MARIA ELVIRA PINTO EXPOSTO

v.

PP

Federal Court, Putrajaya
Tengku Maimun Tuan Mat CJ, Azahar Mohamed CJM, Mohd Zawawi Salleh, Idrus Harun, Nallini Pathmanathan FCJJ
[Criminal Appeal No: 05(M)-142-06-2018(B)]
26 March 2020

Criminal Law: *Dangerous drugs — Trafficking — Defence of innocent carrier — Whether conduct of appellant consistent with an innocent person — Whether doctrine of wilful blindness applied in this case — Whether defence had successfully rebutted presumption of knowledge — Whether defence of appellant inherently incredible*

Criminal Law: *Dangerous drugs — Trafficking — Presumption of knowledge — Trial judge considered defence of appellant on knowledge of drugs after presumption of knowledge established by prosecution — Whether trial judge erred in considering said defence — Criminal Procedure Code, s 182A — Dangerous Drugs Act 1952, s 37(d)*

This was an appeal by the appellant against her conviction and sentence for the offence of trafficking in dangerous drugs. The appellant had been arrested after Methamphetamine ('the drugs') was found concealed in a bag pack ('P6') carried by the appellant, after customs officers at the Kuala Lumpur International Airport inspected P6. At the High Court, the appellant's defence to the presumption of knowledge under s 37(d) of the Dangerous Drugs Act 1952 ('DDA') at the close of the prosecution's case was one of innocent carrier as she contended that she had no knowledge of the drugs concealed in P6. At the end of the trial, the trial judge accepted the defence of the appellant, and therefore acquitted and discharged the appellant. On appeal, the Court of Appeal held that once the High Court had presumed knowledge against the appellant in relation to the drugs at the close of the prosecution's case, the High Court was not at liberty to consider the issue of knowledge raised in the defence any longer. Accordingly, the prosecution's appeal was allowed. Hence, the present appeal.

Held (allowing the appeal; and acquitting and discharging the appellant):

(1) The trial judge had made a correct conclusion that the conduct of the appellant was consistent with that of an innocent person. The trial judge pointed out that the appellant was naive, because she followed other passengers that disembarked from the same aircraft to the immigration and thereafter to the customs checkpoint, although she was not required to clear immigration or customs because she was a transit passenger. In fact, none of the prosecution witnesses made any adverse remarks in respect of the appellant's conduct from

the moment she was stopped by the customs officer at the scanning machine, to the subsequent inspection and even to the interrogation by the investigating officer. Furthermore, based on the evidence adduced by the defence, the doctrine of wilful blindness did not operate against the appellant. (paras 53-54)

(2) Regarding the fact that the appellant disclosed her defence contemporaneously with the discovery of the drugs and in the light of her explanation as to how she came to be in possession of the drugs, the trial judge was right in concluding that the appellant's defence had successfully rebutted the presumption of knowledge under s 37(d) DDA and had raised a reasonable doubt on the prosecution's case. Hence, the trial judge was right in holding that the appellant was an innocent carrier. (para 57)

(3) The trial judge merely re-evaluated the fact deemed by operation of law, namely the element of knowledge. What the trial judge did was in consonance with *Balachandran v. Public Prosecutor* and s 182A of the Criminal Procedure Code which provided that at the conclusion of the trial, the court should consider all the evidence adduced before it. Under the law, the trial judge was thus obligated to consider the defence and to determine whether it had succeeded in rebutting the statutory presumption invoked and/or had succeeded in raising a reasonable doubt on the prosecution's case. (para 64)

(4) On the totality of the evidence, the defence of the appellant was not inherently incredible. The findings of the trial judge were correct and the Court of Appeal ought not to have disturbed those findings as there was no ground for appellate intervention. On the contrary, the Court of Appeal failed to sufficiently and judicially appreciate the defence which rendered the conviction unsafe. (para 67)

Case(s) referred to:

Alcontara Ambross Anthony v. PP [1996] 1 MLRA 47 (refd)

Balachandran v. PP [2004] 2 MLRA 547 (refd)

Duis Akim & Ors v. PP [2014] 1 MLRA 92 (distd)

Lo Sook Ling Adela v. Au Mei Yin Chrisina and Another [2002] 1 SLR(R) 326 (refd)

Low Kian Boon & Anor v. PP [2010] 1 MLRA 418 (refd)

Munuswamy Sundar Raj v. PP [2015] 6 MLRA 443 (refd)

PP v. Abdul Latif Sakimin [2007] 3 MLRA 764 (refd)

PP v. Chong Chai [2006] 2 MLRH 485 (refd)

PP v. Herlina Purnama Sari [2017] 1 MLRA 499 (refd)

PP v. Juli Kanoi [2017] MLRAU 123 (refd)

PP v. Mohd Radzi Abu Bakar [2005] 2 MLRA 590 (refd)

PP v. Muhamad Suhaimi Abdul Aziz [2001] 4 MLRH 442 (refd)

Sansregret v. The Queen [1985] 1 SCR 570 (refd)

Samundee Devan Kerishnan Muthu v. PP [2008] 2 MLRA 650 (refd)

Tan Kiam Peng v. PP [2008] 1 SLR 1 (refd)

Watt (or Thomas) v. Thomas [1947] AC 484 (refd)
Wong Swee Chin v. PP [1980] 1 MLRA 125 (refd)

Legislation referred to:

Criminal Procedure Code, s 182A

Dangerous Drugs Act 1952, ss 2, 37(d), First Schedule

Counsel:

For the appellant: Muhammad Shafee Abdullah (Tania Scivetti, Wan Azman Aiman, Nurfazreen Hazrina & Rahmat Hazlan with him); M/s Scivetti & Associates

For the respondent: Tetralina Ahmed Fauzi; SFC

JUDGMENT

Tengku Maimun Tuan Mat CJ:

Introduction

[1] The appellant was charged in the High Court at Shah Alam for the offence of trafficking in dangerous drugs. The charge reads:

> "Bahawa kamu pada 7 Disember 2014, lebih kurang jam 3:40 petang di Cawangan Pemeriksaan Penumpang 1 (CPP1), Lapangan Terbang Antarabangsa Kuala Lumpur (KLIA), dalam daerah Sepang, dalam negeri Selangor Darul Ehsan, telah mengedar dadah berbahaya iaitu Methamphetamine berat bersih 1142.8 gram, dan dengan itu kamu telah melakukan suatu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah s 39B(2) Akta yang sama."

The Prosecution's Case

[2] Briefly, on 7 December 2014, at about 3:40pm, Customs Officer Noornashriq bin Misnan ("PW2") was on duty at the scanner machine at KLIA. PW2 saw the appellant, who was carrying a luggage ("P7") and a backpack ("P6"). The appellant placed the two bags on the scanner machine. When exhs P6 and P7 were scanned, a green image appeared in P6.

[3] PW2 requested Earizal bin Mohd Khalil ("PW6") to examine P6 further. PW6 took out the contents of P6 before it was scanned again. The green image remained. The appellant and the two bags, P6 and P7 were then brought to the inspection room of the CPPI. At the CPPI, PW6 did further physical examination of P6. He saw stitches at the back of P6. When the stitches were cut open, PW6 found two packages containing substance suspected to be dangerous drugs.

[4] The investigating officer, Noor Mohd Azri bin Brahim ("PW7") sent the two packages to the Chemistry Department for analysis. Upon analysis by

the chemist Suhana binti Ismail ("PW3"), the substance was confirmed to be Methamphetamine, weighing 1142.8 grammes. Methamphetamine is listed as dangerous drugs under the First Schedule of the Dangerous Drugs Act 1952 ("the DDA").

Findings Of The Trial Judge At The End Of The Prosecution's Case

[5] The learned trial judge considered whether the prosecution had proven the following elements of the offence:

(i) That the subject matter of the charge is dangerous drugs listed under the First Schedule of the DDA;

(ii) That the appellant had custody and control of the drugs; and

(iii) That the appellant was trafficking in the said dangerous drugs.

[6] Having evaluated the evidence of PW3, the learned judge found that the prosecution had proved the first element of the charge. As for the second element, ie whether the appellant had custody and control of the drugs, the learned judge relied on the evidence of PW2 and PW6 and invoked s 37(d) of the DDA to presume that the appellant had knowledge of the drugs. *PP v. Abdul Latif Sakimin* [2007] 3 MLRA 764 was cited by the learned judge in holding that PW2 and PW6 had no interest or motive to testify against the appellant. In respect of the final element of the charge, the learned judge applied s 2 of the DDA to find that the appellant was trafficking in dangerous drugs when she carried the drugs concealed in P6, from Shanghai, China to Malaysia.

[7] The trial judge thus found that the prosecution had proved a *prima facie* case. The appellant was called upon to enter her defence.

The Defence

[8] The appellant, an Australian, gave evidence under oath. Her evidence in gist was that she travelled to Shanghai at the request of her fiancee Captain Daniel Smith. The purpose of her travel was to meet Commander James Yates and to collect Captain Daniel Smith's retirement papers from Commander James Yates. Commander Yates however failed to turn up. Instead Tega Collins came to meet the appellant at the hotel in Shanghai, where Captain Daniel Smith's retirement papers were given to the appellant by Tega Collins. In return, Tega Collins gave the backpack exh P6, which contains new clothes to the appellant. P6 was to be given to Tega Collins' relatives in Melbourne, the destination that the appellant was bound for, as Christmas gifts.

[9] The appellant's defence was therefore one of innocent carrier as she contended that she had no knowledge of the drugs and that she carried the backpack P6 for Tega Collins who had helped her with the retirement papers of her fiancee. What the appellant testified in court was consistent with her cautioned statement ("exh D29").

[10] For convenience, we reproduce below her cautioned statement recorded on 10 December 2014, ie three days after her arrest:

> "I went to Shanghai on 4 December 2014 and I stayed in Shanghai Hotel been paid by my fiancee and his commander. My fiancee's name is Captain Daniel Smith, he serves in US Army. My purpose to go to Shanghai is to sign retirement papers of my fiancee. I stayed in Shanghai Hotel for three days. My fiancee also emailed me a ticket flight to Melbourne on 7 December. On the last day on 6 December an African person Mr Tega Collins came to the hotel and call me and asked me to go downstairs and met him. After that he gave me papers for me to signed (*sic*). He gave me a certificate of retirement of my fiancee Captain Daniel Smith, he also gave me an agreement letter for me to sign on behalf of my fiancee. I have to sign these two documents so that he can go back from Kabul Afghanistan to New Mexico. After I sign both of these document, I asked him to take me to airport and he take me to the airport. It is my first time to meet Mr Tega. Then when we arrived in the airport he gave me one bagpack with new clothes for his relatives in Melbourne. He said that this bagpack is for his relatives Christmas present. He opened the bagpack and show me all the clothes inside the bag. I saw all in the bagpack new clothes. I said to him who will pick up the bagpack up in Melbourne then he said there is a people there waiting with my name up in the airport so I can handle him the bagpack. Mr Tega did not give the relatives phone number but he gave me his phone number. I choose to help Mr Tega because it was my first time that someone ask me to take something for his relatives. Mr Tega just drove me to the airport and not staying with me in the airport. In the airport I slept in Shanghai airport. On the next day I took a flight to Melbourne with Malaysia Airlines. I brought with me that bagpack and my suitcase and my handbag inside the aeroplane. After that I transit in KLIA Kuala Lumpur. So I have to change flight to go to Melbourne. I do not know that I have to go out and come to the airport again. I just follow the other passengers. This is my first time travel to Kuala Lumpur and swab (*sic*) the flight. The duration for me to wait is five hours. That is. When I follow others, I volunteered to put the bagpack and my suitcase into the scanner machine because it is my obligation duty to the enforcement authority here. I do not know there is drugs inside the bagpack."

[11] The prosecution did not challenge the contents of the cautioned statement. In fact, the evidence of PW6 was consistent with the evidence in the cautioned statement. PW6 testified that immediately upon her arrest, the appellant informed him that the backpack, P6 and her fiancee's retirement papers were given by Tega Collins in Shanghai and that Tega Collins had earlier made the appellant sign those retirement papers. None of the prosecution witnesses testified as to any suspicious conduct of the appellant upon discovery of the drugs or upon her arrest.

[12] The evidence of the defence on the whole, established that Captain Daniel Smith, Commander James Yates and Tega Collins are all con-men. As a matter of fact, the appellant was a victim of an internet scam. She had been deceived by Captain Daniel Smith.

[13] The appellant called several other witnesses to support her defence, namely Professor Monica Therese Whitty ("DW2"), the appellant's son, Hugo Evaristo Pinto Exposto ("DW3"), DSP Azizi bin Abdul Samad ("DW4") and Haslindawati binti Abd Halim ("DW5").

[14] DW2 is the leading expert on the subject of internet scams. She is a Professor of Human Factors in Cyber Security, Cyber Security Centre (GCHQ Academic Centre of Excellence), WMG, University of Warwick and a part-time Professor of Cyber Security and Communication in University of Melbourne, Australia. DW2 is also a chartered psychologist in UK with 20 years' experience as an academician in psychology and eight years' experience in research pertaining to internet scam. Both DW2 and DW4, a senior police officer with the Cyber Crime and Multimedia Investigation Division, Royal Malaysian Police, Bukit Aman, provided the trial judge with insights into the characteristics, machinations and targets of internet scam. DW2 summarised her job as follows:

> "My work probably almost 10 years now has focused a lot on ... looking at mass marketing fraud, cyber-enabled mass marketing fraud which stems from advanced fee frauds, the Nigerian email scam ... And romance scams have been a big focus because they are the most common out of this marketing frauds."

[15] In DW2's evidence and expert report ("exh D51") she elaborated her grounds and findings as to how the appellant was entangled in an internet romance scam. She stated, *inter alia,* that the appellant is a romance-scam victim who had developed a strong relationship of love and trust with the scammer, Daniel Smith and which resulted in her being hoodwinked into transferring money to him numerous times and later, unknowingly became a drug mule.

[16] DW3 and DW5 produced numerous email correspondences and other relevant documents which proved the existence of this Captain Daniel Smith persona.

Findings Of The Trial Judge At The Conclusion Of The Trial

[17] The learned judge believed that the appellant was charmed by Daniel Smith's persona, the man that she had been in communication for the past two years prior to her arrest, that she could not have foreseen the set-up. The learned judge also accepted the expert evidence of DW2 on her opinion and findings where DW2 concluded that the appellant was a victim of an internet romance scam.

[18] His Lordship observed that the appellant's defence was not an afterthought as the appellant denied her knowledge of the drugs from the very beginning and the position was put to various prosecution's witnesses. Moreover, the oral evidence of the appellant was also consistent with her cautioned statement, exh D29.

[19] The learned judge evaluated the evidence of the defence and the explanation given by the appellant for believing Tega Collins that the backpack, P6 contained Christmas gifts for his family members in Melbourne. His Lordship accepted the appellant's belief in Tega Collins as to who he is. Essentially, the learned judge accepted the appellant's version that there was no cause for suspicion nor the need to examine the bag thoroughly.

[20] Based on his evaluation of the defence, the learned judge accepted that the appellant was an innocent carrier and found that her testimony and that of the other defence witnesses had rebutted the presumption of knowledge under s 37(d) of the DDA. The learned judge therefore acquitted and discharged the appellant. Aggrieved by the decision of the learned judge, the prosecution appealed to the Court of Appeal.

Proceedings In The Court Of Appeal

[21] Two primary issues were considered by the Court of Appeal, namely:

(i) whether the presumption of knowledge has been rebutted; and

(ii) whether the defence of 'innocent carrier' applies.

[22] The Court of Appeal formed the view that once the High Court had found presumed knowledge against the appellant in relation to the drugs at the close of the prosecution's case, the High Court was not at liberty to consider the issue of knowledge raised in the defence any longer. According to the Court of Appeal, the approach taken by the High Court was misguided and unwarranted because the element of knowledge had already been presumed under s 37(d) of the DDA at the *prima facie* stage. Hence it was the finding of the Court of Appeal that the High Court erred in considering the element of knowledge *vis-a-vis* the defence of innocent carrier. Reliance was placed on the decision of this court in *Duis Akim & Ors v. PP* [2014] 1 MLRA 92.

[23] Further, it was the finding of the Court of Appeal that the defence version was improbable for the following reasons:

> "[18] ... *bona fide* responden dilemahkan dengan ketidakmungkinan (improbabilities) yang terletak pada setiap langkah keterangannya dan akhirnya diselubungi dengan kedudukan secara tuntas ketidakmunasabahannya. Langkah-langkah yang kami rujuk itu antaranya ialah:
>
> (a) responden merupakan seorang isteri (dan bersuami) dan ibu kepada 4 orang anak dan berumur dalam awal 50an semasa ditangkap (54 tahun semasa bicara), tidak bekerja dan sekadar bergantung pada manfaat tanpa pekerjaan (unemployment benefit) oleh kerajaan. Kedudukan kewangan tidak mantap;
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> (b) alasan dan justifikasi untuk pergi ke Shanghai, China semata-mata untuk mendapatkan sijil persaraan Kapten Danial, yang bertugas di Kabul,

Afghanistan, daripada Komander James Yates dari Tentera Amerika Syarikat. Kapten Daniel yang kononnya kekasih dan tunangnya, tidak pernah dikenali dan ditemui kecuali atas talian. Sijil-sijil tersebut kononnya hendaklah diserahkan kepada pihak Konsulat Amerika Syarikat di Australia;

(c) Sijil-sijil berkenaan yang ditemukan dalam beg P6 bertarikh 10 December 2014 tetapi kononnya ditandatangani oleh responden pada 7 December 2014. Sijil Penghargaan ke atas responden (Eksibit P6E3) jelas mempunyai kesilapan tatabahasa iaitu "...THIS IS CERTIFY ...".

(d) ketidaktentuan pembayaran penginapan hotel dan aturan pertemuan dengan Komander James Yates di Shanghai yang kemudiannya tidak pernah muncul;

(e) kemunculan Tega Collin dengan tiba-tiba yang tidak pernah dikenali dan tidak pernah dimaklumkan kepadanya oleh Kapten Daniel serta tiada dalam perancangan perjalanan ke Shanghai itu;

(f) Permintaan mengejut oleh Teja (*sic*) Collin kepada responden untuk membawa pulang beg P6 yang dikatakan dan ditunjukkan hanya mengandungi pakaian-pakaian baru. Beg P6 itu hendaklah diserahkan kepada saudara Teja (*sic*) Collin di Melbourne, Australia tanpa apa-apa butiran kecuali saudara Teja (*sic*) Collin akan tunggu di sana dan akan menayangkan tanda kenalan;

(g) Penyembunyian dadah yang amat berharga seberat 1142.8 gram kepada responden kononnya yang naif dan tidak tahu;

(h) peluang meletakkan dadah tersebut dalam P6 dan ketidakmungkinan seseorang mengamanahkan dadah yang bernilai itu kepada seseorang yang boleh mengesyaki sesuatu dan melaporkan syak wasangka itu kepada pihak berkuasa;...

[19] Peguam responden mengatakan kes responden adalah sesuatu yang amat luar biasa kerana melibatkan responden diperdaya dan ditipu sehingga diletakkan dalam kedudukan mabuk cinta sehingga menyebabkan dirinya hilang pertimbangan dan kawalan. Kami amat tidak yakin dengan hujahan tersebut. Pada penghakiman kami, kes ini merupakan satu kes biasa dan melibatkan keldai dadah. Tiada yang luar biasa mengenainya dan pembelaan pembawa polos merupakan pembelaan yang amat lumrah ditimbulkan. ..."

[24] The Court of Appeal found that the appellant's explanation on the deception practised by Captain Daniel Smith and Tega Collins, which forms the foundation of her innocent carrier defence, is nothing more than a 'red-herring'.

[25] In light of the above, the Court of Appeal allowed the prosecution's appeal. Hence the appellant's appeal to this court. Having perused the appeal records and having considered the oral and written submissions of learned counsel for the appellant and learned Deputy Public Prosecutor ("DPP"), we allowed the appeal. We now give our reasons.

Proceedings In The Federal Court

[26] In urging this court to reinstate the decision of the High Court in acquitting the appellant, learned counsel canvassed the following grounds of appeal:

(a) that the Court of Appeal misread the Federal Court reasoning in *Duis Akim (supra)* and formulated a legal proposition contrary to s 182A of the Criminal Procedure Code ("CPC");

(b) that there was nothing to suggest that the finding of the trial court was wrong or perverse to warrant appellate intervention;

(c) that there were no compelling reasons to undermine the trial court's audio-visual advantage; and

(d) that the Court of Appeal did not consider the totality of the evidence and hasten to make a sweeping generalisation of the appellant's conduct.

[27] For brevity, we do not wish to set out the arguments of learned counsel for the appellant in detail on each of the grounds. Suffice to state that it was the submission for the appellant that the Court of Appeal erred in its proposition that once the presumption of knowledge has been invoked, there is no necessity to consider the element of knowledge again at the end of the trial. In support of this argument, learned counsel relied on the case of *Balachandran v. Public Prosecutor* [2004] 2 MLRA 547 where His Lordship Augustine Paul JCA held that 'a case can be said to have been proven beyond reasonable doubt only at the conclusion of the trial upon consideration of all the evidence adduced'.

[28] Learned counsel further submitted that the primary issue before the Court of Appeal was in relation to the appellant's state of mind, namely whether the appellant had the requisite knowledge of the drugs in exh P6. The learned trial judge, according to learned counsel, should not be faulted for evaluating the element of knowledge in light of the appellant's evidence in rebuttal. Such exercise is the bounden duty and expected of a trial judge under s 182A of the CPC.

[29] It was also argued for the appellant that it is a well-settled principle of law that the appellate court should be anxious in altering or substituting the trial court's findings of facts and especially in the absence of any substantial or compelling reasons to disagree with such findings. Such principle is borne not out of respect to courts of first instance but rather out of reverence to the perceptive advantage during trial often not reflected in the printed evidence.

[30] In response, learned DPP naturally defended the judgment of the Court of Appeal. It was contended that the appellate court was correct in rejecting the appellant's defence of innocent carrier for the reasons that were alluded to by the Court of Appeal in its judgment. Learned DPP essentially emphasised the

point that the appellant had ample opportunity to check the bag, P6 and that her failure to do so attracts the doctrine of 'wilful blindness' which the High Court had purportedly failed to consider.

Our Decision

[31] We will begin by setting out the established principles on appellate intervention. In *Watt (or Thomas) v. Thomas* [1947] AC 484 at p 487 as cited by Raja Azlan Shah in *Wong Swee Chin v. Public Prosecutor* [1980] 1 MLRA 125, Lord Thankerton said:

> "... an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion ..."

[32] In *Low Kian Boon & Anor v. PP* [2010] 1 MLRA 418, the Federal Court said:

> "[17] At this stage it is also opportune to mention the principles governing appellate intervention, particularly, where in this appeal before us there are concurrent findings on facts bearing in mind that the conviction has been sustained on circumstantial evidence.
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> [18] In the Malaysian context the much publicised case of *Dato' Mokhtar Hashim & Anor v. PP* [1983] 1 MLRA 7, affords a reminder that has been extolled in the judicial statements of the Federal Court, namely; when the credibility of witnesses are being evaluated the functions of an appellate court, in dealing with a question of fact in which questions of credibility are involved, are limited in their character and scope. In this instant appeal, there are found expressions by the HC judge of his opinion of witnesses whom he has seen and as an appellate court in order to reverse that, this court must be convinced that the trial judge is wrong.
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> [19] The following are some of the judicial decisions that reflect the ambit of the powers of an appellate court to interfere with the findings of a trial court. The case of *Antonio Dias Caldeira v. Frederick Augustus Gray* [1934] 1 MLRA 19 could first be mentioned. The Privy Council held:
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> > ... that the functions of an appellate court, when dealing with a question of fact, and a question of fact in which questions of credibility are involved, are limited in their character and scope.
> >
> > In an appeal from a decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen, an appellate court must in order to reverse, not merely entertain doubts whether the decision below is right but must be convinced that it is wrong."

[33] These principles were reiterated in *PP v. Mohd Radzi Abu Bakar* [2005] 2 MLRA 590, where Gopal Sri Ram JCA (as hen then was) sitting in the Federal Court said:

> "[32] Now, it is settled law that it is no part of the function of an appellate court in a criminal case - or indeed any case - to make its own findings of fact. That is a function exclusively reserved by the law to the trial court. The reason is obvious. An appellate court is necessarily fettered because it lacks the audio visual advantage enjoyed by the trial court."

[34] In the instant case, the issue before the trial judge was whether the appellant had knowledge of the drugs in P6. This concerned the appellant's state of mind. Learned counsel for the appellant submitted that any finding on the appellant's state of mind is predominantly a question of fact inextricably connected to the finding of credibility and demeanour; matters within the purview of the trial judge. As such, an appellate intervention would only be justified where the finding of fact by the trial judge is against the weight of evidence. We agreed with learned counsel.

[35] The learned trial judge had concluded that the appellant's defence was not an afterthought or a bare denial. And why he concluded so was supported by reasons. The conclusion of the learned trial judge was not perverse. Indeed, the defence of the appellant was not a bare denial nor an afterthought. She had given a full account on how she came to be in possession of the drugs and she had also advanced her defence contemporaneously upon the discovery of the drugs. She had also put her defence to the prosecution's witnesses, in particular PW2, PW6 and PW7.

[36] Having seen and heard the appellant and other witnesses for the defence, including DW2, the trial judge was indeed in the better position to conclude on the trustworthiness and reliability of the appellant's evidence. Without cogent reasons, the Court of Appeal would be in no position to reverse the evaluation or finding of the learned judge.

[37] The Court of Appeal however substituted the findings of the trial judge and in so doing, based its conclusions on the following facts:

(i) the appellant was jobless and impecunious;

(ii) there was a grammatical error on one of the certificates/retirement papers;

(iii) the uncertainty as to how the accommodation in Shanghai was paid for;

(iv) the non-appearance of Commander James Yates and the appearance of Tega Collins;

(v) the opportunity to place the drugs in the backpack; and

(vi) the appellant's failure to discover the concealed contents of exh P6.

[38] In reversing the appellant's acquittal, it was apparent to us that the Court of Appeal did not consider the totality of the evidence, did not deliberate on the facts and did not evaluate the evidence that speak in favour of the appellant. The Court of Appeal simply brushed aside the appellant's defence as a 'red-herring'. The Court of Appeal also failed to consider the consistency of her defence, the numerous email correspondences with Captain Daniel Smith and more importantly the evidence of DW2 and DW4. It is pertinent to note that nowhere in its grounds of judgment did the Court of Appeal address the expert evidence of DW2, who had assessed and evaluated the appellant personally. It appears that the findings of the High Court were reversed based on the appellate court's subjective opinion.

[39] With respect, the Court of Appeal erred in concluding that the appellant's case is just one of the mundane cases involving drug mules mounting the defence of innocent carrier. The Court of Appeal further erred in concluding that the innocent behaviour displayed by the appellant was merely to thwart detection, and that the learned judge who had seen and heard the witnesses had failed to observe this. The Court of Appeal failed to take heed the following observation made by this court in *Munuswamy Sundar Raj v. PP* [2015] 6 MLRA 443:

> "[11] In order not to throttle the discretion of judges, let alone no cases are similar, we are loath to lay down restrictive guidelines for courts to consider prior to deciding whether the defence of innocent carrier can prevail. We leave it to the better judgment of the presiding judge. In the case of *Marlan Marpaung v. PP* [2013] 2 MLRA 404, the court had occasion to say:
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> > The defence of the appellant cannot stand in isolation. It must be determined by reference to the facts and circumstances prevailing in each particular case (*Ridwan v. PP* [2010] 1 MLRA 181; *Hoh Bon Tong v. PP* [2010] 1 MLRA 358 and *Wong Vui Chin v. PP* [2012] 6 MLRA 340 ..."

[40] Given that this court was reluctant to formulate any guidelines on the defence of innocent carrier, it is misconceived of the Court of Appeal to generalise the appellant's defence without properly determining the evidence led by the appellant and the other witnesses in support of the defence.

[41] The law only requires the accused to inspect or enquire when reasonable cause for obvious suspicion arises, and if the accused takes no step or effort to dispel this lingering suspicion then he or she is presumed to have known and accepted the risk of that suspicious endeavour. The facts of this case do not warrant the application of the doctrine of wilful blindness to the appellant. The appellant could not be said to have shut her eyes to the obvious when there was nothing remotely suspicious to begin with.

[42] In *Tan Kiam Peng v. Public Prosecutor* [2008] 1 SLR 1, it was held:

> "... wilful blindness was treated as the legal equivalent of actual knowledge. To establish wilful blindness, there had to be the appropriate level of suspicion

> that led to a refusal to investigate further. If controlled drugs were slipped into a respondent person's bag without his or her knowledge, no offence under the Act would have been committed. On the other hand, if a respondent knew that he or she was carrying controlled drugs, merely inquiring as to the nature of the drugs might not be sufficient. If the respondent chose to assume such a large risk by trafficking drugs without establishing the true nature of the drugs he or she was carrying, this was wilful blindness."

[43] In *Sansregret v. The Queen* [1985] 1 SCR 570, the Supreme Court of Canada observed:

> "The rule that wilful blindness is equivalent to knowledge is essential and is found throughout the criminal law. It is, at the same time, an unstable rule, because judges are apt to forget its very limited scope. A court can properly find wilful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realised its probability; but he refrained from obtaining final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is wilful blindness. Any wider definition would make the doctrine of wilful blindness indistinguishable from the civil doctrine of negligence in not obtaining the knowledge."

[44] The Court of Appeal failed to appreciate the fact that the appellant was a victim of an internet romance scam. The appellant was deceived by Captain Daniel Smith whom she had known for two years through the internet. The appellant had given Captain Daniel Smith money on several occasions. The appellant trusted and was in love with Captain Daniel Smith. They were supposed to get married after his return from Kabul, Afghanistan. As for Tega Collins, he was the person representing Captain Daniel Smith's Commander, namely Commander James Yates. The appellant was convinced of Tega Collin's connection to Captain Daniel Smith and the army. After all, Tega Collins came to her with the Captain's retirement papers.

[45] The appellant first met Tega Collins at the hotel in Shanghai. The first impression the appellant had of Tega Collins was that he was a well-dressed African-American man in a black suit, white shirt and black tie. Tega Collins introduced himself to the appellant whereby he explained that he was working for Commander James Yates, who appears to be the appellant's fiancee superior.

[46] Furthermore, in the presence of the appellant, Tega Collins called Commander James Yates and allowed the appellant to speak with the Commander to convince her that he was the Commander's representative to deliver the retirement papers. When the appellant spoke to Commander James Yates the Commander told the appellant that he was Daniel Smith's Commander and the appellant was told to sign the retirement papers in front of Tega Collins.

[47] After the phone call with Commander James Yates, Tega Collins handed a brown envelope (exh P6B) to the appellant which contained her fiancee's retirement papers (exhs P6E(1)-(4)). The retirement papers were signed by

the appellant in front of Tega Collins and after the execution, Tega Collins placed all the retirement papers back into P6B and passed it to the appellant. Thereafter the appellant asked Tega Collins for a lift to the airport.

[48] In our view, any other person in the position of the appellant would be convinced that Tega Collins was genuinely working with her fiancee because she had personally signed her fiancee retirement papers delivered by Tega Collins to her; the very purpose of the trip to Shanghai. As far as the appellant was concerned, those retirement papers were documents of the United States Department of Army. Against that backdrop, there is no reason for the appellant to be suspicious of the contents of the backpack P6, more so having seen that the bag contained new clothes in plastic wrappers as Christmas gifts for Tega Collins' relatives in Melbourne. And to convince the appellant that the bag contained only clothes, Tega Collins had taken the contents out and then turned the bag upside down. When the bag was turned upside down, the appellant saw that it was empty.

[49] In our judgment, the totality of the evidence established that the appellant had fallen in love head over heels with Captain Daniel Smith. She trusted him completely such that she did not realise that she was initially a victim of a financial scam and later on a victim of a more devious schemes, ie to carry illegal drugs across borders. It was only when told by her lawyer that she had been deceived by an international scam and that her romance was nothing but a sham, did she stop believing in Captain Daniel Smith and their future. This was reflected in her evidence, reproduced below:

> "Q: On the day you were arrested in Kuala Lumpur did you still believe all this transaction were for legitimate purposes?
>
> A: Yes.
>
> Q: You believe it?
>
> A: I believed.
>
> Q: Did you believe Daniel Smith when said sent this money and so on and so on?
>
> A: Yes
>
> ...
>
> Q: Did you believe that Daniel Smith existed at the time of your arrest?
>
> A: Yes.
>
> Q: Did you subsequently realised that Daniel Smith is real person or fraudulent people?
>
> A: He didn't come to me that he is a man.

Q: He didn't come to you that he was a fraud?

A: Yes.

Q: He didn't come to you that as a fraud because he is the man you loved?

A: Yes.

Q: My question is, did you subsequently realised and when that this is not real?

A: When I was in jail in Kajang, my lawyer came Ms Tania and I spoke to her, that's why she make me realised that Captain Daniel Smith doesn't exist.

Q: Only after you consulted you lawyer you began to realise that Captain Daniel Smith doesn't exist?

A: It took me 6 months to forget him.

...

Q: We still in the part when you fell in love with Daniel Smith before you(r) arrest. How did you come about to travel to Shanghai?

A: Daniel Smith asked me to go to Shanghai to sign his retirement paper and agreement paper, so we can be together and get married.

...

Q: That agreement is pertaining to what?

A: For him to leave Kabul, Afghanistan.

...

Q: Is this the agreement, apart of the retirement paper or something else?

A: For him to leave Army."

[50] As to why the appellant trusted Tega Collins, she gave the following account:

"Q: Why did you trust Mr Tega, now you are in big trouble, caused namely, according to your evidence because what Mr Tega that giving the bag which you didn't know. My question is why did you trust Mr Tega when you have not met Mr Tega before?

A: Because Mr Tega look after Captain Daniel Smith and he worked with Commander and then Commander sent him come to me, that's why I trust him, I can trust Daniel Smith.

Q: Because you trusted Daniel Smith and his Commander?

A: Yes.

Q: Mr Tega Collins was someone you thought they sent to you?

A: Yes.

Q: Any other reason why you trusted Mr Tega?

A: Because I always trust people.

Q: You know why I ask you then, if Mr Tega came with the document for you to sign the retirement papers that's very direct because that came from what Daniel Smith promise and the Commander. This is the bag which was given to you for a favour for you to bring to his relatives in Melbourne. It is a little bit disconnected from Daniel Smith or the

A: Yes.

Q: Why did you trust Mr Tega when this has got nothing to do with the official business that you went to Shanghai for?

A: Because Christmas was around the corner and then I trust him because he do all Captain Daniel Smith's paper for me to sign it, because I know that supposed to sign in office but I signed it in the hotel.

...

I trusted him because he worked with Captain Daniel Smith and Commander and then he brought all the papers for me to sign.

Q: That's the reason why you did him a favour?

A: Yes.

...

Q: You remember the prosecution also showed you, she said if you look at the picture in exhibit D39, ... the picture of Captain Daniel Smith with this signboard saying "Will you marry me", ... she said do you know that the poster is not real poster but actually edited to the picture, super imposed picture, you remember she asked you that?

A: Yes.

Q: Before she asked you that question did you know that poster could possibly be edited?

A: That time I didn't know until the DPP mentioned it.

...

Q: The learned Prosecution also said you are involved in this entire syndicate of drugs smuggling or drugs trafficking, she put it to you towards the end of cross-examination, and you said "No, I am not involved in this syndicate". I want to ask you this question. Did you know that Tega Collins could possibly have been a drug trafficker?

A: I didn't know.

...

Q: Did you have the slighter suspicion that all these stories about Captain Daniel Smith, the Commander Yates and then Tega Collins coming to your hotel, were all an elaborate scam of drug syndication?

A: No, I didn't know.

Q: ... did you have any incline that all these emails over two years, love stories, romance that was expressed to you, was an elaborate scam to scam you?

A: I didn't know."

[51] The whole body of evidence quoted above seemed to have escaped the consideration of the Court of Appeal. There was thus much force in the submission of learned counsel that there was no proper evaluation of the defence by the Court of Appeal.

[52] In *PP v. Herlina Purnama Sari* [2017] 1 MLRA 499, Raus Sharif (then PCA) said:

"[45] Wilful blindness necessarily entails an element of deliberate action. If the person concerned has a clear reason to be suspicious that something is amiss but then embarks on a deliberate decision not to make further enquiries in order to avoid confirming what the actual situation is, then such a decision is necessarily a deliberate one. The key threshold element in the doctrine of wilful blindness itself is that of suspicion followed by (and coupled with) a deliberate decision not to make further investigations. Whether the doctrine of wilful blindness should be applied to any particular case would be dependent on the relevant inferences to be drawn by the trial judge from all the facts and circumstances of the particular case, giving due weight, where necessary, to the credibility of the witnesses. (See *PP v. Tan Kok Ann* [1995] 4 MLRH 256)

[46] The concept of 'wilful blindness' had been discussed in a number of local cases but it seems to have had its genesis in the dissenting judgment of Yong Pung How CJ (Singapore) in the case of *Public Prosecutor v. Hla Win* [1995] 2 SLR 424. The doctrine of 'wilful blindness' can be summarised to be applicable to a situation where the circumstances are such as to raise suspicion sufficient for a reasonable person to be put on inquiry as to the legitimacy of a particular transaction. To put it another way, if the circumstances are such as to arouse suspicion, then it is incumbent on a person to make the necessary inquiries in order to satisfy himself as to the genuineness of what was informed to him. Should he fail to embark upon this course of action, then he will be guilty of 'wilful blindness'. In other words, he is then taken to know the true situation. He then cannot be said to have either rebutted the presumption of knowledge or have raised a reasonable doubt as to his knowledge of the situation."

[53] The trial judge had made a correct conclusion that the conduct of the appellant was consistent with that of an innocent person. His Lordship pointed

out that the appellant was naive, because she followed other passengers that disembarked from the same aircraft to the immigration and thereafter to the customs checkpoint, although she was not required to clear immigration or customs because she was a transit passenger. In fact, none of the prosecution witnesses made any adverse remarks in respect of the appellant's conduct from the moment she was stopped by PW2 at the scanning machine, to the subsequent inspection by PW6 and even to the interrogation room by the investigating officer PW7.

[54] We agreed with learned counsel for the appellant that in view of the following facts, the doctrine of wilful blindness does not operate against the appellant:

(i) Tega Collins is connected to Captain Daniel Smith, her fiancee;

(ii) It was Tega Collins who brought the retirement papers in her fianceename;

(iii) Commander James Yates confirmed that Tega Collins was his representative for the execution of the retirement papers;

(iv) Tega Collins told the appellant to present the papers to the American Consulate;

(v) Tega Collins gave the appellant a lift to the airport in his car and she was to pass the Christmas gifts to Tega Collins' relative at the airport she was bound for;

(vi) Tega Collins confirmed that the bag contained nothing else but Christmas presents and the bag cleared security checks in Shanghai; and

(vii) There was nothing outwardly suspicious nor were there visible signs of tampering about the bag or the Christmas presents therein.

[55] Further, the fact that the appellant was *naive* may be gleaned from the following evidence:

"Q: Now could you tell us what happened next?

A: And then I was surprised.

Q: But did you know what is "ice" when he told it was "ice"?

A: ... I said to him it is not ice and then he looked at me with surprised and I said because the bag was with me overnight, ice possibly melt by now.

Q: You thought it was common ice?

A: Yes, I thought it was the common ice because I never heard about drugs ice."

[56] The appellant's defence of an innocent carrier which stemmed from the deception on her by Captain Daniel Smith was supported by an uncontroverted evidence of an expert witness. Significantly, the prosecution did not lead any rebuttal evidence against the evidence of DW2. While the learned judge was not obliged to accept the expert evidence of DW2 by reason only that is was unchallenged, if the learned judge finds that the evidence is based on sound grounds and supported by basic facts, there is little else for the learned judge to do than to accept the evidence (see *Lo Sook Ling Adela v. Au Mei Yin Chrisina and Another* [2002] 1 SLR(R) 326; *Samundee Devan Kerishnan Muthu v. PP* [2008] 2 MLRA 650; see also *PP v. Chong Chai* [2006] 2 MLRH 485; *PP v. Muhamad Suhaimi Abdul Aziz* [2001] 4 MLRH 442; *PP v. Juli Kanoi* [2017] MLRAU 123).

[57] Having regard to the fact that the appellant disclosed her defence contemporaneously with the discovery of the drugs and in the light of her explanation as to how she came to be in possession of the drugs, we found that the learned judge was right in concluding that the appellant's defence had successfully rebutted the presumption of knowledge under s 37(d) of the DDA and had raised a reasonable doubt on the prosecution's case. The learned judge was right in holding that the appellant was an innocent carrier.

[58] There is another aspect of the case that needs mention. In relation to the essential aspects of her defence, the appellant had given "*Alcontara* Notice". In *Alcontara Ambross Anthony v. PP* [1996] 1 MLRA 47, Edgar Joseph Jr FCJ said at pp 53-54:

> "To resume our discussion regarding the important point of misdirection as regards the burden of proof, especially the burden on the defence, we must point out, with respect, that it was wrong for the Judge to have criticised the defence for having failed to put to the Investigating Officer, the name of Che Mat or the latter's telephone number or his place of abode, for the simple reason that these particulars had been disclosed in the cautioned statement of the appellant made the day after his arrest so that the police had all the time in the world to check their veracity. That being the case, the onus was on the prosecution, to check on whether the appellant's version of the facts as they appeared in his cautioned statement and to which we have referred, was true or false. In other words, the onus was upon the prosecution to disprove this important part of the appellant's version of the facts. The defence were, therefore, under no duty to put the matters aforesaid to the Investigating Officer having regard to their prior disclosure in the cautioned statement. In holding to the contrary, the Judge had undoubtedly overlooked the material portions of the cautioned statement touching on Che Mat, reversed the onus, and placed it on the defence, so that on this further ground also, the conviction had to be quashed."

[59] In the instant case, not only did the appellant give good "*Alcontara* Notice" to the prosecution through her cautioned statement, her legal representative had also done so through a letter to the investigating officer dated 24 December 2014, where para 10 reads:

> "According to our Client, she has informed you of several names of persons who can of assistance to support her defence and these persons contact details can be found in her mobile phone which has been seized by you upon her arrest. We request access to her mobile phone so that we can record the numbers of these key persons, kindly let us know when and where. We can do this in your presence. But we would strongly suggest that you immediately get an expert to access the logs and dates in our client's handphone immediately and to preserve the integrity of the phone until trial."

[60] There was no reply from the investigating officer to the letter dated 24 December 2014. The appellant's legal representative again wrote to the investigating officer on 31 October 2016 *inter alia* that "Following our interview with the Client, we received her instructions to access to her emails and Facebook profile to obtain documents and the names of few individuals who are of assistance and crucial to her defence". By this letter, particulars believed to be relevant to the investigation were given.

[61] The investigating officer, PW7 admitted that he did not conduct any investigation whatsoever on Captain Daniel Smith or Tega Collins, although they played a crucial role in the present case.

[62] Finally, on *Duis Akim (supra)* which was relied upon by the Court of Appeal to reverse the High Court. The judgment of this court in *Duis Akim (supra)*, must be read in context and not in isolation. This was what Richard Malanjum CJSS (as he then was) said at p 104:

> "[38] We note that when assessing the defence the learned trial judge surprisingly revisited his earlier findings upon which he called for the defence. Such approach is quite contrary to the principle of maximum evaluation of the evidence adduced at the close of the prosecution's case. Indeed in his judgment the learned trial judge made it very clear that he had conducted a maximum evaluation of the evidence adduced by the prosecution before calling for the defence.
>
> ...
>
> [40] Thus, in the present case the learned trial judge, having given the evidence before him the maximum evaluation before calling for the defence, should have therefore focussed on whether the defence had cast a reasonable doubt in the prosecution's case and even if it did not, whether as a whole the prosecution had proved its case beyond reasonable doubt before finding the appellants innocent or guilty for the offence as charged.
>
> ...
>
> [45] But despite his factual finding of positive identification of the appellants by PW1, the learned trial judge subsequently reversed himself at the end of the whole case. And he did it even though the defence had not adduced any evidence to rebut the positive finding on their identification.

> [46] Upon our review of the evidence and the relevant legal principles we are of the view that the learned trial judge erred in reversing his initial finding on the identification of the appellants by PW1."

[63] In our view, the principle enunciated in *Duis Akim (supra)* is not applicable to the instant case. In *Duis Akim (supra)*, the learned judge reversed his earlier finding on the identification of the appellant without any evidence adduced at the defence stage to rebut the finding made at the prosecution's stage. The principle that can be distilled from *Duis Akim (supra)* is that judges are not allowed to retract from an earlier affirmative finding made during the prosecution's stage in the absence of any evidence to rebut the same by the defence.

[64] In the instant case the learned judge merely re-evaluated the fact deemed by operation of law, namely the element of knowledge. What His Lordship did was in consonance with *Balachandran (supra)* and s 182A of the CPC which provides that at the conclusion of the trial, the Court shall consider all the evidence adduced before it. Under the law, the learned trial judge was thus obligated to consider the defence and to determine whether it has succeeded in rebutting the statutory presumption invoked and/or has succeeded in raising a reasonable doubt on the prosecution's case.

Conclusion

[65] This appeal turned on a question of fact, ie whether the defence of innocent carrier has been made out. Case law had established that the determination of whether or not an accused person is an innocent carrier is a matter within the purview of a trial judge. As such, an appellate court must have cogent and compelling reasons to disturb the finding of fact by a trial judge. Here, the learned trial judge after hearing the witnesses and after considering the law and the evidence, concluded that the appellant had no knowledge that the bag P6 contained the impugned drugs and therefore the defence of innocent carrier has been proved.

[66] The Court of Appeal reversed the findings of the trial judge and we found that in so doing, erred in the following respects:

(i) in reversing the primary findings of fact of the High Court which was amply supported by the evidence;

(ii) in failing to consider the expert evidence of DW2; and

(iii) in misreading or misapplying the decision of this court in *Duis Akim (supra)*.

[67] On the totality of the evidence, the defence of the appellant was not inherently incredible. The findings of the learned trial judge was correct and the Court of Appeal ought not to have disturbed those findings as there was no ground for appellate intervention. On the contrary, the Court of Appeal

failed to sufficiently and judicially appreciate the defence which renders the conviction unsafe.

[68] For all the above reasons, we allowed the appeal and we set aside the order of the Court of Appeal. The appellant was acquitted and discharged.

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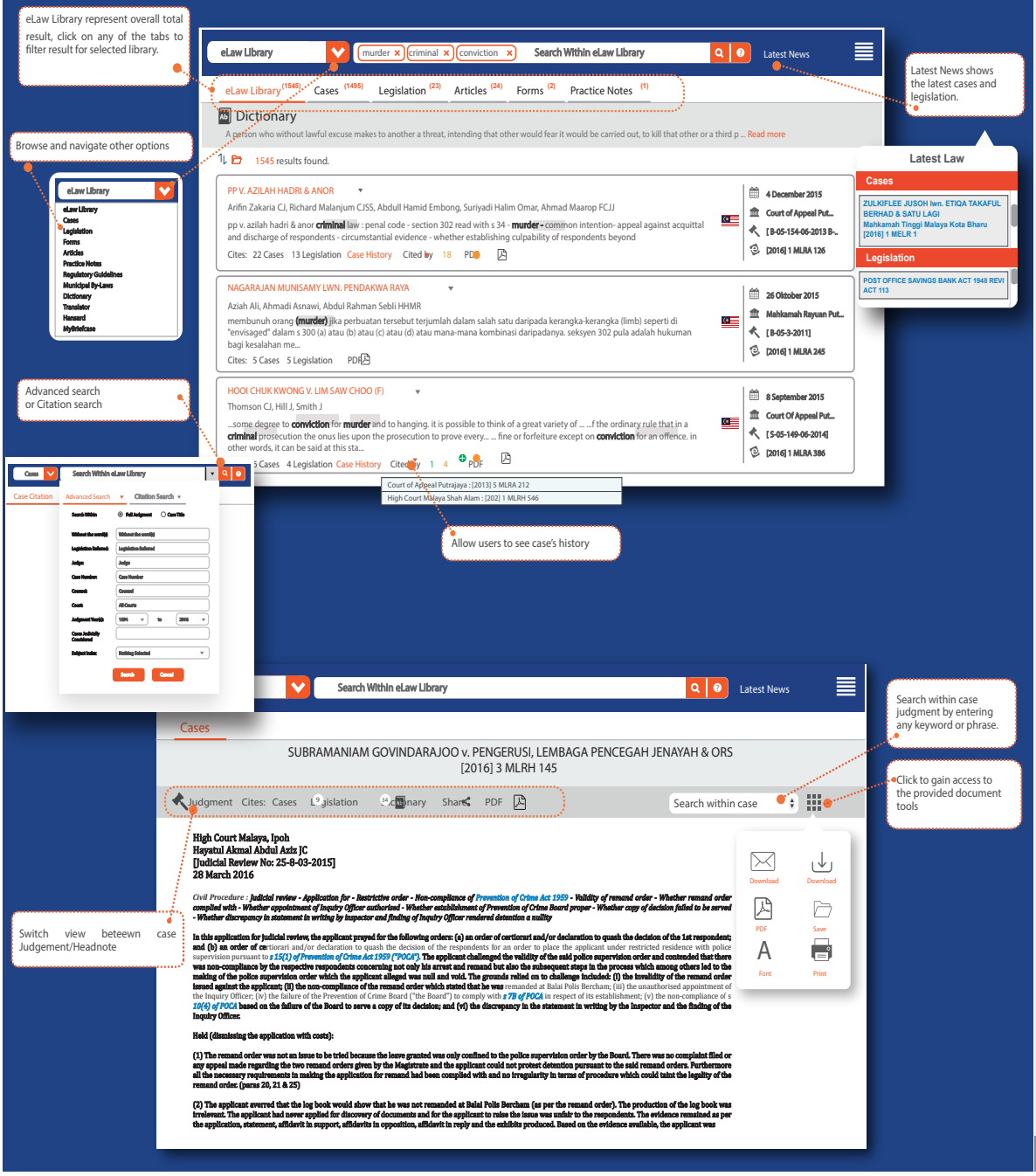

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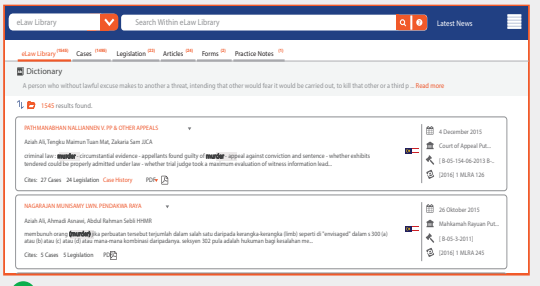

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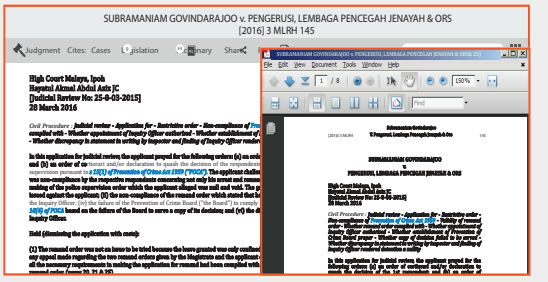

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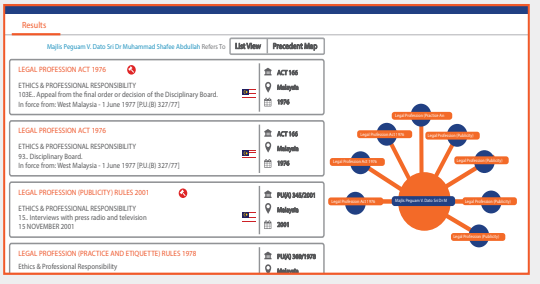

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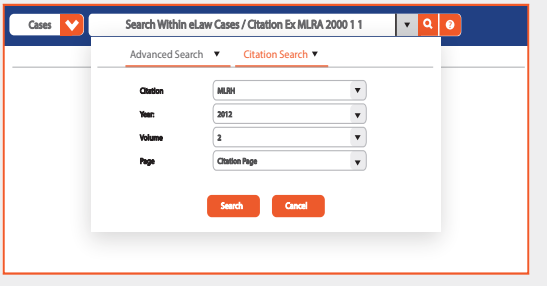

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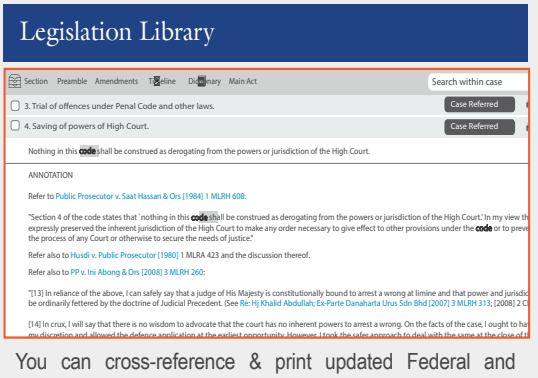

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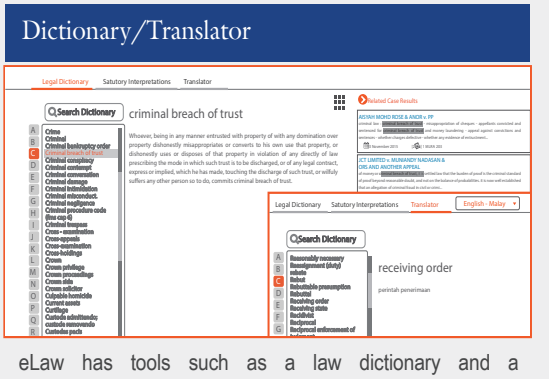

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