
GUNALAN RAMACHANDRAN & ORS v. PP
COURT OF APPEAL, PUTRAJAYA
DENIS ONG, JCA; ABDUL HAMID MOHAMAD, JCA; ABDUL AZIZ MOHAMAD, JCA
CRIMINAL APPEAL NOS: W-05-26-2002, W-05-27-2002 & W-05-28-2002
6 AUGUST 2004
[2004] 4 CLJ 551

***CRIMINAL LAW**: Dangerous Drugs Act 1952 - Section 37(j) - Drug in receptacles - Whether 10% refers to receptacles rather than to total weight of Drug*

***CRIMINAL LAW**: Dangerous Drugs Act 1952 - Section 39(B)(1)(a) - Drug trafficking - Samples of Drug for testing - Whether mandatory for 10% of total weight of Drug to be tested - Whether chemist should determine quantity for testing*

***CRIMINAL LAW**: Dangerous Drugs Act 1952 - Section 39(B)(1)(a) - Drug trafficking - Possession - Exclusive possession*

***CRIMINAL LAW**: Dangerous Drugs Act 1952 - Section 39(B)(1)(a) - Knowledge, how inferred*

***CRIMINAL LAW**: Penal Code - Section 34 - Common intention - Whether misdirection on the part of trial judge in considering common intention - Whether inferred from facts and circumstances surrounding case*

***CRIMINAL PROCEDURE**: Fact, finding of - No failure to consider material evidence in making finding of facts - Whether appellate interference warranted*

***EVIDENCE**: Exhibit - Break in chain of evidence - Effect of - Whether fatal to prosecution's case*

A police team led by PW4 raided a squatter house. In the hall of the house were 10 persons. PW4 and his men then gained forcible entry into a room adjoining the hall. The second appellant attempted but failed to resist or obstruct PW4. Together with the first appellant were the second and third appellants who were seated shirtless on the floor. The first appellant dropped a 'heat-sealer' upon seeing PW4. In the presence of the three appellants, the police team conducted a search and seized several packages containing dangerous drugs. These packages were recovered on the floor where the first and second appellants were seated. The police team also seized drug packing paraphernalia. The appellants were convicted by the High Court on a joint charge under s. 39(B)(1)(a) of the Dangerous Drugs Act 1952('the DDA'), read with s. 34 of the Penal Code and sentenced to death. The appellants appealed. On appeal counsel submitted *inter alia* : (i) it was inherently incredible that the first and third appellants were sitting down when PW4 entered the room; (ii) there was a non-direction by the trial judge in that he did not consider it was a joint charge; (iii) the prosecution did not prove exclusive possession of the room by the appellants; (iv) there was

no evidence of knowledge of the drugs, and without knowledge there could be no possession; (v) there was no nexus between the appellants and the drug. No finger printing impression sufficient for analysis could be lifted from the seized drug packages. Hand swaps and nail clippings were also not taken; (vi) there was a serious breach in the chain of evidence; (vii) the judge had wrongly invoked the presumptions under s. 37 (d) and (da) of the DDA; (viii) the judge had found the appellants guilty 'by inference'; (ix) there was no evidence of how many random samples the chemist (PW2) took and what was the weight; and (x) the judge had erred in finding that the defence had failed to cast a reasonable doubt on the prosecution's case.

Held (dismissing the appeal)

Per Abdul Hamid Mohamad & Denis Ong JJCA:

[1] Whether the first and third appellants were sitting down was a question of facts. The trial judge did not fail to consider material evidence adduced in making his finding of facts. He had the advantage of seeing and listening to the witnesses. There was no reason to interfere with his findings or decision.

[2] It was incorrect to say that the trial judge had not considered the question of the joint charge. The judge, had in his grounds of judgment, reproduced the arguments of counsel and the arguments of the DPP. He had also discussed at length the law on s. 34 of the Penal Code, and its ingredients, citing local and foreign authorities. He also made a specific finding regarding the second appellant, *vis-a-vis* s. 34. There was no misdirection on the part of the judge on the issue of common intention whether in law or on facts. His findings were clear and correct. *Shamsuddin Hassan & Anor v. PP [1991] 3 CLJ 2414; [1991] 1 CLJ (Rep) 428* (distd); *Too Yin Sheong v. PP* [1999] 1 SLR 682 (CA (Singapore)).

[3] In the instant appeal, the appellants were found with the drugs and drug-packing paraphernalia in a room where only the three of them were present and entry into it by the police was resisted. The question of exclusive possession of the room was not material. The issue was whether they had the exclusive possession of the drugs.

[4] Knowledge is to be inferred from the facts and the surrounding circumstances of a case. In the instant case, with regard to the first and third appellants, the trial judge citing various authorities, dealt at length on the question of possession and knowledge. With regard to the second appellant, the trial judge found him liable under s. 34 of the Penal Code after recounting his involvement, perusing the evidence and discussing the law on s. 34. The trial judge was justified in making his decisions.

[5] The inability to lift sufficient finger print impressions from the packets for analysis and the failure to take hand swaps and finger nail clippings did not in any way affect that finding of possession by the trial judge. Such evidence would only add to other available evidence of possession.

[6] In a drug trafficking case, the chain of evidence is more important for the

period from the time of recovery until the completion of the analysis by the chemist. Even then it does not necessarily mean that if the exhibit is passed from one person to another, every one of them must be called to give evidence of the handing over from one person to another and if there is a break, even for one day, the case falls. There should be no confusion between what has to be proved and the method of proving it. What has to be proved is that it is the substance that was recovered that was analysed by the chemist and found to be heroin, cannabis etc, and it is for the trafficking of that same substance that the accused is charged with. The proof of the chain of evidence is only a method of proving that fact. The fact that there is a gap does not necessarily mean that that fact is not proved. It depends on the facts and circumstances of each case.

[7] The chain of evidence is less important during the period it is received back from the chemist until it is produced in court. This is because, there is no law that the exhibit recovered must be produced in court failing which the prosecution's case must necessarily fall. It may or it may not, again depending on the facts and the circumstances of each case. *Sunny Ang v. PP* [1966] 2 MLJ 195 (FC) (folld). In a drug trafficking case, the drug may be lost or destroyed subsequent to it having been analysed by the chemist. So long as there is no doubt that the drug analysed by the chemist is the same one that was recovered in the case and it is in respect of that drug that the accused is charged, and there is a reasonable explanation as to how it was lost or destroyed or the reason for the gap, there is no reason why the prosecution's case should fall. In the instant case, there was no break in the chain of evidence whatsoever, from the day it was seized until the date of trial. The missing exhibits did not contain any drugs. They were empty plastic packets and a weighing machine. Their existence could be seen from the photographs, not to mention oral evidence.

[8] The judge clearly made a definite finding of possession of the drug by the first and third appellants. It was thus not correct to say that the judge relied on presumption (d) of s. 37 DDA to make a finding of possession and then relied on presumption (da) of the same section for trafficking.

[9] The trial judge had in fact used the word 'inference'. However, the inference was in respect of the common intention which the judge drew from the facts. Common intention is proved by inference from the facts and the surrounding circumstances of the case.

[10] In *Leong Boon Huat v. PP* the court did not lay down the rule that 10% of the total weight of the plant material must be taken as sample for the purpose of tests. However, in the circumstances of that particular case the amount taken was found to be adequate by the court. In the absence of a specific provision of the law, it should be the chemist who determines the adequate quantity that should be taken as samples for the purpose of carrying out tests. *Leong Boon Huat v. PP* is not an authority for saying that the law requires that 10% of the total weight of the drug must be tested. There is no provision whatsoever in the DDA which requires at least 10% of the total weight of the substance in question be taken out for the purpose of analysis. The 10% mentioned in s. 37(j) of the DDArefers to 'receptacles' when the drug is

contained in a number of receptacles, not to the weight, and not where the drug is found in one package only. *PP v. Lam San[1991] 3 CLJ 2410; [1991] 1 CLJ (Rep) 391* (SC) (folld); *Au Ah Lin v. PP[1963] 1 LNS 6; [1963] 29 MLJ 365* (FC) (folld); *Leong Boon Huat v. PP* [1993] 3 MLJ 11 (not folld);*Loo Kia Meng v. PP[2000] 3 CLJ 653* (CA) (not folld).

[11] The judge had not misdirected himself on the law. He had considered the evidence both for the prosecution and for the defence very carefully, gave his reasons why he accepted or did not accept certain evidence and correctly came to the conclusions that he did. He had the advantage of seeing and hearing the witnesses. There was no reason why the Court of Appeal should interfere with his findings of facts or his final decision.

*[**Bahasa Malaysia** Translation Of Headnotes*

Sepasukan polis yang diketuai oleh PW4 menyerbu sebuah rumah setinggan. Di ruang depan rumah tersebut terdapat 10 orang. PW4 dan orang-orangnya memasukki sebuah bilik yang bersebelahan dengan ruang depan tersebut secara paksa. Perayu kedua mencuba tetapi gagal untuk menahan atau menghalang PW4. Bersama dengan perayu pertama, perayu kedua dan ketiga sedang duduk tanpa memakai baju di atas lantai. Perayu pertama menjatuhkan satu 'heat-sealer' apabila melihat PW4. Di hadapan ketiga-tiga perayu, pasukan polis menggeledah dan menyita beberapa paket yang mengandungi dadah merbahaya. Paket-paket tersebut dijumpai di atas lantai di mana perayu pertama dan kedua duduk. Pasukan polis juga menyita perlengkapan membungkus dadah. Perayu-perayu disabit oleh Mahkamah Tinggi di atas pertuduhan bersama di bawah s. 39(B)(1)(a) Akta Dadah Berbahaya 1952 ('DDA'), yang dibaca bersama s. 34 Kanun Keseksaan dan dihukum bunuh. Perayu-perayu merayu. Semasa rayuan, peguam menghujahkan antara lain: (i) adalah sukar dipercayai yang perayu pertama dan perayu ketiga sedang duduk semasa PW4 memasuki bilik tersebut; (ii) tiada arahan dari hakim bicara yang beliau tidak menganggap ianya satu pertuduhan bersama; (iii) pendakwa tidak membuktikan milikan eksklusif bilik tersebut oleh perayu; (iv) tiada keterangan berhubung dengan pengetahuan mengenai dadah tersebut, dan tanpa pengetahuan tidak boleh ada milikan; (v) tiada hubungan di antara perayu dan dadah tersebut. Tiada kesan cap jari yang mencukupi dapat diambil dari paket dadah tersebut untuk dianalisakan. Kesan tangan dan potongan kuku juga tidak diambil; (vi) rangkaian rantai keterangan terputus dengan serius; (vii) hakim telah silap menggunakan anggapan-anggapan di bawah s. 37(d) dan (da) DDA; (viii) hakim telah mendapati perayu bersalah secara 'inferens'; (ix) tiada keterangan mengenai berapa banyak sampel rawak yang diambil oleh ahli kimia (PW2) dan apakah beratnya; dan (x) hakim telah silap dalam keputusannya bahawa pihak pembela telah gagal meletakkan keraguan munasabah pada kes pendakwa.

Diputuskan (menolak rayuan)

Oleh Abdul Hamid Mohamad & Denis Ong HHMR:

[1] Sama ada perayu pertama dan ketiga sedang duduk adalah satu persoalan fakta. Hakim bicara tidak gagal untuk menimbang keterangan material yang dimajukan di dalam membuat keputusannya. Beliau mempunyai kelebihan melihat dan mendengar saksi-saksi. Tiada sebab untuk menganggu keputusan beliau.

[2] Adalah tidak betul untuk mengatakan bahawa hakim bicara tidak menimbangkan persoalan pertuduhan bersama. Hakim di dalam alasan penghakimannya, mengulangi kembali hujah-hujah peguam dan DPP. Beliau juga membincangkan dengan mendalam undang-undang berhubung dengan s. 34 Kanun Keseksaan, dan unsur-unsurnya, memetik autoriti tempatan dan luar negara. Beliau juga telah membuat pendapat yang spesifik berhubung dengan perayu kedua, berkenaan s. 34. Tiada salah arah oleh hakim berhubung dengan isu niat umum samada dalam undang-undang atau pada fakta. Keputusan beliau adalah jelas dan betul. *Shamsuddin Hassan & Anor v. PP [1991] 3 CLJ 2414; [1991] 1 CLJ (Rep) 428*(distd); *Too Yin Sheong v. PP* [1999] 1 SLR 682 (CA (Singapore)).

[3] Di dalam rayuan semasa, perayu dijumpai dengan dadah dan perlengkapan membungkus dadah di dalam sebuah bilik di mana hanya tiga orang darinya hadir dan kemasukan polis ke dalam bilik tersebut adalah ditentang. Persoalan mengenai milikan eksklusif bilik tersebut adalah tidak material. Isunya adalah sama ada mereka mempunyai milikan eksklusif dadah tersebut.

[4] Pengetahuan diinfer dari fakta-fakta dan keadaan sekeliling sesuatu kes. Di dalam kes semasa, berhubung dengan perayu pertama dan ketiga, hakim bicara memetik berbagai autoriti, membincang dengan mendalam persoalan mengenai milikan dan pengetahuan. Berkenaan dengan perayu kedua, hakim bicara mendapati bahawa beliau bersalah di bawah s. 34 Kanun Keseksaan selepas mengambilkira penglibatan beliau, membaca keterangan dan membincangkan undang-undang berhubung dengan s. 34. Hakim bicara mempunyai alasan yang kuat membuat keputusannya.

[5] Ketidakmampuan mendapat kesan cap jari yang mencukupi dari peket-peket tersebut untuk dianalisa dan kegagalan untuk mengambil kesan tangan dan potongan kuku tidak memberi apa-apa kesan kepada keputusan hakim bicara mengenai isu milikan. Keterangan sedemikian hanya boleh menambah kepada keterangan mengenai milikan yang sedia ada.

[6] Di dalam kes mengedar dadah, rangkaian keterangan adalah lebih mustahak untuk tempoh dari masa dijumpai sehingga selesai analisa oleh ahli kimia. Namun begitu, ianya bukan semestinya bererti yang jika exhibit tersebut dipindah dari seorang kepada seorang yang lain dan jika ianya terputus, walaupun sehari, kes akan gagal. Sepatutnya tidak terdapat sebarang kekeliruan di antara apa yang kena dibuktikan dan cara membukti. Apa yang mesti dibuktikan adalah bahawa bahan yang dijumpai yang dianalisa oleh ahli kimia adalah heroin, ganja dsb, dan tertuduh dituduh mengedar bahan tersebut. Bukti rangkaian keterangan hanyalah satu kaedah pembuktian fakta. Terdapatnya jurang kekosongan tidak semestinya bererti fakta tak terbukti. Ianya bergantung kepada fakta-fakta dan keadaan sesuatu kes.

[7] Rangkaian keterangan adalah kurang penting di dalam tempoh ia diterima dari ahli kimia sehingga ia dimajukan ke mahkamah. Ini adalah kerana, tiada peruntukan undang-undang yang menyatakan bahawa exhibit yang dijumpai hendaklah dimajukan ke mahkamah dan jika tidak kes pendakwa mesti gagal. Ia mungkin atau tidak, bergantung kepada fakta-fakta dan keadaan sesuatu

kes. *Sunny Ang v. Public Prosecutor* [1966] 2 MLJ 195 (FC) (diikuti). Dalam kes mengedar dadah, dadah mungkin hilang atau rosak kerana ianya dianalisa oleh ahli kimia. Asalkan tidak terdapat keraguan yang dadah yang dianalisa oleh ahli kimia adalah dadah yang sama yang dijumpai di dalam kes dan ianya adalah dadah yang mana tertuduh dituduh, dan terdapat penjelasan yang munasabah kenapa ianya hilang atau rosak atau alasan untuk jurang kekosongan, tiada sebab kes pendakwa perlu gagal. Dalam kes semasa, tiada rangkaian keterangan tidak putus, dari hari ianya disita sehingga ke tarikh perbicaraan. Exhibit yang hilang tidak mengandungi sebarang dadah. Ianya hanya peket plastic yang kosong dan sebuah mesin timbang. Kewujudannya dapat dilihat di dalam gambar foto, dan juga keterangan lisan.

[8] Hakim dengan jelasnya membuat pendapat yang pasti mengenai milikan dadah oleh perayu pertama dan ketiga. Oleh yang demikian adalah tidak betul jika dikatakan yang hakim bergantung kepada anggapan-anggapan (d) s. 37 DDA untuk membuat keputusan mengenai milikan dan kemudiannya bergantung kepada anggapan (da) sekysen yang sama untuk pengedaran.

[9] Hakim bicara telah menggunakan perkataan 'inferens'. Walaubagaimanapun, inferens tersebut adalah berhubung dengan niat umum yang mana hakim perolehi dari fakta. Niat umum dibuktikan melalui inferens dari fakta-fakta dan keadaan sekeliling kes.

[10] Dalam *Leong Boon Huat v. Public Prosecutor* mahkamah tidak menyatakan rukun bahawa 10% dari jumlah berat tumbuhan material mestilah diambil sebagai sampel untuk tujuan ujian.Walaubagaimanapun, dalam keadaan kes tersebut, jumlah yang diambil didapati mencukupi oleh mahkamah. Oleh kerana tiada peruntukan yang khusus di segi undang-undang, adalah wajar ahli kimia yang menentukan sama ada kuantiti yang diambil mencukupi sebagai sample untuk tujuan ujian. *Leong Boon Huat v. Public Prosecutor* bukanlah satu autoriti yang menyatakan undang-undang menghendakkan 10% dari jumlah berat dadah diuji. Tiada sebarang peruntukan di dalam Akta tersebut yang menghendakkan sekurang-kurangnya 10% dari jumlah berat bahan yang berkenaan diambil untuk tujuan analisa. 10% yang disebut di dalam s. 37(j) DDA merujuk kepada 'bekas' di mana dadah itu berada, bukan kepada beratnya, dan bukan bilamana dadah dijumpai di dalam satu peket sahaja.*PP v. Lam San[1991] 3 CLJ 2410; [1991] 1 CLJ (Rep) 391* (SC) (diikuti); *Au Ah Lin v. PP [1963] 1 LNS 6; [1963] 29 MLJ 365* (FC) (diikuti); *Leong Boon Huat v. PP* [1993] 3 MLJ 11 (tidak diikuti); *Loo Kia Meng v. PP* [2000] 3 CLJ 653 (CA) (tidak diikuti).

[11] Hakim tidak tersalah arah dirinya berhubung dengan undang-undang. Beliau telah menimbang keterangan dari kedua-dua pihak pendakwa dan pembela secara teliti, beliau telah memberi alasan mengapa beliau menerima atau tidak menerima sesuatu keterangan dan beliau juga telah dengan betul mencapai keputusannya. Beliau mempunyai kelebihan melihat dan mendengar saksi-saksi. Tiada sebab kenapa Mahkamah Rayuan patut mengganggu keputusan beliau disegi fakta atau keputusan muktamadnya.

Case(s) referred to:

Au Ah Lin v. PP [1963] 1 LNS 6; [1963] 29 MLJ 365 ***(refd)***

Leong Boon Huat v. PP [1993] 3 MLJ 11 ***(refd)***

Loo Kia Meng v. PP [2000] 3 CLJ 653 CA ***(refd)***

Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***

Mohan Singh Lachuman Singh v. PP [2002] 3 CLJ 293 CA ***(refd)***

Muhammad Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***

Munusamy v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***

Pang Chee Meng v. PP [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265 SC ***(refd)***

PP v. Lam San [1991] 3 CLJ 2410; [1991] 1 CLJ (Rep) 391 SC ***(foll)***

PP v. Poh Ah Kwang [2003] 2 CLJ 722 HC ***(refd)***

Shamsuddin Hassan & Anor v. PP [1991] 3 CLJ 2414; [1991] 1 CLJ (Rep) 428 SC ***(dist)***

Sunny Ang v. PP [1965] 1 LNS 171; [1966] 2 MLJ 195 ***(refd)***

Toh Au Kwan v. PP ***(refd)***

Too Yin Sheong v. PP [1999] 1 SLR 682 ***(refd)***

Legislation referred to:

Dangerous Drugs Act 1952, ss. 2, 37(j), 39A

Excise Act 1961, ss. 17(1), 61, 75(1)

Penal Code, s. 34

Counsel:

For the 1st & 2nd appellants - Gurbachan Singh; M/s Bachan & Kartar

For the 3rd appellant - Suresh Thanabalasingam; M/s Kuldip & Assoc

For the respondent - Abdul Wahab Mohamad DPP

Reported by Andrew Christopher Simon

Case History:

High Court : [2002] 1 LNS 153

JUDGMENT

Abdul Hamid Mohamad JCA:

There are three separate appeals by the three appellants. However, even at the High Court they were referred to as the 1st, 2nd and 3rd accused and the appeal record also refer to them as the 1st, 2nd and 3rd appellants respectively. In this judgment I shall refer to them as 1st, 2nd and 3rd appellants, the 1st appellant being Gunalan a/l Ramachandran, the 2nd appellant being Ganesan a/l Haja Mohidin and the 3rd appellant being Victor a/l Rajendran.

Mr. Gurbachan Singh appeared for the 1st and 2nd appellants and Mr. Suresh Thanabalasingam and Mr. Kuldip Singh appeared for the 3rd appellant. Deputy Public Prosecutor, Encik Abdul Wahab bin Mohamad appeared for the Public Prosecutor.

As Mr. Suresh, learned counsel for the 3rd appellant adopted the submissions of learned counsel for the 1st and 2nd appellants and his (Mr. Suresh) brief submissions were on the same issues, I shall discuss the grounds of appeal and the submissions thereof on behalf of the three appellants together.

All the three appellants were charged as follows:

> Bahawa kamu bersama-sama pada 3 Februari 1999, jam lebih kurang 10.25 malam, dibilik sebelah kanan sebuah rumah tidak bernombor Kg. Sam Yoke, Jalan Sungai Besi, Kuala Lumpur, Wilayah Persekutuan telah mengedar dadah berbahaya iaitu 61.1 gram monoacetylmorphines dan oleh yang demikian itu 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 dan dibaca bersama seksyen 34 Kanun Keseksaan.

They were convicted and sentenced to death. They appealed to this court.

Briefly, the facts as adduced by the prosecution are that on 3 February 1999 at about 10.25pm, a team of police officers led by Chief Inspector Rajendran a/1 Kanesan (PW4) went to an unnumbered squatter house at Kampong Sam Yoke, Sungai Besi, Kuala Lumpur to conduct a raid. On arrival at the house, PW4 found the door of the house open. They rushed inside. At the hall which was on the right side of the house, they found a group of 10 Indian males who were sitting and watching television. PW4 introduced himself and directed his men to arrest them.

At that point of time PW4 saw a male Indian (2nd appellant) opening the door of the room adjoining the hall. As soon as the 2nd appellant saw PW4 and his team, the 2nd appellant closed the door. PW4 pushed the door and when the 2nd appellant pushed it back, PW4

kicked the door and rushed into the room followed by two of his men, ie, PW6 and Detective, Lans Corporal Ahmad Kamil (DLC Ahmad Kamil). Besides the 2nd appellant, PW4 saw two more Indian males ie, the 1st appellant and the 3rd appellant who were not wearing shirts sitting cross-legged on the floor in front of some " barangan " (goods/utensils). At the same time PW4 saw the 1st appellant dropping a heat-sealer on the floor. PW4 introduced himself as a police officer and directed PW6 and DLC Ahmad Kamil to hand-cuff the appellants. PW4 then conducted a search in the room in the presence of the three appellants and his two police officers. Resulting from the search, he seized the " barangan " that he found on the floor where the 1st and the 3rd appellants were sitting when he first entered the room. They are:

(i) One big transparent plastic packet containing yellow powder and " ketulan " suspected to be heroin;

(ii) Two transparent plastic packets which have been sealed, each packet containing two bundles of small plastic packets, each bundle containing 20 small plastic packets totaling 80 and each small plastic packet contained yellow powder and " ketulan " suspected to be heroin;

(iii) One transparent plastic bowl containing yellow powder and " ketulan " suspected to be heroin.

(iv) One metal container of Tong Kee Brothers Confectionery " containing 56 sealed, small plastic packets each of which contained yellow powder and " ketulan " suspected to be heroin;

(v) a transparent plastic packet containing one bundle of small plastic packets which were empty;

(vi) one pink plastic packet containing empty transparent plastic packets;

(vii) a weighing machine with a brand name of " Tanita "

(viii) one heat-sealer with a brand name of " impulse " which was lighted;

(ix) a bunch of six keys;

(x) a pair of scissors black in colour.

After seizing those things, PW4 conducted a search outside the room but could not find anything incriminating. The three appellants, all the Indian males arrested at the hall and all the things seized were taken to Sentul Police District Office.

The chemist (PW2) confirmed that the yellow powder and granules found in the plastic packets and bowl contained monoacetylmorphines, a type of dangerous drugs under Part III, First Schedule of the Act and the weight was 61.1 grams.

The evidence of PW4 was confirmed by PW6.

At the end of the prosecution's case, after hearing the submissions of learned counsel and the

Deputy Public Prosecutor, the learned judge called upon all three appellants to enter upon their defence as charged. At the end of the case, after hearing the evidence adduced for the defence and the submissions of the learned counsel and the deputy public prosecutor, the learned judge found all the three appellants guilty as charged and convicted them.

Mr. Gurbachan Singh adopted his submissions in the High Court and went on to submit point by point which we shall deal with accordingly.

Ground 8

Learned counsel repeated the facts which I do not think I have to reproduce again and submitted that it was inherently incredible that the 1st and 3rd appellants were sitting down when PW4 entered the room.

This is a question of facts. The learned judge had discussed the evidence and dealt with the submission in his grounds of judgment:

> Mengenai dakwaan pihak pembelaan bahawa keterangan pihak pendakwaan berbentuk syak-wasangka sahaja, peguam OKT1 bertikai adalah tidak munasabah bagi OKT1 dan OKT3 masih terus duduk bersila berhadapan dengan barangan yang mengandungi dadah itu setelah mereka terdengar bunyi bising diluar bilik tersebut, setelah mereka mendengar orang diluar bilik tersebut teriak " polis " dan setelah melihat OKT2 sedang tolak-menolak pintu bilik tersebut. SP4 dan SP6 menyatakan mereka ternampak OKT1 dan OKT3 sedang duduk bersila di atas lantai sebaik sahaja mereka memasuki bilik tersebut. SP4 dan SPG juga telah menyatakan kejadian itu berlaku dalam beberapa saat sahaja. Saya dapat memerhati SP4 dan SP6 semasa mereka berada dalam kandang saksi dan berpendapat mereka merupakan saksi-saksi yang lurus dan berterus terang. Mereka telah memberi keterangan tentang apa mereka melihat dan setelah saya meneliti keterangan mereka dengan terperinci, saya berpendapat tidak wujudnya alasan bagi saya menolak keterangan mereka tentang kedudukan OKT1 dan OKT3 semasa mereka menyerbu masuk bilik tersebut.

I do not find any misdirection on the part of the learned judge or failure to consider material evidence adduced in making his finding of facts. He had the advantage of seeing and listening the witnesses. I have no reason to interfere with his findings or decision.

Grounds 1 And 2

Learned counsel submitted that there was a non-direction by the learned judge in that he did not consider that it was a joint charge. He submitted that the prosecution must prove joint possession and joint trafficking.

First, it is not correct to say that the learned judge did not consider the question of joint charge. The learned judge, in his grounds of judgment, reproduced the arguments of learned counsel for the accused and the arguments of the Deputy Public Prosecutor. Then he discussed at length the law on s. 34 of the Penal Code, citing local, Singaporean and Indian authorities. He discussed the three ingredients of s. 34 under three heads as was done by

Karthigesu JA (Singapore) in *Too Yin Sheong v. PP* [1999] 1 SLR 682 (CA (Singapore)), ie:

> (i) the common intention of all;
>
> (ii) in furtherance of the common intention; and
>
> (iii) participation in the criminal act.

After discussing the law and the evidence under the first head, the learned judge concluded:

> Dalam kes di hadapan saya ini, adalah jelas bahawa niat bersama ketiga-tiga tertuduh menurut rancangan yang telah mereka buat terlebih dahulu adalah untuk mengendalikan dadah itu di bilik tersebut. Wujudnya barangan seperti dadah yang berada dalam keadaan terbuka, paket-paket plastik kosong, alat penimbang dan alat " heat-sealer " menyokong inferens ini.

Regarding the second and third - heads (or ingredients), after referring to various authorities, the learned judge made a specific finding regarding the 2nd appellant. This is because, earlier on he had already ruled that from direct evidence adduced by the prosecution against the 1st and the 3rd appellant (who were sitting down on the floor shirtless with the drug), the heat-sealer which was still burning and the weighing machines with sealed and empty packets in front of them were clear proof that they were in possession of the drugs.

So, it was in respect of the 2nd appellant who was standing behind the door when PW4 pushed the door that he had to state his clear findings which he did, in these words:

> Dalam kes di hadapan saya ini, kehadiran fisikal OKT2 di tempat kejadian itu, dalam bilik tersebut tidak dipertikaikan. Ia telah cuba menghalang SP4 memasuki bilik tersebut walaupun ia sedar SP4 adalah seorang anggota polis. Kehadiran OKT2 di bilik tersebut bersama penyertaannya bagi mencapai niat bersama mereka semuanya, membuatnya bertanggungan di bawah seksyen 39B(1)(a) Akta itu dibaca dengan seksyen 34 Kanun Keseksaan.

I do not see any misdirection on the part of the learned judge on the issue of common intention whether in law or on facts. His findings are as clear as they can be and, in my view, correct too.

One word should be said about the case of *Shamsuddin bin Hassan & Anor v. Public Prosecutor* [1991] 3 CLJ 2414; [1991] 1 CLJ (Rep) 428. In that case the police saw a bundle thrown out of the left window of a moving car that they were following. A policeman stopped his car and picked up the bundle containing drugs. The other police cars continued to follow the said car which later stopped after it met with an accident. The police found the two appellants, husband and wife, in the car and also a 15-month-old child in the arms of the mother, the second appellant. It was held:

> (2) It is essential in relying on s. 34 of the Code that there should be evidence of a common intention or evidence from which such a common intention can be inferred. The mere fact of a bundle being thrown out of a car is not evidence of common intention or evidence from which common intention can

properly be inferred.

(3) In this case, there was no evidence of custody or control of the drugs to raise the presumption under s. 37(d) of the Act that the appellants were in possession of the drugs, and the further presumption that they must have known that the drugs were cannabis. Until this can be proven, the presumption under s. 37(da) of the Act that the appellants were trafficking in dangerous drugs did not arise.

The facts of the two cases are poles apart. The decision in that case must be understood in relation to the facts of that case. A bundle containing drug was seen thrown out of a moving car. There were two persons in the car, the husband and the wife (and also the child). It is true that the bundle was thrown out of the left window, the side the wife was sitting. But, it was not known who between them threw it. She was holding the child and he was driving. There was nothing to connect the bundle with either of them and it could also be a case where one of them had no custody and control of the bundle and may not have knowledge of the content which was in a bundle. Or, it could also be that both of them had the custody and control and the knowledge of the drug in the bundle before it was thrown away.

The instant appeal is very different. The facts have been reproduced and requires no repetition. In my judgment, this ground fails.

Grounds 3, 4 And 5

It was argued that the prosecution did not prove who was the owner and the occupier of the house and the room. There were 13 people in the house, 10 in the hall and 3 in the room. There was free access. It was put to PW3 that the 1st appellant was the owner of the house. The prosecution's case must fail because the prosecution did not prove exclusive possession of the room by the appellants. The appellants were merely present in the room in which the drugs were found. Learned counsel cited the cases of *Mohan Singh a/l Lachuman Singh v. Pendakwa Raya* [2002] 3 CLJ 293 (CA) and *Pang Chee Meng v. PP [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265* (SC).

Let us look at *Pang Chee Meng v. Public Prosecutor (supra)* first. In that case, the police laid an ambush and arrested the accused near the place where he was known to be living. Upon arrest, the accused allegedly gave information which led to the discovery of heroin, the subject matter of the charge. The drugs were found in a room he was known to be living in. At all time, after his arrest, the accused denied any knowledge of the drugs or that he gave information. It was in evidence that three other named persons also had access to the room. In the circumstances, no wonder the Supreme Court found that the learned Judicial Commissioner who tried the case was manifestly wrong to find as a fact that the appellant had exclusive possession of the room.

In *Mohan Singh a/l Lachman Singh v. Pendakwa Raya (supra)*, a police raid was conducted at about 5.30pm at a flat. There were three males in that flat. The appellant was one of them. Two keys were recovered on the appellant's person. The appellant then led the police party to another flat. The police officers gained access into the second flat by using one of the two keys to open the padlock that secured the collapsible grill at the entrance of the flat. The flat had six rooms. The police party and the appellant proceeded to one of the rooms. The police used the second key to gain access to that room. In the room they recovered the drugs. In the

circumstances, this court found that it would be wholly unsafe to convict the appellant.

On the facts, the two cases are also very different from the instant appeal. In the instant appeal, the appellants were found with the drugs and drug-packing paraphanelia in a room where only the three of them were present and entry into it by the police was resisted. The question of exclusive possession of the room is not material. The issue is whether they had the exclusive possession of the drugs. This ground too fails.

Ground 15

It was submitted that there was no evidence of knowledge of the drugs. Without knowledge there could be no possession. Being able " to see " the drugs " does not amount to possession and knowledge ", learned counsel submitted. Learned counsel referred us to *PP v. Poh Ah Kwang [2003] 2 CLJ 722*(HC) and *Toh Su Kwan v. Public Prosecutor* which was only referred to by the learned judge in *Public Prosecutor v. Poh Ah Kwang (supra)* from a " typed ten page *ex tempore* judgment " of this court. We do not have the full judgment. The passage of the purported judgment in *Toh Su Kwan v. Public Prosecutor* reproduced by the learned judge in *Public Prosecutor v. Poh Ah Kwang (supra)* is not sufficient to enable us to know exactly the decision of this court in *Toh Su Kwan v. Public Prosecutor* and the grounds thereto.

In any event, there is no shortage of cases on possession and knowledge in drug trafficking cases either by this or the highest courts in this country. The law is well established and requires no repetition. Knowledge is to be inferred from the facts and the surrounding circumstances of a case.

In the instant appeal, the learned judge, citing various authorities, dealt at length on the question of possession and knowledge. This is what the learned judge said:

> Dalam kes di hadapan saya ini, saya mendapati keterangan langsung yang dikemukakan oleh pihak pendakwaan dengan jelas menunjukkan OKT1 dan OKT3 ada kawalan fisikal ke atas dadah itu dan ada pengetahuan tentang kewujudan dadah itu sendiri. Dadah yang terdapat dalam mangkuk plastik tersebut berada dalam keadaan terbuka dan boleh dilihat dengan jelas. Dadah yang terdapat dalam peket-peket plastik lutsinar itu juga boleh dilihat dengan jelas dengan mata kasar. OKT1 dan OKT3 sedang duduk bersila dalam keadaan tidak berbaju berhadapan dengan dadah itu dan barangan lain termasuk alat " heat-sealer " itu. Fakta-fakta ini dengan jelas menunjukkan OKT1 dan OKT3 ada milikan fisikal ke atas dadah itu. Keterangan juga menunjukkan alat " heat-sealer " itu masih terpasang dan berhaba yang menggambarkan alat itu sedang digunakan untuk tujuan mengsil sesuatu. Ini menggambarkan mereka sedang mengendalikan dadah itu termasuk barangan lain itu dan sedar tentang kewujudan dadah itu dan ada pengetahuan bahawa mereka sedang mengendalikan barang salah. Pada pendapat saya, peket-peket plastik kecil yang kosong itu serta alat penimbang dan " heat-sealer " itu merupakan barangan dan alat yang digunakan untuk menyusun dan membungkus dadah itu ke dalam peket-peket plastik kecil itu. Mendasarkan apa yang dibincangkan kini, adalah menjadi dapatan saya bahawa pihak pendakwaan telah membuktikan dadah itu ada dalam milikan OKT1 dan

> OKT3 dibilik tersebut pada 3 Februari 1999 jam lebih kurang 10.25 malam.

Regarding the 2nd appellant, the learned judge recounted his involvement as follows:

> Seperti telah dibincangkan di atas, keterangan langsung menunjukkan hanya OKT1 dan OKT3 serta OKT2 berada dalam bilik pada masa itu. Mengenai kedudukan OKT2, keterangan menunjukkan sebaik sahaja SP4 dan pasukannya menyerbu masuk rumah tersebut dan berada di ruang tamu, OKT2 yang berada dalam bilik tersebut, telah membuka pintu bilik tersebut dan apabila ia melihat SP4 dan anggota pasukannya, ia telah tutup pintu itu dengan serta merta dan cuba menahan pintu itu apabila SP4 hendak memasuki bilik tersebut...

The learned judge then went on to discuss the law on s. 34 of the Penal Code and, referring to the evidence, made the following conclusions:

> Dalam kes di hadapan saya ini, adalah jelas bahawa niat bersama ketiga-tiga tertuduh menurut rancangan yang telah mereka buat terlebih dahulu adalah untuk mengendalikan dadah itu di bilik tersebut. Wujudnya barangan seperti dadah yang berada dalam keadaan terbuka, peket-peket plastik kosong, alat penimbang dan alat " heat sealer " menyokong inerence ini.

and, later:

> Dalam kes di hadapan saya ini, kehadiran fisikal OKT-OKT ditempat kejadian itu, dalam bilik tersebut tidak dipertikai. Ia telah cuba menghalang SP4 memasuki bilik tersebut. Walau pun ia sedar SP4 adalah seorang anggota polis. Kehadiran OKT2 di bilik tersebut bersama dengan penyertaannya bagi mencapai niat bersama mereka semuanya membuatnya bertanggungan di bawah seksyen 39B(1)(a) Akta itu dibaca bersama seksyen 34 Kanun Keseksaan.

It is true that the learned judge did not say in so many words, in respect of the 2nd appellant as he did in respect of the 1st and 3rd appellants that he found that there was direct evidence (" keterangan langsung ") that the 2nd appellant had the physical control of the drug and knowledge of its existence. However, invoking s. 34 of the Penal Code and in view of the evidence of the involvement of the 2nd appellant was also " bertanggungan " (liable).

I am satisfied that the learned judge was justified in doing so. This ground fails.

Grounds 6 And 17

It was submitted that there was no nexus between the appellants and the drug. Even though the packets containing the drug were sent to PW7 for finger printing impression, no finger printing impression sufficient for analysis could be lifted. Hand swaps and nail clippings were not taken.

In my view, such evidence, if any, would add to other available evidence of possession. Without it, it does not necessarily mean that possession is not proved. In view of what I have said earlier regarding proof of possession as found by the learned judge on the facts and in

the circumstances of this case, the inability to lift sufficient finger print impressions from the packets for analysis and the failure to take hand swaps and finger nail clippings does not in any way affect that finding of possession by the learned judge. This ground too fails.

Grounds 7 And 10

Learned counsel then tried to cast doubts on the exhibits. He traced the history of the movement of the exhibits from the time of recovery until the trial. He drew our attention to the fact that the drug was recovered on 3 February 1999. On 15 March PW5 (the Investigating Officer) sent the exhibits to PW7, the police finger print expert. They were taken back on 23 August 1999. On 24 September the exhibits were sent to the chemist which was seven months and 20 days after the recovery. On 18 February 2000, the exhibits were taken back from the chemist. In April 2000 PW5 was transferred out. He did not send the exhibits to the store. He was interdicted in August 1999. There was no handing over until 28 March 2002 when the exhibits were handed to PW8 by PW5. In the meantime there was another officer who took over the case. The exhibits were not handed to Inspector Azizan Said. Three exhibits got lost. Chief Inspector Azizan Said was not called as a witness. Thus there was a serious break in the chain of evidence.

First, by way of a general observation, I am of the view that, in a drug trafficking case what is important is that it must be proved that it is the substance that was recovered that was sent to the chemist for analysis and it is that same substance that is found to be heroin or cannabis etc. and it is in respect of that substance that an accused is charged with trafficking. So, the chain of evidence is more important for the period from the time of recovery until the completion of the analysis by the chemist. Even then it does not necessarily mean that if the exhibit is passed from one person to another, every one of them must be called to give evidence of the handing over from one person to another and if there is a break, even for one day, the case falls. There should be no confusion between what has to be proved and the method of proving it. What has to be proved is that it is the substance that was recovered that was analysed by the chemist and found to be heroin, cannabis etc., and it is for the trafficking of that same substance that the accused is charged with.

The proof of the chain of evidence is only a method of proving that fact. The fact that there is " a gap ", does not necessarily mean that that fact is not proved. It depends on the facts and circumstances of each case. There may be a gap in the chain of evidence. But, if for example, during that " gap " the exhibits are sealed, numbered with identification numbers, there is no evidence of tampering, there is nothing that would give rise to a doubt that that exhibit is the exhibit that was recovered in that case and that was analysed by the chemist, the fact that there is a gap, in the circumstances of the case, may not give rise to any doubt of that fact.

The second period is from the time that it was received back from the chemist until it is produced in court. In my view, the chain of evidence is less important during this second period. This is because, as far as I am aware, there is no law that the exhibit recovered must be produced in court and if not the prosecution's case must necessarily fall. It may or it may not, again depending on the facts and the circumstances of each case. Even in a murder trial, the dead body is not produced in court. In *Sunny Ang v. Public Prosecutor* [1966] 2 MLJ 195 (FC) the body of the victim was not even recovered, yet the accused was convicted of murder. What the prosecution has to prove is that a particular person had died and the accused had caused his death. The death of the victim is not proved by looking at his remains in court, but by evidence of witnesses, the medical report, the identity card, the photographs

and so on. Similarly, in a drug trafficking case, the drug may be lost or destroyed subsequent to it having been analysed by the chemist, there may be a gap in the chain of the people keeping custody of it subsequent to it having been analysed by the chemist until the date of trial, but so long as there is no doubt that the drug analysed by the chemist was the same one that was recovered in the case and it is in respect of that drug that the accused is charged, and there is a reasonable explanation as to how it was lost or destroyed or the reason for the gap, there is no reason why the prosecution's case should fall.

In this case, the learned judge dealt at length on the issue of break of chain of evidence. First he reproduced the submission of the learned counsel that covered three pages of the judgment. Then he narrated the chronology in great detail (which I do not think it is necessary to reproduce) and concluded:

> Setelah saya menelti fakta-rakta di atas, saya berpendapat dakwaan peguam OKT1 bahawa terputusnya rangkaian keterangan mengenai barangan kes tidak berasas. Peguam bertikai Ketua Inspektor Azizan Said tersebut tidak dipanggil untuk memberi keterangan ataupun ditawarkan kepada pihak pembelaan. Saya mendapati keterangan menunjukkan barangan kes tidak pernah diserahkan kepada Ketua Inspektor Azizan Said tersebut. Ini jelas dari keterangan SP5 dan SP8. SP5 menyatakan ia mengeluarkan barangan kes dari kabinet besinya di pejabat lamanya di Bahagian Narkotik, Ibu Pejabat Polis Daerah Dang Wangi pada 28 Mac 2002 dan menyerahkan barangan itu kepada SP8. SP8 mengesahkan ini dan menyatakan kes di Ibu Pejabat Polis Daerah Dang Wangi pada hari yang sama. Ini jelas menunjukkan barangan kes tidak pernah diserahkan kepada Ketua Inspektor Azizan Said seperti didakwa dan oleh itu saya tidak dapat memahami kenapa pegawai itu perlu memberi keterangan tentang barang kes ataupun hendaklah ditawarkan kepada pihak pembelaan. Disamping itu nama pegawai itu tidak tercatat dalam senarai saksi-saksi yang dikemukakan oleh timbalan pendakwa raya pada permulaan perbicaraan ini.
>
> Mengenai tiga barang kes yang hilang itu, saya berpendapat ketakwujudan barangan itu tidak menjejaskan kes pihak pendakwaan. Ketiga-tiga barangan itu boleh dilihat dengan jelas dalam gambar barang kes, iaitu ekshibit P13 yang diambil pada 15 Februari 1999. Di samping itu, barangan itu jelas tidak mengandungi dadah itu. Keterangan menunjukkan peket-peket plastik itu adalah kosong semasa SP4 merampasnya. Dadah juga tidak dijumpai berada di atas alat penimbang itu. Kesimpulannya saya berpendapat dakwaan pihak pembelaan bahawa rangkaian keterangan terputus tidak berasas.

I agree with him that the argument has no merits. There is no reason why Chief Inspector Azizan Said should be called as a witness or at least offered to the defence as the exhibit was never handed over to him. He also found that there was no break in the chain of evidence whatsoever, from the day it was seized until the date of trial. Regarding the missing exhibits, they did not contain any drug. They were empty plastic packets and the weighing machine. Their existence could be seen from the photographs, not to mention oral evidence.

Under this head, it was also submitted that there was contradictory evidence as to whether the offending exhibit was in granular form or powdery. PW4 in his evidence at first said that it was "serbuk dan ketulan" but later only used the word "serbuk". PW5 and PW7 described it

as "serbuk".

I have re-read the evidence of PW4. I find that the record shows that on numerous occasions in his evidence, PW4 used the words "serbuk dan ketulan". Even if he had at times, used the word " serbuk " only (which I could not find) that would not make any difference.

Record of PW5's evidence shows that the words " serbuk and ketulan " were consistently used even though the words " serbuk ketulan " and " serbuk " were also used.

Upon perusing the record of the evidence of PW7, I find that such words as " ketulan serbuk ", " serbuk ", " serbuk-serbuk kecil ", " serbuk-serbuk " were used or recorded.

In fact, even learned counsel for the 2nd accused himself, in his cross-examination, is recorded to have used such words as " ketulan/serbuk ", " serbuk kecil " and " serbuk ".

This point is too trivial for this court to waste its time on.

Finally, under the same head, it was argued that there was discrepancy in the weight of the drug. In the charge first preferred before the Magistrate's Court the weight of the drug was stated as 880 grams. From the evidence of the chemist (PW2) at pp. 101 and 102 of the appeal record, the total net weight (by learned counsel's own calculation, I believe, as the chemist did not give the total weight that was given by the learned counsel) is 1211.3 grams but at pp. 98 and 99, the total net weight of the yellow granular and powdery substance is 779 grams.

Actually, the weight of 880 grams stated in the charge before the Magistrate's Court is the gross weight of the suspected drug contained in the plastic packets as weighed by the police. The exhibits had not been analysed by the chemist yet. We cannot expect the initial weighing by the police to be as accurate as that done by the chemist. Regarding the alleged total 1211.3 grams, while writing this judgment, I did my own calculation and I found it to be 779.08 grams, not 1211.3 grams as alleged by the learned counsel. Regarding the total of 779 grams, that is correct. The difference of 0.08 grams with the total at pages 101 and 102 is because the decimal point was omitted. The difference of 0.08 grams is too small to cast any doubt on the evidence of weight of the yellow granular and powdery substance. In any event, that is not the weight for which the appellants were charged. They were charged with trafficking of 61.1 grams monoacetylmorphines. That is the weight given by the chemist. So, this ground has no merits.

Ground 14

It was also submitted that the learned judge had wrongly invoked the presumptions under s. 37(d) and (da) of the Act, referring to *Muhammad bin Hassan v. Public Prosecutor* [1998] 2 CLJ 170. This, according to him, was because there was no direct evidence of possession. At the worst only presumption (d) could be invoked.

I have perused the grounds of judgment of the learned judge. After dealing with the law on possession at length, the learned judge clearly made a definite finding of possession of the drug by the 1st and 3rd appellants. This is what he said:

> Dalam kes di hadapan saya, saya mendapati keterangan langsung yang

> dikemukakan oleh pihak pendakwaan dengan jelas menunjukkan OKT1 and OKT3 ada kawalan fisikal ke atas dadah itu dan ada pengetahuan tentang kewujudan dadah itu sendiri.

He then went on to give his reasons for it and continued:

> Mendasarkan apa yang dibincangkan kini, adalah menjadi dapatan saya bahawa pihak pendakwaan telah membuktikan dadah itu ada dalam milikan OKT1 dan OKT3 dibilik tersebut pada 3 Februari 1999 jam lebih kurang 10.25 malam.
>
> SP2 telah mengesahkan bahan yang terdapat dalam peket-peket plastik itu dan mangkuk plastik itu adalah monoacetylomorphines adalah sejenis dadah berbahaya yang disenaraikan di bawah Bahagian III, Jadual Pertama kepada Akta itu. Berdasarkan demikian adalah menjadi dapatan saya bahawa anggapan pengedaran di bawah seksyen 37(da)(iiia) Akta itu telah timbul terhadaap OKT1 dan OKT3. Seperti telah diturunkan di atas seksyen 37(da)(iiia) itu memperuntukkan bahawa mana-mana orang yang didapati ada dalam pemilikannya 15 gram atau lebih berat menoacetylmorphines selain dari menurut kuasa Akta atau mana-mana undang-undang bertulis, hendaklah sehingga dibuktikan sebaliknya, dianggapkan sebagai mengedarkan dadah tersebut.

So it is not correct to say that the learned judge relied on presumption (d) to make a finding of possession and then relied on presumption (da) for trafficking.

Regarding the 2nd appellant, the learned judge's finding was reproduced in the discussion under ground 16, *supra*.

This ground too fails.

Ground 18

Referring to the grounds of judgment at pp. 39 and 69, learned counsel submitted that the learned judge found the appellants guilty " by inference ". This is what the learned judge said at p. 39 of the Appeal Record:

> Berdasarkan keterangan di atas, timbalan pendakwa raya mendesakkan ketiga-tiga tertuduh sebenarnya bukan sahaja mempunyai niat bersama untuk berurusan dengan dadah itu tetapi sebenarnya inferens boleh dibuat bahawa ketiga-tiga tertuduh sedang berurusan dengan dadah itu dengan cara membungkus atau mengira peket-peket yang mengandungi dadah itu. (emphasis added).

That is the submission of the Deputy Public Prosecutor, not the learned judge's finding.

At p. 69 of the Appeal Record, the learned judge said:

> Dalam kes di hadapan saya ini, adalah jelas bahawa niat bersama ketiga-tiga tertuduh menurut rancangan yang telah mereka buat terlebih dahulu adalah

> untuk mengendalikan dadah itu di bilik tersebut. Wujudnya barangan seperti dadah yang berada dalam keadaan terbuka, peket-peket plasitk yang kosong alat penimbang dan alat " heat-sealer " menyokong **inferens** ini. (emphasis added).

It is true that this is his finding. It is true that he used the word " inference ". But, the inference is in respect of the common intention which he drew from the facts. How else could common intention be proved if not by inference from the facts and the surrounding circumstances of the case?

This ground fails.

Ground 19

Learned counsel next attacked the evidence of the Chemist (PW2). He submitted that there was no evidence of how many random samples PW2 took and what was the weight. He relied on *Loo Kia Meng v. PP [2000] 3 CLJ 653* (CA).

On this issue, it is necessary to take a close look at the relevant provisions of the Act and the decided cases again.

Section 37(j) of the Act provides.

> (j) when any substance suspected of being a dangerous drug has been seized and such substance is contained in a number of receptacles, it shall be sufficient to analyse samples of the contents of a number not less than ten per centum of such receptacles and if such analysis establishes that such samples are all of the same nature and description, it shall be presumed, until the contrary is proved, that the contents of all the receptacles were of the same nature and description as the samples so analysed and if such analysis establishes that such samples consist of or contain a dangerous drug, it shall be presumed, until the contrary is proved, the contents of all the receptacles consist or contain the same proportion of such drug.

What is obvious is that the 10% refers to the number of receptacles, not the total weight of the drug found or the total weight of the samples taken.

What do the cases say?

First, we shall begin, for comparison, with the case of *Au Ah Lin v. PP [1963] 1 LNS 6; [1963] 29 MLJ 365* (FC). In that case, the appellant was charged under s. 17(1) and 75(1) (a) of the Excise Act 1961. Section 61 of the Act provides:

> When any goods suspected of being dutiable or otherwise liable to seizure have been seized, it shall be sufficient to open, examine, and if necessary to test the contents of ten per centum only of each description of package or receptacle in which such goods are contained, and the Court shall presume that the goods contained, in the unopened packages or receptacles are of the same nature, quantity and quality as those found in the similar packages or

receptacles which have been opened.

Thomson LP, delivering judgment of the court said:

> In our view section 61 does not require that samples be taken of the contents of every package or container which is in question. The samples shall be 10% of the packages or containers and when that is done the presumption mentioned in the section as to the contents of all the packages arises. In our view the section does not require the taking of any particular quantity. That is abundantly clear on the reading of the section itself. The words " ten per centum " refer to the packages, not to the contents of each package.

In my view the words used in Act under which the appellants are charged are even clearer than those used in theExcise Act 1961.

I shall now discuss the cases under the Act. In *PP v. Lam San[1991] 3 CLJ 2410; [1991] 1 CLJ (Rep) 391* (SC) the respondent was charged for trafficking 34.81 grams of heroin which was found in a package at a house that was raided by the police. The learned judge found the evidence of the chemist " sketchy " and " unsatisfactory " and doubted the accuracy of the weight of the heroin analysed. It is to be noted that the chemist said that the weight of the greyish brown substance found in the plastic packet was 75.18 grams which on analysis, he found to contain 34.81 grams nett heroin.

In cross-examination, he said:

> From ex 8C I cannot remember exactly but I think I took out about 100 grams for the purpose of analysis.
>
> There is no record in my work sheet of my having taken out a. quantity of the substance for my analysis.

In re-examination, he said:

> For the purpose of analysis the practice is to take out more than 10% of the weight of the sample for analysis.

Hashim Yeop A. Sani (CJ (Malaya), delivering the judgment of the court, said:

> Looking at the evidence of the chemist in its totality, we found it difficult to accept the doubt of the learned judge at the close of the prosecution case to be a doubt arrived at on a rational basis. PW5 was a highly qualified chemist who had served the Department of Chemistry for 22 years and had testified as an expert witness in many court cases.
>
> As to how a trial court should approach the evidence of a chemist, we wish to advert to the judgment of this court in *Munusamy v. PP* 1 where in a passage at p. 496F, Mohamed Azmi SCJ on behalf of the court put in focus the function of the chemist in a trial of this nature:
>
> > We are therefore of the view, that in this type of cases where

> the opinion of the chemist is confined only to the elementary nature and identity of substance, the court is entitled to accept the opinion of the expert on its face value, unless it is inherently incredible or the defence calls evidence in rebuttal by another expert to contradict the opinion. So long as some credible evidence is given by the chemist to support his opinion, there is not necessity for him to go into details of what he did in the laboratory, step by step.

Two things are implicit in that passage. First, unless the evidence is so inherently incredible that no reasonable person can believe it to be true, it should be accepted as *prima facie* evidence. Secondly, so long as the evidence is credible, there is no necessity for the chemist to show in detail what he did in his laboratory.

In our view, the evidence of the chemist in this case was more than sufficient as basis to call for the defence, granted that all the other ingredients of the offence had been successfully proved.

The evidence of the chemist must be looked at in its totality. Seen in its totality, the evidence of the chemist in his case is not sketchy at all. There is no need for him to say what instrument he used for the purpose of the analysis or that the instrument was in good working condition as we have to assume until the contrary is shown that he had the proper instrument to carry out his work. In this case he had even gone to the extent of giving a margin of error and had given the benefit of the doubt to the respondent.

Confining myself to the issue of weight of the samples taken for analysis in that case, it must be noted that the chemist admitted that there was no record in his work sheet of the quantity or weight of the substance he took for analysis. He said he thought he took about 10% of the weight for the purpose. In spite of that the Supreme Court held that the evidence of the chemist including that of the weight of the cannabis should be accepted.

In *Leong Boon Huat v. Public Prosecutor* [1993] 3 MLJ 11 dried leaves believe to be cannabis was recovered in a bag that was carried by the appellant. While the total weight of the plant material believed to be cannabis was 793.85 grams, the total weight samples taken for analysis was " more than 10% " of the nett weight of 793.85 grams of plant material. The chemist did not take any sample from the balance of the plant material which formed a very substantial part of the whole, for analysis. The main ground of appeal was that the testimony of the chemist did not prove beyond any reasonable doubt that the bulk of the dried leaves was cannabis within the meaning of s. 2 of the Act.

Edgar Joseph Jr. SCJ, delivering the judgment of the court said:

> It is obvious that from the extracts of the testimony of the chemist, the following plain facts emerge:
>
> > First, the total weight of the plant material said to be cannabis was 793.85g.

> Second, the total weight of the samples taken for analysis was 'more than 10% of the net weight of 793.85g' of plant material.
>
> Third, the chemist did not take any sample from the balance of the plant material (which formed a very substantial part of the whole) for analysis.

Now, what does 'more than 10% of the net weight of 793.85g' mean? Does it mean 11% or 12% or more than that? Not to put too fine a point on it, the expression 'more than 10%' is ambiguous and there should be no ambiguity on such a matter where the life of a subject is at stake. What is necessary is that the testimony of the chemist upon such a matter must be clear and convincing.

To take the point a little further, if by the expression 'more than 10% of the net weight of 793.85g' means a little more than 10% - and we think, in ordinary parlance, it would not be incorrect to say that it bears such a meaning - then, as a matter of simple arithmetic, the testimony of the chemist, at best, established that the appellant was in possession of a little more than 79.30g of cannabis, which would be well below the statutory minimum of 200g of cannabis required for the operation of the presumption of trafficking under s. 37(da) of the Act.

It is true that the chemist did say that he had conducted a physical examination of the whole of the plant material, by which, we suppose, he meant a visual examination, aided no doubt by a microscope. But while the result of such an examination might well establish, on the balance of probabilities, that the plant material was cannabis within the meaning of s. 2 of the Act it was necessary to take the matter further and establish beyond any reasonable doubt that that was so. This further step would, of necessity, have involved the carrying out of chemical tests on adequate quantities of the plant material. What would be adequate quantities for this purpose would depend on the particular circumstances of each case and we do not consider that any useful purpose would be served by laying down any mathematical formula. Suffice it so say, that in the present case, we were not satisfied that the samples of plant material upon which the chemist had carried out the chemical tests were adequate, having regard to the total weight of the plant material, for the reasons stated.

Again, confining myself to the issue of weight, first it must be noted that the court made it very clear that what would be adequate quantities would depend on the particular circumstances of each case and the court did not consider that any useful purpose would be served by laying down any mathematical formula. The court went on to say: " Suffice it to say that in the present case, we were not satisfied that the samples of plant material upon which the chemist had carried out the chemical tests were adequate having regard to the total weight of the plant material... "

Clearly, the court did not lay down the rule that 10% of the total weight of the plant material must be taken as sample for the purpose of the tests. However, in the circumstances of that particular case the amount taken was found to be adequate by the court. So, I do not think that it is correct to say that the case laid down the principle that at least 10% of the total weight

must be taken as sample for the purpose of carrying out the tests. Indeed, I do not think that that case laid down any general principle. The decision was confined to the circumstances of the case and, as stressed by the court, what would be an adequate quantity would depend on the particular circumstances of each case. Even then, the question is: In the absence of a specific provision of the law, who is to determine what is the adequate quantity that should be taken as sample(s) for the purpose of carrying out the tests? The court or the chemist? Who is the expert? Who carries out the test? The answer must be the chemist.

With greatest respect, I find that the judgment of the Supreme Court in that case is not an authority for saying that the law requires that 10% of the total weight of the drug must be tested. No reference was also made to *Public Prosecutor v. Lam Sam (supra)*. With respect, the judgment seems to focus on the interpretation of the words " more than 10% " used by the chemist as if it is a statutory provision or a clause in a contract. The point is, there is no provision whatsoever in the Act which requires at least 10% of the total weight of the substance in question to be taken out for the purpose of analysis. As seen in *Public Prosecutor v. Lam Sam (supra)* the 10% is nothing more that the practice among chemists.

The only time the word " ten per centum " appears in the Act is in s. 37(j) reproduced above. That 10% mentioned in the Act refers to " receptacles " when the drug is contained in a number of receptacles, not to the weight, not where, as in *Public Prosecutor v. Lam Sam (supra)* and *Leong Boon Huat v. Public Prosecutor (supra)* the drug was found in one package only.

There appears to be a confusion as to the term 10% ie, 10% of what? This can be seen in *Loo Kia Meng v. PP[2000] 3 CLJ 653* (CA). In that case dried plant material suspected was recovered from two packages. I shall allow the judgment of Shaik Daud Md. Ismail JCA, delivering the judgment of the court do the rest of the talking:

> He testified that he took 20 random samples and after doing the chemical tests he concluded that all the dried plant material to be cannabis as defined in s. 2 of the Act. Now under s. 37(j) of the Act, the chemist is required to take a minimum of 10% by virtue of s. 37(j) of the Act (emphasis added). We find that when he said he took 20 random samples, it is ambiguous as the 20 samples taken by the chemist represented a fair sample of the total. With respect, we are unable to agree with that submission because the 20 sample could well be much less than the 10% required to be taken. We hold that pursuant to s. 37(j) of the Act, the chemist is required to give the actual amount or the actual weight of the samples taken in order to comply with that section.

With greatest respect, the sentence " Now under s. 37(j) of the Act, the chemist is required to take a minimum of 10% by virtue of s. 37(j) of the Act " is by itself ambiguous. 10% of what? If, as it appears to be, it is meant to be 10% of the total weight, clearly, that is not what s. 37(j) says. Neither does the section say 10% of the weight in each receptacle. Again with respect, I am unable to find any provision in the Act that requires the actual weight of the samples taken must be given in evidence. All that the section says is that, if " such substance is contained in a number of receptacles, it shall be sufficient to analyse samples of the contents of a number not less than ten per centum **of such receptacles**... " (emphasis added). The 10% refers to the number of receptacles, not the total net weight in all receptacles or in each receptacle. This had been made clear by the Federal Court since 1963 in *Au Ah Lin v.*

Public Prosecutor (supra). It is unfortunate that neither *Au Ah Lin v. Public Prosecutor* (FC) *(supra)*, nor *Public Prosecutor v. Lam Sam* (SC) *(supra)* was brought to the attention of the court. Even s. 37(j) which was mentioned in the judgment was not reproduced for closer scrutiny.

In the circumstances, with greatest respect, I am unable to follow *Leong Boon Huat v. Public Prosecutor (supra)* and *Loo Kia Meng v. Pendakwa Raya (supra).* Instead I prefer to follow *Au Ah Lin v. Public Prosecutor (supra)* and *Public Prosecutor v. Lam Sam (supra).*

In the instant appeal the chemist, in his evidence, gave the net weight of the " yellow granular and powdery substance in each packet and the weight of monoacetylmorphines that he found in each packet, upon analysis. He took representative samples for the tests. He explained that by " representative sample " he meant " sample taken for analysis would represent the whole bulk of the substance from which the representative sample was taken for analysis. The margin of error has been accounted for in the final reporting of the quantity of monoacetylmorphines in the homogenised yellow substance. "

The chemist was not cross examined at all either on the net weight of the " yellow granular and powdery substance " in each packet or the total, the weight of monoacetylmorphines found in each packet or the total thereof or the weight of each sample taken or the total thereof.

Based on the law as discussed earlier and the evidence of PW2 I am satisfied that the learned judge was perfectly correct in accepting his evidence.

This ground too fails.

Alternative Submission

It was also argued, in the alternative, that the learned judge should have found that the prosecution had only proved custody and control against the appellants and therefore should have only called them to enter upon their defence for possession of the drug punishable under s. 39A.

With respect I do not agree with the learned counsel's submission. This is because, as we have seen, the learned judge had made definite finding of possession by the appellants.

Ground 23

We shall now look at the appellants' defence. The learned judge has reproduced the evidence of the appellants and their witnesses at great length. I do not think that it is necessary to reproduce it. I shall, however, reproduce his discussion of their evidence and his findings.

> Di akhir kes pembelaan, setelah saya meneliti keterangan yang dikemukakan pada keseluruhannya, saya mendapati fakta yang tidak dipertikaikan ialah ketiga-tiga tertuduh berada dalam bilik tersebut pada 3 Februari 1999 jam lebih kurang 10.25 malam.
>
> Dalam pembelaannya OKT1 menjelaskan pada hari kejadian, setelah selesai menyimpan barang-barang restorannya di rumah tersebut, ia telah memasuki

bilik tersebut pada jam lebih kurang 10.00 malam untuk menukar bajunya. OKT3 telah mengikutnya dari belakang dan dalam bilik tersebut telah menyerahkan kad jemputan itu. Seterusnya OKT2 pula memasuki bilik itu. Ia sedang berdiri bersama OKT3 apabila pihak polis menyerbu masuk bilik tersebut. Ia menafikan ia sedang duduk bersila bersama dengan OKT3 dalam keadaan tidak berbaju berhadapan barang-barang kes dan sedang mengendalikan dadah itu semasa pihak polis menyerbu masuk.

OKT3 pula menyatakan ia pergi ke rumah tersebut dengan tujuan hendak menyerahkan kad jemputan itu kepada OKT1. Ia telah mengikuti OKT1 masuk ke bilik tersebut dan menyerahkan kad jemputan tersebut. Semasa itu OKT2 pun masuk ke bilik tersebut. Ia mendesakkan ia sedang berdiri dengan OKT1 dalam bilik tersebut apabila pihak polis menyerbu masuk. Ia juga menafikan ia sedang duduk bersila bersama OKT1 dalam keadaan tidak berbaju berhadapan barang-barang kes dan sedang mengendalikan dadah itu semasa pihak polis menyerbu masuk. OKT3 pula mengakui OKT2 ada jenguk dari pintu bilik tersebut apabila mereka mendengar bunyi bising di luar bilik tersebut dan mendengar seorang berteriak " Polis ".

Dalam pembelaannya OKT2 pula menyatakan ia masuk ke bilik tersebut untuk meminta wang dari OKT1 untuk membeli makanan. Pada masa itu OKT1 dan OKT3 sedang berdiri dan bercakap sesuatu. Setelah ia mendengar bunyi bising di luar bilik tersebut dan perkataan " polis " ia telah menjenguk dari pintu bilik tersebut dan pada masa yang sama pihak polis telah menyerbu masuk bilik tersebut. OKT2 menafikan ia tutup pintu itu sebaik sahaja ia melihat anggota polis dan menahan pintu dari di buka apabila SP4 hendak memasuki bilik tersebut tetapi mengakui SP4 ada menendang pintu bilik tersebut.

Saya mendapati pembelaan ketiga-tiga tertuduh berbentuk satu penafian sahaja. Di akhir kes pembelaan saya mendapati pihak pembelaan tidak membawa atau menimbulkan apa-apa keraguan terhadap kes pendakwaan. Pihak pembelaan mencadangkan rumah tersebut merupakan rumah orang bujang dan ramai orang mempunyai akses ke rumah tersebut. Pihak pembelaan juga mencadangkan mana-mana orang boleh menggunakan bilik tersebut. Di samping itu ketiga-tiga tertuduh menyatakan penghuni rumah itu adalah Naga, Suresh dan Balan.

Seterusnya ketiga-tiga tertuduh termasuk SD4 telah menyatakan semasa mereka ditahan di ruang tamu rumah tersebut bersama beberapa lelaki India yang lain itu, pihak polis telah menjumpai satu beg " pouch " yang mengandungi peket-peket plastik berisi bahan kuning dan satu peket plastik lutsinar dibaluti kertas yang mengandungi bahan yang sama di atas sofa dan di atas atau berhampiran sebuah set televisyen di ruang tamu itu. Semasa SP4 diperiksa balas di peringkat kes pendakwaan, peguam OKT1 ada mencadangkan kepadanya bahawa ia menjumpai satu beg " pouch " di atas sofa dalam ruang tamu itu dan SP4 telah tidak bersetuju dengan cadangan itu. SP4 juga tidak bersetuju dengan cadangan peguam bahawa ia ada menjumpai dadah di ruang tamu rumah tersebut seperti dicadangkan. Walau apa pun, SP4 tidak pernah disoal di peringkat kes pendakwaan tentang peket plastik lutsinar yang berisi dengan bahan kuning yang dibaluti dengan kertas yang dikatakan

> berada di atas set televisyen atau berhampiran dengan set televisyen itu yang terletak di ruang tamu rumah tersebut. Setelah saya meneliti keterangan SP4 dan bandingkannya dengan keterangan tertuduh-tertuduh dan juga SD4, saya berpendapat beg " pouch " dan peket plastik berisi dadah yang dibaluti dengan kertas itu tidak wujud. Pada keseluruhannya penjelasan tertuduh-tertuduh tidak menimbulkan dalam minda saya keraguan yang munasabah terhadap salahnya tertuduh masing-masing.
>
> Kesimpulannya saya mendapat kes pembelaan tidak membawa atau menimbulkan apa-apa keraguan terhadap kes pendakwaan. Saya juga mendapati pihak pembelaan gagal mematahkan anggapan statutori bahawa tertuduh-tertuduh mengedar dadah itu. Saya berpuashati melampaui keraguan munasabah bahawa tertuduh-tertuduh bersama-sama telah melakukan kesalahan pengedaran dadah itu. Penjelasan yang diberi oleh tertuduh-tertuduh tidak menimbulkan apa-apa keraguan. Apa yang jelas ialah keterangan dengan jelas menunjukkan tertuduh-tertuduh telah bersama-sama melakukan perbuatan jenayah itu, iaitu, mengedar dadah berbahaya itu bagi mencapai niat bersama mereka semuanya dan oleh itu adalah bertanggungan atas perbuatan itu. Oleh itu saya telah memutuskan tertuduh-tertuduh bersalah dan mensabitkan mereka atas kesalahan mengedar dadah berbahaya itu dibawah s. 39B(1)(a) Akta itu. Seperti diperuntukkan oleh s. 39B(2) Akta itu, saya telah menjatuhkan hukuman mati terhadap tertuduh-tertuduh.

Learned counsel for the 1st and 2nd appellants argued that the defence was reasonable or probable to rebut the presumption (da). He reiterated that the 1st accused brought his things to be kept in the house. Naga, Suresh and Balan were among the 10 people arrested. The 2nd and 3rd appellants assisted to unload the lorry. The lorry driver (DW4) was also arrested. Suresh, Naga and Balan were occupiers of the house. All those were not challenged, he submitted. Learned counsel referred to *Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311* (SC), in particular the passage:

> Held allowing appeal: (1) Even though a judge does not accept or believe the accused's explanation, the accused must not be convicted until the court is satisfied for sufficient reason that such explanation does not cast a reasonable doubt on the prosecution's case.

First, from the notes of evidence, I note that the learned Deputy Public Prosecutor had cross-examined the appellants and their witnesses at great length. Questions were put on all material aspects of the appellants' evidence, including that the story about the alleged transfer of the 1st appellant's goods to the house was a mere fabrication. That Naga, Suresh and Balan and DW4 (the lorry driver) were among the people arrested, is not in dispute. As to who are the " penghuni tetap ", on the facts as to how and where the drug was found in relation to the appellants, it is not material. The point is, the learned judge had considered their evidence with great care and at great length and made his findings (of facts) that he did.

It is also not correct to say that the learned judge failed to apply his mind to the principle stated in *Mohamad Radhi* 's case reproduced above. The part of his judgment that we have reproduced shows that he did so in coming the findings that he did.

In conclusion, I find that the learned judge had not misdirected himself on the law. He had

considered the evidence both for the prosecution and for the defence very carefully, gave his reasons why he accepted or did not accept certain evidence and correctly came to the conclusions that he did. He had the advantage of seeing and hearing the witnesses. I see no reason why I should interfere with his findings of facts or his final decision.

I would dismiss the appeal and confirm the convictions and sentence.