MALAYSIA

IN THE HIGH COURT OF SABAH AND SARAWAK AT BINTULU

[CRIMINAL TRIAL NO: BTU-45B-2/7-2015]

PUBLIC PROSECUTOR

V

BASRI TAKADIR

CRIMINAL LAW: *Defence - Grave and sudden provocation - Whether provocation grave and sudden - Reasonable man test - Proportionality of injury inflicted - Whether proportionate to provocation - Penal Code, s. 300, exception 1*

CRIMINAL LAW: *Defence - Sudden fight - Whether prerequisites fulfilled - Whether undue advantage taken - Whether accused acted in a cruel manner - Penal Code, s. 300, exception 4*

CRIMINAL LAW: *Defence - Self-defence - Whether prerequisites fulfilled - Impending peril to his life or great bodily harm - Whether established - Penal Code, ss. 96, 97, 99, 102, 106*

CRIMINAL PROCEDURE: *Trial - Prima facie - Whether established - Whether prosecution adduced credible evidence - Whether evidence if unrebutted or explained would warrant conviction - Criminal Procedure Code s. 180*

CRIMINAL PROCEDURE: *Trial - Witness statements - Whether certified by witness - Whether contents understood - Whether should be read in open court - Criminal Procedure Code s. 402B*

CRIMINAL PROCEDURE: *Trial - End of defence case - Whether case proved beyond reasonable doubt - Whether accused had cast reasonable doubt - Meaning of 'reasonable doubt' - Approach in evaluating evidence of defence - Criminal Procedure Code s. 182A*

EVIDENCE: *Burden of proof - Defences - Whether proved on balance of probabilities - Evidence Act 1950, s. 105*

[Accused convicted of murder and sentenced to death.]

Case(s) referred to:

Abuchi Ngwoke v. PP [2016] 2 MLJ 623 ***(dist)***

Alcontara a/l Ambross Anthony v. PP [1996] 1 MLJ 209 ***(refd)***

Balachandran v. Public Prosecutor [2005] 1 CLJ 85 ***(refd)***

Bangkong ak Puan (l) v. Public Prosecutor [2012] 1 LNS 950 ***(refd)***

Frans Hiu v. PP & Another Appeal [2014] 9 CLJ 764 ***(refd)***

Ikau anak Mail v. Public Prosecutor [1973] 1 LNS 51 ***(refd)***

Liew Kah Ling & Ors v. Public Prosecutor [1960] 1 LNS 60 ***(refd)***

Looi Kow Chai v. Public Prosecutor [2003] 1 CLJ 734 ***(refd)***

Lorensus Tukan v. Public Prosecutor [1988] 1 CLJ Rep 162 ***(refd)***

Mahmood v. State AIR [1961] ALL 538 ***(refd)***

Mat v. Public Prosecutor [1963] 1 LNS 82 ***(refd)***

Md Zainudin bin Raujan v. Public Prosecutor [2013] 4 CLJ 21 ***(refd)***

PP v. Dato' Seri Anwar bin Ibrahim (No.3) [1999] 2 CLJ 215 1 ***(refd)***

PP v. Saimin [1971] 2 MLJ 16 ***(refd)***

PP v. Subir Gole [2015] 3 CLJ 505 ***(refd)***

Public Prosecutor v. Datuk Haji Harun bin Haji Idris & Ors [1977] 1 LNS 92 ***(refd)***

*Public Prosecutor v. Mohd Radzi bin Abu Bakar [2006] 1 CLJ 457****(refd)***

Public Prosecutor v. Ong Cheng Heong [1998] 4 CLJ 209 ***(refd)***

R v. Duffy [1949] 1 All ER 932 ***(refd)***

Rikky Purba v. Public Prosecutor [2014] 3 CLJ 607 ***(refd)***

Sainal Abidin bin Mading v. Public Prosecutor [1999] 4 CLJ 215 ***(refd)***

Legislation referred to:

Criminal Procedure Code, ss. 173(f), 180, 182A, 402B

Evidence Act 1950, s. 105

Penal Code, ss. 96, 97, 99, 102, 106, 300, 302

Other source(s) referred to:

Dr Sri Hari Singh Gour's Penal Law of India, Vol 3 (Law Publishers (India) Pvt. Ltd, 1th Ed Revised, 2011)

Ratanlal and Dhirajlal's Law of Crimes (25th Ed)

GROUNDS OF DECISION

(At the end of the Defence's case)

INTRODUCTION

[1] The Accused was charged at the instance of the Public Prosecutor for the following offence which reads as follows:

> *"Bahawa kamu pada 28 Mac 2015, jam lebih kurang 09.00 pagi, di rumah tidak bernombor di Foo Shan* Sawmill, dalam Daerah Bintulu, dalam Negeri Sarawak, telah membunuh ERWING (L) (PASSPORT: A0092791) dan dengan itu kamu telah melakukan *suatu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan."*

THE ACCUSED'S CONTENTIONS AT THE END OF THE PROSECUTION'S CASE

[2] The Defence's sole contention was that the Prosecution has failed to establish a *prima facie* case as most of the evidence is inadmissible and the evidence adduced is insufficient to link the Accused in any material manner to establish the elements of the offence and charge.

[3] The Defence further contended that the Prosecution called a total of 22 witnesses, all of whom used witness statements for their examinations-in-chief and that the following witnesses affirmed their oaths in Bahasa Malaysia namely:-

(a) PW1 L/Kpl Mohd Rohaizad.

(b) PW2 Phellas Anak Mudin.

(c) PW3 Kpl Engkamat.

(d) PW5 Saharuddin Arsad.

(e) PW8 Sgt Roland.

(f) PW9 Kpl Zulkifli.

(g) PW11 Kpl Narawi.

(h) PW12 Idris.

(i) PW13 Insp. Noraimah.

(j) PW14 Nurmawati.

(k) PW15 Kamria.

(l) PW16 Insp. Peterson.

(m) PW19 D/Kpl/ Merco.

(n) PW20 Insp. Leonard.

(o) PW21 Asp Md Nurazam.

(p) PW22 Dr. Nafisah.

[4] Before they began giving their examinations-in-chief for each of them it was stated as follows:- "AFFIRMS AND STATES IN BAHASA MALAYSIA":

[5] The following witnesses affirmed their oaths in Mandarin namely:-

(a) PW4 Wong Chee kiong.

(b) PW6 Ting King Ping.

(c) PW7 Soh Chin Lay.

(d) PW18 Lim Seng Kwe.

[6] Only PW10 (Phoon–the Chemist) and PW17 (Dr. Norliza–the Pathologist) affirmed their oaths in English.

[7] In the light of the above, the Defence contended that if the oaths were affirmed in Bahasa Malaysia then either the witness statements must be in Bahasa Malaysia or the witness statements must be interpreted to the respective witnesses from English to Bahasa Malaysia before they were tendered in Court. The same principle applies to those witnesses who gave their oaths in Mandarin.

[8] The Defence contended that a perusal of the Notes of Proceedings showed that the witness statements that are all in the English Language were not interpreted to the respective witnesses with the exception of PW18 (Lim Seng Kwe) who affirmed the oath in Mandarin and only stated in cross-examination at page 111, line 3561 the NOP that his witness statement was interpreted to him in Mandarin, but he did not state whether it was interpreted to him in court just before the tendering of the witness statement and after the oath was affirmed or that the witness statement was interpreted to him outside court well before he gave evidence.

[9] The Defence also contended that the fact that the witness statements for each witness that did not affirm their oaths in English and/or give evidence in English must have the witness statements in English interpreted to them by the court interpreter before the preliminary questions regarding the witness statements are asked and the tendering of the witness statement as an exhibit, is demonstrated by the fact and the manner in which the witness statement of PW 5 was tendered in court as

can be seen at Page 20, lines 504 to 508 of the NOP where the following preliminary statements were made:

("DPP: Since it is English, can we translate the witness statement into Bahasa Malaysia,)

(Court Interpreter, Puan Lily translates the witness statement to the witness into Bahasa Malaysia.)"

The above is the manner in which all the witness statements should have been interpreted and tendered.

[10] The Defence thus contended that with the exception of PW5, PW10 and PW17 the rest of the witnesses' oral evidence and exhibits marked through them is inadmissible and so is their subsequent cross-examination and re-examination because they all originated from a defective source which was the failure to interpret their respective witness statements from English to Bahasa Malaysia or Mandarin, whichever is applicable for non-compliance with section 402B of the Criminal Procedure Code (CPC). (see *Abuchi Ngwoke v. PP* [2016] 2 MLJ 623)

[11] The Defence also contended that even though they did not object to the tendering of the witness statements, however inadmissible evidence does not become admissible by the failure to object. (see *Alcontara A/L AMBROSS ANTHONY v. PP* [1996] 1 MLJ 209)

THE PROSECUTION'S CONTENTIONS ON THE ADMISSIBILITY OF THEIR 22 WITNESS STATEMENTS

[12] The Prosecution contended that the learned defence counsel in this case had agreed to the tendering of the witness statements and the defence counsel also was the person who suggested that

all the witnesses to give evidence through witness statement even though there were mutual agreement between both parties that the witnesses statements were only to be tendered through formal witnesses i.e. the chemist, the photographer, the Investigation Officer and other police personnel.

[13] The Prosecution also highlighted that all the prosecution witnesses had been crossed examined and re-examined whereby 90% of the questions asked by the defence counsel were based on the witness statements themselves and yet all the witnesses were still managed to answer the questions without having any problem understanding the questions asked. This showed that all the witnesses understood the contents of their respective witness statements otherwise they would not know how to answer questions posed to them during cross examination and re-examination.

[14] Further the Prosecution stated that the witness statements were prepared in the presence of the witnesses who sat down with them and whatever uttered by them during the recording were read, translated and explained to them to ascertain the truth of the contents of their respective witness statements.

COURT'S FINDING ON THE ADMISSIBILITY OF THE WITNESS STATEMENTS

[15] This Court finds that the witness statements adduced in court are admissible as the witness statements had been certified by each and every of the witnesses that they are their witness statement. Further they confirmed that they understood the contents of their respective witness statements and confirmed that the contents stated in their respective witness statement are the truth to the best of their knowledge and belief. All the witnesses identified their respective witness statements in open court and signed

their respective witness statements after they confirmed the authenticity of their respective witness statements. All the witness statements had been tendered and marked without any objections by the Defence. Apart from that, all the respective witness statements bore the declaration at the bottom of last page of each witness statements containing the following words "THE ABOVE STATEMENT WAS READ BACK TO ME AND AFFIRMED TO BE TRUE BASED ON THE BEST OF MY KNOWLEDGE AND BELIEF AND SIGNED BY ME".

[16] It is noted that the only thing that was not done was that the witness statements were not read aloud in open court. However, in this case, the Court finds that the court interpreter had translated and explained the respective witness statements to the witnesses in open court. In the circumstance of this case and absence of any objection from the Defence's counsel, this Court finds that there is no necessity to read aloud the witness statement in open court because it would defeat the purpose of the amendment to the Criminal Procedure Code as regards to Section 402B itself because it is the objective of the Parliament in introducing this section that is to speed up the trial held in court.

[17] As regards the case of *Abuchi Ngwoke v. PP* [2016] 2 MLJ 623 which was relied upon by the Defence, this Court finds that the above case can be distinguished as in that case, the Court of Appeal held *inter alia* as follows:

> *"…. there was no indication that SP1 had read out the witness statement. … It was further found that the witness statement of SP1 did not bear his signature and neither did the witness statement contain a declaration required under para (2) (b) of S. 402B of the CPC. Hence, the*

preconditions set out in para (2) for the admissibility of the evidence had not been complied with, rendering the witness statement of SP1 inadmissible (emphasis added)"

[18] The above citied case above can be distinguished with the present case as in that case, the witness statement did not bear the signature of the maker and nor it contained a declaration as required by para (2) (b) of s. 402B of the Criminal Procedure Code. In the present case, all the respective witness statements were duly signed and contained the requisite declarations as required under S. 402B of the Criminal Procedure Code.

[19] This Court finds that since all the relevant witnesses understood the contents of their respective witness statements which were duly signed by them, which contained the requisite declarations and which admission was not objected to, by the Defence and since there is no injustice caused to the Defence, this Court finds that the witness statements had fulfilled the pre-requisites of section 402B of the Criminal Procedure Code and are thus admissible.

DUTY OF THE COURT AT THE END OF PROSECUTION'S CASE

[20] At the end of the prosecution case and having outlined the evidence of the witnesses for the prosecution above, it is pertinent for this court to remind itself as to its duty at this stage of the case. The statutory duty upon a trial court at the end of the case for the prosecution is as laid in section 180 and section 173(f) of the Criminal Procedure Code. Both sections are set out in similar terms. It states that when the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a *prima facie* case against the accused. Sub section 4 of section 180 states, *"For the purpose of this section, a prima facie case is made out against the accused where the*

prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction".

PRIMA FACIE CASE AND THE MAXIMUM EVALUATION TEST

[21] In the case of *PP v. Dato' Seri Anwar bin Ibrahim (No.3)* [1999] 2 CLJ 215; [1999] 2 MLJ 1, it was held as follows:

> *"The meaning of prima facie case in s. 180(1) of the Criminal Procedure Code must be understood in the context of a non jury trial. A prima facie case arises when the evidence in favour of a party is sufficiently strong for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence by the other side. Taken in its totality, the force of the evidence must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. As this exercise cannot be postponed to the end of the trial a maximum evaluation of the credibility of the witnesses must be done at the close of the case for the prosecution before the court can rule that a prima facie case has been made out in order to call for defence. Be that as it may, I am unable to agree with the defence submission that this means that the prosecution must prove its case beyond reasonable doubt at that stage. A case is said to have been proved beyond reasonable doubt only upon a consideration and assessment of all the evidence*

(see Canadian Criminal Evidence (3rd Ed).....thus, a prima facie case as prescribed by the new s. 180(1) of the Criminal Procedure Code must mean a case which if unrebutted would warrant a conviction."

[22] Vincent Ng J (as he then was) in *Public Prosecutor v. Ong Cheng Heong* [1998] 4 CLJ 209; [1998] 6 MLJ 678, stated what amounts to credible evidence in order to make out a *prima facie* case, held as follows:

"What then constitutes a 'prima facie case'? prima facie means on the face of it or at first glance. Tome, in the light of Act A979, perhaps the most appropriate definition of a 'prima facie case' could be found in the Oxford Companion of Law (pg 987) which has it as:

"A case which is sufficient to call for an answer. While prima facie evidence which is sufficient to establish a fact in the absence of any evidence to the contrary, but is not conclusive. "It would follow that there should be credible evidence on each and every essential ingredient of the offence. Credible evidence is evidence which has been filtered and which has gone through the process of evaluation. Any evidence which is not safe to be acted upon should be rejected."

[23] In *Looi Kow Chai v. Public Prosecutor* [2003] 1 CLJ 734; [2003] 2 AMR 89, Gopal Sri Ram JCA(as he then was) held as follows:

"In our respectful view the correct test to be applied in determining whether a prima facie case has been made out under section 180 of the Criminal Procedure Code (and

this would apply to a trial under s. 173 of the Code) is that as encapsulated in the judgment of Hashim Yeop Sani FJ (as he then was) in Dato' Mokhtar bin Hashim & Anor v. PP [1983] CLJ Rep 721; [1983] 2 MLJ 232 at 270:

To summarise, it would therefore appear that having regard to the prosecution evidence adduced so far, a prima facie case has not been established against Nordin Johan and Abdul Aziz Abdullah, the second accused and the fourth accused which, failing their rebuttal, would warrant their conviction. In other words if they elect to remain silent now (which I hold they are perfectly entitled to do so even though they are being tried under Emergency Regulations) the question is can they be convicted of the offence of s. 302 read with s. 34 of the Penal Code? My answer to the question is in the negative.

We are confident in the view we have just expressed because we find nothing in the amended s. 180 of the Criminal Procedure Code that has taken away the right of an accused person to remain silent at the close of the prosecution case. Further we find nothing in the legislative intention of Parliament as expressed in the language employed by it to show that there would be a dual exercise by a judge under s. 180 when an accused elects to remain silent as happened in Pavone v. PP [1983] CLJ Rep 855; [1983] 2 CLJ 225; [1984] 1 MLJ 77. In other words we are unable to discover anything in the language of the recently formulated s. 180 that requires a judge sitting alone first to make a minimum evaluation and the when the accused elects to remain silent to make a maximum evaluation in deciding whether to convict or not at the close of the prosecution case.

It therefore follows that there is only one exercise that that a judge sitting alone under s. of the Code180 has to undertake at the close of the prosecution case. He must subject the prosecution evidence to maximum evaluation and to ask himself the question:

If I decide to call upon the accused to enter his defence and he remains silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no prima facie case has been made out and the accused would be entitled to an acquittal."

[24] In *Balachandran v. Public Prosecutor* [2005] 1 CLJ 85 Augustine Paul JCA (as he then was) held:

"A prima facie case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal. The phrase "prima facie case" is defined in similar terms in Mozley and Whiteley's Law Dictionary, 1th Edn as:

> *A litigating party is said to have a prima facie case when the evidence in his favour is sufficiently strong for his opponent to be called to answer it. A prima facie case then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.*

The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a

prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand if a prima facie case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier. In order to make a finding either way the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence has been established."

[25] In *Public Prosecutor v. Mohd Radzi bin Abu Bakar* [2006] 1 CLJ 457; [2005] 6 AMR 203 the Federal Court laid down the various steps to be undertaken by a trial court at the end of the prosecution's case in the following terms:

"(i) the close of the prosecution's case, subject the evidence led by the prosecution in its totality to a maximum evaluation. Carefully scrutinise the credibility of each of the prosecution's witnesses. Take into account all reasonable inferences that may be drawn from the evidence. If the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused;

(ii) ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent am I prepared to convict him on the evidence now before me? If the answer to that evidence is "Yes", then a prima facie case has been made out and the defence should be called. If the answer is "No" then, a

(iii) prima facie case has not been made out and the accused should be acquitted;

(iv) after the defence is called, the accused elects to remain silent, then convict;

(v) after defence is called, the accused elects to give evidence, then go through the steps set out in Mat v. PP [1963] 1 LNS 82; [1963] MLJ 263."

[26] Applying the principles laid down in the above-mentioned authorities, it is thus the duty of a trial court at the conclusion of the close of the case for the prosecution, to undertake a maximum evaluation of the evidence adduced by the prosecution. This evaluation also involves an assessment of the credibility of the evidence adduced as tested against the circumstances of the case as a whole. Should more than one inference arise out of the evidence given, the inference favourable to the accused must be adopted.

[27] After having subjected the evidences of the Prosecution to maximum evaluation, the question must be asked, "if I call upon the accused to make his defence and he elects to remain silent, am I prepared to convict him on the evidence as it now stands." If the answer to that question is yes, then, a *prima facie* case is made out but not if it is otherwise. With the above well established principles in the forefront of the mind of this court, the process of assessment and evaluation of the evidence and the witnesses for the prosecution was consequently undertaken.

[28] Bearing in mind the provisions of section 180 of the Criminal Procedure Code as stated above, the principles enunciated in case law aforementioned on what constitutes a '*prima facie*' case, and having evaluated the evidences and testimonies of the witnesses for the prosecution, this court then posed the following question to itself; If I now call upon the Accused to

make his defence and he elects to remain silent, am I prepared to convict him on the evidence now before me?

[29] Having given the question posed serious consideration, this court found the answer to that question to be a positive yes. Accordingly this court held that the Prosecution had succeeded in making out a *prima facie* case against the Accused and consequently called upon the Accused to enter his defence. The three alternatives of giving evidence on sworn oath, making a statement from the dock and electing to remain silent were duly explained to the Accused. The Accused elected to give sworn evidence on oath from the witness stand.

DUTY OF THE COURT AT THE END OF THE DEFENCE'S CASE

[30] The duty of a trial court at the conclusion of the Defence's case is laid down in section 182A of the Criminal Procedure Code which reads as follows:

> "182A - Procedure at the conclusion of the trial
>
> (1) At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.
>
> (2) If the Court finds that the prosecution has proved its case beyond reasonable doubt, the Court shall find the accused guilty and he may be convicted on it.
>
> (3) If the Court finds that the prosecution has not proved its case beyond reasonable doubt, the Court shall record an order of acquittal.

[31] In *Md Zainudin bin Raujan v. Public Prosecutor* [2013] 4 CLJ 21; [2013] 3 MLJ 773, the Federal Court observed as follows:

> "At the conclusion of the trial, s. 182A of the Criminal Procedure Code imposes a duty on the trial court to consider all the evidence adduced before it and to decide whether the prosecution has proved its case beyond reasonable doubt. The defence of the accused must be considered in the totality of the evidence adduced by the prosecution, as well as in the light of the well established principles enunciated in *Mat v. Public Prosecutor* [1963] 1 MLJ 263 with regard to the approach to be taken in evaluating the evidence of the defence."

[32] In the case of *Public Prosecutor v. Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 LNS 92; [1977] 1 MLJ 180 Abdoolcader J (as he then was) explained the phrase 'reasonable doubt' as follows:

> "It is not necessary for the defence to prove anything and all that is necessary for the accused to do is to give an explanation that is reasonable and throws a reasonable doubt on the case made out for the prosecution. It cannot be a fanciful or whimsical or imaginary doubt, and in considering the question as to whether a reasonable doubt has been raised, the evidence adduced by and the case for the defence must be viewed in at least some amount of light, not necessarily bright sunlight, but certainly not against the dark shadows of the night."

[33] Apart from what amounts to a reasonable doubt as defined from the cases above, the correct thought process and stages that should be followed by a trial court in the assessment and evaluation of the defence's evidence is that as encapsulated in

the case of *Mat v. Public Prosecutor* [1963] 1 LNS 82; [1963] 29 MLJ 263 where Suffian J (as he then was) held as follows:

> *"The position may be conveniently stated as follows:-*
>
> *(a) If you are satisfied beyond reasonable doubt as to the accused's guilt, Convict.*
>
> *(b) If you accept or believe the accused's explanation, Acquit.*
>
> *(c) If you do not accept or believe the accused's explanation Do not convict but consider the next steps below.*
>
> *(d) If you do not accept or believe the accused's explanation and that explanation does not raise in your mind a reasonable doubt as to his guilt, Convict.*
>
> *(e) If you do not accept or believe the accused's explanation but nevertheless it raises in your mind a reasonable doubt as to his guilt, Acquit."*

[34] The approach in *Mat v. Public Prosecutor* was judicially endorsed by the Federal Court as being the correct one to adopt when evaluating the evidence of the defence's case in *Public Prosecutor v. Mohd Radzi Bin Abu Bakar* [2006] 1 CLJ 457; [2005] 6 MLJ 393 when it held:

> *"For the guidance of the courts below, we summarise as follows the steps that should be taken by a trial court at the close of the prosecution's case:*
>
> *(i) the close of the prosecution's case, subject the evidence led by the prosecution in its totality to a maximum evaluation. Carefully scrutinise the credibility of each of*

the prosecution's witnesses. Take into account all reasonable inferences that may be drawn from that evidence. If the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused;

(ii) ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent am I prepared to convict him on the evidence now before me? If the answer to that question is 'Yes', then a prima facie case has been made out and the defence should be called. If the answer is 'No' then, a prima facie case has not been made out and the accused should be acquitted;

(iii) after the defence is called, the accused elects to remain silent, then convict;

(iv) after defence is called, the accused elects to give evidence, then go through the steps set out in Mat v. Public Prosecutor [1963] 1 LNS 82; [1963] MLJ 263."

[35] As can be gleaned from the above authorities, if the court does not accept or believe the defence raised by the accused it must not convict but must proceed a stage further by considering whether the defence evidence has raised in the mind of the court a reasonable doubt as to the guilt of the accused. If it does, then the accused is nevertheless entitled to an acquittal. In the light of the above well-defined principles, this court, being so guided, proceeded to undertake the evaluation of the evidence for the defence.

EVALUATION OF THE DEFENCE CASE

THE DEFENCE'S VERSION

[36] The Accused testified that he had been working in Bintulu for about 10 years before the incident and had known the Deceased since 2007. They had been good friends all the while and prior to the incident, the Deceased had been unemployed for about 3 months and staying in PW5's quarters as the Deceased was unemployed.

[37] The Accused further testified that the night before the incident the Accused and the Deceased were together and the Deceased had given the Accused some Syabu to consume at Segan Factory. The Accused did not go to sleep and went back to his own quarters early in the morning. The Accused then decided to go to the Canteen at Fo Shan Sawmill and get some cigarettes and in the process went to the Deceased's quarters. The Accused did not bring any objects or weapons with him. As the Accused arrived at the Deceased's quarters, he saw a lady leaving the quarters. The Deceased then demanded money from the Accused for the Syabu that was given to him, the night before. The Accused told the Deceased that he did not have money as he had just come back from Indonesia. The Deceased then pointed a knife at the Accused and hit the back of the Accused's right shoulder with it. A struggle ensued during which the Accused got hold of the knife from the Deceased and stabbed him. The Accused had lost his sense of self-control at the time of the incident and the Accused felt that if he did not react then the Deceased would have killed him.

[38] The Defence contended that the question of whether the Accused brought along the knife with him when he went to see the Accused or did the Accused seize it from the Deceased will have a great impact in deciding whether the Accused is a credible witness or not. The Defence further contended that the Accused

is a credible witness and his version of events ought to be accepted as facts.

THE DEFENCES OF THE ACCUSED PERSON

[39] From a perusal of the evidence adduced by the defence, the defence is relying on the defences of defence of provocation, sudden fight and self-defence. All of these will now be considered in turn.

[40] The Accused testified that he had to defend himself from being stabbed by the Deceased and that he was in a condition of unstable mind and lost his power of self-control. The Deceased first provoked him while holding the knife 22 (Exhibit P18A & P19A) claiming that the Accused owed him the sum of RM1200 for syabu and asked the Accused to pay the debt.

THE DEFENCE OF PROVOCATION AND SUDDEN FIGHT

[41] Provocation operates as an exception to the offence of murder under section 300 of the Penal Code.

Exception 1-Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident.

[42] The above exception is subject to the following provisos:

(a) that the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person;

(b) that the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant;

(c) that the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation-Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder, is a question of fact.

[43] Before proceeding to consider the elements of the exception of provocation, it is also pertinent to consider the burden on an accused where he relies on an exception in the Penal Code. The relevant section is section 105 of the Evidence Act 1950 and it reads as follows:

"105. Burden of proving that case of accused comes within exceptions

When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the court shall presume the absence of those circumstances."

[44] The classic common law definition of provocation can be found in the case of *R v. Duffy* [1949] 1 All ER 932 where Devlin J said:

"Provocation is some act, or series of acts done (or words spoken)... which would cause in any reasonable person and actually causes in the accused, a sudden and temporary

> loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of himself."

[45] The provocation must be grave and sudden. This is a question of fact in each individual case. Dr Sri Hari Singh Gour's Penal; Law of India, Vol 3 (Law Publishers (India) Pvt. Ltd, 1th Ed Revised, 2011), declares "sudden" as follows (at p 2498):

> "What it is said that the provocation must be "sudden" it is implied that it should have all immediately preceded the homicide in point of time. A person may repeated or continuous provocation arouse another to state of mind when the provocation immediately preceding the act is only the last straw."

[46] In *Mahmood v. State AIR* [1961] ALL 538, Oak J had noted (at 538-539):

> "Whether the provocation was sudden or not does not present much difficulty. The word 'sudden' involves two elements. Firstly, the provocation must be unexpected. If an accused plans in advance to receive a provocation in order to justify the subsequent homicide, the provocation cannot be said to be sudden. Secondly, the interval between the provocation and the homicide should be brief. If a man giving the provocation is killed within a minute after the provocation, it is a case of sudden provocation. If the man is killed six hours after the provocation, it is not a case of sudden provocation."

[47] In the Court of Appeal case of *Rikky Purba v. Public Prosecutor* [2014] 3 CLJ 607; [2014] MLJU 72, the court reviewed the authorities on provocation and held *inter alia* as follows:

"It is an established principle of criminal jurisprudence that the defence is not required to prove its case with the same rigour as the prosecution and the defence is only required to prove its case on the balance of probabilities to entitle him to rely on any general exceptions of the PC (see section 105 of the Evidence Act)."

[48] In *PP v. Subir Gole* [2015] 3 CLJ 505, the Court held as follows;

"[28] In order to appreciate the contention of learned DPP, it would be useful to have a look at the law relating to provocation. Exception 1 to s. 300 of the PC operates as a mitigatory or partial defence to murder aimed at the reduction of that offence to simple culpable homicide not amounting to murder. The doctrine of provocation is a concession to human frailty or infirmity, a recognition that a lower standard of criminal responsibility should apply to one who kills when he is 'for the moment not master of his mind'. This approach to defence hinges on the notion of loss of self-control. Its rationale is that provocative conduct, when it is sufficiently serious, is capable of inflaming anger to such degree as to be likely to lead the provoked person to lose his self-control and retaliate in violence. When the provoked person loses self-control, he is unable to weigh up the consequences for his action according to reason. (See Jeremy Horder, Provocation and Responsibility (Oxford: Clarendon Press, 1992)).

[29] 'Provocation has not been defined in the PC. Generally speaking, there are three main types of provocations, namely:

(i) Ordinary provocation (reasonable);

(ii) Cumulative provocation; and

(iii) Self-induced provocation.

[30] Ordinary provocation refers to that provocation which causes a man to lose his self-control; and although a reasonable man who has lost control over himself would not kill, yet his homicidal reaction to the provocation is at least understandable. This form of provocation is based on the standard of the reasonable or ordinary man.

[31] Cumulative provocation is a series of acts or words over a period of time which culminates in the sudden and temporary loss of self-control. This provocation is not confined to the last acts before killing the accused; there may have been previous acts or words which when added, caused the accused to lose his self-control although the last act may not be sufficient to cause provocation.

[32] Self-induced provocation is a form of provocation in which the accused himself started the trouble. This type of provocation is rarely successful as a defence owing to the fact that the accused actually 'provoked' himself and may be rendered responsible for his own anger because he started the trouble himself.

[33] What would amount to "grave and sudden provocation" will depend on the facts of each case. Thus, no straitjacket formula that can be evolved to categories what acts may amount to provocation much less grave and sudden provocation. In the case of Che Omar Mohd Akhir v. PP (supra), Nik Hashim FCJ said:

[14] The question whether the provocation was grave and sudden such as to make the accused to lose his self-control is a question of fact and not one of law (see Explanation to Exception 1 to s. 300 of the PC; Kuan Ted Fatt v. Public Prosecutor [1985] 1 CLJ 150; [1985] CLJ (Rep) 174 FC). Each case is to be considered according to its own facts. The court must decide on the particular circumstances of that case whether the provocation was grave and sudden enough to permit an indulgent view of the crime committed by the accused, (see Ratanlal & Dhirajlal, The Indian Penal Code, 29th edn. 2002 p 1194).

[15] The test of grave and sudden provocation was clearly stated in the Supreme Court case of Lorensus Tukan v. Public Prosecutor [1988] 1 CLJ 143; [1988] 1 CLJ (Rep) 162. Seah SCJ in delivering the judgment of the court said:

The test of 'grave and sudden' provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control (see Nanavati v. State of Maharashtra AIR [1962] SC 605, 530).

In determining what amounts to grave and sudden provocation the court may take into account the habits, manners and feelings of the class or community to which the accused belongs, but not of the particular idiosyncrasies of the accused: Madhavan v. State of Kerala AIR [1966] Ker. 258 (260).

[16] It is also said that the defence of provocation is a dual one: the alleged provocative conduct must be such as (i) actually causes in the accused, and (ii) might cause in a

reasonable man, a sudden and temporary loss of self-control as the result of which he kills the deceased.

[17] Thus, in order to successfully set up provocation as a defence for the reduction of the offence of murder to one of culpable homicide not amounting to murder, it is not enough to show that the accused was provoked into losing his self- control; it must be shown that the provocation was grave and sudden and must have by its gravity and suddenness caused a reasonable man to lose his self-control and induced him to do the act which caused the death of the deceased. In determining that question the court may also consider, along with other factors, the nature of the retaliation by the accused, having regard to the nature of the provocation. (see Ratanlal & Dhirajlal, p 1192; Vijayan v. Public Prosecutor [1975] 1 LNS 189; [1975] 2 MLJ 8).

[49] In the Federal Court case of *Ikau anak Mail v. Public Prosecutor* [1973] 1 LNS 51, his Lordship Azmi LP (as he then was) ruled as follows:

> "To succeed in a defence of grave and sudden provocation, it is necessary in law for the defence to satisfy the Court that not only by the acts of the deceased that the accused had been deprived of the power of self-control, but such acts of provocation would also have deprived a reasonable man of the power of self-control."

[50] As alluded to earlier, the test of whether provocation exists is to be judged by the standard of the reasonable man. See *Lorensus Tukan v. Public Prosecutor* [1988] 1 CLJ Rep 162; [1988] 1 MLJ 251 which held as follows:

> *"The test of 'grave and sudden' provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control (see Nanavati v. State of Maharashtra AIR [1962] SC 605 530)."*

[51] Was the provocation by the Deceased, grave and sudden? This, as the established authorities decided, is a question of fact. In the present case, the evidence relied upon by the Defence in raising provocation are as follows. The Accused testified that the Deceased then pointed a knife at the Accused and hit the back of the Accused's right shoulder with it. A struggle ensued between them during which the Accused got hold of the knife from the Deceased and stabbed him. The Accused had lost his sense of self-control at the time of the incident and the Accused felt that if he did not react then the Deceased would have killed him.

[52] From a distillation of the foregoing narrative that formed part of the Accused's testimony, this Court has to determine whether the Deceased pointing a knife at the Accused and hit the back of the Accused's right shoulder with it and the struggle which ensued between them during which the Accused got hold of the knife from the Deceased and stabbed him, was sufficient to cause the Accused to be deprived of his self - control?

[53] If it was, the next stage of inquiry would be whether the injury inflicted was proportionate to the provocation. It is trite that the test of whether provocation exists is to be judged by the standard of the reasonable man. In the present case, in the assessment of the reasonableness of the Accused's action, it has to be considered as of necessity whether a reasonable man would be so provoked as to act as the Accused did. Therefore it must

follow that if a reasonable man would not have resorted to the degree of retaliation as the Accused did, then it must also follow that the proportionality of the reaction to the provocation would be a relevant factor to consider. If there is any doubt that the consideration of proportionality is relevant to the issue of provocation, this Court is guided by the case of *Bangkong ak Puan (l) v. Public Prosecutor* [2012] 1 LNS 950; [2013] 1 MLJ 293 where it was held;

> *"The appellant alleged that the deceased stabbed him first and it was this act of grave and sudden provocation that purportedly caused him to lose his self-control and retaliate. We find that even if this allegation was true, the brutal manner in which the appellant retaliated was not proportionate to the provocation."*

[54] As stated earlier, the test of whether provocation exists is to be judged by the standard of the reasonable man. See *Lorensus Tukan v. Public Prosecutor* [1988] 1 CLJ Rep 162; [1988] 1 MLJ 251 which held as follows:

> *"The test of 'grave and sudden' provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control (see Nanavati v. State of Maharashtra AIR [1962] SC 605 530)."*

[55] Would a reasonable person react as the Accused did under the circumstances of the present case? Cumulatively taken, the acts relied upon to show evidence of provocation on the part of the Accused were that the Deceased had pointed a knife at him and attacked him unsuccessfully the Deceased then pointed a knife at the Accused and hit the back of the Accused's right shoulder

with it. A struggle ensued between them during which the Accused got hold of the knife from the Deceased and stabbed him. The Accused had lost his sense of self-control at the time of the incident and the Accused felt that if he did not react then the Deceased would have killed him.

THE EXPERT TESTIMONY OF THE FORENSIC PATHOLOGIST PW17

[56] In proving the death of the Deceased, the prosecution is relying on the evidence adduced by the pathologist in this case, Dr. Norliza Binti Ibrahim (PW17) who testified that she had conducted the post mortem on the Deceased on 1.4.2015 at about 11.20 am at mortuary of the Bintulu Hospital, Sarawak. PW17 concluded that based on the post mortem examination and her opinion, the Deceased died of chest injury due to stab wounds. External examination of the Deceased revealed that the Deceased suffered six marks of injuries which were caused by sharp force trauma. Three of the injuries were stab wounds and the other three were incisions. The stab wounds were consistent to be caused by sharp and pointed object such as a knife or any other similar object. The stab wounds were consistent with injuries caused by single edge blade. The width of the stab wounds ranged from 1.3 cm – 1.9 cm. The deepest depth of the stab wounds was 11.6 cm. PW17 clarified that what was in her post mortem report, at line 6 of paragraph 2 at page 5 that the deepest depth of the stab wounds was 9.5 cm which was the result of typing error.

[57] PW17 further testified that while the incisions were consistent with wounds caused by sharp object such as knife, sword, parang or any other similar object. Stab wound injury which was

marked by no. 2 caused injury to the heart while stab wound which was marked no. 3 caused injury to the left lung. These injuries subsequently also leads to bleeding into the heart sac and lung cavities. In PW17's opinion, these chest injuries due to stab wounds led to the Deceased's death and the rest of the injuries were not severe enough to lead to his death. The said injuries which were marked as no. 2 and 3 respectively could lead to death as a result either by excessive bleeding or by disrupting the breathing process which subsequently causing the body as a whole not receiving enough oxygen. The cause of death of the Deceased was chest injury due to stab wounds. In her opinion, in the ordinary course of nature these injuries on the Deceased's body mainly on the chest could lead to death of the deceased. (Refer to WS-PW17, page 6-7)

[58] The Deceased did not have any disease that could cause or contributed to his death. In PW17's opinion, the Deceased did not suffer any injuries consistent with defensive wounds. Defensive wound is wound that suffered by a person in order to ward off the attacker. This injury usually could be seen on the inner part of the forearms (ulna side) and also on the palms especially if sharp force trauma is involved.

[59] This Court also finds that the act of the Accused in stabbing the Deceased several times is out of all proportion to the provocation given by the Deceased. Even assuming that the Accused is to be believed in that the Deceased did indeed point a knife at the Accused and hit the back of the Accused's right shoulder with it, this Court finds that it was unnecessary for the Accused to have used the knife to stab the Deceased several times. After the Deceased's initial attack against the Accused which resulted in the Accused seizing possession of the knife, the Accused could have, in the first instance moved away from

the Deceased and in the worst case scenario he could have gone out of the room safely since he had possession of the knife.

[60] On the issue of proportionality, it must be remembered that the stab wounds inflicted numbered no less than six, the deepest of the stab wounds was 11.6 cm and the width of the stab wounds ranged from 1.3 cm to 1.9 cm. The fatal wounds no. 2 and 3 which were inflicted directed to vital organs, namely the heart and the left lung. The evidence of PW17 and her post mortem report also confirmed that these injuries subsequently also leads to bleeding into the heart sac and lung cavities. In PW17's opinion, these chest injuries due to stab wounds led to the Deceased's death. In all of the circumstances therefore, this Court finds that the Accused has failed on a balance of probability to bring himself within Exception 1 to section 300 of the Penal Code namely, provocation.

DEFENCE OF SUDDEN FIGHT

[61] Exception 4 to this exception to section 300 of the Penal Code reads as follows - Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner.

> Explanation-It is immaterial in such cases which party offers the provocation or commits the first assault.

[62] The facts upon which this exception arises are similar to that of provocation under exception 1 to section 300 Penal Code. It is trite law that to invoke the exception, four requisites must be satisfied, that is to say: (i) it was a sudden fight; (ii) there was no premeditation; (iii) the act was committed in the heat of

passion; and (iv) the assailant had not taken any undue advantage or acted in a cruel manner.

[63] These requirements are cumulative and must all be satisfied for the exception to apply. In the present case, on the facts and in the circumstances of the case, this Court finds that requirement (iv) to exception 4 above has not been satisfied by the Accused. It will be recalled that according to the evidence of PW17 and her post mortem report, there were three stab wounds and three incisions inflicted on the Deceased, two of which proved to be fatal. This was in purported retaliation for the Deceased's action to trying to stab the Accused. It will also be recalled that PW17 had testified that there appeared to be no defensive wounds found on the Deceased indicating that he was not in a position to defend himself from the attack of the Accused. It is therefore the finding of this Court that the reaction of the Accused was out of all proportion to the provocation given by the Deceased. This Court finds that in the circumstances, the Accused's reaction clearly indicated that he had taken undue advantage and acted in a cruel and unusual manner. In the case of *Sainal Abidin bin Mading v. Public Prosecutor* [1999] 4 CLJ 215; [1999] 4 MLJ 497 the court observed as follows:

> *"The learned judge also found that by using P16 to stab the deceased not once but four times including once when the deceased had collapsed, obviously reflected a situation where the appellant had taken advantage or acted in a cruel or unusual manner thereby failing to pass the second test required under exception 4. It was not disputed by the defence that P16 was used by the appellant to inflict those injuries on the deceased. Hence the appellant failed also under exception 4."*

[64] This Court therefore finds that the Accused has under the circumstances failed on balance of probabilities to bring himself within exception 4 to section 300 of the Penal Code, namely, that of sudden fight.

THE DEFENCE OF SELF DEFENCE

[65] Sections 96-106 of the Penal Code codifies the law relating to right of private defence of person and property including the extent of and limitation to exercise such right. Section 96 of the Penal Code states:

> "Nothing is an offence which is done in the exercise of the right of private defence."

[66] Ratanlal and Dhirajlal's Law of Crimes (25th Ed) laid down 4 pre-requisities which must be met before the plea of self-defence can succeed and they are as follows:

> (a) the accused must be free from fault in bringing about the encounter;
>
> (b) there must be present an impending peril to life or of great bodily harm either real or so apparent;
>
> (c) there must be no safe or reasonable mode of escape by retreat; and
>
> (d) there must have been necessity of taking life.

[67] Section 105 of the Evidence Act 1950 places the burden of proving the existence of circumstances bringing the case within any general exception in the Penal Code is upon the accused.

[68] Section 97 of the Penal Code states:

"Every person has a right, subject to the restrictions contained in section 99, to defend-

(a) his own body, and the body of any other person, against any offence affecting the human body;

(b) the property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass.

[69] Section 99 of the Penal Code laid down the parameters for the defence of private defence, which states as follows:

"(1) There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law.

(2) There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by the direction of a public servant acting in good faith under colour of his office, though that direction may not be strictly justifiable by law.

(3) There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities.

(4) The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence."

[70] Section 102 of the Penal Code reads

"The right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence, though the offence may not have been committed; and it continues as long as such apprehension of danger to the body continues."

[71] In the Court of Appeal case of *Frans Hiu v. PP & Another Appeal* [2014] 9 CLJ 764, the Court of Appeal held *inter alia* as follows:

"[25] The right of private defence commences as soon as there is a reasonable apprehension of danger to the body of a person and that right continues for as long as the danger exits. (see PP v. Ngoi Ming Sean [1981] CLJ 93; [1981] CLJ (Rep) 251; [1982] 1 MLJ 24, Ya Daud v. PP [1996] 2 CLJ 540; [1997] 4 MLJ 322, PP v. Dato' Balwant Singh (No 2) [2003] 7 CLJ 285; [2003] 3 MLJ 395).

[26] Section 99 of the Penal Code provides a limitation to the right of private defence. If an accused person has time to have recourse to seek the protection of a public authority or inflicts more harm than necessary for the purpose of defending his person, he can not avail himself of the protection provided by the defence."

[72] Section 105 of the Evidence Act 1950 places the burden of proving the existence of circumstances bringing the case within any general exception in the Penal Code is upon the Accused. The facts of the present case clearly show that, firstly, in spite of the Accused's testimony, there was no impending peril to his life or of great bodily harm after he had obtained possession of the knife.

[73] Further as already considered above, the Accused, could have either pushed the Deceased away or have taken flight from the scene and so escaped by way of retreat. The number of stabs wounds inflicted upon the Deceased also was not proportionate in the circumstances of the case as the Deceased was not armed with any weapon at the material time as the knife was already taken away from him based on the testimony of the Accused and the manner of retaliation by using such a weapon and aiming for the vital organs of the Deceased was out of all proportion in the circumstances.

[74] In the circumstances therefore, this Court finds that the Accused has failed on a balance of probabilities to show that he is entitled to rely on the exception of self defence.

CREDIBILITY OF THE ACCUSED

[75] According to the Accused, since the Deceased pointed a knife at him and threatened to stab him if he did not pay the RM1200.00 debt, he was in a state of fear and felt threatened. The Deceased then hit his back right shoulder with the knife handle and the knife fell so the Accused took the opportunity to grab the knife and there was struggle between the Accused and the Deceased. This is what the Accused testified: -

"Q57: When you entered the quarters Erwing was in, what was the first thing you said to him or he said to you?

A: When I entered the house, he said "Pay your debt" in the Bugis language. I said to him, "I do not have the money. I had just started working". In anger, he pointed a knife at me. Then I avoided the attack but yet the knife hit me on the back of my right shoulder."

[76] From the Accused's above testimony, the Accused testified that the Deceased pointed a knife at him and he never testified that the Deceased attacked him. This Court also finds that the Deceased's act of pointing a knife is not an act of attacking nor is it an act of provocation. At best, it can be construed as a threat or an act of warning. Furthermore, the Accused never explained how the Deceased who was holding the knife, could change position and hit the back of the Accused's shoulder. If it was true that the back of the Accused's right shoulder was hit, it must be the blade of the knife which hit it and not the handle of the knife because the Deceased was holding the handle before the knife fell. There should be at least a cut or scratch found of the back of the Accused's right shoulder but there was none. In the light of the aforesaid, this Court finds that the Accused's testimony is contradictory and not credible.

[77] This Court noted that no one else saw the fight between the Accused and the Deceased. Thus the Accused is at liberty to testify on whatever matters he wished and in the light of such circumstances, the Accused's testimony must be viewed critically.

[78] The injuries inflicted by the Accused on the Deceased showed that the Accused had the intention of attacking and causing injury or even death to the Deceased. It is highly probable that the Accused attacked the Deceased because the Accused did not suffer any injuries such as cuts, wound, incision and stab on any part of his body except the scratch on his right back arm as compared to the injuries suffered by the Deceased. This scratch could be caused by any other possibility and it might occurred before the incident as he worked in a sawmill. The depth and size of the injuries found on the Deceased's body showed that the Accused really wanted or intended to injure the Deceased fatally.

[79] Other witnesses such as PW16, Inspector Peterson Ray testified that when he saw the Accused after the incident, the Accused looked calm, normal and healthy. PW16 did not see any fresh blood or injuries except a long scratch on his right backside of his arm. PW16 also testified that when he asked the Accused to change into lock up attire at CID Office so that he can seize his clothing and shoes as the exhibits for this case. When the Accused was changing his clothes, PW16 saw no injuries on any parts of his body. PW21 as the Investigating Officer of this case also had testified that there were no other injuries found on the Accused's body except a long scratch on the right backside of the Accused. Thus this Court finds that the testimony of the Accused that he was attacked by the Deceased and suffered an injury is not credible.

[80] The Accused also testified that the Deceased had given syabu to him at 1.00 pm at Segan Factory on 28.3.2015 where both of them had consumed the syabu. However based on Exhibit P50, the chemist report stated that Common Basic Drugs and Alcohol were not detected from the Deceased's blood. If the Accused's

evidence was credible, Methampetamine, a dangerous drugs should had been detected in the Deceased's blood.

[81] The Accused also gave contradictory evidence as based on Q&A49 of his Examination in Chief, he stated that there was nobody else inside the Deceased's quarters when he went there but later on agreed that Normawaty was inside the quarters with the Accused and during Re Examination he testified that Normawaty was leaving the quarters when he entered the quarters. Thus there are discrepancies in his evidence. The Accused's evidence which can be seen in Q&A 38 of his Cross-Examination, Q&A 69 and Q&A 75 of his Examination in chief also contradicted each other.

WHETHER THE DEFENCE HAS RAISED A REASONABLE DOUBT ON THE PROSECUTION'S CASE

[82] 'Reasonable doubt' had been defined in the case of *PP v. Saimin* [1971] 2 MLJ 16 as follows:

> *"It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge. It has again been said that "reasonable doubt" is the doubt which makes you hesitate as to the correctness of the conclusion which you reach. If under your oaths and upon your consciences, after you have fully investigated the evidence and compared it in all its parts, you say to yourself I doubt if he is guilty, then it is a reasonable doubt. It is a doubt which settles in your judgment and*

finds a resting place there. Or as sometimes said, it must be a doubt so solemn and substantial as to produce in the minds of the jurors some uncertainty as to the verdict to be given. A reasonable doubt must be a doubt arising from the evidence or want of evidence and cannot be an imaginary doubt or conjecture unrelated to evidence."

[83] In the case of *Liew Kah Ling & Ors v. Public Prosecutor* [1960] 1 LNS 60; [1960] MLJ 306 Thompson CJ referred to the quantum of proof required to prove a case "beyond reasonable doubt" when he quoted the judgment of Denning J (as he then was) in the case of *Miller v. Minister* of Pensions as follows:

"The degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence' of course it is possible, but not in the least probable' the case is proved beyond reasonable doubt but nothing short of that will suffice."

Denning J went on to observe further in Miller's case:

"That evidence that is in the least probable must be evidence that is credible, plausible or logical such that a reasonable person, having regard to the ordinary course of nature or natural events, human conduct, and in the particular circumstances of the particular case, would accept it as to act upon it as having occurred, or as truthful or accurate; and not a doubt that could, with the application of some

ingenuity, be conjured up, envisioned or visualised in a story."

[84] In the light of this Court's above findings, this Court finds that the Accused has failed to prove his defences of private defence and grave and sudden provocation as this Court does not accept or believe the said defences raised by the Accused and also finds that the Defence's evidence has not raised in the mind of this Court, a reasonable doubt as to the guilt of the Accused.

ORDER

[85] In the premises this Court finds that the Defence has failed to discharge the burden of proving the existence of circumstances bringing its case within any of the exceptions referred to above on a balance of probabilities, as are contained in the Penal Code, and has also failed to raise a reasonable doubt in the prosecution case for murder under section 302 of the Penal Code. This court therefore finds the Accused guilty of murder punishable under section 302 of the Penal Code. This Court therefore sentences the Accused to the only sentence permissible by law, that is to death by hanging.

Dated: 18 MAY 2017

(JUSTICE LEE HENG CHEONG)
High Court Judge
Sibu, Sarawak

COUNSEL:

For the prosecution - Maisarah DPP

For the defence - Ranbir Singh

Notice: This copy of the Court's Grounds of Decision is subject to formal revision.