

**Hj Mohd Seriwani Bin Hj Sulaiman**

AND

**Public Prosecutor**

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**(Court of Appeal of Brunei Darussalam)  
(Criminal Appeal No. 6 of 2006)**

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Power, P; Mortimer and Davies, JJ.A.  
**24<sup>th</sup> November, 2008.**

Possession of controlled drugs for the purpose of trafficking. Failure to give full consideration to defence evidence. Failure to allow prosecution witnesses to be recalled for cross-examination as to credit. Conviction unsafe. Conviction quashed.

DPP Zuraini Bte Sharbawi of Deputy Public Prosecutor for the Respondent.  
Mr P. Roy Rajkumar and Mr Yusof Shaikh Abdul Halim of Messrs. Cheok Sankaran Halim for the Appellant.

**Power, P.:**

**The Charge**

The appellant HJ MOHD SERIWANI BIN HJ SULAIMAN was charged that

*“On or about the 9<sup>th</sup> day of March 2004 at house No. 12, Simpang 245-5-10, Kg Mentiri, Muara in Brunei Darussalam, not being a person authorized by the Misuse of Drugs Act, Chapter 27 or the Regulations made thereunder, did have in your possession a total of 418.75 grammes of white crystalline substance containing a total of 279.194 grammes of a Class A controlled drug, to wit, METHYLAMPHETAMINE, for the purpose of trafficking in contravention of Section 3A of the Misuse of Drugs Act and you have thereby committed an offence punishable under section 29 read with the Second Schedule of the said Act.”*

He pleaded not guilty to that charge and was after trial before the Chief Justice and Mr Justice Chong (“the Court”) found guilty as charged and sentenced to death.

At the commencement of the trial Prosecuting Counsel estimated that it would take about three weeks. Hearing of evidence commenced on 25 October 2004 but the hearing was not completed due variously to the unavailability of counsel and of judges until 13<sup>th</sup> May 2006 – an overall period of 1½ years. In any criminal prosecution, and certainly in a capital case, such a fragmented and protracted prosecution is unacceptable as it can increase the likelihood of an unfair trial.

It was the prosecution case, briefly put, that the appellant and his father were apprehended after a car chase and a struggle and were then taken to a house at Mentiri, the keys of which had been found in the possession of the appellant, where a substantial amount of cash and the crystalline substance (“the substance”), the subject of the charge, were found. The appellant was then taken to the Narcotics Control Bureau Office where he was said to have made admissions in a cautioned statement which the Court refused to admit as it was not satisfied that it had been made voluntarily.

### **The Principal Prosecution Witnesses**

The principal prosecution witnesses at trial were:

- PW1            **Lim Swee Chin** a government analyst.
- PW2            **Assistant Narcotics Officer Zulmadji** who arrested the appellant’s father, took photos at the residence at Mentiri and significantly gave evidence of what was said by PW6 to the appellant at that residence prior to the taking of the cautioned statement.
- PW4            **Assistant Narcotics Officer Shahraine** a member of the arresting party who drove the appellant’s car from the scene of arrest to the house at Mentiri and who handed the bundle of house and car keys to the appellant to unlock the door of the house and who later used one of the keys to unlock the upstairs room in which the substance was found.
- PW5            **Assistant Narcotics Officer Ramlee**, the Exhibits Officer, who assisted in the search of the appellant’s car and who took charge of the exhibits which were seized.
- PW6            **Assistant Narcotic Officer Mahmud Kashfi**. This officer was an important prosecution witness. He drove the van which pursued the appellant and later went back to the residence where he found the substance the subject of the charge and showed it to the appellant. He handed all of the exhibits seized at the residence to the Exhibit Officer and, significantly, he, according to PW2, made a threat to the appellant prior to his making a cautioned statement. It was as a consequence of this that the Court refused to admit the cautioned statement in evidence.

- PW7            **Assistant Narcotics Officer Kushdinawata** who assisted PW6 in the search of the upstairs rooms.
- PW9            **Assistant Narcotics Officer Saiful Bahrin** was a member of the arresting party who assisted in the arrest of the appellant and the search of the house.
- PW12          **Assistant Narcotics Officer Halimee**, the diary officer of the arresting party, who arrested the appellant after a struggle, who searched the appellant's car and who kept a diary of the events of arrest and search.
- PW13          **Narcotics Officer Rahman Bin Hj Panjang** who recorded the cautioned statement.
- PW14          **Assistant Narcotics Officer Hajah Masmegawati** who assisted in the counting of the seized cash and witnessed the taking of the cautioned statement.
- PW15          **The Investigating Officer Pg Siti Nurfarah** took charge of the exhibits from PW6 on return of the party to the Narcotics Control Bureau Office. She witnessed the weighing of the substance, counted the seized cash and directed that statements be taken. She kept the exhibits in her locked cabinet.
- PW19          **Chief Narcotic's Officer Ng Thin Chiong** who was in charge of the party which arrested the appellant and searched his house.

The above officers will hereafter be referred to by their witness number.

### **The Prosecution Evidence at Trial**

This evidence we take from the judgment of the court, as set out below.

A Statement of Agreed Facts prepared and signed by counsel of both sides under the provisions of section 117C of the Criminal Procedure Code (Cap 7) was tendered in evidence at the start of the trial. It states:

- “ 1. The Defendant is a 28 year old Brunei Citizen.*
- 2. A body search conducted on the defendant by ANOI Abd Rahman bin Kamis did not reveal anything drug related.*
- 3. A search of the vehicle by ANO II Ak. Shahrainie bin Pg Shahdan revealed nothing drug related. A further search of the vehicle conducted by ANO Ramlee bin Asmat resulted in the seizure of a red and black coloured waist pouch labelled*

*'BILLABONG' belonging to the defendant containing cash totalling B\$4121.00 (Exhibit E8).*

4. *A body search was conducted on defendant's father Hj Sulaiman bin Tangsar by ANO II Hj. Hamdillah Hj Abd. Safar. Nothing related to drugs were found. However, ANO II Hj. Hamdillah did find and seize from Hj. Sulaiman one wrist watch, 2 black wallets in which one of them was found inside a left side pocket of his pants and another one at the right side pocket. Both wallets contained a large amount of cash, albeit not drug related monies. ANO II Hj. Hamdillah immediately handed all these seized items to ANO Ramlee bin Hj. Asmat. ANO II Hj. Hamdillah did not count the cash.*
5. *Photographs of the scene of arrest and the house were taken by ANO II Zulmajdi.*
6. *After the search of the house, the defendant was then brought to the NCB for further investigations.*
7. *An analyst report dated 14<sup>th</sup> April 2004 prepared by Mr. Lim Swee Chin stated that the crystalline substances upon analysis were found to contain METHYLAMPHETAMINE – a Class A drug. He also found traces of METYLAMPHETAMINE on the one TANITA digital weighing scale and a blue straw.*
8. *The total weight of METHYLAMPHETAMINE amounted to 279.194 grammes."*

It is to be noted that both the amount of cash seized, B\$4,121.00, from the appellant and the total weight of the Methylamphetamine analysed by Mr Lim Swee Chin amounting to 279.194 grammes were agreed facts.

### **The Prosecution Case**

The prosecution case was that on 9<sup>th</sup> March 2004 at about 5.21 p.m. some officers of the Narcotics Control Bureau (the NCB) led by PW19 conducted surveillance of the appellant's house at No.12, Simpang 345-5-10, Kg. Mentiri. Positioned in the compound of a neighbouring house was PW12, the diary officer, who saw the appellant coming out of the house with his father Hj. Sulaiman bin Tangsar ("the father") and both getting into the front seat of the appellant's car, a gold coloured Suzuki Vitara registration number BU9321. The appellant was seen driving the car out of the compound of the house and proceeding to the main road.

Through his walkie-talkie PW19 instructed PW6, who was driving a van of the Bureau, BG3866, to intercept the appellant's car as it proceeded out of the junction onto the main road. However, the appellant is alleged to have refused to stop and sped off towards the town centre (Bandar) via the Mentiri Highway.

The NCB officers gave chase and tailed the appellant's car all the way to Bandar where the appellant got stuck in a traffic jam in front of the Terrace Hotel. Seeing this PW19, who was in a car several vehicles behind, instructed the officers in his car, namely, PW2, PW9 and PW12 to run to the appellant's car and arrest him and his passenger, if the conditions were safe for them to carry out his instructions.

First to reach the appellant's car were PW2 and PW12, the latter on the driver's side. PW2 proceeded towards the front seat passenger. PW12 introduced himself to the appellant through the driver's side door window, which was open, as an NCB officer and tried to handcuff him through the door window, but the appellant is alleged to have resisted by pushing the officer's hands away. PW12 opened the driver side door, and again tried to handcuff the appellant. This led to a scuffle between them with the NCB officer trying to handcuff the appellant and the appellant resisting and avoiding by blocking and pushing the officer away with his father assisting him in the scuffle. However, PW12 managed to pull the appellant out of the car and then handcuffed him with the assistance of PW9.

Meantime, PW2 had opened the passenger side door and attempted to arrest the appellant's father who resisted as he was helping his son to avoid being arrested. PW2 admitted that he had to use force in pulling the father's hands in order to handcuff him. Thereafter, both appellant and father were escorted to the nearby parking lot of the Terrace Hotel. PW12 drove the appellant's car into the hotel's car park. There a body search was conducted on both arrested persons. No drug related items were found on either but in the search of the vehicle, PW5 seized a red and black coloured waist pouch labelled 'Billabong' belonging to the appellant, which contained cash totalling B\$4,121.00 (Ex. E8). It was an admitted fact that during the search of the appellant's father, ANO II Hj Hamdillah had seized from him a wristwatch and two black wallets, one from each of his trousers' pockets, containing a large amount of money, albeit not drug related money. It was not counted on the spot and the two wallets and the wristwatch were handed over to PW5. During the search of the appellant's car, PW5 seized a waist pouch (Ex.P3-E8) found above the handbrake of the car, containing cash and some documents belonging to the appellant.

Later, at about 1759 hours, the NCB officers left the hotel parking lot for the Mentiri house in the appellant' car driven by PW4, with the appellant, who was by now handcuffed, sitting in the rear seat with PW9 and PW5. The father was taken to the house in the NCB van driven by PW6 accompanied by other NCB officers.

According to PW12 they arrived at the Mentiri house at about 1824 hours. All the doors of the house were found locked. It was the prosecution evidence that the appellant, using a key attached to the car keys (P3 -E4), which PW4 handed back to the appellant, unlocked the kitchen door. The appellant's father was instructed to wait in the garage under guard of some NCB officers.

The NCB officers then entered the house through the kitchen door. Upon instructions of PW19, PW6 and PW9 searched the kitchen, a clothes room and the living room on the

ground floor in the presence of the defendant, while PW7 searched a store underneath the staircase. At this stage the appellant's father was brought in and asked to wait in the kitchen.

The appellant was then taken upstairs. PW6 and PW7 conducted the search of the upper floor, comprising 4 rooms and a bathroom. PW4 found that only one room was locked. Upon being asked whose room that was, the appellant was alleged to have replied that it was his parents' room, but his father who was waiting in the kitchen, upon being asked by PW4 about the locked room upstairs, denied what the appellant had said. Another officer, SNO Ahmad Al-Shukry (PW11), testified that he went down to the kitchen to seek confirmation from the defendant's father about the locked room. The father admitted that the house was his, but maintained that the defendant occupied it. PW4 was able to unlock the room with one of the keys attached to the appellant's car keys.

Some photographs were taken by PW2, of the scene of arrest as well as of locked room after it was opened. The room was furnished as a bedroom with *inter alia* a bed, a wardrobe, a dressing table, a television and a VCD player.

During the search of the room which was conducted in the presence of the appellant sitting on the bed and which, according to PW12, took nearly two hours from 1851 to 2047 hours, PW6, who was wearing gloves, found three small bags (Ex.P3-E1, E2 and E3) from the top of the wardrobe, as seen in photograph 10/Ex.P5. He examined the contents of the bags, one at a time, and laid them out on the bed where the appellant was sitting. The bag Ex. P3-E1 was found to contain 15 clear plastic packets of the substance, one of which was found in the front pocket and the remaining 14 in the zipped pocket; Ex. P3-E2, a cream coloured bag labelled BE READY was found to contain:

- (i) 10 clear plastic packets of crystalline substances in the front pocket,
- (ii) in its zipped pocket a 'TANITA' digital weighing scale, a pair of scissors, a blue straw, an orange lighter and
- (iii) a 'Zhigao' bag containing 5 plastic packets of the substance, inside a zipped compartment; and Ex. P3-E3, a black bag labelled SHENGNUO which had six bigger clear packets of the substances.

PW2 took photographs of the contents of each bag.

It was the prosecution case that at no time was the appellant allowed to touch the exhibits in particular, contrary to what the appellant claimed, it was PW6's evidence that he never allowed the appellant to touch the small black bag at any time.

Apart from the three bags, PW6 also seized a plastic carrier bag labelled 'DIN' (Ex.P3-E5), which was found underneath the bed in the same room. This bag was found to contain 252 empty clear plastic packets. Also seized was a blue metal clip (Ex.P3-E7) bearing what appeared to be some 'burnt' marks.

PW6 also seized other items from inside the room, such as 2-framed photographs (Ex.P3-E6) of the defendant and his former wife, and a Calvin Klein wallet (Ex.P3-E7) containing 6 receipts in the name of the defendant.

PW6 handed over all these exhibits – Ex.P3-E5, E6 and E7 – to the Exhibit Officer, PW5, who marked and labelled each exhibit that was handed to him.

At about 2049 hours the NCB officers left the house with the appellant and escorted him in his car driven by PW4, together with PW5 and the exhibits and PW12 to the NCB office. The bunch of the appellant's car keys (Ex P3-E4) was also handed to the PW5.

Back at the NCB offices at about 2115 hours, the appellant, his father and the seized exhibits were handed over to PW15, the Investigating Officer. The appellant was then taken to investigation room LG11, and his father was taken to LG09.

According to PW15, who watched the seized substance being weighed by ANO Pg Asmalee (who was not called as a witness) in room LG11, the gross weight of the seized substance was 426.11 grams. Also the cash seized from the appellant and his father (Ex.P3-E8) was counted in the same room in the presence of the appellant by PW15 assisted by ANO Hajah Masmegawati (PW14) and was found to amount to \$16,358.00 (P18/pages 1 to 3).

Also counted was the cash in Ex.P3-E9 and E10 in front of the father in LG09 in the presence of Narcotics Officer (NO) Jusniah, and it was found to total \$8,430.00.

The Investigation Officer PW15 instructed that statements be recorded from the appellant and his father. PW15 also instructed that the fingerprints and urine samples of both the defendant and his father be taken. She also instructed PW13 to record a cautioned statement from the appellant. This he did commencing at 0016 and finishing at 0239 hours, witnessed by PW14.

A voir dire was held in which the appellant gave evidence at the conclusion of the prosecution evidence.

The Court ruled the statement inadmissible during the trial due mainly to the following passage in the cross-examination and the re-examination of PW2:

Cross-examination:

*“Q Put to you that after repeatedly being asked that question (To whom did the drugs belong) and after the defendant repeatedly denied what the bags were or of knowledge of the contents of the bags, it was then that Mohamed Kashfi (PW6) said to him “you better admit this because if you don't we will drag your father into it”?*

*A That was true. Before entering the room, Hj Shahraine (PW4) asked the defendant whose room it was. The defendant told Shahraine it was his*

*mother's room. From there we called the father to tell whether room belonged to defendant or to defendant's mother.*

Re-examination

*Yes, when first asked whose bag it was, the defendant's reply was that it was not his.*

*He was repeatedly asked even when he had a first denied it because it was impossible for him not to know what was inside the bag."*

PW6 denied having used any such words to the appellant.

The Court, when refusing to admit the statement, said, at p.8 of its judgment, that, "besides being a threat, it seemed to us that the officer's attitude indicated that he would be content only when the defendant made the admission that the officer had so clearly expressed in his evidence. The Court clearly did not accept that PW6 was a witness of truth stating that "It is not the function of such investigating officers to jump to conclusions and persevere with the prisoner to get an admission of what the officers had decided was "impossible" for the prisoner not to know what was or was not in the bag."

After the interviews at the NCB office, the appellant and his father were taken to RIPAS Hospital for medical examination, and subsequently were detained at the Central Police Station.

PW15 kept all the exhibits inside her locked cabinet for safekeeping and further investigation.

On the morning of 10<sup>th</sup> March 2004, PW15 said that she re-examined the cash found on the appellant, and realised that a mistake had been made in counting and totalling the money. She immediately informed PW14 who had earlier assisted in counting the money. The cash was then recounted in front of the appellant and found to total \$4,121.00 (Ex.E8).

Also on the same day, i.e. 10<sup>th</sup> March 2004, PW15 handed over the seized drugs and the Fingerprint Form 199 (Ex.P20) upon which ANO Mohamed Yassin (PW16) had taken the appellant's fingerprints earlier that day to Narcotics Officer Kamran (PW3) to take to the Fingerprint Section of the Royal Brunei Police Force HQrs for fingerprint examination. Sgt. 167 Dk. Hjh. Salmah (PW17), a fingerprint examiner received the exhibits from PW3 at about 10.15 a.m., and proceeded with the exercise of lifting fingerprints from the 36 clear plastic packets containing the substance using the fuming cabinet and superglue procedure. The witness testified that within 5 to 10 minutes, she was able to lift one clear fingerprint showing sufficient characteristics from one of those packets. The remainder, there being many without any contours and some having outlines, were insufficient for comparison purposes. She took a Polaroid photograph with a special camera of the packet on which the fingerprint was detected, and labelled that packet with a number. It is Ex.P3-E1:B5. Later at about 10.35 a.m. she returned the

exhibits to PW3. Subsequently upon instructions of her superior officer ASP Hj Limon (PW18) enlargements were made of the Polaroid picture and the appellant's right middle fingerprint on form 199. Thereafter PW18 prepared the fingerprint expert report, Ex.P22.

PW18 explained that one would have to handle an exhibit with sufficient pressure to move the object concerned to leave a fingerprint on it, but under cross-examination he said that with regard to this particular exhibit, a mere touch could have left a fingerprint provided it was with enough pressure to result in the embedding of all the characteristics. Those prosecution witnesses involved in the seizure of the packets consistently denied that the defendant had the opportunity of touching any of the drug exhibits as this would have jeopardised the fingerprint examination investigation.

This having been done, PW5 returned the exhibits to PW15, who then sent the drugs exhibits to PW1, an analyst as defined by section 14(2)(a) of the Misuse of Drugs Act at the Department of Scientific Services, the same day, 10<sup>th</sup> March 2004, at 1505 for analysis. It is an agreed fact that the report dated 14<sup>th</sup> April 2004 prepared by PW1 stated that the substances in Ex. E1(a), E1(b), E2(a), E2(b)iv) and E3 upon analysis were found to contain 0.322 gram, 18.563 grams, 35.550 grams, 27.601 grams and 197.158 grams, of Methylamphetamine a Class A controlled drug under the Act; the Tanita Digital Scale, Ex.E2(b)(i), and the navy blue straw, Ex.E2(b)(iii), had only traces of Methylamphetamine. The analyst went on to say that the total weight of Methylamphetamine was 279.194 grams. PW5 collected the drugs exhibits from the laboratory on 12<sup>th</sup> August 2004 and kept them in the NCB strong room pending the trial. The remaining exhibits (P3-E4 to E10), but not the cash, were taken over by PW5 from the drawer of the Investigation Officer PW15 on 29<sup>th</sup> May 2004, when he was instructed to take over the case from PW15.

At the conclusion of the evidence of PW19, the prosecuting counsel having referred to the evidence of PW15, who had received medical examination reports on the appellant and his father on 11<sup>th</sup> August 2005, said that she had summoned Dr. Vinod Kumar, a daily paid medical officer of RIPAS Hospital, who had medically examined both the appellant and his father on 10<sup>th</sup> March 2004 and who had handed his reports to PW15, to come to court sometime last year. The case was adjourned at the time but counsel had inadvertently overlooked to inform him of the adjournment. At the time counsel had personally informed the doctor that his attendance would be required at a later date and that he would be contacted closer to the date. Later around 4<sup>th</sup> June 2005 counsel was informed that the doctor had finished his term of service with RIPAS on 20<sup>th</sup> March 2005. Upon making enquiries about his whereabouts prosecuting counsel learnt on 13<sup>th</sup> March 2006 that the doctor was employed in the United Kingdom, a fact that was accepted by counsel for the appellant.

The prosecution applied to have those medical reports admitted as corroborative evidence to disprove the defence allegations that both the appellant and his father had been assaulted during their arrest. Prosecuting counsel sought to tender the medical reports made by the doctor under section 32(b) of the Evidence Act (Cap. 108).

The defence objected to the admissibility of the doctor's report based mainly on the ground that the charge faced by the appellant was serious and, if the evidence was permitted, its probative value would be "far outweighed by the prejudice" to the defendant as the doctor could not be cross-examined.

The Court was satisfied that admitting the medical reports made by the doctor without his producing and explaining them would deprive the appellant of his fundamental right of cross-examining the witness, and disallowed the prosecution application in this regard.

At the conclusion of the prosecution's case the defence submitted that there was "no case for the defendant to answer the charge against him".

The Court held that the prosecution had made out a case requiring answer and defence witnesses were then called.

It is important to note that during the evidence of PW12, one of the arresting officers, counsel for the defence asked that five of the witnesses who had already given evidence be recalled for further cross-examination. It was stated that these witnesses had themselves been arrested and it was sought to question them as to the reason for their arrest and to put to them that the evidence in this matter had been tampered with. This cross-examination, would have been as to their credit. The application was however refused. The court ruled; at p. 109 of the Notes of Evidence:

*"You had full opportunity to cross-examine all those witnesses. The reason for these persons' arrests, whatever those may be, are not pertinent, nor do we see them relevant to this case in any manner."*

The matter did not, however, rest there as the Court made the following further reference to its ruling on the cautioned statement; at p. 17 of its judgment:

*"Having carefully considered the submissions of both sides and the evidence, including the reference by the defence to the subsequent detention of some of the NCB officers who had testified before this Court by the Internal Security Department for reasons not divulged by the defence irrespective of whether they were aware of such reasons or not, whom the defence wanted to call, in refusing the application mainly on the basis that the Court was in total darkness not being aware of the relevance of their detention to this case, hence we have been careful not to step into the field of speculation or probabilities, and after carefully considering the case law cited by both sides, we have reached the conclusion that the prosecution evidence taken as a whole has made out a case requiring the defendant to make his defence."*

We will, in due course, return to consider the refusal to allow this further cross-examination.

## The Defence Evidence

The appellant's evidence, briefly put, was that initially he thought that the arresting police officers were persons with whom he had had a fight on the previous day. He said that the officers repeatedly assaulted and threatened him and his father at the scene of the arrest and that they were later taken back to the house at Mentiri where keys which were taken from him were used to open the kitchen door and the bedroom upstairs in which the drugs were found. He said that PW6 showed him a small black bag.

The appellant in his evidence in the voir dire had said in this regard (Record p. 319):

*"I turned around and Mahmud Kashfi (PW6) showed me a small black bag, with its zip open and its contents visible. He showed it to me with his extended hands and asked what it was. I could not see the contents of the bag for it was too high for me to see. Since I could not see the contents, I raised my handcuffed hands up, touched the bag with my finger to lower it to enable me to view the contents of the bag.*

*After I touched the bag and brought it lower down, Mahmud Kashfi (PW6) pulled the bag away from me."*

This evidence was not, however, as detailed as the evidence which he gave in the trial (Record p. 385):

*"Next, not long after that, may be about 3 minute, Mahmud Kashfi called me from behind. I turned, thus changing my position with my back to the door now, and Mahmud Kashfi asked me and showed me a small black bag. And he showed to me the black bag which was already open, and said, "what is this?"*

*I could not see what he showed to me, even though the bag had been unzipped, and even though he opened a little to show the inside but I could not see inside it. He was holding the bag too high. He knelt in the middle of the bed and was facing me, holding the bag slightly open but high up and I could not see inside it. I was sitting on the bed at the time.*

*To confirm what was inside the bag I touched it, in order to pull it down to look inside. Inside it I saw plastic packets.*

*Mahmud Kashfi then pulled the bag away.*

*Zulmajdi then took photos of the bag.*

*Q You said you saw plastic packets inside the bag. Do you recall actually touching the plastic packets?*

*A Yes, I did touch it.*

*Q Are you sure about this?*

*A Yes, I am sure.*

*Q Were you able to see how many packets there were inside the small bag?*

*A I am not sure how many they were.*

*Q You said after you touched the plastic packets inside the bag, Mahmud Kashfi pulled it away; and you saw Zulmajdi take photos of the bag. Do you recall where the bag was when photos were taken?*

*A It was in Mahmud Kashfi's hands."*

The appellant was clearly, in his evidence in chief, at trial, saying that he had touched one of the plastic bags.

The appellant also said that he had never seen any of the 3 bags before they were found by the Narcotics officers and that they had probably been planted by the NCB officers. The father gave evidence which supported that given by the appellant.

### **The Correction to the Judgment**

Before turning to consider the grounds of appeal we think it appropriate to advert to what appears to have been a mistake in the judgment relating to the appellant's evidence that he had touched not only the black bag but also one of the plastic packets inside the bag. This was evidence crucial to the defence case for the only innocent explanation for the finding of his fingerprint on the plastic packet was that it had been placed there after arrest.

When reciting his evidence in this regard, the Court said (Judgment p. 20) "*The defendant said, "To confirm what was inside the bag I touched it, in order to pull it down to look inside. Inside I saw plastic packets". The officer then pulled the bag away. He said that he was shown three bags in all.*"

Shortly after (p. 20) the judgment again touched this matter stating: "*The defendant maintained that when PW6 showed him the unzipped bag because he could not see the contents, he had "touched" the bag and discovered that it contained some plastic packets.*"

Finally (at p. 39) the judgment set out what it said was the appellant's evidence in this regard both in the voir dire and at trial. The Court, however, omitted to make mention of the appellant's evidence that he had touched one of the plastic bags. This was vital evidence as far as the defence was concerned. The conclusion of the Court, which

appears to have been arrived at on the basis of the incomplete evidence which it had set out, was:

*“It is clear from these explanations that in neither did he claim to have touched any of the plastic bags that he saw in the bag.”*

This conclusion would not have been supportable if the evidence of the appellant had been fully and correctly stated.

The judgment was delivered on 8<sup>th</sup> August 2006. Two days later the Court sent a letter to the Attorney General’s Chambers and to the defence counsel stating that the above conclusion should not have been in the judgment. This did not cure the matter as it failed to explain the omission from consideration of the appellant’s evidence that he had touched one of the plastic packets.

We will return to this matter when we deal with the grounds of appeal.

The Court having rejected the suggestion of the appellant that the drugs had been planted by the NCB Officers turned to consider the presumption of possession which arose, by virtue of s. 15 of the Misuse of Drugs Act, from the appellant’s possession of the keys of the premises. The Court was satisfied that the presumption had not been rebutted and convicted the appellant.

The grounds of appeal were argued by Mr. P. Roy Rajkumar and Mr. Mohamed Halim for the appellant.

### **The Grounds of Appeal**

There were 18 grounds of appeals. These can conveniently be reduced to five groups.

- (1) The break in the chain of evidence.
- (2) The failure to give any or any proper consideration to the evidence of the appellant regarding the finding of his fingerprint on one of the plastic bags which contained substance.
- (3) The refusal to allow witnesses to be recalled for further cross-examination.
- (4) The wrongful acceptance by the Court that a proper analysis had been done of the substance found in the plastic bags.
- (5) The failure by the Court to consider the possibility that the seized substance may have been owned by the appellant’s ex-wife.

**(1) The break in the chain of evidence**

It is submitted that the Court could not be satisfied that there was no break in the chain of evidence relating to the handling of the substance given the unsatisfactory nature of the evidence of PW15.

She admitted:

- (i) that she had kept the exhibits, namely the money seized from the appellant and his father and the substance found in the Mentiri house, in her cabinet in a room which she shared with four other officers and not in the strong room where they should have been placed
- (ii) that the money seized from the father (\$8,430) had gone missing from the cabinet
- (iii) that the money seized from the appellant had on a first count been \$16,358 but on a recount on the following day had been found to be \$4,121. She explained this by saying that originally \$100 bills had been mistakenly counted as \$1,000 bills. We were shown a \$100 bill and a \$1,000 bill and considered that only on a most cursory glance could such a mistake be made
- (iv) that she had been suspended from duty in May 2004. The witness appeared to make contradictory statements in this regard. She seemed to concede that she would have been told by her superiors the reason for her suspension but went on to say, in apparent contradiction of what she had just said, that she was not aware of the reason that this suspension had been ordered.

The Court in its judgment bore in mind the criticisms of the evidence of PW15 set out above but, having taken all those matters into account, was nonetheless satisfied that she was an honest witness and that the drugs seized were delivered intact to the Scientific Laboratory. Although her evidence rested on the brink of credibility it would not, we are satisfied, be open to us to question that finding.

**(2) The failure to consider the appellant's evidence re. the fingerprint**

As we have already indicated when considering the evidence the Court did not set out the evidence of the appellant that he had touched one of the plastic packets which contained crystalline substance. This statement was a cornerstone of the defence as it was an innocent explanation of the prosecution evidence which sought to establish control of drugs through the fingerprint evidence. It is true that on 10<sup>th</sup> August 2006 the Court in the letter already referred to sought to withdraw its conclusion that the appellant had never claimed to have touched any of the plastic bags. However his statement that he had done so appears not to have been considered by the Court when reaching its conclusion on 8<sup>th</sup> August. This was a serious shortcoming in the Court's decision. Evidence essential to the defence was never considered by the Court in reaching its verdict.

### **(3) The refusal to allow witnesses to be recalled for further cross-examination**

We turn now to the refusal of the Court to allow prosecution witnesses to be called for cross-examination. In the course of the evidence of PW12, witnesses PW1 to PW11 having already been cross-examined, defence counsel asked to recall five witnesses for further cross-examination. These it seems clear would have included some of the NCB officers involved in the arrest of the appellant. The Court, having indicated that this had “*nothing to do with your cross-examination*”, ruled “*you had full opportunity to cross-examine all those witnesses. The reason for these persons’ arrests, whatever those may be, are not pertinent, nor do we see them relevant to this case in any matter.*” Although the peremptory ruling leaves this Court and left the hearing Court in the dark as to the exact nature of the cross-examination it clearly would have gone to the credit of the witnesses.

We are satisfied that counsel should have been allowed to cross-examine the witnesses he sought to have recalled as to their credit. This is so particularly as regards PW6 who most likely, would have been one of those recalled. He had been disbelieved in the ruling on the voir dire yet the Court had without evaluation or comment accepted his evidence generally. This refusal denied the defence the opportunity to which they were entitled fully to examine prosecution witnesses as to their credit. The consequence was that on the crucial issue of the credibility of these witnesses the defence was not permitted fully to present its case.

### **(4) The wrongful acceptance by the Court of the analysis of the substances.**

It was submitted that it had not been proved that a proper analysis had been done of the crystalline substances found in the plastic packets.

This submission was made in the face of a Statement of Agreed Facts which stated, inter alia,:

*“7. An analyst report dated 14<sup>th</sup> April 2004 prepared by Mr Lim Swee Chin stated that the crystalline substances upon analysis were found to contain Methylamphetamine - a Class A drug. He also found traces of Methylamphetamine on the one TANITA digital weighing scale and a blue straw.*

*8. The total weight of Methylamphetamine amounted to 279.194 grammes.”*

Further when Mr Lim Swee Chin was called as the first prosecution witness he was not cross-examined on the basis that his analysis was faulty or inaccurate.

The objection arose only at the appellate stage. Without this matter being fully canvassed both in evidence and in argument it would be impossible for an appellate court to form any proper decision thereon. Indeed we have some doubt whether it can be said to have been properly before this Court at all. We consider that we should do no more in this

regard than indicate that, if the appeal succeeds and a retrial is ordered, the matter can properly dealt with at that time.

**(5) Failure to consider possible involvement of ex-wife.**

At p. 42 of it judgment the Court made the following reference to the ex-wife:

*“Some mention, more of a passing reference, was made of the conviction and imprisonment of the defendant’s former wife for some drugs offence. Nothing more was said about it, and certainly we can see no reference to it in the closing arguments of the defence counsel. The defendant nowhere in his evidence claimed or made any mention of the drugs that were found in his room as having been left behind by his former wife. Hence, we are not obliged to go any further with this topic and leave it as the defence had left it ‘dormant’. ”*

The argument as we understand it is not that the Court would not have been entitled to refuse to give weight to what was referred to as “the possibility” that the drugs belonged to the ex-wife but that it was not entitled to leave that possibility dormant. It is suggested that the Court by using the word “dormant” was acknowledging that the suggestion was a sleeping but live possibility. This being so it was argued that the Court was required to give it consideration and was not entitled to dismiss it upon the basis that because it had not been pressed by defence counsel it was dormant.

The use of the word “dormant” was unfortunate but we are satisfied, given the overall findings, that the Court, must be taken to have rejected “the possibility” which, it seems clear, did not play any part in the defence case.

For the reasons set out in (2) and (3) above, we are satisfied that this conviction is unsafe.

The appeal must be allowed and the conviction quashed.

We will hear the parties as to an order for retrial.

**Power, P.**

**Mortimer, J.A.**

**Davies, J.A.**