A

OMMAR YACOB v. PP

COURT OF APPEAL, PUTRAJAYA
ABDUL WAHAB PATAIL JCA
MOHAMAD ARIFF YUSOF JCA
DAVID WONG DAK WAH JCA
B [CRIMINAL APPEAL NO: S-05-82-2010]
3 DECEMBER 2014

CRIMINAL LAW: *Murder – Appeal – Appeal against conviction and sentence – Whether intention to kill deceased present – Whether ingredients for murder established – Penal Code, s. 302*

C

CRIMINAL LAW: *Defence – Self-defence – Whether appellant raised reasonable doubt on prosecution's case – Whether trial court could use self-defence and private defence interchangeably*

D ***CRIMINAL LAW:*** *Penal Code – Section 302 – Murder – Conviction and sentence – Appeal against – Whether appellant had intention to cause bodily injury sufficient in course of nature to cause death – Ingredients for murder – Whether established*

The appellant was convicted and sentenced to death under s. 302 of the Penal Code for the murder of one Jully Martin ('the deceased'). At the trial stage,
E post mortem conducted on the deceased showed that the cause of death were stab wounds to the chest out of a total of 54 injuries on the deceased's body. Meanwhile, the appellant was treated for a 1cm longitudinal wound in the middle region of his neck. His DNA was also found on the short pants worn by the deceased as well as in the deceased's nail clippings. It was the
F appellant's defence that while he was involved in a quarrel with the deceased, it was the deceased who had stabbed him first and the injuries he had caused to the deceased were only as a result of the appellant defending himself in the quarrel. The High Court Judge rejected the defence and observed that the facts were more consistent with the deceased who was acting in self-defence,
G having suffered the numerous stabs wounds and the appellant being the attacker, sustaining only the wounds on his neck and palms during the struggle. The appellant appealed against the conviction and sentence by raising the issue as to whether or not he had any intention to cause such bodily injury sufficient in the course of nature to cause death on the deceased.
H The primary evidence in relation to intention were (i) number of injuries; and (ii) testimony of PW14, who had commenced relationship with the appellant after breaking off her relationship with the deceased.

Held (allowing appeal; setting aside conviction and sentence)
Per Abdul Wahab Patail JCA delivering the judgment of the court:

I **(1)** The High Court failed to appreciate the distinction between self-defence negating intention and private defence under the Penal Code and treated both terms interchangeably. Private defence requires proof upon a balance of probabilities, while all that was required of the appellant in

defending on the fourth ingredient of the charge was to raise reasonable doubt as to whether there was intention to cause death or the requisite bodily injury. In this case, the prosecution made no effort to particularise at what point the two fatal injuries that penetrated the deceased's lungs were consistent with an intention to cause either death or bodily injury so as to cause death. Without establishing the same, it remained at the very least possible that they were inflicted in self-defence and with no intention to cause death. The more liberal conclusion ought to have been drawn in favour of the appellant that the prosecution had failed to prove its case as required under s. 180 of the Penal Code. The appellant ought not to have been called to enter his defence. (paras 15, 19 & 21)

(2) There were 54 injuries inflicted on the deceased, two of which were capable of causing death, which were as much evidence of self-defence as they were of an attack by the appellant. Since there were two or more possible conclusions, the High Court should have given the more favourable conclusion, which was that there was no intention to cause death or such bodily injury sufficient in the ordinary course of nature to cause death. (para 26)

(3) The reasoning to dismiss PW14's reply in cross-examination, where she agreed that an SMS sent to the appellant by the deceased contained a death threat, was flawed. It was for the prosecution to ask what the SMS actually said. Nor could the absence of any evidence to suggest that the deceased had done anything between January 2007 and May 2007 to carry out his alleged threat between a fight four months earlier on 18 January 2007 be a reason to dismiss the allegation of a fight since that part of the reasoning was at the prosecution stage and before the appellant had the opportunity to adduce his own evidence. This was not only placing the burden upon the appellant but expecting evidence from him before the defence was called. (paras 30 & 31)

(4) The fact that the deceased still had the keys to PW14's room led to the inference that the relationship between them was not over but still continued and upon discovery that the appellant was still going to PW14's room was reason for a fight. For these reasons, the testimony of PW14 ought to have been scrutinised, specifically as to whether it was safe to rely on it, which was overlooked by the High Court and was accepted at face value. (paras 32 & 33)

(5) The defence of private defence required proof upon a balance of probabilities. The error was in considering that the burden was not a heavy one. It is true that proof on a balance of probabilities is not a heavy one when compared to proof beyond reasonable doubt. What appeared to be overlooked however was that what was being considered was the defence, not prosecution. The defence case was of acting solely

in self-defence, thereby negating formation of any intention to cause death or causing such bodily injury as was likely in ordinary course of nature to cause death, required only reasonable doubt to be established. The High Court had applied a much higher standard than required by law, and failed to follow established case law that what was to be considered was whether the defence established a reasonable doubt, and not whether one believed it or not. The consideration ought to be whether the appellant's defence was not merely possible but was also not in the least probable. (paras 38 & 39)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah disabitkan kesalahan dan dijatuhkan hukuman mati di bawah s. 302 Kanun Keseksaan atas pembunuhan seorang Jully Martin ('si mati'). Di peringkat perbicaraan, bedah siasat yang telah dijalankan ke atas si mati menunjukkan bahawa punca kematian adalah luka tikaman pada bahagian dada daripada sejumlah 54 kecederaan pada badan si mati. Manakala perayu pula telah dirawat untuk luka serenjang berukuran 1sm di tengah-tengah bahagian lehernya. DNA perayu telah dijumpai pada seluar pendek yang dipakai si mati dan juga pada keratan kuku si mati. Perayu telah mengemukakan pembelaan bahawa walaupun dia terlibat dalam pergaduhan dengan si mati, si mati yang telah menikamnya dahulu dan luka-luka yang telah dikenakan pada si mati hanyalah akibat daripada perbuatan perayu mempertahankan dirinya dalam pergaduhan tersebut. Hakim Mahkamah Tinggi telah menolak pembelaan tersebut dan membuat pemerhatian bahawa fakta-fakta kes lebih konsisten dengan si mati yang bertindak mempertahankan dirinya, dengan mengalami sebegitu banyak kesan luka dan perayu merupakan si penyerang, yang hanya mengalami luka pada bahagian leher dan tapak tangan dalam pergaduhan tersebut. Perayu merayu terhadap sabitan dan hukuman tersebut dengan menimbulkan isu sama ada dia mempunyai niat untuk menyebabkan kecederaan tubuh yang memadai dalam perjalanan biasa untuk menyebabkan kematian si mati. Keterangan utama berkaitan niat adalah (i) jumlah luka; dan (ii) keterangan PW14, yang menjalinkan hubungan dengan perayu setelah memutuskan hubungannya dengan si mati.

Keputusan (membenarkan rayuan; mengenepikan sabitan dan hukuman) Oleh Abdul Wahab Patail HMR menyampaikan penghakiman mahkamah:

(1) Mahkamah Tinggi gagal mempertimbangkan bahawa terdapat perbezaan antara mempertahankan diri yang membatalkan niat dan mempertahankan diri di bawah Kanun Keseksaan dan telah menggunakan kedua-dua istilah secara bertukar ganti. Pembelaan mempertahankan diri perlu dibuktikan atas imbangan kebarangkalian sedangkan perayu hanya perlu menimbulkan keraguan munasabah sama ada dia mempunyai niat untuk menyebabkan kematian atau kecederaan tubuh yang dimaksudkan untuk mematahkan syarat keempat pertuduhan, iaitu, niat. Dalam kes ini,

pendakwaan tidak menunjukkan sebarang usaha untuk memperincikan pada titik manakah kedua-dua kecederaan parah yang telah menembusi paru-paru si mati konsisten dengan niat untuk membunuh atau menyebabkan kecederaan tubuh yang memadai dalam perjalanan biasa untuk menyebabkan kematian. Tanpa mengesahkan perkara yang sama, ia sekurang-kurangnya boleh dianggap bahawa kecederaan tersebut telah dikenakan dalam perbuatan mempertahankan diri dan tanpa niat untuk menyebabkan kematian. Kesimpulan yang lebih liberal sepatutnya dibuat bagi pihak perayu bahawa pendakwaan telah gagal untuk membuktikan kes seperti yang dikehendaki di bawah s. 180 Kanun Keseksaan. Perayu tidak sepatutnya dipanggil untuk memasukkan pembelaan.

(2) Terdapat 54 kecederaan yang telah dikenakan terhadap si mati, dua daripadanya berupaya untuk menyebabkan kematian, di mana ia boleh menerangkan perbuatan mempertahankan diri mahupun satu serangan oleh perayu. Memandangkan terdapat dua atau lebih kesimpulan yang boleh dibuat berdasarkan keterangan tersebut, Mahkamah Tinggi sepatutnya memberikan kesimpulan yang lebih menyokong, bahawa perayu tiada niat untuk menyebabkan kematian atau kecederaan tubuh yang memadai dalam perjalanan biasa untuk menyebabkan kematian.

(3) Alasan untuk menolak jawapan SP14 pada peringkat pemeriksaan balas, yang bersetuju bahawa SMS yang telah dihantar kepada perayu oleh si mati mengandungi ugutan bunuh, adalah cacat. Ia bergantung pada pendakwaan untuk bertanyakan apakah yang sebenarnya telah dikatakan dalam SMS tersebut. Ketiadaan sebarang keterangan yang mencadangkan bahawa si mati telah melakukan sebarang tindakan antara Januari hingga Mei 2007 untuk menjalankan ugutannya seperti yang didakwa juga tidak boleh dijadikan sebab untuk menolak dakwaan bahawa satu pergaduhan telah berlaku kerana bahagian pertimbangan tersebut adalah pada peringkat pendakwaan dan sebelum perayu mendapat peluang untuk mengemukakan keterangannya sendiri. Hal ini bukan sahaja meletakkan beban ke atas perayu tetapi mengharapkan keterangannya sebelum dia dipanggil untuk memasukkan pembelaan.

(4) Fakta bahawa si mati masih memegang kunci bilik SP14 membawa kepada inferens bahawa hubungan antara mereka belum tamat dan masih berterusan dan dengan mendapati perayu juga masih pergi ke bilik SP14 merupakan sebab untuk pergaduhan. Oleh sebab itu, testimoni SP14 sepatutnya diperiksa dengan teliti terutamanya sama ada ia selamat untuk dipercayai, tetapi hal ini telah dilepas pandang oleh Mahkamah Tinggi dan diterima bulat-bulat.

(5) Pembelaan mempertahankan diri memerlukan pembuktian pada imbangan kebarangkalian. Kekhilafan berlaku apabila beban tersebut dianggap bukan satu beban yang berat. Sememangnya beban pembuktian pada imbangan kebarangkalian tidaklah seberat pembuktian melebihi keraguan munasabah. Namun begitu, apa yang seakan-akan terlepas dari pandangan Mahkamah Tinggi adalah bahawa apa yang sedang dipertimbangkan adalah pembelaan dan bukannya pendakwaan. Kes pembelaan adalah bahawa perayu bertindak hanyalah dalam mempertahankan dirinya, yang mana menidakkan pembentukan sebarang niat untuk menyebabkan kematian atau kecederaan yang memadai dalam perjalanan biasa untuk menyebabkan kematian, yang memerlukan perayu menimbulkan keraguan munasabah. Mahkamah Tinggi telah mengguna pakai standard yang lebih tinggi daripada yang dikehendaki oleh undang-undang, dan telah gagal untuk mengikuti kes undang-undang yang mantap bahawa apa yang patut dipertimbangkan adalah sama ada pembelaan telah menimbulkan keraguan munasabah, dan bukanlah sama ada ia boleh dipercayai atau tidak. Pertimbangannya di sini sepatutnya adalah sama ada pembelaan perayu bukan sahaja berkemungkinan tetapi mempunyai kebarangkalian yang tinggi.

Case(s) referred to:

Ali Tan Abdullah v. PP [2013] 4 CLJ 757 CA ***(refd)***
Chan Chwen Kong v. PP [1962] 1 LNS 22 CA ***(refd)***
Khairiddin Sufi v. PP [2012] 6 CLJ 457 CA ***(refd)***
Lt Kol Yusof Abdul Rahman v. Kol Anuar Md Amin, Yang Dipertua Mahkamah Tentera Pulau Pinang & Anor [1997] 2 CLJ 752 CA ***(refd)***
Miller v. Minister of Pensions [1947] 2 All ER 372; [1947] 2 KB 372 ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
Mohd Nahar Abu Bakar v. PP [2013] 5 CLJ 977 CA ***(refd)***
Mohd Ya'cob Demyati v. PP [2011] 4 CLJ 758 CA ***(refd)***
Muhammad Rasid Hashim v. PP [2013] 1 CLJ 333 CA ***(refd)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(refd)***
PP v. Dato' Seri Anwar Ibrahim [2014] 4 CLJ 162 CA ***(refd)***
Tan Boon Kean v. PP [1995] 4 CLJ 456 FC ***(refd)***
Tan Chin Meng v. PP [2011] 5 CLJ 524 CA ***(refd)***
Tan Ong Keong v. PP [2012] 4 CLJ 223 CA ***(refd)***
Wong Teck Choy v. PP [2005] 3 CLJ 431 CA ***(refd)***

Legislation referred to:

Criminal Procedure Code, ss. 180(3), (4)
Penal Code, ss. 96, 97, 99, 100, 101, 102, 300, 302

For the appellant - Hamid Ismail; M/s Hamid & Co
For the prosecution - Samihah Rhazali; DPP

[Appeal from High Court Kota Kinabalu; Criminal Trial No: K45-08-2007]

Reported by Lyana Shohaimay

JUDGMENT

Abdul Wahab Patail JCA:

[1] The accused Ommar bin Yacob ("the appellant") appealed against his conviction and sentence to the mandatory sentence of death under s. 302 of the Penal Code on a charge of the murder of one Jully Bin Martin, ("the deceased") between 1pm and 3pm on 12 May 2007 at Room No. 10, Second Floor, Lot 34, Lorong 4, Bandaran Berjaya, Kota Kinabalu, Sabah ("Room No. 10").

The Prosecution Case

[2] The core of the prosecution case, extracted from the submissions for the respondent ("RWS") before us is as follows:

(a) Room No. 10 was occupied by one Aramah binti Angian (PW14), who had commenced a relationship with the appellant after breaking off her relationship with the deceased (RWS para. 2 and 3);

(b) Notwithstanding having broken off, the deceased retained a key to Room No. 10 (RWS para. 2);

(c) In the morning of the day of the incident, the deceased came to Room No. 10, and after having had a shower, had a meal with PW14 (RWS para. 7);

(d) PW14 went out with her friends Lita and Mary, leaving the deceased in Room No. 10 (RWS para. 7);

(e) The appellant called PW14 when she was at the ground floor of Room No. 10: she called back using a public phone, told him where she was going with Lita and Mary, and arranged to meet him later at Centre Point (RWS para. 8);

(f) About half an hour later one Yuliana Bt Bakhtiar ("Anna") called Mary to speak to PW14. Anna told PW14 about hearing sounds of quarrelling from Room No. 10 and thinking PW14 was quarrelling with the deceased (RWS para. 9);

(g) A short while later Anna called PW14 to tell her she heard no more sounds of quarrelling but saw blood coming out of Room No. 10 and on the staircase (RWS para. 9);

(h) PW14 called the appellant who confirmed he had been to Room No. 10. He told PW14 to call back later as he was in a clinic;

(i) PW14 called the appellant later, who told PW14 he went to Room No. 10 to negotiate with the deceased, that it was the deceased who stabbed him first and confessed to PW14 that he killed the deceased. Upon asking, PW14 was told by the appellant that the deceased was at Room No. 10 (RWS para. 11);

(j) A post mortem conducted by PW3 at the Queen Elizabeth Hospital, found 54 injuries on the deceased body. PW3 certified the cause of death as caused by stab wounds to the chest (RWS para. 26 to 27).

[3] It was submitted for the respondent that after the appellant told PW14 that the deceased was at Room No. 10 (RWS para. 11):

> 13. PW14 returned to Room No. 10 after the appellant left her. Before returning, she made a phone call to the deceased but it was not answered. On returning to Room No. 10, she found the deceased lying dead on the floor covered in blood. She later proceeded to find the deceased's sister Mary and later both went back to PW14's room, where the police has arrived and began investigation.

[4] The part that PW14 and the deceased's sister Mary went back to PW14's room, where the police has arrived and began investigation, is not quite correct. The prosecution evidence through PW14 at RR1:198 line 1ff:

> Not long later, Mary met me at Asia City and she asked me why. She asked me why and what happened. I started crying, Mary then embraced me and asked me what really happened. I informed Mary that her brother was killed. She asked me whether if it was true and I said yes. She asked me where Jully was and I told her that Jully was in my room. Mary brought me back to her workplace to inform her boss that she wanted to go to the scene of crime. Mary then contacted her cousins asking them to go to my room. Her cousins then came to Mary's workplace and we all went back to my room.
>
> When we got back there, a crowd had already gathered downstairs. The landlord was there and he would not allow anyone to go up until the police came. After the police arrived, they went up to the scene of crime. Mary and the cousins all waited downstairs. Later, her cousins and Jully's younger brother Max went up to the room. I saw the body of Jully Bin Martin being brought down and put inside the ambulance and was taken away to the hospital.

[5] Little turns upon the inaccuracy, but any inaccuracy is undesirable in a criminal case as it can distort and lead astray the cause of justice.

[6] The appellant had at about 2.30pm the same day sought medical treatment at PW7's clinic at ground floor, Jalan Perpaduan, Kampung Air, Kota Kinabalu for a 1cm longitudinal wound in the mid region of his neck. His DNA was found on the short pants worn by the deceased and a stained cigarette butt as well as in the deceased's nail clippings.

[7] When called under s. 180(3) of the Criminal Procedure Code ("the CPC") to enter upon his defence, the appellant:

(a) Admitted that he was involved in the quarrel with the deceased;

(b) Said it was the deceased who started to stab him first;

(c) Said the injuries caused by him to the deceased was from self-defence in a fight between him and the deceased.

[8] In respect of the fourth ingredient, the intention to cause such bodily injury sufficient in the ordinary course of nature to cause death, the primary focus of the defence was self-defence.

Grounds Of Judgment Of The High Court

[9] In its grounds of judgment, the High Court addressed:

(a) The narrative of the prosecution case;

(b) The law;

(c) The ingredients of the charge;

(d) The evidence thereon;

(e) Contentions for the prosecution that:

(i) The victim had died;

(ii) The death was caused by the injuries sustained;

(iii) The injuries were caused by the appellant before proceeding to consider the issue of whether the appellant did so with the intention to cause such bodily injury sufficient in the ordinary course of nature to cause death;

(f) The contentions for the appellant thereon.

[10] We bear in mind that whether it was the appellant who killed the deceased was not the issue. The issue was whether there was intention to cause such bodily injury sufficient in the ordinary course of nature to cause death.

[11] We take the following excerpts from the grounds of judgment of the High Court to demonstrate not only the matters considered but also the reasoning and findings of the High Court on the question of intention to cause such bodily injury sufficient in the ordinary course of nature to cause death:

(a) The Prosecution Stage

(i) It is the prosecution case that the appellant had stabbed Jully with the intention of causing him bodily harm and that such injury intended to be inflicted was sufficient in the ordinary course of nature to cause death. It is the prosecution case that such intention is to be inferred from the surrounding facts and circumstances revealed in the prosecution case. (Judgment: p. 14 line 26 to 31)

(ii) The defence contention is that this ingredient of the offence has not been proved as the appellant had acted in self-defence when he caused those injuries to Jully. At the very least, the defence contends that from the testimony of the prosecution witnesses itself as well as from the evidence elicited from them during their cross-examination, a reasonable doubt had been created on whether the appellant had the necessary intention to kill Jully as alleged. (Judgment: p. 15 line 5 to 11)

A (iii) ... In doing so I accept it that s. 96 of the Penal Code states that: "[N]othing is an offence which is done in the exercise of the right of private defence" and that under s. 100 of the same Code, the appellant's right of private defence of the body extends, subject to certain restrictions mentioned in s. 99, to voluntarily causing the death or
B any other harm to Jully if the appellant reasonably apprehended that Jully was going to assault him and that he would either die or suffer grievous hurt as a consequence of Jully's assault. (Judgment: p. 15 line 23 to 31 - p. 16 line 5 to 6)

(iv) The defence contends that there is already sufficient evidence
C before the court at this stage of the case to show that the appellant had acted in self-defence when he killed Jully. … (Judgment: p. 16 line 8 to 10)

(v) ... Accordingly, the defence contended that the appellant could not possibly have had the requisite *mens rea* to kill Jully, since he had
D acted in self-defence and killed Jully in a situation where if he did not kill Jully, Jully would have killed the appellant. For these reasons the defence says the accused should be discharged and acquitted without his defence being called. (Judgment: p. 16 line 29 to 31 - p. 17 line 5 to 7)

E (vi) Are the matters which are relied on by the appellant sufficient at this stage to raise a reasonable doubt on the appellant's intention to kill Jully? I find not, for the following reasons. (Judgment: p. 17 line 9 to 1)

F (vii) With regard to Jully's alleged grudge and motive to kill the appellant (Judgment: p. 17 line 13) ... So at this stage of the trial, there is no way of ascertaining if the SMS sent to the appellant was really a death threat as alleged because defence counsel never questioned Aramah about what the SMS actually said. (Judgment: p. 17 line
G 19 to 22)

(viii) Even further still, the earlier fight between the appellant and Jully took place on 18 January 2007 and the threatening SMS was allegedly sent soon after that. (Judgment: p. 17 line 24 to 26) ... With regard to Jully's alleged jealousy of the appellant, the evidence shows that
H even after their break-up, Jully continued to be friendly with Aramah and was treated well by her because it was her evidence that Jully still had a key to her room, that he continued to come to her room at night to check on her and in fact on 12 May 2007 itself she had cooked a meal for Jully. In the light of these facts the alleged jealousy
I and grudge which was attributed as a motive for Jully wanting to kill the appellant cannot be given any credence. (Judgment: p. 17 line 29 to 31 and p. 18 line 5 to 10)

(ix) With regard to the defence contention that the appellant had acted in self-defence because it was Jully who attacked the appellant first, I find that the facts and evidence disclosed at this stage of the trial do not support such a contention. I say so for the following reasons. Although the defence say that the appellant could not have formed an intention to kill Jully at Room 10 because there is no evidence that Aramah had informed the appellant that Jully was there on 12 May 2007, it must not be overlooked that when the appellant spoke to Aramah after the killing, he informed her that he had gone to her room to negotiate with Jully and not to kill him. So quite obviously the appellant did know that Jully was at Aramah's room on the day in question and had gone there to look for Jully. (Judgment: p. 18 line 12 to 23)

(x) With regard to the defence contention that the appellant had acted solely in self-defence as Jully had attacked the appellant first, it must not be overlooked that this allegation comes from the mouth of the appellant himself. This is what the appellant had told Aramah and Dr Peter Selestine. These are self exculpatory statements made by the appellant himself. In my judgment, the appellant's assertion that it was Jully who attacked him first and that he was merely acting in self-defence must be tested or considered in the light of the following evidence: (Judgment: p. 18 line 25 - p. 19 line 6):

(i) It was the accused who had gone to look for Jully at Aramah's room that morning to allegedly negotiate;

(ii) It was Aramah's evidence that when she left her room, her room door was intact but when she returned, there were signs that it had been forced open;

(iii) The evidence shows that there was a fight and a struggle in Aramah's room, but from the injuries sustained by Jully and the accused, it can be seen that apart from a 1cm wound on his neck and some injuries to his palms, no other injuries were sustained by the accused while it was Jully who sustained 18 stab wounds, 18 incised wounds, six bruises and 13 abrasions.

(iv) There was a marked absence of any defensive wounds seen on the accused. (Judgment: pp. 19 to 20)

(xi) In my judgment, when all the above fact are looked at together, especially that it was Jully who sustained 18 stab wounds and 18 incised wounds, eight of which were defensive wounds, the facts are more consistent with Jully having acted in self-defence while it was the appellant who was the attacker and that he sustained the wound to his neck and palms when he attacked and struggled with Jully. (Judgment: p. 20 line 20 to 25)

A (xii) The irresistible inference to be drawn from the fact that the appellant had stabbed Jully not just once, twice or thrice but no less than 18 times with a sharp weapon indicates that he intended to cause such bodily injury to Jully which were sufficient in the ordinary course of nature to cause death, as was confirmed by Dr Jessie Hiu. (Judgment: p. 20 line 25 to 30)

(xiii) I am accordingly satisfied that the prosecution has proved the fourth ingredient of the charge against the appellant. (Judgment; p. 21 line 5 to 6)

C (xiv) There are some other submissions made by the defence which I wish to deal with here. It was said that the prosecution had not proved what the murder weapon was. I find in all probability that it was the knife without a handle (exh. P-13) which was recovered from Aramah's room that was the murder weapon. (Judgment p. 21 line 8 to 12) ... The defence also submits that if the knife without a handle was the murder weapon then why was Jully's blood or DNA not found on it? In my view, there may be many reasons for the absence of Jully's blood or DNA on the knife and the court should refrain from speculating on it, but it does not follow that just because Jully's DNA is not found on this knife or I am wrong in accepting Dr Jessie Hiu's evidence that this could have been the knife. (Judgment: p. 21 line 20 to 26)

(xv) ... In my judgment, what the Investigating Officer said was clearly his own opinion on the matter. His conclusion must be considered in the light of all the other proven facts and circumstances which I find clearly do not support the conclusion that Jully attacked the appellant first, although it is probable that the knife without a handle could have caused the injury to the appellant's neck during the fight. (Judgment: p. 22 line 15 to 21)

G (xvi) The defence also complained that the prosecution had unfairly conducted its case against the appellant because according to the defence, the prosecution knew all along that the appellant had acted in self-defence but refused to question its own witnesses about this during the trial. I find no substance in this allegation. As I have indicated earlier, the allegation that the appellant had acted in self-defence is an allegation that originates from him is a self-exculpatory statement he made to others after killing Jully, which is not supported by the other evidence so far revealed at this stage (Judgment: p. 22 line 23 - p. 23 line 6)

I (xvii) It was on the basis of all the above evidence that I found a *prima facie* case had been established against the appellant and called on him to enter on his defence to the offence charged. (Judgment: p. 23 line 8 to 10)

(b) The Defence

(i) The accused elected to give evidence on oath. He testified. ...

(ii) Based on the appellant's own testimony and from his cross-examination of the prosecution witnesses, it is clearly his case that on 12 May 2007 he was attacked by Jully with a knife at Aramah's room and therefore he acted in self-defence when he killed Jully. ...

(iii) With regard to the appellant's claim to have acted in self-defence, the law on the right of private defence in cases such as this is contained in ss. 96, 97, 99, 100, 101, 102 and Exception 2 of s. 300 of the Penal Code. ... On the facts of this case, only paras. (a) and (b) of s. 100 are relevant for consideration. ...

(iv) In evaluating and assessing the defence of the appellant, the critical question before the court is this: Was the appellant acting in self-defence as he says he was when he killed Jully, in that, he had reasonable cause to apprehend death or grievous hurt to himself? The answer to this question will depend on whether the evidence before the court supports the appellant's story that he was attacked by Jully with a knife at Aramah's room and so acted in self-defence of his body and had to kill Jully, otherwise he himself would have been killed. The test of a reasonable cause of apprehension of death or grievous hurt is an objective one. The burden of proving the defence of private defence rests upon the appellant and is discharged on a balance of probabilities and the burden is not a heavy one. This was held by the Court of Appeal in *Wong Teck Choy v. PP* [2005] 3 CLJ 431; [2005] 4 MLJ 693. ...

(v) Reverting to the facts of this case, I do not believe the appellant's story that he had acted in self-defence on the day in question. Although the evidence shows that there was a struggle in the room, I find the appellant's story that he was acting purely in private defence highly improbable for the following reasons:

(1) If it was really true that Jully had attacked the appellant by rushing at him with a knife and that it only took two steps for Jully to reach the appellant in the room, it is reasonable to expect that the appellant would have been stabbed in the back when he turned his back to Jully while trying to leave the room, but absolutely no injury of any sort was found on the appellant's back.

(2) The appellant also testified that when he felt he could not run out of the room, he turned around and had to shield himself against the knife which Jully was holding and blocking Jully's hand with the knife. If what the appellant said was really true then it would be reasonable to expect that some defensive wounds would be found on the appellant, but absolutely no such wounds

were found on him. The appellant did suffer some cuts on his hands but he explained that these were sustained when he allegedly grabbed the knife from Jully's hand. The facts I have just mentioned are not consistent with or indicative of the fact that Jully had been the attacker as the appellant alleged.

(3) The appellant claims that Jully stabbed him on the neck, but it is significant that according to the appellant's own evidence, he sustained this injury during the struggle when Jully allegedly held the appellant's neck in an arm lock. The injury was definitely not a stab wound as the appellant tried to make out, but a cut wound of 1cm long. In describing how he had sustained this neck wound, the appellant said in his own words that "Jully had his left arm round my neck from the side and he was holding the knife in his right hand".

(4) In describing how he had sustained this neck wound, the appellant said in his own words that ... if that is true, then this means that both the left and right side of Jully's neck were not exposed since the left side of his neck was held in an arm lock while the right side of his neck was pressed against Jully's body. I do not see how it was possible for Jully to then stab the appellant on the right side of his neck as alleged. As such, I am more inclined to believe that the appellant sustained the wound during the struggle and not as a result of Jully being the attacker and deliberately stabbing the appellant as alleged.

(vi) The appellant also alleges that Jully had used the knife (exh. P-13) to attack him, but I find the appellant's story that it was Jully who had the knife, difficult to believe for the following reasons:

(1) Firstly, when shown the knife without a handle (exh. P-13), it was Aramah's evidence that she had never seen this knife in her room before and that it was not from her room. ...

(2) Secondly, according to the appellant when he first saw Jully in Aramah's room, Jully was sitting on the bed watching television, but when the appellant tried to discuss with Jully about their relationship with Aramah, Jully stood up holding a knife in hand. On being cross-examined on the point, the appellant admitted that while he was talking with Jully, the latter was not holding a knife and he also did not see from where Jully got the knife when he stood up. I find the appellant's story that Jully had suddenly stood up holding a knife difficult to believe, particularly when what the appellant said is viewed in the light of Aramah's evidence that no knives were kept in her room. Even further still, the fact that the appellant sustained no injuries of any sort despite his having turned his back to Jully

when the appellant was trying to run out of the room, nor were any other defensive wounds found on the appellant is more consistent with the fact that Jully did not attack the appellant with the knife as alleged and that it was the appellant who was the attacker with the knife, which accounts for the many defensive wounds, stab wounds and lacerations found on Jully.

(3) In an attempt to show that it was Jully who was the attacker that was armed with a knife on the 12 May 2004 and that it was only after he had managed to grab the knife away from Jully that he killed him, the appellant gave an account of the struggle that occurred between him and Jully. It was his evidence that he managed to grab the knife away from Jully's hand when Jully became dizzy after being hit on the head with a soy sauce bottle by the appellant. I find that this assertion of the appellant is not supported by the medical evidence given by Dr Jessie Hiu (PW3) who conducted a thorough post mortem examination of Jully's body. Dr Jessie did not find any bruises or injuries on Jully's head that could be associated with being hit by a bottle because the only wound she found on Jully's head was an incised wound on the left side of Jully's head ... Accordingly, there is no medical evidence to support the appellant's assertion that Jully had became "dizzy" thus allowing him to grab the knife away from Jully and thereafter use it to allegedly "defend" himself when Jully allegedly resumed "attacking" him.

(4) I also find that the medical evidence does not support the appellant's assertion that Jully was the attacker who had used a knife. The total absence of any defensive wounds on the appellant speaks for itself and far louder than any words can. …

(5) ... the same reason, I find from the multiple injuries and the nature and extent of those injuries suffered by Jully, that the appellant had in the alleged exercise of private defence exceeded what is reasonably necessary to avert the alleged attack on him.

(6) Learned defence counsel submitted that the fact that the appellant had mentioned it twice to Aramah, soon after the killing that it was Jully who had attacked him first, lends credence to his defence. I do not agree. What the appellant said on the matter has to be viewed in the light of the other evidence and facts I have discussed above. When that is done, I find that what was said by the appellant to Aramah on the point is self serving and cannot be given any weight at all as it is not supported by other independent evidence in this case.

(7) The appellant next said that when he inflicted the injuries on Jully he did not intend to kill Jully. According to the appellant he only remembers stabbing Jully three times, twice on the back

A and once on his chest. According to him, he had no knowledge of all the other injuries inflicted on Jully. I find I cannot give any credence to the appellant's denial. His testimony shows that he knew what he was doing and that he had intended to inflict the injuries seen on Jully. ...

B (8) Given the fact that the appellant was able to remember all the above details including a detailed account of how the managed break out of the arm lock, for the appellant to now turn around and say he only knows that he stabbed Jully three times but not of the other 15 stab wounds and 18 incised wounds he inflicted C on Jully is just not believable; it is indicative of an exercise in selective memory by the appellant. I find on the evidence before the court that the correct and only inference to be drawn from the injuries found on Jully's body is that the appellant had intended to inflict the injuries which he did because by using a D sharp weapon with a cutting edge such as the knife (exh. P-13) to injure Jully, he clearly intended to cause bodily injury to Jully and the injury intended to be inflicted was sufficient in the ordinary course of nature to cause death, which the evidence of Dr Jessie confirms, the stab wounds to Jully's left chest and back of his right chest were injuries of such nature.

E (9) Learned counsel for the appellant also contended that there was other evidence before the court which tended to negative the element of intention on the part of the appellant to kill Jully. Thus it was said that the appellant had made every effort to F avoid Jully after the fight on 18 January 2007 as Jully had sent threatening SMSes and made a phone call to the appellant saying he would "kerjakan" the appellant, so much so that the appellant even went back to Lahad Datu twice when the disturbances from Jully were becoming worse. I do not agree. Whatever may have been the true content of the alleged SMSes and phone call, G and despite the fact that Aramah confirmed that Jully still came to visit her after they broke-off their relationship, I find the appellant could not have been sufficiently scared by the alleged SMSes and phone call nor disturbed by Jully visiting Aramah's room because on each occasion he returned to Lahad Datu, the H appellant would return to Kota Kinabalu again within a short time, and in March had even gone back to stay in the room next to Aramah's. Further, the evidence shows that while Jully would allegedly kick Aramah's room door and cause it damage, he never once disturbed or kick the door of Room 11 even I though he knew the appellant had came back from Lahad Datu in March 2007, despite his alleged threatening SMSes and phone call some four months earlier.

(10) I also do not believe the appellant's claim that he did not know that Jully was in Aramah's room on 12 May 2007, and had merely gone there to change his clothes. I cannot give much weight to the appellant's assertion about his going to Aramah's room to change clothes because it was his evidence that it had become his habit to do so and to keep his clothes in Aramah's room after he had formed a relationship with her, but this aspect of his defence was never put to Aramah while she was giving evidence. ...

(11) The appellant's claim that on 12 May 2007 he had gone to Aramah's room to change his clothes is difficult to believe because the appellant knew that Aramah was not in her room that morning as he had phoned her to arrange for lunch at Centre Point after she finished shopping at Wisma Merdeka. ...

(12) For the same reason, the appellant's claim that on 12 May 2007, it was Jully who had damaged the door to Aramah's room when he kicked it in from the outside because the appellant had allegedly changed the padlock to the door cannot be true because it is Aramah's evidence that Jully still had a key to her room even after they broke-up, and even more importantly, there was no need for Jully to force entry into Aramah's room on 12 May 2007 because it was Aramah's evidence that she had phoned Jully to inform him that she was at home and when he arrived, she was there. So the evidence points to the fact that it was the appellant who had forced open Aramah's door that morning. ... So the evidence points to the fact that it was the appellant who had forced open Aramah's door that morning.

(13) There is yet another piece of evidence to show that the appellant knew that Jully was in Aramah's room on 12 May 2007. It was her evidence that when she spoke to the appellant after the killing, the appellant had informed her that he had not gone to her room to look for trouble but to negotiate with Jully. The appellant would only go to Aramah's room to negotiate with Jully if he knew that Jully was there. ... Despite the appellant's denial of having said what he is alleged to have said to Aramah, I believe her evidence on the point as I see no reason why she would deliberately tell lies in respect of what the appellant said. During the trial Aramah did not hesitate to give evidence in favour of the appellant whenever possible. She was in a relationship with him and it would serve no purpose to her to tell an untruth regarding the appellant.

A (14) For all the above reasons, I find that the appellant has not discharged, on a balance of probabilities, the onus on him of showing that he had acted in private defence when he killed Jully on 12 May 2007. His defence has not raised or created a reasonable doubt that he had acted in self-defence. ...

B (15) Even though I do not believe that the appellant had acted in self-defence when he killed Jully, I have gone on to consider as a whole all the evidence adduced in his defence including what he relies on in the prosecution case, to see whether a reasonable doubt has been raised on the prosecution case or as to his guilt
C but I find that no such doubt has been raised.

[12] The foregoing demonstrates the following.

Judgment On Basis Of Belief

[13] Scrutiny of the grounds of judgment showed that instead of identifying
D the differing conclusions that can be drawn from the facts and the evidence and why other conclusions hold no merit, the High Court relied on its belief in accepting the case for the prosecution and rejecting the defence. This approach is a serious error. It overlooks that the trial is to examine and test the facts and evidence relied upon as to whether the ingredients constituting
E the offence charged is proved beyond reasonable doubt by the prosecution (see s. 180 Criminal Procedure Code). The beliefs were founded upon the testimony of PW14. But the evidence of PW14 upon which the belief in the prosecution case, and the rejection of the defence and the finding of intention to cause such bodily injury sufficient in the ordinary course of nature to cause
F death was based, was not subjected to close scrutiny before accepting it as safe to be relied upon to support a conviction.

[14] We address this issue further below.

Intention And Private Defence

G **[15]** It is clear the High Court appreciated that the defence of self- defence was raised in relation to the fourth ingredient as to intention. However, the High Court failed to appreciate the distinction between self-defence negating intention and private defence under the Penal Code and treated both terms interchangeably.

H **[16]** In simple terms, the defence is because the appellant was defending himself, it was self-defence and it negates the formation of the necessary *mens rea* of intention to kill.

[17] On the other hand, it is provided in the Penal Code that nothing is an offence which is done in the exercise of the right of private defence (s. 96).
I The right of private defence of body and property is provided for by s. 97, and s. 99 provides that there is no right of private defence against acts done or attempted to be done by a public servant acting in good faith under colour

of his office which do not reasonably cause the apprehension of death or of grievous hurt, or upon his direction, where there is time to have recourse to public authorities, or infliction of more harm than is necessary for the purpose of defence. Section 100 provides as to when the right of private defence to the voluntary causing of death. For the purposes of this case, it is available when the assault by the other party may reasonably cause the apprehension that death or grievous hurt will otherwise be the consequence of such assault.

[18] The key distinction made is that the Penal Code provides the defence of private defence for voluntary acts of defence, while the defence in this case is that the acts were acts in self-defence with no intention to cause death or such bodily injury as the offender:

(a) Knows to be likely to cause would cause the death of the other person;

(b) The bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death.

[19] The defence of no intention to cause death or such bodily injury sufficient in the ordinary course of nature to cause death because of self-defence necessarily implied that the injuries inflicted, even though death was caused, were not intended to cause death. Herein is a further significance of the failure to appreciate the distinction between the right of private defence and self-defence. Private defence requires proof upon a balance of probabilities, while all that is required of the appellant in defending on the fourth ingredient is to raise a reasonable doubt as to whether there was intention to cause death or the requisite bodily injury.

[20] It is true that at the stage of the prosecution case, the only material are the questions put by the defence. They were not conceded or accepted by the witnesses. There was no evidence as would raise a reasonable doubt in favour of the appellant. The questions put merely set the foundation for the appellant to substantiate the lines of defence so disclosed by evidence when called to enter upon his defence.

[21] But in this case no effort was made by the prosecution to particularise as to at what point, as is consistent with an intention to cause either death or the requisite bodily injury as would cause death, the two fatal injuries from stabbing that penetrated the lungs were inflicted. Without it being established it remains at the very least possible that they were caused in the course of infliction of injuries in self-defence and with no intention to cause death. The fact that both were in some form of relationship with PW14 gave both the appellant and the deceased some reason to fight with one another in anger. The conclusions that can be drawn as to intention were not necessarily irresistible but remained equivocal. As to intention to cause death or such bodily injury sufficient in the ordinary course of nature to cause death, all that was proved was a high probability of it. In such case, the more liberal

A conclusion ought to be drawn in favour of the appellant to hold that the prosecution had failed to prove its case as required by s. 180 of the Criminal Procedure Code, and the appellant ought not to have been called to enter upon his defence.

Failure To Examine The Evidence Critically

B

[22] The primary evidence in relation to intention were:

(a) Number of injuries; and

(b) Testimony of PW14.

C **Number Of Injuries**

[23] The High Court appreciated that of the total of 54 injuries, 12 were abrasions, six were bruises, 18 were incised wounds and only 18 were stab wounds. The High Court held that of the stab wounds, eight were in the upper back of the left chest, five to the left shoulder area and two were on the right D arm. It was not appreciated this left three stab wounds unaccounted for.

[24] Be that as it may, there were two stab wounds, No. 7 on the left front chest and No. 10 on the back of his right chest, both penetrating the lungs were both capable in the ordinary course of nature to cause death, as these caused bleeding in the left and right chest cavities and collapse of the lungs.

E

[25] The High Court however took the number of injuries as proof of intention:

> The irresistible inference to be drawn from the fact that the accused had stabbed Jully not just once, twice or thrice but no less than 18 times with
F a sharp weapon indicates that he intended to cause such bodily injury to Jully which were sufficient in the ordinary course of nature to cause death, as was confirmed by Dr. Jessie Hiu.
>
> I am accordingly satisfied that the prosecution has proved the 4th ingredient of the charge against the accused.

G **[26]** The High Court failed to consider whether the 52 abrasions, bruises and incised wounds and other stab wounds evidence a fight with no intention to cause death or such bodily injury sufficient in the ordinary course of nature to cause death or an attack with an intention to cause death or such bodily injury sufficient in the ordinary course of nature to cause death. Without such H evidence, what remained before the High Court is evidence of 54 injuries inflicted, two of which are capable of causing death, which is as much evidence of self-defence as it is of an attack by the appellant. Since where there are two or more possible conclusions, the conclusion the more favourable is to be given, it is plain that they were considered and the High I Court could not have concluded there was an intention to cause death or such bodily injury sufficient in the ordinary course of nature to cause death.

Testimony Of PW14

[27] The testimony of PW14 was the basis of beliefs resulting in conviction and sentence under s. 302 of the Penal Code. The High Court failed to scrutinise her testimony:

(a) Why would PW14 go out with her friends leaving the deceased in her room;

(b) It was not explained why when the appellant called her, PW14 used a public phone to call the appellant to arrange to meet at Centre Point;

(c) It was not explained why Yuliana Bt Bakhtiar would call PW14's friend Mary to speak to PW14 when Yuliana thought PW14 was quarrelling with the deceased in her room;

(d) Instead of checking her room when told blood was coming out of her room and on the staircase, PW14 called the appellant;

(e) It was not explained why even after the appellant told her he had killed the deceased, she went to meet with the appellant in his room, and as submitted by the respondent after the appellant left her she called to the deceased before returning to her room;

(f) The respondent's submission was:

> 13. PW14 returned to Room No. 10 after the appellant left her. Before returning, she made a phone call to the deceased but it was not answered. On returning to Room No. 10, she found the deceased lying dead on the floor covered in blood. She later proceeded to find the deceased sister Mary and later both went back to PW14's room, where the police has arrived and began investigation.

when the prosecution evidence was:

> Not long later, Mary met me at Asia City and she asked me why. She asked me why and what happened. I started crying, Mary then embraced me and asked me what really happened. I informed Mary that her brother was killed. She asked me whether if it was true and I said yes. She asked me where Jully was and I told her that Jully was In my room. Mary brought me back to her workplace to inform her boss that she wanted to go to the scene of crime. Mary then contacted her cousins asking them to go to my room. Her cousins then came to Mary's workplace and we all went back to my room.
>
> When we got back there, a crowd had already gathered downstairs. The landlord was there and he would not allow anyone to go up until the police came. After the police arrived, they went up to the scene of crime. Mary and the cousins all waited downstairs. Later, her cousins and Jully's younger brother Max went up to the room. I saw the body of Jully Bin Martin being brought down and put inside the ambulance and was taken away to the hospital.

[28] The grounds of judgment reflected the defence submission as follows:

> … The defence also contended that the accused could not have formed the intention to kill Jully on 12 May 2007 as there is no evidence that Aramah had informed him that Jully was at Room 10 on that day. The defence further contended that there was evidence before the court that a fight had taken place in Aramah's room on 12 May 2007 and that it was Jully who attacked and stabbed the accused first and caused the injury to the accused's neck which wound, if it had been deeper could have caused his death. It was the defence contention that it was in these circumstances that the accused had acted to defend himself and to cause the injuries to Jully which resulted in the latter's death. Accordingly, the defence contended that the accused could not possibly have had the requisite *mens rea* to kill Jully, since he had acted in self-defence and killed Jully in a situation where if he did not kill Jully, Jully would have killed the accused. For these reasons the defence says the accused should be discharged and acquitted without his defence being called. [Judgment p. 16 line 18 - p. 17 line 8]

[29] The High Court reasoned in respect of a death threat as follows (see judgment p. 17 line 13 to 22):

> With regard to Jully's alleged grudge and motive to kill the accused as evidenced by the SMS he allegedly sent the accused, although the defence contends that the SMS contained a death threat, it must not be overlooked that it was learned defence counsel who suggested to Aramah during her cross-examination that the SMS contained a death threat to which Aramah merely agreed. But she said she never read the SMS. So at this stage of the trial, there is no way of ascertaining if the SMS sent to the accused was really a death threat as alleged because defence counsel never questioned Aramah about what the SMS actually said.

[30] In our view, the reasoning to dismiss PW14's reply in cross-examination where she agreed that a SMS sent to the accused by the deceased contained a death threat, is flawed. The answer is not diminished because defence counsel put it in cross-examination. We asked ourselves when else could he ask the question to PW14. Having obtained that answer, it was not for defence counsel but it is for the prosecution to ask the question what the SMS actually said.

[31] Nor can the absence of any evidence to suggest that Jully had done anything between January 2007 and May 2007 to carry out his alleged threat between a fight four months earlier on 18 January 2007 be a reason to dismiss the allegation of a fight, particularly since this part of the reasoning was at the prosecution stage, and before the appellant had opportunity to adduce his own evidence. This was not only placing the burden upon the accused, but expecting evidence from him before the defence was called.

[32] Similarly, it is difficult to follow the reasoning not to give credence to the allegation put of jealousy and grudge which was attributed as a motive for Jully wanting to kill the accused on the grounds given by the High Court

that Jully still had a key to PW14's room. In our view, that he still had a key leads to the inference that the relationship is not over but still continues and the arrival of the appellant, therefore discovery the appellant was still coming to PW14's room, was reason for a fight. There is no evidence that Jully had come to terms with PW14 seeing both him and the appellant.

[33] For these reasons, the testimony of PW14 ought to have been scrutinised specifically as to whether it was safe to rely upon it. This, the High Court overlooked but went directly to accepting her testimony at face value.

[34] In concluding its reasoning on whether the prosecution had proved a *prima facie* case, the High Court held:

> The defence also complained that the prosecution had unfairly conducted its case against the accused because according to the defence, the prosecution knew all along that the accused had acted in self-defence but refused to question its own witnesses about this during the trial. I find no substance in this allegation. As I have indicated earlier, the allegation that the accused had acted in self-defence is an allegation that originates from him. It is a self exculpatory statement he made to others after killing Jully, which is not supported by the other evidence so far revealed at this stage of the case. So the prosecution cannot be accused of having conducted an unfair prosecution against him.

[35] If the above means that if an allegation of facts in one's defence comes from the accused it is discounted, and discounted also because it is self-exculpatory, this is thoroughly contrary to well established authority and a cornerstone of the criminal law that the evaluation is whether a reasonable doubt has been raised. See *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC; *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337 (FC). Though these cases with dealt evaluation at the end of the defence case, the principle applies for the reason that s. 180(4) of the Criminal Procedure Code which defines a *prima facie* case where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

[36] In our view, the errors made the conclusions unsafe as a basis to call the appellant to enter upon his defence.

The Defence

[37] For completeness, we address the rejection of the defence.

[38] The appellant testified on oath. The High Court summed up his testimony fairly and at some length between pp. 23 and 30 of the judgment. At the top of p. 31 of the judgment, it is clear that the High Court had treated self-defence and private defence as interchangeable. The defence of private defence requires proof upon a balance of probabilities (see *Wong Teck Choy v. PP* [2005] 3 CLJ 431; [2005] 4 MLJ 693, 696 CA. The error is in considering that burden as not a heavy one. It is true that proof upon a

balance of probabilities is not a heavy one when compared to proof beyond reasonable doubt. What appears overlooked however that what is being considered is the defence, not prosecution; and (b) the defence case is of acting solely in self-defence, thereby negating formation of any intention to cause death or causing such bodily injury as is likely in the ordinary course of nature to cause death, requires only a reasonable doubt to be established.

[39] We conclude that the High Court had applied a much higher standard than required by law, and failed to follow established case law that what is to be considered is whether the defence established a reasonable doubt, and not whether one believes it or not. The consideration ought to be whether the appellant's defence is not merely possible but is also not in the least probable (See *Miller v. Minister of Pensions* [1947] 2 All ER 372, [1947] 2 KB 372; *Tan Boon Kean v. PP* [1995] 4 CLJ 456 FC; *Lt Kol Yusof Abdul Rahman v. Kol Anuar Md Amin, Yang Dipertua Mahkamah Tentera Pulau Pinang & Anor* [1997] 2 CLJ 752 CA; *PP v. Dato' Seri Anwar Ibrahim* [2014] 4 CLJ 162 CA; *Mohd Nahar Abu Bakar v. PP* [2013] 5 CLJ 977 CA; *Ali Tan Abdullah v. PP* [2013] 4 CLJ 757 CA; *Tan Ong Keong v. PP* [2012] 4 CLJ 223 CA; *Muhammad Rasid Hashim v. PP* [2013] 1 CLJ 333 CA; *Khairiddin Sufi v. PP* [2012] 6 CLJ 457 CA; *Tan Chin Meng v. PP* [2011] 5 CLJ 524 CA; *Mohd Ya'cob Demyati v. PP* [2011] 4 CLJ 758 CA; *Chan Chwen Kong v. PP* [1962] 1 LNS 22 CA).

[40] The error is evident at p. 33 line 19 of the judgment, where the High Court said:

> Reverting to the facts of this case, I do not believe the accused' story that he had acted in self-defence on the day in question. Although the evidence shows that there was a struggle in the room, I find the accused's story that he was acting purely in private defence highly improbable for the following reasons.

[41] Since the High Court did not consider the correct issue, it is unnecessary to deal with the reasons given and is redundant.

[42] On this error also, the appeal ought to have been allowed.

[43] For the foregoing reasons, we allowed the appeal and set aside the conviction and sentence by the High Court.