

**IN THE COURT OF APPEAL MALAYSIA
[APPELLATE JURISDICTION]
CRIMINAL APPEAL NO. C-05-27-06**

AZHAR BIN CHE WIL

...APPELLANT

V

PUBLIC PROSECUTOR

...RESPONDENT

[In the matter of the High Court Malaya at Kuantan
Criminal Trial No. 45-(46)-3-2004

Public Prosecutor

v

Azhar bin Che Wil & 6 Ors]

HEARD TOGETHER WITH

CRIMINAL APPEAL NO. C-05-94-05

PUBLIC PROSECUTOR

... APPELLANT

V

TEYUN THIAN EIM & 3 ORS

... RESPONDENT

[In the matter of the High Court Malaya at Kuantan
Criminal Trial No. 45-(46)-3-2004

Public Prosecutor

v

Azhar bin Che Wil & 6 Ors]

**CORAM: SURIYADI HALIM OMAR, JCA
WAN ADNAN MUHAMAD, JCA
MOHD HISHAMUDIN HAJI MOHD YUNUS, JCA**

JUDGMENT OF THE COURT

These two appeals, C-05-27-06 and C-05-94-05, are connected. They originated from criminal trial No. 45(46)-3-2004, where seven persons were charged for murder under s.302 of the Penal Code read together with s.35 of the same Code. All the accused persons in the above case are prison officers and personnel from Penjara Penor, Kuantan.

At the trial, before the commencement of the submissions but still at the prosecution's stage, the learned Deputy Public Prosecutor (DPP) conceded that no prima facie case had been established against the sixth accused person, whereupon he was acquitted and discharged. At the close of the prosecution's case, after hearing the submissions of accused persons 1, 2, 3, 4, 5 and 7, the court only called the first accused person to enter his defence, and acquitted accused persons 2, 3, 4, 5 and 7. At close of the defence case the learned trial judge found that the first accused person had failed to cast any reasonable doubt on the prosecution's case and therefore found him guilty. He was accordingly convicted of the charge of murder and sentenced to death.

Pursuant to the order of acquittal of accused persons 2, 3, 4, 5 (hereinafter referred to as respondents) and 7, the Public Prosecutor filed the notice of appeal against the acquittal, registered as C-05-94-05, whilst the convicted accused person, hereinafter referred to as the 'appellant' filed appeal C-05-27-06. Prior to this hearing before us, the Public Prosecutor, vide notice dated 26.12.2001, withdrew the appeal against accused person no. 7 (Ismail @ Mat Daud bin Ideris) hence leaving only the remaining four respondents of C-05-94-05. For the hearing of these appeals, the Public Prosecutor was represented by two deputy public prosecutors, namely, Encik Awang Armadajaya and Encik Saiful Edris.

I decided to hear the appeals together as the facts are connected. The charge against the appellant and respondents reads as follows:

“Bahawa kamu bersama-sama pada tarikh 1.3.2004, di antara jam pukul 4.00 petang hingga 7.00 petang, bertempat di Penjara Penor, Kuantan dalam Negeri Pahang, telah melakukan pembunuhan ke atas MOHD SHUKRI B. MOHD YUSOF KP No. 850404-06-5179, dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 dibaca bersama seksyen 35 Kanun Keseksaan.”

Briefly, the facts of the appeals are as follows.

On 1 March 2004, Mohd Shukri Bin Mohd Yusof (the deceased) a young man of 19 years, who at that time was under remand at the prison, attempted to escape from the Penor Prison at about 4.10 p.m. His attempt was discovered and the alarm was raised. At about 4.45 p.m. i.e. about 35 minutes later the prison authorities captured him in an area known as Zone Nenas, which is nearby the officers' quarters, and he was brought to the main gate of the prison through a football field. A few prison officers assaulted him at the main gate; thereafter he was taken to the Bilik Unit Kawalan Keselamatan Penjara (the prison lock-up) by a few prison personnel, including SP10 (Sopian Yadi bin Hamzah). SP10 testified that he brought the deceased to the lock-up and saw that the latter was uninjured when depositing him there. In fact the deceased replied verbally to his query as to why he attempted to escape. In other words, the deceased was conscious at that point of time.

At about 5.20 p.m. the appellant, being the officer in charge of the lock-up unit, had directed SP7 (Razali bin Fauzi), a subordinate officer of his, to escort the deceased to the lock-up. On the way to the room, SP9 (warden Khatijah binti Adam) cautioned the four prison wardens who escorted the deceased that he was her relative. Upon arrival at the lock-up room, the appellant ordered those wardens to leave him with the deceased with the exception of SP7. Thus, only three persons stayed behind in that lock-up, that is to say, the appellant, SP7 and the deceased.

In the lock-up the deceased sat on the floor, with his hands handcuffed at the back. The appellant then began kicking and stomping on the head of the deceased causing his head to hit the concrete wall and concrete floor of the room. SP7 saw blood coming out from the mouth of the deceased. The deceased then went into a seizure and lapsed into a coma.

The prison medical assistant arrived subsequently and advised that the deceased be taken to the hospital; but he was only sent to the hospital at about 7.00 p.m. where he remained in coma without regaining consciousness, until he died on 10.3.2004.

SP7 related what happened in the lock-up. He said:

“Saya panggil orang tahanan bangun dan memberitahunya yang saya hendak bawa dia ke bilik UKP.

Saya buka lock-up dengan guna kunci. Kunci itu diberi oleh I.P. Azhar Che Wil.

Tahanan itu bangun dan berjalan ke bilik UKP. Tahanan tersebut nampak keletihan sedikit. Tahanan itu diikuti oleh I.P. Azhar Che Wil. Empat warden penjara: Karim bin Mamat dan yang 3 lagi saya tidak ingat nama, sebab anggota baru. Semasa dalam bilik I.P. Azhar telah arahkan supaya warden penjara itu keluar.

Mereka berempat pun terus keluar Semasa saya berada dalam bilik saya lihat I.P. Azhar memakai sarong tangan getah, yang biasa digunakan untuk periksa banduan. Tahanan tersebut bersandar dalam dalam keadaan bergari di belakang berhampiran penjuru bilik UKP. Dia dalam keadaan duduk. Masa itu saya atas kerusi.

Setelah sarong tangan dipakai, I.P. Azhar tiba-tiba terus memukul tahanan tersebut iaitu dengan menyepak, menendang, menerajang di kepala bertalu-talu serta beberapa kali terhantuk di dinding dan juga di lantai. Saya lihat I.P. Azhar menendang dan menyepak tahanan di badan dan di kepala, sambil mengeluarkan kata-kata "kamu ni menyusahkan orang" beberapa kali. Semasa kejadian itu, saya hanya melarang I.P. Azhar dengan kata-kata "Apa ni tuan? Apa ni tuan?" Tidak ada reaksi apa-apa daripada I.P. Azhar. Setelah itu saya melihat tahanan tersebut mengelupur dan kakinya kejang.

....

.... Selain daripada kaki tahanan kejang, saya lihat di mulutnya keluar seketul darah dan diikuti oleh darah yang lain keluar dari mulutnya."

In brief, SP7 testified that the deceased had walked to the lock-up unassisted, though he appeared slightly tired. There, in his (SP7) presence, the deceased was violently and incessantly assaulted on

the body and head by the appellant, and the deceased's head was banged a few times on the concrete floor and wall. He then had a seizure and his leg stiffened. A lump of blood came out of his mouth followed by a flow of fresh blood.

The learned trial judge having observed the demeanour of SP7, who was the subordinate to the appellant and under the same unit, found that he was a truthful witness. There is no evidence that suggests of any possible animosity or enmity between SP7 and his superior, against whom he had testified.

According to the pathologist and forensic expert SP6 (Dr Zahari bin Noor), the injury to the head was caused by multiple blunt trauma to the head. That multiple blunt trauma caused serious injury to the head resulting in sub-arachnoid haemorrhage in the brain area. The relevant part of SP6's evidence, which includes the medical report reads as follows:

“Saya jalankan bedah-siasat. Hasil daripada pemeriksaan: pada luaran, didapati:

25 kecederaan pada badan simati, iaitu:

1. Luka lebam pada kedua-dua Orbit (bahagian mata), yang sampai ke kelopak mata.
2. Luka calar berukuran 4 cm panjang pada tengah dahi kanan.
3. Luka calar pada dahi kiri di atas bahagian orbit mata kiri, berukuran 3 cm panjang.

4. Luka calar dan bengkak pada muka sebelah kiri, berukuran 3 cm x 2 cm; terletak 2 cm di hadapan telinga kiri.
5. Luka calar pada bahagian kepala kanan, bahagian temporal berukuran 3 cm x 2 cm; terletak 5 cm di belakang telinga kanan.
6. Sekumpulan luka calar berganda pada pangkal leher hadapan berukuran antara 4 cm – 7 cm panjang.
7. Luka calar berbentuk linear, pada lengan atas kanan berukuran 4 cm panjang.
8. Luka lacerasi berukuran 1 cm x 1 cm pada lengan bawah kanan, 2 cm daripada pergelangan tangan.
9. Bahagian atas dan tengah dorsal lengan bawah kanan – luka calar berganda berukuran antara 2 cm – 10 cm.
10. Luka calar berganda pada bahagian kanan pinggang, berukuran 6 cm x 6 cm.
11. Luka lebam dan calar yang terletak di atas luka yang ke 10, berukuran 1 cm x 1 cm.
12. Luka calar berganda pada bahagian bahu atas sebelah kiri; berukuran 8 cm x 3 cm.
13. Luka calar berganda pada bahagian lateral tengah bawah lengan kiri;-
3 cm x 2 cm
14. Luka calar pada siku kiri, 1 cm x 2 cm.
15. Luka calar berganda pada dorsal dalam lengan bawah kiri; 8 cm x 6 cm.

16. Dua luka lacerasi di bahagian dorsal, medial pergelangan tangan kiri:
2 cm x 1 cm dan 1 cm x 1 cm.
17. Luka calar berganda pada dada hadapan sebelah kiri:
8 cm x 7cm; ada 4 luka yang berselari, yang berukuran 8 cm x 7 cm, 4 – 5cm, dan jarak ialah 1 cm antara satu sama lain. Ada luka yang lebih lebar, iaitu 1 cm lebar. Luka-luka ini seperti kesan tapak kasut.
18. Luka lacerasi yang kecil pada lutut kiri: 3 cm x 2 cm.
19. Luka calar pada lutut kanan; 1 cm x 1 cm.
20. Luka lacerasi pada bahagian dorsal kaki kiri (tapak kaki) di bawah ibu jari: 2 cm x 1 cm.
21. Luka lacerasi pada bahagian dorsal kaki kiri, di bawah sendiri jari kaki ke 2: 1 cm x 1 cm.
22. Luka calar pada bahagian hadapan betis kanan: 2 cm panjang.
23. Dua luka calar, bentuk “tram-line”, melengkung ke dalam, arah ke atas, pada bahagian belakang – dibelakang tulang scapula kanan: 7 cm panjang dan jarak ialah 1.5 cm.
24. Dua luka calar bentuk tram-line – bahagian belakang dada, di bawah luka No.23, arah melintang dan berukuran 6 cm panjang dan jarak 1.5 cm;
25. Dua luka calar bentuk elictical (semi circle) – dua luka hampir bertemu, bentuk U: 6 cm x 1.5 cm; pada bahagian punggung kanan.

Luka-luka ini menunjukkan kesan-kesan “process healing”.

Anggaran

Luka-luka ini berumur antara 7 – 14 hari.

Saya juga dapati pada bahagian kiri kepala, kesan luka pembedahan yang masih berjahit: 8 jahitan. Ini adalah kesan pembedahan.

Hasil daripada pemeriksaan dalaman, saya telah periksa kepada kepala: Terdapat pendarahan pada lapisan kulit kepala, sebelah kiri belakang “prietobecital” dan bahagian kepala sebelah kanan “frontal”.

Saya telah membuat pembedahan pada bahagian otak. Didapati lapisan otak banyak pendarahan yang nyata adalah pendarahan “sub-arachnoid” yang menyeluruh pada bahagian otak. Ada juga tumpok-tumpok pendarahan “sub-dural” pada bahagian otak. Dan juga terdapat pada kiri otak kesan extra-dural pendarahan.

Kesimpulan dari kecederaan yang ditemui, sebab kematian adalah kecederaan dalam kepala yang disebabkan oleh trauma tumpul yang berganda. Trauma tumpul berganda ini disebabkan oleh perbuatan ataupun tindakan pukulan atau hentakan atau tendangan atau hentaman pada permukaan yang tumpul, seperti dinding atau lantai atau tanah.

....

Perbezaan antara sub-dural heamorrhage dan sub-arachnoid heamorrhage – kedua-duanya adalah kecederaan di kepala, tetapi “sub-arachnoid” adalah kecederaan pada lapisan otak yang lebih bawah dan lebih menyeluruh, sementara “sub-dural” ia adalah kecederaan pada lapisan otak yang lebih atas dan tidak menyeluruh, ianya localize, “Sub-arachnoid” adalah lebih menunjukkan kecederaan otak yang lebih teruk.”

Reflecting on the physical cause of death, i.e. the multiple blunt trauma to the head, only the incident at the lock-up could indicate the whereabouts, time and how the fatal injury was inflicted on the deceased. Considering the evidence as a whole, I was satisfied that:

- (i) there was no evidence to show that the “multiple blunt trauma” to the head that caused the haemorrhage to the brain occurred at the football field or at the main gate; hence the correctness of the learned judge’s finding that only the appellant had caused the death to the deceased;
- (ii) there was no evidence to show that there were some intervening causes that could have disturbed the sequence of events and exonerated the first accused. In a nutshell there was no break in the chain of causation in that the deceased had

immediately been taken to hospital after the assault, and had remained comatose until his death; and

- (iii) the swiftness of the death i.e. within ten days, discounts any doubt of intervening factors whether factually or legally that injury was the cause of the death (*D Yohannan v State of Kerala (AIR) 1958 Ker 207*). The death was too proximate to the act of violence.

Many provisions of the Penal Code specifically spell out the need for mens rea, and even indicate exactly the species of mens rea to be established. Some examples are s.142 of the Penal Code which provides that an offence is committed if he “*intentionally* joins” an unlawful assembly, or an offence is committed if a person “*knowing* any drug...to have been adulterated”....sells such drug (under s.275), or an offence is committed by doing ‘any *rash* or *negligent* act under s.304A, or s.377 that requires “*voluntarily*”, s.415 demanding “*fraudulently*” etc. (*Criminal Law in Singapore and Malaysia by KL Koh, CMV Clarkson and NA Morgan*). Having said that, there are ample authorities to suggest that to ensure protection of liberty, unless a statute clearly rules out mens rea as a constituent part of a crime, a person should not be convicted unless guilty mind has been established (*Brend v Wood (1946) 62 TLR 462*).

S.302 of the Penal Code is silent as to the specific intention requirement as it merely reads, “Whoever commits murder shall be punished with death.” Yet, not unlike some of the abovementioned

Penal Code provisions, the specific intention is legislated under the connected provisions, and they are as follows:

“299. Whoever causes death by doing an act with the *intention* of causing death, or with the *intention* of causing such bodily injury as is likely to cause death, or with the *knowledge* that he is likely by such act to cause death, commits the offence of culpable homicide.”

“300. Except in the cases hereinafter excepted, culpable homicide is murder –

- (a) if the act by which the death is caused is done with the *intention* of causing death;
- (b) if it is done with the *intention* of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
- (c) if it is done with the *intention* of causing bodily injury to any person, and the bodily injury *intended* to be inflicted is sufficient in the ordinary course of nature to cause death; or
- (d) if the person committing the act *knows* that it is so *imminently* dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of

causing death, or such injury as aforesaid
(emphasis supplied).”

The above s. 299 in brief defines the offence of culpable homicide whilst s.300 provides that murder is a type of culpable homicide, with death being the only punishment if found guilty of murder. Be it for murder or some other form of culpable homicide the *actus reus* is causing the death of a human being.

Applying the above provisions of sections 299, 300 and 302 of the Penal Code to the facts of the case, for the appellant to be guilty of the crime of murder, apart from establishing that he caused the death of the deceased, it is also incumbent upon the prosecution to show that he did it in circumstances that fall squarely within one of the limbs of s.300. Here he had committed an act that falls squarely within limb (c) of s.300 of the Penal Code, an act done with the *intention* of causing bodily injury to the deceased; and the bodily injury *intended* to be inflicted was sufficient in the ordinary course of nature to cause death. The prosecution had successfully established that specific *mens rea* (mental element) for the bodily injury, which eventually led to the resultant death, as seen from the manner the head of the deceased was kicked and stomped against the concrete wall and floor. The evidence of the repeated assaults on the head of the deceased, looking at it objectively, was more than sufficient to establish the requisite intention as prescribed by the 3rd limb of s.300 of the Penal Code (*Rajwant Singh v. State of Kerala AIR [1966] SC 1874*).

As regards whether the inflicted injury was sufficient in the ordinary course of nature to cause death, the learned judge made a correct finding of fact when he stated so positively after having evaluated the evidence. He authored:

“Every Tom, Dick and Harry, as human beings, is fully aware that the head is a vulnerable and vital part of a human being. One need not be in the medical field to know such basic fact. It therefore flows that any hard kicking and stomping of the head and especially repeatedly against a hard surface like a concrete wall or a concrete floor, can cause injuries that is sufficient to cause death in the ordinary course of nature.”

The learned judge had correctly alluded to *Mohamed Yasin bin Hussin v. PP* [1976] 1 MLJ 156, where the Privy Council had held that:

“..he intended to inflict upon her the kind of bodily injury which, as a matter of scientific fact, was sufficiently grave to cause death of a normal human being of the victim’s apparent age and build even though he himself may not have had sufficient medical knowledge to be aware that its gravity as such as to make it likely to prove fatal.”

In the present case, the force applied by the first appellant was so overwhelming that serious bodily injury was a certainty.

Penal statutes from early times have always been construed rather strictly, and with individual liberties a favourite topic, they are also construed in favour of the subject, especially provisions relating to the offence of murder (*R v Champman* [1931] 2 KB 606/609; *King v Aung The Nyun*, AIR Rang 259 (FB)). In modern times, a change has taken place in that such statutes are to be construed fairly like other statutes according to the intention of the Legislature. The paramount duty now is to put the words into effect, "honestly and faithfully, its plain and rational meaning and promote its object" (*State of Bombay v Jal K Patel* (AIR) 1951 Bombay 203). There is thus no necessity to strain the words and phrases when they cannot be strained beyond their ordinary meaning. They should be given their natural meaning when the words are perfectly plain.

In the current case, the second part of the requirement of the third limb of s.300 as promulgated by Parliament is not of whether he foresaw the likely result of death, or had intended the result, but that the injury was sufficient in the ordinary course of nature to cause death. The words are clear and simple and they are exactly as what have been legislated. If the injury was sufficient in the ordinary course of nature to cause death, then the first appellant must face the charge of murder. The first appellant will have to take the deceased as he finds him, in a mental and physical sense. He has to assume the responsibility of the risk of the death when he undertook the act of assaulting the deceased violently to the point of comatose and culminating in death.

The Indian Penal Code has a similar provision to the Malaysian provision of murder, though not in pari materia, with the Malaysian third limb of s.300 of the Penal Code, and it reads:

“S.300. Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death,-or

2ndly-....

3rdly- If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or....

Illustrations

(a)....

(b)....

(c)....A, intentionally gives Z a sword cut or club wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here A is guilty of murder, although he may not have intended to cause Z's death.”

In *The Indian Penal Code by Ratanlal & Dhirajlal, Twenty Ninth Edition 2002* at page 1172 the writer wrote:

“To attract the provisions of clause thirdly of Section 300, I.P.C the prosecution should prove that the injuries on the person of the deceased were caused with an intention to

inflict those injuries and none of the injuries was caused unintentionally. It should further be proved that the injuries caused to the deceased were sufficient in the ordinary course of nature to cause his death.

....

The third clause of this section views the matter from a general standpoint. Here the emphasis is on the sufficiency of the injury in the ordinary course of nature to cause death. The sufficiency is the high probability of death in the ordinary way of nature. When this sufficiency exists and death follows and the causing of such injury is intended, the offence is murder. Sometimes the nature of the nature of the weapon used, sometimes the part of the body on which the injury is caused and sometimes both are relevant.”

From the evidence of SP6, I was satisfied that there was sufficient injury in the ordinary course of nature to cause death. Here sufficiency was established by the evidence of the number of blows, the force and nature of the blows and the parts of the body afflicted, in particular, the head, intentionally inflicted by the first appellant on the deceased, and the eventual serious injury which led to comatose, and not just because he died.

Based on the evidence, I found no error in the factual finding of the learned judge when he called upon the appellant, to enter his defence at the close of the case for the prosecution.

It is my observation that the approach and emphasis in the appeal against the conviction by learned counsel for the appellant was directed more at some procedural defects, and the failure on the part of the trial Judge to reject the evidence of SP7, whose evidence had directly implicated the appellant to the murder. Learned counsel briefly mentioned the background of SP7, with the insinuation that he was a person of dodgy character and could have been the one who roughed up the deceased. However, this argument was not seriously pursued. The emphasis of counsel's submission was more on the learned judge's failure to amend the charge first before calling the defense, or even at the conclusion of the trial, and contended by counsel that a retrial should be ordered.

This new argument was made possible, as by consent, the appeal records were amended to include this argument as augmented in the notis usul, which reads:

“1. Mahkamah Yang Mulia ini membenarkan perayu untuk memasukkan ke dalam petisyen rayuan tersebut alasan tambahan yang berikut dan menghujahkannya pada pendengaran bagi rayuan ini:

(1) Yang Arif Hakim perbicaraan yang bijaksana tersilap dalam tidak meminda pertuduhan asal [dibawah seksyen 302 dan dibaca bersama seksyen 35, Kanun Acara Jenayah] kepada suatu pertuduhan dibawah seksyen 302

terhadap perayu pada peringkat penutupan kes pendakwaan selepas membebas dan melepaskan tertuduh 2, 3, 4, 5 dan 7....”.

The argument advanced by appellant’s counsel was that the learned trial judge was in error, in not amending the original charge under s.302 read with s.35 of the Penal Code, to one under s.302 only against the appellant at the close of the prosecution’s case after acquitting and discharging the respondents and the seventh accused person. Counsel pointed out that the appellant was still referred to as the first accused even at the defence stage. For ease of reference I reproduce s.35 of the Penal Code:

“Whenever an act, which is criminal only by reason of its being done with a criminal knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or intention, is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention.”

It is undisputed that the three alternatives were explained to the appellant in this case and he elected to give evidence under oath. At the close of the case for the defence, the appellant was found guilty, convicted, and sentenced to death but again the charge against the appellant was not amended. The appellant’s counsel argued that s.158 of the Criminal Procedure Code empowers the court to amend a charge before judgment is pronounced; and that sub-section (2) of

s.158 requires the amended charge to be read and explained to the accused. We reproduce below s.158. It reads:

“Court may alter or add to charge

158. (1)

(a)

....

(2) Every such alteration or addition shall be read and explained to the accused.”

The defence counsel submitted that by reason of the non-compliance of s.159 and s.162 of the Criminal Procedure Code, and in the interest of justice, having regard to the sentence of death, which had been passed against the appellant, an order for a retrial ought to be made. He even ventilated that due to that error in not amending the original murder charge this panel thus was without jurisdiction to reduce the charge. Regardless of that stance I was not unmindful of s.304 of the Penal Code, as learned counsel was asked whether the court was hindered from considering an offense under that section. He replied in the negative. Pertaining to this recourse, I need to state that having sifted the evidence, no redeeming features were found for the court to consider.

The relevant provisions of s.159 and s.162 are as follows:

“When trial may proceed immediately after alteration or addition

159. If a charge is framed or alteration or addition made under either section 157 or 158, the Court shall immediately call upon the accused to plead thereto and to state whether he is ready to be tried on the charge or altered or added charge. If the accused declares that he is not ready, the Court shall duly consider the reasons he may give and if proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after the charge or alteration or addition has been framed or made, proceed with the trial as if the new or altered or added charge had been the original charge.”

“Recall of witnesses when charge altered

162. Whenever a charge is altered or added by the Court after the commencement of the trial the prosecutor and the accused shall be allowed to recall or re-summon and examine, with reference to the alteration or addition, any witness who may have been examined, and may also call any further evidence which may be material.”

Encik Saiful, the learned DPP, submitted that as no amendments were done to the charge, therefore, sections 159 and 162 were inapplicable in the circumstances of the case. He further argued that the appellant was not prejudiced by the fact that the charged was not amended. I was in agreement with the submission of the learned

DPP that since there were no amendments done to the charge, therefore, s.159 and s.162 did not apply.

In the course of the deliberation, I was also mindful of s. 422 of the Criminal Procedure Code, which reads:

“Irregularities not to vitiate proceedings.

422. Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of –

- (a) any error, omission or irregularity in the complaint, sanction, consent, summons, warrant, charge, judgment or other proceedings before or during trial, or in any inquiry or other proceedings under this Code;
- (b) the want of any sanction, or
- (c) the improper admission or rejection of any evidences,

unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice.”

As regards the above provision, there is thus a need for some discussion on the phrase, “failure of justice’. In *Kiew Foo Mui & Ors v Public Prosecutor [1995] 3 MLJ 505*, the appellants were convicted of murder under s.302 of the Penal Code, read with s.34 of the Code.

The first and third appellants were sentenced to death whilst the second appellant was ordered to be detained. The prosecution's case depended upon circumstantial evidence and the cautioned statements of each of the appellants. The defence objected to the admissibility of the statements, whereupon witnesses were called by the prosecution to establish the voluntariness of the statements, and were cross-examined by the defence. The appellants gave evidence alleging that the cautioned statements were made due to inducement. The judge eventually held the statement admissible. When the trial proper resumed in the presence of the assessors, the cautioned statements were then read in evidence. However, the prosecution witnesses who had testified during the trial within a trial were not recalled by the prosecution to repeat their testimony before the assessors, nor did the defence apply to recall them for cross-examination. The issue before the court was whether the omission was so serious as to justify the quashing of the convictions. S.422 was considered in the course of the deliberation. The court opined that if the challenge to the admissibility of a confession fails in a trial within a trial, it was the duty of the prosecution to ensure that the evidence of the confession and the circumstances in which it had been obtained be given in the presence of the jury or the assessors. Here as the prosecution witnesses had not been recalled by the prosecution to repeat their testimony the defence had lost the opportunity to cross-examine them all over again on the issue of voluntariness. It was also held that it was of fundamental importance to the administration of criminal justice that the accused person should feel that he has had a fair trial. The mistake of his counsel in

omitting to apply for the recall of the prosecution witnesses did not relieve the prosecution of its duty to ensure that they were recalled, for to hold to the contrary would be to reverse the onus of proof with regard to cautioned statements, which at all times, lay upon the prosecution.

The court opined that the expression 'failure of justice' was synonymous with 'miscarriage of justice'. By the court's failure to recall the prosecution witnesses, the effect of the breaches was to sever an important artery of evidence for the consideration of the assessors in as far as the defence were concerned, thereby occasioning a failure of justice within the meaning of s.422 of the Criminal Procedure Code (FMS Cap 6).

S.422 enumerates the irregularities which do not vitiate proceedings (to use the words of the sub-title). It has the effect of curing both defects (error, omissions and irregularities as in limb (a)) (which may not be construed as substantive), as well as the shortcoming of (*total*) want of any sanction (limb (b)), and the improper admission or rejection of any evidence (limb (c)). The specific issue argued by learned counsel in this appeal inevitably falls under limb (a), which, inter alia deals with omissions, found in a host of factual situations pursuant to a trial, inquiry or proceeding under the Criminal Procedure Code.

In my view, with the benefit of being represented by counsel before the trial Judge, it was improbable that the appellant could have been

misled by the omission to amend the charge, or that there could have been a failure of justice by reason of the omission. Even if the law requires such an amendment, that omission was curable, and has not caused any injustice to the first appellant. Fortified by the provision of s.422 of the Criminal Procedure Code, I was satisfied that the finding of guilt, conviction and sentence passed by the learned judge trial were in order.

To conclude this appeal, based on all the above reasons, including the rejection of the argument on the non-amendment of the charge, this panel confirmed the finding of guilt, conviction, and the sentence of death as imposed by the learned trial Judge against the appellant; and accordingly dismissed his appeal (C-05-27-06).

I now move on to the Public Prosecutor's appeal against the acquittal of the four respondents (C-05-94-05). At the end of the hearing this panel dismissed the appeal against their acquittal. But what caused consternation in me was the pursuance of the appeal against the four respondents despite the admission by the Public Prosecutor of the death of evidence to successfully prosecute it. From the flow of events on that fateful day, the involvement of the respondents vis-à-vis the deceased may be segmented into three incidents according to the chronological order of events, and they are as follows:

- (i) in an area within the prison compound known as Zone Nenas, where the deceased was first

apprehended, with this incident implicating only the third respondent;

- (ii) at the football field, where the deceased was alleged to have tried to struggle free but prevented from so doing, in which only the fourth and fifth respondents were implicated; and
- (iii) at the main gate, where the deceased was assaulted by the second respondent.

The incident at the lock-up only implicated the appellant; and was without the presence of the four respondents. It was in evidence that after being assaulted, be it at the Nenas Zone, the football field or the main gate, the deceased was still able to walk unassisted to the lock-up room, where the appellant subsequently assaulted him to the point of comatose followed by death a few days later. At no time was the appellant present at the Nenas Zone, football field or the main gate, and likewise the four respondents were never in the lock-up room when the deceased was assaulted. With the prison's CCTV tape being inadmissible, the issue of identification of who assaulted the deceased outside the lock-up remains unresolved.

There was thus absolutely no evidence of any nexus between the appellant and the respondents and this was admitted by the learned DPP who dealt with appeal C-05-94-05. To regurgitate his concession, as per the notes of proceedings:

“Bob Arumugam: The four of them were never in the room. Judge finding of fact. 144RR....5 did not go out of room.

Awang (DPP): Saya silap. Mereka tiada di bilik. 4 respondents never met accused along the way.”

How could the respondent know the mind of the appellant as required by s.35, when they never met from 4.45 p.m. to 7.p.m on that fateful date? With the failure of the Public Prosecutor to establish the nexus between the appellant and the respondents, they could not be implicated with the murder of the deceased at all.

As said earlier, this panel had unanimously dismissed the Public Prosecutor’s appeal, and had accordingly affirmed the High Court order of the acquittal of the respondents (C-05-94-05).

My brother Justice Dato’ Wan Adnan Muhamad, JCA has read the draft copy of this judgment and agreed with the contents herein.

Dated this 25th day of May 2009

SURIYADI HALIM OMAR
Judge
Court of Appeal, Malaysia

CRIMINAL APPEAL NO. C-05-27-06

For the appellant :

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For the respondent:

Saiful Edris bin Zainuddin
Deputy Public Prosecutor
YB Peguam Negara

CRIMINAL APPEAL NO. C-05-94-05

For the appellant :

Awg. Armadajaya bin Awg Mahmud
Deputy Public Prosecutor
YB Peguam Negara

For the respondents :

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Messrs Vendargon & Partners

Mohd Sukri Mohamed (2nd Respondent)
Messrs Wan Haron Sukri & Nordin

Bob Arumugam (3rd Respondent)
Messrs Bob S. Arumugam & Co.

Richard Bong (4th Respondent)
(Aida Rahayu Abdul Rahman with him)
Messrs Bong & Co.