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PP v. KAMARUZAMAN MOHAMED SHAH & ORS

HIGH COURT MALAYA, MELAKA
ZULKIFLI BAKAR J
[CRIMINAL TRIAL NO: 46B-01-06-2011]
8 MARCH 2016

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CRIMINAL LAW: *Kidnapping Act 1961 – Section 3 – Accused persons jointly charged for kidnapping victim – Prima facie case – Whether established – Circumstantial evidence – Whether sufficient to establish case for offence charged – Whether vehicle rented by accused person used for kidnapping – Whether there was evidence to connect accused persons to commission of offence based on phone records – Whether there was conclusive evidence of fingerprints of accused persons found on premises where kidnapped victim was held – Identification of accused persons – Whether reliable – Non-calling of material witnesses – Whether caused serious gaps in prosecution's case – Whether benefit of doubt ought to be given to accused persons*

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Five accused persons were charged and tried respectively with the commission of kidnapping a Chinese male ('PW21'), an offence punishable under s. 3(1) of the Kidnapping Act 1961. PW21 testified that on 14 February 2011 at about 6pm, he exited from the main door of K&H Trading Sdn Bhd warehouse and saw a van parked nearby some cones. PW21 moved towards the direction where his car was parked and realised four to five people were approaching him. According to PW21, an Indian man (whom he identified as the fourth accused) had punched him in the face. Thereafter, the said four to five people grabbed PW21 and rushed him into the rear of the van. PW21's hands and legs were tied and his eyes and mouth were covered with sellotape. The van travelled for about 20 minutes before arriving at an unknown premise. One of the kidnappers asked PW21 for anyone that could be contacted for his release and PW21 gave his brother's ('PW22') handphone number. The kidnappers then left the premises. According to PW21, he started screaming every 30 minutes in order to get help. Two ladies entered the premises and PW21 asked for their help. One of the ladies ('PW12') who was the owner of the premise, (which was a homestay) had checked on the homestay after receiving information from a neighbour about alleged voices screaming for help coming from the homestay. PW12's son, ('PW32'), then entered the homestay and found PW21 inside a toilet. Shortly, the police arrived at the scene and PW21 was then brought to the hospital. According to PW12, on 14 February 2011, two men had appeared at the homestay and one of them told PW12 that he intended to rent it. He had given a photostated copy of IC and driving licence to PW12 and gave payment of RM140. On that night, PW12 received a call from someone using the number 017-3543499 asking to continue renting the homestay for one more night.

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On 15 February 2011, at around 11.30am, PW15 led a team from the Special Criminal Investigation Division to the homestay. He noticed two Malay men inside a parked blue car and introduced himself as a policeman. The two suspects attempted to flee from the scene and a scuffle ensued. Nevertheless, the two suspects (the first accused and the second accused) were successfully arrested. On the same day, the third accused was also arrested. On 16 February 2011, the fourth and fifth accused were apprehended. The issues that arose for determination were (i) whether the circumstantial evidence adduced was sufficient to establish a *prima facie* case for the offence charged; (ii) whether there was evidence to prove that the van ('P35') that was rented by the first accused was used for the kidnapping; (iii) whether there was evidence of recorded conversations adduced by the prosecution to connect the first to fifth accused to the commission of offence charged; (iii) whether there was conclusive evidence of fingerprints of the accused persons found on the premises where PW21 was held; (iv) whether the identification evidence by PW21 of the fourth accused person was reliable; (v) whether the evidence of PW3, an accomplice in this case, was tainted; and (vi) whether the non-calling of material witnesses caused a serious gap in the prosecution's case.

Held (acquitting and discharging the accused persons):

(1) There was no evidence to prove that P35 was the actual vehicle used in abducting PW21 as PW21 himself did not know the number plate of the vehicle used to abduct him. There was also no other piece of evidence such as DNA or fingerprint of PW21 found inside P35. PW21 explained that he did not know the real colour of the vehicle and what more the type and registration number of the van which he was forced to enter. There was no evidence that P35 was the vehicle that was used in the commission of offence of kidnapping. Further, regarding the allegation that the first accused had rented the said P35, it was dangerous to rely on the identification of the first accused by PW14 when PW14 herself was uncertain with her identification evidence. The quality of the evidence of the identification parade was also poor. Thus, there was no supporting evidence to ensure that there was no mistake in the identification of the first accused. (paras 18 & 19)

(2) It was alleged by PW22 that he received a call from the number 013-6842005 at around 11.30pm on 14 February 2011 in which the caller demanded for ransom for the release of PW21. On 15 February 2011, at around 8.15 am, PW22 received a call from the number 017-7878739 in which PW22 had asked for the ransom amount to be reduced. The court found that the number 013-6842005 was a public payphone, thus it was not proven who was the caller using this public payphone and there was no evidence of direct nexus with any of the accused persons in this case. The phone number 017-7878739 was registered under the

A name of one Dzaid Yusof. The failure of the prosecution to call the said Dzaid had caused a break in the chain of the prosecution's evidence. These circumstantial evidence were too weak as they did not point positively to the first accused. (paras 20, 21 & 23)

B **(3)** There was also evidence that the first and second accused were arrested by PW15 at 11.30am nearby the homestay and that a phone with the two sim cards No. 017-7878739 and 017-3543499 had been confiscated. It was doubtful to make an inference that the first accused had made the call to PW22 to demand for the ransom money without clear evidence from PW22 about what time he received the call from 017-3543499 C (11am). By then, PW21 had been saved and taken to the hospital. If in fact the first and second accused were involved in the kidnapping, there was no reason for them to be near or around the homestay when there was no longer a kidnapped person. There was also no basis to find the third and fourth accused persons guilty merely based on the phone D records showing that they had received or made calls to the said numbers. This evidence was not sufficient to conclude that they had participated in the commission of the offence with common intention. In respect of the phone numbers/sim cards, there was no evidence of recorded conversations adduced by the prosecution to connect the first E accused to fifth accused to the commission of offence charged (paras 26-30)

(4) This court had considered the evidence of fingerprints of the first accused, second accused and fifth accused which were found on Cone 13. However, all items found in front of the K&H Warehouse including F Cone 13 were placed together inside the forensic team's vehicle and brought back to the forensic laboratory before any DNA investigation was carried out on the retrieved items. Therefore, the contaminated Cone 13 could not provide conclusive evidence in respect of fingerprints of the first accused, the second accused and the fifth accused on it. As G for the fingerprint evidence of the third accused on a bottle of drink found at the homestay, there was also evidence that many people had entered and gathered inside the house, therefore there was a danger in concluding that the third accused was one of the kidnappers. (paras 31-34)

H **(5)** PW21 claimed that he recognised the fourth accused as the one who punched him in front of K&H Warehouse. However, PW21 had long-sightedness vision and was able to see distant objects clearly but nearby objects would be out of focus. PW21 was supposed to be able to see the people at some distance more clearly than the person who was nearer I to him. Thus, it could not be accepted that PW21 could only see the fourth accused clearly who was behind him. (paras 35-37)

(6) PW34, who was currently incarcerated due to another offence, was called by the prosecution to give evidence that he had been with the five accused persons and that he was an accomplice in the commission of the kidnapping offence against PW21. What was important to note was that PW32 had said that the DPP and the investigation officer had visited him at the prison for three to four days and that he had been threatened by them to be prosecuted for kidnapping under this case. This court could not rule out the possibility or likelihood of PW34's evidence being adjusted and added with elements of concoction and fabrication due to his fear towards the DPP and the investigation officer. The possibility that PW34 had been coached by the prosecutor to give evidence had tainted its reliability. In the circumstances, with his evidence which was suspect and he being an accomplice, corroboration was required. (paras 38-46)

(7) It is trite law that the burden of proof lies on the prosecution to establish its case beyond reasonable doubt. The law vehemently requires the prosecution to prove the case as per charge and hence it was the duty of the prosecution to call one Surisan and one Yusri, as witnesses to close the gaps. The non-calling of Surisan and Yusri, who were material witnesses who could prove the involvement of the accused persons, was tantamount to withholding of material evidence and had caused big and serious gaps in the prosecution's case. (para 50)

(8) The circumstantial evidence adduced by the prosecution in this case was insufficient to establish a *prima facie* case for the offence charged. There were too many flaws which created doubts in this case. The benefit of the doubts should be given to all these five accused persons. This court had applied the maximum evaluation test on the evidence adduced by the prosecution before reaching to the above findings. The prosecution had failed to prove a case against the five accused persons on the charge preferred against them or for any other offence against any of them at the close of the prosecution's case either by direct or circumstantial evidence. (paras 51-53)

Case(s) referred to:
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Chan Chwen Kong v. PP [1962] 1 LNS 22 CA ***(refd)***
Duis Akim & Ors v. PP [2013] 9 CLJ 692 FC ***(refd)***
Jayaraman & Ors v. PP [1981] 1 LNS 129 ***(refd)***
Kyles v. Whitley 514 US 419 (1995) ***(refd)***
Lim Boon San v. PP [1967] 1 LNS 86 HC ***(refd)***
Magendran Mohan v. PP [2011] 1 CLJ 805 FC ***(refd)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***
Ong Hooi Beng & Ors v. PP [2015] 1 LNS 63 CA ***(refd)***
PP v. Shatisruben Ithayakumar & Ors [2013] 10 CLJ 636 HC ***(refd)***
PP v. Syed Muhamad Faysal Syed Ibrahim [2004] 1 LNS 159 HC ***(refd)***

A *R v. Burns and Holgate (1967) 11 WIR 110* ***(refd)***
R v. Turnbull Guidelines [1976] 3 All ER 549 ***(refd)***
Sabarudin Non v. PP & Other Appeals [2005] 1 CLJ 466 CA ***(refd)***
Tai Chai Keh v. PP [1948] 1 LNS 122 CA ***(refd)***

Legislation referred to:
B Evidence Act 1950, s. 114(g)
Kidnapping Act 1961, s. 3(1)

Other source(s) referred to:
Bennett L Gershman, *"Witness Coaching by Prosecutors",* [2002] 23 Cardozo L Rev. 829

C *For the prosecution - Nurfarhana Ahmad, DPP; State Legal Advisor's Office, Melaka*
For the 1st accused - Chong Joo Tian; M/s JT Chong Assocs
For the 2nd accused - KA Ramu; M/s KA Ramu Vasanthi & Assocs
For the 3rd accused - Gurmit Singh Hullon; M/s Hullon & Co
For the 4th accused - Mohd Hilmy Shamsudin; M/s Mohd Amin, Ng & Assocs
For the 5th accused - Mohd Zulfiqri Zakaria; M/s Zulfiqri Zakaria & Co

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Reported by Suhainah Wahiduddin

JUDGMENT

Zulkifli Bakar J:

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Introduction

[1] Five accused persons were charged and tried respectively with the commission of kidnapping a Chinese male ie, Tan Tiang See (PW21), an offence punishable under s. 3(1) Kidnapping Act 1961.

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[2] The charge against the accused persons read as follows:

> Bahawa kamu bersama-sama pada 14.2.2011 jam lebih kurang 6.00 petang di hadapan Gudang K&H Trading Sdn Bhd, No. 1 Jalan TTC 25, Cheng Industrial Estate, di dalam Daerah Melaka Tengah, dalam Negeri Melaka telah dengan niat hendak membuat tebusan mencolek seorang lelaki cina
G bernama TAN TIANG SEE, K/P: 710314-04-5217 yang berumur 39 tahun serta mengurung lelaki tersebut dengan salah di sebuah rumah beralamat No. 48, Jalan Cengal 1, Taman Merdeka, Batu Berendam, di dalam Daerah Melaka Tengah, di dalam Negeri Melaka sehingga wang tebusan sebanyak RM500,000.00 dibayar oleh abang mangsa iaitu TAN THEAN
H LEE, K/P: 620807-10-5979. Oleh yang demikian, kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 3(1) Akta Colek 1961 (AKTA 365) dan dibaca bersama-sama Seksyen 34 Kanun Keseksaan.

The Facts

I **[3]** PW21 testified that on 14 February 2011 at about 6pm, once he exited from the main door of K&H Trading Sdn Bhd warehouse (company of PW21's brother where he was working) located at No. 1 Jalan TTC 25,

Cheng Industrial Estate, Melaka ("K&H Warehouse"), he saw a van parked at the left side of the main door of K&H Warehouse and there were signboard of "AWAS" and cones beside the van. P21 further saw around seven to eight men working to remove or clear away bushy clump of grass in front of the said K&H Warehouse.

[4] PW21 moved towards the direction where his car was parked. He then realised four or five people approached him. When he glanced back, he saw an Indian man (whom he identified as the fourth accused) punched him in the face. Then, the said four to five people grabbed PW21 from his back and pushed him into the rear of the van. His hands and legs were tied. Meanwhile, his eyes and mouth were covered with sellotape.

[5] The van started to move. After the van travelled for about 20 minutes, PW21 felt the van stopped and he heard the sounds of opening the van door and gate of a premise.

[6] PW21 was carried by some people (kidnappers) and then left onto the floor where he felt there was a hole. After about one hour, PW21 successfully untied his legs. However, the kidnappers realised this and brought him to another spot and spoke to him:

(a) PW21 was told by one of the kidnappers that they did not intend to kill PW21 as the next day would be Awal Muharam;

(b) One of the kidnappers asked PW21 for anyone that could be contacted for his release. PW21 gave his brother's (Tan Tien Lee, PW22) handphone number ie, 019-6677895 to the kidnappers;

(c) After giving the handphone number of PW22, the kidnappers took PW21's gold ring and tied PW21's legs again. At this time, they tightened the tie. Not only that, the kidnappers also checked PW21's trousers pocket and took his wallet which contained at least RM1000, Nokia handphone 5800 and a lighter; and

(d) Thereafter, PW21 was brought back and placed at the original spot where there was a hole. PW21 was instructed to be silent.

[7] After ensuring there was no one present in the premise, PW21 stated that he screamed for every 30 minutes in order to get help until after quite some times till he got response.

[8] PW21 heard the sounds of opening the gate and he initially thought that the kidnappers had returned. To his surprise, he heard a conversation between two ladies in asking to each other whether he was a male or a female. Immediately, PW21 took the opportunity to reply that he is a male and asked for their help. From other evidence adduced, this court also gathered these facts:

A (a) On 14 February 2011, Mohd Azrul bin Abu Hassan (PW32), son of the owner of a house turned into homestay accommodation service, received a phone call from a Malay man at no. 017-3543499 for accommodation matter and he then gave the man his mother's handphone number ie, 013-6910350 for the man to directly deal with
B his mother later. PW32 informed his mother that is Sofiah binti Yang Razali (PW12) about this matter;

(b) PW12 went to the said house at its address No. 48, Jalan Cengal 1, Taman Merdeka, Batu Berendam, Melaka ("Homestay") with her friend to clean the place before renting to others;

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(c) Two men appeared at the Homestay on 14 February 2011 at around 2pm and one of them told PW12 that he had made the call to rent the Homestay. He gave photostated copy of IC and driving licence (P39A) to PW12 and asked PW12 to enter into her record of renting the Homestay based on the name as stated on the said IC. PW12 told this
D court that she was only able to identify the second accused as the man who gave her the copy of P39A. After she received payment of RM140 from him, PW12 passed the key (P43) to the second accused. On that night, PW12 received a call from someone using no. 017-3543499 asking to continue renting the Homestay for one more night;

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(d) On 15 February 2011, PW12 answered call from the neighbour of the Homestay and she was told that the neighbour heard voices of someone asking for help coming from the Homestay. PW12 and PW32 decided to go to their Homestay to find out what had actually happened; and

F (e) When they reached the Homestay at around 8am that morning, they saw many people were gathering and standing in front of the Homestay. They also heard clearly the voices of someone asking for help. Without any delay, PW32 climbed over the gate and unlocked the padlock. Then, he quickly entered the Homestay through unlocked sliding door and looked
G for the source of the voice. Finally, he found PW21 inside a toilet (exhibit photo P15(10&11)). It was PW32's testimony that he noticed that PW21's head was bandaged with blue selloptape (P29A), hands were tied with black cable ties (P28A) and legs were tied with orange nylon rope (P27A). PW32 could see PW21 inside the toilet since the toilet door was ajar and PW21 was asking for help.

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[9] PW21 then heard the reply by a man (PW32) that he could not fully open the door of the toilet. PW32 asked PW21 to be patient and to wait for the arrival of the police.

[10] Shortly, the police arrived at the scene. PW32 and KPL Kamaruddin
I bin Baba (PW8) together carried PW21 to a chair and untied PW21.

[11] PW21 borrowed a cell-phone from a Chinese police officer who was present to contact his brother and his wife. After about ten minutes, PW21's wife arrived at the scene. Later, PW21 was sent to Hospital Besar Melaka accompanied by his wife. At that time, PW21 realised that he was in fact confined at Taman Merdeka nearby his house.

[12] As a result of the incident, PW21 was injured on his right hand, mouth and forehead (exhibit photos P21(1-10)).

[13] On 15 February 2011 at around 11.30am, Insp. Stephen Ak Ayuk (PW15) led a team of Special Criminal Investigation Division (D9) to the Homestay. Upon arrival at the Homestay, he noticed and felt very suspicious of two Malay men who were inside a parked blue Satria car with plate registration no. CBA 848. PW15 restrained the Satria car and introduced himself as a policeman by showing his authority card. These two suspects attempted to flee from the scene. There was a scuffle between the D9 team and the two suspects. Nevertheless, the two suspects were successfully arrested namely Kamaruzaman bin Mohamed Shah (first accused) and Sulaiman bin Abdul Kadir (second accused).

[14] On the same day at 5.30pm, Insp. Henry a/l M Savavimuthu (PW17) led D9 team to arrest Farezzuwan bin Mohd (third accused) at the parking place of Mydin, MITC, Ayer Keroh, Melaka.

[15] Subsequently, on 16 February 2011 at 12.30am, Robin anak Ajing (fifth accused), Yusri bin Ahmad and Murukesan a/l Sivaperumal (fourth accused) were apprehended by a team led by ASP Khairiel bin Mohd Arif (PW35). On the same day at 1.15am later, PW35 arrested a suspect named Surisan bin Ismail.

Issues And Findings

[16] Issues for the findings are as follows:

(a) Van with plate registration no. WFX 6533 (P35);

(b) Phone numbers/sim cards;

(c) Fingerprints evidence;

(d) Identification evidence by PW21 of the fourth accused;

(e) Evidence of Nazrul bin Hussin (PW34) – Accomplice in this case; and

(f) Failure to call Surisan and Yusri by prosecution.

Prosecution's Case

[17] I will first deal with the issues of exhibits which provide circumstantial evidences in this case ie, the van, phone numbers/sim cards and fingerprints evidence. In my considered opinion, in making decision on this kind of indirect evidence (circumstantial evidence), I should consider the

A evidence with logic and common sense with the surrounding circumstances of this case in mind to evaluate whether a satisfaction beyond a reasonable doubt can be achieved from the reasonable inference which can be drawn from the proven facts. I am guided by the principle as laid down:

B (a) In the Court of Appeal case of *Chan Chwen Kong v. Public Prosecutor* [1962] 1 LNS 22; [1962] 1 MLJ 307, Thomson CJ (as he then was) held that:

> That evidence was entirely circumstantial and what the criticism of it amounts to is this, that no single piece of that evidence is strong enough to sustain the conviction. That is very true. It must
C 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 form a rope. The real question is: is that rope strong enough to hang the prisoner?

D (b) In the Court of Appeal of Jamaica case of *R v. Burns and Holgate* (1967) 11 WIR 110, had an occasion stated as follows:

> Counsel for the Crown when dealing with this point relied on the case of *R v. Elijah Murray* ((1952), 6 JLR 256), a case for murder
E in which the evidence was purely circumstantial. In this case two of the judges who sat in the Court of Appeal had also sat in *Clarice Elliott*'s case (*R v. Clarice Elliott* (1952), 6 JLR 173) and the judgment of the court was also delivered by O'Connor CJ The court ((1952), 6 JLR 256, at p. 258) approved of the directions on circumstantial evidence given by Cluer J, who had sat as the third judge in the
F Court of Appeal in the *Clarice Elliott*'s case (*R v. Clarice Elliott* (1952), 6 JLR 173). We set out here the directions given by CLUER, J, as to the rule to be applied to cases depending on circumstantial evidence. They were:
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> > There is a rule to apply to cases which depend solely on
> G circumstantial evidence and it is as follows: a jury may convict a prisoner on purely circumstantial evidence but they should be satisfied not only that these circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that
> H the prisoner was the guilty person. Again, it has been said that 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. Again, the nature of the circumstantial
> I evidence must be such that the jury must be satisfied that there is no rational mode of accounting for the circumstances other than the conclusion that the prisoner is guilty.

> I should also direct you that a high degree of mere suspicion as the sum total of your views as to circumstantial evidence would not be sufficient for a conviction. There must be something more solid than a high degree of suspicion.
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> These directions by Cluer J, complied fully with what the Court of Appeal in *Clarice Elliott*'s case (*R v. Clarice Elliott* (1952), 6 JLR 173) ((1952), 6 JLR 173, at p. 174) laid down as the proper rule to apply to cases which depend solely on circumstantial evidence and it is our view that the statement by O'Connor CJ, relied on by appellant's counsel was not adding to, taking from or varying in any way what was earlier stated by him to be the proper rule. The reference by the learned Chief Justice to "each item of the circumstantial evidence" was made by him when considering this evidence in detail in order to decide whether a new trial ought to have been ordered, and it is quite wrong to say that the court was there laying down as a test for circumstantial evidence that each item by itself must point exclusively to guilt. (emphasis added)

(c) It is my findings that the circumstantial evidence adduced by the prosecution in this case is insufficient to establish a *prima facie* case for the offence charged. The circumstantial evidence available did not only point to the direction of guilt of the accused but also points to other directions as well. In *Tai Chai Keh v. PP* [1948] 1 LNS 122; [1948-1949] Supp MLJ 105 at p. 108, His Lordship Laville J said:

> ... Where there is more than one inference which can reasonably be drawn from a set of facts in a criminal case, we are of opinion that the inference most favourable to the accused should be adopted.

(See *PP v. Syed Muhamad Faysal Syed Ibrahim* [2004] 1 LNS 159; [2004] 6 MLJ 303)

(d) The situations arise and justifications for these findings are discussed thenceforth in this judgment.

First Issue: Van With Plate Registration No. WFX 6533 (P35) (Said To Be Rented By The First Accused And Used For The Kidnapping)

[18] The issue as submitted before this court by the first accused's counsel is that there was no evidence to prove P35 as the actual vehicle used in abducting PW21. I accept this argument based on the following reasons:

(a) PW21 himself did not know the number plate of the vehicle used to abduct him from K&H Warehouse;

(b) There was no other piece of evidence such as DNA or fingerprint of PW21 found inside P35; and

(c) PW21 in his police report (P92) stated that it was a van with green silver colour. However, when he was examined during examination in chief, he explained that he actually did not know the real colour of the vehicle and what more the type and registration number of the van which he was forced to enter.

[19] Hence, evidence of Sadiah binti Sazar Ali (PW14) that she had identified the first accused as the person who rented the said P35 at the Identification Parade may not be relevant to this case since in the first place there was no evidence that P35 is the vehicle that was used in the commission of offence of kidnapping in this case:

(a) Further, PW14's evidence for the identification of the first accused is doubtful because she told the court that the Malay man who dealt with her to rent the van was wearing a helmet and only took off the helmet while entering the van. PW14 also said that she could identify the man as the first accused because he wore the purple baju Melayu at the Identification Parade since it is the same colour of shirt he wore when renting P35 from her;

(b) This court found that it is highly prejudicial to the first accused in the conduct of the Identification Parade because he was told to wear the particular or same colour of shirt so that he can easily be identified by PW14. In assessing the quality of the said Identification Parade under *R v. Turnbull Guidelines* [1976] 3 All ER 549, this court took cognisance of these factors:

> First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.
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> Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the

accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence. Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgment, when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however, that an adequate warning has been given about the special need for caution. Were the courts to adjudge otherwise, affronts to justice would frequently occur. A few examples, taken over the whole spectrum of criminal activity, will illustrate what the effects on the maintenance of law and order would be if any law were enacted that no person could be convicted on evidence of visual identification alone ...

When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification. This may be corroboration in the sense lawyers use that word; but it need not be so if its effect is to make the jury sure that there has been no mistaken identification.

(Federal Court case of *Duis Akim & Ors v. PP* [2013] 9 CLJ 692; [2014] 1 MLJ 49 also referred).

(c) This court concluded that it is dangerous to rely on the identification of the first accused by PW14 when PW14 herself was uncertain with her identification evidence and also the manner of PW14 when she gave evidence in this court where she was sarcastic when answering questions by parties and the court, indicating her unwillingness to cooperate but forced to come to court as a witness at this trial. Therefore, this court

A rejected the identification evidence of PW14 not for this reason but with further reaction of PW14 herself during cross-examination who admitted that:

S: Adakah setuju dengan saya walaupun puan telah berjumpa dengan orang itu 2 kali pada 8/2/2011 dan 14/2/2011, puan masih boleh
B membuat kesilapan kan tentang muka orang yang jumpa dengan puan dengan gambar orang yang berada dalam lesen memandu ini, setuju?

J: Setuju.

C (d) It is clear from the evidence before this court that the photograph of the person in the driving licence is not the first accused. Where the quality of the evidence of the Identification Parade (and the evidence of PW14 as admitted by herself) are poor, this court tried to look for any other evidence which goes to support the correctness of the identification of the first accused to make the identification evidence would be safe to be
D admitted. However, this court could not find any other supporting evidence to ensure that there was no mistake in the identification of the first accused.

Second Issue: Phone Numbers/Sim Cards (Used To Call To Demand For Ransom Money)

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[20] PW22 gave evidence that he received a call from no. 013-6842005 at around 11.30pm on 14 February 2011 in which the caller demanded for ransom of RM500,000 for the release of PW21. After negotiation, PW22 was instructed to prepare RM300,000 as the final amount.

F **[21]** On 15 February 2011 at around 8.15am, PW22 received a call from the same Malay man from no. 017-7878739. PW22 told the Malay man that it was public holiday so none of the bank was in operation and he asked for the amount to be reduced to RM40,000 – RM50,000 which he might be able to obtain by borrowing from friends or relatives. The Malay man ended his
G call without answering to PW22's proposal.

[22] Later at 8.38am, PW22 received a call from his brother (PW21) informing him that PW21 was safe.

[23] The prosecution's evidence with regards to the phone numbers/ sim
H cards are as follows:

(a) The phone no. 013-6842005 was used as a public pay-phone. This court found it was not proven who was the caller using this public pay-phone and there is no evidence of direct nexus with any of the accused in this case. Further to that, the phone could easily be accessed by the public;

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(b) The phone no. 017-7878739 was registered under the name of one Dzaid bin Yusof. PW15 confiscated the phone (P68) from the first accused with two sim cards. One of the sim cards belongs to the no. 017-7878739. Failure of prosecution to call the said Dzaid bin Yusof had caused a break in the chain of the prosecution's evidence in this respect. This court found it is unsafe to conclude that the first accused was the one who called PW22 merely because the phone was found with him when he was arrested;

(c) These circumstantial evidences are too weak as they did not point positively to the first accused. Syed Othman FJ (as he then was) said in the case of *Jayaraman & Ors v. PP* [1981] 1 LNS 129; [1982] 2 MLJ 273:

> I am well aware that the "irresistible" formula has been used by the courts here in dealing with circumstantial evidence. But I would like to refer here to *Mc Greevy v. Direstor of Public Prosecution* where it was argued at page 279, before the House of Lords that "in criminal trial in which the prosecution case, or any essential ingredient thereof, depends, as to the commission of the act, entirely on circumstantial evidence, it is the duty of the trial judge, in addition to giving the usual direction that the prosecution must prove the case beyond reasonable doubt, to explain to the jury in terms appropriate to the case being tried that this direction means that they must not convict on circumstantial evidence unless they are satisfied that the facts proved are (a) consistent with the guilt of the accused and (b) exclude every reasonable explanation other than the guilt of the accused".

[24] On the same day ie, 15 February 2011 at around 9.20am, PW22 again received calls from no. 017-3543499 whilst he was at Hospital Besar Melaka which he had missed the first call. After being advised by a police officer, PW22 answered the second call from the said no. 017-3543499. The caller asked PW22 whether he was ready to give RM20,000. PW22 requested to talk to his brother for confirmation but the caller hung up.

[25] After that at around 11am, PW22 received a call from no. 017-3543499 again whilst he was at his house and was ordered to prepare the ransom money. Again, PW22 demanded to talk to his brother and the call was also ended by the caller.

[26] Another sim card taken from the first accused was for the said no. 017-3543499. In relation to this number, it was registered in the name of one Mohd Elias bin Ahmad who was called by prosecution as PW9. They are also other related evidence to this issue ie:

(a) PW9 (Mohd Elias bin Ahmad) clarified that he had lost his IC on 22 January 2011 and he had lodged a police report (P33);

(b) PW15 (Insp. Stephen Ak Ayuk) said that he found PW9's IC from the first accused when arresting the first accused;

(c) Nevertheless, this court invoked an adverse inference in favour of the first accused since PW9's IC was never produced before this court as exhibit but with only simple reason that the said IC was lost. There was no reasonable explanation as to the efforts made by the police in tracing the IC and how it was lost to this court;

(d) This phone number was also used to call PW12 in asking to extend one more day in renting the Homestay. However, PW12 in her evidence said she only recognised the same phone number was used but could not say whether it is the first or second accused who spoke to her;

(e) PW12 also in her evidence said that two men came to the Homestay and met her in persons. This court had carefully perused the facts and found that it is not tenable to accept the explanation of PW12 that she was only able to recognise one of the two men when the two men were together when they met her. Hence, the evidence of identification of the second accused by PW12 is doubtful; and

(f) Further, there was also evidence that the first and second accused were arrested by PW15 at 11.30am nearby the Homestay. PW15 also had confiscated the phone with the two sim cards no. 017-7878739 and 017-3543499. Therefore, it is doubtful to make an inference that the first accused had made the call to PW22 to demand for the ransom money without clear evidence from PW22 about what time he received the call from no. 017-3543499 (11 lebih pagi). It is also must be noted that by then PW21 had been saved and taken to the hospital. If in fact the first and second accused were involved in the kidnapping, there is no reason for them to be near or around the Homestay when there is no longer the kidnapped person, the police who rescued the victim were already there and more police personnel would be coming to the place.

[27] As for the third accused, he was charged because he had received or made call to the no. 017-3543499; and for the fourth accused, he was also charged because he had received or made call to the no. 017-3543499 and 017-7878739. This court found that there is no basis to find these two accused persons guilty merely based on the phone records. It is unsafe to make any inference of guilt based on phone records only. This evidence is not sufficient to conclude they had participated in the commission of the offence with common intention.

[28] To my mind, the very least there should have been evidence of some acts of facilitating the crime. In my considered view, there is no evidence of any conduct by the third and fourth accused in participating in the offence

during the relevant period such as threatened PW21, tied PW21, prepared the vehicle or prepared the place for confinement. In this respect, I refer to Court of Appeal case of *Ong Hooi Beng & Ors v. PP* [2015] 1 LNS 63; [2015] 3 MLJ 812 that the circumstantial evidence available to support the fact that the common intention of the accused persons was to do particular act:

> [75] ... As to what in law constitutes common intention, we are guided by the principle laid down by the Privy Council in *Mahbub Shah v. Emperor* A28.IR 1945 PC 118 where it was held as follows:
>
> > Under the section, the essence of that liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. To invoke the aid of section 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As has been often observed, it is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case.

(See also *PP v. Shatisruben Ithayakumar & Ors* [2013] 10 CLJ 636 where it listed the examples of the parts played by each of the three accused which are fully supported by evidence).

[29] Here, the facts only disclosed that the third and fourth accused had been found to be in contact with the numbers (017-3543499 and 017-7878739) without more and without any other circumstantial evidence to prove effectively their participations to form the common intention.

[30] All in all, although it may not be necessary if other evidence is sufficient, in respect of the phone numbers/sim cards, there is no evidence of recorded conversations adduced by the prosecution to connect the first accused to fifth to the commission of offence charged.

Third Issue: Fingerprints Evidence

[31] On this issue, I have considered the evidence of fingerprints of the first accused, second accused and fifth accused which were found on cone no. 13. As submitted by the first accused's counsel and admitted by prosecution's witness that all items found in front of K&H Warehouse including the cone no. 13 were placed together inside the forensic team's vehicle and brought back to the forensic laboratory before any DNA investigation is carried out

A on the retrieved items. Therefore, the contaminated cone no. 13 could not provide conclusive evidence in respect of fingerprints of the first accused, second accused and fifth accused on it.

[32] Further to that, during the trial, a cone (P61A) was produced before this court. It was discovered that there is a crack at its side.

B

[33] However, it is noted that, the cone no. 13 as found from K&H Warehouse at that material time did not have any such crack, which had been confirmed by few prosecution witnesses, ie, PW20, PW25, PW27 and PW29. Furthermore, P61A has no number "13" on it when produced at this trial. No reasonable explanation was given by the prosecution witnesses to clarify this material discrepancy and it raised doubt to this court whether P61A is the one and the same cone no. 13 as found earlier. As a result, the fingerprint evidence might possibly mislead this court in any of the circumstances as stated above.

C

D **[34]** At Homestay, D/KPL Karim bin Sabtu (PW18) collected the fingerprint evidence of the third accused at the bottle of drink branded "Cheers" marked "20" (P55B). In the light of evidence by PW8 and PW32 that many people had entered and gathered inside the house, therefore, I had warned myself of the danger in concluding that the third accused was one of the kidnappers since his fingerprint was found on the bottle (P55B):

E

(a) ASP Mohd Ali Hanafiah bin Hashim (PW29) testified that there were two types of bottles namely P55B and bottle of 100 plus marked "21" (P56B) which were found in a rubbish bin at kitchen area. However, during cross-examination, PW29 had said that he only saw P56B in the rubbish bin pursuant to exhibit photo P15 (no. 14) and he did not see P55B:

F

S: Sila beritahu Mahkamah?

J: Ada 2 botol minuman. Satu botol minuman berjenama Cheers dan satu botol minuman 100 plus.

G

S: Sila lihat gambar no. 14 dalam tong sampah yang nampak botol itu botol apa?

J: Botol 100 plus.

S: Dan botol 100 plus itu kita buat penandaan apa?

H

J: Kita buat penandaan no. 21.

S: Ada tak kelihatan botol berjenama Cheers di dalam gambar no. 14 ini?

J: Tidak kelihatan dalam gambar no. 14.

I

S: Dengan itu saya cadangkan bahawa botol Cheers itu tidak dijumpai daripada dalam tong sampah ini?

J: Saya tidak setuju.

(b) I found it would be a serious misdirection to make such conclusion as it was doubtful and no evidence indicated that P55B was found in the rubbish bin inside the Homestay as the photograph which speaks the evidence loudly that bottle P55B with fingerprints of the third accused could not be seen in the photograph. If indeed this bottle (P55B) was there in the rubbish bin, the police (forensic) must have tagged it with number and photographs taken.

Fourth Issue: Identification Evidence By PW21 Of The Fourth Accused

[35] PW21 recognised the fourth accused as the one who punched him in front of K&H Warehouse.

[36] At this juncture, based on the evidence adduced, the court took into account the factor that PW21 (as admitted by him in his evidence) actually had long-sightedness vision. It is a settled position that a person with long-sightedness is able to see distant objects clearly but nearby objects will be out of focus:

(a) When re-examined, PW21 explained that while he came out from K&H Warehouse, he was unable to confirm seven to eight people were of which races, as this was the uncertainty as stated in his report (P92); and

(b) PW21 further said that he was only able to identify the fourth accused because the fourth accused was the one who punched him from his back when he turned to his rear.

[37] Common sense dictates this court to see unjustified problem with PW21's evidence because PW21 was supposed to be able to see the people at some distance clearer than the person who is nearer to him. In the instant fact, it could not be accepted by this court that PW21 could only see the fourth accused clearly who was behind him. If he could see and recognise the fourth accused, surely he could also see and recognise one or two others who caught hold of him on his left and right, before he turned to the back to see the fourth accused. His evidence was that he could not recognise them. If so, how could he recognise the fourth accused?

Fifth Issue: Evidence Of Nazrul bin Hussin (PW34) – Accomplice In This Case

[38] PW34 was called by the prosecution to give evidence (he was not listed as prosecution witness from the beginning) at the eleventh hour. PW34 is currently incarcerated due to other offence.

[39] PW34 had given evidence that he was in fact with the five accused and also with two more persons ie, Surisan and Yusri to kidnap PW21. Having said that, I found that, (if it is true), PW34 was an accomplice to the five accused persons in the commission of kidnapping offence against PW21.

[40] What is important to note, PW34 had said in his evidence that DPP and the Investigation Officer visited him at the prison for three to four days. PW34 further admitted that he was threatened by them to be prosecuted for

kidnapping under this case and his present imprisonment term would be extended.

[41] There had been suggestion that PW34 was coached and threatened by the DPP and Investigation Office of this case and he was frightened. The visits by them were inappropriate. The explanation for the visits by both the DPP and the Investigation Officer was to ensure that PW34 will testify according to his previous statements given to the police. But why three to four times visits and for three to four days? This court cannot rule out the possibility or likelihood of PW34's evidence may have been adjusted within the three to four days and added with elements of concoction and fabrication due to his fear towards the DPP and Investigation Officer.

[42] In US Supreme Court case of *Kyles v. Whitley* 514 US 419 (1995), it said that:

> Fourth, the state's disclosure obligation turns on the cumulative effect of all suppressed evidence favourable to the defense, not on the evidence considered item by item. 473 U. S., at 675, and n. 7. Thus, the prosecutor, who alone can know what is undisclosed, must be assigned the responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. Moreover, that responsibility remains regardless of any failure by the police to bring favourable evidence to the prosecutor's attention. To hold otherwise would amount to a serious change of course from the *Brady* line of cases. As the more likely reading of the Fifth Circuit's opinion shows a series of independent materiality evaluations, rather than the cumulative evaluation required by *Bagley*, it is questionable whether that court evaluated the significance of the undisclosed evidence in this case under the correct standard. Pp. 432–441. 2. Because the net effect of the state-suppressed evidence favouring Kyles raises a reasonable probability that its disclosure would have produced a different result at trial, the conviction cannot stand, and Kyles is entitled to a new trial. Pp. 441–454. (a) A review of the suppressed statements of eyewitnesses – whose testimony identifying Kyles as the killer was the essence of the State's case – reveals that their disclosure not only would have resulted in a markedly weaker case for the prosecution and a markedly stronger one for the defense, but also would have substantially reduced or destroyed the value of the State's two best witnesses. Pp. 441–445. (b) Similarly, a recapitulation of the suppressed statements made to the police by Beanie – who, by the State's own admission, was essential to its investigation and, indeed, "made the case" against Kyles – reveals that they were replete with significant inconsistencies and affirmatively self-incriminating assertions, that Beanie was anxious to see Kyles arrested for the murder, and that the police had a remarkably uncritical attitude toward Beanie. Disclosure would therefore have raised opportunities for the defense to attack the thoroughness and even the good faith of the investigation, and would also have allowed the defense to question the probative value of certain crucial physical evidence, pp. 445-449.

In *Kyles* (*supra*), the key eyewitness had informed the police that he did not see the actual killing but the prosecutor did not disclose this to the defence and had reconciled the eyewitness' story during the trial (adjustment to the witness' original story):

> 4 The implication of coaching would have been complemented by the fact that Smallwood's testimony at the second trial was much more precise and incriminating than his testimony at the first, which produced a hung jury. At the first trial, Smallwood testified that he looked around only after he heard something go off, that Dye was already on the ground, and that he "watched the guy get in the car". Tr. 50-51 (Nov. 26, 1984). When asked to describe the killer, Smallwood stated that he "just got a glance of him from the side" and "couldn't even get a look in the face". Id., at 52, 54.

[43] Witness coaching is a form of prosecutorial misconduct. As noted in the article title "*Witness Coaching by Prosecutors*" by Bennett L Gershman [2002] 23 Cardozo L Rev 829:

> There is nothing wrong with a prosecutor assisting a witness to give testimony truthfully and effectively. However, under their obligation to serve justice, prosecutors should be able to regulate their own conduct to insure that witnesses are not exposed to suggestive questioning that may create false or misleading testimony. Prosecutors should be trained and supervised in interviewing protocols, the vulnerabilities of certain witnesses, and the psychological literature relating to memory, language, and communication.

[44] The conduct of the overzealousness of the DPP and the Investigation Officer in this case by the manner of their inappropriate visits had left my mind with suspicion and inference that PW34 might have been coached to give such evidence by looking at PW34's demeanour in the court and the circumstances in its totality.

[45] Indeed, there was increasing concern amongst decision makers towards the conduct of prosecution in preparing witness to give testimony in the trial. It is mindful that, the prosecution acts as guardian of law, should be aware of its duty in serving justice and never attempt to coach the witness to secure a conviction against the accused.

[46] Other than that, I also consider the aspect of corroboration to the PW34's evidence. Issue of corroboration will not arise if indeed PW34 is unreliable. In the instant case, possibility of PW34 had been coached by prosecutor to give evidence had tainted its reliability. Nevertheless, even if PW34's credibility is not tainted, coupled with his admission for his involvement in the commission of this offence, corroboration by independent evidence is still required to support his evidence. In the circumstances with his evidence which is suspect and he being an accomplice, corroboration is required (*Lim Boon San v. PP* [1967] 1 LNS 86; [1968] 2 MLJ 45). It is stated clearly in the Court of Appeal case of *Sabarudin Non v. PP & Other Appeals* [2005] 1 CLJ 466; [2005] 4 MLJ 37:

> 6. Now, in the judicial appreciation of the evidence of an accomplice there is a special rule for the guidance of the court. It is this. The evidence of an accomplice must be both credible and be corroborated. The first element, namely, credibility, is a requirement that must be met by all witnesses. The second is peculiar to an accomplice. Once an accomplice is found by a trial court to be an unreliable witness, then his evidence must be rejected and no question of corroboration can arise ...

Sixth Issue: Failure To Call Surisan And Yusri By The Prosecution

[47] The prosecution only offered Surisan and Yusri to the defence, which is sufficient to attract the application of adverse inference under s. 114(g) of the Evidence Act 1950.

[48] In my view, Surisan and Yusri are material witnesses who could prove the involvement of the accused and may support or otherwise the evidence of PW34. Further, it can resolve the enquiry as to why both of them were not charged together with the five accused in the instant case, after all, PW21 had testified that he saw seven to eight people around the place before he was abducted.

[49] In *Munusamy Vengadasalam v. Public Prosecutor* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 1 MLJ 492, Mohamed Azmi SCJ (as he then was) held:

> ... It is essential to appreciate the scope of section 114 (g) lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for nonproduction of not just any witness but an important and material witness to the case.

[50] It is a trite law that the burden of proof lies on the prosecution to establish its case beyond reasonable doubt as decided by Federal Court case of *Balachandran v. PP* [2005] 1 CLJ 85; [2005] 2 MLJ 301. The law vehemently requires the prosecution to prove the case as per charge and hence it was the duty of the prosecution to call Surisan and Yusri as witnesses to close the gaps. The non-calling of Surisan and Yusri is tantamount to withholding of material evidence and had caused big and serious gap in the prosecution's case in this instant case. Offering is not sufficient as it is not the obligation of the defence to prove their innocence and there is no duty of the defence to call any witness offered or made available by the prosecution.

Conclusion

[51] For the foregoing reasons as stated above, it is in my considered judgment that there are too many flaws which created doubts in this case. The benefit of the doubts should be given to all these five accused persons. *Magendran Mohan v. PP* [2011] 1 CLJ 805; [2011] 6 MLJ 1 held:

> [44] The test at the end of the prosecution's case is '*prima facie* case' based on a maximum evaluation of evidence. The evidence has to be scrutinised properly and not perfunctorily, cursorily or superficially. If the evaluation of the evidence results in doubt in the prosecution's case, then a *prima facie* case has not been made out. The defence ought not to be called merely to clear or clarify such doubts.

[52] This court appreciated the facts that there is an abduction but the prosecution had failed to prove a *prima facie* case against the five accused persons on the charge preferred against them or for any other offence against any of them at the close of prosecution's case either by direct or circumstantial evidence.

[53] In conclusion, this court had applied the maximum evaluation test on the evidence adduced by the prosecution before reaching to the above findings and this court ordered that these five accused persons to be acquitted and discharged without their defence being called.