Osman bin Ramli v Public Prosecutor
[2002] SGHC 203

Case Number : MA 104/2002

Decision Date : 02 September 2002

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Syed Ahmad bin Alwee Alsree (Billy & Alsree) for the appellant; G Kannan (Deputy Public Prosecutor) for the respondent

Parties : Osman bin Ramli — Public Prosecutor

Criminal Law – Offences – Membership of unlawful assembly – Whether mere passive presence sufficient to constitute membership of unlawful assembly – ss 141(c), 142, 146 & 147 Penal Code (Cap 224)

Evidence – Admissibility of evidence – Credibility of witnesses – Discrepancies in witnesses' testimonies – Whether discrepancies material – Whether credibility impeached

Evidence – Proof of evidence – Corroboration – Witness only a minor – Whether trial judge can convict appellant solely on testimony of minor

Evidence – Weight of evidence – Identification of accused – Identification of appellant by only one of four victims of assault – Whether identification of appellant wrong – Weight of identification evidence – Application of guidelines in Heng Aik Ren Thomas v PP

Judgment

GROUNDS OF DECISION

The Charge

The appellant was charged that he, together with nine others, on or about 2 September 2001, at about 4.00 am at barbecue pit 'O', Pasir Ris Park, were members of an unlawful assembly whose common object was to cause hurt to the following four persons:

> Syaiful Ridhuan Bin Wahid ('Syaiful'), 17 year old male,
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> Mohamed Ridzuan Bin Abdul Talib ('Ridzuan'), 16 year old male,
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> Toh Sunny Bin Faud ('Sunny'), 17 year old male and
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> Muhammad Nursamfauzie Bin Samat ('Fauzie'), 16 year old male

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and in prosecution of the common object of such assembly, violence was used and he had thereby committed the offence of rioting under s 146 of the Penal Code, Cap 224, ("PC"). Under s 147, the offender shall be punished with imprisonment for a term which may extend to five years and shall also be liable to caning.

2 The appellant was jointly tried with the following persons who were within the same unlawful

assembly, namely, Mohamed Noor Bin Abdul Rahman ('Mohd Noor'), Zulkeplee Bin Abdullah ('Zulkeplee'), Mohd Hardian Bin Mohd Yassin ('Mohd Hardian'). At the end of the trial, the appellant was convicted and sentenced to 30 months' imprisonment and six strokes of the cane. The appellant appealed only against conviction and not against sentence.

3 I heard his appeal on 13 August 2002 and dismissed it. I now give my reasons.

Background facts

(a) The birthday party and the fight

4 On 1 September 2001, Siti Noraini Bte Abdul Jalil invited several of her friends, including the four victims in the present case, to her birthday party at barbecue pit 'N', Pasir Ris Park. A lamppost illuminated each barbecue pit.

5 The four victims arrived at the above-mentioned pit at about 9.00 pm. At about 11.00 pm, they proceeded to a neighbouring pit, pit 'O', to play cards. Pit 'N' and pit 'O' are about ten metres apart.

6 At about 3.00 am, while playing cards at pit 'O', the victims noticed a group of about 15-20 male Malays walking briskly towards them. Ridzuan gave evidence that the appellant was part of the group and that he was holding a belt in his hand. As the group approached, Sunny stood up to ascertain what they wanted. According to the prosecution witnesses, Mohd Noor confronted Sunny and asked him which secret society he belonged to. Sunny denied any such involvement rudely after Mohd Noor asked him the same question repeatedly. Thereupon, Mohd Noor threw a bottle to the ground smashing it. Mohd Hardian then rushed forward and punched Sunny on the left jaw. Mohd Noor pushed Sunny and Zulkeplee punched Sunny on the forehead.

7 A fight broke out and the remaining members of the group attacked the four victims by punching and kicking them. During his examination-in-chief, Ridzuan testified that the appellant had hit him on the back and on the chest with a leather belt.

(b) The arrest

8 The victims eventually managed to break away from their assailants and called the police. At about 4.12 am, Sergeant Mazli, of Bedok Police Division, arrived at the scene. Sergeant Mazli questioned the victims and upon being informed that the assailants were wearing dark clothes and had fled in a blue lorry, informed his Operations Room of what he had learned and instructions were issued to look out for a group of Malay persons in a blue lorry.

9 At about 5.00 am, a blue lorry was spotted at Pasir Ris Drive 6, in front of Block 442. There were 15 male and 5 female persons inside the lorry. Corporal Patrick Lim stopped the lorry and detained the group. The appellant was among those detained.

10 Sergeant Mazli, upon being informed of the detention, drove the four victims to the lorry and told them to identify members of the group who assaulted them. During the identification process, the victims remained in the police car. Both Sunny and Ridzuan identified Mohd Noor. Syaiful pointed out Mohd Noor and Mohd Hardian. According to Ridzuan, he did not identify the appellant then because he could not see the appellant's face clearly from the police car.

(c) The medical examination

11 At about 5.59 am the same morning, the victims were medically examined by Dr Wang Shi Tah ('Dr Wang') at the Changi General Hospital. Ridzuan, upon cross-examination, insisted that he did tell Dr Wang that someone had assaulted him with a belt. However, Dr Wang's medical report on Ridzuan indicated that "no weapons were used".

(d) The identification parade

12 Later on the same day between 1.00 pm and 1.30 pm at Bedok Police Station, an identification parade of 15 male Malays was conducted for the four victims. It was not disputed that the identification parade was properly conducted. During the parade, all four victims identified Mohd Noor. Sunny also identified both Zulkeplee and Mohd Hardian. Only Ridzuan identified the appellant. The victims were not specifically asked what roles the identified persons had played in the group.

The prosecution's case

13 The prosecution's case relied entirely on Ridzuan's identification of the appellant. None of the other prosecution witnesses identified the appellant as part of the group. Ridzuan testified as follows:

(i) The appellant was part of the group that approached the victims and was holding a belt in his hand.

(ii) Further, the appellant remained in the group when Mohd Noor confronted Sunny and when Mohd Hardian punched Sunny on the jaw.

(iii) Once the fight began, the appellant hit Ridzuan first on the back, and then on the chest, with his belt.

14 Based on Ridzuan's testimony, the prosecution submitted that on 2 September 2002 the appellant had been a member of an unlawful assembly with the common object of causing hurt to the victims under s 141(c) of the PC. Since force or violence was used by the assembly or by any member thereof in prosecution of their common object, the appellant was guilty of the offence of rioting, as provided for under s 146 of the PC.

The defence

15 The appellant's defence was that he never took part in the riot and was mistakenly identified by Ridzuan as being part of the group assaulting the victims that night. The appellant testified as follows: he had spent that evening in a pub at Boat Quay, together with his wife, Ridiawati Bte Mohd Reduan ('Ridiawati'), at a party celebrating the birthday of 'Baby', the wife of the third accused, Zulkeplee. The other three co-accused were also present at the party.

16 At about 3.00 am, the appellant and his wife left the party. They accepted one Abdul Faisal's offer to take them home in his lorry. The second accused Mohd Noor, the third accused Zulkeplee and his wife 'Baby', the fourth accused Mohd Hardian and his wife, were also in the same lorry. Besides the persons named above, there were also other persons in the lorry.

17 The group decided to detour to Pasir Ris Park where Abdul Faisal parked the lorry at car park 'E', Pasir Ris Park. As 'Baby' wanted to vomit at that time, Ridiawati, Zulkeplee, the appellant and 'two other couples' took 'Baby' to a toilet located beside the car park. When they reached the toilet, all the ladies used the toilet first, leaving 'Baby' seated outside on a bench. Zulkeplee, the appellant and two other male persons attended to her. The ladies came out and took 'Baby' into the toilet. The

appellant and the others then used the toilet.

18 About ten minutes later, the appellant stated that he saw a group of Malay males running towards the car park. Someone shouted for everyone to board the lorry. The appellant and the others who were with him previously at the toilet complied. Abdul Faisal then drove off. Subsequently, a police car stopped the lorry and everyone onboard was taken to the police station.

19 Hence, the main plank of the appellant's defence was that he had been at the toilet attending to 'Baby' when the incidents took place. He had not been part of the group which approached and assaulted the victims. The testimonies of the appellant's wife (Ridiawati) and two of the co-accused (Zulkeplee and Mohd Hardian) supported this version of events.

The decision below

20 The trial judge disbelieved the appellant's testimony that he was at the toilet when the incidents took place for two main reasons. First, there were material discrepancies between the appellant's statement recorded under s 122(6) of the Criminal Procedure Code ("CPC') and his long statement recorded under s 121 of the CPC. In the appellant's s 122(6) statement, he stated that he had been at the lorry; while in his long statement, he stated that he had accompanied his wife to the toilet.

21 Secondly, the testimonies of the defence witnesses were not credible. Ridiawati, being the appellant's wife, was an interested witness. Zulkeplee and Mohd Hardian, being jointly tried as co-accused, also stood to gain by a unified defence of an alibi, namely, that they were not present during the riot but were at the toilet attending to 'Baby' at that time. In any case, Mohd Hardian's evidence was also full of inconsistencies. In one police statement, he stated that he never saw the fight. However, he testified subsequently in court that he had gone to the scene and tried to stop the fight after Mohd Noor shouted for him. Lastly, Sunny, as a prosecution witness, had also identified Mohd Hardian and Zulkeplee as being part of the group which approached the victims, thus bringing into question the veracity of their evidence that the appellant had been with them at the toilet. Sunny's evidence here was entitled to significant weight because he had a special reason to remember Mohd Hardian and Zulkeplee, they being the ones who punched him on the left jaw and forehead.

22 The trial judge further accepted Ridzuan's testimony that the appellant was part of the group. However, given that Ridzuan had upon cross-examination admitted that he could not see clearly the person who had assaulted him with a belt, it might be that the assailant was not the appellant. Nevertheless, he held that the appellant's presence or 'active role' in the group was sufficient to render him a member of the unlawful assembly, whether or not he had actually assaulted Ridzuan with a belt.

Issues arising on appeal

23 Given that conviction depended solely on Ridzuan's identification of the appellant as a member of the group which had approached the victims, much of the appeal was focused on attacking his testimony. The appellant appealed against his conviction on two main grounds:

> (i) The trial judge erred in law in considering the appellant's mere presence in the group as sufficient to render him a member of an unlawful assembly. It must be shown that the appellant was an "active participant"; and

(ii) Even if mere presence was sufficient to render the appellant a member of an unlawful assembly, the trial judge should not have found him to be present based solely on Ridzuan's testimony for the following reasons:

(a) Ridzuan was not a credible witness;

(b) Ridzuan's evidence was inconsistent with the evidence of the other prosecution witnesses;

(c) The quality of Ridzuan's identification evidence was poor and should be rejected by the trial judge; and

(d) It was unsafe to convict the appellant solely on the uncorroborated evidence of Ridzuan as he was a minor prone to giving 'whimsical evidence'.

First ground of appeal: whether mere presence was sufficient to constitute membership of an unlawful assembly

24 Unlawful assembly' and 'rioting' are defined in s 141 and s 146 of the PC respectively which provide as follows:

> 141. An assembly of 5 or more persons is designated an "unlawful assembly", if the common object of the persons composing that assembly is —
>
> …
>
> (c) to commit any mischief or criminal trespass, or other offence;
>
> …
>
> 146. Whenever force or violence is used by an unlawful assembly ***or by any member thereof***, in prosecution of the common object of such assembly, ***every*** member of such assembly is guilty of the offence of rioting [Emphases added].

25 It was not in dispute that the group of 15-20 Malay males which approached the victims shared the common object of causing hurt to the victims, hence constituting an unlawful assembly under s 141(c) of the PC. Further, since violence was clearly used by some members of that assembly, in prosecution of the common object of such assembly, *every* member of such assembly at the time when violence was used was guilty of rioting under s 146. The only issue in the present case was whether the appellant had been a member of that assembly when violence was used.

26 The test of membership in an unlawful assembly is set out in s 142 of the PC which reads as follows:

> 142. Whoever, being aware of facts which render any assembly an unlawful assembly, ***intentionally joins that***

> ***assembly, or continues in it***, is said to be a member of an unlawful assembly [Emphasis added].

Section 142 emphasises the point that anyone who voluntarily associates himself with an assembly after he is aware of facts rendering that assembly unlawful, is deemed to share the common object of that assembly, and hence becomes a member of that assembly. This was confirmed by *Lim Thian Hor & Anor v PP* [1996] 2 SLR 258 where I stated the following opinion at p 264:

> It is of course well settled law that a mere presence in an assembly of persons did not make the accused a member of an unlawful assembly, unless there was direct or circumstantial evidence to show that the accused shared the common object of the assembly. ***In my opinion, however, a person present at the assembly can be said to be a member of the assembly even if no overt act is proved against him. Provided the circumstances are such as to justify an inference that he associated himself with the offending members, it may be inferred that he is a member of such an assembly.*** In every case, this question is one of fact as to whether he happens to be innocently present at the place of occurrence or was actually a member of the unlawful assembly: see *Bishambar v State of Bihar* AIR 1971 SC 2381. [Emphasis added]

Therefore, mere passive presence in an unlawful assembly *may or may not* constitute membership of that assembly: it depends on whether in all the circumstances of the case, the Court can draw the inference even from a person's mere presence that he shared the common object of that assembly. There is no rigid rule that mere presence can never constitute membership of an unlawful assembly. Similarly, there is no requirement that a member of an unlawful assembly must be an 'active participant' or that some 'overt act' must be proven against him.

27 On the facts of the present case, a group of 15-20 males walked towards and surrounded four greatly outnumbered victims in a public park at 4.00 am in the morning. One person within the group repeatedly asked Sunny threatening questions about which secret society he belonged to. Someone then smashed a glass bottle and a fight broke out soon after. In such circumstances, it would have been clear to the appellant that the common object of the assembly was to cause hurt to others, at least from the point when the threatening questions were asked. If he chose to continue to remain present in the assembly beyond that point, the inference would be irresistible that he shared the common object of that assembly, unless he could convince the court that he had some special reason for doing so. However, no such reason was tendered. Although the entire event happened in a matter of minutes, there was still sufficient time for the appellant to dissociate himself from the group if he had wanted to do so.

28 It was hence clear that, on the facts of the case, the trial judge was justified in holding that continued presence by the appellant in the unlawful assembly when threatening questions were asked and when the fight broke out was sufficient to render him a member of that assembly. Particularly, there was no need for the prosecution to prove that the appellant had actually assaulted Ridzuan with a belt. It must be emphasised that I do not mean to say that presence in an unlawful assembly is always or usually sufficient to constitute membership. Each case must be decided on its own facts.

Second ground of appeal: whether the appellant was present in the unlawful assembly when

the threatening questions were asked and when the fight broke out

(a) Ridzuan's credibility

29 The appellant tried to impeach Ridzuan's credibility by pointing out numerous discrepancies in his evidence. Before I examine the alleged discrepancies, three general principles with respect to impeaching witnesses' credibility shall be reiterated.

30 First, 'innocent' discrepancies must be distinguished from deliberate lies. I have expressed the following opinion in *Lewis Christina v PP* [2001] 3 SLR 165 at 170:

> … a flawed witness does not equate to an untruthful witness. The trial judge is entitled to determine which part of the witness's testimony remains credible despite its discrepancies.

Therefore, if the discrepancies are innocent, the judge is entitled to rely on those parts of the evidence which are untainted by the discrepancies. However, if the witness has deliberately lied to the court, it is clear that he is not a reliable witness and as a matter of prudence the rest of his evidence must be scrutinised with great care and indeed with suspicion. To say, however, that because a witness has been proved a liar on one or two points then the whole of his evidence "must in law be rejected" is to go too far and is wrong: per Thomson CJ in *Khoo Chye Hin v PP* [1961] MLJ 105 at 107.

31 Secondly, the credibility of a witness cannot be impeached unless there are serious discrepancies or material contradictions in his evidence: *Mohammed Zairi bin Mohamad Mohtar v PP* [2002] 1 SLR 344 at 33. 'Serious discrepancies' or 'material discrepancies' are those that go to the crux of the charge against the appellant: *Kwang Boon Keong Peter v PP* [1998] 2 SLR 592 at 26.

32 Thirdly, even if a witness's credit is impeached, it does not automatically lead to a total rejection of his evidence. The court must carefully scrutinise the whole of the evidence to determine which aspect might be true and which aspect should be disregarded: *PP v Somwang Phatthanasaeng* [1992] 1 SLR 138 at 148*; Kwang Boon Keong Peter v PP* [1998] 2 SLR 592 at 24; and *Loganatha Venkatesan v PP* [2000] 3 SLR 677 at 56.

33 I will now apply the foregoing principles to the facts of this case. The alleged discrepancies in this case were as follows:

> (a) Ridzuan, under cross-examination, stated that Sunny was wearing a long-sleeved dark-coloured sweater throughout the incident. Upon further questioning, he said that Sunny was shirtless instead.
>
> (b) Ridzuan stated in his examination-in-chief that the appellant smacked him with a belt but admitted under cross-examination that he did not see his assailant clearly.
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> (c) Ridzuan, under cross-examination, stated that when the group approached barbecue pit 'O', the appellant's belt was untidily rolled up and he held it in his hands. Upon further questioning, Ridzuan said that the belt was 'dangling'

instead.

(d) Under cross-examination, Ridzuan stated that he had told Dr Wang that he had been assaulted with a belt. However, Dr Wang's medical report indicated that "no weapons were used".

It was apparent that none of the alleged discrepancies were material because they did not go to the crux of the charge against the appellant. As discussed in 26-28 above, the crux of the charge in this case was whether the appellant voluntarily remained as part of the group before and during the riot. Particularly, (b) and (d) were not crucial to the appellant's charge because in order to constitute rioting under s 146 of the PC, the prosecution need not go further to prove that the appellant had actually assaulted Ridzuan with a belt. Hence, Ridzuan's credibility as a witness was not successfully impeached: *Mohammed Zairi bin Mohamad Mohtar v PP.*

(b) Inconsistencies between the evidence of Ridzuan and the other prosecution witnesses

34 In *Ng Kwee Leong v PP* [1998] 3 SLR 942, inconsistencies between the evidence of different witnesses were classified into three main categories:

(a) The first category is where the discrepancies relied on are immaterial discrepancies, which have no direct bearing on the facts in issue. In such instances, the trial judge should find that these discrepancies do not detract from the general veracity of the witnesses on the material issues and accept their evidence on those issues.

(b) The second category is where the discrepancy, while not relating directly to the crux of the prosecution's or defence's case, as the case may be, may be viewed as deliberate concoction of the witness and affect the credibility of the witness. A cautionary note was sounded in that, even if a witness is found to have lied on a matter, it does not necessarily affect his credibility as a whole.

(c) The third category concerns discrepancies where two persons give separate accounts as to short periods of time. Adequate allowance must be given to human fallibility in the precise assessment of short spans of time. Accordingly, discrepancies are to be expected where two persons give separate accounts as to short passages of time. Accordingly, the court in weighing the testimony of witnesses must recognise human fallibility in observation, retention and recollection.

35 The inconsistency alleged in the present case related to the fact that the prosecution witnesses gave differing accounts as to how Ridzuan came to be assaulted with a belt. Their conflicting evidence was as follows:

(i) Ridzuan testified that the appellant was holding a belt in his hand before the assault began and, when the

fight started, he hit Ridzuan with the belt.

(ii) Syarifa Farhana Bte Syed Hamdan ('Syarifa') testified that she saw a person pull a belt out of his trousers and begin to attack Ridzuan.

(iii) Siti Nuraini Bte Abdul Jalil ('Siti') gave evidence that she never saw anyone using a belt as a weapon during the fight.

(iv) Nur Zakiah Bte Jafar ('Zakiah') gave evidence that the person who assaulted Ridzuan with a belt was wearing a baseball cap. No evidence was led to the effect that the appellant was wearing a cap at the particular time. Defence witnesses also stated that the appellant was not wearing any headgear.

36 Applying the classification adopted in *Ng Kwee Leong* to the present case, there were two reasons why these inconsistencies did not affect the charge against the appellant. First, these discrepancies were not material since it was not necessary for the prosecution to prove that the appellant had actually used the belt to assault Ridzuan (see 26-28 and 33 above), hence falling under the first category. Secondly, the discrepancies might be due to people giving separate accounts as to short periods of time, hence falling under the third category. There was only a two to three minute interval between the time when the group confronted the victims and when Ridzuan was assaulted with a belt. Given the chaotic situation at that time, it would not be unusual for witnesses to come up with different accounts of the same event. Further, Syarifa, Siti and Zakiah were at another barbecue pit 'N' which was some ten metres away from the confrontation and, given that the park was dimly lit, might have affected the accuracy of their observations *vis--vis* Ridzuan's observations.

37 The trial judge was therefore entitled to prefer the testimonies of the prosecution witnesses. It should also be highlighted at this point that failure by the other victims to identify the appellant was of little weight considering that the group was very large and it was only inevitable that the victims remembered different persons in the group.

(c) The quality of Ridzuan's identification evidence was poor and should be rejected by the trial judge

38 The judge followed the guidelines laid down by the Court of Appeal in *Heng Aik Ren Thomas v PP* [1998] 3 SLR 465 in assessing the weight of identification evidence. Essentially, there are three stages to the test.

39 The first stage involves the trial judge asking himself whether the case against the accused depends wholly or substantially on the correctness of the identification evidence that is alleged by the defence as being mistaken. If the first stage is answered in the affirmative, the second question should be whether the identification evidence is of good quality, taking into account the circumstances in which the identification was made. If the quality of the identification evidence is poor, the judge should go on to the third stage which involves the question of whether there is any other evidence that goes to support the correctness of the identification. At the third stage, if the judge is unable to find other supporting evidence for the identification evidence, he should be mindful that a conviction based on such poor evidence would be unsafe.

40 It was not in dispute that the conviction depended wholly on Ridzuan's identification evidence. The appellant contended under the second stage of the *Heng Aik Ren Thomas* test that the identification evidence was of poor quality and the trial judge should have gone on to look for supporting evidence. However, on the facts of the case, the judge was certainly entitled to conclude that the identification evidence was of good quality, considering that Ridzuan was able to observe the appellant at close range, the area around the barbecue pit was illuminated by lamp-posts, no obstruction obscured Ridzuan's observations, the identification parade was conducted just eight hours after the incident and there was a special reason for Ridzuan to remember the appellant because the appellant was holding a belt in his hands when the assembly approached the victims.

(d) Whether Ridzuan's evidence required corroboration

41 There is no mandatory requirement of independent corroborating evidence before a trial judge can convict an accused based solely on the testimony of a minor: *Lee Kwang Peng v PP* [1997] 3 SLR 278. It is a matter for the discretion of the judge as to whether a witness is mature and reliable enough such that his testimony is considered reliable without the need for independent corroborating evidence.

42 A trial judge who has had the benefit of observing the demeanour and conduct of the child witness would be in a far better position to decide if corroboration is required in the circumstances of the case. An appellate court would not readily interfere with such a finding: *Chen Jian Wei v PP* [2002] 2 SLR 255 at 34. In the present case, the trial judge had specifically considered carefully whether corroboration evidence was required before concluding that none was required. At 60 of his judgment, he stated as follows:

> …Ridzuan is a student who had passed his 'N' levels and awaiting his 'O' level results…he was aware of the implications of giving evidence on oath. Having heard his testimony and observed his demeanour I was satisfied that he has given a truthful account of the events as they occurred. He was a victim of an assault and not a bystander who would have been able to [remember] everything that happened. There were no material discrepancies or whimsical changes in his testimony indicating that he was unaware of the implications and consequences of lying on oath…There was no need for corroborative evidence in view of the totality of the evidence.

43 In my opinion, there were no grounds to overturn the exercise of the judge's discretion. As discussed in 33 above, any discrepancy in Ridzuan's evidence was immaterial to the charge. Ridzuan was consistent on the material point all throughout the trial, namely, that he saw the appellant, with a belt in his hand, walking towards barbecue pit 'O' in a group and remaining there before and during the fight. This was in marked contrast to the child witness in *Chen Jian Wei v PP* who changed his testimony on a most material point upon knowing that the accused was actually being charged with a more serious offence. The witness in *Chen Jian Wei v PP* was clearly not mature enough to understand the solemnity of giving evidence in court. Ridzuan's evidence might have contained some immaterial discrepancies, but it would be going too far to say that he was a 'whimsical' witness whose evidence could not be relied upon without independent corroborating evidence.

Conclusion

44 In my opinion, both grounds of appeal were unsustainable. On the totality of the evidence, the prosecution had proven its case beyond a reasonable doubt. For the foregoing reasons, I ordered the appeal to be dismissed.

Sgd:

YONG PUNG HOW

Chief Justice

Republic of Singapore