DALAM MAHKAMAH RAYUAN MALAYSIA DI PUTRAJAYA
(BIDANGKUASA RAYUAN)

MAHKAMAH RAYUAN RAYUAN JENAYAH NO: B-06A-19-2009

DIDENGAR BERSAMA

MAHKAMAH RAYUAN RAYUAN JENAYAH NO: B-06A-19A-2009

ANTARA

1. AZILAH BIN HADRI	**...**	**PERAYU-**
2. SIRUL AZHAR BIN HJ. UMAR		**PERAYU**

DAN

PENDAKWA RAYA	**...**	**RESPONDEN**

Dalam Mahkamah Tinggi Malaya Di Shah Alam Perbicaraan
Jenayah Selangor No: 46-3-2006

Antara

PENDAKWA RAYA

Dan

1. AZILAH BIN HADRI
2. SIRUL AZHAR BIN HJ UMAR

CORAM:

MOHAMED APANDI ALI, JCA
LINTON ALBERT, JCA
TENGKU MAIMUN TUAN MAT, JCA

JUDGMENT OF THE COURT

1] There are two appeals before us, both against conviction and sentence passed by the High Court at Shah Alam. The first appeal B-06A-19-2009 was filed by Azilah bin Hadri (the 1st appellant) while the second appeal B-06A-19A-2009 was filed by Sirul Azhar bin Umar (the 2nd appellant). My learned brothers, Apandi Ali JCA and Linton Albert JCA have read and contributed valuable input and approved this judgment. This is our judgment.

[2] The appellants were members of the Unit Tindakan Khas (UTK) or the Special Action Unit of Polis Diraja at Bukit Aman, Kuala Lumpur with the rank of Inspector and Corporal respectively. They were charged with an offence under section 302 read together with section 34 of the Penal Code i.e. that in furtherance of their common intention, they had committed the murder of one Altantuya Sharibu, a Mongolian citizen. The offence was allegedly committed between 10.00 pm on 19.10.2006 until 1.00 am on 20.10.2006 at a place between Lot 12843 and Lot 16735, Mukim Bukit Raja in the district of Petaling in the State of Selangor Darul Ehsan. One Abdul Razak bin Abdullah (hereinafter referred to as the 3rd accused) was charged for abetting the appellants in the commission of the murder. The cases of murder and abetment were heard together.

[3] We do not wish to set out the facts in full. Suffice to state that the deceased had an affair with the 3rd accused. After the affair ended, the deceased came to Kuala Lumpur on 8.10.2006 accompanied by her maternal cousin and a friend to see the 3rd accused but the 3rd accused refused to see her. The deceased had apparently blackmailed the 3rd accused and had threatened the life of his daughter.

[4] To protect his family from the deceasedôs harassment and threat, the 3rd accused, apart from hiring a private investigator, had sought assistance from one DSP Musa bin Safri to arrange for the police to patrol the vicinity of his house at Damansara Heights. At this juncture it is relevant to state that DSP Musa was not called as a prosecution witness.

[5] The appellants (who do not personally know the 3rd accused) were the police officers who had agreed to undertake the task of patrolling the house. The task was undertaken at the request of DSP Musa initially to the 1st appellant which led to the 1st appellant meeting up with the 3rd accused at his office and thereafter several telephone conversations and SMSes were exchanged between the 1st appellant and the 3rd accused. The 1st appellant then roped in the 2nd appellant to assist him in the said task. On the night of 19.10.2006 when the deceased came to the house of the 3rd accused, she was taken away in a car driven by the 1st appellant together with the 2nd appellant and SP7 in the said car. Later, at Bukit Aman, the deceased was last seen in the car of the 2nd appellant.

[6] A police report lodged on 20.10.2006 on the disappearance of the deceased triggered police investigation. On 6.11.2006, fragments of human bone and tissue were discovered in the forest area in Puncak Alam, Selangor (within lot No 12843 and 16735, Mukim Bukit Raja, Petaling). The DNA analysis proved to be one of Altantuya Shaaribuu. Having examined the remains, the Forensic Pathologist (SP 70) certified that the cause of death was ópprobable blast related injuriesô

[7] The prosecution's case rests on circumstantial evidence. Apart from the evidence showing the deceased to be last seen with the appellants, the prosecution relied on the following evidence to connect the appellants to the murder:-

(i) the call logs from the handphone of the 1st appellant;

(ii) the statements of the 1st appellant leading to the discovery of the crime scene and of the 2nd appellant leading to the discovery of the jewellery belonging to the deceased;

(iii) the CCTV of Hotel Malaya where the deceased stayed, showing the presence of the appellants on 18.10.2006;

(iv) the discovery of a pair of slippers smudged with blood in the 2nd appellant's car;

(v) the smart tag device slot recovered from the 2nd appellant's car showing the movement of the 2nd appellant's car on 19.10.2006 and 20.10.2006 entering/exiting through Kota Damansara/Jalan Duta;

(vi) the discovery of a spent cartridge (exhibit P185B) from inside the 2nd appellant's car;

(vii) the Forensic Video Analysis photograph taken from CCTV at Plaza Tol Kota Damansara showing the 2nd appellant's car passing through the said Plaza Tol on 19.10.2006;

(viii) the discovery of the notes consistent with the handwriting of the 3rd accused from inside the bag of the 1st appellant.

[8] In the course of the trial, the 3rd accused had filed an application for bail. The application was supported by an affidavit exculpating him from the crime. Except for certain paragraphs which were expunged, the learned trial judge accepted the affidavit of the 3rd accused as forming part of the evidence for the prosecution. His Lordship found that the affidavit which was corroborated in material particulars by the evidence of SP1, SP6, SP9 and the other surrounding circumstances have negated and nullified the act of abetment as alleged against the 3rd accused.

[9] At the end of the prosecutionôs case, the learned trial judge found that the prosecution had made out a prima facie case against the 1st and 2nd appellants. The appellants were called to enter defence while the 3rd accused was acquitted and discharged. No appeal was filed by the Public Prosecutor against the acquittal and discharge of the 3rd accused.

[10] The 1st appellant gave evidence under oath. His evidence is that at the material date and time, he was not at the scene of the crime but at Wangsa Maju as per his notice of alibi (exhibit D430). He denied uttering those statements relating to the scene which was admitted by the court as evidence leading to discovery of facts under section 27 of the Evidence Act. It was also the evidence of the 1st appellant that he was not the last person to be with the deceased. According to the 1st appellant, he had handed over the deceased to the 2nd appellant for the 2nd appellant to send back the deceased to the hotel.

[11] The 2nd appellant gave an unsworn statement from the dock. The statement sets out the events from the time the 1st appellant called him on 18.10.2006. The statement explains his presence with the 1st

appellant at Hotel Malaya on 18.10.2006 and at the 3rd accusedôs house on 19.10.2006. He also sets out the events after 20.10.2006 i.e. between 31.10.2006 until 5.11.2006 when he was on duty escorting the Prime Minister to Pakistan; the events that took place after he was brought back to Kuala Lumpur from Pakistan on 6.11.2006 and the events which took place on 7.11.2006 where he was said to make the statements leading to the discovery of the jewellery belonging to the deceased. In essence his defence was that he has been made a ôscapegoatô

[12] The learned trial judge dealt with the defence in the following manner:-

> ñ150. Having heard the defence of the First and the Second Accused, what is required of the court to decide at this stage, is whether the prosecution in the light of the defenceôs case has proved its case beyond reasonable doubt for the accused to be found guilty and convicted and charged or whether the defence have cast reasonable doubt which warrant their acquittal.
>
> 151. The First Accused did not call any of his witness to support his defence and his alibi. The station diary (D428) was likewise not formally proven. The law relating to the non-calling of a witness by the defence is well settled i.e. notwithstanding that, it should not be made subject of adverse comment by the court and that s. 114(g) of Evidence Act should not be invoked against the accused person. The court must still consider whether he has nevertheless succeeded in casting a reasonable doubt on the prosecutionôs case.
>
> 152. The law relating to the weight to be attached to the unsworn statement from the dock which is not subjected to cross examination by the prosecution, is likewise settled i.e. notwithstanding that the weight to be

attached to this category of defence may not be the same as one attached to the defence upon evidence on oath, but the court must no (*sic*) reject it *ipso facto*, instead must consider it for whatever it worth (*sic*) having regard to the other evidence available and to see whether the defence has succeeded in casting a reasonable doubt on the prosecutionôs case.

153. I have kept at the forefront of my mind of the two aforesaid principles in considering the respective defence of these two accused persons.

154. Having heard the submission of both the defence and the prosecution and having considered and tested the defence put up by both the First and Second Accused person, individually and jointly against the totality of the evidence for the prosecution, I find that the defence of each of the accused have essentially been one of denial, of blaming one another, irreconcilable and ambivalent. Consequently they have failed to raise any reasonable doubt on the prosecutionôs case. To respectfully paraphrase the famous words of Thomson CJ in Chan Chwen Kong v PP [1962] MLJ 307 i.e. the several strands of physical and circumstantial evidence of the prosecution have remained unrebutted, unexplained and unanswered by both accused persons. The combined strength of those strands of evidence when twisted together has formed two ropes, strong enough to hang each accused person.

[13] In the final paragraph of the judgment, the learned trial judge states that he was satisfied that the prosecution had proved the case against both the appellants beyond reasonable doubt and accordingly found both appellants guilty and convicted as charged whereby both the appellants were sentenced to death.

THE APPEAL

[14] Before us, learned counsel for the 1st appellant advanced the following grounds of appeal:-

(1) the learned trial judge did not direct his mind, did not consider and did not evaluate exhibit D428 (the station diary) as to whether it had casted a reasonable doubt on the prosecutionôs case.

(2) The learned trial judge failed to address his mind that the data in the call logs P27, P370 and P372B were tampered with and that there were alterations, not authentic and were inaccurate.

(3) The learned trial judge erred in law and in fact in admitting the information under section 27 of the Evidence Act 1950 allegedly given by the 1st appellant.

(4) The learned trial judge did not consider the fact that the first appellant could not have the possession and control of C4 explosives.

(5) The learned trial judge erred in law and in fact in failing to consider the 1st appellantôs defence independently as to whether it casted a reasonable doubt and that the learned trial judge erred in considering the 2nd appellantôs unsworn statement that both appellants were ñblaming each otherò in convicting the 1st appellants.

[15] The 2nd appellant had also put forth 5 main grounds for the appeal. However, in the course of the submission, learned counsel decided not to pursue the 1st ground i.e. that the 2nd appellant in the trial in the High Court had been exposed and had received adverse publicity that had resulted in a mistrial. That leaves four (4) main grounds of appeal which are:-

(1) That the failure to call DSP Musa and to tender crucial evidence in the form of SMS communication between DSP Musa and the 3rd accused amounted to a serious suppression of evidence resulting in an abuse of the process of the court and thereby a mistrial.

(2) That the trial judge had wrongly admitted section 27 statement purportedly made by the 2nd appellant purportedly leading to the discovery of certain ñbarang-barang kemasò in a black jacket in the 2nd appellantôs room of his house.

(3) That the trial judge had wrongly relied on the evidence of blood stain purportedly found on a pair of slippers alleged to be in the 2nd appellantôs car which was held to be proof of his guilt.

(4) That the trial judge had wrongly relied on mtDNA evidence of the blood stain found on the slippers which was held to prove the guilt of the 2nd appellant.

[16] We shall now consider the grounds raised by the appellants.

Defence of alibi of the 1st appellant

[17] The issue of alibi forms the subject of the 1st appellantõs first and fifth grounds of appeal. The 1st appellant contended that he was not at the scene of the crime at the particular time stated in the charge which is between 10.00pm on 19.10.2006 until 1.00am on 20.10.2006. A Notice of alibi was served on the prosecution on 24.5.2007. The notice (exhibit D430) states that:-

> ñ(i) Dari jam lebih kurang 10.00 malam hingga jam lebih kurang 10.25 malam 19/10/2006 tertuduh berada di kawasan Bukit Aman.
>
> (ii) Dari jam lebih kurang 10.25 malam sehingga jam lebih kurang 11.45 malam, pergi, balik dan berada di Seksyen 4 Wangsa Maju di gerai makan dekat Carrefour Kuala Lumpur;
>
> (viii) Dari jam lebih kurang 11.45 malam 19/10/2006 hingga jam lebih kurang 12.20 pagi 20/10/2006 berada di kawasan Bukit Aman.
>
> (ix) Dari jam lebih kurang 12.20 pagi 20/10/2006 beredar dari Bukit Aman dan sampai di Putrajaya lebih kurang 1.00 pagi 20/10/2006.ò

[18] In support of the defence of alibi, the 1st appellant tendered a copy of the station diary (exhibit D428) which was confirmed by the prosecution to be an authentic copy. The station diary states:-

> ñ19/10/06 2218 ï C/Insp Azilah ambil senjata Glock EAH 387 dan 2 magazine Glock, keadaan baik.
> 19/10/06 2210 ï C/Insp Azilah berlepas ke Putrajaya untuk tugas eskot Timbalan Perdana Menteri.ò

[19] The call detail record of the 1st appellantôs handphone no. 0193636153 (exhibit P27) produced by the prosecution shows the following:-

> ñ10/19/2006 ï 22:15:51 ï CPEKANSUBANG
> 10/19/2006 ï 22:19:33 ï CKGMELAYUSBG
> 10/19/2006 ï 22:43:06 ï PUNCAKALAMHWY4
> 10/19/2006 ï 23:16:46 ï PUNCAKALAMHWY4ò

[20] Thus, based on the call log, the 1st appellant was at Pekan Subang area at 10.15pm on 19.10.2006 and was at Kg Melayu Subang at 10.19pm. On the other hand, the station diary shows that the 1st appellant was at Bukit Aman at 10.18pm collecting a Glock. The entries in the station diary, as confirmed by ASP Tony Anak Lunggan, the Investigating Officer (SP75) is a true and accurate record as provided for under s 97 of the Police Act.

[21] It was contended by learned counsel for the 1st appellant that the evidence of D428 had casted a reasonable doubt on those entries in the call logs and that the learned trial judge should have directed his mind to the two (2) contradicting sets of evidence and in failing to do so, had seriously misdirected himself.

[22] Having perused the grounds of judgment, we do not find anywhere in the said judgment that the learned trial judge had considered whether the station diary and the evidence that the 1st appellant was at Wangsa Maju and at Bukit Aman at the material time shows or tends to show that by reason of the presence of the 1st appellant thereat, he cannot be or is unlikely to be at Puncak Alam. In the circumstances, we agree with

learned counsel that the learned trial judge had misdirected himself by way of non-direction in failing to consider the evidence.

[23] It is trite law that an accused person putting forward a defence of alibi bears no legal burden to establish it (*Yau Heng Fang v Public Prosecutor* [1985] 2 MLJ 335; *Ilian & Anor v PP* [1988] 1 MLJ 421). In this regard, the learned trial judge had further misdirected himself in making a finding that D428 was not formally proven when the finding that ought to have been made was whether the defence had casted a reasonable doubt on the prosecutionôs case that the 1st appellant was at the scene of the crime, which the learned trial judge had failed to do. The learned trial judge had indeed failed to consider the defence of alibi of the 1st appellant sufficiently and independently of the 2nd appellant in coming to the conclusion that ñ. the defence of each of the accused have been essentially one of denial..ò

The call logs and coverage predictions

[24] For purposes of proving that the 1st appellant was at the crime scene, the prosecution relied on exhibits P27, P370 and P372B. The exhibits are computer print-outs which were obtained pursuant to the request made by the police on 30.5.2007 after the notice of alibi was served on the prosecution on 24.5.2007.

[25] In respect of P27, it was produced by the prosecution to show the movement of the 1st appellant when he was using his handphone. There is no dispute that P27 is not the original document. The original document is exhibit P370. P370 went through a series of alteration

before it became P372B and then P27. P370 and P372B are therefore the source documents for exhibit P27.

[26] Exhibit P27 was prepared by SP61, the Executive at the Special Project and Investigation Division, CELCOM. He ócriptedôthe document to show the óSite Nameôand óRegionô There were no óSite Nameôand óRegionôin the source documents and the columns in P370 and P372B were arranged differently i.e. óCell IDô and ó1LACô inversed and one thousand eight hundred (1800) calls from P372B were removed before it was reduced into exhibit P27.

[27] Exhibit P370, the location mapping dated 13.6.2007 was prepared by Syed Mustaqim (SP62). SP62 is the IT Analyst. Vide his covering letter (exhibit P369) SP62 emailed exhibit P370 to SP61. Upon receipt of the email, SP61 printed out exhibit P370 (which SP61 refers to as órw dataô) from his computer and using the órw dataô prepared exhibit P27. The issue raised by learned counsel for the 1st appellant is that exhibit P370 was wrongly admitted as it does not satisfy the condition of section 90(2) of the Evidence Act which provides:-

> ñFor the purpose of this section it may be proved that a document was produced by a computer in the course of its ordinary use by tendering to the court a certificate signed by a person who either before or after the production of the document by the computer is responsible for the management and operation of that computer or for the conduct of the activities for which that computer was used.ò

[28] We noted that it was not the evidence of SP61 that he was the person responsible for the management and operation of that computer. What he said was:-

> ñPada masa saya mencetak dokumen ini daripada computer saya, computer saya tersebut adalah di dalam berkeadaan baik dan di dalam perjalanan fungsinya yang biasa begitu juga printer untuknya.ò

[29] Despite the challenge, the learned trial judge did not make a finding that SP61 was the person responsible for the management and operation of that computer and hence the legal and procedural requirement of section 90(2) of the Evidence Act 1950 has been satisfied. In this regard, we find that there is merit in the complaint raised by learned counsel for the 1st appellant as in relation to such piece of evidence, the prosecution must not only prove its admissibility, but must ensure that all other established legal and procedural requirements are stringently adhered to (see *PP v Datuk Hj Sahar Arpan* [1993] 3 CLJ 475).

[30] Further, in preparing exhibit P27, SP61 admitted to omitting some of the data found in P370, example data marked ñTRCò According to SP61, he did not know or understand what ñTRCòmeans but that he was told by SP62 that ñTRCòis not relevant. SP62 in his evidence was not able to explain what ñTRCòmeant as ñanya di luar tugas saya.ò The other information which was found in exhibit P370 which SP61 omitted to produce in exhibit P27 relates to information on particular time and date. In this regards SP61 said ñSaya mengakui P27 ini terdapat 117 transaksi yang diragui ketepatan datanya yang saya hanya menyedari setelah saya menyemak P344.ò

[31] As to the source of the data in exhibit P370, the evidence of SP62 states:-

> ñData-data dalam P370 adalah dari switch. ... Data-data yang ditunjukkan dalam P370 adalah lengkap untuk setiap transaksi berkaitan talian 019 3636153. Sepanjang pengetahuan saya, ada berlaku ketinggalan data yang diambil dari switch. Oleh itu P370 ini mungkin juga berlaku ketinggalan data atau data yang tidak diperolehi.ò

[32] There is also this part of the evidence by SP62 in examination in chief:-

> ñPada kali pertama saya óretrievedô data dalan P370, saya ada menyemaknya dan dapati terdapat kesilapan dan ketidaktepatan. Kesilapan yang berlaku bukan pada sumber data tetapi kesilapan teknikal ketika membuat óscriptingô iaitu berkaitan kesilapan kedudukan LAC dan Cell ID untuk call type mobile terminating. Maksud mobile terminating ialah panggilan yang diterima dan termasuk juga text message yang diterima.
>
> Berdasarkan P370, kesilapan kedudukan LAC dan Cell ID tersebut iaitu untuk call type untuk Voice MOT dan juga Voice MTC. Kesilapannya bukan untuk kesemua transaksi tetapi hanya untuk transaksi pada 17.10.2006 sehingga 19.10.2006. ... Kesilapan di muka surat 9 pula ialah pada transaksi 19.10.2006 jam 22.43.06; 23:16:46; 23:26:53 dan 23:48:39..ò

[33] In cross examination of SP62 the following questions were asked:-

> ñS: Setuju, jika nombor Cell ID diterbalikkan atau disalahletakkan di dalam column LAC, interpretasi berkaitan lokasi atau site name berubah.
>
> J: Setuju.

S: Begitu juga jika nombor LAC disalahletakkan di dalam column Cell ID, keadaan yang serupa berlaku iaitu ósite nameô nya akan berubah.

J: Setuju.

S: Kamu setuju, jika nombor Cell ID tidak diletakkan di tempat yang ianya sepatutnya diletakkan, setuju yang ósite nameôyang tertera juga tidak akan tepat.

J: Setuju.ò

....

Put: Data sebenar dalam data base Celcom berkenaan maklumat call detail records bagi 019 3636153 adalah sebenarnya berbeza dari P370 ini.

J: Setuju.ò

[34] In re-examination, this was the evidence of SP62:-

ñSaya bersetuju dengan peguam jika code Cell ID diletakkan di dalam column LAC, ianya akan memberi interpretasi yang lain kerana secara umumnya, jika Cell ID dimasukkan ke dalam code untuk LAC, lokasi site name akan berbeza, tetapi group network mesti ada órulesôyang mereka gunakan untuk menentukan lokasi atau site name ini. Group Network Unit adalah lebih arif di dalam penentuan lokasi ini. Saya tidak arif dalam perkara ini.ò

[35] Obviously any mistake or uncertainty which concerns the date 19.10.2006 and the time after 10.00pm is crucial given that it forms the particulars of the alleged offence. Consequently it is crucial for the learned trial judge to make a finding on the reliability of exhibit P370 in particular, whether mistake or uncertainty if any, is material and whether it affects the site name as stated in P27.

[36] As for exhibit P372B, it was prepared by SP63, an engineer at CELCOMôs Mobile Planning Division. Upon receipt of exhibit P370 from SP62, SP63 prepared P372B wherein he too added a new column ósite

nameô and óregionô using the programme/system in the computer. The system is maintained by another Division i.e. the óRegional Network Operationô SP63 was also responsible for the preparation of the chart called ócoverage predictionô(exhibit P374) which was also relied upon by the prosecution to show the movement of the 1st appellant.

[37] It was the submission of learned counsel for the 1st appellant that the chart does not show the scene of the crime and it is inaccurate as to the actual geographical location of its coverage. In this respect, learned counsel for the 1st appellant submitted that the coverage prediction is inadmissible as its accuracy has not been proved and it contravenes section 83 of the Evidence Act 1950. Section 83 provides that the court shall presume that maps or plans purporting to be made by the authority or the Government of Malaysia or the Government of any State were so made and are accurate.

[38] For ease of reference, the evidence in examination in chief of SP63 on how he came about doing the chart is reproduced below:-

> ñPada 16.6.2007 saya ada bersama-sama ASP Tonny dan DSP Gan dan seorang anggota polis bernama Chiam pergi ke beberapa tempat. ... Saya dibawa ke Bukit Damansara terus ke Bangsar, kemudian ke Bukit Aman. Selepas itu saya di bawa ke Kota Damansara melalui TOL Jalan Duta melalui Lebuhraya Utara-Selatan, kemudian Lebuhraya NKVE dan keluar TOL Kota Damansara menghala ke Puncak Alam melalui Jalan Lama Sg. Buloh dan masuk ke laluan dari Subang ke Puncak Alam dan terus ke satu tempat yang dikatakan tempat kejadian di satu kawasan Bukit di Puncak Alam sebelum balik semula ke Kuala Lumpur.
>
> ...Tujuan saya dibawa ke tempat-tempat tersebut untuk saya menunjukkan kedudukan Stesyen Pemancar Celcom di sepanjang jalan ke tempat-tempat

tersebut kepada pihak polis. ... Saya bawa bersama ketika itu suatu alat yang dipanggil ñdrive measurement toolsò iaitu untuk merekodkan panggilan yang saya sendiri buat di sepanjang jalan yang kami lalui. ... alat ini dapat mengenalpasti lokasi Stesyen Pemancar yang ócaptureô setiap panggilan saya di laluan tertentu. ..

...Selepas balik ke Kuala Lumpur dari tempat kejadian, saya telah menghasilkan satu carta yang dipanggil ócoverage predictionô untuk Stesyen Pemancar. Saya siapkan pada 18.6.2007 dengan menggunakan komputer saya. Komputer saya ketika itu dalam keadaan baik di dalam perjalanannya yang biasa. Saya bertanggungjawab dalam aktiviti dan operasi komputer saya tersebut. Saya cetak senarai tersebut pada hari yang sama saya menyediakannya...ò

[39] The following is the cross examination of SP63:-

ñS: Apakah stesyen pemancar dalam Bahasa Inggeris

J: Base Station (BS)

S: Base station dapat dikenalpasti berdasarkan 4 digit pertama dalam satu Cell ID

J: Ya.

S: Cell ID yang akan menentukan di mana base station dalam site name atau berada di lokasi mana.

J: Setuju

S: Di dalam Call Details Record, Cell ID juga menentukan base station mana yang digunakan untuk sesuatu transaksi

J: Ya

...

S: Setuju ótheô exact locationô pengguna sesuatu handphone semasa transaksi dilakukan tidak dapat ditentukan.

J: Setuju.

S: Cell ID hanya menunjukkan sesuatu transaksi panggilan telah mengguna khidmat BS tersebut.

J: Ya.

S: Apabila sesuatu transaksi berlaku kemungkinan pemanggil berada di radius BS atau berada di sesuatu BS yang lebih kuat yang telah memberikan perkhidmatan transaksi pemanggil tersebut

J: Ya, setuju.

S: Jika óline congestedô transaksi panggilan tersebut boleh pergi ke BS yang lain untuk menyempurnakan panggilan tersebut.

J: Ya, boleh dengan syarat BS lain tersebut mempunyai liputan di kawasan pemanggil tersebut.

....

S: Kekuatan sesuatu BS, biasanya radiusnya berapa jauh untuk memberi sesuatu khidmatnya.

J: Tidak ada sesuatu radius yang tepat dan tetap.

S: Setuju, liputan di dalam sesuatu kawasan oleh sesuatu BS adalah óoverlappingô dengan beberapa BS lain.

J: Ya, setuju.

[40] SP63 also said ñDalam keadaan ódownô ianya (*BS*) tidak berfungsiò and that he does not know if there is any BS which was ódownô in P27 and P372B on the relevant dates. SP63 was also asked in cross examination ñSekiranya terdapat kemungkinan bahawa maklumat mengenai site name di dalam P372B, P27 dan P370 telah diubahsuai dan tidak tepat, ianya sukar ditentukanò to which he answered ñYa, setuju.ò

[41] SP63 was futher asked:-

ñS: Merujuk kepada P374, coverage prediction is sebenarnya telah sedia ada di dalam sistem komputer kamu.

J: Saya tak faham soalan, tetapi maklumat mengenai kedudukan stesyen pemancar sebagaimana P374 memang telah sedia ada di dalam sistem komputer saya.

S: Siapakah yang memasukkan data mengenai kedudukan stesyen pemancar tersebut di dalam sistem komputer kamu.

J: Mengenai kedudukan stesyen-stesyen sebagaimana P374, ianya di masukkan oleh kakitangan jabatan saya.

S: Adakah pemetaan di dalam P374 ini mengikut maklumat pemetaan sebagaimana Jabatan Pemetaan.

J: Saya tak pasti.

S: Adakah maklumat di dalam P374 ini ada dihantar ke Jabatan Pemetaan untuk mengesahkan kawasan-kawasan sebenar pemetaan P374 tersebut

J: Tidak.ò

[42] If the information on the base station is already available as testified by SP63, one wonders why the need for SP63 to be taken by the police to the specific routes before he undertook the task of preparing the coverage prediction anew in P372B.

[43] Be that as it may, SP63 agreed that if there are any physical changes to the base station, the best serving site can be altered but he does not know when was the coverage prediction updated; he admitted that in P27 there were about 400 transactions whereas in P327B, there were about 1800 transactions.

[44] The learned trial judge found the evidence to be highly technical and as there was no rebuttal evidence from any other witness, he accepted the evidence on the call logs and coverage prediction.

[45] Looking at the evidence set out above, it is our view that nothwitstanding the absence of any rebuttal evidence from any other witness, the testimonies of SP61, 62 and 63 had inevitably put into issue the reliability and accuracy of the call logs and the coverage prediction.

[46] These call logs and coverage prediction are important pieces of evidence to establish the presence of the 1st appellant at the scene of the crime. In our judgment it is essential for the learned trial to address his mind to the challenge raised by the defence on the exhibits and to make a finding whether there was in fact an alteration or tampering of the data and whether the authenticity of the data was questionable or otherwise. Regrettably, this His Lordship failed to do, which in our judgment amounts to serious misdirection rendering the said exhibits unsafe to be relied upon.

Information leading to discovery of fact under section 27 of the Evidence Act 1950

[47] After a trial within a trial, the learned trial judge admitted the statements made by the appellants under section 27 of the Evidence Act. The statement said to be given by the 1st appellant relates to the discovery of the scene of the crime and in respect of the 2nd appellant, the discovery of the jewellery belonging to the deceased.

[48] In particular, the statements attributed to the 1st appellant were:-

(i) in an interview where the 1st appellant was said to have informed Ch Insp Koh Fei Cheow (SP20) ñdia boleh membawa

saya untuk cuba mencari tempat kejadian perempuan Mongolia dibunuh tetapi OKT tidak tahu tentang nama kawasan dan kurang pasti lokasi kawasanò and

(ii) at the scene where the 1st appellant said ñInilah tempatnya perempuan Mongolia diletupkanò and ñInilah tempat perempuan Mongolia ditembak.ò

[49] The statement said to have been made by the 2nd appellant was ñSaya boleh tunjukkan barang kemas bilik perempuan ... (*excluded by the Court*) ada saya simpan di dalam rumah saya di Kota Damansara.ò The statement was said to be made to ASP Zulkarnain bin Samsudin (SP23).

[50] In challenging the admission of s 27 information, learned counsel for both the appellants had raised several grounds. Looking at the grounds and the submissions, we find that in essence the complaints relate to the non-direction by the learned trial judge of the issues raised in respect of the contradictions in the evidence for the prosecution and on the failure of the learned trial judge to address his mind whether the information leading to the discovery was in fact given by the appellants.

[51] Before we proceed, we pause to remind ourselves of the approach to be taken as regards s 27 information as stated by Abdul Hamid Omar LP in *Pang Chee Meng v PP* [1992] 1 MLJ 137:-

ñ.. we are firmly of the view that in invoking section 27 of the Evidence Act 1950 the courts should be very vigilant to ensure the credibility of the evidence by the police personnel in respect of the section, which is so vulnerable to abuse.ò

[52] We shall now deal with the statement of the 1st appellant. Making reference to his I.D, the evidence of SP20 is that while interviewing the 1st appellant on 6.11.2006 ñpada jam 5.23 petang ï semasa membuat temubual dengan OKT, OKT telah dengan kerelaan memberitahu saya bahawa dia boleh membawa saya untuk cuba mencari tempat kejadian perempuan Mongolia dibunuh, tetapi OKT tidak tahu tentang nama kawasan dan kurang pasti lokasi tempat kejadian. OKT dengan kerelaan untuk menunjukkan jalan-jalan ke tempat tersebut.ò

[53] The interrogating officer, DSP Zainuddin bin Abdul Samad (SP21) testified ñpada jam 4.00 lebih petang 6.11.2006 Tertuduh pertama ada memberitahu saya yang beliau ingin menunjukkan tempat kejadian secara agak-agak kepada pegawai penyiasat. ... Saya terus menghubungi I.O. iaitu ASP Tonny mengenai hasrat Tertuduh Pertama ... Apa yang saya maksudkan dengan Tertuduh Pertama berhasrat menunjukkan tempat kejadian secara agak-agak kepada pegawai penyiasat maksud saya beliau berkata begitu kepada sayaò SP21 had followed SP20 to the scene in the same Pajero and when they reached the scene, SP21 said he does not know the name of the area.

[54] Worthy to note is the following two points. The first point is that there is no evidence from either SP20 or SP21 as to the words uttered by the 1st appellant. What was said in their evidence was their narration of what was allegedly said to them by the 1st appellant. Secondly, nowhere in the evidence of SP20 and SP 21 did the appellant ever mention the word ñPuncak Alamò The evidence of SP20 shows that at about 5.20pm ñOKT tidak tahu nama kawasanò However, we noted the following evidence from the prosecution witnesses.

[55] Pegawai Turus Siasatan Khas IPK Kuala Lumpur, Supt Zainol bin Samah (SP19) states in his evidence that ñselepas Tertuduh Kedua ditangkap pada jam lebih kurang 4.15 petang ..., saya telah dimaklumkan oleh ASP Tony ak

Lunggan mengatakan bahawa kedua-dua Tertuduh Pertama dan Tertuduh Kedua telahpun membuat pendedahan. Pendedahan yang dibuat ialah mereka bersetuju untuk menunjukkan tempat kejadian di kawasan Puncak Alam.ò

[56] The evidence of SP75 ñPada 6.11.2006 di sebelah petang saya berjumpa DSP Zainuddin. DSP Zainuddin memaklumkan saya yang Tertuduh Pertama dan Tertuduh Kedua telah ingin membawa dan menunjukkan tempat kejadian di kawasan Puncak Alam. Saya sampaikan maklumat ini kepada DSP Gan dan Supt. Zainol. Tetapi saya tidak maklumkan maklumat ini kepada Ch. Insp Koh Fei Cheow, tetapi saya meminta Ch. Insp Koh Fei Cheow membawa Tertuduh Pertama menunjukkan tempat kejadian. Ketika itu selain dari kawasan tempat kejadian dikatakan Puncak Alam, saya tidak mengetahui di mana lokasi khususnya.ò

[57] Supt Amidon Anan, the Head of the Forensic team (SP58) testified that at about 11am on 6.11.2006 he received the first phone call from SP19 followed by another phone call at 3.15pm asking him to standby to go to the crime scene and at 5.00pm he was asked to go to UiTM Puncak Alam.

[58] The 1st appellantôs version is that he never gave the section 27 information. It was his case that in fact the police had prior knowledge of the location and that he was led to the scene by SP20 and SP21 whom according to the 1st appellant staged a show as though the 1st appellant had led to the discovery when the actual fact was that this was the case of the police leading the accused to a recovery of the deceasedôs remains.

[59] Now, if SP58 had been asked at about 5pm to gather at UiTM Puncak Alam before the 1st appellant was interviewed by SP20 to whom the information was allegedly given at about 5.20pm; if the 1st appellant,

as the evidence of SP20 disclosed, did not know the name of the place and if, as per the evidence of SP21 that even at the time when the scene was discovered, SP21 does not know the name of the place, from where did the police obtain the information on Puncak Alam?

[60] Further, SP20 testified as follows:-

> ñS: Sila beritahu mahkamah apakah perkataan yang sebenar dikatakan oleh Tertuduh Pertama apabila menunjukkan tempat kejadian.
>
> J: Tertuduh Pertama memberitahu saya ñinilah tempat perempuan Mongolia diletupkan.ò
>
> S: Kemudiannya adakah Tertuduh Pertama menunjukkan kamu tempat lain selepas itu
>
> J: Ya, ada
>
> Selepas itu Tertuduh Pertama telah membawa saya pergi ke satu tempat lapang di mana dalam jarak lebih kurang 30 kaki dari tempat letupan dan memberitahu saya ñinilah tempat perempuan Mongolia ditembak.òMaklumat ini juga dicatatkan ... dalam I.D. saya.
>
> Selepas itu, saya telah mengawal tempat kejadian tersebut dan kemudiannya memaklumkan kepada Supt. Zainol Samah (SP19) dan DSP Gan serta ASP Tonny berkenaan kejumpaan tempat kejadian tersebut. Saya maklumkan ketiga-tiga pegawai tersebut melalui handphone. Saya tidak tahu di mana mereka berada ketika itu.
>
> Semasa saya nampak rangka dan serpihan tulang-tulang yang kami percaya tulang manusia, saya nampak jelas tanpa bantuan cahaya lampu. Ketika itu óvisibilityô masih terang. DSP Zainudin *(SP21)* ada juga bersama saya ketika itu. Beliau datang bersama saya, tetapi beliau tidak terlibat di dalam peranan mencari tempat kejadian ini...ò

[61] SP21 states:-

> ñSelepas berhenti Ch. Insp Koh bawa Tertuduh keluar dan saya mengikut di belakang mereka dan tindakan seterusnya Ch. Insp Koh yang lakukan dan arahkan. Apa yang saya nampak, mula-mula Ch. Insp Koh telah bersama Tertuduh Pertama dan anggota escort telah pergi ke tempat yang dikatakan tembakan dilakukan ke atas wanita Mongolia dan selepas itu saya lihat mereka pergi ke dalam belukar iaitu tempat yang dikatakan wanita Mongolia tersebut diletupkan. Saya hanya ikut Ch. Insp. Koh dan Tertuduh Pertama serta escort ke tempat yang wanita Mongolia ditembak, tetapi saya tidak ikut mereka pergi ke tempat yang dikatakan beliau diletupkan. Saya tidak ikut ke tempat tersebut kerana ianya tidak membantu saya untuk maksud mengetahui tempat kejadian.ò

[62] There is thus a contradictory account of what the 1st appellant said and pointed out during their visit to the crime scene. According to SP20, the 1st appellant led them and pointed first to the place where the deceased was blown up and later to the place where the deceased was shot. The evidence of SP21 on the other hand shows that the 1st appellant had first led the police and pointed to the area where the deceased was shot.

[63] SP20 had also testified in examination in chief that upon discovery of the scene, he informed SP75 of the discovery through the handphone. This piece of evidence was denied by SP75. According to SP75, there was no phone call from SP20 regarding the discovery of the crime scene. SP21 who was together with SP20 did not see SP20 making any phone calls at the scene.

[64] During cross examination of SP20, the following evidence was adduced:-

ñS: Semasa temubual, Tertuduh Pertama tidak memberitahu kamu nama kawasan di mana beliau sendiri kata yang beliau kurang pasti lokasi tempat kejadian tersebut.

J: Setuju.

S: Oleh itu pada masa itu tiada maklumat mengenai tempat kejadian

J: Tak setuju kerana terdapat maklumat mengenai tempat kejadian tetapi secara umum.

S: Apakah maklumat umum yang kamu maksudkan.

J: Tertuduh Pertama boleh cuba mencari jalan-jalan yang menunjukkan jalan-jalan ke tempat tersebut.

...

S: Tidak pernahkah terlintas kepada kamu ketika itu, yang Tertuduh Pertama tidak tahu tentang tempat kejadian tersebut.

J: Ya, mungkin

...

S: Bila kamu kata di dalam pemeriksaan utama bahawa kamu berhenti beberapa kali kerana silap jalan, ianya adalah disebabkan Tertuduh Pertama tidak pasti jalan-jalannya.

J: Ya.

S: Adakah terlintas di fikiran kamu, pada masa itu yang Tertuduh Pertama sebenarnya tidak tahu tempat kejadian tersebut.

J: Ya, mungkin.

[65] In re-examination, SP20 said ñSaya telah bersetuju dengan peguam ada kemungkinan Tertuduh Pertama tidak mengetahui tempat kejadian kerana Tertuduh Pertama tidak mengetahui lokasi tepat tempat kejadian dan sebab kami telah beberapa kali sesat jalan.ò

[66] As regards the 2nd appellant, SP20 was also the officer involved in interviewing the 2nd appellant on 6.11.2006 at 2.00 pm, together with ASP Zulkarnain bin Samsudin (SP23). The relevant evidence of SP20 is reproduced:-

> ñS: Apakah maklumat yang Tertuduh Kedua dedahkan
>
> J: Ianya berkaitan dengan barang-barang kemas yang dimiliki oleh perempuan Mongolia tersebut.
>
> Saya sendiri dengar maklumat yang dinyatakan Tertuduh Kedua tersebut. Maklumat ini didedahkan kepada ASP Zulkarnain.
>
> S: Apakah maklumatnya secara tepat atau sebenar
>
> J: Saya tidak ingat perkataan sebenar. Saya hanya ingat ianya berkaitan dengan barang-barang milik perempuan Mongolia tersebut.
>
> Berdasarkan maklumat Tertuduh Kedua tersebut, saya nampak ASP Zulkarnain membuat repot polis mengenai pendedahan Tertuduh Kedua tersebut iaitu pada hari yang sama.
>
> Selepas ASP Zulkarnain membuat laporan polis, ASP Zulkarnain mengetuai satu pasukan polis ... dan bersama Tertuduh Kedua telah bertolak ke rumah Tertuduh Kedua dengan dipandu (guided) oleh Tertuduh Kedua...
>
> ....
>
> Bilik tidur Tertuduh Kedua tidak berkunci. Yang saya ingat, ASP Zulkarnain, saya, DPCorp Chiam dan Tertuduh Kedua yang masuk ke dalam bilik tidur tersebut. Di dalam bilik tersebut, Tertuduh Kedua telah membuka almari baju dan menunjukkan sehelai jaket hitam. Saya nampak ASP Zulkarnain mengeluarkan jacket hitam tersebut dan meletakkan di atas katil. Saya juga nampak ASP Zulkarnain mengeluarkan barang-barang kemas dan jam dari poket bahagian dalam jacket tersebut.

> Merujuk kepada gambar ID60H ... saya hadir semasa gambar-gambar ini diambil.
>
> Sebelum Tertuduh Kedua menunjukkan jacket tersebut, Tertuduh Kedua ada memberitahu ASP Zulkarnain sesuatu tetapi saya telah lupa apa yang beliau katakan. Saya juga tidak ingat lagi apa-apa perbualan di antara Tertuduh Kedua dan ASP Zulkarnain selepas Tertuduh Kedua menunjukkan jacketnya. ..ò

[67] The evidence of SP23 is that in the course of interviewing the 2nd appellant, the 2nd appellant said ñSaya boleh tunjukkan barang kemas milik perempuan ... ada saya simpan di dalam rumah di Kota Damansara.ò At the house, the 2nd appellant was alleged to have said ñSaya simpan barang kemas dalam jaket.ò After the jewellery was taken out and put on the bed, SP23 asked the 2nd appellant ñadakah ini barang-barang kemas yang dimaksudkanò, the 2nd appellant nodded his head and pointed his finger to the jewellery saying ñnilah barang dia.ò

[68] It was further the evidence of SP23 that ñTertuduh Kedua sendiri keluarkan jaket tersebut dan memberitahu sesuatu kepada saya. Akibat dari apa yang beliau beritahu saya telah membuat pemeriksaan di dalam jaket tersebut dan menjumpai 3 jenis barang ... Semasa dalam bilik di rumah Tertuduh Kedua, apabila Tertuduh Kedua mengeluarkan jaket dari dalam almari, Tertuduh Kedua ada berkata sesuatu iaitu ñSaya simpan barang kemas di dalam jaketò

[69] The 2nd appellant similarly denied giving such information relating to the jewellery of the deceased. His version is that it was SP23 who had said the following words to him ñMacam inilah Sirul, kalau engkau setuju, engkau ikut aku, kau camkan barang-barang itu, kau pegang dan tunjuk ke arah barang itu sambil camera man ambil gambar.ò

[70] Inside his room, the 2nd appellant contended that SP23 had forced him to hold one black jacket for the purpose of him being photographed twice. SP23 then took out some items from inside the same jacket and placed them on the bed before forcing him to point by his finger at all those items again for his pictures to be taken. The 2nd appellant is thus saying that the police had planted the jewellery in his house. Relevant to this issue is the fact that the keys to the house was in the possession of the police prior to the search of a black jacket from inside the unlocked cupboard in the 2nd appellantôs unlocked room.

[71] The evidence of SP20 and SP23 will now be examined against the 2nd appellantôs version.

[72] According to SP20 who was together with SP23 and had witnessed the said discovery, the jacket was not taken out by the 2nd appellant but was taken out by SP23. The jewellery was also put on the bed by SP23 where SP23 then said ñadakah ini barang-barang kemas yang dimaksudkanò after which the 2nd accused was said to nod his head and replied ñnilah barang dia.ò SP23 on the other hand said that it was the 2nd appellant who took a black jacket. While taking out the said jacket the 2nd appellant told SP 23 ñsaya simpan barang kemas di dalam jacket.ò

[73] The testimony of Corp Chiam Swee Guan (TWR2 in *voir dire*) to whom the 2nd appellant was handcuffed throughout the process of discovery shows the following. At one point in his evidence, he said ñASP Zulkarnain tanya Tertuduh Kedua berkenaan dengan barang kemas yang berada di atas katil, lalu Tertuduh Kedua beritahu inilah barang dia.ò At another point when he was asked ñApa yang ASP Zulkarnain tanya Tertuduh Kedua berkenaan barang-barang kemas tersebut sebelum Tertuduh Kedua berkata inilah barang-

barang diaò TWR2 answered ñSaya tidak pasti apakah soalan ASP Zulkarnain kepada Tertuduh Kedua tersebut.ò And finally when asked ñAdakah kamu dengar apa-apa arahan daripada ASP Zulkarnain kepada Tertuduh Kedua berkenaan barang kemas tersebutò TWR2 said, ñYa, ada. ASP Zulkarnain ada arahkan Tertuduh Kedua tunjukkan jarinya kepada barang-barang kemas tersebut sebelum jurugambar mengambil gambar beliau menunjukkan jarinya kepada barang-barang kemas tersebut.ò

[74] There is thus a conflicting and inconclusive account of events as regards the discovery of the black jacket and the jewellery. There is also no conclusive account of what exactly was said by the 2nd appellant as regards the jacket. According to SP23, the 2nd appellant said ñsaya simpan barang dalam jacketò whereas the evidence of SP20 does not disclose any such statement being made. What SP20 said was ñSebelum Tertuduh Kedua menunjukkan jacket, Tertuduh Kedua ada memberitahu ASP Zulkarnain sesuatu tetapi saya telah lupa apa yang beliau katakan...ò TWR2 supports the 2nd appellantôs version that it was SP23 who had directed the 2nd appellant to point to the jewellery on the bed. The true substance of the information given by the 2nd appellant is thus not altogether clear.

[75] Further, SP20 said that after the information was received from the 2nd appellant during the interview, SP23 made a police report. This is confirmed by SP23 where he said ñ.. Saya membuat laporan polis berhubung dengan maklumat tersebut. Saya membuat laporan polis tersebut di pejabat saya sendiri...ò The prosecution produced the report marked P76. There was however another report tendered by the defence, marked D91. In D91, the rank of SP23 was stated as Ch. Inspector although at the material time he was an ASP; his name was wrongly spelt and his date of birth was wrongly stated. P76 was the amended version of D91. The ñpembetulanò (the word used by SP23) was done by SP23 after the

discovery at the 2nd appellantôs house and the correction among others, was to change the word ñpenamaò in D91 to ñsuspekò as appeared in P76 and to change the word ñyang saya simpanò in D91 to the words ñada saya simpanò as appeared in P76 and also to add in the word ñsesuatuòin P76 which word was not originally found in D91.

[76] If as testified by SP20 and SP23 that the 2nd appellant had given the information during the interview and that after the 2nd appellant gave the information, SP23 did make a police report before going to the house, it begs the question, why has SP23 got his own personal particulars wrong in the police report and why the need for SP23 to make corrections to the words relating to the information or statement allegedly given by the 2nd appellants (putting aside the question whether the correction leaves a doubt as to the accuracy of the statement allegedly given by the 2nd appellant). SP23 gave an explanation though as regards the discrepancies between D91 and P76. He said that it was typed by SP20.

[77] Given the need to be vigilant, the learned trial judge ought to have directed his mind and examined whether the contradictions or inconsistencies in the evidence of the prosecution witnesses are material; examined the credibility of SP20, SP21 and SP75 (in respect of the 1st appellant) and SP20 and SP23 (in respect of the 2nd appellant); examined whether the appellants had raised a doubt on the accuracy of section 27 statement and examined whether the discovery was made by virtue of and exclusively as a result of the information supplied by the appellants and not from other sources (*Francis Anthonysamy v Public Prosecutor* [2005] 3 MLJ 389). If the police have prior knowledge of the information supplied by the accused, obviously the subsequent

discovery will be based on such prior knowledge and not based on the information of the accused and this will render the information supplied by the accused inadmissible as it will not be the cause of the discovery (*PP v Kanapathy a/l Kupusamy* [2001] 5 MLJ 20; *Md Desa Hashim v PP* [1995] 3 MLJ 350). A fortiori, as has been held by the Federal Court in *Amathevelli v PP* [2009] 2 AMR 281, that the actual words used in the information leading to discovery must be stated orally. This is not the position in the case before us.

[78] The learned trial judge however failed to undertake the above exercise. His Lordshipôs finding on the statements made under section 27 merely states:-

> ñ129. Having considered all the issues raised by the First Accused, I have no reasons to doubt the credibility and reliability of Ch. Insp Koh Fei Choewôs evidence that the First Accused who is also a Police Officer and the Investigation Officer himself did in fact supply the information as aforesaid and that Ch. Insp Koh Fei Choew had no prior knowledge of the particular place of the scene. I therefore find it difficult to exercise my discretion to exclude them.
>
> 130. Having considered all the issues raised by the Second Accused, I find that that the Second Accused has succeeded in showing the shoddy and slip shod manner in the investigation of some officers and the inconsistencies in the evidence of the prosecutionôs witnesses. To my mind, while inconsistencies in the testimony of the witnesses is expected, the fact remains that the said ñbarang-barang kemasò were discovered consequence to the said informations supplied by him. I therefore likewise refuse to exercise my discretion to exclude them.ò

[79] Insofar as the 2nd appellant is concerned, there were in fact three (3) statements made i.e. (i) ñsaya boleh tunjukkan barang kemas milik perempuan ... ada saya simpan di dalam rumah saya di Kota Damansaraò (ii) ñsaya simpan barang kemas di dalam jacketò and (iii) ñnilah barang dia.ò There was no finding by the learned trial judge as to which statement was admitted. To recap, the 1st statement had been the subject of correction by SP23; the 2nd statement raises a doubt as to whether such an occasion exists (in the light of the testimony of SP20 and TRW2); and the 3rd statement was made after the jewellery had been discovered.

[80] We find that there is a non-direction by the learned trial judge in failing to evaluate the evidence before admitting the statements under s 27.

Possession and control of the explosives

[81] The learned trial judge in his grounds of judgment states:-

> ñ137. The way the deceased came about her death is very tragic indeed. It can be no doubt that whoever perpetrated this despicable and unthinkable act of blasting on the deceased must have intended to completely vanish the related evidence into the thin air. Whatever his motive was, it is a matter of law that the ómotiveôalthough relevant has never been the essential to constitute murder. The question for which I am to determine at this stage is who could have possibly connected with the death of the deceased.ò

[82] It was the contention of learned counsel for the 1st appellant that although motive is not essential to be proved by the prosecution, the learned trial judge had failed to correctly address his mind that there was

no evidence to show the 1st appellant had the custody and control of C4 explosives any time prior to his arrest.

[83] We agree with learned counsel. And although this ground was raised by the 1st appellant, we think it applies to the 2nd appellant as well. DSP MV Sri Kumar a/l Madhavan Nair (SP16) was the Pegawai Latihan in UTK. He testified on the explosives available and the procedure that need to be followed when taking the explosives from the store. His evidence shows that bombs are strictly controlled in the police store; that apart from "latihan asas", the appellants had not undergone any other training relating to explosives and that the appellants may not have the necessary experience and skill to handle explosives. Having made a finding on the connection between the explosives and the death of the deceased, the learned judge should, in our judgment address his mind and to make a further finding to connect the explosives and the appellants. By not making sufficient appraisal of such evidence in order to make any finding on possession by the appellants of the explosives used in the commission of the murder, the learned trial judge had failed to address his mind on this missing link resulting in yet, another misdirection.

The non-calling of DSP Musa

[84] This ground raised by the 2nd appellant finds its root in the affidavit of the 3rd accused. As stated earlier, the affidavit of the 3rd accused formed part of the evidence of the prosecution. On account that there was no rebuttal against the evidence of the 3rd accused, the learned trial judge had acquitted and discharged him.

[85] Learned counsel for the 2nd appellant had highlighted several discrepancies in the affidavit of the 3rd accused when compared with the other evidence tendered by the prosecution, in particular as regards the averment on the timing of the request for assistance from the police and the averment that the 3rd accused was not able to get in touch with DSP Musa on 17.10.2006. The argument of learned counsel for the 2nd appellant is that not only is DSP Musa a relevant witness in unfolding the events but DSP Musa is the only witness who could contradict the statements made by the 3rd accused in his affidavit. The prosecutionôs failure to produce the evidence of DSP Musa and to produce certain messages between DSP Musa and the 3rd accused, argued learned counsel, amounts to a suppression of evidence resulting in an abuse of the process of the court which ought to result in a mistrial.

[86] The response from the learned DPP is that the prosecution has led evidence showing the frequency of calls between DSP Musa, the 1st appellant and the 3rd accused; that the 3rd accused sought the assistance of DSP Musa to introduce him to someone and DSP Musa eventually introduced the 3rd accused to the 1st appellant; that there was a meeting between the the 1st appellant and 3rd accused and that there was no cross examination on the I.O. whether DSP Musa knew of what transpired during the meeting between the 1st appellant and the 3rd accused on 18.10.2006. The prosecutionôs stand therefore is that there was no need for DSP Musa to be called as a witness and that the non-calling of DSP Musa creates no gap in the prosecutionôs case. The court, contended learned DPP, should only be concerned with whether the prosecution had proved that the appellants had committed the murder.

[87] With respect, we are not able to agree with the learned DPP for the following reasons. The 3rd accused was tried jointly with the appellants where at the outset it was the prosecutionôs case that the 3rd accused had conspired with the appellants to murder the deceased. It is incumbent upon the prosecution to adduce all available relevant evidence against the 3rd accused. The affidavit which has been taken by the learned trial judge to be part of the prosecutionôs evidence contains prejudicial matters against the appellants and it tends to suggest the guilt of the appellants. In fact, since the 3rd accused was acquitted and discharged with no appeal lodged by the prosecution, it appears that whatever that the appellants did in committing the crime was entirely on their own accord.

[88] However, it must not be overlooked that this ugly and horrendous episode started with the request by the 3rd accused to DSP Musa before the appellants came into the picture. The evidence established that the appellantsôtask was to patrol the vicinity of the 3rd accusedôs house and that the presence of the appellants at the 3rd accusedôs house on the night of 19.10.2006 was upon the request for such assistance from the 3rd accused to the 1st appellant.

[89] The learned trial judge is bound to view the whole of the evidence objectively and from all angles in finding whether the evidence or the facts point to the irresistible inference and conclusion that both the appellants committed this crime or whether there are some other reasonably possible explanation of those facts (see *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137). Now that the task of patrolling the house had ended with murder, we agree with learned counsel for the 2nd appellant that only DSP Musa can confirm the scope of the request

made by the 3rd accused to him. DSP Musa is therefore an important witness to unfold the event, to offer explanation of the facts and to close the gap in the narrative of the prosecutionôs case. It is our judgment that from the facts of this case, namely the role of DSP Musa in bringing the two appellants into the picture of the entire episode, his evidence is essential to unfold the narrative upon which the prosecutionôs case is based on (see *Seneviratne v R* [1963] 3 All ER 36 and *Teoh Hoe Chye v PP* [1987] 1 MLJ 220). The failure of the prosecution to call or offer for cross examination DSP Musa, in the circumstances of the evidence as a whole, would have triggered the adverse inference under section 114(g) of the Evidence Act 1950, against the prosecution.

The pair of slippers

[90] A pair of slippers with traces of blood stains on it (exh P153C) was recovered on 9.11.2006 by Sup. Soo Me Tong (SP42) from the 2nd appellantôs car. Upon mtDNA analysis by the Chemist Mr. Primulpathi (SP39), the said traces of bloodstain were confirmed as one from the same maternal lineage as that of the deceased.

[91] The learned trial judge made the following finding on the slippers:-

> ñ136. I agree with the submission of the learned DPP that the traces of blood stain found the slippers from inside the Second Accusedôs car could not possibly be planted there for its recovery was on the 9.11.2006 whereas the remains of the deceased was found on the 6.11.2006 without any traces of fresh or dried blood and that the blood specimen of the deceasedôs father, Shaaribuu Setev (SP2) was taken only on the 10.11.2006. With respect, I also see the logic in the learned DPPôs remark that the police could have easily put the soil taken from the

scene on the said Suzuki CAC 1883 had they really wanted to frame the Second Accused.

[92] In essence, the argument advanced by learned counsel for the 2nd appellant was that the identity of the user of the slippers at the material time the blood stain came to be on the slippers is a matter gravely in doubt.

[93] We agree with learned counsel for the 2nd appellant. Apart from the fact that a pair of slippers smudged with blood stains (which was not conclusive to be that of the deceased but of someone sharing the same maternal lineage with the deceased), the prosecution led no evidence to establish anything else about the slippers. No DNA specimen was taken from the slippers to ascertain the identity of the user at the time the blood stain came to be on the slippers or that the slippers matches the size of the 2nd appellant. We find no evidence to show any nexus between the slippers and the 2nd appellant.

[94] The 2nd appellant, in his statement said that he had left his car at Bukit Aman on 31.10.2006 before he left for Pakistan for his escort duty; that the car key was kept in a tray at his office; that he had asked Sarjan Rosli (SP24) to start the car once in awhile; that he had nicely arranged his belongings in the boot of the car which includes a size 8 pair of slippers.

[95] According to SP24, he did not see the slippers, exhibit P153C in the 2nd appellantôs car when he warmed up the engine twice. He was certain about it. But more important is the following evidence of SP24: ñPada 3hb saya tidak ingat bulan berapa, saya serahkan kunci kereta Tertuduh

Kedua ini kepada DSP Mohd Khairi bin Khairuddin. DSP Mohd Khairi serahkan semula kunci kereta Tertuduh Kedua ini kepada saya pada 6hb bulan yang sama. Saya serahkan anak kunci Tertuduh Kedua kepada DSP Khairi kerana beliau memintanya. Saya tak tahu sebabnya. Selepas beliau serahkan kuncinya, saya letak semula anak kunci kereta Tertuduh Kedua tersebut ke dalam tray yang sama. DSP Khairi berpesan jika I.O iaitu ASP Tonny datang meminta kunci yang sama pada malam nanti supaya menyerahkan kunci yang sama pada I.O.ò

[96] DSP Mohd Khairi was not called to testify. Hence there was no evidence as to what happened to the said car whilst it was in DSP Mohd Khairiõs custody. The learned DPP submitted that what matters is that the slippers with the blood stain were found in the car. Of course it matters that the slippers were found in the 2nd appellantõs car but it matters too that the prosecution should exclude any possibility of the car being tampered with. It matters that the prosecution must close the gap especially when the slippers were recovered after the key to the 2nd appellantõs car was taken by DSP Mohd Khairi and it matters when learned DPP conceded that the mtDNA analysis on the blood on the slippers is not conclusive as it is only based on maternal lineage. The fact that DSP Mohd Khairi was offered to the defence does not excuse the prosecution (see *Abdullah Zawawi bin Yusoof v Public Prosecutor* [1993] 3 MLJ 1). The learned judge failed to consider all the above which failure had resulted in an injustice to the 2nd appellant.

The spent cartridge

[97] The other evidence found by the learned trial judge to be incriminating of the 2nd appellant was the spent cartridge (exh P185B) recovered from inside the 2nd appellantõs car (on the floor between the driver seat and the door) on 9.11.2006. The Chemist, Shaari Desa

(SP40) examined the cartridge found by SP42 and upon conducting a ballistic test on the cartridge, concluded that the spent cartridge had been discharged from a firearm type HK-MP55D (exhibit 263A).

[98] The prosecution led evidence through WPC Fatimah bt Abdul Wahab (SP15) of Amoury of UTK Bukit Aman that the said firearm was issued to the 2nd appellant on 4.10.2006 and was returned on 30.10.2006. She testified that all bullets supplied to the 2nd appellant had been returned by the 2nd appellant to her.

[99] In the light of the evidence of SP15 that the 2nd appellant took and delivered the exact number of bullets with none missing and in view of the fact that:

(i) the car at the material time was in the custody of DSP Mohd Khairi;

(ii) DSP Mohd Khairi had asked SP24 to hand over the keys to the I.O; and

(iii) DSP Mohd Khairi was the Senior Officer, Logistics and Armoury Bukit Aman in charge of the bullets and firearms,

learned counsel for the 2nd appellant submitted that there is grave suspicion that DSP Khairi may have had something to do with the appearance of the spent cartridge.

[100] We find merits in the submission of learned counsel. PW42, the forensic investigator who went to inspect the car on 9.11.2006 upon the

request by the I.O on the night of 8.11.2006 agreed with learned counselôs proposition that ñAdalah munasabah oleh itu bahawa sebelum kamu periksa kereta tersebut, beberapa orang telah masuk dan keluar dalam kereta tersebut dan kamu tidak tahu samada barang-barang yang dijumpai di dalam keadaan asal ....ò As with the slippers, we find that there is a gap in the prosecutionôs case insofar as the cartridge is concerned which the learned trial judge failed to direct his mind to.

[101] The other evidence adduced by the prosecution to link the 1st appellant to the murder is the recovery of the notes (exh P80A) from inside the bag of the 1st appellant. The notes bear the name of the 3rd accusedôs father, the house address, the telephone number, room number of Hotel Malaya and the name ñAminahò As regards the 2nd appellant, a smart tag device and the T&G card showing the movement of the 2nd appellantôs car on 19.10.2006 and 20.10.2006 entering/exiting through Kota Damansara/Jalan Duta was adduced. The prosecution also adduced the evidence of Forensic Video Analysis photograph obtained from CCTV at Plaza Tol Kota Damansara to show the passing of the 2nd appellantôs car through the Plaza Tol Kota Damansara on 19.10.2006 at 7:14:40am; 8:48:55pm; 10:03:53pm and 11:55:36 pm.

[102] It is our judgment that the headwritten notes of the 3rd accused found in the 1st appellantôs bag has no bearing to connect the 1st appellant to the crime. The notes merely confirmed that he had met the 3rd accused where according to the affidavit of the 3rd accused, for purposes of asking the 1st appellant to patrol the vicinity of his house, he had given the 1st appellant ñmaklumat mengenai alamat Rumah saya, nama bapa saya, nama Si Mati, ñHotel Malayaò di mana Si Mati tinggal (mengikut maklumat yang diberi PB kepada saya).ò

[103] The prosecution had suggested that the presence of the appellants at Hotel Malaya on 18.10.2006 was evidence of the appellantsô intention to commit the crime. However, an inference favourable to the appellants may also be drawn i.e that their presence was merely to confirm that the deceased was indeed staying at the hotel as per the information given by the private investigator to the 3rd accused and by the 3rd accused to the 1st appellant. As such, the presence of the appellants at Hotel Malaya does not establish a complete chain of evidence against the appellants to bring home their guilt. The fact that the appellants were last seen with the deceased shows opportunity for the commission of crime but there is a huge gap between opportunity and commission. The smart tag device and the CCTV showing the movement of the 2nd appellantôs car entering and exiting the Plaza Tol cannot cogently establish the 2nd appellantôs connection to the crime in light of the fact that the 2nd appellant lives at Kota Damansara.

[104] The onus on the prosecution where the evidence is of a circumstantial nature is indeed a very heavy one. The circumstances must be fully and cogently established, the chain of evidence must be complete, the evidence must point irresistibly to the conclusion of the guilt of the accused and there must not be any gaps in the prosecutionôs case. If there are gaps in it, then it is not sufficient. Unless the court is satisfied that the facts proved are consistent with the guilt of the accused and the accused alone and every possible explanation other than the guilt of the accused has been excluded, the accused cannot be convicted based solely on circumstantial evidence (see *Magendran Mohan v PP* [2011] 1 CLJ 805).

[105] There is one other aspect of this appeal. The charge against the appellants was under s 302 read together with s 34 of the Penal Code i.e. that pursuant to the common intention of both of them, they had committed the murder of Altantuya. Common intention within the meaning of s 34 implies a prearranged plan and to convict the accused of an offence by invoking the section it should be proved that the criminal act was done in concert pursuant to the prearranged plan. As has been often observed it is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case (see *Mahbub Shah v Emperor* [1945] AIR PC 118; *PP v Mohd Farid Sukis* [2002] 3 MLJ 401).

[106] Except for the words ñindividually and jointlyò mentioned by the learned trial judge in paragraph 154 of the grounds of judgment, nowhere else did the learned trial judge address the acts or conduct of the appellants or the circumstances that give rise to or prove the prearranged plan to bring about the murder of the deceased. In the grounds of judgment, the learned trial judge made no finding on whether the prosecution has established that there was any prearranged plan by the appellants to commit murder and that murder was committed pursuant to that plan. In our judgment, the absence of such finding by the learned trial judge on the ingredient of common intention amounted to a misdirection by way of non-direction (*Mahbub Shah,* supra). In fact, there was no evaluation of the evidence on the ingredient of common intention based on the principles as stated in *Lee Kwai Heong & Anor v PP* [2006] 1 CLJ 1043.

[107] Learned DPP who conceded that there are various non-directions by the learned trial judge invited us to invoke the proviso to s 60(1) of the Courts Judicature Act 1964 which reads:-

> ñProvided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in the favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.ò

[108] It has been set out in *Tunde Apatira & Ors v PP* [2001] 1 CLJ 381 that as a general rule, the court will, in the normal course of events, quash a conviction where there has been a misdirection. Exceptionally, a conviction will be upheld despite misdirection where the court is satisfied that a reasonable tribunal would have convicted the accused on the available evidence on a proper direction.

[109] Looking at the whole evidence and circumstances of this case, we are of the view that this is not a fit and proper case for us to invoke the proviso. The circumstances relied upon by the prosecution had not been fully and cogently established and the chain of evidence is not complete. We cannot say if a reasonable tribunal properly directed would have convicted the appellants on available evidence. The court below had ignored and overlooked salient facts and evidence favourable to the appellants which resulted in serious and substantial miscarriage of justice to the appellants. In our judgment, the cumulative effect of these non-directions rendered the convictions of the appellants unsafe. Furthermore since the prosecutionôs case relied on circumstantial evidence, we have to adequately caution ourselves, in line with what has been said to be ñthe combined strength of strands to make a rope strong enough

to hangò in *Chan Chwen Kong v PP* [1962] MLJ 307. It is our judgment that the circumstantial evidence are insufficient and not strong enough to sustain the finding of guilt of the appellants. We are conscious that a heinous crime has been committed but where the guilt of the appellants had not been satisfactorily proved, we are constrained to give the benefit of doubt to the appellants. We, unanimously, allow both appeals. Conviction and sentence by the High Court is set aside. The appellants are accordingly acquitted and discharged.

sgd

(DATO' TENGKU MAIMUN BINTI TUAN MAT)
Judge
Court of Appeal, Malaysia
Putrajaya

Dated: 23rd August 2013

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