DALAM MAHKAMAH TINGGI MALAYA DI SHAH ALAM

DALAM NEGERI SELANGOR

[PERBICARAAN JENAYAH NO: 45A-14-2011;

45-15-2011; dan 45-19-2012]

PENDAKWARAYA LWN HO KOK LEONG

CRIMINAL LAW: *Penal Code - s. 302 - Murder - Whether deceased died due to injuries suffered - Whether death of deceased caused by accused - Whether accused fired and shot deceased using a revolver - Whether accused intended to cause death of deceased - Whether prosecution made out a prima facie case against accused*

CRIMINAL LAW*: Penal Code - s. 307 - Attempted murder of SP-11 - Whether accused fired 4 gun shots at SP-11 - Whether accused had the mens rea, both intention and knowledge to cause the death of SP-11 - Whether accused attempted to cause the death of SP-11 in firing/discharging the 4 gun shots aimed at SP-11 - Whether prosecution made out a prima facie case against accused*

CRIMINAL LAW: *Firearms (increased Penalties) Act 1971 - s. 3 - Discharging 4 gun shots from a pistol at SP-11 - Whether accused discharged 4 gun shots with a pistol - Whether shots were discharged*

by accused with the intention to prevent his arrest by SP-11 - Whether accused intended to kill SP-11 when he discharged said 4 gun shots although SP-11 did not suffer death or injuries - Whether prosecution made out a prima facie case against the accused

CRIMINAL PROCEDURE: *Defence - Denial - Accused's testimony never put to the prosecution witnesses - Only revealed during the defence stage, leaving no room for rebuttal, explanation or denial by witnesses - Whether failure by accused to put his case at the earliest possible stage rendered the same to be branded as a recent invention incapable of being accorded the due weight it deserved - Whether defence capable and sufficient to dislodge prosecution's case - Whether it created reasonable doubt*

[Accused found guilty and convicted of the 3 offences as charged; For the first and third charges, accused sentenced to death and in respect of second charge, accused jailed for 5 years to run with effect from the date of his arrest.]

Case(s) referred to:

Alcontra a/l Ambross Anthony v. PP (MR) [1996] 1 MLJ 209 ***(refd)***

Bala anak Matik v. PP [2006] 3 MLJ 516 ***(refd)***

Chan Chuen Kong v. PP [1962] MLJ 307 ***(refd)***

Chua Beow Huat v. PP [1970] 2 MLJ ***(refd)***

Dato Seri Anwar bin Ibrahim v. PP (and Another Appeal) [2003] 4 CLJ 409 ***(refd)***

Idris v. PP [1960] MLJ 269 ***(refd)***

Looi Kow Chai & Anor v. PP [2003] 1 CLJ 374 ***(refd)***

Mohd Abbas Danus Baksan v. PP [2006] 3 CLJ 880 ***(refd)***

Munusamy v. PP [1987] 1 CLJ 250 ***(refd)***

PP v. Abdul Razak Dalek [2006] 4 CLJ 129 ***(refd)***

PP v. Chia Leong Foo [2000] 4 CLJ 649 ***(refd)***

PP v. Lin Lian Chan [1992] 2 MLJ 561 ***(refd)***

PP v. Ling Tee Huah [1982] 2 MLJ 324 ***(refd)***

PP v. Mansor B. Mohd. Rashid [1997] 1 CLJ 233 ***(refd)***

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

Parlan bin Dadeh v. PP [2009] 1 CLJ 717 ***(refd)***

Ramli bin Kechik v. PP [1986] 1 CLJ 308 ***(refd)***

Sam Hong Choy v. PP [2008] 1 CLJ 10 ***(refd)***

Sunny Ang v. PP [1966] 2 MLJ 195 ***(refd)***

Tarmizi Yacob & Anor v. PP & Another Appeal [2010] CLJ 50 ***(refd)***

Yeo Kwee Huat v. PP [2011] 5 CLJ 630 ***(refd)***

Legislation referred to:

Criminal Procedure Code, s. 23(1)(c)

Evidence Act 1950, ss. 8(2), 114(g), 134

Explanation 2 to s. 299 of the Penal Code

Firearms (Increased Penalties) Act 1971, s. 3

Penal Code, s. 302

Police Act 1967, s. 20(3)(a)

Other sources referred to:

Mallal's Penal Law at p. 515

JUDGEMENT

IN case no. **45B-14-2011** the accused was charged of the murder of Lee Fah, an offence under s.302 of the Penal Code and punishable with death thereunder. The offence was alleged to have been committed on 28.6.2010 at about 6.45 p.m. at a parking lot at Jalan SP2/6, Taman Serdang Perdana, Seri Kembangan, Selangor.

In case no. **45-15-2011** the accused was charged of the attempted murder of Police Constable Hosin bin Senawi, an offence under s. 307 of

the Penal Code and punishable thereunder. He was alleged to have discharged four (4) gun shots from a 9mm Stoeger Couger 8000 pistol at the said police constable with intention to cause his death while attempting to evade arrest by the said police constable. The offence was alleged to have been committed on the 28.6.2010 between 6.45 p.m. to 7.30 p.m. at Jalan SP2/2, Taman Serdang Perdana and Jalan Utama, Persiaran Serdang Perdana, Seri Kembangan, Selangor.

In case no. **45-19-2012** the accused was charged of discharging four (4) gun shots from a 9mm Stoeger Couger 8000 pistol at Police Constable Hosin bin Senawi with intention to cause the death of the said police constable while committing a schedule offence ie, preventing his own arrest by the said police constable, an offence under s. 3 of the Firearms (Increased Penalties) Act, 1971 (Act 37) and also punishable with death thereunder. The offence was alleged to have been committed on the same date, time and places a particularized in case no. 45-15-2011.

All the 3 cases were tried together at the request of the prosecution with the concurrence of the defence. The aforesaid charges were thus renumbered and now known as the first, second and third charge respectively.

Case for the prosecution

SP-11, Hosin bin Senawi, now a lance corporal, then attached at Balai Polis Seri Kembangan as a member of the Balai's NKRA Task Force Unit, was having a drink at Restoren Keluarga Ahmed located at Jalan 2/2, Serdang Perdana, with his 2 new acquaintances when he heard 4 gun shots being fired in rapid succession. In the sketch plan exhibit P-40, the said restaurant is marked "A".

In response to the said gun shots, PW-2 ran towards the rear of Restoren Kepala Ikan Chong Heng, shaded in black in the sketch plan P-40. He saw a male Chinese covered with blood lying on the ground at point "B" in the sketch plan next to a BMW motorcar. He took about 10 seconds to

reach point “B” from point “A”. He also saw a male Chinese with white hair, whom he later identified as the accused, walking towards a silver coloured motorcar, a Proton Iswara bearing the registration number WKY 5462, parked nearby at point “X1” which he (SP-11) drew in the sketch plan (herein after referred to as the “WKY 5462 motorcar”).

Next SP11 shouted “polis!”. The accused responded by turning towards him and pointed a pistol at him. He was about 30 feet away from the accused. He scampered behind a pinang tree at point “X” (drawn by him in the sketch plan). However the accused did not open fire at him. From there he next saw the accused entering into the WKY 5462 motorcar, took the wheels and slowly moved forward and turning to the right at the end of the road. SP-11 drew the direction/route taken by the accused in dotted red ink arrows in the sketch plan. He pursued the accused on foot through the route he drew in blue ink arrows in the sketch plan.

He crossed path with the accused at the junction at point "C" in the sketch plan (or at "X2" as drawn by him). At this point he saw the accused putting his right hand out of the car window holding a pistol and pointing at him and eventually fired 2 shots at him. At the material time he was on the right side of the said car, about 15 meters away. He managed to evade by ducking behind a pillar with a big stone wall at point "X3" (drawn by him).

The accused proceeded further and finally entered Jalan Utama heading towards the traffic lights. The accused took the route indicated in dotted red ink arrows, drawn by SP-11. Meanwhile SP-11 continued to pursue the accused using the route he drew in blue ink arrows in the sketch plan.

According to SP-4, the traffic was heavy at Jalan Utama. The accused stopped his car on account of the traffic. SP-11 who was following the accused's car from the rear left saw the accused loading ammunitions into the pistol's magazine. He knocked the rear left window of the

accused's car. The accused responded by surging forward, knocking into several cars on its left and right and finally got stuck at point "D" in the sketch plan due to the heavy traffic.

The accused then exited his car through the front left car door as the driver's side of the car door was squeezed up against another car on its right. At the material time SP-11 was at the rear left door of the car. When the accused exited his car, he ran towards the rear right side of the car. The accused then fired 2 shots at him. He ducked the shots by lying flat, face down on the ground.

The accused then fled on foot towards Mint Hotel through the exit road leading to the Kuala Lumpur - Seremban Highway with SP-11 hot at his heels. At point "E" in the sketch plan he saw the accused stopping a car driven by a woman. The accused pointed his pistol at the woman driver and simultaneously knocking the glass window of the car door to force the woman to open the car door. Occasionally the accused also pointed his pistol at SP-11 who was then at the rear right side of the

women's car. At about the same time L/Corporal Benard and P/Constable Rashid arrived at the scene. L/Corporal Benard then shouted at SP-11 to shoot the accused. It was at this point of time that the woman fled the scene with her car.

When SP-11 told Benard and Rashid to run as the accused was armed with a real pistol, Bernard repositioned himself behind the accused and Rashid sheltered himself behind the road railing. Now SP-11 found himself face to face with the accused. He was about 9 feet away from the accused. Both were pointing their pistols at each other. SP-11 was armed with a 9mm Walther P99 AS pistol, exhibit P.30(C). SP-11 then ordered the accused to put down his pistol but was ignored.

When Bernard again shouted at SP-11 to shoot the accused, the accused turned towards Bernard and pointed his pistol at Bernard. Fearing that he might shoot Bernard, SP-11 open fire, hitting the accused on his right thigh. The accused fell and all 3 rushed in, grappled with accused

and finally apprehended the accused. SP-11 proceeded to seize the accused's pistol from the accused

The said pistol is a 9mm Stoeger Couger 8000 bearing the serial number T-6429-07-05766, exhibit P-8(B). Its magazine is exhibit P-8(C). The 8 live bullets in the said magazine are P-8(D)(1 to 8).

The first charge (case No. 45B-14-2011)

On a charge under s. 302 of the Penal Code, the business of the prosecution is to prove:-

i. the death of the deceased, Lee Fah;

ii. that the deceased died due to the injuries sustained by him;

iii. that the death of the deceased was occasioned by the act or conduct of the accused; and

iv. that the act by which the accused caused such death was done:

a. With the intention of causing death; or

b. With the intention of causing bodily injury as the accused knew to be likely to cause the death of the person whom the harm was caused; or

c. With the intention of causing bodily injury to the person, and the injury intended to be inflicted was sufficient in the ordinary cause of nature to cause death; or

d. With the knowledge that the act was so imminently dangerous that it must in all probability cause death and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

(i) **the first ingredient - the death of the deceased, Lee Fah**

It is my factual finding that there is no issue as regards to the death of the deceased. The body of the deceased was identified by the I.O of the case, SP-12. The deceased's wife Madam Lim Swee Moi, SP-10, also identified the body of the deceased. The pathologist, SP-7, confirmed that on 30.6.2010 he had conducted a post mortem examination on the body of

the deceased. The defence also did not dispute that the deceased had died.

(ii) **the second ingredient - the deceased died due to the injuries suffered by him**

The full report of the pathologist's (SP-7) examination is exhibit P-36. The pathologist testified that the deceased had suffered 9 external injuries, all related to gun-shot wounds. The details are at page 2 of exhibit P-36. There were 4 gun-shot entry wounds and 2 gun-shot exit wounds. He explained further in his testimony, in his own words for purposes of clarity:-

> *"Luka tembak keluar pada pangkal hidung tengah-tengah berbentuk bintang berukuran 1cm x 1cm. Bola mata kanan pecah. Lebam pada kelopak mata kanan atas dan bawah. Luka tembak masuk pada pelipis kanan berukuran 0.9cm x 0.9cm, terdapat kelim lecet di sekelilingnya. Luka tembak masuk pada sudut dagu kanan bawah telinga kanan berukuran 3cm x 1.2cm. Luka tembak keluar pada bahu kanan berukuran 2cm x 1.2cm agak ke depan. Luka tembak masuk pada pangkal lengan atas kanan belakang 1cm diameter dengan kelim lecet di sekelilingnya. Luka tembak masuk pada rusuk kanan belakang pada garis ketiak belakang sama tinggi dengan ketiak berukuran 1cm diameter".*

His internal examination revealed the following, again in his own words:-

> *"Tulang tengkorak dan otak baik. Tulang C2 pecah dan ditemukan anak peluru di situ. Pangkal larinks di bawah pita suara pecah. Tisu-tisu lunak di belakang asefagus di daerah T2 terdapat tembus dan di kelilingi lebam. Terdapat lebam pada tulang selangka kiri dan satu anak peluru utuh ditemui di situ. Pemeriksaan dada terdapat kesan patah pada tulang rusuk ketiga kanan pada garis ketiak belakang. Terdapat pendarahan pada rongga dada kanan. Kesan tembus pada lob atas paru-paru kanan. Pemeriksaan jantung dalam keadaan baik. Dalam abdomen tiap-tiap satu organ dalam keadaan baik."*

The pathologist concluded by saying:-

> *"Terdapat 4 luka tembak masuk dan 2 luka tembak keluar dan 2 anak peluru dijumpai. Luka nombor 7 keluar pada luka nombor 6 dan masuk semula pada luka nombor 5 dan berakhir pada tulang C2 dan satu anak peluru ditemui di situ. Luka nombor 4 adalah luka tembak masuk ke pelipis kanan, menembusi bola mata kanan dan keluar pada luka nombor 1. Luka nombor 8 menembusi tulang rusuk kanan ketiga, lob atas paru-paru kanan, daerah belakang trakea di hadapan tulang T2 dan ke atas tulang selangka kiri dan satu anak peluru ditemui di situ. Jarak tembak adalah jarak jauh. Arah tembak adalah dari depan bawah kanan ke kiri atas belakang. Oleh itu saya simpulkan bahawa kematian disebabkan luka tembak. Luka tembak mengakibatkan pendarahan yang banyak pada bahagian paru-paru dan daerah pita suara. Akibatnya darah banyak keluar dan menyebabkan kematian. Menyebabkan heomorrhage shock dan*

kekurangan darah. Kekurangan oksigen dan menyebabkan semua organ tidak boleh berfungsi. Ini adalah sebab-sebab kematian dia".

Earlier, in response to a question as to how many shots were fired he said, again in his own words:-

"3 kali. Pertama masuk ikut pelipis ke bola mata dan keluar ikut batang hidung. Kedua masuk ikut lengan kanan keluar ikut bahu kanan dan masuk balik melalui dagu kanan dan berakhir di dalam peti suara. Ketiga peluru masuk ikut rusuk kanan belakang dan masuk dalam rongga dada menembusi paru-paru kanan kemudian menembusi trachea dan asefagus dan berakhir di bawah tulang selangka kiri dan tersangkut di situ. Jumpa 2 anak peluru - (i) di peti suara; (ii) di bawah tulang selangka kiri.

The 2 bullet slugs referred to by SP-7 are exhibits P-15(H)(i) and P-15(H)(ii) respectively.

In my view SP-7's findings were sound and his explanation cogent. His testimony was uncontroverted. The defence did not mount any real challenge regarding to the causative factors leading to the death of the deceased. I have thus no reason to disagree with SP-7 in terms of the

cause of the death of the deceased. Hence it is my factual finding that the deceased died because of the gun shot injuries inflicted upon him.

(iii) **the third ingredient - the death of the deceased was occasioned by the act of the accused.**

The evidence of the complainant, SP-11

The testimony of SP-11, is most relevant. His evidence revealed that at point "B" in the sketch plan he saw the accused walking away from the deceased lying motionless on the ground next to a BMW motorcar bearing registration number WTJ 1446 (hereinafter referred to as the "BMW motorcar") as shown in the photographs exhibits P-21(2), (3), (4) and (5), towards a silver coloured Proton Iswara motorcar bearing the registration number WKY 5462 parked nearby at point "X1" (herein after referred to as the "WKY 5462 motorcar"). When SP-11 shouted "polis" at the accused, the accused turned towards him and pointed a pistol at him.

Next the accused entered the WKY 5462 motorcar and moved forward. At point "X2" or "C" in the sketch plan, again the accused pointed his pistol at SP-11 and shot him twice, forcing SP-11 to duck behind a pillar with a stone wall.

From point "C" the accused entered the main road, Jalan Utama. His car came to a stop due to the heavy traffic. He surged forward when SP-11 knocked the rear right door of his car and finally got stuck at point "D". Upon disembarking from his car at point "D", the accused again targeted his pistol towards SP-11 and fired 2 more shots at SP-11.

Thereafter the accused fled on foot and took the slip road leading to Kuala Lumpur - Seremban Highway. Finally at point "E" in the sketch plan, he was shot on his thigh in the most dramatic fashion by SP-11 and got arrested by SP-11 and his colleagues soon after.

SP-11's evidence was unshaken and equally uncontroverted, devoid of infirmities that could erode his credit-worthiness. I have no reason to disbelieve his account of what happened and accepted his factual narratives enumerated above. Hence the conduct of the accused in fleeing the scene upon being accosted by SP-11 very soon after SP-11 heard the 4 gun shots and firing at SP-11 at point "C" and "D" in the sketch plan, is relevant and squarely falls under the ambit of s. 8(2) of the Evidence Act, 1950. The accused indeed harboured some serious explanation to account for his conduct with reasonable fullness of details and circumstance under s. 9 of the same Act - see *Parlan bin Dadeh v. PP* [2009] 1 CLJ 717 at pp 746 and 747, para 36.

The evidence of the head of the police forensic team, SP-9

SP-9, examined the BMW motorcar and the deceased sprawling on the ground covered with blood next to the said car at point "B" in the sketch plan as shown in the photographs exhibit P-21(1), (2), (3), (4), (5) and (6). When he arrived, the scene was already secured by a policeman.

SP-9 found a slug/bullet fragments embedded at the rear view mirror on its rear side of the said car as shown in the photographs exhibit P-21(16) and (17). Otherwise the said motorcar was intact with no other damages. The said slug/bullet fragments are exhibits P-14(K2) and P-14(K3) respectively.

Next at Hospital Serdang, SP-9 met the accused being treated in the Emergency Ward. The I.O of the case, SP-12, was there too. He examined the accused's palms and found the same to be covered with dried glue as shown in the photographs exhibits P-21, (22), (23), (26), (27). He removed the said glue from the accused's palms by pulling the glue as shown in exhibits P21(28), (29), (30), (31) and (32). The traces of glue removed from the accused's palms are exhibits P-15(F)(i) and P-15(G)(i) respectively.

SP-9 next proceeded to examine motorcar WKY 5462 at Jalan Utama, Sri Kembangan, at point "D" in the sketch plan. The scene was already secured by the police when he arrived.

He found a bullet slug at the rear of the said car. He marked it with number 2, shown in exhibits P-21(34) and (36). This bullet slug is exhibit P-15(E)(i). He also recovered another slug near the driver's side of the car door, which he marked with number 3, shown in exhibits P-21(34), (36), (38), (40) and (41). This bullet slug is exhibit P-15(C)(i). From inside the said car, SP-9 found a bullet casing on the floor board of the driver's seat. He marked it with number 4 and shown in photographs P-21 (44) and (45). This bullet casing is exhibit P-15(D)(i).

SP-9 also found a "100 Plus" drink can he marked number 5, a pink towel he marked number 6, a plastic bottle containing yellowish liquid he marked number 7, a bottle of glue bearing the "Dunlop" brand-name he marked number 8, a knife in sheath he marked number 9, a pair of "Crocodile" shoes he marked number 10 and a patch of false hair (toupee) he marked number 11, all shown in the photographs P-21(43), (44), (45), (46), (47), (48), (49), (50) and (51).

Most importantly SP-9 also recovered a Smith & Wesson .38 revolver in a folded piece of newspaper on the floor board of the front passenger seat of the said car which he marked number 12 and shown in photographs P-21(42), (43), (48) and (51). Inside the revolver's chambers he found 3 live bullets and 3 bullet casings, shown in photograph P-21(54). The revolver is exhibit P-12(B), the 3 live bullets are P-12(C)(1, 2 and 3) and the 3 bullet casings are P-12(D)(1, 2 and 3).

SP-9 also recovered a plastic packet containing 4 photographs he marked number 13, shown in P-21(42), (43), (48), (51) and (56).

Additionally SP-9 also recovered the registration plate numbers bearing the number WKT 4582 affixed beneath the plate numbers WKY 5462 at the front and rear of the said car. The registration number WKY 5462 as seen by SP-11 and seen initially by SP-9 affixed over the number WKT 4582 and shown in the photograph P-21(33), (34), (35), (36) and (38) are both false registration numbers as testified by the I.O of the case, SP-12.

PW-9 also went and examined the scene at point "C" in the sketch plan. He did not find anything incriminating though.

The evidence of the I.O, SP-12

The I.O testified that no Proton car was ever registered under the number WKY 5462. Instead a motorcycle was officially registered under the said number. The engine number of the said car also did not exist in JPJ's registration system. Meanwhile the chasis number of the said car originally belonged to a Proton Saga Aeroback motorcar bearing the original registration number WLF 4226.

The I.O also testified that the road tax of the said car carried the number WKT 4582. He investigated the same and confirmed that a motorcar carrying the registration number WKT 4582 does exist, belonging/registered under one Hoe Wee Shiong of No. 130, Taman Sri Kenaboi, Titi, Jelebu, Negeri Sembilan. The said motorcar WKT 4852 was in the possession of the said Hoe Wee Shiong at the material time and the

said Hoe Wee Shiong had not loaned the said car to anyone. The I.O further confirmed that the ownership of the said Proton Iswara driven by the accused was unknown.

The evidence of the chemist, SP-6

Now, the 2 bullet slugs recovered by SP-7 from the person of the deceased [exhibits P-15(H)(i) and P-15(H)(ii)]; the 9mm Stoeger Couger 8000, its magazine and 8 live bullets therein seized by SP-11 from the accused [exhibits P-8(B), P-8(C) and P-8(D)(1 to 8)]; the Smith & Wesson . 38 revolver, the 3 live bullets and 3 bullet casings recovered from its chambers seized by SP-9 from inside the motorcar WKY 5462 [exhibits P-12(B), P12(C) (1, 2, 3) and P12(D)(1, 2, 3)]; the 2 bullet slugs recovered by SP-9 outside the motorcar WKY 5462 [exhibit P-15(E)(i)and P-15(C)(i)]; and the bullet casing recovered by SP-9 from the floor board of the driver's seat in motorcar WKY 5462 [exhibit P-15(D)(i)] were sent to the Chemistry Department by the I.O of the case for ballistic, serviceability, DNA and Gun Shot Residue (GRS) examinations. There were other items sent but not relevant as yet for our discussion presently.

These exhibits were examined by the chemist, SP-6 who was then the Ketua Unit Senjatapi dan Kesan Alat, Seksyen Kriminalistik, Bahagian Forensik, Jabatan Kimia Malaysia, Petaling Jaya.

SP-6 testified that both the Smith & Wesson revolver [exhibit P-12(B)] hereinafter referred to as the "said revolver") submitted to him was serviceable. He also testified that there were traces of gun powder residue in the barrel of this revolver. It showed that the said revolver had been used to discharge bullet shots and had not been cleaned after the shots were fired.

SP-6 further confirmed that the revolver [exhibit P-12(B)] is a .38 Special Smith & Wesson MOD 15-3 and the 2 bullet slugs (exhibit P-15(H)(i) and P-15[(H)(ii)] recovered from the person of the deceased are also .38 Special bullet slugs.

Using the 5 rounds of .38 Special live bullets supplied by the police, SP-6 test fired the said revolver and found the said revolver [exhibit P-12(B)] to be serviceable capable of discharging a shot or bullet by means of an explosive charge. The 5 spent bullet casings used in his tests are exhibits P-17(A)(1 to 5) and the 5 slugs therefrom are exhibits P-17(A) (6 to 10).

He examined and compared these 5 casings and 5 slugs with the 2 slugs recovered from the deceased's persons [exhibits P-15(H)(i) and P-15(H)(ii)] and the 3 casings [exhibit P-12(D)(1, 2 and 3)] recovered from the chambers of the said revolver P-12(B). He found the following:-

(i) the characteristics/features of the 3 bullet casings exhibit P-12(D)(1, 2, 3) matched ("sepadan" - term used by SP-6) with the characteristics/features of the 5 bullet casings exhibit P-17(A)(1 to 5) and

(ii) the characteristics/features of the 2 bullet slugs exhibit P-15(H)(i) and P-15(H)(ii) matched ("sepadan") with the characteristics/features of the 5 bullet slugs exhibits P-17(A)(6 to 10).

From the above findings, SP-6 concluded the following:-

(i) that the 3 bullet casings exhibit P-12 (D)(1, 2, 3) were discharged/fired from the revolver exhibit P-12 (B); and

(ii) that the 2 bullet slugs exhibit P-15(H)(i) and P-15(H)(ii) recovered from the person of the deceased were also discharged/fired from the revolver P-12(B).

SP-6 also confirmed that he examined the Stoeger Couger pistol exhibit P-8(B). He confirmed that there were traces of gun powder residue in the barrel of the said pistol indicating that the same had been used to discharge shots or bullets and had not been cleaned after the bullets were fired.

SP-6 also test fired the said pistol using 5 rounds of 9mm live bullets supplied to him by the police. He found the said pistol exhibit P-8(B) to be serviceable capable of discharging a shot or bullet by means of an explosive charge. The 5 spent bullet casings used in his tests are exhibits

P-16(A)(1 to 5) and the 5 bullet slugs therefrom there are exhibits P-16(A)(6 to 10).

Next SP-6 examined and compared the 5 said bullet casings and 5 bullet slugs with the bullet casing exhibit P-15(D)(i) found by SP-9 on the floor board of the driver's seat of motorcar WKY 5462 and the bullet slug exhibit P-15(E)(i) (SP-6 termed it as "pecahan jaket peluru") found by SP-9 at the rear of motorcar WKY 5462. He found:-

(i) the characteristics/features of the bullet casing P-15(D)(i) matched with the characteristics/features of the 5 bullet casings exhibits P-16(A)(1 to 5); and

(ii) the characteristics/features of the bullet slug exhibit P-5(E)(i) matched with the characteristics/features of the 5 bullet slugs exhibits P-16(A)(6 to 10).

From the aforesaid findings, SP-6 again concluded that:-

(i) the bullet casing P-15(D)(i) was fired/discharged from the Stoeger Couger pistol exhibit P-8(B); and

(ii) the bullet slug P-15(E)(i) was fired/discharged from the same pistol exhibit P-8(B).

I have no reason to disagree with the findings of SP-6 enumerated above. He is most professional in his work and appeared to be very competent in his field of expertise. He had years of experience behind him and his testimony in respect of the same suffered no apparent infirmities to invalidate his credibility as an expert on the matter in issue. Neither were his findings really challenged by the defence. Hence I have no reservation in accepting his evidence and find as a fact that the said revolver exhibit P-12(B) was serviceable at the material time of the incident and still is; that the 3 bullet casings exhibits P-12(D)(1, 2, 3) were discharged/fired from the revolver P-12(B); and that the 2 bullet slugs exhibit P-15(H)(i) and P-15(H)(ii) that occasioned the death of the deceased were also discharged from the revolver P-12(B).

Equally it is also my unequivocal findings that the bullet casing P-15(D)(i) found by SP-9 from the floor board of the driver's seat of motorcar WKY 5462 and bullet slug exhibit P-15(E)(i) found by SP-9 at the rear of the said motorcar were both discharged from the same pistol Stoeger Couger exhibit P-8(B).

Did the accused discharge the fatal shots at the deceased?

As reiterated earlier SP-6 confirmed that the 3 bullet casings [exhibit P-12(D)(1, 2, 3)] found inside the chambers of the revolver exhibit P-12(B) were discharged from the said revolver. It meant 3 shots were fired. SP-6 also confirmed that the 2 bullet slugs [exhibit P-15(H)(i) and P-15(H)(ii)] retrieved from the person of the deceased that occasioned his death were discharged from this same revolver exhibit P-12(B). In such event, in my view the testimony of SP-6 thus established beyond doubt that this revolver P-12(B) was the firearm used to cause the death of the deceased.

SP-7 testified that the deceased died due to gunshot wounds and he was shot 3 times. The findings of SP-6 relating to the said 3 bullet casings found inside the chambers of the revolver exhibit P-12(B) is consistent with SP-7's findings that the deceased was shot 3 times. The recovery of the said 2 bullet slugs from the person of the deceased also confirmed that the deceased was factually shot at and is also consistent with SP-7's findings relating to the entry wounds and exit wounds as well as the trajectory of the said bullets upon entering the deceased's person and the causative factors causing or leading to his death. In all probability the third bullet were the bullet fragments [exhibit P-14(K2) and (K3)] that got stuck at the back of the rear view mirror of the BMW motorcar after the said bullet had exited the deceased's person through the bridge of his nose, as was testified by SP-7.

In the light of the forensic evidence enumerated above, the contradiction in SP-11's evidence that he heard 4 gunshots while having his drink at point "A" in the sketch plan would assumed little relevance. It is no ground to bring down the whole of the prosecution's case.

Hence the corresponding issue is whether it was the accused who had fired/discharged the fatal shots at the deceased using the said revolver P-12(B). In my view there is no direct evidence to that effect. However although the accused was never seen by SP-11 to have handled or used the said revolver at point "B" or elsewhere, the circumstantial evidence is overwhelming that the fatal shots were fired by the accused using the said revolver exhibit P-12(B), crystalised as follows gathered from the testimonies of SP-11, SP-9, SP-7 and SP-6 -

- while at point "A" in the sketch plan SP-11 heard 4 gunshot explosions fired in rapid succession;

- SP-11 reached point "B" in about 10 seconds after he heard the gunshots;

- at point "B", SP-11 saw the deceased slumped on the ground next to a BMW motorcar and the accused walking towards motorcar WKY 5462. SP-11 shouted "polis".

- the accused turned towards SP-11 and pointed the Stoeger Couger pistol exhibit P-8(B) at him (SP-11);

- the accused entered into motorcar WKY 5462 and fled the scene with SP-11 in hot pursuit;

- at point "C" the accused shot SP-11 twice using the said pistol P-8(B).

- the accused's car came to a complete stop at point "D".

- upon emerging from his car at point "D" the accused again shot SP-11 twice using the same pistol P-8(B).

- the accused was finally subdued by SP-11 and his colleagues at point "E" and the said pistol P-8(B) was seized from him by SP-11;

- the said motorcar WKY 5462 was under the control and custody of the accused at all material times until the accused abandoned the said motorcar at point "D" in the sketch plan.

- both the accused hands/palms were covered in glue;

- the said revolver P-12(B), with 3 live bullets [P-12(C)(1, 2,3)] and 3 bullet casings [P-12(D)(1, 2, 3)] in its chambers was recovered on the floor board of the front passenger seat of the said motorcar WKY 5462 which was under the control and custody of the accused;

- there were traces of gun powder residue in the barrel of the said revolver P-12(B), indicating that the said revolver had been used to discharged bullet shots;

- the 3 bullet casings P12(D)(1, 2, 3) were discharged from the said revolver, P-12(B);

- the 2 bullet slugs retrieved from the person of the deceased were discharged from the said revolver P-12(D).

In my view when the combined strength of each of the pieces of evidence enumerated above is taken and considered together there can be only one conclusion to be arrived at ie, that it was the accused who had fired and shot the deceased using the revolver P-12(B).

At point "B" the accused was seen moving away from the deceased and walking towards his car WKY 5462. This was about 10 seconds after SP-11 heard the gunshots. The accused turned towards SP-11 and pointed his pistol at SP-11 after SP-11 shouted "polis". The conduct of the accused as such is relevant under s. 8(2) of the Evidence Act, 1950. In my view there is absolutely no reason for the accused to conduct himself in such an aggressive fashion if he has no part in the shooting of the deceased. Equally there is no reason for him to flee the scene and in the process shooting at SP-11 at point "C" and "D". There is also no reason for him to continually fleeing the scene beyond point "D" until being forcibly subdued by SP-11 and his colleagues. Needless to say, the conduct of the accused belied his innocence.

Additionally the said revolver P-12(B) and the contents of its chambers were found in motorcar WKY 5462 driven by the accused. The accused drove the said car to flee the scene. At all material times the said car was under his custody and control. Equally at all material times the said revolver was apparently under his custody and control until the

accused abandoned the said car at point "D" in the sketch plan. There is no evidence that there were other people with the accused in the said car before the accused abandoned the said car. It was the testimony of SP-11 that the accused was the only person he saw at point "B". It was also the uncontroverted testimony of SP-11 that the accused was alone in the said car at all material times until the accused abandoned the said car. The pink towel [exhibit P-11(E1)] recovered by SP-9 from inside the said car carried the accused's DNA as testified by SP-5. Both SP-9 and SP-11 testified that both the accused palms were covered in glue and a bottle of glue [exhibit P-11(C1)] was recovered from inside the said car.

There is also no evidence that the said car WKY 5462 and its contents as recovered by SP-9 had been tampered with before the arrival of SP-9. The evidence of SP-9 is uncontroverted that the car and its vicinity were secured by the police when he arrived at the scene to examine the said car.

The evidence of SP-14 is also uncontroverted that he secured the said car WKY 5462 and its vicinity with 2 other police officers, P/C Muzamil and P/C Rizal, at about 7.10 p.m. and handed the same to the police forensic team upon their arrival at about 12.10 a.m on 29.6.2010. Additionally SP-15 testified that he arrived and secured the location and its vicinity where the deceased was shot at about 7.05 p.m. upon instruction of the Ketua Polis Balai Sri Kembangan until the arrival of the police forensic team headed by SP-9.

The recovery of the said revolver P-12(B) in motorcar WKY 5462 so soon after SP-11 heard the gunshot explosions, the conduct of the accused before fleeing the scene upon being accosted by SP-11, the conduct of the accused after fleeing the scene until being forcibly subdued by SP-11, the *factum* that there were traces of gun powder residue in the barrel of the said revolver P-12(B), the *factum* that the 3 bullet casings [P-12(D)(1, 2, 3)] were discharged from the said revolver P-12(B), the *factum* that the 2 bullet slugs [P-15(H)(i) and P-15(H)(ii)] retrieved from the person of the deceased were discharged from the said revolver P-12(B), the *factum* that

the said motorcar WKY 5462 was at all material times under the control and custody of the accused, the *factum* that the said revolver was at all material times under the control and custody of the accused and the *factum* that there was no one else apart from the accused at point "B" and inside the said car before the accused abandoned the said car at point "D", only led to the irresistible conclusion that it was the accused who had shot the deceased 3 times using the said revolver P-12(B). It is my specific finding of fact that the totality of the cumulative effect of the series of circumstances and coincidences enumerated above as testified by SP-5, SP-6, SP-7, SP-9 and SP-11 when considered in the aggregate, pointed only to the irresistible conclusion that it was the accused who had occasioned the death of the deceased and no one else - see *Idris v. PP* [1960] MLJ 269; *Chan Chuen Kong v. PP* [1962] MLJ 307; *Sunny Ang v. PP* [1966] 2 MLJ 195; *Mohd Abbas Danus Baksan v. PP* [2006] 3 CLJ 880.

The intervening 10 seconds before the arrival of SP-11 at point "B" accorded the accused more than enough time to switch firearms and in all

the circumstances of the case it could safely be inferred that the accused had switched the firearm he used to shoot the deceased with another to point at SP-11 before the arrival of SP-11 at point "B".

It is immaterial that the deceased did not suffer instant death. It is equally immaterial that the deceased could have survived the gun shots had he been given prompt and proper medical treatment. In this connection Explanation 2 to s. 299 of the Penal Code is relevant and obviously applicable. The said Explanation provides that *".... Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skillful treatment, the death might have been prevented ...."* Hence it is of no consequence that the deceased was still alive when SP-11 spotted the deceased at point "B" where he heard the deceased breathing heavily.

iv. **The fourth ingredient - the intention of the accused**

Intention is a state of mind. It is incapable of being calibrated unless expressed in so many words. As such it is next to impossible to gauge one's intention. Hence in the absence of an express admission, the intention of the accused is a matter for the court to infer from the act or conduct of the accused from the proven set of facts or circumstances before, during or after the occurrence of a particular event or incident. In short the intention of the accused is a matter of inference from what he did.

However, on a charge under s. 302 of the Penal Code, it is the business of the prosecution to prove that the act of the accused leading to the demise of the deceased comes within the ambit of any one or a combination thereof, of the situations as envisaged by s. 300(a), (b) (c) or (d) of the Penal Code.

In my view, upon the facts and evidence adduced, the provision of s. 300(a) is most relevant. It provides:-

> *"300. Except in 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;"*

In respect of the law relating the said s. 300(a), his Lordship Jeffrey Tan J (as he then was) in *PP v. Abdul Razak Dalek* [2006] 4 CLJ 129 at p. 156-157, at para 53 and 54 stated:-

"[53]. In relation to intention under the first clause of s. 300, Ratanlal & Dhirajlal, ibid at p. 1296 - 1297 commented as follows:-

> *The first clause of s. 300 enacts that culpable homicide is murder if the act by which death is cause is done with the intention of causing death… An intention to kill a person brings the matter so clearly within the general principle of mens rea as to cause no difficulty. Such intention however, must be found as a matter of fact. It is distinct from presumed or constructive intention. The accused also cannot be found guilty from the knowledge of the consequences of the act. At the same time, however it is equally true that intention is*

a subjective element and in most of the cases direct proof of intention is not forthcoming. It has rightly been said that the devil himself knows not the thought of man. A man's intention is a question of fact and it can be gathered from his acts. In deciding the intention of the accused, the court may consider the nature of the weapon used, the part of the body of the victim chosen by the accused for attack the number of blows administered, the force used by the assailant, etc."

[54] In Virsa Singh, the Supreme Court stated:

To determine what the intention of the offender is, each case must be decided on its own merits. Where it is proved that the accused fired a gun shot at such close range that it could not have had other than a fatal effect and it is indicative of the intention of the accused that after firing at one person he reloaded the gun and fired a shot at another person there is a clear indication of his intention to commit murder. Where a person fires two shots successively at another person, his murderous intention is clearly evident. The law looks as regards intention to the natural result of the man's act and not to the condition of his mind. From a legal point of view a person intends whatever he gives others reasonable grounds for supposing that he does intend. Where a man strikes lath blows on the head of the deceased mercilessly and practically kills him on the spot, he is guilty of murder. Where a man stabs another in a vital part, he must be

held to have intended to cause death, and if death ensues either directly from the wound or in consequence of the wound creating conditions which gave occasion to the appearance of a fatal disease, the person inflicting the wounds is guilty of murder. Absence of premeditation will not reduce the crime of murder to culpable homicide not amounting to murder....”

In this case before me the accused fired 3 shots in rapid succession at the deceased at least from 1 meter away from the deceased as testified by SP-7. By firing the 3 shots, the accused must have intended to occasion the death of the deceased. It is indicative of the accused’s murderous intention. The accused must have known the consequences of shooting the deceased 3 times in rapid succession. As stated by the Supreme Court of India in Virsa Singh, the law looks as regards intention to the natural result of the man’s act and not to the condition of his mind. Viewed objectively, the natural consequence of the intentional act of the accused in shooting at the deceased 3 times is the death of the deceased.

Hence on the facts and evidence it is my specific finding of fact that the accused intended to cause the death of the deceased by doing what he did to the deceased.

The intention of the accused to cause the death of the deceased is further amplified by the fact that he came well prepared to finish his job. He came with 2 fully loaded firearms, ie, the revolver P-12(B) and the pistol P-8(B). He applied glue to both his palms, most probably to erase traces of his fingerprints on both the firearms as well as the motorcar he was driving and other items recovered therein. Additionally the motorcar driven by him was fitted with 2 false registration numbers and as stated by the I.O of the case, the said car does not appear to have existed in JPJ's registration system. In addition there was a patch of false hair inside the said car, most probably for him to disguise himself. In all the circumstances of the case there can be no doubt that the accused had planned to execute his intention to murder the deceased in the most clinical fashion. On all fours the prosecution's job is done.

The second charge (case No. 45-15-2011)

Here the accused was charged of the attempted murder of SP-11. The business of the prosecution is to prove:-

(i) that there was an attempt by the accused to cause the death of SP-11; and

(ii) that such death was attempted to be caused by, or in consequence of the act of the accused.

In *Mallal's Penal Law* at p. 515 it is stated ... *"the mens rea of intention or knowledge must be present when the offender committed the act that would have resulted in death, if not for supervening events. The mens rea must be to cause death, and nothing less. The offender should have carried out the act to cause death "under such circumstances" that if death occurred, it would be murder..."*

Now the evidence of SP-4 as stated earlier revealed that at point "B" in the sketch plan, the accused pointed his pistol P-8(B) at SP-11; at point

"C" the accused fired 2 shots at SP-11 using the same pistol; and at point "D" the accused fired another 2 shots at SP-11 after alighting from his car, again using the said pistol P-8(B). Earlier along the way at Jalan Utama before reaching point "D", SP-11 saw the accused reloading his pistol's magazine. Additionally SP-11 stated that the accused was the only person inside the said car WKY 5462 at all material times and when the said car came to a stop at point "D" the accused was the only person who had alighted from the said car.

I have no reason strong enough to disbelieve SP-11 nor his account of the course of events. His testimony was cogent and uncontroverted and did not suffer from lapses nor contradictions in material particulars when tested against the silent evidence adduced and the evidence of other prosecution witnesses. Equally his testimony did not melt under the brunt of cross-examination fiercely mounted by the defence.

The testimonies of both SP-6 and SP-9 further established beyond doubt that the said Stoeger Couger pistol P-8(B) was used by the accused to shoot at SP-11. The recovery of the bullet slug exhibit P-15(E)(i) within the vicinity of the said motorcar WKY 5462 at point "D" by SP-9 lend credence to SP-11's testimony that he was shot for the second time by the accused at the place after the accused alighted from the said motorcar.

The testimony of SP-6 that the said pistol P-8(B) is serviceable, that there were traces of gun powder residue in the barrel of the said pistol P-8(B) and that the said bullet slug P-15(E)(i) was fired/discharged from the said pistol P-8(B) are most relevant and offered the best corroborative evidence in support of the evidence of SP-11 that he was shot by the accused at that place by means of the said pistol P-8(B).

Equally the recovery of the bullet casing P-15(D) by SP-9 from inside the said car and confirmed by SP-6 that the same was fired/discharged from the said pistol P-8(B) offered the best corroboration that SP-11 was shot by the accused. This bullet casing which was recovered from inside

the said car could not have been fired/discharged at point "D" as the testimony of SP-11 was uncontroverted that he was shot by the accused after the accused had alighted from his car at point "D". As such the casings from the 2 shots discharged from outside the car could only have been dislodged from the said pistol outside the said car. Hence it is most probable that the said casing P-15(D) which was recovered from inside the said car on the floor board of the driver's seat, was dislodged from the said pistol P-8(B) when the accused fired 2 shots at SP-11 at point "C" in the sketch plan, consistent with SP-11's testimony that he was shot at that place by the accused from inside the said car while being driven by the accused.

For all the reasons enumerated above, it is my specific finding of fact that the accused had indeed fired 4 gun shots at SP-11. By so doing, at the time of committing the said act, the accused had all the *mens rea* (both intention and knowledge) to cause the death of SP-11. The act of the accused in firing or discharging the 4 gun shots aimed specifically at SP-11 would have resulted in the certain death of SP-11. Death was

avoided only because SP-11 was fit, quick and alert enough to ducked the 4 shots fired at him.

In my view on all fours the prosecution had established that the accused had attempted to cause the death of SP-11 and that such death was attempted to be caused by the act of the accused in firing/discharging the 4 gun shots aimed at SP-11.

The third charge (case No. 45-19-2012)

Here the accused was charged under s.3 of the Firearms (Increased Penalties) Act 1971 of discharging 4 gun shots from the said pistol P-8(B) at SP-11 with intention to cause the death of SP-11 while committing a schedule offence ie, preventing his own arrest.

The business of the prosecution under this offence as indicated in *Saw Hong Choy v. PP* [2008] 1 CLJ 10 is to prove that:-

(i) the accused had committed a schedule offence ie, preventing his own arrest;

(ii) SP-11 was lawfully empowered to make or execute such arrest; and

(iii) the accused at the time of committing the schedule offence had discharged the said 4 gun shots at SP-11 with the intention of causing his death or causing bodily injuries to SP-11 notwithstanding that no death or hurt is caused thereby.

In this connection the defence did not dispute that SP-11 is a member of the PDRM. It is also not disputed that at the material time SP-11 was attached at Balai Polis Seri Kembangan as a member of the Balai's NKRA Task Force Unit whose principal duty is the prevention and eradication of serious crimes. His powers to effect an arrest without warrant on any person who has committed a seizable offence as conferred upon him under s. 23(1)(c) of the Criminal Procedure Code is also not under dispute.

Additionally it is not disputed that an offence of murder, a non-bailable and seizable offence, was committed and the accused was seen leaving the scene of the crime and pointed his pistol at SP-11 in response to SP-11 shouting "polis" at him. Further it is in evidence that the single minded purpose of SP-11 in pursuing the accused right from point "B" up to point "E", covering a distance of more the 2 kilometers, was to detain/arrest the accused on account of what he saw at point "B" and the reaction and subsequent conduct of the accused after being accosted by him. Being a member of the PDRM there can be no doubt that he was empowered by law to do so under s. 20(3)(a) of the Police Act 1967 (Revised 1988) and s. 23 of the Criminal Procedure Code.

It is also in evidence that in response to the said pursuit by SP-11, the accused reacted by firing/discharging 4 gun shots by means of the said pistol P-8(B) at SP-11 at point "C" and "D" in the sketch plan. The uncontroverted evidence of SP-11 shows that the accused had discharged the said 4 gun shots aimed and directed at him. In such event there can be no doubt that the 4 gun shots were discharged by the accused to resist

his own arrest. In my view that is tantamount to committing a Scheduled offence as provided in the schedule to the Firearms (Increased Penalties) Act 1971. The body of evidence which I have adverted to and accepted relating to the discharged of the said 4 gun shots by the accused using the said pistol P-8(B) are as enumerated in my findings in relation to the second charge above. I have no wish to have a repetition here.

Hence upon the facts and evidence it is my specific finding of fact that the accused had indeed discharged the said 4 gun shots by means of the said pistol P-8(B). Equally it is also my finding that the said 4 gun shots were discharged by the accused with the intention to prevent his own arrest by SP-11. Even at point "E" in the sketch plan, the accused made attempts and persisted to resist his own arrest even though by then he had been surrounded by SP-11 and his 2 other colleagues.

Additionally the 4 gun shots were aimed and directed by the accused at SP-11 in his attempt to flee from SP-11. Under such circumstances I cannot see how it can be contended that the accused did not harbour any

intention to cause the death of SP-11. It is clear and it is my finding that the evidence clearly shows that the accused did intend to cause the death of SP-11 when he discharged the said 4 gun shots from the said pistol notwithstanding that SP-11 did not suffer death or injuries.

The non calling of Cekok, Zek, L/Corporal Bernard and P/C Rashid

Cekok and Zek were SP-11's new acquaintances who were already seated at a table in Restoren Keluarga Ahmed at point "A" in the sketch plan. SP-11 joined them at their table on account that all the other tables were occupied by other customers. Meanwhile L/Corporal Bernard and P/C Rashid arrived at point "E" to assist SP-11 at the point of time when the accused was forcibly attempting his way into a car driven by a woman. These 4 witnesses were not called to testify by the prosecution. It was hence urged by learned counsel that s. 114(g) of the Evidence Act 1950 ought to be invoked to operate adversely against the prosecution.

In response to the same, what was stated by Sulaiman Daud HMR in *Yeo Kwee Huat v. PP* [2011] 5 CLJ 630 is very apt:-

> *"Telah dijelaskan dalam beberapa keputusan kehakiman bahawa dalam sesuatu perbicaraan jenayah pihak pendakwaan mempunyai budibicara sama ada hendak memanggil mana-mana saksi tertentu bagi membuktikan kesnya. Prinsip ini telah ditegaskan sekali lagi oleh Mahkamah Persekutuan dalam kes Low Kian Boon & AMR v. PP [2010] 5 CLJ 489; [2010] 4 MLJ 425, yang merujuk kepada kes PP v. Dato Seri Anwar bin Ibrahim (No. 3) supra, di mana Augustine Paul J (beliau pada masa itu) berkata bahawa dalam perbicaraan jenayah pihak pendakwaan mempunyai budibicara, dengan syarat tidak ada motif yang salah, sama ada atau tidak hendak memanggil mana-mana saksi tertentu dan khususnya mempunyai budi bicara untuk tidak memanggil bagi menyokong kesnya seorang saksi yang tidak dipercayai kejujurannya. Dalam kes yang sama telah diputuskan bahawa tidak timbul apa-apa inference bertentangan hanya oleh sebab kegagalan memanggil seorang saksi jika terdapat keterangan lain yang mencukupi untuk menyokong kes pendakwaan. Keputusan-keputusan ini nyata selaras dengan seksyen 134 Akta Keterangan yang memperuntukkan bahawa tiada bilangan tertentu saksi dikehendaki untuk membuktikan sesuatu fakta. Begitu juga dalam kes Munusamy v. PP [1987] CLJ 221 (Rep); [1987] 1 CLJ 250; [1987] 1 MLJ 492, Mahkamah Agong memutuskan antara lain, bahawa sesuatu inference bertentangan di bawah seksyen 114(g)*

akan berbangkit bukan kerana kegagalan mengemukakan seorang saksi tetapi kerana kegagalan memanggil saksi penting dan material".

Hence the corresponding issue would be whether the aforesaid 4 witnesses are essential and material witnesses to unfold the full narrative of the prosecution's case. Now, the evidence as reiterated earlier shows that SP-11 joined both Cekok and Zek only because there were no other vacant tables in the said restaurant. Equally the testimony of SP-11 is uncontroverted that both Cekok and Zek did not follow SP-11 to point "B" nor in the pursuit of the accused all the way to point "E" until the eventual arrest of the accused. In such event I cannot see how it could be contended that both Cekok and Zek are essential and material witnesses relevant to the unfolding of the full narrative of the prosecution's case. If both these 2 witnesses were to testify they would not have been capable of adding further value to both the prosecution and the defence case.

As regards to L/Corp Bernard and P/C Rashid, their involvement commenced at point "E" and was confined to assisting SP-11 to apprehend the accused. If both were called to testify, their evidence would have been redundant. They would only replicate SP-11's testimony relating to the arrest of the accused. In such event there was no necessity for the evidence of both Cekok and Zek in the narrative of the prosecution's case. In any event s. 134 of the Evidence Act provides that no particular number of witnesses shall in any case be required for the proof of any fact.

Equally it is trite law that the prosecution wield the discretion to call the witnesses relevant to prove its case or to prove any fact. It is also in their discretion to decide on the number of witnesses they need to call to prove any such fact. Additionally, in this case the fact that the accused was apprehended by SP-11, L/Corp. Bernard and P/C Rashid after he was shot on his right thigh by SP-11 was not disputed nor challenged by the defence. Hence there is no necessity to call L/Corp. Bernard and P/C Rashid on an issue of fact which was not challenged merely to corroborate SP-11's testimony over the same.

In all the circumstances of the case, in my view there are no grounds cogent enough to warrant the invocation of the adverse inference rule to operate in favour of the accused as suggested by learned counsel. The failure to call a particular witness or witnesses by the prosecution does not *per se* trigger into motion the adverse inference rule under s. 114(g) of the Evidence Act. It is not to be invoked liberally. It is only in cases where there have been deliberate/intentional suppression of material or crucial evidence that the rule may be invoked - see *Dato Seri Anwar bin Ibrahim v. PP (and Another Appeal)* [2003] 4 CLJ 409; *PP v. Mansor B. Mohd. Rashid* [1997] 1 CLJ 233; *Munusamy v. PP* [1987] 1 CLJ 250; *PP v. Chia Leong Foo* [2000] 4 CLJ 649 and *Tarmizi Yacob & Anor v. PP & Another Appeal* [2010] CLJ 501. Here I am satisfied that there has not been any deliberate or intentional suppression of crucial and material evidence on the part of the prosecution by not calling the aforesaid 4 witnesses into the stand. The sufficiency of the prosecution to prove its case, particularly in respect of the *factum* of the arrest of the accused, was amply afforded by the single testimony of SP-11. In any event L/Corp. Bernard and P/C Rashid were offered to the defence at the end of the prosecution's case.

No slugs or bullet casings recovered at point "C" in sketch plan

Learned Counsel submitted that the failure by SP-9 to recover slugs or casings at point "C" would lend no weight to SP-11's testimony that he was shot twice by the accused at point "C". However, I have deliberated at length pertaining to the recovery of bullet casing exhibit P-15(D) on the floor board of the driver's seat of motorcar WKY 4562 driven by the accused in the earlier paragraphs and I opined that it is most probable that this casing was dislodged in the said car when the accused shot SP-11 at point "C" from inside the said car.

Additionally as reiterated earlier, the testimony of SP-11 was cogent and uncontroverted that he was shot twice at point "C". He appeared to be a truthful witness. I have no reason to treat his testimony with suspicion nor that his testimony was inherently improbable or incredible. Hence the failure of the prosecution to recover slugs or bullet casings at point "C" does not negate the substantive evidence of SP-11 that he was shot twice by the accused at point "C" in the sketch plan.

The accused's blood specimen was obtained without his consent

In this connection I accepted the I.O's evidence that the accused had consented in writing for his blood specimen to be taken.

Additionally even if there was no such consent the law is trite that relevant evidence is admissible even though it has been obtained illegally - see *Ramli bin Kechik v. PP* [1986] 1 CLJ 308.

No DNA profiling, finger prints of the accused on motorcar WKY 4562

It is in evidence as testified by SP-9, SP-11 and the I.O of the case that both hands/palms of the accused was covered in glue. It is also in evidence that a bottle of glue was found inside the motorcar WKY 4562 by SP-9. As such it came as no surprise that no DNA could be profiled or finger print marks lifted to link the accused with the said motorcar or with the numerous exhibits recovered there from. Equally SP-9 testified that the glue covering the palms of the accused was designed to prevent the imprintment of finger print marks or evidence for DNA profiling on items

touched or held by the accused. However the pink towel exhibit P-11(E1) recovered by SP-9 from inside the said car carried the accused's DNA as testified by SP-5. In any event the evidence of SP-11 that the accused was the sole driver and occupant of the said motorcar from point "B" to point "D" in the sketch plan is uncontroverted and damning enough to link the accused with the said car and the exhibits recovered there from. In such event the absence of the accused's finger print or his DNA profile does not negate SP-11's testimony that it was the accused who drove the said car from point "B" to point "D" before he abandoned the said car at point "D".

***Prime facie* case**

In the event it is my finding that at the end of the prosecution case, upon a maximum evaluation of the evidence adduced before me, the prosecution had made out a *prima facie* case against the accused on the 3 charges as proffered against him within the terms as required in *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 374; *PP v. Mohd Radzi bin Abu Bakar* [2006] 1 CLJ 457. Should the accused remain silent upon his defence being called, the evidence adduced is sufficient to warrant his conviction on

all the 3 charges. The accused was thus ordered to enter his defence upon all the 3 charges.

Case for the defence

The accused opted to testify on oath after the 3 modes of mounting his defence was explained to him.

The accused testified that on 28.6.2010 he was at Taman Cuepacs having a drink with his friend, Liew Ah Meng (hereinafter referred to as "Ah Meng"). Next he agreed with Ah Meng's request to go to South City, Serdang. They drove there in Ah Meng's car, a Proton Iswara WKY 5462. The accused drove the said car. At South City he stopped in front of Kedai Makan Kari Kepala Ikan Cheong Hin. He got down and bought a can of 100 Plus drink and a bottle of mineral water. Ah Meng was holding a black "Amway" bag, exhibit P-20.

The accused then drove the said car to the back of the said Kedai Makan and parked the said car at bay no. 40, near point "B" in the sketch plan. A BMW sports car (exhibit P-41) was parked beside the car he drove at bay no. 41 as shown in the photograph exhibit P-21(2).

Ah Meng then told him that he wanted to see a "Ah Long" as he had a crisis with the said Ah Long. Ah Meng then showed him the contents of the Amway bag, which contained 2 pistols. This was about 3.00 p.m. Ah Meng then got out of motorcar WKY 5462 with the Amway bag and said he wanted to go and find Ah Long. Ah Meng said he owed Ah Long, a money lender, a sum of RM20,000.00 and he wanted to settle some issues with Ah Long.

The accused testified that he was told by Ah Meng to remain in the car and not to go anywhere. He remained inside the car for 2-3 hours. He even urinated into a bottle while in the car. He was also told by Ah Meng to apply glue to his hands which he did.

At about 5-6 p.m. he saw a well built man walking towards the BMW motorcar and another man following him. The well built man sat down on the driver's seat and the man following him shot him. He heard 3 shots. He was frightened but he could clearly see and averred that the man had fallen towards the left of the driver's seat. The man was not lying on the tarmac of the car park as shown in the photographs P-21(3) and (4). He was certain that the man was inside the car.

The accused further testified that the shooter then went to motorcar WKY 5462 (the car the accused drove) and when he entered the car he realized it was Ah Meng. This was because Ah Meng was wearing a wig. He was ordered by Ah Meng to drive away quickly which he did. He went from point "B" to "C" and stopped at Condo East Lake wherein Ah Meng got out of the car and told him to drive towards Mint Hotel. Ah Meng did not take anything from the car and left the Amway bag and the wig in the car.

The accused was emphatic that he did not use any pistol to shoot at anyone at point "C" nor pointing any pistol at anyone at point "C". He also said that he did not see SP-11 at point "B" or at "C", nor point any pistol at SP-11 at point "B".

The accused continued that at point "D" he had collided with 3 cars. He got out of the car and noticed 2 Malay men on a motorbike, with one pointing a finger at him. He was frightened and got back into the car again. He took out a pistol from the Amway bag and accidentally discharged a round while inside the car. He got out of the car. He was frightened of the people around him and fired a shot into the air. He added that the person riding pillion on the motorbike was SP-11. He said that that was the first time he saw SP-11 and that he did not see SP-11 at any point before point "D". He did not point the pistol he was holding at SP-11, but fired upwards towards the sky.

The accused testified that he then proceeded to point "E" where he tried to stop a Myvi motorcar driven by a women. The car crashed at the

side. He then stopped a motorbike. While attempting to get up the motorbike, he felt a sharp pain on his right leg and realized that he was shot from the back. He fell down and SP-11 then came near him and said "polis". SP-11 next kicked the pistol away from his hand and kicked his face. He lost consciousness and woke up in a hospital.

The accused also testified that he was promised RM300.00 by Ah Meng, whom he had not seen again since the incident on 28.6.2010. He has also never used a pistol until the date of the incident. The motorcar WKY 5462 was not his and he has not taken anything into the car.

Evaluation of the accused's defence

I am of the view that the defence of the accused is a complete denial and that the substance of the defence posited by the accused was only raised for the first time at the defence stage, typical of one who kept his defence "up his sleeve". The following were not raised nor suggested to

the prosecution or its witnesses in particular the complainant, SP-11 and the I.O of the case, SP-12:-

- the character, Liew Ah Meng and the role he played in bringing the accused to point "B";

- that he parked the motorcar WKY 5462 he was driving next to the BMW motorcar at point "B";

- that motorcar WKY 5462 he was driving belonged to Ah Meng;

- that at point "B" Ah Meng got out of the said car to look for Ah Long and was told to wait for him and not to get out of the car;

- that at about 5.00 to 6.00 p.m. while waiting in the car he saw a man following a well built man from behind at point "B";

- that when the well built man entered the BMW motorcar and sat at the driver's seat, the said man shot the well built man and he heard 3 shots being fired.

- that the man who shot the well built man then entered motorcar WKY 5462 where he was waiting and only then he realized that the man was Ah Meng as Ah Meng was then wearing a wig;

- that he did not ever get out of the motorcar WKY 5462 at all material times at point "B";

- that SP-11 was never at point "B" or "C";

- that he did not see SP-11 at point "B" or "C";

- that Ah Meng was with him inside motorcar WKY 5462 from point "B" to point "C";

- that adjacent to Condo East Lake Ah Meng got out of the said car and told him to drive to Mint Hotel and Ah Meng left all his belongings behind in the said car;

- that the first time he saw SP-11 was at point "D" when SP-11 came to point "D" riding pillion on a motorbike ridden by another Malay man;

- that he got frightened and went back into the car and he took a pistol from the Amway bag and accidentally discharged a round while inside the car;

- that after getting out of the car the second time he did not point the pistol he was holding at SP-11, but fired upwards towards the sky as he was frightened of the people around him;

- that at point "E" he managed to stop a motorbike and while attempting to get on the said motorbike he was shot from behind on his right thigh; and

- that after he fell after he was shot, SP-11 came to him and after saying "polis", SP-11 proceeded to kick the pistol from his hand and also kick his face.

The accused's testimony enumerated above formed the backbone/crux of the accused's defence. Nevertheless it was never put to the prosecution witnesses but only revealed during the defence stage, leaving no room for rebuttal or explaination or denial by the said witnesses, in particular SP-11 and SP-12. Indeed it took the prosecution by surprise.

They were denied the opportunity to verify the veracity of the evidence given by the accused. Being the crux of his defence, it is only to be expected that these issues should feature prominently in the cross-examination of SP-11 and SP-12. Hence in *Chua Beow Huat v. PP* [1970] 2 MLJ, the Sharma J, after quoting an Indian authority, quoted the following passage:-

"Mukherji J, in this Indian case said:

> *"The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. It has been stated on high authority of the House of Lord that this much a counsel is bound to do when cross-examining that he must put to each of his opponent in turn, so much of his own case as concerns that particular witness or in which that witness had any share. If he ask no question with regard to this, then he must be taken to accept the plaintiff's account*

in its entirety. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he has finished the evidence of his witnesses and when he has no further chance to meet the new case made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated".

The Federal Court in *Alcontra a/l Ambross Anthony v. PP (MR)* [1996] 1 MLJ 209 at m.s. 218 also adverted to the same issue:-

Speaking generally, in criminal trial, the whole point and purpose of the defence having to put its case to such prosecution witnesses as might be in a position to admit or deny it, is to enable the prosecution to check on whether an accused's version of the facts is true or false, and thus avoid the adverse comment, that the defence is a recent invention - in other words, "kept up it sleeve," as it were revealed for the first time when the accused makes his defence from the witness box or dock, thus detracting from the weight to be accorded to the defence".

Coming back to the case before me, I have thus no hesitation to find that such failure by the accused to put his case at the earliest possible stage

would render the same to be likened or branded as a recent invention incapable to being accorded the due weight it deserves - see also *PP v. Lin Lian Chan* [1992] 2 MLJ 561. On the other hand it is very apparent that the crux of the prosecution's case as was anchored upon the testimonies of PW-11, PW-9, PW-7, PW-6 and PW-12 as particularized in the earlier paragraphs stood uncontroverted even after having gone through the vagaries of cross-examination.

More importantly, having scrutinized the evidence in its entirety, the accused does not appear to me to be a credible witness.

Firstly his willful blindness in following the various requests made by Ah Meng is beyond comprehension. At point "B" Ah Meng told him that he wanted to see Ah Long to settle some issues, afterwhich Ah Meng showed him the Amway bag containing 2 pistols and Ah Meng then left the motorcar to look for Ah Long carrying the 2 pistols in the Amway bag with him. The accused, in the circumstances under which Ah Meng went looking for Ah Long and the fact that Ah Meng had told him that he owed

Ah Long, a money lender, the sum of RM20,000.00, must have sensed that Ah Meng is up to no good. Yet he did nothing. He did not even try to disassociate himself from Ah Meng. He did not even refrain Ah Meng from seeing Ah Long armed with 2 pistols. A law abiding reasonable man similarly circumstanced would not have hesitate to report Ah Meng's conduct to the authorities.

Instead the accused blindly followed Ah Meng's instructions. He waited in the motorcar for hours and did not get out of the motorcar when told by Ah Meng to wait in the car and not go anywhere. He even urinated into a bottle in the motorcar. He applied glue over his hands/palms when told by Ah Meng to apply glue over his hands/palms. He admitted that he was not forced by Ah Meng to apply the glue and did not also understand the need to apply the glue over his hands/palms. At the same time he knew the effect of applying glue to his palms ie, to prevent imprintments of his fingerprints on items he touch or hold. Hence what is the glue for if the accused is only to wait in the motorcar for Ah Meng's return?

In all the circumstances of the case, the accused's conduct in waiting still in the said motorcar for such long hours to the extent of even urinating inside the motorcar and in applying glue all over his palms/hands makes no sense. He did not even ask Ah Meng why the need for him to do so. Equally the accused did not also offer any explanation to account for his willful blindness in complying with Ah Meng's requests.

In such event I am most agreeable with the submission of the learned TPR that Ah Meng is a figment of the accused's imagination. He does not exist. The accused was at point "B" on his own accord waiting for the right time to strike at the deceased.

Secondly, the accused witnessed the shooter shooting the deceased. Yet again he did nothing. He did not flee from the scene. He did not recognize the shooter either. When the shooter entered his motorcar, again he did nothing. He did not express any fright, concern, fear or surprise or do something to prevent the shooter from entering the motorcar. The accused was very cool. Only after the shooter had entered

the motorcar he realized that the shooter was Ah Meng as the shooter was then wearing a wig. Again the conduct of the accused in allowing the shooter, whom he did not recognize then, to enter the motorcar makes no sense. The shooter was a stranger before he entered the car and the accused has just witnessed the stranger shooting somebody 3 times. Yet he allowed the shooter to enter his car without fuss.

Thirdly, upon entering the said motocar Ah Meng told him to leave the place quickly. Blindly, the accused obliged. He did not say that he was forced by Ah Meng to do so. Again the accused did not account for his willful blindness.

Fourthly, the accused said that after the well built man was shot, he saw that the man had fallen towards the left of the driver's seat and not lying on the tarmac of the car park as shown in photographs P-21(3) and (4). However not a drop of blood was found inside the said motorcar BMW as testified by SP-9.

Fifthly, the accused testified that he collided with 3 other cars at point "D". However the accused gave no explanation why the collision occurred or the circumstances surrounding the collision. In such event the testimony of SP-11 that the accused stopped his motorcar just before point "D" on account of the heavy traffic and that the accused responded by surging forward and knocking into 3 other cars and got stuck at point "D" after he (SP-11) had knocked the rear left window of the said motorcar appears to be a lot more probable. The accused was in a hurry to flee upon being accosted by SP-11 after SP-11 caught up with him just before point "D".

Sixthly, the accused said that he reentered his car at point "D" after he got frightened when he noticed 2 Malay men on a motorbike with one of them pointing a finger at him. The corresponding issue is - what is he frighten off when the Malay man merely pointed a finger at him?

Once back in the car he said that he took out a pistol from the Amway bag and accidentally discharged a round inside the motorcar. As

the pistol was discharged inside the motorcar, the bullet must have hit at some points or places inside the motorcar. If the said bullet somehow ricochetted and exited the car, there must be bullet hole or holes from within the motorcar to show such exit. The evidence of SP-9 who tooth-combed the inside and outer side of the said motorcar negated the presence of exit hole or parts of the inside of the said motorcar being hit by the said bullet. The testimony of the accused relating to this accidental discharge found no support from the hard evidence. In fact his testimony was contradicted by the hard evidence procured from the testimonies of both SP-11 and SP-9. The presence of the bullet casing on the floor board of the driver's seat of the said car singularly on its own, in the absence of other corroborative evidence is not evidence pointing to the same. Worst still this issue of accidental discharge of the said pistol inside the car was never raised in the cross-examination of SP-11 and SP-9. It is apparent that this issue is an afterthought.

Finally, the accused testified that he did not point his pistol at SP-11 outside the said motorcar and discharged 2 shots at SP-11 at point "D" but

pointed to the sky and discharged a round towards the sky. He said he did so because many people were looking at him and this frightened him. In my view his reasons are most ridiculous.

In his own words, the people were merely looking at him. They did not go or were about to go after his skin. Apparently the people did not intend to harm him. His life and limbs were never in any danger. Hence there is no justification at all for him to discharge the said pistol in the manner he did. Being merely frightened of people looking at him is no justification to discharge the said firearm. Additionally he claimed that he has never used a firearm in his life before. However from the manner he discharged the said pistol it appears that he is very well adept and skilful at using such pistol. In my view this is another red-herring from the accused. On the other hand SP-11's testimony is uncontroverted that the pistol was aimed, directed and discharged at him twice. Bodily injuries or death was only avoided because he managed to duck the shots directed at him.

Verdict at the end of the defence case

Having considered the evidence in its entirety, I am wholly satisfied that the defence posited by the accused is grossly against the weight of evidence. It is a defence of mere denial laced with elements of afterthought. He denied shooting the deceased to death. He denied attempting to murder SP-11 and also denied discharging 4 gun shots from the said Stoeger Couger pistol at SP-11 with intention to cause his death while committing a schedule offence, ie, preventing his own arrest by SP-11. In the light of the evidence before me, such denial without more is incapable and is equally insufficient to dislodge the prosecution's case. It has not created a reasonable doubt upon which the defence was called - see *PP v. Ling Tee Huah* [1982] 2 MLJ 324; *Bala anak Matik v. PP* [2006] 3 MLJ 516. The prosecution on the contrary had proven the 3 offences leveled against the accused beyond a reasonable doubt.

The accused is thus found guilty and convicted of the 3 offences as proferred. He is sentenced to hang by rope by his neck until he is dead according to law in respect of the first and third charges. As regards to the

second charge he is jailed for 5 years to run with affect from the date of his arrest.

(AHMADI HAJI ASNAWI)
Hakim
Mahkamah Tinggi Malaya
Bersidang di Shah Alam

Dated: 25 FEBRUARY 2013

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