A

AHMAD ZAINI ZAINOL & ANOR

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
ABDUL MALIK ISHAK JCA
AZHAR MA'AH JCA
MOHAMED APANDI ALI JCA
[CRIMINAL APPEALS NO: P-05-357-2009 & P-05-358-2009]
C 24 SEPTEMBER 2012

CRIMINAL LAW: *Firearms (Increased Penalties) Act 1971 - Section 7(1) - Trafficking in firearms - Conviction and sentence - Appeal against - Unlawful possession of 26 firearms including hand grenades - Whether*
D *proved - Whether appellants had knowledge of subject matter of charges - Presumption of trafficking in firearms under s. 7(2) of Firearms (Increased Penalties) Act 1971 - Whether unrebutted - Whether trial judge exercised proper discretion in imposing death penalty - Whether appellants sentenced according to law - Arms Act 1960, s. 4*

E

ARMS AND EXPLOSIVES: *Possession - Arms and ammunition - Unlawful possession of 26 firearms including hand grenades- Whether proved - Whether appellants had knowledge of subject matter of charges - Presumption of trafficking in firearms under s. 7(2) of Firearms*
F *(Increased Penalties) Act 1971 - Whether unrebutted - Whether trial judge exercised proper discretion in imposing death penalty - Whether appellants sentenced according to law - Arms Act 1960, s. 4*

The appellants were convicted and sentenced to death in the High Court for the offence under s. 7(1) of the Firearms
G (Increased Penalties) Act 1971, and sentenced to six years imprisonment in respect of the offence under s. 4 of the Arms Act 1960. Dissatisfied, the appellants appealed to this court. The incontrovertible evidence as found in the case was that numerous firearms and ammunition were found in the house rented and
H occupied by both the appellants. The core issue herein was the possession of the subject-matter of the charges *ie*, of the hand grenades and sub-machine guns. The contentions canvassed by the appellants were that (i) PW21 was in the same house with the appellants when a team of policemen raided the premises, thus
I the impeachment proceedings against PW21 was not properly conducted and that possession could be attributed to her; (ii) the existence of one Farok Khan was not properly considered by the trial judge although there was evidence that he had access to the

house and therefore the appellants could not be said to be in exclusive possession; (iii) the reaction of both the appellants in running away was justified as they thought that the police team who forcibly entered the house were robbers and (iv) there was no evidence of trafficking of the firearms.

Held (dismissing appeals; affirming convictions and sentences by High Court)
Per Mohamed Apandi Ali JCA delivering the judgment of the court:

(1) The impeachment proceedings by the trial judge was conducted in a proper manner. Having heard the evidence of PW21 and that of the recording officer, it was well within the discretion of the learned judge to make a decision on the impeachment application. He had the advantage of hearing and observing the manner and the body language of the witnesses who gave evidence during the impeachment proceedings. There was no reason to disturb the exercise of discretion by the trial judge. (paras 7 & 8)

(2) The trial judge had indeed considered the possible involvement of a person by the name of Farok Khan. There was evidence that Farok Khan was neither arrested in regard to this case, nor was he arrested at the house where the appellants were arrested. Even if Farok Khan had been to the house, it did not mean that the two appellants could not have been in possession of the arms and ammunition. This issue was a finding of fact. It is trite law that the appellate court is slow in disturbing such finding unless it is against the weight of available evidence (*Che Omar Mohd Akhir v. PP*, refd). (paras 10 & 11)

(3) The appellants were found to be in unlawful possession of firearms, including 20 hand-grenades. "Firearm" under s. 2 of the Firearms (Increased Penalties) Act 1971, includes grenade containing an explosive charge. In this case, the appellants were found to be in unlawful possession of 26 firearms, which was thirteen times more than the number required to trigger the presumption under s. 7(2) of the Act. The presence of such large quantity of firearms and ammunition, in the manner they were found in the house and in the motorcar, without

any plausible explanation from the appellants, naturally gave rise to a strong inference that both of them had knowledge of the subject matter of the charges against them. (paras 13 & 18)

(4) Both the appellants had tried to escape by climbing a wooden ladder on the upper floor of the house, to get onto the ceiling, where they stayed hidden for more than 12 hours until their arrest. The police had to resort to using tear-gas, to flush out the appellants from their hiding place. This was not an attempt to flee but actual positive actions undertaken with such determination in order to escape apprehension and arrest. Such positive actions require an explanation of such conduct, under ss. 8 and 9 of the Evidence Act 1950. The lame explanation that they had tried to escape because they thought that the men who forcibly entered the house were robbers could not hold water. (para 19)

(5) With no evidence forthcoming from the appellants during their defence, it was inevitable that the presumption of trafficking in firearms under s. 7(2) of the Firearms (Increased Penalties) Act 1971 remained unrebutted. The trial judge had exercised his proper discretion in imposing the death penalty for the offence under s. 7(1) of the Act. (paras 24 & 25)

Bahasa Malaysia *Translation Of Headnotes*

Perayu-perayu disabitkan dan dijatuhkan hukuman mati di Mahkamah Tinggi bagi kesalahan di bawah s. 7(1) Akta Senjata Api (Penalti Lebih Berat) 1971, dan dihukum penjara enam tahun bagi kesalahan di bawah s. 4 Akta Senjata 1960. Tidak berpuas hati, perayu-perayu merayu ke mahkamah ini. Keterangan jelas yang terdapat dalam kes ini adalah bahawa beberapa senjata api dan peluru telah dijumpai di dalam rumah yang disewa dan diduduki oleh perayu-perayu. Isu utama dalam kes ini adalah milikan hal perkara dalam pertuduhan-pertuduhan iaitu bom-bom tangan dan senjata-senjata. Hujahan-hujahan yang dikemukakan oleh perayu-perayu adalah bahawa (i) PW21 berada di dalam rumah yang sama dengan perayu-perayu semasa pihak polis menyerbu premis, oleh itu prosiding pencabaran kebolehpercayaan PW21 tidak dikendalikan dengan betul dan pemilikan boleh dikaitkan dengannya; (ii) kewujudan seorang yang bernama Farok Khan tidak dipertimbangkan dengan betul oleh hakim perbicaraan walaupun terdapat keterangan bahawa dia mempunyai akses

kepada rumah tersebut, dengan itu perayu-perayu tidak boleh dikatakan mempunyai pemilikan eksklusif; (iii) reaksi perayu-perayu apabila melarikan diri adalah wajar kerana mereka beranggapan bahawa pasukan polis yang telah secara paksa memasuki rumah tersebut merupakan perompak-perompak dan (iv) tiada keterangan bahawa terdapatnya pengedaran senjata api.

Diputuskan (menolak rayuan-rayuan; mengesahkan sabitan-sabitan dan hukuman-hukuman oleh Mahkamah Tinggi)
Oleh Mohamed Apandi Ali HMR menyampaikan penghakiman mahkamah:

(1) Prosiding pencabaran kebolehpercayaan oleh hakim perbicaraan telah dikendalikan dengan cara yang betul. Hakim perbicaraan telah mendengar keterangan PW21 dan pegawai merekod, oleh itu ia adalah dalam budi bicara yang arif hakim untuk membuat keputusan berkenaan permohonan pencabaran kebolehpercayaan. Hakim perbicaraan mempunyai peluang untuk mendengar dan memerhatikan cara dan bahasa badan saksi-saksi yang memberi keterangan semasa prosiding pencabaran kebolehpercayaan. Tiada alasan timbul untuk mengganggu perlaksanaan budi bicara hakim perbicaraan.

(2) Hakim perbicaraan telah mempertimbangkan kemungkinan penglibatan seorang yang bernama Farok Khan. Terdapat keterangan bahawa Farok Khan tidak ditangkap berhubungan kes ini, dan dia juga tidak ditangkap di rumah di mana perayu-perayu ditangkap. Jika Farok Khan telah pergi ke rumah tersebut, ia tidak bermakna bahawa perayu-perayu tidak memiliki senjata api dan peluru tersebut. Isu ini merupakan dapatan fakta. Ia adalah undang-undang mantap bahawa mahkamah rayuan selalunya enggan mengganggu dapatan tersebut melainkan jika ia bertentangan dengan keterangan sedia ada (*Che Omar Mohd Akhir v. PP*, dirujuk).

(3) Perayu-perayu didapati mempunyai milikan menyalahi undang-undang ke atas senjata api, termasuk 20 bom tangan. "Senjata" di bawah s. 2 Akta Senjata Api (Penalti Lebih Berat) 1971 termasuk bom yang mengandungi bahan letupan. Dalam kes ini, perayu-perayu didapati mempunyai milikan menyalahi undang-undang ke atas 26 senjata api, iaitu tiga belas kali ganda jumlah yang diperlukan untuk membangkitkan anggapan di bawah s. 7(2) Akta. Kewujudan kuantiti besar senjata api dan peluru, dan cara ia dijumpai di dalam rumah dan kenderaan, tanpa apa-apa penjelasan munasabah daripada

perayu-perayu, secara zahirnya boleh menimbulkan kesimpulan yang kukuh bahawa kedua-dua perayu mempunyai pengetahuan berkenaan hal perkara pertuduhan terhadap mereka.

(4) Kedua-dua perayu telah cuba melarikan diri dengan memanjat tangga kayu menuju ke tingkat atas rumah, untuk ke siling, di mana mereka telah bersembunyi lebih daripada 12 jam sehinggalah mereka ditahan. Pasukan polis terpaksa menggunakan gas pemedih mata, untuk mengusir perayu-perayu dari tempat sembunyi mereka. Ini bukan satu percubaan melarikan diri tetapi adalah tindakan positif yang dilaksanakan dengan penuh ketegasan supaya dapat mengelakkan diri mereka daripada ditahan dan ditangkap. Tindakan-tindakan positif sedemikian memerlukan penjelasan tindakan, di bawah ss. 8 dan 9 Akta Keterangan 1950. Penjelasan lemah bahawa mereka telah cuba melarikan diri kerana beranggapan bahawa lelaki-lelaki yang memasuki rumah tersebut secara paksa adalah perompak-perompak adalah tidak berasas.

(5) Dengan ketiadaan keterangan daripada perayu-perayu semasa pembelaan mereka, ia tidak dapat dielakkan bahawa anggapan pengedaran senjata-senjata api di bawah s. 7(2) Akta Senjata Api (Penalti Lebih Berat) 1971 kekal dan tidak dipatahkan. Hakim perbicaraan telah melaksanakan budi bicara yang sepatutnya dalam menjatuhkan hukuman mati bagi kesalahan di bawah s. 7(1) Akta.

Case(s) referred to:
Che Omar Mohd Akhir v. PP [2007] 3 CLJ 281 FC ***(foll)***
Loganatha Venkatesan & Ors v. PP [2000] 3 SLR 677 ***(refd)***
Mohamed Salleh v. PP [1968] 1 LNS 80 FC ***(refd)***
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(refd)***
PP v. Sanassi [1970] 1 LNS 118 HC ***(foll)***

Legislation referred to:
Arms Act 1960, s. 4
Evidence Act 1950, ss. 8, 9
Firearms (Increased Penalties) Act 1971, ss. 2, 7(1), (2)

For the 1st appellant - Ranjit Singh Dhillon; M/s J Kaur, Ranjit & Assocs
For the 2nd appellant - Kitson Foong; M/s Ahmad Zaidi & Partners
For the respondent - Yusaini Amer Abd Karim; DPP

[Appeal from High Court Malaya, Penang; Criminal Trial No: 45-25-2001]

Reported by Suhainah Wahiduddin

JUDGMENT

Mohamed Apandi Ali JCA:

Introduction

[1] At the High Court in Penang, both appellants were convicted and sentenced for two offences, of which the charges read as follows:

(1) Bahawa kamu bersama-sama pada 11hb Januari 2001, jam lebih kurang 1.15 pagi, di sebuah rumah No. 3, Lorong Idaman 2/2, Taman Idaman, Simpang Ampat, di dalam Daerah Seberang Perai Selatan, di dalam Negeri Pulau Pinang telah didapati berdagang senjata api seperti berikut:

1. Sepucuk pistol jenis SIG SAUER P228, No. B112353 bersama (2) magazine.
2. Sepucuk pistol BROWNING FN No. 123142 di pasang silencer serta (1) magazine.
3. Selaras pump gun sejenis Remington buatan USA.
4. Selaras SMG tidak bernombor serta (2) magazine.
5. Sepucuk pistol Browning BDM No. 945 NW 02234 buatan USA bersama (1) magazine.
6. Selaras shot gun pumpaction jenama Mossberg buatan USA No. J.606008.
7. (20) butir bom tangan.

Oleh yang demikian kamu adalah telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 7(1) Akta Senjata Api (Penalti Lebih Berat) 1971 (Akta 37).

and (2) Bahawa kamu bersama-sama pada 11hb Januari 2001, jam lebih kurang 1.15 pagi, di sebuah rumah No. 3, Lorong Idaman 2/2, Taman Idaman, Simpang Ampat, di dalam Daerah Seberang Perai Selatan, di dalam Negeri Pulau Pinang, telah didapati dalam milik kamu amunisi seperti berikut:

1. (11) butir peluru jenis 9 mm.
2. (6) butir peluru jenis 7.65 mm.
3. Sekotak kertas bertulis "full metal Jacket 71 gr" berisi (17) butir peluru jenis 7.65 mm.

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4. Sekotak kertas bertulis "full Metal Jacket 124 gr" berisi (43) butir peluru jenis 9 mm.

5. (2) buah kotak bertulis 45 Automatic 230 gr "full Metal Jacket" berisi sejumlah (95) butir peluru jenis 45.

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6. Sekotak kertas bertulis Winchester 25 Auto 50 gr berisi (5) butir peluru jenis 25 mm.

7. (15) butir peluru jenis 9 mm.

8. Sekotak kertas bertulis Mat Jan Shotgun Cartridges berisi
C (14) butir peluru jenis 70 mm (12 bore).

9. Sebuah beg plastik hitam berisi (13) butir peluru jenis 70 mm (12 bore).

10. (14) butir peluru jenis 9 mm.

D

11. (5) buah kotak bertulis 99 mm para Full Metal Jacket berisi sejumlah (250) butir peluru jenis 9 mm.

Tanpa lesen yang dikeluarkan kepada kamu di bawah kehendak-kehendak Seksyen 4 Akta Senjata No. 21 Tahun
E 1960 dan boleh dihukum di bawah Seksyen 8(a) Akta yang sama.

[2] At the end of the trial both the appellants were found guilty and convicted and were sentenced to death for the offence under
F s. 7(1) of the Firearms (Increased Penalties) Act 1971 and sentenced to six years imprisonment with effect from the date of their arrests, in respect of the offence under s. 4 of the Arms Act 1960.

[3] The appellants appealed to this court against both their
G convictions and sentences. After hearing the appeals, we dismissed them. We shall now give our reasons.

Factual Background Of The Case

H **[4]** During the appeal, learned counsel for both the appellants did not raise any complaint about the facts of the case as described by the learned trial judge in his grounds of judgment. As such, we shall reproduce the facts of the case as so written by the learned trial judge, which reads as follows:

I

11. The gist of the prosecution case is that on 11.1.2001 at about 1.15 am, DSP Foo Chee Lip SP12 led a team on a raid at a premises No. 3, Lorong Idaman 2/2, Taman Idaman Simpang Ampat, Seberang Perai Selatan ("the

House"). At the time of the raid the 2 accused and SP21 were in the House. When the police team managed to cut the front grill and gain entry to the House, the 2 accused ran upstairs and escaped up a ladder into a hole in the ceiling. They were later arrested hiding near a water tank above the ceiling of house No. 19, Lorong Idaman 2/2 at 1.15 pm on 11.1.2001. Earlier SP21 had been arrested in the House by the raiding party as soon as they entered the House. In the House and in a locked Suzuki Vitara parked in the porch the Police raiding party found the arms and ammunition as per the Amended Charge and the Amended Second Charge.

12. SP5, ASP Zuki bin Othman, the Pegawai Turus Logistik Persenjataan, IPK Pulau Pinang, the Prosecution's Expert Witness in regard to the firearms and ammunition testified that he examined the 20 hand grenades that were in the locked Suzuki Vitara (P32) and found 11 to be model M61 and 9 to be model M67. He also found them to be "live" and complete with a lever, body fragmentation and safety pin. On 17.6.2004 he destroyed the 20 hand grenades by exploding them at Quary Weng Lee, Berapit, Bukit Mertajam. SP5 also examined the weapons and ammunition seized and found the weapons to be serviceable and the ammunition to be usable as he was able to test fire samples of the ammunition.

13. Lee Ah Bah (SP8) testified that he was the owner of house No. 3, Lorong Idaman 2/2, Taman Idaman, Simpang Empat, Seberang Perai Selatan. In the middle of July 2000 SP8 rented the house to the 1st accused for RM480 per month. The tenancy agreement dated 20.7.2000 was marked P24.

Contentions By The Appellants

[5] In this appeal, although each of the appellants was represented by a different counsel, their contentions were common to each other. As such, we shall deal with all the contentions together.

[6] We must note that in this appeal the core issue is the possession of the subject-matter of the charges, ie, of the various firearms, hand-grenades and various caliber of ammunition, by both the appellants. However, the contentions canvassed by learned counsel for each of the appellants can be categorised as follows:

(1) the impeachment proceedings against PW21, Norlila bt. Ismail, who was earlier arrested at the house, was not properly conducted and that possession could be attributed to her;

(2) corollary to contention (1), it was also submitted that the story as narrated by PW21 ought to have been accepted by the trial judge;

(3) the existence of one Farok Khan was not properly considered by the learned trial judge;

(4) that the reaction of both the appellants in running away was justified as they thought that the men who forcibly entered the house were robbers; and

(5) that there was no evidence of trafficking of the firearms.

Our Analysis And Findings

[7] On contentions No. (1) and (2) above, it is our judgment that the impeachment proceedings by the learned trial judge was conducted in a proper manner. In the said proceedings as recorded in the notes of evidence, the witness PW21 was given ample opportunity and time to explain the material contradictions between what she said, under oath in court and the written statement she gave to the police.

[8] Having heard the evidence of PW21 and that of the recording officer, it is well within the discretion of the learned judge to make a decision on the impeachment application. The learned trial judge was in the best position to do so. He had the advantage of hearing and to observe the manner and the body language of the witnesses who gave evidence during the impeachment proceedings. We see no reason to disturb the exercise of discretion by the learned trial judge. The learned trial judge was also not in error when he reserved his decision on the impeachment application and proceeding, until the end of the case for the prosecution. The approach adopted by the learned trial judge was in line with the reasoning in Singapore Court of Appeal case of: *Loganatha Venkatesan & Ors v. PP* [2000] 3 SLR 677, which held that:

> In our opinion, there is no requirement that the trial judge must, at any stage of the trial, make a ruling on whether the credit of the witness is impeached. All that is required is that the court must consider the discrepancies and the explanation proffered by the witness for the purpose of an overall assessment of his credibility. In this regard, it is important to bear in mind that an impeachment of the witness's credit does not automatically lead to

a total rejection of his evidence. The court must carefully scrutinize the whole of the evidence to determine which aspect might be true and which aspect should be disregarded: see *Public Prosecutor v. Somwang Phatthanasaeng* [1992] 1 SLR 138 (HC) and *Kwang Boon Keong Peter* (*supra*). Thus, regardless of whether his credit is impeached, the duty of the court remains, that is, to evaluate the evidence in its entirety to determine which aspect to believe. Reverting to the present case, the learned judge was clearly correct when he said that he took into consideration the two discrepancies in deciding whether to accept Julaiha's evidence. There was absolutely nothing wrong with this approach.

[9] We find no merit on contentions (1) and (2).

[10] On contention (3), we find that the learned trial judge had indeed considered the possible involvement of a person by the name of Farok Khan. The learned trial judge had adequately addressed this issue in para. 20 of his grounds of judgment, which reads as follows:

> 20. The defence argued that another person, ie, Farok Khan had access to the House and so the 1 accused could not be said to be in exclusive possession. However this Farok Khan is since deceased. There is evidence that Farok Khan was neither arrested in regard to this case, nor was he arrested at the House where the 1st and 2nd accused was arrested. He was arrested the next day at a different address and in regard to a different case. Even if Farok Khan had been to the House it did not mean that the 2 accused could not have been in possession of the arms and ammunition. There were firearms found in the briefcase which contained the personal documents of the 1st accused. SP12 saw the 2 accused and SP21 seated at a table at the centre of a House just before the staircase. The inference to be drawn by the two accused taking flight is that they were in possession of the arms and ammunition found in the House.

[11] This issue is a finding of fact. It is trite law that the appellate court is slow in disturbing such finding unless it is against the weight of available evidence (see *Che Omar Mohd Akhir v. PP* [2007] 3 CLJ 281).

[12] On the last contention of no evidence of trafficking of the firearms, it is our judgment that once the unlawful possession of more than two firearms has been proven, the presumption of

A trafficking in firearms under s. 7(2) of the Firearms (Increased Penalties) Act 1971 will be triggered. Section 7(2) of the Act reads as follows:

> 7. (2) Any person proved to be in unlawful possession of more than two firearms shall be presumed to be trafficking in firearms.

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[13] In the present case, the appellants were found to be in unlawful possession of seven firearms, including twenty hand-grenades. "Firearm" under s. 2 of the Firearms (Increased Penalties) Act 1971, includes grenade containing an explosive C charge. In other words, in this case, the appellants were found to be in unlawful possession of actually 26 firearms. It is 13 times more than the number required to trigger the presumption under s. 7(2) of the Act.

D **[14]** For the above reasons, we find that there is no merit in the appellants' last two contentions.

Conclusion

[15] Bearing in mind that an appeal is a continuation of the E hearing of the charges against both the appellants, we evaluated all the evidence adduced at the trial.

[16] Since one of the prosecution witnesses, ie, PW21 has turned hostile, we posed the question to ourselves as to whether F without PW21's evidence was there sufficient evidence to support the findings and decision of the learned trial judge. We are of the opinion that there are other sufficient evidence.

[17] The incontrovertible evidence as found in the case are that G the numerous firearms and ammunition were found in a house rented and occupied by both the appellants. One firearm, a Browning pistol complete with a silencer was found in a brief case containing the personal effects of the first appellant, Ahmad Zaini bin Zainol. The rest of the firearms were found in various places H of the double-storey terrace house and also in a motorcar BEA 4673 which was under the control of the first appellant. The actual locations where the firearms and ammunition were found in the said house can be seen in the sketch-plan (exh. P30). The list of firearms and ammunition seized are as listed in the search list I (exh. P33) and the police report (exh. P34).

[18] Using the rationale, as to knowledge, in *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337 and *Parlan Dadeh v. PP* [2009] 1 CLJ 717, we find that the presence of such a large quantity of firearms and ammunition, in the manner they were found in the house and in the motorcar, without any plausible explanation from the appellants, could naturally give rise to a strong inference that both of them had knowledge of the subject-matter of the charges against them.

[19] This incontrovertible evidence, has to be evaluated with another incontrovertible evidence, ie, that both of them were arrested on the ceiling of house No. 19 in the same row of terrace houses. This house No. 19 was eight houses away from the appellants' residence, at house No. 3. The row of terrace houses were numbered in odd numbers, starting with No. 1 to No. 27. The escape route undertaken by the two appellants, *via* the ceiling of those houses, can be properly visualised by looking at the sketch plan (exh. P40) and also the photographs (as can be seen from pp. 388 to 395 of the Appeal Records). It is also an incontrovertible fact that both appellants tried to escape by climbing a wooden ladder on the upper floor of the house, to get onto the ceiling and moved along the ceiling of the various houses until house No. 19. Both of them stayed on the ceiling, like mice on the run, for more than 12 hours, from just after mid-night on 11 January 2001 until their arrest at about 1.30pm on the same day. The police had to seek the assistance of a specialised unit known as the Unit Tindakan Khas (UTK) in order to apprehend the two appellants. The police had to resort to using tear-gas, to flush out the appellants from their hiding place. It is our judgment that this is not an attempt to flee but actual positive actions undertaken with such determination in order to escape apprehension and arrest. It is our considered view that such positive actions require an explanation of such conduct, under ss. 8 and 9 of the Evidence Act 1950. The lame explanation that they tried to escape because they thought that the men who forcibly entered the house were robbers who wanted to rob them of their jewellery (barang kemas) and money could not hold water as no jewellery or substantial cash money was found in the house.

[20] During the defence stage, both appellants opted to give (by reading a written statement each) unsworn statements from the dock. Such option is a substantive right of any accused person (see *Mohamed Salleh v. PP* [1968] 1 LNS 80; [1969] 1 MLJ 104).

A But it must be reminded that an unsworn statement from the dock cannot be the subject of cross-examination. As such, as Sharma J said in *PP v. Sanassi* [1970] 1 LNS 118; [1970] 2 MLJ 198: "... such a statement does not constitute evidence and the accused making such statement cannot be a witness".

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[21] In our case at hand, despite Justice Sharma's view that an unsworn statement from the dock is not evidence, the learned trial judge did nevertheless considered them for purposes of evaluation and re-evaluation of all the evidence at the end of the trial. This C was a bonus for the appellants. The learned trial judge's consideration of the defence reads as follows:

> 37. Having considered the defence put forward by the 1st and 2nd accused and their unsworn statements, I find that in its totality the defence raised by the 2 accused in (sic) (is) simply D that of a mere denial of possession. They had attempted to implicate Farok Khan (deceased). To my mind they failed miserably. In so far as this defence is concerned I find that it raises no doubt as to the Prosecution case, which is that the 2 accused were in possession of all the items mentioned in the 2 charges. I am satisfied that the 2 accused who were in their E "house clothes" in the House from which a vast quantity of serviceable arms and live ammunition were recovered were in fact and law in possession of those items when the Police party raided the House. The accuseds' unsworn statements were to my mind a feeble attempt to tailor their defence knowing full well that they F were not subject to cross-examination.

[22] It is our judgment that to be over-cautious in considering the appellants' defence or explanation is not an error. After all, it does not in any way prejudice the appellants.

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[23] To us, the two unsworn statements of the appellants (marked as exhs. D60 and D61) were uncannily similar, not only in regard to the line of the story but also as to the actual words used in them. The unsworn statements were thus more consistent with a concocted story.

H

[24] Lastly, with no evidence forthcoming from the appellants during their defence, it is inevitable that the presumption of trafficking in firearms under s. 7(2) of the Firearms (Increased Penalties) Act 1971 remained unrebutted.

I

[25] In view of the large quantity of firearms involved, especially when it involved a sub-machine gun and grenades, we are of the opinion that the learned trial judge had exercised his proper discretion in imposing the death penalty for the offence under s. 7(1) of the Act. After all, as can be seen in the preamble of the Act, that was the legislative intention of the Firearms (Increased Penalties) Act 1971. Learned counsel did not submit on the sentences in respect of the offence under s. 4 of the Arms Act 1960. Wherefore we are of the view, that the appellants were sentenced according to law and there is no reason for us to interfere with a discretion that was provided for by the law.

[26] For the above reasons, we unanimously dismissed the appeals by the appellants and accordingly affirmed the convictions and sentences by the High Court.