

**IN THE FEDERAL COURT OF MALAYSIA AT  
PUTRAJAYA  
CRIMINAL APPEAL NO. 05-67-2005 (J) & 05-68-2005 (J)**

**BETWEEN**

**1. LEE AH SENG  
2. LEE KWAI HEONG**

**... APPELLANTS**

**AND**

**PUBLIC PROSECUTOR**

**... RESPONDENT**

**APPEAL FROM COURT OF APPEAL AT PUTRAJAYA  
(CRIMINAL APPEAL NO. J-05-52-03 & J-05-53-03)**

**QUORUM**

**ALAUDDIN BIN DATO' MOHD SHERIFF, FCJ  
ARIFIN BIN ZAKARIA, FCJ  
NIK HASHIM BIN NIK AB. RAHMAN, FCJ  
ABDUL AZIZ BIN MOHAMAD, FCJ  
AZMEL BIN HAJI MAAMOR, FCJ**

**26 July 2007**

## Judgment

### Background

1. I have had the advantage of reading the judgment of my learned brother Abdul Aziz Mohamad FCJ in which he concluded that the appellants' appeals must succeed. Sad to say, I am unable to agree with my brother's learned judgment. I think the appeals must fail. My reasons are as follows.
2. Both the appellants were convicted and sentenced to death by the High Court at Johore Bahru, before Syed Ahmad Helmy JC (as he then was) for the murder of one Sanip bin Leham and against that conviction they had appealed to the Court of Appeal (Richard Malanjum JCA (now CJ Sabah & Sarawak) Augustine Paul, and Hashim Yusoff JJCA (now FCJJ) ) which dismissed their appeals (see (2006) 1 CLJ 1043; (2006) 3 AMR 26). Hence these appeals to this Court.

3. Before us, learned counsel for the appellants submitted that the death of the deceased was not caused by the appellants as there was no evidence how the deceased was hit. It was pointed out by counsel that there were discrepancies in SP7's evidence particularly on the contents of his first information report (P24). In P24, SP7 failed to mention the names of the appellants and this failure constituted a material omission in P24, thus rendering SP7's evidence suspicious. SP7 was also not consistent in his evidence with regard to the question of whether the appellants were armed when he saw them at the scene. Learned counsel also submitted that it was wrong for the court to find that common intention was established when the evidence of SP7 should not have been believed due to its poor quality. With all the infirmities in his evidence, counsel argued that SP7 should not be held to be a credible and reliable witness.

## High Court

4. On the above complaints all I need to do is to reproduce the following passages in the judgment of the learned trial judicial commissioner :

“The direct evidence relied upon by the prosecution in proving the second element is that SP7 Lee Cheng Soi @ Hassan bin Abdullah who gave an eye witness account of the incident and though there were no lights nevertheless through the moonlight he was able to identify both the accused carrying something that resembled a piece of wood about 3 feet in length and chasing the deceased.

The defence vigorously challenged the evidence of SP7 on the ground that there is major contradiction in SP7’s testimony in examination-in-chief and the cross-examination in relation to whether the 2<sup>nd</sup> accused (the 1<sup>st</sup> appellant) did hold a piece of wood and the several contradictions between his oral testimony and Exhibit P24 which is the police report lodged by SP7 at 6.45 a.m. on the tragic morning of 8.10.98 particularly the failure to state that the deceased yelled that somebody was hitting his head and asked SP7 to run, that there were 3 persons and not 4 as orally testified and failure to mention he saw both the accused runs contrary to the contemporaneous document P24 and hence no value ought to be placed on his oral evidence.

The contention of the prosecution is that both the accused had been positively identified by SP7 as he had known the first accused (the 2<sup>nd</sup> appellant) more than 4

months before the incident and that the second accused was seen several times looking for the first accused. As regards the **contradiction it does not affect the reliability of his evidence of identification and there were explanations as to why the names of both the accused were not mentioned in P24, in that he did not want the deceased's son to quarrel with the first accused.**

I have scrutinized the evidence and the submissions of both the accused counsel and it is my considered view that the defence contention cannot be accepted.

In the first place **there is positive identification of not only the presence of both the accused at the place of incident but also their carrying a piece of wood each or something resembling a piece of wood and chasing the deceased.** The prosecution's principal witness SP7 maintained his stand on this aspect of his testimony in the face of vigorous cross-examination. **Both the accused were in front of him when he ran out of the shed – hence at such a short distance and coupled with the fact that it was a moonlit night I have no hesitation in accepting the evidence of SP7 which I found to be a witness of truth** and conclude that there was positive identification of both the accused persons at the place of incident chasing the accused with a piece of wood or something that resembled a piece of wood. Though SP7 did in cross-examination state that he did not see the second accused holding anything in his hand which represents a contradiction to his testimony in evidence in chief nevertheless to my mind it does not affect his testimony that both the accused with two others at large were chasing the accused armed with a piece of wood or something that resembled a piece of wood.

.....  
 .....

Again the defence strenuous attempt to challenge the identification of the accused by SP7 through the contradictions appearing in the police report P24, namely the failure to state “Sarip jerit ada orang ketuk kepala dia dan dia suruh saya lari cepat” statement that there were 3 persons instead of 4 and the failure to mention both the accused in P24 does not to my mind affect the testimony of SP7 as to the identification of both the accused. This is because the **discrepancies as such is insufficient to destroy his credibility on the issue of identification.** It must be borne in mind that P24 was the first information report made prior to the investigation and hence the omission as to the details is acceptable. Further there is evidence as to the reason behind **the failure to mention both the accused by name in P24 in that he was afraid that the deceased children would go after the accused should their names be mentioned in P24 and there is nothing incredible in the reasoning for the Court not to accept the explanation.**

.....  
 .....

The totality of the evidence of both the prosecution and the defence clearly to my mind establishes that the prosecution has succeeded in proving the charge against both the accused beyond any reasonable doubt.”

(emphasis added)

## **Court of Appeal**

5. In dismissing the appeals of both the appellants against their respective conviction and sentence, the Court of Appeal concurred with the finding of the learned trial judicial commissioner on the evidence of SP7 and agreed that the defence had failed to raise any reasonable doubt in the prosecution's case and that the prosecution had proved its case beyond reasonable doubt that the appellants were guilty as per charge.

## **Findings of this Court**

6. Essentially, the appeals were against the findings of the learned trial judicial commissioner in that he accepted the evidence of SP7 and found him to be a witness of truth who had positively identified both the appellants as amongst the assailants of the deceased. SP7 had testified that there was moonlight which enabled him to witness the attack of the deceased.

7. 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) 2 MLJ 209 FC; Dato' Mokhtar Hashim & Anor v Public Prosecutor (1983) CLJ (Rep)**)

**101 FC; Lai Kim Hon & Ors v Public Prosecutor (1981) 1 MLJ 84 FC; Che Omar bin Mohd Akhir v Public Prosecutor (1999) 2 MLJ 689 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).**

8. Thus, applying the above principles to the facts of this case, it is clear that the learned judicial commissioner was alive to the fact that there were contradictions and discrepancies in the evidence of SP7 and nevertheless held that SP7 was a witness of truth. He ruled that the discrepancies were insufficient to destroy SP7's credibility on the issue of identification. He gave his reasons for his finding : such as the short distance between the appellants and SP7 during the incident and the moonlit night. He found the explanation given by SP7 as to why the names of the appellants were not mentioned in P24 to be credible. It must not be forgotten that P24 is not an encyclopedia. All that is

required for purpose of section 107 of the Criminal Procedure Code (Act 593) is that there should be clear and definite information about the commission of a cognizable offence to set the investigation machinery in motion. It needs not contain the names of the offenders as in the case here. Further, SP7 was merely a fisherman and a Chinese Muslim and his explanation that he was afraid that the deceased's children would go after the 1<sup>st</sup> appellant should he mention the appellants' names in P24 is not unreasonable. It must be noted also that the deceased was a Malay and the appellants were Chinese. This is what he said at p38 of the record of appeal :

“Rujuk P24 kepada saksi – saya buat laporan Polis selepas kejadian. Masa saya buat report saya tidak cakap kepada Polis Ah Hong (1<sup>st</sup> appellant) dan OKT2 (2<sup>nd</sup> appellant) ada pukul Sarip. Saya tidak cakapkan sedemikian kerana saya takut nanti anak arwah Sarip akan bergaduh dengan Ah Hong ....”

Thus in the circumstances, the failure by SP7 to mention the names of the appellants in P24 is justified and therefore, the omission is not fatal to the prosecution case.

9. With regard to the proof of common intention, I agree with the finding of the learned judicial commissioner that common intention may be inferred from the facts and circumstances of the case which are found in the testimony of SP7 who gave an eye witness account of seeing both the appellants together with two others at the scene, both holding something which resemble a piece of wood (P9(a)) and seeing both the appellants chasing the deceased. On this issue, there was no misdirection on the part of the learned judicial commissioner.
  
10. It is very clear from his judgment that the learned trial judicial commissioner took full advantage of the audio-visual benefit that he alone enjoyed in coming to his assessment of the credibility of SP7. In my view, there is no ground for disagreeing with his finding on SP7's credibility. Indeed, the Court of Appeal was in complete agreement with that finding.

11. Having considered the reasons of the Court of Appeal for agreeing with the trial court on the credibility of SP7, I am inclined to agree with it. In coming to such view, I am well aware of the well-known principle that in the event of doubt it must be given favourably to an accused person. But this is not the case here. In the present case, the testimony of SP7, in spite of its infirmities, has impressed the learned trial judicial commissioner to find SP7 to be a witness of truth. In a case of this sort where everything depends on the credibility of a witness about what was said, the view formed by the primary trier of fact, is entitled to great respect and an appellate court lacking the audio-visual advantage enjoyed by the trial court should be slow in disturbing the finding of facts arrived by a trial judge. The finding of credibility of SP7 as a truthful witness by the learned judicial commissioner is a primary finding of fact. Therefore, it is not the function of this Court to substitute its finding for that of the trial court.

12. In **Bear Island Foundation v Attorney-General for Ontario 83 D.L.R. (4<sup>th</sup>) 381**, the Supreme Court of Canada said at p 383 :

“This case, it must be underlined, raises for the most part essentially factual issues on which the courts below were in agreement. On such issues, the rule is that an appellate court should not reverse the trial judge in the absence of palpable and overriding error which affected his or her assessment of the facts : Stein v The Ship “Kathy K” (1975), 62 D.L.R. (3d) 1, (1976) 2 S.C.R. 802, 6 N.R. 359; Century Ins. Co. of Canada v N.V Bocimar S.A (1987), 39 D.L.R. (4<sup>th</sup>) 465, (1987) 1 S.C.R. 1247, 27 C.C.L.I. 51, and Beaudoin v Daigneault v Richard, (1984) 1 S.C.R. 2, 37 R.F.L (2<sup>nd</sup>) 225, 51 N.R. 288. The rule is all the stronger in the face of concurrent findings of both courts below.”

In the present case, there were no palpable and overriding error on the part of the learned judicial commissioner in his assessment of the facts.

13. In my judgment, the learned judicial commissioner was correct to hold that the respondent had succeeded in proving its case beyond any reasonable doubt and that he had considered and accepted the oral evidence of SP7 and that

there were no reasons to question his credibility as a witness. The case for the prosecution is neither incredible nor improbable. Since this Court has had no audio-visual advantage of the witness, it is only proper that this Court defers to the views of the learned trial judicial commissioner.

14. Accordingly, I find that the Court of Appeal was right to concur with the decision of the High Court that the appellants were guilty of the charge. These appeals are therefore dismissed and the conviction and sentence are hereby affirmed.

26 July 2007

**(Dato' Bentara Istana Dato' Nik Hashim bin Nik Ab. Rahman)**  
Judge  
Federal Court  
Malaysia

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