

Proving Drug Trafficking Offence in Malaysia: An Analysis of the Dangerous Drugs Act 1952 and Case Law

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ABSTRACT

Proving a drug trafficking offence under section 39B(1) of the Dangerous Drugs Act 1952 (Act 234)(DDA 1952) is a challenging task, mainly because the section does not prescribe its elements, leaving much to judicial interpretation. Based on an analysis of case law, proof of possession is an important element to prove trafficking. There are two (2) ways of proving possession: actual possession (custody, control and knowledge) and presumed possession (custody or control) and knowledge under section 37(d) of the DDA 1952. This research adopted doctrinal legal research involving detailed analysis of the DDA 1952, the Criminal Procedure Code (Act 593)(CPC), the Evidence Act 1950 (Act 56), case law and scholarly writings related to this area. The findings reveal that in several cases not only section 37(d) has been invoked to prove presumed possession but also section 37 (da) of the DDA 1952 to prove presumed trafficking leading to the use of double presumption. Although section 37A of the DDA 1952 was inserted in 2014 to address the application of double presumption, the Federal Court in *Alma Nudo Atenza v Public Prosecutor & Another Appeal* [2019] 5 CLJ 780 ruled that double presumption was not only rejected but also considered unconstitutional. The research aims to analyse the modes of proving drug trafficking offence under section 39B(1) of the DDA 1952 particularly in terms of the element of possession.

Keywords: Drug trafficking, actual possession, presumed possession, Dangerous Drugs Act 1952, double presumption

INTRODUCTION

Drug trafficking is evolving worldwide, especially in Southeast Asia, with Malaysia serving as a key distribution hub due to its closeness with “Golden Triangle” where the borders of Laos, Myanmar and Thailand meet (Mohamad Daud & Zarina, 2015). Drug trafficking represents a serious global threat, undermining economic, social development and contributing to crime (UNODC, n.d). It serves as a source of funding for various criminal activities and increases threats such as terrorism (Azmawati et al., 2021; Stephen, 2016). Realising its danger and threat, drug trafficking is viewed as a serious offence as stated in section 39B(2) of the Dangerous Drugs Act 1952 (Act 234)(DDA 1952) punishable with either death or life imprisonment. In a drug trafficking case, it is the prosecution’s duty to establish every element of the offence beyond a reasonable doubt throughout the trial. One of the elements that needs to be proved in the offence of drug trafficking is that the accused trafficked the dangerous drug. What is meant by trafficking? According to the definition given by the Online Cambridge Dictionary, it means “*the act of buying or selling goods illegally.*” By this definition, proving trafficking requires a purchase or sale activity. This strict definition of trafficking might cause difficulty for the prosecution in proving the offence, considering that in most drug trafficking cases, the sale or purchase transaction has not yet occurred. Referring to section 2 of the DDA 1952, the term “trafficking” is given a wider definition as opposed to dictionary meaning that more aligns with the definition given by the United Nations Office on Drugs and Crime which include among others manufacturing, selling, storing, administering, carrying, supplying or distributing any dangerous drug. Hence, a reading of this definition section shows that the *actus reus* for this offence is not only confined to act of trafficking itself but also include any of those acts that fall within the ambit of the given definition. In other words, if it can be successfully proved that the accused was selling dangerous drugs as specified in the First Schedule of the DDA 1952, this act can be categorised as trafficking as was decided in *Public Prosecutor v. Mansor Md. Rashid & Anor* [1971] 1 CLJ 233 where the Federal Court ruled that the trafficking charge was established based on the sale of cannabis to PW9, who acted as an agent provocateur. The question that arises is what about other actions that amount to trafficking, such as storing and carrying? Is it sufficient to prove the act of storing or the act of carrying alone to establish the element of trafficking? This issue was discussed in the Federal Court case of *Chan Wei Loon v Public Prosecutor and another appeal* [2021] MLJU 770 where in this case, the reference was made to the High Court’s case of *Public Prosecutor v Chia Leong Foo* [2006] 6 MLJ whereby Augustine Paul J explained that most acts classified as “trafficking” under section 2 of the Act—such as keeping, concealing, storing, transporting and carrying dangerous drugs—typically require the element of possession. However, actions like the sale and supply of dangerous drugs may not necessitate possession. It means that although the word “possession” does not appear within the meaning of trafficking under section 2 of the DDA 1952, the court’s interpretation is that possession is a crucial element in proving trafficking on the grounds that a person cannot keep, hide, store or carry dangerous drugs (as defined by the Act) without having possession of them. This legal principle was applied in *Public Prosecutor v. Abdul Manaf Muhamad Hassan* [2006] 2 CLJ 129 where the Federal Court in its judgment stated that the act of carrying alone does not amount to the offence of trafficking, which was later confirmed by the following Federal Court’s case of *Soorya Kumar Narayanan & Anor v. Public Prosecutor* [2012] 9 CLJ.

In short, referring to cases that have been decided by the court relating to drug trafficking, it usually requires proof of possession except in cases that involve the sale of dangerous drugs. To prove possession, elements that need to be established are control, custody and knowledge as explained by Thomson J in *Chan Pean Leon v. Public Prosecutor* [1956] CLJU 17. This definition of “possession” was later referred by the Federal Court’s case of *Chan Wei Loon v Public Prosecutor & Another Appeal* [2021] 6 CLJ 623.

Previous studies related to drug trafficking have examined the phenomenon of drug trafficking crimes and their impact (Patil & Pandey, 2022), enforcement against drug trafficking (Teymourian et al., 2020), the relationship between drugs and other crimes (Battiston et al., 2024) and recently, drug mules (Whitty, 2023) and online drug trafficking (Szigeti et al., 2023; Rawat et al., 2022). In Malaysia, previous studies are related to challenges faced in proving drug trafficking and defences raised against the charge (Nasreen et al., 2020; Nasreen et al., 2016) measures taken to address drug trafficking, (Setyabudi et al., 2024), online transportation courier services in relation to drug trafficking (Siahaan et al., 2023) and the effect of drug trafficking on Malaysia’s security (Amer Fawwaz, 2023). However, previous studies did not specifically address the elements of drug trafficking offence under section 39B particularly concerning the modes of proving possession. This gap in the research underscores the need to analyse the modes of proving drug trafficking offence in the absence of its statutorily prescribed elements, particularly in terms of the element of possession, which is considered an integral element of trafficking.

METHODOLOGY

The research adopted a doctrinal legal research methodology, whereby data collection involved primary legal sources (statutes and judicial decisions) and secondary legal sources (textbooks, journal articles, and scholarly writings). The primary and secondary legal sources were retrieved from UiTM's online academic databases, including CLJ Prime, Lexis Advance Malaysia as well as Google Scholar. The primary legal sources selected as a sample for analysis were the DDA 1952, the CPC and the Evidence Act 1950. The primary and secondary legal sources were examined analytically and critically, with a focus on the modes of proving the drug trafficking offence under section 39B(1) of the DDA 1952, particularly in terms of the element of possession.

OFFENCE OF DRUG TRAFFICKING

Matters pertaining to drug-related offences are governed by the DDA 1952. Among the offences prescribed under this law is drug trafficking under section 39B(1). Section 39B(1) provides the definition of what constitutes drug trafficking in a dangerous drug. Meanwhile, section 39B(2) provides punishment for the said offence. A reading of subsection (1) of section 39B shows that not only (a) trafficking in dangerous drugs outlawed, but also (b) offering to, or (c) doing or offering to do an act preparatory to or for the purpose of trafficking. To prove drug trafficking offence under section 39B(1)(a), there are elements that need to be proved. Firstly, it must be proved that the drugs in question are categorised as dangerous drugs as mentioned in the First Schedule of the DDA 1952. Secondly, it must be proved that the accused trafficked the dangerous drugs. As explained in the introduction, in general, apart from sales, actions that amount to trafficking as defined in section 2 of the DDA 1952 require proof of possession as established in the Federal Court's case of *Soorya Kumar Narayanan & Anor v. Public Prosecutor* [2012] 9 CLJ. Therefore, an examination of cases decided by the courts involving drug trafficking typically requires proof of possession which involves control, custody and knowledge, as explained by Thomson J in *Chan Pean Leon v. Public Prosecutor* [1956] CLJU 17. Thirdly, the *mens rea* of the offence must be established. If the trafficking is proved by way of possession, the *mens rea* required is knowledge of the drugs (*Ariff Arhannan Che Udin v Public Prosecutor* [2022] 4 CLJ 1). However, the main question is how possession should be proved. The following section explains this in detail.

MODES OF PROVING POSSESSION

It is important to note that the discussion regarding the proof of possession related to drug trafficking is complex. Evidently, the issue of possession for the purpose of drug trafficking has been argued and brought before the Federal Court, with decisions of the Court of Appeal being overruled by the former. In order to comprehend the modes of proving possession, it is worth referring to the judgment in *Ariff Arhannan Che Udin v. Public Prosecutor* [2022] 4 CLJ where the Federal Court explained two modes of proving a drug trafficking case under section 39B(1)(a) as follows:

- (i) *by invoking the statutory presumption of trafficking under s. 37(da), provided it is proved by actual or affirmative evidence that the accused was in possession of the drug. This is presumed trafficking; or*
- (ii) *by invoking the statutory presumption of possession and knowledge of the nature of the drug under s. 37(d), provided it is proved that the accused had custody or control of the drug. Read with the definition of trafficking under s. 2 and taking into account the amount of the drug, an inference of trafficking can be drawn. This is trafficking by inference: [Ong Ah Chuan v. PP \[1980\] CLJU 181; \[1980\] 1 LNS 181; \[1981\] 1 MLJ 64.](#)"*

This judgment shows that there are basically two modes to prove drug trafficking under section 39B(1)(a). The term "*prima facie*" pertains to the stage of prosecution where the prosecution has the burden of establishing a *prima facie* case against the accused before he is required to present a defence (Mohd Safri et al., 2022). This is explicitly outlined in section 180(1) of the CPC, which provide that once the prosecution has finished presenting its case, the court must decide whether a *prima facie* case has been established against the accused. According to section and 180(4) of the CPC, a *prima facie* case against the accused exists when the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

For better understanding, the modes of proving possession for drug trafficking is explained in Figure 1.

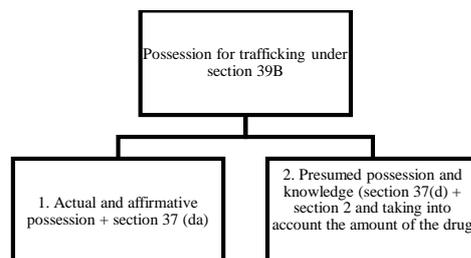


Figure 1: Modes of proving possession for drug trafficking under section 39B of the DDA 1952 (*Ariff Arhannan Che Udin v. Public Prosecutor* [2022] 4 CLJ)

Figure 1 illustrates that there are two (2) modes of proving possession: proof of custody, control and knowledge known as (actual possession), or proof through the presumption provided under section 37(d) known as (presumed possession and knowledge). Both modes will be explained in more detail, starting with the first.

Actual and affirmative possession + section 37(da) of the DDA 1952 (presumed trafficking)

For the first mode, the prosecution can prove possession of the dangerous drugs through actual and affirmative evidence. In doing so, the prosecution has to establish the elements of possession (custody, control and knowledge) through evidence, whether direct, circumstantial or based on conduct (*Ariff Arhannan Che Udin v. Public Prosecutor* [2022] 4 CLJ 1). Once actual possession is proved and the quantity of drugs meets or exceeds the specified amount, the presumption of trafficking under section 37(da) shall apply. The word used in this section is "shall" and not "may", thus implying the invocation of this presumption is mandatory upon fulfilling the prerequisite. This mode of proof can be referred to in the Federal Court's case of *Abdullah Atan v. Public Prosecutor & Other Appeals* [2020] 9 CLJ 151. In this case, a point of law was raised: whether the presumption of trafficking under section 37(da) constitutes credible evidence for the prosecution to make out a *prima facie* case against the accused under section 180(4) of the CPC. It was argued that to prove a *prima facie* under section 180(4) of the CPC,

prosecution has to prove each element of the offence with credible evidence not based on statutory presumptions. There was no credible evidence presented to prove the element of trafficking. Therefore, the trial court's decision that a *prima facie* case of trafficking existed was unsupported and violated section 180(4) of the CPC. The Federal Court held that a presumption is not evidence but a rule of evidence that helps to prove a fact and has no probative value on its own. To invoke the presumption of trafficking under section 37(da), the prosecution must first produce credible evidence of possession as well as the nature and amount of the drugs. Moreover, the presumption of trafficking is not absolute and can be challenged, ensuring that the accused retains the right to be tried fairly. The Federal Court ruled that the trial court correctly established a *prima facie* case under section 180(4) of the CPC by applying the presumption of trafficking under section 37(da) of the DDA 1952 based on credible evidence of actual possession and the drug quantity exceeding the statutory limit.

This method of proof was later upheld in the Federal Court's decision in *Ariff Arhannan Che Udin v. Public Prosecutor* [2022] 4 CLJ 1. In essence, actual and affirmative evidence, such as custody, control and knowledge can be used to establish possession of dangerous drugs. When actual possession is established and the drug quantity meets or surpasses the specific threshold, the presumption of trafficking under section 37(da) applies until it is disproved. As a result, the burden of proof shifts to the accused, who needs to provide a rebuttal to the presumption on a balance of probabilities (*Sathya Vello v. Public Prosecutor* [2022] 5 CLJ 659).

Section 37(d) of the DDA 1952 (presumed possession and knowledge) + section 2 of the DDA 1952 (definition of trafficking) and taking into account the amount of the drug

There are cases where the elements of possession (custody, control and knowledge) cannot be entirely proven through direct evidence, with only the elements of custody or control being established. In such cases, section 37(d) of the DDA 1952 has been used to invoke the presumption of possession (presumed possession and knowledge of the nature of the drug). The section states that:

“any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug.”

The section shows that if it can be proved that the accused only had custody or control of any dangerous drugs, the accused shall be deemed to have been in possession and knowledge of such drugs until proven otherwise. This deeming provision aims to aid the prosecution in proving possession in situations where the element of knowledge is difficult or cannot be proved. That said, it is important to note that the presumption is not absolute but can be challenged. The term “until the contrary is proved” places a legal burden on the accused to demonstrate, on a balance of probabilities, that he was not in possession of the drugs and was unaware of it. This means that if the accused successfully counters the presumption that he was unaware of the drugs' presence, he would be acquitted not only of trafficking drugs but also of the lesser offence of possession of dangerous drugs such as under section 12(2) of the same Act. This is because, without proof of knowledge, he committed no offence under the DDA 1952, despite being in custody or control of the drugs (*Sathya Vello v. Public Prosecutor* [2022] 5 CLJ 659). Likewise, if the accused successfully raises the defence of innocent carrier, disproves the presumption of having knowledge of the drugs' presence, the court may find him not guilty. The defence of innocent carrier was successfully raised in *Maria Elvira Pinto Exposto v. Public Prosecutor* [2020] 5 CLJ 1 where the Federal Court affirmed that the learned judge was correct in concluding that the appellant's defence successfully rebutted the presumption of trafficking under section 37(d) of the DDA 1952 and also effectively raised reasonable doubt about the prosecution's case. It was correct to determine that the appellant was not guilty and that he was an innocent carrier. Accordingly, the Federal Court allowed the appeal, leading to the appellant's acquittal.

It is important to note that if possession is proved by presumed possession and knowledge under section 37(d), then the proof of trafficking can no longer rely on presumed trafficking under section 37(da), as this will result in double presumption (which will be explained in the next section). Thus, the proof of trafficking should rely on evidence other than section 37(da). This was discussed in the Federal Court's case of *Public Prosecutor v Herlina Purnama Sari* [2016] CLJU 1855 where the decision in this case signifies that the prosecution can instead use the presumption under section 37(d) to establish possession and rely on other evidence, separate from the presumption under section 37(da), to prove that the accused was trafficking dangerous drugs. The question may arise as to what evidence can be considered by the court in proving trafficking, considering that in most drug trafficking cases, the accused are arrested while not selling the drugs. Hence, what could constitute trafficking?

To answer this question, it is necessary to refer to *Sathya Vello v. Public Prosecutor* [2022] 5 CLJ 659. In this case, the appellant and the second accused arrived from Chennai, India by AirAsia. They were stopped by police officers due to suspicious behaviour. The officers requested that their bags be scanned. The scan revealed suspicious images even after the bags were emptied. PW2 noted that the empty bags were very heavy and observed that the fabric at the bottom was bulging, prompting a physical examination. During this examination, two brown lace packages containing crystalline substances were discovered hidden in specially constructed compartments at the bottom of the bags. The chemist confirmed the substances to be methamphetamine. The trial court found no direct evidence of the appellant's knowledge of the drugs and relied on the presumption pursuant to section 37(d) because the appellant had custody and control of the bags. The court stated that the appellant's act of carrying the drugs clearly constituted trafficking under section 2 of the DDA 1952 and the absence of any plausible explanation for carrying such a large amount of dangerous drugs was irrefutable proof that he was doing so for the purpose of trafficking. Dissatisfied with the decision, the case was appealed up to the Federal Court. On the proof of trafficking, the Federal Court held that with knowledge of the presence of the drugs presumed against the appellant by section 37(d) (the presumed possession and knowledge were unsuccessfully rebutted by the appellant), coupled with the large amount of drugs that he carried, which was 1,803g, above the minimum weight of 50g specified in section 37(da)(xvi) in respect of the first charge, and 2,151g, above the minimum weight in respect of the second charge, the irresistible inference was that he was carrying the drugs for trafficking.

However, it is worth noting that not all situations where a large amount of drugs is in possession or being carried can be considered trafficking. This depends on the circumstances of how and where the drugs were found. This legal principle was thoroughly discussed in the Federal Court's case of *Soorya Kumar Narayanan & Anor v. Public Prosecutor* [2012] 9 CLJ 141. In this case, the appellants were arrested when they were loading heavy plastic sacks onto a lorry and had no opportunity to check their contents. There was no evidence to suggest they knew the sacks contained drugs, as they claimed they were told to pick up batik clothes. The trial court convicted them of drug trafficking under section 39B of the DDA 1952, and their appeals against the ruling were dismissed. Aggrieved by the Court of Appeal's decision, they appealed to the

Federal Court. On appeal, a few issues were raised. Among others, it was not open for the trial court to have inferred trafficking based solely on the weight of the drug. Meanwhile, the prosecution contended that the trial court’s decision was legally justified, citing the Federal Court’s decision in *Public Prosecutor v. Abdul Manaf Muhamad Hassan* [2006] 2 CLJ 129. In this case, the trial court relied on the presumption of possession and knowledge under section 37(d). Therefore, the court had to make an affirmative finding of fact for trafficking, as he can no longer rely on the trafficking presumption under section 37(da). On the element of trafficking, the trial court made an inference that the drug was for sale and not for personal consumption based solely on the large quantity and weight of the drugs. The Federal Court concluded that the act of carrying alone does not amount to trafficking. The trial court had erred in making an inference of trafficking solely on the quantity and weight of drug found in the absence of the other supporting facts such as found in *Abdul Manaf*’s case. In *Abdul Manaf*’s case, the drugs were packed in small packets and concealed on the accused, including at his waist and in his pockets. This method of carrying suggested that the accused was aware of the drugs. It is therefore reasonable to infer that the accused was aware of the drugs. Given the large quantity and the way they were packed, it could be reasonably inferred that they were for sale, thus satisfying the element of trafficking. In contrast, in this case, the drugs were discovered in bulk inside plastic sacks and the appellants merely loaded these sacks onto a lorry. There was no evidence that the appellants had the opportunity to inspect or handle the contents of the sacks, making it less likely that they were aware of the drugs or intended to traffic them. On those grounds, the Federal Court reduced the charge to one of possession under section 6 read with section 39A of the DDA 1952.

Table 1: Comparison between the application of presumptions under section 37 (d) and (da) of the DDA 1952

Aspect	Presumption under section 37(d)	Presumption under section 37(da)
Prerequisite conditions	The trial court must satisfy that the accused had either custody or control of the drug to invoke presumed possession and knowledge.	The trial court must satisfy that the prosecution has proved the actual possession of drug via custody, control and knowledge to invoke presumed trafficking.
Proof of trafficking	Once presumed possession and knowledge are established under section 37(d), the prosecution must still prove beyond a reasonable doubt that the drugs in the accused’s possession were meant for trafficking.	With proof of actual possession and the drug quantity meeting or exceeding the specific amount, section 37(da) applies pertaining to the presumption of trafficking. Thus, the burden of proof transfers to the accused, who must rebut the presumption, with the standard of proof being a balance of probabilities. (<i>Sathya Vello v. Public Prosecutor</i> [2022] 5 CLJ 659).
Implication if the presumption is successfully rebutted	If the presumption under section 37 (d) is successfully rebutted such as via the defence of innocent carrier, the accused would be acquitted not only of trafficking drugs but also of the lesser offence of possession of dangerous drugs such as under section 12 of the DDA 1952.	The charge against the accused for drug trafficking might be reduced to possession of drugs such as under section 6 or 12 of the DDA 1952 because the direct evidence of possession against the accused still can be successfully proved.

Section 37(d) of the DDA 1952 (presumed possession + knowledge) and section 37(da) of the DDA 1952 (presumed trafficking) [double presumption]

Besides the two modes, there are cases where both presumptive provisions, section 37(d) (presumed possession and knowledge) and section 37(da) (presumed trafficking) have been used simultaneously in proving the drug trafficking offence. In other words, presumed trafficking has been applied upon presumed possession and knowledge known as “double presumption”. One of the early cases that discussed this issue is *Muhammed Hassan v. Public Prosecutor* [1998] 2 CLJ 170. Among the issues raised during the appeal was that the learned trial judge erred in law in invoking section 37(da) based on section 37(d) of the same Act. The Federal Court concluded that the act of carrying alone does not amount to trafficking. The Federal Court ruled that the terms “deemed” in section 37(d) and “found” in section 37(da) of the Act have distinct implications. For the former, deemed possession and knowledge operate by law upon proof of facts namely custody or control unless proven otherwise. These are known as “compelling presumptions,” meaning the court must make these inferences unless the contrary is proved. In contrast, the latter requires the proof of actual or affirmative possession and not merely a presumption under section 37(d) of the Act. In other words, for possession to constitute trafficking under section 37(da), there must be an affirmative finding of possession based on evidence, rather than a legal presumption. The Federal Court further stated that it “*would be unduly harsh and oppressive*” to apply presumption upon presumption automatically. This decision indicates that if the presumption under section 37(d) has already been used to establish possession, it cannot automatically apply the presumption under section 37(da) because actual possession must be proved rather than deemed. This decision basically prohibits reliance presumption upon presumption also known as double presumption thereby becoming a precedent for subsequent cases that deal with the same issue. The same stance was taken by the subsequent case of *Soorya Kumar Narayanan & Anor v. Public Prosecutor* [2012] 9 CLJ, where the Federal Court ruled that since the trial court had relied on section 37(d) for the presumption of knowledge, therefore, the court could no longer rely on the presumption of trafficking under section 37(da).

After the Federal Court ruled against the use of double presumption in *Muhammed Hassan*, Parliament passed the Dangerous Drugs (Amendment) Act 2014, adding a new section 37A. The amendment seeks to allow the application of the presumption in section 37(d) alongside the presumption in section 37(da). More importantly, after the amendment, how has the court’s interpretation of the use of double presumption changed? For clarity, section 37A is reproduced below:

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

To answer this question, it is pertinent to refer to the Federal Court’s case of *Alma Nudo Atenza v. Public Prosecutor & Another Appeal* [2019] 5 CLJ 780. Taking into account important legal issues that could potentially affect the outcome of other cases, the case was heard by a nine-member panel of Federal Court judges. On the issue of double presumption, the Federal Court referred to the wording of section 37A of the DDA 1952. The Federal Court acknowledged that section 37A was established to enable the application of dual presumptions in drug trafficking cases. However, with reference to the case of *Muhammed Hassan*, the term “deemed possession” under section 37(d) cannot be equated with “found possession” necessary for invoking the trafficking presumption under section 37(da). This ruling underscores that the statutory language explicitly distinguishes between these types of possession. For easier reference, Table 2 explains the types of possession used under section 37(d) and (da) respectively:

Table 2: Types of possession under section 37 (d) and (da) of the DDA 1952

No.	Section 37(d)	Section 37(da)
1.	The words used in the section are “... <i>be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug</i> ”	The words used in the section are “... <i>is found in possession of</i> ”
2.	The word “deemed” implies that the prosecution just needs to prove custody or control to raise the presumption of possession and knowledge under section 37(d).	The word “found” under section 37(d) shows that the section cannot be relied on to invoke section 37 (da) because the latter section requires the prosecution to prove that the accused has actual possession of such drugs by direct evidence, not by deemed possession under section 37(d).

The Federal Court further emphasised that despite the introduction of section 37A, sections 37(d) and (da) do not allow the simultaneous application of both presumptions. Section 37(d) allows for the presumption of possession and knowledge upon proving custody or control of a dangerous drug, without further evidence of actual possession. In contrast, section 37(da) requires an affirmative finding of possession of a specified quantity of drugs to infer trafficking as shown in Table 2. Besides, the Federal Court ruled that this approach infringes the presumption of innocence guaranteed under Article 5(1) of the Federal Constitution. Furthermore, allowing a conviction based on presumed possession without requiring an affirmative finding of possession (as per section 37(da)) was excessively harsh and oppressive. The Federal Court held that such a practice failed to meet the proportionality requirement under Article 8(1) of the Federal Constitution, given the serious nature of the offence and the severe penalties involved. Therefore, section 37A was ultimately deemed unconstitutional and struck down, as it undermined fundamental rights by permitting convictions where reasonable doubt may exist, solely based on presumptions rather than proven facts. The principle of prohibiting the use of double presumptions was later affirmed by the Federal Court’s case of *Sathya Vello v. Public Prosecutor* [2022] 5 CLJ 659 and *Ariff Arhannan Che Udin v. Public Prosecutor* [2022] 4 CLJ 1.

The Requirement for the Court to Give Reasons for a *Prima Facie* Decision in relation to a Drug Trafficking Offence

In Malaysia, the criminal justice system operates under an adversarial system rooted in common law. This system dictates that the accused is presumed innocent until proven guilty. The onus to prove all elements under section 39B of the DDA 1952 lies with the prosecution. The prosecution relies on witness testimonies, relevant documents, and statutory presumptions provided by law to support their case. As previously mentioned, there are two ways to prove a drug trafficking offence, and either method is acceptable as long as the presumptions under sections 37(d) and 37(da) are not applied simultaneously, which would create a double presumption. Accordingly, at the conclusion of the prosecution’s case, the High Court (since the offence is punishable with the death penalty, it falls within the jurisdiction of the High Court) will decide whether the prosecution has established a *prima facie* case against the accused as outlined in section 180(1) of the CPC. According to section 180(4) of the CPC, a *prima facie* case is established when the prosecution has adduced credible evidence proving each ingredient of the offence which if un rebutted or unexplained would warrant a conviction. This implies that all elements of the offence must be proved before requiring the accused to enter upon the defence.

Thus, the court plays an important role in determining whether a *prima facie* case has been successfully proven. In cases of possession involving drug trafficking under section 39B of the DDA 1952, the question that arises is whether the court needs to provide the reasons for the *prima facie* case that has been made out and upon which presumption provision it is based, namely whether section 37(d) or section 37(da). Gleaning from the wording of section 180 of the CPC clearly states what is required for the court is to satisfy that all the elements of the offence have been proved through credible evidence if un rebutted or unexplained would warrant a conviction. Impliedly, there is no statutory obligation for the court to state such reasons in its decision. This can be seen in *Sathya Vello v. Public Prosecutor* [2022] 5 CLJ 659 where the Federal Court held that:

“There is no requirement in s. 180 of the CPC that when calling for the accused to enter on his defence, the trial judge must inform him verbally or in writing of the reason or reasons why he is calling for him to enter on his defence. What is required is for the trial judge to be satisfied that the prosecution has adduced credible evidence to prove each ingredient of the offence charged. In fact, the trial judge is not even required to provide any reason for calling for the defence.”

In relation to drug trafficking offence, reference can be made in *Yap You Jee v. Public Prosecutor & Other Appeals* [2015] 7 CLJ 897 “So, if the law does not require the trial judge to give any reason for calling for the accused’s defence, there is no reason why he is required to inform the accused at the close of the prosecution case whether any presumption of law applies against him.” The Judge in *Sathya Vello v Public Prosecutor* [2022] 5 CLJ 659 also cautioned against providing detailed reasons on the ground of presumption as there is a possibility the trial judge may mix up the application of the presumptions under sections 37(d) and 37(da) that could affect the accused’s ability to prepare his line of defence effectively.

However, if the court opts to clarify how the drug trafficking charge has been successfully proven, thus establishing a *prima facie* case, the court must correctly apply the presumptions under section 37(d) and 37 (da) of the DDA 1952. As previously mentioned, the offence of drug trafficking can be established through one of these modes: actual possession combined with presumed trafficking under section 37(da) or presumed possession and knowledge under section 37(d) followed by actual trafficking. Therefore, the court’s decision must be clear and specific. Any suggestion that drug trafficking could be proven by either mode may create uncertainty and hinder the accused’s ability to prepare an effective defence. This was highlighted in the Federal Court case of *Jorge Crespo Gomez v. Public Prosecutor* [2020] 8 CLJ 292. In that case, the trial court made findings based on either (i) *mens rea* possession through direct evidence and the presumption under section 37(da) or (ii) the presumption under section 37(d) for possession and knowledge, along with the definition of “trafficking” under section 2 of the DDA 1952. However, the Judicial Commissioner failed to specify which presumption was relied upon and did not clarify whether the appellant was found in actual possession with presumed trafficking under section 37(da) or presumed possession under section 37(d) with a finding of trafficking under section 2. The Federal Court emphasised that it was crucial to decide which presumption was applied, as this decision affects the burden placed on the defence. Invoking all available presumptions forces the appellant to counter each one, which led to the setting aside of the conviction and sentence by the Judicial Commissioner and the Court of Appeal, replacing it with a conviction under section 12(2) punishable under section 39A(2) of the DDA 1952. This case shows that the ambiguity in the court’s decision could affect the accused’s ability to mount a defence effectively. This could potentially prejudice the accused, as it affects the fairness of the trial process.

CONCLUSION AND RECOMMENDATIONS

In summary, there are two modes to establish possession in order to prove the offence of trafficking: proving custody, control, and knowledge (actual possession), or using the presumption under section 37(d) (presumed possession). The prosecution's approach to proving a drug trafficking charge mainly depends on the facts of each case. If it is a straightforward case, such as when a large quantity of drugs is found on the accused in his trousers pocket while walking on the street, the first mode can be used. In this scenario, once actual possession is proven and the quantity of drugs meets or exceeds the threshold amount, the presumption of trafficking under section 37(da) applies unless the accused can prove otherwise. However, if the case is more complex and proving knowledge of the accused pertaining to the drugs is difficult, such as when the drugs are hidden or concealed without the accused's awareness or ability to inspect them, the second mode might be taken into consideration. In this latter scenario, if possession is established under section 37(d) of the DDA 1952 through presumed possession and knowledge, the prosecution cannot rely on section 37(da) on presumed trafficking, as this would result in double presumptions. The phrase "until the contrary is proved" in section 37(d) places a burden on the accused to prove on a balance of probabilities that they neither possessed nor had knowledge of the drugs. Should the accused successfully refute the presumption of knowledge, the accused would be acquitted of both trafficking and the lesser charge of possession under section 12(2) of the same Act, as without proof of knowledge, no offence of drug possession is committed, even if the accused had custody or control over the drugs (*Sathya Vello v. Public Prosecutor* [2022] 5 CLJ 659). Conversely, if the accused fails to rebut this presumption, then the presumed possession and knowledge become actual and material proof. Next, proof of trafficking needs to be established. Given that section 37(d) is used, section 37(da) (presumed trafficking) cannot be applied, as using double presumptions is deemed unconstitutional and illegal.

Hence, the prosecution needs to prove the element of trafficking independently of section 37(da) of the DDA 1952. In *Sathya Vello v. Public Prosecutor* [2022] 5 CLJ 659, the act of carrying drugs (within the definition of trafficking under section 2 of the DDA 1952) coupled with the drugs found significantly above the minimum weight, can lead to the irresistible inference that the drugs were being carried for trafficking. However, it is worth noting that not all situations where a large amount of drugs is carried can be considered trafficking. If the drugs are found in sealed sacks or boxes and the accused's job was only to load them onto a lorry without having any opportunity to inspect the contents, the fact that the drugs were found in large amounts might still not be sufficient to constitute trafficking as decided in *Soorya Kumar Narayanan & Anor v. Public Prosecutor* [2012] 9 CLJ 141. In such cases, additional evidence is required to prove the element of trafficking.

Once the prosecution has presented the evidence before the court, the court plays a crucial role in determining whether a *prima facie* case has been established against the accused and whether the accused shall enter on his defence. Although it is not mandatory for the court to provide reasons for a *prima facie* decision, if reasons are given, they should not be ambiguous, such as by stating that drug trafficking is proved based on all possible presumptions available (i.e. based on actual possession + presumed trafficking (section 37(da)) or presumed possession and knowledge (section 37(d) + actual trafficking)). This could cause confusion to the accused and affect the accused's ability to mount a defence effectively, as the accused will bear the heavier burden of rebutting the presumptions on a balance of probabilities (*Jorge Crespo Gomez v. Public Prosecutor* [2020] 8 CLJ 292).

Regardless of which mode of proof is used, the prosecution should avoid invoking double presumptions in proving drug trafficking. This is because although section 37A of the DDA 1952 was inserted in 2014 to address the constraints faced in using the double presumption, the Federal Court in *Alma Nudo Atenza* ruled that double presumption was not only rejected but also considered unconstitutional. The same should be considered by the court when determining whether the prosecution has established a *prima facie* case of drug trafficking. If the court decides to provide reasons, the court must clearly state upon which presumption provision it is based, namely whether section 37(d) or section 37(da). Failure to do so may result in such decision being challenged on appeal and could affect the outcome of the case.

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