IN THE HIGH COURT OF MALAYA IN JOHOR BAHRU
IN THE STATE OF JOHOR DARUL TAKZIM
[CRIMINAL TRIAL NO: JA-45A-26-10/2020, JA-45A-27-10/2020 & JA-45A-160-12/2022]

BETWEEN

PUBLIC PROSECUTOR

AND

TAN CHENG KIT

GROUNDS OF JUDGMENT

INTRODUCTION

[1] Tan Cheng Kit was arrested on 3/1/2020 and charged with possession for trafficking of 3, 4- Methylenedioxymethamphetamine (MDMA), possession of dangerous drugs under the Dangerous Drugs Act (1952) and possession of Caffeine and Etizolam under the Poisons Act (1952).

[2] The charges (P2 (A -E)) are set out below:

> **"PERTUDUHAN (JA-45A-26-10/2020)**
>
> Bahawa kamu pada 03/01/2020, lebih kurang jam 1000hrs, bertempat di alamat B-01-17B, Residensi Masai, Jalan Masai Jaya 2, Plentong, di dalam Daerah Johor Bahru, di dalam Negeri Johor Darul Takzim, telah mengedar dadah berbahaya jenis 3, 4-Methylenedioxymethamphetamine (MDMA) dengan berat bersih 545.35 gram, dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B (1)(a) Akta Dadah Berbahaya 1952 dan boleh

dihukum di bawah seksyen 39B(2) Akta yang sama.

PERTUDUHAN-PERTUDUHAN (JA-45A-27-10/2020)

Pertuduhan Pertama :

Bahawa kamu pada 03/01/2020, lebih kurang jam 1000hrs, bertempat di alamat B-01-17B, Residensi Masai, Jalan Masai Jaya 2, Plentong, di dalam Daerah Johor Bahru, di dalam Negeri Johor Darul Takzim, telah didapati memiliki dadah berbahaya dengan berat bersih 1033.06 gram Ketamine, oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 12(2) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 12(3) Akta yang sama.

Pertuduhan Kedua:

Bahawa kamu pada 03/10/2020, lebih kurang jam 1000hrs, bertempat di alamat B-01-17B, Residensi Masai, Jalan Masai Jaya 2, Plentong, di dalam Daerah Johor Bahru, di dalam Negeri Johor Darul Takzim, telah didapati memlliki bahan dengan berat bersih 276.41 gram yang mengandungi kesan 3,4-Methylenedioxymethamphetamine (MDMA) dan Ketamine, oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 12(2) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 12(3) Akta yang sama.

Pertuduhan Ketiga :

Bahawa kamu pada 3/1/2020, jam lebih kurang 1000hrs, bertempat di B-01-17B, Residensi Masai, Jalan Masai Jaya 2, Plentong, di dalam Daerah Johor Bahru, di dalam Negeri Johor Darul Takzim, telah memiliki racun berjadual dengan berat bersih 535.18 gram Caffeine, iaitu satu kesalahan di bawah seksyen 9(1) Akta Racun 1952 (disemak pada 1989) yang boleh dihukum di bawah seksyen 32(3) Akta yang sama.

PERTUDUHAN (JAM45A-160-12/2022)

Bahawa kamu pada 3/1/2020, jam lebih kurang 1000hrs bertempat di B-01-17B, Residensi Masai, Jalan Masai Jaya 2, Plentong, di dalam Daerah Johor Bahru, di dalam Negeri Johor Darul Takzim, telah memiliki berat bersih 122.71 gram Etizolam di mana Etizolam disenaraikan dalam Jadual Ketiga (bahan Psikotropik) Akta Racun 1952 iaitu kesalahan di bawah seksyen 30(3) Akta Racun 1952 yang boleh dihukum di bawah seksyen 32(5) Akta yang sama."

Summary of facts by Prosecution

[3] On 3/1/2020 at about 10.00am, the police received information that there were activities involving drugs being carried out in a black BMW with the registration number JNW 73 (Car). It was parked in the car park on the 1st floor of Residensi Masai, Jalan Masai Jaya 2, Plentong, 81750, Johor Bahru, Johor.

[4] Upon arriving at the car park, the police officer SP2 and his team kept the Car under surveillance. After about 2 hours and 30 minutes, the accused approached and opened the car where the accused was with a lady and baby in a stroller. The accused was arrested and a body search was conducted of the accused by SP2. During the search, SP2 found in the accused's possession, the remote control for the Car, apartment key (Key) (P5B) and access card (Access card) (P5A). Nothing incriminating was found in the Car.

[5] With the help of the accused and using P5A to access the lift, SP2 and his team were brought to unit B-01-17B in the Residensi Masai (Apartment). The Apartment was a studio apartment. Using P5B, SP2 proceeded to open the door of the Apartment and entered it with his team and the accused. The accused witnessed SP2 and his team conducted a search of the Apartment The impugned substances (listed below) were found on the floor near a bed in the living room namely:

(a) 3 big transparent plastic bags each containing 1000 green colour pills with a frog logo suspected to be ecstacy and weighing approximately 984 gram P4(A1-A3)

(b) 2 big transparent plastic bags each containing 1000 blue colour pills with Chinese writing logo suspected to be ecstacy and weighing approximately 540 gram P4(C1-C2)

(c) 1 big transparent plastic bag containing 570 red colour pills with a Rolex logo suspected to be ecstacy weighing approximately 214 gram - P4E

(d) 1 big transparent plastic bag containing white powder suspected to be Ketamine weighing approximately 122 gram - P4G(1-7)

(e) 6 big transparent plastic bags, each containing white powder suspected to be Ketamine and weighing approximately 609.6 gram - P4G(1-7)

(f) 2 big transparent plastic bags, each containing crystals suspected to be Ketamine and weighing approximately 408 gram - P41 (1-4)

(g) 1 big transparent plastic bag containing crystals suspected to be Ketamine weighing approximately 104.8 gram - P41 (1-4)

(h) 1 big transparent plastic bag containing brown crystals suspected to be Ketamine weighing approximately 101.7 gram - P41 (1-4)

(i) 4 transparent plastic bags. Inside each of the bags, there was another plastic bag containing 50 sticks of cigarettes suspected to be cannabis. In total there were 200 sticks of cigarettes weighing approximately 150 gram -P4K (1-4)

(j) 60 red/bronze color tin foils containing 600 pills suspected to be Erimin 5 with a total weight of 179 gram - P4M(1-60)

(k) 6 yellow/red plastic packages with the word “Chinese Tea” on them that contained powder suspected to be Ecstacy weighing

approximately 192 gram - P4O(1-6)

(l) 1 yellow/white plastic package with the word "Tien Guan Yin" on them that contained powder suspected to be Ecstacy weighing approximately 32.1 gram – P4Q

(m) 1 red plastic package with the word "Tea Gift" on them containing powder suspected to be Ecstacy weighing approximately 32.3 gram - P4S

(n) 1 white plastic package with the word "Chinese Tea Gift" on them that contained powder suspected to be Ecstacy weighing approximately 30.4 gram – P4U

[6] The impugned substances (P4) were seized by SP2 and recorded in a search list (P9). The impugned substances were subsequently handed over to SP5 (investigation officer) as recorded in P18. On 6/1/2020, the impugned substances (P4) were delivered to Jabatan Kimia Malaysia to be analysed by the chemist (SP6).

[7] At the close of the Prosecution's case, the court has to decide whether based on the maximum evaluation of the credible evidence adduced by the Prosecution, a prima facie case under s. 180 of the Criminal Procedure Code (CPC) has been made out against the accused. The court is guided by the principles established in the off-cited cases of *Balachandran v. PP* [2005] 1 CLJ 85 (FC) *and Abdullah v. PP* [2020] 9 CLJ 151(FC).

[8] In coming to my decision whether a prima facie case has been made out by the Prosecution, the issues are as follows:

ISSUES

(i) Whether the impugned substances seized on the 3/1/2020 are dangerous drugs as listed in the 1st Schedule Part III of section 2 of the Dangerous Drugs Act 1952 (DDA), poison in the Poison list of 1st schedule of section 2 of the Poison Act 1952 (PA), and psychotropic

substance in the 3rd Schedule of the PA respectively?

(ii) Whether the accused has possession of the impugned substances namely knowledge and custody or control over the impugned substances?

(iii) Whether there is a break in the chain of evidence

(iv) whether a prima facie case has been established against the accused.

First Issue

Whether the impugned substances are dangerous drugs as specified under Part III of 1st schedule of DDA, poison under Poison list of 1st Schedule of PA and psychotropic substance under 3rd Schedule of PA?

[9] The Prosecution through the testimony of SP 6 (science officer) had adduced evidence from the tests and analysis conducted by her, that the impugned substances delivered to her by SP5 (investigation officer) were of the type 3,4 Methylenedioxymethamphetamine (MDMA) (net weight 545.35 gram), Ketamine (net weight 1033.06 gram), Caffeine (net weight 535.18 gram) and Etizolam (net weight 122.71 gram) respectively. Accordingly, she produced a report in court confirming this information(P28).

[10] The accused did not challenge SP6's testimony and P28. The position of the court in the treatment of the expert evidence is stated in the off-cited case of *Munusamy v. PP* [1987] 1 MLJ 492 (SC):

> "We are therefore of the view, that is this type of cases where the opinion of the chemist is confined only to the elementary nature and identity of substance, the court is entitled to accept the opinion of the expert on its face value, unless it is inherently incredible or the defence calls evidence in rebuttal by another expert to contradict the opinion. So long as some credible evidence is given by the chemist to support his opinion, there is no necessity for him to go into details of what he did in the laboratory, step by step."

[11] Since the evidence from SP6 is unchallenged, the court is satisfied that the impugned substances seized on the 3/1/2020 were of the type listed as dangerous drugs under Part III of the 1st schedule DDA, poison under Poison list of 1st Schedule of PA and psychotropic substance under 3rd Schedule of PA.

Second issue

Whether the accused was in possession of the substances namely did he have knowledge and custody or control of the substances.

[12] Since the accused has been charged under s. 39B(1)(a) DDA and s. 12(2) DDA, s. 9(1) PA and s. 30(3) PA, possession is an essential ingredient under both offences. It is trite that what constitutes "possession" is a question of law. see the case of *Yee Ya Mang v. PP* [1972] 1 MLJ 120 (HC) *and PP v. Badrulsham bin Baharom* [1988] 2 MLJ 585 (HC). However, it is a question of fact whether the accused is in possession of it. The onus is on the Prosecution to prove this, see the case of Muhammed bin *Hassan v. PP* [1998] 2 CLJ 170 (FC) *at page 191:*

> "In our view, to constitute "possession" under s. 37(da) of the Act, so as to be capable of forming one of the ingredients thereunder thereby giving rise to the presumption of trafficking, there must be an express affirmative finding (as opposed to legal presumption) of possession as understood in criminal law, based on evidence."

[13] The meaning of possession which has a mental and physical element has been well elaborated on in the off-cited case of *Chan Pean Leon v. PP* [1956] 1 MLJ 237, where Thompson J had explained possession to mean that a person must not only be so situated that he can deal with the thing as if it belongs to him, he must also have the intention to deal with it if he so wishes. He had further said that intention is a matter of fact which cannot be proved by direct evidence but by inference from the surrounding circumstances.

[14] Hence the Prosecution would have to prove both the mental (*mens*

rea) and physical (actus rea) element as there can be no possession if either one is missing. However, in certain circumstances there can be statutory presumed possession as set out in s. 37 DDA. See the case of *Ibrahim Mohamad & Anor v. PP* [2011] 4 CLJ 113 (FC) at page 124 where his Lordship Zulkefli Makinudin FCJ had said as follow:

> **"[15]** The law is well settled that having only custody or control over the said drugs is insufficient to establish "possession". The physical act of custody or control must be accompanied with evidence that the accused had knowledge of the said drugs. In the absence of any statutory presumption, knowledge has to be proved either by direct evidence or circumstantial evidence. Mere knowledge alone without exclusivity of either physical custody or control or both is insufficient in law to constitute possession, let alone trafficking. (See the case of *Chan Pean Leon v. PP* [1956] CLJU 17; [1956] 1 LNS 17)."

[15] In criminal law, possession can be either actual or constructive possession. A person is said to be in constructive possession when the person has knowledge of the presence of the drugs and has custody or control over the drugs. As elaborated in the off-cited case of *Tang Teck Seng & Anor v. PP* [2018] 10 CLJ 315 [CA] at page 327 where his Lordship Mohd Zawawi Salleh JCA had said as follows:

> "[24] It is trite that the word "possession" includes actual as well as constructive possession, and also sole and as well as joint possession. A person who has direct physical control of something on or around his person is in actual possession of it. A person who is not in actual possession, but who has knowledge of the presence of something and has the authority or right to maintain control of it either alone or together with someone else, is in constructive possession of it. If one person alone has possession of something, possession is sole. If two or more persons share possession, possession is joint."

[16] In our case the accused was not arrested inside the Apartment on 3.1.2020. Instead the accused was arrested at the carpark on the 1st floor of Residensi Masai, Jalan Masai Jaya 2, Plentong, 81750, Johor Bahru, Johor. The accused was not in physical possession of the drugs at the time of the arrest. At which instance can he be said to be in constructive possession of the drugs?

[17] To show constructive possession, the Prosecution will need to adduce evidence to prove that the accused had knowledge and custody or control over the drugs in the Apartment. This can be done through presenting direct and or circumstantial evidence or inferences arising therefrom. See the case *PP v. Tan Tatt Eek & Anor* [2005] 1 CLJ 713 (FC).

Knowledge

[18] Since Knowledge which is one of the essential elements of possession can only be proven from the surrounding circumstances and facts, can the necessary inferences on the part of the accused be drawn from the evidence and testimonies of witnesses adduced by the Prosecution? It suffices that the accused had knowledge of the existence of the drugs but not the qualities or quantities. See the case of *PP v. Mohd Farid Sukis & Anor* [2002] 3 MLJ 401 where his lordship Augustine Paul J had said as follow:

> "It must be observed that in proving this element, the obligation of the prosecution is only to establish that the accused had knowledge, either by direct evidence or by way of inference, the existence of the dangerous drug but not its qualities. This stand has been consistently taken by the Singapore Courts following *Warner v. Metropolitan Police Commissioner* [1969] 2 AC 256 which was approved in *Tan Ah Tee & Anor v. PP* [1980] 1 MLJ 49."

[19] It is the Prosecution case that after waiting for about 2 hours and 30 minutes in the car park, SP2 and his team of police officers had arrested the accused when he approached the Car to open the car door. A body search on the accused was conducted by SP2 and no incriminating items

were found on him. However, the accused was holding in his right hand the remote control for the Car, Key (P5B) and Access card (P5A). These items were seized by SP2. Both P5A and P5B do not have identification or markings to indicate the apartment involved. See the cross examination of SP2 by the accused's counsel at page 29 and 30:

"S : Dalam kes ini hanya ada 1 kad akses dan 1 batang kunci dijumpai. Betul?

J : Ya Yang Arif.

S : Dan setuju dengan saya, kad akses itu berwarna putih saja tanpa sebarang label atau tandaan. Betul? Nak rujuk barang kes tak ekshibit P5A, kad akses.

J : Ya Yang Arif.

S : Dan sekadar lihat kad akses tersebut kita tak kan tahu kad akses itu untuk rumah mana, unit mana, tingkat mana. Betul?

J : Ya Yang Arif.

S : Dan kunci iaitu ekshibit P5B yang dirampas tersebut juga adalah 1 batang kunci yang biasa. Betul?

J : Ya Yang Arif.

S : Kunci tersebut juga tidak mempunyai sebarang label atau tandaan. Betul?

J : Ya Yang Arif,

S : Jadi sama juga sekadar Iihat kunci tersebut kita tak kan tahu kunci itu untuk rumah mana, unit mana dan tingkat berapa. Betul?

J : Ya Yang Arif.

S : Setuju dengan saya jika tertuduh tidak tunjuk rumah tersebut, sekadar lihat kunci dan kad akses saja Insp pun tidak akan tahu kad akses dan kunci itu untuk rumah tersebut. Betul?

J : Ya Yang Arif.

S : Dan setuju dengan saya meski pun tiada tandaan pada kad akses dan kunci tersebut, tertuduh masih beritahu bahawa kad akses dan kunci tersebut adalah untuk rumah tersebut.

J : Ya Yang Arif.

S : Dan dia pun tidak bawa Insp untuk merayau-rayau ke tempat lain sebelum ke rumah tersebut. Betul?

J : Ya Yang Arif."

[20] The accused led SP2 and his team of police officers to the Apartment where the drugs were found inside the Apartment. The lock to the main door of the Apartment was opened with the Key (P5B). The information provided by the accused together with the Key P5B is admissible as it led to the discovery as provided under s. 27 of the Evidence Act (EA) which reads as follows:

> **"Section 27. How much of information received from the accused may be proved.**
>
> (1) When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of that information, whether the information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved."

[21] In the case of *Wai Chan Leong v. PP* [1989] 2 CLJ 1168 (SC), the learned Judge had stated as follows:

> "Although we considered that s. 37A of the Dangerous Drugs Act,

which we found is substantially similar to the amended s. 113 of the Criminal Procedure Code, does not override s. 27 of the Evidence Act 1950, we would take this opportunity to repeat and to add a few words to what has been said about this letter section in other cases decided previously including those cited to us. Firstly as s. 27 is an exception to the prohibition imposed by the preceding ss. 24, 25 and 26 of the Evidence Act, it should be strictly construed and applied. Secondly it must be borne in mind that for s. 27 of the Evidence Act to apply, the information must be such as has caused discovery of a fact. In other words, the fact must be the consequence and the information the cause of its discovery. Moreover, the information must relate distinctly to the fact discovered. *(Chong Soon Koy v. Public Prosecutor* [1977] 2 MLJ 78, 79; *Pulukuri Kotayya v. King Emperor 74 I.A 65 at p.77r"*

[22] Since the Access card (P5A) and Key (P5B) had no markings to indicate which floor or apartment were involved, the accused's conduct in leading SP2 and his team of police officers to the Apartment coupled with the opening of the door lock to the main door with the Keys (P5B) is relevant as it shows that the accused had knowledge of the drugs in the Apartment. After all the Apartment is a studio unit and the drugs were lying on the floor beside the bed in the hall. See s. 8 of the EA which reads as follow:

"Section 8. Motive, preparation and previous or subsequent conduct.

(1) Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

(2) The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant if the conduct influences or is influenced by

any fact in issue or relevant fact, and whether it was previous or subsequent thereto."

[23] See the case of *Ariff Arhannan bin Che Udin v. PP* [2022] 3 MLJ 157 (FC).

[24] It is the accused's counsel's contention that the fact the accused did not attempt to run away and had given his cooperation by guiding SP2 and his team to the Apartment shows that the accused had no knowledge of the drugs. The accused's counsel had cited the case of *Saabani Kigongobero & Anor v. PP and Another Appeal* [2014] 3 MLJ 858 (CA). The relevant part of the judgement are as follow:

> **"[20]** The evidence established that prior to the arrest, when the appellants were seen coming out of the hotel, the appellants were not behaving suspiciously. At the time of the arrest, a perusal of the evidence of the taxi driver ('SP4') and the arresting officer ('SP6') revealed that the arrest on the first appellant happened very fast. He was pulled out of the taxi whilst he was making payment for the fare. The evidence of SP6 was 'Masa membuka pintu saya kenalkan diri sebagai polis dan dia terkejut kemudian saya kilas tangan kirinya dia cuba melawan kemudian saya tarik dia keluar dan tiarapkannya di atas jalan.' The evidence suggests that there was no opportunity for the first appellant to run away. In a situation where the police had suddenly pounced on the first appellant in the taxi, it is reasonable to expect the first appellant to display the reaction of 'terkejut'. In fact, SP6 admitted that 'terkejut' was a reasonable reaction. Therefore, in our view, such conduct alone is not sufficient to infer knowledge of the drugs on the first appellant.
>
> **[21]** As for the second appellant, there was no evidence of any resistance on the arrest or any attempt to run away. The evidence of SP8 was '... OKT2 selepas saya kenalkan diri sebagai polis dia tak ada baling beg dan tak cuba larikan diri.' Naturally, there was no evidence led to suggest any situation that made it impossible for the

second appellant to run away from the police. There was thus no basis for the learned trial judge to make a finding that the second appellant could not run away because the situation made it impossible for him to do so."

[25] The facts of our case can be distinguished from those in the case of *Saabani Kigongobero*. The findings by the learned Judge in the case of *Saabani Kigongobero* were very much fact centric based on the circumstances. In our case when the accused was arrested in the car park, he was confronted by SP2 and nine other officers. Under such circumstances, it would not be possible for him to run away. Hence the fact that the accused did not attempt to run away is immaterial

[26] The element of knowledge can be inferred from the fact that the keys and Access Card were found in the possession of the accused on the day of his arrest. In addition, pursuant to s. 8 of the EA, the conduct of the accused who had led SP2 and the police team to the Apartment where the drugs were found showed that the accused knew that the keys were for that particular Apartment.

[27] However the fact that the accused had knowledge is not sufficient, as the accused must also have had custody or control of the drugs. See *Choy Yoke Choy v. PP* [1992] 2 MLJ 632 [SC]. Failure to do so would mean that the element of possession has not been proven.

Custody or Control

[28] The Prosecution had sought to show that the accused had control of the drugs through his possession of the Key and Access Card and the identification of the accused by SP4 (owner).

[29] By virtue of the conduct of the accused in leading SP2 and the policemen to the Apartment, and the subsequent opening of the lock on the door with the Key found on the accused, the Prosecution had shown that the accused had control of the drugs. There was no other person inside the Apartment at that material time.

[30] The prosecution had adduced evidence that the accused was living in the Apartment through the exhibits P18, P19 and D25. In P18, it listed 6 samples collected from the Apartment by SP3 namely a bed sheet, pillowcase, underwear and toothbrush (P6B1, P6C1, P6D1, P6E1, P6F1, and P6G1) for DNA testing. The results of the DNA test (D25) carried out by the science officer Puan Adreanee Reza Binti Alwi from Jabatan Kimia Malaysia showed the presence of the Accused's DNA on the bed sheet (P6B1), pillowcase (P6D1), underwear (P6E1) and toothbrush (P6G1) (D25).

[31] The presence of the Accused in the Apartment has been further confirmed by the SP4 (landlady) who had seen the Accused inside the Apartment when she had gone to the Apartment to obtain the signature of Caroline Tan (named tenant in the tenancy agreement) to renew the tenancy agreement (P20). The apartment is a studio apartment, the description of which can be seen in the testimony of SP4 at page 60 and 61.

S : Rumah ini rumah jenis apa puan?

J : Studio unit.

S : Bila kata studio unit ini dia ada bilik tak?

J : Tiada bilik.

S : Apa ruangan yang ada puan?

J : Cuma ada kitchen cabinet dengan toilet. Tiada balkoni juga."

[32] SP4 had seen the Accused sitting on the bed in the hall. Though SP4 could not see the face of the Accused, she recognised the tattoo on the Accused's hand. See the Q and A page 65 and 66.

"S : Puan ada masuk tak dalam rumah?

J : Saya pergi ke rumah di hadapan rumah dan ketuk pintu

untuk berjumpa Caroline, rumah itu jenis studio petak. Jadi bila buka pintu kita akan nampak keseluruhan rumah.

S : Puan nampak siapa lagi yang ada dalam rumah ini?

J : Kebetulan masa itu saya nampak seorang lelaki baru bangun tidur. Macam saya kata rumah studio itu kecil bila buka pintu boleh nampak keseluruhan rumah. Lelaki yang saya nampak itu saya perasan dia mempunyai tatu.

S : Puan tak cam muka dia?

J : Tak, bangsa Chinese itu pasti tapi muka tak perasan. Tatu saya perasan.

S : Tatu di bahagian mana ingat tak?

J : Mungkin dekat bahagian tangan.

S : Kalau puan lihat dalam Mahkamah hari ini ada tak lelaki itu?

J : Yang berada di belakang.

S : Pakai baju warna apa?

J : Warna putih.

Mah : So kamu cam itu orang yang tidur di katil pada masa itu?

J : Saya perasan tatu di bahagian tangan.

S : Adakah pada tarikh itu saja puan ada nampak lelaki ini?

J : Ya betul.

Mah : Tengok tatu itu tahu tak tangan kiri atau kanan?

J : Rasa dua-dua tangan ada. Sebab muka tak berapa focus, tapi bahagian badan sebab baru bangun dari katil, so saya

say sorry. Dia bangun duduk.

Mah : Dia duduk mesti kamu tengok muka dia kan?

J : Ya.

Mah : Suruh accused bangun. Boleh cam?

J : Ya cam.

S : Puan saya ulang sekali lagi adakah itu saja masa yang puan nampak lelaki ini di apartment?

J : Ya betul,

S : Pada 2019 ini?

J : Ya."

[33] In our case, the accused's counsel alleged that the Apartment was occupied by 2 other persons namely Ee Yong Seng and Caroline Tan.

Ee Yong Seng

[34] The Accused's counsel alleged that Ee Yong Seng (Yong Seng) was the ex-boyfriend of Caroline Tan and that he was living at the Apartment. To support her contention, the Accused's counsel elicited the admission from SP4 that Yong Seng had banked the rental payment into her husband's bank account. See the Q and A at page 82:

"S : Puan pernah dengar ke nama Ee Yong Seng ini?

J : Saya...

S : Puan pernah dengar atau tak pernah dengar?

J : Dia ada transfer duit sewa kepada akaun suami saya.

Mah : Sorry?

J : Dia ada transfer..

Mah : Siapa?

J : Ee Yong Seng.

Mah : You pernah dengar?

J : Pernah tengok nama dia lah. Kita tak very.. kita tak tanya detail lah.

S : Maknanya tengok dekat penyata itu ada nama Ee Yong Seng ini?

J : Ya ada nama.

S : Tahu tak orangnya siapa? Pernah jumpa ke?

J : Saya tahu itu adalah Caroline punya pasangan masa itu.

S : Ingat tak bila?

J : Saya minta maaf sebab resit semua dah bertahun.

S : Pernah ke Caroline beritahu rumah ini sekarang duduk dengan siapa?

J : Walaupun saya jarang ke sana hanya setahun sekali renew tenancy. Tapi saya selalu berhubung melalui whatsapp. Saya tahu dia ada anak lain bersama lelaki lain melalui conversation whatsapp.

S : Yang latest dia beritahu dia duduk dengan siapa?

J : Boyfriend baru."

[35] Other than the confirmation that Yong Seng had banked the rental payment into the bank account, SP4 had no other details nor knowledge of Yong Seng. Though SP4 was informed by Caroline Tan that she had a boyfriend and a baby with him living in the Apartment, SP4 had never met nor was she introduced to the boyfriend by Caroline Tan. Merely the act of

banking in the rental payment into the bank account does not per se substantiate the allegation that Yong Seng was staying in the Apartment. After all it is not uncommon for someone to bank money into the account on behalf of another person. The person whom SP4 saw in the Apartment was the accused when SP4 went to discuss the renewal of the tenancy agreement with Caroline Tan sometime in 2019. I found SP4 to be a truthful and credible witness as her recollection tallied with the facts and remained unshaken even though challenged during cross examination. She has no personal interest in the outcome of this case. Hence it can be confirmed that it was the accused and not Yong Seng who was staying in the Apartment when the police raided the place.

Caroline Tan

[36] According to SP4, since 2016 Caroline Tan had been the tenant to the Apartment pursuant to a tenancy agreement (P20). The tenancy would be renewed on a yearly basis and SP4 would meet with Caroline Tan at the Apartment to obtain her signature once a year. See Q and A at page 62 and 63.

> "S : Dan penyewa ini sewa untuk tempoh berapa lama puan?
>
> J : Penyewa untuk kes ini dia sambung kontrak. Sebab kita kontrak setahun jadi start saya sewakan kita continue setahun ke setahun.
>
> S : Adakah ada penyewa lain selain penyewa yang kena tangkap ini?
>
> J : Maksudnya.
>
> S : Maksudnya rumah ini dah ada berapa orang penyewa?
>
> J : Dia adalah penyewa pertama saya sejak saya dapat kunci rumah.
>
> S : Tadi puan sebut Caroline ini tahu tak dia tinggal dengan

siapa dekat rumah ini?

J : Dia ada cakap dia ada anak dan suami.

Mah : Maksudnya penyewa itu adalah seorang perempuan?

J : Ya.

S : Boleh beritahu Mahkamah sekali lagi siapa nama penyewa ini?

J : Caroline Tan.

S : Puan ada jumpa?

J : Ya saya ad ajumpa.

S : Bila puan jumpa?

J : Setiap kali nak sign renew tenancy agreement.

S : Maksudnya puan ada sign lah tenancy agreement ini?

J : Ya betul.

S : Kalau saya rujuk tenancy agreement ini boleh camkan lagi?

J : Boleh, saya di bahagian saksi rasanya,"

[37] On 3/01/2020, when the accused was arrested at the carpark in the Apartment, Caroline Tan was with the accused and a baby. During the cross examination of SP2, he was told that pursuant to a police report D15 lodged by the accused that on the day of the arrest, the accused had accompanied Caroline Tan to Residensi Masai to meet with Yong Seng. Their purpose for the meeting was to take back the access card and keys to the Apartment from Yong Seng as well as to return the Car to him. They were supposed to meet Yong Seng at the café GC Park on the 6th floor at 10am. After waiting for about 2 hours and Yong Seng had not shown up at

the cafe in spite of the phone calls and messages, they left the cafe to go home. It was when they were in the car park that they were confronted by the police. Needless to say, SP2 denied any knowledge of the alleged meeting that was supposed to be set up between Caroline and Yong Seng. see Q and A at page 37 and 38.

S : Setuju dengan saya dalam laporan polis tertuduh menyatakan bahawa beliau pergi ke Residensi Masai pada hari tangkapan adalah untuk menemani Caroline Tan untuk mengambil balik satu kad akses dan kunci rumah tersebut daripada Ee Yong Seng dan untuk memulangkan kereta BMW itu kepada Ee Yong Seng. Betul?

J : Ya Yang Arif.

S : Dan tertuduh juga menyatakan dalam laporan tersebut bahawa tertuduh dan Caroline Tan telah pergi ke GC Park Café yang berada di tingkat 6 untuk menunggu Ee Yong Seng kerana Ee Yong Seng tidak menjawab panggilan pada masa tersebut. Betul? Dalam laporan.

J : Ya Yang Arif.

S : Dan tertuduh juga menyatakan bahawa kad akses dan kunci rumah yang dijumpai pada beliau adalah kepunyaan Caroline Tan yang mana juga hadir pada hari itu. Betul?

J : Ya Yang Arif.

S : Dan dalam laporan tertuduh juga menyatakan oleh sebab mereka telah manunggu Ee Yong Seng lama dan Ee Yong Seng tidak menjawab panggilan dan membalas mesej mereka, mereka membuat keputusan untuk balik dulu kerana Caroline pada masa itu mempunyai anak yang berumur 2 bulan. Betul?

J : Ya Yang Arif.

S : Dan tertuduh juga menyatakan bahawa rumah B-01-17B bukanlah diinap oleh beliau. Betul?

J : Ya Yang Arif.

S : Dan arahan daripada anak guam saya, kesemua ini beliau sebenarnya telah memberitahu Insp sendiri oleh beliau sendiri dan Caroline Tan pada masa tangkapan. Betul?

J : Tidak setuju Yang Arif."

[38] Caroline Tan was not called as a witness. The Prosecution had sought to admit the written statement recorded under s. 112 of the Criminal Procedure Code (CPC) made by Caroline Tan (P25) through s. 32(1)(i) of the EA. It is then incumbent on the police to show that they had taken all reasonable steps to secure the attendance of Caroline Tan before her written statement can be admitted. See the case of *PP v. Lee Jun Ho & Ors* [2011] 6 MLJ 220 (CA) at para 12 namely:

> **"[12]** We are in complete agreement with the reasoning of the learned trial judge. The basis upon which the prosecution tried to invokes 32(1)(i) of the Evidence Act was that the two witnesses could not be found. However, as pointed out by the learned trial judge, actions to trace the two witnesses were only taken in 2008, while in the midst of the trial. The actions were taken five years after recording the witnesses' statements. Thus, as rightly pointed out by the learned trial judge, greater efforts was expected to secure the attendance of the witnesses in such a serious charge. In the absence of such effort, we are of the same view with the learned trial judge that the witnesses' statements of the two key witnesses could not be admitted under s. 32(1)(i) of the Evidence Act."

[39] Hence have the police taken all reasonable steps to secure her attendance? Other than the occasion when the Police had taken the statement in P25 on 7/1/2020, the police had not been in contact with her. See page 92.

"S : Selain daripada last jumpa Caroline pada 7.1.2020 ambil statement dia. Lepas itu ada berhubung dengan dia?

J : Tak ada.

S : Selepas itu ada jumpa dia?

J : Tak ada.

S : Sepina?

J : Tak dapat diserahkan sebab tak dapat dikesan.

S : Insp ada pergi ke rumah tempat kejadian ini ada jumpa barang-barang peribadi Caroline Tan ini?

J : Saya tak ingat Yang Arif tapi setahu saya barang peribadi tak ada, yang ada cuma baju tapi sizing sesuai dengan OKT. Saya tak tahu baju itu baju perempuan atau lelaki Yang Arif."

[40] They did not manage to serve the subpoena on her. It is surprising that the police did not even get Caroline Tan to post a bond as in s. 118 CPC before releasing her. The steps that the police had failed to carry out in order to come within the ambit of s. 32 (1)(i) EA can be seen through the cross examination of SP5 at page 100 and 101:

"S : Jadi tadi semasa pemeriksaan utama Insp menyatakan bahawa Insp hanya call Caroline Tan untuk datang ke Mahkamah betul?

J : Tak, saya menghubunginya tapi nombor telefon dah tak ada dalam perkhidmatan.

S : Bilakah kali pertama Insp menghubungi Caroline Tan?

J : Selepas tangkapan Tan Cheng Kit saya ada minta nombor telefon dan minta dia datang ke pejabat.

S : Bukan, soalan saya bila kali pertama Insp call dia untuk sapina dan minta dia datang ke Mahkamah?

J : Saya tidak ingat Yang Arif.

S : Adakah buat semakan dengan JPN tentang alamat terkini Caroline Tan?

J : Tidak ada Yang Arif.

S : Adakah buat semakan dengan JPJ tentang alamat yang dibekalkan oleh Caroline Tan semasa beli kereta dan sebagainya.

J : Tidak ada Yang Arif.

S : Ada buat semakan family tree untuk membuat semakan ahli keluarga?

J : Tidak ada Yang Arif.

S : Ada pergi ke alamat terkini Caroline dan pergi ke alamat ahli keluarga?

J : Tidak ada Yang Arif.

S : Ada buat semakan dengan Imigresen sama ada Caroline ini telah ke luar negara atau sebagainya?

J : Tidak ada Yang Arif.

S : Ada mengiklankan dalam mana-mana surat khabar sama ada orang tahu Caroline Tan dan sebagainya?

J : Belum disiarkan Yang Arif.

S : Setakat hari ini ada iklan di buat?

J : Tidak ada Yang Arif.

S : Kes ini sudah 4 tahun dari tarikh tangkapan. Jadi saya cadangkan sekiranya Insp mula usaha lebih awal Caroline Tan ini mungkin dapat dikesan. Setuju?

J : Setuju Yang Arif.

S : Dan saya cadangkan usaha yang dikatakan diambil oleh Insp iaitu cuba untuk menghubungi Caroline Tan adalah tidak mencukupi untuk mengesan seorang saksi yang penting dalam kes ini.

J : Saya tidak setuju Yang Arif."

[41] The failure on the part of the police to use its best endeavours to locate Caroline Tan or take reasonably practicable steps as provided under the CPC to secure the attendance of Caroline Tan means that the s. 112 statement of Caroline Tan should be excluded. The law requires strict proof to explain the non-availability of the maker of a statement as a witness. See the case of *Tee Hock Keong v. PP* [2021] 1 LNS 497(CA) at page 10 para 25 and 26:

> **"[25]** In our case, apart from writing to the Immigration Department and getting their confirmation (P108) that Wulandari had been deported to her home country, the prosecution did not take any other steps to procure her attendance in court. The prosecution needs to do more if it wants to rely on the exception to the hearsay rule in s. 32 (1)(i) of the Evidence Act. The prosecution did not use its best endeavor to locate Wulandari, nor did they take reasonably practicable steps to ensure the attendance of this witness from a neighbouring country. The law requires strict proof to explain the non-availability of the maker of a statement as a witness. See *Mohamed Ghouse v. R* [1910] 11 SSLR 31; *Allied Bank (Malaysia) Berhad v. Yau Jiok Hua* [1998] 6 MLJ 1. The circumstances that would bring a statement within any one of the exceptions in s. 32(1) of the Evidence Act must be established by the party desiring its admission as evidence. This was reiterated by the Federal Court in

Siew Tiew Bee v. Public Prosecutor [1973] 2 MLJ 200. See also *Public Prosecutor v. Lam Peng Hoa & Anor* [1996] 5 MLJ 405 (HC).

[26] The police, and by extension the prosecution, ought to have fully utilized the prevailing and available provisions in the Criminal Procedure Code (CPC) in order to secure the attendance of witnesses. The prosecution could have used the provisions of section 396 of the CPC and have Wulandari committed to civil prison until trial. See *Public Prosecutor v. Lee Jun Ho & Ors* [2009] 3 MLJ 400; *Public Prosecutor v. Somasundram a/l Rajasegaran & Anor* [2016] MLJU 619. In fact Wulandari's evidence could have been first recorded before she was deported to Indonesia. Additionally, the prosecution could have sought the assistance of the Indonesia authorities to procure her attendance in court. However, the prosecution did not do any of this."

[42] During the trial, I had overruled the objection of the accused's Counsel as to the admissibility of the witness statement of Caroline Tan and admitted it as exhibit P25. However, since the Prosecution had failed to comply with the strict requirements of s. 32 EA, I am constrained to rule that P25 is inadmissible as evidence being hearsay. As such I did not take it into consideration in coming to my decision. See the case of *Shamugam s/o Kanapathy v. Pappah d/o Chinniah Nadar* [1994] 2 CLJ 265 at page 269, his lordship Tan Sri Edgar Joseph JR, SCJ had opined as follow:

"Counsel for the defendant had objected to the admissibility of the two letters P3 and P4, on the ground that it was hearsay, the uncle not having been called to testify. Counsel for the plaintiff replied that he would comply with s. 32 of the Evidence Act. I over-ruled the objection subject to compliance with s. 32 of the Evidence Act.

At the end of the day, however, no attempt had been made to comply with the strict requirements of s. 32; not even the pre-requisites of that section, let alone any of the exceptions laid down therein. In my

view, therefore, these letters are inadmissible in evidence being hearsay, and I rule that they are worthless as evidence."

[43] It is the contention of the accused's counsel that the non-calling of Caroline as a witness attracts the adverse inference under s. 114(g) of EA.

> **Section 114. Court may presume existence of certain fact.**
>
> The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.
>
> *(g)* that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it;

[44] In the case of *Shohel v. PP* [2022] 1 LNS 2812 (CA), at para 38 his Lordship had opined a as follow:

> **"[38]** Undang-undang mantap adalah jelas bahawa peruntukan seksyen 114(g) ini terpakai apabila pihak pendakwaan gagal memanggil saksi yang material yang menyebabkan kelompangan dalam kes pendakwaan. Ini dalam lain perkataan juga menyebabkan pihak pendakwaan gagal membuktikan kes pendakwaan tanpa saksi material berkenaan. (lihat kes *Munusamy v. Public Prosecutor* [1987] 1 MLJ 492 (SC); *Pendakwa Raya v. Mansor bin Mohd Rashid* [1996] 3 MLJ 560 (FC))"

[45] This has been reiterated in the case of *PP v. Sanderasegeran Nithenanham* [2024] 4 CLJ 823 (FC).

[46] In our case since it has been established through D25 and the testimony of SP4 that the accused was staying at the apartment, the absence of her testimony does not create a gap in the prosecution case. That she may be staying in the Apartment does not detract from the fact that the accused was staying there as well. This has been set out in para 31 above. After all, it is trite that the Prosecution does not need to prove that

there must be exclusive access by the accused before there can be a finding of possession, See the case of *Hemankumar Subramanian v. PP* [2020] 3 CLJ 844 (CA). It has been opined by the learned Judge in the case of *Lee Gee Hian v. PP* [2022] 1 MLJ 755 (CA) that ownership of the drugs is not relevant consideration as the accused was charged with trafficking in dangerous drugs.

[47] Since the intention was to surrender the Car to Yong Seng and to take back the Keys (P5B) and Access card (P5A) from Yong Seng, after waiting for more than 2 hours in G1 in the cafe, why did they not go up to the Apartment to meet with Yong Seng? After all, there were no allegations of bad blood and no animosity between them which would prevent them from meeting him at the Apartment.

[48] Hence with the Keys (P5A) and Access Card (P5B) found on the accused together with the testimony of SP4, the court is of the opinion that the accused had control of the drugs as defined in the off-cited case of *Chan Pean Leon v. PP* [1956] 22 MLJ 18. The evidence as adduced during the trial has shown that the accused had possession of the drugs.

Third issue

Whether there is a break in the chain of evidence.

[49] The Prosecution has to show that the chain of evidence from the period that the drugs were recovered and sent to the chemist department until the completion of the analysis by the chemist are the same substances that were found to be a type 3, 4 Methylenedioxymethamphetamine (MDMA), Ketamine, Caffeine and Etizolam respectively. See the case of *Gunalan Ramachandran & Ors v. PP* [2004] 4 CLJ 551 (CA).

[50] According to the evidence of SP2, the drugs (P4) were delivered to SP5 on 3/1/2020 (P13). On 6/1/2020, SP5 delivered the drugs to SP6 who acknowledged receipt of it (P22). At all times the drugs were kept under lock and seal.

[51] There has been no challenge to the chain of evidence by the

accused's counsel during the trial or in her submission. Hence there is no break in the chain from the seizure of the drugs by SP2 to the delivery of it by SP5 to SP6 and the subsequent analysis of it by SP6. See the case of *Christopher Uchenna Efogwo lwn. Public Prosecutor* [2017] 1 LNS 1479.

Other issues

[52] There are 2 other issues which were raised by the accused's counsel that the court has to deal with namely the police report lodged by the accused on 12/3/2020 (D15) and the failure to take the CCTV recording from Residensi Masai.

a) The police report lodged by the accused on 12/2/2023 (D15). A copy of it was forwarded to SP5 with a covering letter dated 3/3/2023 from the accused's counsel (D26). It was not received by SP5 as can be seen in the cross examination of SP5 at page 104 and 105.

"S : Ok Insp pernah terima laporan polis yang dibuat oleh OKT?

J : Saya tidak pernah terima.

S : Saya ingin rujuk saksi kepada satu surat laitu satu dokumen baru. Ini adalah satu surat yang dihantar oleh pejabat peguam kepada IO sendiri. Jadi lihat surat ini pada mula-mulanya boleh sahkan bahawa nama yang tertera di situ Insp Syed Mohd Safrizat bin Syed Abdullah adalah Insp sendiri?

J : Ya nama saya Yang Arif.

S : Adakah Insp sekarang bekerja di IPD Kulai?

J : Betul Yang Arif.

S : Adakah Insp sendiri yang terima surat ini bersama laporan polis?

J : Saya tidak terima surat ini Yang Arif.

S : Tapi kenapa ada cop lnsp?

J : Saya tidak tahu berkenaan cop ini tapi saya memang tak ada terima surat ini."

i) In D15, the accused had set out his version of the alleged events of the day of his arrest and that he had not been to the Apartment before that day. D15 was lodged slightly more than 3 years after the accused was arrested. There were no allegations by the accused that during those 3 years he was denied the benefit of legal counsel. Also, in D15 there was no declaration that he had discovered new facts or materials which were not available to him at the time of his arrest. He had claimed that he was not conversant with Bahasa Malaysia and did not understand the content of the written statement which he had given the police on 5/1/2020. It was this written statement which he had sought to correct by lodging the police report D15.

ii) A copy of the accused's written statement had given to his previous counsel Anthon & Chen at a much earlier date on 24/2/2021 as recorded in the court minutes during the case management. It was only when he had discharged his previous counsel and engaged his new counsel H. T. Low that he claimed to be aware of the content of the written statement. Since there were no complaints about his previous lawyer other than this allegation of only being aware of the content of the written statement sometime in January 2023, this allegation has no basis and appears to be an afterthought.

b) The accused's counsel contended that the failure by the police to take the CCTV recordings of the car park on the day of the arrest at Residensi Masai meant that the accused had been prejudiced as it would prove the allegations in D15 namely that Caroline was with

the accused at the car park during the arrest and that Caroline Tan or Ee Yong Seng had access to the Apartment.

i) Since D15 was lodged more than 3 years after the arrest, the police would not have the benefit of knowing about the allegations contained in D15 at the time of the arrest. So, it is understandable that the police would not consider that the CCTV recordings were material evidence. After all, hindsight is often described as "20/20". In any event, the presence of Caroline Tan with the accused was confirmed by SP2 in his re-examination at page 41:

"PEMERIKSAAN SEMULA

S : Dengan izin Yang Arif, ada beberapa soalan. Insp Shahrul Rizal, saya nak tanya tadi lawyer bertanyakan masa serbuan di tempat parkir kereta itu, peguam cadangkan bahawa pada masa itu ada seorang perempuan bernama Caroline Tan bersama. Ada atau tidak sebenarnya pada masa itu?

J : Seingat saya pada masa itu kita tahan 1 lelaki kemudian dihampiri oleh 1 perempuan Cina.

S : Memang ada lah?

J : Ya Yang Arif.

S : Ada tanya nama dia? Ada dia bawa baby pada masa itu?

J : Ada tapi bila kita tanya kepada penama dia mengatakan itu bukan wife dia, itu adalah kawan. Jadi kita beranggapan dia tidak terlibat dengan pemilikan kereta tersebut."

ii) As to the issue of Yong Seng having access to the

Apartment, this has been dealt with in para 35 above. The effect of non-production of the CCTV has been dealt with in the case of *Lee Gee Hian v. PP* [2022] 1 MLJ 755 (CA). In any event, the Prosecution had successfully adduced direct credible evidence to rebut the allegations which the accused's counsel claimed that CCTV recordings, if available, would substantiate the accused' story.

Fourth issue

Whether a prima facie case has been established against the accused.

[53] At the end of the Prosecution case, I have found that the Prosecution has established a Prima Facie case against the accused in all 5 charges and called upon the accused to enter his defence. Since the weight of the drugs exceeded the statutory prescribed limit, the presumption of s. 37(da) DDA applies for the charge as in the case of JA-45A-26-10/2020 where the accused is presumed to be trafficking. However, in the case of JA-45A-27-10/2020 and JA-45A-160-12/2020, the accused is in direct possession of the drugs, poisons and psychotropic substance.

Defence Case

[54] Since the accused is presumed to be trafficking under s. 37(da) DDA, the accused will have to rebut the presumption on the balance of probabilities in respect of the charge for the case JA-45A-26-10/2020. In the case of JA-45A-27-10/2020 and JA-45A-160-12/2020, the accused will have to raise reasonable doubt as to whether he had direct possession of the drugs, poisons and psychotropic substance.

[55] The accused elected to give sworn testimony from the witness box as well as tendered a witness statement (PSSD1). The brief facts as alluded to in his testimony can be summarised as follows:

a. He was helping his sister in a furniture business and also worked part time as a lottery ticket seller every Wednesday, Saturday and Sunday since 2010. He earned roughly around

RM 10000 a month.

b. At the time of the arrest he was living with Caroline Tan (Caroline) in a house at No 19, Jalan Danau 22, Taman Desa Jaya, 81100, Johor Bahru (Taman Desa Jaya House) which belonged to Caroline's mother. He had been in a relationship with Caroline since December 2019.

c. Before his relationship with Caroline, he was living with his parents at No 13A, Lorong Dua, Jalan Gajah, 28300 Triang, Pahang (Lorong Dua House)

d. He had moved in to help Caroline as she had just delivered her baby a month prior to that and was still in her confinement.

e. Caroline had rented the Apartment since June 2019 and was living in the Apartment with Ee Yong Seng (Yong Seng) before they broke up in November 2019. After the breakup, Caroline had shifted out to the Taman Desa Jaya House and Yong Seng continued to stay on in the Apartment.

f. When the accused came to know that the Apartment was rented under the name of Caroline and the Car which was being driven by Caroline was in the name of Yong Seng, he told Caroline that she should return the Car to Yong Seng and to ask Yong Seng to vacate and return the access card and keys to the Apartment. Besides the set of keys and access card held by Yong Seng, there was another set of keys and access card with Caroline.

g. On 2.1.2020, Caroline had informed the accused that Yong Seng had agreed to a meeting at Residensi Masai on the 3.1.2020 at 10am to return the keys and access card to her and at the sametime Caroline was to return the Car to Yong Seng. The accused told Caroline that he would go with her to help her to settle the matter.

h. On 3.1.2020, Caroline and the accused waited at the GC Parc Cafe until 11.30am. However, when there were no responses from Yong Seng to Caroline's phone calls or messages, they decided to go home as Caroline had her 2-month-old baby with her.

i. When they were in the carpark walking towards the Car, they were stopped by the police. The accused was arrested and the search of the accused's body and Car revealed no incriminating items. However, SP2 found the remote control for the car, Access card (P5B) and Apartment keys (P5A) tied together in the Accused's right hand. In the accused pocket, SP2 found the accused's handphone and wallet which had his identification card, driver license and some cash in it. No search was carried out on Caroline.

j. When the accused and Caroline were asked about the P5A and P5B, they had informed SP2 that the Car belonged to Yong Seng and P5A and P5B were for the Apartment which was rented by Caroline. Thereafter the police directed Caroline and the accused to bring them to the Apartment.

k. Before the arrest, the accused had visited Caroline a couple of time prior to the arrest. He had done so at the request of Caroline who had quarrelled with Yong Seng. As ordered by SP2, the accused led the police to the block B lift lobby from the car park. It was Caroline who led SP2 and the police team to the Apartment. With the keys (P5A) from the accused, SP2 and the police team managed to unlock the door and gained entry into the Apartment.

l. Inside the Apartment, the accused saw SP2 found the drugs on the floor beside the bed. The accused was surprised and shocked as he has never been to the Apartment before and has no knowledge of the drugs found in the Apartment.

m. During the time when the accused was in remand for the drugs offences under s. 39B DDA, he was brought for further remand in the Magistrate Court, Johor Bahru, on 2 different occasions namely on 13.1.2020 for involvement in a kidnapping offence under s. 365 Penal Code (PC) and on 15.1.2020 for involvement in a murder offence under s. 302 PC. It was during the remand under s. 302 PC that the accused had met Yong Seng for the first time. The accused did not know Yong Seng prior to this meeting. Both he and Yong Seng were remanded together as they were both suspected to be in the same gang and involved in both the offences. However, the accused was never charged for the offences under s. 365 PC nor s. 302PC.

[56] The accused's defences consist of the following:

a) The accused does not stay at the Apartment but instead at Lorong Dua House.

i) It is the accused's contention that Yong Seng was staying in the Apartment and he had gone with Caroline to the Apartment on 3.1.2020 to take back the Keys (P5A) and access card (P5B) from him. However other than the testimony of SP4 (landlady) of the bank in slip for rental payments by Yong Seng which has been dealt with in para 34 above, the accused did not adduce any further evidence to support this contention. Like it is said "one swallow does not make a summer." The act of banking in the rental payment does not mean that he was staying in the Apartment at the material time. In SP4's testimony, she said that she only knew Yong Seng was the former boyfriend of Caroline. See page 80, 81 and 82.

S : Maksudnya tengok CCTV kemudian baru boleh tahu. Betul?

J : Ya. Actually, saya tahu yang Caroline ini dah ada boyfriend ada anak dan ada boyfriend baru

tapi itu semua hubungan dia.

S : Jadi saya cadangkan Ee Yong Seng yang tinggal di rumah tersebut sehingga tangkapan.

J : Tak setuju.

S : Puan pernah dengar ke nama Ee Yong Seng ini?

J : Saya...

S : Puan pernah dengar atau tak pernah dengar?

J : Dia ada transfer duit sewa kepada akaun suami saya.

Mah : Sorry?

J : Dia ada transfer..

Mah : Siapa?

J : Ee Yong Seng.

Mah : You pernah dengar?

J : Pernah tengok nama dia lah. Kita tak very.. kita tak tanya detail.

S : Maknanya tengok dekat penyata itu ada nama Ee Yong Seng ini?

J : Ya ada nama.

S : Tahu tak orangnya siapa? Pernah jumpa ke?

J : Saya tahu itu adalah Caroline punya pasangan masa ltu.

S : Ingat tak bila?

J : Saya minta maaf sebab resit semua dah bertahun.

S : Pernah ke Caroline beritahu rumah ini sekarang duduk dengan siapa?

J : Walaupun saya jarang ke sana hanya setahun sekali renew tenancy. Tapi saya selalu berhubung melalui whatsapp. Saya tahu dia ada anak lain bersama lelaki lain melalui conversation whatsapp.

S : Yang latest dia beritahu dia duduk dengan siapa?

J : Boyfriend baru."

ii) The fact that Yong Seng was the former boyfriend of Caroline and had allowed Caroline to use the Car does not confirm that Yong Seng was staying in the Apartment at the time of the accused's arrest. More evidence would be required but none was adduced by the accused.

iii) The accused had admitted in his witness statement PSSD1 and D25 that since December 2019 after Caroline and Yong Seng's relationship had broken up, she had shifted out from the Apartment and stayed at the Taman Desa Jaya House. Hence Caroline was not staying in the Apartment at the time of the arrest.

iv) This would mean that the accused was the person staying in the Apartment. After all, SP4 had testified that she had seen the accused in the Apartment during her visits. Also, SD3 in her test report (D25) had confirmed the presence of the accused in the Apartment namely his DNA on a toothbrush (P6G1) and underwear of the accused (P6E1) as well as on a bedsheet (P6B1) and pillow case (P6D1).

v) The accused claimed that the police knew that he was staying at the Lorong Dua as shown in the police report D29 and D30 and not the Apartment. However, a perusal of D29 and D30 shows that the address of the accused stated in it was as per the particulars in his identity card. see D29

> "Bersabit Skudai RPT : 10080/19
>
> Pada 12/01/2020 jam I/kurang 1530hrs, saya bersama anggota cawangan D9 Siasatan Khas IPD Johor Bahru Utara Skudai terdiri daripada D/SI 117614, D/Sjn 103076, Kpl 170032 dan L/Kpl 172727 telah tahan 1 L/Cina di tepi Jalan Persisiran Seri Alam, Seri Alam Johor. Setelah memperkenalkan diri sebagai pegawai kanan polis dengan menunjukkan kad kuasa polis kemudian minta lelaki cina tersebut keluarkan dokumen pengenalan diri untuk pemeriksaan. Butir-butir diberikan seperti berikut :-
>
> 1) Nama: Tan Cheng Kit (secara lisan)
>
> No KPT : 890420-06-5749
>
> Alamat : No. 13-A Lorong Dua Jalan Gajah 28300 Triang Pahang.
>
> (Emphasis added)

vi) Hence the accused's contention that the police knew that he was staying in Lorong Dua House and not the Apartment is not true. The address in the police report (D29 & D30) was obviously copied from the NRIC given to the police. As a formality the police would merely record the particulars as stated in the NRIC. In any event it is not unusual for someone to stay at a different address from that which is stated in NRIC. In fact, the accused himself had alleged in his defence that he was staying with Caroline in the Taman Desa Jaya House, and not in the Lorong Dua House.

vii) It is interesting to note that in the police report lodged by the accused D15, the accused had stated that he had never been to the Apartment prior to the arrest. See p.4 of D15:

> "... Saya juga tidak pada bila-bila masa pernah pergi atau tinggal di rumah B-01-17B tersebut sebelum ini."

However in his witness statement PSSD1 and in the examination in chief by his counsel, the accused admitted to having visited Caroline once or twice in the Apartment a few months prior to the arrest. See page 126 Q and A.

S : Encik Tan adakah kamu pernah pergi ke rumah B-01-17B maksud saya selain daripada hari tangkapan, pernah ke kamu pergi ke rumah tersebut?

J : Pernah Yang Arif beberapa bulan sebelum saya ditangkap. 1-2 kalt saya pernah pergi ke rumah tersebut.

viii) The inconsistency between D15 and PSSD1 shows that the accused had shifted his testimony in an attempt to address the evidence adduced.

b) DNA of third parties found in the Apartment.

i) The accused had adduced the DNA test report (D25) which was carried out by the science officer Puan Aedrianee Reeza Alwi (SD3). In D25, SD3 had confirmed the presence of the accused from the sample taken from the toothbrush (P6G1) underwear (P6E1), pillowcase (P6B1) and bed sheet (P6D1). In addition, SD3 had also confirmed that there was presence of DNA of a female from the same sample namely P6E1, P6B1 and P6D1 as well as from the toothbrush (P6F1).

ii) Since it is not disputed that Caroline was in a relationship with the accused, the presence of DNA of a female in the

Apartment is not surprising. Without the benefit of the blood sample from Caroline, there is no way to know whether the presence of the female as mentioned in D25 is that of Caroline or another person. However, there is no requirement that the accused must have sole possession of the drugs before he can be liable for trafficking in dangerous drugs. It has been decided that possession can be sole or joint In the Federal Court case of *Siew Yoke Keong v. PP* [2013] 3 MLJ 630, it was held that:

> **"[35]** So, in our judgment in the circumstances of this case, the presence of the ladies clothing (two female upper garments and two pairs of female jeans) along with male clothing in the third room of the first house does not mean that no possession was established against Siew. The crucial question is whether Siew was so situated with respect to the proscribed drugs found in the second and third rooms of the first house that he had the power to deal with the drugs 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. In other words, Siew must be so situated that he can deal with the proscribed drugs as if it belonged to him, and it must be shown that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so (he had animus possidendi)."

See at para 32:

> "... In *Public Prosecutor v. Denish a/l Madhavan* [2009] 2 MLJ 194; [2009] 2 CLJ 209, this court had occasion to explain again the meaning of 'possession'. In that case this court held that it was inappropriate to speak of possession of an article in criminal law as exclusive possession. One is either in possession or not in possession. and that one could be in possession jointly

with another or others. The court also held that 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 a conviction is possible. Explaining this Abdul Aziz Mohamad FCJ speaking for the court said at pp 217 (MLJ):

> 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.*

iii) It is also to be noted that although SD3 could derive the presence of an unknown female DNA from some of the items seized, no other unknown male DNA was derived. The Court cannot ignore the odds for the police to accurately pick up the items in the Apartment that contained the DNA of the accused and an unknown female DNA, and yet no other male DNA profile that could be positively derived. If the contention of the accused that Yong Seng had been staying in the Apartment is true, why was there not even one unknown male DNA that could be derived from any of the items tested for DNA

especially in the bedsheet (P681) and pillow case (P6C1) and (P6D1). The case of *Thivasalim a/l Abdul Majeed v. Public Prosecutor* [2014] 3 MLJ 124 cited by the accused's counsel can be distinguished. In that case, a partial male DNA profile was derived from the t-shirt and sweater which did not match the DNA of the accused.

iv) The defence counsel also submitted that there were 4 shirts and 1 pants that were seized by the investigating officer but not sent for DNA analysis. The shirts and pants were actually seized for test-fitting as shown in P23. In any event after the test-fitting exercise, the DNA of the accused will remain on those shirts and pants.

v) As to the DNA found on the other pillow case (P6C1) which had the profile of 3 contributories, one of which is the unknown female and the other two contributories which could not be positively distinguished (D25). The explanation as given by SD3 in the examination in chief by accused' counsel reads as follow: (page 146 and 147)

"S : Sekarang rujuk semula kepada laporan kimia di m/surat 3, result and interpretation under item 5 puan, di situ ada nyatakan bahawa terdapat sekurang-kurangnya 3 individu lagi yang dikesan pada sarung bantal bertanda 2. 1 dinyatakan berpadan dengan female 1, 2 individu lagi puan tidak tahu siapa, betul?

J : 2 lagi individu tidak dapat ditentukan.

S : DNA 2 individu lagi tidak boleh ditentukan kerana puan diberikan 1 sampel darah yang tertentu saja untuk dipadankan. Adakah ini maksud puan?

J : Itu bukan maksudnya. Sekiranya saya mengatakan

the other contributors cannot be positively distinguished bermakna walaupun ada sampel darah rujukan, kita tidak boleh membuat perbandingan kerana profile nya tidak lengkap.

S : Tapi apa yang boleh pasti bagi item tersebut adalah DNA female 1 dikesan dan DNA Tan Cheng Kit iaitu darah sampel yang dihantar kepada puan itu adalah tidak berpadanan dengan sarung bantal tersebut. Betul?

J : Tidak boleh ditentukan sama ada dia ada atau pun tidak. Sebagai 2 penderma yang lain itu.

S : Tapi jika DNA dia ada berkaitan dengan sarung bantal tersebut DNA dia pun akan ditulis di situ sebagai Tan Cheng Kit.

J : Sekiranya ianya boleh dibuat perbandingan.

S : Ok, jadi adakah ini bermaksud terdapat sekurang-kurangnya 2 orang individu lagi dikesan pada sarung bantal itu di mana kami tidak tahu siapa 2 orang itu? Adakah itu maksud?

J : Tidak.

Mah : It's not what that she don't know. She cannot take the DNA from it, that is all she meant. Betul tak?

J : Betul sebab 2 lagi tu berkemungkinan juga Tan Cheng Kit atau pun orang lain, atau 2 orang lain pun kita tak tahu sebab we cannot infer to that profile."

v) Hence SD3 had explained that due to the incomplete profile of the DNA taken from P601, she could not positively distinguish whether the one of the contributors was the accused

or someone else. However, it is interesting to note that SD3 did not derive any unknown male DNA as well.

vi) The DNA tests which were carried out by SP3 on the intimate items like underwear (P6E1) and toothbrush P6G1 together with the identification by SP4 firmly placed the accused in the Apartment.

[57] Looking at the evidence in totality, this court finds the evidence and explanation from the accused to be bare denials and an afterthought. A credible defence is a defence that raises a reasonable doubt on the Prosecution's case. Ultimately it is a question of fact whether the explanation as provided by the accused has a reasonable doubt. see the case of *Azhar Lazim v. PP* [2012] CLJU 262. The accused has failed to rebut the presumption of trafficking under s. 37(da) DDA on balance of probability and has failed to cast any reasonable doubt on the Prosecution's case

Conclusion

[58] The prosecution has succeeded to prove the offences of trafficking under s. 39B(1)(a) DDA, offences of possession under s. 12(2) DDA, offences of possession under s. 9(1) and s. 30(3) Poisons Act 1952 against the accused beyond reasonable doubt. Accordingly, the accused is found guilty and convicted of the offences as charged in all charges in JA-45A-26-10/2020, JA-45A-27-10/2020 and JA-45A-160-12/2022.

[59] After hearing submission from the accused's counsel as well the Prosecution, I had imposed the following sentence:

(a) In respect of the trafficking charge in JA-45A-26-10/2020, imprisonment for life from the date of arrest with the whipping of 12 strokes as stated in s. 39B(2) DDA.

(b) In respect of the charges in JA-45A-27-10/2020,

i. 3 years imprisonment from the date of arrest for the

first charge under s. 12(2) DDA.

ii. 3 years imprisonment from the date of arrest for the second charge under s. 12(2) DDA.

iii. 6 months imprisonment from the date of arrest for the third charge under s. 9(1) Poisons Act 1952.

(c) In respect of the charge under s. 30(3) Poisons Act 1952 in JA-45A-160-12/2020, 1 year imprisonment from the date of arrest.

(d) All sentences of imprisonment to run concurrently.

Dated: 24 DECEMBER 2024

(KAN WENG HIN)
Judicial Commissioner
High Court of Malaya,
Johor Bahru

Counsel:-

For the prosecution - Siti Norliza Abdullah & Juliana Jaffar

For the accused - Low Huey Theng & H T Low