ALMA NUDO ATENZA v. PP & ANOTHER APPEAL

FEDERAL COURT, PUTRAJAYA
RICHARD MALANJUM CJ
DAVID WONG DAK WAH CJ (SABAH & SARAWAK)
RAMLY ALI FCJ
BALIA YUSOF WAHI FCJ
ALIZATUL KHAIR OSMAN FCJ
ROHANA YUSUF FCJ
TENGKU MAIMUN TUAN MAT FCJ
ABANG ISKANDAR FCJ
NALLINI PATHMANATHAN FCJ
[CRIMINAL APPEALS NO: 05-94-05-2017(B)
& 05-193-08-2017(W)]
5 APRIL 2019

CRIMINAL LAW: *Dangerous drugs – Trafficking – Presumption of – Constitutional validity of s. 37A of Dangerous Drugs Act 1952 ('DDA') with reference to arts. 5, 8 and 121 of Federal Constitution ('FC') – Allowing usage of double presumptions to find possession as well as trafficking for charge under s. 39B of DDA – Principle of separation of powers – Whether Parliament empowered only to make laws – Whether judicial power vested exclusively in courts – Whether using presumption of possession to invoke presumption of trafficking under s. 37 of DDA harsh, oppressive and impermissible – Whether s. 37A of DDA offended requirement of fairness under arts. 5 and 8 of FC – Whether right to fair trial and presumption of innocence under art. 5 may be qualified by reference to principle of proportionality – Whether statutory words 'deemed possession' under s. 37(d) of DDA could be equated to 'found possession' to invoke presumption of trafficking under s. 37(da) of DDA – Whether plain reading of s. 37(d) and (da) permit concurrent application of both presumptions in prosecution of drug trafficking offence – Whether s. 37A of DDA prima facie violated presumption of innocence since it permitted accused to be convicted while reasonable doubt exists – Whether s. 37A of DDA unconstitutional for violating arts. 5(1) read with art. 8(1) of FC – Whether convictions and sentences of accused persons quashed under s. 39B and substituted with convictions under s. 12(1) of DDA*

CONSTITUTIONAL LAW: *Presumptions – Dangerous drugs – Offences – Constitutional validity of s. 37A of Dangerous Drugs Act 1952 ('DDA') with reference to arts. 5, 8 and 121 of Federal Constitution ('FC') – Allowing usage of double presumptions to find possession as well as trafficking for charge under s. 39B of Dangerous Drugs Act 1952 – Principle of separation of powers – Whether Parliament empowered only to make laws – Whether judicial power vested*

exclusively in courts – Whether using presumption of possession to invoke presumption of trafficking under s. 37 of DDA harsh, oppressive and impermissible – Whether s. 37A of DDA offended requirement of fairness under arts. 5 and 8 of FC – Whether right to fair trial and presumption of innocence under art. 5 may be qualified by reference to principle of proportionality – Whether statutory words 'deemed possession' under s. 37(d) could be equated to 'found possession' to invoke presumption of trafficking under s. 37(da) – Whether plain reading of s. 37(d) and (da) permit concurrent application of both presumptions in prosecution of drug trafficking offence – Whether s. 37A prima facie violated presumption of innocence since it permitted accused to be convicted while reasonable doubt exists – Whether s. 37A of DDA unconstitutional for violating arts. 5(1) read with art. 8(1)

CONSTITUTIONAL LAW: *Fundamental liberties – Presumption of innocence – Right to fair trial and presumption of innocence under art. 5 of Federal Constitution ('FC') – Offence of trafficking in dangerous drugs – Allowing usage of double presumptions to find possession as well as trafficking for charge under s. 39B of Dangerous Drugs Act 1952 ('DDA') – Constitutional validity of s. 37A of DDA with reference to arts. 5, 8 and 121 of FC – Whether using presumption of possession to invoke presumption of trafficking under s. 37 of DDA harsh, oppressive and impermissible – Whether s. 37A offended requirement of fairness under arts. 5 and 8 of FC – Whether right to fair trial and presumption of innocence under art. 5 may be qualified by reference to principle of proportionality – Whether plain reading of s. 37(d) and (da) of DDA permit concurrent application of both presumptions in prosecution of drug trafficking offence – Whether s. 37A prima facie violated presumption of innocence since it permitted accused to be convicted while reasonable doubt exists – Whether s. 37A of DDA unconstitutional for violating arts. 5(1) read with art. 8(1) of FC*

The common and central issue in the present appeals was on the constitutional validity of s. 37A of the Dangerous Drugs Act 1952 ('DDA') with reference to arts. 5, 8 and 121 of the Federal Constitution ('FC'). Each of the appellants in these two appeals was charged before and convicted by two different trial judges for drug trafficking. However, since both appeals were premised on one common and crucial issue, this court proceeded to hear them together. The first appellant in the first appeal, a national of the Philipphines, was caught red-handed carrying a bag containing 2556.4g of methamphetamine at the Kuala Lumpur International Airport ('KLIA') and was charged with an offence of trafficking in dangerous drugs under s. 39B(1)(a) of the DDA. The High Court Judge ruled that (i) for the element of possession, the presumption under s. 37(d) of the DDA could be invoked against the first appellant; and (ii) the bag was under the custody and control of the first appellant and that there was evidence to indicate the knowledge

of the first appellant. On the issue of trafficking, the trial judge ruled that in view of s. 37A of the DDA, the prosecution was allowed to invoke another presumption under s. 37(da)(xvi) as the weight of the methamphetamine exceeded 50g. Hence, the first appellant was convicted and charged and sentenced to death. The second appellant in the second appeal, a Thai national, was found to have brought a bag with her from Bahrain containing 693.4g of cocaine and was thus charged with trafficking in dangerous drugs under s. 39B(1)(a) of the DDA. The High Court observed that s. 37A of the DDA would allow the use of double presumptions, namely, the presumptions under s. 37(d) and (da) could be used together to prove 'possession and knowledge' and thereafter to prove 'trafficking.' The High Court Judge found that the elements of custody and control against the second appellant were proven, thus s. 37(d) applied and the second appellant was presumed to have possession and knowledge of the drugs. Further, since the weight of the cocaine exceeded the statutory stipulated weight, it was also ruled that s. 37(da)(ix) also applied. The High Court held that the second appellant failed to adduce evidence to rebut the presumptions under s. 37(d) and (da) of the DDA and accordingly, the second appellant was found guilty as charged and sentenced to death. Aggrieved, both the appellants appealed respectively against the said decisions. The Court of Appeal dismissed both the appellants' appeals. Before this court, both the appellants focused their submissions solely on the constitutionality of s. 37A of the DDA, which appeared to allow the use of double presumptions to find possession as well as trafficking for a charge under s. 39B of the DDA. The appellants' main ground for challenging the validity of s. 37A was based on the principle of separation of powers. The appellants submitted (i) under art. 74(1) of the FC, Parliament is empowered only to make laws; (ii) under art. 121(1), judicial power is vested exclusively in the courts; (iii) in the case of *Muhammed Hassan v. PP* ('*Muhammed Hassan*'), the Federal Court declared that using the presumption of possession to invoke the presumption of trafficking under s. 37 of the DDA was harsh, oppressive and thus impermissible; (iv) once the Federal Court had exercised judicial power on the matter, the Parliament could not interfere with the exercise by amending the DDA to legalise what had been declared illegal; and (v) by enacting s. 37A to overrule the decision of *Muhammed Hassan*, Parliament had exercised the judicial power of declaring law. The second ground of challenge raised by the appellants was based on arts. 5 and 8 of the FC. The appellants submitted that (i) art. 5(1) includes the right to a fair trial, which encompasses both procedural and substantive fairness; (ii) for all intents and purposes, s. 37A of the DDA has the effect of reversing the burden onto an accused to prove his or her innocence; (iii) where double presumptions are applied, it has been held in

Muhammed Hassan that the burden on the appellants to rebut both presumptions on the balance of probabilities was oppressive, unduly harsh and unfair; (iv) s. 37A offended the requirement of fairness housed under arts. 5 and 8 of the FC; (v) the right in art. 5(1) is absolute and could not be derogated; and (vi) the Federal Court in *Public Prosecutor v. Gan Boon Aun* had erred in holding that the right to a fair trial and the presumption of innocence under art. 5 may be qualified by reference to the principle of proportionality.

Held (quashing convictions and sentences of appellants under s. 39B of DDA; substituting their respective convictions to one of possession under s. 12(1) of DDA)

Per Richard Malanjum CJ delivering the judgment of the court:

(1) At the commencement of the hearing of these appeals, the respondent raised the issue that the appellants had not obtained leave from the Federal Court to challenge the constitutional validity of s. 37A of the DDA. It was submitted that pursuant to art. 4(4) of the FC, the appellants ought to have sought leave from the Federal Court to mount the present challenge. Article 4(4) only applies where the validity of a law is challenged on the ground that it makes provision with respect to a matter on which Parliament or the State Legislature has no power to make laws. The central question was related to the subject matter of the impugned law. Leave from the Federal Court is only required in proceedings for a declaration that a law is invalid on that specific ground. In such proceedings, the Federal Court has exclusive original jurisdiction to determine the matter. In the present appeals, the legislative competence of Parliament in respect of the subject matter of s. 37A of the DDA was not an issue. The basis of the appellants' challenge was that by enacting s. 37A which reversed the decision of the Federal Court in *Muhammed Hassan*, Parliament had usurped the judicial power of the Federation and fell foul of art. 121(1) of the FC. The appellants' reference to art. 74(1) was merely to draw attention to the words 'Parliament may make law' in support of that basis. Since the validity of s. 37A was not challenged on the ground that it related to a matter on which Parliament had no power to make laws, the challenge did not fall within the scope of art. 4(1) and leave was not required from this court. Therefore, the preliminary objection by the respondent had no merit and was dismissed accordingly. (paras 51, 55, 56, 61 & 62)

(2) The separation of powers between the Legislature, the Executive and the Judiciary is a hallmark of a modern democratic State. Thus, the separation of powers is not just a matter of administrative efficiency. At its core is the need for a check and balance mechanism to avoid the risk of abuse when power is concentrated in the same hands. Between

the three branches of Government, 'all the parts of it form a mutual check upon each other. The three parts, each part regulates and is regulated by the rest.' The separation of powers provides a brake to the exercise of Government power, the institutions are designed 'not only to cooperate but to conflict, as part of the pulley of checks and balances.' This court had, on several occasions, recognised that the principle of separation of powers and the power of the ordinary courts to review the legality of a State action, are sacrosanct and form part of the basic structure of the FC. Whether an enacted law is constitutionally valid is always for the courts to adjudicate and not for Parliament to decide. (paras 69-72 & 74)

(3) Section 37A does not purport to overrule the decision of the Federal Court in *Muhammed Hassan*. The finality of the decision in that case in respect of the rights and liabilities of the parties was unaffected. The effect of inserting s. 37A was to alter generally the law upon which that decision was based. Such an amendment was a permissible exercise of legislative power and did not encroach into the realm of judicial power. In inserting s. 37A, Parliament was only complying with the opinion of the Federal Court therein which stated that presumption upon presumption could only be permitted if 'upon the wordings of the two subsections, such an intention of the Parliament is clear.' As the bulwark of the FC and the rule of law, it is the duty of the courts to protect the FC from being undermined by the whittling away of the principles upon which it is based. The courts should jealously ensure that the powers of the Legislature and Executive are kept within their intended limits. Indeed, the role of the courts is generally to apply and interpret the law as laid down by Parliament. It is not for the courts to refuse to apply a new law solely on the ground that a court had previously expressed a particular view to the unamended version of the law. Thus, the first ground of challenge raised by the appellants was dismissed. (paras 88, 89 & 91-93)

(4) Article 5(1) is the foundational fundamental right upon which other fundamental rights enshrined in the FC draw their support. Depriving a person of his right under art. 5(1), the consequence is obvious in that his other rights under the FC would be illusory or unnecessarily restrained. But, at the same time, art. 5(1) is not all encompassing and each right protected in Part II has its own perimeters. Hence, the provisions of the FC should be read harmoniously. 'Law' as defined in art. 160(2) of the FC read with s. 66 of the Interpretation Acts 1948 and 1967 includes the common law of England. The concept of rule of law forms part of the common law of England. The 'law' in art. 5(1) and in other fundamental liberties provisions in the FC must

A therefore be in tandem with the concept of rule of law and not rule by law. A central tenet of the rule of law is the equal subjection of all persons to the ordinary law. People should be ruled by the law and be able to be guided by it. Thus, the law must be capable of being obeyed. (paras 98, 101 & 103)

B **(5)** Section 37A of the DDA begins with the phrase 'notwithstanding any written law or rule of law.' The words 'rule of law' in s. 37A refer to implied ancillary rules, such as the rules of procedure or evidence. It does not purport to exclude the rule of law as a legal concept. If it were to be interpreted otherwise, then that would be a rule by law and C could not be within the ambit of the term 'law' in art. 5(1) of the FC and hence unconstitutional. The principle of the rule of law, being a constitutional fundamental, could not be abrogated by mere statutory words. Accordingly, art. 5(1) which guarantees that a person shall not be deprived of his life or personal liberty save in accordance with law D envisages a State action that was fair both in point of procedure and substance. The fundamental principle of presumption of innocence, long recognised at common law, was included in the phrase 'in accordance with law'. However, the presumption of innocence is subject to implied limitations. A degree of flexibility was therefore required to strike a balance between the public interest and the right E of an accused person. (paras 108-110 & 112)

(6) When any State action is challenged as violating a fundamental right, such as the right to life or personal liberty under art. 5(1), art. 8(1) would at once be engaged such that the action must meet the test of F proportionality. Proportionality is an essential requirement of any legitimate limitation of an entrenched right. Proportionality calls for the balancing of different interests. In the balancing process, the relevant considerations include the nature of the right, the purpose for which the right was limited, the extent and efficacy of the limitation, G and whether the desired end could reasonably be achieved through other means less damaging to the right in question. The presumption of innocence is by no means absolute. Derogations or limits to the prosecution's duty to prove an accused's guilt beyond a reasonable doubt are carefully circumscribed by reference to some form of proportionality test. The application of the proportionality test in this H context strikes the appropriate balance between the competing interests of an accused and the State. The doctrine of proportionality and the all pervading nature of art. 8 form part of the common law of Malaysia, developed by our courts based on a prismatic interpretation of the FC without recourse to case law relating to the European I Convention of Human Rights. As such, the appellants' assertion that

art. 5 conferred an absolute right upon an accused to be presumed innocent until proven guilty and not subject to the doctrine of proportionality while disregarding art. 8, was unsupported by authority and without basis. (paras 119, 120, 125 & 126)

(7) Section 37A was legislated to permit the invocation of the two presumptions yet there was no amendment to the wording in sub-s. 37(da). The Federal Court held in *Muhammed Hassan* that based on the clear and unequivocal meaning of the statutory wording 'deemed possession' under s. 37(d) could not be equated to 'found possession' so as to invoke the presumption of trafficking under s. 37(da). To do so would be contrary to the ordinary meaning of the statutory language. As such, despite the insertion of s. 37A, a plain reading of the wording in subsections (d) and (da) does not permit the concurrent application of both the said presumptions in the prosecution of a drug trafficking offence. (para 128)

(8) To determine the effect of s. 37A, it is helpful first to consider generally the nature of presumptions. A true presumption takes effect when, upon the proof of one fact (the basic fact), the existence of another fact (presumed fact) is assumed in the absence of further evidence. Presumptions can be categorised into presumptions of law or presumptions of fact. The former involves actual legal rules, whereas the latter are no more than frequently recurring examples of circumstantial evidence. For the presumption under s. 37(d), a person's custody or control of a thing containing a dangerous drug, proved as a fact (the basic fact) was relevant to, but not decisive of, his possession and knowledge of the dangerous drug which need not be proved but merely deemed (the presumed fact). As for the presumption under s. 37(da), a person 'found' (which denotes the need first for an affirmative finding based on the evidence adduced) to be in possession of drugs exceeding a stipulated weight has a logical bearing on the inference of trafficking. The presumptions are largely a matter of logical inference. (paras 132-136)

(9) The presumptions in s. 37 are rebuttable. The phrase 'until the contrary is proved' imposes a legal burden on an accused to prove on a balance of probabilities that he was not in possession and had no knowledge of the drug (s. 37(d)), or that he was not in possession up to the statutory limit in weight of the drug for the purpose of trafficking (s. 37(da)). The weight of evidence required to rebut the presumption would depend on the circumstances of each case. The word 'shall' in both subsections indicates that each of the presumptions is mandatory in nature. However, the word 'may' in

A s. 37A suggests that the cumulative use of double or multiple presumptions is discretionary. But just because it is discretionary it does not *ipso facto* escape a constitutionality scrutiny. (paras 137 & 138)

(10) The effect of s. 37A on the operation of the two presumptions is (i) once the prosecution proves that an accused has the custody and B control of a thing containing a dangerous drug, the accused is presumed to have possession and knowledge of the drug under s. 37(d). The 'deemed possession' presumed by virtue of s. 37(d) is then used to invoke a further presumption of trafficking under s. 37(da), if the quantity of the drug involved exceeds the statutory weight limit; (ii) C s. 37A thus permits a 'presumption upon a presumption'; and (iii) as such for a charge of drug trafficking all that is required of the prosecution to establish a *prima facie* case is to prove custody and control on the part of the accused and the weight of the drug. The legal burden then shifts to the accused to disprove the presumptions of D possession and knowledge (s. 37(d) and trafficking (s. 37(da) on a balance of probabilities). Hence, s. 37A *prima facie* violated the presumption of innocence since it permitted an accused to be convicted while a reasonable doubt may exist. (paras 139 & 141)

(11) The presumptions under s. 37(d) and (da) relate to the three central E and essential elements of the offence of drug trafficking, namely possession of a drug, knowledge of the drug and trafficking. Once the essential ingredients of the offence are presumed, the accused is placed under a legal burden to rebut the presumptions on a balance of probabilities. It is a grave erosion to the presumption of innocence F housed in art. 5(1) of the FC. But the most severe effect, tantamount to being harsh and oppressive, arising from the application of a 'presumption upon presumption' is that the presumed element of possession under s. 37(d) is used to invoke the presumption of trafficking under s. 37(da) without any consideration that the element of possession in s. 37(da) requires a 'found' possession and not a G 'deemed' possession. The phrase 'any person who is found in possession of' entails an affirmative finding of possession based on adduced evidence. To invoke a presumption of trafficking founded not on proof of possession but on presumed possession based on proof of mere custody and control, constituted a grave departure from the H general rule that the prosecution was required to prove the guilt of an accused beyond a reasonable doubt. (paras 146-148)

(12) Based on the factors above – the essential ingredients of the offence, the imposition of a legal burden, the standard of proof required in rebuttal, and the cumulative effect of the two presumptions – this I court considered that s. 37A constituted a most substantial departure

from the general rule, which could not be justified and was disproportionate to the legislative objective it served. It was far from clear that the objective could not be achieved through other means less damaging to the accused's fundamental right under art. 5. In light of the seriousness of the offence and the punishment it entailed, the unacceptably severe incursion into the right of the accused under art. 5(1) was disproportionate to the aim of curbing crime, hence failed to satisfy the requirement of proportionality housed under art. 8(1). Accordingly, s. 37A was unconstitutional for violating art. 5(1) read with art. 8(1) of the FC. The impugned section was hereby struck down. Since there was no challenge to the use of a single presumption in these appeals, the invocation of s. 37(d) by the trial judges did not cause any miscarriage of justice to the detriment of the appellants. Hence, this court hereby quashed the convictions and sentences of both the appellants under s. 39B of the DDA and hereby substituted their respective convictions to one of possession under s. 12(1) and punishable under s. 39A(2) of the DDA. (paras 150-153)

Bahasa Malaysia *Headnotes*

Isu utama dalam rayuan-rayuan ini adalah kesahihan perlembagaan s. 37A Akta Dadah Berbahaya 1952 ('ADB') merujuk pada per. 5, 8 dan 121 Perlembagaan Persekutuan ('PP'). Setiap perayu dalam kedua-dua rayuan dituduh dan disabitkan oleh dua hakim bicara berbeza atas pengedaran dadah. Walau bagaimanapun, oleh kerana kedua-dua rayuan berdasarkan satu isu yang sama dan penting, mahkamah ini mendengarnya bersekali. Perayu pertama dalam rayuan pertama, seorang warganegara Filipina, telah ditangkap membawa sebuah beg mengandungi 2556.4g methamphetamine di Lapangan Terbang Kuala Lumpur ('KLIA') dan dituduh dengan kesalahan mengedar dadah berbahaya bawah s. 39B(1)(a) ADB. Hakim Mahkamah Tinggi memutuskan bahawa (i) untuk elemen milikan, anggapan bawah s. 37(d) ADB boleh digunakan terhadap perayu pertama; dan (ii) beg itu bawah milikan dan kawalan perayu pertama dan terdapat keterangan menunjukkan pengetahuan oleh perayu pertama. Berkenaan isu pengedaran, hakim bicara memutuskan mengikuti s. 37A ADB, pihak pendakwaan dibenarkan menggunakan anggapan lain bawah s. 37(da)(xvi) kerana berat methamphetamine melebihi 50g. Oleh itu, perayu pertama disabitkan dan dijatuhkan hukuman mati. Perayu kedua dalam rayuan kedua, seorang warganegara Thailand, didapati membawa beg dari Bahrain mengandungi 693.4g kokain dan dengan itu dituduh mengedar dadah berbahaya bawah s. 39B(1)(a) ADB. Mahkamah Tinggi, s. 37A ADB membenarkan penggunaan anggapan berganda, iaitu anggapan bawah s. 37(d) dan (da) boleh digunakan bersama-sama untuk membuktikan 'milikan dan pengetahuan' dan seterusnya membuktikan 'pengedaran'. Mahkamah Tinggi mendapati

elemen-elemen jagaan dan kawalan terhadap perayu kedua dibuktikan, oleh itu s. 37(d) diguna pakai dan perayu kedua dianggap mempunyai milikan dan pengetahuan dadah-dadah itu. Seterusnya, oleh kerana berat kokain melebihi berat statutori yang ditetapkan, diputuskan bahawa s. 37(da)(ix) juga terpakai. Mahkamah Tinggi memutuskan perayu kedua gagal mengemukakan keterangan untuk menyangkal anggapan-anggapan bawah s. 37(d) dan (da) ADB dan dengan itu, perayu kedua didapati bersalah dan dihukum mati. Terkilan, kedua-dua perayu masing-masing merayu terhadap keputusan-keputusan tersebut. Mahkamah Rayuan menolak kedua-dua rayuan perayu-perayu. Di hadapan mahkamah ini, kedua-dua perayu menumpukan hujahan mereka pada keperlembagaan s. 37A ADB, yang membenarkan penggunaan anggapan berganda untuk membuat dapatan milikan dan juga pengedaran bawah pertuduhan s. 39B ADB. Hujahan utama perayu-perayu dalam membantah kesahihan s. 37A adalah berdasarkan prinsip pemisahan kuasa. Perayu-perayu menghujahkan (i) bawah per. 74(1) PP, Parlimen diberi kuasa membuat undang-undang; (ii) bawah per. 121(1), kuasa kehakiman diberi secara eksklusif dalam mahkamah; (iii) dalam kes *Muhammad Hassan v. PP* ('*Muhammad Hassan*'), Mahkamah Persekutuan mengisytiharkan pemakaian anggapan milikan untuk menggunakan anggapan pengedaran bawah s. 37 ADB adalah agak keras, bersifat menindas dan dengan itu tidak dibenarkan; (iv) sebaik sahaja Mahkamah Persekutuan melaksanakan kuasa kehakiman atas perkara itu, Parlimen tidak boleh campur tangan dengan pelaksanaannya dengan meminda ADB untuk mengesahkan apa yang telah diisytiharkan haram; dan (v) dengan menggubal s. 37A untuk menolak keputusan *Muhammad Hassan*, Parlimen telah melaksanakan kuasa kehakiman mengisytiharkan undang-undang. Alasan kedua bantahan yang dibangkitkan perayu-perayu adalah berdasarkan per. 5 dan 8 PP. Perayu-perayu menghujahkan (i) per. 5(1) termasuk hak mendapatkan perbicaraan adil, yang merangkumi keadilan prosedural dan substantif; (ii) bagi maksud niat dan tujuan, s. 37A ADB mempunyai kesan menterbalikkan beban pembuktikan kepada tertuduh untuk membuktikan ketakbersalahannya; (iii) di mana anggapan berganda diguna pakai, kes *Muhammad Hassan* memutuskan bahawa beban atas perayu-perayu untuk menyangkal kedua-dua anggapan atas imbangan kebarangkalian adalah menindas, agak keras dan tidak adil; (iv) s. 37A melanggar keperluan keadilan yang telah ditetapkan bawah per. 5 dan 8 PP; (v) hak per. 5(1) adalah mutlak dan tidak boleh terjejas; dan (vi) Mahkamah Persekutuan dalam *Public Prosecutor v. Gan Boon Aun* terkhilaf dalam memutuskan bahawa hak mendapatkan perbicaraan adil dan anggapan ketakbersalahan bawah per. 5 boleh dibenarkan melalui rujukan pada prinsip kekadaran.

Diputuskan (membatalkan sabitan dan hukuman bawah s. 39B ADB; menggantikan sabitan masing-masing dengan sabitan milikan bawah s. 12(1) DDA):
Oleh Richard Malanjum KHN menyampaikan penghakiman mahkamah:

(1) Di permulaan perbicaraan rayuan-rayuan ini, responden membangkitkan isu bahawa perayu-perayu tidak memperoleh kebenaran Mahkamah Persekutuan untuk membantah kesahihan perlembagaan s. 37A ADB. Dihujahkan bahawa menurut per. 4(4) PP, perayu sepatutnya memohon kebenaran Mahkamah Persekutuan untuk membawa bantahan ini. Perkara 4(4) hanya diguna pakai apabila kesahihan undang-undang dibantah atas alasan ia membuat peruntukan berkenaan perkara-perkara yang Parlimen atau Badan Perundangan Negeri tidak mempunyai kuasa menggubal undang-undang. Soalan utama berhubung perkara undang-undang yang dipertikaikan. Kebenaran Mahkamah Persekutuan hanya diperlukan dalam prosiding-prosiding untuk pengisytiharan bahawa undang-undang tidak sah atas alasan spesifik. Dalam prosiding-prosiding sebegitu, Mahkamah Persekutuan mempunyai bidang kuasa asal eksklusif untuk menentukan perkara-perkara itu. Dalam rayuan-rayuan ini, kekompetenan legislatif Parlimen berhubung perkara s. 37A ADB bukan satu isu. Dasar bantahan perayu adalah dengan menggubal s. 37A yang mengakas keputusan Mahkamah Persekutuan dalam kes *Muhammad Hassan*, Parlimen telah merampas kuasa kehakiman Persekutuan dan mencemari semangat per. 121(1) PP. Rujukan perayu-perayu pada per. 74(1) hanyalah untuk menarik perhatian pada perkataan-perkataan 'Parlimen boleh membuat undang-undang' untuk menyokong dasar itu. Oleh kerana kesahihan s. 37A tidak dibantah atas alasan ini berhubungan perkara di mana Parlimen tidak mempunyai kuasa untuk membuat undang-undang, bantahan tidak terangkum dalam skop per. 4(1) dan kebenaran tidak diperlukan daripada mahkamah ini. Oleh itu, bantahan awalan responden tidak bermerit dan ditolak.

(2) Pemisahan kuasa antara badan Perundangan, Eksekutif dan badan Kehakiman adalah ciri-ciri sebuah negara demokratik moden. Oleh itu, pemisahan kuasa bukan hanya perkara kecekapan pentadbiran. Terasnya adalah keperluan untuk satu mekanisme sekatan dan imbangan untuk mengelak risiko penyalahgunaan apabila kuasa ditumpukan pada satu pihak. Antara ketiga-tiga cawangan Kerajaan, 'semua bahagian itu membentuk satu pemeriksaan saling atas satu sama lain. Ketiga-tiga bahagian, setiap bahagian mengawal selia dan dikawal selia oleh bahagian-bahagian lain.' Pemisahan kuasa bertindak sebagai sekatan terhadap pelaksanaan kuasa Kerajaan, institusi-

institusi dibentuk 'bukan hanya untuk bekerjasama tetapi untuk bercanggah, sebagai sebahagian daripada takal sekatan dan imbangan'. Mahkamah ini telah, beberapa kali, mengiktiraf bahawa prinsip pemisahan kuasa dan kuasa mahkamah biasa untuk menyemak semula kesahan satu tindakan Negeri, adalah amat penting dan membentuk sebahagian bentuk struktur asas PP. Sama ada satu undang-undang yang digubal berdasarkan perlembagaan sahih adalah untuk mahkamah menghakimi dan bukan untuk Parlimen memutuskan.

(3) Seksyen 37A tidak bertujuan untuk menolak keputusan Mahkamah Persekutuan dalam *Muhammad Hassan*. Kemuktamadan kes itu berhubung hak-hak dan liabiliti-liabiliti pihak-pihak tidak terjejas. Kesan memasukkan s. 37A adalah untuk mengubah secara umumnya undang-undang di mana keputusan itu didasarkan. Pindaan sebegitu adalah satu latihan kuasa legislatif yang dibenarkan dan tidak mencerobohi bidang kuasa kehakiman. Dalam memasukkan s. 37A, Parlimen hanya mematuhi pendapat Mahkamah Persekutuan yang menyatakan anggapan atas anggapan hanya boleh dibenarkan jika 'atas pengungkapan dua subseksyen itu, niat Parlimen adalah jelas.' Sebagai birai PP dan kedaulatan undang-undang, mahkamah-mahkamah bertanggungjawab melindungi PP daripada dilemahkan oleh prinsip-prinsip yang semakin kikis yang terhadapnya PP didasarkan. Mahkamah-mahkamah harus memastikan kuasa-kuasa badan Perundangan dan Eksekutif disimpan dalam had-had yang diniatkan. Sesungguhnya, peranan mahkamah adalah untuk secara am mengguna pakai dan mentafsirkan undang-undang seperti yang dibentangkan oleh Parlimen. Bukan untuk mahkamah menolak untuk mengguna pakai undang-undang baharu hanya atas alasan mahkamah telah sebelum ini menyatakan satu pandangan tertentu untuk versi undang-undang tidak dipinda. Oleh itu, alasan pertama bantahan yang dibangkitkan oleh perayu-perayu ditolak.

(4) Perkara 5(1) adalah hak asasi di mana hak asasi lain yang disemadikan dalam PP mendapat sokongan. Menafikan seseorang hak bawah per. 5(1), akibatnya jelas iaitu hak-hak lain bawah PP tidak menjadi kenyataan atau dihalang. Tetapi, pada masa yang sama, per. 5(1) tidak sama sekali merangkumi segalanya dan setiap hak yang dilindungi dalam Bahagian II mempunyai parameter tersendiri. Oleh itu, peruntukan-peruntukan PP harus dibaca secara harmoni. 'Undang-undang' seperti ditakrifkan dalam per. 160(2) PP dibaca dengan s. 66 Akta Tafsiran 1948 dan 1967 termasuk common law di England. 'Undang-undang' dalam per. 5(1) dan dalam peruntukan-peruntukan kebebasan asasi dalam PP dengan itu harus selari dengan konsep

kedaulatan undang-undang dan bukan pemerintahan undang-undang. Satu rukun pusat kedaulatan undang-undang adalah ketertaklukan sama bagi semua orang di sisi undang-undang. Rakyat seharusnya diperintah oleh undang-undang dan mampu untuk diberi panduan olehnya. Oleh itu, undang-undang harus berupaya untuk dipatuhi.

(5) Seksyen 37A ADB dimulakan dengan frasa 'walaupun undang-undang bertulis atau kedaulatan undang-undang.' Perkataan-perkataan 'kedaulatan undang-undang' dalam s. 37A merujuk pada peraturan-peraturan sampingan tersirat, seperti peraturan-peraturan prosedur atau keterangan. Ini tidak bertujuan untuk mengecualikan kedaulatan undang-undang sebagai konsep undang-undang. Jika ditafsirkan sebaliknya, ini akan menjadi pemerintahan undang-undang dan tidak boleh terangkum dalam skop terma 'undang-undang' dalam per. 5(1) PP dan oleh itu tidak mengikut perlembagaan. Prinsip kedaulatan undang-undang, sebagai satu asas berperlembagaan, tidak boleh dibatalkan hanya oleh perkataan-perkataan statutori. Sewajarnya, per. 5(1) menjamin bahawa seseorang tidak akan dinafikan hak hidup atau kebebasan peribadi kecuali mengikut undang-undang menjangkakan satu tindakan Negeri yang adil dari segi prosedur dan inti pati. Prinsip asas anggapan ketakbersalahan, yang telah lama diiktiraf dalam common law, termasuk dalam frasa 'sejajar dengan undang-undang.' Walau bagaimanapun, anggapan ketakbersalahan tertakluk pada had-had tersirat. Satu darjah kebolehubahan, oleh itu, diperlukan untuk mencari keseimbangan antara kepentingan awam dan hak tertuduh.

(6) Apabila mana-mana tindakan Negeri dicabar kerana melanggar hak asasi, seperti hak untuk hidup atau kebebasan peribadi bawah per. 5(1), per. 8(1) akan serta-merta digunakan dan tindakan itu harus memenuhi ujian kekadaran. Kekadaran adalah keperluan penting mana-mana had sah hak yang berakar umbi. Kekadaran meminta keseimbangan kepentingan berbeza. Dalam proses keseimbangan, pertimbangan-pertimbangan relevan termasuk sifat hak, tujuan hak dihadkan, takat dan kemujaraban had, dan sama ada keputusan akhir yang diingini boleh dicapai melalui cara-cara lain yang kurang menjejaskan hak yang dipersoalkan. Anggapan ketakbersalahan tidak mutlak. Pengurangan atau had atas tanggungjawab pihak pendakwaan untuk membuktikan kesalahan tertuduh melampaui keraguan munasabah dibatasi dengan berhati-hati melalui rujukan pada sesetengah bentuk ujian kekadaran. Pemakaian ujian kekadaran dalam konteks ini cuba untuk mencapai keseimbangan yang sesuai antara kepentingan-kepentingan tertuduh dan Negeri. Doktrin kekadaran dan sifat per. 8 membentuk sebahagian common law Malaysia, yang

dibangunkan oleh mahkamah kita berdasarkan tafsiran prismatik PP tanpa rekursa pada kes undang-undang berhubung European Convention of Human Rights. Oleh itu, penegasan perayu bahawa per. 5 memberi hak mutlak kepada tertuduh untuk dianggap tidak bersalah sehingga dibuktikan kesalahannya dan tidak tertakluk pada doktrin kekadaran sementara tidak mengendahkan per. 8, tidak disokong autoriti dan tidak berasas.

(7) Seksyen 37A digubal untuk membenarkan penggunaan dua anggapan tetapi tiada pindaan dibuat pada kata-kata dalam sub-s. 37(da). Mahkamah Persekutuan memutuskan dalam kes *Muhammad Hassan* bahawa berdasarkan maksud yang jelas dan terang perkataan statutori 'deemed possession' bawah s. 37(d) tidak boleh disamakan dengan 'found possession' untuk menggunakan anggapan pengedaran bawah s. 37(da). Untuk berbuat demikian akan bertentangan dengan maksud biasa bahasa statutori. Oleh itu, walaupun s. 37A dimasukkan, bacaan perkataan-perkataan dalam sub-s. (d) dan (da) tidak membenarkan pemakaian serentak kedua-dua anggapan tersebut dalam pendakwaan kesalahan pengedaran dadah.

(8) Untuk menentukan kesan s. 37A, harus dipertimbangkan secara am sifat anggapan-anggapan. Anggapan sebenar mulai berkuat kuasa apabila, atas bukti satu fakta (fakta asas), kewujudan fakta yang lain (fakta yang dianggap) dianggap tanpa keterangan lanjut. Keterangan-keterangan boleh dikategorikan pada anggapan undang-undang atau anggapan fakta. Anggapan undang-undang melibatkan peraturan-peraturan undang-undang, dan anggapan-anggapan fakta tidak lebih daripada contoh-contoh keterangan ikut keadaan. Untuk anggapan bawah s. 37(d), jagaan dan kawalan seseorang terhadap sesuatu yang mengandungi dadah berbahaya, yang dibuktikan secara fakta (fakta asas) adalah relevan pada, tapi tidak muktamad, milikan dan pengetahuannya berkenaan dadah berbahaya yang tidak perlu dibuktikan tetapi hanya dianggap (fakta yang dianggap). Untuk anggapan bawah s. 37(da), seseorang yang 'ditemui' (yang menandakan keperluan pertama untuk dapatan afirmatif berdasarkan keterangan yang dikemukakan) mempunyai milikan atas dadah-dadah melebihi berat yang ditentukan mempunyai satu kedudukan logik atas inferens pengedaran. Anggapan-anggapan adalah sebahagian besarnya hal inferens yang logikal.

(9) Anggapan-anggapan bawah s. 37 boleh disangkal. Frasa 'sehingga boleh dibuktikan sebaliknya' mengenakan beban perundangan ke atas tertuduh untuk membuktikan atas imbangan kebarangkalian bahawa dia tidak mempunyai milikan atau pengetahuan berkenaan dadah (s. 37(d)), atau dia tidak mempunyai milikan setakat had statutori dari

segi berat dadah untuk tujuan pengedaran (s. 37(da)). Berat keterangan yang diperlukan untuk menyangkal anggapan bergantung pada keadaan setiap kes. Perkataan 'shall' dalam kedua-dua subseksyen menunjukkan setiap anggapan adalah bersifat mandatori. Walau bagaimanapun, perkataan 'may' dalam s. 37A mencadangkan bahawa penggunaan kumulatif anggapan berganda atau berbilang adalah mengikut budi bicara. Tetapi hanya kerana ini mengikut budi bicara tidak *ipso facto* terlepas daripada satu pemeriksaan rapi berperlembagaan.

(10) Kesan s. 37A atas operasi kedua-dua anggapan adalah (i) sebaik sahaja pihak pendakwaan membuktikan tertuduh mempunyai jagaan dan kawalan atas sesuatu yang mengandungi dadah berbahaya, tertuduh dianggap mempunyai milikan dan pengetahuan berkenaan dadah bawah s. 37(d). 'Deemed possession' yang dianggap bawah s. 37(d) kemudiannya dipakai untuk menggunakan anggapan pengedaran bawah s. 37(da), jika kuantiti dadah yang terlibat melebihi had berat statutori; (ii) s. 37A oleh itu membenarkan 'anggapan atas anggapan'; dan (iii) oleh itu untuk pertuduhan pengedaran dadah, yang diperlukan adalah untuk pihak pendakwaan membuktikan satu kes *prima facie* untuk membuktikan jagaan dan kawalan oleh pihak tertuduh dan berat dadah yang terlibat. Beban perundangan kemudiannya beralih pada tertuduh untuk menyangkal anggapan-anggapan milikan dan pengetahuan (s. 37(d) dan pengedaran (s. 37(da) atas imbangan kebarangkalian). Oleh itu, s. 37A *prima facie* melanggar ketakbersalahan kerana membenarkan tertuduh disabitkan walaupun keraguan munasabah masih wujud.

(11) Anggapan-anggapan bawah s. 37(d) dan (da) berkaitan tiga elemen penting kesalahan pengedaran dadah, iaitu milikan dadah, pengetahuan mengenai dadah dan pengedaran. Sebaik sahaja inti pati-inti pati penting kesalahan dianggap, tertuduh mempunyai beban perundangan untuk menyangkal anggapan-anggapan atas imbangan kebarangkalian. Ini satu hakisan serius terhadap anggapan ketakbersalahan bawah per. 5(1) PP. Tetapi kesan paling parah, iaitu agak keras dan bersifat menindas, yang berbangkit daripada pemakaian 'anggapan atas anggapan' adakah anggapan elemen milikan bawah s. 37(d) yang dipakai untuk menggunakan anggapan pengedaran bawah s. 37(da) tanpa mempertimbangkan elemen milikan bawah s. 37(da) memerlukan milikan 'found' dan bukan milikan 'deemed'. Frasa 'sesiapa yang didapati mempunyai milikan' melibatkan satu dapatan afirmatif berdasarkan keterangan yang dikemukakan. Untuk menggunakan anggapan pengedaran yang didapati bukan atas bukti milikan tetapi anggapan milikan berdasarkan bukti jagaan dan

kawalan, menyimpang daripada peraturan am bahawa pihak pendakwaan perlu membuktikan kesalahan tertuduh melampaui keraguan munasabah.

(12) Berdasarkan faktor-faktor di atas – inti pati-inti pati penting kesalahan, pengenaan beban perundangan, standard pembuktian yang diperlukan untuk menyangkal, dan kesan kumulatif kedua-dua anggapan – mahkamah ini mengambil kira bahawa s. 37A menyimpang daripada peraturan am, yang tidak boleh dijustifikasikan dan tidak setimpal dengan objektif legislatif. Ini jauh daripada jelas bahawa objektif tidak boleh dicapai melalui cara lain yang kurang menjejaskan hak asasi tertuduh bawah per. 5. Berdasarkan keseriusan kesalahan dan hukuman yang dikenakan, serangan yang tidak dapat diterima ke atas hak tertuduh bawah per. 5(1) tidak setimpal dengan tujuan mengawal jenayah, oleh itu gagal memenuhi keperluan kekadaran bawah per. 8(1). Maka, s. 37A tidak mengikut perlembagaan kerana melanggar per. 5(1) dibaca dengan per. 8(1) PP. Seksyen yang dipertikaikan dengan itu dibatalkan. Oleh kerana tiada bantahan terhadap penggunaan satu anggapan dalam rayuan-rayuan ini, penggunaan s. 37(d) oleh hakim-hakim bicara tidak menyebabkan mana-mana salah laksana keadilan yang memudaratkan perayu-perayu. Oleh itu, mahkamah ini membatalkan tuduhan dan hukuman kedua-dua perayu bawah s. 39B ADB dan menggantikannya dengan sabitan milikan bawah s. 12(1) dan dihukum bawah s. 39A(2) ADB.

Case(s) referred to:

Ah Thian v. Government of Malaysia [1976] 1 LNS 3 FC ***(refd)***
Attorney-General of Hong Kong v. Lee Kwong-Kut [1993] AC 951 ***(refd)***
Attorney General's Reference (No 4 of 2002) [2005] 1 All ER 237 ***(refd)***
Badan Peguam Malaysia v. Kerajaan Malaysia [2008] 1 CLJ 521 FC ***(refd)***
Bugdaycay v. Secretary of State for the Home Department [1987] AC 514 ***(refd)***
Cheviti Venkanna Yadav v. State of Telangana [2017] 1 SCC 283 ***(refd)***
Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus [1984] 1 CLJ 28; [1984] 1 CLJ (Rep) 98 ***(refd)***
DPP v. Mollison (No 2) [2003] UKPC 6 ***(refd)***
Dr Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia [2007] 1 CLJ 19 CA ***(refd)***
East Union (Malaya) Sdn Bhd v. Government of State of Johore & Government of Malaysia [1980] 1 LNS 18 FC ***(refd)***
Gerald Fernandez v. Attorney-General, Malaysia [1970] 1 LNS 27 FC ***(refd)***
Gin Poh Holdings Sdn Bhd v. The Government of the State of Penang & Ors [2018] 4 CLJ 1 FC ***(refd)***
Hinds v. The Queen [1977] AC 195 ***(refd)***
In Re Mohamad Ezam Mohd Nor [2002] 5 CLJ 156 HC ***(refd)***
In the matter of Cauvery Water Disputes Tribunal [1993] Supp 1 SCC 96 (II) ***(refd)***
Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals [2018] 3 CLJ 145 FC ***(dist)***

Indira Nehru Gandhi v. Shri Raj Narain [1975] 2 SCC 159 ***(dist)***
J Raz, The Rule of Law and its Virtue (1977) 93 LQR 195 ***(refd)***
Janapada Sabha Chhindwara v. The Central Provinces Syndicate Ltd [1970] 1 SCC 509 ***(refd)***
Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC ***(refd)***
Liyanage v. The Queen [1967] 1 AC 259 ***(refd)***
Maneka Gandhi v. Union of India AIR 1978 SC 59 ***(refd)***
Matadeen v. Pointu [1998] UKPC 9 ***(refd)***
Medical Council of India v. State of Kerala (Writ Petition (C) No 178 & 231 of 2018) ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
Ong Ah Chuan v. PP [1980] 1 LNS 181 PC ***(refd)***
Ooi Kean Thong & Anor v. PP [2006] 2 CLJ 701 FC ***(refd)***
Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC ***(refd)***
PP v. Datuk Harun Hj Idris & Ors [1976] 1 LNS 180 HC ***(refd)***
PP v. Gan Boon Aun [2017] 4 CLJ 41 FC ***(refd)***
PP v. Pung Chen Choon [1994] 1 LNS 208 SC ***(refd)***
PP v. Su Liang Yu [1976] 1 LNS 113 HC ***(refd)***
R v. Johnstone [2003] UKHL 28 ***(refd)***
R v. Kirby; ex p Boilermakers' Society of Australia [1956] ALR 163 ***(refd)***
R v. Lambert [2001] UKHL 37 ***(refd)***
R v. Oakes [1986] 1 SCR 103 ***(refd)***
R v. Whyte [1988] 51 DLR (4th) 481 ***(refd)***
R (Anderson) v. Secretary of State for the Home Department [2002] UKHL 46 ***(refd)***
Rethana M Rajasigamoney v. The Government of Malaysia [1984] 1 CLJ 352; [1984] 1 CLJ (Rep) 323 FC ***(refd)***
Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case [2017] 5 CLJ 526 FC ***(refd)***
Shaw v. DPP [1962] AC 220 ***(refd)***
Sheldrake v. Director of Public Prosecutions; Attorney General's Reference (No 4 of 2002) [2005] 1 All ER 237 ***(refd)***
Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2010] 3 CLJ 507 FC ***(refd)***
S R Bhagwat v. State of Mysore [1995 6 SCC 16 ***(refd)***
ST Sadiq v. State Of Kerala [2015] 4 SCC 400 ***(dist)***
State v. Coetzee [1997] 2 LRC 593 ***(refd)***
State v. Makwanyane [1995] 1 LRC 269 ***(refd)***
State Government of Negeri Sembilan & Ors v. Muhammad Juzaili Mohd Khamis & Ors [2015] 8 CLJ 975 FC ***(not foll)***
State of Haryana v. Karnal Coop Farmers' Society Ltd [1993] 2 SCC 363 ***(refd)***
Syarikat Banita Sdn Bhd v. Government of State of Sabah [1977] 1 LNS 125 FC ***(refd)***
Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 CA ***(refd)***
The State v. Khoyratty [2006] UKPC 13 ***(refd)***
Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri & Ors [2014] 6 CLJ 541 FC ***(not foll)***
Victorian Stevedoring & General Contracting Co Pty Ltd v. Dignan [1932] ALR 22 ***(refd)***
Woolmington v. Director of Public Prosecutions [1935] AC 462 ***(refd)***
Yeoh Tat Thong v. Government of Malaysia & Anor [1973] 1 LNS 180 FC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 78(1)
Dangerous Drugs Act 1952, ss. 2, 12(1), 37A, 37(d), (da)(ix), (xvi), 39B
Federal Constitution, arts. 4(1), (3), (4), 5(1), 8(1), 9, 10, 11, 74(1), 75, 121(1), 128(1)(a), 160(2)
Interpretation Acts 1948 and 1967, s. 66

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H Barnett, *Constitutional and Administrative Law,* 2nd edn, London: Cavendish Publishing, 1998, p 90
L Thio, *A Treatise on Singapore Constitutional Law (Singapore: Academy Publishing, 2012),* p 160

(Criminal Appeal No: 05-94-05-2017(B))
For the appellant - Gopal Sri Ram, Srimurugan Alagan, Surjan Singh, R Kengadharan, Jamil Mohamed Shafie, Emily Wong, Magita Hari Mogan, Yasmeen Soh, How Li Nee, Nursyazwani Ilyana Iskandar Dzulkarnain, Hussein Akhtar, Sathiswaranji Samy; M/s Srimurugan & Co
For the respondent - Nik Suhaimi Nik Sulaiman, Mohd Dusuki Mokhtar, Ku Hayati Ku Haron & Hamdan Hamzah; DPPs

(Criminal Appeal No: 05-193-08-2017(W))
For the appellant - Gopal Sri Ram, A Jeyaseelen, Rajpal Singh, Emily Wong, Magita Hari Mogan, Yasmeen Soh, How Li Nee; M/s Jeyaseelen & Co
For the respondent - Nik Suhaimi Nik Sulaiman, Mohd Dusuki Mokhtar, Ku Hayati Ku Haron & Hamdan Hamzah; DPPs

[Editor's note: For the Court of Appeal judgment, please see Alma Nudo Atenza v. PP [2017] 1 LNS 979 (Varied).
For the High Court judgment, please see [2016] 1 LNS 465 (Varied).]

Reported by Suhainah Wahiduddin

JUDGMENT

Richard Malanjum CJ:

Introduction

[1] The common and central issue in the present appeals is on the constitutional validity of s. 37A of the Dangerous Drugs Act 1952 ("DDA"), with reference to arts. 5, 8, and 121 of the Federal Constitution ("FC").

[2] Each of the appellants in these two appeals was charged before and convicted by two different trial judges for drug trafficking under s. 39B of the DDA. However, since both appeals were premised on one common and crucial issue, we proceeded to hear them together while conscious of the fact that, on merits, these two appeals might differ. We therefore heard submissions on the common issue of these two appeals.

[3] This is a unanimous judgment of the remaining judges of the court delivered pursuant to s. 78(1) of the Courts of Judicature Act 1964. Mr Justice Balia Yusof bin Haji Wahi has since retired on 25 March 2019.

The Salient Facts

Criminal Appeal No. 05-94-05-2017(B) ("First Appeal")

[4] The charge against the appellant in the first appeal (hereinafter "first appellant" for ease of reference) read as follows:

> Bahawa kamu pada 19 Ogos 2014 lebih kurang jam 2.00 pagi di Cawangan Pemeriksaan Penumpang 2 (CPP2) Balai Ketibaan Antarabangsa, Lapangan Terbang Antarabangsa Kuala Lumpur (KLIA), di dalam negeri Selangor Darul Ehsan telah didapati mengedar dadah berbahaya iaitu Methamphetamine seberat 2556.4 gram dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[5] The first appellant, a national of the Republic of the Philippines, travelled from Hong Kong to Malaysia by flight on 19 August 2014. Upon her arrival at KLIA at about 2am, a customs enforcement officer ('PW3') saw the first appellant in the queue and had her bag ('P7') scanned. Upon scanning, PW3 saw a suspicious image inside the bag. He requested a customs officer ('PW6') to examine the bag further.

[6] On physical examination of the contents of the bag, PW6 discovered that it contained several new handbags. He then removed one of the handbags for scanning. PW3 saw a suspicious image inside the handbag. He requested PW6 to place the handbag back into the bag. The first appellant and the bag were then brought to an examination room where they were handed over to an investigating officer ('PW7').

[7] Instructed by PW7, PW6 conducted a search of the bag in the presence of the first appellant. The bag was found to contain clothings, shoes and nine packages of handbags wrapped in clear plastic. Each handbag was found to contain four packages, wrapped with yellow coloured tape and concealed inside the inner back cover of each of the handbags. A total of 36 packages were recovered from the nine handbags. Each package contained crystalline substance.

[8] Using a test kit, PW6 found that the substance in each package tested positive for methamphetamine. The substances were sent to the Chemistry Department for analysis and were confirmed to contain in total 2556.4g of methamphetamine.

Criminal Appeal No. 05-193-08-2017 (W) ("Second Appeal")

[9] The charge against the appellant in the second appeal (hereinafter "second appellant" for ease of reference) was as follows:

> Bahawa kamu pada 1 Julai 2014 jam lebih kurang 8.30 malam di bilik nombor 919, Arena Star Luxury Hotel, Jalan Hang Lekiu, di dalam Wilayah Persekutuan Kuala Lumpur telah didapati mengedar dadah merbahaya iaitu Cocaine seberat 693.4g dan dengan itu telah melakukan kesalahan dibawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

[10] The second appellant, a Thai national, travelled by flight from Bangkok to Bahrain on 26 June 2014, and thereafter from Bahrain to Kuala Lumpur *via* Abu Dhabi on 29 June 2014 on Etihad Airways. At the Bahrain airport, the second appellant checked in a bag (exh. P34) for her flight to Kuala Lumpur. On 30 June 2014, upon her arrival at Kuala Lumpur International Airport (KLIA), the second appellant lodged a complaint regarding the loss of the bag to the airport authorities. The second appellant gave her personal information and the address where she would be staying, which was Room 919 in Hotel Arena Star Luxury, Kuala Lumpur.

[11] On 1 July 2014, the bag arrived at KLIA and was handed over to the Lost and Found Section of Malaysia Airlines System ('MAS'). Etihad Airways had requested MAS to arrange the delivery of the bag to the second appellant. The bag had been labelled with a 'rush' tag ('P28'), indicating the second appellant's name and the tag number.

[12] At about 4pm on the same day, an employee of bags handling company ('SP8') brought the bag from the lost and found section to the arrival hall for scanning. During the scanning process, a customs officer ('SP4') noticed a suspicious green image on the inside walls of the bag. He contacted the KLIA customs enforcement team. SP10 led the enforcement team to the scanning machine and received the bag from SP4.

[13] Having examined the bag, SP10 noticed the second appellant's name on the tag and noted that the bag was in good condition but unlocked. SP10 requested SP8 to deliver the bag to the second appellant as planned. SP10 and some other customs officers followed SP8 to Hotel Arena Star Luxury in a different vehicle.

[14] At the hotel, SP10 brought the bag to the hotel counter and met a hotel staff SP6, who telephoned the second appellant in Room 919 to collect her bag. The second appellant came down to the hotel lobby, signed the receipt, and took the bag from SP8. The second appellant then pulled the bag into the elevator, while being followed by SP10 and three other officers. In the elevator, SP10 saw the second appellant tore off the tag from the bag.

[15] When the elevator reached the ninth floor, the second appellant exited and went to Room 919. As she was about to open the room door, SP10 introduced himself. SP10 had also obtained the bag tag which was earlier on torn off by the second appellant. The second appellant's reaction was one of shock.

[16] In Room 919, SP10 instructed the second appellant to open the bag for examination. After the second appellant unzipped the bag and removed the items therein, SP10 found a black layer on the inside wall of the bag. SP10 requested the second appellant to cut the layer with a knife, and found white powder inside the black layer.

[17] The second appellant and the bag were taken to the KLIA customs enforcement office where SP10 made further inspections of the bag and discovered a black frame. Around the black frame were found two packages containing white powder. The white powder was sent to the Chemistry Department for analysis. After analysis, the white powder was confirmed to contain 693.4g of cocaine.

Decisions Of The High Court

The First Appeal

[18] The learned trial judge in respect of this first appeal ruled that for the element of possession, the presumption under sub-s. 37(d) of the DDA could be invoked against the first appellant. The learned trial judge found that the bag was under the custody and control of the first appellant. Such finding was premised on the evidence that the tag was attached to the bag and the first appellant was caught red-handed carrying the bag.

[19] The learned trial judge also found that there was evidence to indicate the knowledge of first appellant. Such finding was based on how the drugs were carefully and cunningly concealed in the inner layers of the handbags, packed as if they were new and placed together with other items similarly packed. The learned trial judge therefore inferred an intention to avoid detection and thereby knowledge. Indeed the learned trial judge concluded that the only logical finding would be that the first appellant had knowledge of the drugs she was carrying in the bag.

[20] On the issue of trafficking, the learned trial judge ruled that in view of s. 37A the prosecution was allowed to invoke another presumption under sub-s. 37(da)(xvi) as the weight of the methamphetamine exceeded 50g. The trial judge found that the prosecution had proven the following overt acts:

(i) that the first appellant was conscious in the carrying or transporting of the drugs from Hong Kong to Malaysia by flight; and

(ii) that the concealment of the drugs was solely for the purpose of evading detection.

[21] The learned trial judge therefore found a *prima facie* case made against the first appellant.

[22] In her defence, the first appellant said that while on holiday in Thailand with her friend Jackelyn, she was offered an assignment from Jackelyn's boyfriend, Kevin, to carry diamonds from Hong Kong to Malaysia. It was the first appellant's account that the next day she flew to Hong Kong alone. On arrival in Hong Kong, she was picked up by one Mike who on the following day brought her to the Hong Kong airport and checked in the bag for her.

[23] The learned trial judge did not accept the defence of innocent carrier advanced by the first appellant. The learned trial judge reasoned that no one would carry diamonds of colossal value in an unlocked checked-in bag. They could have been stolen while in transit. It was also inferred that from the conduct of the first appellant, the transaction was planned and well-executed based on the frantic and fast-paced action taken. Meanwhile, the account given by the first appellant in court was also ruled to be an afterthought in order to dissociate herself from the knowledge of the drugs.

[24] The learned trial judge also held that there were circumstances which could have aroused the suspicion of the first appellant on what she was carrying in the bag. Yet, she just ignored those facts indifferent to what she was carrying and simply shut her eyes on the obvious. Applying therefore the principle of wilful blindness, the first appellant was taken to know that she was carrying drugs. Hence, the first appellant was convicted as charged and sentenced to death.

The Second Appeal

[25] The High Court observed that s. 37A of the DDA would allow the use of double presumptions, namely, the presumptions under sub-ss. 37(d) and (da) could be used together to prove "possession and knowledge" and thereafter to prove "trafficking".

[26] In respect of the presumption under sub-s. 37(d), the learned trial judge noted that the prosecution needed only to prove that the second appellant had the custody and control over the bag in order for the second appellant to be presumed to have possession and knowledge of the dangerous drug unless proven otherwise. The learned trial judge found custody and control on the following facts:

(i) that at the time of arrest, the second appellant was holding the bag;

(ii) that the second appellant removed the bag tag while still in the elevator;

(iii) that the second appellant's name was shown on the bag tag and the passenger information document;

(iv) that the second appellant checked in the bag herself at the Bahrain airport;

(v) that the second appellant made a complaint at KLIA after failing to locate the bag, and provided her hotel details for the bag to be delivered to her immediately upon arrival;

(vi) that the second appellant received the bag at the hotel lobby and brought it to the room; and

(vii) that the contents of the bag (other than the dangerous drugs) were the second appellant's personal effects, such as clothings.

[27] The learned trial judge took into account the fact that the bag was reported missing and the possibility of having been tampered with since the bag was unlocked. However, based on the evidence as a whole, it was found that the fact that the bag was not with the second appellant for a day did not negate the custody and control on her part. It was highlighted that the drugs were not easily found when the bag was opened. On the contrary, the drugs were hidden in a secret compartment in the bag, namely, within the black frame which was only found when the side of the bag was cut with a knife. The learned trial judge considered that it was not possible within a short time for any other persons to have prepared such a frame to fit the size of the bag and for two packages to fit the size of the frame.

[28] Since the elements of custody and control were proven, it was ruled that sub-s. 37(d) applied and the second appellant was presumed to have possession and knowledge of the drugs. Further, since the weight of the cocaine exceeded the statutory stipulated weight, it was then ruled that sub-s. 37(da)(ix) also applied. As such, the second appellant was presumed to be trafficking the drugs.

[29] Having found that a *prima facie* case had been established by the prosecution, the learned trial judge called for the first appellant to enter defence. The basis of the second appellant's defence case was that she had no knowledge of the drugs in the bag. The learned trial judge however pointed out the inconsistencies in the second appellant's defence case, including:

(i) that it was the second appellant's case that she went to Bahrain for holiday yet it was inconsistent with her testimony during cross-examination that she went there to find work;

(ii) that the second appellant could not recall the hotel or the name of the beach she purportedly visited in Bahrain;

(iii) that the second appellant had stopped working as a bartender, where she had previously earned a monthly salary of RM700. It was difficult to accept that the second appellant, who has a six-year old child, could afford the high cost for the alleged holiday; and

(iv) that the second appellant's account that the money for her holiday in Bahrain was given by a friend, Som, from her previous workplace, was doubtful. Som was not called to give evidence.

[30] The learned trial judge rejected the second appellant's defence as a bare denial and held that the second appellant had failed to adduce evidence to rebut the presumptions under sub-ss. 37(d) and (da) of the DDA. Accordingly, the learned trial judge found the second appellant guilty as charged and sentenced her to death.

Decision Of The Court Of Appeal

[31] Aggrieved, both the appellants appealed respectively to the Court of Appeal against the decisions handed to them by the respective learned trial judges.

The First Appeal

[32] The first appellant appealed on three grounds, namely, on the admissibility of witness statements, the constitutionality on the use of double presumptions and the defence of innocent carrier.

[33] In respect of admissibility of witness statements, the Court of Appeal held that there was no statutory requirement for written consent to be given in order to admit written statements from the prosecution witnesses. More so, when counsel for the first appellant did not object to the use of the written statements during the trial. No miscarriage of justice or prejudice to the first appellant was found to have been caused.

[34] On the issue of double presumptions, the Court of Appeal noted that it was not in dispute that the amending Act inserting s. 37A into the DDA was a valid Act enacted by Parliament. Further, it was considered that despite the invocation of the presumptions, the onus of proving the case beyond reasonable doubt still rests on the prosecution. At any rate before a presumption can be invoked, the prosecution must adduce positive evidence of the relevant fact or facts. As such, the rights of the defence are maintained since the opportunity to rebut the presumption is not taken away. Hence, the Court of Appeal held that the use of double presumptions was not unconstitutional and did not violate the presumption of innocence.

[35] On the defence of innocent carrier, the Court of Appeal agreed with the finding and conclusion of the learned trial judge. It was held that it was not enough for the first appellant to merely assert the absence of knowledge. If and when the circumstances arouse suspicion, the Court of Appeal opined that it was incumbent upon the first appellant to make the necessary inquiries. Accordingly, the appeal of the first appellant was dismissed.

The Second Appeal

[36] The second appellant appealed on the ground that the learned trial judge had erred in law and fact in finding custody and control.

[37] However, the Court of Appeal held that while no drugs might have been detected when the bag was checked in at Bahrain airport, it did not mean that no drugs were present in the bag at that time. The Court of Appeal noted that there were many such instances of such happening. But it is not for the court to answer such question as to how the drugs escaped detection at the airport of origin.

[38] On the possibility of tampering, the Court of Appeal agreed with the finding of the learned trial judge that considering the manner in which the drugs were concealed inside the bag, it would not have been possible for others to have placed the drugs in the bag in that manner within the time period. There was also no evidence found to indicate others including any potential enemy, motivated to harm the second appellant by planting the drugs in the bag. Anyway, the Court of Appeal considered that a person with such a motive would not have gone to such extent of modifying the bag to conceal the drugs. Such person or enemy would have placed the drugs in a conspicuous place.

[39] The Court of Appeal also observed that as the drugs were well concealed, leaving the bag unlocked was just an excuse to say that someone could have placed the drugs inside the bag in the event of the second appellant being caught. Further, since the second appellant had checked the bag and confirmed that it was in good condition upon receiving it at the hotel lobby, the Court of Appeal ruled out tampering as an issue.

[40] The Court of Appeal also agreed with the learned trial judge on the lack of credibility to the story that the second appellant travelled to Bahrain for holiday using funds supplied by Som. Indeed, the Court of Appeal found the defence of second appellant was a bare denial. It was incapable of casting a reasonable doubt in the prosecution's case or rebutting the presumption of knowledge on the balance of probabilities. The appeal was therefore dismissed.

Decision Of This Court

[41] We are very conscious that there are several grounds of appeal submitted for both these appeals. However, before us, learned counsel for both the appellants focused his submissions solely on the constitutionality of s. 37A of the DDA. The section appears to allow the use of double presumptions to find possession as well as trafficking for a charge under s. 39B of the DDA.

[42] Thus, in this judgment, we will therefore mainly deal with the impugned section. In the event we find there is no merit on the constitutionality challenge, we will then, if necessary, proceed with the other grounds submitted before making our ultimate decisions on the respective appeals.

History Of s. 37A Of The DDA

[43] Section 37 of the DDA lists out a number of presumptions. The two presumptions that were invoked in the present appeals are in sub-ss. (d) and (da), which are reproduced below for ease of reference:

> **Presumptions**
>
> 37. In all proceedings under this Act or any regulation made thereunder:
>
> …
>
> (d) any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug; ...
>
> …
>
> (da) any person who is found in possession of:
>
> …
>
> (ix) 40grammes or more in weight of cocaine;
>
> …
>
> (xvi) 50 grammes or more in weight of Methamphetamine;
>
> otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug; …

[44] Prior to the insertion of s. 37A, in the case of *Muhammed bin Hassan v. PP* [1998] 2 CLJ 170; [1998] 2 MLJ 273, the accused was convicted for drug trafficking under s. 39B of the DDA. The trial judge found that the accused had failed to rebut the statutory presumptions in sub-ss. 37(d) and (da) of the DDA on a balance of probabilities.

[45] The Federal Court drew attention to the distinction between the words "deemed" in sub-s. 37(d) and "found" in sub-s. 37(da). The former arises by operation of law without necessity to prove how a particular state of affairs is arrived at, whereas the latter connotes a finding made by a court after trial. It was held that, in order to invoke the presumption of trafficking under s. 37(da), the court must make an express affirmative finding that the accused was "in possession" of the drug based on evidence. Based on the clear and unequivocal wording of the two subsections, the presumption of possession under sub-s. 37(d) cannot be used to invoke the presumption of trafficking under sub-s. 37(da). His Lordship Chong Siew Fai (Chief Judge Sabah and Sarawak) said this at p. 190 (CLJ); p. 289 (MLJ):

> In view of the above differences, it would be unduly harsh and oppressive to construe the automatic application of presumption upon presumption as contended by the learned deputy public prosecutor – a construction that ought to be adopted only if, upon the wordings of the two subsections, such an intention of the Parliament is clear, which, in our opinion, is not.

[46] The Federal Court also went on to express the view that the use of presumption upon presumption would be harsh and oppressive. The court said this at p. 194 (CLJ); p. 291 (MLJ):

> In our view, on the wording of s. 37(da) as it stands, to read the presumption of possession (ie possession as understood in criminal law, with knowledge) provided in s. 37(d) into s. 37 (da) so as to invoke against an accused a further presumption of trafficking (ie presumption upon presumption) would not only be ascribing to the phrase 'found in possession' in s. 37(da) a meaning wider than it ordinarily bears but would also be against the established principles of construction of penal statutes and unduly harsh and oppressive against the accused.

[47] Following the decision in *Muhammed bin Hassan (supra)*, Parliament tabled the Dangerous Drugs (Amendment) Act 2014, which introduced a new s. 37A without any amendment to any of the wordings in the presumption provisions. The legislative purpose in enacting s. 37A is to permit the presumption in sub-s. 37(d) to be applied together with the presumption in sub-s. 37(da) against an accused. It was explained at the second reading of the Bill in the Dewan Rakyat (House of Representatives) (per the Hansard of 4 December 2013) in this way:

A Sebelum ini pihak pendakwaan dengan jayanya menggunakan kedua-dua anggapan ini bagi membuktikan kes pengedaran di bawah seksyen 39B Akta 234 yang jika sabit kesalahan membawa hukuman gantung mandatori. Walau bagaimanapun sejak keputusan kes Mahkamah Persekutuan iaitu *Pendakwa Raya v. Mohamad Hassan* [1998] 2 CLJ 170, pendakwaan tidak lagi boleh menggunakan kedua-dua anggapan ini
B bersekali. Ini telah menyebabkan kegagalan pihak pendakwaan membuktikan pengedaran seperti mana yang ditakrifkan di bawah seksyen 2 Akta 234. Oleh yang demikian bagi mengatasi masalah ini, maka Kementerian Kesihatan mencadangkan peruntukan baru ini dimasukkan ke dalam Akta 234.

C Tuan Yang Di-Pertua, cadangan peruntukan menomborkan semula seksyen 37A sebagai seksyen 37B dan memasukkan seksyen 37A yang baru adalah bertujuan untuk memperjelaskan pemakaian seksyen 37(d) dan 37(da) Akta Dadah Berbahaya 1992. Pindaan ini diperlukan ekoran daripada beberapa keputusan mahkamah yang diputuskan termasuk keputusan Mahkamah Persekutuan di dalam kes *Mohamad Hassan v.*
D *Pendakwa Raya* [1998] 2 CLJ 170.

[48] The purpose of the amendment was therefore obvious, namely, to overcome the impact of the decision in *Muhammed bin Hassan (supra)*. The amendment Act was duly passed and the newly inserted s. 37A came into force on 15 February 2014, before the dates on which the appellants in these
E appeals were charged. Section 37A reads:

Application of presumptions

37A. Notwithstanding anything under any written law or rule of law, a presumption may be applied under this Part in addition to or in conjunction with any other presumption provided under this Part or
F any other written law.

[49] The appellants now seek to challenge the constitutionality of s. 37A on two broad grounds:

(i) that it contravenes the principle of separation of powers in the FC; and
G
(ii) that it violates arts. 5 and 8 of the FC.

[50] But before we deal with these two grounds in turn, we propose to first consider the preliminary objection raised by the respondent.

Preliminary Objection
H

The Submissions Of Parties

[51] At the commencement of the hearing of these appeals, the learned Deputy Public Prosecutor for the respondent raised the issue that the appellants had not obtained leave from the Federal Court to challenge the
I constitutional validity of s. 37A of the DDA. It was pointed out that the

validity of the section was challenged on the ground that Parliament did not have power to enact it under art. 74(1) of the FC. It was submitted that pursuant to art. 4(4) of the FC the appellants ought to have sought leave from the Federal Court to mount the present challenge.

[52] In response, learned counsel for the appellants submitted that the appellants were not challenging the legislative competence of Parliament to enact s. 37A. The crux of the appellants' argument was that, reading art. 121(1) together with art. 74(1), Parliament was empowered to make law and not to declare law. It was the appellants' case that the enactment of s. 37A was an impermissible act of declaring law. As such, it was contended that the present challenge did not fall within art. 4(4) and that leave was not required.

Scope Of art. 4(4) Of The FC

[53] Article 4(3) of the FC reads as follows:

> The validity of any law made by Parliament or the Legislature of any State shall not be questioned *on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws,* except in proceedings for a declaration that the law is invalid on that ground or:
>
> (a) if the law was made by Parliament, in proceedings between the Federation and one or more States;
>
> (b) if the law was made by the Legislature of a State, in proceedings between the Federation and that State. (emphasis added)

[54] Article 4(4) which relates to the ground mentioned in art. 4(3) provides that:

> *Proceedings for a declaration that a law is invalid on the ground mentioned in Clause (3) (not being proceedings falling within paragraph (a) or (b) of the Clause) shall not be commenced without the leave of a judge of the Federal Court;* and the Federation shall be entitled to be a party to any such proceedings, and so shall any State that would or might be a party to proceedings brought for the same purpose under paragraph (a) or (b) of the Clause. (emphasis added)

[55] Thus, art. 4(4) applies only where the validity of a law is challenged on the ground that it makes provision with respect to a matter on which Parliament or the State Legislature has no power to make laws. The central question relates to the subject matter of the impugned law. In *Gin Poh Holdings Sdn Bhd v. The Government of the State of Penang & Ors* [2018] 4 CLJ 1; [2018] 3 MLJ 417 at para. [32]), this court has clarified that the ground of challenge referred to in arts. 4(3) and 4(4) comprises the following situations:

A … an impugned law deals with a matter with respect to which the relevant legislative body has no power to make law if:

(a) Parliament made law on a matter not within the Federal List;

(b) the State Legislature made law on a matter not within the State List;

B

(c) Parliament made law on a matter within the State List pursuant to art 76, but failed to comply with the requirements in the said Article; or

(d) the State Legislature made law on a matter within the Federal List pursuant to art 76A(1), but failed to comply with the requirements in the said Article …

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[56] Leave from the Federal Court is only required in proceedings for a declaration that a law is invalid on that specific ground. In such proceedings, the Federal Court has exclusive original jurisdiction to determine the matter. (See: art. 128(1)(a)).

D

[57] There are of course other grounds on which the validity of a law may be challenged. For instance, a law may be invalid because it is inconsistent with certain provisions in the FC (art. 4(1)), or a State law may be invalid because it is inconsistent with a Federal law (art. 75). The court's power to declare a law invalid on any of these other grounds "is not subject to any restrictions, and may be exercised by any court in the land and in any proceeding whether it be started by the Government or by an individual". (See: *Ah Thian v. Government of Malaysia* [1976] 1 LNS 3; [1976] 2 MLJ 112 at p. 113).

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F **[58]** A broader reading of art. 4(4), however, was adopted in *Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri* [2014] 6 CLJ 541; [2014] 4 MLJ 765. In that case, the validity of provisions in various State Enactments seeking to control and restrict the propagation of non-Islamic religious doctrines and beliefs among Muslims was challenged in the High Court on the ground that they contravened art. 11 of the FC. The Federal Court held that such a challenge fell within the scope of art. 4(3) and (4) of the FC and ought not to have been entertained by the High Court.

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[59] The decision in *Titular Roman Catholic Archbishop of Kuala Lumpur (supra)* was followed in *State Government of Negeri Sembilan & Ors v. Muhammad Juzaili Mohd Khamis & Ors* [2015] 8 CLJ 975; [2015] 6 MLJ 736, where the validity of a State Enactment was challenged on the ground that it offended the fundamental liberties in arts. 5, 8, 9 and 10 of the FC. Similarly, the Federal Court held that the challenge could only be made *via* the specific procedure provided for under art. 4(3) and (4) of the FC.

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I

[60] These two cases suggest that a challenge to the constitutionality or validity of a law on any ground comes within the ambit of art. 4(3) and (4). With respect, we are of the view that the wide interpretation adopted is contrary to the clear wordings of the aforesaid articles and is not supported by any consistent line of authorities. (See: *Ah Thian (supra)*, *Gerald Fernandez v. Attorney-General, Malaysia* [1970] 1 LNS 27; [1970] 1 MLJ 262, *Yeoh Tat Thong v. Government of Malaysia & Anor* [1973] 1 LNS 180; [1973] 2 MLJ 86, *Syarikat Banita Sdn Bhd v. Government of State of Sabah* [1977] 1 LNS 125; [1977] 2 MLJ 217, *Rethana v. Government of Malaysia* [1984] 1 CLJ 352; [1984] 1 CLJ (Rep) 323; [1984] 2 MLJ 52, *East Union (Malaya) Sdn Bhd v. Government of State of Johore & Government of Malaysia* [1980] 1 LNS 18; [1980] 2 MLJ 143). We are therefore not inclined to follow these two cases. In our view, they were decided *per incuriam*. Indeed, the anomaly in these two cases appears to have been acknowledged in *Gin Poh Holdings (supra)* when this court said this at para. [33]:

> A different construction of the scope of arts. 4(4) and 128(1)(a) appears to have been adopted in a handful of cases. The ground of challenge that a law relates to 'matters with respect to which the legislative body has no power to make laws' was given a wider interpretation, extending to challenges that an Act contravenes the fundamental liberties provisions in the Federal Constitution and that a State Enactment is inconsistent with Federal law. We observe that the cases in favour of the wider interpretation do not offer a clear juridical foundation for the alternative construction, and are not altogether reconcilable with the dominant position settled by the line of authorities discussed earlier.

[61] In the present appeals, as readily conceded by learned counsel for the appellants, the legislative competence of Parliament in respect of the subject matter of s. 37A of the DDA is not in issue. The basis of the appellants' challenge is that by enacting s. 37A which reverses the decision of the Federal Court in *Muhammad bin Hassan (supra)*, Parliament had usurped the judicial power of the Federation and fallen foul of art. 121(1) of the FC. The appellants' reference to art. 74(1) was merely to draw attention to the words "Parliament may make law" in support of that basis. Since the validity of s. 37A is not challenged on the ground that it relates to a matter on which Parliament has no power to make laws, the challenge does not fall within the scope of art. 4(4) and leave is not required from this court.

[62] Hence, we find the preliminary objection by the respondent has no merit and we dismiss it accordingly.

A **Challenge Based On Separation Of Powers**

The Submissions Of Parties

[63] The appellants' main ground for challenging the validity of s. 37A is based on the principle of separation of powers. The submissions for the B appellants on this point may be summarised as follows:

(a) under art. 74(1) of the FC, Parliament is empowered only to make laws;

(b) under art. 121(1), judicial power is vested exclusively in the courts;

(c) in *Muhammed bin Hassan*'s case *(supra)* the Federal Court declared that C using the presumption of possession to invoke the presumption of trafficking under s. 37 of the DDA was harsh, oppressive and thus impermissible;

(d) that once the Federal Court had exercised judicial power on the matter, Parliament could not interfere with the exercise by amending the DDA D to legalise what had been declared illegal; and

(e) that by enacting s. 37A to overrule the decision of *Muhammed bin Hassan (supra)*, Parliament had exercised the judicial power of declaring law.

[64] In response, the respondent submitted:

E (a) that s. 37A was validly enacted by Parliament in accordance with its legislative powers under art. 74(1) of the FC read with items 3 and 4 in the Federal List;

(b) that in *Muhammad bin Hassan (supra)*, the Federal Court held that subss. 37(d) and (da) of the DDA should only be construed to permit the F automatic application of a presumption with another presumption if the intention of Parliament was clear from the wordings of the statute;

(c) that the purpose of enacting s. 37A was in fact to bring the DDA in line with the decision in *Muhammad bin Hassan (supra)*, so as to allow the G application of double presumptions;

(d) that s. 37A is not mandatory in nature but gives the court a discretion to apply any presumption in addition to or in conjunction with any other presumptions; and

H (e) that s. 37A does not encroach upon the judicial power of the courts.

Separation Of Powers In The FC

[65] The ground of challenge raised calls for a proper understanding of the principle of separation of powers in our FC and the respective roles of Parliament and the courts.

I

[66] It is well-established that "a constitution must be interpreted in light of its historical and philosophical context, as well as its fundamental underlying principles". (See: *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 3 CLJ 145; [2018] 1 MLJ 545 at para. [29]). It is not to be interpreted in a vacuum without regard to the thinking in other countries sharing similar values. (See: *The State v. Khoyratty* [2006] UKPC 13 at para. [29]). The importance of the underlying values of a constitution was noted by the Judicial Committee of the Privy Council in *Matadeen v. Pointu* [1998] UKPC 9 with these words:

> … constitutions are not construed like commercial documents. This is because every utterance must be construed in its proper context, taking into account the historical background and the purpose for which the utterance was made. The context and purpose of a commercial contract is very different from that of a constitution. The background of a constitution is an attempt, at a particular moment in history, to lay down an enduring scheme of government in accordance with certain moral and political values. Interpretation must take these purposes into account.

[67] It should also be duly considered that constitutions based on the *Westminster* model are founded on the underlying principle of separation of powers with which the drafters are undoubtedly familiar. Thus, even on an independent reading of the FC, unaided by any such knowledge, the provisions therein cannot but suggest the intention to confine the exercise of legislative, executive and judicial power with the respective branches of Government. (See: *Victorian Stevedoring & General Contracting Co Pty Ltd v. Dignan* [1932] ALR 22). The separation of powers between the three branches of Government is a logical inference from the arrangement of the FC itself, the words in which the powers are vested and the careful and elaborate provisions defining the repositories of the respective powers. As such "this cannot all be treated as meaningless and of no legal consequence". (See: *R v. Kirby; ex p Boilermakers' Society of Australia* [1956] ALR 163).

[68] Hence, while the FC does not expressly delineate the separation of powers, the principle is taken for granted as a constitutional fundamental. The absence of express words in the FC prohibiting the exercise of a particular power by a different branch of Government does not by any means imply that it is permitted. Lord Diplock in *Hinds v. The Queen* [1977] AC 195 articulated it well when he said this at p. 212:

> It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government. Thus the constitution does not normally contain any express prohibition upon the exercise of legislative powers by the executive or of judicial powers by either the executive or the legislature. As respects the judicature, particularly if it is intended that the previously

A existing courts shall continue to function, the constitution itself may even omit any express provision conferring judicial power upon the judicature. *Nevertheless it is well established as a rule of construction applicable to constitutional instruments under which this governmental structure is adopted that the absence of express words to that effect does not prevent the legislative, the executive and the judicial powers of the new state being exercisable exclusively by the legislature, by the* B *executive and by the judicature respectively.* (emphasis added)

(See also: *Liyanage v. The Queen* [1967] 1 AC 259 at p. 287).

[69] The separation of powers between the Legislature, the Executive, and the Judiciary is a hallmark of a modern democratic State. (See: *The State v. Khoyratty (supra)* C at para. [29]; *DPP v. Mollison (No 2)* [2003] UKPC 6 at para. [13]; *R (Anderson) v. Secretary of State for the Home Department* [2002] UKHL 46 at para. [50]). Lord Steyn in *The State v. Khoyratty (supra)* at para. [12] succinctly said this:

> The idea of a democracy involves a number of different concepts. The first D is that the people must decide who should govern them. Secondly, there is the principle that fundamental rights should be protected by an impartial and independent judiciary. Thirdly, in order to achieve a reconciliation between the inevitable tensions between these ideas, a separation of powers between the legislature, the executive, and the judiciary is necessary.

E

[70] Thus, the separation of powers is not just a matter of administrative efficiency. At its core is the need for a check and balance mechanism to avoid the risk of abuse when power is concentrated in the same hands. (See: James Madison, "*The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments*", The Federalist Papers No. 51 F (1788)).

[71] Between the three branches of Government, "all the parts of it form a mutual check upon each other. The three parts, each part regulates and is regulated by the rest". (See: *Blackstone, Commentaries (Vol. 1)*, 1765/1979 at p. 154). The separation of powers provides a brake to the exercise of G Government power; the institutions are designed "not only to co-operate but to conflict, as part of the pulley of checks and balances". (See: *L Thio, A Treatise on Singapore Constitutional Law (Singapore: Academy Publishing, 2012)* at p. 160).

H **[72]** This court has, on several occasions, recognised that the principle of separation of powers, and the power of the ordinary courts to review the legality of State action, are sacrosanct and form part of the basic structure of the FC. (See: *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526; [2017] 3 MLJ 561 at para. [90], *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* I [2018] 3 CLJ 145; [2018] 1 MLJ 545 at paras. [48], [90]).

[73] In fact, courts can prevent Parliament from destroying the "basic structure" of the FC. (See: *Sivarasa Rasiah (supra)* at para. [20]). And while the FC does not specifically explicate the doctrine of basic structure, what the doctrine signifies is that a parliamentary enactment is open to scrutiny not only for clear-cut violation of the FC but also for violation of the doctrines or principles that constitute the constitutional foundation.

[74] The role of the Judiciary is intrinsic to this constitutional order. Whether an enacted law is constitutionally valid is always for the courts to adjudicate and not for Parliament to decide. As rightly stated by Professor Sir William Wade (quoted by this court in *Indira Gandhi* at para. [35]):

> … it is always for the courts, in the last resort, to say what is a valid Act of Parliament; and that the decision of this question is not determined by any rule of law which can be laid down or altered by any authority outside the courts.

Legislative Power

[75] It is against the background of these fundamental principles that the appellants' challenge falls to be considered. The appellants rely on three Indian authorities in support of the contention that Parliament may make law, but may not declare law so as to overrule a decision of the court. (See: *S T Sadiq v. State Of Kerala* [2015] 4 SCC 400, *Indira Nehru Gandhi v. Shri Raj Narain* [1975] 2 SCC 159, and *Medical Council of India v. State of Kerala* (Writ Petition (C) No. 178 & 231 of 2018)). The facts and decisions in these cases will be examined in turn.

[76] In *S T Sadiq v. State of Kerala (supra)*, the State Government issued notices to and acquired ten cashew factories pursuant to the Kerala Cashew Factories (Acquisition) Act 1974. The ten factories challenged the acquisition in court. The Indian Supreme Court held that the notice issued was not in compliance with the statutory requirements and ordered the State Government to hand the factories back to the respective owners. The State Government then enacted the Kerala Cashew Factories Acquisition (Amendment) Act 1995. Section 6 of the Amendment Act which declared that the factories specified in the Schedule shall vest in the Government with effect from the date stated, notwithstanding any judgment or order of court, and notwithstanding any other law. The Schedule contained only the ten cashew factories.

[77] The Indian Supreme Court held that s. 6 was unconstitutional in directly seeking to upset a final judgment of the court. Nariman J said this at para. [13]:

A

> It is settled law by a catena of decisions of this Court that the legislature cannot directly annul a judgment of a court. The legislative function consists in 'making' law [see: Article 245 of the Constitution] and not in 'declaring' what the law shall be [see: Article 141 of the Constitution] ... *It is for this reason that our Constitution permits a legislature to make laws retrospectively which may alter the law as it stood when a decision was arrived at.* B *It is in this limited circumstance that a legislature may alter the very basis of a decision given by a court,* and if an appeal or other proceeding be pending, enable the Court to apply the law retrospectively so made which would then change the very basis of the earlier decision so that it would no longer hold good. However, if such is not the case then legislation which trenches upon the judicial power must necessarily be declared to be C unconstitutional. (emphasis added)

[78] In *Indira Nehru Gandhi v. Shri Raj Narain (supra)*, the election of the appellant, the then Prime Minister, had been declared void by the High Court on grounds of electoral malpractice. The Constitution (Thirty-ninth Amendment) Act 1975 was then enacted, purporting to insert art. 329A in D the Constitution. Clause 4 of the said article provided that, among others: no law made by Parliament prior to the Amendment Act in respect of elections shall apply to a person who held the office of Prime Minister at the time of the election; the election of such a person shall not be void on any ground under those laws; notwithstanding any order of court declaring such election E to be void, the election shall continue to be valid; and any such order and any finding on which such order is based shall be void and of no effect.

[79] The Indian Supreme Court held that cl. 4 of the Amendment Act was invalid. Its vice was in conferring an absolute validity upon the election of one particular candidate and prescribing that the validity of that election F could not be questioned before any forum or under any law.

[80] Ray CJ explained at para. [190]:

> A declaration that an order made by a court of law is void is normally part of the judicial function and is not a legislative function. Although G there is in the Constitution of India no rigid separation of powers, by and large the spheres of judicial function and legislative function have been demarcated and it is not permissible for the Legislature to encroach upon the judicial sphere. It has accordingly been held that *a Legislature while it is entitled to change with retrospective effect the law which formed the basis of the judicial decision, it is not permissible to the Legislature to declare the judgment of the* H *court to be void or not binding* ... (emphasis added)

[81] In the recent case of *Medical Council of India v. State of Kerala (supra)*, the admission of about 150 students to some medical colleges during the academic year 2016-17 were found to be illegal by the High Court. The decision was upheld by the Indian Supreme Court. Subsequently, the State I Government promulgated the Kerala Professional Colleges (Regularisation

of Admission in Medical Colleges) Ordinance 2017 to regularise the admissions of those students. The Ordinance provided that, notwithstanding any judgment, order, or any proceedings of any court, it would be lawful for the Government to regularise the admission of those candidates for the academic year 2016-17 whose admission was earlier on cancelled by the court.

[82] The Indian Supreme Court held that the Legislature could not declare any decision of a court of law to be void or of no effect. However, it may remove the defects in the existing law pointed out by the court. On the facts, the case was not one of removing a defect in the law. The State Government sought to get rid of the illegalities in the admissions without changing the provision of the existing law.

[83] The Ordinance was found to be invalid, being an act of nullifying a judgment of the court which tantamount to violating the exclusive vesting of judicial powers in the Judiciary. Arun Mishra J explained at para. [33]:

> It is crystal clear in the instant case that the State Government has exceeded its powers and has entrenched upon the field reserved for the judiciary. It could not have nullified the judgment ... The provision of any existing law framed by legislation has not been changed by the State Government by the impugned Ordinance but illegalities found in the admissions were sought to be got rid of. What was laid down in the judgment for ensuring the fair procedure which was required to be followed was sought to be undone, it was nothing but the wholly impermissible act of the State Government of sitting over the judgment and it could not have promulgated the Ordinance setting at naught the effect of the judgment.

[84] Read in context, the three cases above do not stand for the proposition that any amendment to a law which has been interpreted by a court is an impermissible encroachment into judicial power. On the contrary, the cases clearly recognise the power of the Legislature to amend a law which formed the basis of the decision of the court. The effect of such an amendment is not to overrule the decision of the court in that case, but to alter the legal foundation on which the judgment is founded. The earlier decision of the court then becomes unenforceable for the interpretation of the newly amended law. But the decision itself which led to the amendment is not affected.

[85] In fact, there are plethora of decisions by the Indian Supreme Court postulating a principle to the effect that while a Legislature does not have the power to render ineffective a judgment of a court, it may amend the law to alter the legal basis upon which the judgment was founded. (See for instance *Janapada Sabha Chhindwara v. The Central Provinces Syndicate Ltd* [1970] 1 SCC 509 at para. [10]; *State of Haryana v. Karnal Coop Farmers' Society Ltd*

A [1993] 2 SCC 363 at para. [37], *S R Bhagwat v. State of Mysore* [1995] 6 SCC 16 at para. [18]). The same principle was succinctly elucidated by the Indian Supreme Court in the case of *In the Matter of Cauvery Water Disputes Tribunal* [1993] Supp 1 SCC 96 (II) at para. [76]):

> The principle which emerges from these authorities is that the legislature
B can change the basis on which a decision is given by the Court and thus change the law in general, which will affect a class of persons and events at large. It cannot, however, set aside an individual decision inter parties and affect their rights and liabilities alone. Such an act on the part of the legislature amounts to exercising the judicial power of the State and to functioning as an appellate court or tribunal.

C

[86] The distinction between amending a law to remove its defects and overruling a decision of the court was explained in *Cheviti Venkanna Yadav v. State of Telangana* [2017] 1 SCC 283:

> This plenary power to bring the statute in conformity with the legislative
D intent and correct the flaw pointed out by the court can have a curative and neutralising effect. *When such a correction is made, the purpose behind the same is not to overrule the decision of the court or encroach upon the judicial turf, but simply enact a fresh law with retrospective effect to alter the foundation and meaning of the legislation and to remove the base on which the judgment is founded. This does not amount to statutory overruling by the legislature.* In this manner,
E the earlier decision of the court becomes non-existent and unenforceable for interpretation of the new legislation. (emphasis added)

[87] On a careful reading of the three Indian authorities relied upon by learned counsel for the appellants, we are of the view that those cases do not render any assistance to the appellants' broad proposition. The common
F striking feature of those cases cited is that the impugned laws had the direct effect of overruling the outcome of the respective particular decisions by the courts. Hence, these Indian cases are readily distinguishable from the facts of the present appeals.

[88] In fact, as indicated earlier on s. 37A does not purport to overrule the
G decision of the Federal Court in *Muhammed bin Hassan (supra)*. The finality of the decision in that case in respect of the rights and liabilities of the parties is unaffected. The effect of inserting s. 37A is to alter generally the law upon which that decision was based. As such premised on the principles of law distilled from the other cases which differed for the three cases cited by
H learned counsel for the appellants, such an amendment is a permissible exercise of legislative power and does not encroach into the realm of judicial power.

I

[89] Thus, we agree with the learned Deputy Public Prosecutor's submission for the respondent, that in inserting s. 37A, Parliament was not overruling the decision in *Muhammed bin Hassan (supra)* but only complying with the opinion of the Federal Court therein which stated that presumption upon presumption could only be permitted if, 'upon the wordings of the two subsections, such an intention of the Parliament is clear'.

[90] With respect, the broad proposition contended by learned counsel for the appellants would have the effect of insulating a law from any change by Parliament once it has been interpreted by the court. Taken to its logical end, in effect, the appellants' argument would mean Parliament is prohibited not only from correcting defects in the law pointed out by the court, but from amending the law for the future once it has been applied by the court. Such a far-reaching impact would undoubtedly constitute a significant fetter on the legislative power of Parliament not intended by the framers of the FC. It would upset the delicate check and balance mechanism integral to a constitutional system based on the separation of powers.

[91] As the bulwark of the FC and the rule of law, it is the duty of the courts to protect the FC from being undermined by the whittling away of the principles upon which it is based. The courts should jealously ensure that the powers of the Legislature and Executive are kept within their intended limits. (See: *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 3 CLJ 145; [2018] 1 MLJ 545 at paras. [33]-[34]; *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526; [2017] 3 MLJ 561 at para. [91]; *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135 at p. 148).

[92] Indeed, barring questions on constitutionality, the role of the courts is generally to apply and interpret the law as laid down by Parliament. It is not for the courts to refuse to apply a new law solely on the ground that a court had previously expressed a particular view on the unamended version of the law.

[93] For the reasons above, we dismiss the first ground of challenge raised by the appellants.

Challenge Based On Articles 5 And 8

The Submissions Of Parties

[94] The second ground of challenge raised by the appellants is based on arts. 5 and 8 of the FC. Learned counsel for the appellants submitted that:

(a) article 5(1) includes the right to a fair trial, which encompasses both procedural and substantive fairness;

(b) for all intents and purposes, s. 37A of the DDA has the effect of reversing the burden onto an accused to prove his or her innocence;

A (c) where double presumptions are applied, it has been held in *Muhammed bin Hassan (supra)* that the burden on the appellants to rebut both presumptions on the balance of probabilities is oppressive, unduly harsh, and unfair;

B (d) section 37A offends the requirement of fairness housed under arts. 5 and 8 of the FC;

(e) the right in art. 5(1) is absolute and cannot be derogated;

(f) the doctrine of proportionality does not form part of the common law of England. It arose from the jurisprudence of the European Court of C Human Rights; and

(g) the Federal Court in *PP v. Gan Boon Aun* [2017] 4 CLJ 41; [2017] 3 MLJ 12 had erred in holding that the right to a fair trial and the presumption of innocence under art. 5 may be qualified by reference to the principle of proportionality.

D **[95]** In response, the learned Deputy Public Prosecutor for the respondent submitted that:

(a) the right to a fair trial is implied in art. 5(1) of the FC;

E (b) there are exceptions to the general rule that the accused bears no onus of proof, for there are limits to what the prosecution can reasonably be expected to prove in certain situations;

(c) there is no prohibition on presumptions in principle, provided such presumptions satisfy the test of proportionality. (See: *Gan Boon Aun* F *(supra) and Ong Ah Chuan v. Public Prosecutor* [1980] 1 LNS 181; [1981] 1 MLJ 64);

(d) even where double presumptions are invoked under s. 37A of the DDA, pursuant to s. 182A(1) of the Criminal Procedure Code the duty remains on the prosecution to prove its case beyond a reasonable doubt based on G all adduced and admissible evidence;

(e) the imposition of presumptions rebuttable by an accused on a balance of probabilities strikes a balance between the public interest in curbing crime and the protection of fundamental rights; and

H (f) section 37A of the DDA, being of general application to all persons under like circumstances, does not offend the right to equality under art. 8 of the FC.

I

Article 5: '… In Accordance With Law'

[96] We begin by acknowledging that in interpreting any constitutional provision such as arts. 5 and 8 of the FC, certain principles must be borne in mind.

(a) Firstly, it is trite that a constitution is *sui generis*, governed by interpretive principles of its own.

(b) Secondly, in the forefront of these interpretive principles is the principle that its constitutional provisions should be interpreted generously and liberally, not rigidly or pedantically. (See: *Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus* [1984] 1 CLJ 28; [1984] 1 CLJ (Rep) 98; [1981] 1 MLJ 29).

(c) Thirdly, it is the duty of the courts to adopt a prismatic approach when interpreting the fundamental rights guaranteed under Part II of the FC, in order to reveal the spectrum of constituent rights submerged in each article. (See: *Lee Kwan Woh v. PP* [2009] 5 CLJ 631; [2009] 5 MLJ 301 at para. [8]).

[97] Article 5(1) of the FC reads:

> No person shall be deprived of his life or personal liberty save in accordance with law.

[98] In our view, art. 5(1) is the foundational fundamental right upon which other fundamental rights enshrined in the FC draw their support. Depriving a person of his right under art. 5(1), the consequence is obvious in that his other rights under the FC would be illusory or unnecessarily restrained. In fact, deprivation of personal liberty impacts on every other aspect of human freedom and dignity. (See: *Maneka Gandhi v. Union of India* AIR 1978 SC 59). But at the same time art. 5(1) is not all-encompassing and each right protected in Part II has its own perimeters. Hence, the provisions of the FC should be read harmoniously. Indeed the fundamental liberties provisions enshrined in Part II of the FC are parts of a majestic, interconnected whole and not each as lonely outposts.

[99] The importance of the right to life under art. 5 cannot be over-emphasised. In relation to the rights to life and dignity, the South African Constitutional Court in *State v. Makwanyane* [1995] 1 LRC 269 at para. [84] states:

> Together they are the source of all other rights. Other rights may be limited, and may even be withdrawn and then granted again, but their ultimate limit is to be found in the preservation of the twin rights of life and dignity. These twin rights are the essential content of all rights under the Constitution. Take them away, and all other rights cease.

[100] Since the right to life is "the most fundamental of human rights", the basis of any State action which may put this right at risk "must surely call for the most anxious scrutiny" (per Lord Bridge in *Bugdaycay v. Secretary of State for the Home Department* [1987] AC 514 at p. 531). The courts' role is given added weight where the right to life is at stake.

[101] "Law", as defined in art. 160(2) of the Federal Constitution read with s. 66 of the Interpretation Acts 1948 and 1967, includes the common law of England. The concept of rule of law forms part of the common law of England. The "law" in art. 5(1) and in other fundamental liberties provisions in the FC must therefore be in tandem with the concept of rule of law and NOT rule by law. (See: *Lee Kwan Woh (supra)* at para. [16]; *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507; [2010] 2 MLJ 333 at para. [17]). (emphasis added).

[102] It has been remarked that the phrase 'rule of law' has become meaningless thanks to ideological abuse and general over-use. (See: H Barnett, *Constitutional and Administrative Law*, 2nd edn. (London: Cavendish Publishing, 1998) at p. 90). Different models of the rule of law have been adopted in different jurisdictions. (See: V V Ramraj, *"Four Models of Due Process"* in OUP and New York University School of Law 2004, I.CON Vol. 2, No. 3 at 492-524). It is perhaps opportune and necessary for us to outline what is generally meant by the rule of law.

[103] A central tenet of the rule of law is the equal subjection of all persons to the ordinary law. (See: *A V Dicey, An Introduction to the Study of the Law of the Constitution*, 10th edn. (London: Macmillan, 1959) at p. 202). People should be ruled by the law and be able to be guided by it. Thus, the law must be capable of being obeyed.

[104] "Law" must therefore satisfy certain basic requirements, namely:

(a) it should be clear;

(b) sufficiently stable;

(c) generally prospective;

(d) of general application;

(e) administered by an independent Judiciary; and

(f) the principles of natural justice and the right to a fair trial are observed.

[105] These requirements of "law" in a system based on the rule of law are by no means exhaustive. While the precise procedural and substantive content of the rule of law remains the subject of much academic debate, there is a broad acceptance of the principles above as the minimum requirements

of the rule of law. (See: *J Raz, The Rule of Law and its Virtue* (1977) 93 LQR 195; L Fuller, The Morality of Law (New Haven: Yale University Press, 1964); T Bingham, The Rule of Law (London: Penguin Books, 2011)).

[106] It is therefore clear that the "law" in the proviso "save in accordance with law" does not mean just any law validly enacted by Parliament. It does not authorise Parliament to enact any legislation under art. 5(1) contrary to the rule of law. While the phrase "in accordance with law" requires specific and explicit law that provides for the deprivation of life or personal liberty (see: *In Re Mohamad Ezam Mohd Nor* [2002] 5 CLJ 156; [2001] 3 MLJ 372 at p. 378), nevertheless such law must also be one that is fair and just and not merely any enacted law however arbitrary, unfair, or unjust it may be. Otherwise that would be rule by law.

[107] The "law" thereof also refers to a system of law that incorporates the fundamental rules of natural justice that formed part and parcel of the common law of England. And to be relevant in this country, such common law must be in operation at the commencement of the FC. Further, any system of law worthy of being called just must be founded on fundamental values. "The law must be related to the … fundamental assessments of human values and the purposes of society" (per Viscount Simonds, *Shaw v. DPP* [1962] AC 220 at p. 268). As persuasively argued by Lord Bingham, the rule of law requires that fundamental rights be protected, (see: Bingham, *The Rule of Law* (London: Penguin Books, 2011 at pp. 66-68). It is also taken for granted that the "law" alluded to would not flout those fundamental rules. As Lord Diplock stated in no weak terms, to hold otherwise would render the purported entrenchment of fundamental liberties provisions in the FC "little better than a mockery". (See: *Ong Ah Chuan (supra)* at p. 670).

[108] We pause at this juncture to note that s. 37A of the DDA begins with the phrase "notwithstanding any written law or rule of law". For the avoidance of doubt, the words "rule of law" in s. 37A refer to implied ancillary rules, such as the rules of procedure or evidence. (See: *FAR Bennion, Statutory Interpretation: A Code,* 3rd ed. (London: Butterworths, 1997) at p. 805). It does not purport to exclude the rule of law as a legal concept. If it were to be interpreted otherwise then that would be a rule by law and could not be within the ambit of the term 'law' in art. 5(1) of the FC and hence unconstitutional. It must also be emphasised here that the principle of the rule of law, being a constitutional fundamental, cannot be abrogated by mere statutory words.

[109] Accordingly, art. 5(1) which guarantees that a person shall not be deprived of his life or personal liberty (read in the widest sense) save in accordance with law envisages a State action that is fair both in point of procedure and substance. In the context of a criminal case, the article enshrines an accused's constitutional right to receive a fair trial by an impartial tribunal and to have a just decision on the facts. (See: *Lee Kwan Woh (supra)* at para. [18]).

[110] It has been declared as well by this court that the fundamental principle of presumption of innocence, long recognised at common law, is included in the phrase "in accordance with law". (See: *Gan Boon Aun (supra)* at paras. [14]-[15]). Indeed, the presumption of innocence is a "hallowed principle lying at the very heart of criminal law", referable and integral to the right to life, liberty, and security. (See: *R v. Oakes* [1986] 1 SCR 103 at para. [29]). The famous statement of Viscount Sankey LC in *Woolmington v. Director of Public Prosecutions* [1935] AC 462 at p. 481 is regularly quoted as a starting point in affirming the principle:

> Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and **subject also to any statutory exception** ... No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained. (emphasis added)

[111] It is pertinent to note that Viscount Sankey's proviso of "any statutory exception" was pronounced in the context of a legal system based on Parliamentary sovereignty. Whereas in our jurisdiction, a provision of law, although it may be in the form of a proviso, is not rendered constitutionally valid if it "would subvert the very purpose of the entrenchment of the presumption of innocence" in the FC. (See: *R v. Oakes (supra)* at para. [39]). As such, in determining its constitutionality the substantive effect of a statutory exception must be considered.

[112] Yet at the same time, it must also be taken into account that despite the fundamental importance of the presumption of innocence, there are situations where it is clearly sensible and reasonable to allow certain exceptions. For instance, a shift on onus of proof to the defence for certain elements of an offence where such elements may only known to the accused. But it is not to say that in such instance the prosecution is relieved of its burden to establish the guilt of an accused beyond reasonable doubt. In other words, it is widely recognised that the presumption of innocence is subject to implied limitations. (See: *Attorney-General of Hong Kong v. Lee Kwong-Kut* [1993] AC 951 at p. 968). A degree of flexibility is therefore required to strike a balance between the public interest and the right of an accused person.

[113] In *State v. Coetzee* [1997] 2 LRC 593 the South African Constitutional Court speaking through Sachs J provided clear justification on the need to do the balancing enquiry between safeguarding the constitutional rights of an individual from being 'convicted and subjected to ignominy' and heavy sentence and 'the maintenance of public confidence in the enduring integrity and security of the legal system'. Reference to the prevalence and severity

of a certain crime therefore does not add anything new or special to the balancing exercise. The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put into scales as part of the justificatory balancing exercise. If this were not so, the ubiquity and ugliness argument could be used in relation to murder, rape, car-jerking, housebreaking, drug-smuggling, corruption … the list is unfortunately almost endless, and nothing would be left of the presumption of innocence, save, perhaps, for its relics status as a doughty defender of rights in the most trivial of cases'.

[114] Hence, this is where the doctrine of proportionality under art. 8(1) becomes engaged.

[115] But before we deal with art. 8(1) in relation to the proportionality test, it is perhaps apposite to note here that in *Muhammed bin Hassan (supra)* this court held that to read the presumption of possession in sub-s. 37(d) "into ss. 37(da) so as to invoke against an accused a further presumption of trafficking (ie presumption upon presumption) would not only be ascribing to the phrase 'found in possession' in s. 37(da) a meaning wider than it ordinarily bears but **would also be against the established principles of construction of penal statutes and unduly harsh and oppressive against the accused.** (emphasis added).

[116] Meanwhile, when enacting s. 37A, Parliament did not find it necessary to amend the wordings of sub-s. 37(da) in particular the word 'found' therein. As such, the view given by this court on the word 'found' in *Muhammed bin Hassan (supra)* is still valid.

Article 8 And The Doctrine Of Proportionality

[117] When interpreting other provisions in the FC, the courts must do so in light of the humanising and all-pervading provision of art. 8(1). (See: *Dr Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia* [2007] 1 CLJ 19; [2006] 6 MLJ 213 at para. [8], approved in *Badan Peguam Malaysia v. Kerajaan Malaysia* [2008] 1 CLJ 521; [2008] 2 MLJ 285 at para. [86]; *Lee Kwan Woh (supra)* at para. [12]). Article 8(1) guarantees fairness in all forms of State action. (See: *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771; [1996] 1 MLJ 261). The essence of the article was aptly summarised in *Lee Kwan Woh (supra)* at para. [12]:

> The effect of art 8(1) is to ensure that legislative, administrative and judicial action is objectively fair. It also houses within it the doctrine of proportionality which is the test to be used when determining whether any form of state action (executive, legislative or judicial) is arbitrary or excessive when it is asserted that a fundamental right is alleged to have been infringed.

[118] In other words, art. 8(1) imports the principle of substantive proportionality. "Not only must the legislative or executive response to a state of affairs be objectively fair, it must also be proportionate to the object sought to be achieved". (See: *Dr Mohd Nasir bin Hashim v. Menteri Dalam Negeri Malaysia (supra)* at para. [8]. The doctrine of proportionality housed in art. 8(1) was lucidly articulated in *Sivarasa Rasiah (supra)* at para. [30]:

> … all forms of state action – whether legislative or executive – that infringe a fundamental right must (a) have an objective that is sufficiently important to justify limiting the right in question; (b) the measures designed by the relevant state action to meet its objective must have a rational nexus with that objective; and (c) the means used by the relevant state action to infringe the right asserted must be proportionate to the object it seeks to achieve.

[119] Accordingly, when any State action is challenged as violating a fundamental right, such as the right to life or personal liberty under art. 5(1), art. 8(1) will at once be engaged such that the action must meet the test of proportionality. This is the point at which arts. 5(1) and 8(1) interact. (See: *Sivarasa Rasiah (supra)* at paras. [17]-[19]).

[120] This approach is consistent with that adopted in other Commonwealth jurisdictions. Proportionality is an essential requirement of any legitimate limitation of an entrenched right. Proportionality calls for the balancing of different interests. In the balancing process, the relevant considerations include the nature of the right, the purpose for which the right is limited, the extent and efficacy of the limitation, and whether the desired end could reasonably be achieved through other means less damaging to the right in question. (See: *State v. Makwanyane* [1995] 1 LRC 269 at p. 316).

[121] The United Kingdom position based on the leading cases of *R v. Lambert* [2001] UKHL 37, *R v. Johnstone* [2003] UKHL 28, and *Sheldrake v. Director of Public Prosecutions; Attorney General's Reference (No 4 of 2002)* [2005] 1 All ER 237 was helpfully distilled in *Gan Boon Aun (supra)* at para. [46] as thus:

> (a) presumptions of fact or of law operate in every legal system;
>
> (b) it is open to states to define the constituent elements of an offence, even to exclude the requirement of *mens rea*;
>
> (c) when a section is silent as to *mens rea*, there is a presumption that *mens rea* is an essential ingredient: The more serious the crime, the less readily will that presumption be displaced;
>
> (d) the overriding concern is that a trial should be fair: The presumption of innocence is a fundamental right directed to that end;

(e) *there is no prohibition against presumptions in principle, but the principle of proportionality must be observed. A balance must be struck between the general interest of the community and the protection of fundamental rights. The substance and effect of presumptions adverse to an accused must not be greater than is necessary and must be reasonable*;

(f) the test to be applied is whether the modification or limitation pursues a legitimate aim and whether it satisfies the principle of proportionality;

(g) reasonable limits take into account the importance of what is at stake and maintain the rights of the defence;

(h) the mischief at which the Act is aimed and the ease or difficulty that the respective parties would encounter in discharging the burden are important factors;

(i) it is justified to make it for an accused to prove matters which the prosecution would be highly unlikely to be able to know and which it might be difficult, if not impossible for them to rebut;

(j) relevant to reasonableness or proportionality will be the opportunity given to a defendant to rebut the presumption, maintenance of the rights of the defence, flexibility in application of the presumption, retention by the court of a power to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption;

(k) the test depends upon the circumstances of the individual case. The justifiability of any infringement of the presumption of innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the particular case;

(l) the task of the court is never to decide whether a reverse burden should be imposed on a defendant, but always to assess whether a burden enacted by Parliament unjustifiably infringes the presumption of innocence; and

(m) security concerns do not absolve member states from their duty to observe basic standards of fairness. (emphasis added)

[122] The doctrine of proportionality was likewise implicit in the Hong Kong approach to statutory presumptions in criminal law. Referring to statutory exceptions to the presumption of innocence, the Privy Council explained in *Lee Kwong-Kut (supra)* at pp. 969-970:

> Some exceptions will be justifiable, others will not. Whether they are justifiable will in the end depend upon whether it remains primarily the responsibility of the prosecution to prove the guilt of an accused to the required standard and whether the exception is reasonably imposed, notwithstanding the importance of maintaining the principle which article

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> 11(1) enshrines. *The less significant the departure from the normal principle, the simpler it will be to justify an exception. If the prosecution retains responsibility for proving the essential ingredients of the offence, the less likely it is that an exception will be regarded as unacceptable. In deciding what are the essential ingredients, the language of the relevant statutory provision will be important.* However what will be decisive will be the substance and reality of the language creating the offence rather than its form. If the exception requires certain matters to be presumed until the contrary is shown, then it will be difficult to justify that presumption unless, as was pointed out by the United States Supreme Court in *Leary v. United States* [1969] 23 L. Ed. 2d 57, 82, 'it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.' (emphasis added)

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[123] Useful guidance can also be gleaned from the case of *R v. Oakes (supra).* The Canadian Supreme Court held that, in general, "a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence", at para. [57]. The fact that the standard required to disprove the presumed fact is only on the balance of probabilities does not render the reverse onus clause constitutional, at para. [58].

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[124] Be that as it may, a provision which violates the presumption of innocence may still be upheld if it is a reasonable limit, prescribed by law and demonstrably justified in a free and democratic society. In this exercise, the Canadian Supreme Court in *R v. Oakes (supra*) elaborated on the two central criteria that must be satisfied, at paras. [69]-[70]:

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(i) The objective must be of sufficient importance to warrant overriding a constitutionally protected right. The objective must relate to pressing and substantial concerns;

(ii) The means chosen to achieve the objective must be reasonable and demonstrably justified, in that:

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(a) the measure must be rationally connected to the objective;

(b) the right in question must be impaired as little as possible; and

(c) the effect of the measure must be proportionate to the objective.

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[125] It is clear therefore from the local and foreign authorities above that the presumption of innocence is by no means absolute. However, as discussed above, derogations or limits to the prosecution's duty to prove an accused's guilt beyond a reasonable doubt are carefully circumscribed by reference to some form of proportionality test. We consider that the

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application of the proportionality test in this context strikes the appropriate balance between the competing interests of an accused and the State. (See: *Gan Boon Aun (supra)*).

[126] It is notable that the doctrine of proportionality and the all-pervading nature of art. 8 form part of the common law of Malaysia, developed by our courts based on a prismatic interpretation of the FC without recourse to case law relating to the European Convention of Human Rights. As such, we are therefore of the view that the appellants' assertion that art. 5 confers an absolute right upon an accused to be presumed innocent until proven guilty and not subject to the doctrine of proportionality while disregarding art. 8, is unsupported by authority and without basis.

[127] To summarise, the following principles may be discerned from the above authorities:

(i) Article 5(1) embodies the presumption of innocence, which places upon the prosecution a duty to prove the guilt of the accused beyond a reasonable doubt.

(ii) The presumption of innocence is not absolute. A balance must be struck between the public interest and the right of an accused – art. 8(1).

(iii) A statutory presumption in a criminal law, which places upon an accused the burden of disproving a presumed fact, must satisfy the test of proportionality under art. 8(1). The substance and effect of the presumption must be reasonable and not greater than necessary.

(iv) The test of proportionality comprises three stages:

  (a) there must be a sufficiently important objective to justify in limiting the right in question;

  (b) the measure designed must have a rational nexus with the objective; and

  (c) the measure used which infringes the right asserted must be proportionate to the objective.

(v) Factors relevant to the proportionality assessment include, but are not limited to, the following:

  (a) whether the presumption relates to an essential or important ingredient of the offence;

  (b) opportunity for rebuttal and the standard required to disprove the presumption; and

  (c) the difficulty for the prosecution to prove the presumed fact.

(vi) A significant departure from the presumption of innocence would call for a more onerous justification.

A **The Constitutionality Of s. 37A**

[128] Section 37A was legislated to permit the invocation of the two presumptions yet there was no amendment to the wording in sub-s. 37(da). As we have earlier noted, the Federal Court had held in *Muhammed Hassan (supra)* that based on the clear and unequivocal meaning of the statutory B wording, "deemed possession" under sub-s. 37(d) cannot be equated to "found possession" so as to invoke the presumption of trafficking under sub-s. 37(da). To do so would be contrary to the ordinary meaning of the statutory language. As such, despite the insertion of s. 37A, a plain reading of the wording in sub-ss. (d) and (da) does not permit the concurrent C application of both the said presumptions in the prosecution of a drug trafficking offence.

[129] Anyway, even if Parliament had amended the wording in sub-s. (da) in accordance with the judgment in *Muhammed Hassan (supra)*, the fundamental question of constitutionality remains. It is for the court to D determine whether the substance and effect of the legislation in permitting the use of double presumptions is in line with the fundamental liberties provisions of the FC. It is to this central issue that we now turn.

[130] We now consider the presumption of innocence and the impact of the said section in relation to the relevant principles on proportionality test. But E before doing so we keep in the forefront of our minds that where the constitutionality of a provision is challenged, there is a presumption in favour of constitutionality and the burden rests on the party seeking to establish that the provision is unconstitutional. (See: *Public Prosecutor v. Datuk Harun Haji Idris & Ors* [1976] 1 LNS 180; [1976] 2 MLJ 116, *Public Prosecutor* F *v. Su Liang Yu* [1976] 1 LNS 113; [1976] 2 MLJ 128, *Public Prosecutor v. Pung Chen Choon* [1994] 1 LNS 208; [1994] 1 MLJ 566, *Ooi Kean Thong & Anor v. PP* [2006] 2 CLJ 701; [2006] 3 MLJ 389, *Gan Boon Aun (supra)*).

[131] Meanwhile for clarity, the appellants' challenge to the constitutionality of s. 37A is only in relation to the application of a G presumption in addition to or in conjunction with another presumption. The constitutionality of a single presumption under sub-ss. 37(d) or (da) is not challenged in the present appeals. Hence, we are not addressing it as an issue before us.

H *Nature Of Presumptions*

[132] To determine the effect of s. 37A, it is helpful first to consider generally the nature of presumptions. A true presumption takes effect when, upon the proof of one fact (the basic fact), the existence of another fact (presumed fact) is assumed in the absence of further evidence. I (See: C Tapper, *Cross & Wilkins Outline of the Law of Evidence*, 6th edn.

(London: Butterworths, 1986) at p. 39). "The usual purpose of a presumption is to ease the task of a party who can adduce some evidence which is relevant to, but not necessarily decisive of, an issue" *(ibid)*.

[133] Presumptions can be categorised into presumptions of law or presumptions of fact. The former involves actual legal rules, whereas the latter are no more than frequently recurring examples of circumstantial evidence. (See: *R v. Oakes (supra)* at para. [20]). It is often true that "presumptions of law are nothing else than natural inferences or presumptions of fact which the law invests with an artificial or preternatural weight". (See: C Tapper, *Cross & Tapper on Evidence*, 12th edn. (Oxford: OUP, 2013) at p. 135).

[134] Such is the case with the two presumptions in question in these appeals. For the presumption under sub-s. 37(d), a person's custody or control of a thing containing a dangerous drug, proved as a fact, (the basic fact) is relevant to, but not decisive of, his possession and knowledge of the dangerous drug which need not be proved but merely deemed (the presumed fact).

[135] As for the presumption under sub-s. 37(da), a person "found" (which denotes the need first for an affirmative finding based on the evidence adduced) to be in possession of drugs exceeding a stipulated weight has a logical bearing on the inference of trafficking.

[136] The presumptions are largely a matter of logical inference. Indeed, even without the statutory presumption under sub-s. 37(da), a person caught in the act of conveying a quantity of drugs much larger than is likely to be needed for his own consumption would give rise to an irresistible inference that he was transporting them for the purpose of trafficking, in the absence of any plausible alternative explanation. (See: *Ong Ah Chuan (supra)* at p. 667; s. 2 of the DDA).

[137] The presumptions in s. 37 are rebuttable. The phrase "until the contrary is proved imposes a legal burden on an accused to prove on a balance of probabilities that he was not in possession and had no knowledge of the drug (sub-s. 37(d)), or that he was not in possession up to the statutory limit in weight of the drug for the purpose of trafficking (sub-s. 37(da)) (See: *R v. Oakes (supra)* at para. [24]). The weight of evidence required to rebut the presumption would depend on the circumstances of each case. For instance, as a matter of common sense, the larger the quantity of the drugs involved the stronger the inference that it was intended for the purpose of trafficking and thus the more convincing the evidence needed to rebut it. (See: *Ong Ah Chuan (supra)* at 668).

[138] The word "shall" in both subsections indicates that each of the presumptions is mandatory in nature. However, the word "may" in s. 37A suggests that the cumulative use of double or multiple presumptions is discretionary. But, just because it is discretionary, it does not *ipso facto* escape a constitutionality scrutiny.

[139] The effect of s. 37A on the operation of the two presumptions is therefore as follows:

(a) once the prosecution proves that an accused had the custody and control of a thing containing a dangerous drug, the accused is presumed to have possession and knowledge of the drug under sub-s. 37(d). The 'deemed possession', presumed by virtue of sub-s. 37(d), is then used to invoke a further presumption of trafficking under sub-s. 37(da), if the quantity of the drug involved exceeds the statutory weight limit.

(b) section 37A thus permits a "presumption upon a presumption" (as aptly described in *Muhammad bin Hassan (supra)* at p. 291).

(c) as such, for a charge of drug trafficking, all that is required of the prosecution to establish a *prima facie* case is to prove custody and control on the part of the accused and the weight of the drug. The legal burden then shifts to the accused to disprove the presumptions of possession and knowledge (sub-s. 37(d)) and trafficking (sub-s. 37(da)) on a balance of probabilities.

[140] As to the legal burden upon an accused to rebut a presumption and the risk attached to it, the case of *R v. Whyte* [1988] 51 DLR (4th) 481 at p. 493 (in a passage adopted by Lord Steyn in *R v. Lambert (supra)* at para. [37]) is instructive. Dickson CJ said this:

> The real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists. When that possibility exists, there is a breach of the presumption of innocence. The exact characterisation of a factor as an essential element, a collateral factor, an excuse, or a defence should not affect the analysis of the presumption of innocence. It is the final effect of a provision on the verdict that is decisive. If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused.

[141] Hence, for the above reasons, we are of the view that s. 37A *prima facie* violates the presumption of innocence since it permits an accused to be convicted while a reasonable doubt may exist.

[142] Next to consider is whether the incursion into the presumption of innocence under art. 5(1) satisfies the requirement of proportionality housed under art. 8(1). A

Proportionality And Section 37A

[143] The first stage in the proportionality assessment is to establish whether there is a sufficiently important objective to justify the infringement of the right, in this case the right to presumption of innocence. The legislative objective in inserting s. 37A is to overcome the problem of the prosecution failing to prove the element of trafficking as defined in the DDA. Drug trafficking has been a major problem in the country. It needs to be curbed. One way is to secure convictions of drug traffickers which can be considered a sufficiently important objective and one which is substantial and pressing. B C

[144] The second stage of the inquiry is to consider whether the means designed by Parliament has a rational nexus with the objective it is intended to meet. The effect of s. 37A, as elaborated above, is to shift the burden of proof to an accused on the main elements of possession, knowledge, and trafficking, provided that the prosecution establishes first the relevant basic facts. It is at least arguable that the resulting ease of securing convictions is rationally connected to the aim of curbing the vice of drug trafficking. Bearing in mind that the validity of individual presumptions is not in issue in the present appeals, it is not necessary for us to analyse the rational connection between custody and control on one hand and possession and knowledge on another, or the connection between possession and trafficking. (See: *R v. Oakes (supra)* at para. [78]). D E

[145] The third stage of the inquiry requires an assessment of proportionality. It must be emphasised any restriction of fundamental rights does not only require a legitimate objective, but must be proportionate to the importance of the right at stake. F

[146] The presumptions under sub-ss. 37(d) and (da) relate to the three central and essential elements of the offence of drug trafficking, namely, possession of a drug, knowledge of the drug, and trafficking. We have already discussed this point earlier in this judgment. The actual effect of the presumptions is that an accused does not merely bear an evidential burden to adduce evidence in rebuttal of the presumptions. Once the essential ingredients of the offence are presumed, the accused is placed under a legal burden to rebut the presumptions on a balance of probabilities. In our view, it is a grave erosion to the presumption of innocence housed in art. 5(1) of the FC. G H I

[147] But the most severe effect, tantamount to being harsh and oppressive, arising from the application of a "presumption upon a presumption" is that the presumed element of possession under sub-s. 37(d) is used to invoke the presumption of trafficking under sub-s. 37(da) without any consideration that the element of possession in sub-s. 37(da) requires a 'found' possession and not a 'deemed' possession. The phrase 'any person who is found in possession of' entails an affirmative finding of possession based on adduced evidence. (See: *Mohammed bin Hassan (supra)*).

[148] Section 37A was legislated to facilitate the invocation of the two presumptions yet there was no amendment to sub-s. 37(da). As such and as discussed earlier on in this judgment, to invoke a presumption of trafficking founded not on proof of possession (which currently the subsection demands) but on presumed possession based on proof of mere custody and control, would constitute a grave departure from the general rule that the prosecution is required to prove the guilt of an accused beyond a reasonable doubt.

[149] Further, the application of what may be termed the "double presumptions" under the two subsections gives rise to a real risk that an accused may be convicted of drug trafficking in circumstances where a significant reasonable doubt remains as to the main elements of the offence. In such circumstance, it cannot be said that the responsibility remains primarily on the prosecution to prove the guilt of the accused beyond a reasonable doubt.

[150] Based on the factors above – the essential ingredients of the offence, the imposition of a legal burden, the standard of proof required in rebuttal, and the cumulative effect of the two presumptions – we consider that s. 37A constitutes a most substantial departure from the general rule, which cannot be justified and disproportionate to the legislative objective it serves. It is far from clear that the objective cannot be achieved through other means less damaging to the accused's fundamental right under art. 5. In light of the seriousness of the offence and the punishment it entails, we find that the unacceptably severe incursion into the right of the accused under art. 5(1) is disproportionate to the aim of curbing crime, hence fails to satisfy the requirement of proportionality housed under art. 8(1).

[151] Accordingly, we hold that s. 37A is unconstitutional for violating art. 5(1) read with art. 8(1) of the FC. The impugned section is hereby struck down.

[152] Having struck down s. 37A of the DDA, the question now is to determine the position of the appellants. The learned trial judges in these two appeals invoked both the presumptions in finding the guilt of the appellants. Since there was no challenge to the use of a single presumption in these appeals, we are of the view that the invocation of sub-s. 37(d) by the learned trial judges did not cause any miscarriage of justice to the detriment of the appellants.

[153] Hence, we hereby quash the convictions and sentences of both the appellants under s. 39B of the DDA. As we have no reasonable doubt on the guilt of the appellants for possession of the drugs based on the evidence adduced, we hereby substitute their respective convictions to one of possession under s. 12(1) and punishable under s. 39A(2) of the DDA.

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