MALAYSIA

IN THE HIGH COURT OF SABAH AND SARAWAK

AT KOTA KINABALU

CRIMINAL APPEAL NO.: BKI-42S-13/11 OF 2019

BETWEEN

CARLSTEN FREDDIE JAPAT ... APPELLANT

AND

PUBLIC PROSECUTOR ... RESPONDENT

GROUNDS OF DECISION

INTRODUCTION

[1] The Appellant in this case is charged with another person still at large for an offence under section 395 read together with section 34 of the Penal Code. At the end of whole trial, the Appellant was found guilty and sentenced to 16 years' imprisonment from date of conviction and one stroke of whipping.

[2] Dissatisfied, the Appellant appealed against the conviction and sentence handed down by the learned SCJ on the 11th November 2019. For the convenient of reference, the parties will be referred as they were in the Sessions Court.

[3] The Charge preferred against the Accused is as follows:

AMENDED CHARGE [Exhibit P1]

"Bahawa kamu bersama-sama seorang lagi rakan yang masih bebas pada 17 Oktober 2018 jam lebih kurang 2.30 pagi, bertempat di Kedai No. 2, Tapak Tamu, Pekan Kuala Penyu, di daerah Beaufort di dalam negeri Sabah, telah melakukan rompak berkumpulan dengan mengambil harta berupa sebuah telefon bimbit jenama Oppo F7, sebuah telefon bimbit jenama Vivo Y81, sebuah telefon bimbit jenama Samsung J6, sebuah telefon bimbit jenama Samsung Tab 3, sebuah telefon Lenovo putih, sebuah telefon bimbit jenama Samsung J1, wang tunai lebih kurang RM3,000.00 dan rantai leher emas milik Jerry Teo (No. KP: 890903-49-5137). Oleh yang demikian, kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 395 Kanun Keseksaan dibaca bersama Seksyen 34 Kanun yang sama."

BRIEF FACTS

[4] The Prosecution called six (6) witnesses. During the trial, the Prosecution adduced through its material witnesses the following facts:

[i] The Complainant/Victim, Jerry Teo (PW 4) aged 30 years old, was at his shop at Kingfisher Cafe Kuala Penyu.

He testified that on 17 October 2018 at about 2.30 a.m. he heard somebody knocking on his door and saw two (2) persons who later introduced themselves as police officers from Narcotic IPK. They accused PW 4 of having in his possession drugs in his shop.

[ii] The two (2) persons entered his shop and the Accused handcuffed him while the other person searched or ransacked his shop. The Accused threaten PW 4 and PW 4 was scared. The Accused's friend placed a black plastic bag [Exhibit P3(6)] over PW 4's head. After about 30 minutes, they left the shop after the incident.

[iii] At about 4:30 a.m., PW 4 sought assistance from an unknown man near his shop to contact the police. The police arrived about 15 minutes later.

[iv] Subsequently, PW 4 lodged a police report KUALA PENYU/000632/1 [Exhibit P6].

[v] Upon receiving Exhibit P6, Insp. Ghazali Bin Kasmani (PW 6) conducted his investigation.

[vi] PW6 instructed Insp. Mohammad Rasydan Bin Jasni (PW 3) to arrest the Accused. The Accused was arrested on 17th February 2019 and PW 3 lodged a police report PENAMPANG/000601/19 [Exhibit P4].

[vii] PW 6 instructed Insp. Sudirman Bin Sulaiman (PW 5) to conduct the identification parade session. During the identification parade held on 22nd January 2019, PW 4 was able to identify the Accused as the person who robbed him of his properties.

[viii] PW 5 testified that the identification parade session was conducted according to the standard operating procedure [See line 1744-1766, page 56-57 of NOP]. PW 5 prepared an identification parade report [Exhibit P9] and handed it over to PW 6.

[ix] Based on PW 6's investigation, he found that the Accused along with another person who is still at large, were the persons who robbed PW 4 of his properties on the date and place as stated in the Amended Charge.

[x] The Accused was also identified by PW 4 in the dock during the trial.

[5] When the defence was called, the Accused elected to give evidence on oath and called one (1) witness i.e. his sister Carlmila Freddie J Simol (DW 2). His defence was one of alibi [Exhibit D13]. The alibi notice under section 402A of the CPC was served on the Prosecution on 25th July 2019.

PETITION OF APPEAL

[6] In his Petition of Appeal, the Appellant put forth the following grounds (verbatim):

a. The learned trial judge erred in law and in fact for ruling that the prosecution had established a prima facie case against the Appellant when: -

i. PW 4's evidence was unreliable and uncorroborated.

ii. PW 4's evidence on identification was unreasonable in the circumstances of the case.

b. The learned trial judge erred in law and in fact for not considering that the fact that the items in the charge were not proven by the prosecution.

c. The learned trial judge erred in law and in fact for her failure to notice that there was no evidence to show that the prosecution had attempted to locate the second person allegedly committing the offence together with the Appellant.

d. The learned trial judge erred in law and in fact for rejecting the Appellant's defence on the ground of afterthought defence and inconsistency when such defence, if tested against the prosecution evidence at the end of trial, would show that the Appellant was not present at the crime scene on the date and time as stated in the charge.

e. The learned trial judge imposed manifestly excessive sentence on the Appellant in view of the circumstances

DUTY OF THE APPELLATE COURT

[7] It is settled law that the appellate court would be slow in interfering with the decision of the trial court be it an appeal against conviction or acquittal as well as sentence. It must be emphasized here that in any appeal against conviction/acquittal, it is not the function of an appellate court to make its own finding of facts. The function to make finding of fact is exclusively reserved by law to the trial court. An appellate court is necessarily fettered because it lacks the audio visual advantage enjoyed by the trial court **(*PP v Mohd Radzi Abu Bakar* [2005] 6 MLJ 393 and *Dato Seri Anwar Ibrahim v PP* [2002] 3 MLJ 193)**.

THE LAW

The Law under sections 390, 391 and 395 Penal Code (PC)

[8] **Section 395 PC** must be read together with Sections 390 and 391 of the PC.

[9] **Section 390, PC** provides as follows: -

[1] In all robbery there is either theft or extortion.

[2] Theft is “robbery”, if, in order to commit theft, or in committing the theft, or in carrying away or attempting to carry away

property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death, or hurt, or wrongful restraint, or fear of instant death, or of instant hurt, or of instant wrongful restraint.

[3] Extortion is "robbery", if the offender, at the time of committing the extortion, is in the presence of the person put in fear and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person or to some other person, and, by so putting in fear, induces the person so put in fear them and there to deliver up the thing extorted.

[10] **Section 391, PC** provides as follows:

When two or more persons conjointly commit or attempts to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit the robbery, and of persons present and aiding such commission or attempt, amount to two or more, every person so committing, attempting, or aiding, is said to commit "gang-robbery"

[11] **Section 395 PC** provides as follows:

Whoever commits gang-robbery shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to whipping.

[12] **Section 34 PC** provides as follows:

> Each of several persons liable for an act done by all, in like manner as if done by him alone
>
> **34.** When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable.

ANALISYS

i. PW 4's evidence was unreliable and uncorroborated.

ii. PW 4's evidence on identification was unreasonable in the circumstances of the case.

[13] The prosecution's case against the accused depends substantially on the identification of the accused by PW 4. In her ground of judgement, the learned SCJ accepted PW 4's (complainant) evidence and rule that the identification of the accused was of good quality. In this appeal, the learned counsel submitted otherwise. It was contended that the identification evidence was unreliable and uncorroborated. It was further submitted that the identification was unreasonable in the circumstances of the case.

[14] The crucial question in this appeal is whether the identification of the accused by PW 4 was of good quality. As I have stated above, the learned SCJ accepted the identification of the accused by PW 4 of good

quality. In so deciding, she took into account PW 4's evidence and states her reasons as follows: -

> "[16] The Prosecution's case relied solely on the evidence of PW 4. He testified that two (2) unidentified persons robbed him of his properties as mentioned in the amended charge. It was the evidence of PW 4 that the Accused ran away after committing the offence aided by another person who is still at large. The Accused was later identified by PW 4 during identification parade and dock identification.
>
> …
>
> [21] The court had considered the quality of the identification evidence available.
>
> [22] Firstly, the complainant/victim (PW 4) had about 30 minutes inside the said shop with the accused and the other person. He had a conversation with the accused who threatened him and asked where he placed the items. He had the time to observe the accused and another person still at large before the black plastic bag was used to cover PW4's head. He identified the accused's face and voice. It was not a fleeting glance.
>
> [23] Secondly, as this happened inside the said shop all of them were in close proximity. As such PW4 was able to see the accused as there was nothing to obstruct or block his view on them.

[24] Thirdly, there was good visibility inside the said shop. There were lights inside the said shop.

[25] Fourthly, there was no evidence that PW4 suffer any visual disability at the time of the incident.

[26] Fifthly, there was a lapse of only about 3 months 4 days between the incident on 17 October 2018 and the identification parade session on 22 January 2019. Despite this lapse, PW4 was still able to identify the accused based on his face and voice as the person who robbed him of his items on the date of the incident.

[27] Sixthly, PW4 did not know the accused prior to the incident. PW4 never met the accused and the other participants before the identification parade session was conducted. Therefore, he had no reason to implicate them of committing the said offence.

[28] Seventhly, PW4 was not influenced by any parties to identify the accused as the person who robbed him of his properties. He identified the accused as the person who entered his shop on the day of the incident. He also identified the accused as the person who handcuffed and threatened him.

[29] Eighthly, the accused was identified by PW4 in the dock during the trial.

[30] Ninthly, I found PW4 to be a credible witness and his testimony remains unshaken throughout the cross examination. If

there were any inconsistencies in his evidence, it was minor inconsistencies which were clarified during re-examination. I had no reason to doubt his testimony.

[15] I have no reasons to disagree with the finding of fact by the learned SCJ. She had applied her mind to the **Turnbull Principle** which were considered in the case of ***Duis Akim & Ors v Public Prosecutor*** **[2014] 1 MLJ 49** in which the Federal Court said this at paragraph 47 of the said judgment: -

"To begin it is in the forefront of our minds the Turnbull guidelines ***(R v Turnbull [1976] 3 All ER 549)*** *as succinctly summarised in the case of* ***Heng Aik Ren Thomas v Public Prosecutor [1998] 3 SLR(R) 142.*** *Delivering judgment for the Singapore Court of Appeal M Karthigesu JA said this at paras 33–35 of the judgment: Although the Turnbull guidelines were drafted to assist a trial judge in correctly directing the jury, the principles which were enunciated in it are of equal relevance to our criminal trial system. In adapting the Turnbull guidelines for our local system, we have reworked the Turnbull guidelines into the following three-step test. The first question which a judge should ask when encountering a criminal case where there is identification evidence, is whether the case against the accused depends wholly or substantially on the correctness of the identification evidence which is alleged by the*

defence to be mistaken. If so, the second question should be this. Is the identification evidence of good quality, taking into account the circumstances in which the identification by the witness was made? A non-exhaustive list of factors which could be considered include the length of time that the witness observed the accused, the distance at which the observation was made, the presence of obstructions in the way of the observation, the number of times the witness had seen the accused, the frequency with which the witness saw the accused, the presence of any special reasons for the witness to remember the accused, the length of time which had elapsed between the original observation and the subsequent identification to the police and the presence of material discrepancies between the description of the accused as given by the witness and the actual appearance of the accused. In considering the circumstances in which the identification was made, the judge should take note of any specific weaknesses in the identification evidence. If after evaluation of the identification evidence, the judge is satisfied that the quality of the identification is good, he may then go on to safely assess the value of the identification evidence. Where the quality of the identification evidence is poor, the judge should go on to ask the third question. Is there in any other evidence which goes to support the

correctness of the identification. If the judge is unable to find other supporting evidence for the identification evidence, he should then be mindful that a conviction which relies on such poor identification evidence would be unsafe. The supporting evidence need not be corroboration evidence of the kind required in R v Baskerville [1916] 2 KB 658. What the supporting evidence has to be is evidence that makes the judge sure that there was no mistake in the identification. We agree with the summary of the guidelines."

[16] From the evidence of PW4, the duration of 30 minutes inside the said shop with the accused and the other person and that he had a conversation with the accused who threatened him and asked where he placed the items give him the opportunity to observe the accused which took place within the vicinity of the shop where all of them were in close proximity. He testifies that: -

Pages 27- 28 of Notes of Proceedings

Q Boleh ceritakan kepada Mahkamah, satu persatu macam mana kejadian samun berlaku pada kamu?

A Pada 16.10.2018 lebih kurang jam 10:30PM saya telah tutup kedai, lepas tu saya sudah tidur, masih lagi rileks-rileks, lepas tu pada 17.10.2018 jam 2:30AM, saya diketuk pintu kedai dan didatangi oleh 2 orang pemuda yang bercakap dia polis narkotik. Dan berkata dalam kedai saya ada sejenis

barang jenis syabu, jadi saya terkejut, bingung, tanpa berfikir panjang saya buka kedai. Setelah saya buka pintu grill kedai saya, tangan saya terus digari secara membelakang oleh seorang lelaki itu (points to the accused) dan kasar. Membelakang terus dia grill dua-dua tangan. Kemudian saya dimasukkan ke dlm kedai dan didudukkan oleh dia (OKT) slps tu 1 org kawan dia (OKT) menggeledah kedai dan saya diancam, ditanya oleh OKT mengancam saya sehingga saya makin takut dan terus takut. Dalam keadaan begitu saya tengok saja muka OKT. Macam mana dia buat pun saya tengok saja sehinggalah saya ditutup kepala guna plastik oleh kawan OKT.

…

Page 30 of Notes of Proceedings

Q Memandangkan OKT pakai topi semasa kejadian, macam mana kamu boleh pasti ini adalah lelaki yang telah menyamun kamu pada masa kejadian?

A Satu saya kenal daripada bentuk mulut, jerawat, badan dia, bentuk badan dia macam mana sama suara, mata sebab dia pandang saya.

Q Kamu katakan sebelum muka kamu ditutup dengan plastik, kamu telah lama pandang dia, agaknya berapa lama kamu pandang lelaki ini?

A Dalam 30 minit.

[17] The evidence also shows that PW 4 was able to see the Accused as there was nothing to obstruct or block his view on them. He had a good visibility as there were lights inside the said shop.

Pages 36-37 of Notes of Proceedings

Q Kamu kata 2 lelaki ketuk pintu dan mereka kata polis dan kamu buka pintu kedai, waktu kamu buka pintu kedai kamu di tempat kejadian kedai kamu, ada lampu atau tidak?

A Ada

…

Page 38 of Notes of Proceedings

Q Kamu kata kedai kamu ada cahaya, cahaya terang atau tidak?

A Terang.

Q Cahaya datang dari mana?

A Kedai.

Q Cahaya cukup kuat untuk tengok muka penyamun atau tidak?

A Cukup.

Page 58 of Notes of Proceedings

Further cross-examination of PW4

Q Kamu betul-betul yakin dan pasti saya berada di tempat kejadian pada pagi itu?

A Ya.

Q Tapi kamu tidak mempunyai bukti dan saksi bahawa boleh membuktikan saya ada di situ.

A Suara yang saya dengar sekarang adalah juga suara pada malam itu, itu yang saya makin yakin.

Further Re-Examination of PW4

DPP Refer: "Q Bagaimanakah kamu kenal pasti si OKT berada di situ seperti kamu nyatakan kamu didatangi oleh 2 orang yang tidak dikenali jam 2:30 AM dalam keadaan gelap?

A Tidak gelap, ada lampu jadi saya nampak raut muka dan lebih meyakinkan saya, suara."

Q Suara siapa ni?

A Suara dia. (points to the accused)

Based on the facts and circumstances of this case, I am with the learned SCJ that the identification evidence of the accused was of good quality.

[18] On the identification parade, the learned SCJ accepted the evidence of PW 5 who testified that the identification parade was conducted in accordance to the Standard Operating Procedure (SOP). She accepted the testimonies of PW 5 and PW 4 and said that their testimonies remain unshaken during cross-examination. The learned SCJ was satisfied that the identification parade was properly conducted and there was no confusion as to the identification of the accused made by PW 4. This Court found no reason to disturb on these findings.

[19] In the case **of *Dorai Pandian a/l Munian & Anor v PP* [2012] 10 CLJ 22; [2009] 1 LNS 234; [2009] 4 MLJ 525**, the court held that:

> *"The holding of an identification parade is a part of the investigation process carried out by the investigating authority. The evidence of identification parade is relevant and admission under s. 9 of the Evidence Act 1950, and can be used to corroborate the substantive evidence given by the witnesses in court on identification of the accused as the perpetrator of the alleged offence. It is well settled that the substantive evidence is the evidence of identification in court'.*

[20] Thus, there is no erred in law and fact when the learned SCJ held in her grounds of judgment that she was satisfied that the identification of the accused by PW 4 was safe to rely upon. PW 4's evidence on the identity of the accused was positive and reliable. He identified the

accused together with another who is still at large to be the persons who robbed him of his properties.

Whether the learned trial judge erred in law and in fact for not considering that the fact that the items in the charge were not proven by the prosecution.

[21] Learned counsel had submitted that there was no physical evidence with the accused with the robbery and hence, PW 4's evidence on identification is unsafe.

[22] With due respect, I do not see this submission hold any weight. As submitted by the learned DPP and looking at Exhibit P6 which was not transpired in the amended charge sheet in Exhibit P1, the different descriptions and features contended by the learned counsel is completely wrong as the numbers of items remained the same i.e. the eight items recovered and the only different is that Exhibit P6 in particular has described the colour of each and every item discovered. There was no mentioned anywhere in the Notes of Proceedings that the number of items in both Exhibit P1 and P6 respectively did not match each other and thus, the descriptions were all different.

[23] Even if should the items were undiscovered by PW 6 who was the investigating officer in this case, the learned SCJ was correct in holding the view that despite the fact that no items were recovered by PW 6 in

the course of the investigation, it does not mean that no robbery had taken placed. She proceeded with taking a position that the items might be disposed of prior to that as the incident occurred on 17th October 2018 and the accused was only apprehended on 17th January 2019. The learned SCJ has been insightful enough to draw an opinion by viewing that the items may be in the possession of another person who was at large still as mentioned in Exhibit P1, from which the court has accepted PW 6's explanation.

[24] To this the learned DPP had referred to the case of ***Gunalan Ramachandran & Ors v PP*** **[2004] 4 CLJ 551** where JCA Abdul Hamid Mohamad (as he then was) at page 569 held that: -

> *"This is because, as far as I am aware, there is no law that the exhibit recovered must be produced in Court and if not the prosecution's case must necessarily fall. It may or may not, again be depending on the facts and the circumstances of each case. Even in a murder trial, the dead body is not produced in Court. In* ***Sunny Ang v Public Prosecutor [1966] 2 MLJ 195 (FC),*** *the body of the victim was not even recovered, yet the accused was convicted of murder."*

[25] Further in the Federal Court case of ***Duis Akim & Ors v Public Prosecutor*** *(supra*) the prosecution's case rested solely on a single eye witness. Forensic evidence obtained from the crime scene

was inconclusive and the murder weapon was not recovered. Despite the absence of forensic evidence and the non-recovery of the murder weapon, the Federal Court dismissed the appeal and upheld the conviction of the appellant solely on the identification evidence of PW 1.

[26] Applying to the present facts, I am with the learned DPP that the general descriptions transpired in Exhibit P1 (the amended charge sheet) as compared to one specifying the colours for each and every item in Exhibit P6 (Police Report) does not render the prosecution's case fatal due to the fact that it does not change the fact that PW 4 was robbed by the accused and another person who is still at large.

Whether the learned trial judge erred in law and in fact for her failure to notice that there was no evidence to show that the prosecution had attempted to locate the second person allegedly committing the offence together with the Appellant.

[27] The learned SCJ accepted PW 6's explanation on the conduct of his investigation and he was also cross examined by the accused on the issue and found his evidence unshaken.

[28] I am of the view that the evidence recorded in the notes of proceedings did not suggest that the accused was prejudiced or misled despite the other person still at large remain unidentified.

[29] PW 4 clearly testified that two (2) unidentified persons robbed him of his properties as mentioned in the Amended Charge. With this information, investigation was carried out by PW 6 where he testified that:

Pages 69-70 of Notes of Proceedings

Q Apakah dapatan siasatan kamu mengenai kes ini?

A Dalam siasatan ini saya mendapati terdapat 2 orang lelaki yg telah menyamar dengan cara memperkenalkan diri sebagai polis Narkotik IPK Sabah. Salah seorang daripada lelaki ini telah mengeluarkan gari menyebabkan pengadu percaya bahawa mereka adalah polis. Pengadu telah dituduh ada menyimpan dan menjual dadah dalam kedai menyebabkan pengadu rasa takut. Seterusnya pengadu telah digari di bahagian belakang dan dibawa masuk ke dalam kedai. Kedua-dua lelaki tersebut telah menjalankan soal siasat kepada pengadu lebih kurang 30 minit sebelum saspek tutup kepala dan muka pengadu menggunakan 1 plastik berwarna hitam. Kejadian tersebut berlaku pada jam lebih kurang 2:30AM dan pengadu ditinggalkan dalam keadaan bergari dan kepala bertutup dari jam lebih kurang 3AM-5AM.

Q Apakah hasil daripada siasatan kamu?

A Hasil siasatan yang dijalankan mendapati pengadu cam ke atas OKT seterusnya kawad cam dijalankan dan saya dapati pengadu mengesahkan OKT adalah orang yang berada di tempat kejadian semasa kejadian samun tersebut berlaku.

[30] PW 3, the arresting officer had also testified that the officers and D9 personnel from IPK Sabah were directed to assist and to do intelligent surveillance: -

Page 19 of Notes of Proceedings

Q Mengapa penama Carlsten ditangkap oleh kamu?

A Pada 17.10.2018, kami telah dimaklumkan dengan 1 samun yang berlaku di sebuah kedai di Pekan Kuala Penyu jadi pihak atas iaitu PT D9 telah mengarahkan pegawai dan anggota D9 IPK Sabah untuk membuat risikan dan membantu dalam kes ini. Kemudian sebelum dari tarikh tangkapan, hasil dari risikan kami telah dapat mengenalpasti pelaku iaitu OKT Carlsten dan 1 orang lagi rakan yang masih bebas terlibat dalam kes ini. Jadi kami telah mendapatkan maklumat tentang Carlsten dan lokasi dia tinggal. Pada 17.01.2019, kami mendapat maklumat Carlsten berada di rumah ibunya bertempat di rumah tidak bernombor Kg Hungab Penampang. Saya dan beberapa anggota dari

IPK telah datang ke rumah tersebut dan rumah tersebut dalam keadaan berkunci. Kami memanggil dan penama Carlsten telah menyahut dan membuka pintu. Saya dapati hanya penama Carlsten sahaja yang berada di dalam rumah ketika itu. Saya telah memperkenalkan diri sebagai pegawai penangkap polis dan tujuan membuat penangkapan dan seterusnya geledah rumah tersebut untuk mencari barang kes yang terlibat dalam kes ini, itu saja.

[31] The strength of the Prosecution's case remains intact despite no evidence as to feature of the other robber. The evidence in this case is overwhelming in view of the identification of the accused by PW 4 who have the duration of 30 minutes inside the said shop with the Accused. PW 4 had observed the Accused when he had a conversation with him, who handcuffed and threatened PW 4 and asked where PW 4 placed the items whereas the other person was ransacking the shop. As far as the identification of the Accused, PW 4 had the time to observe him, before the black plastic bag was used to cover PW 4's head. The identification of the Accused by PW 4 as one of the robbers is of good quality.

[32] From the evidence adduced, I am with the learned SCJ on her finding of the offence of gang robbery and that the act was done by the accused and another still at large in furtherance of their common intention. Such finding is reproduced as follows:

> "Gang robbery
>
> [35] From the evidence adduced there was force used by the accused and another person when they barged into his shop. After they robbed PW4's properties, they fled away from the scene. The robbery was made against PW4's will. The act of forcibly removing the said properties from PW4's shop without his consent amounted to theft.
>
> [36] Further, the evidence adduced also showed that PW4 was frightened and terrified when the accused and another person still at large entered the said shop. He was afraid after being threatened by the accused. PW4 was traumatised after the incident.
>
> [37] PW4 lodged a police report [Exhibit P6] soon after the incident. It corroborated his story that his properties were indeed robbed by 2 men in which one of them were subsequently identified by him during the identification parade and dock identification as the accused.

That the act was done by the accused persons in furtherance of their common intention.

[38] The role played by the accused and the other person still at large showed that it was done in furtherance of their common intention. Both the accused and the person still at large identified themselves as narcotic police when they barged into PW4's shop. The accused threatened and handcuffed PW4 while the other person still at large ransacked his shop and both fled away with PW4's properties as mentioned in the charge. The accused also covered PW4's head with a black plastic bag [Exhibit P3(6)].

The Defence

[33] The learned counsel submitted that the trial judge erred in law and in fact for rejecting the accused's defence on the ground of afterthought defence and inconsistency when such defence, if tested against the Prosecution's evidence at the end of trial, would show that the Accused was not present at the crime scene on the date and time as stated in the charge.

[34] The counsel submits that the defence of alibi was a live subject during the Prosecution's stage and the Accused's defence that he was not at the scene of crime on 17.10.2018 at about 2.30 a.m. would sustained.

[35] Though the alibi notice under section 402A of the CPC was served on the Prosecution on 25th July 2019, this alibi was not supported by any evidence. PW 6 testified that: -

Pages 71-72 of the Notes of Proceedings

Q Apakah kesimpulan atau dapatan akhir kamu dalam kes ini?

A Dapatan akhir daripada kes ini, saya dapati OKT dicam oleh pengadu berdasarkan laporan kawad cam yang dibuat oleh Insp Sudirman dan siasatan ke atas keluarga OKT dapati tiada keterangan yang menunjukkan OKT ada di rumah.

Q Boleh jelaskan dengan lebih lanjut tentang 'siasatan ke atas keluarga OKT dapati tiada keterangan yang menunjukkan OKT ada di rumah'?

A OKT telah menyatakan semasa kejadian OKT bersama keluarga di rumah iaitu di Penampang pada tarikh kejadian dan OKT menyatakan semasa kejadian OKT juga berada di Sarawak. Hasil siasatan saya mendapati keluarga OKT hanya memaklumkan OKT ada di rumah pada tarikh 18hb. Dan pergerakan rekod keluar masuk yang diperiksa melalui Imigresen Sabah mendapati pada tahun 2018 tiada sebarang pergerakan keluar masuk OKT sebaliknya hanya pada tahun 2019.

PW6 was not cross-examined on the above findings.

[36] Further, as submitted by the learned DPP, in the present case, there were too many major discrepancies in the alibi raised by the Accused. Firstly, the learned counsel in Para 17 Page 6/7 of their Written Submission in Enclosure 7 has personally admitted that the evidence of the Accused and DW 2 (Carlmila Freddie J Simol), the Accused's sister differed from the contents of the alibi notice. It is reproduced as follows:

> *"…secondly, although the evidence of the accused and DW2 differed from the contents of the alibi notice, the essence of the defence was proven …"*

[37] Secondly, the learned SCJ was correct in taking the considered view that the evidence of DW 2 was demolished by the evidence of the rebuttal witness i.e. PW 6 who testified that DW 2 informed him that the Accused was with her on 18th October 2018 whereas the Notice of Alibi stated that DW 1 (the Accused) was in Sarawak on 17th October 2018. Upon investigation by PW 6, he found that DW 1 went to Sarawak in April 2019 as exhibited in P14 and P15. **This can be seen at Para 49 Page 14/18 of Grounds of Judgment dated 05.02.2020** - **Volume 1 Record of Appeal (pages 11 - 28)**

[38] Thirdly, the learned SCJ was correct in holding the view that obviously, DW 2 was not in a position to know the where-about of the Accused from 2.30 a.m. to 4.00 a.m. on 17th October 2018. This is due

to the evidence given by DW 2 that DW 1 was in her house at Kampung Hungab, Penampang on 17th October 2018 from 11.00 p.m. to 12.30 a.m. of which she did not know the where-about of the Accused after she slept. As such, the Court was in the considered view that DW 2's evidence was incapable of being supportive to the alibi defence of the Accused. **This was transpired in Para 48 Page 14/18 of the Ground of Judgment- Volume 1 Record of Appeal (pages 11 - 28)**

[39] Fourthly, the alibi defence of the Accused collapsed with the learned SCJ's finding that the accused had been positively identified by PW 4. This was illustrated in the case of ***Duis Akim & Ors v PP*** **[2014] 1 MLJ 49** whereby the Federal Court held at page 50 as follows:

> *"With the trial judge's finding that the appellants had been positively identified by PW1, the alibi defence of the first and second appellants collapsed. And as the third appellant did not rely on alibi but simply denied committing the offence, his denial collapsed as well."*

[40] Fifthly, the learned SCJ also noted that the line of defence adopted by the Accused was never put to any of the Prosecution's witnesses during the Prosecution stage. Having perused the notes of proceedings, there was no mentioned anywhere during the Prosecution's stage in the cross-examination of the witnesses that the Accused was not at the crime scene as charged. As cited in the case of ***Ahmadi Moin v***

Public Prosecutor **[2017] 1 LNS 303**, the Court of Appeal held as follows:

> *"We found that the trial judge had duly considered all the evidence adduced before concluding that the defence of the appellant were mere a denial and an afterthought. It is the duty of the defence to put its case to the prosecution's witnesses as might be in a position to admit or deny it to enable the prosecution to check on whether an accused's version of facts is true of false. And thus avoid an adverse comment, that the defence is a recent invention, bare denial or an afterthought (Alcontara a/l Ambross Anthony v PP [1996] 1 CLJ 705).*

[41] The Accused alibi defence as per his testimony during the defence's case quoted below was never put to any of the Prosecution witnesses: -

> **Page 6-7 of 24 Notes of Proceedings (Defence Stage) –Volume 2 Record of Appeal (pages 82 -105)**
>
> "Pada 17.10.2018 di mana saya dituduh membuat 1 rompakan di bawah Seksyen 395 di Kuala Penyu, saya boleh membuktikan saya ada saksi alibi adik saya sendiri pada hari kejadian. Saya sempat naik ke atas rumah di Kampung Hungab Penampang untuk mengambil makanan serta minta dia duit untuk beli rokok pada masa yang samada lebih kurang jam 11PM dekat jam 12AM.

Pada ketika itu saya dalam keadaan lapar saya naik ke atas rumah saya dapati adik saya sedang sibuk buat assignment, dia yang buka pintu supaya saya boleh naik atas makan, masa saya makan saya sempat tengok jam lebih kurang jam 1AM saya dimarahi oleh adik saya kerana seringkali minta dia duit untuk beli rokok, akhirnya dia bagi juga RM10 untuk beli rokok, lebih kurang jam 1:30AM saya turun dan start motor untuk pergi kedai di Kampung Hungab untuk beli rokok pada 17.10.2018"

[42] I am with the learned DPP that the alibi defence put by the Accused as the defence stage is a mere self-serving assertion as per the case of ***Sakri bin Yusuf v Public Prosecutor*** **[2011] 4 MLJ 714** at page 724 whereby Ahmad Maarop JCA (as he then was) reiterated in his judgment, as follows:

"The nature of the defence is to be ascertained not only from the evidence of the accused himself but also from the trend of the cross-examination of the prosecution witnesses and the arguments of the accused's counsel at the close of the trial. It is therefore important for the accused to put his essential and material case to the prosecution witnesses in cross-examination. This is a principle of essential justice. Wherever the opponent has declined to avail himself to the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the

testimony given could not be disputed at all. It is wrong to think that is merely a technical rule of evidence. It is an essential rule of justice. (see Public Prosecutor v Dato' Seri Anwar Ibrahim (No 3) [1999] 2 MLJ at pp 193-194). The purpose of the defence having to put its case to the material witness for the prosecution was explained by the Federal Court in Alcontara a/l Ambross Anthony v Public Prosecutor [1966] 1 MLJ 209:

> *In a criminal trial, the whole point and purpose of the defence having to put its case to such of the prosecution witnesses as might be in a position to admit or deny it, is to enable the prosecution to check on whether an accused's version of the facts is true or false, and thus avoid the adverse comment, that the defence is a recent invention in other words, 'kept up its sleeve' as it were – and revealed for the first time when the accused makes his defence from the witness box or the dock, thus detracting from the weight to be accorded to the defence."*

[43] It is also in evidence that the Accused himself when cross-examined by the Prosecution in his defence, concede with PW 4's identification: -

Page 11 of 24 Notes of Proceedings (Defence Stage) –Volume 2 Record of Appeal (pages 82 -105)

Q Mangsa cam kamu melalui rupa kamu dan suara kamu ketika di Mahkamah terbuka ini, setuju?

A Setuju.

Q Mangsa dapat cam kamu kerana dia melihat kamu ketika waktu kejadian dan mendengar suara kamu?

A Setuju kalau mengikut keterangan yang diberikan pengadu, PW4.

[44] Thus, the alibi defence of the Accused collapsed with the learned SCJ's finding that the accused had been positively identified by PW 4. This was illustrated in the case of ***Duis Akim & Ors v PP*** *(supra)* referred to above.

The Appeal on Sentencing

[45] The Appellant/Accused was sentenced to 16 years' imprisonment from date of conviction and one (1) stroke of the whipping which the learned counsel submitted that it was manifestly excessive on account that injuries-free incident, the cooperative Appellant and unsubstantiated allegation of the Appellant being abused by the police.

[46] In passing the sentence, the learned SCJ had given her reasons as follows: -

[57] The Court took into consideration of the following factors before delivering her order:

[i] Public Interest

The Court gave due consideration to the Parliament's intention when passing the statute in seeking to control this offence. By imposing such sentence, it will deter and prevent offender and would be offenders from committing the same offence [See *PP v. Teh Ah Cheng* [1976] 1 LNS 116, [1976] 2 MLJ 186; *Bhandulananda Jayatilake v. PP* [1981] 1 LNS 139, [1982] 1 MLJ 83].

[ii] Seriousness and rampancy of the offence

The offence committed was very grave and serious. The nature of the crime has been on an increase and very rampant in our society. There were some reports of gang robbery in the newspaper which may even result in grievous hurt and even death. Fortunately, this did not happen to the complainant/victim (PW 4).

[iii] The nature and manner the offence was committed

The complainant/victim (PW 4) was put in fear when the Accused and another person entered his shop by impersonating the narcotic police, handcuffing PW 4 and covering a black plastic bag over his head before fleeing with PW 4's property. It happened after he finished work at about 2:30 a.m. on 17th October 2018.

[iv] Full trial

The Accused was convicted after a full trial where the Prosecution called six (6) witnesses and the defence called two (2) witnesses including the Accused.

[v] Plea in mitigation

The plea in mitigation by the Accused was considered by the Court. (Refer to the Notes of Proceedings).

[vi] Prosecution's Reply

The Court also took into consideration the submission by the Prosecution (Refer to the Notes of Proceedings).

[vii] Previous conviction records

The Accused was convicted and sentenced to 5 years' imprisonment starting from 20.06.2016 (BKI-62RS-39/11-2017), fined of RM1,600 in default 8 months' imprisonment and 2 years' police supervision and National Anti-Drug Agency Malaysia (BKI-83D-1748/12-2017) and sentenced to 5 years' imprisonment with effect from 07.08.2018 where stay of execution granted (BKI-83D-225/2-2018) (refer to NOP) which was admitted by the accused. As such, the accused could be considered as a habitual offender.

[viii] Where whipping is discretionary

The term used "shall be punished with imprisonment … and shall also be liable to whipping" imposes this provision for imprisonment being coupled with discretionary whipping. By imposing the sentence of whipping it will deter the offender and would be offenders from committing the same offence.

[ix] The sentences were not manifestly excessive as Section 395 PC carries a maximum sentence of twenty (20) years imprisonment and liable to whipping.

[47] Clearly, the learned SCJ had outweighed the plea of mitigation in favour of the public interest in view of the seriousness of the offence the Accused person was charged with. The Accused also have the record of previous convictions. In my view, the learned SCJ was not in error when she took the course she did as the imprisonment terms imposed is within her discretionary limits and upon considering all the relevant factors before her.

CONCLUSION

[48] Having perused through the Record of Appeal, the submission by both the Appellant and the Respondent and also the ground of judgment, I find that there is no reason to disturb the finding of facts by the learned SCJ of the identification of the accused by PW4. The alibi

defence of the accused collapsed with the learned SCJ's finding that the accused had been positively identified by PW4. This was illustrated in the case of ***Duis Akim & Ors v PP*** *(supra)* referred to above.

[49] As to the sentencing, the learned SCJ was not in error when she took the course she did as the imprisonment terms imposed is within her discretionary limits and upon considering all the relevant factors before her.

[50] Based on the foregoing reasons, I affirm the conviction and sentence passed by the learned SCJ. Appeal is dismissed accordingly.

-sgd-

AMELATI PARNELL

Judicial Commissioner

High Court Kota Kinabalu

Sabah

Date of Delivering of Ruling: 22nd June 2021

For the Appellant : Mr. Hamid bin Ismail
Messrs. Hamid & Co.
Sabah

For the Respondent: DPP Mohd Khairuddin bin Idris
Deputy Public Prosecutor
Jabatan Peguam Negara, Negeri Sabah
Kota Kinabalu, Sabah