



A           The charge preferred against the Respondents was as follows:

B           “Bahawa kamu bersama-sama di antara 23.12.1998 jam lebih kurang 9.00 MALAM hingga 24.12.1998 jam lebih kurang 5 petang di antara Jalan Solok Sembilan, Seberang Jaya, Butterworth, Pulau Pinang hingga ke suatu kawasan parit di Kampung Padang Buluh, Tikam Batu, Kuala Muda, Kedah Darul Aman telah dengan sengaja membunuh seorang perempuan Ooi Yean Wah K.P. No. 741119-07-5340 dengan itu kamu telah melakukan kesalahan yang boleh di hukum dibawah Seksyen 302 Kanun Keseksaan yang dibaca bersama-sama dengan seksyen 34 Kanun Keseksaan “

C           The fact that the person named in the charge, Ooi Yean Wah (“the deceased”), had died has been proved by the evidence of the father and mother of the deceased (SP16 and SP17 respectively). There is also the testimony of Dr. Bhupinder Singh, the Consultant Forensic Pathologist (SP23) who conducted the post mortem, who testified that the cause of death of the deceased was fracture of the 2<sup>nd</sup> and 3<sup>rd</sup> cervical spine. He also testified that there was also a penetrating injury to left iliac crest of 2 cm depth.

D           The prosecution’s case against the Respondents rests on circumstantial evidence. The prosecution’s attempt to admit the trial records of another case involving the 1<sup>st</sup> Respondent (ID39) was not allowed by the trial Judge. The reasoning of the trial

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- A Judge in arriving at the conclusions which he did may be summarized as follows: Possession of items belonging to the deceased and the manner of how the 1<sup>st</sup> Respondent obtained such items had not been proved. The absence of motive, as well as the absence of any evidence as to how the deceased was killed were factors taken into consideration. Based on the evidence before him, they merely invited the Court to infer that it was the 1<sup>st</sup> Respondent who stole the deceased's car after she was killed, or, the probability that a third party had sold the deceased's car to the 1<sup>st</sup> Respondent. The prosecution's failure to prove "common intention" was significant. The trial Judge ruled that the probability of either one of the Respondents being the person who killed the deceased was insufficient for the Court to conclude that the Respondents were the persons who killed the deceased. He then concluded that the prosecution had failed to prove a prima facie case against the Respondents and acquitted and discharged them.
- D The DPP's arguments in this appeal focused on the High Court Judge's decision in not admitting ID39, the trial records involving the 1<sup>st</sup> Respondent to which he had pleaded guilty for an offence under section 304 of the Penal Code, i.e. that of causing the death of a female Chinese on 11.12.1998. The DPP submitted that earlier case had the following similarities to the facts of this case. The 1<sup>st</sup> Respondent had in that earlier case admitted to puncturing the tyre of his victim's car; that on the

A pretext of helping his victim, to having robbed the victim, and thereafter in driving away in the victim's car. According to the facts in ID39, in the course of committing the robbery, the victim was killed.

The DPP submitted ID39 was relevant and admissible pursuant to section 14 and 15 of the Evidence Act 1950, to show 'modus operandi'. She submitted that had the trial Judge admitted ID39, the Judge should then have made the following inferences. That this was not just an ordinary case of a theft of a motor vehicle. That the person who took the deceased car was the person who had killed her. The injuries inflicted on the deceased was by the use a weapon, such as a knife. On the facts of this case, there is the testimony of SP11 that the 1<sup>st</sup> Respondent had used a knife in puncturing the tyre of the deceased's car. The DPP submitted the trial Judge should have then further inferred that the person who committed these acts was the 1<sup>st</sup> Respondent as he had custody of the deceased's car on 24.12.98, soon after her death. Also significant, was the evidence the 1<sup>st</sup> Respondent meeting SP6 to make a false number plate to replace the existing number plate of the deceased's car.

The tests which have to be applied on the correctness of the decision of the High Court Judge in not admitting ID 39 in this case as laid out by the authorities cited before us are clear:

- A When a person is charged with a criminal offence, evidence that he had on other occasions been guilty of behaviour indicating a criminal disposition is ordinarily inadmissible. It is excluded because it is likely to be regarded as proving too much, and is for that reason likely to proceed upon prejudice rather than proof. In discussing section 14 and 15 of the Evidence Act 1950, the
- B Malaysian courts have relied on the Privy Council's decision of *Makin v Attorney General for New South Wales* [1894] AC 57, 65. In *Makin*, the issue before the Privy Council was whether it was wrong to admit evidence of the finding of other bodies other than the body of the child alleged to be Horace Amber Murray (deceased). The Privy Council laid down the propositions in
- C relation to the application of "similar fact" evidence as follows:

- D "It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried."

The Privy Council further states:

- E "On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were

A designed or accidental, or to rebut a defence which would otherwise be open to the accused. The statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other.”

B In *Reg. v Boardman* [1975] A.C. 421, 461 Lord Salmon states:

C “... evidence against an accused which tends only to show that he is a man of bad character with a disposition to commit crimes, even the crime with which he is charged, is inadmissible and deemed to be irrelevant in English law ...To admit such evidence would be unjust and would offend our concept of a fair trial to which we hold that everyone is entitled. Nevertheless, if there is some other evidence which may show that an accused is guilty of the crime with which he is charged, such evidence is admissible against him, notwithstanding that it may also reveal his bad character and disposition to commit crime.”

D In *R v Raju & Ors v R* (1953) 19 MLJ 21, 22 Spenser Wilkinson J ruled:

“Generally speaking the evidence of similar facts may be relevant for the following purposes, though this list may not be exhaustive:-

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1. To negative accident;
  2. To prove identity;
  3. Where mens rea is the gist of the offence, to prove intention; and
  4. To rebut a defence which would otherwise be open to the

A                   accused.

In my opinion it is of the greatest importance when evidence of this kind is tendered that the prosecution should tender it for a specific purpose and that, if it is admitted, it should be made quite clear for what purpose it is admitted.”

B                   The propositions laid down in *Makin* and *Boardman* has been recognized by the Malaysian courts. In *Junaidi bin Abdullah v PP* [1993] 3 MLJ 217, 218 the Supreme Court relied on Lord Morris’s judgment in *Boardman* and held:

C                   “(4) Where the purpose of adducing evidence of similar facts or similar offences was justifiable on the ground of relevancy and necessity to rebut any defence which would otherwise have been open to the accused (in addition to those under ss14 and 15 of the Evidence Act 1950), evidence of bad character was admissible in evidence, provided that the probative value of such evidence outweighed its prejudicial effect. There must be a real anticipated defence to be rebutted and not merely crediting the accused with a fancy defence. Here, the evidence of the physical possession of the revolver by another person during the earlier robbery was vital to the defence and relevant under s11 of the Evidence Act 1950 to cast a reasonable doubt on the prosecution case that the accused was in possession of the revolver at the time of the arrest. Therefore, the prosecution was entitled to adduce evidence to rebut such a defence.”

E                   The issue in this case is whether the similarities relied upon by the prosecution were unique or striking to reveal an underlying

A link between the matters with which it deals, and the allegations against the Respondents upon the charge under consideration such that common sense makes it inexplicable on the basis of coincidence. This task is ultimately one of judgment. It must go beyond showing a tendency to commit crimes of this kind. It must be positively probative in regard to the crime now charged.

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We are in agreement with the trial Judge's assessment that properly considered the evidence which the prosecution seeks to adduce as "similar fact" did not reveal features of such striking similarity as to be of positive probative value. The similarities raised relates to the surrounding circumstances. Causing the victim's tyre to deflate, of subsequently rendering assistance by changing the affected tyre, these features by itself in our view cannot by themselves lead to the conclusion that it was the 1<sup>st</sup> Respondent who committed the offence of which he now stands charged. The learned Judge was clearly in the circumstances of this case right in taking into consideration the fact that possession of items belonging to the deceased and the manner of how the 1<sup>st</sup> Respondent obtained such items had not been proved, as well as the absence of evidence as to how the deceased was killed. We agree with his finding that the evidence adduced merely invited the Court to infer that it was the 1<sup>st</sup> Respondent who stole the deceased's car after the deceased was killed, or, the probability that a third party had sold the deceased's car to the 1<sup>st</sup> Respondent. We agree that the failure to prove common

A intention was fatal.

In these circumstances the appeal was dismissed. The High Court Judge's decision in acquitting and discharging the Respondents was affirmed.

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ZALEHA ZAHARI  
Judge  
Court of Appeal  
Malaysia

Dated: 25.3. 2009.

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Note:

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For the Public Prosecutor ... Ms. Nurulhuda bt Mohd. Noor  
Timbalan Pendakwaraya  
Bahagian Pendakwaan  
Jabatan Peguam Negara  
Aras 7, Blok C3  
Pusat Pentadbiran Kerajaan  
Persekutuan  
62502 Putrajaya

D

For the Respondents ... Encik Mohd Radzuan bin Ibrahim  
(Encik Jamal bin Abas with him)  
Tetuan Radzuan Ibrahim & Co.  
Suite B9-3a, 4<sup>th</sup> Floor  
Dataran Palma, Jalan Selaman 1  
68000 Ampang

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