

A

Letitia Bosman v Public Prosecutor

B

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO
J-05-44-02 OF 2015
TENGKU MAIMUN, AHMADI ASNAWI AND KAMARDIN HASHIM
JJCA
29 MARCH 2017

C

Constitutional Law — Legislation — Constitutionality of statute — Appellant convicted with offence of trafficking in dangerous drugs and sentenced to death under s 39B(2) of the Dangerous Drugs Act 1952 — Whether mandatory death sentence provided under s 39B(2) unconstitutional

D

Criminal Procedure — Appeal — Appeal against conviction and sentence — Appellant convicted with offence of trafficking in dangerous drugs and sentenced to death — Whether learned trial judge misdirected himself in handling presumptions — Whether learned trial judge failed to appreciate defence — Dangerous Drugs Act 1952 ss 2, 37(d), (da), 39B(1)(a) & (2)

E

F

The appellant was charged with the offence of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 (‘the Act’) punishable under s 39B(2) of the same Act. The prosecution’s case was that, during an inspection by the customs officers at the Senai International Airport, the customs officers found the drugs inside a brown trolley bag (‘P13A’) bearing the appellant’s name. In defence, the appellant contended that she was looking for honeymoon destination when she travelled to New Delhi. The appellant claimed that P13A was given by one African guy named George when she was in New Delhi. The appellant then travelled from New Delhi to Johor. The appellant denied any knowledge of the drugs concealed in P13A. Her defence was one of innocent carrier. At the end of the trial, the trial judge rejected the appellant’s defence and found that the prosecution had succeeded in proving its case against the appellant beyond reasonable doubt. The appellant was thus convicted and sentenced to death. Aggrieved, the appellant filed the present appeal. The appellant submitted that: (a) there was no finding by the learned trial judge at the end of the prosecution case as to whether he had relied on the presumption of possession under s 37(d) of the Act or the presumption of trafficking under s 37(da) of the Act whereas at the end of the defence case, His Lordship failed to make a finding as to which presumption had or had not been rebutted on balance of probabilities; (b) the learned trial judge had failed to appreciate the evidence on George and despite good *Alcontara* notice being given, the prosecution failed to investigate George; and (c) the mandatory

G

H

I

death sentence for trafficking in dangerous drugs provided for by s 39B(2) of the Act was unconstitutional as it violated arts 5(1) and 8 of the Federal Constitution and it was arbitrary, disproportionate and failed to take into account the appellant's individual mitigating circumstances. In relation to this submission, the appellant relied on the Privy Council's decision in the case of *Reyes v The Queen* [2002] UKPC 11 ('*Reyes's case*').

Held, dismissing the appeal and affirming the conviction and sentence of the High Court:

- (1) The learned trial judge had not misdirected himself in handling the presumptions under the Act. At the end of the prosecution case, the learned trial judge made a finding of mens rea possession and trafficking under s 37(da) of the Act. This approach was not wrong in law. The omission of the learned trial judge to make a finding on whether or not the presumption of trafficking had been rebutted by the appellant on a balance of probabilities, in the circumstances of the case, resulted in no miscarriage of justice to the appellant and did not vitiate the conviction. A case of trafficking had been made out by the prosecution under s 2 of the Act premised on the evidence that the appellant was carrying, keeping and transporting the drugs from New Delhi to Johor (see paras 29 & 31).
- (2) It defied common sense and logic that the appellant could not remember George's name when she gave her cautioned statement barely a week after meeting him. Yet when the appellant gave her evidence more than a year later, she remembered and specifically mentioned the name of George. This was an afterthought and the character George was fictitious. In the circumstances, the failure to investigate George could not have adversely affected the prosecution case. Further, the appellant's version of the purpose of her travel was inherently improbable given the appellant made no mention in her evidence as to the places she had visited in New Delhi and identified as the honeymoon destination. The court further found that there was no error of law or fact in the learned trial judge's rejection of the defence of innocent carrier (see paras 35–37).
- (3) Firstly, on *Reyes's case*, the Constitution of Belize contained s 7 which read: 'No person shall be subjected to torture or to inhuman or degrading punishment or other treatment'. There was no similar provision in Federal Constitution. Secondly, after the amendment to the Federal Constitution, vide Act A566, which repealed the provisions concerning appeals from the Federal Court to the Privy Council with effect from 1 January 1985, any decision of the Privy Council would not be binding on the court but would only be of persuasive authority. Thirdly, for the court follow the current international trend and to hold that the mandatory death sentence was degrading and unconstitutional would result in the court departing from the decisions in *Ong Ah Chuan v Public*

- A *Prosecutor* [1981] 1 MLJ 64 and *Public Prosecutor v Lau Kee Hoo* [1983] 1 MLJ 157. Fourthly, it was trite that the function of the court was to apply the law and if at all the present law was disproportionate, cruel, inhuman, or degrading the initiative to change should come from the Legislature. Thus, the mandatory death sentence provided under s 39B(2) of the Act was not unconstitutional (see paras 41 & 44).
- B

[Bahasa Malaysia summary]

- C Perayu dituduh dengan kesalahan mengedar dadah berbahaya di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta') boleh dihukum di bawah s 39B(2) Akta yang sama. Kes pihak pendakwaan adalah bahawa, semasa pemeriksaan oleh pegawai-pegawai kastam di Lapangan Terbang Antarabangsa Senai, pegawai-pegawai kastam menjumpai dadah di dalam beg troli berwarna coklat ('P13A') mempunyai nama perayu. Dalam pembelaan, perayu berhujah
- D bahawa dia mencari destinasi untuk bulan madu semasa dia melancong ke New Delhi. Perayu mendakwa bahawa P13A diberi oleh seorang lelaki Afrika yang bernama George semasa dia di New Delhi. Perayu kemudiannya balik ke Johor daripada New Delhi. Perayu menafikan apa-apa pengetahuan mengenai dadah yang disembunyikan di dalam P13A. Pembelaannya adalah pembawa tidak bersalah. Pada akhir perbicaraan, hakim perbicaraan menolak pembelaan
- E perayu dan mendapati bahawa pihak pendakwaan telah berjaya dalam membuktikan kesnya terhadap perayu melampaui keraguan munasabah. Perayu oleh itu disabitkan dan dijatuhkan hukuman mati. Tidak berpuas hati, perayu memfailkan rayuan ini. Perayu berhujah bahawa: (a) tidak terdapat dapatan oleh hakim perbicaraan yang bijaksana di akhir kes pendakwaan terhadap sama ada beliau bergantung ke atas anggapan milikan di bawah s 37(d) Akta atau anggapan pengedaran di bawah s 37(da) Akta sementara pada akhir kes pembelaan, Yang Arif gagal untuk membuat dapatan terhadap anggapan yang telah atau tidak dipatahkan atas imbalan kebarangkalian;
- F (b) telah gagal untuk menilai keterangan atas George dan walaupun notis *Alcontara* diberikan, pihak pendakwaan gagal untuk menyiasat George; dan (c) hukuman mati mandatori untuk pengedaran dadah berbahaya diperuntukkan oleh s 39B(2) Akta adalah tidak berperlembagaan kerana ia mencabuli perkara 5(1) dan 8 Perlembagaan Persekutuan dan ia adalah sewenang-wenang, tidak seimbang dan gagal untuk mengambil kira keadaan peringanan individu perayu. Berkenaan hujahan ini, perayu bergantung ke atas keputusan Privy Council dalam kes *Reyes v The Queen* [2002] UKPC 11 ('kes *Reyes*').
- G
- H

- I **Diputuskan**, menolak rayuan dan mengesahkan sabitan dan hukuman Mahkamah Tinggi:

- (1) Hakim perbicaraan yang bijaksana tidak salah arah dirinya dalam mengendalikan anggapan di bawah Akta. Pada akhir kes pendakwaan, hakim perbicaraan yang bijaksana membuat dapatan milikan mens rea dan pengedaran dadah di bawah s 37(da) Akta. Pendekatan ini tidak

- salah di sisi undang-undang. Kegagalan hakim perbicaraan yang bijaksana untuk membuat dapatan atas sama ada atau tidak anggapan pengedaran telah dipatahkan oleh perayu atas imbalan kebarangkalian, dalam keadaan kes, mengakibatkan tiada ketidakadilan kepada perayu dan tidak merosakkan sabitan tersebut. Kes pengedaran dadah telah dibuat oleh pihak pendakwaan di bawah s 2 Akta berdasarkan atas keterangan bahawa perayu menjalankan, menyimpan dan mengangkut dadah tersebut daripada New Delhi ke Johor (lihat perenggan 29 & 31). A B
- (2) Ia menentang akal dan logik bahawa perayu tidak mengingati nama George apabila dia memberi pernyataan beramaran baru sahaja seminggu selepas berjumpa dengannya. Tetapi apabila perayu memberi keterangannya lebih setahun kemudiannya, dia teringat dan secara spesifik menyebut nama George. Ini adalah sesuatu yang difikirkan kemudian dan watak George adalah rekaan. Dalam keadaan, kegagalan untuk menyiasat George tidak dapat secara bertentangan menjejaskan kes pihak pendakwaan. Selanjutnya, versi perayu mengenai tujuan perjalanannya adalah sememangnya sukar diterima akal kerana perayu tidak menyebut di dalam keterangannya mengenai tempat-tempat yang dilawatinya di New Delhi dan mengenal pasti destinasi bulan madu. Mahkamah selanjutnya mendapati bahawa tidak terdapat kesilapan undang-undang atau fakta dalam penolakan hakim perbicaraan yang bijaksana terhadap pembelaan pembawa tidak bersalah (lihat perenggan 35–37). C D E
- (3) Pertamanya, berdasarkan kes *Reyes*, Perlembagaan Belize mengandungi s 7 yang mana dibaca: ‘No person shall be subjected to torture or to inhuman or degrading punishment or other treatment’. Tidak terdapat peruntukan yang sama di dalam Perlembagaan Persekutuan. Keduanya, selepas pindaan kepada Perlembagaan Persekutuan, melalui Akta A566, yang mana memansuhkan peruntukan-peruntukan berkenaan rayuan-rayuan daripada Mahkamah Persekutuan kepada Privy Council dengan berkuat kuasa dari 1 Januari 1985, apa-apa keputusan Privy Council tidak akan mengikat ke atas mahkamah tetapi hanya menjadi autoriti berpengaruh. Ketiganya, untuk mahkamah mengikut *trend* antarabangsa semasa dan memutuskan bahawa hukuman mati mandatori adalah menjatuhkan maruah dan tidak berperlembagaan akan mengakibatkan mahkamah menyimpang daripada keputusan dalam kes *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64 dan *Public Prosecutor v Lau Kee Hoo* [1983] 1 MLJ 157. Keempat, ia adalah nyata bahawa fungsi mahkamah adalah untuk mengguna pakai undang-undang dan jika sesungguhnya undang-undang sekarang adalah tidak seimbang, kejam, tidak berperikemanusiaan atau menjatuhkan maruah inisiatif untuk bertukar patut datang daripada Perundangan. Oleh itu, hukuman mati mandatori diperuntukkan di bawah s 39B(2) Akta adalah berperlembagaan (lihat perenggan 41 & 44).] F G H I

A Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 321–500.

For cases on constitutionality of statute, see 3(2) *Mallal's Digest* (5th Ed, 2015) paras 3007–3009.

B**Cases referred to**

Alcontara all Ambross Anthony v PP [1996] 1 MLJ 209, FC (refd)

Leow Nghee Lim v Reg [1956] 1 MLJ 28 (refd)

C *Ong Ah Chuan v PP; Koh Chai Cheng v PP* [1981] 1 MLJ 64, PC (refd)
PP v Abdul Manaf bin Muhamad Hassan [2006] 3 MLJ 193; [2006] 2 CLJ 129, FC (refd)

PP v Abdul Rahman bin Akif [2007] 5 MLJ 1; [2007] 4 CLJ 337, FC (refd)

PP v Lau Kee Hoo [1983] 1 MLJ 157; [1983] CLJ Rep 336, FC (folld)

D *Reyes v The Queen* [2002] UKPC 11, PC (refd)

Teh Hock Leong v PP [2008] MLJU 284; [2008] 4 CLJ 764, CA (refd)

Toh Ah Loh and Mak Thim v Rex [1949] MLJ 54, ACJ (refd)

Legislation referred to

E Constitution of Belize s 7

Criminal Code [BZ] ss 2, 7, 102, 102(1), (3)(b)

Dangerous Drugs Act 1952 ss 2, 37(d), (da), 39B(2), First Schedule

Federal Constitution arts 5(1), 8, 8(1), 121(1)

Internal Security Act 1960 s 57(1)

F

Appeal from: Criminal Trial No 45A-17–42/11 of 2013 (High Court, Johor Bahru)

Abdul Rashid bin Ismail (Azreen bt Ahmad Rastom) (Rashid Zulkifli) for the appellant.

G

Awang Armadajaya bin Awang Mahmud (Dhiya Syazwani Izyan bt Mohd Akhir with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

H Tengku Maimun JCA (delivering judgment of the court):

[1] The appellant was convicted and sentenced to death by the High Court at Johor Bahru on the following charge:

I Bahawa kamu pada 12 September 2013, lebih kurang jam 11.10 malam di Unit Khas Pemeriksaan Penumpang Lapangan Terbang Antarabangsa Senai, di dalam Daerah Kulaijaya, di dalam Negeri Johor Darul Takzim, telah didapati mengedar dadah berbahaya iaitu, methamphetamine seberat 1920.2g, dan dengan itu kamu telah melakukan suatu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah s 39B(2) Akta yang sama.

THE PROSECUTION CASE

A

[2] On 12 September 2013 at about 11.10pm, customs officer Mardiana bt Khairuddin ('SP5') was on duty at the Special Passenger Inspection Unit, Senai International Airport when she scanned a brown trolley bag with a brand name 'Success' ('P13A'). P13A, which had the luggage tag bearing the appellant's name, displayed suspicious images on the left and right wall. SP5 sought the assistance of another customs officer Nor Ashikin to ask the appellant to place the bag on the counter for further inspection. The bag was to be inspected by customs officer Nur Zahirah bt Mail ('SP6') who noticed that the appellant had difficulty opening it.

B

C

[3] SP6 referred the matter to her superior, Anis bin Bengan ('SP7'). SP7 tried to open the bag P13A with the combination numbers given by the appellant but he was not successful. SP7 then sought permission from the appellant to prise open the bag and using a screw driver, SP7 succeeded in opening the bag.

D

[4] SP7 felt lumps on both the left and right walls of the bag. He then asked the appellant to remove the clothes from the bag. SP7 saw the appellant sending text messages through her handphone. DNA profiling was later done on the clothes. Some of the items had the appellant's DNA on them.

E

[5] The empty bag was brought by SP7 for scanning again. The bag still showed suspicious images. SP7 then directed the appellant to the customs office where further inspection was carried out by customs officer Rejab bin Muda on the lumps felt on the walls of the bag.

F

[6] The narcotics unit of the customs department was dispatched. Khairul Anuar bin Ishak ('SP8') who led the narcotics unit inspected the bag. SP8 found two aluminium foils hidden between the walls of the bag. Upon making a small opening on the two aluminium foils, SP8 found that they contained whitish crystalline powder.

G

H

[7] The exhibits were subsequently handed over by SP8 to the investigating officer, Lim Kee Yee ('SP9') who later sent the aluminium foils to the chemist for analysis.

[8] Upon analysis, the chemist Siti Zubaidah bt Hanapi ('SP1') confirmed that the whitish crystalline powder contained in the aluminium foils was methamphetamine, a dangerous drug listed under the First Schedule to the Dangerous Drugs Act 1952 ('the Act').

I

A FINDINGS AT THE END OF THE PROSECUTION CASE

[9] At the end of the prosecution case, the learned trial judge considered whether the prosecution had proved the following ingredients:

- B** (a) that the impugned drugs were in the possession, custody and control of the appellant;
- (b) that the impugned drugs were listed as dangerous drugs within s 2 of the Act or within the First Schedule of the Act; and
- C** (c) that the appellant was trafficking in dangerous drugs.

- [10] Guided by the cases of *Toh Ah Loh and Mak Thim v Rex* [1949] MLJ 54; *Leow Nghee Lim v Reg* [1956] 1 MLJ 28 and *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337 and having considered the evidence of SP5, SP6, SP7 and SP8, the learned trial judge found that the appellant had custody and control and knowledge of the drugs in the bag, P13A. Relying on among others, *Teh Hock Leong v Public Prosecutor* [2008] MLJU 284; [2008] 4 CLJ 764 and *Public Prosecutor v Abdul Manaf bin Muhamad Hassan* [2006] 3 MLJ 193; [2006] 2 CLJ 129, His Lordship found that the appellant had mens rea possession of the drugs. As for the element of trafficking, the learned trial judge invoked s 37(da) of the Act to find that the appellant was trafficking in 1920.2g of methamphetamine.

- F** [11] Having found that the prosecution had established a prima facie case, the learned trial judge called upon the appellant to enter her defence.

THE DEFENCE

- G** [12] In her evidence given under oath, the appellant who is from South Africa stated that she travelled to Bangkok to visit her friend who had a jewellery shop. In Bangkok, the appellant stayed at a hotel. She was in Bangkok for four days.

- H** [13] From Bangkok, the appellant went to New Delhi. The appellant claimed that she was looking for honeymoon destination when she travelled to New Delhi, where she stayed for four days at the hotel she had booked. The appellant further stated that in New Delhi, as she was looking for a luggage shop, she noticed a black African guy walking towards her. He asked her where she was from, what her plans were and how long she was going to be in New Delhi.

I

[14] After being told that the appellant was looking for a luggage shop, the African guy named George told the appellant that he had an extra luggage at home and that he could give her instead of her buying a new one. A

[15] On the day before the appellant left New Delhi, George called the appellant and told her that he was on the way to meet her. George then came to the appellant's room and gave the luggage to her. The appellant transferred her clothing from her old bag to the bag given by George. After helping the appellant to discard the old bag, George left. B

[16] From New Delhi airport, the appellant took a flight to Johor where she transited at the Kuala Lumpur International Airport. When the appellant arrived at Senai International Airport, she collected her bag P13A and went through the customs check point. C

[17] The appellant denied any knowledge of the drugs concealed in the bag. Her defence was one of innocent carrier. D

FINDINGS AT THE END OF THE DEFENCE CASE

[18] The learned trial judge acknowledged that the main line of the defence was that she has no knowledge of the drugs that were found in bag P13A which was given to her by George. E

[19] His Lordship considered whether the person named George was a fictitious character. The learned trial judge observed that the appellant revealed no particulars of George. The appellant did not remember George's phone number and neither did she save his number in the 'contact'. His Lordship however found from the forensic report of the appellant's handphone ('P35A') that there were text messages sent by the appellant to one Boshoff Jaco when the appellant's bag was being searched by the customs officers. F G

[20] Having evaluated the oral evidence and the cautioned statement ('D39') which made no mention of George or Boshoff Jaco, the learned trial judge found that the defence was highly improbable and that George was a fictitious character. H

[21] His Lordship nevertheless considered the defence of innocent carrier by making reference to the line of authorities and he also considered the conduct and the reaction of the appellant upon the bag being searched. In the circumstances of the case, His Lordship rejected the defence of innocent carrier put forth by the appellant. I

[22] Having found that the appellant failed to cast any reasonable doubt on

- A the prosecution case and that the prosecution has succeeded in proving its case against the appellant beyond reasonable doubt, the appellant was convicted and sentenced to death. Aggrieved, the appellant appealed to this court.

THE APPEAL

- B [23] Learned counsel for the appellant raised the following grounds of appeal:
- C (a) that the learned trial judge misdirected himself in the handling of the presumptions under s 37(d) and (da) of the Act;
- (b) that the learned trial judge failed to appreciate the appellant's defence; and
- (c) that the mandatory death sentence provided for under s 39B(2) of the Act is unconstitutional.
- D

- E [24] On the first ground, learned counsel's complaint was that at the end of the prosecution case, there was no finding by the learned trial judge as to whether he had relied on the presumption of possession under s 37(d) or the presumption of trafficking under s 37(da) of the Act whereas at the end of the defence case, His Lordship failed to make a finding as to which presumption has or has not been rebutted on a balance of probabilities.

- F [25] As for the second ground of appeal, learned counsel submitted that the learned trial judge had failed to appreciate the evidence on George and despite a good *Alcontara* notice being given, the prosecution failed to investigate George.

- G [26] In respect of the constitutional issue, learned counsel's argument was that the mandatory death sentence for trafficking in dangerous drugs provided for by s 39B(2) of the Act is unconstitutional as it violates arts 5(1) and 8 of the Federal Constitution and it is arbitrary, disproportionate and fails to take into account the appellant's individual mitigating circumstances.

- H [27] Learned counsel went through the historical developments of the case law in relation to the mandatory death sentence and the position in several jurisdictions including India, United States, Canada and also the position taken by the Organisation of American States and the American Convention on Human Rights. A string of cases were highlighted which we find no necessity to reproduce.
- I

[28] Of significance though is learned counsel's reference to the decision of the Privy Council in *Ong Ah Chuan v Public Prosecutor*; *Koh Chai Cheng v*

Public Prosecutor [1981] 1 MLJ 64 where he submitted that the decision has since been consistently considered as obsolete and incorrectly decided. (In *Ong Ah Chuan*, the Privy Council rejected a challenge to a Singaporean statute which provided the mandatory death penalty for drug traffickers.)

OUR FINDINGS

Whether the learned trial judge misdirected himself in handling the presumptions

[29] Having perused the grounds of judgment, we find that the learned trial judge had not misdirected himself in handling the presumptions under the Act. At the end of the prosecution case, the learned trial judge made a finding of mens rea possession and trafficking under s 37(da) of the Act. This approach is not wrong in law. For ease of reference we reproduce below the finding of the learned trial judge on the element of possession (appeal record Vol 1 pp 17–19):

... the prosecution has proved that through the evidence of SP5 who was on duty at the Senai airport on the night of the incident and she scanned the trolley bag ('P13A') saw suspicious images on the left and right sides of the wall of P13A. The trolley bag P13A was placed on the counter for an inspection inside the bag to be done. ... finally P13A was prised opened by SP7 with the consent of the accused. When the said bag was prised opened, SP7 felt on the left and (right) sides of the bag were lumps and the accused was asked to remove all her clothes from inside the trolley bag ... The accused was seen ... as if she was sending out sms to someone. ...

Based on the direct evidence of SP5, SP6, SP7 and SP8 and indeed the luggage tag (P13A (59)(i) on the trolley bag (P13A) was in the name of the accused. The accused was seen pushing the trolley bag (P13A) from the luggage carousel to the Special Passenger Inspection Unit and to the scanning machine. The Court was also apprised of the fact that one of the items marked as 'B6' which was a short pant and 'G& (sic) long pant retrieved from the trolley bag (P13A) has DNA profiling which was consistent with the blood specimen marked as 'LKY3' which came from the same source ie from the accused. ... The question of whether the accused had the requisite knowledge of the drugs in the trolley bag (P13A), reference was made to the case of *Gunalan a/l Ramachandran & Ors* [2004] 4 MLJ 489 which states that 'knowledge was to be inferred from the facts and the surrounding circumstances of the case'. The prosecution evidence showed that the drugs were concealed in the aluminium foil glued to the wall of the trolley bag (P13A) and was retrieved with some difficulty. In *Teh Hock Leng v Public Prosecutor* [2008] 4 CLJ 764, the court held that the drugs were cunningly concealed may indicate the intention to avoid detection and thereby exhibit knowledge.

[30] We agree with the learned trial judge that the appellant had custody and control of the drugs. As for knowledge, it is trite that proof of knowledge has to be by way of inference from the proven circumstances. From the conduct of the

A appellant and the manner the drugs were concealed, we find that the learned trial judge had made a correct inference that the appellant knew of the drugs in the bag.

B [31] Insofar as the finding at the close of the defence case is concerned, while we accept learned counsel's submission that the learned trial judge failed to make a specific finding on whether the appellant had rebutted the presumption of trafficking under s 37(da) of the Act, we disagree with learned counsel that the conviction ought to be quashed on this ground. In our judgment, the omission of the learned trial judge to make a finding on whether or not the presumption of trafficking has been rebutted by the appellant on a balance of probabilities, in the circumstances of the case, resulted in no miscarriage of justice to the appellant and did not vitiate the conviction. On our part, we find that a case of trafficking has been made out by the prosecution under s 2 of the Act premised on the evidence that the appellant was carrying, keeping and transporting the drugs from New Delhi to Johor Bahru.

Whether the learned trial judge failed to appreciate the defence

E [32] Moving on to the complaint that the learned trial judge failed to appreciate the appellant's defence, we find that this ground is devoid of any merit. The learned trial judge addressed his mind to the aspect of the defence concerning the character George wherein His Lordship made the following observations (appeal record Vol 1 pp 29–30):

F ... no particulars of the person named George were revealed in Court ... She could not remember his hand-phone number and did not save the number in the 'contact'. ... The prosecution tendered the 'Laporan Forensik Telefon' marked as P35A which was prepared by Forensic Department of the Customs Department for purposes of ascertaining call logs, the list of phone numbers and the short messaging service ('SMS'). The Court observed that at p 8 there was the named 'Boshoff, Jaco my baby/M' where the accused must have sent the SMS to 'Boshoff Jaco' to inform him that the accused had just landed at Johor. There was an SMS sent by the accused to 'Boshoff Jaco' which was '*They are opening at customs. They unpacked my bag scanning again-Monty. Looks like they gonna cut open. Monty help. They opened my bag. Help. They open bag completely now. Talk 2 me. I dono baby. I love u remember that. MONTY!!!!*'. These smses were sent out to someone named 'Boshoff Jaco' whose identity was unknown as no particulars were given by the accused. All the above smses must have been sent after the accused landed at Senai airport and sending smses to 'Boshoff Jaco' when SP7 was trying to prise opened the trolley bag (P13A). The fact that the accused was seen sending smses to someone was confirmed by SP7.

I The cumulative reading of all the smses sent by the accused to someone named 'Boshoff Jaco' or be it 'George' gave an irresistible inference that the accused knew inside the trolley bag (P13A) were drugs and she was rather apprehensive in the manner the trolley bag was been thoroughly inspected and would lead to the discovery of the hidden drugs at the sides wall of the trolley bag.

[33] We agree with the learned trial judge that the short messages sent by the appellant to Boshoff Jaco (see appeal record Vol 5 p 444) is indicative of the fact that the appellant knew what was concealed in the bag.

A

[34] Further, in her cautioned statement, D39 recorded on 15 September 2013, the appellant stated among others that:

B

On 09/09/2013, when I was walking alone, I bumped into a Nigerian guy at a luggage bag shop in Delhi city. I look for a new luggage since my bag was broken. The Nigerian guy (I can't remember his name), ask me where I am from, what I was looking for, what was my planning after this and also my next destination. ...

C

[35] To our mind, if the character George indeed exists, it defies common sense and logic that the appellant could not remember his name when she gave her cautioned statement barely a week after meeting him. Yet when the appellant gave her evidence more than a year later ie on 10 December 2014, she remembered and specifically mentioned the name of the Nigerian guy as George. This seems to us to be an afterthought. On the totality of the evidence, we agree with the learned trial judge that the character George is fictitious. In the circumstances, the failure to investigate George could not have adversely affected the prosecution case.

D

E

[36] Contrary to the submission of learned counsel, we find that the learned trial judge has meticulously evaluated the defence. His Lordship considered the appellant's evidence that the purpose of her travel to New Delhi and Johor Bahru was to look for honeymoon destinations (see appeal record Vol 1 p 31). His Lordship concluded that the evidence was highly improbable, reason being that the appellant could have asked her friend Monty who runs a travel agent to give her the suitable honeymoon destination. This conclusion in our view is not perverse. We similarly opine that the appellant's version of the purpose of her travel was inherently improbable given that the appellant made no mention in her evidence as to the places she had visited in New Delhi and identified as the honeymoon destination.

F

G

[37] We also find no error of law or fact in the learned trial judge's rejection of the defence of innocent carrier and we agree with the following findings of His Lordship (appeal record Vol 1 pp 31–33):

H

In so far as the defence of innocent carrier is concerned, in the recent case of *Munuswamy Sundar Raj v Public Prosecutor* [2015] 6 AMR 405 the Federal Court held that the defence of innocent carrier is a valid defence and whether it will succeed or not would very much depend on the facts of each case.

I

...

... Reverting to the facts of the instant case, assuming that 'George' had given her the trolley bag in New Delhi and she had willingly taken custody and was in control of

- A the bag at the material time. She had ample opportunity to look into the trolley bag before she made or continued her journey to Johor Bahru. She chose not to do that. A person who on purpose shut her eyes to the obvious for the reason that she did not want to know would be taken to have the necessary knowledge.
- B ... It was the considered opinion of the Court that the demeanour and conduct as well as the reaction of the accused upon the trolley bag being searched by SP5, SP6, SP7 and SP8 respectively were clearly admissible under Section 8 of the Evidence Act, 1950 on the issue whether the accused having knowledge of the impugned drugs in the trolley bag (P13A) (see *Parlan Dadeh v Public Prosecutor* [2009] 1 CLJ 717).
- C THE CONSTITUTIONALITY OF THE MANDATORY DEATH SENTENCE
- D [38] One of the cases cited by learned counsel that deserves mention is *Reyes v The Queen* [2002] UKPC 11 where the Privy Council held that the imposition of a mandatory death penalty on all those convicted of murder was disproportionate, inappropriate and inhuman.
- E [39] For convenience, we reproduce below the facts of *Reyes* as appeared in the head notes. The appellant ('defendant') was convicted on two counts of murder by shooting, which by s 102(3)(b) of the Criminal Code of Belize was classified as a class A murder. Pursuant to s 102(1) which prescribed a mandatory death penalty for class A murder, he was sentenced to death on each
- F count. By the proviso to s 102(1) in the case of murder classified as B the court might, where there were special extenuating circumstances, refrain from imposing a death sentence and instead pass a sentence of life imprisonment. The defendant's appeal against conviction and sentence was dismissed by the Court of Appeal of Belize. The judicial committee of the Privy Council
- G dismissed his petition for special leave to appeal against conviction but granted leave to appeal against sentence so that he could challenge the constitutionality of the mandatory class A murder on the ground, among others, that it infringed his right not to be subjected to inhuman or degrading punishment or other treatment contrary to s 7 of the Constitution of Belize. By s 2 any law
- H inconsistent with the Constitution was void to the extent of the inconsistency.
- I [40] On the defendant's appeal against sentence to the judicial committee of the Privy Council, the appeal was allowed. The Privy Council held, among others that in requiring a mandatory sentence of death to be passed on the defendant on conviction of murder by shooting, s 102 of the Criminal Code precludes any judicial consideration of the humanity of condemning the defendant to death and subjected him to inhuman or degrading punishment or other treatment incompatible with the right afforded to him by s 7 of the Constitution.

[41] Firstly, on *Reyes*, we noted that the Constitution of Belize contains s 7 which reads: 'No person shall be subjected to torture or to inhuman or degrading punishment or other treatment'. We do not have similar provision in our Federal Constitution. Secondly, after the amendment to the Federal Constitution, *vide* Act A566, which repealed the provisions concerning appeals from the Federal Court to the Privy Council with effect from 1 January 1985, any decision of the Privy Council would not be binding on us but would only be of persuasive authority. Thirdly, to accede to the invitation of learned counsel that we follow the current international trend and hold that the mandatory death sentence is degrading and unconstitutional would result in us departing from the decisions in *Ong Ah Chuan* and *Public Prosecutor v Lau Kee Hoo* [1983] 1 MLJ 157; [1983] CLJ Rep 336. Fourthly, it is trite that the function of the court is to apply the law and if at all the present law is disproportionate, cruel, inhuman, or degrading the initiative to change should come from the Legislature.

[42] In fact, the answer to the constitutional issue mounted by learned counsel for the appellant is found in *Lau Kee Hoo* where the Federal Court had to consider whether or not the mandatory death sentence provided under s 57(1) of the Internal Security Act 1960 is ultra vires and violates arts 5(1), 8(1) and 121(1) of the Federal Constitution.

[43] In answering the question in the negative, Suffian LP said at pp 338 and 340 which we respectfully endorse:

First, we considered the argument based on art 5(1) which provides:

No person shall be deprived of his life ... save in accordance with law.

Thus it will be seen that the Constitution itself envisages the possibility of Parliament providing for the death penalty, so it is not necessarily unconstitutional. That this is so is fortified by reference to art 42 which deals with the power of the Yang Dipertuan Agong, a Ruler and Governor to grant pardons, reprieves and respites. There is a campaign inspired from some Western countries to abolish the death penalty on the ground that it is cruel, but there is no provision in our Constitution corresponding to art VIII of the American Constitution prohibiting 'cruel and unusual punishment', nor similar to the provision contained in s 2(b) of the Constitution of Trinidad and Tobago which was considered by the Privy Council in *Micheal de Freitas v Benny* [1976] AC 239. Nor does our Constitution contain any provision prohibiting 'torture or inhuman or degrading punishment' like s 60 of the Constitution of Rhodesia and Nyasaland which was considered by the Privy Council in *Runyown v The Queen* [1967] AC 26. Mr Karpal Singh did not however seek to argue that the penalty in question was cruel or unusual or was tantamount to torture or was inhuman or degrading; but simply because, as earlier stated, it was said to contravene certain provisions of our Constitution. In parentheses it may be remarked that one would not expect Parliament to countenance torture or any punishment that is inhuman or degrading; that as regards the death penalty which has existed here for well over a century, while it may

- A be regarded as cruel in certain other countries, public opinion here is not quite ready to follow suit as far as certain grave offences are concerned, though it might do so in future; and that if the fathers of our Constitution had desired to abolish it they would have said so in the clearest of language. ...
- ...
- B As regards the question whether or not a mandatory death sentence is constitutional in the light of Article 8 we would respectfully follow the reasoning of Lord Diplock when delivering the judgment of Privy Council in an appeal from Singapore, *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64, holding that the mandatory death sentence for trafficking in heroin exceeding 15g contrary to s 3 of the Singapore Dangerous Drugs Act 1973, was constitutional and not contrary to arts 9(1) and 12(1) of the Singapore Constitution which are *pari materia* with our arts 5(1) and 8(1).
- C

- [44] Applying the above reasoning to the instant appeal, we hold that the mandatory death sentence provided under s 39B(2) of the Act is not unconstitutional.
- D

CONCLUSION

- E [45] In the light of the aforesaid, we find no merit in the appeal. In our judgment the conviction of the appellant is safe. The appeal is unanimously dismissed and the conviction and sentence of the High Court is affirmed.

Appeal dismissed; conviction and sentence of High Court affirmed.

F

Reported by Dzulkarnain Ab Fatar.

G

H

I