A

CHUA KIM HOCK v. PP & OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
MOHTARUDIN BAKI JCA
ZAKARIA SAM JCA
ABANG ISKANDAR JCA

B

[CRIMINAL APPEALS NO: M-05-4-01-2013, M-05-5-01-2013, M-05-6-01-2013 & M-05-281-12-2013]
21 AUGUST 2015

C

EVIDENCE: *Adverse inference – Failure of prosecution to call witness – Invocation of adverse inference for non-calling of witness by prosecution – Existence of other independent evidence – Whether adverse inference ought to be invoked against prosecution*

D

CRIMINAL PROCEDURE: *Prosecution – Prosecution's case – Break in chain of causation – Murder – Cause of death – Failure of investigating officer to conduct forensic investigation – Whether there was break in chain of causation in prosecution's case – Whether nova actus interveniens exist*

E

CRIMINAL PROCEDURE: *Charge – Defective charge – Allegation of wrong location of commission of crime stated in charge – Whether charge was defective – Whether prosecution tendered sufficient evidence to justify exact location of commission of crime as stated in charge*

F

CRIMINAL PROCEDURE: *Defence – Alibi – Availability of defence – Accused raised alibi at scene which was missing in charge – Whether defence of alibi must address itself to allegation as contained in charge that was preferred against accused – Whether accused had successfully justified defence of alibi*

CRIMINAL PROCEDURE: *Appeal – Evidence – Evidence supporting finding – Failure of trial judge to consider possibility of offence under s. 299 instead of s. 300 of Penal Code – Whether trial judge was justified in finding appellants guilty of murder*

G

CRIMINAL LAW: *Common intention – Participation in criminal act – Fatal injury – Whether who among appellants had inflicted fatal injury matters – Whether all appellants criminally responsible for act inflicted by one of them in furtherance of their common intention – Penal Code, s. 34*

H

The appellants were jointly charged for an offence under s. 302 of the Penal Code ('the Code'), read together with s. 34 of the Code for the murder of one Yap Wai Seng ('the deceased'). During the trial, the first, second and fourth appellants contended that the deceased could have died of injuries caused to his head as a result of a fall which the deceased encountered at a graveyard near Bukit Jelutong ('the alleged location') and not at No. 149A, Jalan Johor, Semabok, Melaka as stated in the charge (exh. P-1), whereas the third

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appellant had pleaded defence of alibi and contented that he was not at the alleged location. At the end of the trial, the trial judge found all the four appellants guilty and convicted them of murder as charged. The first, second and third appellants were sentenced to death by hanging and the fourth appellant, who was only 17 years and 7 months old at the time of the commission of the crime, was ordered to be detained in prison during the pleasure of the Yang-Di Pertua Negeri under s. 97(2) of the Child Act 2001. Hence, the present appeal. The issues raised during the appeal were: (i) where there was an invocation of adverse inference against the prosecution in relation to the non-calling of two witnesses by the prosecution; (ii) whether there was a break in the chain of causation in the prosecution's case as a result of the investigating officer's failure to pursue a forensic investigation pertaining to the grass that was found in the deceased's hair; (iii) whether the charge was defective as it had stated in it the wrong place as to where the offence was committed; (iv) whether there was availability of defence of alibi to the third appellant; (v) whether the trial judge had failed to consider the possibility that offence could have fallen under s. 299 instead of s. 300 of the Code; and (vi) whether there was common intention.

Held (dismissing appellants' appeal; affirming convictions and sentences)
Per Abang Iskandar JCA delivering the judgment of the court:

(1) This rule on the invocation of presumption of adverse inference is not an inflexible rule, but which exercise must be dependent upon the dictates of the prevailing circumstances in each particular case. In the circumstances of this case, the trial judge was correct in deciding that the duty to invoke a presumption of adverse inference against the prosecution under s. 114(g) of the Evidence Act 1950 did not arise. (paras 22 & 23)

(2) There was no break in the chain of causation in the prosecution's case. It was the injury suffered by the deceased at the Jalan Johor, Semabok that was caused by the appellants that had caused bleeding in his brain. That injury eventually, but effectively and significantly, if not singularly, had caused his death. There were 19 external injuries in the head area of the deceased alone. In the circumstances, the fact that the investigating officer did not pursue a forensic run on the grass found in the deceased's hair angle, would not be of any material consequence to the prosecution's case. There was no '*nova actus*' that had effectively intervened, and broke the cause of death of the deceased. The evidence had clearly shown that the acts of the appellants had caused the death of the deceased. (paras 35 & 36)

(3) The complaint by the appellants that the charge was defective had no substance in the light of the evidence of the government pathologist, PW18, who had positively testified that the deceased had died of injuries sustained by him as a result of the attack on him by the appellants in front of the gate of the house as mentioned in the charge at Jalan Johor, Semabok, Melaka. He had sustained head injuries due to the use of weapons such as sticks and iron-rod on various parts of his person, by the appellants. The appellants' contention that the deceased had died at the graveyard at Bukit Jelutong, Melaka was devoid of substance. (para 38)

(4) The alibi defence, like any other defence, must address itself to the allegation as contained in the charge that was preferred against the accused person. As such, it is not open to the accused to choose what the accusation against him ought to be. In this case, the charge had stated clearly that the alleged offence took place at Jalan Johor, Semabok, Melaka not at a graveyard at Bukit Jelutong. It might be the appellants' version that the fatal fall occurred at the graveyard, but definitely that was not the prosecution's version as evidenced by the contents of the charge that was preferred against them (exh. P-1). On that ground alone, the defence of alibi of the second accused person was inherently and fatally flawed. (para 46)

(5) In light of the nature of the overall evidence led by the prosecution against all the appellants, the need for the trial judge to consider the probable defence of culpable homicide in this case did not arise. From the nature of the injuries inflicted on the deceased and where on his person those injuries were inflicted, it is clear that the most probable result of such inflicted injuries would be the death of the deceased. Indeed he had succumbed to those injuries. The evidence before him had justified the trial judge's finding of murder of the deceased having been committed by the appellants. (paras 53 & 54)

(6) Under s. 34, it matters not who among the appellants had inflicted that fatal injury. As it was inflicted by one of them in furtherance of their common intention, as witnessed by PW12, all the appellants were criminally responsible, under the law, for the death of the deceased. (para 59)

Bahasa Malaysia *Translation Of Headnotes*

Perayu-perayu telah dituduh secara bersama terhadap satu kesalahan di bawah s. 302 Kanun Keseksaan ('Kanun'), yang dibaca bersama-sama dengan s. 34 Kanun bagi pembunuhan seorang yang bernama Yap Wai Seng ('si mati'). Semasa perbicaraan, perayu pertama, kedua dan keempat menghujahkan bahawa si mati telah meninggal dunia akibat kecederaan yang dialami di kepala berikutan kejatuhan si mati di sebuah tanah perkuburan

berdekatan Bukit Jetutong ('lokasi yang didakwa') dan bukan di No. 149A, Jalan Johor, Semabok, Melaka seperti yang telah dinyatakan dalam pertuduhan (eks. P-1), manakala perayu ketiga pula telah memplidkan pembelaan alibi dan mendakwa bahawa dia tidak berada di lokasi yang didakwa. Di akhir perbicaraan, hakim bicara mendapati keempat-empat perayu bersalah dan mensabitkan mereka atas pembunuhan seperti dalam pertuduhan. Perayu pertama, kedua dan ketiga telah dihukum gantung sampai mati dan perayu keempat, yang hanya berumur 17 tahun dan 7 bulan ketika perlakuan jenayah, telah diperintahkan ditahan di penjara selama yang diperkenankan oleh Yang di-Pertua Negeri di bawah s. 97(2) Akta Kanak-Kanak 2001. Oleh itu, rayuan ini. Isu-isu yang dibangkitkan dalam rayuan adalah: (i) sama ada terdapat penggunaan inferens bertentangan terhadap pendakwaan berkaitan dengan kegagalan memanggil dua orang saksi oleh pendakwaan; (ii) sama ada terdapat pemutusan rantaian penyebab dalam kes pendakwaan berikutan kegagalan pegawai penyiasat menjalankan penyiasatan forensik berkenaan rumput yang telah dijumpai pada rambut si mati; (iii) sama ada pertuduhan cacat kerana ia telah memperihalkan di dalamnya tempat yang salah di mana kesalahan telah dilakukan; (iv) sama ada terdapat ketersediaan pembelaan alibi kepada perayu ketiga; (iv) sama ada hakim bicara gagal untuk mempertimbangkan kemungkinan bahawa kesalahan tersebut boleh terangkum di bawah s. 299 dan bukan s. 300 Kanun; dan (vi) sama ada wujud niat bersama.

Diputuskan (menolak rayuan perayu-perayu; mengesahkan sabitan dan hukuman)

Oleh Abang Iskandar HMR menyampaikan penghakiman mahkamah:

(1) Peraturan bagi pemakaian anggapan berkenaan inferens bertentangan bukan peraturan yang tidak lentur, tetapi yang mana perjalanan harus tertakluk kepada arahan keadaan-keadaan yang wujud dalam setiap kes tertentu. Dalam keadaan kes ini, hakim bicara betul dalam memutuskan bahawa kewajipan untuk membangkitkan sesuatu anggapan bagi inferens bertentangan terhadap pendakwaan di bawah s. 114(g) Akta Keterangan 1950 tidak timbul.

(2) Tidak terdapat pemutusan rantaian penyebab dalam kes pendakwaan. Kecederaan yang dialami oleh si mati di Jalan Johor Semabok yang disebabkan oleh perayu-perayu yang telah mengakibatkan pendarahan dalam otak si mati. Kecederaan tersebut akhirnya, tetapi secara berkesan dan nyata sekali, jika tidak secara tunggal, telah menyebabkan kematiannya. Terdapat 19 luka luaran pada bahagian kepala si mati sahaja. Dalam keadaan kes ini, fakta bahawa pegawai penyiasat tidak melakukan siasatan forensik terhadap rumput yang dijumpai pada bahagian rambut si mati, tidak akan memberi sebarang kesan penting kepada kes pendakwaan. Tidak terdapat '*nova actus*' yang telah secara berkesan mencelah, dan mematahkan sebab kematian si mati. Keterangan jelas menunjukkan bahawa tindakan perayu-perayu telah menyebabkan kematian si mati.

(3) Aduan perayu-perayu bahawa pertuduhan adalah cacat tidak mempunyai asas berdasarkan keterangan ahli patologi kerajaan, PW18, yang telah secara positif memberi keterangan bahawa si mati telah meninggal dunia akibat kecederaan yang dialaminya berikutan serangan terhadap dirinya oleh perayu-perayu di hadapan pintu pagar rumah yang telah diperihalkan dalam pertuduhan di Jalan Johor, Semabok, Melaka. Si mati telah mengalami kecederaan di kepala disebabkan penggunaan senjata-senjata seperti kayu-kayu dan batang besi pada pelbagai bahagian pada dirinya, oleh perayu-perayu. Dakwaan perayu-perayu bahawa si mati telah meninggal dunia di tanah perkuburan di Bukit Jelutong, Melaka adalah tidak berasas.

(4) Pembelaan alibi, seperti mana-mana pembelaan yang lain, harus merujuk kepada dakwaan yang terkandung dalam pertuduhan terhadap tertuduh. Oleh demikian, adalah tidak terbuka kepada tertuduh untuk memilih apakah pertuduhan yang mungkin boleh dikenakan terhadapnya. Dalam kes ini, pertuduhan telah secara jelas menyatakan bahawa kesalahan telah berlaku di sebuah tempat di Jalan Johor, Semabok, Melaka bukan di tanah perkuburan di Bukit Jelutong. Ia mungkin versi perayu-perayu bahawa kejatuhan yang membawa kematian telah berlaku di tanah perkuburan, tetapi ternyata ia bukan versi pendakwaan seperti yang terbukti berdasarkan kandungan pertuduhan yang telah dikenakan terhadap mereka (eks. P-1). Berdasarkan alasan tersebut sahaja, pembelaan alibi oleh tertuduh kedua adalah sememangnya dan sudah tentu cacat.

(5) Berdasarkan keseluruhan sifat keterangan yang telah dikemukakan oleh pendakwaan terhadap kesemua perayu-perayu, keperluan untuk hakim bicara mempertimbangkan pembelaan yang berkemungkinan berkenaan homisid salah dalam kes ini tidak timbul. Daripada sifat kecederaan-kecederaan yang diakibatkan ke atas si mati dan di mana ke atas dirinya kecederaan-kecederaan tersebut telah diakibatkan, adalah jelas bahawa kesan yang lebih berkemungkinan berdasarkan kecederaan-kecederaan yang diakibatkan telah menyebabkan kematian si mati. Sememangnya si mati meninggal dunia akibat kecederaan-kecederaan tersebut. Keterangan di hadapannya telah mewajarkan dapatan hakim bicara berkenaan pembunuhan si mati yang telah dilakukan oleh perayu-perayu.

(6) Di bawah s. 34, adalah tidak penting siapa di antara perayu-perayu yang telah mengakibatkan kecederaan yang membawa maut. Oleh kerana ia telah diakibatkan oleh salah seorang daripada mereka lanjutan daripada niat bersama mereka, seperti yang telah disaksikan oleh PW12, kesemua perayu-perayu adalah secara jenayah bertanggungjawab, di bawah undang-undang, atas kematian si mati.

Case(s) referred to:
Chan Chor Shuh v. PP [2003] 1 CLJ 501 CA ***(refd)***
Duis Akim & Ors v. PP [2013] 9 CLJ 692 ***(refd)***
Kenneth Fook Mun Lee v. PP [2006] 4 CLJ 359 FC ***(refd)***
Khairul Edam Adam & Anor v. PP [1999] 2 SLR 57 ***(refd)***
Mahboob Shah v. Emperor AIR [1945] PC 118 ***(refd)***
Mat v. PP [1963] 1 LNS 82 HC ***(refd)***
Mutachi Stephen v. Uganda [2003] UGCA 9 ***(refd)***
Namasiyam Doraisamy v. PP & Other Cases [1987] 1 CLJ 540; [1987] CLJ (Rep) 241 SC ***(refd)***
PP v. Mansor Md Rashid & Anor [1997] 1 CLJ 233 FC ***(refd)***
PP v. Mohd Azam Basiron & Anor [2010] 9 CLJ 1 CA ***(refd)***
R v. Porritt [1961] 45 Cr App R 348 ***(refd)***
R v. Smith [1959] 2 QB 35 CA ***(refd)***
R v. White [1908-10] All ER Rep 340 CA ***(refd)***
Raja Sanjivi & Satu Lagi v. PP [2012] 1 LNS 1450 CA ***(refd)***
Rusman Sulaiman v. PP [2013] 4 CLJ 305 FC ***(refd)***
Tham Kai Yau & Ors v. PP [1976] 1 LNS 159 FC ***(refd)***
Wong Nyet Wah v. PP [1962] 1 LNS 208 HC ***(refd)***

Legislation referred to:
Child Act 2001, s. 97(2)
Dangerous Drugs Act 1952, s. 39B
Evidence Act 1950, ss. 103, 114(g)
Penal Code, ss. 34, 299, 300

For the 1st appellant - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co
For the 2nd appellant - Ayasamy Velu; M/s V Samy & Co
For the 3rd appellant- J Amardas (Terrence Chan Yoong Tian with him); M/s KP Ng & Amardas
For the 4th appellant - K Vikneswaran; M/s Viknes Ratna & Co
For the respondent - Mazelan Jamaludin; DPP

[Editor's note: For the High Court judgment, please see PP v. Chua Kim Hock & Ors [2013] 1 LNS 1385.]

Reported by Thirunavakarasu Vijayan

JUDGMENT

Abang Iskandar JCA:

The Charge

Bahawa kamu bersama-sama pada 11.2.2010, jam lebih kurang 11.45 malam di alamat No. 149A, Jalan Johor, Semabok, Melaka, di dalam daerah Melaka Tengah, di dalam negeri Melaka telah membunuh YAP WAI SENG No. K/P 920920-04-5335 dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan dan dibacakan bersama seksyen 34 Kanun Keseksaan.

A **Facts Of The Case**

[1] On 11 March 2010, at about 11pm, while one Lim Pui See (PW2) and Awr Kar Seng (PW4) were having supper with Yap Wai Seng ("the deceased") at one coffee shop in Batu Berendam, the deceased received a call from Yeo Chee Teong (the fifth accused in the court below) requesting him to go to one Ker Li's house at the address as stipulated in the charge.

[2] At about 11.20pm, the deceased proceeded to Ker Li's house alone. PW2 and PW4 had requested to come along but the deceased asked them to wait for him at 12am at PW4's house also located within the vicinity of Ker Li's house.

[3] According to Jenny Yoong Wei Chin (PW12) at the material time, she was at Ker Li's house and that she saw the fifth accused coming to the house. Not long after, the deceased arrived there on a motorcycle. She saw both, the deceased and the fifth accused talking outside the gate of Ker Li's house.

[4] PW12 then saw a group of people including the first appellant Chua Kim Hock (the first accused in the court below/appellant in case M-05-4-01-2013), the third appellant Lim Chin Aun (the second accused in the court below/appellant in case M-05-6-01-2013), and the second appellant, Choo Cheng Chye (the fourth accused in the court below/appellant in case M-05-5-01-2013) emerged from beneath a nearby mango tree and had rushed towards the deceased. She then had seen them attacking the deceased by using their bare hands, bottle, iron rod, sticks, and helmets.

[5] PW12 said that she saw the deceased running back to the front of Ker Li's house and was pursued by his attackers. She also saw the first accused leaving the scene, only to come back later in front of the said house driving a Proton Iswara bearing registration plate No. MBK 658 ("the car"). SP12 saw the deceased was forcefully pushed into the car before it sped off from the scene.

[6] On 12 March 2010, at about 1am to 1.30am, the car stopped by the roadside along Leboh Air Keroh facing Ayer Itam Toll House, about 150m away from a police road block.

[7] L/Kpl Zakaria bin Hamat (PW10) and L/Kpl Rashid bin Yunus (PW11) from Unit Kereta Peronda, PDRM were dispatched to investigate the car. PW11 stopped in front of the car and found all the appellants inside. The first accused then got down from the car while the second accused who was seated next to the driver's seat told PW11 that the car's engine was having some problem.

[8] The first accused refused to open the car boot when was asked by PW11 and said that there were some liquor in the boot. He then got back to the driver's seat.

[9] PW11 became suspicious and he then called his subordinate, L/Corp Ahmad Zaidi for reinforcement. The latter came to the scene with SM Osman. At the scene, PW11 then switched off the car engine and took the car keys. He then opened the boot of the car. Upon opening the boot, PW11 found a man's body inside the boot, appearing lifeless.

[10] Dr. Sai Won Yi, of the Unit Forensik, Hospital Besar Melaka (PW14) who later arrived at the scene, confirmed the death of the man found in the boot of the car who was later identified as the deceased.

[11] After investigations, all the five accused persons were later charged with the murder of the deceased with common intention as read together with s. 34 of the Penal Code as appeared in the charge proffered against them. At the end of the prosecution case, the first, second, third, and fourth accused were called to enter their defence, as the court having found that a *prima facie* case had been established against them. However, the fifth accused was acquitted and discharged of the offence on account of the prosecution's failure to make out a *prima facie* case against him to warrant the calling of his defence.

[12] The Public Prosecutor had appealed against the acquittal of the fifth accused to the Court of Appeal ("COA"). However on 27 August 2012, the COA struck out the appeal as the Notice of Appeal could not be served on fifth accused.

[13] The first, third, and fourth accused persons argued that the deceased person could have died of injuries caused to his head as a result of a fall which he encountered at a graveyard when his head could have hit a hard object on the ground as a result of the fall. The second accused person pleaded *alibi*, in that he was not at the graveyard at the time of the incident.

[14] At the end of the trial, the learned trial judge found that the defence was just a bare denial and that all the four accused persons had failed to raise a reasonable doubt on the prosecution case. He found the first, second, third, and fourth accused persons guilty and convicted them of murder as charged. The first, second and fourth accused were sentenced to death. As against the third accused, who was only 17 years and 7 months old at the time when the offence was committed, he was ordered to be detained in prison during the pleasure of the Yang di-Pertuan Negeri under s. 97(2) of the Child Act 2001.

The Appeal

[15] Being aggrieved by the learned trial judge's decision, all the four accused persons had appealed against it to this court. We had the opportunity to hear submissions by all parties on 10 February 2015 and had then indicated that we needed time before we could come to a decision and that parties would be informed in due course accordingly. This is now our decision.

[16] Before us, a number of issues were raised on behalf of all the appellants by their respective learned counsel. We will deal with those issues accordingly, though not necessarily in the order that they were presented before us.

The Issue Of Adverse Inference

[17] This issue was raised in relation to the non-calling by the prosecution of two witnesses, namely Ker Li and her mother. It was contended by learned counsel for the defence that in the circumstances of this case, these two persons ought to be called by the prosecution as they were purportedly material witnesses who could contribute to the narrative of the prosecution case. As they were not called, an adverse inference under s. 114(g) of the Evidence Act 1950 ought to have been invoked against the prosecution by the learned trial judge. This issue was indeed raised before the learned trial judge during submissions at the end of the prosecution case in the court below. The learned trial judge had ruled against any invocation of adverse inference against the prosecution.

[18] We had occasion to refer to his grounds of decision on this issue and in particular, at pp. 61 to 63 of the rekod rayuan jilid 1. The issue arose in relation to the proof of the place of the incident as referred to in the charge as being the place where the offence was alleged to have taken place. In the charge the place referred to was "at No. 149A, Jalan Johor, Semabok, Melaka". In the course of proving what had happened at that place at the material time, the prosecution had called PW12, who was admittedly known to all the accused persons. It was her evidence that prior to the incident (that would happen later that night) she had seen the accused persons bringing into the house an iron rod and sticks. She had identified the iron-rod in court which was marked as (P43(A)). During the incident at the material time, that happened in front of the house at Jalan Johor, as stated in the charge, she said saw the accused persons hitting the deceased with bare hands, an iron-rod, sticks and helmet. She also said she saw the four accused persons had earlier sprung out from their hiding place from under a nearby mango tree and proceeded to hit the deceased who was then having a conversation with the fifth accused. When the deceased had tried to run away from the accused persons, the latter had chased after him and having caught up with him, they continued to hit him. PW12 had testified that she heard the deceased had screamed, telling his assailants not to hit him. PW12 also testified that she then saw the first accused leaving the place, only to come back to the scene in a Proton Iswara car. The first accused was seen driving the said car. She saw the deceased being then forced into the said car by the accused persons (except the fifth accused person, who remained at the scene) before the car sped away from the place at Semabok. This narration by PW12 was materially repeated by two other eye-witnesses, namely PW3 and PW13 who were occupants of the neighbouring house to where PW12 said she saw the incident on the 11 March 2010 at Semabok.

[19] The defence argued that the prosecution ought to have called Ker Li and her mother as the incident had happened in front of the gate to their house. It was argued by the defence counsel that these two persons had tried to separate and defuse the commotion but to no avail. As such, it was argued further that they were material witnesses to the unfolding of the prosecution case and as such, they ought to have been called by the prosecution. As they were not, adverse inference must be invoked against the prosecution under s. 114(g) of the Evidence Act 1950. The non-invocation of the same had aggrieved the appellants.

[20] We now would advert to what the learned judge had said in his decision on this issue of adverse inference. Having correctly recognised that the an adverse inference ought only to be invoked when there was suppression of material evidence, the learned trial judge had proceeded on to say, at pp. 62 to 63 of rekod rayuan jilid 1, as follows:

> Hence the corresponding issue would be whether the aforesaid witnesses are essential and material witnesses to unfold the full narrative of the prosecution's case. Now, the testimony of PW-12 in respect of the factum of the said attack and assault mounted against the deceased unfolding before her eyes is uncontroverted. Her identification of the 4 accused persons as the attackers and assailants was equally beyond reproach. Additionally her evidence was evidently fortified by the evidence of PW-3. The testimony of PW-11 in finding the deceased motionless in the boot of the said car and the testimony of PW-18 in concluding the causative factors leading to the demise of the deceased completes the narrative of the prosecution's case. If both Ker Li and her mother, who were both with PW-12 at the time of attack/assault, were called to testify, they would only replicate PW-12's testimony relating to the factum of the said attack and assault. Their evidence would have been redundant, incapable of adding further value nor weightage to both the prosecution and the defence case - see *Chua Keen Long v. PP* [1996] 1 SLR 510 at p. 523. It would thus be an exercise in redundancy to call both these witnesses. The testimonies of PW-12, PW-3, PW-11, PW-18 and the other witnesses called by the prosecution are sufficient to meet the prosecution's imperatives of discharging its burden of proving its case.

[21] With respect, we cannot see any error in the manner as to how the learned trial judge had articulated his legal reasoning in concluding the way he did. We would only wish to state here that the legal position can be amply distilled from the decision of our apex court in the case of *Namasiyam Doraisamy v. Public Prosecutor & Other Cases* [1987] 1 CLJ 540; [1987] CLJ (Rep) 241 where learned Justice Syed Agil Barakbah [SCJ] had said that:

> Clearly Francis was a *participes criminis*, an accomplice in the true sense of the word. It was submitted that the absence of Francis at the trial would raise the presumption under section 114(g) of the Evidence Act unfavourable to the prosecution. Be that as it may, in the light of overwhelming prosecution evidence as stated earlier, we do not think that the presence of Francis, had he been available, would have made any difference.

[22] This rule on the invocation of presumption of adverse inference is not an inflexible rule, but which exercise must be dependent upon the dictates of the prevailing circumstances in each particular case. (See the Federal Court case of *Public Prosecutor v. Mansor Md Rashid & Anor* [1997] 1 CLJ 233).

[23] Again, in the circumstances obtaining in this case, the learned trial judge was correct in deciding as he did that the duty to invoke a presumption of adverse inference against the prosecution under s. 114(g) of the Evidence Act 1950 did not arise.

[24] Apart from the evidence of the said three eye-witnesses, there was also the independent evidence of the government pathologist, Mohamad Azaini bin Ibrahim (PW18) who said that the head injuries that had caused the death of the deceased was a blunt object which could be caused by an object such as the iron-rod (P-43(A)) that was shown to him. He had also said that the other injuries found on the person of the deceased were consistent with injuries caused by blunt objects such as helmets. Then there was the evidence of C/Insp Ali Hanafiah (PW22) the police forensic crime scene investigator, who testified, among others, that he had found and recovered from inside the said Proton Iswara car, an iron rod (P-43(A)) which had blood stains on it. A subsequent DNA analysis done on the said blood stains had yielded a profile that matched the DNA profile of the deceased.

[25] The chemist (PW7) who did the DNA profiling testified that the probability of a randomly selected unrelated individual having this matching DNA profile was approximately 1 in 95 quintillion. In common parlance, that is as good as an absolute impossibility.

[26] The corroboration of PW12's evidence on the deceased having been hit by the accused persons, if indeed one is needed, has been independently corroborated by these independent evidence of these witnesses. We therefore see no merit in the appellants' contention grounded on failure by learned trial judge to invoke an adverse inference against the prosecution.

The Issue On Causation.

[27] It was also argued before us that there was a failure on the part of the investigation to investigate what had happened at the graveyard on that fateful night. It was the contention by the defence that while there were evidence as to what happened in front of Ker Li's house, there was no evidence adduced at the prosecution case as to what had happened at the graveyard near Bukit Jelutong. No investigations were done by the investigating officer in that regard, such as forensic analysis on the grass found in the deceased's hair. Learned counsel for the first, third and fourth appellants had argued that the deceased person could have died of injuries caused to his head as a result of a fall which he was alleged to have suffered at a graveyard at Bukit Jelutong, whereby his head could have hit a hard object on the ground as a result of the fall. In other words, the pertinent

questions posed by the defence had been: Was the cause of death as a result of blow by blunt object to the head of the deceased? Could it be as a result of the fall suffered by the deceased as a result of the fall at the graveyard at Bukit Jelutong, as alleged by the accused persons? Who among them had caused this on the deceased?

[28] During the course of submissions before us, the case of this court in *PP v. Mohd Azam Basiron & Anor* [2010] 9 CLJ 1 ("*Azam Basiron*'s case") was cited. Briefly, in that *Azam Basiron*'s case (*supra*) the facts were as follows. The accused was a practising doctor who operated his own clinic. He was indebted to a money-lender who would send his agent to collect money from the accused every night at his clinic. On the night of the incident as stipulated in the proffered charge, this agent, also known as Azman had come to the clinic as he usually did for the same purpose. What happened at the clinic on that fateful night was narrated by the prosecution's only eye-witness, namely SP7, an employee of the accused person. Among others, what SP7 had testified in that case had been that after the agent was beaten by the accused on the head, the agent was still alive as he was put on a wheel-chair after which he was put into a car and was driven up to Genting Highlands where he was then left by the roadside to make it appear as if he was a victim of an accident. He was found two days later, already well and truly dead.

[29] The accused person was convicted by the learned trial judge for the murder of the agent on the strength of the testimony of SP7. On appeal to the Court of Appeal, the accused was acquitted and discharged, basically on account of three factors. First, was that the charge was found to be defective. Second, SP7 upon whose evidence the case of the prosecution was premised, as the bedrock of its factual foundation, was found to be an accomplice whose evidence, like any other accomplice evidence needed by law to be corroborated in material particular. In fact, the appeal judges had found the testimony of SP7 to be too incredible to be believed in the circumstances of that case. Such was the evidence led by SP7 that it could not, in itself, be capable of being corroborated. In other words, the testimony of SP7 was inherently deficient and such, could not be acted upon to found a conviction for an offence as grave as murder. The third ground of acquittal was that there was no evidence as to what had happened at the Genting Highland after the agent was left there, because even believing SP7 for a moment, the agent was still alive when he was put in the car at the clinic after he was allegedly beaten up by the accused person.

[30] With respect, the prosecution case in the *Azam Basiron*'s case (*supra*) was inherently weak, especially after the SP7's testimony was rendered incredible to be believed, as was found by the learned justices in the Court of Appeal. Essentially, the order of acquittal in favour of the accused person in that case was entered due primarily to the lack of material evidence led by the prosecution as a result of the rejection by the courts of the testimony

of SP7 who, as a self-confessed accomplice, had lacked credibility. Learned Justice Suryadi JCA, speaking for the Court of Appeal in the *Azam Basiron*'s case (*supra*) had said:

> The prosecution further submitted that the issue of want of corroboration did not arise here as SP7 was corroborated in many material particulars. As an example the remarks of SP7 that the deceased was struck on the head was corroborated by medical evidence. Only a person who witnessed the killing could have known all that. This piece of corroborative evidence may not necessarily assist SP7, as knowledge of the location of the injury could also mean that he was the one who struck the deceased, and now was passing the blame to someone else. It must be understood that at the prosecution's stage, with both respondents being charged, Haris Fadzilah being dead, and another at large, the last bastion of the prosecution's case was SP7 himself. With such absolute free hand, and no one to contradict him, he could spin any story under the sky, and no one would have been the wiser.

[31] As regards the lack of evidence as to what had happened at Genting Highlands, there was nothing much from a perusal of the judgement in the *Azam Basiron*'s case (*supra*) that can assist in terms of causation, in determining the intervening factor that could be the cause of death of the agent in that case.

[32] Causation in criminal law works in the like manner as how it operates in the civil law sphere. The pertinent question that needed to be asked by the court could necessarily be postulated as follows: "Did the act of the accused result in the harm suffered by the victim. In other words was the accused responsible for the factual cause of death?" The law accepts that there needs to be some conduct that has significantly contributed to the wrongful harm that has been caused to the victim, for otherwise it would not be fair to allocate responsibility on the accused person. In the English case of *R v. White* [1908-10] All ER Rep 340 (CA) ("*White*'s case") the issue of causation was the turning point at the trial of the accused.

[33] In the *White*'s case (*supra*) the accused person was charged for the murder of his mother. It was the *Crown*'s case that the accused had planned to kill his mother and towards that objective he had in fact, poisoned her night-time drink, by putting cyanide into it. The mother did drink it. In fact, his mother, did die. But she had died of a heart attack and not of the poison, after drinking the poisoned drink. It was held by the trial court that since the accused's act had not factually caused her death, he could not be found guilty of her murder. Instead, he was convicted for attempted murder. The *Crown*'s subsequent appeal to the Court of Appeal was dismissed. Clearly therefore, in terms of causation in law, it must be established that not only was the accused person responsible for the factual harm of the victim, but also, his role must be the significant cause of the harm that was suffered by the victim. The impugned act of the accused person must be the operating and substantial cause of the death. Only if an intervening cause amounts to a '*novus actus*'

that is, something that breaks the chain of causation, will the prosecution have failed to establish causation in law. See also the case of *R v. Smith* [1959] 2 QB 35 [CA] as per the speech of learned Lord Parker CJ.

[34] Now, reverting to our instant appeal, the investigating officer admitted that he did not do forensic investigation pertaining to the grass that was found in the deceased's hair. It was the defence's contention that the death of the deceased could have been caused by a fall suffered by the deceased, which they had alleged had happened at Bukit Jelutong graveyard. This contention was premised on the fact that there was the evidence of the government pathologist, PW18, who had testified that the injury suffered by the deceased could be caused by force being applied to the head by blunt object, as a result which the death of the deceased had been occasioned.

[35] With due respect, we would have no difficulty in agreeing with the defence contention had there been no more evidence emanating from the government pathologist, PW18, on this issue. However, from a perusal of the testimony of the said pathologist, it was in evidence that he had affirmatively testified that the injury suffered by the deceased had been caused by a hit that was consistent with a blow to the head with a blunt object that had caused blood haemorrhage in the brain of the deceased person. The fatal injury according to the pathologist could, in all probability, be caused by an iron rod, similar to the one that was shown to him at the trial, namely prosecution exh. P43A. There was the evidence of the police forensic officer, PW22, who testified that from a physical examination conducted by him of the Proton Iswara car from which boot the body of the deceased was found by PW11, he had recovered P43A (the iron rod) on the floor of the back passenger seat of the car, which he had duly seized. A subsequent analysis by the government chemist on the sample of the said blood stains found on P43A (the iron rod) had revealed that the DNA profile developed from the said blood samples had matched with the DNA profile of the blood sample taken from the body of the deceased. Add to these, the evidence of PW12 (Jenny), who testified that she saw the iron rod which she had also identified in court as having used in hitting the deceased on that fateful night, we are of the considered view that there was no break in the chain of causation in the prosecution case. It was the injury suffered by the deceased at the Jalan Johor Semabok that was caused by the appellants that had caused bleeding in his brain. That injury eventually, but effectively and significantly, if not singularly, had caused his death according to the pathologist, PW18. The most telling evidence that had effectively negated whatever the defence had to say about the cause of the fatal injury suffered by the deceased had come from the same government pathologist, PW18, when he was confronted with the question as to the cause of the injury. His answer to that question can be seen in the notes of proceedings:

> Q: Adakah kecederaan ini disebabkan **jatuh atau dipukul**?
>
> A: Memandangkan kecederaan **berganda**, saya berpendapat bahawa ciri-ciri kecederaan ini lebih kepada dipukul. (emphasis added)

[36] There were 19 external injuries in the head area of the deceased alone. In the circumstances obtaining in this case, the fact that the investigating officer did not pursue a 'forensic run on the grass in the deceased's hair' angle, would not be, to our mind, of any material consequence to the prosecution's case. There was no '*nova actus*' that had effectively intervened, and broke the cause of death of the deceased. The evidence clearly had shown that the acts of the appellants had caused the death of the deceased in this case.

[37] As such, with respect, we are not able to see how the *Azam Basiron*'s case (*supra*) can be of assistance to the appellants. The *substratum* as to why the prosecution case had failed in that case was due to a total lack of credible evidence before the court, in light of the incredible evidence of the prosecution star witness namely PW7. But no such parallel could be drawn in the instant case before us because the defect that had blighted the prosecution's case in the *Azam Basiron*'s case (*supra*) does not exist in this instant case before this court, as had been alluded to by us in above paragraphs.

That The Charge Was Defective As The Offence Had Occurred At Bukit Jelutong

[38] It was also submitted on behalf of the appellants that the charge that was preferred against them was defective as it had stated in it the wrong place as to where the offence was committed. It was the contention of the appellants that the deceased had suffered a fall at the graveyard at Bukit Jelutong, as a result of which he could have succumbed to his death due to the injury that he had suffered from the fall. Suffice to state here that the complaint by the appellants that the charge was defective had no substance in the light of the evidence of the pathologist, PW18 who had positively testified that the deceased had died of injuries sustained by him as a result of the attack on him by the appellants in front of the gate of the house as mentioned in the charge at Jalan Johor, Semabok, Melaka. He had sustained head injuries due to the use of weapons such as sticks and iron-rod (P43A) on various parts of his person, by the appellants. The appellants' contention that the deceased had died at the graveyard at Bukit Jelutong, Melaka was devoid of substance. It had been effectively negated by the testimony of the said government pathologist when he was confronted with that question directly by defence counsel during his cross-examination. We therefore reject such contention by the appellants accordingly.

The Defence Of Alibi

[39] The second accused person had pleaded *alibi*, in that he was not at the graveyard at the time of the incident. He was actually not at the graveyard at Bukit Jelutong where it was contended that the deceased had fallen on the ground that had caused the fatal injury. According to the second accused, he was elsewhere at the material time, namely that he was drinking coffee at a shop near the Petronas petrol station in the vicinity of Bukit Jelutong. He was never at the graveyard.

[40] Having considered this issue of *alibi* as a defence of the second accused, we are in agreement with the learned trial judge that such a defence ought to fail. Upon a consideration of the totality of the evidence led in this case, the evidence on the identity of the second accused was beyond reproach. He was known to the eye-witness PW12. In fact, all the appellants in this case were no strangers to PW12. They were mutual friends. In fact, it was the uncontroverted evidence of PW12 that they had gone out together during the evening before the fateful incident that occurred in front of the gate to the house where PW12 would witness the attack on the deceased by persons who were her friends. So really, the issue of identity of the second accused was a non-starter. There was no apparent reason why PW12 would unfairly and unnecessarily implicate the second accused when they were mutual friends.

[41] In this regard, we would refer to the case of *Duis Akim & Ors v. PP* [2013] 9 CLJ 692 as was cited to us by learned Mr Deputy in his submissions. In that *Duis Akim & Ors v. PP*'s case (*supra*), the appellants there were charged of committing murder of one of the 7-Eleven outlet's employees, in the course of them robbing the outlet in the early hours of the morning as stated in the charge. During the robbery, it was the evidence of the prosecution witness, PW1 who had testified during the trial, that he had the opportunity of looking at the faces of the appellants for a good five minutes during the heist. Based on that observation, PW1 was able to positively identify the appellants at an identification parade that was held about one month after the incident when the appellants were arrested by the police. Based on the identification, among others, the appellants were charged for murder that was committed in the course of the said robbery at the 7-Eleven outlet. In their defence, the first and the second appellants had put up the defence of *alibi*. According to them, although they were at the vicinity of the 7-Eleven outlet at the time when the alleged offence was committed, it was their version that in fact, they were already at home when the offence was committed. They had called witnesses to prove their *alibi*. At the end of the whole case, they were convicted by the learned High Court Judge of the offence as charged. They had then appealed right up to the apex court against their respective conviction. The issue pertaining to the defence of *alibi* was raised in the course of the appeal.

[42] In rejecting their appeal, the learned appeal justices of the apex court had held that "a defence of *alibi* could not prevail over the positive identification of an appellant person especially so in the face of categorical statements coming from credible witnesses who had no ill motives in testifying". (See para. [82] of the decision of the Federal Court). In light of such positive identification by the prosecution witness, the *alibi* defence must collapse as the appellants had been "squarely put at the scene of the crime". (See para. [83] of the judgment of the Federal Court).

[43] Likewise, in our instant appeal, in fact, the case for the prosecution was on stronger footing as the PW12 the eye-witness to the fateful incident knew all the appellants personally. They were friends. She was a credible witness. The issue of identification of the second accused person did not, with respect, arise.

[44] To borrow the phrase of the Ugandan Court in the case of *Mutachi Stephen v. Uganda* [2003] UGCA 9, which was cited in the *Duis Akim & Ors*'s case (*supra*) in light of such evidence of PW12, the second accused "has been squarely put at the scene of crime". His *alibi* defence must also collapse. He had failed to prove that he was elsewhere as was required of him to prove, pursuant to the clear provisions as contained in the ILLUSTRATION (b) to s. 103 of our Evidence Act 1950. For convenience, we reproduce the same:

> (b) B wishes the court to believe that at the time in question he was elsewhere. He must prove it.

[45] With respect, we agree with the learned trial judge that the second accused person had failed in his *alibi* defence. In fact, looking at the *alibi* defence as pleaded by the second accused, we find it rather interesting that the second accused was trying to avoid from being implicated in what the appellants had contended to be the place where the deceased had suffered the fatal injury, namely at the graveyard at Bukit Jelutong. The *alibi* defence of the second accused person was addressed not to avoid what was alleged in the charge. With respect, we are of the view that such *alibi* would be of no value at all because it did not tend to answer what was specifically alleged against him in the charge.

[46] The *alibi* defence, like any other defence must address itself to the allegation as contained in the charge that was preferred against the accused person. In a criminal prosecution, the prosecution sets out the parameters, by stating in the charge what are the accusations leveled against the accused person. That right, to our mind, resides well within the domain of exclusive prosecutorial discretion, and having said that the prosecution bears the duty to prove its allegations as contained in the charge beyond reasonable doubt throughout the entire case. In other words, the legal burden to prove the guilt of the accused person rests squarely on the shoulder of the prosecution. As such, it is not open to the accused to choose what the accusation against him ought to be. In this case, the charge had stated clearly that the alleged offence took place at Jalan Johor, Semabok, Melaka not at graveyard at Bukit Jelutong. That the deceased fell down and suffered his fatal injury at Bukit Jelutong as contended by the appellants, was never the prosecution's case against all the appellants. It might be the appellants' version the fatal fall occurred at the graveyard, but definitely that was not the prosecution's version as evidenced by the contents of the charge that was preferred against them (exh. P-1). On that ground alone, the defence of *alibi* of the second accused person was inherently and fatally flawed. It had entirely missed the mark.

On The Failure Of The Learned Trial Judge To Consider The Possibility That The Offence Could Have Been One Under s. 299 Instead Of s. 300 Penal Code

[47] This issue was raised by learned counsel for the first appellant. It was argued before us that the learned trial judge had failed to consider in his grounds of judgment, the possibility that the case against the first appellant could have fallen under s. 299 Penal Code instead of s. 300 Penal Code. In other words, he could have been guilty of culpable homicide and not of murder. That possible defence was not considered by the learned trial judge, so it was complained by learned counsel. Learned counsel was, in his usual candour, frank enough to admit that such issue on the possible defence was not raised in the court below.

[48] Cases such as *Chan Chor Shuh v. PP* [2003] 1 CLJ 501; [2003] 2 MLJ 26 and *Kenneth Fook Mun Lee v. PP* [2006] 4 CLJ 359 were cited in support of the argument that was ventilated before us. We had considered those cases. What has become clear to us from those cases is that as the issue of a probable defence was not raised at the trial, it is not therefore the duty of the trial judge to embark on such an exercise. Indeed, in the Federal Court case of *Kenneth Fook Mun Lee v. PP*'s (*supra*) in the very passage cited to us by learned counsel, "… for to do so would not be in consonance with the relevant provisions as set out in the Criminal Procedure Code ("CPC")". What is trite is that the trial judge must consider a defence put up by the accused person however weak it may appear. But having said that, it is also clear to us that there is nothing to stop the trial judge, in 'appropriate case' (*Kenneth Fook Mun Lee*'s case (*supra*)) and 'in a suitable case' (*Chan Chor Shuh*'s case (*supra*)) to embark on such exercise, depending as it were, on the circumstances of the case, even though the issue that may amount to a probable defence open to the accused person, was never raised by the defence counsel. Indeed, the learned Court of Appeal Justices in the *Chan Chor Shuh*'s case (*supra*) had cited the English case of *R v. Porritt* [1961] 45 Cr App R 348 which made the following acute observation like so:

> ... but there is ample authority for the view that notwithstanding the fact that a particular issue is not raised by the defence, it is incumbent upon the judge trying the case, **if the evidence justifies it**, to leave such issue to the jury. (emphasis added)

[49] Again, that approach, as we understand it, recognises that such course of action by the trial judge must be driven, as it were, by the nature and state of the evidence that was staring into the face of the court, such that grave and manifest injustice could be visited upon the accused if the court so faced with such compelling evidence, were to refuse to act on it. So, it is not an absolute rule, if ever there is one, but instead, it depends on the exercise of discretion by the trial judge, which again must necessarily be dictated by the nature of the evidence that has face flown across the face of the court, so to speak.

[50] So, it was argued with much persuasion before us by learned counsel for the first appellant that the circumstances in this case ought to warrant a finding of culpable homicide against his client, the first appellant. Indeed, the test to apply in determining whether an impugned act is one of murder or one of culpable homicide has been laid down with great clarity by Raja Azlan Shah FCJ (as His Highness then was) in the *Tham Kai Yau*'s case (*supra*) like so:

> ... Whether the offence is culpable homicide or murder, depends upon the degree of risk to human life. If death is **likely** to result, it is culpable homicide. If it is the **most probable** result, it is murder. (emphasis added)

[51] Applying the principle, as we understand it to be, to the evidence before the learned trial judge, we are of the view that the issue of him having to consider the probable defence of culpable homicide did not arise. The need for him to undertake such exercise as suggested by learned counsel for the first appellant did not arise, in the circumstances of this case. We now would allude to the case of *Tham Kai Yau & Ors v. PP* [1976] 1 LNS 159; [1977] 1 MLJ 174 where the learned justices of the apex court had said:

> The deliberate use by some men of dangerous weapons at another leads to the irresistible inference that their intention is to cause death. This inference should therefore make it a simple matter to come to a decision as to intention, in any case, such as the present, where the weapons used by the appellants were a deadly weapons and where the person was struck more than one blow.

[52] Let us look at the evidence pertaining to the injuries suffered by the deceased in this case. We have the evidence, led before the learned trial judge that there were numerous injuries inflicted by the appellants on the person of the deceased. Learned Mr. Deputy had directed our attention to the evidence of the government pathologist (PW18) where it was established that the deceased had suffered numerous injuries on his head, face, neck, body and both upper and lower limbs as enumerated in his post mortem report, exh. P-82. There were 19 injuries found on his body and on the lower limbs of the deceased. 19 external injuries were found at the head area of the deceased alone. Then there were three injuries found beneath the skin of his head, bleeding around the brain as well as swelling of the brain. There were definitely more than one injury that was sustained by the deceased.

[53] In light of the nature of the overall evidence led by the prosecution against all the appellants, the need for the learned trial judge to consider the probable defence of culpable homicide in this case did not arise. From the nature of the injuries inflicted on the deceased and where on his person those injuries were inflicted, it is clear that the most probable result of such

inflicted injuries would be the death of the deceased. Indeed he had succumbed to those injuries. We quote the relevant part of the judgment of the Federal Court in the case of *Rusman Sulaiman v. PP* [2013] 4 CLJ 305:

> Even though ss. 299 and 300 of the Penal Code equally contemplate death, the scenario here is that the degree of risk to death is past that of being the likely result but the most probable result, and that the Appellant knew death would ensue [the subjective ingredient].

[54] In our view, that would neatly encapsulate the irresistible conclusion that must be arrived at in light of the evidence before the learned trial judge. The evidence before him had, to our mind, justified his finding of murder of the deceased having been committed by the appellants. We see nothing patently erroneous in his approach in so concluding the way he did.

[55] In the upshot, we are of the view that the learned trial judge did not err when he did not consider the probable defence of culpable homicide that could be open to the first appellant. First, that issue was not raised before him. Second, looking at the nature of the evidence led in this case, the need for such an exercise to be undertaken, with respect, did not arise. The compelling probability, as opposed to the mere likelihood of death to occur to the deceased, as a result of the injuries inflicted on him by the appellants, was all too clear to fathom from a proper appreciation of the evidence that was led during trial. The fact that the learned trial judge had found the appellants guilty of murder is, to our mind, amply supported by the evidence before him. As such, we see no merit in the ground on this issue as raised by learned counsel for the first appellant.

Issue Of Common Intention: Whether Need To Differentiate The Roles Of Accused Persons.

The Operation Of s. 34 Penal Code

[56] It must be recalled that the charge against the appellants had employed the operation of s. 34 of the Penal Code. What that means is that the appellants had acted in furtherance of their common intention of them all when they committed this offence of murder. How this section operates has been succinctly described by the Privy Council in the case of *Mahboob Shah v. Emperor AIR* [1945] PC 118 where it was held that:

> To invoke the aid of s. 34 successfully, it must be shown that the criminal act complained against was done by one of the Appellant persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any of the persons in the same manner as if the act were done by him alone.

[57] Their Lordships then went on to say the need to establish that there was a pre-arranged plan among all of the appellants to commit the crime. Once that is established, then any act done by any of them is done in furtherance of their common intention. In the case of *Khairul Edam bin Adam & Anor v. PP* [1999] 2 SLR 57 it was ruled that "… the plan could develop on the spot. What was required was a meeting of the minds or acting in concert".

[58] Applying s. 34 Penal Code to the evidence in this case, to our mind, is justified. From the evidence of PW12 it was clear that there was a common intention among the appellants as could be seen where earlier on in the evening before the incident, PW12 had seen them bringing items which she would later saw were used by the appellants to beat up the deceased. Important to note among these items had been the iron rod (P43A) which, according to the government pathologist, could have been used to cause the fatal injury suffered by the deceased that had caused the bleeding in his brain. Further, there was the uncontroverted evidence of PW12 whereby she said that she saw the appellants rushing out from their ambush position from under a nearby mango tree thereupon they had pounced on the deceased. That, to our mind had constituted a clear pre-arranged plan on the part of the appellants. Their attacks on the person of the deceased had been relentless. There were at least 19 external injuries on the head, as observed by the pathologist. Of these injuries to the head, the pathologist had described them as follows:

> Kecederaan kepala bahagian dalaman, 3 jenis kecederaan iaitu pendarahan bawah kulit kepala, pendarahan di keliling otak dan pembengkakkan otak.

[59] The fatal one was identified as the injury on the head caused by the iron rod (P43A). Under s. 34 it matters not who among the appellants had inflicted that fatal injury. As it was inflicted by one of them in furtherance of their common intention, as witnessed by PW12, all the appellants were criminally responsible, under the law, for the death of the deceased.

[60] Now, it was also argued before us that "the law on common intention also differentiates the roles between a principal offender and a secondary offender". The dissenting decision of learned Justice Syed Ahmad Helmy JCA in the case of *Raja Sanjivi & Satu Lagi v. PP* [2012] 1 LNS 1450 ("*Raja Sanjivi & Satu Lagi*'s case") was cited in support of that legal proposition by learned counsel for the first appellant. We were appraised by learned counsel during submissions that this dissenting judgment had found favour with the Federal Court on appeal, but we were not supplied with a copy of the apex court's decision by learned counsel.

[61] At the outset, we noted that the *Raja Sanjivi & Satu Lagi*'s case (*supra*) had concerned a drug trafficking case. It had involved two accused persons who were jointly charged under s. 39B of the Dangerous Drugs Act 1952. The prosecution there had employed in aid s. 34 Penal Code thereby alleging that there was a common intention between the two accused persons as was evident in the charge. Learned Justice Syed Ahmad Helmy JCA in dissenting from his two learned brothers, had said at pp. 13 to 14 in his grounds of decision thus:

> On the co-relation between common intention and section 37(da) DDA 1952 I agree with the submission of learned counsel for the Second Appellant that in order to fasten constructive liability on the Second Appellant for the criminal act of the First Appellant for the offence of trafficking in dangerous drugs on a basis of a presumption of trafficking under section 37(da) DDA 1952, it must be proven that the common intention was to in possession of not just any amount of the drug in question but specifically an amount in excess of the minimum amount stated in section 37(da) DDA.
>
> Thus it would not necessarily follow that the presumption of trafficking under section 37(da) DDA 1952 which fastens on to any person who is found in possession of quantities of dangerous drugs enumerated in the section 37(da)(i) to 37(da)(xxv) of the Act which is applicable to the person in actual possession of the drugs should be equally applicable to a secondary offender like the Second Appellant herein. For section 37(da) presumption of trafficking, if s. 34 were to apply, it would not be sufficient for the Second Appellant as the secondary offender to have subjective knowledge that some amount or weight of drugs is in the possession of the First Appellant as the primary offender. The Second Appellant as the Secondary Offender has to have subjective knowledge that the weight of drugs in possession of the First Appellant as the primary offender is in excess of the quantity enumerated in section 37(da) of the Act. (See *Daniel Vijay s/o Katherasan & Ors v. PP* [2010 4 SLR 1119).

[62] The learned justice in his dissenting judgment, had gone on to state that the second appellant in the *Raja Sanjivi & Satu Lagi*'s case (*supra*) namely, Krishnan was an innocent bystander in which case it was opined by the learned Justice Syed Ahmad Helmy that the "mere fact of presence could be equally consistent with innocence as with guilt". (See the case of *Wong Nyet Wah v. PP* [1962] 1 LNS 208; [1962] MLJ 312). In fact, from the evidence as recorded by the learned High Court Judge, Justice Ahmad Syed Helmy was of the view that there was not sufficient evidence to justify a finding that there was a common intention between Raja and Krishnan. In short there was no pre-arranged plan between them. He had also cited Lord Reading CJ in the case of Gray 12 Cr App Report 244 as follows:

> Equally it must be borne in mind that the mere fact of standing by when the act was committed is not sufficient. A man to become amenable to the law must take such a part in the commission of the crime as must be the result of a concerted design to commit the offence.

[63] Seen in that context, therefore, it was clear that s. 34 Penal Code was not applicable to the circumstances in the *Raja a/l Sanjavi*'s case (*supra*). On the facts, we are in agreement that Krishnan was rightly acquitted of trafficking as common intention was not established. However, with respect, it is clear in our mind that Krishnan was not acquitted because he had played a lesser role in the commission of the crime. Being an innocent bystander, as found by learned Justice Ahmad Helmy, common intention could never be invoked in aid by the prosecution, as there was plainly no pre-arranged plan. The basis for s. 34 Penal Code to operate simply did not exist, let alone flourish, in such a circumstance.

[64] But with respect, the circumstances in this case before us, as shown by the evidence as led by the prosecution, are entirely on a different footing altogether. We had alluded to the first appellant's role earlier in this decision. Clearly, he can hardly be likened to Krishnan in the *Raja Sanjivi & Satu Lagi*'s case (*supra*). Definitely he was not an innocent bystander.

[65] Therefore the participation of the first appellant in our present case cannot, by any stretch of imagination, be equated with that of the second accused person in the *Raja Sanjivi & Satu Lagi*'s case (*supra*). To our mind, once common intention is shown to exist, thereby connoting a pre-arranged plan among the accused persons, then, any act however small done by any one of them, as long as it is done in furtherance of a common intention, he is liable for the offence, as if the offence is committed by him alone. That is the process under s. 34 Penal Code in order to determine liability of persons acting in furtherance of a common intention. The issue of whether an accused person is a primary or a secondary participant on account of his degree of participation in the commission of the offence does not, with respect, arise at all in such determination. All of them are equally as guilty as long as they contribute acts which are done in furtherance of their common intention. In that regard, it must be reiterated that there is common intention proven to have existed among them. Once that pre-condition is fulfilled then any act done by any of them in furtherance of that common intention, is deemed as 'shared' among them. If at all, the different degrees of participation among the accused persons may be considered by the court, in passing sentence, if they are found guilty and are convicted by the court. In other words, it may be relevant in mitigation. But in terms of attaching liability, a consideration of the degree of participation by the various accused persons in the commission of the offence, with respect, ought not to happen.

[66] Premised on the above, we are not able to agree with learned counsel for the first appellant that his client ought to be treated differently from the other appellants when determining liability. We cannot find sufficient body of jurisprudence to be able to accede to such submissions by learned counsel for the first appellant. Suffice to say that once s. 34 Penal Code applied

against all the appellants, in that they had acted in furtherance of their common intention, each of them is liable for that act in the same manner as if the act were done by him alone. In common parlance, all the appellants in our instant appeal were in it together.

[67] On the overall perusal of the defence as set out by the appellants, we are of the view that the learned judge had appreciated them judicially and found that the defence of the appellants had amounted to no more than a mere denial. He had preferred the evidence of the prosecution witnesses to the evidence of the appellants. He had the distinct advantage of having the audio-visual observation of all the witnesses who had testified before him and as the primary trier of facts we had to defer to his findings. We do so because it was not shown to us that he had committed clear and obvious material errors in concluding the way he did, which would otherwise have warranted our appellate intervention.

Conclusion

[68] The evidence, as led by the prosecution through its witnesses, coupled with the bare denial defence, had led the learned trial judge to arrive at his ultimate decision that the appellants were guilty of the offence of murder as per the charge. The learned trial judge had directed himself correctly when he found that prosecution had proven its case against all the appellants beyond reasonable doubt and that none of the appellants had raised any reasonable doubt on the prosecution case, as to their guilt. (See, case of *Mat v. PP* [1963] 1 LNS 82; [1963] MLJ 263.) We are unable to find any cogent reason to disturb his findings, both in fact and in law. The appeals of all the appellants are hereby dismissed. We therefore affirm the decision of the learned trial judge both in respect of the convictions entered against all of the appellants as well as in respect of the sentences as imposed by him on the respective appellants.

Order accordingly.