DEATH PENALTY FOR DRUG TRAFFICKING: IMPEDIMENTS IN ACHIEVING THE INTENTION OF THE POLICYMAKERS IN MALAYSIA

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ABSTRACT

Imposing appropriate punishment for drug trafficking offence is a challenge for law and policymakers around the world. Drug trafficking is a threat to all nations. Policymakers need to implement appropriate measures to wage war against drug traffickers and one of the methods is in enforcing stringent laws. In Malaysia, the punishment for drug trafficking under section 39B of the Dangerous Drugs Act 1952 (Revised 1980) is mandatory death sentence, a punishment often criticized as violating the principles of human rights. The existence of a death penalty, however, does not ensure that every drug trafficker is sentenced to death. Provision of a severe sentence such as death penalty does not appear to fulfill the policymaker and legislature’s intent in deterring drug trafficking activities if it is difficult to obtain a death sentence. Analysis of preliminary empirical evidence in this study revealed that there are various obstacles in securing a conviction for drug trafficking. This paper will highlight the obstacles faced by the prosecution in securing a conviction and that of judges in being satisfied before passing a death sentence in Malaysia. These obstacles, which are categorized as procedural, evidential and administrative obstacles, are strong influence in the possible acquittal of an accused person, resulting in death penalty or any other punishment not being imposed. There appears to be no conclusive evidence that death penalty has a deterrent value to curb drug trafficking activities. Law and policymakers in Malaysia may need to substitute mandatory death penalty with another punishment which would achieve the aims of their policy in combating drug trafficking menace.

Field of Research: Drug Trafficking, death penalty, drug, criminal law

1. Introduction

Law and policymakers worldwide have the duty to regulate and eradicate the abuse of illegal drugs. To do so, national policies and legislation need to be implemented to restrain the activities of drug manufacturing, selling, smuggling, trafficking and any other activities which would facilitate the passage of drugs from its supply to the users. Drug trafficking is viewed as the most hideous crime among all drug related offences as it involves distribution of drugs to the public for monetary gains. In Malaysia, drug trafficking is punishable by death as the law and policymakers are of the view that imposing a harsh punishment such as death penalty would deter the crime. This article examines whether the intention of the law and policymakers in Malaysia in deterring drug trafficking with death penalty has been fulfilled and whether there are impediments in materializing the legislative intent.
2. Mandatory death penalty for drug trafficking in Malaysia and deterrent principles

Section 39B of the Dangerous Drugs Act 1952 (Revised 1980) (hereinafter referred to as “DDA”) provides mandatory death sentence for drug trafficking offences. Harsh as it may be, mandatory death penalty is deemed necessary to debilitate the offender and at the same time serve as a deterrent to potential drug traffickers (Ho, 2007). By imposing a severe penalty, policymakers and legislatures anticipated that there would be more deterrents of such crimes (Koh, C.M.V., & Morgan, 1989). Mandatory death penalty for drug trafficking serves mainly as a general deterrence as opposed to specific/individual deterrence; punishing the offender not only to deter the offender from repeating the offence but also as an example to prevent others from committing similar offence (Clarkson & Keating, 2007). The general deterrence value in death penalty is to keep alive the constant threat of punishment by passing exemplary sentences, particularly when the offence is deemed to be on the increase (Clarkson & Keating, 2007).

In accordance with the general deterrence value, the main purpose of imposing a deterrent punishment is to protect the public interest (Public Prosecutor v Loo Chang Hock [1988] 1 MLJ 316 at 318, per Zakaria Yatim J (as he then was). As the guardians of public interest, the court’s prime concern in sentencing is whether it is in the public’s interest for such punishment be met out (Bhandulananda Jayatilake v Public Prosecutor [1982] 1 MLJ 83, FC at 84; per Abdoolcader J in Public Prosecutor v Teh Ah Cheng [1976] 2 MLJ 186; and per Hashim Yeop A Sani J (as he then was) in Public Prosecutor v Loo Choon Fatt [1976] 2 MLJ 256 at 257). Public interest and deterrence were given primary consideration in the case Tan Bok Yang v Public Prosecutor [1972] 1 MLJ 214. In pronouncing the sentence, Sharma J said:

“…It is not merely the correction of the offender which is the prime object of punishment. The considerations of public interest have also to be borne in mind. In certain types of offences a sentence has got to be deterrent so that others who are like-minded may be restrained from becoming a menace to society.”

The predominant features in the penalty for drug related offences which Malaysian judges need to be cognizant of in sentencing are retribution, deterrence and protection of the public interests (Khaira, 2005). In the case of PP v Lok Kok Wai (1988) 3 MLJ 124, in convicting and sentencing the accused for drug trafficking, the court stressed on the protection of the public in addition to punishing the accused for a grave offence disapproved by the public. Similarly in a more recent case, Public Prosecutor v Jamaluddin bin Mokhtar [2006] 5 MLJ 446, the court viewed that public interest would be protected by meting out severe punishment not only to punish the offender but also to deter others.

While imposing severe punishment is a reflection of public abhorrence of the offence committed, the Court of Appeal in Tia Ah Leng v Public Prosecutor [2004] 4 MLJ 249 took judicial notice of the fact that drug addiction amongst youths is still rampant and that death penalty had not been a very successful deterrent. The Court of Appeal reiterated the views of previous judges, policymakers and legislatures that the main culprits were drug traffickers and peddlers who profited from the lucrative business of selling and trafficking drugs.

Despite having mandatory death penalty to punish drug traffickers, the number of drug trafficking cases in Malaysia continued to increase. From 1990 to 2011, the number of persons arrested in relation to drug
trafficking had increased from 744 to 3,845. This corresponds with the increase in the cases charged under section 39B DDA.

Figure 1: The number of cases and arrested persons under Section 39B DDA from the year 1990 until 2011 (source: Narcotic Department Investigation Crime, Royal Police Department of Malaysia)

From the statistics above, the number of cases in which the accused persons were charged for drug trafficking was less than those arrested. This could be attributed to the fact that more than one accused persons were jointly charged in the same case. However, a good number of persons arrested were not charged due to insufficient evidence. The escalating figures of persons arrested and cases charged under section 39B DDA appear to suggest that the mandatory death penalty has not achieved the legislature and policymaker’s intent in deterring drug trafficking. From 1980 to 2011, only 262 accused persons convicted under section 39B DDA were executed.

![Executed Under Section 39B DDA](image-url)
Financial incentives could be the motivation for drug traffickers but the possibility of escaping the gallows further enhances their courage to break the law. Being charged under section 39B DDA does not guarantee that death penalty would be imposed on the accused as there are impediments which may prevent the courts from convicting the accused persons.

3. Procedural, evidential and administrative obstacles in enforcing mandatory death penalty

To obtain a conviction under section 39B DDA, the prosecution must prove a prima facie case as stated under Section 180(1) of the Criminal Procedure Code. In proving a prima facie case, the prosecution needs to prove the ingredients under section 39B DDA: that the accused had exclusive possession of the drugs and for that, it must be shown that the accused had custody and control of the drugs; that the accused had knowledge of the drugs in his/her possession, and that the weight of the specific drugs must meet the requirements under the DDA to establish trafficking in addition to actions amounting to trafficking. There are, however, impediments in proving knowledge, possession, weight of the drugs and/or the act of trafficking. Such impediments may lead to some defects in the prosecution’s case resulting in the acquittal of the accused.

In addition to proving the ingredients under section 39B, the prosecution must ensure that there are no procedural and evidential impediments which would jeopardize the conviction. Procedural and evidential requirements in a criminal case impose obligations on the prosecution to prove that there is no break in the chain of evidence; that the identity of the drugs were not compromised and relevant witnesses must be traced and called to give evidence (Abdullah, 2006). Evidentially, material discrepancies and contradictions in the witnesses’ evidence may also be fatal in the prosecution’s case (Abdullah, 2009). A chemist’s evidence which is successfully challenged by the defence and inaccuracies in the chemist’s report further adds risks to the prosecution’s case. Administrative impediments can be seen in the investigations carried out by the investigating officers, the interpretation of the law by the courts and other actions in the carrying out of justice. In the following, analysis of section 39B cases demonstrate various procedural, evidential and administrative impediments which impede the aims of legislature and policymakers in Malaysia in imposing mandatory death penalty for drug trafficking.

3.1 Challenges in proving possession, knowledge, custody and control

The mere possession of drugs is an offence under section 36 DDA. However, for an offence to fall under section 39B DDA, the prosecution must prove that the drug was a dangerous drug within the meaning of section 2 DDA, that the weight of the dangerous drug meets the requirement of the DDA and that the accused was trafficking in the dangerous drugs. The prosecution must also prove that the accused had possession of the drugs coupled with the knowledge that the drugs are in his/her possession. A person is presumed to have possession and knowledge of the drugs when he/she is found to have custody and control over the drugs or anything containing the drugs. This statutory presumption is laid down in S.37(d) DDA which states that:
“any person who is found to have had in his custody or under his control anything
whatevsoever 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”.

Trafficking can be proven by relying on the statutory presumption under section 37(da) DDA if the
weight of the drugs seized had fulfilled the requirements under the DDA. Each type of drugs has a
specific weight requirement which would attract the presumption of trafficking if the drug was found to
be in one’s possession. For example, a person having 200g or more cannabis in his possession is deemed
to be trafficking cannabis.

In the absence of direct evidence of trafficking, the prosecution must first establish the ingredient of
possession before he could rely on the presumption of trafficking under section 37(da) DDA. Possession
and knowledge of the drugs are inter-related ingredients which need to be proven. In order to prove
possession, the prosecution must adduce evidence to demonstrate that the accused had knowledge of
the item that was in his/her possession. There is not specific definition of “possession” under the DDA.
Thus, the task lies in the courts to determine what amounts to possession. In the case of Saad Ibrahim v
Public Prosecutor [1968] 1 MLJ 158 at p. 159, Yong J held that:

“Mere possession is one thing and possession with mens rea is another. Possession which
incriminates must have certain characteristics; the possessor must be aware of his
possession, must know the nature of the thing possessed and must have the power of
disposal over it. Without these characteristics possession raises no presumption of mens
rea. Without mens rea possession cannot be criminal except in certain cases created by
statute, which is not applicable in this case”.

The tasks of the prosecution in proving his case were summed up by Visu Sinnadurai, J in the case of
Public Prosecutor v Muhamad Nasir bin Shaharuddin & Anor [1994] 2 MLJ 576 page 592 as follows:

Possession is not defined in the DDA. However, it is now firmly established that to constitute
possession, it is necessary to establish that: (a) the person had knowledge of the drugs; and
(b) that the person had some form of control or custody of the drugs. To prove either of
these two requirements, the prosecution my either adduce direct evidence or it may rely on
the relevant presumptions under s 37 of the DDA.

On the face of it, the DDA appears to facilitate the prosecution’s case by allowing a person to be
convicted on the basis of presumptions and as such, convictions ought not to be difficult to attain. Based
on reported cases, however, conviction under section 39B is not assured regardless of the presumptions
under the DDA. Although the prosecution may rely on statutory presumptions, it must be borne in mind
that the presumptions are rebuttable. The accused may rebut the presumptions by adducing evidence
and/or by challenging the evidence of prosecution’s witnesses. Thus, whilst the prosecution has a choice
to prove the possession, knowledge and trafficking either by relying on the statutory presumptions or by
producing positive evidence, it is essential for the prosecution to build his case with cogent evidence to
prove possession, knowledge and trafficking.

Failure of the prosecution to prove that the accused had possession, that the accused had some form of
control and custody as well as knowledge in addition to the weight of the drugs exceeding the stipulated
limit would result in the accused being acquitted. For instance, in *Public Prosecutor v Abd Razak bin Termizi @ Fudzil* [2011], 4 MLJ 76 the accused was acquitted because the prosecution failed to prove that the accused had physical possession and knowledge of the drugs. The drugs were found in a packet at the foot of the driver’s seat and the evidence was insufficient to prove that the accused had control or care of the drugs. The prosecution had not proven that the accused had physical possession of the drugs and there was uncertainty as to which part of the floor of the driver’s seat were the drugs placed.

An accused found with physical possession of the drugs (such as having drugs strapped to his body) may have an arduous task to disprove possession or knowledge. In circumstances where physical possession cannot be proven, it is vital that the prosecution proves that the accused had exclusive possession of the place where the drugs were found. In three celebrated cases, *P.P v. Abdullah Zawawi bin Yusof* [1993] 3 MLJ 1, *Choo Yoke Choy v PP* [1992] MLJ 632, *SC and PP v Muhammad Nasir B. Shaharuddin* [1994] 2 MLJ 576, the courts emphasized that the exclusivity of custody and control of the drugs by the accused must be established by the prosecution. The prosecution, therefore, needs to adduce evidence of exclusive possession of the place where the drugs were found which excludes accessibility by others.

Access by others to the place where the drugs were found (e.g. access to a room, a house or a car) would raise a doubt as the accused may not have been the trafficker. In view of the doubt raised due to the prosecution’s failure to prove exclusive possession, the accused would inevitably be acquitted. In *Public Prosecutor v Tukiman bin Demin* [2008] 4 MLJ 79, the drugs were found in a room to which several persons had access. In acquitting the accused, the court held that knowledge of the existence of the drugs alone was not enough to establish control. Similarly, in *Thong Jin v PP* [2002] 3 CLJ 553, there was evidence that third parties had access to the premises. As the exclusivity of use of the premises had not been proved, the accused was acquitted.

It can be challenging to prove exclusive possession when drugs are found in vehicles. In the case of *PP v Ibrahim Mahmud* [2001] 3 CLJ 284, failure on the part of the prosecution to call witnesses to prove exclusive possession of the vehicles, resulted in the accused’s acquittal. This was gravely unfortunate for the prosecution as the case involved a huge amount of heroin.

The term "exclusive possession" is not defined in the DDA. Nevertheless, the courts have elucidated "exclusive possession" as follows:

> “Thus, to sum up, the common usage, plain, natural and ordinary meaning of "exclusive" is "excluding or to exclude all others; not shared or divided". In the context of drug possession, "exclusive possession" can be construed to mean that the place where the drugs are found must be exclusive to the accused. However, possession of the drugs need not be exclusive. Possession may be joint, that is, two or more persons may jointly have possession of the contraband, exercising custody and control over it. In that case, each of these persons is considered to be in possession of that contraband” (per Zawawi Salleh, JC in *Public Prosecutor v Tukiman bin Demin* [2008] 4 MLJ 79).

It is also strenuous for the prosecution to prove knowledge. The prosecution not only has to prove that the accused had knowledge of the drugs in his/her possession but recent judicial interpretations of knowledge have placed a heavier burden on the prosecution to prove that the accused should know the nature of the drugs in his possession (Abdullah, 2006). The courts in *PP v Abd Latif bin Sakimin* [2005] 6 MLJ 351, *Public Prosecutor v Poh Ah Kwang* [2003] 3 AMR 664, *Public Prosecutor v Rosman bin Ismail*
[2003] 5 CLJ 139 held that the accused must have actual or full knowledge of the nature of drugs in order to establish possession. Although some judges may not agree with this narrow interpretation of knowledge, they are bound by judicial precedent to follow the decisions of higher courts. In the case of Public Prosecutor v Rosman bin Ismail [2003] 5 CLJ 139, the judge agreed that the law imposed a higher burden on prosecution to prove a prima facie case but was unable to depart from the decision. The honourable judge said:

“I feel the prosecution has been given a near impossible task of establishing knowledge on the part of an accused person that he knew what drug he was carrying. I have no choice but to follow the decisions of the higher courts. The sooner the law is amended to redress the problem the better it is”.

In sum, despite the presumptions under the DDA, the prosecution is still imposed with a heavy burden to prove the essential ingredients of section 39B. The presumptions do not necessarily lessen the evidential burden of the prosecution to prove the accused's guilt. Although in theory, more convictions should be secured with the aid of the presumptions, the reality is that the prosecution cannot merely rely on the presumptions to obtain a conviction.

3.2 Presumption and proof of trafficking

Under section 2 DDA, there are eighteen different conducts that can be regarded as “trafficking” which includes, inter alia, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug otherwise than under the authority of this Act or the regulations made under the Act. Regardless of the wide scope of trafficking, there are some difficulties on the part of prosecution to prove trafficking.

It is trite law that before the prosecution must prove the element of possession before he can invoke the presumption of trafficking under section 2 DDA. The easiest way for the prosecution to prove the element of trafficking is to invoke the presumption of trafficking provided in section 37 (da) of the DDA. It has been held in several cases that the mere act of carrying the drugs, keeping, concealing is not sufficient to constitute the offence of trafficking (Koh Chai Cheng v PP [1981] 1 MLJ 64, PP v Hairul Din Zainal Abidin [2001] 6 CLJ 480). Lord Diplock laid down the principle of trafficking in the case of Ong Ah Chuan v PP [1981] 1 MLJ 64 as follows:

“To ‘traffic’ in controlled drug it involves something more than passive possession; it involves doing or offering to do an overt act of one or other of the kinds specified in the definition of ‘traffic’ and imports the existence of at least two parties, namely, a supplier and the person to whom the goods are to be supplied”.

From the above, it is necessary to prove that the accused had transferred, or at least intended to transfer possession of drug to another party (PP v Nik Ahmad Aman Nik Mansor [2002] 6 CLJ 369). The obstacle to secure a conviction is where the conducts stated in section 2 DDA would not constitute trafficking if there is no further evidence on the part of the accused to trade or deal with the drugs. This was highlighted by Augustine Paul J (as he then was) in PP v Mohd Farid Mohd Sukis [2002] 8 CLJ 814:
“This is where the difficulty arises. Proof of the purpose from which a person is keeping, concealing, or carrying dangerous drugs is often difficult to establish.”

Thus, in many situations, the prosecution relied on inference to prove that the accused had transferred or intended to transfer the drugs to another party. For example, by referring to the weight of drugs involved or by relying on the presumption of trafficking as stated in section 37 (da) of the Act.

The example could be seen in the case Ong Ah Chuan (supra) where Lord Diplock explained that in relation to the verb ‘transport’, the inference that arises from the quantity of drugs involved, is that they were being transported for the purpose of transferring possession of them to another person and not solely for the transporter’s own consumption.

“... in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he was transporting them for the purpose of trafficking in them would, in the absence of any plausible explanation by him, be irresistible — even if there were no statutory presumption such as is contained in s 15 of the Drugs Act”.

The above principle was adopted by the Federal Court in Public Prosecutor v Abdul Manaf bin Muhammad Hassan [2006] 3 MLJ 205 where the court held that possession of 334 grammes more than the statutory minimum of 200 grammes provided in S37(da) DDA gave rise to the inference that it was not for personal consumption, but rather the accused was trafficking in dangerous drugs.

However, in the case of PP v Hasbi b M Kusin & Anor [2008] 7 MLJ 331, the court was reluctant to accept the inference of trafficking. In this case, the two accused were charged with trafficking in 876g of cannabis. The prosecution sought to establish the ingredients of the charge by relying on section 2 DDA which includes in its definition of ‘trafficking’, the act of ‘transporting’ dangerous drugs. The quantity of cannabis was far in excess of an amount that would be utilized for personal consumption, was in itself sufficient to warrant an inference of ‘trafficking. The court, however, amended the charge for an offence under s 6 DDA and the first accused in this case was sentenced to 14 years imprisonment and 10 strokes of the whipping. The reason being lack of evidence on ‘transport’; that the evidence had not shown that the cannabis was ‘conveyed’ from one place to another.

Agent provocateurs are often used to prove trafficking. In Public Prosecutor v Sidek Abdullah [2005] MLJU 503 the agent provocateur (PW12) was on a pretext of being a drug trafficker and there were several negotiations of the sale transaction between PW12 and the accused. Finally, the accused agreed to supply 50 kg of cannabis at the price of RM75,000. Both of them agreed to conclude the transaction at Ulu Bernam Road. The accused was arrested when he stopped his car very close to Shell petrol station situated at Ulu Bernam Road by the strike team of Narcotic Department. The court held that the prosecution had failed to establish a prima facie case against the accused as there was “no evidence of a sale transaction ever took place between the accused and PW12”.

In contrast, in the case of Teuku Nawardin Bin Shamsuar v Public Prosecutor [2010] MLJU 249, the accused was convicted and sentenced to death on a charge of trafficking. In this case, the accused was riding a motorcycle and stopped in front of the factory. He was apprehended and the police found a package of 491 grams cannabis wrapped in tin foil plastic and cello tape tucked in front of his waist underneath his trousers and covered by his jacket. On the issue of trafficking, the judge referred to Lord
Diplock in *Ong Ah Chuan v PP (supra)* and decided that as the amount of drugs recovered from the accused in the present case is about 10 times more than the statutory minimum of 50 grams under Section 39A(2) of the Act, and there being no challenge made by the defence that the cannabis in question was for his personal consumption, the prosecution had successfully proven a prima facie case of drug trafficking.

To summarize, the fact that the accused is transporting a quantity of drugs from one point to another does not make him a trafficker. Whether he is trafficker in those circumstances depends on the facts and circumstances of the given case, including the quantity of the drugs and any transaction the accused proposed to enter into. Thus, the prosecution carries the legal burden to prove that the accused intended to transfer the drugs to another person in other to succeed to establish trafficking as mentioned by section 2 of the Act.

### 3.3 Material contradiction in the witnesses’ evidence

The prosecution has a duty to prove the case against the accused. On the other hand, the task of the counsel for the accused is to raise a reasonable doubt on the prosecution’s case. Reasonable doubts can be raised by showing material discrepancies and contradictions in the prosecution witnesses’ evidence. According to Hisham Abdullah (2009), contradiction may happen when the prosecution tender two different versions on an important feature of its case either through a single witness or a combination of witnesses. It may also happen when the version or description of a material prosecution witness contradicts his previous testament. In the case of *Adzhaar bin Ahmad [2002] 7 MLJ 77* the learned judge emphasized that contradiction on evidence would cause the evidence to be unreliable and as such, there is no trustworthy evidence to convict the accused. Where there are two versions, the one most favourable to the accused ought to be accepted (*Tai Chai Keh V PP [1948] 1 LNS 122*), thereby giving the accused the benefit of the doubt.

Material contradiction in the evidence of the prosecution’s witnesses is an evidential impediment which results in the acquittal of the accused. In the case of *PP v Saare Hama & Anor [2001] 4 CLJ 475* the court acquitted the accused on the ground of conflicting evidence given by four prosecution witnesses. One version was that there was a two inch slits on the 48 slabs of drugs whereas the other version was that there were none. This contradiction led to a serious doubt on the prosecution’s case as it affected the identity of the drugs.

Inconsistencies in the description on the conduct of the accused at the time of arrest was also deemed to be crucial in the case of *PP v Mok Kar Poh (2001) 5 CLJ*. The court rejected the circumstantial evidence and inference relied upon by the prosecution in respect of the accused’s conduct because one prosecution witness said nothing about the accused’s conduct at the time of arrest whereas another prosecution witness testified that the accused tried to run away.

The prosecution must ensure that evidences adduced by witnesses are consistent. Conflicting evidence adduced by different prosecution witnesses would mean that the court is left with no reliable and trustworthy evidence upon which the conviction of the accused might be based. In such circumstances,
The accused must be given the benefit of the doubt and conviction cannot be secured against the accused. In the case of Public Prosecutor v Rajandiran a/l Kadirveil (2002) 7 MLJ 77 there were numerous inconsistencies as regards where the sling bag containing the drugs were found and circumstances leading to the discovery of the drugs. In the light of so much contradictory statements given by the prosecution witnesses, the court acquitted and discharged the accused without his defence being called.

Description of the drugs is vital to identify that the drugs were the same drugs seized from the accused and handed over to the chemist for analysis. An arresting officer may have arrested more than one accused persons or may have been involved in the seizure of drugs in different cases. Hence, it is crucial that evidence led by the prosecution does not contain discrepancies on the identity of the drugs. In the case of PP v Ibrahim Mahmud [2001] 3 CLJ 284 the prosecution witness gave contradicting evidence on the identity of the drugs. He repeatedly stated in his evidence that the items seized were “ketulan” (granule) but when the trial continued on the next day, he changed his version to state that the items were “bahan mampat” (compressed/processed elements). The discrepancies in describing the drugs raised doubts on the identity of the drugs resulting in the prosecution’s failure to discharge the burden of proof required by the law. Therefore, it is important for the prosecution to eliminate contradiction in the evidence tendered by him in order to warrant a conviction. This was emphasized by the court in the case of PP v Ong Cheng Hong [1998] 4 CLJ 209 where the court stated that credible evidence is evidence which has been filtered and which has gone through the process of evaluation. Any evidence which is not safe to be acted upon should be rejected.

Inconsistencies in the evidence of prosecution witness, however, may not affect the prosecution’s case if such inconsistencies are not material and do not affect the evidence of the ingredients of section 39B. For example, in the case of Public Prosecutor v Reza Mohd Shah bin Ahmad Shah [2002] 4 MLJ 13, the discrepancies were as regards when the marking of the exhibit was done. Prosecution witness, PW2, contended that he marked the exhibit before he handed over the exhibit to another prosecution witness, PW5. On the other hand, PW5 stated that the exhibits were marked in his presence. Regardless of the contradiction, it did not raise any doubt in the chain of custody of the exhibits from the time they were seized until there were produced in court.

In sum, the discrepancies and contradictions in the evidence of the prosecution witness or witnesses would result in the acquittal of the accused if such inconsistencies affect the prosecution’s case against the accused. While the accused should be given the benefit of the doubt in situations where there are discrepancies or material contradictions, reckless slip-ups or blunders made by the prosecution witnesses would be destructive to the legislature and policymaker’s aim in using death penalty to deter drug trafficking.

3.4 Obliterating a break in the chain of evidence

In establishing his case, the prosecution needs to prove that there is no break in the chain of evidence. It is crucial that the movements of the drugs are accounted for from the time the drugs were discovered until they were handed over to the chemist for analysis and until they were returned by the chemist. The drugs would have to be exhibited as evidence in court and it is fundamental that the prosecution eliminate any doubts as to the handling of the drugs. It must be proven that the drugs sent to the
chemist were the same drugs as the drugs seized; that the drugs exhibited in court were also the same
drugs seized from the accused. To prove the movements of the drugs or any other exhibits in relation to
the case, relevant witnesses must be called to testify. Among the relevant witnesses are the arresting
officer(s), the investigating officer or any other persons who were authorized with the safekeeping of
the drugs before and after sending the drugs to the chemist for analysis. Inability of the prosecution to
account for the handling of the drugs may raise a doubt and may result in acquittal of the accused,
particularly when it affects the identity of the drugs.

In Shamsuddin bin Hassan & Anor v PP [1991] 3 MLJ 314 the prosecution witnesses failed to explain why
there was more than 5 hours gap before the drugs were handed over to the investigating officer. This
created a break in the chain of evidence and reasonable doubt was raised. The prosecution also has to
ensure that the chemist accounted for the handling of the drugs to prevent any possibility of tampering
of evidence. In the case of PP v Mansor bin Md Rashid & 2 Ors [1993] 4 CLJ 266, no explanation was
given on how long the government chemist handled the drugs and the steps taken to ensure the safe
custody of the exhibit. This gave rise to a break in the chain of evidence.

The prosecution’s dilemma is enhanced when the officers responsible for the arrest of the accused and
seizure of the drugs had made more than one arrests or seizures on the same day but could not
positively account for the movement of the drugs or clearly identify the drugs. In the case of Public
Prosecutor v Lee Boon Seng [1995] 4 MLJ 277 where there was flaws in the prosecution’s case in
handling evidence, where there were two sets of arrests relating to drug trafficking on the same day the
accused was arrested. All the drugs were kept in the same cabinet. Since no other precautions were
taken to avoid the possibility of a mix-up of exhibits and there was no distinguishing marking on the
exhibits, the court found that there was a break in the chain of exhibit.

Relevant witnesses must be called to justify the movement of the exhibits to eliminate doubts or
discrepancies of exhibit which may cause a break in the chain of evidence. In Abdullah bin Yaacob v PP
[1991] 2MLJ 237, failure of the prosecution to call the police officer who kept all the exhibits for a long
period from 1985 to 1989 was held to be a serious failure causing break in the chain of evidence leading
to doubts. Attempts must be made by the prosecution to trace the witnesses, particularly when the
witnesses are traceable through government agencies.

A break in the chain of evidence raises reasonable doubt to the prosecution’s case and thus, the onus is
on the prosecution to ensure that there is no break in the chain of evidence to prove a prima facie case
against the accused. The prosecution’s failure to do so would be an advantage for the accused and the
accused may escape the gallows on evidential and procedural grounds.

3.5 Failure to call material witnesses

The prosecution is under a duty to call all material witnesses to prove the case against the accused. A
material witness is one who is “essential to the unfolding of the narratives on which the prosecution
case is based” as per Lord Roche in Seneviratne v R [1936] 3 All ER 36. A person is a material witness if
he/she could shed some light to prove the accused’s exclusive possession, knowledge, custody and
control or the accused’s whereabouts leading towards proving the accused’s action in possession or
trafficking.
There are four serious consequences of the prosecution’s omission call a material witness (Abdullah, 2009). The most severe is acquittal of the accused following the rule in *Ti Chuee Hiang v PP [1995] 2 MLJ 433*. Should the prosecution omit to call a particular person as a witness, the aforesaid rule requires the prosecution to offer the witnesses to the defence. Justification must be made for non-compliance of the rule. Secondly, by invoking section 114(g) of the Evidence Act, adverse inference can be made against the prosecution for failure to call a material witness as the evidence of the witness may possibly be in favour of the accused. Thirdly, the defence has been prejudiced or disadvantage and lastly, there exists a gap in the prosecution’s case.

In the case of *PP v Saare Hama & Anor [2001] 4 CLJ 475* the judge acquitted the accused as the prosecution failed to call the owner of the car in which the drugs were found. The owner of the car was also wanted by the Thai narcotic enforcement officers to assist them in the investigation of other dangerous drugs offences. Although details of the owner’s residential address was available, no effort had been made to trace him. The onus was on the prosecution to rule out the probability that the owner himself had placed the drugs in the compartment of the car. The prosecution, however, had failed to rule out such probability and the accused must be given the benefit of the doubt. Likewise, in *Public Prosecutor v Karim bin Ab Jaabar (2002) 2 MLJ 888*, cannabis weighing 10,384g were found in the front passenger seat and the booth. The court invoke section 114 (g) of Evidence Act 1950 as the prosecution failed to call the registered owner of the car. In acquitting the accused, the court ticked off the prosecution for the lackadaisical approach taken to secure the attendance of the witness in the court.

A witness who could disprove the prosecution’s evidence on possession of the drugs by the accused and who could support the accused’s statement on the drugs is a material witness. In *PP v Mohd Faris B. Mohd Sukis & Anor [2002] 3 MLJ 401*, the prosecution’s failure to call such witness was fatal and created doubt in the prosecution’s case. Similarly, in *PP v Ibrahim Mahmud [2001] 3 CLJ 284*, the prosecution’s failure to call two witnesses to testify in the trial against the accused constituted suppression of evidence as their evidence had the potential of showing that the accused did or did not have exclusive possession or in fact, that these witnesses had exclusive possession. As the probabilities raised doubt, the accused was acquitted.

Therefore, the prosecution’s failure to call a material witness will create a gap in the prosecution’s case resulting in acquittal of the accused. Irrespective of large amount of drugs discovered, the accused may walk free if the prosecution’s case contains flaws due to failure to secure the evidence of a material witness or at the very least some justification of the witness’ absence.

### 3.6 The Chemist Report and other Evidence

It is elementary that a chemist report is required to prove that the drug is dangerous drugs under section 2 of the DDA. The chemist report, the qualification of the chemist, the tests conducted by the chemist and the amount of sample taken for analysis have been frequently challenged by the defence in raising a doubt in the prosecution’s case. From the reported cases, there appears to be divergent interpretations on the amount of drugs which required to be analyzed by the chemist in order for the test to be conclusive that the exhibits were, in fact, dangerous drugs. The judge in *Loo Kia Meng v PP [2000] 2 AMR 1831* interpreted section 37(j) DDA to mean that the chemist is required to give the actual amount or weight of the samples. For the purpose of the analysis, a minimum 10% from the receptacle.
in which the drug was found needed to be tested. Failure of the chemist to state the accurate amount of drugs taken for analysis or to test sufficient sample of the drugs would raise a doubt on the actual content of the drugs. In a subsequent case, Gunalan a/l Ramachandran & 2 Ors v PP [2004] 4 CLJ 551, the court decided that as long as the chemist’s evidence is credible, it has to be accepted at the face value. The chemist could decide what amounts are sufficient for analysis purpose.

The chemist report and evidence is vital in determining whether the substance seized were dangerous drugs. Thus, failure to satisfy the court that the chemist had undertaken the necessary tests and had tested on sufficient samples so as to prove that the substance was dangerous drugs would put the prosecution’s case at risk.

In addition to chemist’s analysis of the drugs, finger print evidence is also essential to prove the accused’s possession of the drugs. However, this fundamental procedure is sometimes overlooked – there were cases where the investigating officer failed to dust the packages for finger prints, failed to take hand swaps or nail clippings from the accused, failed to test the accused's clothing for traces of drugs. These omissions may be fatal to the prosecution’s case, particularly when physical possession could not be proven. For instance, in PP v Fom It Cheong [1991] 3 CLJ 524, no finger print dusting was done on the exhibits. The prosecution had failed to prove knowledge and possession on the part of the accused. Similarly, in Public Prosecutor v Rajandiran a/l Kadirveil (2002) 7 MLJ 77, neither the bag nor the packets containing the drugs were dusted for fingerprints to show if the accused had handled them. Thus, the prosecution had failed to prove knowledge or possession. Finger print test, however, would not be necessary if the drugs were found on the accused’s body such as that in the case of PP v Chuah Kok Wah [1994] 2CLJ 423. Therefore, while some tests may be merely procedural, chemist’s evidence on the tests conducted on the drugs is extremely important and other tests need also be undertaken to substantiate the prosecution’s case. It is unfortunate, however, that these tests were not done comprehensively and meticulously resulting in gaps and doubts in the prosecution’s case.

4. Conclusion: The future of mandatory death sentence in drug trafficking

Drug trafficking is a serious crime but there is no conclusive evidence that the provision of mandatory death penalty under the DDA is an effective deterrence. Analysis of the cases above indicates that despite the aid of presumptions under the DDA, the prosecution is faced with numerous impediments in securing a conviction. The prosecution alone cannot ensure that the deterrence objective of the legislature and policymakers are achieved. The prosecution’s case is very much affected by those who carried out the investigations leading to the arrest of the accused, the chemist’s analysis of the drugs as well as any other material witnesses to the case. Indeed, the prosecution’s burden is a heavy one and it should be, considering that a human’s life is at stake. Legislature and policymakers perhaps need to consider removing the mandatory death penalty and allow the judges to exercise their discretion on several punishments.
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