IN THE HIGH COURT OF MALAYA

IN THE STATE OF PERAK DARUL RIDZUAN

[CRIMINAL TRIAL NO: MT45A-10-12/2015]

BETWEEN

PUBLIC PROSECUTOR

AND

1) MATHAVAN A/L SUBRAMANIAM

2) LOGESWARAN A/L SUBRAMANIAM

3) KELEMAN A/L LENIN

JUDGMENT

INTRODUCTION

[1] The prosecution laid several criminal charges against the above accused persons, Mathavan a/l Subramaniam ("Mathavan"-OKT1), Logeswaran a/l Subramaniam ("Logeswaran"-OKT2) and Keleman a/l Lenin ("Keleman"-OKT3) (collectively known as "the accused persons") for the offences of trafficking under section 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA").

[2] The said charges read as follows:

First Charge

"Bahawa kamu bersama-sama pada 20.2.2015 jam lebih kurang 3.00 petang di rumah No. 13, Jalan Lahat Mines 15, Bandar Lahat Mines, Lahat, Ipoh, di dalam Daerah Kinta, di dalam Negeri Perak Darul

*Ridzuan dalam meneruskan niat bersama kamu telah mengedar dadah berbahaya seberat **207.8 gram (157.5 gram Heroin dan 50.3 gram Monoacetylmorphines**) dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 39B (1) (a) Akta Dadah Berbahaya 1952 dan boleh dihukum dibawah seksyen 39B(2) Akta yang sama dibaca dengan seksyen 34 Kanun Keseksaan".*

Second Charge

*"Bahawa kamu bersama-sama pada 20.2.2015 jam lebih kurang 3.00 petang di rumah No. 13 Jalan Lahat Mines 15, Bandar Lahat Mines, Lahat,Ipoh, di dalam Daerah Kinta, di dalam Negeri Perak Darul Ridzuan dalam meneruskan niat bersama, kamu telah mengedar dadah berbahaya seberat **17.6 gram (10.0 gram Heroin dan 7.6 gram Monoacetylmorphines**) dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1) (a) Akta Dadah Berbahaya1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama dibaca dengan seksyen 34 Kanun Keseksaan."*

Third Charge

*"Bahawa kamu bersama-sama pada 20.2.2015 jam lebih kurang 3.00 petang di rumah No. 13, Jalan Lahat Mines 15, Bandar Lahat Mines, Lahat, Ipoh, di dalam Daerah Kinta, di dalam Negeri Perak Darul Ridzuan dalam meneruskan niat bersama kamu telah mengedar dadah berbahaya seberat **466.1 gram methamphetamine** dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1) (a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama dibaca dengan seksyen 34 Kanun Keseksaan".*

[3] The accused persons claimed trial to all charges which were heard together in a joint trial and the prosecution called thirteen (13) witnesses to prove the said charges against the accused persons.

THE PROSECUTION'S CASE

[4] On 20th February 2015, Insp G/19609 Sherman Jackson (SP6) had formed a team comprising eight (8) police personnel of various ranks from Bukit Aman for a briefing regarding drugs trafficking activity at a house No.13 Jalan Lahat Mines 15, Bandar Lahat Mines, Lahat, Ipoh ("the said house"). After the briefing, SP6 then divided his team into two groups, i.e. one headed by him and the other was headed by Insp Mohd Ikhwan Firdaus (SP10). SP6 then instructed his team to enter the housing area to prepare for an ambush of the said house while SP10 and his team waited outside the housing area pending further instructions from SP6.

[5] At about 2 pm, before raiding the said house, SP6 had firstly carried out observation work and checked the surrounding area of the target location and found the area to be quiet, with no one coming in and out of the said house. According to SP6, there appeared to be no entrance/exit from the back of the said house. At about 2.55-3.00 pm, after ensuring there is no presence of any henchmen, SP6 and his team proceeded to approach the said house and found the gate of the said house closed but was not locked. Subsequently, SP6 claimed to have seen the curtain being moved aside ("*diselak*") and he was apparently able to see three (3) Indian men standing by a table in the main hall and there were some movement in the said house.

[6] Before he could enter the said house, SP6 found the grille door and the main door locked. SP6 instructed Detektif Koperal Fairol and Detektif Koperal Azizi to cut the grille loop ("*telinga gril*") after which he had instructed Detektif Sarjan Zulkifli to break the wooden main door by using a door arm. According to SP6, after successfully gaining access into the said house and after introducing himself as police officer, he saw two (2) Indian men running away towards the stairs. SP6 then assisted by D/Kop Fairul Anuar and D/Kop Azizi

apprehended and arrested them who was later identified as Mathavan (OKT1) and Logeswaran (OKT2). SP6 also saw another man running towards the kitchen, SP6 assisted by D/Kop Aminudin and D/Kop Saiful apprehended and arrested the man who was later known as Keleman. According to SP6, during the arrest, all the accused persons appeared to be scared and due to the scuffle with all of them during the arrest, the said accused persons were injured.

[7] SP6 then instructed SP10 to guard the accused persons while he went upstairs to carry out further inspection but found nothing incriminating. As SP6 carried out further investigation downstairs, he found on top of the dining table in the main living room substances suspected to be heroine scattered on the dining table, weighing machined, clear plastics cover and others (refer to para 9 for the details). SP6 then proceeded to the toilet downstairs and found substances suspected to be heroine scattered on the toilet floor and in the toilet bowl which SP6 believe the accused persons were trying to dispose of the said substance suspected to be drugs. SP6 then proceeded to go upstairs to double check but again he found nothing incriminating.

[8] Other than the substance suspected to be heroin found on the table and in the toilet, SP6 did not find any other incriminating substance in the said house. By using uncalibrated weighing machine, SP6 proceeded to weigh the substance suspected to be heroin and he issued a search list which was done in-front of the accused persons. SP6 further explained the contents of the search list to the accused persons in Tamil, they acknowledged and signed the search list (exhibit P19). SP6 then instructed SP10 to accompany Logeswaran (OKT2) and Keleman (OKT3) to the hospital to treat their injuries. SP6 then informed Inspector Zaffrul (SP11) for forensic investigation and then SP6 with the rest of his team went back to the *Jabatan Siasatan Jenayah Narkotik*, ("JSJN") IPD Ipoh together with the

exhibits and lodged police report [(Lahat report 208/15) – (P18)] and an amended police report to amend the address of the said house [(Lahat report 211/15) – (P22)]. The accused persons and the seized items were later handed over to the first/initial IO, Asp Shukry G/15184 (SP5) and "*akuan serah menyerah barang kes"* (P20).

[9] Two days later, on 22nd February 2015, at about 5 pm, SP6 went back to the said house together with SP13 and photographer Kop Zamri RF 87762 (SP1) who took photos of the said house [P6(1-14)] and exhibits [P7(1-43)], SP6 found the said house had been intruded ("*dicerobohi"*) where the grille door and the wooden door were damaged and cannot be closed. SP6 then later secured the grille door by using the chain and padlock that was provided for him and the keys were handed over to SP5 (the first/initial IO).

[10] SP6 referred to his police reports (P18 and P22), search list (P19), photos of exhibits [P7(1-43)], list of "*borang serah menyerah barang kes*" (P20), the following were marked and tendered as follows:

"1. A plastic cup red in colour [(marked as N1) – P13(D)] which contained powdery substance suspected to be heroine (approximately 250 gram);

2. Scattered white powdery substance suspected to be heroine found on the dining table [(collected and put in a translucent plastic and kept in a PDRM bag) – (approximately 368 grams), (marked as N2) – P13I];

3. A package wrapped in a newspaper Metro Ahad dated 16th November 2014 [(marked as N3) – P12(A)] tied with two (2) green rubber-bands, which contained a translucent plastic [(marked as N3a) – P13B(1)] that contained

substances suspected to be heroine (approximately 456 grams);

4. A package wrapped in a Sunday newspaper dated 16th November 2014(marked as N4) – P12(B)] tied with two (2) green rubber-bands which contained a translucent plastic [(marked asN4a) – P13B(2)] that contained substances suspected to be heroine (approximately 452 grams);

5. A package wrapped in a newspaper Metro Ahad dated 16th November 2014[(marked as N5) – P12(C)] tied with two (2) green rubber-bands which contained a translucent plastic [(marked as N5a) – P13B(3)] that contained substances suspected to be heroine (approximately 453 grams);

6. A package wrapped in a newspaper Metro Ahad dated 16th November 2014 [(marked as N6) – P12(D)] tied with two (2) green rubber-bands which contained a translucent plastic [(marked as N6a) – P13B(4)] that contained white substances suspected to be heroine (approximately 456 grams);

7. A package wrapped in a newspaper Metro Ahad dated 16th November 2014 [(marked as N7) – P12I] tied with two (2) green rubber-bands that contained a translucent plastic [(marked as N7(a)- P13B(5)] that contained white substances suspected to be heroine (approximately 455 grams);

8. A package wrapped in a newspaper Metro Ahad dated 16th November 2014 (marked as N8a) – P12F(2)] wrapped with a translucent plastic [(marked as N8) – P12F(1)] further wrapped with a translucent plastic [(marked as N8a1-

exhibit P13A(1)] that contained pink substances suspected to be heroine (approximately 454 grams);

9. A package wrapped in a newspaper Metro Ahad dated 16th November 2014 [(marked as N9a) – P12G(2)] wrapped with a translucent plastic [(marked as N9) – P12G(1)] further wrapped with a translucent plastic [(marked as N9a1) – P13A(2)] that contained pink substances suspected to be heroine (approximately 453 grams);

10. A package wrapped in a newspaper Metro Ahad dated 16th November 2014 [(marked as N10a) – P12H(2)] wrapped with a translucent plastic [(marked as N10) – P12H(1)] and further wrapped with a translucent plastic [(marked as N10a1) - (P13A(3)] that contained pink substances suspected to be heroine (approximately 455 grams);

11. A package wrapped in a newspaper Metro Ahad dated 16th November 2014 [(marked as N11a – P12I(2)] wrapped with a translucent plastic [(marked as N11) – P12I(1)] further wrapped with a translucent plastic [(marked as N11a1)) - P13A(4)]that contained pink substances suspected to be heroine (approximately 456 grams);

12. A package wrapped in a newspaper Metro Ahad dated 16th November 2014 [(marked as N12a) – P12J(2)] wrapped with a translucent plastic [(marked as N12) – P12J(1)] further wrapped with a translucent plastic [(marked as N12a1) – P13A(5)] that contained pink substances suspected to be heroine (approximately 228 grams);

13. A brown envelope 2014 [(marked as N13) – P12(K)] that contained two (2) translucent plastics, first translucent plastic [(marked N13a-P13F(1)] which contained crystal

substances suspected to be syabu (approximately 505 grams) and second translucent plastic [(marked N13b-P13F(2)] which contained crystal substances suspected to be syabu (approximately 204 grams);

14. Scattered white powdery substance suspected to be heroine found in the toilet on the dining table [(collected and put in a translucent plastic and kept in a PDRM bag [(marked as N21) –P13I;

15. An electronic weighing machine [(marked as N14) – P12(L)];

16. A sealer with brand name Arrow [(marked as N15) – P11(A)];

17. A plastic package that contained several pieces of translucent plastics (respectively marked as [N16-P11(B)], [N17- P11(C)] and [N18) – P11(D)];

18. A calculator with brand name Casio [(marked as N19) – P11I];

19. A scissor [(marked as N20) – P11(F)];

20. A set of three (3) keys- (P24);

21. A padlock with the brand name Epal Top Security (P25).

[11] SP10 who was attached to the unit *"Tindakan Khas Jabatan Siasatan Jenayah Narkotik, Bukit Aman*" was with SP6 during the said raid and arrest, corroborated the evidence of SP6. SP10 received instruction from SP6 and attended a briefing regarding drugs trafficking activity at Lahat, Ipoh. After receiving information, they left at about 10.45am and arrived at Lahat area around 2.00pm. SP10 and his team then waited outside the housing area while SP6 inspected

the surrounding area. Around 2.50pm, SP6 instructed SP10 and his team to follow him into the housing area and around 3.00 pm they ambushed the said house. His team jumped over the fence and SP6 instructed one of the team to cut the padlock to the grille and within a minute they managed to enter the said house and managed to arrest two (2) Indian men who ran towards the stairs and was arrested at the stairs whom later were identified as Mathavan (OKT1) and Logeswaran (OKT2) and another Indian man who ran to the kitchen and was arrested at the kitchen area whom later was identified as Keleman (OKT3). SP6 instructed SP10 to guard the accused persons while SP6 and his team went upstairs and found nothing incriminating. SP6 then proceeded to inspect in detail at the ground floor area and found substance suspected to be drugs (heroin) scattered on the dining table and in the toilet. SP6 then weighed and seized the substance suspected to be heroin and he subsequently issued a search list to the accused persons. According to SP10, SP6 went twice upstairs, the first time for initial investigation ("*pemeriksaan awal"*) and the second time SP6 went upstairs together with OKT2. After issuing the search list (P19) to the accused persons, SP6 informed the forensic and narcotic Ipoh and instructed SP10 to bring Logeswaran and Keleman to the hospital because they sustained injury during the raid. SP10 identified the photo of the said house [P6(1-14)]. SP10 further identified the photo of the toilet bowl [P6(9-10)] where the accused persons were trying to dispose of the said substance suspected to be drugs.

[12] SP6's evidence was further corroborated by SP11 who was attached at the forensic department IPK, Ipoh Perak when his forensic team was instructed to assist SP6 in investigating a house No.13 Jalan Lahat Mines 15, Bandar Lahat Mines, Lahat, Ipoh. When he arrived at the said house SP6 was still there. SP11 did the swabbing on all of the accused persons, two (2) tooth brushes and a comb and left the said

house around 6.35pm. SP11 then went back to IPD Ipoh and handed over the items for forensic investigation and his report (P37) to the IO [(SP13) -who took over from SP5, Insp Mohamad Azri I/8820]. SP11 identified P10A-P10B. SP9 is the government chemist for forensic exhibits. On 5th May 2015 SP4 received the exhibits in envelopes marked as A7-A6 intended for the Chemist Department ("JKM") and tendered P16 (receipts from JKM). SP4, who after having examined and analysed the same (chemist report - P17) had found the result of the swabbing (*gumpalan kapas*) to be negative and found no trace substance of the said drugs.

[13] The evidence of SP6, SP10 and SP11 were corroborated by the IO (SP13). SP13 confirmed that on 20th February 2015 at 11.45pm, he received the exhibits from SP5 and "*borang serah menyerah barang kes" (*P21). According to SP13, SP6 was also present when he went to the said house. From SP13's investigation, the owner of the said house is an Indian man who works in Singapore and the caretaker of the said house is the man's uncle name Mr Rajkumar a/l Narayanan (SP8). According to SP8 he rented the said house to an Indian woman name Thivarani (later known as SD4) with a rental of RM850.00 a month which she paid cash. The said house was rented to Thivarani for only 3-4 months before the said raid/ambush by the police. According to SP8, Thivarani informed him that she is living in the said house together with her husband Keleman (OKT3). There was a rental agreement which is still with the lawyer and yet to be signed by SD4. SP13 recorded SP8 statement and according to SP8, he rented the said house to an Indian woman which SP13 found to be Keleman's wife. There was no rental agreement tendered and Keleman's wife was not called as a witness because according to SP13, they were unable to serve her the subpoena despite several attempts made on her various known addresses. On 22nd February 2015 around 5.00pm, together with SP6, SP13 went to the said house to investigate and has

instructed Kop Zamri RF 87762 (SP1) to take photographs of the said house. On the same day, around 7.30pm at the IPD, SP13 took out the all exhibits and instructed SP1 to take photographs of exhibits. All photographs were tendered as follows:

(i) P6(1-14) – photo of the place of the offence (*tempat kejadian*);

(ii) P27 (1-43) – exhibits seized including the impugned drugs; and

(iii) P8 – CDR (the above photos were copied and saved on a CDR).

[14] The suspected drugs were later sent to the government chemist. On 31st March 2015 around 8.30, SP13 has instructed SP3 to send the exhibits in envelopes marked as A7-A13 to JKM and tendered P14 (receipts from JKM). SP4, who after having examined and analysed the same (chemist report marked as exhibit P17) had found the impugned substance are scheduled as dangerous drugs listed under the DDA.

THE LAW

[15] It is trite that pursuant to section 180 of the CPC that once the prosecution had concluded their case, the legal burden rests with the court to determine whether in all the circumstances of the prosecution case presented to the court, a *prima facie* case has successfully been made out against the accused. In this instance a *prima facie* case is made out where the prosecution has adduced credible evidence proving each ingredient of the offence, which if unrebutted or unexplained would warrant a conviction. 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. 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 his defence. In the premise it is also trite and incumbent upon the court before making out such legal determination to carry out a maximum evaluation on the evidence and credibility of the witnesses at the close of the case for the prosecution (*Balachandaran v. PP* [2005] 1 CLJ 85; and *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457).

[16] Maximum evaluation denotes an assessment process for the essential purpose of analysing the credibility and reliability as well as trustworthiness of the evidence of the prosecution. Credible evidence is evidence which had been filtered and which had gone through the process of evaluation and any evidence which is not safe to be acted upon should be rejected (see *PP v. Ong Cheng Heong* [1998] 4 CLJ 209). Thus, what is required by a trial court is to test the evidence of a witness from all angles as well as its reliability and credibility by considering the entire evidence placed before the court. The evidence must not be accepted at face value but must be tested and evaluated before reliance can be placed on each piece of evidence adduced. Further, the trial court has the duty to consider the evidence, which favours the defence. This requires a consideration of the existence of any reasonable doubt in the case for the prosecution and if there is any such doubt, there can be no *prima facie* case (see *Balachandran v. PP* (*supra*). The above principle of law on maximum evaluation should be read together with the principle relating to judicial appreciation of evidence which is set out in the following words of Gopal Sri Ram JCA in *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97:

> *" A trier of fact, who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness's evidence, runs the risk of having his findings corrected on appeal. It does not matter whether the issue for*

decision is one that arises in a civil or criminal case, the approach to judicial appreciation of evidence is the same".

THE COURT'S FINDINGS AT THE END OF THE PROSECUTION'S CASE

[17] The essential ingredients of the charge against the accused persons that must be established by the prosecution at the close of the prosecution's case are as follows:

(i) the drugs are 'dangerous drugs' as defined in the First Schedule to the Dangerous Drugs Act 1952;

(ii) the said drugs were in the possession of the accused persons and the accused persons has knowledge of the said drugs;

(iii) the accused persons were 'trafficking' the said drugs ; and

(iv) the trafficking above was done in furtherance of common intention between the accused persons (section 34 Penal Code).

Issue (i)

[18] In the present case, on a maximum evaluation of the evidence adduced by the prosecution, I found that there was nothing incredible in the evidence so adduced for it not to be believed. SP4 who is the government chemist, after having examined and analysed the same submitted the Chemist Report (exhibit P17) where SP4 had found the impugned substances to be:

i. 5 packets of plastics marked as N8a1-N12a1 contains 16.6 grams of Monoacetylmorphines;

ii. 5 packets of plastics marked as N3a-N7a contains 33.7 grams of Monoacetylmorphines;

iii. A bag PDRM marked as N21 contains 10.0 grams of Heroin 6.6 and 7.7 grams of Monoacetylmorphines;

iv. 2 packets of plastics marked as N13a-N13b contains 466.1 grams of Monoacetylmorphines;

Those aforesaid drugs are scheduled as dangerous drugs listed under the DDA. The defence at this stage of the prosecution case elected not to dispute the procedure and findings of SP4. Nevertheless, for completeness, I will proceed with my findings. I find there is no break of chain in the evidence of SP6 from the raid and seizure of the exhibits and it was surrendered to the initial IO (SP5) and the later the IO (SP13) and later to the Chemist SP4. All exhibits seized were identified, marked and signed by SP6 and confirmed by SP13. The evidence of SP6 was corroborated by his police reports [P18 and P22(amended)], "*senarai bongkar*" (P19), "*borang serah menyerah"* (P20) to SP5 and further "*borang serah menyerah"* to SP13 (P21). I find the prosecution had proven that the drugs seized from the accused person are scheduled as dangerous drugs listed under First Schedule of the DDA.

Issue (ii)

[19] The prosecution must prove that the said drugs were in the possession of the accused persons and they had knowledge of the said drugs. There was no reason to doubt the evidence of SP6 and SP10 at this juncture of the prosecution's case, the police personnel involved in the said raid at the said house on 20th February 2015 and SP5 who is the initial IO and SP13 who took over as IO from SP5. As stated in the case of *PP v. Mohamed Ali* [1962] 28 MLJ 257:

"When a Police witness says something that is not inherently improbable his evidence must in the first instance be accepted. If he says he saw a cow jumping over the moon his evidence is, of course, not to be accepted, but if he says he saw a cow wandering along one of the main streets of Kuala Lumpur (the sort of thing we all see every day of our lives) there is not the slightest justification for refusing to believe him. Of course, if his evidence is contradicted by other evidence or is shaken by cross-examination then it becomes the business of the Magistrate to decide whether or not it should be accepted. In the absence of contradiction, however, and in the absence of any element of inherent probability the evidence of any witness, whether a Police witness or not, who gives evidence on affirmation, should normally be accepted."

[20] The evidence of SP6, SP10 and SP13 corroborated each other and the combination of their evidence in its entirety had proven that the accused persons had the possession and knowledge of the said drugs. The accused persons were in the said house, which was locked and according to the evidence of SP6, when he first saw them, they were at the dining table where most of the drugs were later found together with other items including various plastic packets, sealer and digital weighing machine. SP6 also found documents belonging to OKT3 in the cupboard near the dining hall and a toothbrush with his DNA in the said house. According to SP6, the accused persons looked shocked and ran when SP6 introduced himself as a policeman. The fact that the accused persons appeared scared when SP6 introduced himself clearly demonstrated guilty knowledge on the part of the accused persons as provided for under section 8 of Evidence Act in the absence of evidence by the defence to negate such inferences. And this inference is further supported by the fact that the said house was locked at the grille and at the wooden door which shows the inference

to avoid any unwanted intrusion. The Federal Court in *Parlan Bin Dadeh* [2008] 6 MLJ 19 said that proof of knowledge is very often a matter of inference which varies from case to case. It would be sufficient for the prosecution to prove facts from which it could properly be inferred that the accused persons had the necessary knowledge. The explanation for their reaction must therefore be offered by the accused persons themselves as required by section 9 of the Act. However, since the accused persons did not offer any explanation at the prosecution stage for their reactions upon being approached by the police, it could be validly used as evidence against him. In the circumstances, the inference to be drawn from the evidence was that they knew about the impugned drugs that were in their possession.

[21] In the premise, this court found that the prosecution had successfully established a *prima facie* case against the accused persons. The evidence adduced had proven that the accused persons had the possession, custody and control of the impugned drugs as the accused persons were caught in the said house with the said translucent plastic packets containing the said drugs on the dining table in the main hall and in the toilet. I find as a fact and as a matter of law, that the prosecution has succeeded in proving that the accused persons had actual possession of the impugned drugs independent of the provisions of presumed possession under section 37(da) of the DDA 1952.

[22] Based on the celebrated cases of *Chan Pean Leon* [1956] MLJ 237, *Wong Nam Loi v. PP* [1997] 4 AMR 3603 and *PP v. Badrulsham Bin Baharom* [1988] 2 MLJ 585, I am also satisfied that the accused persons had the requisite knowledge of the drugs which were in their custody and control and in their possession. In the case of *Chan Pean Leon* (*supra*) the Court stated that knowledge cannot be proved by direct evidence and it can only be proved by inference from the

surrounding circumstances. Likewise, in the case of *Wong Nam Loi v. PP* (*supra*), His Lordship Shaik Daud JCA stated:

> *"to constitute possession, there must be knowledge. Knowledge cannot be adduced by direct or tangible evidence but only by inference from the surrounding circumstances"*

[23] The defence at the prosecution stage only advocated an issue that the impugned drugs were not found with the accused persons. It was further contended that the place where the drugs were found was rented by OKT3's wife and she has the spare keys. The defence submitted that since Thivarani and other friends of Keleman had their spare keys therefore there is no exclusivity as the said house is accessible by Thivarani and the others.

[24] This court is always reminded that there should not be any confusion as to the term 'exclusive possession'. In the case of *PP v. Denish a/l Madhavan* [2009] 2 MLJ 194, the Federal Court explained the term 'possession' in drugs trafficking case and stated:

> *"[16] Before proceeding to consider the reasons for the Court of Appeal's decision, we will say a few words about 'exclusive' possession. It is inappropriate to speak of possession of an article in criminal law as exclusive possession. One is either in possession or not in possession, although one could be in possession jointly with another or others. To say that the prosecution of a drug case fails because there has been no proof of exclusive possession is apt to convey the wrong impression that it is only in cases where possession is entirely with one person, — that is, 'exclusive' — that a conviction is possible. When the learned trial judge said 'The accused sought to negative the proof of exclusive possession…', we take it that he meant no more than that the respondent sought to show that he was not in possession of the drugs because he had no knowledge*

of their existence and that the drugs could have been placed in his bags by some other person or persons.

[17] The idea of exclusivity features in the meaning of 'possession' in criminal law as one of the elements necessary to constitute possession. As Taylor J said in Leow Nghee Lim v. Reg [1956] MLJ 28:

... It is often said that 'possession must be exclusive'. This is ambiguous. Possession need not be exclusive to the accused. Two or more persons may be in joint possession of chattels, whether innocent or contraband. The exclusive element of possession means that the possessor or possessors have the power to exclude other persons from enjoyment of the property.

Custody likewise may be sole or joint and it has the same element of excluding others. The main distinction between custody and possession is that a custodian has not the power of disposal. The statement that 'possession must be exclusive' is often due to confusion of the fact to be proved with the evidence by which it is to be proved. It is essential to keep this distinction clearly in mind, especially when applying presumptions

[18] Thomson J in Chan Pean Leon v. Public Prosecutor [1956] MLJ 237, said that 'possession' for the purposes of criminal law involves possession itself — which some authorities term 'custody' or 'control' — and knowledge of the nature of the thing possessed. As to possession itself he cited the following definition in Stephen's Digest (9th Ed), at p 304), in which the exclusive element mentioned by Taylor J appears:

A moveable 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.

[19] Once the elements needed to constitute possession are established, including the element of exclusive power to deal, then what is established is possession, not exclusive possession. So much for exclusive possession."(Emphasis added)".

[25] The defence in this case asserted and aimed to show the probability of access by others as a cause to negative exclusive possession, it was to assert that the drugs found in the said house could have been planted there by these other persons. But bare assertions or mere suggestions could not be said to be evidence that raises reasonable doubts. In the case of *Ali Hosseinzadeh Bashir v. Public Prosecutor* [2015] 1 CLJ 918 the Court of Appeal stated:

"[23] It must be understood that what counsel puts or suggests to a witness in cross-examination is not evidence. They are merely suggestions and to give notice to the prosecution that the defence has a different version of the events. They prove nothing and will remain nothing unless confirmed by the witness or by the party on whose behalf the suggestions are made when his turn comes to give evidence."

In the case of *Lim Son Heng v. Public Prosecutor* [2014] 6 MLJ 109 the Court of Appeal explained:

"[14] With respect, it is incorrect to argue that just because someone else has access to the house, the person occupying that house would lose exclusive possession of all the things inside the house. R v. Woodman [1974] 2 All ER 955 is a case concerning theft of scrap metal from a factory site, where the owners had put up fencing around the site to keep out trespassers. The owners themselves were unaware that remnants

of scrap metal still remained in the factory. Lord Widgery CJ in delivering the judgment of the Court of Criminal Appeal held that:

We have formed the view without difficulty that the recorder was perfectly entitled to do what he did, that there was ample evidence that English China Clays were in control of the site and had taken considerable steps to exclude trespassers as demonstrating the fact that they were in control of the site, and we think that in ordinary and straightforward cases if it is once established that a particular person is in control of a site such as this, then prima facie he is in control of articles which are on the site.

[15] On the facts of the present case, there can be no doubt that the appellant had possession of all the things inside the premises to the exclusion of other people. This is evidenced from the fact that he made sure he locked the grille door with a padlock before he left the premises, the keys to the premises were found with him. In such a situation, the appellant 'has the power to exclude other persons from the enjoyment of the property' as explained by Taylor J in Leow Nghee Lim."

[26] In the present case, there was no evidence to show that there were other people staying with the accused persons in the said house and I find the accused persons were the persons who had the power to deal with the said drugs. Based on the facts and evidence adduced, the conduct of the accused coupled with the evidence of them being in direct possession of the said drugs, were corroborative of the fact that the accused persons had the required *mens rea* in the sense that they knew what was in the said plastic packets that was in the said house at the material time. The fact that the accused had looked shock, was caught red handed and apprehended while in the said house was

sufficient and is corroborative of the fact that they had knowledge. In the case of *PP v. Mardani Hussin* [2005] 7 CLJ 495, Abdul Hamid Embong J concluded that where the accused was caught literally red-handed with the impugned drugs and had looked scared, and that the accused's expression of shock and fear when confronted by the police is corroborative of the fact that he had this knowledge.

[27] In the case of *Public Prosecutor v. Mansor Md Rashid & Anor* [1996] 3 MLJ 560 Chief Justice Chong Siew Fai (Sabah and Sarawak) had the occasion to say the following:

> *"Where the identity of a culprit is in question or is required to be proved, fingerprint evidence will be of great significance and value. In the instant case, however, the charge alleged trafficking in the form of a 'sale' and there was evidence indicating the identities of the alleged offenders and the sale transaction. Fingerprint evidence, therefore, assumed little value or significance."*

[28] In the case of *Balachandran v. PP* (*supra*) the Federal Court stated a *prima facie* case is therefore one that is enough under the law for the accused to be called upon to answer. I find as a fact and as a matter of law that the prosecution had succeeded in proving the ingredients of the charge with no break of chain in the evidence, the element of actual possession with *mens rea* from evidence adduced through witnesses and independent of the provisions on presumed possession under section 37(da) of the DDA, 1952. In light of the fact that the accused was found to be in actual possession of more than 15 grammes of the scheduled dangerous drugs, the prosecution is perfectly placed to invite this court to invoke the presumption of trafficking against the accused under section 37(da) of the DDA, 1952.

Issue (iii)

[29] The prosecution must prove that the accused persons were trafficking the said drugs on the said date, time and place as charged. In the case of *PP v. Chia Leong Foo* [2000] 6 MLJ 705, [2000] 4 CLJ 649 where it was held that as most of the acts that constitute trafficking involve the prerequisite element of possession, the initial matter that requires proof by the prosecution is possession. This court is of the considered view that the prosecution had proven the accused persons to have possession of the said drugs and therefore the prosecution can rely on the presumption under section 37(da)(iiia) of the Act which provides as follows:

> *"s. 37 (da) (iiia) a total of 15 grammes or more in weight of heroin, morphine and monoacetylmorphines or a total of 15 grammes or more in weight of any two of the said dangerous drugs;…*

Considering the foregoing, I find the prosecution had succeeded in proving that the accused persons were trafficking the said drugs.

Issued (iv)

[30] The charge against the accused persons were under section 39B of the Act read together with section 34 of the Penal Code ("PC") where they were said to have trafficked the said drugs in furtherance of their common intention. Section 34 PC lays down only a rule of evidence to infer joint responsibility for a criminal act performed by a plurality of persons. This section is drafted in such a way so as to meet situations where it would be difficult to identify the exact acts of individual members of a party who acted in furtherance of their common intention.

[31] On a charge involving common intention, the prosecution must show that there was a pre-arranged plan to commit the crime and the crime forming the subject matter of the charge was done in concert pursuant to that pre-arranged plan. In the case of *Mahbub Shah v. King Emperor* [1945] AIR PC 118, pre-arrangement need not exist in the sense of a prior plan. From the evidence before this court today, the accused persons were arrested in the said house and there were no one else, SP6 found the impugned drugs in the toilet and on the dining table together with various plastic, sealer, weighing machine with the main door and the grille locked. Examining the evidence in entirety, I find the accused persons to have a pre-arranged plan to deal with the impugned drugs found in the said house. With this back drop, it is sufficient for this court to make an inference that the accused persons have the common intention as provided for under section 34 of the Penal Code in that the accused persons have common intention to traffic the said drugs. In the premise and based on maximum evaluation, I found that the prosecution had succeeded in establishing a *prima facie* case against the accused persons and they were called to enter their defence on all charges.

APPLICATION BY THE DEFENCE TO RECALL SP1, SP6 AND SP13

[32] Before the defence could present their case the newly appointed learned counsel for OKT1 and OKT2 made an application to recall SP1, SP6 and SP13 by invoking section 425 of the Criminal Procedure Code ("CPC") where the main point of contention was the threshold issue and the requirement for the just determination of the case. The said learned counsel contended that when the accused had engaged him to take conduct of this case, he advocated that from the documents adduced in court there were certain issues which needed further cross not based on fault of the previous counsel but because

two (2) counsels can hold two different views on the issue, and that notwithstanding recall must be applied for clarity and the just decision of the case. Briefly the areas that require further examination is the evidence of SP1, photos taken in relation to the house where exhibits were found and the line of question on those pictures, where the drugs were found etc. For SP6, they found that there are question wanting for the RO in relation to what he showed, the manner of the raid and the said conduct of the accused persons. For SP13, the evidence of the IO needs to be explored, there are other persons arrested and their role and how it prejudices the case. This application was objected to by the learned DPP since the court had already called the accused persons to enter their defence. There are several provisions empowering a trial court to permit the recalling of witnesses. The main provision under the CPC is section 425 as applied today, which comprises two limbs, namely the first limb (may) which is discretionary and the second (shall) which makes it incumbent on the court to allow, *inter alia*, the recall of any person as in this case today the recall of SP1, SP6 and SP13 on the grounds that their evidence is essential to the just decision of the case. I refer to the case of *Chin Kek Shen v. PP* [2013] 5 MLJ 827, [2013] 7 CLJ 435 where the Court of Appeal ruled at what stage a witness can be recalled:

> *"On the factual matrix of this case it was plainly wrong for the trial judge to arbitrarily disallow the appellant's application to recall SP1 without good reasons. It is well settled that a court has a wide discretion to allow a witness to be called or recalled under s. 425 of the Criminal Procedure Code ('CPC') before the close of the defence case. Although the power under s. 425 of the CPC is discretionary, it ought to be exercised judiciously, failing which appellate interference was warranted. In the*

instant case, the refusal of the trial judge to allow the witness to be recalled and subsequently making adverse findings and remarks in respect of the defence case, compromised the integrity of the decision-making process and attracted the jurisprudence relating to mistrial as well as miscarriage of justice, which required appellate intervention to rule that the conviction was unsafe (see paras 8-9)".

After hearing submissions by the learned counsel and the learned DPP and based on the reasons given I take judicial cognisance of the fact that that the accused persons could face the death penalty in the event of a conviction and in the circumstances, they must be accorded every opportunity allowed by law to present their defence. In any event I find no prejudice in the circumstances on the prosecution case thus far presented. Therefore, I allowed the application by the learned counsel to recall SP1, SP6 and SP13 for the just decision of this case.

[33] Facts gathered (briefly) during this recalled proceeding. SP1 during cross examination when referred to photo P6(1-14), affirmed that from the main gate, neither the main hall nor any activity in the main hall can be seen which clearly contradict the testimony of SP6 in regard to the same issue. SP1 had also agreed to the suggestion by the learned counsel that even if the curtain/s were "*diselak*", people cannot see clearly what is going on in the said house. When SP1 was referred to the photo of the wooden door P6(4) and when it was put to him that the door was not broken, SP1 answered that he is not sure, but he admitted that the door was a bit ajar ("*renggang*"). On re-examination by the DPP, SP1 admitted that he only took the said photos based on the instruction from the IO (SP13).

[34] SP6 and SP13 were also recalled as witness but the co-counsel for OKT 1 and OKT2 informed the court that since the lead counsel

Tan Sri Shafee was not available, she was not given the mandate by OKT1 and OKT2 to proceed with the cross examination of SP6 and SP13. I hold that such reasoning in the circumstances do not afford any justification to not proceed with the further cross examination of the recalled witness SP6 and SP13 bearing in mind it was the learned counsel's application to recall and to further cross examine which had been granted and consequently I proceeded by calling SP6 and SP13 to take the stand. However, the learned counsel for OKT3 informed the court that as with the co-counsel for OKT1 and OKT2, he too had no question for SP6 and SP13 and neither the DPP, SP6 and SP13 were eventually released by this court as witness. The lead counsel later did apply for a second recall of SP6 and SP13, but I rejected the said application when he had failed to be present and to further cross the said witnesses who were present on the last hearing date.

THE DEFENCES' CASE

[35] The accused persons were given the three (3) options of giving evidence and they elected to give evidence on oath and had also called six other (6) supporting witnesses, i.e.:

(i) SD4, Thivarani a/p Mahainderan (wife to OKT3);

(ii) SD5, Narayani a/p Madhavan (wife to OKT1);

(iii) SD6, Kanageswary a/p Muthu Manickam (wife to OKT2);

(iv) SD7, Pemangku DSP M.Navamany a/l Retnam G/14640;

(v) SD8, Insp Mohd Faizal bin Jamaludin G/16338;

(vi) SD9, Surendran a/ Subramaniam;

[36] On 20th February 2015, which was second the day of Chinese New Year ("CNY"), OKT1 who was on leave had lunch at home and

later contacted OKT2 to ask him out. OKT2 informed him to meet up at their common friend's house [Keleman's house – ("the said house")]. According to OKT 2, he was working half day on 20th February 2015 and was at his own car wash shop which was located at Pasar Bina, Pengkalan, Ipoh. After he finished his work he went home and reached his house at around 1.30 pm. Upon discovering that no one was at home, OKT2 called his wife to ask for her whereabouts. OKT2 subsequently received a call from OKT1 who asked him to hang out and they then agreed to meet up at the said house. The evidence of OKT1 was corroborated by his wife SD5.

[37] OKT2 arrived at the said house at around 2.30pm. He entered the said house and saw 3 Indian men were sitting on the sofa. OKT2 did not know these 3 Indian men as he has never seen them before. Immediately after seeing OKT2, the 3 Indian men informed OKT2 that they are leaving the said house. OKT1 went out around 2.15-2.20p.m and arrived at the said house around 2.50pm. Upon reaching the said house, he parked his car and entered the said house as the gate was not locked. He then knocked on the main door but there was no answer. He tried to open the main door and found it was not locked and when he entered the said house, he saw OKT2 sitting on the sofa. He then sat on the sofa with OKT2.

[38] OKT3 runs a "*besi buruk*" business with the name *"Legend Metal Enterprise*" at Menglembu area. After his marriage to his wife (SD4), they stayed at his in-law's place in Taman Tasek Mewah, Ipoh. To facilitate his business, he had asked SD4 to find him another place in Menglembu while SD4 continues to stay at her parents' house. OKT3 intent to use the said house to entertain his client for his "*besi buruk business*" and a place to hang out with friends. On November 2014, SD4 managed to rent the said house and barely a week after, three (3) of OKT's friends were interested to stay in the said house too and SD4 later sub-let three (3) rooms (with no furniture) to

OKT3's friends (Mailan, Mathekumar and Nantha of which none of them were called as a witness) with a monthly rental of RM100.00 per month. According to OKT3, SD4 gave duplicate keys to the said house to the three (3) friends but they did not stay at the said house permanently. On the 19th February 2014 OKT3 together with a few of his friends and 2-3 persons that was just introduced to him had a few drinks and around 2 am on 20th February 2014 he went up to this room to sleep. Around 2.20 pm he went downstairs and saw OKT1 and OKT2 sitting on the sofa and said "hi" to them. A moment later all of the accused persons suddenly heard a loud noise and knocking on the floor. OKT1 went to the window and saw several men carrying weapons entering the said house and OKT1 shouted "*kita akan dirompak dan dipukul, mari kita lari*". According to OKT1 he was indeed robbed on 27th April 2013 and he was beaten by the robbers and he had his police report as evidence in support (D46). The evidence of OKT3 was supported by the evidence of SD4.

[39] OKT1 and OKT2 were apprehended when they were at the stairs whilst OKT3 was apprehended in the kitchen. OKT2 and OKT3 alleged they were beaten by the police and they were sent to the hospital to treat their injuries. When OKT2 arrived at IPD Ipoh together with OKT3, OKT2 noticed that 2 out of the 3 Indian men he saw at the said house were also arrested by the police. During remand the next day the 2 Indian men were identified as Sassitheran and Jivasugan.

SUBMISSION BY THE DEFENCE

[40] The learned counsel for OKT3 submitted that the defence had managed to raise a reasonable doubt in the prosecution case based on the following reasons:

[41] The accused persons were arrested in a house and it is important for the court to be satisfied that they have the exclusive possession of the said drugs and the said house is not accessible to the others either during or before the arrest. He referred to the case of *PP v. Bathumalai a/l Krishnan* [2018] 8 AMR 500 where Collin Lawrence Sequerah J has explained in detail on possession. In the present case the said drugs were found on the dining table in the hall and was scattered in the toilet. OKT1, OKT2 and OKT3 were consistent in their evidence that they didn't see the said drugs nor the packages on the said dining table which is corroborated by SD4 and by the prosecution witness SP10 who in his evidence confirmed that he didn't see any drugs on the said dining table. It is argued that this evidence contradicts the evidence of SP6 who claimed that he saw the accused person standing by the dining table from outside the house. This evidence of SP6 when taken with the evidence of SP13 is also not consistent when SP13 confirmed that he could not see the inside of the said house from outside. The evidence of SP13 is however consistent with the evidence of SP8. The evidence of SP8 and SP13 was further corroborated by the evidence of SP1 during recalled that he can't see the inside of the house from outside. The learned counsel further submitted that the prosecution agreed that there were eight (8) arrest made, i.e. three (3) from the said house and five (5) others from other places and there was information that there is a drug syndicate run by Indian men. The learned counsel urge this court to consider this information as evidence and can be accepted in assessing the evidence in the present case. I was alluded to the case of *Yen Wee Chin v. PP* [2008] 6 CLJ 773 where COA held the object of defence was not to seek to establish the truth of the information received by PW5 but only the fact that he had received it. In the present case, information received regarding a drug syndicate by Indian men and from the police report Lahat report (P18). Information said 8 Indian men were arrested therefore it is important that the other 5 Indian men

ought to be called as a witness to exclude the information received by SP6 regarding the drug syndicate by Indian men.

[42] The said learned counsel argued regarding section 8 of EA where the said accused persons were said to have ran away where an adverse inference can be drawn for such conduct. From the evidence of OKT1, it is clear that he shouted because he was scared as he had a traumatic experience of being robbed and beaten before. This shouting panicked OKT 2 and OKT3 who also decided to run to hide. The explanation by OKT1 is reasonable and it is the truth argued the said learned counsel since it is supported by his police report regarding the said robbery [(D46) - Kg Rapat 1984/13 dated 27th April 2013].

[43] The learned counsel submitted that the credibility of SP6 is now suspect. The alleged OKT3's signature on P19 is disputed and it is not OKT3's signature. Even though SP6 said that OKT3 signed the "*senarai bongkar*" (P19), but the learned counsel however submitted that the court can see that OKT3's signature in D45 is different from his signature in P19. The defence had at all times disputed the fact that the said drugs were seized from the dining table in the hall. SP6 in his evidence said that the said accused persons were running towards the stairs and the kitchen, however when the forensic came not long after the said arrest and after they did swabbing on the accused persons' hands and finger nails but found no traces of drugs. This is inconsistent with P26 (1-2) which shows that the said drugs were scattered in the toilet floor and in the toilet bowl but there were no traces of drugs on the accused persons nor their clothes or hands and finger nails. I was alluded to the case of *PP v. Syahrani Ishak* [2017] 1 LNS 503 where drugs were found scattered but it has no "*kesan"* on the accused clothes and hands. It is not disputed too that there are 5 more arrest made which is related to the arrest in the present case. And since the accused person gave their evidence on

oath, their evidence ought to be accessed equally with the evidence of the police.

[44] SD4 in her evidence stated that she rented the three (3) rooms in her house to three other persons Mailan, Sassitheran and Nantha and tendered three (3) sets of keys [D42(1-3)] which were shown in open court that all keys could open the padlock (P25). There was no evidence that the said keys were made by the accused persons or by anyone after the arrest. This fact is also consistent with the caution statement of the accused persons that there are others who had access and keys to the said house. If the prosecution is disputing these sets of keys, they should have called Mailan, Sassitheran and Nanda but they never did. Three rental receipts (D47), were issued to Mathekumar a/l Sanker 920731-08-5047 and the fact that SD4 was only able to tender the carbon copy rather than the original shows that it is true since the original was issued to the tenant themselves and it was found in the cupboard in the said house and therefore it is not a fabrication. The prosecution can also call Mailan to determine that the fail D41 and a copy of car title does not belong to his friend. This rebuttal witness will exclude access to the said house by the others. The prosecution alleged that the caution statement were made after the accused persons had discussed among themselves during the remand period. However it was denied by the accused persons and the learned counsel submitted that the prosecution can find support by calling SP13 to verify and clarify but in their failure to do so, the prosecution cannot find support in the allegation that the caution statement of the accused persons were made after the accused persons had a discussion amongst themselves.

[45] The main issue is the evidence of SD9, Surendran. OKT2 in his evidence stated that when he entered the said house, he saw three (3) Indian men seated on the sofa in the hall of the said house, and when he entered the three (3) Indian men went out and left the said house.

Later OKT1 came into the said house and they had a chat on the sofa in the hall until finally OKT3 came downstairs. The prosecution submitted that the fact that these there Indian men were in the said house and later left were fabrication but it was rebutted by the evidence of SD9 who said that on 20th February 2015 around 12.00pm he met Sassitheran and Jivasugan and they have asked SD9 to send them the said house (Keleman's house) which he did and according to SD9 he saw both of them entered the said house and then SD9 left around 12.30pm. It was submitted that the prosecution did not challenged or put to SD9 that he was lying or creating stories to assist the accused persons and hence the evidence of SD9 ought to be considered by this court. The possibility of whether the said drugs belong to Sassitheran, Jivasugan and another person will never be known. Again the learned counsel submitted that the prosecution ought to call Sassitheran and Jivasugan to challenge or rebut the evidence of SD9 and failure by the prosecution to do so shows that the evidence of SD9 to be true and submit that the five (5) persons that was arrested were related with the present case who were not offered to the defence either. The learned counsel referred to the police report D29 (the arrest of Sassitheran, Police report Tg Rambutan/591/15) and D31 ((the arrest of Jivasugan, Police report Simpang Pulai/6611/15) are clearly related to the present case. I was alluded to the case of *PP v. Chia Leong Foo* [2000] 4 CLJ 649 and *Aedy Osman v. PP* [2011] 1 CLJ 273. In the present case before OKT2 entered the said house, he saw Sassitheran and Jivasugan in the said house and it would appear that they are the trafficker and the prosecution can use this as a notice for rebuttal witness/evidence. The learned counsel argued that if the prosecution finds that Sassitherean and Jivasugan are not material but however if there is serious allegation regarding access, it is the responsibility of prosecution to prove that Sassitherean and Jivasugan have no access to the said house by calling these two persons to give evidence in court. The burden to prove their

case is on the prosecution throughout. The learned counsel submitted that the defence had raised reasonable doubt in the prosecution case and pray for OKT3 to be acquitted and discharged.

[46] The learned counsel for OKT1 and OKT2 adopted the submission by the learned counsel for OKT3 and further argued that the evidence of SP6 has got a lot of loop holes and unexplained contradictions. In this case, SP6 is the only one who claimed to be able to see the 3 persons (OKT1-OKT3) at the table even from outside the house. This evidence is highly improbable looking at the evidence other witnesses who had testified that it is not possible to see the hall in the said house from the outside. The following are the instances on the inconsistencies and unreliability of the evidence of SP6 drawn to the attention of the court which seriously challenges the crucial evidence of the prosecution submitted to be sufficient to raise the necessary doubt in the prosecution's case:

(i) SP6 said that upon entering the said house, he found on the table scattered, the alleged drugs and weighing machine. The learned counsel referred to P26 (1-3) which produced startling evidence because the photos tells the discrepancies of the said drugs on the table as compared to the amount of drugs as evidenced by the police officer.

(ii) P6 (1-14) was taken by the police photographer. Photo of the said dining table P6 (7) clearly showed there was nothing on the table. The same goes for the photo of the toilet P6 (8), the toilet is totally cleaned as if a cleaner came and cleaned the toilet. Photo P6 (9) and P6 (10), no traces of drugs which SP6 claimed was scattered ("*berterabur")* on the floor. Although photo was taken on 22nd February 2015, the forensic PW11, said that on the day of the arrest, he came at 5.30pm and found the toilet

was cleaned by someone and there was no evidence for him to record.

(iii) An examination of exhibit P7 (photo: 3, 4, 6, 8, 9, 10, 12, 13, 15, 16, 19, 21, 23, 24 and 25), these are photos taken by an official photographer (SP1) and when cross referred to photos taken by SP6 himself using his personal mobile phone in P26 (1-3), the discrepancies becomes apparent inviting serious doubt as to the veracity of the said evidence. In P26 (1) some newspapers have been shoved in the toilet bowl. These newspapers are identified to be same newspapers that were found on the table. Compare P26 (1) and P7 (4), the counsel submitted the image of the car is the same car as the one in photo no 1. Similarly in P26 (2) there is Kia and compared with picture P7 (3) this particular photo is in the same particular wrap ("*bungkus*"). Refer P7 (16) reflective of picture in P26 (2). The pictures in P26 (1-2) shows to the court that the toilet situation was in a mess. The arrest were from 3pm-5pm on that day. However, after the forensic team arrived at 5.30 pm they discovered the toilet to be completely cleaned with no trace of the substance of the said drugs found in it or on the table. In P26 (3), there is no evidence to indicate when and how these drugs were found and removed from the premises or why the drugs were no longer in the toilet. This is critical since SP6 claimed he send P26 (1-3) to the IO but the IO said he never received such photos. No testimony about his hand phone was offered.

(iv) PW10 was one of the raiding officer who confirmed that he saw nothing on the table, he was guarding the accused persons in the living room but saw nothing on the table.

These issues are serious contradictions and challenges the evidence of SP6.

(v) PW11 said he was asked by SP6 to do the DNA test, but for some reason or another SP6 denied giving such instruction. The forensic did swabbing of the entire premises and more importantly under the accused persons' finger nails. Looking at the scattered substance in the premises, it is impossible that when the police raided the said house (with suggestion by the prosecution that the accused persons were in the midst of throwing away the substance) their finger nails do not carry any trace of substance of the said drugs. No DNA was found to tie OKT1 and OKT2 to the premise which in the circumstances strongly suggest that they were temporary visitors as stated clearly in their evidence. The evidence of OKT1 and OKT2 are consistent with OKT3 when OKT3 said he stayed upstairs and consistent with the toothbrush found upstairs with his DNA. OKT1 and OKT2 said they were visitors and there were no finger print, no DNA, no belongings in the said house.

[47] The learned counsel referred to the submission by the learned DPP which says *"...setelah pihak pendakwaan berjaya membuktikan kes prima facie pada peringkat pendakwaan, pihak pembelaan hendaklah mengemukakan keterangan-keterangan untuk menyangkal keterangan yang telah dikemukakan..."* and submitted that technically it is not admissible unless it benefit the accused (see *Chan King Yu v. PP* [2009] 1 CLJ 601), the prosecution must exclude what they have failed to do.

[48] The said learned counsel also referred to the court's decision when calling for defence at the end of the prosecution's case by

invoking an inference that OKT1 and OKT2 had custody and control of the said premise by virtue of their conduct as presented by the prosecution. However, at this defence stage, evidence had been led that at the material time they were just temporary visitors and certainly in the said circumstance they cannot be held to have care and management of the said house. Attention was drawn to the ruling in *R v. Abbot* [1955] 2 AER 899, Lord Goddard CJ: "…if two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other, and there is no evidence that they were acting in concert, the jury ought to return a verdict of not guilty against both because the prosecution have not proved the case. If, in those circumstances, it were left to the defendants to get out of it if they could, that would put the onus on the defendants to prove themselves not guilty. This ruling was subscribed to by the Supreme Court in *Abdullah Zawawi Yusof v. PP* [1993] 4 CLJ 1, Edger Joseph Jr. SCJ: "in a situation where two persons are jointly charged for an offence, the evidence does not point to one person, and there is no evidence that they were acting in concert, then both persons ought to be released". In the present case based on the totality of the evidence before the court, it is impossible to say all 3 were involved, and in the circumstances the conclusion to be arrived at is clear (see *R v. Abbot supra*). As pointed out by SD4 this *"rumah bujang*" was simply used by her husband (OKT3) for the convenience of doing the business.

[49] The learned counsel also submitted that as stated in the defence of OKT1 and OKT2 that at the material time, it was during the period of the CNY year holiday where they were on leave and it is very reasonable during this period for the accused persons to get together. It had also been sufficiently explained that they attempted to run upstairs for fear that they were being robbed due to the manner in which the police forcibly entered the said house causing fear and

apprehension amongst the accused persons' that there was an attempted robbery. This reaction is given and reasonable on the basis of the traumatic experience that OKT3 had when he was robbed and beaten up. In *Ahmad Azhari Ahmad Zaini v. PP & Other Appeals* [2015] 1 CLJ 157, Court of Appeal ruled that the said conduct could also be a manifestation of the human instinct of self-preservation. In *Ibrahim Mohamad & Anor v. PP* [2011] 4 CLJ 113, Federal Court held, that where there are two or more inferences that could be made, the inference most favourable to the accused must be drawn. It is the prosecution story that the accused persons had got together to concoct their defence, but this allegation remains merely that as no evidence was adduced to substantiate it. The accused persons were never detained in one lock-up to provide such an opportunity for them to deliberate and to come up with their consistent defence. The learned DPP could only afford a conjecture to the court that since their caution statement were consistent to each other leaving the only possibility that it had to have been discussed between them.

[50] The learned counsel submitted that, OKT1 and OKT2 had been consistent from the time of their arrest throughout the trial that they had no knowledge of the impugned drugs found in the said house. The accused person had at the earliest opportunity maintained and informed the police officers as can be seen in their caution statement. This was established throughout the trial that there was never an opportunity for them to discuss amongst each other. Despite giving the Alcontara Notice of their defence in their caution statement, the learned counsel submitted that the prosecution has failed to rebut by calling rebuttal witness. In *Alcontara a/l Ambross Anthony v. PP* [1996] 1 CLJ 705, Edger Joseph Jr, FCJ, the FC ruled that where the crucial particulars of the defence had been disclosed by the accused in his cautioned statement the day after the arrest, the police had all the time in the world to check its veracity. Consequently, the onus is on

the prosecution to check and establish the truthfulness or falsity of the accused's version of the story. In *Bunya Jalong v. PP* [2015] 5 CLJ 893, Court of Appeal held that the duty of the investigators is to investigate the facts and to collect all available evidence pertinent to the case. A completed investigation is one that includes investigation of the defences that emerged from the investigation. This includes such gaps or weaknesses emerging from the statement of the witnesses and of the defences from the statement of the accused person. Such investigations may eliminate the gaps or weaknesses, and provide substance to be tested against defences when raised. In *Rahmani Ali Mohamad v. PP* [2014] 6 MLJ 525, Court of Appeal held that no investigation to disprove the accused's version of facts which was given at the earliest opportunity and the accused could not therefore be penalised for the lack of ingenuity, negligence or inadvertence on the part of the investigator depriving the accused of the time honoured benefit of doubt. Based on this critical omission leaving many stones unturned and critical gaps in the facts, an inference in favour of the accused ought therefore to have been drawn by the learned Judge.

[51] The learned counsel further submitted, that based on the testimonies and evidence presented throughout the trial, there exist no evidence to support the prosecution's contention that there was actual positive possession of the drugs by OKT1 and OKT2. Testimonies of the prosecution had never been squarely put and no evidence in particular OKT1 or OKT2 are in fact in actual possession since they were not occupiers of the said house. As such it cannot be said with certainty that OKT1 and OKT2 had the power to deal with the impugned drugs to the exclusion of all others. Mere presence alone does not make OKT1 and OKT2 the occupiers of the said house. Consequently, the learned counsel argued that the accused persons never saw the drugs and were not brought to the toilet. The evidence of the defence has brought into dispute as to the actual location as to

where the alleged drugs was recovered. Looking at the evidence of SP6, it is indeed questionable with the various material contradictions. This doubt should entitle OK1and OKT2 to be discharge and acquitted of the charges.

SUBMISSION BY THE PROSECUTION

[52] The DPP in her submission stated that, the learned counsels of the accused persons had submitted that other than the accused persons, the said house is also accessible to five other people. There are material contradiction between the evidence of SP6, SP8, SP10 and SD4 as to whether the dining table in the said house can be seen from outside of the house. SP6 did the observation and he saw the accused persons were at the said dining table whereas SP10 said otherwise. SP8 and SD4 were consistent in that one cannot see the inside of the houses from the outside. The learned DPP submitted that whether the dining table or the interior of the said house is visible from the outside is not material contradiction. SP6 in his evidence confirmed that he observed the said house and he saw there were three (3) men at the table and there is no doubt as to his evidence. SP10 didn't see anything on the table because during re-examination he explained that he was guarding the said accused persons, hence the DPP submitted that the contradiction is not material. SP8 and SD4 are not witnesses who were at the said house during the material time. SD4 were showed the photo P6(4) and agreed that she cannot see the inside of the house because there were clothes rack ("*ampaian"*) in front of the front window of the said house, however SD4 agreed that she do not know whether there were clothes rack in front of the house at the material time during the raid of the said house. Therefore the DPP submitted that there were no contradiction between the evidence of the prosecution witnesses and the defence witnesses.

[53] Swabbing was done by the forensic team (SP11) on the accused persons but the result was negative. Even though the DNA of the accused persons was negative, it does not amount to an issue with the element of the charges and these are only supporting evidence because from the facts of this case, there were scuffles between the accused persons and the police resulting in injuries. These scuffles might have affected the presence of drugs on the accused persons.

[54] The others that were arrested on the same day as the accused persons that were related to the said house were not stated in the caution statement in D43-D45 to enable the police to do further investigation because it was only raised during trial and the three sub-tenants were only raised during the defence stage. The learned DPP submitted based on the evidence of SP7 and SP8 the arrest in this present case is related to the Lahat Report 208/15 (P18). However SP7 said he was instructed by ASP Anuar whereas SP8 said he was instructed by ASP Rajendran and both stated there was no seizure of drugs made, while the report for the present case (Lahat report-P18) was made earlier. The IO (SP13) confirmed that there were other arrest on the same date however the other arrest were not related to the present arrest of the accused persons. The learned counsel however pointed out that if it is true that SP6 were surveying the said house at 2.00pm (found no movement), and if it is true that Sassitheran, and Jivasugan were at the said house, why were they released. The learned DPP in reply argued that, Sassitheran was arrested on 20th February 2015 at 3.10 pm (D29) and Jivasugan was arrested on 20th February 2015 at 3.35 pm (D31) and both reports were instructed by ASP Anuar and ASP Rajendran, respectively. It had no connection with the Lahat report (P18) relating to the accused persons and if at all it was true that Sassitheran, and Jivasugan were at the said house, they would definitely have been arrested too. From the report (D29) Sassitheran was arrested at Ulu Kinta at 3.10pm and

Jivasugan was arrested at Simpang Pulai at 3.35 pm (D31), it in the premise it would not have been reasonable for Sassitheran, and Jivasugan to be at the said house during the said raid and arrest. Attention is drawn to the evidence of SD9 that said he sent Sassitheran and Jivasugan to the said house but he did not have any knowledge until what time they had stayed there. On the issue of unlocked door, it had been argued by the learned DPP that if it is true that the door was not locked, it does not explain how it took SP6 a minute to enter the house and in such circumstance it would have accorded an opportunity for the accused persons to take flight through the unlocked door.

[55] On the issue of rebuttal witness, the learned DPP submitted that the three (3) Indian men that the accused persons alleged to have been in the house prior to OKT1 and OKT2 going over to the said house was never raised in the caution statement of the accused persons (D43-D45) and therefore an investigation could not have carried out by the police to ascertain their presence in the said house whether they have keys to gain access to the said house. The facts of this case is clear that there were only three (3) persons found to be in the said house and other arrests which were stated in the police reports (D29 and D31) are not related to the present case and in addition to this there were no drugs seized during the said arrests under D29 and D31. The learned DPP submitted since the arrest were made at a different place it has no connection to the present case before this court and therefore, there is no necessity to call rebuttal witness as there is nothing to rebut.

[56] On the issue of credibility of SP6, the prosecution believed that the credibility of SP6 and whether it is material that the said drugs were found on the table or in the toilet had been assessed by this court before the accused persons were called for their defence. There is no reason for SP6 to lie in court. On the issue whether the accused

persons did tailored their caution statements, the learned DPP pointed out that on the day they were arrested, the accused persons did meet the five other persons at the IPD and also during the remand proceeding the next day.

THE LAW

[57] The burden to prove the guilt of the accused beyond reasonable doubt is always with the prosecution. The burden never shift to the accused. However, since in this case the presumption of trafficking operated against the accused, the evidential burden placed on the accused can be rebutted by him adducing evidence to discharge that burden on balance of probabilities as enumerated in the case of *PP v. Yuvaraj* [1969] 2 MLJ 89 PC and *Mohd Radzi v. PP* [2006] 1 CLJ 457. That evidential burden on the part of the accused relates only to the presumption of trafficking. The accused needed only to raise a reasonable doubt on the rest of the prosecution case for him to earn an acquittal. In this respect I must evaluate the defence in light of the *prima facie* evidence already proven at the prosecution stage. To earn an acquittal, it is incumbent on the accused person to raise reasonable doubt as to the truth of the prosecution's case.

[58] Section 182A CPC set out the procedure and duty of a trial court at the conclusion of the defence case that at the conclusion of the trial, the court shall consider all the evidence adduced before it and shall decide whether the prosecution had successfully proven its case beyond reasonable doubt. If the court finds that the prosecution has proved its case beyond reasonable doubt, the court shall find the accused guilty and he may be convicted on it. If the court finds that the prosecution has not proven its case beyond reasonable doubt, the court shall record an order of acquittal.

[59] In *Md Zainudin bin Raujan v. Public Prosecutor* [2013] 4 CLJ 21, the Federal Court observed as follows:

> "*At the conclusion of the trial, s. 182A of the Criminal Procedure Code imposes a duty on the trial court to consider all the evidence adduced before it and to decide whether the prosecution has proved its case beyond reasonable doubt. The defence of the accused must be considered in the totality of the evidence adduced by the prosecution, as well as in the light of the well - established principles enunciated in Mat v. Public Prosecutor [1963] 1 LNS 82; [1963] 1 MLJ 263 with regard to the approach to be taken in evaluating the evidence of the defence*"

[60] Section 182A states that "all" evidence must be considered by the court. It is to be noted that emphasis has been laid on the phrase "all". In *Prasit Punyang v. Public Prosecutor* [2014] 7 CLJ 392; [2014] 4 MLJ 282, it was held as follows:

> "*In accordance with the provisions of s. 182A(1) of the Criminal Procedure Code, it is the bounden duty of the learned JC, at the conclusion of the trial, to consider all the evidence adduced before him and shall decide whether the prosecution has proved its case beyond reasonable doubt. The legislature has advisedly used the term all the evidence. The emphasis must be on the word all.*"

[61] What amounts to a "reasonable doubt" itself is not defined in section 182A of the Criminal Procedure Code. However, there are plethora of case laws as to its meaning. In *Public Prosecutor v. Saimin* [1971] MLJ 16, it was held by Sharma J that:

> "*It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to*

some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge. "

[62] In the case of *Public Prosecutor v. Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180, Abdoolcader J, explained the phrase reasonable doubt as follows:

"*It is not necessary for the defence to prove anything and all that is necessary for the accused to do is to give an explanation that is reasonable and throws a reasonable doubt on the case made out for the prosecution. It cannot be a fanciful or whimsical or imaginary doubt, and in considering the question as to whether a reasonable doubt has been raised, the evidence adduced by and the case for the defence must be viewed in at least some amount of light, not necessarily bright sunlight, but certainly not against the dark shadows of the night.* "

[63] It can be summarised therefore that the phrase "reasonable doubt" excludes fanciful or imaginary doubts or stories that are so obviously conjured up so as not to be in accord with the ordinary course of nature or human conduct when viewed and appraised from the test of reasonableness. The foregoing of course, are only guidelines and the court must apply these according to all the circumstances of the case at hand.

[64] The approach in *Mat v. Public Prosecutor* was judicially endorsed by the Federal Court as being the correct one to adopt when evaluating the evidence of the defence case in *Public Prosecutor v. Mohd Radzi Bin Abu Bakar* [2006] 1 CLJ 457; [2005] 6 MLJ 393, when it held:

"*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] 1 LNS 82; [1963] MLJ 263."

[65] Guided by these aforementioned decisions, if the court does not accept or believe the defence raised by the accused it must not convict but must proceed a stage further by considering whether the evidence by the defence has been sufficient to raise reasonable doubt as to the guilt of the accused. If it does, then the accused is nevertheless entitled to an acquittal.

THE COURT'S FINDINGS AT THE DEFENCE STAGE

[66] I find the crucial facts that had been established by the defence that has raised reasonable doubt in the prosecution case are as follows:

i. The defence had called nine (9) witnesses to support their evidence;

ii. OKT1 and OKT2 had gone to the said house [rented by SD4 (OK3's wife)], to hang out as it was during the CNY holidays;

iii. The accused persons do not deny they were at the said house during the raid by the police which had resulted in the seizure of the said drugs seized from the said house;

iv. The accused persons had been consistent throughout their defence in maintaining that they have no knowledge nor control of the said drugs seized, and as a matter of fact they had not seen any drugs on the dining table in the hall;

v. The accused persons claimed that they were not even near the said dining table during the ambush as OKT1 and OKT2 were seated on the sofa in the main hall and OKT3 who had just come down from upstairs;

vi. The accused persons explained that they attempted to flee the said premise for fear that they were being robbed due to the manner in which forcibly entry of the raiding party caused fear and apprehension amongst the accused persons' that there was an attempted robbery. The raid was quick and sudden by people dressed in black wearing ski masks and carrying firearms with no labelling on their chest or back the word "Police". This evidence had not been refuted. Attention is drawn to the traumatic experience that OKT3 had when he was robbed and

beaten up. The reaction was an automatic manifestation of self-preservation. Reliance is made on *Ahmad Azhari Ahmad Zaini v. PP* and *Ibrahim Mohamad & Anor v. PP* (*supra*). It is trite as ruled by the Federal Court that where there are more than one inference that could be drawn, one most favourable to the accused must be made.

vii. The said house where OKT3 also stayed is a rented house by his wife SD4 from one Raj Kumar. She had also sub-let the rooms in the said house to Mathekumar, Nantha and Mailan at a rental of RM100.00 for each room to show that the said house is accessible to other people apart from OKT3.

viii. SD5, the wife of OKT1 corroborated his evidence that he did go out with a friend on the material date. While SD6, the wife of OKT2 confirmed that he did called her on her phone to inquire about her whereabouts on the material date.

ix. SD7 and SD8 are police personnel's called by the defence. SD7 in his evidence stated that he was directed by ASP Rajendran to observe an Indian man in Ipoh area from his house and the transport he is using. By referring to D31, SD7 said the Indian man was Jivasugan a/l Natarajan who was arrested on 20th February 2015 at 3.10 at a restaurant in Simpang Pulai and it was ASP Rajendran who has instructed him to linked it with the Lahat report (P18). By referring to D32, SD7 said he had also arrested another Indian man named Mailan a/l Natarajan who was arrested on 20th February 2015 at 3.10 at a house Simpang Pulai and it was ASP Rajendran who has instructed him to linked with the Lahat report (P18). This seriously contradict and compromise the stand of the prosecution who had maintained that there is no connection between the present case with the

arrest in D31 and D32. The defence must be accorded every opportunity to present its defence.

x. SD9 is the defence last witness who saw Sassitheran dan Jivasugan as he was the one who sent them to the said house and SD9 saw them entered the said house but does not have knowledge when these men left the said house;

xi. Examining P26(1-3) reveals discrepancies of the said drugs on the table as compared to the amount of drugs as evidenced by the police officer denting the evidence of SP6;

xii. Serious discrepancies are revealed in official photographs in P6 (1-14) taken by the police photographer (SP1) as compared to the photographs taken by SP6 in P26 (1-3) using his hand phone at the time of the raid which he had elected to tender it in court. Official photograph of the said dining table P6 (7) clearly showed there was nothing on the table. The same goes for the photograph of the toilet P6 (8) that shows the toilet is totally clean. Photographs P6 (9) and P6 (10), showed no traces of drugs which SP6 claimed was scattered (*berterabur)* on the floor. Although photographs was taken on 22nd February 2015, the forensic PW11, said that on the day of the arrest, he came at 5.30pm and found the toilet was cleaned by someone. This brings into question as to the actual status of the said drug during and after the raid at the said house;

xiii. Photographs taken by the official police photographer in P7(1-43) when compared with photos taken by SP6 himself using his personal mobile phone in P26 (1-3), reveals apparent discrepancies inviting serious doubt as to the veracity of the said evidence. In P26(1) some newspapers have been shoved in the toilet bowl. These newspapers are identified to be same newspapers that were found on the table. The pictures in P26 (1-

2) showed that the toilet situation was in a mess whereas the forensic team discovered the toilet to be completely cleaned with no trace of the said drug substance found in it or on the table. SP6 in his evidence admitted that he took the photographs of the said toilet P26 (1-3) using his personal hand phone and he had claimed to have forwarded the same to the IO (SP13) who denied ever receiving P26 (1-3). SP6 said that the accused person were trying to dispose of the drugs as found in the photo P26(1), scattered in the toilet as found in photo P26(2) and found on the dining table as seen in P26(3). However, I am in agreement with the submission of the defence that the facts of this case doesn't support the evidence of the IO that the said drugs were found on the dining table as reflected in the Lahat police report (P18) when cross referenced with the photographs taken by SP6 as seen in P26 (1-2) which clearly shows that the said drugs were found in the toilet. Consequently, this conflict in evidence creates suspicion and speculation in the claim that the said drugs were allegedly found on the dining table as in the Lahat police report (P18). These facts taken in totality with the other evidence creates reasonable doubt in the prosecution case.

xiv. In P26 (3), there is no evidence to indicate when and how these drugs were found and removed from the premises or why the drugs were no longer in the toilet;

xv. There is serious discrepancies when SP6 claimed he send P26 (1-3) to the IO but the IO said he never received such photos. No testimony about his hand phone was offered to the court;

xvi. Inconsistencies between the witnesses for the prosecution is further revealed when PW10, one of the raiding officer confirmed that while guarding the accused persons in the living room he saw nothing on the table. These issues are serious

contradictions and challenges the evidence of SP6 as the main witness of the prosecution who claimed that the said drugs was seized form the dining table in the main hall with OKT1-OKT3 standing by the dining table when he first saw them from outside the house. The defence had throughout disputed that the said drugs were found on the dining table as in the Lahat Police Report (P18). I find that the evidence of OKT1, OKT2 and OKT3 to be contradictory of the evidence of the SP6 which is also inconsistent with the evidence of SP9, SP10, SP13 and SD4 who confirmed that they can't see the inside of the said house from the outside.

xvii. The prosecution had alleged that the accused persons were in the midst of disposing the said drug in the toilet during the raid which would suggest that they were handling/or in physical contact with the said drugs. But as the forensic evidence (SP11) would show that after swabbing on the hands, fingernails and the body of the accused persons, no trace substance of the said drugs were found on their person and the toilet where the alleged disposal of the said drugs was to have taken place was clean with also no trace substance of the alleged drug contrary to the mess as shown in the photographs taken by SP6 in P26 (1-3). In the premise I hold that it can be safely concluded that in such circumstance, the accused persons were not dealing or handling the said drugs found in the said house as alleged. This raises reasonable doubt in the prosecution case whereby someone must have removed the said drugs from the toilet and had cleaned the toilet too.

xviii. No DNA and finger print was found to tie OKT1 and OKT2 to the said house which in the circumstances strongly suggest that they were temporary visitors as stated clearly in their evidence.

xix. The evidence of OKT1 and OKT2 are consistent with OKT3 when OKT3 said he stayed upstairs and consistent with the toothbrush found upstairs with his DNA;

xx. Regarding the "*borang senarai pemeriksaan*" (P19), I find the signature of the accused persons on P19 differs from the caution statement signed by them and the accused persons denial of their signatures on P19 was never rebutted by the prosecution.

[67] The legal burden throughout the case rests on the prosecution to prove their case beyond reasonable doubt though a *prima facie* case had been made out at the prosecution stage. It is trite that after the defence has presented its evidence, the prosecution may be allowed an opportunity to negate the evidence of the defence by adducing and calling for further witnesses in order to sustain the integrity of the prosecution's evidence which had resulted in the defence being called which if unrebutted would warrant a conviction. But the prosecution had elected not to adduce any rebuttal evidence after the defence evidence was presented premised on their belief that rebuttal in the circumstances was not required [see *PP v. Chia Leong Foo* and *Md.Nazli Sahid@Said v. PP* (*supra*)].

[68] The element of trafficking cannot be said to have been proven if reasonable doubt exist in the issue of possession. It was ruled in the case of *Chan Pean Leon v. PP* [1956] MLJ 237 that:

"To establish possession for the purpose of criminal law, two separate questions are involved. The first is whether the accused party was in possession of the article in question and the second, by reason of the application of the maxim ***actus non facit reum nisi mens sit rea****, is whether he had knowledge of the thing possessed"*

Considering the evidence of the prosecution and the defence in totality and subject *Chan Pean Leon's* case (*supra*), I am left in doubt

as to the accused persons' alleged positive possession of the said drugs where the court must be fully satisfied that the accused persons not only have possession but also has knowledge, custody and control of the drugs so seized. Anything less will not suffice. I have had the opportunity to legally appraise the evidence of the defence and the prosecution in totality together with the written submissions of the respective learned counsels and the learned DPP. As succinctly said by Suffian J in *Mat v. PP* (*supra*), if upon the whole evidence you are left in real state of doubt, the prosecution has failed to satisfy the onus of proof which lies upon it. In totality of the evidence before me, I find that the evidence of the defence had succeeded in raising reasonable doubt in the prosecution case. Doubt is raised in the accused persons having knowledge, custody and control of the said drugs to the exclusion of others which inference lies in favour of the accused persons. Consequently, I hold that it is not safe to convict the accused persons in the circumstances and any benefit of doubt which ought to be given is accorded to the accused persons.

CONCLUSION

[69] Considering the foregoing and on the above maximum evaluation of the evidence of the prosecution and the defence, I find that the defence have succeeded in raising reasonable doubt in the prosecution's case and consequently therefore, the prosecution has failed to prove their case beyond reasonable doubt. In the premise as required by law, I therefore acquit and discharge the accused persons from the said charges.

Dated: 3 MAY 2019

(HAYATUL AKMAL ABDUL AZIZ)
Judge
High Court Shah Alam
Selangor Darul Ehsan

COUNSEL:

For the prosecution - Wan Azimah Yaacob & Maziyah Mansor, Deputy Public Prosecutors; State Deputy Public Prosecutor Offices Perak

For the first & second accused - Muhammad Shafee Muhamad Abdullah & Tania Scivetti; M/s Scivetti & Associates

For the third accused - Charan Singh & Jagdave Singh; M/s Nurul & Charan

Case(s) referred to:

Balachandaran v. PP [2005] 1 CLJ 85

PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457

PP v. Ong Cheng Heong [1998] 4 CLJ 209

Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19; [2003] 2 MLJ 97

PP v. Mohamed Ali [1962] 28 MLJ 257

Parlan Bin Dadeh [2008] 6 MLJ 19

Chan Pean Leon [1956] MLJ 237

Wong Nam Loi v. PP [1997] 4 AMR 3603

PP v. Badrulsham Bin Baharom [1988] 2 MLJ 585

PP v. Denish a/l Madhavan [2009] 2 MLJ 194

Ali Hosseinzadeh Bashir v. Public Prosecutor [2015] 1 CLJ 918

Lim Son Heng v. Public Prosecutor [2014] 6 MLJ 109

PP v. Mardani Hussin [2005] 7 CLJ 495

Public Prosecutor v. Mansor Md Rashid & Anor [1996] 3 MLJ 560

PP v. Chia Leong Foo [2000] 6 MLJ 705, [2000] 4 CLJ 649

Mahbub Shah v. King Emperor [1945] AIR PC 118

Chin Kek Shen v. PP [2013] 5 MLJ 827, [2013] 7 CLJ 435

PP v. Bathumalai a/l Krishnan [2018] 8 AMR 500

Yen Wee Chin v. PP [2008] 6 CLJ 773

PP v. Syahrani Ishak [2017] 1 LNS 503

PP v. Chia Leong Foo [2000] 4 CLJ 649

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R v. Abbot [1955] 2 AER 899

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Alcontara a/l Ambross Anthony v. PP [1996] 1 CLJ 705

Bunya Jalong v. PP [2015] 5 CLJ 893

Rahmani Ali Mohamad v. PP [2014] 6 MLJ 525

PP v. Yuvaraj [1969] 2 MLJ 89 PC

Mohd Radzi v. PP [2006] 1 CLJ 457

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Prasit Punyang v. Public Prosecutor [2014] 7 CLJ 392; [2014] 4 MLJ 282

Public Prosecutor v. Saimin [1971] MLJ 16

Public Prosecutor v. Datuk Haji Harun bin Haji Idris & Ors [1977] 1 MLJ 180

Public Prosecutor v. Mohd Radzi Bin Abu Bakar [2006] 1 CLJ 457; [2005] 6 MLJ 393

Chan Pean Leon v. PP [1956] MLJ 237

Legislation referred to:

Dangerous Drugs Act 1952, ss. 37(da)(iiia), 39B(1)(a), First Schedule

Evidence Act, ss. 8, 9

Criminal Procedure Code, ss. 180, 182A, 425

Penal Code, s. 34