

**IN THE COURT OF APPEAL MALAYSIA AT PUTRAJAYA
(APPELLATE JURISDICTION)
[CRIMINAL APPEAL NO: K-05(SH)-372-08/2024]**

BETWEEN

LINGESWARAN AMBALAKHAN

... APPELLANT

AND

PUBLIC PROSECUTOR

... RESPONDENT

[In the Matter of the High Court of Malaya at Sungai Petani
In The State of Kedah Darul Aman
Criminal Trial No: KB-45A-42-12/2022

Between

Public Prosecutor

And

Lingeswaran Ambalakkan]

CORAM:

**AZMAN ABDULLAH, JCA
AZMI ARIFFIN, JCA
NOORIN BADARUDDIN, JCA**

JUDGMENT

Introduction

[1] The charge preferred against the appellant reads as follows:

“Bahawa kamu, pada 07/09/2022, jam lebih kurang 12.30 tengah malam, bertempat di tepi Jalan Kenari Biru 1, Taman Kenari Jaya, Sungai Petani, di dalam daerah Kuala Muda, di dalam Negeri Kedah Darul Aman, telah mendapati mengedar dadah berbahaya seberat 43.2gram (iaitu gabungan dadah berbahaya Heroin seberat 40.1gram dan dadah berbahaya Monoacetylmorphines seberat 3.1 gram). Oleh yang demikian, kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.”

- [2] The appellant pleaded not guilty to the charge and claimed trial.
- [3] At the end of the prosecution’s case, the learned trial judge found that the prosecution had made out a *prima facie* case against the appellant on actual possession which triggered the statutory presumption of trafficking.
- [4] The appellant was ordered to enter his defence.
- [5] The appellant elected to give evidence on oath as a sole witness for his defence.
- [6] At the end of the defence case, the learned trial judge found the appellant guilty and sentenced him to thirty (30) years imprisonment and twelve (12) strokes of whipping. Against the said decision, the appellant appeal.
- [7] We will for convenience in this appeal, refer the appellant in the manner he was referred to in the High Court.

The Prosecution’s Case

- [8] The case of the prosecution was well laid out by the learned trial judge in her grounds of judgment which is reproduced herein:

- “3. A total of 5 witnesses were called for the prosecution at the trial. This included police photographer D/Kpl 180288 Azizi bin Yahaya (PW3) and police storekeeper SM 133493 Rahimah binti Ibrahim (PW1). Their case was simple and straightforward.
4. Inspector G/22205 Danendran a/l Nata Raja, the complainant (PW4) gave evidence that on 6.9.2022 at 10:00 pm, he received information that an Indian man was trafficking drugs in Taman Kenari Jaya, Sungai Petani. He assembled his team and gave them a briefing.
5. PW4 and his raiding team then proceeded to Taman Kenari Jaya using an unmarked police car. They arrived at the site at 12:20 am 7.9.2022. There was a row of shops and the area was well lit from the lightings from the shops and streetlights. The area was quiet and there was no traffic.
6. The team took their position and monitored the area for about 1015 minutes. From a distance of 10 meters, PW4 first observed a man standing alone and holding something on Jalan Kenari Biru 1, Taman Kenari Jaya. He looked suspicious given the time of night and because he was standing alone in that quiet area (marked X on Exhibit P7B).
7. The unmarked police car approached the man. PW4 and his team got down from the car and when PW4 introduced himself as a police officer, the man whom PW4 identified as the OKT, looked scared and pleaded to be released.
8. The OKT was holding a blue plastic bag (Exhibit P2A) in his right hand. Upon further investigation, PW4 found the bag to contain 2 plastic packets (Exhibits P2B(1) & (2)) each containing substance believed to be heroin.

9. *The OKT was arrested and PW4 seized the blue plastic bag and its contents. The OKT did not have identification documents with him. The OKT and the seized items were taken to Ibu Pejabat Daerah (IPD) Kuala Muda and at all material times, PW4 had custody of the seized items.*
10. *At IPD Kuala Muda, PW4 prepared the necessary documentation and weighed and marked the seized items. At around 1:05 am, he handed over the OKT and the seized items to Inspector G/27130 Mohamad Nishamasraaf bin Mohd Yusoff, the investigating officer (PW5).*
11. *PW5 examined the OKT and the seized items. He re-marked the drug exhibits (Exhibits P2A and P2B(1) and (2)). He also weighed the items together and directed PW3 to take photographs of the same before and after dusting (Eksibit P3A-C).*
12. *He put the seized items into a PDRM exhibit bag which he marked “NN” and sealed with the PDRM 579 seal (Exhibit P2). The PDRM exhibit bag was kept in a locked cabinet to which only PW5 had access.*
13. *At 4:00 pm the same day, he visited the site with PW4 and PW3. He directed PW3 to take photographs of the general area and the place where the OKT was arrested (Exhibit P6A-E). PW5 also drew a sketch plan of the same area (Exhibit P14 & P14K).*
14. *Later that same day, PW5 revisited the site with PW3 and directed him to take photographs of the site at night (Exhibit P7A-B).*
15. *The following morning, PW5 handed over Exhibit P2 to Encik Ahmad Hishahuddin bin Mohd Fuzi, the chemist (PW2) at the Chemistry Department in Alor Setar. PW2 issued a receipt*

bearing laboratory number: 22-FR-K-06133 (Exhibit P4). The same laboratory number was recorded on P2, P2A and P2B(1) and P2B(2).

16. *PW2's analysis is reflected in his chemist report dated 25.10.2022 (Exhibit P5) and showed that:*

- (i) Exhibit P2B(1) had a net weight of 451.6grammes and contained 20.3grammes of heroin and 1.8grammes of monoacetylmorphines; and*
- (ii) Exhibit P2B(2) had a net weight of 451.3grammes and contained 19.8grammes of heroin and 1.3grammes of monoacetylmorphines."*

The Defence's Case

[9] The defence of the accused in summary is that he had been employed for over three (3) years as a runner for a car workshop. His job involved assisting accident victims by liaising with the traffic police and hospitals and coordinating insurance claims typically under the direction of a legal representative known to him as Durga and supervised by a man he referred to as Mohd Rafi.

[10] On 6 September 2022, at approximately 8.30pm, the accused stated that he arrived by motorcycle and was stationed at Jalan Kenari Biru 1 near a tuition centre called 'Do-Re-Me', which he identified as a known accident-prone area. He claimed he was waiting "on standby" for potential accidents that might arise during the post-tuition traffic flow which was consistent with his duties as a workshop runner.

[11] The accused alleged that he was approached by an Indian man i.e. Inspector Danendran a/l Nata Raja (PW4), who introduced himself as a police officer from Bukit Aman.

[12] The accused testified that he was searched at the scene but was not carrying anything and no drugs were found on him. He then stated he

was handcuffed and taken to I PD Kubang Pasu, where he arrived at around 9.30pm.

- [13] There, the accused claimed to have been questioned by officers from IPD Kubang Pasu and shown photographs of unknown individuals.
- [14] Several hours later, at approximately 1.45am, the accused stated that he was transferred to IPD Kuala Muda. He noticed that his lawyer Durga and his friend Mohd Rafi, the workshop supervisor was there at IPD Kuala Muda waiting for him.
- [15] The accused denied in possession of the drugs.
- [16] After the accused completed his testimony, counsel for the defence requested an adjournment to secure the attendance of Mohd Rafi, whom the accused said could confirm his arrest timeline and prior employment. However, the application was dismissed on the grounds that three (3) months had passed since the decision at the close of *prima facie* was delivered and the accused was ordered to enter his defence.

Findings Of The Learned Trial Judge At The Conclusion Of The Trial

- [17] The learned trial judge then analysed the evidence of the accused and concluded as follows:

Defence timeline

“58. The defence case is that the OKT was at Jalan Kenari Biru 1 at 8:30pm because that place was an accident-prone area due to the tuition centre. He was detained and search but nothing was recovered. He was arrested and taken to IPD Kubang Pasu and kept there for several hours before being taken to IPD Kuala Muda.

59. *The OKT points to PW4's police reports (Exhibits P11 and P12) that show the reports were made at IPD Kubang Pasu to support his account of events.*
60. *The OKT's account is diametrically opposed to the timeline presented by PW4. PW4's chronology starts with him and his team arriving at Jalan Kenari Biru 1 at 12:20 am 7.9.2022 and ends with the handing over of the OKT to PW5 at 1:05 am the same day at IPD Kuala Muda.*
61. *Although the OKT's sequence of events were put to PW4 and PW5 during cross examination, both these witnesses denied it.*
62. *This Court finds that PW4's narrative is supported by the borang bongkar dated 7.9.2022 at 12:30 am (Exhibit P10), his police report made on 7.9.2022 at 1:01 am (Exhibit P11), the borang serah menyerah barang kes dated 7.9.2022 at 1:01 am (Exhibit P11) and PW5's evidence.*
63. *This Court also accepts PW4's explanation for the police reports (Exhibits P11 and P12) showing that they were generated at IPD Kubang Pasu which was:*

Anggota saya adalah detektif, jadi mereka ada markah dalam sebulan berapa kes mereka tangkap. Daripada ini kami akan nampak maklumat, jadi kami akan bagi markah kepada mereka. Sebab itu kami akan key in bagi. Sebab itu walaupun maklumat saya, kita akan sharing maklumat dan dia akan dapat markah. Pegawai tidak markah serupa itu. Detektif saja yang dapat markah.”

Mohd Rafi

“64. *The first mention of Mohd Rafi was during cross examination of PW5 wherein it was suggested that Mohd Rafi and Durga were waiting for the OKT at IPD Kuala Muda. PW5 denied this.*

65. *This was the OKT’s evidence about Mohd Rafi -*

(i) *during examination in chief -*

Bila saya berada di Kawasan nak masuk ke lokap, ada seorang anggota polis katakan dengan saya lawyer saya Durga dengan kawan saya Rafi tunggu saya lama di balai; and

(ii) *during cross examination:*

S: Mond Rafi itu siapa?

J: Supervisor workshop

S: Masa kamu standby dekat situ, dia ada ke?

J: Dalam walkie talkie berkomunikasi memang saya bagitahu saya standby di kawasan itu.

66. *Section 259(1) Criminal Procedure Code gives the Court an unfettered discretion to postpone or adjourn proceedings in a criminal trial. This Court was also mindful that every latitude must be given to an accused person to defend his case and call witnesses.*

67. *However, in the circumstances of this case, this Court of the view that the trial should not be adjourned for the OKT to call Mohd Rafi because there were no details of Mohd Rafi other than his name and that he was a supervisor at a workshop. The OKT did not know his full name and did not identify the workshop where Mohd Rafi was the supervisor.*

68. *This cannot amount to “reasonable cause” to adjourn the matter. The interest of justice would not have been served by further postponing the case which involved an offence committed in 2022.”*

Credibility of witnesses

- “71. *This Court had the benefit of seeing and hearing the prosecution witnesses giving evidence and found them to be credible witnesses. PW4 gave evidence in a clear unhesitating manner and remained unshaken during cross examination. This Court accepts his evidence as truthful and he ought to be believed.*
72. *The discrepancies pointed out by the defence nor the nonproduction of his pocket diary did not in any way render the entirety of PW4’s evidence unworthy of belief.*
73. *This Court undertook a positive evaluation of the prosecution’s evidence against the OKT to determine if there is credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant his conviction on the charge.*
74. *Upon maximum evaluation and careful assessment of the entirety of evidence by both prosecution and defence, this Court finds:*
- (i) prosecution has successfully proven its case against the OKT beyond reasonable doubt as there was credible evidence to prove each and every ingredient of the offence as required under the law;*
 - (ii) the OKT has failed to raise a reasonable doubt in the prosecution’s case; and*

(iii) *the OKT had failed to rebut the statutory presumption of trafficking on a balance of probabilities.*

The Principle of Law on Appellate Intervention

[18] An appellate court should be slow in disturbing the findings of facts arrived by the trial court who had the advantage of seeing and hearing the witnesses, unless there are substantial and compelling reasons for disagreeing with the finding.

[19] In *Herchun Singh & Ors v. PP* [1969] MLRA 382, Ong Hock Thye CJ (as he then was) said as follows:

“An appellate Court should be slow in disturbing such finding of fact arrived at by the Judge, who had the advantage of seeing and hearing the witness, unless there are substantial and compelling reasons for disagreeing with the finding.”

[20] In *Che Omar Mohd Akhir v. Public Prosecutor* [2007] 3 CLJ 281, the Federal Court speaking through Nik Hashim FCJ (as he then was) held as follows:

“It is trite law that an appellate court should be slow in disturbing a finding of facts by the trial judge unless such finding is clearly against the weight of evidence which is not the case here.”

[21] In *Nor Azlina Abdul Aziz v. Expert Project Management Sdn Bhd* [2017] 5 CLJ 58 the Court of Appeal speaking through Harmindar Singh Dhaliwal JCA (as he then was) held as follows:

“[20] Nevertheless there are occasions when appellate interference is warranted and these occasions have been well set out in numerous cases. Some of these occasions are:

- (a) *where the trial judge took into account irrelevant considerations and failed to give due weight to relevant considerations. (see Director of Forestry, Sabah & Anor v. Mau Kam Tong & Ors And Another Appeal [2010] 3 CLJ 377; [2010] 3 MLJ 509);*
- (b) *where there was no proper evaluation of the evidence by the trial judge. (see Lee Nyan Hon & Brothers Sdn Bhd v. Metro Charm Sdn Bhd [2009] 6 CLJ 626; [2009] 6 MLJ 1);*
- (c) *where the decision arrived at by the trial court was without judicial appreciation of the evidence. (see Gan Yook Chin & Anor v. Lee tng Chin & Ors [2004] 4 CLJ 309; [2005] 2 MLJ 1);*
- (d) *where a trial court has so fundamentally misdirected itself, that no reasonable court which had properly directed itself and asked the correct questions, would have arrived at the same conclusion. (see Raja Lob Sharuddin Raja Ahmad Terzali & Ors v. Sri Seltra Sdn Bhd [2008] 2 CLJ 284 ;[2008] 2 MLJ 87);*
- (e) *where the trial judge was plainly wrong in arriving at his decision. (see Lee ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19; [2003] 2 MLJ 97);*
- (f) *where a trial judge had so manifestly failed to derive proper benefit from the undoubted advantage of seeing and hearing witnesses at the trial, and in reaching his conclusion, has not properly analysed the entirety of the evidence which was given before him (see First Count Sdn Bhd v. Wang Yew Logging & Plantation Sdn Bhd [2013] CLJU 625; [2013] 1 LNS 625; [2013] 4 MLJ 693 which followed the Privy Council case of Choo Kok Beng*

v. Choo Kok Hoe & Ors [1984] CLJU 40; [1984] 1 LNS 40; [1984] 2 MLJ 165); and

(g) where the judgment is based upon a wrong premise of fact or of law. (see Perembun (M) Sdn Bhd v, Conlay Construction Sdn Bhd [2012] CLJU 1416; [2012] 1 LNS 1416; [2012] 4 MLJ 149)”

[22] In *Tan Kim Ho & Anor v. PP* [2009] 3 CLJ 236, Zaki Tun Azmi CJ (as he then was) reiterated as follows:

“It is an established principle of law that when dealing with finding of facts, the trial Judge is more often than not, in a better position to decide. The appellate court must be reluctant to interfere with had clearly and wrongly evaluated the facts.”

[23] Bearing the above-mentioned principles in mind, we now turn to consider the issues raised by the parties in this appeal.

The Appeal

[24] Before us, although the petition of appeal contained several grounds, however learned counsel for the accused submitted that he will be confined to only five (5) grounds of appeal, namely:

Ground 1: Parole Evidence Rule

Ground 2: Competing Narratives

Ground 3: Credibility of the Witnesses

Ground 4: Failure to Appreciate the Defence

Ground 5: Improper Use of Presumption

Our Decision

[25] Having considered the submissions of the learned counsel and learned deputy public prosecutor and having perused the appeal

records, we unanimously dismissed the appeal. Our reasons now follow:

Ground 1: Parole Evidence Rule Under Section 91 and 92 of the Evidence Act 1950

- [26] The accused disputed the time and location of his arrest. He claimed that he was arrested at 8.30pm on 6 September 2022, rather than at 12.30 a.m. on 7 September 2022 as testified by PW4 and PW5. The accused alleged that he was brought to I PD Kubang Pasu and that the First Information Report (FIR) was actually lodged in IPD Kubang Pasu instead of IPD Kuala Muda at 9.30pm as orally testified by PW4.
- [27] The defence further argued that PW4's testimony that the police report dated 7 September 2022 at 1.01 am (exhibit P11) was in fact lodged at IPD Kuala Muda and not IPD Kubang Pasu cannot be used to vary or contradict the stated location in exhibit P11 i.e. IPD Kubang Pasu. This argument, they contend, runs afoul of section 91 and section 92 of the Evidence Act 1950.
- [28] The significance of this to the defence narrative is that it renders the defence version that he was not holding the blue plastic bag possible, thus raising a reasonable doubt.
- [29] With greatest respect, we cannot accede to the argument mounted by the learned defence counsel.
- [30] To recapitulate, PW4 was asked during his Examination-in-Chief, Cross Examination and Re-Examination regarding the conflict in the police report (Exhibit P11) he lodged and his oral testimony in Court. His response essentially was that he had asked his right-hand man, who was a subordinate officer participating in the raid, to lodge exhibit P11 to help improve his key performance index ("KPI"). The relevant notes of proceedings are reproduced as follows:

[A] In **Examination-in-Chief** (Enclosure 7 Volume 2 Pages 79-81 of the Records of Appeal) the following was the evidence of PW4:

S: Kamu kata kamu buat report di BSJND IPD Kuala Muda dan kamu sahkah sebentar tadi. Boleh jelaskan dibuat di mana?

J: Report ini memang dibuat di IPD Kuala Muda. Tapi kami guna ID kami. ID anggota saya Mohd Radzi, penerima report itu iaitu anggota serbuan. Jadi bila kami guna ID kami, ia akan automatik keluar balai dan daerah itu IPD Kubang Pasu dan Daerah Kubang Pasu.

S: Jadi dalam kes ini macam mana penjelasan kamu tadi saya tidak faham.

J: Bila saya guna ID anggota serbuan saya Mohd Radzi, jadi automatik dia keluar daerah dan balai Kubang Pasu.

S: Bila maksud kamu automatik ini dia mengikut apa?

J: Tempat bertugas pegawai dan anggota tersebut.

S: Apa penjelasan kamu bila report dibuat di IPD Kuala Muda, benda ini boleh dipinda atau tidak?

J: Boleh

S: Dalam kes ini ada buat apa-apa pindaan atau laporan pembetulan ke?

J: Tidak.

S: Boleh jelaskan kenapa?

J: Pada masa itu tidak ingat untuk buat pindaan.

S: Disebabkan isu ini berbangkit, semasa kamu buat report ada tak anggota dari balai IPD Kuala Muda?

J: Ada.

S: Jadi kenapa pada masa itu tak minta IPD Kuala Muda untuk buat report?

J: Pada masa tersebut anggota Kuala Muda sibuk membuat return tangkapan harian Kuala Muda 6/9/2022 dan kami yang buat serbuan dan kami yang buat tangkapan, jadi lebih baik saya buat report sendiri.

S: Adakah report ini kamu buat sendiri atau anggota kamu Mohd Radzi yang buat?

J: Saya buat sendiri. Saya cuma ID anggota saya.

[B] In **Cross-Examination** (Enclosure 7 Volume 2 Pages 86 of the Records of Appeal) PW4 said:

S: Jika kamu telah buat laporan polis di Sungai Petani, ia akan menyatakan bahawa balai di mana laporan dibuat adalah Balai Sungai Petani. Di mana kita buat laporan polis, di situlah dia akan tunjukkan di mana laporan itu dibuat. Jika betul kata kamu bahawa ini dibuat di IPD Kuala Muda, ia akan katakan balai itu adalah Balai IPD Kuala Muda. Ia tidak akan kata pejabat IPD Kubang Pasu. Kamu tidak boleh lari daripada fakta itu ini adalah melibatkan kebebasan dan juga nyawa anak guam saya. Saya katakan laporan ini dibuat di Kubang Pasu.

J: Tidak setuju.

S: Tiada keperluan untuk kamu menggunakan nama Mohd Radzi untuk membuat laporan ini. Jika betul kamu sendiri

boleh menggunakan ID kamu sebagai penerima report dan juga pembuat report. Betul?

J: Betul.

[C] In **Re-Examination** (Enclosure 7 Volume 2 Page 97 of the Records of Appeal) PW4 said:

SP4: Boleh saya jelaskan sedikit berkenaan dengan penerimaan report kenapa tidak orang yang sama? Saya ingin jelas dalam kes ini.

Mah: Boleh.

SP4: Anggota saya adalah detektif, jadi mereka ada markah dalam sebulan berapa kes mereka tangkap. Daripada ini kami akan nampak maklumat, jadi kami akan bagi markah kepada mereka. Sebab itu kami akan key in bagi. Sebab itu walaupun maklumat saya, kita akan sharing maklumat dan dia akan dapat markah. Pegawai tidak markah serupa itu. Detektif saja yang dapat markah.

Mah: Antara 3 orang kenapa pilih Mohd Radzi?

SP4: Sebab dia anggota kanan saya. Sebab itu saya bagi dia.

[31] The defence contends that PW4's oral testimony or explanation during trial that P11 was lodged at IPD Kuala Muda cannot be relied upon to vary the location as stated in P11 as it goes against ss 91 and 92 of the Evidence Act 1950.

[32] At this juncture, it is essential to appreciate the scope of section 91 and section 92 of the Evidence Act 1950 lest it be carried too far outside its limit.

Section 91

“When the terms of a contract or of a grant or any other disposition of property have been reduced by or by consent of the parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of the contract, grant or other disposition of property or of the matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.”

Section 92

“When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representative in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms.”

- [33] From our reading of ss 91 and 92 of the Evidence Act 1950 it is patently clear that the document contemplated under these provisions are limited to document relating to the terms of contracts, grants and other dispositions of property mutually agreed upon by the parties.
- [34] In our humble opinion, the rationale behind these provisions is certainly to prevent a party who has agreed to specific terms, grants or disposition from later coming to court and attempting to vary, add to or contract those agreed terms using parole (oral) evidence.
- [35] His Lordship Abdoolcader J (as he then was) in the case of *PP v. Datuk Haji Harun Bin Haji Idris & Ors* [1977] 1 MLJ 180 said this:

“...And secondly, in the context of the wording in Section 92 of the Evidence Act, the clause “any matter required by law to be reduced to the form of document” would appear to refer to bilateral instruments and dispositive document only, such as

contracts, grants or other disposition of property which the law requires to be reduced to writing, and not to every and all matters which the law requires to be reduced into a document, as for instance, the depositions of witnesses which, though required by law to be reduced to the form of a document, would not come within this section and oral evidence is therefore admissible to contradict such depositions.”

[36] In *PP v. Ifeanyi Christian Nwankwo* [2014] 7 CLJ 76, the Court of Appeal through the judgment delivered by Tengku Maimun JCA (as Her Ladyship then was) said the following in respect of ss. 91 and 92:

“[11] To recapitulate, what had happened in this case was that although SP4 and SP6 had both testified (which testimony was consistent with exh. P7) that the markings of the three plastic packets were G4, G5 and G6, when the box containing the exhibits was opened in court during the examination-in-chief of SP4, the exhibits produced (P33, P34 and P35) were not the exhibits marked G4, G5 and G6. Instead the exhibits bore the markings of G2, G3 and G4. Faced with the discrepancy, the learned trial judge in fact posed this question to SP4 “Tadi kamu kata kamu tanda bungkusannya itu dengan G4, G5 and G6” to which SP4 answered “Saya tak ingat” (RR1: p. 39).

[13] *At this juncture, SP4 did not offer any explanation on why the exhibits tendered in court had a different marking from what he had handed over to SP6. In re-examination (RR1: p. 61) the following question was asked by the learned Deputy Public Prosecutor “... Boleh nyatakan mengapa tandaan pada plastic ini tidak sama sepertimana ditulis pada P7?”. The answer by SP4 was “Saya tersilap tanda pada borang serah terima dan borang serah terima barang kes ini. Yang sebenarnya sepertimana yang tercatat pada P33, P34 dan P35”.*

- [14] *The submission for the prosecution was that the learned trial judge erred in relying on ss. 93 and 94 of the Evidence Act 1950 when His Lordship rejected the oral explanation made by SP4 as regards exh. P7. It was argued that ss. 93 and 94 had to be read in the context of ss. 91 and 92 of the same Act; that ss. 91 and 92 only applies to bilateral instruments and dispositive documents between contracting parties and that the provisions do not apply to the evidence of SP4 and SP6.*
- [15] *In PP v. Datuk Haji Harun Haji Idris & Ors [1977] CLJU 92; [1977] 1 LNS 92; [1977] 1 MLJ 180, the learned trial judge said the following in respect of s. 92:*
- ... in the context of the wording in s. 92 of the Evidence Act 1950, the clause ‘any matter required by law to be reduced to the form of a document’ would appear to refer to bilateral instruments and dispositive documents only, such as contracts, grants or other disposition of property which the law requires to be reduced to writing, and not to every and all matters which the law requires to be reduced into a document, as for instance, the depositions of witnesses which, though required by law to be reduced to the form of a document, would not come within this section and oral evidence is therefore admissible to contradict such depositions.*
- [16] *The Federal Court in Datuk Haji Harun Haji Idris & Ors v. PP [1977] CLJU 24; [1977] 1 LNS 24; [1978] 1 MLJ 240 agreed with the trial judge on the applicability of ss. 91 and 92 of the Evidence Act 1950 (see also Datuk Tan Leng Teck v. Sarjana Sdn Bhd & Ors [1997] 3 CLJ 421; [1997] 4 MLJ 329).*
- [17] *Based on the above authorities we agree with the learned deputy public prosecutor that ss. 91 and 92 are not applicable to the present case.”*

[37] Thus, in the circumstances of the case before us, the interpretation of Abdoolcader J in *Datuk Haji Harun's* case (*supra*) as to the effect of ss.91 to 92 of the Evidence Act 1950 which were clearly endorsed by the Federal Court in the same case should be the preferred interpretation than what the case of *Ah Mee v. PP* [1967] 1 MLJ 221 relied on by the defence where the Federal Court, *per curiam*, states as follows:

“Section 91 of the Evidence Ordinance applies equally to criminal trials, no less than to civil proceedings, and it categorically states that ‘in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms ... of such matter except the document itself. The report was information relating to the commission of an offence which ‘shall be reduced to writing pursuant to s. 107 of the Criminal Procedure Code (Cap 6), and s. 92 of the Evidence Ordinance goes on to exclude all parole evidence seeking to contradict or vary what was set out in writing.”

[38] Exhibit P11 was a police report lodged by PW4 and does not fall within the ambits of section 91 and section 92 as it is neither a bilateral instrument nor does it constitute a contract, grant or disposition of property as contemplated by these provisions.

[39] The defence has also failed to appreciate that a police report such as exhibit P11 can never be treated as a piece of substantive evidence and the mere absence of the First Information Report is not in itself a valid ground to dismiss a case or to prevent the police from investigating (see *PP v. Foong Chee Cheong* [1969] CLJU 128 & *Dato' Seri Anwar Ibrahim v. PP* [2003] 4 CLJ 409).

[40] According to PW4, as he was stationed at IPD Kubang Pasu, the system automatically generated his station information when he keyed in his ID and password to prepare exhibit P11. As a result, the

report reflected IPD Kubang Pasu as the location, even though it was actually lodged at IPD Kuala Muda.

[41] The learned trial judge who has heard the witnesses, is the best person to decide whether to accept or to reject the explanation given by PW4. The trial judge finds that PW4's narrative is supported by the '*borang bongkar*' dated 7.9.2022 at 12:30 am (exhibit P10), his police report made on 7.9.2022 at 1:01 am (exhibit P11), the '*borang serah menyerah barang kes*' dated 7.9.2022 at 1:01 am (exhibit P13) and PW5's evidence.

[42] Assessing credibility is difficult and is best left to the trial judge who has the audio-visual advantage of a witness in action. In this case, the learned trial judge, in our view, had correctly evaluated PW5's evidence and made an affirmative finding that PW4 was a credible and truthful witness and accordingly accepted PW4's explanation for the police reports (exhibits P11 and P12) showing that they were generated at IPD Kubang Pasu which was:

“Anggota saya adalah detektif, jadi mereka ada markah dalam sebulan berapa kes mereka tangkap. Daripada ini kami akan nampak maklumat, jadi kami akan bagi markah kepada mereka. Sebab itu kami akan key in bagi. Sebab itu walaupun maklumat saya, kita akan sharing maklumat dan dia akan dapat markah. Pegawai tidak markah serupa itu. Detektif saja yang dapat markah.”

[43] We have gone through the evidence thoroughly and have come to the same conclusion that PW4 is a credible witness. Having said that, we find no compelling reasons which require our appellate interference. Thus, we find no merit in the complaint of the accused on this issue.

Ground 2: Competing Narratives

[44] Next complaint was the allegation that the learned trial judge failed to weigh the clearly contradictory narratives presented by both the

prosecution and the defence and simply accepted the prosecution's version without engaging in a proper evaluation of both narratives.

[45] The defence further contended that the learned trial judge erred in law and fact by solely relying on the testimony of PW4, particularly in light of the fact that three (3) other members of the raiding team who were present during the arrest were not called to testify. It was submitted that had the prosecution called these witnesses, they could have either decisively confirmed or refuted the accused's version of events.

[46] The learned counsel for the accused relied strongly on the case of *Azrol Nizam bin Mohd Zaid v. Pendakwa Raya* [2022] 5 MLJ 950 to support his contention where the Court of Appeal speaking through Che Mohd Ruzima Ghazali JCA held that where there is a '*satu lawan satu*' situation -i.e. the prosecution's sole witness is contradicted by the sworn testimony of the accused, the learned trial judge ought not to simply accept the prosecution's account simply because it came from a police officer:

"[42] Dari segi pembuktian pula, tidak dipertikaikan bahawa pihak pendakwaan berhak untuk memilih saksi mana yang hendak dipanggil bagi mengemukakan keterangan dan menurut s. 134 Akta Keterangan 1950, tiada bilangan tertentu saksi diperlukan untuk membuktikan sesuatu fakta. Walaupun begitu, pihak pendakwaan perlulah membuktikan tanpa keraguan yang munasabah bahawa perayu memiliki dadah tersebut untuk tujuan pengedaran semasa ditahan.

[43] *Berkait dengan pendakwaan terhadap perayu, pihak pendakwaan memilih untuk hanya memanggil SP3 walaupun pasukan serbuan turut dianggotai oleh sembilan anggota polis yang lain. Selain itu, keterangan SP3 sendiri menyatakan bahawa semasa serbuan dibuat, Azwan, adik perayu yang membuka pintu setelah diketuk. Azwan sepatutnya tahu apa*

yang berlaku pada masa serbuan. Oleh itu, mana-mana anggota yang turut sama semasa memasuki tempat kejadian ataupun Azwan yang juga ada ditempat kejadian boleh dipanggil pihak pendakwaan bagi menafikan versi pembelaan yang menyatakan perayu sedang berbaring di ruang tamu dan bukannya di dalam bilik tersebut pada ketika itu.

[44] *Walau bagaimanapun, pihak pendakwaan telah memilih untuk tidak memanggil mana-mana saksi yang dapat merungkai kebenaran pembelaan. Dengan itu, wujud situasi keterangan satu lawan satu iaitu keterangan SP3 lawan keterangan perayu. Dalam situasi tersebut, hakim bicara tidak boleh mengabaikan keterangan perayu begitu sahaja dengan alasan bahawa beliau menerima keterangan SP3 yang dianggap betul dan tepat hanya kerana dia adalah seorang pegawai polis. Lebih-lebih lagi, perayu telah pun meletakkan asas pembelaan yang menyatakan dia tidak berada dalam bilik tersebut sejak SP3 memberikan keterangan lagi. Pihak pendakwaan sepatutnya lebih peka terhadap versi yang dibangkitkan pihak pembelaan dan bertanggung mematahkan versi tersebut.”*

[47] With respect, *Azrol (supra)* case must certainly be distinguished from the present case because in that case, the prosecution relied solely on SP3’s evidence to illustrate what had occurred on 18 November 2017 at the place of incident. According to SP3, the accused was in the room locked from the inside during the raid and the drugs were found in the room. However, the accused submitted a different version. The accused’s counsel suggested that the accused was lying down on the mattress in the living room of the place of incident instead of in the room, as evidenced by SP3. In other words, the accused was not in the room during the raids conducted by SP3.

[48] In addition, SP3’s own evidence stated that during the raid, Azwan, the accused’s younger brother, had opened the door after hearing the knock. Azwan should be aware of what happened during the raid.

However, the prosecution chose not to call Azwan or nine other members of the raiding team who can unravel the truth regarding the defence's version that the accused was lying down in the living room and not in the room at that time. Thus, there existed a situation where one evidence was contrary to another, namely the SP3's evidence against the accused. The Court held that learned trial judge had ignored the accused's testimony simply on the grounds that he accepted the SP3's evidence as correct and accurate because he was a police officer.

- [49] However, we find that the authority cited by the learned counsel for the accused is not applicable to the factual situation in this appeal. Here, the accused admitted that at the time of his arrest by PW4, he was alone, and neither Mohd Rafi nor Durga was present at the scene. Therefore, any testimony from them would be of no relevance and incapable of undermining the prosecution's case or establishing the accused's defence.
- [50] It is also important to highlight that the names of Mohd Rafi and Durga were never put to PW4 during the prosecution's case. Although their names were subsequently raised in cross-examination of PW5 there was no suggestion by the defence that any relevant particulars or information pertaining to Mohd Rafi and Durga had been provided to the police to enable a thorough investigation into the plausibility of the accused's defence. This omission alone renders the accused's version of event not only highly improbable but also raises serious doubts about the credibility of his defence.
- [51] PW4 was not an interested witness but a police officer performing his duties. His testimony clearly reflects what he personally observed and did during the arrest compared to the accused's bare and unsubstantiated assertions. In any event, PW4's testimony was consistent with both of his police reports (exhibit P11 & P12) and corroborated by the search list (exhibit P10), as well as the testimony of PW5's. Collectively, these pieces of evidence confirm that the

accused was arrested on 7 September 2022 at approximately 12.30 am and not on 6 September 2022 at 8.30 pm as alleged in his defence.

[52] There was overwhelming evidence that the accused had possession of the impugned drugs. The direct testimony of PW4 suffices to explain and prove that the drugs were found on him. There was nothing to suggest that PW4 or the police had any motive to falsely implicate or frame the accused. In the absence of any such motive or evidence, the learned trial judge was justified in accepting PW4's testimony.

[53] In *Wan Amirul Mubin bin Wan Kamaruddin v. PP* [2017] CLJU 1478; [2017] 1 LNS 1478, the Court of Appeal held as follows:

“It is unthinkable that PW4 had fabricated evidence in view of the complete absence of any evidence or allegation by the appellant that PW4 had made up a story regarding Exhibit P30. In fact, the appellant admitted during cross-examination that PW4, PW5 as well as PW7 had absolutely no reasons to lie about him. PW4 and PW5 were police officers who were merely performing their duties and they had no reasons to lie or to frame up the appellant whom they said they did not know.

[30] *It is significant to bear in mind that since both PW4 and PW5, were carrying on their official duties at the relevant time, in law the court is entitled to presume that their official acts were regularly performed and prima facie they did so honestly and conscientiously. Section 114 illustration (e) of the Evidence Act 1950 in this regard provides that the court may presume that judicial and official acts have been regularly performed. In the case of PP v. Dato' Seri Anwar Ibrahim [2014] 4 CLJ, the Court of Appeal said:*

It must be borne in mind that s. 114 illustration (e) of the Evidence Act 1950 provides that the court may presume

that judicial and official acts have been regularly performed. In State of Punjab v. Rameshwar Dass [1957] Cri LJ 1630, the Punjab and Haryana Court held at p. 1631 as follows:

It is well settled that prima facie the public servants must be assumed to act honestly and conscientiously. It would, therefore, be basically wrong, without other cogent ground to consider them as untrustworthy witness in respect of their activities in performance of their official duties merely because of their official status unless the evidence is considered to be suspicious and that the conviction of the accused cannot be sustained on the statements of the official witnesses. The presumption that a person acts honestly applied as much in favour of a police officer as of other persons, and it is not a judicial approach to distrust and suspect him without good grounds?

[31] Accordingly, without cogent reasons that would allow us to hold otherwise, it would be manifestly wrong to consider PW4 and PW5 as untrustworthy witnesses in handling this case. In the end what we have before us is nothing more than the bare oral testimony which was a mere denial.”

[54] In *Sahrul Mazlee Mohd Khalid v. PP* [2022] CLJU 4; [2022] 1 LNS 4, the Court of Appeal through the judgment delivered by Vazeer Alam Mydin Meera JCA (as he then was) held that:

“[55] There was no evidence of any prior relationship or any evidence that the appellant knew any members of the police raiding team or vice versa. Thus, the learned trial judge concluded that there was nothing to suggest that the police might have had any motive to frame the appellant. In the absence of any such motive, or evidence, the learned trial

judge found that despite the assertion by the defence that the white plastic bag with the drugs was found on the roof of the Viva car outside the house, the evidence established the fact that the appellant was holding the white plastic bag in his hand when apprehended.

[94] *...The frame up theory advanced by the appellant vaporised into thin air when considering the fact that the large amount of drugs have considerable value. We agree with the learned trial judge that no reasonable person would want to frame up someone by leaving such a huge quantity of drugs with considerable value behind in the bedroom.”*

[55] In the case of *Khee Thuan Giap v. Public Prosecutor* [2019] 4 MLJ 651, the Court of Appeal speaking through the judgment delivered by Ahmadi Asnawi JCA (as he then was) held as follows:

“[48] Now, it would also appear that the appellant was accusing SP5, SP6 and D/Kpl Yusrizal bin Yahya of fixing or framing the appellant with the commission of a capital offence by fabricating and manufacturing evidence against him. Hence, of relevant consideration were the motive or motives propelling these witnesses to embark upon such an endeavour.

[49] *The evidence revealed that SP5, SP6 and D/Kpl Yustizal bin Yahya were total strangers in relation to the appellant. The burden is always upon the appellant to prove their motive or motives in fixing the appellant with the commission of the said offence. In our view, the appellant had miserably failed to show that they have an axe to grind against the appellant to propel them to fabricate and manufacture evidence and to testify adversely against the appellant in the trial. The appellant had equally failed to show that the said prosecution witnesses had harboured a motive to falsely implicate the appellant with the commission of the offence.*

[50] *This court in Dickson Levy all Maria George v Public Prosecutor [2018] MLJU 98; [2018] CLJU 135; [2018] 1 LNS 135 had reiterated that:*

[47] *Also, there was no rhyme nor reason for the police officers in this case to frame up the appellant with the impugned drugs, as they were just performing their duty (see the cases of Mohd Ali Jaafar v. Public Prosecutor [1998] 4 MLJ 210; [1998] 4 CLJ Supp 208 and Goh Han Heng v. Public Prosecutor [2003] SGHC 226; [2003].*

[48] *In Goh Han Heng v Public Prosecutor, Yong Pung How CJ (Singapore) had this to say:*

I disagreed with counsel. All that the passage means is that where the accused can show that the complainant has a motive to falsely implicate him, then the burden must fall on the prosecution to disprove that motive. This does not mean that the accused merely needs to allege that the complainant has a motive to falsely implicate him. Instead, the accused must adduce sufficient evidence of this motive so as to raise a reasonable doubt in the prosecution's case. Only then would the burden of proof shift to the prosecution to prove that there was no such motive. To hold otherwise would mean that the prosecution would have the burden of proving a lack of motive to falsely implicate the accused in literally every case, thereby practically instilling a lack of such a motive as a constituent element of every offence.

[49] *The appellant failed to demonstrate to us any evidence to show that the police had harboured a motive to falsely implicate the appellant.*

[51] *It is apparent that the testimonies of both SP5 and SP6 were grounded upon the factual seizure of the impugned drugs from the right front side pocket of the jeans worn by the appellant upon his arrest outside his house. In our view SP5, SP6 and D/Kpl Yusrizal bin Yahya were mere police officers executing their onerous duties with no reason to fabricate and manufacture evidence against the appellant in the manner as contended by the appellant and his witnesses. There was equally nothing inherently improbable in their evidence.*”

[56] In addition, under section 134 of the Evidence Act 1950, the testimony of a single credible witness is sufficient to establish a fact or sustain a conviction. Accordingly, the prosecution is entitled to rely solely on the testimony of PW4 to prove the trafficking charge against the accused. To suggest otherwise would be contrary to the express provision of section 134 which provides that ‘*no particular number of witnesses shall in any case be required for the proof of any fact*’.

[57] This legal position is supported in *Md Zainudin Raujan v. PP* [2013] 4 CLJ 21 where the Federal Court through the judgment delivered by Hasan Lah FCJ (as he then was) held as follows:

“[55] *PW5 was a police witness. The learned trial judge found him to be a credible witness. It is true that the prosecution’s case rested solely on the evidence on PW5. However, under the law there is no requirement for his evidence to be corroborated. The learned trial judge believed PW5 and as such his evidence was sufficient to establish the case for the prosecution. Any requirement for PW5’s evidence to be corroborated will conflict with s. 134 of the Evidence Act 1950 which provides that no particular number of witnesses shall in any case be required for proof of any fact (see *Balachandran v. PP* [2005] 1 CLJ 85).*”

[58] For the reasons given above, we find grounds (2) of the accused's appeal to be devoid of any merit.

Ground 3: Credibility of the Witnesses

[59] The learned counsel for the accused argued that the defence of the accused remained consistent throughout the trial and the reaction of the accused at the point of arrest was wholly consistent with someone being ambushed and falsely implicated. On the contrary, the evidence of the prosecution witnesses demonstrated a lack of corroboration and credibility in material aspects. The learned trial judge had also failed to conduct a maximum evaluation at the close of the prosecution's case.

[60] Additionally, it was argued that the learned trial judge failed to consider the importance of the pocket diary to the present set of facts which might render the entirety of PW4's evidence unworthy to be believed. However, till the end of the trial the pocket diary was never produced yet the learned trial judge failed to draw an adverse inference under section 114(g) of the Evidence Act 1950 regarding the deliberate suppression of documentary evidence, that if produced could have corroborated the version of the accused.

[61] At the same time, the DNA and fingerprint test conducted on the two (2) transparent packets inside the blue plastic bag were negative for the accused's DNA and fingerprints. Again, the learned trial judge failed to evaluate this evidence, which if taken cumulatively, corroborate the accused's version that he had nothing to do with the drug.

[62] Nevertheless, we find the evidence of the accused holding a blue plastic bag (Exhibit P2A) in his right-hand containing drug and when PW4 introduced himself as a police officer, the accused looked scared upon arrest leads to the irresistible inference that in the circumstances the accused knew about the incriminating items found

inside the plastic bag. The testimony of PW4 is indeed credible. As said, PW4 had no purpose or reason to fabricate his evidence or concoct it in an attempt to frame or trap the accused for the preferred charge against him.

[63] Having regard to the fact, we find that the subsequent behaviour or conduct the accused is closely connected and highly relevant under ss. 8 and 14 of the Evidence Act 1950.

[64] In *Parlan Dadeh v. PP* [2009] 1 CLJ 717, the Federal Court deliberating on the conduct of the accused said as follows:

*“[38] In this case the reaction of the appellant in looking stunned or shocked upon being approached by the police is clearly admissible under s. 8 since it has a direct bearing on the fact in issue as the drugs found were tucked away in the front of the jeans worn by him. The explanation for his reaction must therefore be offered by he himself as required by s. 9. The court cannot, on its own, offer an explanation for his reaction. However, in his defence the appellant did not offer any explanation at all for his reaction upon being approached by the police. It can therefore be validly used as evidence against him. The inference to be drawn from the evidence of conduct of the appellant against the background of the other evidence is that he knew what he was carrying (see *DPP v. Brooks* [1974] 2 All ER 840). It follows that the stand taken by the appellant in relation to the evidence of conduct is not sustainable. Be that as it may, the evidence of conduct in this case is not very significant in view of the manner in which the appellant carried the drugs on his person from which it can reasonably be inferred that he had knowledge of the drugs in his possession (see the cases referred to earlier, and, in particular, *Tunde Apatira & Ors v. PP* [2001] 1 CLJ 381 and *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337).”*

[65] In the case of *Aedy Osman v. PP* [2011] 1 CLJ 273, the Federal Court speaking through James Foong FCJ (as then was) held as follows:

*“On the evidence as presented at the stage of the prosecution case, we find no error committed by the trial judge in coming to such a decision. Regarding intention derived from the struggle between the appellant and the police officers who apprehended him, this relates to the appellant’s conduct which is admissible under s. 8 of the Evidence Act 1950. This element of conduct has been discussed by this court in detail in *Parlan Dadeh v. PP* (supra). It is not necessary for us to repeat except to say that the trial judge has correctly exercised his discretion in coming to a conclusion that in the circumstances of this case, the struggle between the appellant and the police officers, though in plain clothes, is a factor, amongst others, to imply that the appellant has knowledge of what was inside the bag. We agree that there may be another inference to this: such as the appellant being scared when pounced upon by certain men unknown to him but then, as the trial judge has said, other factors like the appellant walking in a suspicious manner and carrying a bag over his shoulder which contained the incriminating drugs considered as a whole implies that the appellant has knowledge of what was inside the bag.”*

[66] Next, the failure of the prosecution to produce or tender PW4 pocket diary was not fatal especially when all contemporaneous documentary evidence namely exhibits P10 (search list), exhibit 11 and P12 (police reports), clearly indicate that the accused was in possession of a blue plastic bag at 12.30 am on 7 September 2022. Neither would it attract the adverse inference principle under section 114 (g) of the Evidence Act 1950 against the prosecution. In such circumstances, we find that the learned trial judge was correct in declining to invoke the adverse inference against the prosecution.

[67] The scope of s. 114(g) has been explained by the Supreme Court in *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 at p. 223; [1987] 1 MLJ 492 at p.494:

“... It is essential to appreciate the scope of section 114(g) lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for nonproduction of not just any witness but an important and material witness to the case.”

[68] From the evidence which we have endeavoured, we find that the absence of such evidence before the court was only a minor issue. We find no necessity for us to deliberate at length on this issue raised, safe to say that the non-production of his pocket diary did not in any way diminish the weight and credibility of the of PW4’s testimony or render the entirety of PW4’s evidence unworthy of belief. Testimonies of the prosecution material witnesses clearly shows beyond doubt that the accused had possession and knowledge of the impugned drugs. (see *Leow Nghee Lim v. Reg* [1956] 1 MLJ 28, *Siew Yoke Keong v PP* [2013] 3 MLJ 630 and *Chan Pean Leon v. PP* [1956] 22 MLJ 237.

[69] On the issue that the two (2) transparent packets inside the blue plastic bag were negative for the accused’s DNA and fingerprint lifting linking the accused to the drug, given the fact that the prosecution had clearly established that the accused was caught red-handed with the dangerous drugs in his possession, hence, what else could the accused do apart from saying that he had no nothing to do with the drug. From the totality of the evidence, there is ample evidence established by the prosecution that the accused had the necessary knowledge of the dangerous drugs in question found on his very person. Thus, fingerprint lifting and DNA would therefore

assumed little value of significance unless of course the testimony of PW4 is wholly discredited (see *Yeo Kwee Huat v. Public Prosecutor* [2011] 5 CLJ 630). The evidential status of such evidence is merely of corroborative value. Fingerprints and DNA evidence is relevant and of great significance when identity is in doubt which is not the case here.

[70] In *PP v. Mansor Md Rashid & Anor* [1997] 1 CLJ 233, Chong Siew Fai CJSS (as he then was) in delivering the judgment of the Federal Court held:

“We also find ourselves in agreement with the learned Deputy Public Prosecutor that the learned trial Judge had erred in law when he faulted PW13 the investigating officer for not lifting the finger prints off the wrappings of the cannabis and for not taking photographs of the street light in front of the house No. 129. Where the identity of a culprit is in question or required to be proved, fingerprint evidence would be of great significance and immense value. In the present case under appeal, however, the charge alleged trafficking in the form of sale and there is evidence indicating the identities of the alleged offenders and the sale transaction. Fingerprint evidence on the newspaper wrapping, white plastic and the loytape, therefore, assumes little value or significance.”

[71] In *Mohamad Shahrudin Md Isa v. PP & Another Appeal* [2015] 8 CLJ 839, Abang Iskandar JCA (now PCA) speaking on behalf of the panel held as follows:

“[32] With regard to the absence of fingerprint of first accused on the plastic wrapping that contained the drugs, it had been explained by the Investigating officer. It was in evidence that the said exhibit had been handled by the searching officers without using gloves. As such, a fingerprint lifting exercise by

the investigating agency would only prove futile. We found that reason as being acceptable.

[33] *Be that as it may, the high authority in the decision of the apex court in case of **PP v. Mansor Bin Md Rashid**, had clearly stated that where the identity of the person from whom the drugs were recovered was not in issue, the need for fingerprint evidence must assume little significance under the circumstances.”*

[72] The Court of Appeal in *PP v. Ebrahim Mirzaie Hj Ebrahim Deh Mokhtar* [2017] 1 CLJ 575 through the judgment delivered by Ahmadi Asnawi JCA (as he then was) held:

“[38] *The evidential value of CCTV evidence. DNA profiles and fingerprint impressions as decided by high authority is only corroborative. The learned trial judge correctly appreciated the position. In **PP v Mansor Md Rashid & Anor** [1997] 1 CLJ 233, the Federal Court stated that:*

Where the identity of a culprit is in question or required to be proved, fingerprint evidence would be of great significance and immense value. In the present case under appeal, however, the charge alleged trafficking in the form of sale and there is evidence indicating the identities of the alleged offenders and the sale transaction. Fingerprint evidence on the newspaper wrapping, white plastic and the loytape, therefore, assumes little value or significance.

[39] *Now, having scrutinised the evidence, we were with the learned DPP that even without the CCTV evidence, DNA profiles and fingerprint impressions, there are sufficient evidence to prove the prosecution’s case.”*

[40] The evidence of both PW2 and PW3 (DSM Hairudin bin Abdullah) were uncontroverted that they saw the respondent pulling the bag, exh. P10, before and at the time they approached the respondent. The bag they saw and seized was a brown coloured bag carrying the “Sphere” brand name, exh. P10. It was the respondent himself who had put the said bag in the scanning machine and it was equally the respondent himself who had carried the said bag to the narcotics office. Both testified that the examination of the said bag was done in the presence of the respondent. These are uncontroverted direct evidence which needs no further support for its sustenance.”

[73] In any event, fingerprint dusting was in fact conducted by PW5 on the two plastic packets containing the impugned drugs. PW5 also provided an explanation for not conducting fingerprint dusting on the blue plastic bag itself, namely that his focus was on the two plastic packets which contained the drugs found in the blue plastic bag.

[74] As said earlier, the evidence against the accused was overwhelming and the accused identity was never in doubt. Therefore, the absence of fingerprint evidence did not in any way affect the learned trial judge’s finding of possession. In *Nasir Ibrahim v. PP* [2012] CLJU 1432; [2012] 1 LNS 1432, the Court of Appeal speaking through Hasan Lah JCA (as he then was) held as follows:

*“[25] In our view the absence of the appellant’s fingerprints on the exhibits was not fatal to the prosecution’s case as the evidence against the appellant was overwhelming. The appellant’s identity was not in doubt. As such the inability to lift fingerprint impressions on the exhibits did not in any way affect that finding of possession by the learned trial judge (see *Gunalan Ramachandran & Ors v. PP* [2004] 4 CLJ 551; [2004] 4 MLJ 489).”*

[75] We have considered the view of the learned trial judge and the argument of the learned counsel for the accused on the issues pertaining to the fingerprint and DNA profile. We find no reason to interfere with the conclusion of the court below.

Ground 4: Failure to Appreciate the Defence

[76] It is not necessary for us to repeat except to say that a scrutiny of her overall judgment revealed that the learned trial judge had judicially addressed her judicial mind to the accused defence placed significance emphasis to it, considered the accused versions and she chose to disbelieve the evidence of the defence. It is implied from the finding.

[77] Hence, to allege that the learned trial judge has not considered the defence adequately is certainly without merit. In concluding her judgment, the learned trial judge at the end of trial only had this to say:

“Upon maximum evaluation and careful assessment of the entirety of evidence by both prosecution and defence, this Court finds:

- (i) prosecution has successfully proven its case against the OKT beyond reasonable doubt as there was credible evidence to prove each and every ingredient of the offence as required under the law;*
- (ii) the OKT has failed to raise a reasonable doubt in the prosecution’s case; and*
- (iii) the OKT had failed to rebut the statutory presumption of trafficking on a balance of probabilities.”*

[78] We find no reasons to disturb the findings of the learned trial judge. She had not misdirected herself in law and in fact. The findings were

premised on the credibility of witnesses which is within the domain of the trial judge.

Ground 5 Improper Use of Presumption

- [79] We will now deal with the defence contention that the learned trial judge erred in invoking the presumption of trafficking under section 37(da) against the accused. The defence argued that where there is direct evidence of possession or of trafficking, the court shall not invoke the presumption under section 37(d) of the Dangerous Drugs Act 1952 or section 37(da) of the said Act as the case may be.
- [80] In spite of this, the learned trial judge still proceeded to invoke the presumption of trafficking under section 37(da) of the Act which is not intended to operate in parallel with the prosecution case alleging direct evidence of trafficking. The learned counsel submitted that this approach is legally flawed. Once the prosecution claims that PW4 personally witnessed the act of trafficking (i.e. carrying the drugs), it must succeed or fail on that evidence alone.
- [81] It was further argued by the defence that the application of the presumption in this case unfairly places a burden on the accused, requiring him to rebut a presumption on a balance of probabilities, which is a higher burden than his evidential burden to merely raise a reasonable doubt, that ought never to have been triggered in the first place. This is especially serious in the context of a capital offence where the standard of proof must be strictly observed.
- [82] The learned counsel concluded that the incorrect use of the presumption of trafficking which then placed an unfair burden on the accused constitutes a serious misdirection warranting appellate intervention.
- [83] In response, the learned deputy public prosecutor submitted that such contention is untenable in law.

[84] Now, the pertinent question to be considered by us was whether the learned trial judge erred in invoking the presumption under section 37(da) in respect of the charge against the accused.

[85] In our considered view, we do not think that the approach taken by the learned trial judge in invoking the said presumption was wrong. In this regard, perhaps we should remind ourselves the case of *Jazlie Jaafar v. PP* [2020] 2 CLJ 28, where the Federal Court through the judgment delivered by Ahmad Maarop PCA (as he then was) had this to say:

“[31] In the context of the offence of trafficking, s. 37(da) cannot exist on its own. It must be read with s. 39B of the DDA which provides the provision for the creation and punishment of the offence of trafficking in dangerous drugs. In this regard, in PP v. Abdul Rahim Kalandari Mustan [2008] 5 CLJ 108, this court held:

... that for the offence of trafficking to be punishable as provided the Act prescribes certain prerequisites, namely:

- (i) that an accused has to be found in possession which include knowing the nature of the thing possessed, a vital element for the ingredient of possession;*
- (ii) that the quantity of drug found in possession must at least meet the statutory minimum amount specified depending on the nature of the drug found in possession; and*
- (iii) that the possession is otherwise than in accordance with the authority of the Act or any other written law. Obviously, the aforesaid prerequisites must be with regard to the provision under s. 37(da). As for prerequisites (i) and (ii), there must be an express*

finding of possession as understood in criminal law based on evidence. The burden is on the prosecution to adduce sufficient evidence to establish the two prerequisites to trigger the presumption under s. 37(da). As for prerequisite (iii), as in the case of s. 2 of the DDA which we have dealt with, this is where the statutory exception under s. 36 of the DDA is applicable. We have also held that prosecution for an offence of trafficking under s. 39B(1)(a) of the DDA is within the ambit of the phrase “any proceedings against any person for an offence against this Act (ie, the DDA).” Thus, pursuant to s. 36 of the DDA, it shall not be necessary for the prosecution to negative by evidence the absence of authority of the DDA or any other written law, and the burden of proving “in accordance with the authority of this Act or any other written law” is on the accused (ie, Jazlie in the present case).

[32] *Hence, in Muhammed Hassan v. PP [1998] 2 CLJ 170; [1998] 2 MLJ 273, the leading case on the use of the presumption under s. 37(da), Chong Siew Fai CJ (Sabah & Sarawak) delivering the judgment of this court held at pp. 190-191 (CLJ); p. 289 (MLJ) that:*

... to arrive at the presumption of ‘trafficking’ under s. 37(da), a finding of being ‘in possession’ of the drug is necessary (in addition, of course, proof of the relevant minimum quantity specified).

...

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. [33] Further at p. 195 (CLJ); p. 292 (MLJ), His Lordship said:

We would further add that in so construing as we do, we see no injustice to the prosecution. In a proper case where the evidence so warrants and the amount of the dangerous drug reaches or exceeds the quantity specified in s 37(da), there is nothing to prevent a trial court from coming to a factual finding of possession as understood in criminal law, thereby attracting the presumption of trafficking under the said s. 37(da) which, of course, is rebuttable.

[34] The aforesaid statements were referred to and held to be correct by Abdul Malek Ahmad PCA in his judgment in PP v. Tan Tatt Eek & Other Appeals [2005] 1 CLJ 713 at p. 744:

As for s. 37(da) of the Act, it does not start with “any person who is deemed in possession” shall be presumed to be trafficking, in which case it will be considered a consequence of s. 37(d) of the Act. Instead, the word “found” is inserted and so there must be a finding of possession first before the presumption of trafficking comes about. It is, therefore, my considered opinion that the decision in Muhammed bin Hassan is correct.

[35] The aforesaid statements at p. 119 (CLJ); p. 292 (MLJ) were referred to by this court in PP v. Abdul Rahim Kalandari

Mustan (supra), where Richard Malanjum CJ (Sabah and Sarawak) as he then was said:

Indeed, on closer reading of what was stated by this court in Muhammed bin Hassan (supra) it is clear that if the presumption of trafficking is to be invoked there must first be a factual finding of possession. The following statement supports this conclusion: ‘where the evidence so warrants and the amount of the dangerous drug reaches or exceeds the quantity specified in s. 37(da), there is nothing to prevent a trial court from coming to a factual finding of possession as understood in criminal law, thereby attracting the presumption of trafficking under the said s. 37(da) which, of course, is rebuttable.

[36] *Thus, it is clear that what is necessary to arrive at the presumption of “trafficking” under s. 37(da) in addition to proof of the relevant minimum weight of the dangerous drugs specified, is a finding of being “in possession” of the dangerous drugs (and we must add, not a finding of being “in possession otherwise than in accordance with the authority of the DDA or any other written law “. The reason is obvious. By virtue of s. 36 of the DDA, it is not necessary for the prosecution to prove the element stated in the phrase in the italics.*

[37] *For reasons we have given, we hold that the learned judge of the High Court did not err in invoking the presumption under s. 37(da) of the DDA in respect of both the charges. We find no misdirection or appealable error on the part of the learned judge of the High Court.”*

[86] In *Muhammed Hassan v. PP* (supra) the Federal Court further held as follows:

“We would further add that in so construing as we do, we see no injustice to the prosecution. In a proper case where the evidence so warrants and the amount of the dangerous drug reaches or exceeds the quantity specified in s. 37(da); there is nothing to prevent a trial court from coming to a factual finding of possession as understood in criminal law thereby attracting the presumption of trafficking under the said s. 37(da) which, of course, is rebuttable...”

[87] In *PP v. Lim Hock Boon* [2009] 3 CLJ 430, the Federal Court through the judgment delivered by Nik Hashim FCJ (as he then was) said as follows:

*“... [34] It is worthy of note that there is only one offence of trafficking under the Act. However, there are several acts that may constitute the offence. If the prosecution is not able to bring its case within one of the acts (see *Ong Ah Chuan v. Public Prosecutor* [1980] CLJU 181; [1980] 1 LNS 181) under s. 2 of the Act, but is nevertheless able to establish the existence of primary facts that draw the presumptions under the Act, then the court is enjoined to draw those presumptions, subject of course to the bar as set out by Muhammed Hassan, supra ...*

*[69] The judgment in *Chia Leong Foo* does not state whether the prosecution proceeded on the basis of actual trafficking only or on the basis of trafficking by presumption only, but apparently it was a case in which the prosecution sought to rely on whichever means that was available to prove trafficking, because at p. 727 C-D the learned judge found that, on the evidence, the prosecution had made out a prima facie case of trafficking by transporting the 218.79 grams of heroin in the charge, and added, “I did not consider it appropriate to rely on the charge, and added, the relevant presumptions provided by the Act in view of the evidence available to make out the*

charge against the accused”. This means that had it been considered appropriate, the learned judge would have applied the presumptions. This further means that the learned judge recognized that the prosecution was conducted on the basis that trafficking was to be proved either as an actual act of trafficking or by the presumption in s. 37(da) and that it was quite in order for the prosecution to have been so conducted.

[70] *The passage from Chia Leong Foo that the Court of Appeal relied on was the end part of a lengthy discussion of the applicability of the presumptions in the Act and the part in which the learned judge concluded, at p. 725 E-G, as follows:*

... I am therefore of the view that the presumption provisions become inapplicable when there is evidence of the very fact to be presumed. They must be invoked when there is no such evidence or when the available evidence is not safe or satisfactory to be relied upon. The mandatory nature of the presumption provisions must therefore be read in that light to mean that where there is evidence only of the basic facts the presumed facts must be deemed to exist unless the contrary is proved

...

[71] *As I construe the judgment, the only purpose of the discussion and that conclusion was to pave the way for, and to justify, the basis of the learned judge’s finding at p. 727 C-D, that I have set out, that the prosecution had made out a prima facie case of trafficking. I do not construe that conclusion as directed to the basis on which a prosecution is conducted and as saying that the prosecution ought not to proceed on a presumption if there exists evidence of the fact to be presumed. That would be an impracticable direction that would place the*

prosecution in a very difficult and awkward position. As I said, the learned judge recognized that the open basis on which the prosecution proceeded in that case was in order. Judging from his finding at p. 727 C-D, it seems to me that the conclusion that I have quoted was one intended for a judge to consider in making his finding at the close of the case for the prosecution. The passage from Chia Leong Foo that the Court of Appeal relied on in the present case does not, to my understanding, lay down the principle, to quote the Court of Appeal again, “that once the prosecution elects to rely on one of the statutory presumptions in s. 37 of the Act, it cannot at a later stage of the trial seek to rely on the very general definition of s. 2 of the Act...”

(Emphasis added)

- [88] In the present appeal, the heroin and monacetylmorphine found in the possession of the accused weighed a total of 43.2grammes, which exceeds the statutory threshold of 15grammes. The learned trial judge also made a positive finding that the accused was found in possession of, and had knowledge of the impugned drugs.
- [89] Thus, we find no appealable errors on the part of the trial judge that warrants appellate intervention when she invoked the presumption of trafficking under section 37(da) and called upon the accused to enter his defence on a finding of a *prima facie* case even when there is direct evidence of the act of ‘carrying’ which was clearly defined as trafficking under section 2 of the Dangerous Drugs Act 1952.
- [90] Accordingly we find no material substance in the complaint on this issue.

Conclusion

[91] For all the reasons stated above, we unanimously find that the conviction of the accused safe. The appeal against conviction is dismissed and the sentence meted out by the learned trial judge is affirmed.

Dated: 24 JUNE 2025

(Azmi Ariffin)

Judge

Court of Appeal Malaysia

Counsel:

For the appellant - Grace Subathirai Nathan & Sivananthan Nithyanantham; Ms Grace S Nathan

For the respondents - Zander Lim Wai Keong; Deputy Public Prosecutor