MALAYSIA
IN THE HIGH COURT OF SABAH AND SARAWAK AT KUCHING
[CRIMINAL TRIAL NO : KCH-45B-1/5-2015]

BETWEEN

PUBLIC PROSECUTOR ... COMPLAINANT

AND

MOHAMAD NAZARIE B. HALIDI ... 1ST ACCUSED

SUFFRY ANAK EMPI ... 2ND ACCUSED

BEFORE THE HONOURABLE JUDGE

YA TUAN STEPHEN CHUNG HIAN GUAN

CRIMINAL LAW: *Murder - Penal Code, ss. 302 and 34 - Intention - Deceased died due to multiple injuries - Deceased was attacked by accused when accused break into deceased's house - DNA evidence showed accused was present in house - Whether there was intention to cause death - Whether ingredients of ss. 302 and 34 of Penal Code has been met*

CRIMINAL PROCEDURE*: Defence - Denial - Charge under s. 302 of Penal Code - Deceased was attached by accused when accused break into deceased's house - Accused denied entering into deceased house - Accused alleged other person entered into deceased house - DNA evidence showed accused was present in house but not other person as suggest by accused - Whether DNA evidence contradicted defence -*

Whether accused was lying - Whether accused persons had raised doubt as to their guilt

[First and second accused was found guilty and sentenced to be hanged until dead.]

Case(s) referred to:

Amri Ibrahim & Anor v. PP [2017] 1 CLJ 617 FC ***(refd)***

Balfour v. Public Prosecutor [1949] Supp MLJ 8 ***(refd)***

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

Duis Akim & Ors v. PP [2013] 9 CLJ 692 FC ***(refd)***

Farose Tamure Mohamad Khan v. PP & Other Appeals [2016] 9 CLJ 769 FC ***(refd)***

Hanafi bin Mat Hassan v. Public Prosecutor [2006] 4 MLJ 134 ***(refd)***

Hazly Ali v. PP & Other Appeal [2014] 1 LNS 945 CA ***(refd)***

Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***

Low Kian Boon & Anor v. PP [2010] 5 CLJ 489 FC ***(refd)***

Mat v. Public Prosecutor [1963] 1 LNS 82 HC ***(refd)***

Munusamy Vengasalam v. PP [1987] CLJ Rep 221 SC ***(refd)***

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

Public Prosecutor v. Abdul Hamid [1968] 1 LNS 98 HC ***(refd)***

Public Prosecutor v. Datuk Haji Harun Bin Haji Idris & Ors [1977] 1 LNS 92 HC ***(refd)***

R v. Turnbull [1976] ER 549 ***(refd)***

R v. Killick [1980] 24 SASR 137 ***(refd)***

R v. Miliken [1969] 53 Cr App R 330 ***(refd)***

Saminathan & Ors v. Public Prosecutor [1955] 1 LNS 138 HC ***(refd)***

Shahrullah Abdul Rakeb v. PP [2011] 1 LNS 1721 CA ***(refd)***

Ti Chuee Hiang v. Public Prosecutor [1995] 3 CLJ 1 FC ***(refd)***

Wan Yurillhami Wan Yaacob & Anor v. PP [2010] 1 CLJ 17 FC ***(refd)***

Wong Swee Chin v. Public Prosecutor [1980] 1 LNS 138 FC ***(refd)***

Woolmington v. DPP [1935] AC 462 ***(refd)***

Legislation referred to:

Penal Code, ss. 34, 299, 300, 302

Criminal Procedure Code, ss. 180(1), 182A, 277, 425

Evidence Act, ss. 114(b), 138(4)

JUDGMENT

[1] The 1st and 2nd accused were charged for murder under s. 302 read together with s. 34 of the Penal Code. Both accused pleaded not guilty to the charge. The charge reads as follows:

"Bahawa kamu bersama-sama pada 30.1.2015, di antara jam 9.00 malam sehingga 11.00 malam, di No.82, Matang Family Park, Jalan Matang, dalam daerah Kuching, di dalam negeri Sarawak,

bagi mencapai niat bersama kamu telah membunuh Hii Nek Kah (L) (KPT: 481010-13-5727), dan dengan itu kamu telah melakukan suatu kesalahan dibawah Seksyen 302 Kanun Keseksaan dan dibaca bersama seksyen 34 kanun yang sama."

[2] In its opening statement, which was read out in court, the prosecution stated that both accused were charged for an offence under s. 302 of the Penal Code read together with s. 34 of the Penal Code for causing the death of Hii Nek Kah on 30.1.2015 at about 9.00 p.m. to 11.00 p.m. at No.82, Matang Family Park, Jalan Matang, in the District of Kuching, in the State of Sarawak.

[3] The learned DPP informed the court that the prosecution would rely on direct, medical, scientific and circumstantial evidence to prove that both accused persons were present at the crime scene and in furtherance of a common intention to cause the death of the deceased. He said from the totality of the evidence to be adduced, the prosecution would prove beyond reasonable doubt that both accused persons had intentionally caused the death of the deceased.

[4] Section 180(1) of the Criminal Procedure Code (CPC) provides that when the case for the prosecution is concluded, the court shall consider whether the prosecution has made out a *prima facie* case against the accused. Under subsection(4), a *prima facie* case is made out where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

[5] The duty of a judge sitting alone, at the close of the case for the prosecution, is to determine as a trier of fact whether the prosecution has made out a *prima facie* case against the accused person. He must subject the evidence of the prosecution to a

maximum evaluation: *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734.

[6] Culpable homicide and murder are defined in s. 299 and s. 300 of the Penal Code respectively. Section 34 of the Penal Code provides that when a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

[7] In order to establish a *prima facie* case against the accused under ss. 302 and 34 of the Penal Code, the prosecution has to prove: (a) the death of the deceased; (b) that the deceased died as a result of injuries sustained by him; (c) that the injuries which resulted in the deceased's death were caused by the acts of the accused; (d) in inflicting the injuries upon the deceased, the accused caused them with the intention of causing death, or caused them with the intention of causing such bodily injuries as they knew to be likely to cause the death of the deceased, or cause them with the intention of causing bodily injuries and such injuries were sufficient in the ordinary course of nature to cause death, or caused them with the knowledge that the acts were so imminently dangerous that they must in all probabilities cause death and committed such acts without any excuse for incurring the risks of causing death or such injuries as aforesaid; and (e) that the acts of both accused which resulted in the death of the deceased were in furtherance of the common intention of all.

[8] The deceased was the owner of the house situated at No. 82, Matang Family Park, Jalan Matang, Kuching. At that time he was renovating the house to operate it as a home-stay business. He had engaged a contractor to carry out the renovations. Some

employees of the contractor were given a place to stay at the workers' quarters during the renovations. PW1, a friend of the deceased, who helped with painting in the house, stayed in the house to accompany the deceased.

[9] On 30.1.2015 at about 9.00 p.m. the deceased woke PW1 from his sleep after the deceased's car alarm went off. While they were talking in the dining room, two persons entered the house through the back door of the house, one with a knife and one with a stick, approaching towards them. PW1, upon seeing the two persons armed with the weapons, warned the deceased of the intruders and ran inside and locked the door of his bedroom. He heard the deceased calling out for help and someone knocking on the door trying to open the door of his bedroom. PW1 escaped using the bedroom window and ran to the road seeking for help.

[10] He stopped a car asking for help from the driver who took him to a police station where PW1 told the police about what happened. He also informed the family of the deceased. Two sons of the deceased including PW2 arrived at the house before the police. PW2 said they arrived at about midnight. They found the gate not in its place and their father's Toyota Prado vehicle missing. They called out their father's name but there was no answer and the front door locked. PW2 went to the back of the house and found the backdoor open and there was a hole in the door. He entered the house and found his father dead. He found that a drawer in his father's bedroom had been forced open, cash of RM7,000.00 and his father's two hand-phones missing. He said subsequently he found that the cash was in fact RM14,000.00 which was to pay for the wages and renovations for the house. The police and PW1 arrived at the house later. PW1 lodged a police report which was tendered as exhibit P4.

PW2 also lodged a police report which was tendered as exhibit P18.

[11] At about 11.00 p.m. a police mobile patrol, carrying random checks at the Kuching waterfront, stopped a Toyota Prado bearing registration QC9935. There were six persons in the vehicle, namely Mohamad Nazarie b. Halidi (1st accused), Suffry anak Empi (2nd accused), Nizam bin Roslan, Noraini binte Kifflie, Justira bin Mohd Kuan also known as Dedeng and a child. When the police stopped the vehicle Nizam and Justira ran away. The police managed to apprehend Nizam but failed to apprehend Justira. He was arrested subsequently, but the date of his arrest was not given during the prosecution's case. The 1st accused, 2nd accused, Nizam and Noraini were detained for questioning at the Kuching central police station (CPS). PW2 identified the said Toyota Prado vehicle to belong to the deceased. The Toyota Prado was taken and driven from the house by the six persons. The 1st and 2nd accused persons were charged for the murder. The other three were not. Did any or all of them commit the murder?

[12] PW8, a forensic medicine specialist attached to the Sarawak General Hospital (SGH), was requested to go to the crime scene. She arrived at about 3.30 a.m. on 31.1.2015 but only allowed to enter the house about ten minutes later. She confirmed the death of the deceased at 3.40 a.m. On the same day at 4.40 a.m., the body of the deceased was brought to SGH.

[13] On 2.2.2015 at 9.30 a.m. PW8 conducted a post mortem on the deceased at the mortuary of SGH. The body of the deceased was identified by PW2 and by PW18, who was the investigation officer (IO) of the case. PW8 prepared a post mortem report which was tendered as exhibit P57.

[14] PW8 testified as a witness and prepared her CV which set out her qualifications and experience as a forensic medicine specialist. Her CV was tendered as exhibit P56. She said that upon examination she found the following external injuries on the deceased;

1. Abrasion and bruising on right forehead, from midline 1.5 cm, from right eyebrow 6 cm, measuring 1.5 x 1cm.

2. Bruise on the left forehead, just to the midline, from left eyebrow 1cm, measuring 2 x 2.5cm.

3. Periorbital haematoma, measuring 6 x 3cm.

4. Abrasion on the chin, measuring 2.5 x 0.5cm.

5. Linear laceration on the front right side of the head, from right ear 8cm, from midline 6cm, measuring 5cm.

6. "V" shape wound on left side of the head, from midline 2cm, from left ear 11cm, the front arm of the wound, a laceration measuring 4cm, and the back arm of the wound 3cm, a slashed wound. The slashed wound cut the skull.

7. Laceration on the left side of the head, from midline 9cm, 5.5cm from the left ear, measuring 8cm.

8. Incised wound on left side of head, just above the left ear, from midline 14cm, incised wound 3cm, back of the wound squared front the wound sharp. It cut the thickness of the skin. At the back of the wound about 0.5cm, there was an incision, measuring 0.5cm. at the front of the wound, there is a circular depression, diameter of 4cm.

9. Linear abrasion on the back of left ear, 1cm from the left ear, measuring 0.3 x 1.8cm.

10. Abrasions on the right chest, from midline 10.5cm, from right nipple 2cm, measuring an area 6 x 1.5cm.

11. Linear abrasion on the left chest, from midline 12cm, tip of left shoulder 8cm, measuring 2cm.

12. Abrasions on the left back upper part of the back, from midline 6cm, measuring 25.5 x 10cm.

13. Linear abrasion on upper 3rd left arm, from tip left shoulder 12cm, from elbow 19cm, measuring 3cm.

14. Bruise on outer part of left elbow, measuring 2 x 1cm.

15. Linear abrasion surrounded by bruise on upper 3rd posterior left forearm, from elbow 3cm, from wrist 17cm, measuring 3 x 1.5cm.

16. Abrasions surrounded by bruise on inner part of the left wrist (ulna area), an area measuring 5 x 2cm.

17. Bruise and abrasion on proximal interphalangeal (first joint of the finger) of middle left finger, measuring 4 x 2cm.

18. Incised wound on distal phalanges (the 3rd part of the finger) left ring finger, at the base of the nail, measuring 1cm.

19. Linear abrasion middle 3rd right arm, tip of shoulder 16cm, 15cm from right elbow, measuring 4cm.

20. Bruise on right elbow, measuring 1.5 x 1cm.

21. Linear abrasion on the back of right hand, 6cm from wrist, measuring 1cm.

[15] PW8 then testified on her findings on the internal injuries to the head, mouth and neck structures of the deceased. She said the subgaleal haematoma, meaning bruising underneath the scalp, was noted over the vertex (top) of the head, an area of 20 x 8cm, and multiple skull fractures were noted over the cranial vault mainly over the left side, measuring an area of 17 x 12cm, extending to left middle cranial fossa (base of skull depression) and left anterior (front) cranial fossa. She said the fractures were due to injury no. 6 to no.8. She said the brain (1400gm) had subdural haemorrhage, meaning bleeding underneath the brain covering, and subarachnoid bleeding, which is bleeding on the surface of the brain, were generalised. Cortical contusion (bruising at grey matter of the brain) was noted over the base of left temporal, measuring an area of 9 x 5cm. A laceration was noted over the left parietal lobe measuring about 3.5 x 1.5cm and just above it at the left temporal, there was an incised wound measuring about 2cm. She said the tongue, hyoid bone and thyroid cartilage were normal, the neck muscle and major blood vessels of the neck were not injured and the cervical bone was not fractured.

[16] She said out of these injuries, two were due to sharp force trauma, two was a combination of blunt and sharp force trauma and the rest were due to blunt force trauma. She said her examination revealed that as a result of injury no.6 to injury no. 8, the deceased suffered multiple skull fractures and underlying brain injuries including generalised subdural and subarachnoid bleeding, contusion, laceration and incision. She said the deceased suffered injuries consistent with defensive injuries. In her opinion, the injuries to the head caused the death of the deceased.

[17] She said the slashed wounds as seen at injury no.6 were consistent to be caused by a sharp and heavy weapon such as a cleaver, parang, golok or any other similar object while the incisions at injury no.8 and injury no.11 were consistent to be caused by a circular, heavy and blunt object such as hammer face, handle of a parang or any other similar object. The lacerations as seen in injury no.6 and 7 were consistent to be caused by blunt force trauma such as being hit by something hard and blunt such as wood, iron or any similar object.

[18] PW8 said that the cause of death to the deceased was head injuries due to sharp and blunt force trauma. The defence did not lead any evidence to the contrary on the time of death or the cause of death. On the evidence and surrounding circumstances, the injuries inflicted to the head were sufficient in the ordinary course of nature to cause the death of the deceased.

[19] The prosecution submitted that it was never disputed during the trial that the deceased had died due to the injuries he suffered and that its case depended entirely on circumstantial evidence. It was submitted that PW1 had identified the 1st and 2nd accused as the two persons armed with weapons who had entered the house on that night. He was able to identify them because he was face to face with them and he had seen them working at the house. The prosecution submitted that although after PW1 had run into his bedroom and did not see or knew what exactly happened to the deceased, there was overwhelming circumstantial evidence and DNA evidence that both accused had entered the house and inflicted the injuries which caused the death of the deceased. It was submitted that both accused had common intention to kill the deceased on that night. The prosecution cited numerous authorities in support of its submission.

[20] The defence submitted that the prosecution has failed to establish a *prima facie* case against both accused persons because: (a) it has not been proven that they were involved in the killing; (b) PW1's identification of the accused as the two persons armed with weapons entering the house on that night was doubtful and not correct; (c) the prosecution failed to call Nizam bin Roslan, Noraini binte Kifflie and Justira bin Mohd Kuan as witnesses to explain what happened on that night because one of them could have committed the murder; (d) the prosecution failed to prove that the accused had an intention with a motive to kill the deceased; and (e) it did not lead any evidence of any common intention between the accused to kill the deceased. The defence has also cited many authorities.

[21] In respect of the 1st accused, it was submitted *inter alia* that (i) no finger print was lifted from any of the weapons found or recovered to tie the 1st accused to them; (ii) nothing belonging to the 1st accused was found at the scene of crime, for example hair sample and his blood; (iii) no nail clippings were taken from him for DNA analysis; (iv) the discovery of the deceased's blood on a pair of trousers with size 'XXL' did not belong to the 1st accused because he wore size 'S' which in fact belonged to Nizam bin Roslan; (v) the belt allegedly used to hold up the trousers did not belong to the 1st accused; (vi) the blood could have been smeared on the trousers to incriminate the 1st accused; (vii) if in fact there was blood on it when the trousers and belt were seized from the 1st accused at CPS Kuching, it would have been noted in the lock-up register; (viii) it was strange that bloodstains from the 1st accused were found on a shirt belonging to the 1st accused but no bloodstains from the deceased were found on the shirt if the 1st accused was at the scene at the time of murder; and (ix) at that time the 1st accused was sleeping in

the workers' quarters when he was told by the driver of the stolen vehicle to run away and he blindly followed to the Toyota Prado.

[22] On behalf of the 2nd accused, it was submitted that the he did not commit the murder because (i) a weapon described as a sickle, found on a sofa chair in the house, which was tendered as exhibit P10, could not be the weapon used by any of the accused in the murder because PW1 said that he had not seen this sickle; (ii) there was no bloodstain on it; (iii) although the deceased's blood was splattered on the kitchen wall, kitchen cabinet and sink, no bloodstain was found on the trousers seized from the 2nd accused if he was present at the scene at the time of the murder; and (iv) at the time of his arrest sitting inside the Toyota Prado, which was driven by Justira, he did not run away because he did not do it whereas Justira and Nizam ran away indicating their guilt.

[23] Although they were in the Toyota Prado vehicle together with the 1st and 2nd accused on that night, the prosecution did not call Nizam, Noriani or Justira as witnesses. It is clear law that while the prosecution has a complete discretion as to the choice of witnesses to be called at the trial, it also has a duty to call all necessary witnesses to establish proof against the accused beyond all reasonable doubt: *Ti Chuee Hiang v. Public Prosecutor* [1995] 3 CLJ 1. Were there any miscarriage of justice or adverse inference against the prosecution or have the accused raised any doubt on the prosecution's case in failing to call Nizam, Noraini and Justira as witnesses?

[24] The prosecution has subpoenaed Nizam bin Roslan, Noraini bte Kifflie and Justira bin Mohd Kuan but they were not called to testify as witnesses. The prosecution submitted that they were

not at the crime scene but were only inside the Toyota Prado and they were only accomplices in the theft of the vehicle. It was submitted that pursuant to s. 114(b) of the Evidence Act, they were unworthy of credit and there was no valid reason to call them as witnesses. Instead the prosecution offered them to the defence at the end of the prosecution's case.

[25] On the facts and circumstances of the case, there was nothing to suggest that in not calling them as witnesses that the prosecution was suppressing evidence and there was no ground to invoke any adverse inference against the prosecution as such: see *Munusamy v. Public Prosecutor* [1987] 1 MLJ 492; *Hazly bin Ali v. Public Prosecutor and another appeal* [2015] 1 MLJ 527; *Amri bin Ibrahim & Anor v. Public Prosecutor and another appeal* [2017] 1 MLJ 1. The burden was still on the prosecution to prove its case against the accused.

[26] The evidence showed that about two hours after the two armed persons had entered the house, the police stopped the Toyota Prado at the waterfront with the 1st and 2nd accused, Nizam bin Roslan, Justira bin Mohd Kuan and Noraini bte Kifflie inside. This vehicle belonged to the deceased which was taken and driven by them after the incident in the house. PW4 said that when he stopped the vehicle, Justira was in the driver's seat. Therefore the defence submitted that Justira had taken the car key and stole the vehicle, implying that he was present in the house and responsible for the murder.

[27] Several questions came to mind. Did Justira, Nizam, the 1st or 2nd accused or someone else take the key of the vehicle? Did Justira take and drove the vehicle from the house to the waterfront? Did that mean that he was in or at the house at the material time? Were Nizam bin Roslan and Noraini bte Kifflie

also in or at the house at that time? Did they work and stay at the workers quarters? Did they know what happened in the house at that time? Were they involved or complicit in the murder or only in the theft of the vehicle or as accessories after the fact? Or did one of the accused take the key, drove the vehicle from the house and picked the others somewhere else? Did the 1st and 2nd accused know how to drive? All these were not raised or dealt with during the prosecution's case, either by the prosecution or the defence. The prosecution should but did not clear these questions or doubts bearing in mind Nizam, Noraini and Justira were the prosecution's witnesses who could give answers to the questions raised. To be cautious and to avoid any adverse inference, the prosecution should have also called the contractor to confirm whether the 1st and 2nd accused and or whether Nizam and Justira were his workers and whether they were staying at the workers quarters during the renovations. In any event the burden was on the prosecution to prove its case against the accused.

[28] Notwithstanding the above questions, what was the evidence against the accused? PW1 testified that on 30.1.2015 at 9.00 p.m. he was sleeping in his bedroom in the house when the deceased woke him up. He said the deceased told him two workers had disturbed his car, namely the Toyota Prado, which set off the car alarm and asked him whether he knew the phone number of the contractor. He said he told the deceased he did not know the phone number of the contractor. He said they had these conversations at the dining room of the house.

[29] He said when he had the conversations with the deceased, he saw two persons, without wearing shirt but wearing trousers, entering the house through the backdoor of the house, walking along the corridor, he used the words 'walk path', towards the

dining room, the person in front was holding a knife behind his back and PW1 only saw the tip of the knife and the person behind was holding a stick. He said he saw the two persons because he was facing the back door and facing them when they entered the house and therefore he shouted out that somebody entered the house armed with a knife. He said the deceased was surprised how they could enter the house since the backdoor was locked. He said he ran into his bedroom and locked the bedroom door but they knocked and pushed the door. He said he asked them not to do that and he pushed a cabinet and table to block the door. He heard the deceased shouting his name and he escaped through the window of the bedroom. He went towards the road to ask for help. A car stopped and took him to a police station where he subsequently lodged his police report.

[30] During his testimony he was asked who were the two persons had entered the house on that night, PW1 pointed to the two accused sitting in the dock. He said he could identify them because they were facing him when he saw them. He said the 2nd accused in the dock was the person walking in front armed with the knife and the 1st accused was armed with the stick. It should be noted that although PW1 had seen them entering the house armed with weapons, he did not actually see what happened to the deceased or the murder. He last saw the deceased when they were talking in the dining room in the house and when he ran inside the bedroom at about 9.00 p.m. on that night.

[31] The evidence showed that after PW1 informed the police and the family of the deceased, PW2 and his brother arrived at the house about midnight, before PW1 and the police team arrived. They found the body of their father on the floor of the kitchen in the house. There were bloodstains splattered on the kitchen cabinet, kitchen sink and the kitchen wall. The police found a sickle on a

sofa chair in the living room, a stick with nails on one end on the floor near to the kitchen and a slipper. They also found a green plastic bag containing a tin of glue, an L shape ruler and a screwdriver on a bed in a bedroom. This was the bedroom of the deceased. The police took swabs from these places in the house and seized the items found. These were shown in the photographs taken by PW3 at the crime scene. These photographs were tendered as exhibit P6(1-73).

[32] As stated above, on 30.1.2015 at about 11.00 p.m., PW4 together with three other police personnel were on mobile patrol at the main bazaar and waterfront area in Kuching where they stopped the Toyota Prado vehicle. PW4 called it a Toyota Pajero. The police brought the three men and a woman and the vehicle to CPS. The four persons were detained for investigation. PW4 identified the 1st and 2nd accused in court as two of the four persons detained in the vehicle at the waterfront on that night. The clothes worn by them on that night were kept in the lockers at CPS and subsequently seized by the police. The police also seized some clothes and a parang found inside the vehicle. The police took swabs from inside and outside the vehicle. All these items were sent to the Chemistry Department for examination. The police also found one fingerprint on the vehicle but could not identify this fingerprint when matched with the police fingerprint database.

[33] The prosecution relied on the testimony of PW1that both accused were responsible for the murder of the deceased based on his identification of both accused as the two persons armed with weapons who had entered the house on that night. The prosecution submitted that based on the testimony of PW1, the DNA obtained at the crime scene and based on the

circumstantial evidence adduced, both accused were responsible for the murder and death of the deceased.

[34] I shall deal with the identification of both accused by PW1. The defence submitted that PW1's identification of both accused as the two persons who had entered the house on that night was not reliable and could not be correct because PW1 had poor eyesight due to his old age, he had to wear glasses at night, that the incident happened very fast and in poor lighting. It was submitted that PW1 on seeing the two persons, at a distance of about 30 feet, immediately ran away and he only had a fleeting glance of the two persons. It was submitted that therefore he was mistaken in identifying both accused as the two persons who had entered the house on that night.

[35] As part of police investigation, the police carried out identification parades for PW1 to identify some persons suspected to be involved in the crime. The defence submitted that the identification parades conducted did not comply with standard procedures, were prejudicial and flawed because the accused were in lock-up uniform, bare-footed and that the other participants in the line-up were not members of the public but persons detained in the lock-up who were suspects for other crimes. It was submitted that these other participants were not of the same race, skin colour and height of the accused and that PW1's identification of the accused should not be admissible against them. However, these complaints or alleged irregularities were not put to PW1 and that these had unduly influenced or prejudiced his identification of both accused at the identification parades. These alleged irregularities were also not put to PW13. Both the prosecution and defence have cited authorities in support of their submissions and I am aware of the

guidelines set out in *R v. Turnbull* [1976] ER 549 and in the case of *Duis Akim & Ors v. Public Prosecutor* [2014] 1 MLJ 49.

[36] The evidence showed that on 4.2.2015 PW13 conducted six identification parades at Tabuan Jaya police station for PW1 to identify some persons suspected to be involved in the murder of the deceased. There were three suspects to be identified by PW1. There were ten participants including a suspect in each identification parade. The other participants were detainees from the lock-up at the police station. All the participants including the suspects were in the lock-up uniform provided by the police and all barefooted. Each suspect and the other participants in the identification parade were brought to a room. PW1 was brought to an adjoining room separated by a wall with a one way mirror where he could see the participants in the line-up in the identification parade in the adjoining room. He was asked to try to identify a suspect, whom he had seen at the house on the night of the incident, among the participants in the line-up via the one way mirror. After the identification parades conducted, PW13 prepared his report on the identifications carried out. This report was tendered as exhibit P98.

[37] PW1 testified that in the first identification parade conducted, he identified the 1st accused standing in position no. 5 among the participants as a person whom he had seen at the house. He was asked to attend a second identification parade to confirm his identification of this person. In the second identification parade PW1 identified the 1st accused in position no. 9 among the participants.

[38] PW1 attended the next identification parade to identify another suspect. In this identification parade he failed to identify any person among the participants in the line-up. He was asked to

try to identify a suspect in the fourth identification parade. Again he failed to identify any person in this identification parade because he said none of the participants in these two parades was seen at the house on that night. The evidence showed that this suspect in the line-up whom he could not identify was Nizam bin Roslan, who was one of the persons in the Toyota Prado who was arrested at about 11.00 p.m. at the waterfront on the night of the incident.

[39] PW1 attended the next identification parade to identify another suspect. In this identification parade PW1 identified the 2nd accused standing in position no.10 among the participants as a person whom he had seen at the house. He was asked to attend the next identification parade to confirm his identification of the same suspect. In this sixth identification parade PW1 identified the 2nd accused standing in position no. 3 among the participants.

[40] Although the defence has submitted that PW1's identification of both accused was unreliable and not correct, counsel for both the accused did not cross-examine PW1 on his identification of both accused at the identification parades. It was never put to him that his identifications of the 1st and 2nd accused at the identification parades were flawed or wrong or mistaken for the reasons as submitted. His testimony in these respects was not seriously challenged. Similarly the defence did not strenuously challenge the testimony of PW13 who conducted the identification parades.

[41] PW1 said that he had to wear glasses at night when he was driving. On that night, in the house, he was not driving and did not require glasses when he saw and identified both accused as the two persons who had entered the house on that night. Based

on the evidence adduced, PW1 was able to and had identified both accused as the two persons armed with weapons who had entered the house from the backdoor of the house on that night. On that night it was not the first time that he had seen them. He said he could identify them because he had seen them before. He said they were the workers doing the renovations at the house.

[42] Based on the defence case, the 1st and 2nd accused persons were staying in the workers quarters albeit it was submitted that they were sleeping at the time. This was put to PW18 but it was not put to PW1. It was not put to PW1 that Justira and Nizam were also working and staying in the workers quarters at the house and had entered the house on that night. It was never put to PW1 that he had seen them at the house. Similarly, during the prosecution's case, the prosecution did not lead any such evidence of the presence of Justira, Nizam and Noraini in the house or in the workers' quarters.

[43] PW1 had stayed in the house for a few days to accompany the deceased during the renovations. He had seen and recognised the two accused who were working at the house for the past few days. He identified the two accused as the two persons, armed with weapons, who had entered the house from the backdoor on that night. PW1 had identified both accused at the identification parades as the two persons who had entered the house on that night. He had also identified both accused in court as the two persons who had entered the house on that night. Based on the evidence, his identification of both accused was of good quality. Therefore there were no merits that PW1 had wrongly identified both accused as the two persons armed with weapons who had entered the house on that night.

[44] Further, the evidence showed that although Nizam bin Roslan was a suspect in the line-up in two of the identification parades, PW1 did not identify Nizam bin Roslan as one of the two persons who had entered the house on that night. That would probably exclude him as one of the two persons who had entered the house on that night. It was not put to the prosecution's witnesses and there was no evidence that Nizam bin Roslan and or Justira bin Mohd Kuan were the two persons armed with the weapons who had entered the house at that time or that they were present in the house on that night. It was not put to PW1 that Nizam bin Roslan and Justira bin Mohd Kuan were some of the workers doing the renovations at the house or that they had stayed in the quarters at the house and that PW1 had seen them at the house and therefore his identifications of the suspects were flawed and mistaken. The evidence showed that the police did not detect or find any bloodstain or DNA belonging to Nizam bin Roslan, Noraini bte Kifflie or Justira bin Mohd Kuan on the exhibits seized in the house at the material times and the defence did not lead any evidence to the contrary.

[45] The prosecution has submitted that its case against the 1st and 2nd accused did not wholly or substantially depend on the identification evidence of PW1 against them, but also on the DNA evidence and circumstantial evidence adduced. In such a case, what has to be considered is not only the strength of each individual strand of evidence but the combined strength of these strands when twisted together to make a rope. The real question is, is that rope strong enough to hang the prisoner? : see *Chan Chwen Kong v. Public Prosecutor* [1962] 28 MLJ 307. What was the circumstantial evidence against them?

[46] PW6 from the forensic unit of IPK Sarawak was at the crime scene on the night of the incident. At the scene he recovered the

sickle which he labelled as E2 which was tendered as exhibit P10, the stick with nails at one end was labelled as E3 and tendered as exhibit P13, one slipper labelled as E4 (exhibit P40B), one green plastic bag containing a tin 'Rubber Cement' labelled as E7 which were tendered as exhibits P43B and P43C respectively, one screwdriver labelled as E8 (exhibit P44B), one L shape ruler labelled as E9 (exhibit P45B) and several swabs taken for DNA. PW6 handed these to PW18 as the IO. PW6 prepared his report on the items recovered and seized. The report was tendered as exhibit P36.

[47] The evidence showed that PW8 collected head hair, nail clippings, clothes and blood specimen from the deceased during the post mortem to be sent to the Chemistry Department for DNA, blood alcohol and drugs analysis. She handed the specimen to PW18. The police had also collected blood specimen from the 1st and 2nd accused and from Nizam bin Roslan and Noraini bte Kifflie. I refer to exhibits P46A-D and exhibits P47A-D. At the material time Justira had not been arrested and his blood specimen was not taken.

[48] The evidence showed that PW11 led a police team to recover and seize the vehicle, the clothes worn by the 1st and 2nd accused, Nizam and Noraini and the clothes and the parang found in the vehicle. They also took swabs from inside and outside the vehicle for DNA analysis. The photographs of the vehicle, the clothes kept in the lockers, the clothes and the parang found in the vehicle and the places where the swabs were taken are shown in the photographs taken by PW3 which were tendered as exhibit P15 (1-28). PW11 prepared a sketch plan and a report on the recovery of the items found in the vehicle. This report was tendered as exhibit P84 and the sketch plan as exhibit P85. PW11 handed over the items to PW18 who packed and sent

them to the Chemistry Department for analysis. These items were tendered in court as exhibits P71A to P83B. Based on the seizure list which was tendered as exhibit P92, PW11 seized the vehicle and car key from the 2nd accused. The vehicle was tendered as exhibit P16.

[49] PW11 also seized the clothes worn by the 1st and 2nd accused and the clothes worn by Nizam bin Roslan which were kept in the lock-up lockers at CPS Kuching where they were detained for investigation. The seizure lists were tendered as exhibits P89, P90 and P91. A pair of blue trousers seized from the 2nd accused was tendered as exhibit P28C. The following items were seized from the 1st accused; a pair of knee length brown trousers 'Snails' brand with size 'XXL' which was tendered as exhibit P29B, one short sleeve shirt 'Pazze' brand tendered as exhibit P30B, a pair of brown shoes 'Vogue' brand tendered as exhibit P31B and a brown belt with a 'Batman' buckle tendered as P32B. The items seized from Nizam bin Roslan were tendered as exhibits P33B, P34B and P35B respectively. PW11 handed over these items to PW18.

[50] PW18 instructed PW15 to send all the items recovered or seized during the investigation and the blood, urine and hair specimen and nail clippings of the deceased to the Chemistry Department for analysis. PW15 handed these items to a chemist (PW16) on 10.2.2015 who then handed them over to another chemist (PW9) on 13.2.2015.

[51] The evidence showed that on an application by the police, PW7 took blood specimen from both the accused and from Nizam bin Roslan and Noraini bte Kifflie. PW18 similarly instructed PW15 to send the blood specimen to the Chemistry Department for analysis. On 10.2.2015 at 11.47 a.m. PW15 handed over the

specimen to a chemist (PW12) who carried out the analysis. She prepared her report on the analysis carried out. This report was tendered as exhibit P97. She testified that she did not detect any ethyl alcohol or common basic drugs in the blood and urine specimen.

[52] PW9 testified that on 13.2.2015 at 0800 hours, at the Department of Chemistry Malaysia, Kuching, PW16, who was taking leave for Chinese New Year, handed over to her the 42 items which consisted of two packages marked as "E3" and "E32" and 40 envelopes marked as "E1", "E2", "E4", "E5", "E6", "E7", "E8", "E9", "E10", "E11", "E12", "E13", "E16", "E17", "E18", "E19", "E20", "E21", "E22", "E23", "E24", "E25", "E26", "E29", "E30", "E31", "E33", "E34", "E35", "E36", "E37", "E38", "E39", "E40", "E42", "E43", "E45", "E48" and "E49" respectively. She said PW16 told her that he received these items from PW15 at 1201 hours on 10.2.2015.

[53] She said all the packages and envelopes were sealed as follows:

(a) "E1" to "E9": "FORENSIK POLIS DIRAJA MALAYSIA" security tapes and "POLIS STATION 18 MILES" wax-seal.

(b) "E10" to "E26" and "E43" to "E49": "POLIS STATION 18 MILES" wax seal.

(c) "E29" to "E42": "POLIS STATION 18 MILES" wax seal and "FORENSIC" security tapes.

[54] PW9 testified that she carried out the analysis on these items and she had prepared a report on her analysis. This report was tendered as exhibit P69. I referred to some of the findings. She said a DNA profile developed from bloodstains indicated on the

wooden stick (exhibit P13) with nails on one end labelled as "E3" and on a pair of short pants labelled as "E20" (exhibit P29B) matched with the DNA profile developed from the bloodstained FTA card "E13" belonging to the deceased. This meant that the blood of the deceased was found on the stick and on the trousers worn by the 1st accused on that night. This meant that the 1st accused and the deceased were in close proximity when the deceased was attacked with the stick which caused the deceased's blood to be splattered onto the trousers worn by the 1st accused on that night. However no bloodstain or DNA belonging to the 1st or 2nd accused was detected on this stick.

[55] She said a DNA profile developed from bloodstains indicated on the sickle labelled as "E2" (exhibit P10) revealed that it was a mixed profile consistent with being contributed by one major contributory source and at least one minor source. The source represented by the bloodstained FTA card "E48" labelled Suffry ak Empi, namely the 2nd accused, was indicated as the major contributory source. She said the source represented by the bloodstained FTA card "E13" labelled Hii Nek Kah could not be excluded as a minor contributory source of the DNA profile. She said the probability of a randomly selected unrelated individual with a DNA profile matching the profile of "E48" being a contributor of this mixed profile is approximately 1 in 23.5 trillion as calculated based on the Malaysian Iban population database. No bloodstain or DNA was detected on the handle of the sickle.

[56] She said a partial DNA profile was developed from the swab taken of a plastic bag labelled as "E7" (at 6 STR loci) consistent with the DNA profile developed from bloodstained FTA card "E48" labelled Suffry ak Empi, namely the 2nd accused.

[57] She said weak and inconclusive DNA profiles were developed from cotton swab "E29", bloodstains indicated on cotton swabs "E1", "E6" and "E33" and swab taken from handle of sickle "E2" and parang "E32". The parang was found in the vehicle. No evidence was adduced to whom it belonged. In any event no bloodstain or DNA was found on the parang. No evidence was adduced that it was used and the defence did not submit that it was used in the attack on the deceased.

[58] As stated above, it was submitted that the trousers (exhibit P29B) did not belong to the 1st accused because it was too large based on the trouser size 'XXL'. It was submitted that since no bloodstain belonging to the deceased was detected on the shirt worn by the 1st accused on that night, the bloodstain belonging to the deceased detected on the trousers worn by him was wrongfully smeared on the trousers by someone to implicate the 1st accused.

[59] The evidence showed that on that night at about 11.00 p.m. the police stopped the Toyota Prado and arrested the 1st and 2nd accused, Nizam bin Roslan and Noraini bte Kifflie at the waterfront. They were brought to CPS and detained in the lock-up. The clothes worn by them on that night which were kept in the lock-up lockers at CPS were seized and tendered as exhibits. The seizures were recorded in exhibits P25, P26 and P27. There was no evidence that there had been a mixed-up and there was no evidence that the shirt, trousers, belt and shoes worn by the 1st accused in fact belonged to the 2nd accused or Nizam bin Roslan. The defence did not lead any evidence and there was no evidence that someone had replaced the trousers or had smeared blood on the trousers in order to incriminate or harm the 1st accused. There were no merits in the submissions that the trousers did not belong to the 1st accused or that someone had

smeared blood belonging to the deceased on the trousers of the 1st accused in order to incriminate the 1st accused.

[60] Although PW9 was cross-examined, the defence did not seriously cross-examine or challenge her evidence on her examinations of the items, her analysis and findings. The defence did not lead or introduce any report or evidence to the contrary or that her examinations, analysis and findings were seriously flawed or wrong or that her evidence should not be accepted. There was nothing to suggest that her evidence was inherently incredible or implausible or not admissible: see *Hanafi bin Mat Hassan v. Public Prosecutor* [2006] 4 MLJ 134.

[61] The evidence showed that PW9 had examined a pair of short pants labelled as E20 (exhibit P29B) bearing stains indicating the presence of blood. On DNA profiles developed from bloodstains on the stick (P13) and P29B, she found that they matched with the DNA profile developed from the blood specimen labelled as E13 (exhibit P61C) belonging to the deceased. The bloodstains on the stick and on this pair of trousers came from the deceased. PW1 had testified that the 1st accused entered the house armed with a stick on that night. The presence of the deceased's blood on the stick pointed to the fact that it was used to attack the deceased on that night. The presence of the deceased's blood on the trousers worn by the 1st accused on that night pointed to the fact that the 1st accused was present and in close proximity to the deceased at the time of the attack.

[62] This pair of trousers, with the bloodstains which came from the deceased, was worn by the 1st accused on that night when he was detained by the police at the waterfront, about two hours after the attack on the deceased in the house. They took and drove the

vehicle belonging to the deceased from the house where they were stopped by the police at the waterfront. There was no evidence that the deceased had injured himself and was bleeding prior to or on that night or that he had accidentally come into contact with the trousers of the 1st accused on that night. The 1st accused did not submit that he accidently came into contact with the deceased's blood or that it was on another occasion and that he had yet to wash his trousers. The presence of the deceased's blood on his trousers on that night irresistibly pointed to his presence in the house on that night. This corroborated the testimony of PW1 that the 1st accused armed with the stick entered the house on that night.

[63] The presence of the deceased's blood on the stick and the trousers irresistibly pointed to the fact that the 1st accused had used the stick to attack the deceased in the house on that night. PW8 had testified that the lacerations at injury no. 6 and injury no. 7 were consistent to be caused by blunt force trauma such as being hit by a wood.

[64] PW9 had testified that she examined the sickle labelled as E2 and found bloodstain on it. The DNA profile developed revealed that it was a mixed profile consistent being contributed by FTA blood specimen labelled E48 (exhibit P53C) taken from the 2nd accused and from exhibit P61C from the deceased. The 2nd accused did not lead any evidence to the contrary. The presence of the 2nd accused DNA on the sickle found in the living room of the house on that night pointed to his presence in the house on that night.

[65] Further, PW9 found DNA belonging to the 2nd accused on the green plastic bag containing the tin of glue (exhibits P42B and P42C), which were found on the bed in the deceased's bedroom

in the house on that night. The 2nd accused did not lead any evidence to the contrary or that it was not his DNA on the plastic bag. Although he said Dedeng came into the room and took the green plastic bag and he saw the tin of glue in Dedeng's room, these were not put to the prosecution's witnesses. He did not put to the prosecution's witnesses that he did not leave the green plastic bag there or that he left the plastic bag containing the tin on the bed on an earlier occasion and not on that night or that someone else had put the green plastic bag with his DNA on it on the bed to incriminate him. There was no evidence that someone had put the green plastic bag with his DNA on it in the bedroom to incriminate him. The absence of Dedeng's DNA on the green plastic bag and the tin of glue contradicted his allegations. Without any plausible explanation, his DNA on the plastic bag, in the bedroom, on that night, again pointed to his presence in the house on that night.

[66] The presence of the DNA of the 2nd accused on the sickle and on the plastic bag found in two locations in the house on that night, in the living room and in the deceased's bedroom, irresistibly pointed to his presence in the house on that night. This corroborated the testimony of PW1 that he saw the 2nd accused armed with a knife entered the house from the backdoor of the house on that night.

[67] The presence of the DNA of the 2nd accused and the DNA of the deceased on the sickle irresistibly pointed to the fact that the sickle was used to attack the deceased on that night which explained the presence of their DNA on the sickle. The sickle was a sharp object. PW8 testified that the slashed wounds at injuries no.6, no.8 and no.11 were consistent to be caused by a sharp and heavy weapon.

[68] To reiterate, on the evidence adduced, on that night at about 9.00 p.m. the 1st accused armed with the stick and the 2nd accused armed with the knife broke the backdoor and entered the house from the backdoor approaching towards PW1 and the deceased. PW1 ran into the bedroom and locked his bedroom door. He heard the deceased calling out to him for help and he escaped using the bedroom window to seek help. After he returned to the house with the police, he saw the body of deceased on the kitchen floor. Both the accused were no longer in the house. They had left the house using the Toyota Prado belonging to the deceased. They were stopped by the police at the waterfront and detained at CPS. The stick and sickle were found in the house. Their DNA and that of the deceased found on the said exhibits irresistibly pointed to the fact they used the stick and the sickle to attack the deceased in the house on that night.

[69] Based on the multiple injuries sustained by the deceased, there was an intention to cause death to the deceased. Based on evidence adduced, no bloodstains or DNA belonging to Nizam, Noriaini or Justira were found on the stick, sickle or green plastic bag containing the tin of glue or inside the house. The accused did not lead any evidence to the contrary. This would exclude the presence of Nizam, Noraini and Justira inside the house on that night where the deceased was attacked and killed. This irresistibly pointed to the fact that it was the 1st and 2nd accused who had *mens rea* and who had attacked and caused the death of the deceased in the house.

[70] Following the above, it was the 1st and 2nd accused who had ransacked the house, including the drawer in the deceased's bedroom with the cash and hand-phones missing. This was the bedroom where the green plastic bag, with the DNA of the 2nd

accused on it, containing the tin of glue, was found. These pointed to the fact they had a motive to rob and attack the deceased in the house on that night although the prosecution did not lead evidence whether the cash and hand-phones were recovered from the accused.

[71] In a criminal prosecution where s. 34 of the Penal Code is invoked, it is not incumbent on the prosecution to prove that there existed between the accused a common intention to commit the crime actually committed. As long as there is a common intention to commit a criminal act, which resulted in the commission of a crime actually committed, s. 34 operates against all the persons involved in the commission of the actual crime: *Farose Tamure Mohamad Khan v. PP & Other Appeals* [2016] 9 CLJ 769. A pre-concert or pre-planning may develop on the spot or during the course of the commission of the offence but the crucial test is that such a plan must precede the act constituting the offence. The existence of common intention is a question of fact: *Wan Yurillhami Wan Yaacob & Anor v. PP* [2010] 1 CLJ 17; see also *Low Kian Boon & Anor v. PP* [2010] 5 CLJ 489. Based on the facts and circumstances of the case, there was a pre-concert or pre-planning or meeting of minds between the 1st and 2nd accused to rob and attack the deceased which caused the death of the deceased.

[72] On evidence adduced, the prosecution has proved the essential ingredients of the charge under s. 302 read together with s. 34 of the Penal Code and has made out a *prima facie* case against the 1st and 2nd accused. They had been called to enter their defence.

[73] At the close of the defence case, the prosecution applied under section 425 of CPC to call Justira otherwise known as Dedeng as a rebuttal witness. During the defence case the accused put the

blames onto Dedeng saying that (i) Dedeng was sniffing glue, (ii) Dedeng tried to enter the house, (iii) the accused were sleeping when Dedeng woke them up, and (iv) the key of the Toyota Prado was with Dedeng. The prosecution submitted that this evidence was not disclosed to the prosecution and not foreseeable. The prosecution submitted that therefore it was essential to the just decision of the case to call Dedeng to rebut this evidence.

[74] Based on the prosecution's witness list, Nizam, Noraini and Dedeng were on the witness list. The prosecution chose not to call them and submitted that they were not present in the house but were only found inside the car when it was stopped at the waterfront. The learned DPP submitted that they were only involved in the theft of the car and only accomplices in the theft of the car. He submitted that pursuant to s. 114(b) of Evidence Act, they were unworthy of credit and there was no reason to call them as witnesses.

[75] Dedeng was not called as a prosecution witness but was offered to the defence. The defence also chose not to call him. He was not recalled as a witness under section 138(4) of the Evidence Act. The defence called the 1st and 2nd accused as their only witnesses.

[76] Although s. 425 of CPC gives to the Court discretion to call a witness at any stage of the trial in rebuttal, this is only in very special or exceptional circumstances. This power should be exercised only in rare cases, for instance where one side has raised at the trial a point which the other side could not have foreseen. This discretion must be exercised with the utmost caution and that this person appears to the Court essential to the just decision of the case: see *Balfour v. Public Prosecutor*

[1949] Supp MLJ 8; *Public Prosecutor v. Abdul Hamid* [1969] 1 MLJ 53; *Public Prosecutor v. Chia Leong Foo* [2000] 6 MLJ 705; *Shahrullah bin Abdul Rakeb v. Public Prosecutor* [2012] 4 MLJ 592.

[77] The case of *Chia Leong Foo* (*supra*) referred to several authorities including *Woolmington v. DPP* [1935] AC 462 and *R v. Killick* [1980] 24 SASR 137 which set out the followings: (i) The general rule is that the prosecution must present its primary case completely before closing its case. This will include negating the case for the defence as suggested to each witness in cross-examination. (ii) A failure to observe this rule will result in the prosecution being precluded from adducing evidence in rebuttal on the ground that it would amount to the prosecution splitting its case. (iii) However there is a discretion to allow evidence in rebuttal in very special or exceptional circumstances. (iv) In exercising this discretion the Court must have regard to all the circumstances of the case and evaluate whether the prosecution is attempting to improve on something it has already begun or whether it is seeking to refute something that can reasonably be characterised as fresh material contained in the defence case.

[78] On the first point, of Dedeng sniffing glue, the prosecution has produced and tendered the green plastic bag containing the tin of glue found in the bedroom of the deceased. Based on the DNA evidence adduced and cross-examination of the accused by the DPP, it was apparent that Dedeng was one of the workers at the house. Therefore Dedeng being a prosecution witness, whether he or Nizam was a glue sniffer should be within the knowledge of the prosecution based on their interview or interrogation by the police. Therefore this is foreseeable and should have been

put to Dedeng or Nizam or PW18 (the IO of the case) to negate this point during the prosecution's case.

[79] On the second point that Dedeng tried to enter the house, based on the prosecution's submission, at the end of its case, that he was not present in the house but was found inside the car when the car was stopped by the police at the waterfront and that he and Nizam were accomplices in the theft of the car. Therefore there was no necessity to rebut this issue bearing in mind the submission of the prosecution that there was no bloodstain or DNA of Dedeng or Nizam or Noraini found in the house on that night and PW1 has testified that the 1st and 2nd accused were the two persons who entered the house on that night.

[80] On the third and fourth points, that both accused were sleeping when Dedeng woke them up and Dedeng had the key of the car, these are issues of fact to be determined at the end of the trial, bearing in mind that it was not put to the prosecution's witnesses except to PW18 that Dedeng had possession of the key when he woke them up. These would also go to the credibility and defence of the 1st and 2nd accused and the weight to be given. Therefore there was no necessity to call Dedeng to rebut these bearing in mind that Dedeng was a prosecution's witness but chose not to call him.

[81] Where the evidence sought to be introduced in rebuttal is itself evidence probative of the guilt of an accused and where it is reasonably foreseeable by the prosecution that some gaps in the prove of guilt needs to be filled by evidence called by the prosecution, then generally speaking the Court is likely to rule against the closing any such gap by rebuttal evidence: see *R v. Miliken* [1969] 53 Cr App R 330.The prosecution must be bound by their own submission i.e. that Dedeng would be unworthy of

credit. If that was the case what was the point of calling him as a rebuttal witness if he was unworthy of credit. For the reasons given, the application to call Dedeng as a rebuttal witness was not granted.

[82] In a criminal trial the onus of proving the guilt of an accused person beyond reasonable doubt, which never shifts, lies throughout on the prosecution. The burden is not on the accused persons to prove their innocence but merely to offer an explanation which may reasonably be true or which raises a reasonable doubt as to their guilt: see *Saminathan & Ors v. Public Prosecutor* [1955] 21 MLJ 121; *Public Prosecutor v. Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180. In considering the defence the court is guided by the principles set out in the case of *Mat v. Public Prosecutor* [1963] 1 MLJ 263.

[83] The 1st accused testified under oath. He said his friend Dedeng, who was from Bako, introduced and brought him to the house to work as a brick-layer. Dedeng and Nizam had been working at the house before him. He started work at the house three days before the incident at the house. He said he and the 2nd accused started work at the house on the same day. He said there were altogether eight workers at the house. He wore a straw hat because it was hot and he was facing the wall when he was laying the bricks, therefore no one could see his face. He was asked and he said during his three days working at the house he had never seen PW1 at the house. He was asked and he said he was not in the habit of glue sniffing or drinking liquor.

[84] In view of the distance from the house to the city, he was provided a place to stay at a room, which was to be the hostel of the home-stay, which was being built. He shared the room with the 2nd accused and Nizam. He said Dedeng stayed in the next

room with his wife Noraini and their ten years old son. The other four workers did not stay in the house.

[85] The 1st accused said on 30.1.2015 he was working but they worked half-day until 12.30 noon on that day. In the afternoon they went to a shop which was about half an hour's walking distance from the house to buy foods such as chicken, eggs and packet noodle which were put inside a green plastic bag (exhibit P43B) which was carried by the 2nd accused. He said he was wearing a black t-shirt and blue jeans. He was asked and he changed his answer that it was a yellow checked shirt. They returned to the house at 5.30 p.m. They had dinner around 7.00 to 8.00 p.m. After that he relaxed in his room and went to sleep.

[86] He was shown exhibit P29B and he said the trousers did not belong to him. He was shown exhibit P30B and he said the shirt belonged to him. He said the blue jeans were not seized by the police on that night and he did not know what happened to the blue jeans.

[87] The 1st accused said when he was about to go to sleep, Dedeng came to his room and he heard the sound of a plastic bag taken out of the room. One hour later, Dedeng woke the three of them and asked them to go to a vehicle which they followed. He said he did not ask Dedeng why he asked them to go to the vehicle. He said Dedeng drove the vehicle and he was seated next to Dedeng. Nizam, the 2nd accused, Noriani and the child were in the back passenger seats. He said they did not know what happened that night but on the way to town they were stopped by the police. He then said Dedeng saw a van that looked like a police van in the rear mirror of the vehicle and Dedeng suddenly stopped the vehicle and ran away. He said they were arrested and charged for murder.

[88] He was asked and he said Dedeng looked frightened and nervous when he woke them up. He said he did not know whose vehicle was that and he did not have a driving licence. He was asked and he said he could not drive.

[89] He denied that he and the 2nd accused were the two persons without shirt and carrying weapons who had entered the house on that night. He was shown the stick (exhibit P13) and he said he had never seen it and he did not bring a piece of wood as alleged against him. He was asked and he said he did not together with the 2nd accused plan to enter the house of the deceased on that night and did not plan to attack the deceased.

[90] The 1st accused also said that during the identification parades a police officer asked him to come nearer to the one-way mirror so that PW1 could see him and he also saw PW1 on the other side of the one-way mirror. He said PW1 could not identify him on both occasions during the identification parades. He said on the third time PW1 still could not identify him and the police pointed him to PW1 that this was the one and PW1 nodded his head. He then said PW1 did not come to testify in court.

[91] The 2nd accused also testified under oath. He followed his employer known as Ah Mew, the subcontractor of the deceased, who brought him to work as a labourer laying bricks at the house of the deceased. He was on daily pay at RM85.00, but paid at the end of each month. He said that he wore a straw hat, facing the wall, while laying bricks and plastering the wall so that people could not see his face. He said all the other workers wore a hat, but different types. He, the 1st accused, Nizam, Dedeng and his family stayed at the rooms provided which were outside the house. The other workers did not stay at the house and followed Ah Mew back each day.

[92] He was asked and he said on 28th, 29th and 30th of January, 2015 while he was working at the house he did not meet face to face with PW1 and he said if PW1 was at the work site, PW1 could not see his face clearly, even during lunch breaks when he was not wearing his hat. He said he had never seen PW1 and PW1 never entered the rooms where they slept. He was asked and he said he did not sniff glue but he drank a little bit of alcohol to ease his tiredness.

[93] The 2nd accused said on 30.1.2015 they worked half day. That night they wanted to have a barbeque and they went to a shop at Telaga Air to buy chicken, noodles, eggs and biscuit. The chicken was put in white plastic bag and the eggs, noodles and biscuit were put in a green plastic bag. He carried both plastic bags. At the house he put both plastic bags in Dedeng's room, Dedeng's wife kept the white plastic bag whereas Dedeng took the green plastic bag. Subsequently he said he brought the green plastic bag to their room because the 1st accused wanted to eat the noodle. He said later Dedeng came into the room. He did not know what he was doing in their room but he heard the sound of plastic bag being brought with him from their room. He was shown a green plastic bag (exhibit P43B) and he said it looked similar to the green plastic bag. He said he did not know what happened to the green plastic bag.

[94] He was asked by his counsel whether he was aware of any person having the habit of sniffling glue in the two rooms and he said he had personal knowledge and he named the 1st accused as the glue sniffer. He was asked and he said he never found any tin of glue in the two rooms but the 1st accused brought the glue during working hours. Later in his evidence, he was shown a tin (exhibit P43C) and he said he had seen it in Dedeng's room. The next day, towards the end of his evidence-in-chief, he said he

wished to amend his testimony that the 1st accused was a glue sniffer. He said he never saw the 1st accused sniffing glue. He was also asked whether Dedeng was a glue sniffer and he said "Yes, he is a glue sniffer."

[95] He said he helped to cut the wood by using a sickle (exhibit P10) for the barbeque. While he was cutting the wood he mistakenly cut his finger. He was asked how much blood and he said just a little. Then he left the sickle in Dedeng's room. After the barbeque, at 8.00 p.m., he went to bed because he was tired. Although it was put to PW18 that the sickle originated from the workers quarters which was used for cutting vegetables, chopping meat and chicken etc., it was not put that the 2nd accused had used the sickle to cut the wood and cut his finger which explained his DNA on the sickle.

[96] When he was sleeping Dedeng woke them up and asked them to run away. He said Dedeng looked scared. He did not know why he asked them to run away. Dedeng asked them to follow him to the car. Dedeng had the car key, he did not know where he took the key from. They all entered the car and Dedeng drove the car towards the waterfront where he stopped to buy a drink. When Dedeng was about to enter the car he saw a police car came and he ran away. He said Nizam also ran away but the police caught him. He did not know why the police detained the car.

[97] He was asked and he said he did not enter the house of the deceased on that night. He said he did not bring the sickle into the house of the deceased on that night. He said he had no motive and common intention to enter the house of the deceased on that night. He denied the allegation made by PW1 that he together with the 1st accused attacked the deceased on that night.

He was also asked and he said PW1 could not identify him during the identification parades.

[98] The 1st and 2nd accused gave similar evidence, albeit there were inconsistencies and contradictions. The 1st and 2nd accused denied that they were the two persons, without shirt, armed with the stick and sickle, who had entered the house of the deceased at about 9.00 p.m. on that night. They put the blame for the murder on Dedeng because they said Dedeng woke them up asking them to run away and to follow him into the Toyota Prado. They alleged that Dedeng had the car key who drove the car to the waterfront where they were stopped by the police and arrested except Dedeng who ran away. They said Dedeng took the green plastic bag from their room. The 2nd accused said after he cut the wood for the barbeque, he left the sickle in Dedeng's room. He said he saw the tin of glue in Dedeng's room and that Dedeng was a glue sniffer. They contended that it was Dedeng who had the sickle who entered the house and attacked the deceased with it and left the green plastic bag with the tin of glue inside the bedroom of the deceased. They submitted that the fact that Dedeng had run away when he saw the police indicated his guilt in the murder. They did not put any blame on Nizam although he was in the Toyota Prado who also ran away but was apprehended by the police.

[99] What they had said about Dedeng's involvement in the murder was not put to the prosecution's witnesses except to PW18 who was the investigating officer. Their allegations that PW1 was never at the house, that he could not identify them at the identification parades and that they were pointed out to PW1 by the police were not put to PW1, PW13 or PW18 notwithstanding that PW1, who was not seriously challenged in his testimony, had testified and identified both accused as the two persons who

had entered the house on that night. PW1's testimony as such has been corroborated by the DNA evidence. These not only raised serious doubts on their credibility but also their defence. There is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony: *Wong Swee Chin v. Public Prosecutor* [1981] 2 MLJ 212.

[100] Initially the 2nd accused said that he never saw any tin of glue in the two rooms where they slept but he knew the 1st accused was a glue sniffer because the 1st accused brought the glue during working hours. But he contradicted himself when he later said that he had seen the tin of glue (exhibit P43C) in Dedeng's room. He then changed his evidence to say that he never saw the 1st accused sniffing glue but that Dedeng was a glue sniffer. These contradictions were not explained by the defence.

[101] PW1's testimony that two persons, one armed with a knife and the other with a stick, who had entered the house from the backdoor of the house was never challenged. They only challenged PW1's identification of the two persons. I have dealt with the identification. Although they alleged it was Dedeng who entered the house and left the sickle in the house, there was no explanation who was the other person who entered the house armed with the stick and left it there as the defence alleged. The defence did not adduce any evidence that someone had put the sickle, stick and the green plastic bag containing the tin of glue in the house after both accused had left the house in the vehicle. The evidence showed that no DNA of Dedeng, Nizam and Noraini were found on the sickle, stick, green plastic bag or tin of glue or in the house from police investigation carried out on that night. In particular, no DNA of Dedeng was found on the sickle, stick or green plastic bag containing the tin of glue. The

DNA evidence excluded the presence of Dedeng, Nizam or Noraini in the house or their involvement in the murder. The defence did not introduce any evidence to the contrary. The DNA evidence contradicted their assertions that Dedeng entered the house, used the sickle and or the stick to attack the deceased and left the sickle, the stick and the green plastic bag in the house and fled from the scene by taking the car key of the deceased from inside the house and drove the deceased's vehicle from the house.

[102] On the contrary, the DNA evidence showed that the 1st and 2nd accused were in the house on that night. The DNA of the deceased was detected on the stick which was used to attack the deceased which was found in the house. The DNA profile developed from the bloodstain found on 1st accused trousers worn by the 1st accused on that night was from the deceased. The DNA of the 2nd accused was found on the sickle which was used to attack the deceased bearing in mind that Dedeng's DNA was not found on the sickle. The DNA of the 2nd accused found on the green plastic bag contradicted his evidence about the green plastic bag and the tin of glue and who was a glue sniffer, again bearing in mind that Dedeng's DNA was not found on the green plastic bag or on the tin of glue. The DNA evidence not only contradicted their defence but found them to be lying.

[103] Although both accused said they did not know how to drive and that it was Dedeng who drove the vehicle, on the evidence adduced that Dedeng's DNA was not found on the weapons or on the green plastic bag or in the house and that the accused had disturbed the Toyota Prado which set off the car alarm prior to their entry into the house, the inferences reasonably drawn pointed to the fact that after they had attacked the deceased, they took the car key from the house, woke up Dedeng, Nizam

and Noraini and asked them to run and asking Dedeng to drive the vehicle. Based on the seizure list (exhibit P92), the vehicle and car key were seized from the 2nd accused. The defence did not challenge exhibit P92. These contradicted their allegations that Dedend took the car key or had the car key when he woke them up.

[104] On the evidence adduced, and on a balance of probabilities, the defence raised by the accused could not be true and has also failed to raise a doubt as to their guilt.

[105] At the conclusion of the trial, on the totality of the evidence adduced, the prosecution has proved its case against each of the two accused beyond reasonable doubt: see s. 182A of CPC.

[106] I find each accused guilty and convict each of them of the offence under s. 302 of the Penal Code read together with s. 34 of the Penal Code as per the charge made against them.

[107] Upon the conviction recorded, pursuant to s. 302 of the Penal Code and s. 277 of CPC, the 1st and 2nd accused shall be punished with death. Each accused shall be hanged by the neck till he is dead.

Dated: 26 APRIL 2017

(STEPHEN CHUNG HIAN GUAN)
High Court Judge
Kuching

COUNSEL:

For the prosecution - DPP Musli Ab Hamid

For the 1st accused - CM Sundram; M/s CM Sundram & Co Advocates

For the 2nd accused - Fung Lee Fook; M/s Fung Lee Fook Advocates

Notice: This copy of Judgment is subject to amendments, corrections and editorial revision.