MALAYSIA
IN THE HIGH COURT IN SABAH AND SARAWAK
AT MIRI, SARAWAK
[CASE NO:MYY-45B-3/11-2016]

BETWEEN

PUBLIC PROSECUTOR ... PROSECUTION

AND

MOHAMAD FITRI PAUZI ... 1st ACCUSED

JOINTLY TRIED WITH

CASE NO:MYY-45B-4/11-2016
LIE CHANG LOON ... 2nd ACCUSED

CASE NO:MYY-45B-5/11-2016
CHIN WUI CHUNG ... 3rd ACCUSED

CASE NO:MYY-45B-1/1-2017
LEE CHEE KIANG ... 4th ACCUSED

CRIMINAL LAW: *Murder - Penal Code, s. 302 - Deceased was shot dead by accused - Deceased suffered several gunshot injuries - Wounds on neck and head - Circumstances evidence - Accused and deceased involved in land dispute - Whether elements of offence of murder fulfilled - Whether wounds on neck and head were sufficient in ordinary cause of nature to cause death immediately - Whether weapon used was functional - Whether shotgun was fired with intention of causing death or knowledge that it will cause death*

CRIMINAL LAW: *Abetment - Commission of crime - Abetment of murder - Penal Code, s. 107 - Whether prosecution had tendered evidence to prove that abettors had instigated and conspired with main accused in murder*

[Prosecution failed to establish *prima facie* case against 2nd, 3rd and 4th accused and 2nd 3rd and 4th accused was discharged and acquitted from charge. Prosecution successfully established prima facie case against the 1st accused and 1st accused called to enter defence.]

Case(s) referred to:

Belhaven & Stenton Peerage [1875] 1 App Cas 278 ***(refd)***

Chan Chwen Kong v. Public Prosecutor [1962] 1 LNS 22 CA ***(refd)***

Chandrasekaran & Ors v. Public Prosecutor [1970] 1 LNS 11 HC ***(refd)***

Chong Soon Koy v. Public Prosecutor [1977] 1 LNS 20 FC ***(refd)***

Ghambhir v. State of Maharashtra AIR [1982] SC 1157 ***(refd)***

Idris v. Public Prosecutor [1960] 1 LNS 40 HC ***(refd)***

Mah Hong Ching & Anor v. PP [2007] 2 CLJ 292 CA ***(refd)***

Pathmanabhan Nalliannen v. PP & Other Appeals [2017] 4 CLJ 137 FC ***(refd)***

PP v. Abuchi Ben James [2015] 8 CLJ 1011 CA ***(dist)***

PP v. Gobinath Alfonso A Kuppusamy [2009] 8 CLJ 255 HC ***(dist)***

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

PP v. Yong Ngie Ung [2016] 1 LNS 1152 CA ***(refd)***

Pulukuri Kotayya v. King Emperor 74 IA 65 ***(refd)***

Sunny Ang v. Public Prosecutor [1965] 1 LNS 171 FC ***(refd)***

Sukhvinder Singh Naldip Singh v. PP & Another Appeal [2014] 5 CLJ 574 CA ***(refd)***

Wai Chan Leong v. Public Prosecutor [1989] 1 CLJ Rep 171 SC ***(refd)***

Legislation referred to:

Arms Act 1960, s. 2

Criminal Procedure Code, ss. 180, 402B

Evidence Act 1950, s. 27

Firearms (Increased Penalties Act) 1971, s. 2

Penal Code, ss. 107, 299, 300(c)

JUDGMENT

Introduction

[1] On 21st June 2016, one Bill anak Kayong was shot dead at a traffic light intersection in Miri. Four accused persons were charged in separate cases in connection with the killing. At the outset of the trial, the prosecution successfully applied for a joint trial for all the four cases. In Case MYY-45B-3/11-2016, Mohamad Fitri Pauzi was charged with murdering Bill anak Kayong. The charge reads as follows:

> "That you MOHAMAD FITRI PAUZI (KPT-870604-13-5627) on 21 June 2016 at about 8.20 a.m., at a traffic light intersection near E-Mart supermarket, Jalan Kuala Baram Bypass, in the district of Miri, in the State of Sarawak, did commit murder by causing the death of BILL ANAK KAYONG (KPT: 731208-13-5051), and you thereby committed an offence punishable under section 302 of the Penal Code [Act 574]."

[2] The three other accused persons were charged with abetting Mohamad Fitri Pauzi to commit the said murder. In Case MYY-45B-4/11-2016, Lie Chang Loon was charged as follows:

> "That you together with one Stephen Lee Chee Kiang and another person who are still at large, on 21 June 2016 at about 8.20 a.m., at a traffic light intersection near E-Mart supermarket, Jalan Kuala Baram Bypass, in the district of Miri, in the State of Sarawak, abetted one **MOHAMAD FITRI PAUZI (KPT: 870604-13-5627),** in the commission of murder of BILL ANAK KAYONG (KPT: 731208-13-5051), which offence was committed in consequence of your abetment and that you have thereby committed an offence punishable under section 109 of the Penal Code [Act 574] read together with section 302 of the same Code."

In Case MYY-45B-5/11-2016, Chin Wui Chung was charged as follows:

> "That you together with one Stephen Lee Chee Kiang and another person who are still at large, on 21 June 2016 at about 8.20 a.m., at a traffic light intersection near E-Mart supermarket, Jalan Kuala Baram Bypass, in the district of Miri, in the State of Sarawak, abetted one **MOHAMAD FITRI PAUZI (KPT: 870604-13-5627),** in the commission of murder of BILL ANAK KAYONG (KPT: 731208-13-5051), which offence was committed in consequence of your abetment and that you have thereby committed an offence punishable under section 109 of the Penal Code [Act 574] read together with section 302 of the same Code."

In Case MYY-45B-1/1-2017, Lee Chee Kiang was charged as follows:

> "That you together with one Lie Chang Loon (NRIC: 790105-13-5729), one Chin Wui Chung (NRIC: 660411-13-5705) and another person who is still at large, on 21 June 2016 at about 8.20 a.m., at a traffic light intersection near E-Mart supermarket, Jalan Kuala Baram Bypass, in the district of Miri,

in the State of Sarawak, abetted one MOHAMAD FITRI PAUZI (KPT: 870604-13-5627), in the commission of murder of BILL ANAK KAYONG (KPT: 731208-13-5051), which offence was committed in consequence of your abetment and that you have thereby committed an offence punishable under section 109 of the Penal Code [Act 574] read together with section 302 of the same Code."

[3] All accused person were represented by retained counsel. Initially, Mr. Ranbir Singh indicated that he and Mr. Arthur Lee would jointly represent Mohamad Fitri Pauzi and Lie Chang Loon. However, after I queried whether that arrangement is prudent, Mr. Ranbir Singh said that he will act for Mohamad Fitri Pauzi and that Mr. Arthur Lee will act for Lie Chang Loon. Accordingly, I let the record reflect that all accused persons are separately represented in this trial. For ease of reference, in the notes of proceedings and in this judgment, Mohamad Fitri Pauzi, Lie Chang Loon, Chin Wui Chung and Lee Chee Kiang are also referred to as the 1st accused, 2nd accused, 3rd accused and 4th accused respectively. Finally, I must mention that the 4th accused, Lee Chee Kiang is also referred to as Stephen Lee Chee Kiang in some of the documents, including the consent to prosecute.

[4] At the close of the case for the prosecution, learned DPP submitted that it had established a *prima facie* case against the 1st accused, Mohamad Fitri Pauzi. He is the principal offender in this case. The learned DPP did not submit that there was a case to answer by the other three accused persons who had been charged with abetting the 1st accused to murder Bill anak Kayong (the deceased). I enquired whether it was an omission but the learned DPP replied that the evidence pointed to only one accused person. This is reflected in the notes of proceedings as follows:

> Court: At the last page at paragraph 3: offence under section 302 and you referred to the accused person in the singular and no submission on abetment.
>
> DPP: All the accused being charged under section 302. Throughout the evidence adduced, it clearly shows that it points to only one particular accused person.

Nonetheless, as the case against the alleged abettors has not been discontinued by the Public Prosecutor, as a matter of law, the court is obliged to consider all the evidence tendered by the prosecution and rule whether there is a case to answer by all the accused persons.

Summary of case for prosecution

[5] The prosecution called a total of 28 witnesses. I shall first summarize the case of the prosecution before proceeding to consider the evidence in support of the ingredients of the offence of murder and abetment against the accused persons.

On 21st June 2016, at about 8.45 a.m., P.W. 8 was on his way home when he noticed that a Toyota Hilux bearing registration number QMU 6462 had stopped at the traffic lights intersection near E-Mart, Jalan Kuala Baram Bypass. It did not move when the lights changed. He also saw gunshot marks on the driver's side of the Toyota Hilux. He immediately called the police. The patrol car officers arrived at the scene at 9.06 a.m. They cordoned off the area around the Toyota Hilux with traffic cones and yellow police tape while waiting for an ambulance team and the investigating officer of the case. The investigating officer of the case, Inspector Lee Chee Keat (P.W. 28) and the ambulance team arrived soon after. The medical assistant (P.W. 7) confirmed that the deceased had died and that there was injury to the right side of the neck.

[6] Inspector Lee commenced investigations immediately. The body of the deceased was sent for autopsy. It was identified by the widow of the deceased (P.W. 10). Witness statements were taken from a number of people. Apart from P.W. 8, another passer-by, i.e. P.W. 9 testified that he was at the traffic lights in question on that fateful day when he heard a gunshot. He saw that the glass window of a Toyota Hilux had cracked.

[7] On 30th June 2016, the police arrested Mohamad Fitri Pauzi (1st accused) at the Central Police Station in Miri. On the same day, Lie Chang Loon (2nd accused) was arrested near a restaurant in Miri. On 18th August 2016, Chin Wui Chung (3rd accused) was arrested in front of the Central Police Station by DSP Soliment Nyian (P.W. 24). The 4th accused, Lee Chee Kiang was arrested much later after the 1st to 3rd accused persons were charged in court. He was arrested at the Kuala Lumpur International Airport on 13th December 2016 by the investigating officer, ASP Lee Chee Kiat (P.W. 28). No reasons for his late arrest were furnished by the investigating officer.

[8] The prosecution's case against the 1st accused is built on circumstantial evidence. Evidence was led that the 1st accused had asked one Lau Lee Shen (P.W. 25) to keep a shotgun for him. The prosecution tendered forensic evidence to the effect that the same shotgun was used to kill the deceased in this case. A face mask was found inside the shotgun bag and upon DNA analysis it was found to match the DNA profile of the 1st accused. The prosecution also led evidence through P.W. 20 that the 1st accused was one of two accused persons who entered the land belonging to longhouse residents in Bekelit and had threatened them.

[9] The crime scene investigator (ASP Mohamed Nizam) analyzed the trajectory of the gunshot that hit the Toyota Hilux driven by the deceased. He theorized that the fatal gunshot was fired at the deceased

by a shooter who was in a car that is lower in height than the Toyota Hilux. One Sim Chien Hui (P.W. 27) led the police to the discovery of a white Proton Wira sedan car bearing registration number MA 8686 Q. A Science Officer, Farah Ad-Din (P.W. 18) testified that gunshot residue (GSR) was found inside the car. However, Sim Chien Hui (P.W. 27) was ultimately of little assistance to the prosecution. He and another witness (Paul Boniface anak Ampuan, P.W. 26) were impeached by the prosecution when they departed from their section 112 statement by saying they had no knowledge at all about the case.

[10] In respect of the prosecution's case against the alleged abettors, i.e. Lie Chang Loon (2nd accused), Chin Wui Chung (3rd accused) and Lee Chee Kiang (4th accused), very little evidence was tendered by the prosecution witnesses. No incriminating evidence at all was tendered in respect of the 2nd accused. In respect of the 3rd accused, P.W. 20 alleged that he had threatened villagers in Bekelit. In respect of the 4th accused, evidence was led that he had apologized for the behaviour of a certain "Ah Lek" who had issued threats against the employer of the deceased.

Whether prima facie case established?

[11] The test of a *prima facie* case is whether the prosecution had adduced credible evidence to prove each ingredient of the offence which if unrebutted or unexplained would warrant a conviction (section 180 of the Criminal Procedure Code). In the case of *PP v. Mohd. Radzi bin Abu Bakar* [2006] 1 CLJ 457, the test of a *prima facie* case is stated as follows:

> "… 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".

[12] In the instant joint trial, the charges are in respect of two offences, i.e. the principal charge of murder against the 1st accused and the charge of abetment against the other three accused persons. I shall first consider the case against the 1st accused.

[13] The elements of the offence of murder are found in sections 299 and 300 of the Penal Code. Section 299 defines culpable homicide as follows:

> Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

Section 300 reads as follows:

> Except in the cases hereinafter excepted, culpable homicide is murder-
>
> *(a)* if the act by which the death is caused is done with the intention of causing death;
>
> *(b)* if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
>
> *(c)* if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or

(d) if the person committing the act knows that it is imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

[14] The learned DPP submitted that he is relying on the third limb i.e. section 300(c) to prove that the 1st accused murdered the deceased. I pause to note that there is no requirement in the Criminal Procedure Code to state the limb of section 300 in the murder charge. Therefore, as long as the act of an accused person falls within any of the four limbs, it would satisfy the offence of murder as defined in section 300.

[15] Having regard to the charge of murder in this case, the prosecution is obliged to prove the following crucial elements:

(1) That Bill anak Kayong had died as a result of the gunshot wounds he received;

(2) That the 1st accused had inflicted the said gunshot wounds;

(3) That the act of the 1st accused in inflicting the gunshot wounds on Bill anak Kayong came within the ambit of any one of the four circumstances listed in section 300(a) to (d) of the Penal Code.

Cause of death

[16] The widow of Bill anak Kayong identified the body at the commencement of the autopsy in the presence of the police. The Forensic Medicine Specialist (Dr Norliza binti Ibrahim, P.W. 11) told the court that the deceased suffered several gunshot injuries but the wounds on his neck and head were sufficient in the ordinary cause of nature to cause death immediately. She opined that the deceased

would have died immediately and that the shot was fired from close to intermediate range. Dr Norliza binti Ibrahim is a qualified Forensic Medicine Specialist attached to a government hospital. She has performed countless autopsies and her previous court testimonies have been accepted by the court as stated in her *curriculum vitae*. No challenge was mounted in respect of her qualification, expertise or her findings in this case. In the premises, I find that the prosecution has proved that the cause of death in this case is the gunshot wounds to the neck and to the head of the deceased.

Whether the 1st accused inflicted the gunshot wounds?

[17] This is the crucial element in this case. The prosecution rested its case against the 1st accused solely on circumstantial evidence. I shall discuss it under the following sub-headings for sake of convenience.

Opening Statement

[18] I am mindful that in the opening statement, the learned DPP had stated that the prosecution will prove its case based on circumstantial as well as direct evidence. Counsel for the 1st accused submitted that an adverse inference should be drawn for the failure of the prosecution to call any eye-witness despite the allusion in the opening statement that they existed. He cited three cases, i.e. *PP v. Yong Ngie Ung* [2016] 1 LNS 1152, *PP v. Gobinath Alfonso A Kuppusamy* [2009] 8 CLJ 255 and *Mah Hong Ching & Anor v. PP* [2007] 2 CLJ 292.

[19] I am of the view that the failure of the prosecution to call eye-witnesses despite the proclamation to that effect in the opening statement is not fatal. I also see no reason to invoke adverse

inference. Firstly, it must be noted that adverse inference should only be invoked if there is suppression of evidence. There is no reason to hold that the prosecution had deliberately suppressed evidence by preventing witnesses from testifying. In fact, two witnesses called by the prosecution, i.e. P.W. 26 and P.W. 27 were impeached as they denied knowledge of the case although they gave detailed information in their section 112 statement.

[20] Secondly, in all the cases cited by counsel for the 1st accused, the court did not rule that the failure to adhere to the opening statement alone was fatal to the prosecution's case. In *PP v. Yong Ngie Ung* (*supra*), the trial court only made an observation that the evidence at the trial departed from the opening statement. In *PP v. Gobinath Alfonso A Kuppusamy* (*supra*), the court drew an adverse inference only because the two crucial witnesses who were named in the opening statement were not called as prosecution witnesses but were instead offered to the defence. In *Mah Hong Ching & Anor v. PP* (*supra*), the prosecution omitted to make an opening statement and the court commented adversely on the said omission. In the instant case, the prosecution did not name any eye-witness to the murder in the opening statement. In fact if the opening statement is read carefully, the prosecution did not even say that the "direct evidence" they referred to was in respect of witnesses who actually saw the shooting. The relevant portion of the opening statement is paragraph 6 and it reads as follows:

> 6. In this trial, the prosecution will rely on medical evidence, scientific evidence, circumstantial evidence as well as direct evidence.

Thus, the instant case can be easily distinguished from *PP v. Gobinath Alfonso A Kuppusamy* (*supra*). Therefore, I see no reason to

draw an adverse inference against the case for the prosecution for not calling eye-witnesses.

Assessment of* Circumstantial *evidence

[21] Before proceeding further, I shall first direct myself on the law in respect of the assessment of circumstantial evidence in a criminal case. I shall first refer to the recent Federal Court case cited by the learned DPP. In the case of *Pathmanabhan Nallianen v. PP and other appeals* [2017] 4 CLJ 137, the Federal Court referred to several well known authorities on circumstantial evidence. In *Chan Chwen Kong v. PP* [1962] MLJ 307, Thomson CJ described the approach in assessing circumstantial evidence as follows:

> It must, however, be borne in mind that in cases like this where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. The real question is: is that rope strong enough to hang the prisoner?

[22] The Federal Court also quoted the old case of *Belhaven & Stenton Peerage* (1875) 1 App Cas 278 at p 279 (cited in *Idris v. PP* [1960] X MLJ 296 at p 297). In *Belhaven & Stenton Peerage* (*supra*), Lord Cairns defined the nature of circumstantial evidence in the following memorable passage:

> "My Lords, in dealing with circumstantial evidence we have to consider the weight which is to be given to the united force of all the circumstances put together. You may have a ray of light so feeble that by itself it will do little to elucidate a dark corner. But on the other hand you may have a number of rays, each of them insufficient, but all converging and brought to bear upon

> the same point, and when united, producing a body of illumination which will clear away the darkness which you are endeavouring to dispel."

[23] However, the onus on the prosecution when it relies on circumstantial evidence is onerous. In the following passage in the above mentioned case of *Belhaven & Stenton Peerage* (*supra*), Lord Cairns cautioned as follows:

> In other words circumstantial evidence consists of this: that when you look at all the surrounding circumstances, you find such a series of undesigned, unexpected coincidences that, as a reasonable person, you find your judgment is compelled to one conclusion. If the circumstantial evidence is such as to fall short of that standard, if it does not satisfy that test, if it leaves gaps then it is of no use at all. As I have stated this case depends entirely upon circumstantial evidence.'

The same view has been echoed in many other cases that dealt with circumstantial evidence. In the Singapore case of *Sunny Ang v. PP* [1966] 2 MLJ 195, it was stated that the circumstantial evidence must be of the standard that it not only irresistibly, inexorably and unerringly points to the guilt of the accused but that other co-existing circumstance must exclude any other explanation.

[24] In *Ghambhir v. State of Maharashtra* AIR 1982 SC 1157 which was cited by our Court of Appeal in *Sukhvinder Singh Naldip Singh v. PP and another appeal* [2014] 5 CLJ 574, Misra J in the Supreme Court of India stated that three tests should be adopted in dealing with circumstantial evidence which are as follows:

> When a case rests upon the circumstantial evidence, such evidence must satisfy three tests: (1) the circumstances from which an inference of guilt is sought to be drawn, must be

> cogently and firmly established (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused. The circumstantial evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

With the above directions in mind, I shall now consider whether the circumstantial evidence tendered in this case is sufficient to establish a *prima facie* case against the 1st accused on the charge of murder.

Identification of murder weapon

[25] Lau Lee Shen (P.W. 25) led police to the discovery of a shotgun which was hidden below the ceiling of his house. The pellets recovered during autopsy of the deceased's body were sent to the police ballistics expert (ASP Nik Mohd Norhsyam Bin Nik Ismail, P.W. 22) for comparison. He said that in his opinion, the pellets were fired from the same shotgun. Counsel for the 1st accused challenged his evidence.

[26] The ballistics expert (P.W. 22) outlined the method he employed in his witness statement under section 402B of the Criminal Procedure Code. He compared the pellets recovered from the body of the deceased with the markings left behind by the firing pin on the percussion cap of the three cartridges that were used during the shotgun serviceability test. He used the computerised Integrated Ballistics Identification System (IBIS) which records images of markings.

[27] During cross-examination, his evidence was challenged because he used his naked eyes to compare the images of the pellets with the unique markings and the markings on the percussion cap of the said three cartridges. The exchange between witness and counsel for the 1st accused is as follows:

Q: Can you explain to us how does this IBIS device allowed you to make this comparison?

A: I recorded the 3 images of the casing in the said system, then I made the comparison by images

Q: These images you referred to did you put them side by side each other while making comparison?

A: Yes.

Q: In other words, you used your naked eyes to see the images and make the comparison you referred to.

A: Yes.

Q: I PUT it to you that is incorrect procedure to make comparison of markings of marks found on percussion caps.

A: I disagree.

Q: I put it to you that the proper and accepted way to make comparison of markings left behind by firing pins on percussion caps is by recording images of the markings on the percussion cap and overlapping the same in the computer system to see if they are match exactly, do you agree?

A: I disagree.

[28] During re-examination and further cross-examination, he said that side by side examination of the images which had been recorded using the IBIS system is accurate. He said as follows:

> Maksud saya dengan menggunakan mata kasar yang direct memang menghasilkan jawapan yang tidak tepat. Akan tetapi setelah menggunakan system IBIS, saya telah merekodkan image ketiga-tiga kelongsong peluru dengan menggunakan sistem IBIS, saya juga membuat perbandingan menggunakan mata kasar juga. Akan tetapi ketiga-tiga imej kelongsong peluru tersebut, gambarnya lebih jelas daripada kita tengok sebelum dimasukkan ke dalam sistem IBIS.

[29] Counsel for the 1st accused submitted that the comparison of the unique individual markings on the pellets and percussion cap is

inaccurate because P.W. 22 used his naked eyes. I find no merit in this argument. P.W. 22 had disagreed with counsel for the 1st accused and said that the images were produced using the IBIS computer system and he had also compared the images with his naked eyes by placing the images side by side. P.W. 22's evidence that he has been trained in ballistics analysis was not credibly challenged. He had worked as a ballistics analyst for more than ten years at the Royal Malaysia Police Forensics Laboratory in Cheras. He has worked on about 500 cases and has attended many courses in ballistics since 2007. In the absence of expert rebuttal evidence, I see no reason not to accept the disinterested evidence of a police expert witness.

[30] Counsel for the 1st accused also submitted that the evidence of P.W. 22 is inadmissible for the reason that he did not identify two of the three cartridges in court. He also said that there was "misidentification" of the exhibits as it is stated in the notes of proceedings "at page 334 that P134 to P149 were identified as cartridges and the cartridges themselves were marked as P134A to P149A." I see no merit in the above arguments. The envelopes containing all the sixteen cartridges tendered in court by the earlier witness (P.W. 21) were marked with numbers. The cartridges inside the envelopes were marked with the numbers and the letter "A". Therefore, even if the notes of proceedings do not reflect the fact that P.W. 22 referred to the correct marking of the exhibit, i.e. with the letter "A", it does not mean that he did not identify it in court. In any event, I find it all irrelevant. P.W. 22 affirmatively said that he examined the three cartridges HK1, HK 2 and HK 3 and compared them with the pellets recovered from the deceased. It is stated in his report as well. Therefore, even if he omitted to identify two of the three cartridges in open court, I cannot fathom how it can detract from his expert findings after having examined the pellets and cartridges in the laboratory.

Serviceability of the murder weapon

[31] Counsel for the 1st accused also challenged the finding of the police ballistics expert (Inspector Mohd Riyadh, P.W. 21) who tested the shotgun and wrote the serviceability report (P129). P.W. 21 testified that he examined the shotgun. He found that the essential component parts were complete i.e. the shotgun had barrel, trigger, hammer and firing pin. He tested the shotgun using the Bullet Recovery System and found that the shotgun is serviceable. The concluding paragraph of his report reads as follows:

> 2.3. Senjata api barang kes telah dijalankan ujian tembak (serviceability) di bilik ujian tembak dengan mengunakan Bullet Recovery System pada 11/08/2016 jam 1115 Hrs. Ujian tembak telah dilakukan dengan menggunakan sebanyak (2) dua butir peluru barang kes yang diambil secara rambang. Senjatapi barang kes dapat melepaskan tembakan setelah diuji dengan peluru-peluru barang kes tersebut.

[32] Learned counsel for the 1st accused put to P.W. 21 that he did not test fire the shotgun with a live round, i.e. with pellets, wad and gunpowder. P.W. 21 agreed but said that it will not affect the result of his test. He said as follows:

> If the pellets, the gunpower and the wad removed from the cartridge, it will not affect the result, because it is sufficient to test because the percussion cap will trigger gun powder and to blast the wad and pellets through the barrel.

[33] P.W. 21 also said that if the barrel is blocked and projectiles cannot pass through, it would have been considered non serviceable. Counsel for the 1st accused referred to the definition of section 2 of the Arms Act 1960 (revised 1978) which reads as follows:

> "arm" means any lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged, or which can be adapted for the discharge of any such shot, bullet or other missile, and any weapon of whatever description designed or adapted or which can be adapted for the discharge of any noxious liquid, gas or other thing, and includes an air gun, air pistol, automatic gun, pistol and any component parts of any such weapon, and any accessory to those weapons designed or adapted to diminish the noise or flash caused by firing the weapon;

He also cited section 2 of the Firearms (Increased Penalties Act) 1971 which reads as follows:

> "firearm" means any lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged by means of an explosive charge, and includes a bomb or grenade containing an explosive charge;

[34] Counsel for the 1st accused submitted that the test performed by P.W. 21 does not fulfil the requirements of the above mentioned definitions. Be that as it may, there is no statutory provision that governs the manner of testing the serviceability of a firearm in the above mentioned legislation. P.W. 21 is in my view an expert. He has attended a course in ballistic armament and ballistic analysis. He had conducted more than 100 ballistic analyses and has testified in court more than ten times. He said that to his knowledge, his expert evidence has yet to be rejected. Although live rounds were not used by P.W. 21, he has examined all the component parts before test firing the weapon. In the absence of expert rebuttal evidence, I see no reason not to accept his evidence that the shotgun in question is serviceable.

[35] Finally, counsel for the 1st accused submitted that PW. 21 and P.W. 22 who are both ballistics experts did not swab the shotgun to detect Gun Shot Residue (GSR) for signs that it had been fired. P.W. 21 and P.W. 22 agreed that swabs for GSR were not taken as they were tasked to perform only ballistics analysis.

[36] However, it must be noted that SJN Jiffen ak Sotok (P.W. 16) of the Forensics Unit has swabbed the barrel of the shotgun in question for GSR. It was marked EB6(5)C and labelled *"Swab pada hujung laras senapang patah"*. Science Officer Farah Ad-Din said that she found GSR residue on EB6(5)C. Her evidence was seriously challenged on various grounds. She said that upon analysis she found lead (plumbum) and antimony in the swab. Counsel for the 1st accused referred to literature on ballistics and challenged her finding by saying that three elements must be found in GSR, namely lead, antimony and barium. She disagreed. Again I see no reason not to accept the finding of a qualified expert in the absence of expert rebuttal evidence. Counsel for the 1st accused also put to her that the elements of GSR are also found in brake lining pads used in bicycles, cars and motorcycles. In the written submissions, counsel for the 1st accused addressed this point again. I do not see the relevance of this submission as SJN Jiffen swabbed the end of a shotgun barrel for GSR tests and not a brake lining pad.

[37] Counsel for the 1st accused also questioned the analysis of P.W. 18 for the following reason. During the course of the cross-examination, counsel requested that P.W. 18 show her the computerized images taken by the Scanning Electron Microscope (SEM). They were marked as defence exhibits D4(A) and D4(B). In the written submissions, counsel for the 1st accused raised the argument that the words "*Sample Analysis by Mohamad Firdhaus bin Ramli"* appears at the bottom of the printout of D4(A) and D4(B). In the second written submission he cited the Court of Appeal case of *PP*

v. Abuchi Ben James [2015] 8 CLJ 1011. Holding (1) of the headnote reads as follows:

> (1) Based on the evidence of SP1, it was clear that two science officers calibrated the machines used for the GCMS and GCFID tests. They were given the samples by SP1 for analysis and they operated the machines. Following that, they gave the printout from the machines to SP1. Hence, there remained a doubt as to whether the analysis was done by the science officers or by SP1. If the analysis was done by the science officers, the evidence of the chemist was vitiated and the ingredients of the charge had not been proved. (paras 20 & 23)

[38] In my opinion, the facts of the above mentioned case are distinguishable from the instant case. It was undisputed in the above mentioned case that two science officers had calibrated the said machines and a doubt arose as to who had done the analysis. In the instant case, throughout the trial, P.W. 18 said that she conducted the analysis and completed the report. This fact was never disputed during the trial. Despite being given the computer printout images in D4(A) and D4(B), counsel for the 1st accused never asked her whether anyone else had done the SEM analysis. Had P.W. 18 been asked by counsel for the 1st accused, she may have given an explanation. It appears that for some reason, the name Mohamad Firdhaus bin Ramli had been keyed in at the bottom of the printout. Whether it was keyed during a preceding analysis or the instant analysis in question, I should think that it is useless to hazard a guess now. However, since counsel for the 1st accused never queried P.W. 18 who was on the witness stand, in my view, it is too late to submit in this manner now.

[39] Since P.W. 18 had testified unchallenged that she analysed the GSR swab in question, I shall accept her evidence. From her

curriculum vitae that was tendered in court, I am satisfied that she is an expert in GSR analysis. She had attended courses in the subject and has testified more than ten times in court and her evidence had been accepted. The evidence of GSR on the shotgun means that it had been fired.

[40] For all the above reasons, I find that the prosecution has proven that the shotgun that was used to murder the deceased in this case is the shotgun that was recovered from the house of Lau Lee Shen (P.W. 25). The prosecution has also proven that the weapon was functional. I shall now address the evidence of Lau Lee Shen which is crucial to the case of the prosecution.

Evidence of Lau Lee Shen

[41] The thickest strand of circumstantial evidence against the 1st accused was provided by Lau Lee Shen (P.W. 25). He is a furniture shop owner. He led the police to the discovery of the murder weapon. He strongly implicated the 1st accused in the killing of the deceased in this case although his evidence is circumstantial evidence only. The deceased was murdered on 21st June 2016. Lau Lee Shen could not remember the exact date but he said that he was contacted by the 1st accused whom he knew as "Apek" in the middle of June of the same year. The 1st accused showed him a photograph of a man and said that he "wanted" the man without explaining further. However, when shown a photograph by the prosecution, he was unable to identify the picture of the man in it. Lau Lee Shen said the 1st accused asked him to keep a shotgun. The 1st accused then gave Lau Lee Shen a shotgun which had been placed in a bag. Lau Lee Shen hid the shotgun and the bag under the ceiling of his house. The 1st accused also asked him to go with him to test fire the shotgun. They pair went to a place in Bakam to test fire the shotgun.

[42] Lau Lee Shen was told that the 1st accused would collect the shotgun the next morning at 5.00 a.m. The following morning, the 1st accused collected the shotgun from Lau Lee Shen around 6.00 a.m. The 1st accused returned the shotgun to Lau Lee Shen's house about three hours later at around 9 a.m. Lau Lee Shen identified the 1st accused in court as "Apek". The only thing that Lau Lee Shen heard after that event about the 1st accused and the shotgun was that a murder had occurred.

[43] In my opinion, the testimony of P.W. 25 constitutes strong circumstantial evidence to implicate the 1st accused in the murder of the deceased. An irresistible inference can be drawn that the 1st accused had a direct role in the death of the deceased. My reasons are as follows.

[44] The 1st accused not only left the murder weapon with P.W. 25 about a week before the murder of the deceased but also went to test fire the gun with him in Bakam. In fact, from the testimony of P.W. 25, it is apparent that the shotgun was tested with live rounds. Furthermore, the 1st accused made an appointment with P.W. 25 to collect the gun the following morning at 5.00 a.m. The 1st accused collected the shotgun at 6.00 a.m. but returned it around 9.00 a.m. The charge states that the murder occurred around 8.20 a.m. By 8.45 a.m., P.W. 8 noticed that the Toyota Hilux had stopped at the traffic lights intersection in question. By 9.00 a.m., the widow of the deceased heard that something had happened to her husband. In the premises, it can be reasonably deduced that the deceased was shot at the traffic lights well before 9.00 a.m. It has been conclusively proven that the shotgun that the 1st accused had left with P.W. 25 for safekeeping is the murder weapon.

[45] Although P.W. 25 cannot remember the exact date, it is highly probable that the 1st accused returned to the former's house to collect

the gun on the day of the murder of the deceased. The deceased was murdered on 21st June 2016. P.W. 25 told the court that the 1st accused contacted him in the middle of June of 2016. Although during cross-examination, he was not sure about the date, he did say affirmatively during examination in chief that it was in the middle of June of 2016. That was about a week before the murder of the deceased. P.W. 25 later heard that there was a murder. During cross-examination, P.W. 25 said that he did not make a note as to the date he heard that there was a murder. The exchange between counsel and P.W. 25 during cross-examination is as follows:

> Q: Did you make a note as to the date when you allegedly heard that there was a murder?
>
> A: No.
>
> Q: In your testimony you merely heard that there was a murder case, am I right?
>
> A: Yes.

In his written submission, counsel for the 1st accused said that the murder referred to by P.W. 25 did not necessarily occur on the same day that the 1st accused collected the weapon but could have occurred on any other day. He also said that P.W. 25 did not refer to a "murder" in Miri and thus he could have referred to a murder anywhere in the world.

[46] In my opinion, given the context of the testimony of P.W. 25, he only referred to a murder that occurred in Miri and that it was related to the shotgun that the 1st accused had given to him for safekeeping. I reproduce below his exact words during examination in chief by the learned DPP:

Q: After Apek took the shotgun around 6am, what happened then to Apek and the shotgun?

A: After that I heard there is a murder case occurred.

Quite obviously, P.W. 25 was responding to the question as to what happened to the 1st accused and the shotgun. Assuming that the "murder" he referred to had occurred somewhere else in the world or on some other occasion, it would have been wholly unnecessary for him to respond to the question of the learned DPP in the manner he did. In the premises, the evidence of P.W. 25 very strongly suggests that the 1st accused was involved in the murder of the deceased.

[47] I shall now consider whether the 1st accused could have dealt with the shotgun for the purpose of game hunting. Counsel for the 1st accused suggested to P.W. 25 that if the shotgun had been given to him at all by the 1st accused, it was for the purpose of hunting animals. From the photographs, the place where the shotgun was tested appears to be a secluded spot in Bakam. I should think that it is unlikely that if one had intended to go game hunting, one would be seen fit to test fire the weapon in a secluded spot beforehand. It could have been done at hunt itself. Therefore, from the evidence of P.W. 25, it is probable that the 1st accused had a more evil purpose in mind than hunting animals.

[48] Counsel for the 1st accused put to P.W. 25 that he had lied in court because he had been detained by the police under the Prevention of Crime Act 1959 (POCA) and he had also been placed under restricted residence. He also suggested that P.W. 25 had made a bargain with the police to avoid being charged for a firearm possession offence. P.W. 25 denied the suggestion. In my view, there is no material to make such a suggestion. In any event, I found him to be a credible witness. From the answers that P.W. 25 gave during examination in chief and cross-examination, it is obvious that he was

not eager to overstate the case of the prosecution in any way by giving exact dates and embellishing details. It is apparent that he gave answers only insofar as his memory retained them. If he had been coached as a witness upon the striking of an unholy bargain with the police, it is likely that he would have given exact dates and more incriminating particulars. Although, demeanour is no touchstone of truth, I am satisfied that P.W. 25 is a credible witness. Therefore, I see no reason to hold that he was an untruthful witness as submitted by counsel for the 1st accused merely because he had been detained under POCA or subjected to restricted residence. I will now consider other strands of circumstantial evidence that point to the role of the 1st accused in the murder of the deceased.

Face mask

[49] When the shotgun was recovered from P.W. 25, the police found a face mask inside the shotgun bag. The face mask was sent for DNA profile analysis. Zaliha Suadi (P.W. 12), the DNA expert confirmed in court that she developed a DNA profile from material found on the face mask that matched the DNA profile developed from the blood specimen of the 1st accused. The face mask was tendered into evidence without any objection by the defence.

[50] However, the identity of the face mask was questioned by counsel for the 1st accused. The chemist (P.W. 17, Mohd Riduan) received it from the investigating officer and forwarded it to the DNA expert for analysis. P.W. 17 said that the said face mask is an "ALPINE" brand face mask. During the trial, he agreed that the marking "ALPINE" does not appear on the face mask. However, P.W. 17 explained that he mistook the logo on the face mask to be of the "ALPINE" brand. He said as follows:

Q: You were asked about Alpine or logo by the defence counsel and you said 'no' there was no Alpine logo, you agreed to it and about the brand name Alpine and you also said 'yes' there is no brand name Alpine that you could see from the exhibit but you seemed to want to explain something to this Court?

A: The Alpine actually I was referring to this face mask and now I am aware that this logo is an Alpinestar logo.

The investigating officer, P.W. 28 testified that only one face mask was recovered from the shotgun bag. In the premises, there is no merit in the suggestion of the defence that it is possible that two face masks were recovered or there was mix up of exhibits or there was "misidentification" of exhibits.

[51] Counsel put to the DNA expert witness (P.W. 12) whether she knew that the 1st accused was forced to wear the face mask while in police custody. However, this suggestion was never put to the police witnesses including the investigating officer. Thus, there is no reason to speculate that the DNA material of the 1st accused got on to the face mask after his arrest.

[52] The fact that the 1st accused's profile was developed from material found on the face mask which was recovered from the shotgun bag corroborates the evidence of P.W. 25. The shotgun was given to P.W. 25 together with the bag. P.W. 25 took it on the day in question together with the bag in which the face mask was found. Therefore, an inference can be drawn to link the 1st accused to the smoking gun which is the same gun that P.W. 25 said was given to him for safekeeping.

Evidence of P.W. 20 – Jambali anak Jali

[53] P.W. 20 (Jambali anak Jali) is the former headman of a longhouse in Sungai Bekelit Bekenu. He was a friend of the deceased. He said the deceased always supported the longhouse residents in the land dispute with a plantation company known as Tung Huat Pelita Niah Plantation. P.W. 20 said that the deceased told him that the "Tung Huat people" want to give him "bribe money" to persuade the longhouse residents to surrender their land. However, he said the "company" threatened the deceased as he had refused the offer. P.W. 20 said that on one occasion the 1st accused and 3rd accused came to their land to threaten them. He said as follows:

> Q: With regard to you said 'our land problem', can you please elaborate more on that?
>
> A: Our land problem with a company called Tung Huat Pelita Niah Plantation. I myself did not enemy with anybody because these people are the ones who disturbed Bill Kayong and myself. Every time Bill Kayong support what am I doing, the people from the Company always threaten us until Chin and Fitri enter our compound, because this people do not want to see the late Bill to support the long house folks.

[54] It has been suggested by counsel that the words "*until* Chin and Fitri enter our compound" in the sentence "the people from the Company always threaten us *until* Chin and Fitri enter our compound", means that threats ceased after the 1st and 3rd accused entered their land. For good measure, the definition of "until" in the Oxford Learner's Dictionary (9th Edition) was also cited. With respect, this is not the way to understand or analyse the meaning of the words that were translated into English from another language by the court interpreter. P.W. 20 testified in Iban. In the context of his

evidence, what he meant was that the threats received by the longhouse residents culminated in 1st and 3rd accused entering their compound. Otherwise, the entire passage I cited above would not make any sense.

[55] However, P.W. 20 did not say anything else about the details of the threats that the deceased had received.

> Q: About this threat received, can you elaborate more on that?
>
> A: The Late Bill Kayong did not tell me in details about the threat that he received. He only told me that he received threat from this people.

Nonetheless, the evidence of P.W. 20 links the 1st accused to the land dispute that the longhouse residents in Bekelit and the Tung Huat Plantation company were embroiled in. There is no evidence about the role of the 1st accused in the Tung Huat Plantation company but P.W. 20 said that the 1st accused actually came to their land to threaten them. P.W. 20 said that the deceased was also involved in the same dispute as he was helping the longhouse residents. This strand of circumstantial evidence that links the 1st accused to the murder of the deceased is a weak strand but it provides motive and strengthens other strands of circumstantial evidence to link him to the death of the deceased.

Other issues

[56] For sake of completeness, I shall also address some other issues that were raised by the prosecution and the defence in the written submissions and during oral arguments. I shall discuss these issues under the following sub-headings.

Identity of Toyota Hilux

[57] The first information report was taken down by KPL Hairi bin Bain (P.W. 1). He said the informer (P.W. 8) told him that the registration number of the Toyota Hilux was QMN 6462. In his police report, P.W. 1 stated it as QMU 6462. He said the registration number was provided by P.W. 8. The police patrol car with KPL Mohd Firdaus (P.W. 6) and KPL Sandy arrived at 9.06 a.m. They immediately cordoned off the area around a Toyota Hilux that had stopped at the traffic lights intersection in question. The police photographs show that the number of the Toyota Hilux vehicle was QMU 6462. P.W. 8 was shown a set of 52 photographs marked as P19(1-52) which showed a Toyota Hilux with a shattered window on the driver's side. He identified it as the vehicle that had stopped at the traffic lights. P.W. 7, the medical assistant who arrived at the scene soon after said as follows:

> We arrived at the place of incident at 9.36 a.m and I noticed that there were police officers and many public around. I also noticed there was a vehicle on the road which is Toyota Hilux bearing registration no. QMU 6462.

[58] P.W. 28, the investigating officer of the case said that when he arrived at the scene, he noticed that a Toyota Hilux bearing registration number QMU 6462 had been cordoned off with a yellow police tape. Thus, none of the witness who were at the scene had said that there was a second Toyota Hilux bearing registration number QMN 6462. It is patently clear that P.W. 1 made a mistake when he said QMN instead of QMU when referring to the registration number.

[59] However, counsel for the 1st accused submitted there could have been a second Toyota Hilux at the scene. His reason for this argument is as follows. The investigating officer (P.W. 28) had said as follows:

> *Dengan bersama jurufoto* L/KPL Mohamad Noorazam bin Bahari dan ASP Zainan Azlili bin Abdul Latiff, *saya telah mengambil gambar* sekeliling kereta Toyota Hilux.

During cross-examination, counsel for the 1st accused asked the investigating officer to confirm whether the above statement is true and the latter answered in the affirmative. Based on the above answer, counsel for the 1st accused has latched on to the mistake of P.W. 1 and submitted that the photographs taken by the investigating officer were not tendered into evidence. He also argued that if the said photographs were tendered into evidence, it "would show the existence of a second Hilux". My view on this argument is this. If the statement of the investigating officer which is in Malay is read in its proper context, one would realise that it does not say that the investigating officer took a different set of photographs at the scene. The investigating officer had said as follows:

> ".....dengan bersama jurufoto.... saya telah mengambil gambar".

He did not say that both he and the photographer took photographs separately. He did not say that he personally (saya sendiri) took some photographs. It must be borne in mind that the investigating officer is a senior officer and that he is assisted by various junior officers in his work. In any event, counsel for the 1st accused who conducted a very lengthy cross-examination of the investigating officer never asked him about the existence of the photographs that the latter allegedly took at the scene of crime. Therefore, with respect, the submission of learned counsel for the 1st accused is speculative and even fanciful.

Confession *of P.W. 27*

[60] During the trial, evidence was tendered in respect of the police interrogation of a suspect, one Sim Chien Hui (P.W. 27). According to DSP Soliment Nyian (P.W.24), the suspect said as follows:

> "Apek telah letak satu senapang panjang dalam bonet belakang kereta saya jenis proton wira warna putih nombor?? 8686 sebelum hantar sama Ah Seng. Kereta itu saya letak luar Balai Polis Miri. Kunci kereta ada di Balai Polis Miri. Saya boleh tunjuk tempat itu sama tuan".

P.W. 24 took down the confession of P.W. 27 by hand. It is signed by both P.W. 24 and P.W. 27. He also lodged a police report and reproduced the same statement in it (P158). P.W. 27 subsequently led the police to a Proton Wira Car bearing registration number MA8686Q which was parked beside the Miri Central Police Station. The police forensics team swabbed the car for Gun Shot Residue (GSR). Science Officer, Farah Ad-Din (P.W. 18) confirmed finding GSR on samples taken from the car. The learned DPP submitted that it is another piece of circumstantial evidence. I admitted the police report. I was of the view that it is admissible as it relates to what P.W. 24 heard from P.W. 27. However, P.W. 27 was impeached by the prosecution as he repudiated his section 112 statement. In the premises, the police report containing the confession of P.W. 27 cannot be used to prove the truth of the contents as it would amount to hearsay. Thus, it has no evidentiary value.

[61] During the trial, the learned DPP submitted that the police report was made pursuant to section 27 of the Evidence Act 1950 as evidence of discovery. In the written submission, the learned DPP did not address this point again. Nonetheless, I am of the opinion, that the confession of P.W. 27 which is produced in the police report is not admissible under section 27 of the Evidence Act 1950. It is trite law that section 27 must be strictly construed as it is an exception to the normal rules of admitting a confession. As stated in *Chandrasekaran & Ors v. PP* [1971] 1 MLJ 153, section 27 is a concession to the prosecution. In above mentioned case, Raja Azlan Shah J (as HRJ then was) explained the underlying principle as follows:

> The reason is that, since the discovery itself provides the acid test, the truth of the statement that led to the discovery is thereby guaranteed.

Section 27 reads as follows:

> 27. How much of information received from accused may be proved
>
> (1) When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of that information, whether the information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

[62] The first condition that must be noted is that the information must come from "a person accused of any offence". In the case of *Chong Soon Koy v. PP* [1977] 2 MLJ 78, the accused was a mere suspect in the custody of the police at the time he gave the information in question which led to the discovery of firearms. He had yet to be accused of any crime but he was charged later. The former Federal Court held that "a person accused of any offence" can mean "a person accused at the time or subsequently of any offence." However, P.W. 27 in the instant case has not been charged with any offence relating to this case. Therefore the statement cannot be admitted under section 27 of the Evidence Act 1950.

[63] Even if it were otherwise, as stated in section 27, only so much of the information as relates distinctly to the fact thereby discovered may be proved. This condition was elucidated in the well known Supreme Court case of *Wai Chan Leong v. PP* [1989] 3 MLJ 356. Gunn Chit Tuan SCJ re-stated the requirement pithily as follows:

> In other words the fact must be the consequence and the information the cause of its discovery. Moreover the information must relate distinctly to the fact discovered.

The learned Judge also cited an illustration given in the old Privy Council case of *Pulukuri Kotayya v. King Emperor* 74 IA 65 about how much of the information which led to discovery of a fact can be admitted:

> Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which I stabbed A.' these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."

[64] In the instant case, as a result of the information given by P.W. 27, the police discovered the Proton Wira car. Therefore, that fact the Proton Wira car was parked at the road near the police station to the knowledge of P.W. 27 is admissible. The fact that "Apek" had put a shotgun in the car is not admissible as the police did not find any shotgun in the car. In any event, as I said earlier, P.W. 27 is not an accused person. It can only apply to an accused person who has made a confession which resulted in the discovery of a fact.

[65] There is also a further reason why the statement of P.W. 27 is not admissible under section 27. In the statement of P.W. 27 that was taken down by P.W. 24 and reproduced in the police report (P158), P.W. 27 had said as follows:

Kunci kereta ada di Balai Polis Miri.

The police witnesses did not explain the significance of this statement. However, the car was parked just outside the Miri Central Police Station and from the plain meaning of the words uttered by P.W. 27, the car was for some reason already in the custody of the police as the keys were in the police station. Therefore, it cannot be said to have been discovered as a consequence of the information given by P.W. 27.

As there is no other evidence to link the car to the accused, the finding of GSR in the car cannot be considered to constitute another strand of circumstantial evidence.

Chain of evidence

[66] Counsel for the 1st accused submitted that there was a break in the chain of evidence relating to the exhibits analysed by the Chemist (P.W. 12) because her assistant (Hamidon) had access to the strong room where the exhibits were kept. Furthermore, the assistant also handled the exhibits. Hamidon was not called as a witness. Counsel for the 1st accused submitted that there could have been tampering or contamination of the exhibit and he urged the court to draw an adverse inference. I see no merit in this submission. It is purely speculative. The chemist cannot be expected to work without assistants. Counsel for the 1st accused did not establish through cross-examination that there was contamination or tampering with the exhibits. In fact, P.W.12 strongly denied the suggestion of counsel. For the same reason, counsel for the 1st accused suggested that there was tampering or contamination in respect of the exhibits handled by P.W. 17 who is the chemist who collected all the samples. The reason is that another chemist by the name of Mohd Fazli also had access to

the strong room. I see no merit in this submission for the same reasons given earlier.

[67] Counsel for the 1st accused suggested that there was a mix-up of exhibits in relation to the analysis of the face mask because no handing over receipts between P.W. 12 and P.W. 17 were tendered in evidence. Both witnesses disagreed with the suggestion that there was no proper handing over. I see no merit in this suggestion merely because the receipts were not tendered.

Case to answer by 1st accused

[68] In conclusion, the prosecution has adduced strong circumstantial evidence to link the 1st accused to the murder of the deceased. To recapitulate, the 1st accused had handled the murder weapon at about the same time when the deceased was murdered. He had tested the weapon the day before the murder in a secluded spot. He came the following morning to pick up the weapon. After the weapon was returned, P.W. 25 heard there was a murder. DNA evidence linked the 1st accused to the face mask found inside the shot gun bag. The former longhouse chief (P.W. 20) said the 1st accused had threatened them and did not like the fact the deceased assisted longhouse residents to defend their land. The shotgun is a powerful weapon that is lethal if fired at short range. The forensic medical specialist said that death was immediate. Therefore, the shotgun must have been fired with the intention of causing death or knowledge that it will cause death under limb (c) of section 300 of the Penal Code. Although there is no evidence of the manner the shot was fired because of absence of eye-witnesses, all the above pieces of evidence if combined together, leads to the irresistible inference that it was the 1st accused who had shot the deceased on that fateful morning. I therefore reject the contention of counsel for the 1st accused that the evidence only casts

mere suspicion against the 1st accused. I hereby call upon the 1st accused to enter his defence upon the said charge of murdering the deceased.

Case against abettors

[69] The 2nd accused, 3rd accused and 4th accused have been charged with abetting the murder of deceased by the 1st accused. The definition of abetment is provided in section 107 of the Penal Code. The provision (shorn of Explanations and Illustrations) reads as follows:

> A person abets the doing of a thing who--
>
> (a) instigates any person to do that thing;
>
> (aa) commands any person to do that thing;
>
> (b) engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or
>
> (c) intentionally aids, by any act or illegal omission, the doing of that thing.

[70] It behoves the prosecution to tender evidence to satisfy any one of the limbs of the above mentioned definition. The prosecution should tender evidence to prove that the abettors had either instigated the 1st accused or had commanded him or had conspired with him or aided him in the murder of the deceased. However, during the trial sufficiently cogent circumstantial evidence was not given to support the abetments charges against all the said three accused persons. I

shall address the evidence that was tendered against each of the three accused persons separately.

Evidence against 2nd accused – Lie Chang Loon

[71] The 2nd accused was only mentioned by the prosecution witnesses in relation to his arrest by the police, his identification by the investigating officer in court and the testing of his blood sample for the purpose of developing a DNA profile. It goes without saying that this type of evidence cannot by any stretch of the imagination connect him to the murder of the deceased in the instant case. No witnesses came forward to say that the 2nd accused had even in some remote manner instigated, commanded, conspired or aided the 1st accused to murder the deceased. There is no forensic evidence or any other circumstantial evidence that can connect him to the murder of the deceased either. In the premises, the case of the prosecution against the 2nd accused is a complete non-starter.

Evidence against 3rd accused – Chin Wui Chung

[72] The 3rd accused was also mentioned by prosecution witnesses during the trial for the same reasons, i.e. he was arrested, a blood specimen was taken from him and he was identified in court. Apart from that, the only mention of the 3rd accused was made by P.W. 20 (Jambali anak Jali). I had referred to his evidence earlier when dealing with the circumstantial evidence against the 1st accused. P.W. 20 said that the 1st accused and 3rd accused had entered their land to threaten the longhouse residents. No other evidence linking the 3rd accused to the crime of abetting the murder of the deceased was adduced.

[73] I had called for the defence of the 1st accused based on various pieces of circumstantial evidence including forensic evidence. The 1st accused is charged with the principal offence of murder. The 3rd accused is charged with abetting him. In the premises, the prosecution must adduce evidence that the 3rd accused had either instigated or commanded or conspired with or aided the 1st accused to murder the deceased. The single piece of evidence to incriminate the 3rd accused was that he was together with the 1st accused when the longhouse residents were threatened. This evidence is plainly insufficient to satisfy the ingredients of the offence of abetment in the murder of the deceased. It can only cast suspicion which cannot satisfy the test of a *prima facie* case. Moreover, the evidence in question is circumstantial evidence and the principle is that a case predicated on circumstantial evidence alone must irresistibly and unerringly point to the guilt of the accused person and must also exclude any other explanation.

Evidence against 4th accused – Lee Chee Kiang

[74] The 4th accused was mentioned by three witnesses in this trial, P.W. 19, P.W. 20 and the investigating officer, P.W. 28. However, none of the witnesses who mentioned him gave an iota of evidence to connect him to the crime in question. The prosecution did not tender any forensic evidence either to support the charge of abetment. I shall consider their evidence below.

[75] P.W. 19 is a private medical practitioner. He is also the Member of Parliament for Miri. He told the court that the victim is his special assistant. P.W. 19 said the victim had been involved in assisting villagers in a land dispute with the Tung Huat Plantation company in Bekelit. P.W. 19 said both he and the victim had been threatened. He said a man who called himself "Ah Lek" said that he is a friend of Datuk Stephen Lee and had threatened to kill him. The threat was

made over the phone. P.W. 19 lodged a police report. P.W. 19 said a few weeks before that incident, the 4th accused met him in a coffee shop and asked for his help as the longhouse people had been seen coming to his clinic. The 4th accused told P.W. 19 that he had bought the land in dispute for RM10 million. P.W. 19 said he will help but did not know what he can do. After that, the said "Ah Lek" threatened P.W.19 over the phone. Then 4th accused came to see him to apologize for Ah Lek's behavior. The 4th accused even offered to bring the said "Ah Lek" to the police station. That was the sum of P.W. 19's evidence.

[76] P.W. 20, the former headman from Sungai Bekelit Bekenu also mentioned the 4th accused. He did not say anything incriminating against the 4th accused as he only said that he can identify him. During cross-examination, he admitted that he can identify the 4th accused only because he saw his pictures in the newspapers.

[77] The final mention of the 4th accused was by the investigating officer, P.W. 28. The terse statement of P.W. 28 was that he arrested the 4th accused at the KLIA on 13th December 2016 at 8 p.m. He identified the 4th accused in court. P.W. 28 did not say anything else about the 4th accused in his evidence in chief. He did not even relate the circumstances that led to the arrest of the 4th accused at the KLIA. As I said at the outset, no reason was given why the 4th accused was arrested much later than the other accused persons.

[78] Thus the evidence of the investigating officer (P.W. 28) and P.W. 20 in respect of the 4th accused are not in the least incriminatory. Their evidence does not even cast suspicion on him in respect of the offence of abetting the murder of the deceased.

[79] P.W. 19 had given evidence that the deceased had been threatened. However, he never said that the 4th accused had threatened the deceased. He only said the deceased was threatened in relation to

his work of defending the interests of the longhouse residents in a land dispute with the Tung Huat Plantation Company. The prosecution did not tender any evidence in respect of the ownership of this company. In any event, the charge of abetment is directed at an individual, namely the 4th accused. Even if the evidence of P.W. 19 is viewed as a strand of circumstantial evidence, it is only one strand of evidence which on its own cannot satisfy the test of a *prima facie* case. The question to ask would be whether if the defence of the 4th accused is called based on the evidence of P.W. 19 alone, would the court be prepared to convict him if he remains silent? The evidence of P.W. 19, at its highest, can only cast suspicion of the 4th accused. To my mind, without other circumstantial evidence to connect the 4th accused to 1st accused or to the other accused persons in respect of the murder of the deceased, the evidence of P.W. 19 is plainly insufficient to establish a prima case against the 4th accused.

[80] In conclusion, the prosecution has failed to establish a *prima facie* case against the alleged abettors, i.e. the 2nd accused, the 3rd accused and the 4th accused. In the premises, I shall discharge and acquit the 2nd accused, the 3rd accused and the 4th accused without calling for their defence.

[81] As for the 1st accused, I had found that the prosecution has established a *prima facie* case. I therefore call upon him to enter his defence on the charge of murder of Bill anak Kayong.

(RAVINTHRAN PARAMAGURU)
Judge
High Court
Kota Kinabalu, Sabah

Date of Grounds of Judgment: 6 JUNE 2017

Date of Delivery of Decision: 6 JUNE 2017

Date of Hearing: 18 JANUARY 2017

7 – 10 MARCH 2017

13-15 MARCH 2017

28 – 31 MARCH 2017

25 MAY 2017

COUNSEL:

For the prosecution - DPP Mohd Fuad Abdul Aziz, Attorney General Chambers, Putrajaya

For the 1st accused - Ranbir S Sangha; M/s Ranbir S Sangha & Co
Advocates and Solicitors
Miri, Sarawak

For the 2nd accused - Arthur Lee; M/s Arthur CA Lee &Partners
Advocates and Solicitors
Miri, Sarawak

For the 3rd accused - David Kuok; M/s Wong Orlando Chua & Kuok Advocates
Advocates & Solicitors
Sibu, Sarawak

For the 4th accused - Orlando Chua; M/s Wong, Orlando Chua & Kuok Advocates
Advocates and Solicitors
Sibu, Sarawak

Notice: This copy of the Court's Reasons for Judgment is subject to editorial revision.