[BKI-42S-13/11 of 2019]   
 (Carlsten Freddie Japat v. Public Prosecutor )   
   
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 MALAYSIA 5   
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 10   
AND   
PUBLIC PROSECUTOR ... RESPONDENT   
   
GROUNDS OF DECISION   
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INTRODUCTION   
[1] The A ppellant 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 20   
one stroke of whipping.   
[2] Dissatisfied, the A ppellant appealed against the conviction and   
sentenc e 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. 25

[BKI-42S-13/11 of 2019]   
 (Carlsten Freddie Japat v. Public Prosecutor )   
   
2   
 [3] The Charge preferred against the Accused is as follows: 5   
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 10   
berkumpulan dengan menga mbil 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 S amsung J1, wang tunai 15   
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 bersam a Seksyen 34   
Kanun yang sama. ” 20   
   
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 25   
old, was at his shop at Kingfisher Cafe Kuala Penyu.

[BKI-42S-13/11 of 2019]   
 (Carlsten Freddie Japat v. Public Prosecutor )   
   
3   
 He testified that on 17 October 2018 at about 2.30 a.m. he 5   
heard somebody knocking on his door and saw two ( 2)   
persons who later introduced themselves as police officer s   
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 10   
handcuffed him while the other person searched or   
ransacked his shop. The Accused threaten PW 4 and PW 4   
was s cared. The Accused ’s friend placed a black plast ic bag   
[Exhibit P3(6)] over PW 4’s head. After about 30 minutes,   
they left the shop after the incident. 15   
[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] . 20   
[v] Upon receiving Exhibit P6, Insp . Ghazali Bin Kas mani   
(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 25   
PENAMPANG/000601/19 [Exhibit P4] .

[BKI-42S-13/11 of 2019]   
 (Carlsten Freddie Japat v. Public Prosecutor )   
   
4   
 [vii] PW 6 instructed Insp . Sudirman Bin Sulaiman (PW 5) to 5   
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 rob bed him of   
his properties.   
[viii] PW 5 testified that the identification parade session was 10   
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 hand ed it over to   
PW 6.   
[ix] Based on PW 6’s investigation , he found that the Accused 15   
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 . 20   
[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. 25

[BKI-42S-13/11 of 2019]   
 (Carlsten Freddie Japat v. Public Prosecutor )   
   
5   
 PETITION OF APPEAL 5   
[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 : - 10   
i. PW 4’s evidence was unreliable and uncorroborated.   
ii. PW 4’s evidence on identification was unreasonable i n 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 15   
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. 20   
d. The learned trial judge erred in law and in fact for rejecting   
the Appellant’s def ence 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 25   
on the date and time as stated in the charge.

[BKI-42S-13/11 of 2019]   
 (Carlsten Freddie Japat v. Public Prosecutor )   
   
6   
 e. The learned trial judge imposed manifestly excessive 5   
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 10   
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 15   
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) 20   
[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 25   
the theft, or in carrying away or attempting to carry away

[BKI-42S-13/11 of 2019]   
 (Carlsten Freddie Japat v. Public Prosecutor )   
   
7   
 property obtained by the theft, the offender, for that end, 5   
voluntarily ca uses 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 10   
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. 15   
[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 20   
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 25   
shall also be liable to whipping.

[BKI-42S-13/11 of 2019]   
 (Carlsten Freddie Japat v. Public Prosecutor )   
   
8   
 [12] Section 34 PC provides as follows: 5   
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 .   
 10   
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 15   
on the iden tification of the accused by PW 4. In her ground of   
judgement, the learned SCJ accepted PW 4’s (complai nant) 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 20   
further submitted that the identification was unreason able in the   
circumstances of the case.   
[14] The crucial question in this appeal is whether the iden tification 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 25

[BKI-42S-13/11 of 2019]   
 (Carlsten Freddie Japat v. Public Prosecutor )   
   
9   
 quality. In so dec iding, she took into account PW 4’s evidence and 5   
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 10   
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 15   
evidence available.   
[22] Firstly, the complainant/victim (PW 4) had about 30 minutes   
inside the said shop with the accused and the ot her 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 20   
accused and another person still at large before the black pl astic   
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 25   
as there was nothing to obstruct or block his view on them.

[BKI-42S-13/11 of 2019]   
 (Carlsten Freddie Japat v. Public Prosecutor )   
   
10   
 [24] Th irdly, there was good visibility inside the said shop. There 5   
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 10   
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 15   
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 20   
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 25   
testimony remains unshaken throughout the cross examination. If

[BKI-42S-13/11 of 2019]   
 (Carlsten Freddie Japat v. Public Prosecutor )   
   
11   
 there were any inconsistencies in his evidence, it was minor 5   
inconsistencies which were clarified during re -examination. I had   
no rea son 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 10   
[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 Pro secutor [1998] 3 15   
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 principl es which were enunciated   
in it are of equal relevance to our criminal trial system. In adapting 20   
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 shou ld ask when encountering a criminal   
case where there is identification evidence, is whether the case   
against the accused depends wholly or substantially on the 25   
correctness of the identification evidence which is alleged by the

[BKI-42S-13/11 of 2019]   
 (Carlsten Freddie Japat v. Public Prosecutor )   
   
12   
 defence to be mistaken. If so , the second question should be this. 5   
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 o f time that the witness observed the accused,   
the distance at which the observation was made, the presence of 10   
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 acc used, 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 15   
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 20   
the identification evidence. If aft er 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. 25   
Is there in any other evidence which goes to support the

[BKI-42S-13/11 of 2019]   
 (Carlsten Freddie Japat v. Public Prosecutor )   
   
13   
 correctness of the identification. If the judge is unable to find other 5   
supporting evidence for the identification evidence, he should then   
be mindful th at 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 10   
evidence that m akes 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 minute s 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 15   
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 20   
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 25   
polis narkotik. Dan berkata dalam kedai saya ada sejenis

[BKI-42S-13/11 of 2019]   
 (Carlsten Freddie Japat v. Public Prosecutor )   
   
14   
 barang jenis syabu, jadi saya terkejut, bingung, tanpa berfikir 5   
panjang saya buka kedai. Sete lah 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) 10   
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 kepa la guna plastik 15   
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 20   
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.

[BKI-42S-13/11 of 2019]   
 (Carlsten Freddie Japat v. Public Prosecutor )   
   
15   
 Q Kamu katakan sebelum muka kamu ditutup dengan plastik, 5   
kamu telah lama pandang dia, agaknya berapa lama kamu   
pandang lelaki i ni?   
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 10   
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? 15   
A Ada   
…   
Page 38 of Notes of Proceedings   
Q Kamu kata kedai kamu ada cahaya, cahaya terang atau   
tidak? 20   
A Terang.   
Q Cahaya datang dari mana?   
A Kedai.   
Q Cahaya cukup kuat untuk tengok muka penyamun atau   
tidak? 25   
A Cukup.

[BKI-42S-13/11 of 2019]   
 (Carlsten Freddie Japat v. Public Prosecutor )   
   
16   
 Page 5 8 of Notes of Proceedings 5   
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 10   
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 15   
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 20   
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. 25

[BKI-42S-13/11 of 2019]   
 (Carlsten Freddie Japat v. Public Prosecutor )   
   
17   
 [18] On the identi fication parade, the learned SCJ accepted the 5   
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 cro ss-examin ation. The learned   
SCJ was satisfied that the identification parade was properly conducted 10   
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 15   
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 t he alleged 20   
offence. It is well settled that the substantive evidence is the   
evidence of identification in court’.   
[20] Thus, there is no erred in l aw and fact when the learned SCJ held   
in her grounds of judgment that she was satisfied that the identificati on   
of the accused by PW 4 wa s safe to rely upon. PW 4’s evidence on the 25   
identity of the accused was positive and reliable. He identified the

[BKI-42S-13/11 of 2019]   
 (Carlsten Freddie Japat v. Public Prosecutor )   
   
18   
 accused together with another who is still at large to be the persons who 5   
robbed him of his properties.   
   
Whether th e 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. 10   
[21] Learned counsel had submitted that there was no physi cal   
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. A s   
submitted by the learned DPP and looking at Exhibit P6 which was not 15   
transpired in the amended charge sheet in Exhibit P1, the different   
descriptions and featu res contended by the learned counsel is   
completely wrong as the numbers of items remained the same i.e. the   
eight items recovered and the o nly different is that Exhibit P6 in   
particular has described the colour of each and e very item discovered. 20   
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 un discovered by PW 6 who was the   
investigating offic er in this case, the learned SCJ was correct in holding 25   
the view that despite the fact that no items were recovered by PW 6 in

[BKI-42S-13/11 of 2019]   
 (Carlsten Freddie Japat v. Public Prosecutor )   
   
19   
 the course of the investigation, it does not mean that no robbery 5   
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 possessio n of another 10   
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 Mohama d (as he t hen was) at page 569 held that: - 15   
“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 20   
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 Aki m & Ors v   
Public Prosecutor (supra ) the prosecution’s case rested solely on a 25   
single eye witness. Forensic evidence obtained from the crime scene

[BKI-42S-13/11 of 2019]   
 (Carlsten Freddie Japat v. Public Prosecutor )   
   
20   
 was inconclusive and the murder weapon was not recovered. Despite 5   
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   
gene ral descriptions transpired in Exhibit P1 (the amended charge 10   
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 fa ct that PW 4 was   
robbed by the accused and another person who is still at large.   
 15   
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 20   
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. 25

[BKI-42S-13/11 of 2019]   
 (Carlsten Freddie Japat v. Public Prosecutor )   
   
21   
 [29] PW 4 clearly testified that two ( 2) unidentified persons rob bed him 5   
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? 10   
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 15   
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 l ebih kurang 30 minit sebelum saspek tutup 20   
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.   
 25

[BKI-42S-13/11 of 2019]   
 (Carlsten Freddie Japat v. Public Prosecutor )   
   
22   
 Q Apakah hasil daripada siasatan kamu? 5   
A Hasil siasatan yang dijalankan mendapati pengadu cam ke   
atas OK T seterusnya kawad cam dijalankan dan saya dapati   
pengadu mengesahka n OKT adalah orang yang berada di   
tempat keja dian semasa kejadian samun tersebu t berlaku.   
[30] PW 3, the arresting officer had also testified that the officers and 10   
D9 personnel from IPK Sabah were directed to assist and to do   
intelligent surve illance : -   
 Page 19 of Notes of Proceedings   
Q Mengapa penama Carlsten ditangkap oleh kamu?   
A Pada 17.10.2018, kami telah dimaklumkan dengan 1 samun 15   
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 da ri tarikh   
tangkapan, hasil dari risikan kami telah dapat mengenalpasti 20   
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 25   
Kg Hungab Penampang. Saya dan beberapa anggota dari

[BKI-42S-13/11 of 2019]   
 (Carlsten Freddie Japat v. Public Prosecutor )   
   
23   
 IPK telah datang ke rumah tersebut dan rumah tersebut 5   
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 10   
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 identificat ion of the accused by PW 4 who 15   
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, 20   
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.   
   
 25

[BKI-42S-13/11 of 2019]   
 (Carlsten Freddie Japat v. Public Prosecutor )   
   
24   
 [32] From the evidence adduced, I am with the learned SCJ on her 5   
finding of the offence of gang robbery and that the act was done by the   
accused and another still at large in furthe rance of their common   
intention . Such finding is reproduced as follows:   
“Gang robbery   
[35] From the evidence adduced there was force used by the 10   
accused and another person when they barged into his shop. After   
they robbed PW4’ s properties, they fled away from the scene. T he   
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. 15   
[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. 20   
[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 doc k   
identification as the accused. 25

[BKI-42S-13/11 of 2019]   
 (Carlsten Freddie Japat v. Public Prosecutor )   
   
25   
 That the act was done by the accused persons in furtherance of 5   
their common intention .   
[38] The role played by t he 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 p olice when they barged into PW4’ s shop. 10   
The accused threatene d and handcuffed PW4 while the other   
person still at large ransacked his s hop and both fled away with   
PW4’ s properties as mentioned in the charg e. The accused also   
covered PW4’ s head with a black plastic bag [Exhibit P3(6)].   
 15   
The Defence   
[33] The learned counsel submitted that t he 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 20   
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 25   
sustained.

[BKI-42S-13/11 of 2019]   
 (Carlsten Freddie Japat v. Public Prosecutor )   
   
26   
 [35] Though the alibi notice under section 402A of the CPC was served 5   
on the Prosecution on 25th July 2019, this alibi was not supported by any   
evidence. PW 6 testified that: -   
Page s 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 10   
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 15   
OKT ada di rumah ’?   
A OKT telah menyatakan semasa kejadian OKT bersama   
keluarga di rumah iaitu di Penampang pada tarikh kejadia n   
dan OKT menyatakan semasa kejadian OKT juga berada di   
Sarawak. Ha sil siasatan saya mendapati keluarga OKT 20   
hanya memaklumkan OKT ada di rumah pada tarikh 18hb.   
Dan pergerakan rekod keluar masuk yang diperik sa melalui   
Imigresen Sabah mendapati pada tahun 2018 tiada   
sebarang p ergerakan keluar masuk OKT sebaliknya hanya   
pada tahun 2019. 25   
PW6 was not cross -examined on the above findings.

[BKI-42S-13/11 of 2019]   
 (Carlsten Freddie Japat v. Public Prosecutor )   
   
27   
 [36] Further, a s submitted by the learned DPP , in the present case, 5   
there were too many major discrepancies in the alibi rai sed by the   
Accused . Firstly, t he learned counsel in Para 17 Page 6/7 of their   
Written S ubmission in Enclosure 7 has personally admitted th at 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 10   
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, t he learned SCJ was correct in taking the considered 15   
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 20   
April 2019 as exhibited in P14 and P15. This can be seen at Para 49   
Page 14/18 of Groun ds 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 25   
Accused from 2.30 a.m. to 4.00 a.m. on 17th October 2018. This is due

[BKI-42S-13/11 of 2019]   
 (Carlsten Freddie Japat v. Public Prosecutor )   
   
28   
 to the evidence given by DW 2 that DW 1 was in her house at 5   
Kampung Hungab, Penamp ang on 17th October 2018 from 11.00 p.m. to   
12.30 a.m. of which she did not know t he where -about of the Accused   
after she slept. As such, the Court was in the consider ed view that   
DW 2’s evidence was incapable of being supportive to th e alibi defence   
of the Accused . This was transpired in Para 48 Page 14/18 of the 10   
Ground of Judgment - Volume 1 Record of Appeal (pages 11 - 28)   
[39] Fourthly, the alib i 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: 15   
“With the trial judge’s finding that the appellants had been   
positively identified by PW1, the alibi defence of the first and   
second appellant s coll apsed. And as the third appellant did not rely   
on alibi but simply denied committing the offence, his denial   
collapsed as well.” 20   
[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 25   
crime scene as charged. As cited in the case of Ahmadi Moin v

[BKI-42S-13/11 of 2019]   
 (Carlsten Freddie Japat v. Public Prosecutor )   
   
29   
 Public Prosecutor [2017] 1 LNS 303 , the Court of Appeal held as 5   
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 10   
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 Ambros s Anthony v   
PP [1996] 1 CLJ 705). 15   
[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) 20   
“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 Penampan g   
untuk mengambil makanan serta minta dia duit untuk beli rokok 25   
pada masa yang samada lebih kurang jam 11PM dekat jam 12AM.

[BKI-42S-13/11 of 2019]   
 (Carlsten Freddie Japat v. Public Prosecutor )   
   
30   
 Pada ketika itu saya dalam keadaan lapar saya naik ke atas 5   
rumah saya dapati adik saya sedang sibuk buat assignment, dia   
yang buka p intu 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 10   
jam 1:30AM saya t urun 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 al ibi 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 15   
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 th e   
cross -examination of the prosecution witnesses and the arguments 20   
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 25   
cross -examination, it must follow that he believed that the

[BKI-42S-13/11 of 2019]   
 (Carlsten Freddie Japat v. Public Prosecutor )   
   
31   
 testimony given could not be disputed at all. It is wrong to think 5   
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 wi tness for the prosecution was   
explained by the Federal Court in Alcontara a/I Ambross Anthony v 10   
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 15   
facts is true or false, and thus avoid the adverse comment,   
that the defence is a recent invention in other words, ‘kept up   
its slee ve’ 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 20   
defence.”   
[43] It is also in evidence that th e 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 25   
2 Record of Appeal (pages 82 -105)

[BKI-42S-13/11 of 2019]   
 (Carlsten Freddie Japat v. Public Prosecutor )   
   
32   
 Q Mangsa cam kamu melalui rupa kamu dan suara kam u 5   
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, 10   
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. 15   
   
The Appeal on Sentencing   
[45] The Appellant/Ac cused 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 20   
that injuries -free incident, the cooperative Appellant and unsubstantiated   
allegation of t he 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 25   
before delivering her order:

[BKI-42S-13/11 of 2019]   
 (Carlsten Freddie Japat v. Public Prosecutor )   
   
33   
 [i] Public Interest 5   
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; 10   
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 15   
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 20   
The complainant/victim (PW 4) was put in fear when the   
Accused and another person entered his shop by   
impersonating the narcotic police, handcuffin g PW 4 and   
covering a black plastic bag over h is head before fleeing with   
PW 4’ s property. It happened after he finished work at about 25   
2:30 a.m. on 17th Octo ber 2018.

[BKI-42S-13/11 of 2019]   
 (Carlsten Freddie Japat v. Public Prosecutor )   
   
34   
 [iv] Full trial 5   
The Accused was convicted after a full trial where the   
Prosecution calle d 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 10   
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 15   
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’ 20   
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.   
 25

[BKI-42S-13/11 of 2019]   
 (Carlsten Freddie Japat v. Public Prosecutor )   
   
35   
 [viii] Where whipping is discretionary 5   
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 offen ders from committing the same offence. 10   
[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 15   
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 imprison ment terms imposed is   
within her discretionary limits and upon considering all the relevant   
factors before her. 20   
   
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 25   
the learned SCJ of the identification of the accused by PW4 . The alibi

[BKI-42S-13/11 of 2019]   
 (Carlsten Freddie Japat v. Public Prosecutor )   
   
36   
 defence of the accused collapsed with the learned SCJ’s finding that the 5   
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 10   
her.   
[50] Based on the foregoing reasons, I affirm the conviction and   
sentence passed by the learned SCJ . Appeal is dismissed accordingly.   
   
-sgd- 15   
AMELATI PARNELL   
Judicial Commissioner   
High Court Kota Kinabalu   
Sabah   
 20   
Date of Delivering of Ruling: 22nd June 2021   
   
For the Appellant : Mr. Hamid bin Ismail   
 Messrs. Hamid & Co .   
 Sabah 25   
For the Respondent: DPP Mohd Khairuddin bin Idris   
 Deputy Public Prosecutor   
 Jabatan Peguam Negara, Negeri Sabah   
 Kota Kinabalu, Sabah