

DALAM MAHKAMAH PERSEKUTUAN MALAYSIA

(BIDANG KUASA RAYUAN)

RAYUAN JENAYAH NO: 05-67-2005 (J) & 05-68-2005(J)

ANTARA

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

DAN

PENDAKWA RAYA ... RESPONDEN

[Dalam Mahkamah Rayuan Malaysia
(Bidang Kuasa Rayuan)
Rayuan Jenayah No. J-05-52-2003 & J-05-53-2003

ANTARA

1. LEE KWAI HEONG ... PERAYU-
2. LEE AH SENG ... PERAYU

DAN

PENDAKWA RAYA ... RESPONDEN]

Coram: ALAUDDIN MOHD. SHERIF, FCJ
ARIFIN ZAKARIA, FCJ
NIK HASHIM NIK AB. RAHMAN, FCJ
ABDUL AZIZ MOHAMAD, FCJ
AZMEL MAAMOR, FCJ

JUDGMENT

1. The two appellants were convicted by the High Court of the murder of one Sanip bin Leham alleged to have been committed on 8 October 1998 at about 4.00 a.m. at the disused mine known as Lombong Jomis, at Km 4, Jalan Sungai Rengit, in the District of Kota Tinggi, in the State of Johor. They were alleged in the charge to have committed the offence jointly with two others who were still at large and the charge against them was brought in reliance on the common intention provisions of section 34 of the Penal Code. Their appeals to the Court of Appeal were dismissed. They now appeal to this court.

2. At the disused Lombong Jomis there were two rectangular pools, one small and the other large, connected by a neck of water. The deceased Sanip was an inland fisherman who fished at the pools. Fronting the small pool, and just a short distance away from it, were three shacks. The one in the centre was used by Sanip. Almost against it was another shack. The fronts of these two shacks were without a wall and were open.

3. The second appellant, Lee Kwai Heong (“Ah Hong”), was the first accused in the High Court and the first appellant in the Court of Appeal. The first appellant, Lee Ah Seng (“Ah Seng”), was the second accused in

the High Court and the second appellant in the Court of Appeal. In the High Court they were separately represented, Ah Hong's counsel being Encik Hisyam Teh Poh Teik. In the Court of Appeal, as in this court, they were both represented by Encik Hisyam.

4. After the close of the case for the prosecution, the appellants were called to enter upon their defence. The defence of Ah Hong was one of alibi. The defence of Ah Seng was a denial.

5. The only eye-witness evidence against the appellants was that of Lee Cheng Soi, a Chinese Muslim whose Muslim name is Hassan bin Abdullah. He will be referred to as "Hassan Lee", although the learned trial judge referred to him as Hassan Abdullah. At the material time he was also a fisherman at Lombong Jomis. On 8 October 1998, the day of the incident, at 4.40 a.m., he lodged a police report (Sungai Rengit Report 712/98) in which he said as follows: At about 4.00 a.m., when he was sleeping in his shack, he heard his friend Sanip, who was sleeping in the shack next to his, crying for help and telling him loudly that he had been hit by three unknown persons. Sanip ran out of his shack in an unsteady state. After that he, Hassan Lee, sought the help of a friend by the name of Goh Kim Hooi who was staying at a nearby shack, to obtain assistance from the police station. In the incident, said the report, a motorcycle No.

JCK 7096 belonging to Sanip was taken away. The exact text of the report, which was in Malay, is as follows:

“ Pada jam lebih kurang 4.00 am 8/10/98 semasa saya sedang tidur di pondok berhampiran ikan, Jalan Jomis Sg Rengit terdengar jeritan minta tolong daripada kawan saya nama Sanif yang tidur bersebelahan dengan pondok saya. Beliau menjerit memberitahu kepada saya dengan kuat beritahu beliau telah kena pukul oleh (3) orang lelaki yang tidak dikenali. Beliau lari keluar daripada pondoknya dalam keadaan terhoyang hayang. Selepas itu saya meminta tolong dengan kawan nama Goh Kim Hoi yang tinggal dalam pondok berhampiran untuk dapatkan bantuan di balai polis. Dalam kejadian tersebut sebuah m/sikal no. JCK 7096 telah dilarikan bersama kepunyaan Sanif.”

6. It is conspicuous from the report that when Hassan Lee made it he did not implicate anybody in what happened to Sanip.

7. Sjn/Mejar Harun bin Salleh went to the scene at 4.50 a.m. and found Sanip lying covered with blood near one of the four sides of the smaller pool. He was still alive and tried to rise but was unable to speak. A wooden lath (*kayu beroti*) about three feet long was found on the ground about four metres from Sanip (P9A). It bore blood stains, which were later proved to be human blood Group A, the group of Sanip's blood. About nine metres from Sanip, on the ground by the smaller pool, by the side of it facing the three shacks, was found a length of iron pipe (P8A) bearing blood stains which subsequently were found insufficient for determining the species of the blood.

8. Sanip was taken away by ambulance and died in hospital at 9.15 a.m. on the same day.

9. At about 10.30 a.m. on the same day ASP Wan Hassan bin Wan Ahmad, the I.O., went to the scene with Sjn/Mejar Harun and found a parang sheath outside Sanip's shack.

10. The post-mortem examination carried out on the body of Sanip on 9 October 1998 established that there were seventeen injuries on various parts of the body, including several incised wounds, one of which was at the back of the head. The pathologist was of opinion that the incised wounds could have been caused by a blunt knife or a blunt parang or anything that had an edge that was not sharp, including the wooden lath P9A if applied by a side having an edge (*bucu*). According to the pathologist, the injuries to the left arm, consisting of a swelling and the fracturing of the radius and ulna bones, could have been caused by the iron pipe P8A. The pathologist gave brain injuries as the cause of death, resulting from the blow that caused the incised wound at the back of the head. He was of opinion, judging from the injuries to the left hand and the back of the head, that Sanip and his assailants were face to face when the injuries were inflicted.

11. Several persons were arrested as suspects. The first arrest was on 9 October 1998, the day after the incident, and the person arrested was Rozanizam bin Borhan, who was released after about a week and became the prosecution's sixth witness. On 18 October 1998, Goh Kim Hooi, whose name was mentioned in Hassan Lee's report, and Mohamed Nizam bin Abu Bakar, were arrested. Goh Kim Hooi was released after fourteen days and in the trial was offered to the defence. Mohamed Nizam was released after three days. Hassan Lee was arrested on 19 October 1998, eleven days after the incident, and was released after fourteen days. The appellants were the last to be arrested, Ah Hong on 21 October 1998 and Ah Seng on 14 November 1998, after Hassan Lee's arrest. Ah Hong was arrested while Hassan Lee was in detention, and after Ah Hong's arrest Hassan Lee continued to be kept in detention for twelve days. He was to admit in cross-examination by Ah Hong's counsel that he was interrogated many times.

12. On 27 October 1998, after Ah Hong's arrest, Sjn/Mejar Harun found Sanip's motorcycle No. JCK 7096, which Hassan Lee had mentioned in his report, sunk in a marsh (*paya*) about 300 metres from the scene of the incident. Two days later, on 29 October 1998, according to ASP Wan Hassan the I.O., he found, about 1400 metres from the place of incident, at a place marked L in the sketch plan P32, which would have been in the

larger pool near one of its four sides, a red torch, which was damaged and was proved to belong to Sanip. In connection with this finding, an information allegedly received from Ah Hong was admitted in evidence under section 27 of the Evidence Act 1950. On 25 November 1998, after the arrest of Ah Seng, according to ASP Wan Hassan, he found, in a building in Kampung Setinggalan MIC, Batu 11, Ulu Tiram, Johor, a waist-pouch, which was proved to belong to Sanip. In connection with this finding, an information allegedly received from Ah Seng was admitted in evidence under section 27. In this appeal the learned DPP conceded that those pieces of information from Ah Hong and Ah Seng were inadmissible.

13. It was in his testimony given in the trial on 2 July 2001, almost three years after the incident, that Hassan Lee, the only eye-witness, implicated the appellants. He was the seventh prosecution witness (SP7 or PW7). His evidence was as follows. At about 4.00 a.m. on 8 October 1998, when he was sleeping in the shack next to Sanip's – which must have been the one stated earlier as being almost against Sanip's shack – he heard Sanip crying out that some person or persons were hitting him on the head – “ada orang ketuk kepala saya” – and asking him to quickly run away. He went out of his shack and saw Ah Hong and Ah Seng, who were known to him, take a length of wood (*mengambil kayu*) and chase Sanip, who ran to the side of the pool. He was certain that each of the appellants

was holding a piece of wood about three feet long. He also saw two other persons whom he could not recognize, but his evidence in examination-in-chief, as recorded by the learned trial judge, did not expressly state what the other two persons actually did. His actual evidence, as recorded, was: “Ada orang lain juga yang saya nampak pada masa itu. Saya tak kenal orang lain. Semua sekali ada 4 orang – 2 orang saya tidak cam” (notes, p. 29). The judge took the evidence to be that all the four persons chased Sanip. But in cross-examination by Ah Seng’s counsel, Hassan Lee said that he saw three other persons who ran (*yang lari*) but since they were about twenty yards away he could not recognize them. It is not clear from the notes whether the words “*yang lari*” meant that they ran in pursuit of Sanip or they ran away. That would make it five persons that Hassan Lee said he saw in the incident, including the two appellants.

14. As to what happened after he saw Sanip being pursued, Hassan Lee said in examination-in-chief that he went to look for one Goh Ah Long who was somewhere nearby and both of them went to look for Sanip and found him lying beside the pool. After that they went to the police station, arriving at 4.40 a.m., and Hassan Lee lodged his report. It will be recalled that in his report he said that the person to whom he went for help was Goh Kim Hooi. There is no evidence that Goh Kim Hooi and Goh Ah Long are the names of the same person. In cross-examination by Ah Seng’s counsel,

Hassan Lee said that after he saw Ah Hong and the three other persons he immediately ran to some bushes and into Ah Hong's shack. There is no evidence to connect sequentially this activity of Hassan Lee's with his evidence of going to Goh Ah Long for help.

15. As to his testimony that he saw each of the appellants holding a piece of wood, in cross-examination by Ah Seng's counsel Hassan Lee said that the wooden lath P9A, which the police found near where Sanip was lying on the ground, was not the wood that he saw either appellant was holding and that he did not see Ah Seng holding anything or doing anything. In re-examination he again said that he did not see Ah Seng holding anything ("*saya tidak nampak dia pegang barang*"). As to what he saw Ah Hong was holding, in re-examination he was less definite than he was in examination-in-chief. He said that he saw Ah Hong's hand "*macam pegang kayu*", which could mean that it was as if Ah Hong's hand was holding a piece of wood or Ah Hong was holding what resembled a piece of wood.

16. In cross-examination by Ah Hong's counsel, Hassan Lee confirmed that Sanip said (when in the shack) that he did not recognize the persons who were hitting him. This point is significant in view of Hassan Lee's evidence in cross-examination by both counsel that Sanip knew Ah Hong

and Ah Seng and the opinion of the pathologist that it was likely that he was face to face with his assailants when he received his injuries. This is assuming – because there is no evidence to provide an indication – that the injuries to the left hand and the back of the head on which the pathologist based his opinion were received in the shack and not after Sanip had left the shack. It was a moonlight night and it was by the moonlight that Hassan Lee claimed that he recognized the appellants. Sanip’s shack was not walled on one side, so that the inside of the shack could also have been lit by the moon. The question arises whether, if the appellants were among the assailants, it was likely that Sanip, as he was said to have said, did not recognize them.

17. Hassan Lee was cross-examined by Ah Hong’s counsel on his evidence that Sanip cried out to him to quickly run away, which he did not mention in his police report. His reply was that what was in the report was not said by him and that the report was wrong and that it was true that Sanip told him to quickly run away. In re-examination he said that Sanip’s words were “*orang ketuk kepala saya – Pak Hassan lari*” (“someone’s hitting my head – run Pak Hassan”).

18. In cross-examination by Ah Hong’s counsel, Hassan Lee admitted that when making his report he did not mention Ah Hong’s name or his

seeing Ah Hong carrying a piece of wood although he agreed that when he went to lodge the report the significant event that was foremost in his mind to say was that he saw Ah Hong, armed with a stick, chasing Sanip. In re-examination he admitted that he did not mention the involvement of the appellants when making his report and he gave as the reason for his failure his fear that Sanip's child or children (*anak*) would quarrel (*bergaduh*) with Ah Hong. He admitted that it was when he was interrogated by the police when he was in detention that he told the police that he saw Ah Hong take a piece of wood (*ambil kayu*) that night.

19. The most important ground in this appeal is that it is not safe to convict the appellants on the evidence of Hassan Lee, whose evidence was the only evidence that implicated the appellants, because it is not safe to treat Hassan Lee as a truthful witness. The veracity of Hassan Lee is brought into question by reason of several discrepancies between his police report (P24), which was the First Information Report ("F.I.R."), and his evidence and by reason of certain unsatisfactory features in his evidence. Of the discrepancies, the most prominent and significant is the omission to mention in the F.I.R. the involvement of the appellants and the alleged pursuit of Sanip after he came out of his shack. The omission is not one of mere detail but of the important second half of the events that were related in evidence. That section of the evidence is important because it was there

that the appellants were implicated and also because, even if it was true that Sanip said in the shack that he was being hit, the finding of the wooden lath and piece of iron pipe near where Sanip's body was found lying near the pool would suggest that he might have received further injuries there and that, if Hassan Lee's evidence about the chase was true, the chase ended with the infliction of those injuries. But the F.I.R. stopped short at the point where Sanip came out of his shack and omitted to state the pursuit and the persons who did the pursuing. It has also to be borne in mind that the omission was not due to the decision of the officer who took down the report that it was only necessary, for the purposes of an F.I.R., to write down only so much, but was, on Hassan Lee's own admission, a deliberate omission on his part.

20. The consequences of an omission to state an important matter in the F.I.R. have been mentioned in several Indian authorities, of which the following may be cited. In *Sher Ali v Emperor*, (29) A.I.R. 1942 Pesh. 51, at p. 52 C2, the story of an incident related by a witness was held to be rightly disbelieved by the trial court because the witness did not mention the incident in the F.I.R. that he had made. In *Ramlal Singh v State*, A.I.R. (45) 1958 M.P. 380, paragraphs (12), (13), H.R. Krishnan J disagreed with the Sessions Judge in being very greatly impressed by a boy witness's account of the happening because it was not mentioned in the F.I.R. of the

person to whom the boy must have related what he saw if he had seen it. He said that the F.I.R. “is a piece of corroborative evidence; omissions in it will, other things being the same, deprive prosecution of the most valuable corroboration and thereby make the story suspicious”. In *Hari Nath v State of U.P.*, A.I.R. 1988 S.C. 345, one at least of several eye-witnesses to a dacoity could reasonably be expected to have known some of the appellants, but the identity of the culprits was not disclosed in the F.I.R. At paragraph 7, Venkatachaliah J said: “The omission to disclose their identity in the F.I.R. would raise a reasonable doubt about their complicity in the crime”.

21. The Court of Appeal said (judgment, paragraph 13) that “it would not be in accordance with the settled principle if the evidence of PW7 in Court should be considered unreliable by reason of him failing to include the names of the Appellants when he lodged exh P24”. *Balachandran v Public Prosecutor* [2005] 2 MLJ 301, a decision of this court, was referred to for the “settled principle”, but the passage referred to, which was from paragraph [11], was part of the deliberation on the question of the consequences of failure by the prosecution to tender in evidence the F.I.R., not the consequences of failure of a witness to include in his report an important information, that is to say, of omissions in the F.I.R. The Court of Appeal recognized, as may be seen from the next paragraph of their

judgment (paragraph 14), that the consequences of omissions in the F.I.R. were considered in *Herchun Singh & Ors. v Public Prosecutor* [1969] 2 MLJ 209, and they cited a passage in which the then Federal Court cited with approval a passage from *Sohoni's* commentary on section 154 of the *Indian Criminal Procedure Code* (16th Edition, Vol. 1, page 750), part of which reads as follows:

“... But it cannot be said that omissions in the first information report would always be of no significance. The report is not substantive evidence and omissions in it will not *ipso facto* lead to the case being thrown out. But it is a piece of corroborative evidence; omissions in it will, other things being the same, deprive the prosecution of the most valuable corroboration and thereby make the story suspicious.

When a first information report contains an omission as to an important fact relied upon by the prosecution, the omission is important and in the absence of any other evidence, the court may in a given case refuse to consider the evidence of the informant on that fact because of such omission ...”

22. In this case the deliberate failure of Hassan Lee to mention in the F.I.R. the second half of the incident, including the appellants' involvement in it, should have given cause to the learned trial judge to be very careful about accepting Hassan Lee's evidence of the appellants' complicity in the crime. Of course if there was a reasonable explanation for the failure, it should not have any effect on the veracity of Hassan Lee. As has been stated, the reason that he gave for the failure was his fear that Sanip's child or children would quarrel with Ah Hong. At pages 16 and 17

of his judgment, the learned trial judge firstly treated the failure “as an omission as to details”, which, as already shown, it clearly was not, and secondly, as regards Hassan Lee’s explanation, said that “there is nothing incredible in the reasoning for the Court not to accept the explanation”.

23. With respect, in my judgment the explanation was inherently improbable. It is unnatural for a person who claims to have seen another commit a crime to report the crime and yet withhold the identity of the perpetrator, because the purpose of reporting a crime is to bring the wrongdoer to justice. It would require a very strong reason to deter one from revealing the culprit. The reason given by Hassan Lee was extremely weak. No reason was given as to why he was so protective of Ah Hong, who to his mind was involved in the commission of a crime against Sanip, who was his friend, from any likely trouble from Sanip’s children. Even if the *bergaduh* that Hassan Lee feared was that Sanip’s children would seek to wreak vengeance on Ah Hong, no reason was given – such as the character of Sanip’s children – as to why Hassan Lee thought that Sanip’s children would take the law into their own hands and not let the law take its course. Furthermore, Hassan Lee would surely have thought, as everyone else would, that if he mentioned the appellants to the police, the police would be likely to immediately arrest them, so that there would be no question of Sanip’s children going after Ah Hong. Or even if Hassan

Lee feared that some time would elapse before the police could arrest Ah Hong, he was not likely to have thought that in the meantime the fact that he had mentioned Ah Hong to the police would leak out to Sanip's children and that they would get at Ah Hong before the police could. Then there is the consideration that by failing to reveal the identity of Ah Hong in order to protect him from Sanip's children, Hassan Lee placed his own self in jeopardy, since, as it turned out, he himself was arrested as a suspect. It is unlikely that Hassan Lee could have failed to foresee such a consequence of his reticence. There is no reason to make it credible that Hassan Lee was so concerned for Ah Hong's welfare as to be willing to face the risk of jeopardy himself. Looked at from any angle, Hassan Lee's explanation was absurd. In my judgment the learned trial judge simply accepted Hassan Lee's explanation without judiciously weighing it. The Court of Appeal apparently went along with the learned trial judge's finding that Hassan Lee's explanation was not inherently improbable, because in paragraph 20 of their judgment they merely said – and that was in dealing with the contention that it was probably from motives of self-preservation that Hassan Lee finally named the appellants: “The explanation given by PW7 for not mentioning the Appellants in his police report should answer the contention”.

24. The logic is simple. If it was true that Hassan Lee, as he said in evidence, saw the appellants chase Sanip, by the natural course of human conduct he would have mentioned the fact in the F.I.R. Since he did not, and he failed to give a reasonable explanation for the omission, the truth of his evidence becomes open to at least a reasonable doubt.

25. The learned DPP submitted that the learned trial judge had found Hassan Lee to be a witness of truth and that we ought not to interfere with that assessment because the credibility of a witness is primarily a matter for the trial judge. In paragraph 30 of his written submission the learned DPP said this:

“It is respectfully submitted that the learned Trial Judge’s assessment of the credibility of SP7 is without fault. Reasons were given for that positive assessment after duly considering discrepancies and contradictions contained. Such assessment by the learned Trial Judge, in keeping with high authority, is entitled to due deference.”

26. The learned trial judge’s assessment of credibility that the learned DPP referred to is found at pages 11 and 12 of the judgment where the learned trial judge, in rejecting the defence submission as to the credibility of Hassan Lee, said:

“ 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 stated [*sic*] 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 [*sic*] armed with a piece of wood or something that resembled a piece of wood.” [Emphasis added].

27. It would appear from that passage that the finding that Hassan Lee was a witness of truth was made on the basis that he was unshaken in cross-examination and that the circumstances – closeness and moonlight – were favourable for an unmistakable identification. With respect, when the suggestion is that a witness is not speaking the truth in implicating a person, that is to say, that he is saying that the person was present at a place when he knows that the person was not, the fact that the circumstances were favourable to an unmistakable identification does nothing to prove that the witness is a witness of truth. The favourable circumstances go to the question of correctness of observation and do so only in respect of a witness who believes that his observation is correct.

28. As to being unshaken in cross-examination, Hassan Lee's mere insistence that he saw the appellants chasing Sanip does not necessarily make him a witness of truth. The fact, however, is that he *was* shaken in cross-examination at least in one important respect pertaining to the appellant Ah Seng. As has been related, in examination-in-chief he stated positively that he saw both the appellants chasing Sanip, each carrying a stick, but in cross-examination and even in re-examination he said that the appellant Ah Seng was not carrying anything and was not doing anything. Since Hassan Lee's evidence consisted, in essence, only of his hearing Sanip's cry and seeing the appellants chasing Sanip, each carrying a piece of wood, his subsequent dropping of Ah Seng out of that picture constitutes being shaken as to fifty per cent of his evidence. The learned trial judge, as can be seen from the passage quoted earlier, recognized this "contradiction", but said "nevertheless to my mind it does not affect his testimony that both the accused with two others at large were chasing the accused [*sic*] armed with a piece of wood or something that resembled a piece of wood". It would appear as if the learned trial judge merely brushed aside the contradiction, ignored the benefit derived for Ah Seng from Hassan Lee's admission in cross-examination that he was not holding anything and – which the judge failed to mention – was not doing anything, and proceeded on the basis that Hassan Lee's evidence was that both the appellants were chasing Sanip while holding a piece of wood or –

which, according to the notes, Hassan Lee said in re-examination in reference to Ah Hong – “*macam pegang kayu*”.

29. On that aspect of Hassan Lee’s evidence, the Court of Appeal, in paragraph 18 of their judgment, taking “the view that the learned trial Judge did examine the evidence of PW7 and applied the correct judicially accepted test”, said:

“Discrepancies are there in the testimony of PW7 in relation to exh. P24. One discrepancy highlighted was whether the second Appellant was armed when PW7 allegedly saw him chasing the deceased. From the evidence recorded PW7 corrected himself in re-examination that the second Appellant was not armed. Thus, nothing turns on this point. In any event we are in agreement with the learned trial Judge that the explanation given is not inherently incredible as to warrant a complete rejection of the evidence of PW7.”

30. It is to be observed that the Court of Appeal seem to view the point, firstly, as one of discrepancy between Hassan Lee’s evidence and the F.I.R. (P24), and, secondly, as a point as to which Hassan Lee corrected himself in re-examination and therefore “nothing turns on this point”. As has been related, it was a point of contradiction between his evidence in his examination-in-chief and his evidence in cross-examination, which contradiction he maintained in re-examination. In examination-in-chief he said that Ah Seng carried a piece of wood, in cross-examination he said that Ah Seng was not holding anything and in re-examination he continued

to say that he did not see Ah Seng holding anything. And it was not at all a case of correction in re-examination. It was not a case of Hassan Lee saying in re-examination that in fact Ah Seng did hold a piece of wood and that his answer in cross-examination was for some reason a mistake. Furthermore, in taking the view that Hassan Lee corrected himself in re-examination, the Court of Appeal had to be accepting as correct Hassan Lee's evidence in re-examination, which was that Ah Seng was not holding anything, and therefore should have been critical of the learned trial judge's brushing aside of that evidence and proceeding still on the basis that Ah Seng was chasing Sanip armed with a piece of wood. To me, it serves as a clear indication that the learned trial judge did not subject Hassan Lee's evidence to a critical examination but was determined to treat him as a witness of truth where his evidence in examination-in-chief was concerned.

31. It may be argued, although this was not expressly done in this appeal, that the learned trial judge found Hassan Lee to be a witness of truth on the strength of his demeanour, but he has not expressed this as his reason for so finding. In any case, he could not validly make such a finding without attempting a rationalization of Hassan Lee's contradictory evidence on an important point.

32. It is also to be observed that the Court of Appeal, in relation to this question, also said that they agreed with the learned trial judge that Hassan Lee's explanation was "not inherently incredible". I think, with respect, that the Court of Appeal again fell into confusion there. Hassan Lee did not give any explanation of the contradiction. The explanation that Hassan Lee gave and that the learned trial judge found not inherently incredible was the explanation of his failure to mention the appellants in the F.I.R., which, as I have said, is absurd.

33. The learned trial judge's finding of Hassan Lee as a witness of truth is therefore highly questionable.

34. I should like to mention just two cases in which this court did not accept the finding of the trial judge that a witness was a witness of truth. In *Mahinder Singh v Public Prosecutor* [1967] 1 MLJ 126, where the charge of voluntarily causing grievous hurt depended solely on the uncorroborated evidence of the complainant, the trial judge had believed the complainant's evidence that it was the appellant who had stabbed him because "his evidence as regards his ability to identify the assailant was completely unshaken". Ong Hock Thye F.J. (as he then was) said that the trial judge failed to consider certain "self-contradictions" in the answers given by the complainant in cross-examination and that, if those answers

were considered, “there can no longer be that degree of satisfaction of guilt of an accused person which alone can justify a verdict of guilty”. In *Dato’ Sri Anwar Ibrahim v PP & Another Appeal* [2004] 3 CLJ 737, the majority of the court, after considering as a whole the evidence of the witness who had alleged being sodomized, were unable to agree with the “firm finding” of the learned trial judge and the Court of Appeal that he “is a wholly reliable, credible and truthful witness” (p. 758 f-h). At page 752 Abdul Hamid Mohamad FCJ said:

“Clearly, an appellate court does not and should not put a brake and not going any further the moment it sees that the trial judge says that that is his finding of facts. It should go further and examine the evidence and the circumstances under which that finding is made to see whether, to borrow the words of HT Ong (CJ Malaya) in *Herchun Singh’s* case ([1964] 2 MLJ 209) ‘there are substantial and compelling reasons for disagreeing with the finding.’ Otherwise, no judgment would ever be reversed on question of fact and the provision of s. 87 CJA 1964 that an appeal may lie not only on a question of law but also on a question of fact or on a question of mixed fact and law would be meaningless.”

35. The learned trial judge also relied on circumstantial evidence to conclude that the appellants committed the crime. This may be seen at pages 17 and 21 of his judgment where he relied on the evidence of the chemist (SP1), the pathologist (SP4), Rozanizam bin Borhan (SP6), who has been mentioned as one of those arrested as suspects, and of the section 27 informations which, as I have said, the learned DPP has now conceded are not admissible, and which, I should add, the learned trial judge, while

taking them into consideration, did not at all set out what they said. At page 17 the learned trial judge said: “Aside from the direct evidence of SP7 there is also the circumstantial evidence through the testimony of SP6, SP4 and SP1 the chemist which I am satisfied proves the guilt of the both [*sic*] accused”. At page 24, the learned trial judge concluded: “Hence the cumulative effect of the evidence as presented above clearly leads me to the irresistible conclusion that it was both the accused that committed the offence.” As regards the evidence of Rozanizam (SP6), the Court of Appeal, in paragraph 23 of their judgment, said that “the trial judge merely alluded to it and in passing” and that “we did not find that he substantially relied on it in coming to his decision”. But the learned trial judge did rely on it as a piece of circumstantial evidence.

36. The evidence of the chemist cannot be used as circumstantial evidence pointing to the appellants. The evidence of the chemist merely served to link the exhibits found to the victim. The evidence of the pathologist merely served to establish the cause of death and intention to cause death. Their evidence did not serve to establish the identity of the offenders.

37. As to Rozanizam, his evidence was that he had been working for Ah Hong but had stopped on 15 October 1998. On 16 and 17 October 1998 he

went to see Ah Hong to get his shirt and shoes, when Ah Hong inadvertently said (*terlepas keluar cakap*) that he wanted to whack (*belasah*) Sanip. After giving those specific dates, he said that when he took his shoes Sanip had not died yet. This witness's evidence is clearly unreliable because the specific dates that he gave was after Sanip's death and Ah Hong could not, after Sanip's death, be wanting to whack him. After giving those specific dates, to say that it happened before Sanip died could not mend his credibility. The learned trial judge, at page 17 of his judgment, without stating that the witness gave those specific dates, merely glossed over this oddity by saying that the witness "was a bit confused as to the actual date". The learned DPP has not sought in this appeal to rely on the evidence of this witness as a piece circumstantial evidence. This may be seen from paragraph 62 h of his written submission, where he mentions only the evidence of the chemist, the pathologist and the I.O. (SP10), who gave evidence as to the section 27 informations, which have been conceded to be inadmissible.

38. There is therefore no circumstantial evidence to support Hassan Lee's evidence implicating the appellants.

39. It is not only in the implicating of the appellants in the events that took place on the night in question that Hassan Lee's evidence is open to

reasonable doubt, by reason that his reason for not mentioning the appellants in the F.I.R. is absurd. There are indications that make for doubting that the events of that night occurred as Hassan Lee related them in evidence. In cross-examination it was put to him that he was covering up certain facts pertaining to this case, which he of course denied.

40. There is the question whether Sanip did in fact say that he could not recognize his attackers. If he did say so, which Hassan Lee insisted he did, it would, as has been indicated earlier, be a point in the appellants' favour. But it is not natural for a person who cries out to another in the course of being attacked or is on the point of running away after being attacked to include in his cries information as to whether he did or did not recognize his assailants. Then there is the question whether in fact Sanip did tell Hassan Lee to run away, because that would mean that Hassan Lee would also be in danger from the assailants and that Sanip, while himself being in danger, still could think of Hassan Lee's safety. It was as if Sanip thought that his assailants had come to attack everyone found at the place. Then there is the question of the number of persons. Were there four or five persons? Then there is the problem of fitting Ah Seng into the scene and the sequence of events, assuming that he was there, if, as Hassan Lee said, he was not carrying anything and not doing anything, let alone chasing Sanip. Then there is the question of the weapons. Since Hassan Lee said

that the weapon that he saw Ah Hong carry was not the wooden lath P9A, which bore stains of Sanip's blood, whose weapon was it? Whose weapon was the iron pipe P8A? Hassan Lee did not say that the two or three other persons carried any weapons. As I said, it is not clear from the judge's notes of Hassan Lee's evidence that they also pursued Sanip. Then there is the question whether Goh Kim Hooi and Goh Ah Long were the same person and, if not, which of them did Hassan Lee go to for help? Then there is the problem of fitting the picture of Hassan Lee going to seek the person with his running into some bushes and into Ah Hong's shack.

41. Finally there is a point that was never taken up in cross-examination or in submission in the High Court, in the Court of Appeal or before us, but nevertheless is a point that stands out starkly and cannot be ignored. The evidence is that Sanip's motorcycle was found in a marsh on 27 October 1998. Hassan Lee in his police report stated that Sanip's motorcycle was taken away in the incident that night. According to him the incident occurred at 4.00 a.m. He lodged his report at 4.40 a.m. That means that between 4.00 and 4.40 a.m. he came to know that some person or persons took away Sanip's motorcycle. It is likely that his knowledge came from his own observation of what took place between 4.00 a.m. and before he left to lodge his report, which would be sometime before 4.40 a.m. But his evidence was only that he saw the appellants chasing Sanip, and the taking

of the motorcycle does not fit into that picture. Apart from that, there is the question of who took away the motorcycle and what part did they actually play in the incident that night. Going by Hassan Lee's evidence, it was not the two or three other persons whom he said he saw.

42. Those are indications that raise a reasonable inference that something more happened that night pertaining to the attack on Sanip that was not related by Hassan Lee in evidence and that what happened that night was not wholly as related by Hassan Lee. That, and the doubt as to Hassan Lee's veracity in implicating the appellants in the incident, render the appellants' conviction unsafe. For that reason I would allow their appeal, set aside their conviction and the sentence imposed and acquit and discharge them.

Dated: 26 July 2007

DATO' ABDUL AZIZ BIN MOHAMAD

Judge
Federal Court Malaysia

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