A

PP

v.

AHMAD NASHRI ABDUL RAZAK

B

COURT OF APPEAL, PUTRAJAYA
LINTON ALBERT JCA
MAH WENG KWAI JCA
ROHANA YUSUF JCA
[CRIMINAL APPEAL NO: B-05-81-03-2012]

C

22 MAY 2014

CRIMINAL PROCEDURE: *Appeal - Appeal against acquittal and discharge - Appeal by prosecution - Accused charged for trafficking in 931g ganja - Drugs retrieved from accused's bedroom - Whether accused*
D *had exclusive possession of bedroom - Whether drugs could have been placed by frequent visitors - Whether accused had mens rea possession - Presumption of trafficking - Whether rebutted by defence - Whether defence cast reasonable doubt on prosecution's case - Dangerous Drugs Act 1952, ss. 37(da), 39B(2) - Criminal Procedure Code, s. 182A(3)*

E

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(2) - Trafficking in 931g ganja - Drugs retrieved from accused's bedroom - Whether accused had exclusive possession of bedroom - Whether drugs could have been placed by frequent visitors - Whether accused had mens rea possession - Whether defence cast reasonable doubt on prosecution's case*
F *- Dangerous Drugs Act 1952, ss. 37(da), 39B(2) - Criminal Procedure Code, s. 182A(3)*

Acting on the information given by one Poon that a certain drug trafficking activity would take place, an ambush plan was laid by
G the police party. Poon was arrested on the night before for being in unlawful possession of ganja. On interrogation, Poon informed the police officer ('PW3') that he had obtained the ganja from the respondent. While waiting for the respondent at the car park, PW3 instructed Poon to call the respondent to request for the
H supply of 1kg of ganja. The respondent told Poon to wait at his condominium. Upon arriving at the car park, the respondent was arrested by the police. The respondent then led the police to the third bedroom in his apartment where he retrieved a black and yellow coloured 'Garfield' bag ('the bag') from a pink-coloured
I container in a cupboard. Inside the bag was a slab of dried plant material, suspected to be ganja, wrapped in aluminium foil. In the

High Court, the respondent was charged with trafficking in 931g of ganja, an offence under s. 39B(2) of the Dangerous Drugs Act 1952 ('DDA'). At the close of the prosecution's case, the High Court found the respondent to be in *mens rea* possession of the ganja and invoked the presumption of trafficking under s. 37(da)(vi) of the DDA. In his defence, the respondent denied having knowledge of the presence of the bag and that it had been left in the cupboard by Poon and one Azman who had visited him the day before the arrest and had spent time in the third bedroom playing computer games. According to the respondent, he did not take out the bag from the cupboard as it was PW3 who did. Satisfied that the defence had cast a reasonable doubt on the prosecution's case, the trial judge consequently acquitted and discharged the respondent pursuant to s. 182A(3) of the Criminal Procedure Code. Hence, the present appeal by the prosecution.

Held (dismissing appeal)
Per Mah Weng Kwai JCA delivering the judgment of the court:

(1) There was no merit in the appeal. The trial judge was correct in invoking the presumption of trafficking under s. 37(da) of the DDA against the respondent and in holding that the prosecution had established a *prima facie* case at the close of the prosecution's case and had called upon the respondent to enter his defence. If not for the invocation of the presumption of trafficking under s. 37(da)(vi) of the Act, the prosecution may well have not been able to establish a *prima facie* case against the respondent given the adverse rulings made by the trial judge. The presumption had been invoked based mainly on the prosecution's proven case that the respondent was found in *mens rea* possession of the ganja. (paras 29, 31 & 32)

(2) The drugs were found in an opaque bag in an unlocked cupboard in an unlocked bedroom of the respondent's apartment. This clearly demonstrated that the respondent who was occupying the apartment with his family did not have exclusive possession of the third bedroom. Further, it was proved that Poon and Azman frequently visited the respondent at his apartment and had used the third bedroom to play computer games. The suggestion by the respondent that the bag could have been left in the cupboard by either Poon or

A Azman the day before was not so inherently incredible that it could not be believed by a reasonable person altogether given that Poon and Azman were known to be frequent visitors to the respondent's apartment (paras 34-36)

B **(3)** It could not be gainsaid, on a beyond reasonable doubt basis, at the end of the defence case that the respondent was in *mens rea* possession of the bag and the ganja. The respondent had successfully rebutted the presumption invoked under s. 37(da)(vi) of the DDA. Even if it was incorrect for the trial C judge to have accepted the defence of the respondent that he had no knowledge of the bag and the ganja, applying an objective test, it might still be reasonably true that the bag may have been placed in the unlocked cupboard in the unlocked third bedroom by Poon or Azman. (para 40 & 41)

D ***Bahasa Malaysia Translation*** *Of Headnotes*

Bertindak atas maklumat yang diberikan oleh seorang yang bernama Poon bahawa satu aktiviti pengedaran dadah akan berlaku, satu perancangan serang hendap telah dirangka oleh pihak E polis. Poon telah ditahan pada malam sebelum itu kerana memiliki ganja secara salah. Sementara menunggu responden di tempat letak kereta, PW3 mengarahkan Poon menghubungi responden untuk meminta bekalan 1kg ganja. Selepas disoal siasat, Poon memaklumkan kepada pegawai polis ('PW3') bahawa dia telah F memperoleh ganja tersebut daripada responden. Setibanya di tempat letak kereta, responden ditahan oleh pihak polis. Responden kemudiannya membawa pihak polis ke bilik tidur ketiga dalam pangsapurinya di mana dia mengeluarkan sebuah beg 'Garfield' berwarna hitam dan kuning ('beg tersebut') daripada G bekas berwarna merah jambu dalam sebuah almari. Dalam beg tersebut terdapat ketulan bahan tumbuhan kering yang disyaki ganja, dibalut dengan kerajang aluminium. Di Mahkamah Tinggi, responden dituduh mengedar 931g ganja, satu kesalahan di bawah s. 39B(2) Akta Dadah Berbahaya 1952 ('ADB'). Di penutup kes H pendakwaan, Mahkamah Tinggi memutuskan bahawa responden mempunyai milikan *mens rea* ganja dan membangkitkan anggapan pengedaran di bawah s. 37(da)(vi) ADB. Dalam pembelaannya, responden menafikan mempunyai pengetahuan mengenai kewujudan beg tersebut dan bahawa beg tersebut ditinggalkan dalam almari I oleh Poon dan seorang lagi yang bernama Azman yang telah menziarahi Poon sehari sebelum penangkapannya dan telah

menghabiskan masa di dalam bilik tidur ketiga bermain permainan komputer. Menurut responden, dia tidak mengeluarkan beg tersebut daripada almari kerana PW3 yang berbuat sedemikian. Berpuas hati bahawa pembelaan telah menimbulkan keraguan munasabah ke atas kes pendakwaan, hakim bicara seterusnya melepaskan dan membebaskan responden di bawah s. 182A Kanun Tatacara Jenayah. Oleh itu, rayuan ini oleh pihak pendakwaan.

Diputuskan (menolak rayuan)
Oleh Mah Weng Kwai HMR menyampaikan penghakiman mahkamah:

(1) Tiada merit dalam rayuan. Hakim bicara betul dalam membangkitkan anggapan pengedaran di bawah s. 37(da) ADB terhadap responden dan dalam memutuskan bahawa pihak pendakwaan telah membuktikan kes *prima facie* di penutup kes pendakwaan dan telah memanggil responden untuk memasukkan pembelaannya. Jika tidak kerana bangkitan anggapan pengedaran di bawah s. 37(da)(vi) Akta, pihak pendakwaan tidak mungkin dapat membuktikan kes *prima facie* terhadap responden melihatkan pada keputusan bertentangan yang dibuat oleh hakim bicara. Anggapan telah dibangkitkan khasnya berdasarkan kes pendakwaan yang dibuktikan bahawa responden telah didapati mempunyai *mens rea* milikan ganja.

(2) Dadah-dadah tersebut ditemui dalam beg legap di dalam almari tidak berkunci di dalam bilik tidur tidak berkunci pangsapuri responden. Ini jelas menunjukkan bahawa responden yang menghuni pangsapuri tersebut dengan keluarganya tidak mempunyai milikan eksklusif bilik tidur ketiga. Selanjutnya, telah dibuktikan bahawa Poon dan Azman sering menziarahi responden di pangsapurinya dan menggunakan bilik tidur ketiga untuk bermain permainan komputer. Cadangan oleh responden bahawa beg telah ditinggalkan di dalam almari oleh sama ada Poon atau Azman sehari sebelum itu bukanlah sememangnya luar biasa hinggakan ia tidak boleh dipercayai oleh seorang yang munasabah secara keseluruhannya kerana Poon dan Azman diketahui merupakan pelawat kerap ke pangsapuri responden.

(3) Tidak boleh dinafikan, atas dasar melampaui keraguan munasabah, di penutup kes pendakwaan bahawa responden mempunyai milikan *mens rea* beg dan ganja. Responden telah berjaya menyangkal anggapan yang dibangkitkan di bawah

A s. 37(da)(vi) ADB. Jikapun adalah khilaf bagi hakim bicara untuk menerima pembelaan responden bahawa dia tidak mempunyai pengetahuan mengenai beg dan ganja, mengguna pakai ujian objektif, ia mungkin secara munasabahnya benar bahawa beg tersebut kemungkinan telah diletakkan dalam
B almari tidak berkunci dalam bilik tidur tidak berkunci itu oleh Poon atau Azman.

Case(s) referred to:
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
C *PP v. Chia Leong Foo [2000] 4 CLJ 649 HC* ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP v. Yuvaraj [1968] 1 LNS 116 PC ***(refd)***
Wan Yurillhami Wan Yaacob & Anor v. PP [2010] 1 CLJ 17 FC ***(refd)***

Legislation referred to:
D Criminal Procedure Code, ss. 112, 180, 182A(3)
Dangerous Drug Act 1952, ss. 37A(1)(b), 37(da)(vi), 39B(1)(a), (2), 40
Evidence Act 1950, ss. 5, 6, 7, 8, 9, 32(1)(i), 114(g)

For the prosecution - Awang Armadajaya Awang Mahmud; DPP
E *For the respondent - Muhammad Shafee Abdullah (Syed Muhammad Ismat & Al Firdaus Shahrul Naing with him); M/s Shafee & Co*

[Editor's note: For the High Court judgment, please see PP v. Ahmad Nashri Abdul Razak [2013] 1 LNS 273.]

F *Reported by Najib Tamby*

JUDGMENT

G **Mah Weng Kwai JCA:**

Prosecution's Case

[1] On 8 March 2008 at about 5pm, the respondent was arrested in the car park of his apartment at B 101, Block B, De
H Rozelle Condominium in Kota Damansara, Petaling Jaya (the condominium) on suspicion of drug trafficking.

[2] Acting on the information given by one Poon Weng Wai (Poon), on the date and time in question Inspector Nasrul
I Yamani bin Mohd Yusof (PW3) led a police party to the condominium and laid an ambush at the car park waiting for the return of the respondent. Poon was present with the police party.

[3] Poon had been arrested the night before by PW3 for being in unlawful possession of ganja. On interrogation Poon had informed PW3 that he had obtained the ganja from the respondent. Poon was able to inform PW3 of the name of the respondent, the type of car owned by the respondent and the name of the condominium where the respondent resided.

[4] While the police party and Poon were waiting for the respondent, PW3 instructed Poon to call the respondent on his (Poon's) mobile phone to request for the supply of 1kg of ganja.

[5] PW3 who had overheard the telephone conversation, said in his evidence that the respondent had told Poon to collect the ganja at his condominium.

[6] Eventually, the respondent was seen driving his car into the car park. The respondent's car was then blocked by PW3's car and the respondent was arrested by PW3 and his officers.

[7] On arrest, PW3 administered the caution (under s. 37A(1)(b) of the Dangerous Drug Act 1952 (the Act) to the respondent and in answer to a question by PW3, the respondent replied in the affirmative that he was keeping ganja in his apartment.

[8] The respondent then led PW3 and his officers upstairs to his apartment. There, the respondent unlocked the padlock of the grill door and opened it. The respondent then unlocked and opened the front wooden door leading into the apartment.

[9] Once inside, the respondent led PW3 and his officers into the third bedroom. Inside the bedroom, the respondent opened a cupboard and from a pink coloured container took out a black and yellow coloured "Garfield" bag which he handed over to PW3.

[10] On being asked what was inside the bag, the respondent had replied that it was ganja and on PW3's instructions, the respondent opened the bag.

[11] The respondent then handed the bag to PW3 who recovered a slab of dried plant material, suspected to be ganja, wrapped in aluminium foil. PW3 then seized the bag and arrested the respondent for an offence of trafficking in a dangerous drug.

[12] The respondent was charged with the offence of trafficking in 931g of cannabis (ganja) on 8 March 2008 at 5pm at B101, Block B, Kondominium De Rozelle, Kota Damansara, Petaling Jaya, an offence punishable under s. 39B(1)(a) of the Act read with s. 39B(2) of the same Act.

[13] The evidence of PW3 was substantially corroborated by the evidence of D/Sgt Ravin (PW8), D/Cpl Mohd Jamil (PW9) and WPC Syina (PW11).

[14] During the cross-examination of the prosecution witnesses, counsel for the respondent had at the earliest opportunity put the respondent's case to them that the respondent was not in possession, custody and control of the bag containing the ganja but instead the bag had been left in the cupboard by either Poon or by another person named Azman, a mutual friend of the respondent and Poon. It was further suggested to the witnesses that the respondent had placed a computer in the third bedroom of the apartment where the respondent and his friends Poon and Azman, used to play computer games.

Findings Of The Learned Trial Judge At The Close Of The Prosecution's Case

[15] Upon the objection raised by counsel for the respondent, the learned trial judge found as of fact that PW3 did not administer the caution to the respondent upon his arrest. This was because the learned Deputy Public Prosecutor had failed and/or omitted to ask PW3 to repeat the words of the caution and neither did PW3 volunteer to repeat the words in his evidence. Further, in the police report lodged by PW3 shortly after the arrest, PW3 had also failed and/or omitted to state that he had administered the caution to the respondent.

[16] Without the caution being administered to the respondent, the learned trial judge held that the purported answers given by the respondent in answer to the questions by PW3 that firstly, he was keeping ganja in his apartment and secondly he knew that there was ganja inside the bag, were inadmissible as the purported answers were given after the respondent had been arrested upon his arrival in the car park.

[17] That Poon was not a mere informer on the date and time in question to be granted "protection" under s. 40 of the Act. The learned trial judge held that Poon had played an active role in the entrapment of the respondent leading to his arrest and that Poon was undisputedly an agent provocateur, a material witness whom the prosecution ought to have called.

[18] Up to the close of the prosecution's case, the learned Deputy Public Prosecutor did not call Poon as a witness. Instead, the prosecution applied to the court to admit two witness statements recorded from Poon under s. 112 of the Criminal Procedure Code by Insp Nor Asmar binti Sulong (PW14). They were tendered on the ground that Poon was not available to be called as a witness as he had "absconded" to Thailand. The prosecution urged the court to invoke the provisions of s. 32(1)(i) of the Evidence Act 1950 to admit the statements. It will be noted that the first statement was recorded and signed by Poon on 16 November 2010 and whereas the second statement recorded on 16 December 2010 was not signed by Poon. These statements were recorded about three months after the trial of the respondent had commenced and when Poon was still serving sentence in the Seremban Prison. Poon was released on 9 August 2011 and left for Thailand on 15 August 2011.

The learned trial judge held, and quite rightly, that the prosecution could not just ask the court to invoke the provisions of s. 32(1)(i) of the Evidence Act by merely saying that Poon had absconded to Thailand. The prosecution had failed to apply for a bond for Poon to be called as a witness after his release from prison and neither did the police authorities request their counterpart in Thailand to look for and secure the presence of Poon as a witness in the trial.

The upshot of this unhealthy scenario was that the learned trial judge upon the objections of counsel for the respondent, was justified to invoke an adverse presumption under s. 114(g) of the Evidence Act against the prosecution's case for failing to call Poon as a witness. Thus, whatever evidence that was adduced from PW3 and his officers attributed to Poon was held inadmissible as being hearsay evidence. In particular, the statement by Poon to PW3 that he had obtained the ganja the previous night from the appellant was held inadmissible.

[19] The learned trial judge also held that PW3 ought to have:

(a) recorded the telephone conversation between Poon and the respondent when Poon was instructed by PW3 to call the respondent when the police party was waiting in ambush at the car park;

(b) checked the telephone records of the mobile phones of Poon and the respondent; and

(c) wore gloves when handling the bag upon recovery so that the bag could have been dusted for finger prints.

[20] The evidence of the presence of a dangerous drug in the urine sample of the respondent taken on the day he was arrested was held admissible as being relevant evidence under s. 5 of the Evidence Act read together with ss. 6 to 9. The learned trial judge held that that was *res gestae* evidence and admissible in that "it was evidence of facts which though not in issue are so related to each other as to form components of the principal fact and to form part of the same transaction".

In light of the urine sample results of the respondent, the learned trial judge held that the respondent was no stranger to ganja as he had consumed the ganja before his arrest by PW3.

[21] There was no breach in the chain of evidence in respect of the ganja seized by PW3.

Decision Of The Learned Trial Judge At The Close Of The Prosecution's Case

[22] At the close of the prosecution's case the learned trial judge after evaluating the evidence as mandated under s. 180 of the Criminal Procedure Code and as decided in *Balachandran v. PP* [2005] 1 CLJ 85; [2005] 2 MLJ 301 FC, held that the prosecution had succeeded in establishing a *prima facie* case against the respondent on the charge and called on the respondent to enter into his defence.

[23] The respondent was found to be in *mens rea* possession (ie, the physical and mental elements) of the 931g of ganja at the material time.

[24] As the respondent was found to be in *mens rea* possession of the ganja which was in excess of 200g the learned trial judge invoked the presumption of trafficking under s. 37(da)(vi) of the Act. As the evidential burden had shifted to the respondent, the court had to call for the defence so that the respondent could rebut the statutory presumption of "trafficking" by giving an explanation which might reasonably be true in order to cast a doubt on the prosecution's case (see *PP v. Yuvaraj* [1968] 1 LNS 116; [1969] 2 MLJ 89 and *PP v. Mohd Radzi b. Abu Bakar* [2006] 1 CLJ 457; [2005] 6 MLJ 393).

The Defence

[25] The respondent elected to give evidence on oath. He called two witnesses namely, Khairul Bahrin b. Abdul Rahman (DW2) a friend who would testify that Poon and Azman used to visit the respondent and play computer games in the third bedroom of the apartment, and Zurinah bte Hamzah (DW3) the respondent's wife.

[26] The evidence of the respondent may be summarised as follows:

(i) The bag and the slab of ganja did not belong to him;

(ii) He had no knowledge of the presence of the bag containing the slab of ganja inside the cupboard in the third bedroom of his apartment;

(iii) He did not inform PW3 that he had ganja in his apartment;

(iv) Poon was known to him;

(v) The bag was left in the cupboard of the third bedroom by either Poon or Azman;

(vi) The reason was because his friends including Poon and Azman used to visit him to play football and also computer games in the third bedroom;

(vii) Sometimes they would sleep over in the third bedroom and return to their respective homes the following day;

(viii) Some of his friends would also play 'sepak takraw' with him in the compound of the condominium and they would shower in his apartment before going back to their respective homes;

(ix) On 7 March 2008 at about 5pm, the day before his arrest both Poon and Azman had visited him;

(x) Both of them were together when they visited him;

(xi) Both of them went to the third bedroom to play computer games;

(xii) He did not see whether they had brought anything with them;

(xiii) At about 7pm, Poon left his apartment;

(xiv) Azman continued to play the computer games and only went home the following morning;

(xv) On 8 March 2008, the day of his arrest, he had attended a wedding reception at a friend's house. At no time did Poon call him and requested for the supply of 1kg of ganja.

(xvi) Upon his arrest he had told PW3 that Poon and Azman had visited him the day before;

(xvii) He had also told PW3 that Poon, a bachelor, stayed in Bandar Utama with his mother and Azman stayed in Sg. Buloh and that the two of them would visit him two or three times a week to play computer games;

(xviii) He had taken PW3 to his apartment because he wished to show PW3 that he was not keeping any drugs in his apartment;

(xix) He also told PW3 that if Poon or Azman had left anything in his apartment it would be in the third bedroom;

(xx) He did not take out the bag from the cupboard and hand it over to PW3;

(xxi) He did not open the bag to show the slab of ganja inside the bag to PW3;

(xxii) It was PW3 who took out the bag from the pink coloured container in the cupboard;

(xxiii) PW3 did not show the slab of ganja to him;

(xxiv) PW3 merely told him the bag contained drugs;

(xxv) It was only later when he and his wife were taken to the police station that PW3 showed the slab of ganja inside the bag to him; and

(xxvi) He was working and earning a monthly salary of RM2,500 prior to his arrest. He was not in financial difficulties and did not have to resort to the trafficking of ganja to support himself, his wife and his two young children.

Decision Of The Learned Trial Judge At The Close Of Defence

[27] At the conclusion of the trial, the learned trial judge was satisfied that the defence had succeeded in casting a doubt on the prosecution's case and consequently acquitted and discharged the respondent pursuant to s. 182A(3) of the Criminal Procedure Code.

[28] Being dissatisfied with the decision of the court, the learned Deputy Public Prosecutor filed an appeal to the Court of Appeal.

Decision Of The Court Of Appeal

[29] Upon reading the rekod rayuan and the submissions of the learned Deputy Public Prosecutor and counsel for the respondent and upon hearing the oral submissions of the learned Deputy Public Prosecutor and counsel aforesaid, the court found no merit in the appeal and unanimously dismissed the appeal.

[30] Being dissatisfied with the decision, the prosecution now wishes to appeal to the Federal Court.

Grounds Of Decision

[31] Upon considering the lengthy grounds of judgment, we are of the view that the learned trial judge was correct in invoking the presumption of trafficking under s. 37(da) of the Act against the respondent and in holding that the prosecution had established a *prima facie* case at the close of the prosecution's case and had called upon the respondent to enter his defence, notwithstanding that the learned trial judge had ruled that:

– PW3 had failed and/or omitted to administer the caution under s. 37A(1)(b) of the Act to the respondent and accordingly whatever statements made by the respondent to PW3 after his arrest were inadmissible;

– Poon was an agent provocateur and not a mere informer and ought to have been called as a witness (see *Wan Yurillhami Wan Yaacob & Anor v. PP* [2010] 1 CLJ 17 FC). Poon was not an ordinary informer whose identity was protected from disclosure (see s. 40 of the Act) and who need not be called as a witness in the prosecution's case.

– The two s. 112 witness statements of Poon were inadmissible as the prosecution had failed to satisfy the requirements of s. 32(1)(i) of the Evidence Act and as such, the evidence of PW3 on what was said to him by Poon was inadmissible as being hearsay evidence.

[32] In our judgment we are of the view and would venture to say, that if not for the invocation of the presumption of trafficking under s. 37(da)(vi) of the Act, the prosecution may well have not been able to establish a *prima facie* case against the respondent given the adverse rulings made by the learned trial judge contained in paras 7.1.1. to 7.1.3. above. The presumption had been invoked based mainly on the prosecution's proven case that the respondent was found in *mens rea* possession of the ganja.

[33] We are also of the view that the learned trial judge was correct when, after hearing the evidence of the respondent and his two witnesses, came to the conclusion that the respondent had successfully rebutted the presumption of trafficking under s. 37(da)(vi) of the Act and had cast a doubt on the prosecution's case.

[34] The drugs were found in an opaque bag in an unlocked cupboard in an unlocked bedroom of the respondent's apartment. This clearly demonstrated that the respondent who was occupying the apartment with his wife and child did not have exclusive possession of the third bedroom.

[35] It was proved in the evidence of the defence, that Poon and Azman frequently visited the respondent at his apartment and had used the third bedroom to play computer games.

[36] There were two opposing versions of evidence as to who had taken the bag out of the unlocked cupboard. The learned trial judge had found the respondent, after hearing his evidence and having observed his demeanour throughout the trial, to be a 'timid person' and believed his testimony that he had taken PW3 to the

third bedroom of his apartment but that he did not take out the bag from the unlocked cupboard or showed the contents of the bag to PW3.

The learned trial judge accepted the evidence of the respondent that he had no knowledge of the bag and its contents in the unlocked cupboard and that he was not the one who had put or kept the bag there. The suggestion by the respondent that the bag could have been left in the cupboard by either Poon or Azman the day before was not so inherently incredible that it could not be believed by a reasonable person altogether given that Poon and Azman were known to be frequent visitors to the respondent's apartment.

[37] As a matter of fact, it was said in evidence that Poon and Azman had visited the respondent the evening before the respondent was arrested. Poon most certainly is not a fictitious character as he was positively identified by PW3 during the course of the trial.

[38] The learned Deputy Public Prosecutor had contended in his submission that there was no basis for the respondent to allege that the respondent had been framed by the police on the charge. By this submission it demonstrates that the learned Deputy Public Prosecutor had clearly missed the wood for the trees on the point about the allegation of a frame up. The respondent did not allege a frame up by the police but that the frame up was by Poon who had in all probability left the bag in the cupboard and laid the blame on the head of the respondent.

[39] It was decided by Augustine Paul J (as he then was) in *Public Prosecutor v. Chia Leong Foo* [2000] 4 CLJ 649 that where there is a failure by the prosecution to call a witness, not deemed material during the prosecution's case but deemed material at the close of the defence case, who was present at the time of the incident as a rebuttal witness, at the close of the defence case, the benefit of the doubt ought to be given to the accused.

[40] In view of the conclusions arrived at by the learned trial judge, it could not be gainsaid on a beyond reasonable doubt basis, at the end of the defence case that the respondent was in *mens rea* possession of the bag and the ganja. The respondent had been able to successfully rebut the presumption invoked under s. 37(da)(vi) of the Act.

[41] Even if it was incorrect for the learned trial judge to have accepted the defence of the respondent that he had no knowledge of the bag and the ganja, applying an objective test, it might still be reasonably true that the bag may have been placed in the unlocked cupboard in the unlocked third bedroom by Poon or Azman as they were frequent visitors to the respondent's apartment and often played computer games in the third bedroom.

[42] It will be noted that the bag and the slab of ganja were neither sent for finger print dusting nor for DNA profiling by the Investigations Officer so as to incriminate the respondent.

Conclusion

[43] In the result, the order of acquittal and discharge made by the learned trial judge was correct and we see no grounds in the appeal that would attract appellate intervention.

[44] Accordingly the order of the High Court was affirmed.