

**IN THE COURT OF APPEAL OF MALAYSIA
(APPELLATE JURISDICTION)
CRIMINAL APPEAL NO.: 05(SH)-160-04/2023**

BETWEEN

AW FATT SIN ... APPELLANT

AND

PUBLIC PROSECUTOR ... RESPONDENT

**[IN THE MATTER OF HIGH COURT IN SABAH AND SARAWAK
AT TAWAU CRIMINAL CASE NO. TWU-45A-8/6-2021**

BETWEEN

PUBLIC PROSECUTOR ... APPELLANT

AND

**1. AW FATT SIN
2. KAM LI LEE ... RESPONDENTS]**

CORAM:

**AZMAN BIN ABDULLAH
AZHAHARI KAMAL BIN RAMLI
NOORIN BINTI BADARUDDIN**

FOUNDATIONS OF JUDGMENT



INTRODUCTION

1. The appellant was initially charged with the second accused (Kam Li Kee) for drug trafficking under section 39B (1)(a) of the Dangerous Drugs Act 1952 (DDA) for trafficking in 2, 774.3 grams of methamphetamine and the charge reads as follows:

Bahawa kamu bersama-sama pada 1 Julai 2020, jam lebih kurang 11.45 pagi bertempat di kaunter pemeriksaan mesin pengimbas di Balai Ketibaan Lapangan Terbang Tawau, di daerah Tawau, dalam negeri Sabah telah didapati mengedar dadah berbahaya iaitu Methamphetamine seberat 2, 774.3 gram dan dengan itu kamu telah melakukan kesalahan di bawah perenggan 39B (1) (a) Akta Dadah Berbahaya [Akta 234] yang boleh dihukum di bawah subseksyen 39B(2) Akta yang sama dan dibaca bersama seksyen 34 Kanun Keseksaan.

2. After a full trial, the learned High Court Judge (HCJ) convicted the appellant and sentenced him to 30 years imprisonment. However, the learned HCJ found no prima facie case against the second accused and ordered that she be acquitted and discharged without calling for her defence.
3. Dissatisfied with the decision, the appellant appealed against the whole decision of the learned HCJ.



The Prosecution's case.

4. On 1.7.2020, the appellant and the second accused landed at Tawau Airport on an Air Asia flight AK5724. They landed at the airport at 11.25 am. At about 11.45 am, the appellant was seen carrying a deep-blue coloured baggage (P10) and put it through the scanning machine managed by the Jabatan Kastam Diraja Malaysia. The appellant also had with him an Adidas bag with clothes on it (P11) and a Tuscano backpack (P12).
5. During the scanning process of P10, Custom Officers Norasmah binti Gani (PW5) noticed suspicious images inside P10. She informed Custom Officer Bakri bin Abdul Rashid (PW4) about it.
6. PW4 then instructed the appellant to take P10 to a counter for inspection. At the counter, PW4 instructed the appellant to open P10.
7. The appellant complied with the instruction; he took out a key from the bag he had on his person and opened the baggage (P10). When P10 had been opened, five (5) packages covered with gift wrapping paper (P10 (F1) -(F5) were seen.
8. The appellant was then asked by PW5 to open one of the gift-wrapped packages. When the gift wrapping was opened, PW5 saw an aluminium package which, when unwrapped, revealed a blue carbon paper package and that in turn covered a green-yellow plastic package with the brand name "Guanyinwang". Inside the green-yellow plastic package was a transparent plastic package



with a writing "AAA" containing crystalline substance suspected to be drugs.

9. PW4 then informed Customs Officer Juhari bin Jabbar (PW9) about the discovery. PW9 then proceeded to Tawau Airport together with 3 other Custom officers. PW9 met the appellant and instructed him to open his baggage (P10). Inside the baggage, PW9 saw 5 packages wrapped with gift wrapping paper. He took a transparent plastic package with the writing "AAA" containing crystalline substance from the package that had been opened when it was discovered, suspected to be drug. He then administered the caution under section 37D of the Dangerous Drugs Act 1952 (the DDA) to the appellant.
10. At about 2.05 pm, the appellant was taken from the airport to together with the baggage (P10) and its content, his bag of clothing and his backpack to the Custom Department's Enforcement branch in Tawau. At about 2.05 pm, PW9 started the seizure and marking of exhibit process in the appellant presence. At this juncture, the Investigating Officer (IO) of the case, Ali Hasan bin Buglayan (PW10), was present to sign the exhibits which PW9 had marked. At about 9.00 pm, PW9 lodged a police report (P39) on the arrest of the appellant with the crystalline substance suspected to be methamphetamine.
11. Thereafter, PW9 returned to the Custom's enforcement branch in Tawau. At about 11.30 pm, he handed over to PW10 the appellant and all the seized items along with the sketch plan (P28), the seizure list (P40 (1-5) signed by the appellant and PW9, and the



handing over list (P41 (1-3) signed by PW9 and PW10. At 11.45 pm, PW10 handed over all these exhibits to the Store Officer Abdullah Abdul Salam (PW2).

12. The second accused was not apprehended together with the appellant. She had left Tawau on 2.7.2020. The appellant and her were scheduled to fly back to Kuala Lumpur. It must also be noted that the second accused had purchased the flight tickets and that the appellant and the second accused were seated next to each other on the flight. The CCTV recording at Tawau airport also showed both the accused talking to each other.
13. The arrest of the second accused was sought, she was arrested on 10.7.2020 by Muhammad Faiz Omar (PW8) in Negeri Sembilan. PW8 handed over the second accused to PW10 on the same day.
14. On 11.7.2020 PW9 handed over the second accused to PW10
15. On 13.7.2020, PW10 put the drug exhibits in a box which he marked "M" and secured with a Custom's seal. At about 11.00 pm, PW10 drove to Kota Kinabalu with the box marked "M", accompanied by one Custom officer named Ishak Suebe. On 14.7.2020 at about 8.00 am, PW10 handed over the box marked "M" (P3) to PW1 together with a request for analysis (P4). He was issued a receipt by PW1 which bears the unique serial number 20-FR-S-02480 (P5).



16. The analysis found that the crystalline substance to contain 2,774.3 gram of methamphetamine. The accused were then charged at the High Court at Tawau.

Finding of the learned HCJ at the end of the Prosecution's case.

17. The learned HCJ firstly identified the ingredients of the offence, namely:

(i) The identity and the weight of the drug, viz, 2,774.3 grams of methamphetamine;

(ii) The accused persons had possession of the drugs;

(iii) The accused persons were trafficking in the drugs on the date, and at the time and place as particularised in the charge; and

(iv) They did so in furtherance of common intention.

18. The learned HCJ also had reminded himself that at the close of the prosecution's case, the court's duty is to subject the evidence to maximum evaluation in order to ascertain whether there is a prima facie case against the accused persons which require them to enter their defence.

19. The learned HCJ accepted the qualification, expertise and the analysis conducted by the government chemist who had confirmed that the packages found in the baggage carried by the accused (P10) to contain 2,774.3 grams of methamphetamine. There was



also no break in the chain of evidence which would render doubtful the identity and weight of the drugs. The historical journey of the drugs was documented in the seizure list as well as the handing over list. The whereabouts of the drugs was accounted for by PW1 and PW2. The learned HCJ was satisfied that the drugs seized were the same drugs which were produced and exhibited in court.

20. With regard possession, the learned HCJ is aware that the prosecution must prove that: (i) the accused persons had knowledge of the drugs; and (ii) The accused persons had some form of custody and control of the drugs. In order to prove either of the two requirements, the prosecution may either adduce direct evidence or it may rely on the relevant presumptions under section 37 of the DDA.

21. Despite the learned counsel's contention that the drugs were hidden from plain sight, and there was an absence of fingerprints on the gift wrapping and other layers to indicate that the appellant knew of the drugs, the learned HCJ found ample evidence which, taken as a whole, showed that the appellant had custody, control as well as knowledge of the drug. In particular, the learned HCJ stated that:
 - (i) The Air Asia flight manifest for AK 5742 (P35 (1-12) and the appellant boarding pass (P12H) established that the appellant was on flight AL 5742 from Kuala Lumpur to Tawau on 1.7.2020.



- (ii) PW4 and PW5, as well as the airport CCTV recording (P29) provided evidence that the appellant carried the baggage (P10) containing drug and put it through the scanner after being asked by PW5. The appellant also unlocked the baggage (P10).
- (iii) The personal effect and clothing of the appellant were in the baggage (P10).
- (iv) The baggage tag of P10 (TWU 0807323036) bore the name of the appellant.

22. From the facts in para 21 (i) – (iv) above, the learned HCJ ruled that actual possession have been proved. The learned HCJ opined that the absence of fingerprints is immaterial as the identification and other evidence were compelling and pointed to a prima facie case against the appellant. Further, the learned HCJ also observed that the learned counsel for the appellant had conceded that her client was carrying P10 when he was stopped by PW4 and PW5. The presence of the appellant's personal effects and clothing commingled with the gift-wrapped drugs in P10 called for the appellant to enter his defence, to explain or to rebut the prosecution's evidence against him.

23. As for the appellant's contention that he had, at the investigation stage, told PW10 that a person named Teh had asked him to bring Chinese tea to Tawau for RM5, 000.00, the court is unable to draw adverse inference from the prosecution's failure to call Teh as a witness. In any case there were incomplete and insufficient



particulars of Teh provided by the appellant. PW10 testified that he was not given "*sebarang maklumat berkaitan dengan alamat, no telefon atau apa-apa berkaitan dengan Teh*" which would enable him to carry out investigations on this person who was only known by a monosyllabic name. On a related note, the learned HCJ observed that it was put to PW10 in cross-examination that the appellant had provided information of the car which he saw Teh was driving, in which the witness had testified that he could not recall such information. In this respect, the learned HCJ also noted that there was no tangible or credible evidence to indicate that such information had been provided.

24. The learned HCJ also observed that while the appellant had raised the defence of innocent carrier (from his cross-examination of PW10), ignorance or absence of knowledge of the drugs is only a defence when there is no reason for suspicion, and no right or opportunity of examination. In this case, the learned HCJ found that the defence of innocent carrier was not applicable because there was no evidence that he had made any attempt to check the gift-wrapped packages.
25. On the issue of trafficking, the learned HCJ held that as the evidence was sufficient to prove actual possession, the presumption of trafficking under section 37 (da) (xvi) is triggered. This is because, the weight of the drugs i.e. 2, 774.3 grams of methamphetamine is far higher than the statutory threshold of 50 grams.



Finding at the end of the prosecution's case.

26. Based on the evidence before him, the learned HCJ ruled that a *prima facie* case under section 39B (1) (a) had been established against the appellant and ordered that the appellant to enter his defence. However, the learned HCJ found no *prima facie* case against the second accused and ordered that the second accused to be acquitted and discharged. It must be noted that the prosecution did not appeal against the acquittal of the second accused.

The Appellant's defence.

27. The appellant in his sworn testimony told the court that he had previously carried Chinese tea for Teh to Tawau in 2019. Hence, when he was arrested, he was carrying out the same assignment for Teh. According to the appellant, two days before his flight to Tawau, he passed his personal belongings such as clothes and toiletries to Teh and Teh had told him that he will pack the baggage for him. On the day of the flight, around 6.00 am, Teh passed him the baggage (P10). The baggage was locked when Teh handed it to him and Teh gave him the key for the lock.
28. The appellant came to know Teh in July 2019 at a karaoke outlet near Seri Kembangan. The appellant had complained about his financial hardship to Teh and Teh offered him RM5, 000.00 for each delivery of Chinese tea to Tawau. The appellant did not have Teh's phone number. Teh would call him but there would be no caller's number appearing.



29. For the delivery on 1.7.2020 (the subject matter of the charged against the appellant), Teh booked a hotel for him and told him that someone would pick him up at Tawau airport. For the previous trip, someone had picked him up at the airport and then took him to the hotel where he was paid RM5,000.00 after handing over the Chinese tea to the person. The appellant said he only came to know of the drugs when the Custom officers opened the gift-wrapped packages.
30. According to the appellant, he gave all the information he knew about Teh to PW10, including the registration number of Teh's car i.e. B_V 5333, a white Toyota Vios. He said he was shown a search result on the car by a Customs officer which showed that the car owner to be Teh's wife. The appellant complained that "no further investigation was conducted to identify the existence of 'Teh' and the information of the owner of the car i.e. Teh's wife.
31. In cross-examination, the appellant said he did not know Teh's full name and despite having worked for Teh since 2019, he maintained that he did not know Teh's handphone number. However, he denied that Teh was a fictitious character. The appellant told the court that he did not tell the Customs officers that someone will pick him up at Tawau airport because he was not asked about it by the Customs officers. However, he did not have the phone number of the person who was supposed to pick him up at Tawau airport. With regards to registration number of Teh's car, the first accused testified that he can only remember two of the alphabets but he cannot remember the third alphabet.



The learned HCJ finding at the end of defence case

32. The learned HCJ acknowledged that the appellant was relying on the defence of innocent carrier and contended that the incomplete and shoddy investigations had deprived him of a fair hearing of his defence.
33. In this regard, the learned HCJ found that there was no evidential basis to suppose the existence of Teh, such as his full name, address or telephone number, which might have led the authorities to him. According to the learned HCJ it is unlikely that PW10 had conducted a successful search on Teh's car and shown the first accused the search result (that Teh's wife is the registered owner) when the appellant could not remember the missing alphabet in the car registration number.
34. In respect of the appellant's claim that PW10 had also showed him a driving licence and the identity card of Teh's wife on his handphone, the learned HCJ found such claim lacks credibility, more so when there is no related or evidence supporting such allegation. Furthermore, it was never put to PW10 in cross-examination that he had shown the appellant the image of the driving licence, hence such allegation which was raised in defence is clearly an afterthought or recent invention.
35. The learned HCJ also held that even if Teh does exist, the defence of innocent carrier does not avail the first accused. The learned HCJ found that there were reasonable grounds for



suspicion, but the first accused did not take steps to verify the contents of the baggage (P10).

Decision at the end of defence case.

36. Having considered the evidence in totality, the learned HCJ held that the prosecution had proven its case beyond reasonable doubt. The essential ingredients of the offence have been proven beyond reasonable doubt i.e. the identity and the weight of the drugs (2,774.3 grams of methamphetamine) and actual possession which triggered the statutory presumption of trafficking under section 37 (da) (xvi) of the DDA.
37. The learned HCJ further held that the appellant had failed to rebut the presumption of trafficking on the balance of probabilities or cast any reasonable doubt on the prosecution's case. The learned HCJ then proceeded to convict the appellant sentenced him to life imprisonment, that is thirty (30) years imprisonment pursuant to section 3 of the Criminal Justice Act 1953. However, since the first accused was fifty years (50) old, the learned HCJ did not impose the whipping sentence.

Analysis and our decision

38. The petition of appeal listed nine (9) grounds of appeal. However, at the outset, learned counsel for the first accused had indicated that he would only focus on the following grounds of appeal:



- (i) That the learned HCJ had incorrectly applied the presumption of trafficking; and
- (ii) The learned HCJ had wrongly inferred the issue of wrongful blindness.
- (iii) Innocent carrier and the role of "Teh".
- (iv) Lack of overt act of trafficking.

39. We will now deal with the issues in turn.

Whether the learned HCJ had incorrectly applied the presumption of trafficking

40. In ground 8 of the petition of appeal, the appellant contended that the learned HCJ had erred in law by interchangeably referring to the presumption of possession under section 37 (d) or the presumption of trafficking under section 37 (da). In this regard, learned counsel referred to the following passages in the grounds of judgment of the learned HCJ:

"65. The evidence was sufficient to prove actual possession so as to trigger the presumption of trafficking under section 37(da)(xvi) of the Dangerous Drugs Act 1952 and it was for the 1st accused to rebut the presumption of trafficking on a balance of probabilities....

.....



92. Having considered the evidence in totality as required by section 182A of the Criminal Procedure Code, the Court finds that the prosecution have proven its case against the 1st accused beyond reasonable doubt: identity and the weight of the drugs (2,774.3 grams of Methamphetamine) and actual possession which triggered the statutory presumption of trafficking under section 37 (da) (xvi) of the Dangerous Drugs Act 1952. [emphasis added]
93. The 1st appellant failed to rebut the statutory presumption of trafficking on the balance of probabilities, or to cast doubt on the prosecution's case in other material aspects.
41. It was submitted by learned counsel that relying on possession alone, without proving knowledge, renders the invocation of section 37(da) of the DDA legally flawed. While "statutory presumption" was mentioned, the learned HCJ had failed to specify what case the appellant need to meet – whether one of actual trafficking or presumed trafficking - and more importantly the learned HCJ did not explain the legal effect of the presumption or the standard of proof required from the first accused to rebut it.
42. In essence, the appellant contended that the learned HCJ erred when he invoked the presumption under section 37 (da) of the DDA based merely on the finding of possession without the finding of knowledge.
43. It is perhaps appropriate for us to remind ourselves that an appeal is, in effect, a continuation of a trial and the appellate court is duty



bound to evaluate all evidence that had been presented at the court below in order to determine whether or not the findings of the trial court are correct (see PP v Ma'arif [1969] 2 MLJ 65; [1969] CLJU 134). It is also settled law that the appellate court is not in the position to make its own finding of facts, such function is exclusively reserved by law to the trial court as it lacks the audio-visual advantage enjoyed by the trial court (see Public Prosecutor v Mohd Radzi Abu Bakar [2006] 6 MLJ 393; [2006] 1 CLJ 457; [2005] 2 MLRA 590 and Dato Seri Anwar bin Ibrahim v PP [2002] 3 MLJ 193; [2002] 3 CLJ 457; [2002] 1 MLRA 266).

44. With regard to the power of the appellate court in reversing the trial court's finding of fact, learned author Tan Kee Heng in his book **Civil and Criminal Appeal in Malaysia Forth Edition** at para [8.120] has summarised the law as follows:

It is rare that an appellate court interferes with a finding of fact by the trial court although its power to do so cannot be disputed.²⁵⁵ In a case involving purely a question of fact, the appellate court is free to determine whether or not the various findings of the trial court are correct.²⁵⁶ In this connection, it should also be observed that it is the duty of an appellate court to be a judge of facts as well of law and it would be abrogating its functions if it made a hard and fast rule never to interfere with finding of facts and felt bound to support a judgment which, on a review of all the evidence, is considered to be clearly wrong.²⁵⁷ Having given due regard to the findings of facts of the lower court, an appellate court is not precluded from looking at the matter afresh.²⁵⁸ Indeed, it is the duty of the



appellate court to review all evidence ²⁵⁹ presented before the lower court and it should go further and examine the evidence and the circumstances under which that finding is made to see whether there are substantial and compelling reasons for disagreeing with the finding.²⁶⁰

(see also the case of **Dato Seri Anwar Ibrahim v Public Prosecutor [2004] 3 MLJ 405; [2004] 3 CLJ 737; [2004] 1 MLRA 634** per Abdul Hamid Mohamad, FCJ)

45. Be that as it may, it is pertinent to observe that, notwithstanding the opinion of the appellate court that the point raised in the appeal might be decided in favour of the appellant, the Court of Appeal and the Federal Court have the power to dismiss the appeal if it considers that there is no substantial miscarriage of justice has occurred. This power is provided for under section 60 (1) (and section 90 (1) of the Court of Judicature Act 1964 with respect of the powers of the Federal Court) which provides:

60. (1) At the hearing of an appeal the Court of Appeal shall hear the appellant or his advocate, if he appears, and, if it thinks fit, the respondent or his advocate, if he appears, and may hear the appellant or his advocate in reply, and the Court of Appeal may thereupon confirm, reverse or vary the decision of the High Court, or may order a retrial or may remit the matter with the opinion of the Court of Appeal thereon to the trial court, or may make such order in the matter as to it may seem just, and may by that order exercise any power which the trial court might have exercised:



Provided that the Court of Appeal may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

46. With the above principle of law in mind, it is now incumbent upon us to evaluate the evidence that had been presented in the trial court and determine the issue raised in this appeal. It is not disputed that the presumption under section 37 of DDA is a rebuttable presumption on law.
47. In their book **Practice and Principle of Evidence Law in Malaysia**, learned authors Habibah Omar and Muzlina Mahadi aptly states the law as follows:

[13.026] Rebuttable presumptions of law denote a conclusion that must be drawn by a court on proof of the basic fact of the presumption unless and until the party disputing it disproves the conclusion. Here, if a proponent establishes this basic fact with admissible evidence or if the opponent admits the basic fact or if the court can take judicial notice of the alleged basic fact, the court must then draw the conclusion on the existence or otherwise, truthfulness or falsity of the presumed fact. Then, it is up to the party against whom that presumption is drawn to disprove that established basic fact with admissible evidence satisfactorily and to prevent the court from considering the presumed fact as established.



[13.027] Thus, the rebuttable presumption of law operates upon proof of basic fact; the opposite party can rebut the presumption by producing evidence to the contrary. When the basic fact has been found to exist, the jury (and, in the context of Malaysia, the judge) must further find the existence of the presumed fact, unless certain specified conditions are met, usually by the opponent of the presumed fact.²⁸ This type of presumption of law affects the burden of proof as the opponent of the presumed fact must introduce evidence rebutting the presumption. It shifts the evidential burden of tendering the evidence to the opposite parties (an accused, in the context of criminal law).

48. In the case of **Muhammed Hassan v Public Prosecutor [1998] 2 MLJ 273; [1998] 2 CLJ 170; [1997] 2 MLRA 311** in so far as the difference between presumption of possession and presumption of trafficking, the Federal Court, through Chong Siew Fai (CJSS) stated:

“Furthermore, the basic or primary facts needed to raise ‘deemed’ possession and ‘deemed’ knowledge under s 37 (d) of the Act and those required to raise ‘presumed...trafficking’ under s 37 (da) are different. To come to the presumption of possession and knowledge under s 37 (d), one need only to arrive at a finding of having had ‘in custody or under... control anything whatsoever containing’ the drug (as opposed to the drug itself) whereas to arrive at the presumption of ‘trafficking’ under s 37 (da), a finding of being ‘in possession’ of the drug is necessary...”



49. As we have averred to earlier in this judgment, in paragraph 8 of the petition of appeal, the appellant contended that the learned HCJ had erred by interchangeably referring to the presumption of possession under section 37 (d) or the presumption of trafficking under section 37 (da). With respect, upon closer examination of the learned HCJ's grounds of judgment, we could not find any reference to section 37 (d) of the DDA. In fact, in paragraph 65 of the grounds of judgement, the learned had explicitly referred to the presumption of trafficking under section 37 (da) (xvi) of DDA.
50. We pause here to note that by paragraph 8 of the petition of appeal (wherein it was averred that learned HCJ has interchangeably referring to the presumption of possession under section 37 (d) or the presumption of trafficking under section 37 (da)), the appellant seems to suggest that the learned HCJ was wrong in applying double presumption of possession and presumption of trafficking to the facts of the case. However, in his submission, learned counsel did not argue on this point, but on the issue of wrong application of the presumption by the learned HCJ. In taking this approach, we notice that the appellant had departed from his petition of appeal.
51. It is trite that the appellant is not permitted to go beyond the issues identified in the Memorandum of Appeal (see **Government of the State of Sabah v Syarikat Raspad [2010] 5 MLJ 717; [2010] 7 CLJ 945; [2010] 2 MLRA 230, Jaafar bin Ibrahim v Gan Kim Kin [1985] 2 MLJ 24; [1985] 1 CLJ 539 (Rep); [1984] 1 MLRA 873 and Bar Malaysia v Neasarani Singara Thevar & Anor [2015] 8 CLJ 634; [2015] 6 MLJ 348; [2016] 1 MLRA 120**); and that under



Rule 18 (2) of the Rules Court of Appeal the first accused may only raise additional ground of appeal with leave of the court (see **Ooman Chung v Director of Lands and Surveys, Sabah & Ors [2015] 10 CLJ 85; [2015] 10 MLJ 112**). However, we find that the prosecution is not prejudiced by such departure. This new issue had been sufficiently rebutted by the prosecution in the written submission. Hence, we will consider the issues raised in the appellant's written submission.

52. In this appeal, the learned HCJ had made it clear that he is invoking the presumption of trafficking under section 37 (da) (xvi). However, learned counsel submitted that the learned HCJ was wrong when relying on possession alone, without proving knowledge which renders the invocation of section 37(da) of the DDA legally flawed.
53. As stated in **Muhammed Hassan (supra)** the presumption of trafficking would first necessitate the finding of possession. It is hence incumbent that the learned HCJ to make positive finding of the ingredients of possession, namely custody, control and knowledge.
54. In this regard, the learned HCJ had made the following findings:
 - (i) It was argued by learned counsel for the 1st accused that the drugs were hidden from plain sight, and there was an absence of fingerprints on the gift wrapping and other layers to indicate that her client knew of the drugs. (paragraph 42)



- (ii) There was, however, ample evidence, which, taken as a whole, showed that the 1st accused had custody or control as well as knowledge of the drugs. (paragraph 43)
- (iii) The Air Asia flight manifest for AK 5742 – P35(1-12) – and the 1st accused's boarding pass – P12(H) – established that the 1st accused was on flight AK5742 from Kuala Lumpur to Tawau on 1 July 2020. (paragraph 44)
- (iv) PW 4 and PW5, as well as the airport CCTV recording (P29) provided evidence that the 1st accused carried P10 containing the drugs and put it through the scanner after having been asked by PW5. The 1st accused unlocked P10. (paragraph 45)
- (v) The personal effects and clothing of the 1st accused were in P10. (paragraph 46)
- (vi) The baggage tag of P10 (TWU 0807323036) bore the name of the 1st accused. From these facts, actual possession may be inferred: custody or control and knowledge. (paragraph 47)
- (vii) The absence of fingerprints is immaterial as the identification and other evidence were compelling and pointed to a prima facie case against the 1st accused. (paragraph 48)
- (viii) Learned counsel for the 1st accused in fact conceded that her client was carrying P10 when he was stopped by PW4 and PW5. See enclosure 55, paragraph 10. (paragraph 49.)



- (ix) The seizure list P40(1-5) signed by the accused and PW9, and photographs P27(1-270) taken by PW3 showed the gift-wrapped packages and the various layers of covering concealing the drugs, as well as the drugs. The presence of the 1st accused's personal effects and clothing commingled with the gift-wrapped drugs in P10 call for the 1st accused to enter his defence, to explain or rebut the prosecution's evidence against him. (paragraph 50)
- (x) As for the 1st accused's contention that he had at the investigation stage told PW10 that a person named Teh had asked him to Chinese tea to Tawau for RM5,000.00, the Court is unable to draw any adverse inferences from the prosecution's alleged failure to call Teh as a witness. (paragraph 51)
- (xi) In any case, there were incomplete and insufficient particulars of Teh Provided by 1st accused. PW10 testified that he was not given "*sebarang maklumat berkaitan dengan alamat, no. telefon atau apa-apa dengan "Teh"*", which would enable him to carry out investigations on this person who was only known by a monosyllabic name. On a related note, it was put to PW10 in cross-examination that the 1st accused had provided information of the car which he saw Teh driving (its plate registration number, colour, and model), but PW10 testified that he did not recall the provision of such information. There was no tangible or credible evidence to indicate that such information had been provided. (paragraph 53)



- (xii) While the 1st accused raised the defence on innocent carrier through the line of cross-examination primarily directed at PW10, ignorance or absence of knowledge of the drugs is only a defence when there is no reason for suspicion, and no right and opportunity of examination. (paragraph 55)
- (xiii) The accused is taken to possess the requisite knowledge if there is wilful blindness on his part, if he does not want to know. (paragraph 56)
- (xiv) The learned DPP submitted that the 1st accused was wilfully blind as he should have been suspicious when Teh asked him to carry Chinese Tea to Tawau and did not provide any information on the recipient(s). The 1st accused had the opportunity to check the gift-wrapped packages as he was able to open P10 when asked to do so, but there was no evidence he made any attempt to do so. Moreover, there is the alleged remuneration of RM5,000.00 for the delivery of those gift-wrapped packages said to contain Chinese tea which should have aroused the 1st accused's suspicion. (paragraph 57)
- (xv) There is no merit in the contention that the 1st accused co-operated with the Customs and did not try to flee or escape. It was argued that such conduct was consistent with that of an innocent carrier under **section 8** of the **Evidence Act 1950**. There were 4 Customs officers by the scanning machine and the examination spot. Any refusal to open P10 was not an option. A refusal would only have momentarily delayed the



opening of P10 by the cutting of the lock/luggage. (paragraph 58)

55. In view of paragraph 54(i) – (xv), with respect, we find the appellant's contention misconceived. From the grounds of judgment, it is obvious that the learned HCJ had made the finding that:

- (i) the appellant was flying in from Kuala Lumpur to Tawau on 1.7.2020;
- (ii) The appellant was carrying the baggage (P10) which contain the drugs;
- (iii) The baggage tag bore the name of the appellant;
- (iv) The baggage (P10) was locked and the appellant had the key to the lock and used it to open the baggage; and
- (v) The appellant's personal belongings were also found together with the packages containing drugs.

56. The above evidence, in our view, pointed to the fact that the appellant was the one who had the custody and control of the baggage (P10) prior to and upon checking in at Kuala Lumpur airport, when he collected the said baggage from the carousel and when it was checked via the scanning machine.

57. The element of knowledge, in our view, could be inferred from the fact that the appellant's personal belongings were found together



with the parcels containing drugs were found in the baggage (P10). The manner the drugs were packed (i.e. in transparent plastic packets which was put in a green-yellow plastic packet with the brand name "Guanyinwang", which was then wrapped with a blue carbon paper package, which was then wrapped using an aluminium package and finally wrapped using gift-wrapping paper) is a clear indication that the appellant intended to deceive the authorities as to the true contents of the parcel. i.e. into believing that the parcels contain gifts.

58. It is also important to note the fact that the appellant had told PW10 during the investigation that he was instructed by Teh to bring Chinese tea to Tawau for RM5,000.00 is also relevant to infer that the appellant had the knowledge of the drugs. We are of the view that it is unreasonable for the appellant to be paid RM 5,000.00 merely to deliver Chinese tea to Tawau. We take judicial notice that courier services are available to send merchandise from Kuala Lumpur to Tawau, and it would be cheaper to send the tea using courier service rather than paying the first accused RM 5,000.00. Hence, in our view, the reasonable inference than can be made is that the appellant was paid RM5,000.00 to deliver the drugs to Tawau and he knew that he was carrying the drugs in the baggage (P10).
59. Most importantly, the learned HCJ did also consider the appellant's defence of innocent carrier which was put across to the prosecution during the cross-examination of PW10. In this regard, from the evidence adduced during the prosecution's case, the learned HCJ had found that the appellant was wilfully blind because given the



suspicious circumstances of the instruction (including the high remuneration of RM 5,000.00 for the delivery of the Chinese tea), there was no evidence that he had checked the gift-wrapped packages even though he had the opportunity of checking the baggage (P10). In the circumstances, under the law, the appellant is taken to possess the requisite knowledge of the drugs.

60. In our view, the evidence as discussed in the preceding paragraphs supports the learned HCJ's finding at paragraph 43 of his grounds of judgment that there are ample evidences which, taken as a whole showed that the appellant had custody and control as well as knowledge of the drugs. That being the case, the primary facts of possession had been proven and the learned HCJ was correct in invoking the presumption of trafficking under section 37 (da) (xvi) of the DDA.

61. Be that as it may, the learned counsel for the appellant also submitted that

“...while “statutory presumption” was mentioned, the learned HCJ had failed to specify what case the first accused need to meet – whether one of actual trafficking or presumed trafficking - and more importantly the learned HCJ did not explain the legal effect of the presumption or the standard of proof required from the first accused to rebut it.”

62. We have carefully examined the grounds of judgment and could not agree with the contention of the appellant that the learned HCJ had “failed to specify what case the first accused need to meet –



whether one of actual trafficking or presumed trafficking”. To the contrary, the learned HCJ has made it clear that:

- (i) the prosecution had highlighted the weight of the drugs (2,774.3 grams) and rested on its submission that the statutory presumption of trafficking arose by reason of the appellant’s **actual possession** of the drugs which exceeded the threshold of 50 grams; and
- (ii) the evidence was sufficient to **prove actual possession so as to trigger the presumption of trafficking** under section 37 (da) (xvi) of the Dangerous Drugs Act 1952, and it was for the appellant to rebut the presumption of trafficking on a balance of probabilities. [emphasis added]

63. In this respect, we are of the opinion that the cases cited by the accused, especially **Bong Sing Seng v PP [2023] 8 CLJ 505; [2023] 6 MLJ 518; [2024] 1 MLRA 1** are distinguishable and not applicable to our present case. For example, in **Bong Sing Seng (supra)**, the trial court have failed to inform the accused at the prima facie ruling whether the defence was called on direct trafficking or presumed trafficking, whereas here, the learned HCJ had made it clear that the defence was called based on presumed trafficking.

64. We are of view that the learned HCJ has only made one finding i.e. that based on the evidence before him the presumption of trafficking has been triggered after the prosecution has proved actual possession. We fail to see how much clearer the learned



HCJ could have been on this issue. We find no appealable error on this issue.

65. Be that as it may, the appellant also argued that the learned HCJ's decision in calling him to enter on his defence is flawed because the learned HCJ did not explain the legal effect of the presumption or the standard of proof required from the appellant to rebut it.
66. By his submission, the appellant seems to suggest that, when calling the accused to enter on his defence (after the close of the prosecution's case), the trial judge is duty bound to explain to the accused of the legal effect of the presumption or the standard of proof required from the first accused to rebut it.
67. The relevant question to be asked now is; what are the duties of the trial court when calling the accused to enter on his defence, at the close of the prosecution's case?
68. The court's duty at the end of the prosecution's case is clearly provided for under the Criminal Procedure Code (the CPC). For both the Subordinate Courts and the High Court, section 173 (h) (i) and 180(3) respectively of the CPC provides:

If the Court finds that a prima facie case has been made out against the accused on the offence charged, the court shall call upon the accused to enter on his defence.

69. In the event that the court finds that a prima facie case has been made out against the accused on an offence other than the offence



charged with, section 173 (h) (ii) provides that the Court shall amend charge. Consequently, section 173 (i) requires that the amended charge shall be read to the accused and he shall again be asked whether he is guilty of the offence in the charge as amended. Naturally, this process will be undertaken by the Court. It must be noted that under section 173 (ha) when the Court calls upon the accused to enter on his defence under subparagraph (h) (i), the Court shall read and explain the three options to the accused namely whether: (i) to give sworn evidence in the witness box; (ii) to give unsworn statement from the dock; or (iii) to remain silent.

70. It must be emphasis that, in the cases where the accused is unrepresented, and he is called upon to enter on his defence, that the Court has the duty to explain the prosecution's case to the accused. In this regard, section 257 CPC reads:

257 (1) At every trial before the Court of a Magistrate and if when the Court calls upon the accused for his defence it shall, if he is not represented by an advocate, inform him of his right to give evidence on his own behalf, and if he elects to give evidence on his own behalf shall call his attention to the principal points in the evidence for the prosecution which tell against him in order that he may have an opportunity of explaining them.

(2) The failure at any trial of an accused to give evidence shall not be made the subject of adverse criticism by the prosecution.



71. In so far as the trial in the High Court is concerned, it must be noted that, section 181 (1) of the CPC allows the accused or his advocate to open his case, stating the facts or law on which he intends to rely and making such comments as he thinks necessary on the evidence for the prosecution.
72. We could not find any other provision in the CPC which imposes a duty on the trial court to explain to the accused “of the legal effect of the presumption or the standard of proof required from the first accused to rebut it”. Section 257 of the CPC expressly refers to a situation where the accused is not represented (see **Awaluddin bin Suratman & ors v Pendakwa Raya [1992] 1 MLJ 416; [1992] 1 CLJ 353; [1991] 1 MLRH 573**). The appellant here was represented throughout the trial, hence section 257 of the CPC, requiring the court to explain the prosecution’s case, is not applicable to him.
73. We find no provisions under the CPC that supports the first accused’s proposition that the court explain to the accused “the legal effect of the presumption or the standard of proof required from the appellant to rebut it.” In drug trafficking cases, the authorities cited by the appellant, merely ruled that the court has the duty, especially when invoking the presumption under section 37 of the DDA, to state clearly the reason for calling the accused to enter on their defence. The court must state whether there is evidence of direct or presumed possession; or whether there is evidence of direct or presumed trafficking. The legal effect of the presumption or the standard of proof required from the accused are basic questions of law which the advocate representing the



accused is expected to know. In this scenario, it is the responsibility of the advocate to advise the accused and to come out with the best possible strategy in defending the interest of the accused. Further, after listening to the evidence of the prosecution's witnesses, the advocate should be in the best position to launch an attack on the prosecution's case at the defence stage. In the circumstances, the court should not take the necessary burden to explain the law to the represented accused person. With respect, we find no merit on this ground of appeal.

Whether the learned HCJ had wrongly inferred the issue of wrongful blindness.

74. The appellant also contended that the learned HCJ had erred when he has misdirected himself to the issue of wilful blindness to the first accused for not suspecting or checking the contents of the gift-wrapped packages, as these gift-wrapped packages are sealed and to be delivered to Tawau on the alleged sum of RM5,000.00, which the appellant had no knowledge of drugs inside those gift-wrapped packages, though he may be in the possession of P10.

75. In the case of **PP v Herlina Purnama Sari [2017] 1 MLRA 499; [2017] 2 MLJ 553; [2017] 1 CLJ 533; [2017] 1 MLRA 499**, it was held that:

[45] Wilful blindness necessarily entails an element of deliberate action. If the person concerned has a clear reason to be suspicious that something is amiss but then embarks on



a deliberate decision not to make further enquiries in order to avoid confirming what the actual situation is, then such a decision is necessarily a deliberate one. The key threshold element in the doctrine of wilful blindness itself is that of suspicion followed by (and coupled with) a deliberate decision not to make further investigations. Whether the doctrine of wilful blindness should be applied to any particular case would be dependent on the relevant inferences to be drawn by the trial judge from all the facts and circumstances of the particular case, giving due weight, where necessary, to the credibility of the witness. (see PP v Tan Kok Ann [1995] 4 MLRA 256)

[46] The concept of 'wilful blindness' had been discussed in a number of local cases but it seems to have had its genesis in the dissenting judgment of Yong Pung How CJ (Singapore) in the case of Public Prosecutor v Hla Win [1995] 2 SLR 424. The doctrine of 'wilful blindness' can be summarised to be applicable to a situation where the circumstances are such as to raise suspicion sufficient for a reasonable person to be put on inquiry as to the legitimacy of a particular transaction. To put it another way, if the circumstances are such as to arouse suspicion, then it is incumbent on a person to make the necessary inquiries in order to satisfy himself as to the genuineness of what was informed to him. Should he fail to embark upon this course of action, then he will be guilty of 'wilful blindness'. In other words, he is then taken to know the true situation. He then cannot be said to have either rebutted the presumption of knowledge or have raised a reasonable doubt as to his knowledge of the situation.



76. Wilful blindness is obviously the state of mind of a person who is faced with circumstances that could arouse suspicion of the legality of something but decided to ignore that suspicion. It is a deliberate action of refraining from making inquiries because he did not want his suspicions to be confirmed. Since wilful blindness is the state of mind of a person, the peculiar facts and circumstances of the case must be evaluated before court can determine whether the doctrine is applicable in the case.
77. Based on the evidence, it is safe to conclude that the circumstances surrounding the first accused's journey from Kuala Lumpur to Tawau were highly suspicious.
- (i) Firstly, he was asked to deliver Chinese tea to Tawau without knowing the name of the recipient. Assuming that Teh does exist, there is no evidence to show that Teh was involve in the business of tea distribution. Hence, it is hard to believe that Teh would asked the first accused to deliver the Chinese tea to an unidentified person.
 - (ii) Secondly, the appellant accused was to be paid RM 5,000.00 for a single delivery of the Chinese tea consignment. Assuming that the gift-wrapped packages did contain Chinese tea, the appellant was paid that huge amount of remuneration for the delivery of 2,774.3 grams of Chinese tea. As we have stated earlier, we are entitled to take judicial notice that courier services are available to send goods/product from Kuala Lumpur to Tawau, and it would be cheaper to send the tea using courier service rather than paying the appellant RM



5,000.00. This high amount of remuneration for the simple delivery of Chinese tea should have alerted the first accused of the actual contents of the parcels.

(iii) Thirdly, it was the appellant's evidence that Teh was the one who had packed his personal belongings before the trip to Tawau. In his witness statement, the appellant stated that two days before his flight to Tawau, he passed his personal belongings such as clothes and toiletries to Teh as Teh had told him that he will pack the luggage for the first accused. The luggage (P10) was only passed to the first accused at 6.00 am on the day of his flight to Tawau (1.7.2020). We find it odd for Teh who was barely known by the appellant (the first accused did not know Teh's full name) would take the trouble to pack the appellant's personal belongings for that Tawau trip.

78. We are of the considered view that the evidence in paragraph 77 (i) to (iii) are sufficient to raise suspicion about the contents of the baggage. However, the first accused did not inquire from Teh about the content of the baggage (P10) but chose to ignore the red-flags and proceeded to bring it with him to Tawau. Notwithstanding the appellant's contention that he had a narrow window of three hours from the time he received the baggage (P10) and his departure time, there was no evidence that he was late to the airport justifying his excuse for not checking the contents of the baggage or making inquiries with Teh. Since the appellant had ignored the suspicious circumstances about the content of the baggage (P10) and did not make further investigation to satisfy himself of the genuineness of what was informed to him, he is wilfully blind and must be taken to



know the content of the gift-wrapped parcels, namely 2,774.3 grams of methamphetamine.

79. In the circumstances, we are of the opinion that the learned HCJ did not err on this issue.

Defence of innocent carrier and the role of “Teh”.

80. It was contended by the appellant that the learned HCJ had erred in accepting the evidence on face value and found there was no evidential basis to suppose the existence of a third party, namely “Teh” as the appellant had revealed car registration information which revealed the car belonging to Teh’s wife. It was also submitted that the baggage was passed to the appellant roughly three hours prior to his departure to Tawau at 9.25 am. This very narrow window supports the assertion that the first accused had neither time nor cause to inspect the gift-wrapped items inside the baggage.

81. In Venkatesan Chinnasami v PP [2011] LNS 1736; [2012] 6 MLJ 301; [2012] 3 CLJ 32; [2012] 5 MLRA 680 this court stated that:

“...A defence of innocent carrier refers to a state of affairs where an accused person acknowledges carrying, for example a bag or a box, as in the case before us, containing the dangerous drug but disputes having knowledge of the drugs. whether it will succeed or not would very much depend on the facts of each case.”



82. The application of the defence of innocent carrier must depend on the facts and circumstances of the case. Obviously, it would require the trial judge to evaluate the evidence and make a finding of fact of whether or not the accused is entitled to rely on it. In the process, the trial judge is entitled to assess and attach whatever weight to the evidence given in support of the said defence. Hence, in **Munuswamy Sundar Raj v. PP [2016] 1 CLJ 357; [2015] 6 MLJ 214; [2015] 6 MLRA 443**, the Federal Court held:

[10] As said above it is imperative that the success of the defence of innocent carrier depends very much on the facts of each case. Ignorance simpliciter is not sufficient to let an accused person off the hook as otherwise every other accused person will allude to that defence. It needs more than that. Without any reason for suspicion, or there is no right or opportunity of examination, ignorance may be a good defence. A hypothetical scenario could be when an accused person receives a package which contains illicit drugs from say, England when not a shred of evidence could establish him having been aware of the circumstances of the drugs being sent to him or having any nexus with him. Prior to the parcel appearing at his door step he would not have had any reason for suspicion or the opportunity to inspect the parcel bearing in mind that the package was beyond his reach until it reaches his hand. The rider is that everything depends on the facts.

83. At the risk of being repetitive, we must state that, by virtue of the fact that he held the key to the baggage lock, the appellant had the



right and opportunity to inspect the baggage (P10) when it was passed to him by Teh. We do not accept the contention that, since the baggage was passed to the appellant slightly over three hours before his departure time, did not have the opportunity to inspect the baggage. As we have stated earlier, there is no evidence that the appellant was in the rush catching his flight, hence he should have checked the baggage, given the suspicious manner in which he was asked to send the purported Chinese tea to an unidentified person in Tawau.

84. Appraising his written grounds, the learned HCJ had adequately addressed his mind to the defence of innocent carrier. This was summarised by the learned HCJ in the following manner:

83. The 1st accused had barely known Teh for a month when he agreed to deliver the first consignment to Tawau, and there is no evidence that he got to know Teh better by the time he entrusted Teh with his personal belonging in order to pack the chine tea for the fateful trip to Tawau. As submitted by the prosecution, what was the need for the 1st accused to pass his personal belonging to Teh to pack P10 when Teh could simply pass the Chinese tea to him to bring to Tawau. The prosecution, with justification, argued that it was no more than a fictitious account to show that he hid not know the contents of the gift-wrapped packages.

85. In our considered view, the appellant's wilful conduct in the light of his financial difficulties, makes his defence an afterthought leading to the learned HCJ's inference that he knew the contents of the gift-



wrapped packages in the baggage (P10). We find no appealable error committed by the learned HCJ on this issue.

86. On the purported role of Teh, it was submitted that the identity of Teh was raised at the earliest possibility and the first accused had consistently referred Teh as the individual who handed the baggage to him on the morning of the flight.
87. The role of Teh was raised by the first accused to advance his defence of innocent carrier. This is in line with the Alcontara Notice (see Alcontara Ambrose Anthony v PP [1996] 1 MLRA; [1996] 1 MLJ 209; [1996] 1 CLJ 705). Be that as it may, among others, the information given to the investigating office must be clear and specific and it must establish and not merely support the defence. Hence, in Phiri Mailesi (Zambian) v Public Prosecutor [2013] 5 MLJ 780; [2013] 4 CLJ 348; [2013] 7 MLRA 338 the Court of Appeal held that:

[6]

(e)...It is pertinent to note that the 'Alcontara Notice' must have sufficient particulars in the right perspective and not a vague notice where the prosecution will not be able to advance their investigation to rebut the defence story or version. It must also be given at the earliest opportunity at the material time of the arrest or at least upon counsel taking instruction from the accused to conduct its defence. In addition the defence's version should be put at the prosecution's stage and the story must be maintained at the defence stage. There will be duty



placed on the judge even at the prosecution's stage to positively evaluate the story of the accused relating to 'Alcontara Notice' before evaluating the prosecution's case and applying the maximum evaluation as Alcontara case places the onus on the prosecution to rebut or sufficiently explain that they have discharged that onus. In the instant case evidence will show that the defence has not given the 'Alcontara Notice' in the right perspective.

88. In this case, the learned HCJ observed that the information provided by the appellant regarding Teh as incomplete and insufficient. He admitted that he did not know Teh's full name. He did not know Teh's handphone number, alleging that whenever "Teh" called, his phone number did not appear on the handphone screen. The first accused also did not furnish Teh's address. He also could not remember Teh's car registration number; he admitted that he gave Teh's car registration number as B_V 5333 adding that he could not remember the middle alphabet.
89. Given the nature of the information given to the investigating officer (PW10), the learned HCJ could not faulted when he ruled that it was unlikely that PW10 had conducted a successful search on Teh's car and shown the appellant the search result (as alleged by the appellant that PW10 had shown the search result which recorded that the owner of the car was the appellant's wife) when the appellant could not remember a missing alphabet in the car registration number. We agree with the learned HCJ that there was no evidential basis to suppose the existence of Teh. That being the



case, the appellant's evidence on the purported role played by Teh, is at best, manufactured to suit the appellant's defence.

Lack of overt act of trafficking

90. The appellant asserted that the learned HCJ had erred in law and in fact to consider the 'overt act of trafficking' under section 2 of the DDA, hence misdirected himself on the issue to rebut the presumption of 'knowledge' to look for the same to wilful blindness. However, it was further submitted that mere possession does not automatically establish the *actus reus* of trafficking unless it is accompanied by conduct such as delivery, distribution, or offer to traffic. It was further submitted that the prosecution had failed to adduced sufficient evidence to prove the element of overt act.
91. In this respect, we can do no better than referring to the case of **PP v Herlina Purnama Sari (supra)** where the Federal Court through Md Raus Sharif PCA held that:

*[34] Based on the above, we are of the view that the trial judge as well as the Court of Appeal had wrongly applied that decision of this court in PP v Abdul Manaf Muhamad Hasan to the present case. No doubt in that case this court had stated that 'the mere act of carrying is not sufficient to constitute the offence of trafficking', but that statement must not be read in isolation. It must be read in the context of what was said by Lord Diplock in **Ong Ah Chuan v PP and Another Appeal** (supra) with regard to the interpretation of the word "trafficking"*



...

[38] *With respect, the proposition that there must be in all cases an overt act in order to constitute trafficking is misconceived. It would be contrary to the definition of trafficking as provided under s. 2 of the Act.....*

.....

[39] *We are of the view that whether or not a person is a trafficker within the definition of the Act is dependent on the facts and circumstances of a given case. In this case, it is not in dispute that when the respondent was arrested she was carrying the luggage bag which amongst other things contained the impugned drugs. The respondent was apprehended in the act of carrying from one place to another a large amount of drugs. It is in evidence that the respondent was unaccompanied by any person when she was carrying the luggage bag. The luggage bag was registered in the name of the respondent's name when she checked in at the Air Asia check-in counter. The impugned drugs were found hidden in the two boxes. We are of the view that the manner in which the impugned drugs were concealed in the luggage bag showed that the respondent knew the existence of the drugs there, and evinced the intention of and careful planning by the respondent to conceal the impugned drugs to avoid and escape detection (**PP v Abdul Rahman Akif [2007] 1 MLRA 568 and The Hock Leong v PP [2001] 1 MLRA 548**).*

92. We are of the view that the learned HCJ did not err when at paragraph 90 of the grounds of judgment His Lordship stated that "this court is also required to deal with the contention that (i) the 1st



accused had successfully rebutted the presumption of knowledge, and (ii) **there must be an overt act of trafficking**” (emphasis added). We say so because at paragraph 91 of the grounds of judgment, the learned HCJ had referred to paragraph [38] in case Herlina Purnama Sari (supra) that we have referred to in paragraph 91 of this judgment. That being the case, the learned HCJ did not insist on the evidence of an overt act, hence there is no merit on this issue.

Conclusion

93. Based on the above reasons, we are of the considered view that there are no merits in this appeal. We are satisfied that the conviction and sentence are safe. This appeal is hereby dismissed. We affirmed the decision of the learned HCJ.

Dated: 25 February 2026

-sgd-

AZHAHARI KAMAL BIN RAMLI

JUDGE

COURT OF APPEAL MALAYSIA

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