

**DALAM MAHKAMAH PERSEKUTUAN MALAYSIA
(BIDANG KUASA RAYUAN)
RAYUAN JENAYAH NO: 05-67-2005 (J) & 05-68-2005 (J)**

ANTARA

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

DAN

PENDAKWA RAYA**RESPONDEN**

**[Dalam Mahkamah Rayuan Malaysia
(Bidang Kuasa Rayuan)
Rayuan Jenayah No: J-05-52-03 & J-05-53-03**

ANTARA

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

DAN

PENDAKWA RAYA**RESPONDEN]**

**CORAM : 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**

JUDGMENT OF Y.A. DATO' AZMEL BIN HAJI
MAAMOR (FCJ)

1. I have read the judgment of my learned brother Abdul Aziz bin Mohamad FCJ and also the judgment of my learned brother Nik Hashim bin Nik Ab. Rahman FCJ. I am fully in agreement with the decision of my learned brother Nik Hashim FCJ that these appeals be dismissed.

2. These appeals were based entirely on findings of facts made by the learned trial Judicial Commissioner. The conviction of the two appellants for the offence of murder of one Sarip bin Leham were based mainly on the evidence of SP7. Despite the existence of discrepancies in the evidence of SP7 the learned Judicial Commissioner still accepted SP7 to be a truthful and reliable witness as he was satisfied with SP7's explanation in respect of the discrepancies. In arriving at this conclusion the learned Judicial Commissioner had carefully scrutinized the evidence before him and the submissions of both the accused counsel.

3. It has been generally accepted that the evidence of a witness will contain contradictions and discrepancies. But that does not mean that he is not a truthful and unreliable witness. In other words no witness is capable of giving perfect evidence. And it has been frequently ruled by courts that flawless evidence of a witness should be looked with suspicion as there is great likelihood that he had been coached or his evidence concocted.

4. The ability of a witness to narrate and recollect any particular incident depends very much on his level of education, intelligence, upbringing and experience. Hence one witness may perceive the incident differently from another witness. One witness may be able to give detailed account while the other may only be able to give it scantily. But both may be telling the truth of what they perceive of the same incident. It is true, however, that certain witnesses may not be telling the truth. Hence it is very essential for the trial judge to observe the

behaviour or the demeanour of the witness while giving evidence.

5. Such observation would to a large extent help him to determine whether the witness is truthful or otherwise. This is one important aspect where an appellate court does not have the audio-visual advantage of the witness, to that extent somewhat handicapped in making a proper assessment as regards the credibility of the witness. Merely relying on what is stated in the notes of evidence would be grossly insufficient.

6. It is for that reason that a guiding principle for the appellate court has been well established that in dealing with issues of facts the appellate court should be very slow in disturbing the finding of the trial judge. I only need to refer to the decision of Abdul Hamid FJ (as he then was) in the Federal Court case of **Lai Kim Hon & Ors. V. PP** [1981] 1 MLJ 91 at p.93 where His Lordship stated as follows :-

“Viewed as a whole it seems clear that the finding of fact made by the trial judge turned solely on the credibility of the witnesses. The trial judge heard the testimony of each witness and had seen him. He also had the opportunity to observe the demeanour of the witnesses. 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. And which evidence is to be believed or disbelieved is again a matter to be determined by the trial judge based on the credibility of each witness. 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. Viewed in that light we did not consider it proper for this court to

substitute its findings for that of the learned trial judge.”

7. In respect of the same principle I refer to the case of **Herchun Singh & Ors v. Public Prosecutor** [1969] 2 MLJ 209 where Ong Hock Thye C.J. (Malaya) said :-

“The learned trial judge, having heard the complainant’s explanation, was satisfied that the latter was still very much shaken by the alarming experience he had undergone when he made his report but that, despite his agitation, he did mention some names to the police. This was a finding of fact that the report which was taken down contained errors and omissions for which the constable alone was responsible. The view of the trial judge as to the credibility of the witness

must be given proper weight and consideration. An appellate court should be slow in disturbing such finding of fact arrived at by the judge who had the advantage of seeing and hearing the witness, unless there are substantial and compelling reasons for disagreeing with the finding.”

8. It is on the basis of this well established principle that on the facts and circumstances of this case I find myself unable to disturb the finding of fact made by the learned Judicial Commissioner because I am unable to see how SP7 behaved himself while giving evidence. SP7 is a simple kampong folk with low level of intelligence. There was nothing to suggest that he would gain anything by stating what he said in court. Due to his level of intelligence and life style, his evidence undoubtedly, contained several contradictions. But

that does not necessarily mean he was not telling the truth. He had satisfactorily explained the contradictions in his evidence.

9. The learned Judicial Commissioner ruled that SP7's identification of the Appellants was positive. SP7 had also explained why his 1st information report did not mention the names of the Appellants. Such explanations were accepted by the learned Judicial Commissioner. In my view it is quite improper to rule that SP7 is not a reliable witness, purely on the basis that his evidence contained a number of contradictions without my having the advantage of seeing his demeanour while giving evidence. The learned Judicial Commissioner had given his reasons why he concluded that SP7 was a truthful and reliable witness. Only he had seen SP7 giving evidence and observed his behaviour. And he made the ruling that SP7 was a truthful and reliable witness.

10. Furthermore the three judges of the Court of Appeal had unanimously confirmed the finding of facts of the learned

Judicial Commissioner. In the light of the concurrent finding of facts by the courts below I am of the view that it is not proper to disturb his finding.

11. In support of such view I refer to the case of **Sri Kelangkota Rakan Engineering JV Sdn. Bhd. & Anor v. Arab Malaysia Prima Realty Sdn. Bhd. & Ors.** [2003] 3 CLJ, where Abdul Malek Ahmad FCJ (as he then was) said :-

“In our view, looking at the above cited passages from the judgment of the Court of Appeal and having regard to the fact that the issue that was decided by the Court of Appeal and the High Court was clearly one of fact there is obviously no merit in the contention of the appellants as found in the grounds of appeal that the Court of Appeal erred in law in deciding as they did. Even assuming for a moment

that the Court of Appeal erred in the application of the principles of law to the particular set of facts in the instant appeal, there is no room for this court to reverse the concurrent finding of fact made by the High Court and the Court of Appeal that the appellants were the guilty party in breach of the agreements since it is trite law that the appellate court is not prepared to interfere with the concurrent finding of facts made by the courts below as held by this court in Lim Geok Liang v. East West UMI Insurance Bhd. [1997] 4 CLJ.405.”

12. I would accordingly dismiss these appeals. The conviction and sentence would hereby be affirmed.

Dated : 26th July 2007.

(DATO' AZMEL BIN HAJI MAAMOR)
Judge
Federal Court Malaysia

Counsels for the Appellants : Hisyam Teh Poh Teik
Solicitors for the Appellants : Messrs Teh Pok Teik & Co.
Counsel for the Respondent : Manoj Kurup
Deputy Public Prosecutor