

DALAM MAHKAMAH PERSEKUTUAN MALAYSIA

(BIDANG KUASA RAYUAN)

RAYUAN JENAYAH NO: 05-21-2007(P) & 05-22-2007(P)

ANTARA

1. TAN KIM HO ... PERAYU-
2. HO JIN LOCK PERAYU

DAN

PENDAKWA RAYA ... RESPONDEN

(Dalam perkara Mahkamah Rayuan Malaysia
Rayuan Jenayah No: P-05-50-1999 & P-05-51-1999

Antara

1. TAN KIM HO ... PERAYU-
2. HO JIN LOCK PERAYU

Dan

PENDAKWA RAYA ... RESPONDEN)

(Dalam Mahkamah Tinggi Malaya di Pulau Pinang
Perbicaraan Jenayah No: 45-7-1993 & 45-6-1993

PENDAKWA RAYA

lwn

1. TAN KIM HO
2. HO JIN LOCK)

Coram: Zaki Tun Azmi, CJ
Abdul Aziz Mohamad, FCJ
Hashim Yusoff, FCJ

JUDGMENT
Of
Abdul Aziz Mohamad, FCJ

1. The appellants were tried jointly at the High Court, the first appellant for an offence under section 3 of the Firearms (Increased Penalties) Act 1971, and the second appellant for an offence under section 3A of that Act. They were convicted and sentenced to death. The Court of Appeal dismissed their appeals. They now appeal to this court.

2. Sections 3 and 3A of the Act provide, so far as material for the purposes of this judgment, as follows:

“3. Any person who at the time of his committing ... a scheduled offence discharges a firearm with intent to cause death or hurt to any person, shall ... be punished with death.

3A. Where, with intent to cause death or hurt to any person, a firearm is discharged by any person at the time of his committing ... a scheduled offence, each of his accomplices in respect of the offence present at the scene of the commission ...thereof who may reasonably be presumed to have known that such person was carrying or had in his possession or under his custody or control the firearm shall ... be punished with death ...”

Robbery is a scheduled offence.

3. By the evidence of witnesses present at the time of the incident, the learned trial judge found the prosecution had established certain facts, of which I need only state the following for the purposes of this judgment. At

11.30p.m. on 4 August 1992 six young professionals were seated together at a table at one end of the lounge of a public bar called the Hot Lips Lounge in Georgetown, Penang. At 12.30 a.m. next day there was an argument followed by a fight between two groups, one of two persons, the other of seven persons. One of them was injured above an eyebrow. They finally left the premises. At 2.30 a.m. there remained only the six young professionals in the lounge, besides the proprietor and his partner, Lee Kum Weng. Then the two persons who had fought with the group of seven came back to the lounge. One wore spectacles. The other had a surgical plaster over the left eyebrow. The bespectacled man hit Lee repeatedly with a crash helmet. The man with the surgical plaster pulled out a gun and after asking certain questions of two of the six customers, Ramesh and Edmund, shot Edmund, who suffered serious head injuries but did not die. The gunman ordered the six to take out their belongings. They complied and placed their wallets on the table. The bespectacled man collected the wallets and also snatched off the gold necklaces that two others of the six were wearing. The bespectacled man wanted to smash an empty glass on Edmund's head but missed. Obeying the gunman's order, the six positioned themselves with their knees and heads to the floor. Another shot was heard and the two men were heard leaving. Ramesh was found lying dead on the floor. The gunman was the first appellant. The bespectacled man was the second appellant.

4. What is important to note from the facts as found, and that is for the purposes of the second appellant's appeal, is that it was the same two

persons who entered the lounge at 2.30 a.m. and did what they did and left the lounge after that, that they were the two appellants, and that during that time, when the only other people in the lounge were the party of six and the two partners, the two appellants were always together and no one else entered the lounge.

5. When their turn came to present their defences, the first appellant chose to remain silent but the second appellant gave evidence on oath, after which the appellants were convicted.

6. I will consider the appeal of the second appellant first. It requires a consideration of his evidence. I will state it sketchily and so far only as relevant to the point arising in his appeal. Between 11.30 p.m. on 4 August and midnight, he and the first appellant and one David Goh arrived at the lounge and started drinking. The first appellant was attacked by eight or nine persons, who finally left. The first appellant and company also left. The second appellant took the first appellant, who was injured above the left eyebrow, to a clinic, where the wound was attended to, after which the second appellant applied a surgical plaster to it. They later gathered at David's house, where David and the first appellant decided to look for one Ah Goo. So they went back to the lounge on motor-cycles. The two appellants entered the lounge about 2.00 a.m. but did not find Ah Goo. At about 2.10 a.m. the first appellant went to talk to the group of six professionals while the second appellant, who was at the counter, left the lounge and told David, who was outside the lounge, that Ah Goo was not in

the lounge. David then entered the lounge after telling the second appellant to remain outside. After about ten minutes David and the first appellant left the lounge in a state of confusion (*kelam-kabut*). All three went back to David's house, from which the second appellant left for his home.

7. According to the learned trial judge, the defence of the second appellant was that he was not inside the lounge at the time of the robbery and shooting and that he had been mistakenly identified as the man who was inside the lounge then, when it was David Goh. The learned trial judge said that the second appellant's defence that he was not inside the lounge at the crucial time smacked of an alibi. The learned trial judge ruled that since the notice required by section 402A of the Criminal Procedure Code had not been given, the evidence that the second appellant was outside the lounge at the crucial time, which the judge found was the evidence in support of the defence of alibi, must be excluded, but that there still remained to be considered the defence of mistaken identity, which the judge said was the defence that it was David who was inside the lounge at the crucial time, having entered it after the second appellant had left it, and who was mistaken for the second appellant.

8. The learned trial judge found that although it was established that David was not a fictitious character – that there existed a man by the name of David Goh Pok Wah who had responded to the call of the police to assist them in their investigation of this case – the second appellant's allegation of the role played by David was an invention. That was because, apart from the

second appellant's testimony, there was no other evidence of David's involvement, whereas the evidence for the prosecution was that two people – who even according to the second appellant were he himself and the first appellant – entered the lounge and were there throughout until they left after the robbery and the shooting, and that evidence had gone unchallenged in cross-examination. The learned trial judge was sure that if, as alleged by the second appellant, one of the two persons who entered the lounge together left it afterwards before the robbery and the shooting, and then one person, whether one of the two or another, came in, at least one of the prosecution witnesses who were in the lounge would have noticed it and mentioned it in evidence.

9. The Court of Appeal did not, in their judgment, clearly evince their appreciation that the learned trial judge had viewed the second appellant's defence as being twofold, namely, alibi and mistaken identity. Paragraphs 4 and 5 of their judgment leave the impression that they understood the second appellant's defence to be one of alibi only. They concluded that the learned trial judge had misdirected himself in regarding the defence as one of alibi because, to constitute the defence of alibi, the plea must be one of not being present at the scene at the time of the incident, whereas the second appellant was present at the scene, which was the Hot Lips Lounge, even though, as he claimed, he was not inside it but was outside it. The Court of Appeal, however, found that no substantial miscarriage of justice was occasioned by the misdirection because the learned trial judge "nevertheless went on to consider in depth the second defendant's defence

in its entirety ...” and that accordingly it was an appropriate case to apply the proviso to section 60 of the Courts of Judicature Act 1964, which provides that “the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.” If the Court of Appeal had had in mind that what the learned trial judge went on to consider after excluding the evidence in support of the defence of alibi, namely the evidence that the second appellant was outside the lounge, was the defence of mistaken identity, there would have been no necessity to apply the principle of no substantial of miscarriage of justice in the proviso to section 60.

10. In the appeal before us, the main point submitted on by the second appellant’s counsel, Mr. Karpal Singh, was the alibi point. But I was not confident that I fully grasped his line of argument. Among other things he said that having found that the learned trial judge had misdirected himself in finding that the defence of the second appellant was one of alibi, the Court of Appeal should not have gone to the rescue of the learned trial judge by resorting to the proviso to section 60 of the Courts of Judicature Act 1964 because the proviso should be applied only in exceptional cases, and he cited three authorities in support of that contention. It might appear that Mr. Karpal Singh thought that the Court of Appeal regarded the learned trial judge as having found that the entire defence of the second appellant was one of alibi and that he agreed with the finding of the Court of Appeal that it was not a defence of alibi and that he was contending that with the finding

that the learned trial judge had misdirected himself on that point, the Court of Appeal should have ordered a retrial and not resorted to the proviso to section 60 to approve of the learned trial judge's undertaking of a consideration of the second appellant's testimony in his defence. I should have thought that if the learned trial judge had regarded the whole defence as one of alibi, then the consequence of the finding by the Court of Appeal that it was not a defence of alibi would be that the evidence in support of the defence was *not inadmissible* by reason of absence of notice under section 402A of the Criminal Procedure Code, and the learned trial judge was right after all in considering the evidence. There would have been no necessity to resort to section 60. The position would have been as if the learned trial judge had said that in case he erred in holding that the defence was one of alibi and the evidence was inadmissible because of the absence of notice, he would nevertheless proceed to consider the evidence. There would then have been no necessity for the Court of Appeal to resort to the proviso to section 60 to find that there was no substantial miscarriage of justice in the erroneous finding that the defence was one of alibi. Resort to the proviso would have been appropriate if the judge, on the basis that the defence was one of alibi, had refused to consider the evidence in support of it because it was inadmissible for absence of the section 402A notice and had convicted the second appellant by reason that there was no admissible evidence in his defence. Then the Court of Appeal would have appropriately resorted to the proviso by *themselves* looking at the defence evidence that the trial judge had refrained from considering, and finding that after all there was no substantial miscarriage of justice in the trial judge's failure to

consider the defence evidence because, even if he had done so, in the Court of Appeal's assessment of the evidence he would not have found in favour of the defence.

11. As I was not sure that I fully understood Mr. Karpal Singh's line of argument on the alibi question, and believing that if a submission were reduced into writing great care would be taken to present and develop the argument with clarity and logic and counsel would not be able to say afterwards that he did not say what the court thought he said, I asked Mr. Karpal Singh to reduce his oral submission into writing. This he did three weeks after the hearing in court of the appeal.

12. In that written submission, after stating that the requirement of giving notice of alibi pursuant to section 402A is mandatory and citing related cases, Mr Karpal Singh says as follows (and I affirm that the first paragraph, which is cast in language that is difficult to follow, is exactly as in the original):

"Clearly, the Court of Appeal was wrong in, after having rejected the second appellant's evidence that he was outside the Hot Lips lounge being an alibi, could not have lawfully having in mind that no notice of alibi had been given under the provisions of section 402A of the Criminal Procedure Code have appreciated what it had rejected for want of giving notice of alibi under section 402A.

With respect, the learned judges of the Court of Appeal were wrong in holding that the learned trial judge had in fact considered the defence of the

second appellant, which he could not have, because of the contravention of section 402A.

With respect, having regard to the circumstances, the Court of Appeal should have held that the second appellant had been deprived by the trial judge of putting up a defence which was a fundamental and substantial defect in the administration of law. Such defect was incurable.

The second appellant's appeal ought to have been allowed on this score without invoking the proviso to section 60 (1) of the Courts of Judicature Act, 1964. The Court of Appeal was therefore wrong in concluding,

‘This is accordingly an appropriate case to apply the proviso to section 60 of the Courts of Judicature Act, 1964. See, *Tunde Apatira & Ors v PP* [2001] 12 CLJ 381.’

The second appellant's appeal should be allowed by this Honourable [Court] and the sentence of death imposed on him by the High Court and confirmed by the Court of Appeal ought to be set aside and the second appellant be acquitted and discharged.”

13. And that is all. There are absent the submission about the exceptional circumstances justifying resort to the proviso to section 60 and the three authorities in support of it. The gist of Mr. Karpal Singh's submission now seems to be that the Court of Appeal should have found that the trial was incurably defective because the learned trial judge, by failing to consider the second appellant's defence, had deprived him of his right to put up a defence. The reason why Mr. Karpal Singh submits that the learned trial

judge *had not considered* the defence is a perverse one, namely, that the learned judge *could not have considered* the defence, having held that the evidence in support of it was inadmissible by reason of non-compliance with the requirement of notice of section 402A.

14. The submission is clearly devoid of merit. Even if the entire defence of the second appellant was one of alibi, the learned trial judge did in fact consider it. But in truth the judge viewed the defence of alibi as confined only to the second appellant's evidence that he was outside the lounge during the crucial ten minutes. It was that evidence only that the learned trial judge treated as inadmissible and did not consider by reason of section 402A, but having considered and rejected the other defence, that of mistaken identity, he could not have accepted the alibi evidence even if he had considered it. The two defences went hand-in-hand. If one failed the other must fail. As the judge, after considering the defence of mistaken identity, still accepted the evidence for the prosecution that it was the second appellant who was in the lounge with the first appellant during the crucial space of time, he could not have accepted that the second appellant was outside the lounge during that time.

15. Mr. Karpal Singh also submitted orally in court on points in the first appellant's appeal, on the plea that the outcome of the first appellant's appeal would also affect the position of the second appellant, but I will deal with the points in the first appellant's appeal when I come to it shortly.

16. Before the hearing of the appeals, Mr. Karpal Singh had also prepared a written submission in which he submitted on the evidence of identification of the second appellant, giving reasons for contending that the identification was unsafe; on the learned trial judge's remarking that the second appellant did not put at the earliest stage, by cross-examination of the prosecution witnesses, his case that before the crucial space of time he had left the lounge and David Goh had come in; and on the prosecution's failure to call David Goh to testify during the trial. Mr. Karpal Singh did not raise these points in his oral submission but, after submitting on the alibi question, said that he was not abandoning them. I thought that it was an indication of a realization that those were not strong points and in any case I find no merit in them.

17. I turn now to the first appellant's appeal. In his written submission, the first appellant's counsel, Mr. Jagdeep Singh Deo, raised three points. He submitted orally during the hearing of the appeal on only two points and after that he said, as regards the other point, which was about the evidence of identification of his client being unsafe, that it was not his "strongest" point because there had been concurrent findings on identification by the High Court and the Court of Appeal. For my own part, I find there is no merit in it.

18. The two points that were submitted on orally are about the right to remain silent and failure to explain the consequences of remaining silent. Encik Jagdeep Singh first submitted on the right to remain silent, and when

he came to submit on the other point he said that that was the real point, thereby impliedly acknowledging that the point about the right to remain silent was not a real point, as indeed it is not, but I will say something about it.

19. Mr. Jagdeep Singh's point about the right to remain silent is that it is a substantive right, and if, upon exercise of the right, conviction follows automatically, that is a denial of the right. Therefore upon the first appellant exercising his right to remain silent the court should have re-evaluated the evidence for the prosecution.

20. That is illogical and farcical. In the first place, the right to remain silent is a right to something of a negative nature, a right not to do anything. Logically such a right can only be said to be denied if the person is compelled to do something, in this case if the first appellant was compelled to say something. But he was allowed his right. He was not compelled to say anything. That the consequence of the right to remain silent is automatic conviction cannot, logically, be a denial of the right to remain silent. The position cannot be compared with the right to give an unsworn statement from the dock, which was considered in *Mohamed Salleh v Public Prosecutor* [1969] 1 MLJ 104, and which Mr. Jagdeep Singh relies on for his point about the right to remain silent. The right to give an unsworn statement is a right to a positive thing. That is a right to do something, to make one's defence in a particular manner. It is logical that it would amount to a denial of that

right if the court were to refuse to consider the statement on the ground that its veracity could not be tested by cross-examination.

21. In the second place, by section 180 of the Criminal Procedure Code, what the court is required to find at the conclusion of the case for the prosecution is whether a case has been made out against the accused “which if unrebutted ... would warrant a conviction”. To put it another way, the court is required to find whether or not the prosecution has made out a case against the accused which would warrant his conviction, if unrebutted. Therefore upon finding that the prosecution has made out such a case, but there is no evidence or there is going to be no evidence in rebuttal, conviction is warranted and must follow. In this case the judge said that the prosecution “had made out a beyond reasonable doubt case [against each appellant] which if unrebutted would warrant his conviction”. That finding was made after the first appellant’s counsel must have done his utmost to persuade the court that the prosecution had not made out such a case and after the learned trial judge had, as he said, done a maximum evaluation of the evidence for the prosecution but was not so persuaded. As it happened, this case involved two accused, and the first appellant was convicted after the court had heard the evidence of the second appellant, but if this were a case involving only one accused, as a lot of criminal cases do, it would be expecting a farce to expect the trial judge, after all that has been done that I have mentioned, and with nothing more happening after that except the accused electing to remain silent, to postpone the trial, return to his

chambers to re-evaluate the evidence and come back to court and say that the prosecution has not, after all, made out a case to warrant his conviction.

22. I turn now to Encik Jagdeep Singh's real point, namely, the contention that the consequences of remaining silent were not explained to his client. For this, it is necessary to set out the relevant events in the trial. On 4 November 1997, after hearing submissions following the conclusion of the prosecution's case and undoubtedly after finding – though this was not recorded in the notes of proceedings – that the prosecution had made out a case against both the appellants to warrant their conviction, the learned trial judge asked whether the appellants were ready to enter upon their defence. Several adjournments followed and during this period Mr. Harpal Singh was discharged as the first appellant's counsel at the former's request and Mr. Gurmit Singh was retained in his place.

23. On 4 February 1999, more than a year after the learned judge asked whether the appellants were ready to enter upon their defence, Mr. Gurmit Singh, after the three alternatives were explained to the appellants, informed the court that his client wished to remain silent and would not be calling any witnesses. Several more adjournments followed. Then on 9 March 1999 the learned trial judge explained in open court that on the previous occasion, which must have been on 4 February 1999, he had merely asked the first appellant whether he knew what he was doing by electing to remain silent and that he did not say, as reported in the press, that the court could deem silence as an admission of guilt. Mr. Gurmit Singh, the first

appellant's counsel, Mr. Karpal Singh, the second appellant's counsel, and the learned DPP all then agreed that what had happened on the previous occasion was as the judge explained.

24. On 15 March 1999, the three alternatives were again made known to the appellants. The first appellant still elected to remain silent and his counsel, Mr. Gurmit Singh, informed the court that he was not calling any evidence. The learned trial judge then asked Mr. Gurmit Singh if he had explained the three alternatives to his client, and Mr. Gurmit Singh confirmed that he had.

25. The first appellant was convicted along with the second appellant on 31 July 1999 after the judge had heard submissions after the conclusion of the testimony of the second appellant.

26. It is clear from those events that although there is no record that the learned trial judge or the interpreter had informed the first appellant of the consequences of remaining silent, his counsel would have done so. In particular, on 15 March 1999, when the learned trial judge asked Mr. Gurmit Singh whether he had explained the three alternatives to his client, the judge must have meant, and Mr. Gurmit Singh, when he replied in the affirmative, must have understood the judge to mean, whether he had explained the consequences of choosing any one of the three alternatives. The judge could not have meant to satisfy himself merely that the first appellant knew what the three alternatives were, because this had already been made known to

him a few moments earlier. In any case, this being a capital charge, the first appellant's decision to remain silent would have been made after consultation with his counsel and it cannot be supposed that his counsel did not inform him of the consequences of remaining silent.

27. Mr. Jagdeep Singh submitted that the first appellant chose to remain silent as a result of the clarification made by the judge on 9 March 1999. That is not correct. The clarification was about what the judge said on 4 February 1999 *after* the court was informed on that day by Mr. Gurmit Singh that his client wished to remain silent. The first appellant had decided to remain silent even before the clarification.

28. For the reasons that I have given I would dismiss both the appellants' appeals and confirm their convictions and the sentences imposed upon them.

Dated: 17 February 2009

DATO' ABDUL AZIZ BIN MOHAMAD
Judge
Federal Court of 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