Balachandran v Public Prosecutor

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–42 OF 2002 (W)
AHMAD FAIRUZ CJ, PS GILL FCJ AND AUGUSTINE PAUL JCA
22 NOVEMBER 2004

Criminal Law — Dangerous Drugs Act (Malaysia) — s 12(2) — Possession of monoacetylmorphines — Substituted charge — Appeal against conviction and sentence — Whether allowed

Criminal Procedure — Defence — Accused remaining silent — Whether trial judge must re-evaluate evidence before convicting accused — Whether there was prima facie evidence to support conviction beyond a reasonable doubt

Evidence — Adverse inference — Failure to produce first information report — Whether such failure capable of adverse inference being drawn against prosecution — Non-requirement of evidence to be corroborated in law — Whether obligation exists to tender corroborative evidence — Evidence Act 1950 s 114(g)

Evidence — Burden of proof — Prosecution's burden — Close of prosecution's case — Legal and evidential burden — Discharge of burden — Where accused remains silent — Whether necessary to re-evaluate evidence in determining existence of reasonable doubt — Criminal Procedure Code ss 180 and 182A(1)

Evidence — Expert evidence — Chemist's evidence — Evidence of tests carried out in arriving at conclusion not given — Whether court entitled to accept such evidence at face value — Whether evidence of chemist regarding analysis of dangerous drugs is one of fact or opinion

Evidence — Statement — Exculpatory statements — Reliance on trial judge on exculpatory statement — Whether error amounts to miscarriage of justice

The accused was originally charged with trafficking in 73.34 grammes of monoacetylmorphines under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). At the close of the case for the prosecution the charge was reduced to one under s 12(2) read with s 39A(2) of the Act. When he was found guilty of the amended charge, he was convicted and sentenced to 16 years' imprisonment and 11 strokes of the rotan. His appeal against conviction and sentence was dismissed by the Court of Appeal and he has now appealed to the Federal Court. In reducing the charge the trial judge accepted the accused's version of events as contained in his cautioned statement. The defence raised a few points of law in that: (a) the effect of failure by the prosecution to tender in evidence the police report made by PW1 admissible under s 108A of the Criminal Procedure Code ('CPC') and ss 35 and 157 of the Evidence Act 1950 ('EA'), being a vital piece of evidence; (b) the sufficiency of the evidence of the chemist; and (c) the standard of proof on the prosecution at the close of the case for the prosecution.

Held, dismissing the appeal: **A**

(1) An exculpatory statement cannot form the basis of an order in favour of an accused person at the close of the case for the prosecution as the accused, not having given evidence at that stage, could not rely on the statement without it having been tested by cross examination. Therefore, that the reliance of the trial judge on the exculpatory part of the accused's cautioned statement at that stage could not be sustained in law. However, the error does not amount to a miscarriage of justice to warrant this court's intervention in view of a similar finding that he made at the close of the case for the defence (see para 4). **B** **C**

(2) The evidentiary value of a first information report is only to contradict the testimony of a witness under s 145 of the EA or to corroborate his testimony under s 157 of the same Act. It is not substantive evidence of its contents. The question that required determination in the circumstances was whether the failure to adduce, in evidence, the first information report was capable of an adverse inference being drawn against the prosecution under s 114(g) of the EA. Where the evidence of a witness does not require to be corroborated in law, there is no obligation to tender corroborative evidence to support his testimony. Thus if the case for the prosecution rests solely on the evidence of one witness in such a category there is no requirement in law for his evidence to be corroborated (see para 11); *Lim Guan Eng v PP* [2000] 2 MLJ 577 referred. **D** **E**

(3) If indeed the first information report contradicts the evidence of a witness it is the duty of the defence to use it in order to attack the credibility of the witness. The failure of the defense to do so would be seen as contradictory should they seek for an adverse inference to be drawn against the prosecution for failure to adduce it in evidence. On the contrary the failure of the defence to use it as described may lead to the inference that it is not adverse to the evidence of the witness. The corollary is that an adverse inference cannot be drawn against the prosecution for failure to tender in evidence a first information report and the strength of its case is to be assessed as it stands (see para 12). **F** **G**

(4) It is true that the chemist did not give any evidence of the tests carried out by him in arriving at his conclusion. The court is entitled to accept the evidence of the chemist on its face value without the necessity for him to go into details of what he did in the laboratory step by step unless it is inherently incredible or the defence calls evidence in rebuttal by another expert. The evidence of a chemist on dangerous drugs analysed by him is one of fact and not of opinion. In the circumstances the evidence of a chemist is not controlled by s 51 of the EA thereby making it unnecessary for him to testify on the tests conducted by him in arriving at his conclusion. The evidence of the chemist was therefore **H** **I**

sufficient. The defence did not seriously challenge the evidence beyond merely putting to the chemist that his analysis was improper and inadequate (see para 17); *Munusamy v PP* [1987] 1 MLJ 492; *PP v Lam San* [1991] 3 MLJ 426 and *Khoo Hi Chiang v PP* [1994] 1 MLJ 265 referred.

(5) As the accused can be convicted on the *prima facie* evidence it must have reached a standard which is capable of supporting a conviction beyond reasonable doubt. However it must be observed that it cannot, at that stage, be properly described as a case that has been proved beyond reasonable doubt. Proof of beyond reasonable doubt involves two aspects. While one is the legal burden on the prosecution to prove its case beyond reasonable doubt, the other refers the evidential burden on the accused to raise a reasonable doubt. Both these burdens could only be fully discharged at the end of the whole case when the defence has closed its case. Therefore a case can be said to have been proved beyond reasonable doubt only at the conclusion of the trial upon a consideration of all the evidence adduced as provided by s 182A(1) of the CPC. That would normally be the position where the accused has given evidence. However, where the accused remains silent there will be no necessity to re-evaluate the evidence in order to determine whether there is a reasonable doubt in the absence of any further evidence for such a consideration. The *prima facie* evidence which was capable of supporting a conviction beyond reasonable doubt will constitute proof beyond reasonable doubt (see para 23).

[Bahasa Malaysia summary

Tertuduh pada asalnya dituduh dengan kesalahan mengedar 73.34 gram monoacetylmorphines di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Pada akhir kes pendakwa, tuduhan tersebut dikurangkan kepada satu di bawah s 12(2) dibaca bersama s 39A(2) Akta. Bila dia didapati bersalah di bawah tuduhan yang dipinda, dia disabitkan dan dihukum penjara 16 tahun berserta 11 sebatan rotan. Rayuannya terhadap sabitan dan hukuman ditolak oleh Mahkamah Rayuan dan di kini merayu kepada Mahkamah Persekutuan. Dalam mengurangkan tuduhan tersebut, hakim bicara telah menerima hujahan tertuduh mengenai hal kejadian seperti yang terkandung di dalam kenyataan beramarannya. Pihak pembela telah memajukan beberapa isu undang-undang iaitu: (a) kesan kegagalan pihak pendakwa memajukan bukti laporan polis yang dibuat oleh PW1 yang boleh diterima di bawah s 108A Kanun Acara Jenayah ('KAJ') dan ss 35 dan 157 Akta Keterangan 1950 ('AK'), yang merupakan bukti yang sangat penting; (b) kesempurnaan keterangan ahli kimia; dan (c) tahap pembuktian yang berada pada pihak pendakwa pada akhir kes pendakwa.

Diputuskan, membatalkan rayuan tersebut: **A**

(1) Suatu kenyataan pembebasan tidak boleh menjadi dasar kepada suatu perintah yang berpihak kepada pihak tertuduh pada penutupan kes pendakwa kerana tertuduh, yang tidak memberi keterangan pada ketika itu, tidak boleh bergantung pada kenyataan tersebut tanpa ia dipersoalkan semasa pemeriksaan balas. Maka dengan itu, kebergantungan hakim **B** bicara ke atas bahagian pembebasan kenyataan beramaran tertuduh pada ketika itu tidak dapat disokong oleh undang-undang. Akan tetapi, kekhilafan tersebut tidak membawa kepada salah laksana undang yang memerlukan campur tangan mahkamah ini dalam melihat kepada suatu keputusan yang serupa pada penutupan kes bagi pihak pembela (lihat **C** perenggan 4).

(2) Nilai keterangan laporan keterangan pertama hanyalah untuk menyangkal testimoni yang dibuat oleh saksi di bawah s 145 AK atau menyokong testimoninya di bawah s 157 Akta yang sama. Ia bukan keterangan substantif mengenai kandungannya. Soalan yang perlu diputuskan di **D** dalam keadaan semasa adalah sama ada kegagalan untuk memajukan, sebagai keterangan, laporan keterangan pertama berupaya membolehkan andaian yang memudaratkan dibuat terhadap pihak pendakwa di bawah s 114(g) AK. Di mana keterangan seseorang saksi tidak diperlukan untuk disokong di sisi undang-undang, tidak terdapat kewajipan untuk **E** memajukan keterangan sokongan untuk menyokong testimoninya. Oleh itu, jika kes pihak pendakwa bergantung sepenuhnya kepada keterangan seorang saksi di dalam kategori sebegitu, tidak terdapat keperluan di bawah undang-undang untuk keterangannya disokong (lihat perenggan 11); *Lim Guan Eng v PP* [2000] 2 MLJ 577 dirujuk. **F**

(3) Sekiranya memang laporan keterangan pertama tersebut bercanggah dengan keterangan seorang saksi, adalah menjadi tugas bagi pihak pembelaan untuk menggunakannya untuk mempersoalkan kredibiliti saksi berkenaan. Kegagalan pihak pembela untuk berbuat begitu akan mewujudkan percanggahan sekiranya mereka menghendaki andaian **G** memudaratkan dibuat terhadap pihak pendakwa kerana gagal memajukannya dalam keterangan. Sebaliknya, kegagalan pihak pembelaan untuk menggunakannya seperti yang dikatakan akan membawa kepada inferens bahawa ia tidak memudaratkan keterangan saksi. Lanjutan daripada ini adalah andaian memudaratkan tidak boleh dibuat terhadap **H** pihak pendakwa ke atas kegagalan untuk memajukan sebagai bukti laporan keterangan pertama dan kelebihan sesuatu kes akan dinilai di dalam keadaan sedia adanya (lihat perenggan 12).

(4) Sememangnya benar bahawa ahli kima tidak memberi apa-apa bukti mengenai ujian-ujian yang dilakukan olehnya dalam memberi **I** keputusannya. Mahkamah berhak untuk menerima keterangan ahli kimia atas nilai mukanya tanpa keperluan untuk beliau memberi butir-

butiran mengenai apa yang dilakukan olehnya di makmal langkah demi langkah melainkan jika keterangannya tidak boleh dipercayai secara semula jadi atau sekiranya pembelaan memanggil keterangan menyangkal oleh seorang pakar yang lain. Keterangan seorang ahli kimia berkenaan dadah berbahaya yang dianalisis olehnya adalah suatu yang berpandukan fakta dan bukan pendapat. Di dalam keadaan sebegitu, keterangan ahli kimia tidak terkawal oleh s 51 AK dan dengan itu tidak memerlukannya untuk memberi keterangan ke atas ujian-ujian yang dilakukan olehnya dalam memberi keputusannya. Keterangan ahli kimia maka dengan itu adalah memadai. Pihak pembela tidak dengan sungguh-sungguh mencabar keterangan tetapi hanya mengadu kepada ahli kimia bahawa analisisnya tidak lengkap dan tidak mencukupi (lihat perenggan 17); *Munusamy v PP* [1987] 1 MLJ 492; *PP v Lam San* [1991] 3 MLJ 426 dan *Khoo Hi Chiang v PP* [1994] 1 MLJ 265 dirujuk.

(5) Oleh kerana tertuduh boleh disabitkan atas keterangan *prima facie*, ia perlu sampai ke suatu tahap di mana ia berupaya menyokong suatu sabitan di luar keraguan munasabah. Akan tetapi, harus dinyatakan bahawa ia tidak boleh, pada ketika itu, dengan betulnya digambarkan sebagai suatu kes yang telah dibuktikan di luar keraguan munasabah. Bukti di luar keraguan munasabah melibatkan dua aspek. Manakala satu adalah beban undang-undang ke atas pihak pendakwa, satu lagi merujuk kepada beban keterangan atas tertuduh untuk mewujudkan keraguan munasabah. Kedua-dua beban ini hanya boleh dilaksanakan pada akhir keseluruhan kes apabila pihak pembela telah menutup kes mereka. Oleh itu, sesuatu kes hanya boleh dikatakan sebagai dibuktikan di luar keraguan munasabah pada akhir sesuatu kes selepas mengambil kira semua keterangan yang dimajukan di bawah s 182A(1) KAJ. Itulah keadaan lazimnya apabila tertuduh selesai memberi keterangan. Akan tetapi, apabila tertuduh berdiam diri, tidak terdapat keperluan untuk menilai semula bukti untuk memutuskan sama ada terdapat keraguan munasabah dalam ketiadaan apa-apa bukti yang selanjutnya untuk membuat pertimbangan tersebut. Keterangan *prima facie* yang berupaya untuk menyokong suatu sabitan di luar keraguan munasabah akan membentuk bukti di luar keraguan munasabah (lihat perenggan 23).

Notes

For cases on burden of proof, see 7(2) *Mallal's Digest* (4th ed, 2003 Reissue) paras 272–558

For cases on Dangerous Drugs Act 1952 s 12(2), see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 151–156

For cases on exculpatory statements, see 7(2) *Mallal's Digest* (4th ed, 2003 Reissue) paras 2290–2291

For cases on expert evidence, see 7(1) *Mallal's Digest* (4th ed, 2003 Reissue) paras 1355–1461

For cases on failure to produce first information report, see 7(1) *Mallal's Digest* (4th ed, 2003 Reissue) paras 182–183
For cases on the accused remaining silent, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 1558–1561

Cases referred to

Au Ah Lin v PP [1963] MLJ 365 (refd)
Chin Khing Siong v R [1952] MLJ 74 (refd)
Emperor v Khwaja Nazir Ahmad AIR 1945 PC 18 (refd)
Khaw Cheng Bok & Ors v Khaw Cheng Poon & Ors [1998] 3 MLJ 457 (refd)
Khoo Hi Chiang v PP [1994] 1 MLJ 265 (folld)
Lim Guan Eng v PP [2000] 2 MLJ 577 (refd)
Loo Kia Meng v PP [2000] 3 MLJ 664 (refd)
Looi Kow Chai & Anor v PP [2003] 2 AMR 89 (refd)
Munusamy v PP [1987] 1 MLJ 492 (folld)
Ooi Hock Leong v R [1955] MLJ 229 (refd)
PR v Mansor bin Mohd Rashid & Anor [1996] 3 MLJ 560 (folld)
PP v Adetunji Adeleye Sule [1993] 2 MLJ 70 (folld)
PP v Chan Kim Choi [1989] 1 MLJ 404 (folld)
PP v Lam Sam [1991] 3 MLJ 426 (folld)
PP v Lee Eng Kooi [1993] 2 MLJ 322 (refd)
PP v Foong Chee Cheong [1970] 1 MLJ 97
R v Storey (1968) 52 Cr App R 334 (folld)
Tan Cheng Kooi & Anor v PP [1972] 2 MLJ 115 (refd)
Vadivelu Thevar v State of Madras AIR 1957 SC 614 (refd)

Legislation referred to

Criminal Procedure Code ss 108A, 180(1), (2), (3), 182A(1)
Criminal Procedure Code (FMS Cap 6) s 113(1)
Dangerous Drugs Act 1952 ss 12(2), 37(j), 39B(1)(a), 39A(2)
Evidence Act 1950 ss 35, 51,114(g), 134, 145, 157

Gurbacban Singh (Bachan & Kartar) for the appellant
Teo Say Eng DPP (AG's Chambers) for the prosecution

Appeal from: Criminal Appeal No W–05–10 of 2000 (Court of Appeal, Kuala Lumpur) and Criminal Trial No 45–28 of 1999 (High Court, Kuala Lumpur)

Augustine Paul JCA (delivering judgment of the court):

[1] The accused was originally charged with trafficking in 73.34 grammes of monoacetylmorphines under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). At the close of the case for the prosecution the charge was reduced to one under s 12(2) read with s 39A(2) of the Act. When he was found guilty

of the amended charge he was convicted and sentenced to 16 years' imprisonment and whipping of 11 strokes. His appeal against conviction and sentence was dismissed by the Court of Appeal and he has now appealed to this court.

[2] The facts of the case as summarised by the trial judge in his grounds of judgment read as follows:

> Pada 23 September 1998 jam 8.25 malam, Inspektor Wan Azlan (SP1) dan 13 anggota polis yang lain, telah membuat serang hendap di hadapan Sekolah Rendah Jenis Kebangsaan Cina Mun Chong, Batu 5, Jalan Ipoh Kuala Lumpur. SP1 telah nampak OKT membimbit satu beg plastik warna oren P11 di tangan kirinya dan berjalan menuju ke kereta No JBW 2490. Pada masa itu SP1 berada pada jarak 10–15 meter daripada OKT. OKT berseorangan ketika itu. Tidak ada sesiapa pun di dalam kereta itu. SP1 dan D/L/Kpl Fairuz Khan (SP3) terus menghampiri OKT dengan menaiki sebuah motosikal yang dipandu oleh SP3 SP1 mengenalkan dirinya sebagai Polis kepada OKT dan OKT telah cuba melarikan diri. Satu pergelutan telah berlaku. P11 yang dipegang oleh OKT terjatuh ke tanah dan dirampas oleh SP1. Akhirnya, OKT telah berjaya ditangkap.
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> SP1 telah memeriksa P11 di hadapan OKT dan didapati mengandungi 1 beg plastic warna putih (P12) di dalamnya yang mengandungi 5 bungkusan, terdiri dari 1 bungkusan keratan akhbar Cina (P13) dan 4 bungkusan warna coklat (P14). Setiap bungkusan tersebut mengandungi 1 paket plastik berisi ketulan dan serbuk merah jambu yang disyaki dadah heroin. Satu telefon bimbit Nokia (P5) dan satu dompet (P6) berisi wang tunai RM300 dan 6 keping kad kredit juga dirampas daripada OKT.
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> Lima bungkusan tersebut telah dihantar ke Jabatan Kimia, Petaling Jaya untuk dianalisis. Ahli Kimia, En Cheong Meow Kioon (SP2) telah menjalankan analisis dan mengesahkan bahan ketulan dan serbuk merah jambu dalam 5 bungkusan tersebut mengandungi dadah berbahaya, jenis monoacetylmorphines dan beratnya ialah 73.34 gram. Jumlah berat bahan ketulan dan serbuk merah jambu ialah 2,249.5 gram semuanya. Monoacetylmorphines adalah dadah berbahaya yang disenaraikan di bawah Jadual Pertama kepada Akta SP2 juga telah menyediakan satu laporan kimia (P19) yang mana satu salinannya telah diserahkan kepada OKT.
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> Keputusan Di Akhir Kes Pendakwaan
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> Selepas mendengar hujah-hujah kedua belah pihak dan meneliti serta menimbang segala keterangan yang ada terdiri dari 7 orang saksi dan 24 eksibit yang telah dikemukakan, saya dapati pihak pendakwa telah berjaya membuktikan secara prima facie bahawa OKT telah memiliki dadah berbahaya jenis monoacetylmorphines dan beratnya ialah 73.34 gram.

[3] In explaining the reason for reducing the charge to one of possession he said:

> Oleh kerana OKT telah dijumpai memiliki dadah monoacetylmorphines melebihi 15 gram, maka menurut seksyen 37(da) Akta, sehingga dibuktikan sebaliknya,

OKT adalah dianggap mengedar dadah tersebut. Walau bagaimanapun, beban untuk mematahkan anggapan itu adalah ringan, iaitu atas imbangan kebarangkalian, dan ia boleh dipatahkan dengan keterangan yang ada walaupun di peringkat kes pendakwaan (sila lihat *Chee Chiew Heong v Public Prosecutor* (1981) 2 MLJ 287). Dalam kes ini, saya dapati pihak pembelaan telah berjaya mematahkan anggapan pengedaran dengan kemungkinan wujudnya Shan dari awal kes pendakwaan. Pegawai Penyiasat, SP5 telah mengesahkan bahawa OKT telah mengatakan dalam pernyataan beramarannya (ID22) bahawa dadah yang dia bawa adalah kepunyaan Shan. Jadi kemungkinan besar Shan seorang pengedar dadah yang sebenarnya tidak boleh dikesampingkan. Dengan itu, saya beri manfaat keraguan kepada OKT. Walaupun begitu, pihak pendakwa telah berjaya membuktikan bahawa OKT telah memiliki dadah tersebut.

[4] It is clear that in reducing the charge the trial judge had accepted the accused's version of events as contained in his cautioned statement. It is settled law that an exculpatory statement cannot form the basis of an order in favour of an accused person at the close of the case for the prosecution as the accused, not having given evidence at that stage, cannot rely on the statement without it having been tested by cross examination (see *PR v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560, *PP v Adetunji Adeleye Sule* [1993] 2 MLJ 70, *PP v Chan Kim Choi* [1989] 1 MLJ 404 and *R v Storey* [1968] 52 Cr App R 334). It follows that the reliance of the trial judge on the exculpatory part of the accused's cautioned statement at that stage cannot be sustained in law. However, the error does not amount to a miscarriage of justice to warrant intervention by us in view of a similar finding that he made at the close of the case for the defence. As he said in his grounds of judgment:

Kemungkinan kewujudan Shan tidak boleh dikesampingkan. Itulah sebabnya mengapa pertuduhan pengedaran diperturunkan kepada kesalahan pemilikan.

[5] In his submission before us, counsel advanced several grounds of appeal. We gave anxious consideration to his arguments on the facts and the law. His complaints on the findings of fact of the trial judge, in particular, the rejection of the evidence of DW2 cannot be sustained as they have been well reasoned out. However, we felt that the submission on some of the points of law raised by counsel merits consideration. They are:

(a) The effect of failure by the prosecution to tender in evidence the police report made by PW1,

(b) The sufficiency of the evidence of the chemist, and

(c) The standard of proof on the prosecution at the close of the case for the prosecution.

[6] We will now consider the issues that have been identified.

(a) The effect of failure by the prosecution to tender in evidence the police report made by PW1

[7] Counsel argued that the police report made by PW1, admissible under s 108A of the Criminal Procedure Code ('s 108A') and ss 35 and 157 of the Evidence Act 1950, is a vital piece of evidence. It ought to have been tendered in evidence by the prosecution particularly as its case rested solely on the evidence of PW1. Accordingly, he contended that an adverse inference ought to have been drawn against the prosecution. In support he relied on the case of *Tan Cheng Kooi & Anor v PP* [1972] 2 MLJ 115.

[8] Section 108A reads as follows:

> In any proceeding under this Code a copy of an entry relating to an information reduced to writing under the provisions of s 107 or 108, and purporting to be certified to be a true copy by the officer in charge of the police district in which the police station where the information given is situated, shall be admitted as evidence of the contents of the original and of the time, place and manner in which the information was so recorded.

[9] The certified copy is thus admissible only as evidence of the contents of the original. In other words it takes the place of the original. Section 108A therefore deals only with the admissibility of a certified true copy of a first information report; its evidentiary value would therefore remain on the same footing as that of the original. In explaining its object and use as evidence, Lord Porter in delivering the advice of the Privy Council in *Emperor v Khwaja Nazir Ahmad* AIR 1945 PC 18 said at p 20:

> In truth the provisions as to an information report (commonly called a first information report) are enacted for other reasons. Its object is to obtain early information of alleged criminal activity, to record the circumstances before there is time for them to be forgotten or embellished, and it has to be remembered that the report can be put in evidence when the informant is examined *if it is desired to do so.* (Emphasis added)

[10] Chang Min Tat J (as he then was) in dealing with the evidentiary value of a first information report said in *Tan Cheng Kooi & Anor v PP* [1972] 2 MLJ 115 at p 118:

> Now the importance of a first information report has been stressed in a number of decisions. It is not a substantive piece of evidence and it is inadmissible for the purpose of proving that the facts stated in it are correct. But it can be used by way of corroboration or contradiction: *per* Carnduff J in 17 CWN 1213:
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> > The first information is a document of great importance and in practice it is always and very rightly produced and proved in criminal trials. But it is not a piece of substantive evidence and it can be used only as a previous statement admissible to corroborate or contradict the author of it.
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> as cited in *Sohoni's Code of Criminal Procedure* (14th Ed) at p 275.

Although of great importance, the omission of a first information report does not however appear per se to be fatal to the prosecution. In *Ooi Hock Leong v R* [1955] MLJ 229, Spenser-Wilkinson J (as he then was) while deploring the omission as very serious found on the record evidence other than from the complainant of the offence of the accused and dismissed the appeal against conviction. Gill J (as he then was) in *Public Prosecutor v Foong Chee Cheong* [1970] 1 MLJ 97 was of the same mind. He held that the fact that no first information report was made was not itself a ground for throwing out a case. The case of *Ooi Hock Leong v R, supra*, is however distinguishable and was distinguished by the learned judge himself from the earlier case of *Chin Khing Siong v R* [1952] MLJ 74, and it is clear from his explanation that where the case against the accused depended entirely on the evidence of the complainant, the failure to produce the first information report had deprived the accused of an opportunity to cross examine his accuser and in these circumstances the presumption under s 114(g) of the Evidence Ordinance must be raised that the report would be unfavourable to the prosecution case. This rationale was followed by Smith J in *Teo Thin Chan & Anor v Public Prosecutor* [1957] MLJ 184 where the appeal against conviction was allowed.

[11] The passage just referred to makes it patent that the evidentiary value of a first information report is only to contradict the testimony of a witness under s 145 of the Evidence Act 1950 or to corroborate his testimony under s 157 of the said Act the operation of which is as explained in *Lim Guan Eng v PP* [2000] 2 MLJ 577. It is not substantive evidence of its contents. The question that arises for determination, in the circumstances, is whether the failure to adduce in evidence the first information report is capable of an adverse inference being drawn against the prosecution under s 114(g) of the Evidence Act 1950. Where the evidence of a witness does not require to be corroborated in law there is no obligation to tender corroborative evidence to support his testimony. Thus if the case for the prosecution rests solely on the evidence of one witness in such a category there is no requirement in law for his evidence to be corroborated. Any such requirement will conflict with s 134 of the Evidence Act 1950 which provides that no particular number of witnesses shall in any case be required for the proof of any fact. This means that the testimony of a single witness, if believed, is sufficient to establish any fact (see *Khaw Cheng Bok & Ors v Khaw Cheng Poon & Ors* [1998] 3 MLJ 457). However, the facts and circumstances of a particular case may make it desirable for his evidence to be corroborated. As Sinha J said in *Vadivelu Thevar v State of Madras* AIR 1957 SC 614 at pp 618–619:

On the consideration of the relevant authorities and the provisions of the Evidence Act, the following propositions may be safely stated as firmly established:

(1) As a general rule, a court can and may act on the testimony of a single witness though uncorroborated. One credible witness outweighs the testimony of a number of other witnesses of indifferent character.

(2) Unless corroboration is insisted upon by statute, courts should not insist on corroboration except in cases where the nature of the testimony of the single witness itself requires as a rule of prudence, that corroboration should be insisted upon, for example in the case of a child witness, or of a witness whose evidence is that of an accomplice or of an analogous character.

(3) Whether corroboration of the testimony of a single witness is or is not necessary must depend upon facts and circumstances of each case and no general rule can be laid down in a manner like this and much depends upon the judicial discretion of the judge before whom the case comes.

[12] It is therefore clear that the need for a first information report to be used to corroborate the testimony of a witness depends on the facts and circumstances of each particular case. Where the evidence of a single witness who has made a first information report is vague it is most desirable to tender it in evidence in order to enhance his credibility. That was the basis of the judgment in cases such as *Chin Khing Siong v R* [1952] MLJ 74 and *Ooi Hock Leong v R* [1955] MLJ 229. Where it is not tendered in evidence in such a situation the evidence of the witness stands to be rejected; not because it lacks corroboration but because it may not pass the test of credibility and reliability on its own. It is only to that extent can it be said that the failure to produce the first information report is fatal. If indeed it contradicts the evidence of a witness it is the duty of the defence to use it in order to attack the credibility of the witness. Where that has not been done it would be a contradiction in terms for the defence to ask for an adverse inference to be drawn against the prosecution for failure to adduce it in evidence. On the contrary the failure of the defence to use it as described may lead to the inference that it is not adverse to the evidence of the witness. The corollary is that an adverse inference cannot be drawn against the prosecution for failure to tender in evidence a first information report and the strength of its case is to be assessed as it stands. The submission advanced by counsel cannot be sustained as the trial judge had accepted the evidence of PW1 which was supported by the testimony of PW3. The need for PW1's evidence to be corroborated by his police report therefore does not arise.

[13] In any event the report made by PW1 (if any) is not the first information report as he himself obtained information regarding this case from one ASP Rosdi. Perhaps counsel was influenced by the judgment in *PP v Lee Eng Kooi* [1993] 2 MLJ 322 where it was held that the repeal of the old s 113(1) with the substitution as it now reads " … has the effect of clearly and decisively removing the pre-amendment distinction between first information and non-first information reports" (at p 330). The distinction between both types of reports is not anchored on rules relating to their admissibility but the purpose they serve. While a first information report serves as a complaint to the police to set the criminal law in motion the other reports relate to steps taken by the police thereafter as, for example, an arrest report. Thus any change in the law relating to their admissibility cannot alter their character. The distinction between both types of reports still remains. It must be added that only the first

information report is admissible under s 108A in addition to ss 145 and 157 of the Evidence Act 1950 while the other reports are admissible only under the latter provisions of law.

(b) The sufficiency of the evidence of the chemist

[14] In order to appreciate the submission of counsel on the sufficiency of the analysis of the dangerous drugs carried out by the chemist it is necessary to first set out the material parts of his evidence. It runs as follows:

> … The exhibits were handed to me for analysis for dangerous drugs. (NB: Insp Rajendran — was not around yet for identification).
>
> This is the official acknowledgement receipt issued to Insp Rajendran — produced as (P18).
>
> ID10 — box referred — this is the box received, produced as (P10).
>
> In this box are:
>
> 1 An orange plastic bag marked 'A' in which was a white plastic bag marked 'B' containing a newspaper package and 4 brown paper packages marked from 'C' to 'G' respectively. I found each of the 5 packages C to G to contain a plastic packet of pinkish granular powdery substance marked from C1 to G1, respectively.
>
> On 26 February 1999 during office hours I carried out analysis and found the pinkish substances in the 5 packages C1 to G1 to contain monoacetylmorphines (MAM). The result of the analysis are as follows:
>
> Package – C1
>
> Net weight of the pinkish substance was 458.9 grams. Monoacetylmorphines (MAM) obtained was 14.31 grams.
>
> Package – D1
>
> Net weight of the pinkish substance was 459.3 grams. MAM obtained was 16.44 grams.
>
> Package – E1
>
> Net weight of the pinkish substance was 443.2 grams. MAM obtained was 13.91 grams.
>
> Package – F1
>
> Net weight of the pinkish substance was 444.2 grams. MAM obtained was 13.59 grams.
>
> Package – G1
>
> Net weight of the pinkish substance was 443.9 grams. Weight of MAM was 15.09 grams. The total weight of pinkish substance obtained from the 5 packages was 2,249.5 grams. The total weight of MAM obtained was 73.34 grams.

The pinkish substance in 5 packages C1 to G1 had been powdered during analysis after which they were put into 5 separate plastic packets supplied by me and marked with laboratory number (PJ) For 8267/98 – 0 – followed by C1 to G1 respectively… .

Cross-examination: I agree the report was made under sec 399 of the CPC. The gross
weight of the 5 packages is 2,265.76 grams. The analysis started on 26 February 1999.

Put: Your analysis was improper and inadequate.

A : I disagree.

tt

(Dato' Nik Hashim bin Nik Ab Rahman)

Re- examination: Gross weight is the weight of the pinkish substance plus the plastic
packages containing the substance.

[15] Counsel's submission on this issue was two-fold. Firstly, he contended that the evidence of the chemist does not state the amount of the drugs that he analysed. He said that this is fatal as s 37(j) of the Dangerous Drugs Act 1952 ('s 37(j)') requires an analysis of 10% of the total amount of drugs. In support he relied on *Loo Kia Meng v PP* [2000] 3 MLJ 664. In his reply the deputy public prosecutor argued that s 37(j) does not arise for consideration as all the drugs seized had been analysed. He added that in any event the amount that is required to be analysed by s 37(j) is ten percent of the receptacles as enunciated in *Au Ah Lin v PP* (1963) MLJ 365 and not of the contents. Secondly, counsel submitted that the evidence of the chemist does not disclose the nature of the analysis conducted by him. He said that the chemist ought to have testified on the tests that he carried out in arriving at his conclusion. In his reply the deputy public prosecutor said that based on *PP v Lam Sam* [1991] 3 MLJ 426 there is no obligation on the prosecution to lead such evidence which ought to have been elicited in cross examination which was not done.

[16] The thrust of the first submission of counsel becomes a relevant matter for consideration only if the chemist had not analysed all the substances handed to him. The chemist had testified on the net weight of the pinkish substance in each of the five packages followed by the weight of monoacetylmorphines obtained from each package. This indicates that he had analysed all of the pinkish substances in each of the packages. It is confirmed by his evidence that the pinkish substances in the five packages were powdered during analysis. This makes it patent that the chemist had analysed all the substances handed to him thereby making it unnecessary for the prosecution to rely on s 37(j). This part of the submission of counsel therefore does not require consideration by us.

[17] The second part of the submission of counsel relates to the nature of the evidence that must be adduced from the chemist. It is true that the chemist did not give any evidence of the tests carried out by him in arriving at his conclusion. It has been held by the trilogy of the (then) Supreme Court cases of *Munusamy v PP* [1987] 1 MLJ 492, *PP v Lam Sam* [1991] 3 MLJ 426 and *Khoo Hi Chiang v PP* [1994] 1 MLJ 265 that the court is entitled to accept the evidence of the chemist on its face value without the necessity for him to go into details of what he did in the laboratory step by step unless it is inherently incredible or the defence calls evidence in rebuttal by another expert. The rationale of this view is lucidly explained in *Khoo Hi Chiang v PP* [1994] 1 MLJ 265 where it was held that the evidence of a chemist on dangerous drugs analysed by him is one of fact and not of opinion. In the circumstances the evidence of a chemist is not controlled by s 51 of the Evidence Act 1950 thereby making it unnecessary for him to testify on the tests conducted by him in arriving at his conclusion. The evidence of the chemist is therefore sufficient. The trial judge had accepted it. The defence did not seriously challenge the evidence beyond merely putting to the chemist that his analysis was improper and inadequate. The chemist disagreed with the suggestion. This submission of counsel cannot therefore be sustained.

[18] We are thus unable to agree with the submission of counsel on the sufficiency of the evidence of the chemist.

(c) The standard of proof on the prosecution at the close of the case for the prosecution

[19] Counsel submitted that the burden on the prosecution at the close of its case is to make out a case which is beyond reasonable doubt and not on a *prima facie* basis as done in this case. The DPP relied on *Looi Kow Chai & Anor v Pendakwa Raya* [2003] 2 AMR 89 to disagree with the submission made.

[20] As the offence in this case was committed in 1998 the burden of proof on the prosecution is governed by ss 180 and 182A of the Criminal Procedure Code as amended in 1997 ('s 180' and 's 182A' respectively). They read as follows:

Section 180

(1) When the case for the prosecution is concluded, the court shall consider whether the prosecution has made out a *prima facie* case against the accused.

(2) If the court finds that the prosecution has not made out a *prima facie* case against the accused, the court shall record an order of acquittal.

(3) 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.

Section 182A

(1) At the conclusion of the trial, the court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.

(2) If the court finds that the prosecution has proved its case beyond reasonable doubt, the court shall find the accused guilty and he may be convicted on it.

(3) If the court finds that the prosecution has not proved its case beyond reasonable doubt, the court shall record an order of acquittal.

[21] Section 180(1) makes it clear that the standard of proof on the prosecution at the close of its case is to make out a *prima facie* case while s 182A(1) enunciates that at the conclusion of the trial the court shall consider all the evidence adduced and decide whether the prosecution has proved its case beyond reasonable doubt. The standard of proof on the prosecution at the end of its case and at the end of the whole case has thus been statutorily spelt out in clear terms. The submission made must therefore be ratiocinated against the background of the meaning of the phrase '*prima facie* case' in s 180. Section 180(2) provides that the court shall record an order of acquittal if a *prima facie* case has not been made out while s 180(3) provides that if a *prima facie* case has been made out the accused shall be called upon to enter his defence. A *prima facie* case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal. The phrase '*prima facie case*' is defined in similar terms in *Mozley and Whiteley's Law Dictionary* 11th Ed as:

> A litigating party is said to have a *prima facie* case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A *prima facie* case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.

[22] The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand if a *prima facie* case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier. In order to make a finding either way the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established. As the trial is without a jury it is only with such a positive evaluation can the court make a determination for the purpose of s 180(2) and (3). Of course in a jury trial

where the evaluation is hypothetical the question to be asked would be whether on the evidence as it stands the accused could (and not must) lawfully be convicted. That is so because a determination on facts is a matter for ultimate decision by the jury at the end of the trial. Since the court, in ruling that a *prima facie* case has been made out, must be satisfied that the evidence adduced can be overthrown only by evidence in rebuttal it follows that if it is not rebutted it must prevail. Thus if the accused elects to remain silent he must be convicted. The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a *prima facie* case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If there is any such doubt there can be no *prima facie* case.

[23] As the accused can be convicted on the *prima facie* evidence it must have reached a standard which is capable of supporting a conviction beyond reasonable doubt. However it must be observed that it cannot, at that stage, be properly described as a case that has been proved beyond reasonable doubt. Proof beyond reasonable doubt involves two aspects. While one is the legal burden on the prosecution to prove its case beyond reasonable doubt the other is the evidential burden on the accused to raise a reasonable doubt. Both these burdens can only be fully discharged at the end of the whole case when the defence has closed its case. Therefore a case can be said to have been proved beyond reasonable doubt only at the conclusion of the trial upon a consideration of all the evidence adduced as provided by s 182A(1) of the Criminal Procedure Code. That would normally be the position where the accused has given evidence. However, where the accused remains silent there will be no necessity to re-evaluate the evidence in order to determine whether there is a reasonable doubt in the absence of any further evidence for such a consideration. The *prima facie* evidence which was capable of supporting a conviction beyond reasonable doubt will constitute proof beyond reasonable doubt.

[24] It follows that the submission of counsel that the burden on the prosecution at the close of its case is to make out a case which is beyond reasonable doubt and not on a *prima facie* basis is contrary to the clear and plain language of s 180 and s 182A. It cannot therefore be sustained.

[25] With the rejection of the submissions of counsel the appeal against conviction must be dismissed. Counsel did not address us on sentence. In imposing sentence the trial judge took into account the relevant factors. As he said in his grounds of judgment:

> Dalam mitigasi untuk meringankan hukuman, peguam bela yang bijaksana memohon mahkamah mengenakan hukuman dekat dengan minimum yang dibenarkan atas dasar OKT berumur 31 tahun, sudah berkahwin, mempunyai seorang anak berumur 6 tahun; OKT bekerja sebagai jurujual dengan pendapatan RM1,200 sebulan.

A Bagi pihak pendakwaan pula, Penolong Pendakwa Raya yang bijaksana, memohon suatu hukuman yang setimpal dengan kesalahan dan menarik perhatian mahkamah kepada kepentingan awam dan berat dadah supaya ia diberi pertimbangan saksama dalam menjatuhkan hukuman. Beliau juga mengesahkan bahawa OKT ada mempunyai satu kesalahan lampau menurut Pendaftaran Jenayah Pusat (P25), iaitu pada 14 September 1990 OKT telah dihukum penjara 1 hari dan denda S$200 oleh Mahkamah Majistret Singapura atas kesalahan mencuri dalam bangunan di bawah s 380 Cap 224.

Dalam menentukan hukuman yang setimpal dalam kes ini, mahkamah telah meletak kepentingan awam sebagai pertimbangan utama daripada kepentingan peribadi kerana tujuan sesuatu hukuman itu bukan sahaja untuk menghukum OKT tetapi ia juga mestilah merupakan suatu langkah pencegahan kepada orang ramai daripada melakukan kesalahan.

Kesalahan yang melibatkan dadah berbahaya adalah amat serius dalam negara kita. Penyalahgunaan najis dadah membawa kepada kemusnahan masyarakat. Jadi, hukuman yang dikenakan hendaklah mencerminkan keseriusan kesalahan itu. Dalam kes ini, OKT telah didapati bersalah selepas perbicaraan penuh apabila pertuduhan asal diperturunkan. Jadi, diskaun yang lazimnya diberi kepada pesalah yang mengaku salah tidak terpakai kepada OKT.

Berat dadah yang terlibat ialah 73.34 gram dan jenis dadah ialah monoacetylmorphines, dan semestinya ia perlu diambil kira dalam menentukan hukuman pemenjaraan dan sebatan. Berat dadah dalam kes ini adalah banyak, melebihi 68.34 gram daripada minimum 5 gram yang ditetapkan di bawah s 39A(2)(c) Akta.

Jadi, memandangkan kepada faktor-faktor di atas dengan mengambil kira kepentingan awam dan kepentingan OKT, saya telah menjatuhkan hukuman penjara selama 16 tahun mulai tarikh tangkap 23 September 1998 dan sebatan 11 kali, dengan penuh harapan semoga OKT akan insaf akan tindakan jijiknya dalam melakukan kesalahan ini dan sekali gus memberi amaran kepada orang awam betapa beratnya kesalahan yang melibatkan penyalahgunaan dadah berbahaya di negara ini.

[26] We are unable to say that the trial judge had erred in imposing the sentence as he had taken relevant factors like the element of public interest and the weight of drugs involved into consideration.

Appeal against conviction and sentence dismissed.

Reported by Sally Kee