MOHAMMED RAFI v. PP & OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
BALIA YUSOF WAHI JCA
MOHTARUDIN BAKI JCA
TENGKU MAIMUN TUAN MAT JCA
[CRIMINAL APPEALS NO: B-05-350-12-2011,
B-05-351-12-2011 & B-05-352-12-2011]
17 DECEMBER 2014

CRIMINAL LAW: *Firearms (Increased Penalties) Act 1971 – Sections 3 & 3A – Discharging gunshots from pistol during scheduled offence – Whether first and second appellants accomplices in discharge of firearms – Element of knowledge – Whether proved – Whether first and second appellants had knowledge that third appellant carried firearms – Identity of deceased – Whether proved – Admissibility of post mortem report concluding death caused by firearm injury – Whether produced in accordance with s. 32 Evidence Act 1950 – Whether fourth person could have fired shots that killed deceased – Identification parade – Whether properly held – Whether court identification of third appellant of value or significance – Prosecution's failure to call important witnesses – Whether there were fatal gaps in prosecution's cases – Whether there were infirmities in prosecution's case – Whether conviction of appellants safe*

CRIMINAL PROCEDURE: *Appeal – Conviction and sentence – Appeal against – Appellants charged under ss. 3 & 3A of the Firearms (Increased Penalties) Act 1971 – Discharging gunshots from pistol during scheduled offence – Whether first and second appellants accomplices in discharge of firearms – Element of knowledge – Whether proved – Whether first and second appellants had knowledge that third appellant carried firearms – Identity of deceased – Whether proved – Admissibility of post mortem report concluding death caused by firearm injury – Whether produced in accordance with s. 32 Evidence Act 1950 – Whether fourth person could have fired shots that killed deceased – Identification parade – Whether properly held – Whether court identification of third appellant of little value or significance – Prosecution's failure to call important witnesses – Whether there were fatal gaps in prosecution's cases – Whether there were infirmities in prosecution's case – Whether conviction of appellants safe*

The first and second appellants were charged under s. 3A Firearms (Increased Penalties) Act 1971 ('the Act') for being accomplices in a case of discharge of a firearm at the time of committing an offence with intent to cause death or hurt on any person. The third appellant was charged under s. 3 of the Act for discharging a firearm in the commission of a scheduled offence. All three appellants were found guilty, convicted and sentenced to death by the High Court. They have filed separate appeals, hence, the three appeals were heard together before this court. On the material date, 17 March 2006, the deceased and SP10 were getting into a car outside a supermarket when a male, who was later identified as the third appellant, had

A approached the deceased and asked him for money while pointing a pistol at him. In an ensuing struggle, SP10 heard a gunshot and the scream of the deceased, who was then pushed into a car whilst SP10 was also dragged into the same car by another person. SP10 saw that there were a few men inside the car. Along the way, SP10 was asked to leave the car at a place he did
B not know and at that time SP10 stated that there were no movements by the deceased, who had been in the backseat of the car. Subsequently, SP3, a security guard, found the body of the deceased in an open space and alerted the police. A year later, a pistol (exh. P20B) was found in the possession of one Haniffa at the same time of the arrest of the third appellant. Haniffa was
C charged for possession of the same but no investigation was carried out on Haniffa as to his involvement in the present case. In the appeal herein, a number of issues were raised for the first and second appellants which were (i) the identity of the deceased had not been proven and related to this, was the issue on the post mortem report marked as ID38; (ii) the involvement and degree of participation of the first and second appellants and proof of
D their intentions; (iii) the existence of a fourth person named 'Thambi'; and (iv) the non-calling of important witnesses. The third appellant adopted the submissions of the first and second appellants *in toto* and added another issue on the identification parade, which he alleged was improper and highly irregular.

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Held (allowing appeals; acquitting and discharging appellants)
Per Balia Yusof Wahi JCA delivering the judgment of the court:

(1) The charge against both the first and second appellants under s. 3A of the Act required the element of knowledge to be proven. The ingredient
F of the offence that both the first and second appellants had knowledge that the third appellant carried a firearm at the time of the commission of the scheduled offence of robbery with intent to cause death had not been proven by the prosecution. In so far as the involvement of the first and second appellants was concerned, the evidence merely suggested
G that while the shooting was carried out by the third appellant, the first appellant was merely driving the car away from the supermarket car park and the deceased was seated in between the second appellant and SP10. There was no evidence which showed that the first and second appellants may reasonably be presumed to have knowledge that the third appellant had a firearm. The trial judge had found that being at the scene
H of the crime when the robbery and the discharge of the firearm was committed was sufficient to hold both the first and second appellants as being involved in the crime. The trial judge had fallen into error in so holding. (paras 15 & 16)

I **(2)** The reliance placed by the trial judge on ID38 in concluding that death was caused by firearms injury to the chest was misplaced. ID38 was inadmissible as evidence. Its production was not in accordance with s. 32 of the Evidence Act 1950 and it was merely put in for

identification. There were also other infirmities in ID38 itself in that the identity of the deceased had not been satisfactorily proven. SP10 who would be the best person to identify the deceased to the pathologist who carried out the post mortem did not do so. He only identified the deceased from the photographs shown but not for purpose of identification at the autopsy. Another person who would be able to positively identify the deceased would be the cousin, Mujibur Rahman, as stated in ID38 but he too was not called to testify on this issue. Further, the oral testimony of SP15 stated that he saw a naked dead body at the scene and the naked body was brought to the hospital for post mortem. Whereas ID38 stated that the body was dressed in blue shirt and grey slacks. Further, the post mortem report merely showed two firearms entry wounds and not three as the trial judge had found. This was an erroneous finding made by the trial judge. (paras 18, 28 & 31)

(3) The gist of the three appellants' defence was that it was one Thambi who had the firearm and fired the shot that killed the deceased. The trial judge had acknowledged the existence or rather the presence of the fourth person as claimed by the defence. The evidence of SP10 confirmed that there was a fourth person, who was not only in the car when the deceased was taken away after being shot at the car park, but also before the shooting itself. The existence of the fourth person as claimed by the defence could not be a bare denial. The fourth person did exist and it was part of the prosecution's case. The conclusion reached by the trial judge was plainly erroneous. (paras 32 & 34)

(4) Haniffa was an important witness who could testify on the causal link between the pistol allegedly used by the third appellant and the pistol for which he was charged for being in possession of. How the same pistol changed hands between the third appellant and Haniffa could only be explained by Haniffa. The failure of the prosecution to call Haniffa left a gap in the prosecution's case against the appellants, a gap which in the circumstances was fatal. (paras 36 & 37)

(5) When the manner of the identification parade held was unfair to the accused, the subsequent identification in court was of little value or significance. In the instant case, having considered the factual matrix of the matter on the aspect of identification, the court identification of the third appellant by SP10 was of little value or significance. The identification of the appellant was an essential part of the prosecution's case which needed to be proven satisfactorily. The identification parade was improperly held and unfair to the third appellant. (para 44)

(6) There were merits in the appeal by the three appellants. Given the errors committed by the trial judge and the infirmities in the prosecution's case, the conviction of the appellants were unsafe. In a criminal case, the court's duty is to consider whether the conviction of the appellant

A is right. It is not whether the decision of the trial judge is wrong but whether the conviction is safe (*Mohd Johi Said & Anor v. PP*, refd). (para 45)

Bahasa Malaysia *Translation Of Headnotes*

B Perayu pertama dan kedua dipertuduh di bawah s. 3A Akta Senjata Api (Penalti Lebih Berat) 1971 ('Akta') kerana menjadi rakan jenayah dalam kes melepaskan tembakan pada masa melakukan satu kesalahan dengan niat menyebabkan kematian atau kecederaan ke atas seseorang. Perayu ketiga dipertuduh di bawah s. 3 Akta kerana melepaskan das tembakan semasa melakukan kesalahan berjadual. Ketiga-tiga perayu didapati bersalah, C disabitkan dan dijatuhkan hukuman mati oleh Mahkamah Tinggi. Mereka telah memfailkan rayuan secara berasingan, dengan itu, ketiga-tiga rayuan didengar bersama di mahkamah ini. Pada tarikh material, 17 Mac 2006, si mati dan SP10 sedang memasuki sebuah kereta di hadapan satu pasar raya apabila seorang lelaki, yang kemudiannya dikenal pasti sebagai perayu D ketiga, telah mendekati si mati dan meminta duit sambil mengacukan pistol kepadanya. Dalam pergelutan yang berlaku selepas itu, SP10 mendengar bunyi tembakan dan jeritan si mati, yang telah ditolak ke dalam sebuah kereta manakala SP10 juga telah diheret ke dalam kereta yang sama oleh seorang lagi. SP10 melihat bahawa terdapat beberapa orang lelaki dalam E kereta tersebut. Dalam perjalanan seterusnya, SP10 diminta keluar dari kereta di suatu tempat yang dia tidak diketahuinya dan pada waktu itu SP10 menyatakan bahawa si mati yang berada di bahagian belakang kereta sudah berhenti bergerak. Berikutnya, SP3, seorang pengawal keselamatan, menemui mayat si mati di kawasan terbuka dan melaporkannya pada pihak F polis. Setahun kemudian, sepucuk pistol (eks. P20B) dijumpai dalam milikan seorang yang bernama Haniffa dan pada waktu yang sama perayu ketiga telah ditangkap. Hanifa dipertuduh mempunyai milikan ke atas senjata api itu tetapi tiada siasatan dijalankan ke atas Haniffa berkenaan penglibatannya dalam kes ini. Dalam rayuan ini, beberapa isu telah dibangkitkan untuk perayu pertama dan kedua iaitu (i) identiti si mati tidak dibuktikan dan G berhubungan dengan itu, adalah isu laporan bedah siasat yang ditanda sebagai ID38; (ii) penglibatan dan tahap penyertaan perayu pertama dan kedua dan bukti niat mereka; (iii) kewujudan orang keempat bernama 'Thambi' dan (iv) kegagalan memanggil saksi-saksi penting. Perayu ketiga menerima pakai hujahan-hujahan perayu pertama dan kedua dan menambah lagi satu isu H mengenai kawad cam, dengan dakwaan bahawa ia telah dijalankan secara tidak wajar dan tidak teratur.

Diputuskan (membenarkan rayuan-rayuan; melepaskan dan membebaskan perayu-perayu)

I **Oleh Balia Yusof Wahi HMR menyampaikan penghakiman mahkamah:**

(1) Pertuduhan terhadap kedua-dua perayu pertama dan kedua di bawah s. 3A Akta memerlukan elemen pengetahuan dibuktikan. Intipati kesalahan bahawa kedua-dua perayu pertama dan kedua mempunyai

pengetahuan bahawa perayu ketiga membawa senjata api semasa melakukan kesalahan berjadual iaitu rompakan dengan niat menyebabkan kematian tidak dibuktikan oleh pihak pendakwaan. Setakat penglibatan perayu pertama dan kedua, keterangan hanya menyarankan bahawa semasa tembakan dilakukan oleh perayu ketiga, perayu pertama hanya memandu kereta keluar dari tempat kereta pasar raya tersebut dan si mati duduk di antara perayu kedua dan SP10. Tiada keterangan menunjukkan bahawa perayu pertama dan kedua semunasabahnya dianggap berpengetahuan bahawa perayu ketiga mempunyai senjata api. Hakim bicara telah mendapati bahawa dengan adanya perayu pertama dan kedua di tempat kejadian di mana rompakan dan lepasan tembakan telah berlaku adalah memadai untuk memutuskan bahawa perayu pertama dan kedua terlibat dalam jenayah itu. Hakim bicara telah terkhilaf dalam membuat kesimpulan tersebut.

(2) Pergantungan yang diletakkan oleh hakim bicara ke atas ID38 dalam memutuskan bahawa kematian disebabkan oleh kecederaan senjata api ke bahagian dada adalah salah. ID38 tidak boleh diterima sebagai keterangan. Pengemukaannya tidak mengikut s. 32 Akta Keterangan 1950 dan ia hanya dikemukakan untuk pengenalpastian. Terdapat juga kelemahan-kelemahan lain dalam ID38 sendiri di mana identiti si mati tidak dibuktikan secara memuaskan. SP10 iaitu orang yang paling sesuai untuk mengenalpasti si mati kepada pakar patologi yang menjalankan bedah siasat tidak berbuat demikian. Dia hanya mengenalpasti si mati daripada gambar-gambar yang ditunjukkan tetapi bukan untuk tujuan identifikasi di autopsi. Seorang lagi yang boleh mengenalpasti si mati adalah sepupunya, Mujibur Rahman, seperti yang dinyatakan dalam ID38 tetapi dia juga tidak dipanggil untuk memberi keterangan mengenai isu ini. Selanjutnya, testimoni secara lisan SP15 menyatakan bahawa dia melihat sekujur mayat tidak berpakaian di tempat kejadian dan mayat tidak berpakaian itu telah dibawa ke hospital untuk dibedah siasat. Manakala ID38 menyatakan bahawa mayat tersebut dijumpai berpakaian kemeja biru dan seluar kelabu. Seterusnya, laporan bedah siasat hanya menunjukkan bahawa terdapat dua kemasukan luka senjata api dan bukan tiga seperti yang didapati oleh hakim bicara. Dapatan yang dibuat oleh hakim bicara adalah salah.

(3) Intipati pembelaan ketiga-tiga perayu adalah bahawa seorang yang bernama Thambi yang telah mempunyai senjata api dan melepaskan tembakan yang telah membunuh si mati. Hakim bicara telah mengakui kewujudan atau kehadiran orang keempat ini seperti yang didakwa oleh pihak pembelaan. Keterangan SP10 mengesahkan bahawa terdapat orang keempat bukan hanya dalam kereta tersebut apabila si mati dibawa pergi selepas ditembak di tempat letak kereta, tetapi juga sebelum penembakan itu berlaku. Kewujudan orang keempat seperti yang

A didakwa oleh pihak pembelaan bukanlah penafian kosong. Orang keempat sememangnya wujud dan ia adalah sebahagian kes pendakwaan. Kesimpulan yang dicapai oleh hakim bicara adalah dengan jelasnya salah.

(4) Haniffa adalah saksi penting yang boleh memberi keterangan berkenaan
B pertalian sebab antara pistol yang didakwa digunakan oleh perayu ketiga dan pistol yang didakwa berada dalam milikan Haniffa. Bagaimana pistol itu boleh bertukar tangan antara perayu ketiga dan Haniffa hanya boleh dijelaskan oleh Haniffa. Kegagalan pihak pendakwaan untuk memanggil Haniffa meninggalkan jurang dalam kes pihak pendakwaan
C terhadap perayu-perayu, jurang yang dalam keadaan ini adalah fatal.

(5) Apabila kawad cam dijalankan secara tidak adil terhadap tertuduh, nilai dan kepentingan pengenalpastian seterusnya di mahkamah menjadi berkurangan. Dalam kes ini, setelah mempertimbangkan fakta matrik perkara dari aspek pengenalpastian, identifikasi yang dibuat oleh
D mahkamah berkenaan perayu ketiga oleh SP10 mempunyai nilai dan kepentingan yang berkurangan. Pengenalpastian perayu adalah satu bahagian penting kes pendakwaan yang perlu dibuktikan secara memuaskan. Kawad cam telah dijalankan secara tidak wajar dan adalah tidak adil kepada perayu ketiga.

E **(6)** Terdapat merit-merit dalam rayuan oleh ketiga-tiga perayu. Memandangkan terdapat kesilapan oleh hakim bicara dan kelemahan-kelemahan dalam kes pihak pendakwaan, sabitan perayu-perayu adalah tidak selamat. Dalam satu-satu kes jenayah, tanggungjawab mahkamah adalah untuk mempertimbangkan sama ada sabitan perayu adalah betul.
F Ia bukan sama ada keputusan hakim bicara adalah salah tetapi sama ada sabitan adalah selamat (*Mohd Johi Said & Anor v. PP*, refd).

Case(s) referred to:
Goh Kooi Pheng v. PP [2013] 1 CLJ 190 CA ***(refd)***
Mohd Johi Said & Anor v. PP [2005] 1 CLJ 389 CA ***(refd)***
G *Ong Poh Cheng v. PP [1998] 4 CLJ 1 CA* ***(refd)***
PP v. Datuk Haji Harun Haji Idris & Ors [1977] 1 LNS 92 HC ***(refd)***
PP v. Mohamed Majid [1976] 1 LNS 104 HC ***(refd)***
PP v. Pasupathy Kanagasaby [2001] 2 CLJ 753 CA ***(refd)***

Legislation referred to:
H Evidence Act 1950, s. 32
Firearms (Increased Penalties) Act 1971, s. 3A
Penal Code, s. 34

For the 1st & 2nd appellants - Sreedevi Naidu; M/s SR Naidu & Co
For the 3rd appellant - James George Chelliah; M/s James George & Co
I *For the respondent - Muhammad Iskandar; DPP*

[Appeal from High Court, Shah Alam; Criminal Trials No: 45D-83-2008 & 45D-84-2008]

Reported by Suhainah Wahiduddin

JUDGMENT

Balia Yusof Wahi JCA:

[1] The three appeals were heard together.

[2] The appellant in Criminal Appeal no. B-05-350-12/2011, Mohd Rafi and the appellant in Criminal Appeal no. B-05-351-12/2011, Ganesh a/l Perumal were jointly charged in the Shah Alam High Court *vide* Criminal Trial No. 45D-83-2008 and the charge against them reads:

> Bahawa kamu bersama dengan Jaibalan a/l Govindarajoo, pada 17 Mac 2006, lebih kurang jam 9.00 malam bertempat di tempat letak kereta Giant Hypermarket Kelana Jaya, di dalam Daerah Petaling Jaya, di dalam Negeri Selangor Darul Ehsan, ketika berada di tempat itu, salah seorang dari kamu telah melepaskan tembakan senjata api pada masa melakukan satu kesalahan berjadual iaitu rompakan dengan niat menyebabkan kematian ke atas Jainul Abdeen (pasport E5375042), yang mana kamu telah mempunyai pengetahuan bahawa orang yang bersama kamu membawa senjata api, dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 3A Akta Senjata Api (Penalti Lebih Berat) 1971.

[3] The appellant in Criminal Appeal No. B-05-352-12/2011, Jaibalan a/l Govindarajoo was also charged in the Shah Alam High Court *vide* Criminal Trial No. 45D-84-2008 and the charge against him reads as follows:

> Bahawa kamu pada 17 Mac 2006, lebih kurang jam 9.00 malam bertempat di tempat letak kereta Giant Hypermarket Kelana Jaya, di dalam Daerah Petaling Jaya, di dalam Negeri Selangor Darul Ehsan, semasa melakukan rompakan telah melepaskan satu das tembakan dengan menggunakan sepucuk pistol Walther jenis PP Cal. 9mm Kurz, no siri 34649/34649 A, dengan niat hendak menyebabkan kematian ke atas Jainul Abdeen (Pasport E5375042), dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 3 Akta Senjata Api (Penalti Lebih Berat) 1971.

[4] The two cases against all the three appellants were heard together in the High Court. Ganesh, Mohammed Rafi and Jaibalan were referred to as the first, second and third accuseds respectively. And for purposes of this appeal, they will respectively be referred to as the first, second and third appellants respectively too.

[5] The three appellants were found guilty, convicted and sentenced to death by the High Court. They have filed separate appeals hence, the three appeals before us now.

Brief Facts

[6] SP10 was the only eyewitness in the case. On 17 March 2006 at about 9pm together with one Jainul Abdeen (the deceased), he left the Giant Hypermarket, Kelana Jaya and headed for their car at the car park. SP10 sat

on the front passenger seat while the deceased was at the wheel. SP10 saw a male approaching the deceased and pointed a pistol at him. The deceased was directed by the said male to follow him. SP10 also saw another male standing near the car he was in.

[7] SP10 heard the first male asking the deceased to "mengeluarkan duit". Then, the other male directed SP10 to get out of the car and pulled his hands. SP10 saw the first male pointing a pistol at the deceased's waist. This male was later identified as the third appellant (Jaibalan). When the deceased was pulled by the third appellant, the deceased tried to release himself and in the ensuing struggle, SP10 heard a gunshot and the scream of the deceased. The deceased was then pushed into a car whilst SP10 was also dragged into the car by another person.

[8] In the car, SP10 saw that there was a male at the wheel, the third appellant sat on the front passenger seat and another male sat behind the driver. Next to the male was the deceased. SP10 was seated next to the deceased whilst the man who held SP10 was seated left most behind the third appellant. That means, beside SP10 and the deceased there were four other males in the car. The car then left the Giant Hypermarket car park.

[9] Along the way, SP10 was asked to leave the car at a place he did not know. At that time, to use his own words, SP10 stated "there were no movements by the deceased" nor did he say anything.

[10] SP3, a security guard, found the body of the deceased in an open space and alerted the police.

[11] A pistol (exh. P20B) was found in the possession of one Haniffa about a year after the incident and the same time of the arrest of the third appellant. Haniffa was charged for possession of the same and he had been granted a DNAA. No investigation was carried out on Haniffa as to his involvement in the present case as admitted by the investigating officer, SP15.

The Appeal

[12] A number of issues were raised by learned counsel for the first and second appellants which may be summarised as follows:

(a) Identity of the deceased had not been proven and related to this, is the issue on the post mortem report which was marked only as ID38.

(b) The involvement and degree of participation of the first and second appellants and proof of their intentions.

(c) The existence of a fourth person "Thambi".

(d) Failure of the prosecution to include s. 34 of the Penal Code in the charge.

(e) Non-calling of important witnesses.

[13] Learned counsel for the third appellant adopted the submissions of the first and second appellants' counsel *in toto* and added another issue on the identification parade which was held about 1-1 1/2 years after the incident. It was submitted that the identification parade was improper and highly irregular.

[14] We heard the three appeals together and having considered the submissions of all parties, both written and oral, we unanimously allowed the appeals, set aside the conviction and sentence on the three appellants and made an order of acquittal and discharge on the trio. We now give our reasons for so ordering.

Involvement Of The Appellants

[15] In allowing the appeals, we have, among others, considered the concession made by the learned Deputy Public Prosecutor that in so far as the involvement of the first and second appellants is concerned, the evidence merely suggest that while the shooting was carried out by the third appellant, the first appellant was merely driving the car away from the Giant Hypermarket car park and the second appellant was seated behind the driver. The deceased was seated in between the second appellant and SP10. The learned Deputy Public Prosecutor also conceded that there is no evidence which shows that the first and second appellants may reasonably be presumed to have knowledge that the third appellant had a firearm.

[16] The charge against both the first and second appellants under s. 3A of the Firearms (Increased Penalties) Act 1971 (FIPA) requires the element of knowledge to be proven. The ingredient of the offence that both the first and second appellants had knowledge that the third appellant carried a firearm at the time of the commission of the scheduled offence of robbery with intent to cause death had not been proven by the prosecution. SP10 was the only witness to the incident. The evidence is totally lacking on this aspect. The shooting took place at the Giant Hypermarket car park and subsequent to that, the deceased and SP10 were shoved into a car with three other males inside, one at the wheel and the other two at the back passenger seat. The third appellant sat on the front passenger seat.

[17] In implicating the first and the second appellants to the crime charged, the learned trial judge had made the following findings at pp. 25-27 of the appeal record:

> The identification of the First and Second Accused by SP10 is not doubted as SP10 sat in the car for sometimes before he was asked to leave. SP10 withstood cross-examination that there was sufficient lighting for him to identify both the First and Second Accused in the car.
>
> As such both the First and Second Accused **were at the scene** when the offences of robbery and discharging the firearms was committed and therefore involved in the crime.

A Therefore all the three (3) Accused were involved as per the charge. All three of them **were at the scene** of the crime ie, "Kawasan Giant" and their participations are as follow:

(1) Discharge of firearm by the Third Accused;

(2) Robbery, demand by the Third Accused;

B (3) Death of deceased (Jainul Abdeen); and

(4) The First and Second Accused were in the car, in fact the Second Accused drove the car.

Since all the ingredients of both the charges were proven, all three (3) Accused were asked to enter their defences. All of them elected to give

C evidence on oath. (emphasis added)

[18] It was the judge's finding that all the three appellants were at the scene of the crime at the time of the discharge of the firearm and the robbery by the third appellant. It was also Her Ladyship's finding that the first and second appellants were in the car with the second appellant driving the same.

D The learned trial judge found, being at the scene of the crime when the robbery and the discharge of the firearm was committed was sufficient to hold both the first and second appellants as being involved in the crime. We find the learned trial judge had fallen into error in so holding. Referring to the charge framed against the first and second appellants, we found that the

E prosecution had failed to prove that both the first and second appellants had any knowledge that the third appellant was carrying or having a firearm. Neither can knowledge be inferred in the circumstances of the case. And the learned Deputy Public Prosecutor had conceded to this.

F **[19]** We agree with the submissions of learned counsel and we further rule that the learned Deputy Public Prosecutor had rightly conceded on the issue of the involvement of the first and second appellants and their knowledge about firearm. On this ground alone we would allow the appeals by the first and second appellants.

G **[20]** For the aforesaid reason, we do not see any real purpose whether the other issues raised by learned counsel of the first and second appellants merits our further consideration. Be that as it may, since these other issues are also relevant for consideration of the third appellant's appeal, we will accordingly deal with them in terms of its relevancy to the third appellant's appeal. We have noted earlier that learned counsel for the third appellant

H adopts *in toto* the issues raised by the first and second appellants as stated in paras. 12 and 13 of this judgement.

Identity Of The Deceased And The Post Mortem Report

[21] We will now deal with the issue of the identity of the deceased and

I related to that, is the post mortem report, exh. ID38. The learned trial judge had rightly ruled that death of the deceased, one by the name of Jainul Abdeen (Pasport: E5375042) is among the ingredients of the offence for which the appellants stand charged.

[22] In proving the death of Jainul Abdeen, the prosecution sought to rely on the evidence from the post mortem report marked as ID38. Exhibit ID38 was tendered by SP16, one Dr Mathi Haran Karunakaran, an associate professor at University of Malaya Medical Centre (UMMC). SP16 did not carry out the post mortem. It was conducted by one Dr Virendran Kumar who has since left service and gone back to his country of origin, India. SP16 was the supervisor at UMMC and he oversees post mortem being carried out at the centre. He has never met Dr Virendran, does not know him and was no more working with the hospital. SP16 was called merely to tender the post mortem report to be marked as ID38. The post mortem was conducted on 18 March 2006 and SP16 only joined UMMC in 2009.

[23] ID38 is an autopsy report on Jainul Abdeen bin Abdul Jabbar. The post mortem was carried out by Dr Virendran Kumar and the body was identified by ASP Mohd Hamidi b Daud (SP15). SP15 went to the place where the deceased was found on 17 March 2006 at about 11.05pm and saw a dead body without any clothes on. He also stated the relatives and friends of the deceased were also at the scene and confirmed the deceased to be Jainul Abdeen bin Abdul Jabbar (p. 129 of appeal record). He further stated he attended the post mortem being conducted by Dr Virendran Kumar and the body was brought to the hospital naked. As the initial investigating officer, SP15 did not carry out any investigation or made any attempt to trace Dr Virendran Kumar. SP14, another investigating officer in the case also said nothing about any effort to trace the said Dr Virendran Kumar. SP21, yet another investigating officer in the case, testified that on 30 May 2011 Interpol Bukit Aman sent a signal to Interpol India regarding Dr Virendran Kumar but received no reply. He did nothing further.

[24] Another person mentioned in exh. ID 38 was Mujibur Rahman, described as the cousin of the deceased. However, Mujibur Rahman was not called to testify on the identity of the deceased. SP10 identified the deceased from the photographs showed to him in court but he was not present at the autopsy.

[25] The cause of death is stated in ID38 as firearms injuries to the chest and the report also described the body was dressed in a blue shirt and grey pair of slacks.

[26] Learned counsel submitted that ID 38 is not admissible and the learned trial judge had erred in relying on the said exhibit in concluding and making a finding that death to the person named in the report was proven and the cause of death being firearm injuries to the chest. The learned trial judge had also erred in relying on the evidence of SP16 (the supervisor at UMMC) and SP20 a Medical Forensic Consultant who testified just by looking at ID38, the injuries sustained by the deceased led to his death.

[27] The learned trial judge had made the following finding on death. At pp. 23-24 of the appeal record, Her Ladyship stated:

> Death
>
> In respect of this ingredient, there is without a doubt there was a death. The body of the Deceased (Jainul Abdeen) was identified by SP10 and his death was certified to be as a result of a "fire arm injuries to the Chest" (ID38). This report remained as an ID as the Doctor who performed the Post Mortem (Dr Virendran Kumar) could not be traced as he had left the service of the PPUM and the country. However SP16 who is a Supervisor at UMMC where the Post Mortem of the Deceased was done produced the Post Mortem Report (ID38).
>
> Subsequently SP20, a Medical Forensic Consultant testified that looking at ID38, the injuries sustained by the Deceased led to his death. Therefore it is without a doubt the Deceased died from the gun shot injuries. There was no challenge by the First and Second Accused on his testimony. The questions posed by the Third Accused in Cross Examination did not mar SP20's evidence.

[28] In our view, the reliance placed by the learned trial judge on ID38 in concluding that death was caused by firearms injury to the chest is misplaced. ID 38 is inadmissible as evidence. Its production was not in accordance with s. 32 of the Evidence Act 1950 and it was merely put in for identification. Abdoolcader J (as he then was) in *Public Prosecutor v. Datuk Haji Harun Haji Idris & Ors* [1977] 1 LNS 92; [1977] 1 MLJ 180 at p. 183 when referring to exhibits marked as ID said:

> … certain exhibits which have been put in the course of these proceedings for identification but have not in fact been proved as they should have been and are accordingly not exhibits in the strict sense and cannot therefore form part of the record in the case, namely, D41 and D43 which were both put in identification only and which are the audited accounts and annual report of the Bank for the years 1973-74 and 1972 respectively. As these two exhibits have not been proved and properly admitted as such, they must in the ultimate analysis be discounted and I shall accordingly disregard references to them and also all oral testimony as well adduced in relation thereto.

[29] Besides, we do note that there are also other infirmities in ID38 itself in that the identity of the deceased had not been satisfactorily proven. SP10 who would be the best person to identify the deceased to the pathologist who carried out the post mortem did not do so. He only identified the deceased from the photographs shown but not for purpose of identification at the autopsy. Another person who would be able to positively identify the deceased would be the cousin, Mujibur Rahman as stated in ID38, but he too was not called to testify on this issue. Further, the oral testimony of SP15 stated that he saw a naked dead body at the scene and the naked dead body was brought to the hospital for post mortem. Whereas, ID38 states the body was dressed in blue shirt and grey slacks.

[30] Referring to the injuries stated in ID38, it was recorded that there were two firearm entrance wounds 0.8cm x 0.5cm over the right side front chest and over the dorsum of the left hand. It also states one firearm exit wound 2cm x 1cm over the palmer aspect of left hand. The learned trial judge however at p. 22 of the appeal record stated in her judgment as:

> The post mortem conducted on the Deceased showed that there were three bullets entry points and three exit points and the death was certified to be as a result of firearm injuries to the chest.

[31] We found, that this is an erroneous finding made by the learned trial judge. It is unsupported by evidence. The post mortem report even if it was admissible merely showed two firearm entry wounds and not three as the learned trial judge had found.

The Existence Of A Fourth Person, Thambi

[32] The learned trial judge had rightly found that the gist of the three appellants' defence was that it was Thambi who had the firearm and fired the shot that killed the deceased. Her Ladyship also made a finding that the defence story does not differ from what SP10 had testified save that it was Thambi who discharged the firearm. At p. 31 of the appeal record the learned trial judge found:

> Basically the Defence story does not differ from what SP10 said save that it was Thambi who discharged the firearm. However the fact remains that the Three (3) Accused were around at the scene of the crime. The Third Accused went with them and with another person confronted the Deceased and SP10. The First and Second Accused were in the Proton Wira which as claimed by the Defence belonged to Thambi.

[33] From the above passage it is apparent that the learned trial judge had acknowledged the existence or rather the presence of the fourth person as claimed by the defence and also as testified by SP10, yet Her Ladyship found that "It is a bare denial and a story that is full of gaps and unanswered questions" (p. 30 appeal record) and further concluded "the story is just not probable or possible" (p. 31 appeal record).

[34] We cannot agree with the learned trial judge that the defence is a bare denial and neither can we agree that the defence story is not probable. The evidence of the prosecution witness, SP10, confirmed that there was a fourth person not only in the car when the deceased was taken away after being shot at the car park, but also before the shooting itself. The existence of the fourth person as claimed by the defence could not be a bare denial. The fourth person did exist and it was part of the prosecution's case. In the upshot, the conclusion reached by the learned trial judge on the defence is plainly erroneous.

A **Non-Calling Of Important Witnesses**

[35] It was submitted before us that the person named Haniffa is an important witness and the failure of the prosecution to call him leave a gap in the prosecution's case against the appellants. As what we have adverted to earlier, Haniffa was charged for possession of a firearm which happened
B to be the pistol tendered by the prosecution in the instant case (exh. P20B). The pistol was recovered from Haniffa about one year after the date of the alleged offence in the instant appeal. The third appellant was also arrested at the same time. The case against Haniffa was granted a DNAA. No other details were proffered by the prosecution.

C **[36]** We agree with the submissions of learned counsel that Haniffa is an important witness who can testify on the causal link between the pistol allegedly used by the third appellant and the pistol for which he was charged for being in possession of. There is a lingering doubt according to counsel whether the fourth person in the car was Thambi or could he be this person,
D Haniffa. How the same pistol changed hands between the third appellant and Haniffa can only be explained by Haniffa. After all, it is the prosecution's case that this same pistol was the one used by the third appellant.

[37] We found merits in the appellants' contention that Haniffa is an
E important witness to unfold the narratives of the prosecution's case against the third appellant. We agree that there is a gap in the prosecution's case against the third appellant, a gap which in the circumstances is fatal.

Failure To Include s. 34 Of The Penal Code

[38] This issue was brought up by the first and second appellants and
F adopted by the third appellant. With due respect, we do not see how this issue is relevant to the third appellant. He was charged alone for discharging the firearm. We have reproduced the charge against him in the earlier part of this judgment and we need say no more.

G **[39]** As for the first and second appellants, we are of the view that the failure of the prosecution to include s. 34 of the Penal Code in the charge proffered against them is immaterial. We say so simply on the basis that by the wordings of s. 3A of the Firearm (Increased Penalties) Act 1971, s. 34 of the Penal Code is not relevant. For ease of reference we set out the said provision which reads as follows:

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> Section 3A. Penalty for accomplices in case of discharge of firearm. Where, with intent to cause death or hurt to any person, a firearm is discharged by any person at the time of his committing or attempting to commit or abetting the commission of a scheduled offence, each of his accomplices in respect of the offence present at the scene of the
I commission or attempted commission or abetment thereof who may reasonably be presumed to have known that such person was carrying or had in his possession or under his custody or control the firearm shall,

notwithstanding that no hurt is caused by the discharge thereof, be punished with death, unless he proves that he had taken all reasonable steps to prevent the discharge.

[40] By the wordings of the provision, it is incumbent upon the prosecution to prove that the first and second appellants are accomplices in respect of the offence. It is also incumbent on the part of the prosecution to prove that the first and second appellants may reasonably be presumed to have known that the third appellant had in his custody or control the firearm. By the same token we agree with the submissions of the learned Deputy Public Prosecutor that it is erroneous on the part of learned counsel to submit that the failure to include s. 34 of the Penal Code is fatal to the charge.

Identification Parade

[41] The only additional issue raised by learned counsel for the third appellant is on the identification parade held in respect of the third appellant. There were two identification parades held. According to learned counsel, the identification parades were held about a year or a year and half after the incident. Learned counsel further submitted, as evident from the testimony of SP10 during cross-examination, the participants in the identification parade were of various make up. Some were tall, while others were short and there were also others with moustache and beard. The third appellant was on a wheelchair. He was identified by SP10 as the person who fired the shot. He was identified at the second identification parade. It was submitted that the identification parade was not proper, irregular and unfair to the third appellant. It was a bad identification.

[42] In his submission in reply, the learned Deputy Public Prosecutor submitted that even if the identification parade was defective and improperly held, there was dock identification of the third appellant by SP10. The case of *Ong Poh Cheng v. PP* [1998] 4 CLJ 1; [1998] 4 MLJ 8 was cited in support of this submission.

[43] In *PP v. Pasupathy Kanagasaby* [2001] 2 CLJ 753; [2001] 2 MLJ 143, this court had held that to ensure that the parade is properly and fairly held, it is the duty of the officer conducting the parade to look for participants who are of similar age, stature and appearance as the accused person.

[44] In our view, the identification parade was improperly held and unfair to the third appellant. In *Goh Kooi Pheng v. PP* [2013] 1 CLJ 190, (Criminal Appeal No: P-05-135- 2010) this court had said; when the manner of the identification parade held was unfair to the accused, the subsequent identification in court was of little value or significance as was earlier held in *Public Prosecutor v. Mohamed Majid* [1976] 1 LNS 104; [1977] 1 MLJ 121. Likewise, in the instant case, having considered the factual matrix of the matter on the aspect of identification, we find that the court identification of

A the third appellant by SP10 is of little value or significance. The identification of the appellant is an essential part of the prosecution's case which needs to be proven satisfactorily.

[45] We found there are merits in the appeal by the three appellants. Given the errors committed by the learned trial judge and the infirmities in the
B prosecution's case, we find the conviction of the appellants to be unsafe. In a criminal case, our duty is to consider whether the conviction of the appellant is right. It is not whether the decision of the trial judge is wrong but whether the conviction is safe. (*Mohd Johi Said & Anor v. PP* [2005] 1 CLJ 389)

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[46] For the aforesaid reasons, we allow the appeals and set aside the conviction and sentence imposed by the High Court. The three appellants are hereby acquitted and discharged.

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