



Public Prosecutor

AND

**Mohammad Khairil Shah bin Hj Abdul Halim (D1)
Harrisman Affendy bin Hj Ali (D2)**

**(High Court of Brunei Darussalam)
(Criminal Trial No. 4 of 2011)**

**Steven Chong, Ag. C.J. and Hairol Arni, J.
10 March 2014**

Criminal law – Import and possession for trafficking of cannabis – Whether plant material proved to be cannabis within the “old definition” of cannabis.

DPP Anifa Rafiza bte Hj Abd Ghani and DPP Ak Shahyzul Khairuddien bin Pg Abd Rahman for the Public Prosecutor.

Mr Mohamed Yusof Shaik Abdul Halim and Mr P Roy Rajkumar Prabhakaran (M/S Sankaran Halim) for D1 and Sheikh Noordin bin Sheikh Mohammad (M/S Sheikh Noordin Mohammad & Associates) for D2.

Cases cited:

Haw Tua Tau v Public Prosecutor [1981] 2 MLJ 49.

Muhammad bin Kadar & anor v Public Prosecutor [2011] SGCA32.

Public Prosecutor v Alcontara [1993] 3 MLJ 568.

Public Prosecutor v Dahalan bin Ladqewa [1995] 2SLR(R)24.

Public Prosecutor v Gary Shih Cheng Cheuan [2009] 2JCBD8.

Steven Chong, J.:

The Charges

Mohammad Khairil Shah bin Hj Abdul Halim (D1) and Harrisman Affendy bin Hj Ali (D2) are charged jointly with two counts under the Misuse of Drugs Act: import of 2264.179 grammes of cannabis contrary to section 5 (1st Charge);



and possession for trafficking of the same drug contrary to section 3A (2nd Charge).

Statement of Agreed Facts

A “Statement of Agreed Facts” pursuant to section 117C of the Criminal Procedure Code was admitted in evidence whereby it was agreed by the prosecution and the defendants that:

- “1. The first defendant is a male citizen of Brunei Darussalam. He was born on 21st June 1978 in Brunei Darussalam. He holds a yellow identity card bearing registration number 00-274462. He is married to one Khairunnisa Flora bte Abdullah Koh with whom he has two children, one boy and one girl. At all material times, he was employed by Royal Brunei Airlines as a Leading Steward.*
- 2. The second defendant is a male citizen of Brunei Darussalam. He was born on 11th October 1975 in Brunei Darussalam. He holds a yellow identity card bearing registration number 00-264313. He is married to one Suliana binti Hj Johari with whom he has three children, 3 girls. At all material times, he was employed by Royal Brunei Airlines as a Cabin Services Officer which is a higher position to the first defendant.*
- 3. On 11th August 2010, the first and second defendants, whilst off-duty, travelled to Bangkok, Thailand together. The electronic ticket of both defendants for this trip has been marked as **P1A** and **P1B**.*
- 4. On 11th August 2010, both defendants checked-in separately at the Brunei International Airport. The second defendant checked in first whilst the first defendant checked in later.*
- 5. The first defendant brought with him only **one black coloured trolley bag brand DELSEY (P2)** and **one green coloured sling bag brand RIP CURL (P3)** which was carried by hand onto the aircraft. The second defendant checked-in one blue coloured luggage bag brand “LOJEL” (**P4**) inside of which was another bag, **a black***



coloured bag brand ERGO (this bag was never seized and marked).

6. *In the airplane, the first defendant was assigned to seat 6A (boarding pass not found and seized) whilst the second defendant was assigned to seat 6K (please refer to the boarding pass marked **(P5)**). The two defendants were the only passengers seated in the Business Class Section of the flight at the time.*
7. *In Bangkok, Thailand, the defendants stayed in one room at Boutique Place, a guesthouse. The room was registered under the name of and paid for by the second defendant. Please refer to the **'Guest Check in Registration' form (P6A)** and **'Guest Payment Record' (P7B)** showing the same..*
8. *Whilst in Bangkok, the defendants visited various shopping complexes including Panthip Plaza and Tesco Lotus and also went for a massage at a massage parlour called Majestic Massage.*
9. *They both also went to Yanhee International Hospital late at night where the first defendant purchased prescribed slimming pills using the name YASMOON YUSOF and NORAZIZAH HJ KASSIM. Please refer to the **Yanhee International Hospital payment receipts No. Y*53/1498 (P7A) and Y*53/1499 (P7B).***
10. *On 12th August 2010, the defendants returned to Brunei Darussalam on flight BI 516. One blue coloured luggage bag brand LOJEL **(P4)** and **two mattresses brand TOTO PICNIC (P8ABCD)** were checked in under the name of the first defendant whilst **one black coloured bag brand ERGO** [never seized and marked] and **two mattresses brand TOTO PICNIC and TULIP PICNIC (P8ABCD)** were checked in under the name of the second defendant. There is an issue as to who checked-in the baggages at the Bangkok International Airport.*
11. *On the flight back to Brunei both defendants sat at the business class section of the flight. The first defendant was assigned to seat no. 7K **(P9)** whilst the second defendant was assigned to seat*



No. 7A (boarding pass not found and seized). They were both the only passengers seated at the Business Class Section of the flight.

- 12. On 12th August 2010, at the Brunei International Airport, between 1615hrs and 1630 hrs, the Royal Customs and Excise officers conducted observations at various points of the arrivals terminal as they have received information that two Bruneian Malay man (two suspects) are arriving from Bangkok on flight BI 516. The information was that the two suspects were bringing in restricted items.*
- 13. The flight BI 516 from Bangkok arrived at the Brunei International Airport around 1626 hrs. As both defendants were the only passengers at the Business Class section of the flight they were the first ones to exit the airplane and to arrive at the Immigration counter.*
- 14. Upon their arrival at the Immigration counter, the first and second defendants were the only Malay men presenting their passports at the Immigration counter for Brunei citizens. They were then identified as the two suspects by Customs Examining Officer No. 229 Hj Abdullah bin Mohd Salleh. The first defendant was wearing a black coloured Tshirt and the second defendant was wearing a blue shirt. After that both defendants then proceeded to Belt 4 (the baggage claim area).*
- 15. Hj Abdullah bin Mohd Salleh then informed about the arrival of the two suspects to Customs Examining Officer No. 166 Hj Abd Rahman who then informed the same to Customs Prevention Officer No. 19 Haris bin Hj Sulaiman (PP19 Haris). PP19 Haris then informed about the two suspects to the Head of the Operation that afternoon, Assistant Superintendant of Customs Hj Jumat bin Hj Sulaiman (ASC Hj Jumat). Thereafter both ASC Hj Jumat and PP19 Haris made an observation on the two suspects who were still at Belt 4.*
- 16. After some time, the second defendant left Belt 4 and proceeded to the Customs inspection point bringing with him only **one black***



*coloured bag brand **ERGO** [this bag was never seized and marked] which he took from Belt 4 and one black coloured sling bag brand **OBERMAIN (P10)**. The first defendant was still at the Belt 4 area when the second defendant went to the Customs inspection point.*

17. *When the second defendant arrived at the Customs check point he was stopped by ASC Hj Jumat bin Hj Sulaiman (who showed his warrant card) and PP 19 Haris. ASC Hj Jumat then instructed the second defendant to go into the Customs office for a full inspection. Inside the Customs office, the second defendant's small black trolley bag was fully inspected and no prohibited items were found. After that a full body search was also conducted on the second defendant and no prohibited items were found on him.*
18. *Before a full body search was conducted on the second defendant, the first defendant had just entered the Customs office after being stopped at the Customs check point by ASC Hj Jumat who also instructed him to go into the Customs office for a full inspection. At that time the first defendant only had with him a trolley full of four mattresses (**P8ABCD**) and one black coloured trolley bag brand **DELSEY (P2)** and one green coloured sling bag brand **RIP CURL (P3)**. The first defendant's bags were fully inspected and no prohibited items were found in those bags.*
19. *After Royal Customs and Excise officers inspected the first defendant's black coloured trolley bag brand **DELSEY** and green coloured sling bag brand **RIP CURL**, the first defendant was asked if he had another bag. Subsequently he was escorted and asked to go to Belt 4 after which he was then instructed to bring the blue "LOJEL" bag (**P4**) into the Customs Office for inspection.*
20. *Before the inspection into the blue "LOJEL" bag (**P4**) was conducted, the inspection on the second defendant's body and small black trolley bag (this bag was never seized and marked) and black coloured sling bag brand **OBERMAIN (P10)** had been*



completed. Since no prohibited items were found on him and on his bags, he was allowed to leave the Customs office.

21. *After the second defendant had left the Customs office, Customs Prevention Officers No. 16 Hj Afineh bin Hj Ali (PP16 Hj Afineh) and No. 18 Hamadi bin Jublee (PP18 Hamadi) were instructed to conduct an inspection on the blue “LOJEL” bag **(P4)** and PP19 Haris was instructed to take photographs.*
22. *As a result of the inspection of the blue “LOJEL” bag **(P4)** PP16 Hj Afineh and PP18 Hamadi found amongst others the 6 biscuit tins of which 3 tins contained the controlled drugs in question in this case and 3 more tins containing a huge number of pills, all of which are listed in the List of Exhibits **(P12MA, P12MB, P12MC)** prepared by PP32 Hj Baharin Hj Md Noor (PP32 Hj Baharin) and List of Exhibits **(P14M)** prepared by PP33 Noraini @ Bahrin Pengarah Hj Mokti.*
23. *Other than the items mentioned in the List of Exhibits P12MA, P12MB, P12MC and P14M, the Royal Customs and Excise officers also found inside the blue “LOJEL” bag **(P4)** the items listed at **No. 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14** under the ‘List of Exhibits seized’ in the **Receipt and Handing Over Form – BKN 114 dated 13/08/2010 (P11) prepared by ANO II Anuar bin Hj Abd Razak.***
24. *When the discovery of the dried leaves was made in the first biscuit tin that was opened (the biscuit tin brand “Matinee” **[P60E1(c)(i)]** by the Royal Customs and Excise officers, an officer from the Narcotics Control Bureau (NCB) Airport branch, SNO Zaim bin Hj Zaini (SNO Zaim), was called to identify whether the dried leaves found was a controlled drug or not. Upon seeing the dried leaves, SNO Zaim confirmed that the dried leaves found is cannabis. Upon seeing the brand of the biscuit tin, “Matinee”, SNO Zaim commented “Ani memang mati ni” (in Malay) which translate as “This is surely die”. SNO Zaim then left the Customs office to make the necessary arrangements for the NCB to take over the case.*



25. *At about 1925 hours on 12th August 2010, the NCB, led by SNO II Hamdani bin Madil arrived at the Brunei International Airport to take over investigations into this matter.*
26. *SNO I Mohamad Nawawi bin Haji Jaidin received one blue “LOJEL” luggage bag **(P4)** together with its contents, as mentioned in para. 22 and 23 in the above, from ASC Hj Jumat.*
27. *SNO I Mohamad Nawawi then inspected the said bag in the Customs office at the airport and found the bag contain exhibits mentioned in para. 22 and 23 stated in the above. SNO I Mohamad Nawawi bin Haji Jaidin also received exhibits **E2, E3, E4 and E5** as listed in seizure lists **P22M© to P22M(d)** from PP32 Haji Baharin.*
28. *The above exhibits were handed over to the exhibits officer ANO II Anuar Hj Abd Razak. The first defendant also surrendered exhibit **E6** to ANO II Anuar Hj Abd Razak who then prepared a seizure list for the said items as in **P22M(a) to P22M(d)**. this seizure list was subsequently signed by the first defendant.*
29. *ANO II Mohammad Saufi bin Abd Talip was instructed by SNO I Hamdani bin Madil to take photographs of the seized items at the Customs office at the airport. Before taking the photographs ANO II Mohammad Saufi bin Abd Talip had laid out the seized exhibits on a red cloth and then labelled the exhibits individually. He then took 36 photographs altogether which he later produced in the NCB album marked **P20a** and he also prepared the keys to the photographs which is marked **(P12)**.*
30. *The seized items and the first defendant were then taken to the NCB headquarters for further investigations.*
31. *The conduct of the NCB investigations at the Customs office at the Brunei International Airport were recorded in a diary by diary officer ANO II Muhammad Ali Iskandar Mustapha who subsequently was tasked to lodge a police report regarding the*



*arrest of the first defendant on the same day at the BSB Central Police station and the report is as in **(P13)**.*

32. *On 13th August 2010 at about 0215 hours, the seized items mentioned above and the first defendant were handed over to the investigating officer NO Maswemah binti POKJAID DP Awg Haji Mashor.*
33. *On 12th August 2010 at about 2220 hours, the second defendant was arrested by NCB officers at his home at No. 10, Spg 543, Kg Jalan Pasir Berakas. The NCB officers were led by Assistant Director Mohammad Mu'inuddin Chin bin Abdur Rahman.*
34. *NO Wasli bin Hj Tuah arrested the second defendant outside of a bathroom inside the house. The second defendant was then handcuffed by ABO II Ahmed Faez bin Hj Anuar.*
35. *ANO Hj Saipul bin Hj Ibrahim conducted a body search of the second defendant and did not find anything relating to drugs.*
36. *ANO Hj Saipul bin Hj Ibrahim proceeded to inspect the house but did not find anything relating to drugs. However, he did seize exhibits **E1 to E3** as listed in seizure lists **P33M(a) to P33M(d) (P14)**. He was instructed to seize exhibit E3 by NO Haji Hairman bin Haji Abd Rahman. These items were then handed over to ANO II Muhammad Samirza Zhafran bin Abdullah Sambut, the exhibits officer.*
37. *NO Wasli bin Hj Tuah and ANO Zahidah further made and inspection on to the second defendant's car, one Mitsubishi Lancer bearing registration number KR1434. They did not find anything suspicious or related to drugs in the said car.*
38. *ANO II Mohammad Azrin bin Sulaiman took photographs at the second defendant's house that night and produced 41 photographs in the NCB photo album marked **P31a** with the keys for the said photographs marked as **P31Mb. (P15)**.*



39. *The second defendant and the seized items mentioned in para. 36 above, were then taken to the NCB Headquarters for further investigations.*
40. *ANO II Muhammad Samirza Zhafran bin Abdullah Sambut prepared the seizure lists **P33M(a) to P33M(d) – (P14)** pertaining to the seized items which were subsequently signed by the second defendant.*
41. *At the NCB headquarters, the second defendant and the seized items were handed over by ANO II Muhammad Samirza Zhafran bin Abdullah Sambut to ANO I Pg Mohd Shamsul Adli bin Pg Salleh on behalf of the investigating officer NO Maswemah binti POKJAID DP Awg Haji Mashor.*
42. *A police report regarding the arrest of the second defendant was lodged by ANO II Ahmad Sukarni Hj Awg Umar at the BSB Central Police Station on 13th August 2010. The report is as in **P25M. (P16).***
43. *On 12th August 2010, the three blocks of dried leaves seized [**P60E1(a)(i), P60E1(b)(i) and P60E1(c)(i)**] were weighed by ANO II Hj Md Adib Bahzi bin Hj Majid. The weighing of the said items was witnessed by the first defendant himself. The total gross weight of the said items was 2411.15 grams.*
44. *On 16th August 2010, the three blocks of dried leaves together with the pills [**P60E(d)(i), P60E1(e)(i), P60E1(f)(ii), P64E5(i), P64E5(ii), P64E5(iii), P64E5(iv), P64E5(v) and P64E5(vi)**] were sent by the investigating officer NO Maswemah binti POKJAID DP Awg Hj Mashor to the Department of Scientific Services, Ministry of Health for analysis.*
45. *The items were analysed by Lim Swee Chin. The results of the analysis are contained in a report dated 8th January 2011 with reference number KMN/165/10 (**P59**) prepared by Lim Swee Chin. The three blocks of dried leaves are listed as E1(a)(i), E1(b)(i) and E1(c)(i) in the report and the pills are listed as E1(d)(i)(a) to E1(f)(ii) and E5(i) to E5(vi)(e).*



46. According to the report, the dried leaves E1(a)(i), E1(b)(i) and E1(c)(i) were found to be cannabis weighing 912.755 grams, 904.505 grams and 445.919 grams respectively. The total weight of the cannabis is 2264.179 grams. The first defendant at trial will be disputing to this report made by Mr. Lim Swee Chin.
47. The pills, E1(d)(i)(a) to E1(f)(ii) and E5(i) to E5(vi)(e), were not found to contain any controlled substances under the Misuse of Drugs Act (Cap 27). According to the report (**P59**), some of the pills were only found to contain amongst others Appetite suppressant, Antidepressant, Stimulant laxative which are not controlled substances under the Misuse of Drugs Act or poisons under the Poisons Act (Cap 114).
48. The first defendant's urine sample was collected on 13th August 2010 at 0357 hours at the NCB office. He then wrote his name and IC Number on a sticker which he himself placed on a sealed bottle containing his urine sample. The first defendant then placed the bottle in a box labeled BKN/D12(d)-13/05 and then locked the box. Inside the said box was also placed earlier one sealed bottle containing the second defendant's urine sample.
49. The second defendant's urine sample was also collected on 13th August 2010 at 0248 hrs. He also wrote his name and IC Number on a sticker which he placed on a sealed bottle containing his urine sample which he then placed inside the box labeled BKN/D12(d)-13/05.
50. The box BKN/D12(d)-13/05 containing both defendant's urine sample was then sent for analysis to the Department of Scientific Services on 16th August 2010 by NO Dyg Maswemah.
51. The result of the urine analysis for the first defendant is found in the **DSS report with reference NAR/NCB/SUP/BSB/10002872 (P17)** dated 21st August 2010 where his urine was found to be negative for any traces of controlled drugs.



52. *The result of the urine analysis for the second defendant is found in the **DSS report with reference NAR/NCB/ENF/BSB/10002974 (P18)** dated 30th August 2010. The result of the analysis shows that Methylamphetamine, a class A controlled drug, was detected in the second defendant's urine sample but the amount detected was below the cutoff value of 500ng/ml therefore the conclusion of the analysis is negative for Methylamphetamine.*
53. *According to the Intelligent Section of the NCB, through a **report prepared by SNO II Haji Jali bin Abdul (P19)**, the market value of cannabis is B\$50.00 for one packet weighing 0.5 gram. This calculation is based on the gross weight of the drugs found.*
54. *The 3 plastic bags with the metal biscuit tins contained in it [**P60E1(a), P60E1(b) and P60E1(c)**] were sent by NO Dyg Maswemah to the Crime Scene Unit Lab of the Royal Brunei Police Force for fingerprint examination on 23rd August 2010.*
55. *The result of the examination is reported in the Fingerprint Examination Report (**P20**) by PC 4717 Irma Azizun bin Hj Matussin which states that there are no prints of value developed from the examination.*
56. *The first defendant's first ordinary statement (**P21**) was recorded on 14th August 2010 by NO Masmegawati Mahmud Besiuni with ANO Pg Mohd Shamsul Adli Pg Salleh as the witness. The statement was recorded at the NCB Headquarters at 0135 hrs and ended at 1700 hrs, and it contains 8 pages.*
57. *The first defendant's second ordinary statement (**P22**) was recorded on 4th September 2010 by NO Masmegawati Mahmud Besiuni with ANO Pg Mohd Shamsul Adli Pg Salleh as the witness. This further statement was recorded at the Jerudong Prison at 0945 hrs and ended at 1140 hrs. The statement was recorded at the Jerudong Prison at 0945 hrs and ended at 1140 hrs. The statement contains 6 pages.*



58. *The first defendant's third ordinary statement (P23) was recorded on 13th December 2010 at the Jerudong Prison by NO Masmegawati Mahmud Besiuni with ANO Pg Mohd Shamsul Adli Pg Salleh as the witness. The statement was recorded at 1055 hrs and it contains 4 pages.*
59. *The first defendant's cautioned statement (P24) was recorded on 19th August 2010 at the NCB Headquarters by SNO1 Md Hardiyamin Hj Badarudin with NO Fauziah Manaf as the witness. The statement as recorded at 1203 hrs and ended at 1245 hrs. The statement contains 6 pages.*
60. *The second defendant's first ordinary statement (P25) was recorded on 14th August 2010 by NO Fauziah Manaf with ANOI Hj Adib Bahzi as the witness. The statement was recorded at the NCB Headquarters at 1317 hrs and ended at 1638 hrs, and it contains 10 pages.*
61. *The second defendant's second ordinary statement (P26) was recorded on 4th September 2010 by NO Fauziah Manaf with ANOI Hj Adib Bahzi as the witness. The statement was recorded at the Jerudong Prison at 0952 hrs and ended at 1002 hrs, and the statement contains 2 pages.*
62. *The second defendant's third ordinary statement (P27) was recorded on 13th December 2010 by NO Fauziah Manaf with ANOI Hj Adib Bahzi as the witness. The statement was recorded at the Jerudong Prison at 1013 hrs and ended at 1025 hrs, and it contains 2 pages.*
63. *The second defendant's cautioned statement (P28) was recorded on 19th August 2010 by SNOI Hj Alinor Hj Mohd Yassin with NO Masmegawati Mahmud Besiuni as the witness. The statement was recorded at the NCB Headquarters at 1320 hrs and ended at 1335 hrs, and it contains 5 pages.*
64. *An ordinary statement was recorded by the NCB from the second defendant's brother, Harrisman Asmaedy bin Hj Ali (P29), in*



relation to a different NCB case in 2010. The statement was recorded on 25th April 2010 by ANOI Mahadi. The statement was recorded at the NCB Headquarters at 1655 hrs and ended at 1720 hrs. It contains 4 pages.

65. *A cautioned statement was recorded from Ahmad bin Haji Sahari in relation to a different case in 2009 (BKN/IP/157/09) **(P30)**. The statement was recorded on 14th December 2009 by Rahaman Hj Panjang with ANOI Mohd Nasrul bin Ahmad Senusi as the witness. The statement was recorded at the NCB Headquarters at 1452 hrs and ended at 1557 hrs. It contains 8 pages.*
66. *The first defendant had stated that he bought the pills seized in the present case under the name of two persons, being Norazizah Hj Kassim and Yasmoon Yusof. These two persons were formerly colleagues with the first and second defendants.*
67. *An ordinary statement was recorded from Norazizah Hj Kassim **(P31)** on 27th November 2010 by ANO Ampuan Ronie. The statement was recorded at the NCB Headquarters at 1548 hrs and it contained 2 pages.*
68. *An ordinary statement was recorded from Yasmoon Yusof **(P32)** on 1st December 2010 by ANO Ampuan Ronie. The statement was recorded at the BMC Headquarters at 1455 hrs. It contains 2 pages.*
69. *On 9th December 2010, the NCB sent a memorandum to the Airport Police **(P33)** requesting for the CCTV footage on 11 and 12 August 2010 at the Brunei International Airport pertaining to this case.*
70. *On 11th December 2010, the Airport Police wrote a memorandum to the NCB **(P34)** in reply to the request stating that the requested footages for the 11 and 12 August 2010 are no longer kept in their possession.*



71. According to the first defendant's passport, in 2009 (**P35**), the first defendant travelled to Bangkok once from 20th November 2009 to 21st November 2009. In 2010, according to the same passport, he travelled to Bangkok 7 times as follows:
- a) From 15th January 2010 to 16th January 2010;
 - b) From 7th February 2010 to 8th February 2010;
 - c) From 15th March 2010 to 18th March 2010;
 - d) From 25th April 2010 to 26th April 2010;
 - e) From 30th May 2010 to 31st May 2010;
 - f) From 8th July 2010 to 9th July 2010;
 - g) From 11th August 2010 to 12th August 2010.
72. According to the second defendant's passport (**P36**), the second defendant travelled to Bangkok, in 2009, 12 times as follows:
- a) From 15th January 2009 to 18th January 2009;
 - b) From 26th April 2009 to 28th April 2009;
 - c) From 5th June 2009 to 6th June 2009;
 - d) From 23th June 2009 to 24th June 2009;
 - e) From 13th July 2009 to 14th July 2009;
 - f) From 1st August 2009 to 2nd August 2009;
 - g) From 13th August 2009 to 14th August 2009;
 - h) 2nd September 2009 to 3rd September 2009;
 - i) From 1st October 2009 to 2nd October 2009;
 - j) From 20th October 2009 to 21st October 2009;
 - k) From 20th November 2009 to 21st November 2009;
 - l) From 6th December 2009 to 7th December 2009.
73. From the same passport, the second defendant travelled to Bangkok, in 2010, 10 times as follows:
- a) From 17th January 2010 to 18th January 2010;
 - b) From 7th February 2010 to 8th February 2010;
 - c) From 12th March 2010 to 13th March 2010;
 - d) From 20th March 2010 to 22nd March 2010;
 - e) From 7th April 2010 to 8th April 2010;
 - f) From 25th April 2010 to 26th April 2010;



- g) From 30th May 2010 to 31st May 2010;*
- h) From 4th June 2010 to 5th June 2010;*
- i) From 8th July 2010 to 9th July 2010;*
- j) From 11th August 2010 to 12th August 2010.*

74. *The following documents are hereby agreed to be tendered without calling the maker of such documents:-*

- (a) Boutique Place Guest Check In Registration form and Guest Payment Record;*
- (b) Yanhee International Clinic payment receipts No. Y*53/1498 and Y*53/1499;*
- (c) First Information Report with reference BSB/CR/2122/2010 marked P17M;*
- (d) First Information Report with reference BSB/CR/2123/2010 marked P25M;*
- (e) NCB photo album parked P20a and the keys to the photographs marked P20Mb;*
- (f) NCB photo album marked P31a with the keys for the said photographs marked as P31Mb;*
- (g) Seizure List prepared by ANOII Muhammad Samirza Zhafran bin Abdullah Sambut – P33M(a) to P33M(d);*
- (h) Urine analysis result for the first defendant – DSS report with reference NAR/NCB/SUP/BSB/10002872;*
- (i) Urine analysis result for the second defendant – DSS report with reference NAR/NCB/ENF/BSB/10002974;*
- (j) Market Value for Cannabis report dated 5th April 2012 prepared by SNOII Haji Jali bin Abdul;*
- (k) Fingerprint Examination Report prepared by PC 4714 Irma Azizun bin Hj Matussin (P53);*



- (l) *First defendant's ordinary statement dated 14th August 2010 (P37M);*
- (m) *First defendant's ordinary statement dated 4th September 2010 (P38M);*
- (n) *First defendant's ordinary statement dated 13th December 2010 (P39M);*
- (o) *First defendant's cautioned statement dated 19th August 2010 (P45M);*
- (p) *Second defendant's ordinary statement dated 14th August 2010 (P41M);*
- (q) *Second defendant's ordinary statement dated 4th September 2010 (P42M);*
- (r) *Second defendant's ordinary statement dated 13th December 2010 (P43M);*
- (s) *Second defendant's cautioned statement dated 19th August 2010 (P47M);*
- (t) *Ordinary statement of Harrisman Asmaedy bin Hj Ali dated 25th April 2010 (P56M);*
- (u) *Cautioned statement of Ahmad bin Haji Sahari dated 14th December 2009 (P57M);*
- (v) *Ordinary statement of Norazizah Hj Kassim dated 27th November 2010;*
- (w) *Ordinary statement of Yasmoon Yusof dated 1st December 2010;*
- (x) *Memorandum from NCB to Airport police dated 9th December 2010 with reference (11)BKN(C);*



- (y) *Memorandum from Airport police to NCB dated 11th December 2010 with reference AD. 13/AP/28/1/2;*
- (z) *Copy of first defendant's passport;*
- (aa) *Copy of second defendant's passport."*

This sensible course of action taken by the prosecution and counsel for the defendants is commendable as it saves time. The number of prosecution witnesses has been considerably reduced, from 35 to 25.

Prosecution case

Most of the evidence-in-chief of the majority of the witnesses for the prosecution was given in the form of a written statement pursuant to section 117B of the Criminal Procedure Code ("*section 117B statement*"). The salient parts of the evidence of the main witnesses are as follows.

CO Hj Abdullah's evidence

Customs officer Hj Abdullah bin Mohd Salleh ("*CO Hj Abdullah*") said he stood in front of the immigration counter for local passengers to carry out observation. He saw D1 and D2 going to belt 4 after clearing immigration. At one point he saw D1 picking up a blue bag (which he identified in court as the "*Lojel*" bag) from belt 4 and placing it on the floor.

In the course of cross-examination by counsel for D1, CO Hj Abdullah admitted that in his section 117B statement made on 12 March 2011 for the purpose of the preliminary inquiry, he did not mention he saw D1 taking the "*Lojel*" bag from belt 4 and leaving it on the floor.

Under cross-examination by counsel for D2, CO Hj Abdullah said he was sure he saw D1 picking up the "*Lojel*" bag from belt 4 and leaving it on the floor. He did not see a "*commotion*" involving D1 at the customs inspection area.

In re-examination CO Hj Abdullah explained that he remembered the incident of D1 picking up the "*Lojel*" bag from belt 4 after he had read his investigation diary. He said that before he went to inform Deputy Superintendent of Customs Hj Jumat bin Hj Sulaiman ("*DSC Hj Jumat*") about this event, he



observed from a distance that the “Lojel” bag had been moved from its original position and was located in front of the lost and found room.

CO Haris’ evidence

Customs Officer Haris bin Hj Sulaiman (“CO Haris”) in his section 117B statement said he was standing near the X-ray machine at the customs inspection counter when he observed D1 and D2 at belt 4. He saw D1 lifting a “big blue” bag (which he identified in court as the “Lojel” bag) from belt 4 and placing it on the floor. He also saw D2 taking a black bag from belt 4 before walking to the customs inspection counter.

In the customs office CO Haris saw D1 opening the combination lock of the “Lojel” bag. When questioned by DSC Hj Jumat, D1 said that the “Lojel” bag contained medicine, the biscuit tins containing slimming pills belonged to him and the other tins did not belong to him and he did not know what was inside them.

Questioned further by DSC Hj Jumat, D1 said the three “tall” biscuit tins belonged to him. D1 “kept quiet” when asked by DSC Hj Jumat who the other three biscuit tins belonged to.

In evidence-in-chief in court, CO Haris said D1 did not show any reaction when the dried leaves were first found in one of the biscuit tins but “looked worried” when Senior Narcotics Officer Zaim bin Hj Zaini identified the dried leaves as cannabis and made the remark, “This is surely die”. D1 also “looked worried” with the discovery of dried leaves in another two biscuit tins.

Under cross-examination by counsel for D1, CO Haris agreed that he made no mention of seeing D1 taking the “Lojel” bag from belt 4 or of D1 keeping quiet when confronted with the dried leaves found in the biscuit tins, either in his statement to his department or in his section 117B statement for the preliminary inquiry. He explained that he “just remembered” these events for the trial. He said he was able to identify the “Lojel” bag from belt 4.



DSC Hj Jumat's evidence

DSC Hj Jumat in his section 117B statement said he was with CO Haris standing near the x-ray machine at the customs inspection counter when he, too, saw D1 lift a blue bag (which he identified in court as the *"Lojel"* bag) from belt 4 and place it on the floor. He then saw D2 taking a black bag from belt 4 before walking to the customs inspection counter.

In the customs office DSC Hj Jumat noticed that D1 had brought along a black bag, a green sling bag and four mattresses but not the *"Lojel"* bag. He immediately asked D1 if he had another bag that was left behind in the vicinity of belt 4, to which D1 kept quiet. After CO Hj Abdullah entered the office and said D1 had left a bag in the belt 4 area, DSC Hj Jumat instructed D1 to get the *"Lojel"* bag.

DSC Hj Jumat and Customs officer Hj Baharin bin Hj Md Noor (*"CO Hj Baharin"*) escorted D1 to belt 4 to retrieve the *"Lojel"* bag. DSC Hj Jumat saw four bags near the lost and found office and he told D1 to get his bag. D1 took the *"Lojel"* bag. DSC Hj Jumat inspected the baggage tag on the *"Lojel"* bag and found D1's name on the tag. DSC Hj Jumat then told D1 to bring the *"Lojel"* bag to the customs office for inspection.

On the way to the customs inspection office, D1 said there were six tins in the *"Lojel"* bag but only three tins were his. DSC Hj Jumat asked D1 about the contents of the tins and D1 said the three tins belonging to him contained slimming pills, whilst the *"other three tins"* belonged to his friend and he did not know what was inside them.

Reaching the customs office DSC Hj Jumat asked D1 for the name of his friend who owned the *"other three tins"*. D1 kept quiet but looked over to D2 who was present at the time. DSC Hj Jumat told D1 to put the *"Lojel"* bag on the table for inspection by Customs Officer Afineh bin Hj Ali (*"CO Hj Afineh"*) and Customs Officer Hamadi bin Jublee (*"CO Hamadi"*). D2 was allowed to leave the customs office since nothing of significance was found on him or his bag.

Before inspection of the *"Lojel"* bag, DSC Hj Jumat asked what was in the bag and D1 said *"medicine"*. DSC Hj Jumat told D1 to open the bag and D1 did so by unlocking the combination lock. DSC Hj Jumat asked D1 which items were



his. D1 lifted the plastic bags containing clothes which were on the top revealing the six biscuits tins underneath. CO Hamadi opened the “short” biscuit tin with the name “*Matinee*” and found a plastic packed of dried leaves inside. Senior Narcotics Officer Zaim bin Hj Zaini (“*SNO Zaim*”) of the Narcotics Control Bureau (“*NCB*”) was asked to enter the customs office to identify the dried leaves.

SNO Zaim identified the dried leaves to be cannabis and commented, “*This is surely die.*”

CO Hj Afineh then inspected the other two “short” biscuit tins and discovered that each tin contained a plastic packet of dried leaves.

The three “tall” biscuit tins which D1 admitted were his were found to contain pills.

In evidence-in-chief in court, DSC Hj Jumat said when the dried leaves were discovered in the “*Matinee*” biscuit tin, D1 kept quiet.

Under cross-examination by counsel for D1, DSC Hj Jumat agreed that in his earlier statement dated 13 August 2010 and in his statement made for the preliminary inquiry, he made no mention of D1’s admission that three tins in the “*Lojel*” bag were his or that D1 had looked in the direction of D2 when asked for the identity of his friend who owned the other three tins. DSC Hj Jumat also agreed that in his statement dated 13 August 2010 he merely said he saw a suspect taking a bag from belt 4 and he did not name him.

DSC Hj Jumat disagreed that when D1 was confronted with the “*Lojel*” bag D1 had protested that he had not checked in this bag; that when D1 was stopped by him D1 had repeatedly denied the “*Lojel*” bag belonged to him and had said it belonged to his friend; that D1 was handcuffed as soon as the “*Matinee*” biscuit tin was opened; and that he and other customs officer had taunted D1 telling him he would be hanged.

In re-examination DSC Hj Jumat said that in his statement dated 13 August 2010, when he mentioned the suspect had left the blue bag near belt 4, he meant it was D1, and this statement was “*all about*” the arrest of D1.



DSC Hj Jumat recalled that when he asked D1 if he had another bag whilst they were in the customs office, D1 had kept quiet; but after CO Hj Abdullah said D1 had left a bag at belt 4, D1 admitted it.

CO Hj Baharin's evidence

CO Hj Baharin confirmed that D1 had at first kept quiet when asked by DSC Hj Jumat if he had another bag but after CO Hj Abdullah Said D1 had left a bag at belt 4, D1 admitted it.

It was also the evidence of CO Hj Baharin that after D1 had retrieved the *"Lojel"* bag from the belt 4 area on the instruction of DSC Hj Jumat, during the walk to the customs office, D1 admitted that three tins containing *"medicine for body slimming"* belonging to him were in the bag whilst another three tins belonged to his friend and he did not know the contents; and when asked by DSC Hj Jumat for the identity of his friend, D1 kept quiet.

Under cross-examination by counsel for D1, CO Hj Baharin agreed that in his earlier statement made on 13 August 2010 he made no mention of D1's admission on the way to the customs office from belt 4 after the *"Lojel"* bag was retrieved or that DSC Hj Jumat had asked D1 who his friend was and D1 had kept quiet.

CO Hamadi's evidence

Customs Officer Hamadi bin Jublee (*"CO Hamadi"*) gave evidence that in the customs office, after D1 was asked to open the *"Lojel"* bag, he heard DSC Hj Jumat ask D1 what was inside the bag and D1 answered, *"Medicine."* He then saw D1 opening the combination lock of the bag. After the bag was opened by D1, DSC Hj Jumat asked D1 which items belonged to him. D1 lifted the plastic bag on the top (containing clothes, bedsheets, instant noodles and slippers) and pointed to several plastic bags containing tins at the bottom.

There were a total of six biscuits tins: three *"tall tins"* and three *"short tins"* in the *"Lojel"* bag. One of the three *"tall tins"* is of the brand *"Julie's Melodies"* whilst the other two are of the brand *"Imperial Varieties"*. One of the three *"Short tins"* is of the brand *"Matinee"* whilst the other two are of the brand *"Delio"*.



DSC Hj Jumat asked D1 what was inside the tins and D1 said the three "*tall tins*" containing "*medicine*" belonged to him and he did not know the contents of the other three tins which did not belong to him.

CO Hamadi opened the "*Matinee*" biscuit tin on the instruction of DSC Hj Jumat. The tin was sealed with cellotape. He used a cutter to cut the cellotape seal. He found a plastic package containing dried leaves placed "*in the middle between the biscuits.*"

Customs Officer Hj Afineh bin Hj Ali ("*CO Hj Afineh*") was instructed to open the two "*Delio*" biscuit tins which were also sealed with cellotape. Biscuits and a package of dried leaves were also found in each tin.

After that CO Hj Afineh opened one of the sealed "*Imperial Varieties*" biscuit tin (*the first "Imperial Varieties" biscuit tin*) and this was found to contain pills placed underneath some biscuits. CO Hj Afineh proceeded to open the sealed "*Julie's Melodies*" biscuit tin and this was also found to contain pills kept underneath some biscuits.

CO Hamadi inspected the other "*Imperial Varieties*" biscuit tin (*the second "Imperial Varieties" biscuit tin*) and this was also found to contain pills kept underneath some biscuits.

D1 was silent and looked worried when the dried leaves were found in the "*Matinee*" biscuit tin.

Under cross-examination by counsel for D1, CO Hamadi agreed that in each of the three "*short tins*", namely, the "*Matinee*" biscuit tin and the two "*Delio*" biscuit tins, the plastic bag containing the dried leaves was cellotaped with clear cellotape; that the seals of both of the "*Imperial Varieties*" biscuit tins have the word "*Imperial*" imprinted on them which is the same word "*Imperial*" on the tins and no clear cellotape was found on these tins; that the cellotape seal on the "*Julie's Melodies*" biscuit tin has the word "*Julie's*" imprinted on it and no clear cellotape was found on this tin; that there is no mention of D1's reaction upon seeing the dried leaves found in the "*Matinee*" biscuit tin in (1) his statement dated 13 August 2010, (2) in his section 117B statement for the preliminary inquiry and (3) in his section 117B statement for this trial.



In cross-examination by counsel for D2, CO Hamadi said the *"Julie's"* biscuits found in the *"Matinee"* biscuit tin looked like the *"Julie's"* biscuits found in the *"Julie's Melodies"* biscuit tin. Also, the *"Variety"* biscuits found in the *"Matinee"* biscuit tin are the same as the *"Variety"* biscuits found in the first *"Imperial Varieties"* biscuit tin.

CO Hj Afineh's evidence

CO Hj Afineh recounted that in the customs office after CO Hj Baharin had just completed inspecting D1's black bag, DSC Hj Jumat asked D1 whether he had left another bag at belt 4 and D1 kept quiet; but after CO Hj Abdullah told DSC Hj Jumat that D1 had left a bag at belt 4, D1 said he *"had another bag"*.

In the customs office before the *"Lojel"* bag was opened for inspection DSC Hj Jumat asked D1 what was inside the bag and D1 said *"medicines"*.

After the six biscuit tins were taken out of the *"Lojel"* bag DSC Hj Jumat asked D1 what was inside the tins and D1 said the three *"tall"* tins containing *"medicines"* belonged to him whilst the three *"short"* tins did not belong to him and he did not know the contents.

CO Hj Afineh's evidence relating to the opening of the six biscuit tins and the contents of these tins was similar to the evidence given by CO Hamadi.

D1 kept quiet when the dried leaves were found in the *"Matinee"* biscuit tin and the two *"Delio"* biscuit tins.

The *"Variety"* biscuits were found in both of the *"Delio"* biscuit tins.

The *"Variety"* biscuits found in the *"Matinee"* biscuit tin and the two *"Delio"* biscuit tins are the same as the *"Variety"* biscuits found in the first *"Imperial Varieties"* tin.

The *"Julie's"* biscuits found in the *"Matinee"* biscuit tin are of the same kind as the *"Julie's"* biscuits found in the *"Julie's Melodies"* biscuit tin.

Under cross-examination by counsel for D1, CO Hj Afineh agreed that clear cellotape was found on the three *"short tins"* but not on the three *"tall tins"*;



and that there is no mention of D1 keeping quiet on being asked by DSC Hj Jumat whether he had another bag and of D1 remaining silent when the dried leaves were found in the three *“short tins”* either in his statement dated 13 August 2010 or in his section 117B statement for the preliminary inquiry.

In cross-examination by counsel for D2, CO Hj Afineh explained that his statement made on 13 August 2010 and his section 117B statement for the preliminary inquiry are *“brief”* statements while his section 117B statement for the trial is a *“mere complete and detailed version”*.

CO Mawardy’s evidence

Customs Officer Mawardy bin Haji Matyassin (*“CO Mawardy”*) was the diary officer and kept a record of the events that occurred at the airport upon the arrival of the defendants on flight BI 516.

He gave evidence that after D1’s black bag was inspected in the customs office, Hj Jumat asked D1 whether he had *“prohibited goods”* with him and D1 replied *“no”* and that he only had clothing with him.

DSC Hj Jumat also asked D1 if he had any other bags and D1 kept quiet. But when CO Hj Abdullah entered the customs office and informed DSC Hj Jumat that D1 had left a bag at the belt 4 area, DSC Hj Jumat again asked D1 if he had another bag and D1 answered *“Yes”*. This exchange is recorded in the *“small note book”*.

He referred to the *“small note book”* when he recorded his investigation diary.

After D1 brought the *“Lojel”* bag into the customs office and before the bag was inspected, DSC Hj Jumat what was inside the bag and D1 answered *“medicine”*.

Upon the discovery of the 6 biscuits tins in the *“Lojel”* bag DSC Hj Jumat asked D1 what was inside the tins and D1 answered that three tins belonged to him and these contained *“medicine”* whilst the other three tins did not belong to him and he did not know the contents.



In his investigation diary he did not record that D1 kept quiet when DSC Hj Jumat asked him if he had another bag. He would usually not mention it in his investigation diary when a suspect kept quiet.

Under cross-examination by counsel for D1, CO Mawardy agreed that the record of any admission by a suspect should be read to him and signed by him; that in his 117B statement for the preliminary inquiry he did not mention that D1 kept quiet when DSC Hj Jumat asked him if he had another bag (he explained that this was a “*brief*” statement); that he and other officers in the preventive unit “*cross-referenced*” their evidence to ensure D1 was convicted; that he believed his role in giving evidence was to ensure D1’s conviction; that the matters recorded in his diary are matters showing D1’s guilt; and that there were quite a few events that occurred in the customs office which he did not record in his investigation diary.

However, CO Mawardy disagreed that when DSC Hj Jumat asked D1 whether he had another bag D1’s answer was “*Mana ada*”.

In cross-examination by counsel for D2, CO Mawardy said this was his first drugs case and his first experience giving evidence in court; and his section 117B statement for the trial is the most detailed and accurate statement of what occurred on the material day.

CO Mawardy said in re-examination that on page two of his investigation diary at the passage stating “*PK6 asked the accused person if there is another bag....The accused person answered yes*”, he also added “*Early information from Hj Abdullahto....Hj Jumat*”. He meant that DSC Hj Jumat asked D1 whether he had another bag after CO Hj Abdullah had informed DSC Hj Jumat about the bag.

SNO Hamdani’s evidence

Senior Narcotics Officer Hamdani Bin Madil (“*SNO Hamdani*”) of the NCB was the Head of Operation.

Counsel for D1 initially took objection to the admissibility of the following paragraphs in SNO Hamdani’s section 117B statement:



- “12. *Considering the Arrested Person Mohd Khairil was also a RBA flight attendant so it crossed my mind to ask him with whom did he actually fly to Bangkok, maybe he flew with Harrisman. Therefore I asked the Arrested Person Mohd Khairil personally regarding with whom he flew and the Arrested Person Mohd Khairil initially kept quiet but after that he admitted that he actually flew to Bangkok and back to Brunei with Harrisman. After that I asked him again why didn’t he inform this matter to Customs but the Arrested Person Mohd Khairil kept quiet only.*
13. *As far as I can remember after that I did ask the Arrested Person Mohd Khairil where was Harrisman at that time and the Arrested Person Mohd Khairil answered that Harrisman was released earlier and at that time he was shopping at Yayasan. I was curious as to how the Arrested Person Mohd Khairil knew that Harrisman was at Yayasan at that time but I did not ask him regarding this matter. I only said to him “That’s good you’re the only one who is in trouble, he is having fun shopping in Yayasan”.*
14. *After that I did then ask who actually owns the cannabis and the Arrested Person Mohd Khairil kept quiet only.”*

It was contended that these paragraphs were inadmissible because of “procedural flaws” in that they were in breach of section 116 of the Criminal Procedure Code as there was no written record of the conversations and that it was necessary to hold a *voire dire* to determine the admissibility of D1’s admissions.

Reliance was placed on a decision of the Singapore Court of Appeal in *Muhammad bin Kadar & anor v Public Prosecutor* [2011] SGCA32 where V.K.Rajah, J.A. said at p.24:

“.....in Public Prosecutor v Dahalan bin Ladqewa [1995] 2SLR(R)24 (“Dahalan”), S Rajendran, J. held (at [26]-[27]) that he had the discretion to refuse to admit an accused person’s statement under s.122(5) of the CPC even if it was voluntarily made without threat, inducement or promise. He appeared to have concluded that he had such a discretion



based on the fact that s.122(5) made statements “admissible” without mandating that they be “admitted”.”

V. K. Rajah, J. A. went on to say at p.26:

“For present purposes, it suffices for us to state that from the recent authorities cited above, it is clear that a common law discretion to exclude voluntary statements that would otherwise to admissible exists where the prejudicial effect of the evidence exceeds its probative value...”

Section 122(5) of the Singapore Criminal Procedure Code states:

“Where any person is charged with an offence any statement, whether it amounts to a confession or not or is oral or in writing, made at any time, whether before or after that person is charged and whether in the course of a police investigation or not, by that person to or in the hearing of any police officer of or above the rank of sergeant shall be admissible at his trial in evidence and, if that person tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit:

Provided that the court shall refuse to admit such statement or allow it to be used as aforesaid if the making of the statement appears to the court to have been caused by any inducement, threat or promise having reference to the charge against such person, proceeding from a person in authority and sufficient, in the opinion of the court, to give such person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.”

The equivalent provision in our Criminal Procedure Code is section 117 which states:

“(1) In any criminal proceeding any statement made by any person including a person in the custody of a police officer, whether it amounts to a confession or not or is oral or in writing, made at any time, whether before or after that person is charged and



whether in the course of a police investigation or not, by that person to or in the hearing of any police officer shall be admissible in evidence and, if that person tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit.

- (2) *The court **shall admit** under subsection (1) a statement made by an accused only if the prosecution satisfied the court that the statement was voluntary, that is to say it was not obtained by violence, inducement, threat or oppression by a person in authority.”*

We drew attention of counsel for D1 to the crucial difference in wording between the Singapore section 122(5) and our section 117(1) and (2) in that whereas the former provides that the court “*shall refuse to admit*” such a statement if it appears to the court to be involuntary, the latter states explicitly that the court “*shall admit*” such a statement if it is voluntary.

In our view the test for admissibility of such a statement under section 117 (1) and (2) is whether the statement was voluntary. Once the prosecution has satisfied the court that the statement was voluntarily made, the court is required to admit the statement. The common law discretion to exclude voluntary statements that would otherwise be admissible where the “*prejudicial effect of the evidence outweighs its probative value*” expounded in the **Dahalan** case has no application in light of the clear wording of section 117(1) and (2). The weight to be given to any statement although voluntary is, of course, a separate issue.

Counsel for D1 having reviewed the **Dahalan** case withdrew his application for a *voire dire*.

Returning to the evidence of SNO Hamdani, under cross-examination by counsel for D1, he conceded that the matter stated in paragraphs 11 to 15 of his section 117B statement are not mentioned in two earlier statements made by him on 7 September 2010 and on 10 March 2011 (for the preliminary inquiry); that he did not keep any record of what occurred in a pocket diary; that it was difficult to remember events which had happened nearly 2 years ago; and that he could not rule out the possibility of errors in his memory.



SNO Hamdani further said that the baggage receipts were found after D1 was searched; that D1 claimed that D2 had checked in the bags and not him; that he had received information that D2 was dealing in cannabis in 2009 and 2010; that Harrisman Asmaedy bin Hj Ali had made a statement that he obtained cannabis from his elder brother, D2; that one Ahmad bin Haji Sahari had given a statement that D2 supplied him with cannabis which D2 obtained from Bangkok; and that the NCB was monitoring D2's facebook account as he was suspected of using this medium to sell cannabis.

In cross-examination by counsel for D2, SNO Hamdani agreed that notwithstanding the information he had received about D2 dealing in drugs, D2 was never charged for selling drugs; and that following D2's arrest in relation to this case, no drugs were found in his house or car.

CCTV evidence

Staff Sergeant 1380 Rakiah binti Hj Tengah (*"S/Sgt Rakiah"*) was at the Arrival Control Post at the airport on that day when she received information at 1950 hours from a person whom she believed to be a narcotics officer that D1 had been detained in the customs office on suspicion of bringing 2½ Kgs of cannabis and was waiting for the NCB vehicle to arrive. She immediately informed the Operation Room of this and gave instruction for the CCTV to focus on the customs area.

Corporal 2882 Aminuddin bin Hj Tahir (*"Cpl Aminuddin"*) received the information that D1 had been detained in the customs office from S/Sgt Rakiah. He then told Police Constable 4427 Mohd Azman bin Hj Norsalam (*"PC Azman"*) to carry out observation using the CCTV camera located at the Arrival Hall.

PC Azman said he conducted observation of the customs office with camera 3 and saw *"a lot of people"* coming out. At the time he did not know the identity of the *"arrested person"*. Later, he observed the area outside the Arrival Hall.

After hearing from Cpl Aminuddin that the *"arrested person"* was on flight BI 516 from Bangkok, PC Azman replayed the CCTV recording of the Arrival Hall to see if the *"arrested person"* could be seen. The recording from camera 3



showed the *“arrested person”* just *“being arrested”* and led into the customs office. After that the recording from cameras 107 and 108 showed the same person being taken out of the customs office to a vehicle parked in front of the parking ticket counter.

PC Azman made a digital copy of the CCTV recording from cameras 3, 107 and 108 from 1600 hours to 2400 hours and kept this in a folder in the hard drive. He did not make any copy of the CCTV recording from camera 109 (showing belts 3 and 4) and camera 111 (showing belts 1 and 2) because he *“did not see the person that was arrested”* on that day on this recording.

Under cross-examination by counsel for D1, PC Azman said the footage from all 88 cameras would automatically be recorded in the hard disk system and saved for one month; he saved eight hours of footage from each of the three cameras (3, 107 and 108) from 1600 to 2400 hours; the footage from camera 3 shown in court starts from 1642 hours and lasts for about one minute; the footage from camera 8 shown in court is about 10 minutes long; the footage from camera 107 which he saved has disappeared; he never viewed the footage from camera 109; and he viewed the footage from cameras 3, 107 and 108 on fast forward mode.

In the latter part of PC Azman’s evidence under cross-examination by counsel for D1, contrary to what he had said earlier (that he never viewed the footage from camera 9), he claimed that he had viewed footage from camera 9, and cameras 106 and 111 too. He explained that he had been confused by the questions; it took him one and a half hour to view the footage from the six cameras and he left the airport at 1.45 a.m. He agreed that since he viewed the footage in fast forward mode he could have missed out certain events.

Cross-examined by counsel for D2, PC Azman said he saw the *“detainee”* in the footage from cameras 3, 107 and 108; and although he viewed this footage in fast forward mode he was still able to view the footage clearly.

Lance Corporal Nasrul Hadi bin Haji Tuah (*“L/Cpl Hadi”*) took over the operation of the CCTV system when PC Azman ended his shift. He said PC Azman informed him an arrest had been made on the afternoon of 12 August 2010 and showed him the arrested person in the footage from cameras 3 and 108.



On 23 August 2010 L/Cpl Hadi was told by Lance Corporal 3370 Sonny bin Ahmad that Assistant Superintendent Hong Chian Yen (*"ASP Hong"*) wanted the CCTV recording of the arrest made on 12 August 2010. L/Cpl Hadi's understanding was that ASP Hong was interested only in the footage showing *"when the arrest was made and when the arrested person was brought out of the airport."*

L/Cpl Hadi therefore *"chose and exported"* the relevant parts of the footage from cameras 3 and 108 and saved these into the *"Video Export"* folder. Then he burnt the footage into a DVD and gave this to ASP Hong on 24 August 2010. He confirmed that the footage from cameras 3 and 108 viewed in court is the relevant footage he burnt into the DVD. He did not burn a DVD of footage from camera 107 as this shows the person concerned going out of the arrival hall and is unrelated to the arrest.

Mobile phone numbers

Hjh Noryana binti Hj Nasu is a DST officer. From the *"Call Data Record"* (*"the CDR"*) she was able to identify the mobile phone number 8782223 as belonging to Harrisman Affendy bin Hj Ali. This number was temporarily suspended in 2010 at the request of Suliana binti Hj Johari who is the wife of Harrisman Affendy bin Hj Ali.

The CDR report of mobile phone number 8771701 shows that it belongs to Mohammad Khairil Shah bin Hj Abdul Halim. It was terminated on 31 August 2010.

As to the CDR report of mobile phone number 8710987 this reveals that it belongs to Suliana binti Hj Johari.

Finally, the CDR report of mobile phone number 8711701 shows there were three owners: K. F. Multitech which was terminated on 10 December 2001; Hjh Norzainah binti Hj Bujang which was terminated in 2002; and Mohammad Khairil Shah bin Hj Abdul Halim which was terminated on 31 August 2010.



D2's urine specimen

The urine specimen of D2 was collected from him on 13 August 2010. Upon analysis by the Department of Scientific Services ("DSS") the drug methylamphetamine was detected but the amount was below the "*cutoff value*" of 500 ng/ml and therefore the conclusion made was that the sample was "*negative*" for methylamphetamine.

Pg Mohd Helmy bin Pg Hj Rabaha, a scientific officer in the DSS, explained that the result of this analysis showed that the drug methylamphetamine had been consumed but he was unable to say when consumption took place. It is possible that consumption occurred 2 to 3 days prior to the collection of the urine specimen; this depends on the metabolic activity of the individual.

"Yanhee" slimming pills

There was evidence from Norazizah binti Haji Kassim that she had given D1 \$270 to buy "*Yanhee*" slimming pills for her before he went to Bangkok. They had been colleagues in Royal Brunei Airlines.

Also, there was evidence from Yasmoon Binti Yusof that she had allowed D1 to use her "*Yanhee*" hospital card to purchase slimming pills.

Defendant's statements to the NCB

There were four statements recorded from each defendant by the NCB. Neither defendant challenged the admissibility of these statements on the ground that they were not made voluntarily.

D1 in his statements said:

- 1) he and D2 had planned to go to Bangkok together because D2 wanted to buy items for his "*shirt business*" and mattress for sale;
- 2) D2 purchased and paid for his air ticket;
- 3) D2 suggested they both use the "*Lojel*" bag as it was "*big enough for our items*";



- 4) Arriving in Bangkok they checked into a room which they shared at the Boutique Hotel;
- 5) he then accompanied D2 to meet D2's Thai friend "*Kin*" at the Pantip Plaza;
- 6) D2 met "*Kin*" and he waited at a shop whilst D2 and "*Kin*" appeared to be in "*negotiations*";
- 7) after that they bought four mattresses and returned to the hotel;
- 8) they went for a massage at 3.00 p.m. and he returned to the hotel at 5.10 p.m. and D2 was already in the room;
- 9) D2 told him that he had put some of "*our items*" into the "*Lojel*" bag but had left space for D1 to use;
- 10) At 6.00 p.m. they went to a shop where he bought football jerseys;
- 11) they went to Tesco supermarket at 7.00 p.m. and he bought amongst other things three biscuit tins which he intended to use to keep his slimming pills;
- 12) D2 bought clothes "*Maggi*", crackers and cellotape from Tesco;
- 13) they went to Yanhee Hospital where he bought slimming pills;
- 14) after dinner they returned to the hotel at about 2.00 a.m. and D2 went to bed immediately whilst he put his slimming pills in his biscuit tins which were then placed in the "*Lojel*" bag;
- 15) he noticed D2's "*stuff*" in the "*Lojel*" bag comprising "*several blue tins and one white biscuit tin*" in the "*Lojel*" bag;
- 16) he did not ask D2 about the contents of the "*blue tins*" because he "*really thought it was biscuits*" and he did not want to "*interfere into his personal matter*" and he "*believed in him*";



- 17) at 8.30 a.m. they left the hotel to buy shirts and other items and returned to the hotel at 10.00 a.m.;
- 18) on the way to Bangkok airport, in the car, D2 told him that upon arrival in Brunei airport he (D1) was to take the mattresses and D2 would take the *"Lojel"* bag and black bag belonging to D2.
- 19) they both went to the check in counter at Bangkok airport but he was *"texting"* his wife at the time and D2 *"handled"* the check in of their bags;
- 20) arriving in Brunei airport after clearing immigration he took a trolley and collected the mattresses from the baggage carousel before going to customs;
- 21) both he and D2 were taken into an inspection room where he answered *"no"* when a customs officer asked him whether he had any other bag;
- 22) he was asked for his baggage tag which stated he had checked in three items, namely, two mattresses and one bag;
- 23) he wondered which bag had been checked in under his name and then remembered that D2 did not have the *"Lojel"* bag with him during his inspection;
- 24) he was shocked when he realized the *"Lojel"* bag belonging to D2 had been checked in under his name without his knowledge;
- 25) he co-operated with customs officers by bringing the *"Lojel"* bag into the inspection room and informing them that the bag belonged to his friend *"Harrisman"* and half of the *"stuff"* inside the bag was his (D1) and some belonged to D2.
- 26) the inspection of the *"Lojel"* bag yielded three *"Delio"* biscuit tins, blue in colour, containing several packages of brown leaves which he had never seen before and he was shocked that D2 was willing to make him a *"victim"* by bringing in *"these items"*;



- 27) he admitted the red and white tins containing slimming pills belonged to him but not the tins with dried leaves; and
- 28) he had been *"trapped"* and *"set up"* by his *"best friend"*, D2.

D2 in his statements said:

- 1) he and his *"colleague"*, D1, went to Bangkok to shop for *"goods"*, car spare parts and to go to the hospital;
- 2) during the flight to Bangkok D1 told him to buy *"marijuana"* from his friend *"Kin"* but he did not know *"how many"*;
- 3) D1 asked him whether *"Kin"* could find *"marijuana"* for him;
- 4) in Bangkok he brought D1 to meet *"Kin"* to *"deal"* with the drugs;
- 5) he had bought *"marijuana"* from *"Kin"* in 2009 for his consumption;
- 6) he had consumed *"syabu"* in the past;
- 7) he consumed cocaine two to three months ago;
- 8) he had never brought drugs into Brunei;
- 9) in July D1 had borrowed his *"Lojel"* bag for a trip to Bangkok and D1 had changed the combination lock number to *"100"*;
- 10) he bought clothes for his wife and children during his stay in Bangkok;
- 11) since he failed to find the car spare parts he was looking for, D1 *"borrowed"* his *"Lojel"* bag to keep D1's *"medicines"*;
- 12) when he woke up in the morning *"all my goods [had] already been packed up"* by D1 into the *"Lojel"* bag;
- 13) he had no knowledge of the contents of the *"Lojel"* bag; and



14) he did not know D1 was carrying drugs.

Ordinary statement of Harrisman Asmaedy bin Hj Ali

In this statement Harrisman Asmaedy bin Hj Ali admitted that the cannabis found in his waist pouch upon his arrest outside “Lim’s” house at Kampong Sungai Hanching on 25 April 2010 was obtained from his elder brother, D2. He said: *“I buy it for people from my older brother; after completing the sale then I will get paid.”*

Notice of warning statement of Ahmad bin Haji Sahari

In this statement made under section 117(3) of the Criminal Procedure Code Ahmad bin Haji Sahari admitted that part of the cannabis found in his possession upon his arrest at the RBA grand stand complex on 13 December 2009 had been given to him by “Harrisman”, who is Malay, aged about 35 to 36, married and working as a flight attendant for “RBA”, to sell. He said “Harrisman” got his cannabis supply from Bangkok and that he had been selling cannabis for “Harrisman” for a month and had done so two to three times.

Digital forensic analysis

Nor Azmi bin Hj Serudin is a certified forensic analyst with ITASS Sdn Bhd. On 13 March 2012 he received a request from the NCB to conduct a mobile forensic extraction on 3 mobile phones, 9 SIM cards and 2 memory cards. Using XRY software he was able to carry out data extraction on all these exhibits and he produced a report of his findings.

He did two types of extraction on the 3 mobile phones: logical and physical. On phone 01 and phone 02 he could only do a logical extraction which is a technique to extract live data, i.e. data not deleted. On phone 03 he was able to do a physical extraction which is a technique to extract complete and raw data from the phone memory. Physical extraction leads to the recovery of deleted information.

In respect of phone 01 the following message was sent to “Aleel”, number +6738814444 on 9/8/2010 8:26:09 PM: *“Awu bro by 2 nyt, utk capital tnx”*



Shortly after this, at 8:28:43 PM, the following message was sent also to "Aleel", the same number "1800 to 2k if dpt...."

In relation to phone 02 this message was sent to "Aayang Khairunnisa", number +6738771701 on 12/8/2010 5:03:04 PM: "Me in trouble"

It was followed by this message which was sent also to "Aayang Khairunnisa", the same number: "Mati lah me syg. Habis semua dapatan. Just remember I love u so much. I love the kids. Ni last lah me msg u kali. Love u."

Many of the messages in phone 03 do not have a date and time stamp. This could be due to "bugs" in the device resulting in the date and time not being saved. There was, however, complete extraction.

Drug analysis

Lim Swee Chin ("Mr. Lim") is an analyst at the Department of Scientific Services. His evidence in his section 117B statement is as follows.

On 16 August 2010 he received seven sealed envelopes from Narcotics Officer Dyg Maswemah which contained, among other exhibits, three slabs of dried compressed plant material labelled E1(a)(i), E1(b)(i) and E1(c)(i) weighing 913.755 grams, 904.505 grams and 445.919 grams respectively ("the plant material").

On 18 August 2010 he began to analyse the plant material for the presence of drugs. The analysis process consisted of exhibit item description, weighing, sampling, qualitative analysis [which includes macroscopic and microscopic examinations, Colour Test (CT), Thin Layer Chromatography (TLC) and Gas Chromatography Mass Spectrometry (GCMS)], validation of results and reporting.

Through macroscopic and microscopic examinations of the plant material he was able to find "substantial amount of the resin" that contain the chemical ingredients of Delta -9- Tetrahydrocannabinol, cannabinol and cannabidiol ("the chemical ingredients"). The presence of the resins was further supported by the "strong response" in CT and TLC. The chemical ingredients were further identified and confirmed by GCMS.



With the analysis results he concluded that the plant material was cannabis.

In evidence-in-chief in court Mr. Lim explained that macroscopic examination is the process whereby the plant material is loosened up and examined visually without instruments or with minimum instruments to look for the features of the cannabis plant; microscopic examination is the process whereby the plant material is examined under a microscope; upon macroscopic examination of the plant material he was able to see *"some spots"* of resin which is dark brown to black in colour; and *"strong response"* in the CT and TLC test meant a *"positive result"*.

Under cross examination Mr. Lim said he knew that *"the Gary Shih case"* decided that the definition of cannabis required the existence of a substantial amount of resin; he agreed that in his work sheet there is no mention a substantial amount of resin was seen, the CT is a presumptive test whilst the TLC and GCMS tests are conclusive; and these tests detect the presence of the chemical ingredients and are qualitative and not quantitative tests.

Mr. Lim said he disagreed that apart from the resin other parts of the cannabis plant contained the chemical ingredients but accepted that his opinion on this point differed from that of his colleague Ak. Helmy; he agreed the UNODC document states that THC can be found in the roots of the cannabis plant; resin can be found in the roots of the cannabis plant; resin can be extracted from the cannabis plant but he was unable to tell if there was any extraction; the *"strong response"* in the CT and TLC test *"indirectly"* indicated the presence of a *"large amount"* of resin; the whole cannabis plant is resinous; the whole plant and the whole slab and microscopic examinations and TLC test were done on 1 December 2010 whilst CT and GCMS test were conducted before that; and he could not explain how he was able to isolate intact branches of the plant material for macroscopic and microscopic examinations after the plant material had already been homogenized; in his worksheet in relation to macroexamination the *"ticks"* under column *"G"* indicate that he observed *"a lot of resinous glands and these secrete a lot of resins"*.

Upon further cross-examination Mr. Lim said he agreed that not homogenizing all the plant material contradicted the Standard Operating Procedure of the laboratory; from time to time there may be a departure from the Standard Operating Procedure; in this case the focus was more on the *"morphological"*



of the plant material; the “ticks” under column “G” denotes the features of the cannabis plant are present; because there was so much plant material he concluded there was a substantial amount of resin; and even if resin had been extracted, looking at the plant material he would still be of the opinion that there was a substantial amount of resin.

The final question from counsel for D1 to Mr. Lim was this:

Q: Really what you are saying is even if the plant material has had resin extracted, you do macroscopic and microscopic examinations, if there is presence of some resin you would conclude there is a substantial amount of resin.

Mr. Lim’s answer was “Yes”.

Upon enquiry by the court, it was Mr. Lim’s evidence that because he saw a lot of resinous glands on the plant material, he could assume there would be a lot of resins as resinous glands produce resins, but he could not say if there had been resin extraction because the original plant at the time of harvest was not available for analysis.

Prima facie case

At the close of the case for the prosecution submissions were made on behalf of D1 and D2 that the prosecution had failed to prove a prima facie case against the defendants on the charges.

Section 177(1) of the Criminal Procedure Code states:

“If upon taking all the evidence referred to in section 176 and making such examination (if any) of the accused under section 220 as the Court considers necessary it finds that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Court may, subject to the provisions of section 186, record an order of acquittal.”



The test in deciding whether there is a prima facie case against the defendant or not is that expounded in the decision of the Privy Council in *Haw Tua Tau v Public Prosecutor* [1981] 2 MLJ 49 where Lord Diplock said at p. 52:

“At the conclusion of the prosecution’s case what has to be decided remains a question of law only. As decider of law, the judge must consider whether there is some evidence (not inherently incredible) which, if he were to accept it as accurate, would establish each essential element in the alleged offence. If such evidence as respects any of those essential elements is lacking, then, and then only, is he justified in finding “that no case against the accused has been made out which if unrebutted would warrant his conviction”, within the meaning of section 188(1). Where he has not so found, he must call upon the accused to enter upon his defence, and as decider of fact must keep an open mind as to the accuracy of any of the prosecution’s witnesses until the defence has tendered such evidence, if any, by the accused or other witnesses as it may want to call and counsel on both sides have addressed to the judge such arguments and comments on the evidence as they may wish to advance.”

The central issue is whether the evidence adduced by the prosecution proves the plant material seized from the Lojel bag is cannabis within the definition of section 2 of the Misuse of Drugs Act.

Prior to amendment the definition of cannabis under section 2 of the Misuse of the Drugs Act (*“the old definition”*) was in these terms:

“Cannabis means any part of any plant of the genus cannabis from which the resin has not been extracted, by whatever name it may be designated.”

In *Public Prosecutor v Gary Shih Cheng Cheuan* [2009] 2JCBD8, in a judgment delivered on 23 July 2009, this Court after a survey of the law in Malaysia and Singapore concluded that under the old definition of cannabis the onus was on the prosecution to prove: (1) that the plant material is of the genus cannabis; and (2) that the resin content in the plant material is either *“wholly intact”* or the resin *“which remained in the plant material after extraction is not so*



minute as to amount in reality and common sense to nothing at all and therefore harmless”.

Acquitting the defendant of the charge of possession of cannabis for the purpose of trafficking contrary to section 3A of the Misuse of Drugs the court said at p. 29:

“As the prosecution has failed to prove that resin has not been extracted from the plant material concerned, the court is left in doubt as to whether the plant material is cannabis as defined under section 2. We are unable to tread the path taken by the court in the Alcontara case in which the chemist had given clear evidence, that from the combination of tests carried out, that the plant material was cannabis with ‘abundant and substantial resin’.”

The definition of cannabis under section 2 of the Misuse of Drugs Act was amended on 15 February 2012 (*“the new definition”*). Cannabis is presently defined to mean *“any part of the genus cannabis, or any part of such plant by whatever name it is called”*.

No question arises as to whether the plant material concerned in this case is cannabis under the new definition of cannabis. The combination of tests carried out on the plant material which included macroscopic and microscopic examinations, CT, TLC and GCMS tests, clearly showed the physical features, and the presence of the chemical ingredients of Delta -9-Tetrahydrocannabinol, cannabinol and cannabidiol, of the genus cannabis plant.

However, as these offences are alleged to have been committed in 2010, before the amendment to section 2 of the Misuse of Drugs Act, we must consider whether the plant material concerned is cannabis under the old definition of cannabis.

On Mr. Lim’s evidence of his analysis of the plant material and his findings we are not satisfied the prosecution has established the plant material in question is cannabis within the old definition of cannabis. In our judgment the fatal flaw in the evidence of Mr. Lim that the plant material he examined is cannabis is that he thinks because there is a presence of *“some”* resin in the plant material



he can conclude there is a “*substantial amount*” of resin. We are also of the view that the evidence of Mr. Lim that because he saw a lot of resinous glands he could assume the presence of a lot of resins as resinous glands produce resins is fallacious.

Mr. Lim accepted that resin can be extracted from the genus cannabis plant but he was unable to say whether there was any extraction of resin from the plant material he examined. We reiterate what we said in *Public Prosecutor v Gary Shih Cheng Cheuan* (supra): The non-extraction of resin from the plant material concerned is an essential ingredient to be proven by the prosecution. Unlike the situation in *Public Prosecutor v Alcontara* [1993] 3 MLJ 568, where the evidence of the chemist was that from the samples taken and tested he concluded that solvent had not been used to extract resin and he noticed the presence of resin in the plant material he examined was “*abundant and substantial*”, in this case there is no evidence of any test done to determine if resin had been extracted from the plant material.

We have no doubt that the plant material is comprised of the genus cannabis plant. But the observation of the presence of “*some*” resin in the plant material weighing a total of 2264.179 gs cannot lead to the ineluctable conclusion of the existence of a “*substantial amount*” of resin. It is incumbent upon the prosecution to adduce evidence that the plant material as a whole indeed possesses a “*substantial amount*” of resin making it a dangerous drug and falling within the old definition of cannabis. The prosecution has failed to do this.

With respect to Mr. Lim we think his reasoning that the “*strong response*” in the CT and TLC test “*indirectly*” indicated the presence of a “*large amount*” of resin is misconceived since he agrees that the CT, TLC and GCMS tests are qualitative and not quantitative tests. As we understand the evidence these tests merely detect the presence of the chemical ingredients in the genus cannabis plant and are not determinative of the quantity of resin.

For the foregoing reasons we find that no case against the defendants have been made out which, if unrebutted, would warrant convictions.

The defendants are acquitted accordingly.



DATO PADUKA STEVEN CHONG
Acting Chief Justice

DATO PADUKA HAIROL ARNI MAJID
Judge, High Court