# Low Song Kim v Public Prosecutor

## [2020] MLJU 73

Malayan Law Journal Unreported

COURT OF APPEAL (PUTRAJAYA)

KAMARDIN HASHIM, RHODZARIAH BUJANG AND MOHAMAD ZABIDIN MOHD DIAH JJCA

CRIMINAL APPEAL NO P-05(M)-91-02/2018

3 January 2020

*Rosal Azimin bin Ahmad (Diar Isda Yasmin, Luqman Mazlan and Nur Syakirah Abdullah with him) (Shamsuddin & Co) for the appellant.*
*Nahra bt Dollah (Deputy Public Prosecutor) for the respondent.*

## Rhodzariah Bujang JCA:

JUDGMENT

**[1]**The appellant was charged, together with one Thai lady named Nantawan Aranratchapisan, with two offences under section 39B(1)(a) of the Dangerous Drugs Act 1952 ("DDA"), to wit, trafficking in 101.06 grams of heroin and 16.34 grams of monoacetylmorphines (first charge) and 647.19 grams of methamphetamine (second charge). The two charges reads as follows:-

*"Pertuduhan Pertama*

*Bahawa kamu bersama-sama pada 21 hb Disember 2013, jam lebih kurang 4.30 pagi, di No. 3 Tingkat Lorong Merbau 5, Taman Merbau, Bagan Ajam, Butterworth, di dalam Daerah Seberang Perai Utara, di dalam Negeri Pulau Pinang, telah memperedarkan dadah berbahaya iaitu Heroin seberat 101.06 gram and Monoacetylmorphines seberat 16.34 gram*

*(keseluruhan berat 117.4 gram) dan dengan itu kamu telah melakukan satu kesalahan di bawah* Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 *dan boleh dihukum di bawah* Seksyen 39B (2) *Akta yang sama dan dibaca bersama* seksyen 34 Kanun Keseksaan*."*

***"Pertuduhan Kedua***

*Bahawa kamu bersama-sama pada 21 hb Disember 2013, jam lebih kurang 4.30 pagi, di No. 3 Tingkat Lorong Merbau 5, Taman Merbau, Bagan Ajam, Butterworth, di dalam Daerah Seberang Perai Utara, di dalam Negeri Pulau Pinang, telah memperedarkan dadah berbahaya iaitu Methamphetamine seberat 647.19 gram* dan dengan itu *kamu telah melakukan satu kesalahan di bawah* Seksyen 39B(1)(a) Akta Dada Berbahaya 1952 *dan boleh dihukum di bawah* Seksyen 39B (2) *Akta yang sama dan dibaca bersama* seksyen 34 Kanun Keseksaan*."*

**[2]**At the close of the prosecution case, only the appellant was called to give his defence to the charge whilst the lady was discharged and acquitted. After hearing his defence, the learned Judicial Commissioner convicted the appellant of both charges and sentenced him to the mandatory death penalty under section 39B(2) of the DDA. We heard his appeal against the said convictions and sentence on 09/10/2019 and dismissed the same. Our reasons for so deciding are in this judgment. However before delving into them, we would give a brief summary of the case for both sides.

The Prosecution Case

**[3]**Based on information received, ASP Poobalan a/l Krishnasamy (PW9) led a team of police personnel to the address as stated in the charge, which is a fenced up single storey terrace house with 3 rooms. They arrived there just half an hour before the time stated in the charge and saw that the house were brightly lit whilst the gate and the sliding door to the house was not locked but the main grille was. According to PW9, after his repeated knockings on the grille, the appellant was seen coming from the first room at the right side of the house and opening the grille with a key he obtained from the same room after PW9 identified himself as a police officer. The lady was found in one of the three rooms in the house though not the same one as stated above. Nothing incriminating was found in any of the three rooms or on the appellant and the lady. The drugs as stated in the charge were actually found on a table in the sitting room and they are:

(i) 5 transparent plastic containing heroin and monoacetylmorphines in a box with the words "Classic Selection Steel AISI 304" written on it.

(ii) Methamphetamine in a biscuit tin brand ‘Danish’.

(iii) One square plastic container containing 28 plastic packets of methamphetamine;

(iv) One transparent plastic tied with rubber band containing methamphetamine.

(v) One plastic container ‘Elianware’ containing 4 transparent plastic packets of 30.76 grams of pseudoephedrine was also found on the said table.

**[4]**Besides these drugs, on the floor were found a box containing empty plastic packets, an electronic weighing scale and one weighing scale. Behind a cupboard in the sitting room were found a host of liquidefied chemicals such as sodium hydroxide, methanol and acetone, 3 electric stoves and strainers (alat penapis). From a television cabinet in the sitting room were also found the appellant’s international passport and a framed photograph of him with another man. The appellant’s DNA was also found on a razor blade which was in the house as well as on a pair of short pants in a laundry basket which was near the washing machine.

**[5]**The prosecution also produced a statement under section 112 of the Criminal Procedure Code recorded from one Ooi Choon Boay which states that the house was rented out by her to the appellant before the raid. The learned Judicial Commissioner therefore found on the evidence that the appellant not only had custody and control of the drugs but knowledge too given that they were found on the table which was laid out in the open. As for the lady, the learned Judicial Commissioner found that she was just a domestic servant in the house whose border-pass shows that she only came there to work 16 days before the raid. In respect of the element of trafficking, the learned Judicial Commissioner invoked the presumptions under section 37(da)(iiia) and section 37(da)(xvi) of the DDA, respectively for the two charges.

The Defence

**[6]**The appellant gave sworn evidence in his defence and called the lady as his witness (DW2). He said he only went to the house a few hours before the raid that is at 11.00 p.m. to accompany the lady at the request of his friend named Tan whose BMW car was parked at the car porch whilst Tan and his family went to Kuala Lumpur for 3 days. The drugs were actually not found on the table as testified by PW9 but in the third room in the house and the house was accessible to others. The lady also testified that the third room where the drugs were found were

used not just by Ooi Choon Boay who came to the house often but also by Tan, his wife and children. The learned Judicial Commissioner found the defence did not raise any reasonable doubt on the prosecution's case on the following grounds:-

(i) It is illogical for Tan to ask appellant who was just a casual friend to look after his house with the valuable drugs in the house whilst he was away as the appellant was a lorry driver with flexible working time.

(ii) Tan's particulars and background were not given to the police although the appellant alleged that the drugs belonged to him and Ooi Choon Boay.

(iii) Inconsistencies in the defence put to the prosecution witnesses and that raised in the defence on where the drugs were found, in that during the prosecution's case the defence was that the drugs were hidden in the third room whereas in the defence it was contended that the drugs and its paraphernalia were taken out of the said room.

(iv) It was never put to PW9 and the Investigating Officer, ASP Yusof Bin Zainuddin (PW13) that the key to the house was in the sitting room which the appellant said he took to open the door for the police; that he only arrived at the house a few hours before the raid at Tan's request and had informed PW13 of this as testified by the appellant in his defence. Therefore, the defence was an afterthought and the case of *Rosenizam Bin Maharam v PP* [2003] 5 MLJ 49 and *Henry Chan Kok Loon v PP* [2017] 1 LNS 1174 was cited in support of His Lordship's conclusion.

(v) It is completely illogical for Tan to leave such valuable drugs without securing them because the evidence of PW9 was that all 3 rooms were wide-opened and Tan could not have just left the drugs in the third room without locking it for according to PW9, the market value of heroin is around RM3,500 - RM4,000 per kilogram, whereas for methamphetamine it was RM90,000 - RM100,000 per kilogram.

(vi) The alleged involvement of Ooi Choon Boay with the drugs found in the house was a fabrication of the appellant as the prosecution's evidence that he rented the house to the accused was not impeached.

(vii) The defence never disputed during the prosecution case that the man in the framed photo was not the appellant and his evidence that it was not him but Tan was a mere denial and afterthought.

(viii) The appellant's DNA found on a pair of short pants (Exh. P118) in a laundry basket near the washing machine proved that the appellant was the occupant of the house and it could be inferred that he put it there to wash. His DNA found on the razor blade is also evidence of the same for it is illogical that he would use the razor blade after arriving in the house at 11.00 p.m..

(ix) As for the lady, whatever she said about what was said by PW9 and PW13 in their conversation, that has no evidential value as she admitted she could not speak and understand Bahasa Malaysia.

The Appeal

**[7]** The appellant listed 25 grounds in his petition of appeal but before us, learned counsel for the appellant condensed these grounds into 5 issues and in the order he presented them at the hearing they are:

(i) Wrong finding by the learned Judicial Commissioner that the defence was an afterthought;

(ii) Failure of the learned Judicial Commissioner to adhere to the Radhi's direction;

(iii) Failure of the learned Judicial Commissioner to undertake a maximum evaluation of the prosecution case at the end of it;

(iv) Misdirection when admitting Exh. 153 that is the section 112 statement of Ooi Choon Boay;

(v) Break in the chain of evidence in respect of the drugs seized.

We would consider the points raised below but not necessarily in the order as listed above. We begin with the issue on the break in the chain of evidence.

Break In The Chain Of Evidence

[8]Learned counsel highlighted the evidence of PW9 that when PW13 and the Sgt. Abdul Wahab Bin Hassan (PW12) came to the scene he was there and all the drugs were still on the table at the sitting room. PW9 then said that the drugs were put in a box/green bag but the photographs taken at the scene [Exh. 108(4)] did not show the existence of the said box/green bag. PW13 confirmed in evidence that no such box/green bag was handed over to him and that the photograph Exh. P108 (6) which was taken at the scene did not show the drugs exhibits as shown in the photographs marked as Exh. P36 (1 - 8) on the table. PW12 who came to the scene to take 'swab dadah' from the appellant and the lady testified that he did not see the drugs on the table. Therefore, learned counsel submitted that the said drugs were never found on the table as alleged by the prosecution or alternatively the drug exhibits have been compromised because they were moved before any labelling or marking were done and the said markings were not made in the presence of the appellant.

[9]The learned Deputy Public Prosecutor (DPP) on the other hand submitted that at the trial, the defence never challenged the markings and identification of the drug exhibits and based on the evidence of PW9 and PW13, there was no break in the chain of evidence. She however admitted in her oral submission before us that as shown in Exh. P108 (4) (at page 68 of the Appeal Record Volume 3) there was a green bag seen on the floor next to the sitting room table but it was not stated in the search list. However, that bag, submitted the learned DPP was not material evidence for the charge.

[10]With respect, we do not see any merit in this issue raised for we agree with the learned DPP that the green bag or box had nothing to do with the drugs which were on the table because as testified by PW13, for they were just receptacles used to place the drug exhibits, and to carry them after their seizures. As shown in the photographs Exh. P108 (4), (5) and (6) there were lots of other things found near and around the sitting room table and unless they were connected in one way or another with the drugs seized, it is pure common sense, not just the law, that the prosecution need not have to tender them in court. The relevancy of the evidence, in other words is the paramount consideration.

[11]As for the evidence of PW12, what is clear is he arrived at the scene at 10.30 a.m. as per his

witness statement at page 286 of the Appeal Record Volume 2B and based on the handing over note (Exh. P140 at page 112 Volume 3 of the Appeal Record) signed by Sgt. Tahir Jalaludin Bin Ngah (PW14) and PW13 the exhibits were handed over at 11.00 a.m. Obviously PW12 arrived at the tail end of the raid which started at 4.30 a.m. conducted in the house and without further elucidation from the witnesses and evidence to the contrary, it is safe to infer that by then, the police team were already winding down their operation and the drugs would not be on the table anymore. We are fortified in our view above from the evidence of PW9 who, even though he said earlier that the drugs were on the table in the sitting room, explained in his subsequent answers to questions posed to him in re-examination that when PW12 and PW13 arrived, he had put the drugs in a box beside the green bag. That evidence of his at pages 142-143 of the Appeal Record, Volume 2A is reproduced below:

*“*

| | |
|---|---|
| *TPR:* | *Kamu ditanya* |
| *Peg1:* | *Di mana keduduk barang-barang kes dadah P44, P46, P48, P60 dan P62 serta P64 berada semasa pasukan D10 membuat siasatan?* |
| *SP9:* | *Semua ada di atas meja di bahagian ruang tamu. Peg1: Dalam keadaan asal telah berubah?* |
| *SP9:* | *Berubah ke bahagian tengah ruang tamu.* |
| *Peg1:* | *Rujuk P108(4), ada atau tidak barang-barang dadah yang kamu rampas berada di atas meja seperti yang kamu katakan dalam gambar No. 4?* |
| *SP9:* | *Pada masa ini barang dadah tidak ada.* |
| *Peg1:* | *Tadi kamu kata barang-barang dadah semasa D10 sampai masih ada di tempat asal atas meja sedangkan dalam gambar ini diambil pada jam 9.45 a.m. tidak ada, mana pergi barang dadah ini?* |
| *SP9:* | *Saya telah simpan di hadapan meja, ada kotak, susun di dalam, bawah meja.* |
| *TPR:* | *Sila jelaskan sewaktu D10 sampai, barang-barang kes yang dijumpai di atas meja berada di mana?* |
| *SP9:* | *Pada masa D10 sampai di tempat kejadian, barang-barang kes iaitu dadah yang dijumpai di atas meja di ruang tamu semua telah diambil dan dimasukkan ke dalam kotak, saya letakkan di bawah tepi meja di atas lantai ruang tamu tersebut dan dalam kawalan saya. Disebabkan itu, unit D10 yang mengambil gambar ruang tamu seperti P108(4), barang kes tidak ada di atas meja iaitu pada kedudukan asal semasa menjumpainya.”* |

As for the labelling or markings of the exhibits, there is no legal requirement and we were not appraised of one that these actions be done in situ where they were found and in the presence of an accused. Thus, we did not find any merit on the issue raised above.
Exh. 153

**[12]**Section 32(1)(i) of the Evidence Act 1950 allows the tendering of statements by persons not a witness at the trial on relevant facts as evidence. The said sub-section reads:

> *'*Section 32 Evidence Act 1950*:*
>
> *Cases in which statement of relevant fact by person who is dead or* ***cannot be found****, etc., is relevant*
>
> *32.(1)* ***Statements, written or verbal, of relevant facts made by a person who is*** *dead or* ***who cannot be found****, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases:*
>
> *... ...*
>
> *(i)* ***when the statement was made in the course of, or for the purposes of, an investigation or inquiry into an offence under or by virtue of any written law****; and ..."*(emphasis added)

**[13]**This statement of Ooi Choon Boay was tendered as she had in the said statement stated that she sub-lets the house to the appellant. The learned Judicial Commissioner at paragraph 5 of his judgment mentioned the efforts made by both the PW13 who was the original Investigating Officer of the case and Insp. Anastasya Binti Abdul Ghafar (PW15) who was the substitute Investigating Officer of the case to trace her and this is reflected in pages 103-104 of Volume 2A of the Appeal Record and pages 161-163 of the same volume, respectively. The summary of the evidence is reproduced by the learned DPP in her written submission and we have taken the liberty to do the same below:

> *"SP11: Pernyataan Saksi WSP11 m/s 283-284 Jilid 2B Keterangan SP11 di m/s 103 & 104 Jilid 2A*
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> a) *26.2.2016 - Arahan diberikan kepada Kpl Abd Ghani bin Ariffin untuk menyerahkan sapina kepada penama yang beralamat di No. 18, Taman Merbau, Bagan Ajam. Sapina tidak dapat diserahkan kerana dimaklumkan oleh bapa penama bahawa penama tidak tinggal di alamat tersebut dan penama bekerja di Alor Setar dan tinggal di Kepala Batas.*

b) *22.3.2017 - Terima diari siasatan dari Kpl Marzukai bin Roni untuk menyerahkan sapina kepada penama di alamat No. 29 Bukit Pinang, 06200 Kepala Batas. Sapina tidak dapat diserahkan kerana dimaklumkan oleh seorang penghuni di rumah iaitu Chong Vee Teng tersebut bahawa beliau telah berpisah dengan penama selama empat tahun dan tidak mengetahui di mana penama berada. Penyerah sapina juga telah menghubungi penama melalui nombor telefon 016-4478824 namun gagal.*

c) *24.3.2017 - Siaran akhbar melalui Sinchew Daily (Northern Region)*

***SP15: Pernyataan Saksi WSP15 m/s 6-8 RRT Keterangan SP15 di m/s 161-163 Jilid 2A***

a) *5.10.2017 - Siaran akhbar melalui Oriental Daily*

b) *5.10.2017 - Arahan diberikan kepada D/SM Mohamad bin Haris untuk menyerahkan sapina kepada penama yang beralamat No. 209 Bukit Pinang, 6200 Kepala Batas Kedah @ No. 18 Taman Merbau, Pulau Pinang. Sapina tidak dapat diserahkan di alamat No. 209 Bukit Pinang kerana dimaklumkan oleh penghuni rumah tiada penama Ooi Choon Boay*

c) *Kemudian arahan diberikan untuk mengesan penama di No. 18 Taman Merbau dan dimaklumkan oleh bapa penama bahawa penama telah beberapa tahun tidak balik dan penama tinggal di Alor Setar, Kedah tetapi bapanya tidak mengetahui alamat dan nombor telefon penama*

d) *7.11.2017 - semakan telah dibuat dengan Jabatan Pengangkutan Jalan dan pada 10.11.2017 dimaklumkan oleh Jabatan pengangkutan Jalan bahawa tiada rekod kenderaan yang wujud atas nama penama*

e) *7.11.2017 - semakan telah dibuat dengan Jabatan Pendaftaran Negara dan pada 13.11.2017 dimaklumkan oleh Jabatan Pendaftaran Negara bahawa alamat terkini penama adalah di 209 Bukit Pinang, 06200 Kepala Batas, Kedah*

f) *7.11.2017 - semakan telah dibuat dengan Jabatan Imigresen dan pada 14.11.2017 dimaklumkan oleh Jabatan Imigresen bahawa tiada rekod terkini penama*

g) *7.11.2017 - semakan telah dibuat dengan Kumpuan Wang Simpanan Pekerja dan pada 20.11.2017 dimaklumkan oleh Kumpulan Wang Simpanan Pekerja bahawa tiada maklumat alamat terkini penama."*

**[14]**Learned counsel for the appellant has cited to us the Federal Court's decision in *Sim Tiew Bee v Public Prosecutor* [1973] 2 MLJ 200 on the interpretation of the aforesaid section 32, the relevant excerpts of which he had reproduced in his main written submission and which we would do the same below as well:-

> *"It is therefore admissible in evidence provided it is proved that the maker is dead, cannot be found, or has become incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable. (*Section 32(b) of the Evidence Act.*)*
>
> *... ... ...*

*This finding is not supported by evidence.* ***The condition precedent to the reception of the document should be independent evidence that it would involve such delay and expense as would seem unreasonable.***

*In the case of Chainchal Singh v Emperor* AIR 1946 PC 1 *at p 2 evidence given by a witness in a judicial proceeding was to be used under section 33 of the Indian Evidence Act in a subsequent judicial proceeding on the ground that the witness was incapable of giving evidence. It was held by Lord Goddard that:*

*"****Where it is desired to have recourse to this section on the ground that a witness is incapable of giving evidence that fact must be proved, and proved strictly. It is an elementary right of an accused person or a litigant in a civil suit that a witness who is to testify against him should give his evidence before the court trying the case which then has the opportunity of seeing the witness and observing his demeanour and can thus form a far better opinion as to his reliability than is possible from reading a statement or deposition. It is necessary that provision should be made for exceptional cases where it is impossible for the witness to be before the court, and it is only by a statutory provision that this can be achieved. But the court must be careful to see that the conditions on which the statute permits previous evidence given by the witness to be read are strictly proved. In a civil case a party can if he chooses waive the proof, but in a criminal case strict proof ought to be given that the witness is incapable of giving evidence".***" (emphasis added)

**[15]**Guided by this case authority we are more than satisfied that serious efforts have been made by PW13 and PW15 to trace this Ooi Choon Boay and the failure of the prosecution to release her on bond as submitted by learned counsel does not prejudice the reception of the said evidence by the learned Judicial Commissioner. Neither is the fact that two other names mentioned by Ooi Choon Boay in her statement i.e. Low Wei Chong (whom Ooi Choon Boay states stayed with her in the house) and one Kok whom she also rented the house to, both not being called by the prosecution to testify, fatal to the prosecution case because these were individuals who occupied the house before Ooi Choon Boay sub-let it to the appellant. Further, the learned Judicial Commissioner had at paragraph 37 of his judgment warned himself to only give light weight to the said evidence because Ooi Choon Boay was not cross-examined by the defence counsel but said in the same paragraph that he considered other corroborative evidence that the appellant rented the house before the raid and his arrest and this is in line with what this court had advised in *S.P Rajnath K Saudrapandian & 1 Lagi v Pendakwa Raya* [2017] 1 LNS 1223. It is a consideration of the law and application of it which in our view, His Lordship had rightly made.

Non-Consideration Of The Defence

**[16]**The remaining three issues listed by learned counsel for the appellant can be encapsulated

under this one issue as in the title above. The basic thrust of the defence is that the appellant had no possession of the drugs found in the house for he was only in the house to look after the house on behalf of Tan. Learned counsel for the appellant submitted that against the learned Judicial Commissioner's finding, that defence is not an afterthought or mere denial as stated by His Lordship and had failed in his evaluation of the defence to follow the **Radhi's** direction given by the Supreme Court in the case of the same name, that is, *Mohamad Radhi Yaakob v Public Prosecutor* [1991] 1 CLJ (Rep) 311 which reads as follows:

> *"To earn an acquittal, the Court may not be convinced of the truth of the defence story or version. Raising a reasonable doubt in the guilt of the accused will suffice. It is not, however, wrong for the Court to be convinced that the defence version is true, in which case the Court must order an acquittal. In appropriate cases it is also not wrong for the Court to conclude that the defence story is false or not convincing, but in that instance, the Court must not convict until it asks a further question that even if the Court does not accept or believe the defence explanation, does it nevertheless, raised a reasonable doubt as to his guilt? It is for this reason that in dealing with the defence story or explanation, the majority of Judges rightly prefer to adopt straight away the legally established "reasonable doubt" test, rather than to delve in the "believable and convincing" test before applying the "reasonable doubt" test."*

**[17]**When we considered learned counsel's submission on these issues and the evidence highlighted to us, it is firstly true as admitted by PW13 that the appellant had mentioned Tan's name to him during his remand but as considered by the learned Judicial Commissioner, simply giving his name, not even his full name we would add, without any other personal particulars is insufficient to negate his possession of the drugs. Equally true is the fact that there was no evidence adduced by the prosecution as to the owner of the BMW car parked at the driveway of the house but as rightly submitted by the learned DPP, the drugs were found in the house and not in the car. Contrary and with respect, to the contention of learned counsel, the learned Judicial Commissioner did evaluate the defence and had clearly stated his reasons for rejecting the same which we had summarised earlier and one of which, we again reiterate for its importance and significance - finding it illogical that Tan, and we would also agree (even if he does exist) to leave such valuable drugs lying around the house unsecured, assuming that the drugs were found in the unlocked third bedroom as alleged by the appellant. We noted the evidence of PW9 at page 92 of the Appeal Record Volume 2A that the estimated market (or street) value of the drugs seized was between RM120,000.00 to RM130,000.00, which is no mean sum. We must also say that His Lordship had rightly considered the other evidence produced by the prosecution such as the DNA of the appellant on the short pants and razor

blade, his framed photograph and what is equally damaging, his international passport in the house. For someone who was supposed to stay there for two days, the presence of these last two personal items, even if we are prepared to excuse the first two (but which we do not) have not been reasonably explained by the appellant. The existence of photographs of others, for example, as shown in Exh. P38 (6) and (7) (at Volume 3 pages 49 and 50) does not, with respect to learned counsel, proved that the appellant was not the man in the framed photograph mentioned earlier.

**[18]**With regards to learned counsel's submission that the appellant had no exclusive possession of the house and that it was accessible to others, as for example shown by the presence of the DNA of Female 1 and Female 2 and an unidentified person found on the cigarette butt, tooth brush, the same razor blade where the appellant's DNA was found and a towel all seized from the house, as testified by the Scientific Officer, Asfarina Binti Jamal Mohidean (PW8) that issue had been put to rest by the Federal Court's decision in *PP v Denish a/l Madhavan* [2009] 2 MLJ 194 which held as follows:-

> *"[16] Before proceeding to consider the reasons for the Court of Appeal's decision, we will say a few words about "exclusive" possession. It is inappropriate to speak of possession of an article in criminal law as exclusive possession. One is either in possession or not in possession, although one could be in possession jointly with another or others. To say that the prosecution of a drug case fails because there has been no proof of exclusive possession is apt to convey the wrong impression that it is only in cases where possession is entirely with one person, - that is, "exclusive" - that a conviction is possible. When the learned trial judge said "The accused sought to negative the proof of exclusive possession ...", we take it that he meant no more than that the respondent sought to show that he was not in possession of the drugs because he had no knowledge of their existence and that the drugs could have been placed in his bags by some other person or persons.*
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> *[17] The idea of exclusivity features in the meaning of "possession" in criminal law as one of the elements necessary to constitute possession. As Taylor J said in Leow Nghee Lim v. Reg.* [1956] MLJ 28*::*
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> > *... It is often said that 'possession must be exclusive'. This is ambiguous. Possession need not be exclusive to the accused. Two or more persons may be in joint possession of chattels, whether innocent or contraband. The exclusive element of possession means that the possessor or possessors have the power to exclude other persons from enjoyment of the property. Custody likewise may be sole or joint and it has the same element of excluding others. The main distinction between custody and possession is that a custodian has not the power of disposal. The statement that 'possession must be exclusive' is often due to confusion of the fact to be proved with the evidence by which it is to be proved. It is essential to keep this distinction clearly in mind, especially when applying presumptions.*

*[18] Thomson J in Chan Pean Leon v. Public Prosecutor* [1956] MLJ 237*, said that "possession" for the purpose of criminal law involves possession itself - which some authorities term "custody" or "control" - and knowledge of the nature of the thing possessed. As to possession itself he cited the following definition in Stephen's Digest (9th edn, p. 304), in which the exclusive element mentioned by Taylor J. appears: A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.*

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

**[19]**We also fully endorsed the learned Judicial Commissioner's finding that the aforesaid evidence does not impugn the prosecution's case against the appellant because it was not reasonable for any house owner to leave drugs and its paraphernalia such as weighing scales lying around in the sitting room in the open space even when he was on holiday as Tan was according to the appellant.

**[20]**The other complaint of the appellant was the alleged biasness of the learned Judicial Commissioner, that is, acquitting the lady without her defence being called and not giving the same treatment to the appellant. Again with respect, the learned Judicial Commissioner had rightly evaluated the prosecution's case against her and the evidence shows that she was only in the house for two weeks before the raid and as even admitted by the appellant, she was just a domestic servant in the house whereas the evidence against the appellant was so much stronger and these we have just considered above. In the upshot, we would say that the learned Judicial Commissioner had judicially appreciated the evidence before him and had undertaken a maximum evaluation of the same. The complaints levelled against His Lordship's judgment, in our view, were totally unjustified. We had therefore affirmed his decision on the convictions and sentence passed on the appellant.

**[21]**Before we conclude, just for the sake of completeness, though it was not a point raised before us, we would like to mention that at paragraph 70 of the Grounds of Judgment when the learned Judicial Commissioner made a finding at the close of the prosecution's case, His Lordship said this:

*"[70] Atas alasan ini adalah menjadi keputusan saya bahawa OKT mempunyai milikan dan pengetahuan (milikan fizikal) ke atas dadah tersebut tempat bergantung kepada anggapan di bawah* seksyen 37(d)*. Manakala bagi intipati pengedaran*

*dadah ke atas OKT, saya menggunakan anggapan di bawah* seksyen 37(da)(iiia) *bagi dadah Heroin dan Monoacetylmorphine seberat 117.4 gram di bawah* seksyen 39B dan seksyen 37(da)(xvi) *AB bagi pertuduhan dadah Methampethamine seberat 665.86 gram."* (emphasis added).

**[22]**It is obvious that the word underlined was a typographical mistake - it should be 'tanpa' and it is equally obvious that the appellant accepted it as such because the issue of double presumptions was not a ground of appeal before us. We have, however, decided to mention it out of an abundance of caution, just to set the record straight.

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