DALAM MAHKAMAH PERSEKUTUAN MALAYSIA
(BIDANG KUASA RAYUAN JENAYAH)
RAYUAN JENAYAH NO. 05-21-2007(P) & 05-22-2007 (P)

ANTARA

1. TAN KIM HO
2. HO JIN LOCK … PERAYU

DAN

PENDAKWA RAYA … RESPONDEN

KORAM: ZAKI TUN AZMI, CJ
ABDUL AZIZ MOHAMAD, FCJ
HASHIM DATO' HJ. YUSOFF, FCJ

JUDGMENT OF ZAKI TUN AZMI, CJ

1. This case is based purely on the finding of facts by the learned trial judge. There is hardly any new or novel point of law that needs to be considered. The laws that are relevant to the case have all been well established. The finding as to the identity of the Appellants which was upheld by the Court of Appeal are really all the facts in issue.

2. Nevertheless, I looked at and evaluated the evidence again. Below are my findings.

3. In addition, at this court and not at the courts below, the Appellants raised the question whether the trial judge had properly advised the Appellants of their rights at the close of the prosecution's case.

4. The 1st Appellant in Criminal Appeal no. 05-21-2007(P) was charged under section 3 of the Firearms (Increased Penalties) Act 1971 for discharging a firearm while committing a scheduled offence i.e. robbery. It resulted in the death of one M. Ramesh s/o M. Munisamy

and injury to one Edmund s/o K. Ganamuthu. The 2nd Appellant in Criminal Appeal no. 05-22-2007(P) was charged for being in the company of the 1st Appellant with reasonable knowledge that the 1st Appellant was in possession of a revolver and that the 1st Appellant had discharged a firearm with intention of causing death while in the course of robbery (a scheduled offence) and at the same time causing injury to the person earlier mentioned. These offences were alleged to have been committed on the 5.8.1992 at about 2:20am at a pub known as Hot Lips Lounge located at Jalan Pinang, Georgetown, Pulau Pinang.

5. On that unfortunate night, the witnesses and the deceased had decided to visit the pub because the deceased had completed a major project ("Oleh kerana si mati baru-baru menghabis satu kerja besar…"). That was at about 11:30 pm. At about midnight, there was a commotion between two groups of people in the pub. There was an altercation in Chinese. Suddenly the lights came on. Two of those who had been involved in the commotion approached the deceased and his friends. The 1st Appellant questioned the identity of the deceased as well as where he had come from. The 1st Appellant pointed the gun towards Edmund (PW6) and shot him. They were told to take out their wallets and money which they duly complied with and placed them on the table. These wallets and a gold chain were subsequently robbed off them. They were then asked to put their heads on the floor in a prostration position. Then after reloading his gun, the 2nd Appellant shot the deceased.

6. Both the 1st and 2nd Appellants were found guilty and convicted by the High Court. Their appeals to the Court of Appeal were both dismissed.

7. Both Appellants submitted that the trial judge had erroneously directed

the accused of their rights at the close of the prosecution's case.

8. It is to be noted that at the High Court the 1st Appellant was represented by a counsel, different from the one appearing in this court. The 2nd Appellant however was represented by the same counsel at all levels.

9. Counsel for the 1st Appellant at this court contended that at the close of the prosecution's case his client was wrongly advised by the trial judge of his rights. According to him, the judge had erroneously advised the 1st Appellant that if he elects to remain silent, he may not be deemed guilty. Counsel for the 2nd Appellant supported this contention for the benefit of his client.

10. The basis of the 1st Appellant's submission is what appears at page 202 of the record of appeal on 9th March 1999:

"Mahkamah : … Court also clarifies That (sic) the press reports on the proceeding on the last occasion when all counsel (sic) were present, to effect that the court could deem silence as admission as wholly erroreous (sic) and also inaccurate. The Court merely asked the 1st Defendant through interpreter when the Court was informed that the 1st Defendant elected to remain silent. Whether he knew what he was doing – namely by electing to remain silent. …

DPP : That was what I was informed.

Karpal : I agree the Court merely asked the 1st Defendant whether he was aware of what he was doing.

Encik Hullon : I confirm."

(Underlining mine)

11. This clarification by the learned trial judge, as the notes disclosed,

seems to be as a result of a wrong report in the press. The judge was clarifying the error that appeared in the media after the last adjournment probably on 4.2.1999. The notes are not too clear on this.

12. Counsel urged us to infer from the underlined words that what the Court meant was that it was wholly erroneous and also inaccurate to say that if the accused remain silent it would amount to admission. According to him, his client could have been made to understand that he would not be found guilty and be convicted if he chose to remain silent. This is obviously contrary to what the law is.

13. Counsel also submitted that when the judge said that he was obliged to convict once the accused chose to remain silent, it made his right to remain silent illusory and of no consequence. According to him, the accused was not explained the implications of remaining silent.

14. It is trite that notes of evidence recorded by a judge in his own hand writing is seldom done verbatim. Such notes are not meant to be a detailed recording. That is why they are called notes. They are a summary to reflect what had taken place in court during the proceedings. Each individual judge decides what is to be written and what is to be omitted. He decides on relevancy as well as the manner it is to be recorded. Under the present practice, he is the only person responsible for the corrections of the notes. Inadvertently, sentences may not be complete, spellings may be wrong, capital letters may appear at the wrong places and a sentence may not be correctly punctuated. The notes must be read in total. Notes taken down by a trial judge must necessarily be read in the context of the complete record of proceedings. Sentences must not be read out of context. But they must be accepted as final and correct unless parties can prove otherwise. It must be so because otherwise there will continue to be

disputes as to whether the trial judge had properly and correctly recorded the proceedings. The burden of proving that it is not properly recorded must necessarily fall on the party who claims that the notes are wrongly recorded.

15. In the case of *Renal Link (KL) Sdn. Bhd. V. Dato' Dr. Harnam Singh*[1], Gopal Sri Ram JCA had said the following:

> 'So far as procedure is concerned, we need look no further than the decision of the Singapore Court of Appeal in *Chan Kok Liang v. Tan Swan Cheng & Anor.* [1970] 2 MLJ 253, cited to us by Encik Joginder Singh. There, Wee Chong Jin CJ, said (at p. 254):
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> > "It is not the practice of the Courts in Singapore [and we add that the same may be said of Courts in Malaysia] to have a *verbatim* shorthand note taken of the entire proceedings in Court. If it is intended that any note taken by Counsel at the trial of an action be accepted as part of the notes of evidence for use by an appellate Court, it is desirable that the trial Judge and Counsel for the other party or parties should be supplied at the earliest possible opportunity with a copy of the note so made for correction or acceptance or otherwise. If the trial Judge and Counsel for all parties agree to the original or a corrected version then such agreed original or corrected version can properly be included in the record of appeal as part of the notes of evidence. Where no version can be so agreed, then in any application for leave to include the note made or taken by Counsel at the trial, the affidavit in support of the application ought to set out the circumstances under which the note was made or taken and the steps taken to obtain the agreement of all concerned together with all correspondence relating to the attempt to obtain such agreement."'

16. For this present case, no request or attempt had been made to correct or clarify the notes of evidence and therefore, they have to be accepted as correctly recorded by the learned judge. I therefore have to interpret the meanings from just what appear in the notes of evidence.

17. The learned DPP on the other hand correctly asked us to look at other parts of the notes of evidence. He pointed out that the prosecution's

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[1] [1997] 3 CLJ 225

case was closed on 4.11.1997 and did not continue until 15.3.1999, a lapse of over 1 year. The incident mentioned in the notes of evidence took place on 9.3.1999. Between 4.11.1997 and 15.3.1999, the case could not proceed because of several reasons, the most important being that the counsel representing the 1st Appellant was not getting proper instructions, as result of which he had to discharge himself. In addition to the two counsels there was in fact another counsel appointed but who apart from mentioning the case on one day, otherwise never acted for him at all. In short, during the trial the 1st Appellant was represented by 3 different counsels.

18. On 4.2.1999 at page 198 this is what appears:

"Mahkamah : 3 alternatives again explained to both accuseds.

Gurmit : I have instruction to inform that my client wish to remain silent and would not be calling any witnesses.

Karpal : My client would give evidence on oath. I believe I can close my case on 9.2.99.

Mahkamah : 9.2.99"

(Underlining mine)

19. On 15.3.1999 the notes of evidence reflect as follows:

"Kes untuk defence.

Miss Chan reads the 3 alternatives to OKT1 and OKT2.

Miss Chan inform that OKT1 (Tan Kim Ho) elects to remain silent.

Miss Chan inform that OKT2 (Ho Jin Lock) elects to give his evidence on oath.

Encik Gurmit : I (*sic*) also not calling any evidence. I am closing my case. I have nothing else to add.

Mahkamah : Court enquire from Gurmit if he has also explained it to the

accused 1 the 3 alternative. (*sic*)

Encik Gurmit :	I have.

…

Gurmit :	Right to silence is a constitutional right. Guilt could not be inferred from silence.
Karpal :	I have a comment on Arulpragasan @ page 408. Even if the accused remains silent, the court may choose to re-evaluate the prosecution case. The court is not functus. The words "must" in page 408 @ paragraph 5 must not mean that the court must convict even if the court is of belief that the defence was wrongly called.

…

Gurmit :	I am grateful for Mr. Karpal's comment on silence and witnesses silence would mean automatic conviction."

(Underlining mine)

20. Section 272 of the Criminal Procedure Code provides "In all criminal cases tried before the High Court the Judge shall take down in writing notes of the evidence adduced." Reading from all the notes of evidence and the grounds of judgment, I am well satisfied that the 1st Appellant was properly advised on his rights as well as on the effect of choosing to remain silent. The notes show that not only were the Appellants advised by the court but they were represented by able and experienced counsels. The duty to advise the accused person when he is represented by a counsel also lies with the counsel, not merely the court. From the notes of evidence appearing on page 202 counsel for the 2nd Appellant agreed that the court merely asked the 1st Appellant whether he was aware of what he was doing. I am fully confident that if the learned trial judge had wrongly advised the

Appellants of their rights and the implications of them electing to remain silent, a senior and very experienced counsel such as that representing the 2nd Appellant, would have definitely advised and pointed out the errors to the learned judge accordingly. He would have failed in his duty as an officer of the court should he have not done so. A lawyer is first an officer of the court. He is obligated to advise the court on what he understands to be the law. In this respect, this is what Lord Reid said in *Rondel v. Worsley*[2]:

> "Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. But, as an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession, he must not withhold authorities or documents which may tell against his clients but which the law or the standards of his profession require him to produce. And by so acting he may well incur the displeasure or worse of his client so that if the case is lost, his client would or might seek legal redress if that were open to him." (Underlining mine)

21. The counsel for the 2nd Appellant[3] had acted and been involved in so many criminal cases involving new principles in criminal law including cases relating to the burden of proof at the close of the prosecution

[2] [1969] 1 A.C. 191 at 227

[3] Mr. Karpal Singh

case.[4]

22. In any case, further, the 1st Appellant's own counsel confirmed that the 1st Appellant elected to remain silent, not on one occasion, but on three different occasions during the trial.

23. There is nothing in the grounds of judgment to indicate that the judge had erred in law on the rights of the Appellants to the three choices at the close of the prosecution case. His grounds of judgment clearly indicate that he correctly directed himself on the burden of the prosecution at the close of the prosecution's case. He correctly applied the law, particularly the decisions of *Khoo Hi Chiang*[5] and *Arulpragasan*[6]. He said in his judgment:

> "At the close of the close of the prosecution case, the court was totally convinced, after a maximum evaluation of the prosecution evidence on the guidelines laid down in Khoo Hi Chiang v PP (1994) 1 MLJ 265 and affirmed in Arulpragasan a/l Sandaraju v PP (1997) 1 AMR 329, that the prosecution (even without Edmund's dock identification of OKT1 and OKT2 which was not given weight) had made out a beyond reasonable doubt case against OKT1 and a beyond reasonable case against OKT2, which if unrebutted would warrant his/their conviction. Accordingly, both OKT1 OKT2 were called to enter on their defence.
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> Trial only resumed after a long lull, as OKT1 was without counsel after his defence was called. When trial eventually resumed, OKT1 elected to remain silent, yes, OKT1 elected to remain silent, notwithstanding that the fact that prosecution had made out a case on beyond reasonable doubt evidence which if unrebutted would warrant his conviction. In PP v Goh Kim

[4] See *Khoo Hi Chiang v. Public Prosecutor and Another Case* [1994] 2 CLJ 151, *Tan Boon Kean v. Public Prosecutor* [1995] 4 CLJ 456, *Arulpragasan Sandaraju v. Public Prosecutor* [1996] 4 CLJ 597

[5] (1994) 1 MLJ 265

[6] (1997) 1 AMR 329

Looi [1994] 2 AMR 1381, Vincent Ng JC (as he then was) remarked: "this new position [the maximum evaluation of the prosecution case] would justify automatic conviction of the accused should he remain silent". And in Arulpragasan a/l Sandaraju v PP (1997) 1 AMR 329 @ 408, the Federal Court per Edgar Joseph Jr SCJ said, "if, upon the defence being called [after a maximum evaluation of the prosecution case] the accused elects to remain silent and calls no evidence then, the court must convict" Mr Gurmit, who conducted OKT1's defence after OKT1 was ordered to enter his defence, submitted – and that was all he submitted – that OKT1's silence was his undoubted right, that his silence was not an admission of guilt and that the actual gun must be produced. Shoring that ethereal submission for his learned friend, Mr Karpal gratuitously commented that "must convict" does not mean that a court must convict even if the court upon reflection is of the belief that the defence was wrongly called.

OKT1's silence was undoubtedly his right. Except unfortunately, with silence, there was and there is nothing to rebut the prosecution case and nothing to cast any reasonable doubt on the prosecution case. And also unfortunately the production of the actual gun is not essential for a successful prosecution of a section 3 offence (see PP v Ong Poh Cheng [1996] 1 CLJ 501, affirmed by the Court of Appeal (Ong Poh Cheng v PP [1998] 4 MLJ 8) and Federal Court). Ineluctably, as a result, OKT1 has not cast any reasonable doubt on the prosecution case. The prosecution case on beyond reasonable doubt evidence after a maximum evaluation with OKT1's is totally intact. The court is totally convinced that OKT1 is guilty as charged."

24. I am of the opinion that what the judge meant in his notes was that the report in the media was erroneous and inaccurate and not what he had said in court was erroneous and inaccurate. On this ground of appeal I find that both Appellants failed.

25. Both Appellants raised other issues, though not seriously pursued. Nevertheless, I gave careful consideration to these grounds of appeal.

Both Appellants challenged their identification by the three witnesses.

26. The grounds raised by the 2nd Appellant challenging identification are:

    (a) Witnesses had been consuming alcohol and therefore could not have narrated the identity of the Accused.

    (b) PW6 dock identification: this identification was rejected by the trial court.

    (c) Not all witnesses could identify and therefore not much reliance should be placed on those who identified the Appellants.

    (d) Since witnesses were in extreme fear they could not have been able to remember the faces of the Appellants.

    (e) Circumstances under which test identification parade was held were undesirable.

    (f) Whether there was a David Goh Pok Wah who was wrongly identified as the 2nd Appellant.

27. Grounds (a) to (e) could equally be grounds of appeal by the 1st Appellant.

28. I find that the learned judge had not committed any error in appreciation of facts relating to grounds (a) to (e). These are all questions of fact. The learned trial judge had dealt with the question of identity at length in his grounds of judgment. These were subsequently re-evaluated by the Court of Appeal. The Court of Appeal found that the learned trial judge had not committed any error in the directions that he gave himself on the issue of identification. At the expense of repetition, the question of identification is a question of fact.

29. It is an established principle of law that when dealing with finding of facts, the trial judge is more often than not, in a better position to decide. The appellate court must be reluctant to interfere with such findings, unless the facts obviously disclose the courts below had clearly and wrongly evaluated the facts.

30. In *Lee Ah Seng & Anor v. PP*[7] this court held:

> "The approach to be taken by an appellate court when dealing with a trial court's assessment of credibility of witness is well-established by high authorities. The credibility of a witness is primarily for the trial judge. An appellate court should always be slow in disturbing such finding of fact arrived at by the judge who had audio-visual advantage of the witness, unless there are substantial and compelling reasons for disagreeing with the finding. Discrepancies will always be found in the evidence of a witness but what a judge has to determine is whether they are minor or material discrepancies. It would be wrong to say just because a witness may have contradicted in his evidence or even told lies on one or two points, his evidence should be totally rejected. In the final analysis it is for the trial judge to determine which part of the evidence of a witness he is to accept and which to reject (see *Herchun Singh & Ors v. Public Prosecutor* [1969] 1 LNS 52; [1969] 2 MLJ 209 FC; *Dato' Mokhtar Hashim & Anor v. Public Prosecutor* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC; *Lai Kim Hon & Ors v. Public Prosecutor* [1980] 1 LNS 197; [1981] 1 MLJ 84 FC; *Che Omar bin Mohd Akhir v. Public Prosecutor* [1999] 2 CLJ 780 CA). It is not the function of an appellate court to make primary findings of facts (see *Public Prosecutor v. Mohd Radzi Abu Bakar* [2005] 6 MLJ 393; [2005] 6 AMR 203; [2006] 1 CLJ 457 FC)."

31. Regarding ground (f) i.e. as to whether it was David who was with the 1st Appellant and not the 2nd Appellant, the learned judge had rightly

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[7] [2007] 5 CLJ 1

considered that the name David was only first raised by counsel during the 2nd Appellant's testimony. The learned trial judge had also correctly held that the claim by the 2nd Appellant that he walked out of the bar of the lounge before the shooting and that David walked in instead was never raised during the prosecution's case by either of the Appellants.

32. The learned DPP Mr. Wong Chiang Kiat submitted that this is bare assertion by the 2nd Appellant as it was never put to any of the prosecution's witnesses.

33. In our adversarial system of justice, the duty of each party is to show that his case is the truth. This is done by him adducing his own witnesses to support his contention. When it is the plaintiff or prosecutor who is adducing the evidence, his witnesses are subject to cross examination by the defence or the accused person. When a prosecution witness makes a statement of fact which is disagreed to by the defence it becomes the defence's duty to, in whatever way, put to the plaintiff or prosecution witness that what the witness has said is not true. In addition, he could also use the plaintiff's or prosecution's witnesses to adduce evidence to support his defence and to indicate what his defence is. This he is required to do to enable the plaintiff or prosecution to bring out evidence to disprove what the defence intends to adduce. If the defence does not in any way indicate by cross examination of those facts, those statements made by the plaintiff's or prosecution's witnesses must be accepted as true. Even if the plaintiff's or prosecution's witness does not say anything relating to the defence case, it is still the duty of the defence to bring out his case during plaintiff's or prosecution's case. In fact this duty to disclose his defence during the prosecution's case is more relevant in criminal

cases than in civil. This is particularly so when the plaintiff or prosecution's witness is relevant to the fact in issue. In criminal cases, the prosecution does not know what the defence is going to be, except in alibi, until the defence adduces its evidence.

34. The failure of a party to put questions to his opponent's material witnesses in cross-examination is said by Gopal Sri Ram JCA in *Aik Ming (M) Sdn Bhd & 8 Ors v. Chang Ching Chuen & 3 Ors & Another Case*[8] to be an abandonment of the pleaded case and may be barred from raising it in argument thereafter. On this point, both cases of *Chua Beow Huat v. PP*[9] and *Aik Ming (M) Sdn Bhd & 8 Ors v. Chang Ching Chuen & 3 Ors & Another Case* (*supra*) agreed with the decision of the House of Lords in *Browne v. Dunn*[10] and quoted Lord Herschell[11] as follows:

> "Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact, by some questions put in cross examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit.
>
> My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making

[8] [1995] 3 CLJ 639

[9] [1970] 2 MLJ 29

[10] (1893) 6 The Reports 67

[11] (*supra*) at 70

any explanation which is open to him, and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses."

35. Lord Halsbury's description of the situation of failure to examine a witness during the plaintiff or prosecution's case as a "perfect outrage"[12]. Lord Halsbury said in the same case[13]:

> "My Lords, with regard to the manner in which the evidence was given in this case, I cannot too heartily express my concurrence with the Lord Chancellor as to the mode in which a trial should be conducted.
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> To my mind nothing would be more absolutely unjust than not to cross examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to.
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> ...
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> My Lords, it seems to me that it would be a <u>perfect outrage</u> and violation of the proper conduct of a case at Nisi Prius if, after the learned Counsel had declined to cross-examine the witness upon that evidence, it is not to be taken as a fact that that witness did complain of the plaintiff's proceedings, that he did receive advice, that he went round to Mr. Dunn as a solicitor, and that he did sign that retainer, the whole case on the other side being that the retainer was a mere counterfeit proceeding and not a genuine retainer at all." (Underlining mine)

36. This is however not to say that there is any burden placed on the

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[12] (*supra*) at 77

[13] (*supra*) at 76-77

accused to disprove any guilt or to prove innocence. It is only assessing the credibility of a witness, in this case the 2nd Appellant's credibility. In order to determine whether an accused was telling the truth, one of the consideration is whether he had indicated his defence during the prosecution's case. In this respect the learned judge had properly and correctly considered and rejected the claim by the 2nd Appellant that he had walked out of the lounge and David walked in. He said in his judgment:

> "... And surely, one witness at least at the scene would have seen – if it was true that OKT2 walked out from the lounge and David (even if mistaken for OKT2) entered the lounge after OKT2 walked out from the lounge – one of the two men who entered the lounge at 2.00 am walking out of the lounge. At least one witness at the scene would have seen David or a third party entering the lounge. Also, OKT2 would not have not put his case, because it was so crucial to his case, that he had walked out of the lounge. But there is no evidence of David's presence and there is no evidence even remotely supporting David's presence at or about the vicinity of the scene of the crime at or about the time of the commission of the crimes. As against the weight of the unchallenged evidence on the entire sequence of events inside the lounge that not one of the two men who entered the lounge left the lounge until after the robbery and shooting, there is only the word of OKT2 who had been keeping his defence 'up his sleeve' that he walked out of the lounge before the commission of the crimes and that David walked into the lounge after he walked out from the lounge. Surely, it is evident that David's alleged role was an invention and an afterthought."

37. There was nothing in the evidence to indicate that David entered the lounge after the 2nd Appellant walked out. The learned DPP rightly submitted that it is therefore irrelevant whether David was called or not as a witness. There was nothing in the prosecution's case to indicate that the non-calling or offering of David to the defence could have

undermined the prosecution's case. David was not even a witness necessary for unravelling the prosecution's case and therefore could not be deemed as a material witness for their case. The defence cannot invoke section 114(g) of the Evidence Act. As Mohamed Azmi SCJ said in the case of *Munusamy v. PP*[14]:

> "... Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case."

38. The 2nd Appellant's claim that the person whom the witnesses identified as the 2nd Appellant was in fact David, cannot also be accepted for reasons that all the three witnesses clearly and confidently identified the 1st and 2nd Appellants. They had seen the faces of these two persons clearly. The lights had been turned on.

39. The learned judge properly considered and evaluated all the evidence before him and was right in concluding that the two Appellants were correctly identified.

40. According to the learned counsel for the 2nd Appellant, as I understand it, if his alibi is rejected then the Appellant would be left with no defence for him. He concluded that the Court of Appeal should not have considered the prosecution's evidence at all. He sought an order for retrial. The Court of Appeal in fact ruled that on the facts of this case, the issue of alibi does not arise because the charge against the 2nd Appellant was that the offence was committed <u>at</u> Hot Lips Lounge.

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[14] [1987] 1 MLJ 492 at 494

Obviously, where a defence raised by the accused during the defence case is rejected outright by the court the accused would therefore be without a defence. In the light of my findings I think this issue as to whether the offence was committed “in” or “at” Hot Lips Lounge (as discussed by the Court of Appeal) is not relevant to this appeal.

41. Bearing in mind that I am satisfied as to the identity of the 2nd Appellant, his claim that he was outside the lounge is obviously untrue.

42. In conclusion, therefore, I dismiss both appeals and affirm the convictions and sentences by the High Court and the Court of Appeal against both 1st and 2nd Apellants.

43. My learned brother Hashim Dato’ Hj. Yusoff FCJ has read this judgment in draft and he concurs with me.

Dated : 17 February 2009

ZAKI TUN AZMI
Chief Justice
Malaysia

Counsel for the first appellant :	Jagdeep Singh Deo
Counsel for the second appellant:	Karpal Singh, Jagdeep Singh Deo, and Nicholas Netto
Solicitors for both appellants:	Karpal Singh & Company
Counsel for the respondent :	Wong Chiang Kiat Deputy Public Prosecutor