PP v. TAN CHAI HING

COURT OF APPEAL, PUTRAJAYA
MOHD ZAWAWI SALLEH JCA
AHMADI ASNAWI JCA
IDRUS HARUN JCA
[CRIMINAL APPEAL NO: B-05(LB)-40-01-2016]
5 APRIL 2018

CRIMINAL LAW: *Murder – Penal Code, s. 302 – Circumstantial evidence – Existence of DNA that did not match with DNA of accused – Whether created reasonable likelihood of presence of another person at scene of murder – Whether prosecution established prima facie case against accused – Defence – Alibi – Whether defence created reasonable doubt on prosecution's case – Whether trial judge correct in acquitting and discharging accused*

CRIMINAL PROCEDURE: *Appeal – Appeal by prosecution – Murder – Appeal against order of discharge and acquittal – Circumstantial evidence – Existence of DNA that did not match with DNA of accused – Whether created reasonable likelihood of presence of another person at scene of murder – Whether prosecution established a prima facie case against accused – Whether defence created a reasonable doubt on prosecution's case – Whether trial judge correct in acquitting and discharging accused*

PW1, upon returning from a dental treatment, found the deceased lying on the floor with blood by the side of her body. PW1 thereupon telephoned PW2 and PW2 arrived not long later. Post mortem examination by PW8 revealed that the deceased's death was attributed to 'combined head and neck injuries and asphyxia due to closure of mouth and nose'. The evidence gleaned from PW1's testimony revealed that the accused always come to his house to repair the house and on the day in question, the accused knew that PW1 would be going to the hospital. The police raided the accused's house resulting in his arrest. The accused then led the police team to a house where two Rolex watches, a Sony Camera and a gold bar belonging to the deceased were recovered. The accused was then charged under s. 302 of the Penal Code for the murder of the deceased. The prosecution led evidence to the effect that the last time the deceased called the accused was at 11.11am and the deceased's body was found by PW1 at 2pm. On the contrary, the charge specified the time during which the deceased was murdered was between 11am until 1pm. Based on the evidence adduced, the learned trial judge allowed the prosecution's application to amend the charge to state that the murder took place between 11.11am to 2pm. At the end of the defence case, the learned trial judge held that the defence had succeeded in raising a reasonable doubt in the prosecution's case and consequently acquitted and discharged the accused from the murder charge. The learned judge pointed out mainly to the fact that the DNA report produced by the prosecution through PW14 showed the presence of a mixed DNA of two contributories

from the bloodstains on a yellow rafia string one of which belonged to the deceased whilst the other belonged to an unknown person. There was, in addition, a common DNA profile from two cigarette butts which did not match with the DNA profile developed from the accused's blood specimen indicating that the DNA identified originated from different sources. The learned judge also found that the prosecution failed to lead evidence through PW1 that, on the day in question, he saw the deceased were the gold chain before he went to the hospital, holding that such failure was fatal to the prosecution's case as the defence case was that the accused stole the same a few days earlier. As regards the evidence of alibi that between 12pm until 2pm the accused went to PW5's jewellery shop, the learned judge was satisfied that the accused's evidence had cast a reasonable doubt in the prosecution's case in that at the relevant time he was not at the deceased's house. Dissatisfied, the prosecution appealed.

Held (dismissing appeal; affirming order of acquittal and discharge of the High Court)

Per Idrus Harun JCA delivering the judgment of the court:

(1) The accused in his defence testified that he telephoned the deceased six times on the day in question. If the accused was already at the deceased's house, why was there the evidence that the accused needed to call the deceased. This evidence showed that the prosecution's case, that the accused was at the deceased's house between 11.11am to 2pm, was very much in doubt. (paras 14 & 15)

(2) The learned judge, having evaluated the evidence in its entirety chose to accept PW8's evidence on the time the deceased succumbed and His Lordship's conclusion on the issue of alibi was clearly justified. Taking 11:16:33am as the time the accused went to the deceased's house and the irrefragable evidence of PW8 relating to the time the deceased died, the learned judge was perfectly entitled to conclude that PW16, had failed to carry out a thorough and further investigation in respect of the defence of alibi. In fact, when he testified for the defence as DW2, the investigation officer confirmed the content of the notice of alibi that the accused went to PW5's jewellery shop between 12pm to 2pm. This evidence consequently led the learned judge to accept the accused's evidence that the accused went to the said jewellery shop during the time in question. The failure by the prosecution to lead evidence through PW1 that on the day before the murder and specifically, before PW1 left for the hospital, the deceased was wearing the gold chain exacerbated the problem further in the prosecution's case and thus provided some semblance of truth to the accused's evidence that he stole the gold chain a few days before the fateful incident and pawned it at PW5's jewellery shop between 12pm to 2pm on 13 December 2013 and that he did not go to the deceased's house on the day she was murdered. (para 16)

(3) The prosecution's case was with manifest flaws, gaps and doubts which the defence had successfully laid bare. The prosecution's case was wholly reliant on the circumstantial evidence which when considered in totality was fraught and abound with reasonable doubts. Evidence also showed that a mixed DNA profile of two contributors developed from the blood stains on the yellow rafia string, one belonging to the deceased, and the other, to an unknown person. From the two cigarette butts, found near the door and on the staircase outside the house, a common male DNA profile developed therefrom did not match with the DNA profile of the accused. This evidence indicated the presence of one unknown male individual, but not the accused, suggesting the possibility that the accused was not at the scene of crime and a reasonable likelihood of the presence of the said unknown male person who could have committed the offence. (paras 17 & 18)

(4) The prosecution's case is wholly dependent on circumstantial evidence. Such evidence in law must be considered as a whole. Not only that the court must consider the strength of each individual evidence but also the combined strength of this evidence so that when taken as a whole, it is strong enough to raise an inference to connect it to a conclusion of fact that it was the accused who murdered the deceased. The reliance on the DNA evidence fell short of achieving the purpose of bolstering the prosecution's case. It, on the other, had weakened the prosecution's case creating, inevitable gaps in the chain of evidence, hence, casting a reasonable doubt in the prosecution's case. (para 19)

Bahasa Malaysia *Headnotes*

PW1, setelah pulang dari rawatan pergigian, mendapati si mati terbaring di atas lantai dengan darah di sisi tubuhnya. PW1 kemudian menelefon PW2 dan PW2 tiba tidak lama kemudian. Pemeriksaan bedah siasat oleh PW8 mendedahkan bahawa kematian si mati disebabkan oleh 'kecederaan kepala dan leher digabung dan asfiksia akibat penutupan mulut dan hidung'. Keterangan yang diperoleh daripada keterangan PW1 menunjukkan bahawa tertuduh selalu datang ke rumahnya untuk membaiki rumahnya dan pada hari yang dipersoalkan, tertuduh tahu bahawa PW1 akan pergi ke hospital. Pihak polis menyerbu rumah tertuduh yang membawa kepada penangkapannya. Tertuduh kemudian membawa pasukan polis ke sebuah rumah di mana dua jam tangan Rolex, Kamera Sony dan bar emas yang dimiliki oleh si mati ditemui. Tertuduh kemudian dituduh di bawah s. 302 Kanun Keseksaan atas kesalahan membunuh si mati. Pihak pendakwaan mengemukakan keterangan bahawa kali terakhir si mati membuat panggilan kepada tertuduh pada 11.11 pagi dan mayat si mati ditemui oleh PW1 pada jam 2 petang. Sebaliknya, pertuduhan menspesifikasikan masa si mati meninggal dunia antara jam 11 pagi hingga 1 petang. Berdasarkan keterangan

yang dikemukakan, hakim bicara membenarkan permohonan pendakwaan untuk meminda pertuduhan untuk menyatakan pembunuhan tersebut berlaku antara pukul 11.11 pagi hingga 2 petang. Pada akhir kes pembelaan, hakim perbicaraan berpendapat bahawa pembelaan telah berjaya menimbulkan keraguan munasabah dalam kes pendakwaan dan membebaskan dan melepaskan tertuduh dari tuduhan tersebut. Hakim perbicaraan menerangkan terutamanya fakta bahawa laporan DNA yang dikemukakan oleh pendakwaan melalui PW14 menunjukkan kehadiran DNA campuran dua penyumbang dari darah pada rentetan rafia kuning yang salah satunya milik si mati sementara yang lain milik seorang yang tidak dikenali. Di samping itu, profil DNA daripada dua puntung rokok tidak sepadan dengan profil DNA yang dihasilkan daripada spesimen darah tertuduh menunjukkan bahawa DNA yang dikenal pasti berasal dari sumber yang berbeza. Hakim bicara juga mendapati bahawa pihak pendakwaan gagal mengemukakan keterangan melalui PW1 bahawa, pada hari berkenaan, dia melihat si mati memakai rantai emas sebelum dia pergi ke hospital, memutuskan bahawa kegagalan tersebut adalah memudaratkan kepada pihak pendakwaan kerana kes pembelaan tertuduh adalah bahawa tertuduh telah mencuri rantai tersebut beberapa hari sebelum itu. Berkenaan dengan keterangan alibi bahawa antara pukul 12 tengah hari hingga 2 petang tertuduh telah pergi ke kedai barang kemas PW5, hakim bicara berpuas hati bahawa keterangan tertuduh telah mewujudkan keraguan munasabah ke atas kes pendakwaan bahawa pada masa yang relevan itu, tertuduh tidak berada di rumah si mati. Tidak berpuas hati, pihak pendakwaan merayu.

Diputuskan (menolak rayuan; mengesahkan perintah pelepasan dan pembebasan Mahkamah Tinggi)

Oleh Idrus Harun HMR menyampaikan penghakiman mahkamah:

(1) Tertuduh dalam pembelaannya memberi keterangan bahawa dia menelefon si mati enam kali pada hari yang dipersoalkan. Jika tertuduh sudah berada di rumah si mati, kenapa ada keterangan bahawa tertuduh perlu menelefon si mati. Keterangan ini menunjukkan bahawa kes pendakwaan bahawa tertuduh berada di rumah si mati antara 11.11 pagi hingga 2 petang sangat diragui.

(2) Hakim perbicaraan, setelah menilai keterangan secara keseluruhannya memilih untuk menerima keterangan PW8 berkaitan masa si mati meninggal dan kesimpulannya pada isu alibi jelas dijustifikasi. Mengambil masa 11:16:33 pagi sebagai masa tertuduh pergi ke rumah si mati dan keterangan yang tidak diakas oleh PW8 berkaitan dengan masa si mati meninggal dunia, hakim bicara berhak untuk menyimpulkan bahawa PW16, telah gagal melaksanakan dengan teliti dan siasatan lanjut mengenai pembelaan alibi tertuduh. Malah, ketika dia memberi keterangan mengenai pembelaan sebagai DW2, pegawai penyiasat mengesahkan kandungan notis alibi bahawa tertuduh telah pergi ke kedai barang kemas PW5 antara pukul 12 hingga 2 petang.

Keterangan ini seterusnya menyebabkan hakim perbicaraan untuk menerima keterangan tertuduh bahawa tertuduh pergi ke kedai barang kemas tersebut pada waktu yang dipersoalkan. Kegagalan pihak pendakwaan mengemukakan keterangan melalui PW1 bahawa pada hari sebelum pembunuhan dan khususnya, sebelum PW1 ke hospital, si mati memakai rantai emas memburukkan lagi kes pendakwaan dan, dengan itu, menyokong keterangan pembelaan tertuduh bahawa tertuduh telah mencuri rantai emas beberapa hari sebelum kejadian pembunuhan tersebut dan menggadaikannya di kedai barang kemas PW5 antara pukul 12 tengah hari hingga 2 petang pada 13 Disember 2013 dan bahawa dia tidak pergi ke rumah si mati pada hari dia dibunuh.

(3) Kes pendakwaan mengandungi kesilapan nyata, jurang dan keraguan yang diwujudkan oleh pembelaan. Kes pendakwaan bergantung sepenuhnya pada keterangan ikut keadaan yang, apabila dipertimbangkan dalam keseluruhannya, menimbulkan keraguan munasabah. Keterangan juga menunjukkan bahawa profil DNA campuran dua penyumbang yang dihasilkan daripada kesan darah pada tali rafia kuning dimiliki oleh si mati dan satu lagi orang yang tidak dikenali. Daripada dua puntung rokok, yang terdapat berhampiran pintu dan di tangga di luar rumah, profil DNA lelaki terhasil daripadanya tidak berpadanan dengan profil DNA tertuduh. Keterangan ini menunjukkan kehadiran seorang lelaki yang tidak dikenali, tetapi bukan tertuduh, mencadangkan kemungkinan bahawa tertuduh tidak berada di tempat kejadian dan kemungkinan munasabah kehadiran seorang lelaki lain yang tidak dikenali melakukan kesalahan tersebut.

(4) Kes pendakwaan bergantung sepenuhnya pada keterangan mengikut keadaan. Keterangan sedemikian dalam undang-undang mesti dipertimbangkan secara keseluruhannya. Bukan sahaja mahkamah mesti menimbangkan kekuatan setiap keterangan individu tetapi juga kekuatan gabungan keterangan ini supaya apabila diambil secara keseluruhannya, ia cukup kuat untuk menimbulkan anggapan untuk mengaitkan kepada kesimpulan fakta bahawa ia adalah tertuduh yang membunuh si mati. Pergantungan terhadap keterangan DNA tidak menguatkan kes pendakwaan. Sebaliknya, ia melemahkan kes pendakwaan dengan menimbulkan jurang yang tidak dapat dielakkan dalam rantai keterangan yang menyebabkan keraguan yang munasabah dalam kes pendakwaan.

Case(s) referred to:

Jaafar Ali v. PP [1999] 1 CLJ 410 HC ***(refd)***
Magendran Mohan v. PP [2011] 1 CLJ 805 FC ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
PP v. Hanif Basree Abdul Rahman [2008] 4 CLJ 1 FC ***(refd)***
PP v. Iskandar Mohamad Yusof [2006] 6 CLJ 379 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 182A
Penal Code, s. 302

For the appellant - Tengku Intan Suraya Tengku Ismail; DPP
For the respondent - Tan Choon Hong; M/s Tan Choon Hong & Assocs

[Editor's note: For the High Court judgment, please see PP v. Tan Chai Hing [2016] 1 LNS 1038 (affirmed).]

Reported by Sandra Gabriel

JUDGMENT

Idrus Harun JCA:

[1] The accused in this case was, at the end of the defence, acquitted and discharged by the High Court from the charge of murder under s. 302 of the Penal Code. The Public Prosecutor appealed against the said order of acquittal and discharge. The charge (exh. P2A) against the accused initially reads as follow:

> Bahawa kamu di antara 13 Disember 2013 jam lebih kurang 11.00 pagi hingga 1.00 tengahari, bertempat di No. 129, Jalan SS 22A/2, Damansara Jaya, Petaling Jaya di dalam Daerah Petaling di dalam Negeri Selangor Darul Ehsan dengan sengaja menyebabkan kematian kepada Leong Yoke Leong @ Chan Yoke Lan (No. Kad Pengenalan: 370815-08-5104). Oleh yang demikian, kamu telah melakukan kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan.

[2] Before proceeding further, we may mention that the prosecution led evidence to the effect that the last time the deceased called the accused was at 11.11am and the deceased's body was found by PW1 at 2pm. On the contrary, the charge set out above specifies the time during which the deceased was murdered was between 11am until 1pm. Based on the evidence adduced, the learned trial judge allowed the prosecution's application to amend the charge to state that the murder took place between 11.11am to 2pm.

[3] We shall next proceed to state the material facts which we have garnered from the evidence led by the prosecution and as found by the learned judge in the court below. In the morning of 13 December 2013, Yip Chee Fook (PW1), the deceased's husband, went to the Kuala Lumpur General Hospital to seek dental treatment. He left the hospital thereafter to meet his friend at Jalan Pekeliling for approximately 1 hour. He returned home *circa* 2pm. Upon reaching his house, PW1 noticed that the gate was closed but the side door of the house was open. Upon entering the house, PW1 proceeded to the upper floor of the house and noticed that the door to a room was open. He saw the deceased lying on the floor with blood by the side of her body. Feeling scared, PW1 thereupon telephoned his son-in-law, Eddy Choo Choong Siong (PW2). The evidence gleaned from PW1's testimony shows that the accused always came to his house to repair the

house and on the day in question, the accused knew that PW1 would be going to the hospital. PW2 arrived at about 2.45pm. He was accompanied by a security guard. PW2 saw the deceased lying on the floor in PW1's room with a black coloured adhesive tape or sellotape occluding her mouth and nose. He also saw blood beside the body of the deceased. PW2 immediately dialled '999' and the police arrived at the scene of crime between 3pm to 3.30pm. The investigation officer, Assistant Superintendent Ranjit Singh a/l Harbajan Singh (PW16), arrived at the house at about 4.20pm to investigate. He was assisted by a forensic team headed by Inspector Mohd Rafidzan b. Mohd Nazri (PW11). By 8.30pm and upon completion of the investigation, PW11 handed over case exhibits to PW16 for further investigation.

[4] Based on the evidence of Professor Dr. Mathiharan Karunakaran (PW8) who conducted a post-mortem on the deceased's body on 14 December 2013 and a post-mortem report (exh. P30) prepared by him, the deceased's death was attributed to "combined head and neck injuries and asphyxia due to closure of mouth and nose".

[5] The police raided the accused's house on 23 December 2013 at about 10.45pm resulting in his arrest. He was taken to IPD Petaling Jaya for further investigation.

[6] On 24 December 2013 at about 9.15pm, the accused led a police team headed by Assistant Superintendent Supari Hj. Muhammad (PW7) and accompanied by Inspector Affendy Mohamad Nor (PW6) to a house at No. 61A, Jalan Pandan Indah 1/23, Pandan Indah where two Rolex watches (exhs. P55 and 56), a Sony camera (exh. P56) and a gold bar (exh. P57) belonging to the deceased were recovered.

[7] Based on an information provided by the accused, on 28 December 2013 at about 4.40pm, PW6 proceeded to a jewellery shop by the name of Choon How Enterprise, at No. 33, Jalan Pudu, Kuala Lumpur. However, nothing was recovered there. On 30 December 2013, the proprietor of the said jewellery shop, Lai Wai Yin (PW15) handed over a green card with number 1931 and RM2,000 written thereon (exh. P64) and a gold chain (exh. P65) to PW7.

[8] In his evidence, PW5 stated that the accused came to his shop on 13 December 2013 between 12.30pm to 2pm to pawn the gold chain for which PW5 paid RM2,000 in return. He issued the green card (exh. P64) on which he wrote the date of 13 December 2013, the sum of RM2,000 and the weight of the gold chain.

[9] Having undertaken a maximum evaluation of the evidence led by the prosecution, the learned trial judge accordingly concluded at the end of the prosecution's case that a *prima facie* case against the accused on the amended charge had been established and accordingly called upon the accused to enter on his defence.

[10] The accused gave his evidence on oath. We summarise below the position he adopted in his defence as found by the learned judge:

(i) on 13 December 2013, the accused woke up at about 8 or 9am. He had breakfast after which he made a telephone call to his wife who was in Pulau Langkawi informing her that he would be going to Thailand. The accused then went to the market in Pudu where he met his friend by the name of Ah Leong;

(ii) after chatting with Ah Leong, the accused, between 12pm to 2pm, went to the jewellery shop where he pawned the deceased's gold chain (exh. P65). A few days before the incident he repaired the deceased's bathroom and he stole the gold chain in question;

(iii) on 13 December 2013, at about 10am, the accused went to Puduraya to purchase a ticket for his trip to Hatyai. This he did after he pawned the gold chain and was paid RM2,000. The bus would depart for Hatyai at around 10pm on the same day;

(iv) the accused telephoned the deceased 2 to 3 times on the same day, but there was no answer. Subsequently, according to the accused, the deceased called him asking whether he would be coming over to her house to repair the house to which the accused replied that he could not do so as he would be going to Thailand;

(v) the accused returned home and had his lunch. After having a shower, the accused met his friends and around 2 to 3pm he bought a few things for his trip to Thailand. Thereafter, the accused went to a shop named 'Hong Kong Shiong' opposite the Pudu market to play computer game until 9-9.30pm. He then proceeded to Puduraya to take a bus to Hatyai. He returned to Malaysia on 23 December 2013; and

(vi) the accused testified that he would not return to Malaysia if he killed the deceased and he needed to take care of his child who was schooling. Furthermore, he was close to the deceased and PW1.

[11] At the end of the defence case, the learned trial judge held that the defence had succeeded in raising a reasonable doubt in the prosecution case and consequently acquitted and discharged the accused from the murder charge. Stating the reasons very specifically, the learned judge pointed out mainly to the fact that the DNA report produced by the prosecution (exh. P14) through the chemist namely Hazwani bt Hapiz (PW14) showed the presence of a mixed DNA of two contributories from the bloodstains on a yellow rafia string (exh. P45(A)) one of which belonged to the deceased whilst the other belonged to an unknown person. The evidence of PW11 shows that the yellow rafia string (exh. P45(A)) was found underneath the deceased's right arm. There was in addition, a common DNA profile from two cigarette butts (exhs. P46(A) and P47(A)) which did not match with the

DNA profile developed from the accused's blood specimen indicating that the DNA identified originated from different sources. The learned judge also found that the prosecution failed to lead evidence through PW1 that on the day in question he saw the deceased wear the gold chain (exh. P65) before he went to the hospital holding that such failure was fatal to the prosecution case as the defence case was that the accused stole the same a few days earlier. As regards the evidence of alibi (exh. D80) that between 12pm until 2pm the accused went to PW5's jewellery shop, the learned judge was satisfied that the accused's evidence had cast a reasonable doubt in the prosecution case in that at the relevant time he was not at the deceased's house.

[12] In her brief written submission, the learned Deputy Public Prosecutor (the learned Deputy) presented three main contentions, *viz:*

(a) the accused's notice of alibi failed to raise a reasonable doubt in the prosecution case;

(b) there were discrepancies in the accused's testimony; and

(c) the defence was a bare denial.

[13] However, in her oral submission before us, the learned Deputy told us that the only issue the prosecution would much rely on would be the issue of alibi. The learned Deputy pointed out that the notice of alibi showed that the accused went to PW5's jewellery shop between 12pm to 2.30pm. Since the time the offence was alleged to have been committed as specified in the charge was between 11.11am until 2pm, the accused failed to give notice of his whereabouts before he went to the said jewellery shop. We considered the evidence of the pathologist (PW8) in which he testified that the deceased's body was brought to the emergency ward at 7.51pm on 13 December 2013 after which it was sent to the mortuary at 9.30pm where the body was kept in a freezer. At that time, the deceased was already dead and she died between six to eight hours before the body was sent to the mortuary. Thus, based on the estimated time of death as given by the expert witness, PW8, that the deceased died between six to eight hours before the body was sent to the mortuary, there is certainly force in the defence contention that death could have occurred between 1.30pm to 3.30pm. It must, moreover, be emphasised that the learned judge considered PW8's evidence as deliberated above and stated that deceased had probably died between 1.51pm to 3.51pm. We have no difficulty whatsoever in holding on the strength of this evidence, that PW8's expert testimony lends credence to the accused's defence, as corroborated by PW5, and accepted by the learned judge, that he was at PW5's jewellery shop between 12pm to 2pm on the day the deceased was murdered.

[14] It must be remembered that the accused in his defence testified that he telephoned the deceased on the day in question. This evidence was clearly supported by the documentary evidence in exhs. P78 and P79 that the

accused called the deceased 6 times at 10:46am, 10:46:41am, 10:49:46am, 11:10:54am, 11:11:35am, 11:16:33am on 13 December 2013. This evidence, according to the learned judge and we agree with His Lordship, that if the accused was already at the deceased's house, why was there the evidence that the accused needed to call the deceased until 11.16am. We find such documentary evidence is manifestly consistent with and positively supports the evidence of the accused.

[15] The evidence highlighted above plainly shows that the prosecution case that the accused was at the deceased's house between 11.11am to 2pm is very much in doubt. We now quote from the judgment of the learned judge the relevant paragraphs on the issue of alibi and His Lordship's reasonings in concluding that it is wholly unsafe to convict the accused:

> 33. Pertamanya, subjek material yang mengaitkan OKT dengan kematian simati adalah barang kes rantai emas simati (P65) yang digadai oleh OKT di kedai emas milik SP5. Dalam pembelaan OKT, OKT mendakwa beliau mencuri P65 beberapa hari sebelum tarikh kejadian. Berdasarkan keterangan anak simati (SP12), beliau (SP12) masih melihat simati memakai P65 pada 2-3 hari sebelum tarikh kejadian malang tersebut, tidak bermakna secara konklusifnya bahawa rantai emas itu dipakai oleh simati pada tarikh kejadian.
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> 33.1 Tambahan pula, SP1 tidak pernah dalam keterangannya menyebut bahwa beliau ada melihat simati memakai rantai emas itu (P65) di lehernya pada hari kejadian;
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> 33.2 Merujuk kepada kes *Amathevelli a/p P Ramasamy v. Public Prosecutor* [2009] 2 MLJ 367, Mahkamah Persekutuan telah menyatakan:
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> **[34] In this case the deceased was wearing the gold chain at the time of her death. This is a material element to connect the appellant to the murder of the deceased.** This is further supported by other evidence such as, the acid injury on the appellant's lips and arm when the deceased also had acid injuries and the presence of the Yamaha motorcycle at the deceased's shop at about 7.05 am on the material date. Thus, the evidence is sufficient to convict the appellant for the murder of the deceased. The inferences drawn from the evidence of conduct of the appellant will remain as she has not explained them pursuant to s. 9 of the Evidence Act 1950. As Augustine Paul FCJ said in the judgment of this court in *Parlan bin Dadeh v. Public Prosecutor* [2008] 6 MLJ 19 at p 44:
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> > If the explanation is accepted by the court then the inference arising from the conduct is rebutted. If it is not accepted or if the accused does not explain his conduct the inference remains unrebutted. (Penekanan ditambah)

33.3 Mahkamah ini juga mengambil ingatan seperti yang telah disarankan melalui kes *Abdullah bin Saad (supra)*:

> Wills on Circumstantial Evidence, 7th edition, p. 104 has the following passage:
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> …
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> But the rule must be applied with discrimination, for the bare possession of stolen property, *though recent, uncorroborated by other evidence, is sometimes fallacious and dangerous as a criterion of guilt.*
>
> In the present case, *the only evidence to connect the appellant with the killing is the possession of two pieces of jewellery, the property of the deceased, and it is not certain that they were on the deceased's person on the day of his death.* In our view, this did not supply sufficient evidence on which to found a conviction for murder, and we accordingly allowed the appeal and directed that the appellant should be discharged. (Penekanan ditambah)

33.4 Pada hemat saya, kegagalan Pendakwaan untuk mengemukakan keterangan melalui SP1 (suami simati) yang ada bersama dengan simati di rumah mereka pada pagi hari kejadian bagi menyatakan sama ada rantai emas itu masih dilihatnya dipakai oleh simati sebelum beliau keluar ke hospital adalah sesuatu yang fatal. Oleh yang demikian, Mahkamah ini memutuskan Pembelaan berjaya menimbulkan suatu pembelaan yang munasabah atas imbangan kebarangkalian bahawa beliau telah mencuri rantai emas itu beberapa hari sebelum kejadian dan bukanlah pada hari kejadian kematian simati dan mungkin tidak terlibat langsung dalam kesalahan membunuh simati semasa kecurian barang tersebut. Mahkamah ini mendapati tanpa keterangan sokongan lain adalah bahaya untuk mensabitkan OKT di bawah kesalahan membunuh simati di dalam kes ini. Tambahan pula, aspek ini adalah relevan dan konsisten dengan pembelaan "alibi" oleh OKT.

34. Keduanya adalah keterangan dari segi masa yang tertera terdapat kemungkinan bahawa OKT tidak terlibat dalam kesalahan yang dipertuduhkan di hadapan Mahkamah ini. Pegawai Penyiasat (SP16) telah dipanggil sebagai "SD2" semasa kes pembelaan untuk menjelaskan hasil siasatannya mengenai notis alibi yang dikemukakan oleh OKT dan melaluinya didapati:

34.1 Rumah OKT di Taman Pandan Indah, Kuala Lumpur dan jaraknya ke rumah simati di Jalan SS 22A/2, Damansara Jaya adalah lebih kurang 19.6km (setelah disemak google map) yang mengambil masa selama lebih kurang 22 minit sekiranya menggunakan perjalanan biasa jalan raya yang paling singkat jika tiada kesesakan lalu lintas. Ini juga adalah berdasarkan kiraan berlandaskan keterangan SP2 mengenai masa beliau tiba di rumah simati daripada rumah beliau. Ataupun, secara teorinya, Mahkamah ini mengambil kira OKT bertolak ke rumah simati dari Puduraya pada jam 11.16 pagi berdasarkan keterangan yang ada dalam perbicaraan ini melalui SP16/SD2 yang telah menyiasat dan mengemukakan rekod panggilan telefon OKT dan rekod panggilan telefon simati. Daripada rekod (P78A) didapati enam kali panggilan dibuat dalam pukul 10:46:00 am, 10:46:39 am, 10:49:46 am, 11:10:52 am, 11:11:07 am dan 11:16:33 am;

34.2 Kalau benar OKT sudah berada di rumah simati, mengapakah pula ada bukti OKT masih perlu menelefon simati sehingga jam lebih kurang 11.16 am? Ini bermaksud OKT tidak berada di rumah OKT sehingga jam 11.16 am dan ini konsisten dengan pembelaan OKT. Katakanlah, OKT mengambil masa lebih kurang 30 minit untuk sampai di rumah simati disebabkan kesesakan lalu lintas yang biasa berlaku di Kuala Lumpur dan dijangka sampai di rumah simati pada jam lebih kurang 11.46 am. Seandainya pada tarikh itu di dalam rumah simati, OKT dikatakan mengambil masa paling singkat iaitu selama 10 minit untuk mencuri lima jenis barang (P54, P55, P56, P57 dan P65), mengikat simati dan mencederakan simati dan selesai pada jam lebih kurang 12.06 pm. Seterusnya, OKT bergerak ke kedai pajak milik SP5 yang terletak di Jalan Pudu, Kuala Lumpur untuk selama 30 minit dan dengan ini sampai di kedai SP5 pada jam lebih kurang 12.36 pm. Ini adalah konsisten dengan keterangan yang diberikan oleh SP5 yang menyatakan selepas jam 12.00 pm barulah OKT datang ke kedainya untuk memajakkan rantai emas, dan juga disahkan melalui siasatan SP16/SD2. Dari teori pengiraan di atas, masa simati sepatutnya mati adalah sebelum 12.00 pm. Namun dilihat dari keterangan pakar patologi (SP8) yang berpendapat bahawa simati telah mati pada 13/12/2013 dalam 6 hingga 8 jam sebelum jam 7.51 pm dan ini bermakna bahawa kemungkinan si mati telah mati pada 3.51 pm atau 2.51 pm atau 1.51 pm pada tarikh tersebut; dan

34.3 Diteliti aspek-aspek teori dan andaian daripada fakta yang wujud, Mahkamah ini mendapati adalah mustahil bagi OKT yang muncul di kedai SP5 selepas tengahari dengan rantai emas itu dan masih pulang ke rumah simati untuk membunuh simati pada jam paling awal 1.51 pm. Mahkamah

ini ingin mengambil kesempatan ini untuk menekankan kegagalan Pegawai Penyiasat (SP16/SD2) untuk menyiasat secara lanjut, terperinci dan lengkap umpamanya tidak membuat jangkaan masa seperti yang telah dibuat oleh Mahkamah ini di atas. Pegawai Penyiasat (SP16/SD2) juga tidak serius dalam menjalankan siasatan tentang notis alibi dan hanya menyatakan pengesahan dibuat dari rakaman percakapan SP5 dan oleh itu Mahkamah menerima keterangan bahawah OKT muncul di kedai SP5 di Jalan Pudu, Kuala Lumpur pada jam 12.00pm-2.00pm. Berlandaskan kes *Pang Chee Meng v. Public Prosecutor* [1992] 1 MLJ 137, OKT tidak patut dihukum kerana siasatan Pegawai Penyiasat tersebut yang dijalankan secara tidak menyeluruh. Jadi, Mahkamah ini telah memutuskan untuk bergantung kepada pendapat SP8 selepas membuat pertimbangan yang wajar terhadap keseluruhan keterangan yang sedia ada sepertimana yang diberikan oleh SP5, SP16/SD2 dan jangkaan kiraan masa di atas.

35. Secara kesimpulannya, Mahkamah ini memutuskan bahawa pembelaan alibi OKT telah berupaya menimbulkan keraguan yang munasabah ke atas kes Pendakwaan bahawa beliau tidak berada di rumah simati pada masa kejadian (*Illian v. PP* [1988] 1 MLJ 421). Keterangan ikut keadaan yang dibuktikan oleh Pendakwaan semasa kes *prima facie* telah berjaya dipatahkan disebabkan tiada keterangan yang menunjukkan bahawa rantai emas itu ada dipakai oleh simati pada tarikh dan masa kejadian. OKT pula disahkan berada di kedai SP5 pada jam lebih kurang 12.00-2.00 pm dan tidak mungkin telah menyebabkan kematian simati pada jam 1.51-3.51pm sepertimana hasil daripada siasatan. Terdapat banyak lompang dan keraguan yang berjaya ditimbulkan atas kes Pendakwaan melalui pembelaan OKT ini.

[16] The learned judge, having evaluated the evidence in its entirety and in great detail, chose to accept PW8's evidence on the time the deceased succumbed and we think that His Lordship's conclusion on the issue of alibi is clearly justified. Taking 11:16:33am as the time the accused went to the deceased's house and the irrefragable evidence of PW8 relating to the time the deceased died, the learned judge was perfectly entitled to conclude that PW16 who was also called by the defence to testify as their witness (DW2), had failed to carry out a thorough and further investigation in respect of the defence of alibi. In fact, when he testified for the defence as DW2, the investigation officer confirmed the content of the notice of alibi (exh. D80) that the accused went to PW5's jewellery shop between 12pm to 2pm. This evidence consequently led the learned judge to accept the accused's evidence that the accused went to the said jewellery shop during the time in question. The failure by the prosecution to lead evidence through PW1 that on the day before the murder and specifically, before PW1 left for the hospital, the

deceased was wearing the gold chain exacerbated the problem further in the prosecution case and thus provides some semblance of truth to the accused's evidence that he stole the gold chain a few days before the fateful incident and pawned it at PW5's jewellery shop between 12pm to 2pm on 13 December 2013 and that he did not go to the deceased's house on the day she was murdered.

[17] The prosecution case is, in our judgment, pregnant with manifest flaws, gaps and doubts which the defence had successfully laid bare. Relying on the highest case authority in the judgment of the Federal Court in *Magendran Mohan v. PP* [2011] 1 CLJ 805, we would say that "before accusing an innocent person of the commission of a grave crime like the one punishable under s. 302 PC, an honest sincere and dispassionate investigation has to be made" and we must feel sure that the accused alone was responsible for committing the crime. It is plain that such doubt as found by the learned judge in the passages quoted above is not a mere scintilla, instead, it would not be farfetched for this court to say that the prosecution case is wholly reliant on the circumstantial evidence which when considered in totality is fraught and abound with reasonable doubts.

[18] That we think lets in the last remaining point which the prosecution did not address in this appeal. It concerns the evidence of the chemist (PW14) and the chemist report (exh. P34) prepared by her. As earlier stated, the evidence that could be discerned from the testimony of PW14 and exh. P34 reveals a mixed DNA profile of two contributors developed from the blood stains on the yellow rafia string one belonging to the deceased and the other, to an unknown person. From the two cigarette butts (exhs. P46(A) and 47(A)), found near the door and on the staircase outside the house, a common male DNA profile developed therefrom did not match with the DNA profile of the accused. It belongs to an unknown male source. This evidence indicates the presence of one unknown male individual, but not the accused, suggesting the possibility that the accused was not at the scene of crime and a reasonable likelihood of the presence of the said unknown male person who could have committed the offence.

[19] The prosecution case is wholly dependent on circumstantial evidence. Such evidence in law must be considered as a whole. In other words, not only that the court must consider the strength of each individual evidence but also the combined strength of this evidence so that when taken as a whole in this particular case before us, it is strong enough to raise an inference to connect it to a conclusion of fact that it was the accused who murdered the deceased. The DNA evidence in this case may be of relevance and can be relied on by the prosecution to bolster its case. We would note, anyhow, that such reliance on the DNA evidence falls short of achieving the purpose of bolstering the prosecution case. It on the other has weakened the prosecution

case creating in the process, inevitable gaps in the chain of evidence hence casting a reasonable doubt in the prosecution case. Reference in this connection may be made to the case of *PP v. Hanif Basree Abdul Rahman* [2008] 4 CLJ 1; [2008] 3 MLJ 161, wherein the Federal Court held:

> [34] I have read through the judgments of the learned trial judge and the Court of Appeal and find that the trial judge had correctly examined the evidence adduced before him and had also correctly applied the principles when assessing circumstantial evidence, **particularly as in this case, when there is a reasonable likelihood of the existence of another person who could have committed the offence** (see *R v. Abbot* [1955] 2 All ER 899 and *Public Prosecutor v. Muhamad Nasir bin Shaharuddin & Anor* [1994] 2 MLJ 576. (emphasis added).

[20] Under s. 182A of the Criminal Procedure Code, it is clearly the duty of the court to consider all the evidence before it and it shall decide whether the prosecution has proved its case beyond reasonable doubt. This is a mandatory requirement as evident by the use of the word 'shall' in that section. What it entails is that, at the end of the defence, it is incumbent on the court to evaluate the entire evidence placed before it including the prosecution evidence. This was exactly what the learned judge had undertaken at the end of the defence case having considered the case of *Jaafar Ali v. PP* [1999] 1 CLJ 410; [1998] 4 MLJ 406 which succinctly stated the following useful guidelines:

> It follows that in calling upon the accused to enter his defence the court must keep an open mind as to the accuracy of the prosecution evidence until the defence evidence has been tendered. *At the close of the case for the defence and submissions, the court must review the evidence adduced with regard to all the elements to be proved and then decide whether the prosecution has proved the case against the accused beyond reasonable doubt.* (emphasis added)

The learned judge had also relied on the case of *PP v. Iskandar Mohamad Yusof* [2006] 6 CLJ 379; [2006] 5 MLJ 559 which similarly required the court to re-evaluate the prosecution's story at the end of the defence case.

[21] We agree with the learned judge that the prosecution had failed to prove its case beyond reasonable doubt. The defence evidence adduced through the accused has created a reasonable doubt in the prosecution case so much so that the circumstantial evidence relied on by the prosecution is adversely affected and is thus rendered insufficient to prove conclusively that it was the accused and only the accused who killed the deceased. The trite requirement of the law is that the general burden of proof lies throughout on the prosecution to prove beyond reasonable doubt the guilt of the accused for the offence with which he is alleged to have committed. There is no similar burden placed on the accused to prove his innocence to the satisfaction of the court, the trier of fact. The maxim that the accused is presumed innocent

until proven guilty is firmly entrenched in our system of criminal justice. In dealing with the duty of the trial court at the end of the defence case, it would be beneficial to be reminded of the Supreme Court's decision in *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 from which the relevant excerpt is reproduced below:

> … whenever a criminal case is decided on the basis of the truth of the prosecution case as against the falsity of the defence story, a trial judge must in accordance with the principle laid down in *Mat v. PP* [1963] 1 LNS 82 go one step further before convicting the accused by giving due consideration as to why the defence story though could not be believed did not raise a reasonable doubt on the prosecution case. Thus, even though a Judge does not accept or believe the accused explanation, the accused must not be convicted until the Court is satisfied for sufficient reason that such explanation does not cast a reasonable doubt on the prosecution case.

[22] This is the threshold of proof which the prosecution is required to discharge. For the reasons earlier given, we are in agreement with the learned judge that it is not safe to convict the accused on the charge of murder under s. 302 of the Penal Code and that on the contrary he ought to be acquitted. That being the case, we come to the inevitable conclusion that this appeal ought to be dismissed. The decision of the learned judge is affirmed.