IN THE HIGH COURT OF MALAYA

IN IPOH PERAK DARUL RIDZUAN

[CRIMINAL TRIAL NO: 45B-01-10/2013]

PUBLIC PROSECUTOR

v.

TEE CHIH WEI

[CRIMINAL TRIAL NO: 45B-02-10/2013]

PUBLIC PROSECUTOR

v.

IZWAN MOHAMAD

[CRIMINAL TRIAL NO:45B-03-10/2013]

PUBLIC PROSECUTOR

v.

KASFUL ANUAR GHAZALI

***EVIDENCE**: Statement - Statement under s. 112 of the Criminal Procedure Code - Admissibility - Police failed to exhaust all reasonable steps to locate witness - Statement recorded four years before trial but efforts to trace witnesses made at eleventh hour - Whether requirement under s. 32 of Evidence Act 1950 was fulfilled - Whether s. 112 statement was admissible*

***CRIMINAL LAW**: Common intention - Participation in criminal act - Murder - Preparation and execution of plan to kill - Whether accused persons committed crime in furtherance of their common intention*

***CRIMINAL PROCEDURE**: Defence - Alibi or denial - Absence of direct evidence to show accused was at crime scene - Prosecution relied on circumstantial evidence - Whether defence of alibi applicable - Whether there was requirement to give notice of alibi to prosecution - Whether accused persons successfully raised reasonable doubt in prosecution case*

[Defendant successfully raised reasonable doubt in prosecution's case. Accused persons acquitted and discharged from charge.]

Case(s) referred to:

Balachandaran v. PP [2005] 1 CLJ 85 FC ***(refd)***

Che Omar Mohd Akhir v. PP [1999] 2 CLJ 780 CA ***(foll)***

Jee Chai Foo v. PP [2014] 1 LNS 694 CA ***(refd)***

Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***

Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***

Mahbub Shah v. King Emperor [1945] AIR PC 118 ***(refd)***

Md Zainudin Raujan v. PP [2013] 4 CLJ 21 FC ***(refd)***

PP v. Datuk Haji Harun Bin Haji Idris [No. 2] [1976] 1 LNS 184 ***(refd)***

PP v. Lee Jun Ho [2011] 6 MLJ 220 CA ***(refd)***

PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***

PP v. Ong Cheng Heong [1998] 4 CLJ 209 HC ***(refd)***

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

Public Prosecutor v. Lee Eng Kooi [1993] 2 CLJ 534 HC ***(refd)***

Prasit Punyang v. PP [2014] 7 CLJ 392 CA ***(refd)***

Public Prosecutor v. Saimin & Ors [1971] 1 LNS 115 HC ***(refd)***

Legislation referred to:

Criminal Procedure Code, ss. 118, 180, 182A, 261, 271

Evidence Act, ss. 27, 32, 112, 114(g)

Penal Code, ss. 34, 302

JUDGMENT

[1] The accused Tee Chih Wei ("OKT1"), Izwan Bin Mohamad ("OKT2") and Kasful Anuar Bin Ghazali ("OKT3") [collectively referred to as "the accused persons"] were charged with the murder of one Ong Chee Leong ("the deceased"). The murder was said to have been committed by the accused persons together in furtherance of their common intention under s. 34 of the Penal Code ("PC").

[2] The charge reads as follows:

> *"Bahawa kamu pada 8 Julai 2012 jam lebih kurang 10.45 pagi di Lot 539, Foong Soon Furniture Trading, Jalan*

Tupai, Taiping di dalam daerah Larut Matang, di dalam Negeri Perak Darul Ridzuan, dalam melaksanakan niat bersama kamu telah menyebabkan kematian Ong Chee Leong No.K.P. 541112-08-5961 dan oleh yang demikian, kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan dan dibaca bersama seksyen 34 Kanun yang sama."

[3] This trial was partly heard by the previous learned Judicial Commissioner ("the learned JC") before it adjourned at the stage of cross-examination of the main witness (PW4) where the said learned JC was subsequently transferred to the Kuala Lumpur High Court. When I took over and presided on the continuing trial of this case on 11 January 2016, the respective learned counsels had no objection for me to proceed with the trial, provided that their request for the hearing dates be vacated to enable them to write to the Right Honourable Chief Judge of Malaya requesting for the learned JC to continue this part heard, be recorded. The learned Deputy Public Prosecutor ("DPP") on the other hand had no objection to either the part heard be postponed or for me to proceed. I have duly examined the notes of evidence and I concluded that the learned JC didn't state any comments or remark regarding the demeanour of PW4 or any of the other witnesses [s. 271 Criminal Procedure Code – ("CPC")]. After careful deliberation and taking into consideration that this is a capital punishment case, time is of paramount importance. The right to recall witnesses as provided for under s. 261 CPC was not invoked by any of the respective counsels. It was my judicious observation and decision that none of the parties would be prejudiced thereof and consequently therefore I proceeded to preside over this part heard.

[4] After the conclusion of the trial and on 11 November 2016, I acquitted and discharged all accused persons (OKT1, OKT2 and OKT3) after hearing and deliberating on their defence. On 18 November 2016, the learned Public Prosecutor filled an appeal against the said decision.

THE PROSECUTION CASE

[5] The prosecution called twenty-six (26) witnesses. The facts established by the prosecution through their witnesses were these. On 8 July 2012, at about 10.00 am, Ang Ah Choo (PW12) and her daughter (not called as a witness) went to Fong Soon Furniture Trading in Taiping ("the said furniture shop") to buy a mattress. There was a man (later known as "the deceased") and a woman (later known as "the deceased's wife") in the said furniture shop. According to PW12, the man was outside the shop when PW12 together with the woman went to the back of the shop into an office space to look at a computer chair since she was also interested to buy a computer chair.

[6] While in the office, PW12 heard noises which she described as sounding like "pranng, pranng" together with the sound of falling items. At PW12's instigation, the deceased's wife went outside to find out what had happened. Not long thereafter, the deceased's wife ran back into the office followed by two masked men whom PW12 said appeared to be Malay men. The men broke the office's glass window, with one of them waving a knife while uttering in Malay, "duit mari-duit mari", while the other ransacked the office. PW12 covered her face with her hands as she was too scared to look. Not long after that PW12 heard one of them said "Jom" and they left the office. The deceased's wife told PW12 that the two men took her computer

and her bag. PW12 and the deceased's wife went out from the office and saw the deceased bloodied body lying on the floor. The deceased's wife asked PW12's daughter to call her daughter. The woman's daughter came and PW12 and her daughter left the furniture shop. PW12 didn't identify any of the accused and neither did she lodge any police report regarding this incident. The deceased's wife (later known as Kok Kwee Lan) and step daughter (later known as Woon Yit Wen and also as OKT1's girlfriend, named Xiao Mei) were not called as witnesses because according to the ASP Seah Chong Seng [PW26-Investigating Officer (IO)], they could not be found. It is to be noted at this stage that the application to admit their s. 112 statements were rejected by this court. I will address this issue later.

[7] Kek Eng Seng (PW15) is the owner of a car repair workshop located opposite the said furniture shop. On 8 July 2012 (he opened his workshop after 9.00am), PW15 heard loud noises as if someone was quarrelling at the furniture shop, the sound of broken glasses and knocking of wall. He went to the shop to check and from across the street, he saw a Malay man came out holding a knife. According to PW15, the Malay man was walking towards a Citra model car (parked in front of the furniture shop), silver in colour bearing registration number 4004. This Malay man however turned back towards the furniture shop and later PW15 heard woman's scream and he saw the Malay coming out from the furniture shop followed by another Malay man who was also holding a knife. The men entered the car from the left side of the car and drove away. In open court, PW15 identified OKT2 as the person he first saw holding the knife even though during cross examination, PW15 admitted that he can only identified 30% of OKT2 during the ID parade that is as regards to OKT2's face and body size only.

[8] According to ASP Abang Kaderi bin Abang Wasli (PW11), the said ID parade was held on 23 July 2012 and the ID parade report was tendered as exhibit P38. PW11 affirmed that during the ID parade, PW15 had only managed to identify 30% of OKT2 as the man who was at the crime scene on that day that is as regards to the chin and body size only.

[9] Lau Choon Wei (PW4) is the main witness in this trial, narrated the several meetings he had with OKT1. According to PW4, OKT1 had a girlfriend in Taiping who was always abused by his step father (the deceased). Hence OKT1 had asked PW4 to help him find someone to assist him to kill the deceased person who lives in Taiping. PW4 then introduced OKT1 to OKT2 and was later introduced to OKT3. Before leaving for Taiping, OKT1 gave PW4 a sum of RM6,000.00 for safe keeping which was later to be given to OKT2 and OKT3 as a reward (*ganjaran*). OKT1 has also requested PW4 to prepare drugs eramine, syabu and cash of RM500.00 for expenses to go to Taiping. OKT1 (driving the Naza Citra), OKT2 and OKT3 eventually left for Taiping at night.

[10] On 8 July 2012 at about 9.00 am, OKT1 called PW4 and confirmed that they are now in Taiping and waiting for time (*menunggu masa*). At about 11.00 am, PW4 received a call from a person named Ah Liang who informed him that the step father of OKT1's girlfriend was robbed and killed. At about 2.00 pm OKT1 called PW4 and said they are on their way back to Johor from Taiping. At about 9-10 pm OKT1 gave PW4 a hand carry bag, licence and identity card of the deceased's wife for PW4's safe keeping. OKT1 had also asked PW4 to dispose of the Naza Citra which PW4 refused. After 2-3 days, sensing that something was not right, PW4 asked to meet with OKT1, OKT2 and OKT3 (all three were identified by PW4). During this

meeting OKT2 gave him a Dell branded laptop which according to OKT2 he had brought it from Taiping. PW4 identified OKT1 as similar to the man in the CCTV recording marked as ID13 (later marked as exhibit P13), PW4 identified OKT2 as the man in the CCTV recording marked as ID14 (later marked as exhibit P14). PW4 has also identified OKT1 at the petrol pump and OKT2 while walking to the Naza Citra (the car used by the accused persons to go to Taiping) in the CCTV recording marked as ID15 (later marked as exhibit P15). PW4 has also identified OKT2 on the day he gave RM6,000.00 to OKT2, in the CCTV recording marked as ID12 (later marked as exhibit P12). (I observed that from P12, the date of recording stated as 12 July 2012). On the day PW4 was arrested he had asked his wife to destroy and burned the above items which his wife did (PW4's wife Choi Pei Chyn was identified by PW4 but not called as a witness).

[11] Dr Mohammad Shafie bin Othman@Osman (PW9) conducted the post-mortem on the deceased on 9 July 2012 at 9.00 a.m. at the Forensic Department, Raja Permaisuri Bainun Hospital, Ipoh. PW9 affirmed that the cause of the deceased's death was 4 stab-wounds to his neck and chest. According to PW9, the incisions and stab-wounds injuries suffered by the deceased were consistent with that of the injuries caused by flat, sharp and pointed object. The deceased was said to have died 12 hours before post-mortem was done. PW9 prepared and documented his findings in the post-mortem report (exhibit P37).

[12] ASP Mohd Hasni bin Mohd Nasir [(SP17) - Pegawai Penyiasat Tempat Kejadian] upon instruction from PW26, went to the crime scene and arrived around 12.10 pm. He managed to lift 4 finger prints at the crime scene, three finger prints on the glass door of the office marked as C1, C2, C3 and a finger print on the

cupboard near the deceased marked as C4. According to Sjn Mat Radzi bin Abdul Aziz (SP21), C1-C4 were sent to Bukit Aman for thumb print comparison and identification. Ng Sman bin Saring (SP14), by referring to his report (exhibit P41) confirmed that the finger print "C3" found at the crime scene belongs to OKT3. Insp Vijaraj a/l Rajamurthi (SP23) had seized a pair of Nike shoes and a pair of shorts from a person by the name of Lasmirah (not called as a witness). Erizasyira bt Basri [(SP8)-Chemist] by referring to her report (exhibit P18) confirmed that the blood stain found on the said Nike shoes was that of the deceased. Dr Chong Xiao Yuan (PW19) confirmed that the blood sample exhibit P48A belongs to OKT3. During cross examination, PW26 however admitted that OKT3's DNA was not found in the shoes and he admitted that he cannot confirmed that the shoes belongs to OKT3.

[13] On 8 July 2012, Kop RF Suhaili Ahmad (PW3) was on duty at the Bilik Gerakan IPD Taiping from 8 a.m. until 4 p.m. He received a phone call from a person named Fauzi (cannot be identified and not called as a witness) informing him of a robbery whereby a Chinese man was badly injured, believed to have been caused by a sharp object. PW3 then informed the MPV to go the location. Insp Suhaini bin Mohamed [(PW7)- IO on duty] upon receiving the instruction from Bilik Gerakan, went to the furniture shop together with Kop Mohd Fauzi bin Abd Jabar [(PW1-photographer]. PW7 saw a man lying in a pool of blood whom PW7 believed to have died. During cross PW7 admitted that when he received the instruction to go to the crime scene he was informed that it was a robbery. After informing PW26, PW7 then went to the Hospital Bainun together with Sjn Razali bin Seman [(PW2)-photographer], to attend the post mortem on the deceased.

[14] Steven Anthony Soosay (PW22) is a Safety and Security Manager of Starbuck Malaysia and through this witness, the CCTV recording of Starbuck in Jusco Tebrau Johor was tendered and marked as P60(A-C) (3 folders). Lau Chin Seng (PW24) owns a car accessories business in Kulai Johor. According to PW24, OKT1 (PW24's customer) did bring a silver coloured Naza Citra to his shop to change the plate number of the car. He can't remember the number that was changed but he confirmed that the new plate number was different from the plate number on the said car.

S. 112 Statements Of Two Other Witnesses Who Were At The Furniture Shop On 8 July 2012

[15] According to PW26, police were unable to serve the subpoenas to Kok Kwee Lan and Woon Yit Wen because they were unable to locate these two witnesses. At this juncture, the learned TPR applied to tender the s. 112 statements made by Kok Kwee Lan and Woon Yit Wen. On being questioned from the learned TPR on the efforts he took to locate these two witnesses, PW26 said he had posted an advertisement in Harian Metro dated 14 March 2016, marked as exhibit P78 and in Sin Chew Jit Poh dated 15 March 2016, marked as exhibit P79.

[16] According to PW26, Kok Kwee Lan's statement was recorded three times because of several questions that needed clarification from this witness. PW26 further stated that upon his instruction, PW7 went to Johor to Kok Kwee Lan's hometown and two other known addresses, her father's address and her daughter's address but fail to locate Kok Kwee Lan. PW26 said that Kok Kwee Lan and Woon Yit Wen were released under s. 118 CPC and the bon of attendance for Kok Kwee Lan

and Woon Yit Wen were tendered and marked P80 and P81 respectively. The learned counsels objected to the tendering of Kok Kwee Lan's and Woon Yit Wen's s. 112 statements, on grounds that the requirements of section 32 of the Evidence Act was not fulfilled. The TPR and the learned counsels then submitted on this issue.

[17] After hearing the said submissions I made the following findings:

(a) This trial had started in 2015 and it was only now that efforts were made to trace these witnesses.

(b) PW26 had only made efforts through advertisement on March 2016 and gave instruction to his officers to look for these witnesses. From the facts made available to the court, I find the police failed to exhaust all reasonable steps to locate these witnesses.

(c) The importance of these two witnesses must have been realised after their s. 112 statements were recorded but however, action to locate them were only taken during this trial and obviously at the eleventh hour when in fact their recorded statements were taken four years ago, and such lackadaisical approach in a murder trial under s. 302 of the Penal Code is unacceptable. I would expect greater efforts and commitment to be made by the prosecution to find and produce such important witnesses for the trial of this case. In short the gravity of this case demands greater effort.

(d) I refer to the decision of the Court of Appeal in *PP v. Lee Jun Ho* [2011] 6 MLJ 220 where Raus Sharif JCA said:

"We are in complete agreement with the reasoning of the learned trial judge. The basis upon which the prosecution

tried to invoke s. 32(1)(i) of the Evidence Act was that the two witnesses could not be found. However, as pointed out by the learned trial judge, actions to trace the two witnesses were only taken in 2008, while in the midst of the trial. The actions were taken five years after recording the witnesses' statements. Thus, as rightly pointed out by the learned trial judge, greater efforts was expected to secure the attendance of the witnesses in such a serious charge. In the absent of such effort, we are of the same view with the learned trial judge that the witnesses' statements of the two key witnesses could not be admitted under s. 32(1)(i) of the Evidence Act".

The decision of the COA is binding on this court. Based on the above reasons, the application to admit the s. 112 statements by Kok Kwee Lan and Woon Yit Wen are not allowed.

Submissions at The End of The Prosecution's Case

[18] Briefly, the learned counsel for OKT1 submitted that the prosecution relied on the evidence of the main witness that is PW4. However, from the evidence of PW4, clearly, he is an accomplice because he did all the acts to assist in the murder. The counsel further submitted that PW4 is not a reliable witness because he didn't lodge any police report. His evidence must be corroborated which in the present case, no corroboration was offered. The learned counsel submitted that PW12 was a customer and PW15 was the person outside the shop who saw OKT2 coming out and entered a car. However, PW15 contradicted his story when during the ID parade where PW15 identified only 30% of OKT2 (figure and the chin only). The reason given by PW15 was that he was scared that something

might happen to him but the counsel further submitted that despite this fact, the police didn't record s. 112 statement from PW15. The fact remains that PW15 had only identified 30% of OKT2 during the ID Parade.

[19] Regarding the car said to be used by the accused persons, the counsel submitted that PW15 in his evidence had only mentioned Citra and not Naza Citra. He submitted that Naza Citra came about because the IO had inquired from SM Chan Kok Choon (PW20) and it was PW20 who reported that there was a Naza Citra WMT 4004 entering the highway heading south at 10.59 am, this is clearly hearsay evidence because although PW20 was called as a witness, PW20 did not testify to this fact. In the circumstances, what the IO had said related to what PW20 had said which clearly constituted hearsay evidence. There was another person who saw the accused persons that is Tan Bee Yee but her evidence was ignored and she was not called as a witness.

[20] The counsel further submitted that the IO investigated Naza Citra with registration number WMT 4004 seen entering the highway with an assumption that the said car was driven by OKT1. However, from the CCTV recording, the Naza Citra bearing registration number WQD 166 was apparently driven by OKT1 and it has nothing to do with the other car bearing registration number WMT 4004 that was being investigated. The learned counsel had also submitted that the evidence of the PW26 is hearsay because he relied on the evidence of these two witnesses (PW12 and PW15).

[21] Briefly, the learned counsel for OKT2 (adopted the submission by the counsel for OKT1) submitted that PW4 did not received the information that a murder had happened from the accused

persons but rather from Ah Liang and the court must judiciously appraise the reliability of PW4. The evidence on the weapon used adduced through PW12 and PW15 postulates that the man entering the furniture shop was supposedly wearing a mask and gloves, but however, nothing was offered in evidence.

[22] Briefly, the learned counsel for the OKT3 (adopted the submissions by the counsel for OKT1 and OKT2) submitted that the fact that the finger print of OKT3 was at the furniture shop doesn't mean that he was at the crime scene when the murder was committed.

[23] The learned DPP submitted that the evidence of PW4 could be relied upon and the fact that the accused persons and PW4 knew each other. From the meetings they had, it showed that there was in fact a plan and intention to kill the deceased. The learned DPP admitted that the prosecution is relying on *circumstantial* evidence but the evidence support the inference that all the accused persons were involved in the said murder. Their movement to Taiping and the evidence from PW4 showed that there was in fact a common intention to kill the deceased. The evidence is supported by the recording of the CCTV that shows the movement of the accused persons from Johor to Taiping.

[24] The learned DPP further submitted that based on the facts adduced the court could make an inference from the aforesaid meetings that the accused persons went to Taiping to commit murder. Though evidence might show that at the beginning that was not the intention but the evidence has shown otherwise. PW15 gave evidence of the appearance of two Malay men after a commotion. The Naza Citra was driven by OKT1 and this is consistent with the evidence of PW4 that had seen all three accused persons leaving for Taiping in the said Naza Citra. The

fact that the car was driven by OKT1 is supported by the evidence of PW15.

[25] The learned DPP further submitted that the investigation of PW26 showed the movement of Naza Citra bearing registration number WQD 166 entering the tol plaza and exiting at the Tol Plaza Changkat Jering as Naza Citra bearing the registration number WMT 4004. And this fact is supported by the evidence of PW15 who said Naza Citra bearing the registration number of 4004 was seen leaving the crime scene on that day. The learned DPP admitted that Naza Citra bearing registration number WQD 166 could not be located until today. This fact is supported by the evidence of PW4 when he said that OKT1 had asked him to dispose of the Naza Citra that OKT1 had used on that particular day.

[26] The learned DPP also submitted that the ID parade is the important element to tie OKT2 to this charge. The evidence of PW15 is consistent when he was able to identify OKT2 as the person who left the furniture shop that particular morning. The explanation by PW15 that he can only identify OKT2 at 30% was due to his own safety is reasonable and ought to be accepted. All the more so when PW15 was unable to identify the other OKT, as this would go to show that PW15 did not concoct a story regarding OKT2. If he had in fact made up the story, why was it that he could not identify the other OKT? All these would go to show that PW15 was in fact telling the truth. The learned DPP urged the court to accept PW15 identification of OKT2 even though at 30%.

[27] The forensic evidence regarding the finger print of OKT3 at the crime scene is material and OKT3 ought to be called for defence and explained why his finger print was found at the crime scene.

Regarding the shoes that was seized by PW7, the learned DPP submitted that ownership of the shoes is not an issue because it was a recovery under section 27of Evidence Act.

[28] The shoes was seized from the house that OKT3 lives in and it is for the OKT3 to explain why the blood of the deceased was found on his shoes. The learned DPP submitted that obviously OKT3 was at the crime scene during the murder and that is why the traces of blood of the deceased could be found on the said shoes. The learned DPP also submitted that all the planning and the execution all goes to show that all three accused had the common intention to kill the deceased.

The Law

[29] Section 180 of the CPC provides that when the case for the prosecution is concluded, the court must consider whether the prosecution has made out a *prima facie* case against the accused. And if the court finds that the prosecution has not made out a *prima facie* case against the accused, the court shall record an order of acquittal. If the court finds that a *prima facie* case has been made out against the accused on the offence charged the court shall call upon the accused to enter on his defence. 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. Based on the established principle of law, before the court can rule that a *prima facie* case has been made out, a maximum evaluation of the credibility of the witnesses must be done at the close of the case for the prosecution (*Balachandaran v. PP* [2005] 1 CLJ 85; *Looi Kow*

Chai & Anor v. PP [2003] 1 CLJ 734; [2003] 2 MLJ 65 and *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457).

[30] Maximum evaluation means the assessment process for the essential purpose of analysing the credibility and reliability as well as trustworthiness of the evidence of the prosecution. Credible evidence is evidence which has been filtered and which has gone through the process of evaluation and any evidence which is not safe to be acted upon should be rejected (*PP v. Ong Cheng Heong* [1998] 4 CLJ 209). Thus, what is required by a trial court is to test the evidence of a witness from all angles as well as its reliability and credibility by taking into account the entire evidence placed before the court. The evidence must not be accepted at face value but has to be tested and evaluated before reliance can be placed on the particular evidence. Further, the trial court has the duty to consider the evidence which favours the defence. This requires a consideration of the existence of any reasonable doubt in the case for the prosecution and if there is any such doubt, there can be no *prima facie* case (*Balachandran v. PP* (*supra*)).

[31] The above principle of law on maximum evaluation should be read together with the principle relating to judicial appreciation of evidence which is set out in the following words of Gopal Sri Ram JCA in *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness's evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case, the approach to judicial appreciation of evidence is the same.

The Court's Findings At The Prosecution Case

[32] The prosecution has to prove the following ingredients:

(i) the death of Ong Chee Leong ("the deceased") had taken place;

(ii) the deceased died as a result of injuries sustained by him;

(iii) the injuries of the deceased were caused by or the results of the acts of the accused persons; and

(iv) the death of the deceased was caused in furtherance of common intention between the accused persons.

(i) The Death Of Ong Chee Leong ("The Deceased")

(ii) The Deceased Died As A Result Of Injuries Sustained By Him

[33] I find the first two ingredients were proven and it is not in dispute that the deceased was one Ong Chee Leong [identified by his son Ong Wooi Loon-(PW6)] and he died due to the injuries that were inflicted on him. The deceased's cause of death was certified and confirmed by PW9 who conducted a post-mortem on the deceased (exhibit P37).

(iii) The Injuries of The Deceased Were Caused by or the Results of the Acts of the Accused Persons

[34] Upon the maximum evaluation of the evidence, I am satisfied that the injuries of the deceased were caused by or the results of the acts of the accused persons. I relied on the evidence of PW12 and PW15 that OKT2 & OKT3 were both holding knives during the incident. I take note that PW4 didn't supply the knives to the accused however I find that this fact failed to negate the fact that the injuries suffered by the deceased was

from a flat, sharp object which I can safely infer as a knife (exhibit 37).

[35] Further, I find that the evidence in respect of this element comes almost solely from the direct evidence of PW4. PW4 who oversaw the preparation and the planning to kill the deceased that had involved all the accused persons. I agree that since PW4 was involved with the accused person from the planning stage, looking for and securing OKT2 and OKT3 to assist OKT1 in killing the deceased, holding the RM6,000.00 and then giving it to OKT2 after the murder was carried out.

[36] All the above act support the submission that PW4 was in fact an accomplice. However the evidence of an accomplice has to be corroborated. I am satisfied that the evidence of PW4 is supported/corroborated by the evidence of CCTV where PW4 identified the car Naza Citra used by the three accused persons to go to Taiping. PW4 identified OKT2 coming out from the car and identified OKT1 pumping the petrol into the car. PW4 had also confirmed that the Naza Citra that he saw in the CCTV is the same Naza Citra that was used by the three accused persons when they left Johor Bahru for Taiping. I find that the IC and licence belonging to the deceased's wife were not disputed evidence. I also find that the evidence of PW4 is supported by the evidence of PW12 who was at the scene and confirmed that the deceased's wife had lost her bag and laptop on that day.

[37] It is clear that the prosecution had relied on the evidence of PW4 regarding the involvement of all the accused persons right from the planning to the execution thereof. The defence had urged the court to disregard the evidence of PW4 for inconsistency with no other supporting evidence. I agree that the evidence of PW4 are at times inconsistent but there is no rule of

law that the testimony of a witness must either be believed in its entirety or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other. It is, therefore, necessary to scrutinize each evidence very carefully as this involves the question of weight to be given to certain evidence in which it is given or arises.

[38] The function of the court in a criminal trial is to find whether the person arraigned before it as the accused is guilty of the offence with which he is charged. For this purpose, the court scans the material on record to find whether there is any reliable and trustworthy evidence upon the basis of which it is possible to anchor the conviction of the accused and to hold that he is guilty of the offence with which he is charged.

[39] I find support in the following cases. In the case of *Che Omar bin Akhir v. PP* [1999] 2 MLJ 689 where COA held that:

> *"(1) Adalah salah untuk berkata bahawa hanya kerana seorang saksi mungkin memberikan keterangan yang bercanggah atau menipu sekali dua, keterangannya patut ditolak sepenuhnya. Di dalam fakta, hakim perbicaraan telah menilai dengan betul dan mempertimbangkan keterangan saksi-saksi yang material dan berhak untuk membuat pendapatnya sama ada untuk menerima atau menolak keterangan mereka"*

In the celebrated case of *PP v. Datuk Harun Bin Haji Idris [No. 2]* [1976] 1 LNS 184 HRH, the late Raja Azlan Shah said:

> *"There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is fully competent, for good and cogent reasons, to accept*

> *one part of the testimony of a witness and to reject the other. It is, therefore, necessary to scrutinize each evidence very carefully as this involves the question of weight to be given to certain evidence in particular circumstances."*

In the case of *PP v. Lee Eng Kooi* [1993] 2 MLJ 322, it was held that:

> *"The function of the court in a criminal trial is to find whether the person arraigned before it as the accused is guilty of the offence with which he is charged. For this purpose, the court scans the material on record to find whether there is any reliable and trustworthy evidence upon the basis of which it is possible to found the conviction of the accused and to hold that he is guilty of the offence with which he is charged"*

[40] I find that the evidence of the witnesses above were consistent and clearly showed that the OKT1, OKT2 and OKT3 were involved in the murder. The evidence of PW4 were consistent in showing that there were in fact discussion, preparation and execution of the plan to kill the deceased person. I find that there is no reason for me to make a finding that the evidence of PW4, PW12 and PW15 as stated in the above were not acceptable as credible evidence. Hence I find the evidence of the prosecution witnesses are reliable and trustworthy.

(iv) The Death of the Deceased Was Caused In Furtherance of Common Intention between the Accused Persons

[41] The charge against the accused persons was under s. 302 read together with s. 34 of the Penal Code ("PC") where they were said to have committed the crime in furtherance of their common intention.

[42] S. 34 PC lays down only a rule of evidence to infer joint responsibility for a criminal act performed by a plurality of persons. This section is drafted in such a way so as to meet situations where it would be difficult to identify the exact acts of individual members of a party who acted in furtherance of their common intention. It allows for the imposition of the liability of the person who actually perpetrated the crime on to a participant whose participation contributed to the result, though he could not be proved to have committed the *actus reus* himself.

[43] On a charge involving common intention, the prosecution has to show that there was a pre-arranged plan to commit the crime and the crime forming the subject matter of the charge was done in concert pursuant to that pre-arranged plan. Further on, from the principle laid down in the case of *Mahbub Shah v. King Emperor* [1945] AIR PC 118, pre-arrangement need not exist in the sense of a prior plan. The plan may develop on the spot. Again, the forensic evidence specifically one of the fingerprints lifted at the furniture shop belongs to OKT3. I find that the accused persons, whether actively or passively, had participated in one way or another, in the act constituting the offence. I opined so because the OKT2 and OKT3 had left the crime scene in a car that was driven by another person which I can safely infer it was OKT1 because of the evidence of PW4 who identified the three

accused persons as persons who was in the Naza Citra and evidence of PW23 who confirmed through CCTV recording that the accused persons were at the Petronas Skudai, Johor Bahru [refer to his police report exhibit P68 and P14 (CCTV recording)]. From all of these facts and circumstances adduced before this court I hold that it is safe to conclude that the element of common intention existed amongst the accused persons to commit the said crime.

[44] At the end of the prosecution case, the court's duty is to decide whether the prosecution has succeeded in proving a *prima facie* case against the accused persons as provided for under section 180 CPC. In *Looi Kow Chai v. PP* (*supra*), Court of Appeal said:

> *"It is the duty of a judge sitting alone to determine at the close of the prosecution's case, as a trier of fact, whether the prosecution had made out a prima facie case. He must subject the prosecution evidence to maximum evaluation and ask himself whether he would be prepared to convict the accused on the totality of the evidence contained in the prosecution's case if he were to decide to call upon the accused to enter his defence and the accused had elected to remain silent. If the answer to that question is in the negative, then no prima facie case would have been made out and the accused would be entitled to an acquittal. There was no burden on the prosecution to prove its case beyond a reasonable doubt at the close of the prosecution's case".*

In *Balachandran v. PP* (*supra*), Federal Court decided as follows:

> *"A prima facie case is one that is sufficient for the accused to answer, and the evidence adduced must be such*

that it can only be surmounted by evidence in rebuttal. The force of that evidence must, if unrebutted, be sufficient to induce a state of belief that the facts as they stand are as stated in the charge. In order to make a finding the court must, at the close of the prosecution's case, undertake a positive evaluation of the credibility and reliability of all the evidence adduced to determine whether all the elements of the offence have been established. If the evidence is unrebutted, and the accused remain silent, he must be convicted. Therefore, the test to be applied at the end of the prosecution's case is whether there is sufficient evidence to convict the accused if he chooses to remain silent, which if answered in the affirmative means that a prima facie case has been made out. This requires a consideration of the existence of any reasonable doubt in the prosecution's case, which if it exists, cannot lead to the finding of a prima facie case having been made out."

In *Jee Chai Foo v. PP* [2014] 6 MLRA Court of Appeal said:

"(1) By virtue of s. 180 of the Criminal Procedure Code ('CPC'), when the case for the prosecution is concluded, the court must consider whether the prosecution has made out a prima facie case against the accused. Section 180 (4) of the CPC provides that 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. 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. Maximum evaluation is the assessment process for analysing the credibility and

reliability as well as the trustworthiness of the evidence of the prosecution. 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. It is also the duty of the trial court to consider the evidence which favours the defence."

[45] Based on the above and after a maximum evaluation of the evidence tendered by the prosecution I find that the prosecution has proven a *prima facie* case against the accused persons and the accused persons were therefore called to enter their defence against the said charge. After giving the accused persons the three options available to them, they choose to give evidence on oath.

The Defence Case

[46] Before going into the detail of the defence forwarded by the accused persons, this court must reiterate that at this stage the burden to prove the guilt of the accused persons remained with the prosecution and that burden is one beyond reasonable doubt. The burden never shifted to the accused persons. The accused persons needed only to raise a reasonable doubt on the rest of the prosecution case for them to earn an acquittal. This court must evaluate the defence in light of the *prima facie* evidence already proven at the prosecution stage. At this juncture, the accused persons must raise a reasonable doubt on the truth of the prosecution case.

[47] All of the accused persons in their defence consistently denied that they have the common intention to kill the deceased person. OKT1 in his defence admitted that he has a girlfriend by the name of Xiao Mei/Woon Yit Wen. Their relationship was not

approved by Xiao Mei's step father (the deceased). Since Xiao Mei defied her step-father, she was always scolded and hit by the deceased. OKT1 admitted that he had on occasions, warned the deceased to treat Xiao Mei and Xiao Mei's mother better but it was ignored and the said abuse continued. About two months before the incident, OKT1 met his friend by the name of Albert/Lau Choon Wei (PW4) and informed him that OKT1 must warn the deceased to stop abusing Xiao Mei and her mother and to treat them better. PW4 agreed to help OKT1 and will look for people to assist OKT1 to warn the deceased. OKT1 then gave PW4 RM6,000.00 to help him finds these persons.

[48] OKT1 was then introduced to OKT2 and eventually OKT3 (OKT3 was brought in by OKT2 to assist him). OKT1, OKT2 and OKT3 then left for Taiping but dropped off OKT2 in Kuala Lumpur and OKT1 and OKT3 then proceeded to Taiping. However before they reached Taiping, a person by the name of Ah Liang called OKT1 and informed him that the deceased was robbed and killed on that day. OKT1 and OKT2 then decided to abandon their trip to Taiping and made a u-turn back to Kuala Lumpur. OKT1 denied that he went to Taiping.

[49] OKT2 in his evidence affirmed the story by OKT1. According to OKT2, when OKT1 and OKT3 was about to leave for Taiping, OKT2 has asked for a lift to Kuala Lumpur because he wanted to visit his sister in Kuala Lumpur. OKT2 denied that he went to Taiping with OKT1 and OKT3. OKT3 in his evidence affirmed the story of OKT1 and OKT3. According to OKT3, he worked as a lorry attendant with a furniture shop. When approached by OKT2 who is his friend, he agreed to assist OKT2 in giving a warning to the deceased. As a lorry attendant OKT3 has travelled to many states and he might have been to the said furniture shop in Taiping but he can't remember when. All the

accused persons admitted that they went together to Taiping by using a Naza Citra however none of them ever reached Taiping on the said day and time. OKT2 was dropped off in Kuala Lumpur whereas OK1 and OKT2 had made a U-turn when they were informed by Ah Liang the deceased was robbed and killed.

[50] The accused persons were consistent in saying that the reason why they all went to Taiping were to scare and to give a warning to the deceased to better treat Xiao Mei and her mother and they never had the intention to kill the deceased. OKT1 denied meeting PW4 and further denied that he ever gave PW4 any LV bag containing the identity card and licence belonging to the deceased's wife. He also denied suggesting to PW4 to run away to Thailand and neither did he ever suggested to PW4 to dispose of the said Naza Citra.

Submissions at The End of The Defence Case

[51] The learned counsel for OKT1 submitted that the prosecution is relying on s. 34 PC because of the evidence by PW4, there is no witness who can identify OKT1 at the scene. There was no evidence which can place OKT1 at the scene of the crime and the only avenue left is s. 34 PC. The learned counsel submitted that PW4 is not a truthful witness because of his contradicting evidence. The common intention of the accused persons was to warn and not to murder and the learned counsel had put that to PW4 who then agreed to that proposition during cross examination at the prosecution stage. Therefore, it would be misleading to say the defence had never put this proposition across.

[52] The learned counsel further submitted that Ah Liang is not a fictional character and in fact Ah Liang was mentioned by PW4

in his examination in chief at the prosecution stage. He submitted further that from the facts adduced it could be gathered that OKT1 had in fact made a U-turn and did not proceeded to Taiping. Regarding the issue of alibi, no direct evidence placing the OKT1 at the scene of the crime was offered by the prosecution and it raises no burden on the defence to prove otherwise. The learned counsel submitted that the defence had successfully raised reasonable doubt in the prosecution case and pray that OKT1 be acquitted and discharged.

[53] The counsel for OKT2 adopted the submission by the counsel for OKT1 and further submitted that there is reasonable doubt raised by OKT2. There was no direct evidence to show that OKT2 committed this murder. The only evidence available is the evidence of PW15 who saw OKT2 in the vicinity of the crime scene on that day. However, the evidence of PW15 is suspect since he was only able to identify 30% (as regards to his chin and body) of OKT2. The learned counsel submitted that PW15 only saw from a distance and even then for a short period of time only.

[54] It is submitted by the learned counsel that it is not reasonable that PW15 can only identify 30% of OKT2 during ID Parade that was held on 23 July 2012 but now after 3 1/2 years later, PW15 is able to identify OKT2 in the open court. The reason given by PW15 that he was able to identify 30% for safety reason is not acceptable. The counsel also argued that PW15 had never in his evidence provided the time that he saw OKT2 at the crime scene whereas in the charge it is very specific with time mentioned at 10.45 am. The learned counsel postulates that looking at the evidence of PW15 in comparison to the evidence of OKT2, the evidence of PW15 is not safe to be relied upon by this court.

[55] The evidence of OKT 2 is consistent with the evidence of OKT1 in that they were never at the crime scene. As regards to the defence of alibi, the learned counsel adopted the submission by the counsel for OKT1 and submitted that there is no evidence to show to the satisfaction of this court that OKT2 was at the crime scene on that particular date. He submitted that it is not about the weakness of the defence case but the strength of the prosecution case and in that respect the learned counsel submitted that the defence had successfully raised reasonable doubt in the prosecution case and pray that the OKT2 be acquitted and discharged.

[56] The counsel for OKT3 adopted the submissions by the counsel for OKT1 and OKT2 and submitted that the finger print report, based on the evidence tendered by the prosecution merely goes to show that the said finger print was found. However that evidence alone is not sufficient to attach guilt as something more is needed. The prosecution failed to prove whether OKT3 was in fact at the material time present at the crime scene during the commission of the alleged murder. Alibi does not apply since there is no independent evidence placing OKT3 at the crime scene.

[57] The learned counsel also submitted that the defence has claimed that the shoes with the blood stain belongs to OKT3's brother Mohd Jumaat. The prosecution failed to call Mohd Jumaat as a rebuttal witness and neither did any statement was recorded from the said Mohd Jumaat to show otherwise. The evidence regarding the shoes belonging to Mohd Jumaat was never challenged by the prosecution. No DNA evidence of OKT3 was found on those shoes. In this regard it is not the duty of the defence to call Mohd Jumaat. Therefore the counsel submitted that the failure by the prosecution to call Mohd Jumaat as a

rebuttal witness warrants the court to invoke an adverse inference under s. 114 (g) of EA against the prosecution

[58] The learned DPP submitted that the prosecution witnesses had given evidence that the accused persons were involved in this crime as charged. The PW4 had meetings, planning and preparation with the accused persons to kill the deceased and that cannot be disputed.

[59] The main issue is either to kill or just to warn the deceased. PW4 is a reliable and credible witness and his evidence didn't falter during cross and during re-examination. The court can access the evidence of PW4 who had a final meeting with the accused persons at 2.00 am whereby the accused persons left Johor Bahru for Taiping. The intention to kill can arise at any time. The situation is similar even if the initial intention of the accused persons were to merely warn the deceased but the end result brought about the murder of the deceased.

[60] The pathologist confirmed that the deceased death was caused by 4 stab wounds. PW15 saw OKT2 at the crime scene. OKT3 finger print was found at the crime scene. It was never denied that OKT2 did use the said shoes and deceased blood was found on one of those shoes. The learned DPP submitted further that since defence proffered the defence of alibi then prior notice ought to be given. He submitted that the defence has failed to raise any doubt in the prosecution case and consequently the prosecution has proven its case beyond reasonable doubt. The accused persons must be found guilty of the charge.

The Law

[61] Section 182A CPC set out the procedure and duty of a trial court at the conclusion of the defence case that 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. 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. If the Court finds that the prosecution has not proved its case beyond reasonable doubt, the Court shall record an order of acquittal.

[62] In *Md Zainudin bin Raujan v. Public Prosecutor* [2013] 4 CLJ 21, 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 LNS 82; [1963] 1 MLJ 263 with regard to the approach to be taken in evaluating the evidence of the defence."*

[63] Section 182A states that "all" the evidence must be considered by the court. It is to be noted that emphasis has been laid on the phrase "all". In *Prasit Punyang v. Public Prosecutor* [2014] 7 CLJ 392; [2014] 4 MLJ 282, it was held as follows:

> *"In accordance with the provisions of s. 182A(1) of the Criminal Procedure Code, it is the bounden duty of the learned JC, at the conclusion of the trial, to consider all the evidence adduced before him and shall decide whether the prosecution has proved its case beyond reasonable*

doubt. The legislature has advisedly used the term all the evidence. The emphasis must be on the word all."

[64] What amounts to a "reasonable doubt" itself is not defined in section 182A of the Criminal Procedure Code. However, there is a plethora of case law as to its meaning. In *Public Prosecutor v. Saimin* [1971] MLJ 16, it was held by Sharma J that:

"*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.*"

[65] In the case of *Public Prosecutor v. Datuk Haji Harun bin Haji Idris & Ors* [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.*"

[66] It can be summarised therefore that the phrase "reasonable doubt" excludes fanciful or imaginary doubts or stories that are

so obviously conjured up so as not to be in accord with the ordinary course of nature or human conduct when viewed and appraised from the test of reasonableness. The foregoing of course, are only guidelines and the court must apply these according to all the circumstances of the case at hand.

[67] 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 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."

[68] Following from the above, 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.

The Court's Findings At The Defence Case

[69] After maximum evaluation of all the evidence available I find that the evidence of OKT1-OKT3 are consistent is saying that they were not at the said furniture shop when the murder took place. It is obvious that the prosecution relied on *circumstantial* evidence and the main witness PW4 who had narrated the story of the preparation and execution for this murder that involved all the accused persons. I have not over looked the fact that during the cross examination of PW4, he said that there was no pact (*pakatan*) to kill the deceased and instead the pact was to warn and scare off the deceased and to better treat Xiao Mei and her mother. I find that this fact was not re-examined at all by the prosecution. I find that there is in fact a reasonable doubt as to

the pact to kill the deceased. I opined so because the evidence of PW4 is consistent with the evidence of the accused persons that the pact they have was to warn and scare the deceased only and there was no intention to kill the deceased at all.

[70] I agree with the submission by the learned counsel for OKT1 that PW4 seems to have changed his evidence regarding this pact when during examination in chief PW4 said there was a pact by the accused persons to kill the deceased but he nevertheless changed his evidence during cross when he agreed to the suggestion by the counsels that there was never a pact to kill the deceased. Obviously PW4 has given contradictory evidence but he was never made a hostile witness nor has an impeachment proceeding taken against PW4.

[71] I find that this fact made the evidence of PW4 that there was never a pact by the accused persons to kill the deceased most plausible. The learned counsel further submitted that the only evidence that involves OKT1 is regarding the fact that he wanted to warn and scare the deceased only. This unchallenged evidence by PW4 had positively supported the fact that OKT1 had only intended to warn and scare the deceased. I find that a person by the name of Ah Liang (who called OKT1 and OKT3 and made them make a U-turn and who also called PW4 to inform him of the deceased's death) raised by the defence during the prosecution case was never rebutted by the prosecution and consequently I would agree with the submission of the learned counsels that the prosecution cannot now at the stage of the defence propose or have this court believed that Ah Liang is a fictional character

[72] I also agree with the submission by the learned counsel for OKT1 and OKT2 that the prosecution had failed to cross

examined these two-accused persons regarding their evidence that they had only intended to warn the deceased. The failure by the prosecution to cross examine the said OKT1 and OKT2 on a crucial part of the case will amount to a tacit acceptance of OKT1 and OKT2 version of the story in that they had only wanted to warn the deceased.

[73] Regarding alibi, the learned DPP contended that by claiming that the accused persons were not at the crime scene during the murder that would amount to a defence of alibi and hence notice ought to be given to the prosecution. However, the learned counsels submitted that their defence is not one of alibi because there was no evidence to show that the accused persons were at the scene of the crime when the murder took place. Therefore, no notice to the prosecution is required. It was submitted by the learned counsels that the defence is not under a supposed duty to prove otherwise and therefore they do not have to give the notice of alibi. The counsels submitted that the accused persons were consistent in their evidence that they didn't proceed to Taiping when they were informed by Ah Liang that the deceased was robbed and killed. I agree with the learned counsels that since there was no evidence to place the accused persons at the scene of the crime when the murder took place, it is not alibi as such and the requirement for notice to the prosecution is not required.

[74] Regarding the evidence of PW15 who had identified OKT3 in court as the Malay man he saw leaving the furniture shop. It must be remembered that PW15 had only managed to identify OKT3 for 30% only during the ID parade which was done on 23 July 2012 which was only days after the murder of the deceased. Whereas after a lapse of 3 1/2 years PW15 came to court and can identify the OKT3 as the Malay man whom he saw leaving furniture shop on that said day. PW15 admitted that he might be

mistaken and again this evidence was not re-examined by the learned prosecutor. I believe the evidence of PW15 had been successfully challenged by the defence and hence I find it is unsafe to be relied upon. On a maximum evaluation of the main witnesses of the prosecution whom failed to be consistent as compared to the consistency of the evidence of the accused persons. I find that the evidence of the prosecution witnesses in particular as regards to the evidence of PW4 and PW15 has been successfully challenged by the defence and could no longer be relied upon. I also find that the finger print of OKT3 at the furniture shop is only evidence to show that OKT3 was at the furniture shop but however I am of the opinion that it is not enough evidence to show that OKT3 was at the furniture shop during the commission of the crime.

[75] Based on the above maximum evaluation of the evidence of the prosecution and the defence, I find that the defence has succeeded in raising reasonable doubt in the prosecution case and consequently therefore, the prosecution has failed to prove their case beyond reasonable doubt. As is mandated by law, I therefore acquit and discharge the accused persons from the said charge.

Dated: 5 JANUARY 2017

(HAYATUL AKMAL ABDUL AZIZ)
Judicial Comissioner
Ipoh High Court
Perak

COUNSEL:

For the Prosecution - Harris Ong Jefferey Ong, Deputy Public Prosecutor

For the OKT 1 - Kamarul Hisham Kamaruddin, Muhammad Ashraff Mohd Diah & Mohd Ruzaini Zulkifli; The chambers of Kamarul Hisham & Hasnal Rezua

For the OKT 2 - Charan Singh & Jagdave Singh; Nurul & Charan

Santhiram Vello; Charanjit, V Santhiran & Partners

For the OKT 3 - Ranjit Singh; Ranjit Singh Sandhu & Co