR 633 at p 639 (which was referred to with approval by our Federal Court in PP v. Abdul Rahman Akif [2007] 4 CLJ 337) such assertions should not be given too much weight. Otherwise drug peddlers could escape liability simply by ensuring that any drugs coming into their possession are first securely sealed in opaque wrappings. In our view the circumstances just mentioned by us show that the Appellants' claimed ignorance of the drugs in the plastic bags and sacks is not credible.

[30] With regard to the absence of the Appellants' finger prints on the incriminating items, we find that not much weight can be attached to such evidence either because in criminal law, a person may still be in possession of a movable thing without actually being in physical contact with it. ***What is required is that 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 which, as we found earlier, is the case here****."*

[42] From my literal reading of s. 37(d) of the Act, the Accused is deemed to know nature of the drugs but not the presence or

existence of the drugs. The Prosecution contended that knowledge is generally presumed and relied on the Court of Appeal cases of *Jonaidi Mansor v. PP* (*supra*) and *Ali Hosseinzadeh Basher v. Public Prosecutor* Criminal Appeal no. B-05-36-211 (Iran) (unreported).

In the former case, Gopal Sri Ram JCA (later FCJ) held as follows with emphasis added by me:

> *"There are passages in his judgment which suggest that it is for an accused to show on a balance of probabilities that he did not have custody of the prescribed drug under s. 37(d). Counsel for the appellant submitted that this was an erroneous statement of the law and cited a helpful passage in the judgment of Visu Sinnadurai J in PP v. Tan Tuan Seng [1993] 2 CLJ 557, where he said:*
>
> *Section 37(d) is applicable whenever a person is found to have in his custody or control anything containing dangerous drugs. This section envisages by the use of the word 'anything' that the drugs were contained in a container or receptacle. Once it is established by the prosecution that the accused had in his custody or control the container containing the drugs, the accused is deemed to be in control of the drugs. In such a case, there is no need for the prosecution to go any further to prove knowledge of the drugs on the part of the accused. Though knowledge is an essential ingredient of the offence of possession, the need to establish knowledge as a separate ingredient is dispensed with by the fact that the prosecution by establishing custody or control has activated the presumption of possession. Implicit in the accused having knowledge, is that the element of*

knowledge of the drugs by the accused is also presumed, for without knowledge (presumed) there cannot be possession. In other words, once the presumption has been activated, the accused is deemed to have possession, and as he is deemed to have possession, he is also deemed to have knowledge: see however the views of Wilson J in Choo Teck Soon v. PP [1954] MLJ 63 where a different approach was taken as the wording in the then legislation was different.

It is sometimes said that knowledge, in such circumstances is presumed under the last limb of s. 37(d), that is, by the words 'he is deemed to have known the nature of the drugs'. This appears to be a mis-interpretation of the section as these words merely dispense with the need for the prosecution to establish that the accused knew the exact nature or quality of the drugs*: see Lockyer v. Gibb[1966] 2 All ER 653 at p. 656 CA and as explained in Warner v. Metropolitan Police Commissioner [1968] 2 All ER 356 HL.* ***It should be noted that it is for this reason that the last limb of s. 37(d) does not provide by saying that the accused is also deemed to have knowledge of the drugs. To do so would have been superfluous, since the accused is already deemed to have possession, which of course must mean that he is presumed to have knowledge.***

We are in agreement with the interpretation of s. 37(d) given it by Visu Sinnadurai J..."

Subsequently in the latter case, Abdul Rahman Sebli JCA however held as follows:

"Even assuming it is true that Ashgar does exist and that he did asked the appellant to carry the bag to Malaysia, the question for the trial court to consider was whether the accused had knowledge of the drugs. To prove trafficking, knowledge must of course be established but that is a matter for the appellant to disprove by virtue of section 37(d) of the DDA and not for the prosecution to established at the closed of its case once custody and control had been established..."

[43] In the Federal Court case of *Ibrahim Mohamad & Anor v. PP* [2011] 4 CLJ 113 Zulkefli Makinuddin FCJ (now PCA) however held as follows:

"The law is well settled that having only custody or control over the said drugs is insufficient to establish 'possession'. The physical act or custody must be accompanied with evidence that the accused had knowledge of the said drugs. In the absence of any statutory presumption, knowledge has to be proved either by direct evidence or circumstantial evidence. Mere knowledge alone without exclusivity of either physical custody or control or both is insufficient in law to constitute possession, let alone trafficking."

[44] It therefore seems to me that knowledge of the presence or existence of the drugs has to be proved as part and parcel of proof of custody and/or control of the drugs. The prosecution must prove knowledge of the presence of the drugs on the part of the Accused notwithstanding that specific reliance is made on s. 37(d) of the Act.

Consequently it is seen in *Public Prosecutor v. Abdul Rahman bin Akif* (*supra*) that Arifin Zakaria FCJ (later CJ) held as follows with emphasis added by me:

> *"**[22]** Reverting to the present case, it is therefore incumbent upon the court to scrutinize the entire evidence before the court to see whether an inference can be drawn against the respondent that he knew about the drug in the three packages found in the car. It is not in dispute that the three packages were found hidden in the car under the driver's seat and under the front passenger's seat. He was alone in the car at the material time. One other important factor of relevance is that the car had been in his possession for the past seven months prior to his arrest.*
>
> ***[23] It is true that the trial judge did not make any finding on the issue of knowledge necessary to establish possession of the drugs, as he relied on the cautioned statement in coming to his finding**. **The Court of Appeal on the facts correctly found that there was sufficient evidence to find the respondent to be in custody and control of the three packages found in the car and relying on the presumption under s. 37(d) of the Act the Court of Appeal went on to hold that the respondent was in presumed possession of the drug.***
>
> ***[24] Applying the observations set out in the authorities cited above to the facts in the present case, the irresistible inference that may be drawn in the circumstances is that the respondent all along knew about the drug found in the car**. The fact that they were found hidden under the seats of the car and wrapped in Chinese newspaper would not assist him to negate such an*

inference. From the evidence of PW5 it is clear that little effort was required to uncover what was contained in the three packages. ***Therefore, we are of the view that on the facts and in the circumstances of this case the learned trial judge, properly directed on the law, would have come to the finding that prima facie the respondent had possession of the drug independent of the statutory presumption under s. 37(d) of the Act****."*

[45] Accordingly, custody and/or control of the drugs involves both the ability to physically deal with them to the exclusion of others as well as having knowledge of their presence or existence. They must both be established, otherwise custody or control of the drugs is not proved.

[46] From the circumstances surrounding the discovery of the drugs in the shed herein, I am satisfied that the Accused had the power to deal with the things in the unlocked drawer of the table in the shed including the first aid kit and the contents therein to the exclusion of other persons at the material time. The drugs were contained in packets in the first aid kit as well as in another packet outside the first aid kit, all of which were in that drawer.

[47] As to proof of knowledge, Augustine Paul FCJ held as follows in the Federal Court case of *Palan Dadeh v. PP* [2009] 1 CLJ 717 with emphasis added by me:

"As I said in PP v. Hoo Chee Keong [1997] 2 CLJ SUPP 357; [1997] 4 MLJ 451 at p 459:

Proof of knowledge is very often a matter of inference*.*

Thean J (as he then was) in elaborating on the matter of inferring knowledge said in PP v. Phua Keng Tong & 2

Other Appeals [1986] 1 LNS 129; [1986] 2 MLJ 279 at p 286:

However, in this case, like in many others, proof of knowledge or belief on the part of an accused is a matter of inference from facts. In the case of RCA Corp v. Custom Cleared Sales Pty Ltd [1978] FSR 576; 19 ALR 123, the Court of Appeal in New South Wales in dealing with the question of knowledge of infringement of copyright said at p 478:

***Except where a party's own statements or gestures are relied upon, proof of knowledge is always a matter of inference, and the material from which the inference of the existence of actual knowledge can be inferred varies infinitely from case to case**.*

And the court further said, at p 579:

It seems to us that the principle is more accurately put by saying that a court is entitled to infer knowledge on the part of a particular person on the assumption that such a person has the ordinary understanding expected of persons in his line of business, unless by his or other evidence it is convinced otherwise. In other words, the true position is that the court is not concerned with the knowledge of a reasonable man but is concerned with reasonable inferences to be drawn from a concrete situation as disclosed in the evidence as it affects the particular person whose knowledge is in issue. In inferring knowledge, a court is entitled to approach the matter in two stages; where opportunities for knowledge on the part of the particular person are proved and there is nothing to indicate that there are obstacles to the particular person

acquiring the relevant knowledge, there is some evidence from which the court can conclude that such person has knowledge.

***It is therefore clear that knowledge can be proved by drawing inferences from surrounding circumstances**."*

[48] Put simply, knowledge on the part of an accused person such as the presence of drugs is fact sensitive depending on the peculiar facts and circumstances of each case.

[49] Again on the facts of the case herein, I am satisfied that the Accused was proximate to the drugs because he was in the shed at the material time. However proof of proximity alone is inadequate. In the Court of Appeal case of *Romi Amora Amir v. PP* [2011] 1 CLJ 870, Suriyadi Halim Omar JCA (later FCJ) held as follows:

"Unless knowledge is proved, an item however close to a person, could just be miles away."

Likewise, Collin Lawrence Sequerah JC (now J) held as follows in *PP v. Mohd Nizam Abdul Kassim & Anor* [2016] 1 CLJ 1046:

"[52] It is therefore clear that mere proximity or juxtaposition of the second accused to the drugs without more is insufficient to fasten possession upon him."

[50] In my opinion, knowledge may be imputed upon the Accused through methodical elimination reasoning process based on circumstantial evidence as existed. The Accused managed the shed to carry out his scrap metal business. Hence if the drugs were found exposed or visible on the table proximate to the Accused, it can safely be said that he had knowledge of the presence of the drugs. This is however not the case here. The

drugs were concealed in the drawer of the table. It may still be inferred that the Accused had knowledge of the drugs if the drawers were locked and he had the keys to open them. This is neither the case here too. The drawers were not locked. In this case, it may nonetheless be reasonably inferred that the Accused had the knowledge if only he had exclusive access to the shed. Otherwise, there must be other connecting proof such as finger prints or DNA traces of the Accused found on the packet(s) containing the drugs or that the other surrounding evidence plainly pointed to the Accused having knowledge of the existent of the Drugs.

[51] The cases on exclusive possession, or more accurately in my opinion exclusive access, to the exclusion of others of the drugs found are aplenty. They include *Gooi Loo Seng v. Public Prosecutor* (*supra*), *Saludin bin Surif v. Public Prosecutor* [1997] 3 MLJ 317, *Roslan Abdullah v. PP* [2010] 1 CLJ 685, *PP v. Mazlan Mustaffa* [2011] 1 CLJ 964**,** *Muhammad Nazir bin Jamaludin v. Pendakwa Raya* [2011] 2 MLJ 311, *Azizan Yahya v. PP* (*supra*), *Mohamad Abdul Rahman v. PP* (*supra*), *PP v. Mohd Sairi Abdul Samat* (*supra*) and *PP v. Ahmad Nashiri Abdul Razak* [2014] 7 CLJ 749. Since the facts in these cases are dissimilar to that herein, I do not think it is worthwhile to reproduce them. It can generally be surmised that possession has been found not to be proved when exclusive access to the drugs by the accused persons has not been proved by the prosecution therein. It suffices for me just to quote what was held by Balia Yusof Wahi JCA (now FCJ) in the Court of Appeal case of *Mohammad Abdul Rahman v. PP* (*supra*) on rather analogous facts:

> *"**[20]** Taking into consideration the totality of the evidence, we are of the considered view that the learned*

trial judge had failed to consider that the room where the drugs were found was accessible to others and there was no exclusive custody and control of the drawer by the appellant. Our perusal of the learned trial judge's grounds of judgment did not indicate that His Lordship had made that consideration. In our view, that evidence is material and that failure to consider material evidence does make an error of law beyond argument. (Gotham Construction Co v. Amulya Krishna Ghose And Ors AIR [1968] Cal 91)."

[52] From the evidence adduced here before me, SP9 conceded under cross examination that the shed is accessible to anyone. The relevant excerpts of the notes of proceedings are as follows:

"Q: Soalan saya bukan kata kamu kenal adakah kamu tahu orang-orang yang kawan-kawan yang biasa yang selalu datang ke bangsal tersebut. Soalan saya bukanlah kamu kenal mereka, soalan saya di antara kawan-kawan Linges yang datang ke bangsal itu adakah kawan-kawan yang selalu datang ke bangsal itu yang kamu kenal rupa mereka?

A: Ya, ya, ya kenal.

Q: Kamu juga tahu nama mereka?

A: Tahu.

Q: Apa nama mereka?

A: Arun, Tamilkumar, Doc.

Q: Dan siapa lagi?

A: Selalu dia orang yang datang sana.

Q: Dan kamu kata ada juga pekerja-pekerja ladang juga datang ke bangsal itu?

A: Ya.

Q: Dan bila ditanya oleh DPP tadi kamu kata kawan-kawan dan pekerja-pekerja ladang ini juga pernah datang melepak di bangsal itu, betul?

A: Ya.

Q; Kamu pernah nampak mereka lepak di bangsal itu?

A: Pernah lihat.

…

Q: Tadi kamu kata bangsal itu berdekatan dengan ladang betul?

A: Betul.

Q: Dan ada juga jalan daripada ladang itu ke bangsal?

A: Ada.

…

Q: Dan setuju dengan saya bangsal ini tidak ada apa-apa pagar atau pintu yang boleh dikunci siapa-siapa saja boleh masuk?

A: Ya boleh masuk."

[53] Thus and notwithstanding that the Accused occupied the shed, I however find and hold that the Accused did not have exclusive access to the shed. In the premises, it could not be safely inferred that he had knowledge of the presence or existence of

the drugs in the drawer of the table. The drugs could have been placed there by his friend(s) or the estate worker(s) for safekeeping. In this respect, SP9 answered as follows under cross examination:

> *"Q: Dan setuju dengan saya tanpa pengetahuan Lingeswaran, tanpa pengetahuan kamu sendiri dadah yang polis jumpa di dalam tempat tersebut boleh diletakkan di situ oleh mana-mana kawan-kawan Lingeswaran atau pekerja ladang senyap-senyap mereka letakkan di situ. Kamu setuju dengan saya?*
>
> *A: Setuju."*

[54] There is also no evidence adduced by the prosecution that finger prints or DNA traces of the Accused were found on the packets that contained the drugs which would otherwise be cogent evidence to infer knowledge on his part independent of access to them by other persons as held in the Supreme Court case of *Public Prosecutor v. Lim Lian Chen* (*supra*).There were also no finger prints or DNA traces of the Accused found on the *Nagata* red weighing scale and *Kickapoo* bottle modified for smoking drugs which were found on the table in the shed.

[55] Nevertheless, the prosecution still endeavoured to illustrate that the Accused knew of the presence or existence of the drugs by his conduct of attempting to escape when confronted by the raiding team led by SP6 that afternoon. I noted that Augustine Paul FCJ held as follows in *Palan Dadeh v. PP* (*supra*):

> *"**[36]** ... If there is no evidence to show that the conduct is influenced by any fact in issue or relevant fact as required by s. 8 Evidence Act 1950 ('EA'), then it is not admissible as it would then be an equivocal act justifying inferences*

favourable to the accused being drawn. If it satisfies the requirement of section 8 EA it is admissible. The degree of proof required to establish evidence of conduct would depend on the nature of the conduct. Conduct like the flight of an accused is a more positive act and is easily established. On the other hand conduct like the accused looking stunned, nervous, scared or frightened is very often a matter of perception and more detailed evidence may be required. Once admitted the court cannot resort to any other explanation for the conduct or draw inferences on its own accord to render it inadmissible. The onus is on the accused to explain his conduct pursuant to s. 9 EA …"

[56] The defence however submitted that the testimony of SP6 on this aspect of the conduct of the Accused is equivocal and contradictory. In this regard, SP6 gave three versions during examination in chief itself as seen from the following excerpts of the notes of proceedings:

"Q: OK setibanya di lokasi kejadian sila jelaskan apa berlaku setibanya van Hi Ace ini tiba apa berlaku?

A: Setibanya di tempat kejadian saya bersama anggota terus membuat serbuan di sebuah bangsal.

…

Q: Apabila Inspektor nampak lelaki India ini, apa yang lelaki India ini membuat?

A: Pada masa itu lelaki India itu tersebut sedang berdiri dan seperti pada saya membuat sesuatu di dalam bangsal berkenaan.

Q: Boleh Insp. Jelaskan buat sesuatu itu buat apa itu?

A: Pada saya seolah-olah suspek ini sedang membuat kerja. Saya tak pastilah kerja apa.

Q: Boleh Inspektor jelaskan tak sebab Inspektor kata terus serbu bangsal nampak lelaki ini maknanya turun daripada van terus masuk ke dalam bangsal?

A: Ya, saya Tuan.

Q: Jadi Inspektor masuk ke dalam bangsal ke macam mana?

A: Ya, saya terus masuk ke dalam bangsal tersebut dan tahan lelaki berkenaan.

...

Q: Boleh jelaskan tak kejadian masa Inspektor nampak satu lelaki India itu, apa berlaku di situ?

A: Baik, semasa serbuan suspek nampak saya dan anggota dan beliau telah cuba untuk melarikan diri dengan menuju ke arah kami sebab laluan satu sahaja tetapi berjaya ditahan.

Q: Apa maksud Inspektor ada satu laluan sahaja? Kan Inspektor ramai-ramai dia lari ke arah Inspektor?

A: Ya, dia lari ke arah saya sebab pada masa tersebut saya pada pendapat saya dia pun mungkin nampak anggota yang berada di arah hadapan anggota Task Force tadi so dia berlari ke sebelah tepi ini mengarah ke arah kami pula.

Q: Lepas itu apa jadi?

A: Dia cuba lari tetapi berjaya ditahan.

…

Q: Yang sebenarnya Inspektor tahan lelaki tersebut di dalam bangsal atau di luar bangsalkah macam mana?

A: Berdekatan bangsal.

…

Q: Inspektor boleh tak Inspektor jelaskan tadi Inspektor kata saya terus ke dalam bangsal tahan lelaki, keterangan yang baru Inspektor sebut dia lari ke arah tepi dan Inspektor tahan dia, dia cuba lari. Macam mana Inspektor nak jelaskan daripada sini?

A: Baik saya lari terus ke arah bangsal dan pada masa yang sama lelaki tersebut berlari keluar daripada bangsal menghala ke arah saya kerana bangsal itu adalah tempat terbuka jadi dia terus berlari keluar."

I am however aware SP6 stated that he had made Tasek Gelugor police report no. 002415/14 (exhibit P37) in the evening after the raid which, *inter alia*, stated as follows:

"Suspek telah cuba melarikan diri namun berjaya ditahan."

The prosecution accordingly submitted that SP6 should be excused from the inconsistency in his testimony because there was a long period that had since elapsed between the arrest and the trial. In other words, SP6's imperfect recollection should not be faulted. Reliance is made by the prosecution on the case *Pie bin Chin v. Public Prosecutor* [1985] 1 MLJ 234 and the recent

Federal Court case of *Amri Ibrahim & Anor v. PP* [2017] 1 CLJ 617.

[57] I have reviewed this alleged discrepancy in SP6's testimony very carefully as it concerned a pertinent and material point. I am mindful that it was held by the Federal Court in *Public Prosecutor v. Mohd Radzi Abu Bakar* (*supra*) that if the evidence adduced admitted two or more versions, then the version that is most favourable to the Accused should be accepted. After analysing the SP6's evidence in entirety, I find that SP6 made an honest mistake when he originally testified that the Accused was standing in the shed working when the raid occurred. I therefore accept his later testimony that the Accused fled towards SP6 when he saw the raiding team approaching him. This is corroborated by his contemporaneous police report made on that day.

[58] That notwithstanding, I also accept that the conduct of the Accused fleeing is consistent with him attempting to escape from capture because he was unlawfully operating an unlicensed scrap metal business in the shed as so submitted by the defence. In other words, I do not find that the adverse conduct on the part of the Accused in fleeing from capture per se is adequate to justify the inference that he had knowledge of the presence of the drugs in the shed.

[59] The prosecution further attempted to show knowledge of the presence of the drugs on the part of the Accused by his conduct of informing SP6 upon arrest to search the Premises first instead of the shed. The relevant excerpt of the notes of proceedings reads as follows:

"Q: Suspek itu minta apa?

A: Minta saya periksa rumah tersebut dahulu tapi saya menegaskan untuk memeriksa bangsal tersebut dahulu."

[60] I find that alleged statement of the Accused to be inadmissible because there is no evidence of caution pursuant to s. 37A of the Act having being prior administered by SP6 to the Accused before the statement was uttered: see *Hendra Kozama v. Public Prosecutor* [2018] MLJU 11. In any event, I do not find that the alleged statement is suggestive of guilt or even knowledge of the presence or existence of the drugs on the part of the Accused. The shed is accessory to the Premises occupied by other persons. Since there is no evidence of SP6 having told the Accused on the purpose of the raid, it is in my opinion reasonable in such circumstance for the Accused to have told SP6 to first search the Premises which is the main building. I do not find anything incriminating or suspicious that should be inferred.

[61] The prosecution also attempted to impute knowledge of the presence of the drugs upon the Accused because he looked shocked and nervous upon arrest as well as there were clothing and towel of the Accused found in the Shed as seen from his DNA traces on them as analysed by SP5. I noticed that the prosecution's submission on the disposition of the Accused is rather ambivalent because the Accused was supposedly shocked and nervous upon but was however calm after the arrest. That is baffling. In any event, I do not however find that the shock and nervous reaction of the Accused per se implicated the Accused with the Drugs too because it is also likely as submitted by the defence that the Accused worked in the shed operating an unlicensed scrap metal business. In *Public Prosecutor v. Syed Muhammad Faysal bin Syed Ibrahim* [2004] 6 MLJ 303, VT Singham J held as follows in respect of DNA evidence:

> *"Nevertheless, whole the admission of DNA evidence is recognised in this jurisdiction, it does not speak as to a fact but it is only an incriminating piece of evidence and the DNA profiling establishes no more than that the suspect could be the offender, not that he or she is the offender. It mere tends to show or possibly link a suspect with the crime scene or with the victim but other circumstantial evidence in a criminal trial so as to implicate the suspect or the person charged in court …"*

[62] Finally as to the prosecution's proposition that the Accused knew of the presence of the drugs when his counsel put to the witnesses of the prosecution that the drugs belonged to Arun during cross examination which hence constituted an admission pursuant to s. 18 of the Evidence Act 1950, I think that this must be seen in its proper context. Firstly it was unmistakenly put by counsel as part of his duty pursuant to the *Browne v. Dunn* rule as affirmed by the Federal Court in *Wong Swee Chin v. Public Prosecutor* (*supra*). Secondly, the suggestion of the drugs belonged to Arun cannot *ipso facto* mean that the Accused knew of the existence of the drugs prior to his arrest. The reference to Arun can equally be the explanation of the Accused as to who was likely the possessor of drugs after they were found by SP6. The bottom line in my view is that nothing incriminating can be concluded against the Accused at this stage unless he himself has been asked on it and his corresponding answer incriminated him. Thirdly, the prosecution's relied on s. 18 of the Evidence Act in support of its proposition. The provision reads as follows:

> *"**18. Admission by party to proceeding, his agent or person interested***

> ***(1)*** *Statements made by a party to the proceeding or by an agent to any such party whom the court regards under the circumstances of the case as expressly or impliedly authorized by him to make them are admissions.*
>
> ***(2)*** *Statements made by parties to suits, suing or sued in a representative character, are not admissions unless they were made while the party making them held that character.*
>
> ***(3)*** *Statements made by –*
>
> *(a) persons who have any proprietary or pecuniary interest in the subject matter of the proceeding, and who make the statement in their character of persons so interested; or*
>
> *(b) persons from whom the parties to the suit have derived their interest in the subject matter of the suit, are admissions if they are made during the continuance of the interest of the persons making the statements."*

The prosecution did not tender any case authority to support its reliance on s. 18 of the Evidence Act in analogous circumstance. On careful reading of it, I find and hold that the reliance is misplaced because it should apply only to admissions by parties or persons made outside of the trial. Even if it should apply at trial, it must necessarily be confined to admissions given by witnesses and cannot extend to contents of questions posed by counsel notwithstanding that counsel is an agent of the party in trial.

[63] By reason of the prosecution's failure to adequately prove knowledge of the presence or existence by reason of non exclusive access to the drugs on the part of the Accused in the

circumstances, I find that he did not have custody or control of the drugs. As the result s. 37(d) of the Act could not be invoked. There is in fact also no actual possession of the drugs by him without knowledge of their presence or existence and I so find and hold accordingly. I hence find and hold that the prosecution has failed to establish the second ingredient of possession under maximum evaluation. It is unsafe to find and hold that the Accused was in possession of the drugs from the evidence adduced before me.

[64] Consequently, it is unnecessary for me to make my finding on the third ingredient of the offence on trafficking following *PP v. Wong Moy* [1988] 2 CLJ 521.

Conclusion

[65] For the foregoing reasons, I find and hold that the prosecution has not made out a *prima facie* case against the Accused. Consequently, I order that the Accused be discharged and acquitted.

Dated: 30 MARCH 2018

(LIM CHONG FONG)
Judge
High Court Georgetown Penang

COUNSEL:

For the prosecution - Noor Azrul Abdul Rahman; Pejabat Penasihat Undang-Undang Negeri Pulau Pinang

For the defence - RSN Rayer & M Mathan; R Nethaji Rayer & Co