

**ADPAN
COUNTRY
REPORT**

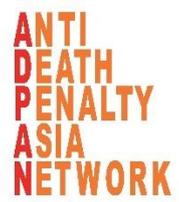
Malaysia

REPORT ON THE
DEATH PENALTY
IN MALAYSIA

**REFORM
in LIMBO**

**ANTI
DEATH
PENALTY
ASIA
NETWORK**





ADPAN Country Report – Malaysia

Report on the Death Penalty in Malaysia

Reform in Limbo

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Executive Summary

The death penalty remains a contentious issue in Malaysia following the uptick of public opposition to the Pakatan Harapan administration's announcement that the country intended to abolish the death penalty back in October 2018. Since then, the abolition of the death penalty has been downscaled to abolishing the mandatory death penalty.

A Special Committee to Review Alternative Sentences to the Mandatory Death Penalty was established by the Pakatan Harapan administration in September 2019, and a final report was submitted to the late Minister of Law, Datuk Liew Vui Keong, in February 2020.¹ Following the collapse of the administration, the report finding has been kept secret by the new government, with the Minister-in-charge suggesting that the Committee's findings need thorough examination by the government before a decision can be made.²

An unofficial moratorium on executions was reported to have been implemented by the Barisan Nasional administration when it reviewed the mandatory death penalty imposed under the Dangerous Drugs Act 1952. This was later expanded during the Pakatan Harapan administration, where the cabinet also implemented a moratorium on all executions. As of 2021, there is no indication that the government has withdrawn the moratorium.

Despite the uptick in support for maintaining the death penalty in late-2018 and early-2019, the surge of public support slowed down significantly since then and returned to a level measured³ in Roger Hood's 2013 study in Malaysia.⁴ While the upswing in support could be attributed to the broad campaign by the opposition⁵ of the day,⁶ the general populace's social and political perspective indicates substantial advocacy work is needed to nurture alternative views of the criminal justice system and the death penalty.

¹ Bernama, 'Minister: Special Committee submits report on the death penalty alternative sentences' (Malay Mail, 11 February 2020) <<https://www.malaymail.com/news/malaysia/2020/02/11/minister-special-committee-submits-report-on-death-penalty-alternative-sent/1836640>> accessed 30 March 2021

² Geraldine Tong, 'Mandatory death sentence abolition needs further scrutiny – minister' (MalaysiaKini, 6 November 2020) <<https://www.malaysiakini.com/news/549686>> accessed 6 April 2021

³ Soo Wern Jun, 'Over half of Malaysian polled in new survey feel death sentence still necessary' (Malay Mail, 19 June 2020) <<https://www.malaymail.com/news/malaysia/2020/06/19/over-half-of-malaysians-polled-in-new-survey-feel-death-sentence-still-nece/1876815>> accessed 30 March 2021

⁴ Roger Hood, 'The Death Penalty in Malaysia: Public opinion on the mandatory death penalty for drug trafficking, murder and firearms offenses' (Death Penalty Project & Malaysia Bar Council, 2013) pp. 9-11 <<https://www.deathpenaltyproject.org/wp-content/uploads/2018/02/Malaysia-report.pdf>> accessed 19 May 2021

⁵ Susan Loone, 'Penang MCA's campaign against death penalty abolition gaining traction' (MalaysiaKini, 31 January 2019) <<https://www.malaysiakini.com/news/462453>> accessed 30 March 2021

⁶ 'MCA and PAS take common stand on death penalty' (The Star, 17 October 2018) <<https://www.thestar.com.my/news/nation/2018/10/17/mca-and-pas-take-common-stand-on-death-penalty>> accessed 30 March 2021

Current Situation

The last substantial and detailed breakdown of statistics relating to the death penalty and individuals on death row was made available by the government in 2018 as part of its engagement with stakeholders. The information provided during the brief period should be considered as an anomaly as the change of administration swiftly brought an end to the data provided, and advocates are now heavily reliant on Parliamentary Questions to obtain new data sets.

Key information provided in 2018 includes a breakdown on gender, nationality, ethnicity, faith, period of detention, and the professions of detainees prior to arrest. Due to the details in the data set provided in 2018, the report will largely base the statistics and assessment of the death penalty and its development based on key data points relative to the information in 2018.

It should be noted that the government's statistics in terms of death row inmates include individuals who are sentenced at the High Court but continues to be on appeal. Thus, the numbers shift within the report may be attributable to a successful clemency process or an acquittal at the Court of Appeal or Federal Court.⁷

Breakdown of Death Row Inmates based on Gender and Nationality - 2018

Nationality	Gender		Total
	Male	Female	
Malaysian	694	19	713
Foreign Nationals	445	123	568
Total	1,139	142	1,281

In terms of executions, between January 2010 to October 2018, a total of 33 individuals were executed. Of these, 1 was executed for drug trafficking, 3 for offences under the Firearms Act, and the remainder for murder.

⁷ Question 10, Parliament reply, 1st Meeting, 3rd Term, 14th Parliament <<https://pardocs.sinarproject.org/documents/2020-july-august-parliamentary-session/written-replies-soalan-bertulis/20200828-par14s3m2-soalan-bukanlisan-10.pdf/view>> accessed 6 April 2021

Executions between 2010 - 2018

Year	Drug Trafficking	Murder	Firearms Act	Total
2010	0	1	0	1
2011	0	0	0	0
2012	0	0	0	0
2013	1	1	1	3
2014	0	6	0	6
2015	0	1	0	1
2016	0	8	1	9
2017	0	11	1	12
2018	0	1	0	1
Total	1	29	3	33

Since then, the number of death row inmates has increased to 1,324 individuals⁸. No new executions were noted between October 2018 and October 2020, presumably due to the moratorium still in force.

Despite this increase, the number of women on death row has decreased from 142 to 129. The proportion of foreign nationals on death row has also undergone a marginal decrease.

Breakdown of Death Row Inmates based on Nationality – October 2020

Nationality	Total
Malaysian	788
Foreign National	536
Total	1324

Breakdown of Death Row Inmates based on Gender – October 2020

Nationality	Total
Male	1195
Female	129
Total	1324

Unfortunately, the varying data points available in Parliament Questions' data does not allow for a direct comparison of gender and nationality between different years together. In terms of foreign nationals, significant numbers of death row inmates are from Nigeria, 108 individuals (20.1%); Iran, 90 individuals (16.8%); and Indonesia, 82 individuals (15.3%).

⁸ Question 20, Parliament reply, 3rd meeting, 3rd term, 14th Parliament <<https://pardocs.sinarproject.org/documents/2020-november-december-parliamentary-session/oral-questions-soalan-lisan/2020-11-26-parliamentary-replies/20201126-p14m3p2-soalan-lisan-20.pdf/view>> accessed 6 April 2021

Breakdown of Death Row Inmates based on Ethnicity between 2018 - 2020

Year	Malay	Chinese	Indian	Others
2018	340	168	170	28
2019	348	193	150	34
2020 ⁹	405	210	173	0 ¹⁰

In terms of ethnicity, each race's overall representation among death row inmates has been relatively consistent over the three-year range, with minor shifts ($\pm 2\%$) each year. Information from the Department of Statistics of Malaysia does provide ethnic breakdown information for comparison with the statistic information of those on death row. However, the overall ethnic breakdown within the country does not differentiate between ethnic Malay and other indigenous groups.

Based on the latest available data in July 2020, Bumiputera, which includes ethnic Malay and the indigenous peoples of Malaya, Sabah, and Sarawak comprise 69.6% of the population; ethnic Chinese 22.6%; ethnic Indian 6.8%; and 1% of other ethnicities.

In contrast, Malaysian nationals on death row comprise 51.4% Malay, 26.6% Chinese, and 22% Indian. Curiously, the 34 individuals under the category of others, presumably including other indigenous peoples and ethnicities, decreased from 34 individuals to 0 in the latest information provided in Parliament reply.

Regarding the type of offences, we can contrast data provided by the Prison Department in a death penalty conference hosted by Malaysia Coalition against the Death Penalty in January 2019 with subsequent Parliament Questions¹¹.

Comparison of Offences Between 2019 and 2020

Type of Offence	January 2019	October 2020	Changes
S39B DDA	932	912	-20
S302 Penal Code (Murder)	317	381	+64
Others ¹²	30	31	+1
Total	1279¹³	1324	45

Due to limited information on the clemency process and the outcomes of clemency applications by death row inmates, this report cannot conclude with certainty that the decreased number of death row inmates for drug trafficking under Section 39B of DDA noted between January 2019 to October 2020 can be attributed to successful petitions.

⁹ Ibid

¹⁰ Information not provided

¹¹ Ibid 3

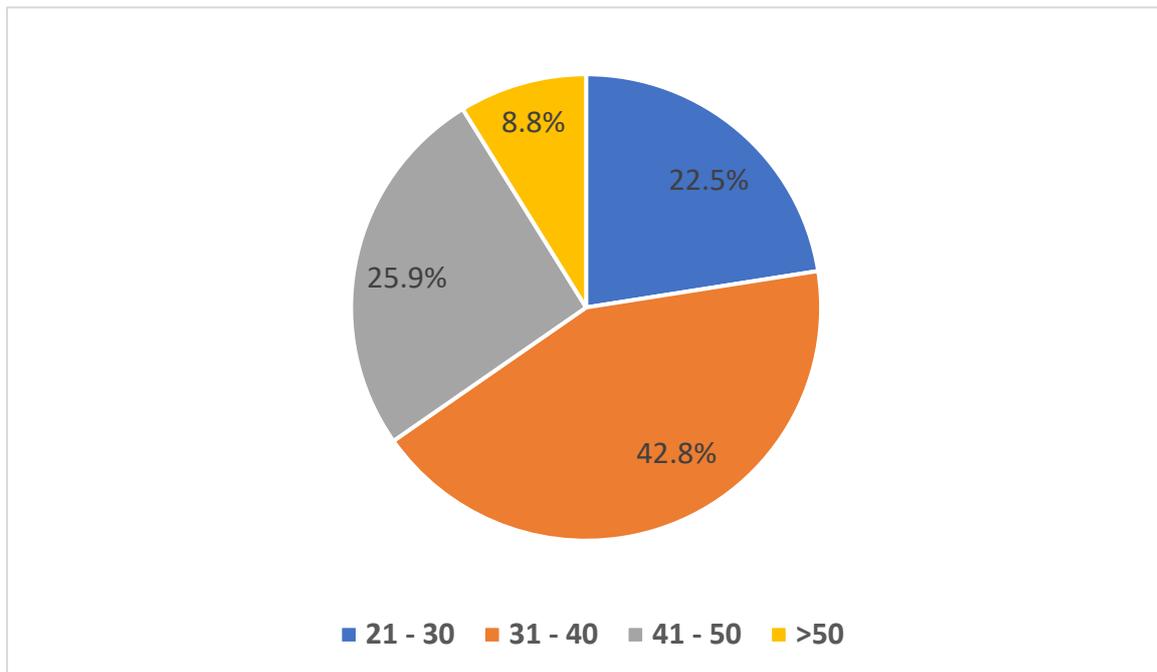
¹² Includes Firearms offences, terrorism offences and gang robbery with murder

¹³ Discrepancy between the data point is due to the changes of statistic between October 2018 and January 2019

As of data available in July 2020, of the 1,314¹⁴ individuals on death row, 475 are still pending appeal at the Court of Appeal or Federal Court, whereas 839 individuals are waiting for the clemency application process. This has indirectly ensured that no further execution will take place until the conclusion of these processes¹⁵.

A significant number of individuals are aged between 31 to 40 years old, constituting 42.8% of all death row inmates, followed by the age groups of 41 to 50 years old at 25.9% and 21 to 30 years old at 22.5%. The smallest demographic at 8.8% is an inclusive group of 51 years old and above.¹⁶

Breakdown of Death Row Inmates based on Age Groups – July 2020



However, these data were presented piecemeal in several Parliamentary Questions, making it impossible to correlate it against the various other statistics presented earlier in this report.

¹⁴ 10 less than those reported in October 2020

¹⁵ Question 10, Parliament reply, 1st Meeting, 3rd Term, 14th Parliament <<https://pardocs.sinarproject.org/documents/2020-july-august-parliamentary-session/written-replies-soalan-bertulis/20200828-par14s3m2-soalan-bukanlisan-10.pdf/view>> accessed 6 April 2021

¹⁶ Question 44, Parliament reply, 1st meeting, 3rd term, 14th Parliament <<https://pardocs.sinarproject.org/documents/2020-july-august-parliamentary-session/oral-questions-soalan-lisan/2020-07-13-parliamentary-replies/20200713-par14s3m2-soalan-lisan-44.pdf/view>> accessed 4 May 2021

Malaysian Parliament Amendment to the *Dangerous Drugs Act 1952*

*The Dangerous Drugs Act 1952*¹⁷ (“DDA”) has undergone various amendments over its long history governing drug offences in Malaysia. This report will consider the amendments in 1975, 1983, and 2017 to examine how the drug trafficking offence has been altered over time. The transition from a discretionary alternative to the death penalty to the mandatory death penalty and then back to a discretionary approach will be examined. This lens will establish why there is confusion regarding the intent behind the most recent amendment in 2017.

1975 Amendment

The *Dangerous Drugs (Amendment) Act 1975*¹⁸ was not the first alteration to the DDA, but it was significant as it introduced the offence of trafficking in dangerous drugs in section 39B. The punishments for this offence were either the death penalty or life imprisonment and/or whipping. Judges had the discretion to decide whether the death penalty should be imposed or not.

1983 Amendment

The *Dangerous Drugs (Amendment) Act 1983*¹⁹ was enacted in response to the perceived growing threat of the drug trade in Malaysia and the increased rates of addiction. In response to this, the amendment in 1983 made the death penalty mandatory. The effect of this was that anyone, regardless of mitigating circumstances, would be sentenced to death by the courts, and judges had no discretion to consider a lesser sentence.

*“We hang anyone convicted who exhausts their appeals,” said Tey Boon Hwa, assistant director of the Anti-Narcotics Task Force. “We also hang old ladies, even if we don’t normally publicise it. If you get caught, you face the music.”*²⁰

Although arguing the mandatory death penalty was a key deterrent, in 1988, 9,710 new addicts were identified, the highest recorded number since 1984²¹ – and these numbers were emerging after the introduction of the mandatory death penalty.

It has been suggested that “Parliamentary enactment of the mandatory death sentence arguably grew out of the Federal Court’s own inability to specify the appropriate “exceptional circumstance” that would justify a life sentence.”²² If the courts differ in their judicial interpretation, then the law’s uneven application can lead to inconsistent sentencing and, subsequently, the need for Parliament to step in and tighten the law.

¹⁷ Act 234, Revised 2017.

¹⁸ Act A293, w.e.f. 30.4.1975.

¹⁹ Act A553/83 w.e.f. 15.4.1983.

²⁰ Steven Erlanger, ‘Intensive War on Drugs by Malaysia and Singapore Shows Mixed Results’ *The New York Times* (15 December 1989) archived: <https://www.nytimes.com/1989/12/15/world/intensive-war-on-drugs-by-malaysia-and-singapore-shows-mixed-results.html> (‘Intensive War on Drugs’).

²¹ Erlanger, ‘Intensive War on Drugs’ (n 4).

²² Sidney Harring, ‘Death, Drugs and Development: Malaysia’s Mandatory Death Penalty for Traffickers and the International War on Drugs’ *City University of New York* (1991) 381.

2017 Amendment

In November 2017, section 39B (2A) was inserted into the DDA to create a discretionary alternative to the death penalty for drug trafficking offences. Life imprisonment and a whipping of not less than fifteen strokes can be applied as an alternative to the death penalty in the following circumstances:

*“(a) there was **no evidence of buying and selling** of a dangerous drug at the time when the person convicted was arrested;*

*(b) there was no involvement **of agent provocateur**; or*

*(c) the involvement of the person convicted is **restricted to transporting, carrying, sending, or delivering** a dangerous drug; and*

*(d) that the person convicted **has assisted an enforcement agency in disrupting drug trafficking activities within or outside Malaysia.**”²³*

Despite the amendment, from 2018 to 2020, the discretion has potentially only been considered and applied in three cases.²⁴ If the purpose of the amendment was to give judges discretion, especially in cases where the offender was taken advantage of or engaged in drug trafficking as a result of their vulnerable situation, then the question is: why is the discretion not being applied?

The answer to this question can partly be explained by the uncertainty surrounding the amendment’s actual intended purpose to the DDA. This, in turn, has created uneven judicial interpretation across cases, with judges differing in the opinion of how to correctly interpret the wording of s 39B (2A).

The position of the Malaysian Parliament at the time of the amendment can be outlined in the Explanatory Statement to the Draft Bill 2017 (DR 45/2017):

*“However, **in imposing the punishment of imprisonment for life and whipping of not less than fifteen strokes, the Court may have regard only to any of the circumstances specified in the proposed new paragraph 39B(2A) (a), (b) or (c) and the Court shall have regard to a certification in writing by the Public Prosecutor that in the Public Prosecutor’s determination the person convicted under subsection 39B(2) has assisted an enforcement agency in disrupting drug trafficking activities within or outside Malaysia.**” [Emphasis added.]*

Despite this reference to certification in writing by the Public Prosecutor in the Explanatory Statement, the existing law makes no mention of this. It states, *“the court may have regard...that the person convicted has assisted an enforcement agency in disrupting drug trafficking activities within or outside Malaysia.”*²⁵ On its face, this would seem to allow courts

²³ *Dangerous Drugs Act 1952* s 39B (2A).

²⁴ *PP v Chandru a/l Muniandy* [2018] MLJU 2142; *Pendakwa Raya v Mohamad Hafizul bin Che Mohamad Zahid* [2019] MLJU 482; *PP v Brits Shaun* [2019] MLJU 916.

²⁵ *Dangerous Drugs Act 1952* s 39B (2A).

discretion to evaluate on a case-by-case basis whether or not a person had disrupted drug trafficking activities.

To give ultimate power to the Public Prosecutor to decide whether or not to impose the death penalty removes the discretionary power of the courts and creates a dangerous situation where the threshold for the discretion is set so high that the majority of offenders are simply unable to meet the requirement even if they cooperate with law enforcement agencies.

According to Amnesty International, 70% of men on death row in Malaysia are there for drug-related offences and a staggering 95% of women for the same offences.²⁶ A recent study has found that “many of the women facing the death penalty in Malaysia were either unemployed or employed in low-level, low-paid, precarious work.”²⁷ There is an inherent vulnerability here, emphasising the need for judicial discretion and the total abolition of the death penalty for drug-related offences.

Case Law Analysis

An examination of three cases where the discretion has been considered and applied between 2018 – 2019 demonstrates the shifting interpretation of s 39B (2A) by the courts and explains why in later cases in 2020, courts have been reluctant to exercise the discretion.

Based on the cases studied, we identify the following issues:

1. Ambiguity in interpretation – conjunctive/disjunctive
2. Inconsistency in application
3. Court relying on the prosecution/police testimony
4. Court not looking at other mitigating circumstances
5. The reversal of the burden of proof in favour of the prosecution – issue of the right to remain silent

PP v. Chandru a/l Muniandy [2018] MLJU 2142

In this case, the accused, Mr Muniandy, was charged with trafficking under s 39B (1)(a) and three other possession charges under s 12(2) of the DDA. The illegal substances included 15.71 grams of heroin, 3.63 grams of monoacetylmorphines, and 1.32 grams of methamphetamine.

The drugs were found in the accused’s house during a police raid. When considering and applying s 39B (2A), Hayatul Akmal Abdul Aziz, JC held, despite the drugs being found at the property, and there was no evidence of the accused buying or selling the drugs at the time he was convicted and arrested.

²⁶ Amnesty International 2019, pp 18-29).

²⁷ Lucy Harry, ‘Rethinking the relationship between women, crime, and economic factors: the case study of women sentenced to death for drug trafficking in Malaysia’ *Centre for Criminology, University of Oxford* (2021) 10, 2.

The prosecution could not lead evidence of where the accused had purchased the drugs or proof he was selling them. There was also no evidence of the involvement of an agent provocateur. The accused was sentenced to life imprisonment and fifteen strokes of *rotan*.

The judge, in this case, Hayatul Akmal Abdul Aziz, JC, did not interpret the legislation as requiring evidence of the offender having disrupted drug trafficking activities and particularly made no mention of any requirement of a certificate from the Public Prosecutor.

Pendakwa Raya v. Mohamad Hafizul bin Che Mohamad Zahid [2019] MLJU 482

Following the case of *PP v. Chandru a/l Muniandy*, the High Court heard the case of Mr Mohamad Hafizul bin Che Mohamad Zahid in 2019, charged with two counts of trafficking in methamphetamine under s 39B (1)(a). He pleaded guilty to both charges, and the methamphetamine weighed 89.8 grams and 843.5 grams, respectively.

The accused was caught with drugs in his car, and upon the discovery, he cooperated with police by confessing he had more drugs stored in his rental house.

The judge in his case, Ahmad bin Bache J, made some interesting comments about how to interpret s 39B (2A):

*“To my mind and upon a proper construction, the way the provision is drafted admits to an interpretation that the provision is to be read **disjunctively**, in that there is a word “or” appearing after subparagraph (b). This, to my mind, dictates that the accused is entitled to be considered to be sentenced to life imprisonment if he brings himself within **either** subparagraph (a) and (b) **OR** (c) and (d). In other words, **subparagraph (a) and (b) are to be read conjunctively, inter se and to be read disjunctively from subparagraph (c) and (d).**”²⁸ [Emphasis added.]*

Therefore, in this case, the judge was satisfied the accused’s actions brought him under subparagraphs (a) and (b) as there was no evidence of him selling or buying the drugs and no involvement of an agent provocateur. Ahmad bin Bache J further continued that even if his interpretation of the section was wrong, the accused also arguably satisfied subparagraphs (c) and (d). This is because his actions were restricted to carrying the drugs, and his cooperation with the police led to the discovery of more drugs at his rental property.

Ahmad bin Bache J held:

*“Though that arrest did not culminate into an arrest of other traffickers, this court is of the considered opinion that **there is no such requirement as subparagraph (d) is silent on this point.**”²⁹ [Emphasis added.]*

The judge further affirmed that he considered subparagraph (d) also to be satisfied on the grounds that by leading the police to further drugs, the accused had assisted in taking those

²⁸ Pendakwa Raya v Mohamad Hafizul bin Che Mohamad Zahid [2019] MLJU 482 [17].

²⁹ Ibid [22].

drugs out of market circulation and into police safekeeping – thus “disrupting drug trafficking activities.” The accused was sentenced to life imprisonment and 15 strokes of whipping.

Again, there was no mention of a certificate in writing from the Public Prosecutor that the accused had assisted in disrupting drug trafficking activities. Ahmad bin Bache J rightfully exercised his judicial direction in interpreting the legislation to find life imprisonment suitable.

PP v Brits Shaun [2019] MLJU 916

This 2019 case marked a decisive shift away from earlier judicial interpretation and has impacted subsequent cases where s 39B (2A) is considered. The accused, Mr Shaun, was a South African national charged with a single offence of trafficking 522.74 grams of cocaine.

He flew into Penang International Airport, where he was detained for questioning, and his luggage was inspected. Nothing was found on him in that initial inspection. However, a further X-Ray was done, which revealed drugs concealed in capsules within the accused’s body. The accused pleaded guilty to the offence under s 39B (1)(a).

Evidence was led revealing Mr Shaun’s cooperation with the Royal Malaysia Police (“RMP”). Crucially Mr Shaun’s information included identifying people involved in international drug trafficking, where they were located and further information about the movements of drug traffickers. This information was reportedly beneficial to the RMP.

When deciding how to interpret s 39B (2A), the judge, in this case, Moho Radzi bin Abdul Hamid JC considered recent cases, including *Pendakwa Raya v Mohamad Hafizul bin Che Mohamad Zahid*. He also examined the Explanatory Statement to the Draft Bill 2017 (DR 45/2017) and the Parliamentary Minutes to consider the Legislature’s intention in drafting the section.

Moho Radzi bin Abdul Hamid JC decided, “paragraphs (a), (b) or (c) are to be read **disjunctively** and then **read conjunctively with paragraph (d).**”³⁰ [Emphasis added.] Once an accused has satisfied either (a), (b), or (c), they must also satisfy (d). The judge noted the difficulty in deciding whether an accused has satisfied (d), as there was no definition of what amounts to assisting an enforcement agency in disrupting drug trafficking activities.

After some consideration, Moho Radzi bin Abdul Hamid JC held:

*“the words “has assisted an enforcement agency in disrupting drug trafficking activities within or outside Malaysia” means that the accused must have done something **beyond just leading the enforcement agency to the discovery of drugs** following an arrest or raid, notwithstanding that the discovery was volunteered by the accused. The assistance must be in the form of **disclosure of information** that would help the enforcement agency in investigations to **determine and identify the network***

³⁰ PP v Brits Shaun [2019] MLJU 916 [25]

of other traffickers, distributors, or producers of drugs or their masterminds that will disrupt or cripple their criminal activities.³¹

Subsequently, the judge was satisfied Mr Shaun fell into subparagraph (c) where he was transporting drugs and that his assistance to the RMP was enough to fulfil the requirements of section (d). The accused was sentenced to life imprisonment and 15 strokes of whipping.

After the case of *PP v Brits Shaun* other judges have adopted this narrower approach to discretion, resulting in continued death sentences under s 39B (1)(a).

Crucially, in this case, Moho Radzi bin Abdul Hamid JC held:

*“Although the Parliamentary Minutes on the speech by the Minister indicated that **it is the Legislature’s intention to provide the discretion to the Courts** to determine if an assistance was given by a convicted person to an enforcement agency in disrupting drug trafficking within or outside Malaysia, it is this Court’s view that such determination must primarily be guided **the confirmation of the enforcement agency**. This Court holds the view that a Court is not the party with the power to make such a confirmation.”* [Emphasis added.]

Here Moho Radzi bin Abdul Hamid JC clearly states it is the Legislature’s intention to give discretion to the courts. In His Honour’s learned opinion, the discretion should be primarily guided by actual confirmation from an enforcement agency that an accused has assisted in disrupting drug trafficking.

Despite this, relying on the enforcement agency to confirm if an accused has sufficiently assisted their investigations is inherently risky. Such an approach fails to consider situations where an accused has honestly attempted to assist enforcement agencies but has been unable to provide enough information to satisfy the agency.

There is intent on the part of the Legislature to give discretion to the courts and make it mandatory for an enforcement agency to approve the application of the discretion in s 39B (2A) would mean ignoring the function of the court and judicial system. Subsequent cases have shown the unfortunate impact of this judicial decision.

Public Prosecutor v Ong Swee An [2020] MLJU 47

The accused, Mr Ong Swee An, was charged with three drug trafficking charges under s 39B (1)(a) of the DDA. Mr Ong was charged with carrying 5,369.3 grams of methamphetamines, 2,121.5 grams of Methylenedioxymethamphetamine, and 92.7 grams of Nimetazepam.

The prosecution claims Mr Ong was carrying these drugs in a bag on his person when exiting an elevator in a parking garage. The accused claimed he met an individual to purchase a second-hand car from them. After exchanging keys and documents, he claims he travelled

³¹ Ibid [33].

down in the elevator, whereupon he claims the police arrived as he was exiting the elevator in the parking garage.

He claimed the police found the keys to the car on him and opened the boot of the car to find the drugs inside. The accused denied knowing the drugs being in the boot and claimed the police stashed the drugs in his bag he had been carrying on him earlier.

The judge, Ahmad Shahrir Mohd Salleh JC, found the defence had failed to prove their case, and in the absence of any cooperation with the police, Mr An was sentenced to death.

Public Prosecutor v Imran bin Ismail [2020] MLJU 214

A month later, this case was heard in the High Court. The accused, Mr Imran bin Ismail was charged with the offence of trafficking 2,393 grams of methamphetamines. After a tip about drug trafficking, the police observed where they found the accused travelling to a jetty by taxi.

The accused attempted to run when the police identified themselves but were arrested. A bag found in the taxi was found to belong to the accused and contain the drugs. The accused denied the bag was his.

The judge, in this case, Shahnaz Sulaiman JC, affirmed the approach favoured in *PP v Brits Shaun*, where (d) must be satisfied if the discretion can be applied. Given there was no cooperation between the accused and police, the judge sentenced Mr Ismail bin Ismail to death.

These two cases of *Public Prosecutor v Ong Swee An* and *Public Prosecutor v Imran bin Ismail* might give the impression that lack of cooperation is the key factor that results in the death penalty being imposed. However, the subsequent case of *Qui Jieru v Public Prosecutor and another appeal* proves that even when an accused cooperates to their best of their ability, they can still be sentenced to death under the narrow judicial interpretation under s 39B (2A).

Qui Jieru v Public Prosecutor and another appeal [2020] MLJU 821

In June 2020, this appeal was heard by Yaacob Haji MD Sam, Rhodzariah Bujang, and Abu Bakar Jais JJCA. The appellant, Ms Jieru, is a Chinese national who was originally convicted and sentenced to life imprisonment by the High Court for the offence of drug trafficking 1,211.5 grams of methamphetamines.

Ms Jieru arrived from China on a flight in 2013, where her luggage was examined and found to contain the drugs. The accused claimed in her original trial that she was coming to Malaysia to meet her boyfriend, who had instructed her to meet up beforehand with a friend of his who wanted to send some belongings ahead to Malaysia. Ms Jieru claimed the friend gave her the bag that was later found containing the drugs.

When considering her case, the judge originally decided to impose a sentence of life imprisonment rather than the death penalty because Ms Jieru might have been an innocent carrier of the drugs – it had not been proven beyond a reasonable doubt that she knew about the drugs. There was also evidence that Ms Jieru cooperated with the police and attempted to assist her boyfriend and his friend’s apprehension.

Ms Jieru appealed her sentence in 2020 because she had been an innocent carrier of the drugs without knowing what was in the bag. The prosecution in the appeal argued for the death penalty to be imposed.

The appeal judges held that Ms Jieru was “not a simpleton gullible of taking that yellow bag from someone hardly known to her without at least being suspicious of the same.”³²

Furthermore, they considered the cooperation Ms Jieru had with authorities and concluded:

*“The fact that she had **cooperated with the authorities** and did not run away **should not weigh favourably** for her to be considered as an innocent carrier. She had no option but to answer the questions and obey the instructions of the Customs officers.”³³*

The appeal judges noted the accused had been unable to provide surnames for either her boyfriend or his friend, and as such, not much investigation could occur.

The judges affirmed that section (d) must be satisfied and held:

*“...without the full names of the two gentlemen being given, **no meaningful investigation could have been done** by the Customs officers. As indicated too, the appellants failed to provide further details about the two gentlemen for the Customs officers to mount a serious concerted effort in tracing both of them so that drug trafficking could be disrupted.”³⁴ [Emphasis added.]*

Subsequently, the accused’s life imprisonment sentence was overturned, and she was sentenced to death. Most shockingly, the fact the court believed her cooperation with the authorities to not weigh favourably in her case is confusing and concerning. With courts leaning towards favouring evidence of cooperation with law enforcement agencies, it is another example of the inconsistent judicial interpretation in this area of the law. Furthermore, it highlights the lack of consideration for innocent carriers and drug mules who are taken advantage of due to their vulnerable situations.

³² Qui Jieru v Public Prosecutor and another appeal [2020] MLJU 821 [40].

³³ Ibid [44].

³⁴ Ibid [73].

Public Prosecutor v Mehrdad Rahmati Yadollah (Iran) & Anor and other appeals [2020] MLJU 1823

In November 2020 was an appeal case concerning two men convicted of offences of drug trafficking and sentenced to death. The minority judgment of Lee Swee Seng JCA provides a persuasive and crucial investigation into the correct judicial interpretation of s 39B (2A).

Lee Swee Seng JCA examined the use of the word “may” in reference to “may have regard only to the following circumstances” in s 39B (2A) and held:

“The point I want to make is that the Legislature does not use the word “may” and “shall” interchangeably but intentionally. Each time it wants discretion taken away “shall” is invariably used.”³⁵

Lee Swee Seng JCA’s point is that the Legislature clearly intended for Court’s to have discretion, and as the phrase selected is “may have regard,” this inherently means courts can still consider life imprisonment even if not all subparagraphs are satisfied – including the much-debated subparagraph (d).

Lee Swee Seng JCA explains this using the following scenario:

“If the examination authority states that a candidate may be allowed into the examination hall having regard only to the candidate bringing in (a) his examination slip; (b) pencil; or (c) pen and (d) his identification card, the candidate may still be allowed to enter the examination hall if instead of his identification card he has only brought his driving licence that states his identification card number and shows his face.”³⁶

“It would have been different if the instruction has stated that no candidate shall be allowed into the examination hall if he does not have the following (a) his examination slip; (b) pencil or (c) pen and (d) his identification card.”³⁷

This conclusion reached is that:

“We must be careful not to read into s 39B (2A) of the DDA what it does not say. While it does say what are the circumstances the Court may have regard only to, it does not say that if any of these circumstances are absent or that the opposite is true, then the discretion to impose the life imprisonment sentence and whipping may not be exercised.”³⁸ [Emphasis added.]

Lee Swee Seng JCA raised the point that many drug mules are unaware of the inner workings of drug operations, and they can only share a certain extent of information. Furthermore, His Honour added there is no way to control how quickly the police act on the information given,

³⁵ Public Prosecutor v Mehrdad Rahmati Yadollah (Iran) & Anor and other appeals [2020] MLJU 1823 [13].

³⁶ Ibid [18].

³⁷ Public Prosecutor v Mehrdad Rahmati Yadollah (Iran) & Anor and other appeals [2020] MLJU 1823 [19].

³⁸ Ibid [25].

and even effective information the accused provides can become useless if the drug syndicate becomes aware of their arrest.

In conclusion:

*“To make the fate of the convicted person hang on the quality of the information given to the enforcement agency and the effectiveness of such a lead to disrupting the trafficking activities would be **to make the convicted person responsible for matters beyond his control.**”³⁹*

“Parliament could not have intended that, and so it frames it as circumstances that the Court may have regard to only and not requirements that the convicted person must satisfy the Court before deserving of the Court exercising its discretion to impose the life sentence and whipping.”⁴⁰

Public Prosecutor v Hadi Bakhshi Kheimeisari Aliasghar and another appeal [2020] MLJU 2202

A month after *Public Prosecutor v Mehrdad Rahmati Yadollah (Iran) & Anor* at the end of 2020, this other appeal case was heard. In 2014 the Appellant, Iranian citizen Mr Hadi Bakhshi Kheimeisari Aliasghar, had his bags inspected at Kuala Lumpur International Airport. Drugs were found concealed in the bags, and the appellant was sentenced under s 39B (1)(a) of the DDA.

The appellant argued he had no knowledge of the drugs and asserted he was an innocent carrier of the bags, which he stated he had picked up from a friend of a friend. He could not provide the name of this individual, but as he had cooperated with the authorities to the best of his ability, the trial judge sentenced him to life imprisonment.

On appeal, the judges were not satisfied the appellant had any evidence he was an innocent carrier and insisted:

“It must also be proven that the Appellant had assisted an enforcement agency in disrupting drug trafficking activities within or outside Malaysia...the Appellant’s cooperation with police while the bags were searched could not mean that he has assisted a law enforcement agency...”⁴¹

The judges drew on the judgment from the *Qui Jieru* case that the appellant had cooperated with authorities did not weigh favourably in a case as he had no other option but to obey the instructions of the Customs Officers.

³⁹ Ibid [93].

⁴⁰ Ibid [94].

⁴¹ Public Prosecutor v Hadi Bakhshi Kheimeisari Aliasghar and another appeal [2020] MLJU 2202 [51].

Further echoing earlier, stricter cases, the judges again referred to the Explanatory Statement to the Dangerous Drugs (Amendment) Bill regarding a Public Prosecutor certificate despite this not being required under the actual legislation.

The judges stated:

“...there is no certificate from the Public Prosecutor for the Appellant in the present appeal that he has assisted an enforcement agency in disrupting drug trafficking activities without or outside Malaysia.”⁴²

Again, it must be reiterated that although a certification from the Public Prosecutor was referenced in the Explanatory Memorandum, the Legislators chose not to insert this into law. There is no mandatory requirement, under the law, for a certificate to be issued in order for life imprisonment to be considered.

Pendakwa Raya Iwn Muhammad Hafiz Mukrimin bin Abdulkeh @ Nurhisyamuddin [2021] MLJU 100

This is the most recent case to consider the application of s 39B (2A) of the DDA, heard in February 2021. The defendant pleaded not guilty to two charges of trafficking Methamphetamines weighing 1206.3 grams and 307.9 grams, respectively.

The accused’s defence revolved around another person identified as Pok Ya, a friend from the same village as the accused. The defence alleged that the accused was an innocent carrier whom Pok Ya manipulated to carry the drugs.

The judge in the case, Rozana Ali Yusoff H, held:

“The accused wilfully closed his eyes to suspicious matters such as the contents of the black sling bag. The accused’s reckless act and decision not to know falls under the doctrine of “wilful blindness.”

Subsequently, the judge held that the accused was not an innocent carrier and furthermore that Pok Ya was not a real person. Rozana Ali Yusoff H concluded that since the accused had not provided complete details about Pok Ya, such as a full name or contact details. This meant the police were unable to locate Pok Ya, and with no further evidence, the judge found the prosecution had proved its case beyond reasonable doubt that the accused had trafficked the drugs and was not an innocent carrier.

Without further analysis of the matters relevant to s 39B (2A), the judge held:

“I also find the accused does not satisfy the requirements of paragraph 39B (2A) Dangerous Drugs Act 1952. With that, the accused is sentenced to death.”

⁴² Public Prosecutor v Hadi Bakhshi Kheimeisari Aliasghar and another appeal [2020] MLJU 2202 [54].

Recommendations

1. Amendment to the law – discretionary (and eventually abolishment)
2. Bifurcated trial for capital punishment cases

There is obviously a desperate need for clarity in this area of law. There continues to be a variety of judicial interpretations of s 39B (2A), and the contradiction between the Explanatory Memorandum and the existing law needs to be addressed. Judges continue to reference the Explanatory Memorandum and to debate over the construction of the section in question.

Ultimately the amendment was inserted into the DDA to give courts discretion in whether or not to impose the death penalty. The important thing is for courts to be aware of this responsibility and not to decide cases entirely based on the word of the Public Prosecutor or law enforcement agencies. Sentencing is a function of the courts and should remain at the discretion of a judge whether or not a person has satisfied s 39B (2A).

Introduction

Despite the shift in global perspectives on cannabis, the rapid acceptance of medical cannabis and the decriminalisation of recreational use of cannabis elsewhere around the world has not notably influenced the government's perception of cannabis in Malaysia⁴³.

At present, those who are found with cannabis can and are still prosecuted for an offence under the Dangerous Drugs Act 1952, and those who were detained with more than 200g of cannabis or cannabis resin would be presumed to be in possession of the drugs and presumed to be trafficking said drug. While a constitutional challenge on the legality and constitutionality of the double presumption imposed under Section 37A of the Dangerous Drugs Act 1952 was successful in 2019⁴⁴, subsequent cases indicate that the decision was an anomaly and not necessarily in line with the more recent legal trends.

This limited study hopes to provide an overview and insight into the developments of cases⁴⁵ relating to cannabis in recent years.

Methodology

Using LexisNexis Malaysia, the study searched key terms such as 'cannabis' and 'death' to locate appropriate case examples. The study looked for these cases systematically, beginning with the most recent judgments in 2020 and working chronologically backwards. The cases from 2012 and older were sourced originally from the ADPAN/Monash Report⁴⁶ and were later verified and substantiated with the case judgments on LexisNexis Malaysia.

Our sample size classified by year is as follows:

- 2020: 14 cases
- 2019: 10 cases
- 2018: 2 cases
- 2012: 2 cases
- 2010: 1 case
- 2008: 1 case

Each case was analysed, focusing on how the court assessed prominent issues in the judgments. Based on these observations, recurrent themes and arguments emerged - these

⁴³ Hana Naz Harun 'PM: Malaysia will not legalise cannabis' (New Straits Times, 18 February 2021) <<https://www.nst.com.my/news/nation/2021/02/666896/pm-malaysia-will-not-legalise-cannabis>> accessed 7 April 2021

⁴⁴ Alma Nudo Atenza v PP <[https://www.zulrafique.com.my/ckfinder/userfiles/files/case%20update%20judgment/Alma%20Nuda%20Atenza%20%20%20Orathai%20Prommatat%20v%20Public%20Prosecutor%20Criminal%20Appeal%20No_%2005-94-05-2017\(B\)%2C%20Federal%20Court%20\(01751201xA335E\).pdf](https://www.zulrafique.com.my/ckfinder/userfiles/files/case%20update%20judgment/Alma%20Nuda%20Atenza%20%20%20Orathai%20Prommatat%20v%20Public%20Prosecutor%20Criminal%20Appeal%20No_%2005-94-05-2017(B)%2C%20Federal%20Court%20(01751201xA335E).pdf)>

⁴⁵ A full list of cases is available at <https://bit.ly/33WcAHX>

⁴⁶ 'Drug Offences and the Death Penalty in Malaysia: Fair Trial Rights and Ramifications' <https://www.monash.edu.my/__data/assets/pdf_file/0007/2214196/Monash-University-Report.pdf> accessed 19 May 2021

were noted and statistics recorded. We then summarised each case according to the year, the amount of cannabis concerned in the charge, the facts of the case, the legal arguments advanced, and the outcome of each decision.

Observations: General Trends

The amounts of cannabis concerned, when classified according to the amount of cannabis charged, are presented below.

Number of Cases by Cannabis Charged⁴⁷

Amount Range [grams (g)/kilograms (kg)]	Number of Cases	Proportion of Cases
200g – 500g	6	20%
501g – 2 kg	12	40%
2.01kg – 5 kg	4	13%
5.01kg – 10kg	1	3%
10.01kg – 20kg	3	10%
> 20.01kg	4	13%

This data indicates that a large number of cases concerned relatively low amounts of cannabis. In total, 60% (18 cases) of the cases surveyed were for amounts of cannabis less than 2 kilograms. Three cases (cases #2, #6, and #17) involved amounts of less than 250 grams - only marginally above the 200-gram threshold of the presumptive traffickable quantity under s 37 of the Dangerous Drugs Act 1952. Given all three cases resulted in the death penalty sentence, this suggests that courts are unlikely to be lenient towards accused parties having low amounts of cannabis in their possession and may still readily impose the death penalty.

The Difficulty in Securing Successful Appeals/Acquittals

Of the cases surveyed, only six cases (20%) resulted in a successful acquittal or appeal. These are cases #11, #13, #14, #18, #27 and #30. The other twenty-four (80%) resulted in the death penalty being sentenced or upheld.

These acquittals/appeals were achieved mainly through the prosecution’s failure to call key witnesses or produce vital evidence (cases #11, #13, #27). Case #18 was overturned based on the trial judge failing to ensure a fair trial for an accused with a mental disability, whereas case #30 was overturned based on the inconsistency between police evidence and chemist and photographic evidence. Case #14 was set aside due to the unconstitutionality of the ‘invocation of double presumptions’ (see paragraph [37] of the judgment).

Nevertheless, the low number of successful appeals and acquittals suggests the difficulty of successfully avoiding the death sentence when an accused is found in possession of 200 grams or more of cannabis.

⁴⁷ Based on 30 cases identified

The Character of the Accused

The accused parties were overwhelmingly male-only case #25 involved a female accused.

Some cases specified the ethnicity of the accused - cases #2 and #6 both specify that the accused were Indian, while cases #8, #16, and #26 specified that the accused were Malay. However, the majority of case judgments did not specify the ethnicity or background of the alleged offender.

Key Legal Arguments and Themes

It should be noted that all cases were pursuant to s 39B of the Dangerous Drugs Act 1952 ('DDA'), which states that the trafficking of a dangerous drug imposes a mandatory death penalty. Cannabis and cannabis resin are specifically stated as examples of dangerous drugs in the First Schedule of the Act. Many cases also relied on s 37(da)(vi), which places a presumption of trafficking if a person is found in possession of 200 or more grams of cannabis.

1. Defence arguing that a third party had access to the premises/vehicle where the cannabis was found

To rebut the presumption of trafficking, many accused and appellants argued that other person(s) had access to the premises or vehicles where the cannabis was found and thus alleged that the drugs belonged to these other individuals. Litigants often challenged the 'possession' or 'knowledge' elements of the trafficking offence by advancing this argument. Of the cases surveyed, thirteen (43%) explicitly raised this argument.

2. Defence arguing that the alleged trafficker was merely an 'innocent carrier' of the cannabis

In cases #20 and #21 (two cases; 7% of the total cases surveyed), the defence counsel argued that the accused was merely an 'innocent carrier' of the drugs rather than a trafficker. Both of these cases resulted in death sentences.

3. The prosecution's Emphasis on the accused's conduct at the time of the arrest

In seven cases (23%), the prosecution advanced arguments concerning the accused's conduct at the time of arrest - such as fleeing, hiding, or resisting arrest - to argue that the accused did have knowledge of the drugs. These were cases #2, #4, #8, #14, #20 and #21. One of these cases (#14) resulted in a successful appeal, lowering the conviction from 'trafficking' to 'possession' and thus avoiding the death penalty. The other six cases resulted in the death penalty.

4. The courts' value of police evidence

Three cases (cases #2, #6, and #22: 10%) contained explicit references to the high value that courts affix to police evidence and the general acceptance of police evidence at face value. In case #22, the court accepted the prosecution's version of

events, emphasising the lack of motive for the prosecution to ‘lie’ or ‘fabricate evidence.’

This judicial attitude may be a contributing factor to the relative paucity of successful appeals and acquittals.

5. Issues regarding police procedural work

Several cases raised issues about proper police procedures and investigation. The judgment in case #5 noted that there was no chemical testing done to verify the precise amount of THC in the bottles of cannabinoid oils retrieved by police. In case #16, the police chemist failed to make an appropriate distinction between the ‘cannabis’ and ‘cannabis resin’ confiscated by police and which were the subject of the charge.

Defence counsels in cases #6 and #19 both unsuccessfully attempted to argue that the police investigation was incomplete and hastily performed. On the other hand, the court in case #18 found that the police’s failure to further investigate the identity of an alleged third-party possessor of drugs contributed to the appeal being allowed, and the court set aside the conviction of the death penalty.