



**BASUNI TOHER v. PP**

**COURT OF APPEAL, PUTRAJAYA**

**SYED AHMAD HELMY JCA**

**MOHAMED APANDI ALI JCA**

**AZIAH ALI JCA**

**[CRIMINAL APPEAL NO: K-05-484-2010]**

**13 JULY 2012**

**CRIMINAL LAW:** *Firearms (Increased Penalties) Act 1971 - Section 3 - Discharge of firearm while committing robbery - Appeal against conviction and sentence - Identity of alleged offender based on testimony of victim - Whether trial judge made correct finding of identification - Whether conviction safe*

**EVIDENCE:** *Identification parade - Turnbull guidelines - Whether evidence on identification parade reliable - Whether evidence of identification parade provided corroborative evidence of dock identification - Whether trial judge committed appealable error*

**Held:**

Dismissing appeal and affirming death sentence.

**Annotation:**

- (1) In matters of identification, of utmost importance is the quality of the identification. If the quality is good and remains good at the close of the defence, the danger of a mistaken identification is lessened, but the poorer the quality, the greater the danger.
- (2) The learned trial judge was correct and justified in his finding of identification based on SP2's evidence. The cumulative effect of SP2's evidence which stands largely unchallenged established beyond reasonable doubt the positive identification of the appellant.

**Case(s) referred to:**

*Budhsen v. State of Uttar Pradesh [1970] Cr LJ 1149 (refd)*



*Malkansingh v. State of Madhya Pradesh [2003] Cr LJ 3535 (refd)*

*PP v. Choo Chuan Wang [1992] 2 CLJ 1242; [1992] 3 CLJ (Rep) 329 HC (refd)*

**Legislation referred to:**

Firearms (Increased Penalties) Act 1971, ss. 2, 3

Penal Code, s. 34

*For the appellant - Lt Kol Roseli Abdul Gani (B); M/s AG Roseli & Assocs*

*For the prosecution - Mohamad Abazafree Mohd Abbas; DPP*

*[Appeal from High Court, Alor Setar; Criminal Case No: 45D-22-2009]*

**JUDGMENT**

**Syed Ahmad Helmy JCA:**

[1] The appellant herein was initially charged with one other person under s. 3 of the Firearms (Increased Penalties) Act 1971 read together with s. 34 of the Penal Code.

[2] At the close of the prosecution's case upon the appellant's co-accused being acquitted and discharged, the appellant was called upon to enter his defence on an amended charge which reads as follows:

Bahawa kamu pada 27/7/2008 jam lebih kurang 1.30 pagi bertempat di nombor 481, Jalan Mahsuri 1/A, Taman Mahsuri Fasa 3C, Padang Serai, di dalam Daerah Kulim, di negeri Kedah, telah melepaskan tembakan dengan menggunakan senjata api dan menyebabkan kecederaan kepada Chua Ah Hing. Oleh itu kamu telah melakukan satu kesalahan di bawah Seksyen 3 Akta Senjatapi (Penalti Lebih Berat) 1971.

[3] At the conclusion of the trial the appellant was found guilty and sentenced to death. Hence this appeal:

**Brief Facts**

[4] On 27 July 2008 at 1.30am Chua Ah Hing (SP2) and his girlfriend Peng Fang a Chinese national drove back to their house at No. 481, Taman Mahsuri Fasa 3C, Padang Serai, Kulim in their Toyota Unser PFW 8340. Upon arrival Peng Fang alighted to open the gate. SP2 who was seated in the car and was talking on his handphone saw a male pointing a knife at Peng Fang. At the same time another male fired a shot in the direction of SP2 which missed him. A second shot was fired and it hit SP2 at his stomach area. The area was lighted by house lights, street lights and the headlights of the Unser motor car.

[5] The male person who shot SP2 did not cover his face which circumstance led SP2 to identify the male person as the appellant. Upon being hit by the second shot SP2 pleaded with the appellant not to shoot him further. The appellant then asked SP2 “di mana beg.” SP2 then handed the bag which contained between RM30,000 to RM40,000 to the appellant. After the appellant and the other co-accused exited the scene SP2 was sent to Kulim Hospital by his neighbour. SP2 was immediately operated upon by SP3 Dr Safinaz who confirmed that the injuries sustained by SP2 was as result of gun shot wounds.

[6] Apart from the requisite intent to cause death or hurt a conviction under s. 3 of the Act would invariably involve the successful establishment of the twin ingredients of the commission of a scheduled offence and the discharge of a firearm. (see *PP v. Choo Chuan Wang* [1992] 2 CLJ 1242; [1992] 3 CLJ (Rep) 329). Section 3 of the Act reads:

Any person who at the time of his committing or attempting to commit or abetting the commission of a scheduled offence discharges a firearm with intent to cause death or hurt to any person, shall notwithstanding that no hurt is caused thereby, be punished with death.

[7] Section 2 defines “scheduled offence” as “any offence enumerated in the schedule” and robbery is one of the offences enumerated.

[8] Learned counsel for the appellant in his submission before us advanced only one issue, namely evidence of identification. The prosecution according to learned counsel failed to prove the identification of the appellant beyond reasonable doubt. The trial judge erred in his findings which was based on the testimony of SP2 which was uncorroborated either by forensic and/or circumstantial evidence.

[9] The issue advanced by learned counsel would require an appraisal of the evidence adduced and in this connection the evidence of SP2 assumed critical importance. From the narrative of the facts as outlined above SP2 was the victim of the robbery who was shot and who gave an eye-witness account of the scenario of the incident.

[10] The relevant passage of the learned trial judge's findings on the issue of identification pursuant to his analysis and reliance on the testimony of SP2 is found at p. 180 of the appeal record where his findings were recorded as follows:

... SP2 secara positif cam Tertuduh yang menembaknya. Tembakan pertama tersasar. Tembakan kedua mengenai perutnya dan SP2 mendapat cedera. Identiti tertuduh dapat dicam dengan positif oleh SP2 kerana jarak semasa Tertuduh menembaknya dengan SP2 adalah terlalu dekat dan keadaan sekeliling pada masa itu cerah dengan lampu jalan, lampu rumah dan lampu Unser kepunyaan SP2. Keadaan sekeliling tidak gelap. Tertuduh tidak menutup mukanya. Oleh itu, identiti Tertuduh adalah positif. Rujuk keputusan kes *Public Prosecutor v. Basar* [1965] 1 MLJ 75.

[11] From the passage aforesaid the learned trial judge's findings on identification upon his evaluation of the evidence of SP2 was predicated on the following factors:

- (a) The close proximity between SP2 and the appellant.
- (b) The appellant did not cover his face thus exposing his full face.
- (c) The bright lighting condition through the street lights house lights and the headlights of the Unser.



[12] It is trite that in matters of identification of utmost importance is the quality of the identification. If the quality is good and remains good at the close of the defence the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger.

[13] We have scrutinised the appeal record and in particular to the testimony of SP2 and it is our considered view that the learned trial judge was correct and justified in his finding of identification based in SP2's evidence.

[14] The factor of the close distance between SP2 and the appellant and the appellant's face being uncovered is found in the following evidence of SP2:

[15] Examination in chief - pp. 19-20 AR.

Q. Lelaki yang tembak awak berada di mana?

A. Dia berada dalam jarak yang dekat dengan saya. Saya berada dalam kereta. Lelaki itu berada dekat saya di luar kereta dalam jarak dekat tembak masuk.

Q. Bagaimana dengan penutup muka?

A. Saya dapati mereka tidak tutup muka.

Q. Bagaimana dengan lelaki yang tembak, kamu boleh cam?

A. Saya boleh cam.

Q. Siapa lelaki yang tembak kamu.

A. Dia ada dikandang orang salah iaitu tertuduh kedua. Tertuduh Kedua ditunjuk dan dicamkan iaitu Basuni bin Toher.

A. Tertuduh Kedua adalah lelaki yang tembak saya.

[16] Cross-examination - p. 52.



- Q. Apa pakaian mereka?
- A. Saya tidak pedulikan baju mereka. Cam muka lebih penting dari cam baju.
- Q. Kali pertama dia tembak, kedudukan kamu dalam kereta. Bagaimana?
- A. Saya duduk di tempat pemandu.
- Q. Pada masa itu, muka kamu menghala kemana?
- A. Kedepan.
- Q. Pada masa itu orang itu berada di sisi kamu?
- A. Dia datang dari arah kanan saya. Dia disebelah kanan saya.
- Q. Semasa tembakan pertama tidak kena, kamu ada elak?
- A. Selepas tembakan pertama, saya toleh ke kanan dan buka pintu kereta.
- Q. Berapa lama jarak tembakan pertama dengan tembakan kedua.
- A. Sekejap sahaja. Ia cepat. Saya toleh ke kanan selepas tembakan pertama, kemudian dia tembak kali kedua.

[17] Re-examination - pp. 59-60 AR.

- Q. Kejadian berlaku dengan pantas dalam tempoh 5 minit. Kamu cam orang yang tembak kamu dalam keadaan cepat, pantas dan kelam kabut.
- A. Semasa dia hendak tembak saya kali kedua, saya toleh ke arahnya dan saya nampak mukanya dalam jarak yang dekat.
- Q. Jarak dekat berapa jarak?
- A. Lebih kurang 2 kaki.



Q. Kamu tidak ingat baju yang dipakai oleh orang yang tembak kamu. Kamu tidak peduli baju. Apa yang kamu pedulikan.

A. Saya nampak muka orang yang tembak saya. Saya pentingkan mukanya berbanding dengan bajunya.

[18] The factor of the lighting condition of the place of incident is at p. 18.

[19] Examination in chief:

Q. Bila sampai di rumah kamu di Taman Mahsuri, bagaimana cahaya di luar rumah kamu.

A. Saya dapati rumah saya agak cerah. Lampu buka.

Q. Ada lampu jalan depan rumah kamu?

A. Ada lampu jalan.

Q. Bagaimana lampu jalan itu?

A. Oleh kerana keadaan cerah, saya anggap lampu jalan beroperasi/berfungsi.

Q. Bagaimana dengan lampu Unser kamu?

A. Saya buka.

[20] Cross-examination - p. 47 AR.

Q. Setiba di rumah No. 481 pada malam itu lampu terang?

A. Betul.

Q. Lampu dari mana?

A. Lampu rumah, lampu jalan, Lampu rumah kalimantang di siling.

[21] It is to be observed that the factor of the close proximity, the uncovered face of the appellant and the lighting condition of the place



of incident was never challenged by the defence which in our view leaves the quality of the identification evidence intact.

[22] To seal the quality of the identification of the appellant is the circumstance of the interaction between the appellant and SP2 deducible from the evidence commencing from the demand by the appellant of the whereabouts of the bag containing the sum of between RM30,000 and RM44,000 to the handing over of same by SP2 to the appellant.

[23] This piece of evidence is found at pp. 21 to 22 AR.

[24] Examination in chief:

Q. Selepas kamu ditembak, apa lelaki ini buat terhadap kamu?

A. Selepas tembakan kedua, saya buat rayuan supaya dia tidak tembak saya lagi.

Q. Apa respon lelaki itu.

A. Dia beredar dari situ.

Q. Selepas dia beredar apa dia buat pada kamu?

A. Dia bercakap dengan saya.

Q. Apa dia cakap.

A. Selepas tembakan kedua, dia tanya saya “dimana beg itu?” saya berikan beg itu kepadanya.

Q. Beg apa yang kamu berikan kepada Tertuduh Kedua?

A. Beg itu adalah beg berisi wang.

Q. Kamu ambil beg itu dari mana?

A. Sebelum itu beg itu berada dalam kereta saya iaitu digantung di bahagian depan saya.

Q. Beg itu yang kamu serahkan kepadanya.





A. Ya.

Q. Kemudian apa berlaku?

A. Selepas dia ambil beg, saya nampak macam dia nak tembak saya sekali lagi. Saya merayu kepadanya jangan tembak dengan berkata “tak mahu, tak mahu.” Selepas itu dia beredar dari tempat kejadian.

[25] The cumulative effect of the evidence of SP2 which stands largely unchallenged to our mind establishes beyond reasonable doubt the positive identification of the appellant.

[26] The identification of the appellant by SP2 was not only made through the dock but also at the earlier identification parade at the police station. The law pertaining to identification is clear in that dock identification is a piece of substantive evidence. Evidence pertaining to identification parade provides corroborative evidence of the substantive evidence of dock identification. (see *Budhsen v. State of Uttar Pradesh* [1970] Cr LJ 1149; *Malkansingh v. State of Madhya Pradesh* [2003] Cr LJ 3535).

[27] In conclusion we do not find any appealable error on the part of the learned trial judge and we see no ground for contending that the conviction is unsatisfactory or unsafe. The appeal is accordingly dismissed and the conviction and sentence of the High Court affirmed.