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INTRODUCTION

As a judge Sultan Azlan Shah decided a number of criminal cases and as usual His Royal Highness expressed with clarity and felicity the principles of law applicable. Many of the cases touch on questions of criminal procedure and evidence but a few deal with the substantive law.

In *Tham Kai Yau & Ors* v *Public Prosecutor*[1] light was shed on the distinction between murder and culpable homicide not amounting to murder. In the course of his judgment Raja Azlan Shah FJ (as he then was) delivering the judgment of the Federal Court said:

> The fine distinction between section 299 and section 300 is very important and that point should be clearly put to the jury in such a way that they would be able to come to a correct conclusion. The forensic practice of reading sections 299 and 300 to juries is likely to confuse rather than help. In view of what we have stated above, a case such as the present must therefore fall within the second part of section 299 or the third clause of section 300. Speaking generally, if the act must in all probability cause death, the offence is within section 300, Penal Code, but if the act is only likely to cause death, the offence fills within section 299, Penal Code.[2]

In *Sathiadas* v *Public Prosecutor*[3] Raja Azlan Shah J (as he then was) dealt with the ingredients of the offence of criminal breach of trust. He said:

> The gist of the offence of criminal breach of trust is entrustment and dishonest misappropriation or conversion to own use. Once the prosecution has succeeded in proving the receipt of money for a particular

[1][1977] 1 MLJ 174.
[2]At page 177.
[3][1970] 2 MLJ 241.

> purpose the case of entrustment is made out. Dishonest misappropriation or conversion to own use involves wrongful gain to the appellant or wrongful loss to his employers for the period of the retention of the money. That must depend on the facts and circumstances of each case. Criminal breach of trust is not an offence which counts as one of its factors, the loss that is the consequence of the act, it is the act itself, which in law amounts to an offence. The offence is complete when there is dishonest misappropriation or conversion to one's own use, or when there is dishonest user in violation of a direction, express or implied relating to the mode in which the trust is to be discharged.

His Lordship added:

> It may be observed that mere retention of money would not necessarily raise a presumption of dishonest intention, but it is a step in that direction. The fact that money entrusted for a particular purpose was not used for such purpose, that there was retention for a sufficiently long time would, together with other facts and circumstances, justify the inference that the appellant had dishonestly misappropriated or converted the money to his own use.

In *Public Prosecutor* v *Ooi Kee Saik & Ors*[4] Raja Azlan Shah J (as he then was) dealt with the law of sedition. His Lordship said:

> In interpreting the Sedition Act, 1948, I have been urged by Sir Dingle Foot to follow the common law principles of sedition in England. In England it can now be taken as established that in order to constitute sedition the words complained of are themselves of such a nature as to be likely to incite violence, tumult or public disorder. I can find no justification for this contention. The opinion of the Judicial Committee of the Privy Council in *Wallace-Johnson* v *The King* demonstrated the need to apply our own sedition law although there is close resemblance at some points between the terms of our sedition law and the statement of the English law of sedition. I can find of no better reason than that of Stratchey J who pointed out in *Queen Empress* v *Balagangadhar Tilak* that the Indian law of sedition which is found in section 124A of the Indian Penal Code (which is quite similar to section 3(1) of our Sedition Act) is a statutory offence and differs in that respect from its English counterpart which is a common law misdemeanour elaborated by the decisions of the judges.

Raja Azlan Shah J then added:

> Although it is well to say that our sedition law had its source, if not its equivalent from English soil, its waters had, since its inception in 1948, flowed in different streams. I do not think it necessary to consider the matter in great detail because I have been compelled to come to the conclusion that it is impossible to spell out any requirement of intention to incite violence, tumult or public disorder to constitute sedition under the Sedition Act. The words of subsection (3) of section 3 of our Sedition Act and the subject-matter with which it deals repel any suggestion that such intention is an essential ingredient of the offence.

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[4][1971] 2 MLJ 108.

During the course of his judgment, his Lordship made the following observation on freedom of expression:

> Sir Dingle Foot has stressed the need to give the greatest latitude to freedom of expression. Dato Seenivasagam, as I understand him, said that the Sedition Act strikes at the very heart of free political comment. It is of course true, as a general statement, that the greatest latitude must be given to freedom of expression. It would also seem to be true, as a general statement, that free and frank political discussion and criticism of government policies cannot be developed in an atmosphere of surveillance and constraint. But as far as I am aware, no constitutional state has seriously attempted to translate the 'right' into an absolute right. Restrictions are a necessary part of the 'right' and in many countries of the world freedom of speech and expression is, in spite of formal safeguards, seriously restricted in practice.

After a detailed study of the position as to freedom of speech in India, United States and England, his Lordship observed:

> My purpose in citing these cases is to illustrate the trend to which freedom of expression in the constitutional states tends to be viewed in strictly pragmatic terms. We must resist the tendency to regard right to freedom of speech as self-subsistent or absolute. The right to freedom of speech is simply the right which everyone has to say, write or publish what he pleases so long as he does not commit a breach of the law. If he says or publishes anything expressive of a seditious tendency he is guilty of sedition. The Government has a right to preserve public peace and order, and therefore, has a good right to prohibit the propagation of opinions which have a seditious tendency. Any government which acts against sedition has to meet the criticism that it is seeking to protect itself and to keep itself in power.

Raja Azlan Shah J then pointed out:

> Whether such criticism is justified or not, is, in our system of Government, a matter upon which, in my opinion, Parliament and the people, and not the courts, should pass judgment. Therefore, a meaningful understanding of the right to freedom of speech under the constitution must be based on the realities of our contemporary society in Malaysia by striking a balance of the individual interest against the general security or the general morals, or the existing political and cultural institutions. Our sedition law would not necessarily be apt for other people but we ought always to remember that it is a law which suits our temperament. A line must therefore be drawn between the right to freedom of speech and sedition. In this country the court draws the line.

His Lordship then spelt out the circumstances under which political criticism will amount to sedition under the Sedition Act.

In *Public Prosecutor* v *Kang Siew Chung*[5] Raja Azlan Shah J (as he then was) shed light on the vexed question as to whether a threat to exercise a legal power can be an 'injury' within the meaning of section 44 of the

[5][1968] 2 MLJ 39.

Penal Code. He said:

> In my view the learned President had properly directed his mind on the law that the threat to exercise a legal power does not constitute injury within the meaning of section 44 of the Penal Code. But where he had erred was in failing to consider the exercise of legal power. Under the section it is incumbent to distinguish between the threat to use the process of law and the exercise of that process. The power, for example, in the present appeal, the threat to take the couple to the police station in order to obtain their particulars, does not constitute injury as prescribed in section 44. But if, as in this appeal, the threat is made with the object of exacting money that is not due, it is an abuse of the exercise of that power and is therefore illegal, and such a threat made with such an object constitutes a threat of injury within the meaning of the section.

In *Chandrasekaran & Ors* v *Public Prosecutor*[6] Raja Azlan Shah J (as he then was) dealt with the ingredients of a conspiracy. He said:

> Conspiracy is defined in section 120A of the Penal Code. In order to constitute the offence of abetment by conspiracy there must be a combination of two or more persons to do, or cause to be done, an illegal act, or an act, which is not illegal, by illegal means and that act or omission must take place in pursuance of that conspiracy and in order to the doing of that thing. It is not necessary that the abettor should himself be directly involved as a participant in the offence committed. It is sufficient if he engages in the conspiracy in pursuance of which the offence is committed. In a conspiracy there is a common purpose. Each and every one of the conspirators is aware that he has to play his own part in a united effort to achieve the common purpose, although at times he does not know all the secrets or the means by which the common purpose is to be achieved. The concept of conspiracy is the agreement to work in furtherance of the common purpose. (See *Hussain Umar* v *Dalipsinghji*).

In *KS Roberts* v *Public Prosecutor*[7] Raja Azlan Shah J (as he then was) made some of his characteristic remarks in dealing with a case of possession of an obscene publication. One of the grounds of appeal was that the publication was an approved publication by the Government and therefore not an obscene publication. Raja Azlan Shah J said:

> I think there is a fallacy in the argument. In my view the word 'approved' strong as it is, cannot be read without any qualification. It does not mean *extra legem* . We boast of being a free democratic country but that does not mean that we are not subject to law. The impugned article is clearly obscene and a publication is an obscene publication even if only part of it is obscene.

In *Tan Teck Yam* v *Public Prosecutor*[8] Raja Azlan Shah J (as he then was) dealt with the offence of obstructing a public servant in the discharge of his public functions. In *Public Prosecutor* v *Tengku Mohamood Iskandar*[9] Raja Azlan Shah J (as he then was) dealt with the offences of voluntarily

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[6][1971] 1 MLJ 153.

[7][1970] 1 MLJ 137.

[8][1968] 1 MLJ 57.

[9][1973] 1 MLJ 128.

causing hurt. The learned President of the Sessions Court in that case after finding the accused guilty had made an order binding over the accused under section 173A of the Criminal Procedure Code having taken into consideration the fact the accused was a prince of the Royal House of Johore. The Public Prosecutor appealed. Raja Azlan Shah J began his judgment by saying:

> Today it is not so much the respondents who are on trial but justice itself. How much justice is justice? If the courts strive to maintain a fair balance between the two scales, that is, the interest of the accused person and the interest of the community , then I must say justice is just. The aim of justice must be balance and fairness. No tenderness for the offender can be allowed to obscure that aim. The concept of fairness must not be strained till it is narrowed to a filament.

Later in his judgment Raja Azlan Shah J said that the learned President in making the order had thereby conflicted with Article 8 of the Constitution which says that all persons are equal before the law. He added:

> That implies that there is only one kind of law in this country to which all citizens are amenable. With us, every citizen irrespective of his official or social status is under the same responsibility for every act done without legal justification. This equality of all in the eyes of the law minimizes tyranny.

The sentences on the accused were increased to reflect the gravity of the offences.

DECISION AND COMMENTS

BRIBERY AND CORRUPTION
(a) Burden of proof

Syed Ismail
v
Public Prosecutor

[1967] 2 MLJ 123 High Court, Kuala Lumpur

See under Administration of Criminal Justice at page 44 above.

(b) Prevention of Corruption Act: evidence of co-accused — corroboration

Chandrasekaran & Ors
v
Public Prosecutor

[1971] 1 MLJ 153 High Court, Kuala Lumpur

Cases referred to:-
(1) *Hussain Umar* v *Dalipsinghji* AIR (1970) SC 5.
(2) *Seah Chay Tee* v *Public Prosecutor* [1948] MLJ 77.
(3) *Daud bin Awang Ngah* v *Public Prosecutor* [1958] MLJ 168.
(4) *Tan Cheng Seng & Anor* v *R* [1948] MLJ 148.
(5) *Seet Ah Ann* v *Public Prosecutor* [1950] MLJ 293.
(6) *Sarjit Singh* v *State of Punjab* [1970] Cr LJ 944.
(7) *Subramaniam* v *Public Prosecutor* [1956] MLJ 220.
(8) *Mawaz Khan* v *R* [1967] 1 All ER 80.
(9) *R* v *Baskerville* [1916] 2 KB 658.
(10) *Public Prosecutor* v *Err Ah Kiat* [1966] 1 MLJ 9.
(11) *Pulukuri Kottaya* v *Emperor* (1947) 48 Cr LJ 533.
(12) *Hanumanth* v *State of Madhya Pradesh* AIR (1952) SC 343.
(13) *Manabendra Nath Roy* v *Emperor* AIR (1933) All 498,501.
(14) *SH Jhabwala* v *Emperor* AIR (1933) All 690, 705.
(15) *Bacha Babu* v *Emperor* AIR (1935) All 162, 169.
(16) *Chelaji Gomaji* v *Bai Jashodharabai Shambhudutt Nishir* 60 Bom LR 251.
(17) *Muldowney* v *Illinois CRR Co* 36 Iowa 472.
(18) *Chandika Prasad* v *Emperor* 126 IC 684.
(19) *Yohannan* v *R* [1963] MLJ 57.
(20) *Mohamed Fiaz Baksh* v *The Queen* [1958] AC 167.

RAJA AZLAN SHAH J: One Chandrasekaran, a checking clerk attached to the Accountant-General's Department was convicted on two charges of knowingly using as genuine forgeries of two treasury vouchers to the value of $207,630 in contravention of section 4(c) of the Prevention of Corruption Act, 1961 and sentenced to 3 years' imprisonment and fined $2,000. The evidence established that the said vouchers had been forged. He has not appealed. The appellants, both police officers attached to the Special Branch were charged and convicted of abetting Chandrasekaran under section 4(c) read with section 11(a) of the Act. The first appellant was sentenced to 2 years' imprisonment and fined $2,000 while the second appellant was sentenced to $2^1/_2$ years plus a fine of $2,000. If they are guilty then I must say that their conduct was iniquitous in the highest degree, deserving the strongest condemnation by every man in this country, for it is essential to the welfare of society that policemen should uphold the law rather than break it when corrupted by greed. A fourth person PW55 was also charged for abetment but the court allowed him to give evidence for the prosecution under section 19 of the Act and at the end of the case he was given a certificate of indemnity.

This case discloses a conspiracy which was carefully planned, deliberately and boldly carried out. Undoubtedly a number of others were

concerned in the conspiracy and the *modus operandi* clearly indicates that they were assured of co-operation from Chandrasekaran in the Accountant-General's Department.

The gist of the prosecution case against Chandrasekaran was this. Two forged treasury vouchers, purportedly emanating from the trade division of the Ministry of Commerce and Industry for the purchase of insecticide worth $111,889.50 and $95,740.50 from Messrs Kee Cheong of No 43A, Kampong Dollah, Kuala Lumpur, together with forged supporting documents, were presented to the Accountant-General's Department for payment. Chandrasekaran was the only clerk concerned with the detailed checking and he approved them. It is quite clear that, but for Chandrasekaran's connivance in the fraud, the two vouchers could not possibly have been approved. Chandrasekaran's conduct provides ample evidence of his guilt, for it cannot be reconciled with his innocence. I am thus perfectly satisfied that he had been rightly convicted.

A fraud having been perpetrated on the Government, the question arising in this appeal is whether the fraud was the result of a conspiracy; if so, whether each of the appellants was involved in that conspiracy.

The provision relating to abetment of offences under the Prevention of Corruption Act is contained in section 11 of the Act and abetment bears the same meaning as in the Penal Code. Section 107 of the Penal Code brings conspiracy within the defination of abetment as follows:

> A person abets the doing of a thing who ..... *Secondly* - Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing.

And explanation 2 of the section reads:

> Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.

Conspiracy is defined in section 120A of the Penal Code. In order to constitute the offence of abetment by conspiracy there must be a combination of two or more persons to do, or cause to be done, an illegal act, or an act, which is not illegal, by illegal means and that act or omission must take place in pursuance of that conspiracy and in order to the doing of that thing. It is not necessary that the abettor should himself be directly involved as a participant in the offence committed. It is sufficient if he engages in the conspiracy in pursuance of which the offence is committed. In a conspirary there is a common purpose. Each and every one of the conspirators is aware that he has to play his own part in a united effort to achieve the common purpose, although at times he does not know all the secrets or the means by which the common purpose is to be achieved. The concept of conspiracy is the agreement to work in furtherance of the common purpose: see *Hussain Umar* v *Dalipsinghji*[1].

On this point it is pertinent to refer to the provisions of section 10 of

the Evidence Ordinance which reads:

> Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons, in reference to their common intention after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

It will be observed that there must be reasonable ground to believe that two or more persons have conspired together to commit an offence, and that being shown, anything said, done or written by any one of such persons in reference to that common intention may be proved both for the purpose of proving the existence of the conspiracy as also for showing that any such person was party to it.

As already stated there is indubitable evidence in this case of the existence of a conspiracy to defraud the Government by means of forged vouchers. The appellants were charged with and convicted of abetment of the offence of defrauding the Government. Abetment of an offence includes abetment by conspiracy; therefore the question which I have to consider is whether each of them was a party to the conspiracy in furtherance of which the common purpose was accomplished. In order to determine this, it is desirable that the cases against the appellants be considered separately.

It is to be noted that the principles applicable in an appeal from a judge sitting without a jury are not the same as those applicable to jury cases. In the former it is for the appellate court to take the whole case into consideration and determine for itself whether the decision of the trial court was justified or whether there had been in fact a failure of justice. An appellate court must not lightly disregard the judgment appealed from but must give special weight to that judgment where the credibility of the witnesses comes into question, although with full liberty to draw its own inference from the facts proved and to decide accordingly.

The case against the appellant No 1 rests on the evidence of PW 55, an accomplice, and the learned president himself stressed the need for corroboration. However, Dato Marshall went further and argued that the learned president was wrong in law in failing to recognise that PW 55 was an unconvicted accomplice and an accused person on trial in the same case, who therefore had the strongest possible motive for seeking to exculpate himselt at the expense of others. Counsel stressed the proposition that the evidence of a co-accused must be given less weight than that accorded to the evidence of an accomplice and requires stronger corroboration. That proposition was taken from a passage in the judgment of Laville J in *Seah Chay Tee* v *Public Prosecutor*[2] but, as pointed out by the Court of Appeal in *Daud bin Awang Ngah* v *Public Prosecutor,*[3] that passage was *obiter*, since it was not necessary for the determination of the case. The Court of Appeal relied instead on the

judgement of the Singapore Court of Criminal Appeal in *Tan Cheng Seng & Anor* v *Rex*[4] where it was held that a co-accused giving evidence on his behalf against a co-accused was not to be regarded as an accomplice and therefore the rule regarding corroboration did not apply. They clearly laid it down that the rule only applied to witnesses for the prosecution.

It was further argued by counsel that, in accordance with well-established practice, PW 55 should first have been dealt with by the court before he was allowed to give evidence as a prosecution witness, otherwise his evidence might be influenced by his anticipation of its likely effect on his sentence: see *Seet Ah Ann* v *Public Prosecutor*[5] where Abbott J adopted the established practice in the Criminal Courts of England. PW 55 had given evidence under section 19 of the Prevention of Corruption Act. That section may be described as peculiar, unparallelled and unique. It gives an unfettered discretion to the court to require a co-accused to give evidence for the prosecution. For comparison see section 254 of the Criminal Procedure Code, which gives the public prosecutor a discretion to withdraw a charge against an accused person who unless good cause is shown, will be acquitted. A witness called under section 19 is entitled to a certificate of indemnity 'if the court is of the opinion that the witness makes a true and full discovery of all things of which he is lawfully examined'. This, is my opinion, can only be decided after the witness has given evidence and not before, otherwise the provisions of that section would be quite illusory. I am bound to construe the section in the form in which it was enacted. Although the witness was only dealt with after the close of his evidence, I have no doubt that it never was the intention of the legislature to depart from well-established principles of criminal law, that when an accused person gives evidence against a co-accused in the hope of receiving a pardon, his evidence must be even more closely scrutinised. For this reason I hold the view that, whenever an accused person is required to give evidence under section 19 of the Act, he does so in such a state of suspense that he will naturally have every inclination to minimise his own part in the transaction: his evidence must therefore be treated with even greater caution: see *Sarjit Singh* v *The State of Punjab.*[6] In other words, his evidence must meet the twin tests of reliability and corroboration i.e., he has to satisfy the court not only that his evidence is in general credible but also that there is independent corroboration in material particulars.

It was also argued that the learned president was wrong in law in treating PW 55 as a peripheral accomplice and thereby entitled to more credence than an accomplice. I agree that the learned president appeared to have treated PW 55 as a 'peripheral' accomplice but I do not see the need for drawing any such distinction. In my view there is only one type of accomplice. By whatever name he is called, an accomplice in fact remains an accomplice and the law with regard to accomplice evidence is unequivocally clear in requiring corroboration by reliable and independent testimony.

He was, however, satisfied that PW 55 was merely a front for appellant

No 1 without being aware of the real nature of the criminal design. I cannot say that the learned president had misdirected himself on the law. There is no irregularity, but if it were, such irregularity had not occasioned any failure of justice.

So far as the evidence of PW 55 is concerned it fully incriminated appellant No 1. His evidence consisted of the conversation that took place between himself and this appellant, the part he played in pursuance of the conspiracy and what Leong Chye Kee had told him. The learned president admitted hearsay evidence by PW 55 regarding what Leong had told him — Leong had since disappeared — but, be it noted, merely as explaining the relevant conduct of PW 55 and not to prove the truth of the statements. As authority for so doing the Privy Council case of *Subramaniam* v Public Prosecutor[7] was cited by him. That in my view was a correct approach. Leong is untraced. He was not a witness in the case. Whatever statements he had made to PW 55 were admitted, not for the purpose of establishing the truth of the facts alleged, but to show the state of mind and conduct of Leong and PW 55 and to draw inferences therefrom: see, further, *Mawaz Khan* v *Reg*[8]. The statements admitted established that there was a plot to open a bank account of a fictitious firm dealing in insecticide with the Oversea-Chinese Banking Corporations, Sungei Besi Branch, Kuala Lumpur and their knowledge of it.

PW 55's evidence was as follows: Sometime in October 1969, appellant No 1, who had known PW 55 for some 20 years, went to his house. He asked PW 55 to find a friend who knew a manager of a Chinese bank for the purpose of opening a business account for a dealer in insecticide. He gave PW 55 his office telephone number 87771 and house telephone number 28920, for purposes of contacting him. PW 55 took down these numbers in his pocket book, Exh P58. According to PW 55 he rang the appellant from time to time to obtain instructions. PW 55 succeeded in getting his friend, Leong Chye Kee, a member of a secret society, who knew a manager of the OCBC, Sungei Besi Branch. The stage was then set whereby indirect contact was made between appellant No 1 and the bank. This contact was clearly necessary so that the profits of the fraud could be paid into the bank.

The next thing that appellant No 1 asked PW 55 to do was to rent a house, using a fictitious name. On 21st October 1969, PW 55 succeded in renting premises 43A, Kampong Dollah from PW 14 using a false name Ho Sin Fan and a false identity card number. PW 14 confirmed that PW 55 and his wife PW 13 negotiated with him for the renting of the said premises. He produced the tenancy agreement, Exh P18 and the deposit receipt, Exh P19. It is significant to note that this address was used on the forged vouchers Exh P4 and P5 and their supporting documents. The connecting link in the chain of events was this address, needed to be used in pursuance of the common purpose. Appellant No 1 had also asked PW 55 to borrow $2,000 in order to open the business account. In October 1969, Lee Thong (PW 53) gave PW 55 a loan of $2,000 although he could not remember the exact date. That amount was repaid by PW 55 in November 1969.

On 22nd October 1969 the appellant No 1 took PW 55 to Weng Wah Press off Pudu Road, Kuala Lumpur where the latter ordered 500 invoices in the name of the fictitious Messrs Kee Cheong, 43A, Kampong Dollah, Kuala Lumpur, telephone number 25869. The arrangements for this order were made the previous day, though not by PW 55. PW 16, the proprietor of Weng Wah Press, testified that he issued a receipt. Exh P20, on the day of the order but could not identify the person who had placed the order or the person who took delivery. He identified Exh P4C and P5B as the invoices he had printed for the alleged Messrs Kee Cheong.

On 23rd October 1969 the first forged voucher, Exh P4 was approved by Chandrasekaran. On 24th October 1969 the Bank Negara cheque for $111,889.50 was prepared and issued. On 27th October 1969 Pw 55 took Leong Chye Kee to the bank. With the collaboration of an officer of the bank he succeeded in opening a bank account in the fictitious name of Messrs Kee Cheong of 43A, Kampong Dollah, Kuala Lumpur, using a false name Lim Chuan Chong as sole proprietor and a false identity card number 3006416. It may be noted that there is in fact a shop bearing the name Kee Cheong but at No 6, Loke Yew Road, Kuala Lumpur, dealing in provisions. It is further to be noted that the proprietor of that shop is also named Lim Chuan Chong. The identity card No 3006416 given as that of Lim Chuan Chong in the bank application form belonged to one Shafie bin Mohamed of Johore.

On 29th October 1969 the second voucher Exh P5 was forged. On 31st October 1969 the first Bank Negara cheque Exh P2, was credited into the account of Messrs Kee Cheong of 43A, Kampong Dollah, Kuala Lumpur in the OCBC, Sungei Besi Branch. On that same day Chandrasekaran approved the second voucher Exh P5. Between 3rd and 6th November 1969, three amounts totalling $112,000 were withdrawn and distributed between appellant No 1, PW 55, Leong Chye Kee and the officer of the bank. On 3rd November 1969 the second cheque, Exh P3 for $95,740.50 was prepared and issued and on 6th November 1969 it was credited into the same bank. Various sums of money were subsequently withdrawn leaving a small balance of $170.

The learned president relied on three pieces of evidence as corroboration implicating appellant No 1 with the crime. First, the appellant No 1 told PW 55 to contact a friend who knew a manager of a Chinese bank for the purpose of opening a business bank account and he provided PW 55 with his own office and house telephone numbers 87771 and 28920. These numbers were confirmed by PW 32, an Assistant Controller of Telecommunications, as that of the Ministry of Internal Security as used by the police and of the appellant's house. Secondly, PW 13, the wife of PW 55 testified that the appellant No 1 visited their house after her husband had arranged to rent the house at Kampong Dollah and that both left together. Thirdly, the evidence of the document examiner, PW 52, who had expressed the opinion that he found scribbles over the figures 87771 and 28920 in PW 55's pocket book, Exh P58.

Counsel has criticised this part of the judgment on two grounds, one of

which is, I believe, the main ground of appeal. It was said that the learned president had failed to direct his mind to the question of corroboration of accomplice evidence in that there must be independent testimony connecting the appellant 'with the crime' and that such failure has prejudiced the appellant. The answer is that the learned president, after deciding that PW 55 was an accomplice and an accused person, used these words:

> I followed the well-known rule of prudence and practice and required independent testimony corroborating the evidence of Lee (i.e., PW 55) as regards the identity of the second accused (i.e., appellant No 1) and the commission of the crime.

This was not a jury trial. If it were, perhaps different considerations would apply. The instant case, however, was tried by an experienced president and after a careful and anxious scrutiny of the whole of his judgment it is quite obvious to me that he had given effect to the requirement of law that corroboration of an accomplice evidence must be from a reliable and independent source which established not only that a crime had been committed but that it was committed by the appellant. I am of opinion therefore that there are no merits on this point.

Counsel's second point has indeed given me some anxiety. The contention put forward is that the evidence relied on by the learned president as corroboration did not in law constitute corroboration. It will be necessary to examine the evidence and see whether PW 55 had been sufficiently corroborated to prove the charge against him beyond all reasonable doubt.

The first piece of evidence relied on by the learned president as corroboration was the pocket book, Exh P58 in which PW 55 had written down the telephone numbers of the appellant. PW 55 had alleged that the numbers were given to him by the appellant No 1 and he noted them down, in his own handwriting. It is true that an accomplice cannot corroborate himself. That was the argument put forward by counsel and I accept it. What PW 55 deposed to as a fact constituting corroboration did not come from an independent source. It came from the witness's own mouth. In order to be of any value the fact relied on for corroboration must be established by such reliable and independent evidence as will satisfy reasonable minds that the witness was telling the truth. It was further said that there was no assurance that PW 55 did not himself write down the telephone numbers taken from the telephone directory after the appellant was arrested on 6th January 1970, so as to exculpate himself. PW 55 was arrested on 15th January 1970. I am afraid it is difficult to swallow this argument at its face value. In fact I am not prepared to accept it at all. There is in my view no explanation consistent with commonsense which would enable any reasonable man to understand why in the world must PW 55 implicate anyone, least of all his friend of 20 years standing unless he was telling the truth. In so far as this point is concerned, I am no less satisfied than the learned president that PW 55 was telling the truth. But, in so far as the learned

president found that Exh P58 was independent testimony that constituted corroboration, I do not agree with him. At its highest, it could be held as a circumstance telling against the appellant, but that, by itself, would certainly not connect him with the crime. I would also say the same regarding the third piece of evidence relied on by the learned president, i.e., the scribbles found over the two telephone numbers.

The second piece of evidence relied on by the learned president as constituting corroboration, stands however, on a different footing. After considering the train of events in the case the learned president found as a fact that the appellant No 1 had visited PW 55 and his wife in October 1969. If this finding of fact can be supported by the evidence, then that affords corroboration of the material part of PW 55's story connecting or tending to connect the appellant with the crime. That would be reliable and independent testimony of a circumstantial nature. It showed that this appellant was playing his separate part in one integrated and united effort to achieve the common purpose which in due course he achieved. PW 55 had testified that in October 1969 the appellant saw him about the opening of the fictitious bank account. That in my view, is a fact relevant to the issue — that the appellant was a member of a conspiracy. It is this relevant fact that required corroboration, not the witness who deposed to such fact.

The fact relied on for corroboration need not be direct, it is sufficient if it is merely circumstantial evidence connecting the appellant with the crime. The corroboration must be some supporting evidence rendering it more probable that the story of the accomplice is true than untrue and that it is reasonably safe to act upon it: see *Rex* v *Baskerville*[9]. After all the object of corroboration is to satisfy the court that the witness is telling the truth. Although the learned president did not in his judgment set out in detail the train of events which established the fact that the appellant saw him in October 1969, I am satisfied that there existed circumstantial evidence of a cogent nature which led to the irresistible conclusion that the appellant did see PW 55 in October 1969 and not in November 1969 as claimed by PW 13.

Such circumstantial evidence was as follows: On 21st October 1969 premises 43A, Kampong Dollah, Kuala Lumpur was rented to PW 55. This fact was confirmed by the landlord, PW 14 himself, who produced the tenancy agreement, Exh P18 and the deposit receipt Exh P19. On 23rd October 1969 the first forged voucher, Exh P4 was approved by Chandrasekaran. On 24th October 1969 the cheque for $111,889.50, Exh P2 was prepared. On 27th October 1969 Leong succeeded in opening a fictitious bank account for Messrs Kee Cheong with OCBC Sungei Besi Branch (see Exhs P13-P16A). On 24th October 1969 the second voucher, Exh P5 was forged. On 31st October 1969 Chandrasekaran approved Exh P5. On the same day Exh P2 was credited into the OCBC Sungei Besi Branch. Each item of circumstantial evidence disclosed some incriminating fact, which taken together with other proved facts conclusively proved that the appellant must have seen PW 55 in October 1969. The dates revealed the vital period of the conspiracy during which the appellant No 1 took an active part in the preparation for

the final blow to be struck. In my view there was reliable testimony of an independent nature which corroborated the testimony of PW 55.

Another point was taken by counsel that PW 13, the wife of PW 55, was herself an accomplice and therefore she could not corroborate her husband, another accomplice. The learned president, for reasons with which I concur, did not regard her as an accomplice. She does not satisfy the definition of an accomplice. According to the evidence she went with PW 55 to rent premises 43A Kampong Dollah, Kuala Lumpur. She testified that the appellant came to visit them in November 1969, she went to the bank on two occasions to cash two cheques of $5,000 and $35,000 and on the second occasion Leong gave her $1,000. She said PW 55 told her that he had struck a lottery. The learned president was satisfied that she verily believed her husband's tale. Nonetheless the learned president had carefully considered her evidence and treated it with caution. It is obvious that she had an interest to serve and her evidence therefore must be treated with suspicion and had to be strictly scrutinised. The learned president had not failed to meet this test.

Yet another point was taken by counsel, that her evidence violates the provisions of section 122 of the Evidence Ordinance, but the argument is without substance. Consent of the husband was in fact obtained, as recorded in the notes of evidence, although it was obtained in parts. At all events no reliance was placed on her evidence in order to corroborate the evidence of PW 55 that the appellant saw him in October 1969.

To bring home the charge against appellant No 2 the prosecution sought to prove by circumstantial evidence that he typed Exh P4C, one of the forged accompanying documents on a typewriter (Exh P21), which he borrowed from his friend Chief Inspector Abu Hassan bin Ariffin, PW 17. If the circumstantial evidence points irresistibly to this one conclusion then it discloses the part played by him in pursuance of the common purpose. I now proceed to examine in detail the evidence in the light of the various criticisms made by defence counsel. There are two aspects to be considered: first, the nature of the evidence and secondly its probative value.

The appellant was arrested on 6th January 1970. On the following day the police recorded a cautioned statement from him, presumably under section 15 of the Prevention of Corruption Act. Two days later a second cautioned statement was recorded. These statements were rejected by the learned president on the ground that they had been obtained by compulsion. The prosecution then sought to put in a portion of the statements by invoking section 27 of the Evidence Ordinance, which reads as follows:

> When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of such information, whether such information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

The learned president admitted it as Exh P75A. I reproduce that statement:

> One old portable Remington which I borrowed with the implied consent of Ketua Inspector Abu Hassan bin Ariffin who was my neighbour before ... When I went to the house and took the typewriter Enche Abu Hassan was not in the house. I removed the typewriter the following day.

Two complaints were raised by counsel on this issue. It was said that, once the whole statement was rejected under section 15 of the Act, no portion thereof could be admitted under section 27 of the Evidence Ordinance. In any event, counsel submitted, the said statement was not one distinctly relating to the discovery of the typewriter Exh P21 and therefore the whole of that statement should not have been admitted under section 27 of the Evidence Ordinance.

Section 27 is a concession to the prosecution. It is the express intention of the legislature that, even though such a statement is otherwise hit by the three preceding section viz., section 24-26 of the Evidence Ordinance, any portion thereof is nevertheless admissible in evidence if it leads to the discovery of a relevant fact. The reason is that, since the discovery itself provides the acid test, the truth of the statement that led to the discovery is thereby guaranteed. Admissibility of evidence under section 27 is in no way related to the making of the confession rather such evidence is admitted on clear grounds of relevancy as directly connecting the accused with the object recovered: see *Public Prosecutor* v *Er Ah Kiat*[10]. If a statement which would otherwise be hit by section 24 of the Evidence Ordinance is not excluded under section 27, *a fortiori* a statement which would otherwise be hit by section 15 of the Corruption Act cannot be excluded under section 27 of the Evidence Ordinance, because a statement made under section 15 of the Corruption Act is in the nature of one made under section 24 of the Evidence Ordinance.

In my view, however, the statement marked Exh P75A should not have been admitted. It was tantamount to an admission that:

> he borrowed an old Remington with the implied constent of Ketua Inspector Abu Hassan bin Ariffin who was his neighbour before....

It is well-established law that a statement concerning the circumstances under which the borrowing of the typewriter took place exceeds the bounds laid down by section 27. The statement purportedly admitted under section 27 not only embraced the place from which the typewriter was obtained but also that it was borrowed without the knowledge of its owner in his absence: see *Pulukuri Kottaya* v *Emperor*[11]. However, notwithstanding the improper admission of the statement in Exh P75A, I am prepared to accept as admissible the fact that the appellant thereby led the police to Ketua Inspector Abu Hassan's house, to which the typewriter Exh P21 was traced. So much of the information as distinctly led to the discovery of Exh P21 in Ketua Inspector Abu Hassan's house cannot be challenged. Any evidence of a fact the truth of which cannot be doubted should be admissible. Once, therefore, it is proved that Exh P21 was used in typing the forged document Exh P4C, then the fact discovered is naturally most relevant and no rule of evidence should be construed with such rigid pedantry

that the court must shut its eye to the truth.

The next piece of evidence which the prosecution sougth to adduce was the borrowing of Exh P21 from Chief Inspector Abu Hassan PW17 in September/October 1969 which was an active step taken in furtherance of the common purpose. PW 17 testified that since 1967 both this appellant and he were living in the police flats at Siew Dor Building, Jalan Scott, Kuala Lumpur. In 1967 both of them were attending a course at the Police Depot and the appellant had occasion then to borrow his typewriter. I reproduce what he further said in his examination-in-chief:

> In 1968 or 1969 he also borrowed my typewriter; I thought it was the end of 1968; cannot remember exactly. When he borrowed the second time I was downstairs and he said he wanted to borrow my typewriter. I told him he could come to my house and get it from any of the occupants since he knew my family very well. I did not see him fetch the typewriter; only sought my permission.

His daughter, PW 25, aged 15 years and a Form III student of the Methodist Girls School, Kuala Lumpur said in evidence that on one occasion in September/October 1969 she handed the typewriter to the appellant. Her father was not then in the house. Her evidence was not sworn or affirmed. She was cross-examined by counsel regarding her veracity. The learned president regarded her a truthful witness. She had known the appellant for years and in my opinion it is inconceivable that the witness who had no reason for false implication could have deposed against the appellant on any other ground save her own experience of having handed the typewriter to him in September/October 1969. In re-examination PW 17 said that the appellant was the only person who had borrowed his typewriter. In answer to a question by his counsel, viz., 'Apart from borrowing in 1967 and 1968, any other borrowing?' he replied 'After hearing my daughter I say it is the third time'. He therefore corrected his former evidence by saying that when the appellant sought his permission to borrow his typewriter a second time when he was 'downstairs', he meant it was the third time and by necessary inference it was at the end of 1969. That in my view constitutes sufficient corroboration of the daughter's statement that the appellant borrowed the typewriter in September/October 1969. The explanation of the appellant that he borrowed the typewriter at the end of May or beginning of June 1969 for the purpose of typewriting reports in connection with May 13 disturbances did not find favour with the learned president. The learned president was justified in arriving at this conclusion.

The prosecution next proposed to prove that Exh P 4C was typed on Exh P21. It is convenient at this stage to consider the admissibility of typewriting evidence under section 45 of the Evidence Ordinance. It was submitted by counsel that in India such evidence was held to be inadmissible. The Supreme Court case of *Hanumanth* v *The State of Madhya Pradesh*[12] was cited in support of the proposition. It is unfortunate that the Indian Supreme Court gave no indication of the

grounds for holding such evidence inadmissible beyond merely saying that the 'opinions of such experts were not admissible under the Indian Evidence Act as they do not fall within the ambit of section 45 of the Act'. That was all they said. There were three earlier decisions of the High Court in India which had not been considered. In *Manabendra Nath Roy* v *Emperor,*[13] the High Court on an appeal from the sessions court held that evidence as to the fact that the typewriters used in the typing of the various exhibits had certain defects which were clear from the typing of these exhibits was evidence of that fact which could be competently given by an expert who had had an opportunity of examining the documents. The court further held that it was entitled to draw its own conclusion as to the source and authorship of the documents from the whole evidence in the case and was entitled to take into consideration the fact spoken to by an expert witness that there were certain peculiarities in the typing of the documents resulting from defects of the machines by which the documents were typed. In *S H Jhabwala* v *Emperor,*[14] the same court consisting of two judges while holding the view that the opinion of an expert to the effect that one document had been typewritten on the same machine as another document was not admissible under section 45 of the Evidence Act, remarked that it could ask the witness to explain points in favour of the view whether the two documents had or had not been typewritten on the same machine but that it could not treat the witness's opinion as expert testimony. In the case of *Bacha Babu* v *Emperor*[15], the same court consisting of two judges held similar views. In 1956 the High Court of Bombay in its original civil jurisdiction being bound by *Hanumanth's* case disallowed an expert on typewritten documents giving his opinion under section 45 that a pro-note and a memorandum of mortgage were typed on the same typewriter by reference to the similarities or defects between the documents in respect of the typing. The court further refused the expert permission to compare photographic enlargements and measurement of the letters in those two documents in order to arrive at the conclusion that they were made on the same typewriter. (See *Chelaji Gomaji & Co* v *Bai Jashodharabai Shambhudutt Nirshir*[16]).

I have been asked to follow *Hanumanth's* case because it is said that our Evidence Ordinance is derived from the Indian Evidence Act and therefore whatever the Indian courts decide we ought to follow. The learned author of *Sarkar on Evidence* 11th Edition Vol 1 p 504 described the case as an unfortunate decision. *Woodroffe & Ameerali* 12th Edition Vol 2 p 1033 too expressed the view that that case may require reconsideration in the light of modern knowledge indicating that detection of forgeries of typewritten documents has become an integral part of the science of questioned documents. The expression 'science or art' is elastic enough to be given a liberal interpretation. If the *Hanumanth* decision was based on the premise that typewriting was not specifically mentioned in section 45 then equally there is no mention of hand-writing or foot-print or telephony and yet the evidence of handwriting, foot-print or telephonic experts has been held

admissible. So also of ballistic or medical experts who too have not been mentioned in section 45. It is sufficient to mention that the Indian Supreme Court decision was a departure from English and American decisions on the subject. In my view, and I say it without any hesitation, expert opinion on typewriting is as much a matter of science study as handwriting and finger-print evidence. I would therefore adopt what was said in *Muldowney* v *Illinois CRR Co*[17] thus:

> The opinion of witnesses possessing peculiar skill is admissible whenever the subject-matter of inquiry is such that inexperienced persons are not likely to prove capable of forming a correct judgment upon it without such assistance; in other words, when it so far partakes of the nature of science, as to require a course of previous habit or study in order to the attainment of a knowledge of it and that the opinions of witnesses cannot be received when the inquiry is into a subject-matter, the nature of which is not such as to require any particular habits or study in order to qualify a man to understand it. If the relations of facts and their probable results can be determined without special skill or study the facts themselves must be given in evidence, and the conclusions or inferences must be drawn by the jury.

Our courts are perfectly entitled to refer to any appropriate treatise on works of science. See sections 57 and 60 of the Evidence Ordinance. *Osborn* , the leading American authority on questioned documents, points out:

> The increasing use of the typewriter for the production of fraudulent writings of many kinds has certainly created an urgent necessity for means that will lead to the correct identification of these documents, the determination of their dates, and the discovery of their authors .... It is especially important, however, that those whose interests are attacked by documents of this kind should know first, that typewriting can sometimes be positively identified as being the work of a certain individual typewriting machine and second, that the date of a typewriting in many cases can be determined with certainty and positively proved. In many cases the discovery of these two facts gives information to those who try cases in Courts of Law which enable them to expose pretentious fraud and prevent miscarriages of justice ..... The indentification of a typewritten document in many cases is exactly parallel to the identification of an individual who exactly answers a general description as to features, complexion, size etc, and in addition matches a detailed list of scars, birth-marks, deformities and individual peculiarities.

It is not without precedent that when our courts strongly feel that a decision of a court of different jurisdiction cannot be supported we have not hesitated to say so. In my view the Supreme Court went too far in refusing to allow typewriting evidence under section 45. I do not propose to perpetuate the unfortunate effects of *Hanumanth's* case; few can have survived so precariously for so long. The winds of change must be heeded in the corridors of the courts if we in the law are to keep abreast of the times. I would accordingly hold that the opinion of the typewriting expert was admissible under section 45 of the Evidence Ordinance.

The expert took 5 specimen typescripts from Exh P21 (Exh DS(i)—(v)) at two different points of time. By using a stereoscopic microscope he compared them with Exh P4(C) and found that both were similar in size and design of the types and in alignment and weight of impressions. After giving allowance for a number of variable facts which might have caused similarities or differences to appear in the specimen obtained from the same typewriter, e.g., kind of paper used, differences in ribbon, kind of backing, and also not excluding the possibility that another similar typewriter would have developed the same defects as found in Exh P4C, he was of the opinion that the prosecution evidence was consistent with the typescripts on Exh P4C being made on Exh P21. The expert said he exercised his own discretion in applying the standards with regard to the typewriting identification. He found double impressions on the specimen typescript he obtained from Exh P21 *i.e.*, Exh DS(i)—(v) and in the witness box he circled in ink and initialled examples of double impressions on Exh DS(ii) and (v). He further circled in ink and initialled the double impressions he found on Exh P4C. The expert holds a degree of Bachelor of Science (Honours) and had attained specialised training in document examination for 2 years. He is now with the Department of Chemistry and his evidence has been accepted in the courts in this country, Singapore and Sarawak.

With regard to the evidentiary value of expert evidence it is of course true to say that the court cannot delegate its authority to the expert but has to satisfy itself as to the value of such evidence in the same manner as it has to weigh any other evidence. This is achieved by examining the expert as to the extent of his experience in typewriting identification and how much study and research he had given to the subject. An appellate court is in much the same position as the trial court to appreciate this point although I must say that the science of typewriting identification has not developed to a stage of exactitude as that of finger-prints and therefore complete reliance cannot be placed on the evidence of the expert on such a subject. Nonetheless, there are cases, as here, where it is a weighty piece of evidence which clearly can be taken into consideration as lending support to the conclusion arrived at from other evidence external or internal, though by itself it would not be sufficient to carry conviction.

Evidence that the typewriter Exh P21 had certain peculiarities, such as double impressions which were clearly discernible in the various exhibits, is evidence of a fact which can be competently given by PW 52 who had had an opportunity of examining the documents. The court, after considering the whole of the evidence, is entitled to draw its own conclusion as to the source and authorship of the documents and is entitled to take into consideration the fact spoken to by the expert that there were certain peculiarities in the typing of the documents resulting from defects of the machine by which the documents were typed. The learned President reviewed the whole of the evidence of the expert and he accepted it as reliable. He admitted it as evidence of surrounding circumstances. I have also examined the double impressions found on the exhibits with the assistance of a magnifying glass and I do not doubt

the evidence of the expert as reliable. It may be observed here that apart from the evidence of PW 52 as to the peculiarities in the type-writer, Exh P21, there is evidence *aliunde* to establish that the appellant was a member of the conspiracy. Unless he was a member of the conspiracy he would not be in a position to know and use the fictitious name and address of Kee Cheong, 43A, Kampong Dollah, Kuala Lumpur on the forged document, Exh P4C. There was other extrinsic evidence that he borrowed Exh P21 from PW 17 at the crucial period of the conspiracy.

The last piece of circumstantial evidence against appellant No 2 was evidence of subsequent conduct. The prosecution led evidence that this appellant told his office colleagues PW 30 and PW 31 of his purchase of a $1,000 diamond ring for his wife from alleged turf club winnings and evidence of payment of outstanding bills of about $1,500. The evidence of subsequent conduct is relevant under section 8 of the Evidence Ordinance and may properly be taken into account, after the prosecution has established the guilt of the accused, to reinforce the satisfaction of the court as to the proof of guilt made out by the prosecution case: see *Chandika Prasad* v *Emperor*[18].

In a criminal case the conduct of an accused person is relevant against him under section 8 of the Evidence Ordinance. Therefore where the accused volunteered a statement presenting facts in a light favourable to himself, such conduct is relevant and can be held to be incriminatory only where it is open to no other reasonable explanation but of guilt. Of course, this category of conduct is not conclusive. It does not necessarily follow therefrom that he is guilty, any more than that an accused person making a false statement to enhance his apperance of innocence thereby necessarily provides proof of his guilt. It is only evidence which must, like all other evidence, be considered by the tribunal on a question of fact. Therefore such evidence is admissible where it lends support to show that the accused is guilty. In this case the appellant volunteered a statement to PW 30 in November 1969 that he won about $5,000 at the races. He also volunteered a statement to PW 31 on the second day of Hari Raya that he bought a $1,000 diamond ring for his wife a few days before Hari Raya (that was in December 1969) from his alleged turf club winnings of $2,500. There was no cause to make those statements, except for obvious reasons. The learned president considered this conduct of the appellant as a circumstance telling against him and he had to explain it when called upon to make his defence. The appellant called Inspector Sunny Tait as his witness, but the learned president did not consider him a witness of truth I share the same view. I have studied Inspector Sunny Tait's evidence very carefully, though without the advantage that is gained by seeing and hearing the witness. A study of the record is no adequate substitute for the gradual unfolding of evidence presented by a witness whom the court can see and hear. Gestures, changes of intonation, pauses and all those incidents which enabled the learned president to assess the credibility of the witness cannot be reproduced in the notes of evidence. I am satisfied that Inspector Sunny Tait was not a convincing witness. His evidence contains inherent weaknesses which become more appa-

rent the more carefully one probes. The appellant did say in evidence that he won about $2,500 from two races, the 8th and the 9th, but that it was the last race which had brought him winnings on 20 win and 20 place tickets. He remembered only the names of two horses but was unable to state which particular horse had brought him the windfall, nor did he mention the amounts paid for a win and for a place. A story which left entirely unexplained such important facts such as these cannot be accepted as reasonable or probable. The defence does not hold water. I have yet in fact or in fiction to come across a more impudent defence than that raised by this appellant.

On 13th November 1969 appellant No 2 paid his mess bills amounting to $396.35 cts. which he had been unable to settle since August 1968. On the same day, he also made full payment of $816.70 cts to Joo Lee Finance Co in respect of his car loan. On 30th November 1969 he paid $300 to a moneylender in respect of a loan which he and Chandrasekaran had jointly taken in July 1968. In December 1969 he bought his wife a diamond ring which according to him cost $930. Adding together these various sums of money which he had spent in November/December 1969, the total amount came to $2,442.05, a very substantial figure of nearly $2,500. That was the amount he said he had won at the races. That was the money he said he had paid towards all his outstanding debts and the purchase of the diamond. But the learned president, for reasons which I do not hesitate to concur in, had found that appellant No 2 had won no such sum at the races, in the circumstances the appellant's explanation of this issue was not rebutted.

I am satisfied that there was a chain of evidence so far complete as not to leave any reasonable doubt as to the guilt of appellant No 2. The circumstantial evidence established that in all human probability the typing of Exh P4C must have been done by him. The evidence of his subsequent conduct is further proof which fortified the prosecution case as to his guilt.

I have dealt with the major portion of the grounds of appeal advanced on behalf of appellant No 1. All other grounds, except one, are in my opinion of no consequence and do not assist the appellant in any way. That one is:

> The learned president applied the wrong test when exercising his discretion under the provisions of section 113 of the Criminal Procedure Code, on the request of the appellant to act thereunder in respect of the statement made by PW 55 — Lee Kim Ying — to the police in the course of police investigation, whereby the appellant was denied his statutory right of access to important material for cross-examination.

Counsel advanced two proposition *viz.*, that, as the police statement made by the appellant on 16.1.1970 under section 15 of the Corruption Act was a confession, the defence was entitled as of right to be given access to that statement; failing that argument, it was submitted that it was a statement falling within the ambit of section 113 of the Criminal Procedure Code and that the learned president had applied the wrong

test when exercising his discretion under it.

The fallacy of the first argument is that it ignores the intention of the legislature as expressed in the section. Subsection (1) of section 15 of the Act permits the statement of an accused person to be admitted in evidence at his trial under the Act and if he gives evidence on his own behalf, that statement may be used in cross-examination and for purposes of impeaching his credit. In my view the subsection is quite specific. It applies only to the statement of an accused person; he must be an accused person when the statement is intended to be used against him. If he turns what in English law is termed 'King's Evidence' he is no longer an accused person and in the circumstances the subsection does not apply. The correct approach would be to invoke the provisions of section 113 of the Criminal Procedure Code. That brings me to counsel's second argument. Has the learned president applied the wrong test? Let us then see the procedure which he adopted. That appears on page 299 of the notes of evidence:

> Kandan — applying to have statement made by witness on 16th night. To test his credibility. Court adjourns to read statement. Court sits again: bearing in mind that he is a peripheral accomplice he is substantially accurate.

Section 113(1) of the Criminal Procedure Code confers an unfettered discretion on the court to direct the accused to be furnished with a copy of the police statement for purposes of impeaching credit. If an accused or his counsel has reason to believe that the evidence which the witness gives in the witness box differs in material particulars from the police statement he or his counsel can request the court to refer to a particular passage or passages in the statement and the court is obliged to refer to them. Failure to refer to such statement is a denial of justice: see *Yohannan* v *R.*[19] The court then exercises its discretion whether to furnish the accused with a copy of the police statement. The true test when exercising such discretion seems to be that the police statement must afford material for serious challenge to the credibility or reliability of the witness on matters relevant to the prosecution case: see *Mohamed Fiaz Baksh* v *The Queen*[20]. If the court finds there is no material to afford a serious challenge to the credibility or reliability of the witness, the accused need not be furnished with a copy of the police statement. In the present case the learned president at the request of counsel had referred to the police statement and he had come to the conclusion that there was no material for serious challenge to the credibility or reliability of PW 55. I do not think that, merely because he had rejected the application, it can be said that he had failed to exercise his discretion judicially and that he had applied the wrong test in applying the provisions of section 113 of the Criminal Procedure Code.

I have also considered the other grounds of appeal advanced on behalf of appellant No 2. I do not consider that there are merits in any of them.

The appeal by both the appellants against conviction is dismissed.

I am afraid that the sentence of 2 years' imprisonment imposed by the

lower court on appellant No 1 is out of line when compared with the sentenced imposed on Chandrasekaran. What I am stressing as significant is that the learned president found that he was the brain behind the conspiracy, but he did not give expression to it in his sentence. In the circumstances it is only right and proper that he deserves no lesser sentence, if not a heavier one than that imposed on Chandrasekaran. Giving the matter my best consideration I enhance his sentence from 2 years' to 3 years' imprisonment. I do not propose to interfere with the sentence of $2^1/_2$ years' imprisonment imposed by the lower court on appellant No 2.

Appeal dismissed.

Dato' David Marshall for the Appellants.
Hassan Ishak (Deputy Public Prosecutor) for the Respondent.

Note

In *Chandrasekaran & Ors* v *Public Prosecutor* [1971] 1 MLJ 153 Raja Azlan (as he then was) dealt with the ingredients of conspiracy. There must be reasonable grounds to believe that two or more persons have conspired together to commit an offence, and that being shown, anything said, done or written by any one of such persons in reference to that common intention may be proved both for the purpose of proving the existence of the conspiracy as also for showing that such person was party to it.

(c) Whether gratification was solicited corruptly

Public Prosecutor
v
Datuk Haji Harun Bin Haji Idris (No.2)

[1977] 1 MLJ 15 High Court, Kuala Lumpur

Cases referred to:-
(1)*Sweeney v Astle* [1923] NZLR 1198, 1202.
(2)*Lim Kheng Kooi* v *Reg* [1957] MLJ 199.
(3)*R* v *Smith* [1960] 1 All ER 256.
(4)*Chempan Varkey* v *State of Kerala* (1972) Indian Yearly Digest 2099.
(5)*R* v *Andrews-Weatherfoil Ltd* 56 Cr App R 31; [1972] 1 WLR 118; [1972] 1 All ER 65.
(6)*Crown Prosecutor* v *RK Pillai* AIR (1948) Mad 281.
(7)*Imperatrix* v *Appaji* (1896) ILR 21 Bom 517.
(8)*BK Sen* v *Prasad* AIR (1945) Pat 259.
(9)*R* v *Swemmer* 15 E & E Digest (Rep) 119.
(10)*In re MS Mohiddin* AIR (1942) Mad 561.
(11)*In re Varadadesikachariar* AIR (1950) Mad 93.

RAJA AZLAN SHAH FJ: The accused is charged as follows:

First Charge: That you between February 22, 1972 and July 24, 1972, in your office at Kuala Lumpur, then in the State of Selangor, corruptly solicited for a political party, namely, United Malays National Organisation (UMNO), a gratification, to wit two hundred and fifty thousand dollars ($250,000) from the Hongkong and Shanghai Banking Corporation, Kuala Lumpur, as an inducement to you, being a member of a public body, namely Government of the State of Selangor, to obtain the approval of the Executive Council of the Government of the State of Selangor in respect of an application of the said bank for alienation of a piece of State land held under TOL 6450 for the purpose of amalgamating the land applied for with Lots 76,77 and 78, Section 11,Bandaraya Kuala Lumpur and to construct thereon a multi-storey building and that you thereby committed an offence punishable under Section 3(a)(ii) of the Prevention of Corruption Act, 1961.

Second Charge: That you on or about August 16, 1972 at the Kuala Lumpur International Airport Subang, in the State of Selangor, being a member of a public body, to wit, Mentri Besar Selangor, did accept from the Hongkong and Shanghai Banking Corporation for a political party, namely United Malays National Organisation (UMNO), a gratification, to wit, twenty-five thousand dollars ($25,000) cash through one Haji Ahmad Razali bin Haji Mohd Ali as an inducement for your aiding in procuring the performance of an official act, to wit, to obtain the approval of the Selangor State Executive Council in respect of an application of the said bank for alienation of a piece of State land held under TOL 6450 for the purpose of amalgamating the land applied for with Lots 76,77 and 78, Section 11, Bandaraya Kuala Lumpur and to construct thereon a multi-storey building and that you thereby committed an offence punishable under section 9(b) of the Prevention of Corruption Act, 1961.

Alternatively: That you on or about August 16, 1972 at the Kuala Lumpur International Airport, Subang, in the State of Selangor, being an agent of the Ruler of the State of Selangor, to wit, Mentri Besar Selangor, did corruptly accept from the Hongkong and Shanghai Banking Corporation for a political party, namely, United Malays National Organisation (UMNO), a gratification, to wit, twenty-five thousand dollars ($25.000) cash through one Haji Ahmad Razali bin Haji Mohd Ali as an inducement for showing favour in relation to your principal's affairs, to wit, to obtain the approval of the Selangor State Executive Council in respect of an application of the said bank for alienation of a piece of State land held under TOL 6450 for the purpose of amalgamating the land applied for with Lots 76, 77 and 78, Section 11, Bandaraya Kuala Lumpur and to construct thereon a multi-storey building and that you thereby committed an offence punishable under Section 4(a) of the Prevention of Corruption Act, 1961.

Third Charge: That you on or about March 27, 1973 in your office in Kuala Lumpur, then in the State of Selangor, being a member of a public body, to wit, Menteri Besar Selangor, did accept from the Hongkong and Shanghai Banking Corporation, Kuala Lumpur for a politicil party, namely, United Malays National Organisation (UMNO), a gratification, to wit, two hundred and twenty-five thousand dollars ($225,000) cash as an inducement for your aiding in procuring the performance of an official act, to wit, to obtain the approval of the Selangor State Executive Council in respect of an application of the said bank for alienation of a

piece of State land held under TOL 6450 for the purpose of amalgamating the land applied for with Lots 76, 77 and 78, Section 11, Bandaraya Kuala Lumpur and to construct thereon a multi-storey building and that you thereby committed an offence punishable under section 9(b) of the Prevention of Corruption Act, 1961.

Alternatively: That you on or about March 27, 1973 in your office in Kuala Lumpur, then in the State of Selangor, being an agent of the Ruler of the State of Selangor, to wit, Mentri Besar Selangor did corruptly accept from the Hongkong and Shanghai Banking Corporation, Kuala Lumpur, for a political party, namely, United Malays National Organisation (UMNO) a gratification to wit, two hundred and twenty-five thousand dollars ($225,000) cash as an inducement for showing favour in relation to your principal's affairs, to wit, to obtain the approval of the Selangor State Executive Council in respect of an application of the said bank for alienation of a piece of State land held under TOL 6450 for the purpose of amalgamating the land applied for with Lots 76, 77 and 78, Section 11, Bandaraya Kuala Lumpur and to construct thereon a multi-storey building and that you thereby committed an offence punishable under section 4(a) of the Prevention of Corruption Act, 1961.

To appreciate the charges it is necessary to give a narrative of the chronological events as established by the prosecution which led to the prosecution of the accused.

The Hongkong & Shanghai Banking Corporation ('the bank') own lots 76, 77 and 78, Section 11, Bandaraya, Kuala Lumpur and also a narrow strip of land held on TOL 6540 since 1963, measuring 450 sq. ft. which is sandwiched between lots 76 and 77. This area has been zoned for comprehensive development. The bank proposed to develop that land so as to provide a suitable headquarters office for their banking activities in East and West Malaysia, and incorporate an investment block with the building premises to service the bank. So in April 1971 they commissioned a firm of architects, Messrs Swan & Maclaren to design the building. Late in 1972 this firm's name was changed to Jurubena Sinar Murni. During the relevent period Peter Lim Teik Oon,.the resident partner, was dealing with the project. Messrs Swan & Maclaren put up their report and designed a study model of the building, which was a 28-storey building with a cantilevered podium block extending over Jalan Benteng and an underground car-park. The estimate was in the region of $27 million.

On April 29, 1971, the bank's property managers, Messrs Wicks & Partners, wrote to the State Planning Officer, Selangor regarding the proposed project. That letter was re-directed to the Planning Committee, Bandaraya, who replied that they had no technical objection to the bank's application for alienation of the strip of land held on TOL 6540.

So on June 18, 1971 Messrs Wicks & Partners wrote to Pegawai Pemungut Hasil Tanah, Kuala Lumpur ('PHTKL') enclosing their formal application for alienation of the land held on TOL 6540 for purpose of amalgamation with lots 76, 77 and 78, and construction of a multi-storey building on the said lots. It was acknowledged by the Land Office on June 22, 1971.

The initial plans were submitted to the Planning Committee, Ban-

daraya, and on August 17, 1971 the Committee approved the project in principle but laid down six conditions; two of the conditions were: (i) that the bank had to obtain prior approval of the State Government to put up any projection over Jalan Benteng as that involved using the air-space over Jalan Benteng, which was State land, and (ii) the problem of night hawkers.

The bank was informed by the Planning Officer by letter dated August 30, 1971 that until these two problems were solved to the Planning Committee's satisfaction, their proposed project could not be entertained. The bank was also informed to communicate direct with the State Government regarding the State land. A copy of that letter was extended to PHTKL. The bank did communicate with the PHTKL on September 9, 1971 concerning the problems of the air-space and the underground car-park and they sent a reminder on January 14, 1972, but no formal application for alienation of the State land over Benteng was made until January 30, 1973.

On October 2, 1971 Khalil Akasah, Special Officer to the Prime Minister, wrote to the accused a letter entitled 'The Construction of a New Building for Hongkong and Shanghai Bank and a 'Plaza'. In that letter the writer discussed about the private sectors' participation in the construction of new buildings in accordance with Government plans to amend the Laws of Construction for the Kuala Lumpur area. The last three paragraphs speak for themselves:

> In support of this plan, the Hongkong and Shanghai Banking Corporation has expressed their intention to build a 23-storeys sky-scraper at their present site which is situated at Leboh Ampang. The Bank's plan includes a 'Plaza' with a shopping arcade and a flower garden. As this project is a huge one a portion of the Government's land near the embankment of Klang river is required. The Bank's representative stated that it would not hinder the public traffic in that area. They have already written to the District Office about it.
>
> Attached herewith a letter from the Hongkong and Shanghai Banking Corporation together with a photograph of their project. I have pleasure to note that the Municipality after examining the plan of the above-mentioned building, does not have any objection to the bank's plan.
>
> In the construction scheme, the bank will also beautify the Jame' Mosque which is nearby so as to make the whole area look more beautiful. I trust that your honourable will have no objection to the bank's plan to participate in the Second Malaysia Plan, especially as it shows the faith of the private sector and to give a new look to Kuala Lumpur. I sincerely hope your honourable will let us have your decision soon so that the Bank could be notified.

By the end of 1971 the bank had still not received approval of their application for alienation of the land held on TOL or to proceed with their project. The bank manager, DJR Smorthwaite, expected approval of their plans to be given within a matter of 6-8 weeks from the date of submission. The delay was a significant consideration from the point of view of investment. For a large expatriate firm like the bank, the formal difficulties seemed somewhat greater. They naturally wanted it solved

expeditiously. The main problem encountered was the application for alienation of the small strip of land held on TOL and the fact that their plans called for a cantilevered podium block extending over part of Benteng. On the latter aspect, they were more concerned with the air-space than the land. To them, or at least to their architect, the problem concerning the air-space was a novelty since they thought it was not provided for under the National Land Code. Because it also concerned State Land and as they considered the accused was head of the State Government, they explored the possibility of a meeting with him. If a meeting between the accused and the bank officials could be arranged, their problems could be solved expeditiously, and the bank officials saw just that as a distinct possibility. But none of them, Smorthwaite, or JGT Sim, the deputy Manager, knew the accused personally. Peter Lim too did not know the accused personally. So the three had a discussion and the outcome of it was that Peter Lim would enlist the help of a longtime friend, Chew Beng Chiat, to arrange a meeting.

Peter Lim contacted Chew Beng Chiat. Chew said he did not know the accused personally but he knew Rosedin bin Haji Yaacob, the accused's political secretary. That was good enough for Peter Lim who asked Chew to arrange a meeting between him and Rosedin. A luncheon meeting was then arranged at Le Coq d'or sometime in February 1972 where all three attended. Peter Lim briefed Rosedin on the bank's building project and the problems regarding the air-space and said that the bank officials would like to see the accused concerning their application for the air-space. Rosedin agreed to brief the accused on the matter and would give an answer. After being reminded by Peter Lim, Rosedin briefed the accused who agreed to see the bank officials on February 22, 1972 at 9.30 am. On February 14, 1972 Rosedin wrote to Smorthwaite notifying him of the date of the meeting and also sent copies to Pegawai Daerah, Kuala Lumpur, Pegawai Kemajuan Negeri Selangor, Pegawai Kemajuan Negeri, Selangor, Pegawai Peranchang Negeri, and Datuk Bandaraya (Exhibit P12). The bank agreed to the date (Exhibit P24).

The meeting on February 22, 1972 was attended by Smorthwaite, Peter Lim and Ishak, the representative of the bank's quantity surveyor (Ishak was not called by the prosecution, but he was made available to the defence at the end of the prosecution case). Smorthwaite explained to the accused the bank's schemes and their related problems and showed him the study model. The accused seemed receptive but said he would have to consult his legal adviser and land officers concerning the title to the air-space and the connected problems of relocating the night hawkers and the car-park. He further indicated that if the problem of the air-space could be resolved satisfactorily, he thought solutions to the other problems could be found. Smorthwaite was happy with the outcome of that meeting.

The bank kept their headoffice in Hongkong informed of the progress of their project and the meetings with the accused by telephone and by letter because they had to obtain the necessary approval from them. Following the first meeting on February 22, 1972 Smorthwaite wrote to

Hongkong (Exhibit P13) reproducing what took place at that meeting and is as follows:

> My dear Mosley,
> I refer to Nolan's letter of February 12.
>
> *BANK PROPERTY*
>
> *Kuala Lumpur Office*
>
> As advised by Nolan, I had a meeting this morning with the Chief Minister at which I was able to explain in general terms what we had in mind and why we consider it necessary to project our podium block out over Benteng.
>
> I was able to illustrate our ideas with the very good model produced by our architects and I think it is safe to say that the Chief Minister is enthusiastic and has given his approval in principle. However, the idea of building out over a public thoroughfare is new to West Malaysia and before giving us firm approval the Chief Minister has said that he would like to look into the legal implications. It seems that he is not concerned about our wishing to build under Benteng, but is curious to know what our title will be to the bit that sticks out into space; also who bears the responsibility should it collapse on to a crowded area.
>
> Unfortunately, as I have said, there does not appear to be a precedent and it may well be that we shall have to take a TOL for the area of land over which we wish to build with an undertaking to allow public right of way. All this may take time although the Chief Minister had already summoned the various authorities concerned before we left his office, so it may well be that things will now move a little faster than previously. The main thing is that we have the agreement in principle of both the Federal and State Governments and now that we have got beyond the departmental stage, we should be in position to submit our drawings to the town planners in the not too distant future.
>
> The architects advise me that the town planning stage will not take more than six weeks and provided you can let us have your approval in due course we would hope to be able to move to our temporary accomodation in the latter part of this year.
>
> Yours very truly,

However, on March 7, 1972 the application for alienation of the TOL land was still not settled. It was still under consideration as was borne out by PHTKL's letter of even date to Messrs Wicks & Partners (Exhibit P9A page 104). On April 24, 1972 Smorthwaite again wrote to Hongkong. The first two paragraphs are relevant, and I produce them here:

> I confirm my telephone conversation of Saturday 22 during which I advised you that we now think that we shall be given a 99 year lease for that part of Benteng over which we wish to build. This will enable us to build over and under without hindrance and we believe that there should be no objection if we want the podium to extend upwards for three or four stories. I am told that the premium for this lease is likely to be very nominal.
>
> I have also managed to find out the State Government's ideas on the extra 'development charge' and a figure of 2% has been mentioned or alternatively, we could give up one floor for their use. I do not know how they would plan to utilise the space, and obviously I think we shall need to

> have a few more details before we commit ourselves. However, now that we have got down to fundamentals, we do not anticipate any further hold up and firm approval should be given fairly soon.

On July 4, 1972 the Standing Committee (Majlis Jawatankuasa Tetap, Tanah & Galian), recommended approval of the bank's application for alienation of the TOL land.

On July 7, 1972 the Chief Administrative Officer, Bandaraya, Ahmad Hussaini bin Abdul Jamil, was summoned to attend a meeting together with the accused and a number of Government officials, to discuss the bank's application for State land on Jalan Benteng. At that meeting Ahmad Hussaini reiterated Bandaraya's view that they had no technical objection in principle to the bank's application subject to certain conditions.

On July 13, 1972 the Executive Council which was presided by the accused deferred decision concerning the application for alienation of the TOL land pending an application from the bank for alienation of the State land on part of Jalan Benteng.

There was a second meeting between the accused, Smorthwaite and Peter Lim on July 24, 1972. Smorthwaite had asked for that meeting because he still felt matters concerning the air-space and the underground car-park were being held up. Smorthwaite said he asked Peter Lim to arrange for that meeting. Peter Lim said Rosedin informed him of the date of that meeting; so was the bank. Neither Smorthwaite nor Peter Lim was cross-examined on this point. It is therefore quite obvious that Peter Lim must have asked Rosedin to arrange for that meeting. The meeting was attended by a number of Government officials. When Smorthwaite explained to the accused the two matters the latter directed the government officials present to expedite them. Smorthwaite gained the impression that the bank's problems — night hawkers, underground car-park and air-space — were resolved on the spot. That was reflected in his letter to Hongkong dated July 24, 1972, *vide* the first and second paragraphs which read:

> We are at last making a breakthrough and I have had successful meetings with the Menteri Besar and the Deputy Governor of Bank Negara.
>
> My meeting with the Menteri Besar was attended by the District Officer, Commissioner of Town Planning, State Development Officers and a few others. In brief, the Menteri Besar commenced by informing the meeting that he was in favour of our new development and that he wanted it settled once and for all with no more arguments. The question of temporary accommodation for the night-hawkers was resolved on the spot as was the question of our being given a lease for that part of Benteng over and under which we propose to build. We have not been advised of the premium we shall have to pay for the lease, but we still believe that it will be nominal.

On August 7, 1972 Sulaiman Khan on behalf of PHTKL conveyed Executive Council's decision to Messrs. Wicks & Partners.

On the eve of the accused's departure for Munich on August 16, 1972 a sum of $25,000 was collected by Peter Lim from the bank and handed

to Haji Ahmad Razali bin Haji Mohd Ali, the secretary to the Selangor UMNO Liaison Committee, at the Subang International Airport. He was instructed by the accused to deposit the money into the bank and that was in due course done. As this particular aspect of the case is very much involved with the 2nd charge I will deal with it in a moment.

On August 19, 1972 Chew Beng Chiat, the intermediary who had arranged the luncheon meeting between Peter Lim and Rosedin, was paid a sum of $10,000 by Peter Lim on behalf of the bank. To the bank officials Chew was instrumental to arrange the meetings between them and the accused.

On August 21, 1972 Swan & Maclaren wrote to Pengarah Tanah & Galian, Persekutuan ('PT&G') enclosing a copy of a site plan indicating the area of State land on Jalan Benteng which the bank proposed to apply for a 99 year lease. On October 14, 1972 Swan & Maclaren submitted a formal application of their plans to Bandaraya to construct a 28-storey building. This was processed and in due course a development order was issued on February 23, 1973 (Exhibit P28). On October 18, 1972 PT&G wrote to PHTKL enclosing Swan & Maclaren's letter of August 21, 1972, with a copy to the latter directing them to communicate direct with PHTKL *untuk mendapat keterangan lebih lanjut.* Sulaiman Khan took action on Swan & Maclaren's letter and on November 3, 1972 directed his Land Office clerk to inform the bank to file a formal application. That was done as was borne out by a minute in Exhibit P9A to the effect that a discussion was held with one Mohd Din of HKSBC on December 4, 1972 and the forms which had been handed to him for necessary action were still awaited.

On December 18, 1972 Jurubena Sinar Murni (successor of Swan & Maclaren) wrote to PHTKL referring him to the bank's application for the alienation of the TOL land dated June 18, 1971 and inquired *dapatkah kiranya kami diberi sedikit bayangan bila agaknya penukaran tanah yang sekarang dipegang dibawah TOL 6540 itu boleh dibenarkan.*

It would therefore appear after a lapse of $1^1/_2$ years the application was still not solved.

On January 1, 1973 Raja Azman bin Raja Ismail assumed office as PHTKL. On January 23, 1973 he received a phone call from the accused and he minuted it in the file (Exhibit P9A) as follows:

> *Saya telah menerima talipon daripada YAB MB Sel bertanyakan kedudokan file permohonan tanah Hongkong Shanghai Bank.*
>
> *Perkara ini perlu disegerakan spt. arahan YAB Datuk MB itu. Saya hendak mengkaji file ini.*

Obviously the new PHTKL did not know the subject-matter of the *arahan* . On the same day he minuted to his Chief Assistant District Officer as follows:

> *Saya hendak bercakap atas hal ini dengan segera.*

Between January 29, 1973 and October 18, 1973 there were a series of correspondence between the bank's architect, Jurubena Sinar Murni

and PHTKL, enquiring from the latter the result of their applications and informing him of the new name of the company which was to carry on the project, i.e., Benteng Redevelopment Sdn Bhd, and also notifying him that the bank would vacate their premises on April 16, 1973; between Jurubena Sinar Murni and Pengarah Parit & Taliair, Negeri, regarding the river-reserve; between Jurubena Sinar Murni and Bandaraya concerning the cantilever projection over Benteng and the underground car-park; and between PHTKL and Bandaraya regarding the same matter.

On January 30, 1973 the bank filed a formal application for alienation of State land on Benteng measuring 3,800 sq ft.

On February 19, 1973 a set of keys and a receipt (Exhibit P19) concerning a locked tin-box registered in the name of the accused made available to him or his personally authorised representative and kept in the bank's security safe were handed to Peter Lim who on February 20, 1973 handed them to Rosedin for onward transmission to the accused. On March 27, 1973, the bank released the $225,000 which were in the locked tin-box to Rosedin as the accused's personally authorised representative. This is the subject of the 3rd charge and will be dealt with in proper time.

On October 18, 1973 the Executive Council gave formal approval to the bank's application. The bank was notified of the decision on November 23, 1973.

As a result of information received by Biro Siasatan Negara, a police report was lodged on July 14, 1974.

On November 22, 1975 a statement was recorded from the accused. I held a trial within a trial to determine whether the statement was made voluntarily. I am satisfied that it was so made, and I admit it as Exhibit P10.

On November 24, 1975, the accused was arrested.

In this case different witnesses have testified to different parts of what had happened or what had been said and also there are, in the evidence of the witnesses for the prosecution, some discrepancies,as would be expected of witnesses giving their recollections of a series of events that took place in 1971-1973. In my opinion discrepancies there will always be, because in the circumstances in which the events happened, every witness does not remember the same thing and he does not remember accurately every single thing that happened. It may be open to criticism, or it might be better if they took down a note-book and wrote down every single thing that happened and every single thing that was said. But they did not know that they are going to be witnesses at this trial. I shall be almost inclined to think that if there are no discrepancies, it might be suggested that they have concocted their accounts of what had happened or what had been said because their versions are too consistent. The question is whether the existence of certain discrepancies is sufficient to destroy their credibility. There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other. It is, therefore,

necessary to scrutinize each evidence very carefully as this involves the question of weight to be given to certain evidence in particular circumstances.

It is also salutary to remember that in a corruption case, direct testimony of wholly disinterested witnesses can seldom, if ever, be forthcoming. It is invariably circumstantial evidence which has to be availed of in such a case.

Another salutary principle to observe is the fact that this is not a court of morals, and I am not to allow any moral disapproval to colour my judgment on matters of fact.

It is in this light that the evidence of the prosecution witnesses, in particular that of Peter Lim, Rosedin, Chew Beng Chiat and the bank officials must be considered. Their testimonies are not to be rejected in toto as tainted without adequate justification, without meticulous scrutiny. The further circumstance that they are interested witnesses assumes a greater significance and it may not be prudent to base a conviction on their sole evidence without corroboration.

The object of corroboration is no doubt to satisfy the court that the witnesses are telling the truth and that it is reasonably safe to act upon them. It is not necessary that the corroboration should be of the actual commission of the crime, for then there would be independent evidence of the commission of the offence. It would be enough corroboration if there is independent evidence of relevant circumstances connecting the accused with the crime.

The first charge against the accused is that between February 22, 1972 and July 24, 1972 he corruptly solicited for UMNO a gratification of $250,000 from Hongkong & Shanghai Banking Corporation as an inducement to him, being a member of a public body, namely the Government of the State of Selangor, to obtain approval of the Executive Council in respect of the bank's application of the TOL land for purpose of amalgamation with lots 76, 77 and 78, an offence under section 3(a)(ii) of the Prevention of Corruption Act, 1961.

In order to establish a charge under section 3(a)(ii) the prosecution must prove:

(i) that the accused is a member of the Government of the State of Selangor.

(ii) that between those 2 dates he solicited for UMNO a gratification of $250,000;

(iii) that the circumstances in which the gratification was solicited give rise beyond reasonable doubt to an inference that it was solicited corruptly;

(iv) that the accused solicited the gratification as an inducement to obtain approval of the Executive Council in respect of the bank's application. I willl now consider these 4 ingredients.

(i) That the accused is a member of the Government of the State of Selangor.

Without going into legal semantics, the accused as Menteri Besar, Selangor, (*vide* Selangor GN 419/69) obviously is a member of the State Government. In a federation, like ours, each State has within its

constitutional limitations a unitary system of Government in which the Legislative Assembly is supreme and the different functions or organs of Government can be mingled at will. The Legislative Assembly is closely interwoven with the executive by reason of members of the Government being also members of the Legislative Assembly, an arrangement loosely termed responsible Government. Under the Laws of the Constitution of Selangor, 1959, the Ruler is a constitutional monarch. He is the executive authority of the State, but, with certain exceptions, he acts on the advice of his Executive Council which he appoints. He appoints the Menteri Besar; he also appoints members of the Executive Council on the advice of his Menteri Besar. The Menteri Besar presides over the Executive Council. It is the Executive Council who is the executive organ of the State Authority and exercise executive functions in the name of the Ruler. The Menteri Besar is paid from the State coffers. If he is not a member of the Government. I do not know who is.

(ii) That between February 22, 1972 and July 24, 1972, the accused solicited for UMNO a gratification of $250,000.

The words 'solicit' is a common English word, and it means, in its simplified form, 'to ask'. In various English dictionaries this simple meaning is given, but other similar words are also used to explain other meanings it possesses, such as 'to call for', 'to make request', 'to petition', 'to entreat', 'to persuade', 'to prefer a request': see *Sweeney* v *Astle.*[1] Thus when a businessman advertises his goods, we say he is soliciting customers. He wants to sell his goods, and he solicits people to buy them. Again, such a businessman goes to a person whom he selects to try to induce him to buy, we say he is soliciting orders. To solicit then, means to ask for or invite offers. Thus to solicit, an order for goods means merely to ask for or invite offers for the purchase of those goods. A statement therefore, the real and operative purpose of which is to induce somebody to make such offers, amounts to asking for or inviting such offers. But to constitute soliciting, the request or invitation must reach the person solicited. Now, coming to our point, when a politician makes a statement to someone in an appropriate circumstance, to the effect 'what are your views on political donations to party funds?', the real and operative purpose of which is to induce that person to ask for or invite offers for making a political donation to party funds, we say he is soliciting a political donation.

Soliciting does not cease to be soliciting if it is received by the person solicited not from the person who solicits, but by other means of transmission or communication, such as a letter, circular, newspaper advertisement, telephone or a message. To take the illustration further, if the politician enlists the services of his subordinate or some third person or persons to do the act of soliciting for political donation, that is nonetheless soliciting for the same by him. It is by the instrumentality of his subordinate or the third person that the act was done for him.

Let us now consider the evidence.

Peter Lim said that towards the end of the first meeting with the accused on February 22, 1972 he had vague recollections that the accused had asked Smorthwaite for his views on political donation to

Smorthwaite testified that at the first meeting on February 22,1972, donation to party fund was not mentioned. It was indicated to him by Peter Lim only in about April 1972, but no amount was fixed. He said prior to the second meeting with the accused on July 24, 1972, he had referred the request for donation to UMNO to the Hongkong Headoffice and had received their approval in principle. However,at that stage no amount was mentioned. After that second meeting was concluded he requested Peter Lim to remain behind and endeavour to find out what sort of sum was expected of the bank. He said he could not remember the sequence of events but later in the day Peter Lim advised 'us' that a sum of $250,000 'cash, no receipt' would be acceptable. Peter Lim also raised the question of payment of $10,000 to be made to the gentleman who had arranged the first meeting with the Chief Minister. He agreed to the donation of $250,000 and was so pleased with the progress of the meeting that he was in no mood to quibble over $10,000. He then said, the decision he had to make, having taken into consideration that the request for donation was probably connected with the new building project, 'was not so much what we might gain by making the donation, but what we might lose if we did not, and I advised my headoffice accordingly':

> When I left Menteri Besar's office on February 22, 1972. I was happy of the outcome. Not at that stage was donation to a political party mentioned.
>
> As far as I could recall, Peter Lim said they would like a political donation. As I understood it, it was a request for a political donation. I could not indicate if the donation would be particularly helpful.
>
> The donation was not specifically tied up with the application. Not to the best of my knowledge.
>
> Between February 22, 1972 and April, 1972, I thought that the short period of time between our request to see Chief Minister and the request for a political donation implied that there was a connection even though nothing was actually said. I therefore regarded it as a gesture of goodwill, if you wish. I do not regard it in that line of a bribe. If a bribe had been suggested I would not have entertained it.
>
> I conveyed what Peter Lim told me to Hongkong Head Office. I received approval in principle — Exh P14 refers.
>
> April 24, 1972. I had already been informed of the suggestion of a donation.
>
> A cash donation would be less worrying than to give one floor for their use.

At the end of his cross-examination on this point he said Peter Lim came to the bank and related to him. By that he understood to mean that Peter Lim had discussed the matter of the amount with Rosedin. In re-examination he said that for want of a better word he had agreed with counsel for the defence in cross-examination that the idea to make an offer of a political donation was a gesture of goodwill. He further said he did not wish to offend by refusing to make such a donation; 'We would offend UMNO or the Chief Minister'.

It is quite apparent that there are contradictions between the

party funds and Smorthwaite had replied 'yes, we would contribute'. He further said that he raised the question of $10,000 with the bank officials at a later date when things seemed to be progressing quite well. He was cross-examined at length and on this point he explained that the event happened such a long time ago that he could not be sure. He remembered the event only because after Smorthwaite and he had left the accused's room the former had asked him in low tone to remain behind and endeavour to find out what sort of sum was expected of the bank. Peter Lim then went to Rosedin's room and inquired from him the sort of sum expected of the bank. Rosedin then said 'wait' and he left the room and came back and told Peter Lim the amount was $250,000. Peter Lim then went to the bank and informed either Smorthwaite or Sim, he said he could not remember which one, the amount, and while doing so, one or the other, Smorthwaite or Sim, came into the room and joined in the discussion. Peter Lim further said that when he told them the amount, they were comparing other figures which he said he did not know; probably he said they were discussing about other figures which he took it to mean contribution which they had obtained from other sources.

Sim, who had assumed office as deputy manager at the end of February 1972, said Smorthwaite briefed him on the background of the bank's application and the connected problems of the title to the air-space and the amalgamation of the land on which the bank proposed to put up the building. Here is his evidence-in-chief:

> One solution to overcome the difficulties was suggested to us by Peter Lim that we might consider making a donation to party funds. That was in early 1972. In April.
>
> After a short space of time we were informed that a sum of $250,000 would be acceptable to the authorities concerned, in particular, to Datuk Harun.
>
> A further sum of $10,000 was required to be paid to the intermediary who had arranged meetings for us with Datuk Harun.
>
> The bank agreed to such payment.

In cross-examination he said the suggestion of donation to party funds was first conveyed to him by Peter Lim and then they discussed it with Smorthwaite. He emphasised that it was not Peter Lim's own suggestion. He said 'the basis of the decision to accept the idea to make a donation to the party (which he named as UMNO) was because of the request that had been made of us'. In respect of the $250,000 he has this to say:

> I only knew what Peter Lim told me. Peter Lim did not convey to me direct that $250,000 was acceptable to the authorities concerned. That was conveyed to Smorthwaite who informed me. Peter Lim did not identify the authorities concerned to Smorthwaite. Datuk Harun at that time, as we understood it, was the titular head of the authorities with whom we were concerned with. I therefore conclude that the authorities referred to was Datuk Harun. When Peter Lim gave the information, I believe the source of the information may have been from an intermediary of Datuk Harun or one of his staff.

evidence of Peter Lim and that of Smorthwaite and Sim regarding the time when the political donation was requested. Nonetheless, these witnesses in substance are all telling the same story, i.e., that the request was indicated to them sometime in April 1972.

Peter Lim may have given a display of faulty memories of events that transpired years before, but after watching his demeanour in the witness-box and anxiously scrutinising his answers in cross-examination I am satisfied that he is telling what is substantially true and that he is not absolutely certain of all the details. The whole incident regarding the request for the political donation is so impersonal and so unimportant to him that he could only recall vague impressions of it. As the learned Solicitor-General has very properly submitted, he could certainly have improved on his evidence if he wanted it to tally with that of Sim or Smorthwaite after reading the extensive coverage of the daily proceedings in the press. It may be noted that he gave his testimony on April 28 (Wednesday) after Sim and Smorthwaite had testified on April 23 (Friday) and April 26 (Monday), and April 27(Tuesday) respectively. A judge can feel great confidence in the evidence given by a particular witness without accepting all to which he deposes. The maxim *falsus in uno falsus in omnibus* is neither a sound rule of law or a rule of practice. Regarding Peter Lim's evidence on this point, I think, as a matter of probabilities, it is probable that the difference as to the date was an inaccuracy due to a *bona fide* mistake.

I am of the view, quite irrespective of the evidence of Peter Lim to which exception is taken, there is overwhelming evidence that a request for a political donation was made sometime in April 1972. That is also borne out by Smorthwaite's letter to his headoffice on April 24, 1972 which he said was written after he had received indication through Peter Lim that a political donation for UMNO would be in order, and that he used the expression 'the extra development charge', in the letter, for something better to call. Smorthwaite further said that from the short period of time that had elapsed between his first meeting with the accused on February 22, 1972 and the suggestion in April 1972 that a political donation would be in order, he assumed that the two, i.e., the donation and the application, were interconnected even though nothing was actually said.

The evidence leaves in no doubt that an 'over-ture' for a political donation was made sometime in April 1972 and the prosecution case is not weakened by the fact that Peter Lim may have made a contradictory statement on that aspect of the case. If the stark fact is that a political donation was indicated sometime in April 1972 and the probabilities point in that direction, and if the proven fact is that $250,000 was paid out by the bank in response to the 'overture', and this had been proved beyond reasonable doubt, it follows as a matter of inexorable logic that someone must have made the request. The question is, who made the request? Was it made by Haji Ahmad Razali, Chew Beng Chiat, Peter Lim, Smorthwaite or Sim, Rosedin, or the accused?

Haji Ahmad Razali, the current deputy to the Menteri Besar, Selangor

was the accused's political confidant. Could he have made the request? I do not think so. When the $25,000 was first mentioned to him at the airport he had to confirm it from the accused and had to ask him what to do with it. Such was the character of the man. The plain implication is that he had no knowledge of the matter and was hearing it for the first time at the airport. He was not authorised to receive donations. He could not possibly have made the request.

What about Chew Beng Chiat? I find him excitable, loquacious and very fascinating likely to be of interest to other persons as a contact-man and nothing more. He could not possibly have made the request.

Peter Lim gave his evidence with calmness and great assurance. Smorthwaite and Sim have borne him out that the request for a political donation did not originate from him.

Smorthwaite and Sim are categorical in their testimony that the request did not come from them.

Could Rosedin have made the request? He was the accused's political secretary since 1964. He owed the accused at least party loyalty, if at any rate, during that period. I have observed him in the witness box; he is probably not a man of very strong initiative. He was not authorised to receive donations on behalf of UMNO. He was something of a political 'light weight'. The probabilities favour the inference that he did not make the request, although there is a strong probability that he served the accused as a willing hatchet man, always acting at his behest.

When all the evidence are considered even with an indulgent eye, it is impossible for any court to doubt that the request really came from the accused. He had the opportunity and authority to make such a request. He was, among other things, chairman of the Selangor UMNO Liaison Committee and was given *carte blanche* approval to operate the Special Fund. As Menteri Besar he occupied a highly responsible position of power and authority in the State, and being such, there would be many people who may believe in factual statements made by him. And Smorthwaite and Sim were only two of the many. When the request was communicated to them Smorthwaite had only one thing to say 'I do not wish to offend by refusing to make such a donation; we would offend UMNO or the Chief Minister' and 'As far as we were concerned Datuk Harun and UMNO were synonymous'. It is therefore plausible to conclude that as far as they were concerned to refuse to make an offer of a political donation would be inimical to the prospect of obtaining the approval of their application.

But how could the bank make an offer unless and until they knew the amount so that they could obtain the approval from their headoffice. How would they know the amount unless and until they inquired. So Peter Lim was asked to make discreet inquiries. Peter Lim said he did make discreet inquiries. He asked Rosedin about it, and he came back with the figure of $250,000. Of course, Rosedin denied this part of the story and for very good reasons too. As I have said he was only a willing hatchet man and did not wish to incriminate the accused as far as he could help it.

Smorthwaite's letter of July 24, 1972 is consistent with his testimony.

In that letter he said "one immediate result of this meeting (that was the second meeting on July 24, 1972) was that after a certain amount of haggling 'the extra development charge' has been fixed at $250,000 plus $10,000 for sundry expenses. I have taken the liberty of agreeing to these figures and hope this has your approval". The headoffice duly gave their approval by phone, and that was followed by letter dated September 28, 1972 — Exhibit P16.

I am satisfied that there is independent evidence of relevant circumstances connecting the accused with the solicitation.

(iii) ***That the circumstances in which gratification was solicited give rise to the inference that it was solicited corruptly.***

'Corrupt' means 'doing an act knowing that the act done is wrong, doing so with evil feelings and evil intentions': see *Lim Kheng Kooi* v *Reg;*[2] 'purposely doing an act which the law forbids': see *R* v *Smith.*[3]

'Corrupt' is a question of intention. If the circumstances show that what a person has done or has omitted to do was moved by an evil intention or a guilty mind, then he is liable under the section. Thus if the accused used his position to solicit gratification with a guilty mind, he is caught within the *ambit* of the section. The real point is whether there is soliciting a political donation with a corrupt intention.

The manner in which the payments were made in a relevant consideration in the present case. It is in evidence that the bank was asked to make them in cash. Smorthwaite said that he asked Peter Lim to find out how such payment should be made, and his answer was in cash, no receipt. That is substantiated by the evidence of payments in cash. The bank could, and it is very much in their power, make the payment by way of cheque, or for that matter in one lump sum in cash. But they were coerced to make it in cash, and strangely enough, in two payments. This strange behaviour necessitated the bank in opening the New Building: Property Suspense Account for their accounting purposes.

Then, the 'request' for the so-called donation. That is another telling point against the accused. In ordinary circumstances, the presentation of a donation, be it by way of cheque or otherwise, is preceded by certain formalities, for example, a representative of the donor firm would personally hand it to the donee at a proper place and in the presence of witnesses; not in some 'back alley'. I am quite sure that the donor wants to be present to show that he is participating in whatever worthy cause the donee is undertaking, be it politics, charity, education or welfare. The donation is then properly presented and properly acknowledged. In the present case, the donation was 'presented' in a very strange way. It was made in two substantial payments, one at the airport on the eve of the accused's departure overseas, and the other, literally from a locked tin-box kept at the bank at the accused's disposal. Granted that the accused could receive a cash donation, the question arises as to why did he not take the whole lot at one time and have it deposited in the Special Fund Account at the Mercantile Bank? Why on two separate occasions, and an interval of $7^1/_2$ months? Is not such conduct contrary to human instinct and human nature, unless there is the overwhelming stimulus of guilt? It does appear somewhat curious and not a little disquieting

that a donation should be demanded and accepted in this manner; it is incomprehensible in its motivation, unless there is a consciousness of guilt. The manner how the donation was demanded and received, in my view, lends credence to the prosecution story that it was being solicited with a corrupt mind. If the defence wish to say that the two payments were innocently demanded and received, it is for the accused to explain them. It is not the law that the prosecution has to eliminate all possible defences or circumstances which may exonerate the accused. Of course I am not unmindful of the onus on the prosecution to establish a *prima facie* case in the first instance, and that it is not enough for them to establish the facts and then to throw the onus on the accused to prove his innocence.

The substratum of the prosecution case is galling; it discloses a trail of surreptitious cash payments demanded and received, long and wide enough to sustain an inference that the donation was solicited with a corrupt mind.

(iv) ***That the accused solicited the gratification as an inducement to obtain approval of the Executive Council in respect of the application.***

The word 'inducement' evidently refers to a future act. What is forbidden, generally speaking, is soliciting a gratification as an inducement to do any matter or transaction in which the State Government is concerned. The gravamen of the offence is soliciting a gratification as an inducement to do any official act or conduct. This need not be proved by explicit evidence but may be inferred from surrounding circumstances.

Just as 'corruptly solicit' may be inferred from all the surrounding circumstances, such as evidence of payments received in response to the request made in April 1972, so can 'inducement' be inferred from acts or conduct from the relevant circumstances. As this element of 'inducement' is common to all the three charges, I will deal with it under the second and third charges.

The second and the third charges can be dealt with together.

The second charge against the accused is that on or about August 16, 1972, at Kuala Lumpur International Airport, Subang, being a member of a public body, to wit Mentri Besar, Selangor, accepted from the Hongkong & Shanghai Banking Corporation, for UMNO, a gratification of $25,000 cash through Haji Ahmad Razali, as an inducement for the accused aiding in procuring the approval of the Executive Council in respect of the bank's application for alienation of the TOL land, an offence under section 9(b) of the Prevention of Corruption Act, 1961.

The third charge against the accused is also under section 9(b) of the Prevention of Corruption Act, 1961, the only difference is the date, the place, the amount and the person from whom he accepted the gratification, and is as follows: 'that on or about March 27, 1973, in his office in Kuala Lumpur, he accepted from the Hongkong & Shanghai Banking Corporation a gratification to wit, $225,000.

It must not be forgetten that the aim of the section is to punish those members of a public body who betray public office. Its object is to prevent them being put in a position where they are subject to

temptation. As such the section is differently worded from setion 3 which includes 'for any other person'. This phrase is omitted in section 9. The gist of the offence under section 9 is the 'inducement' to show favour, irrespective of whether the public officer has the power to do it or not, and irrespective of whether it concerns the affairs of the public body or not.

The prosecution has to prove.

(a) that the accused is the Menteri Besar, Selangor, and as such he is a member of the State Government. I have dealt with it under the first charge. No repetition is called for;
(b) that the accused accepted from the Hongkong & Shanghai Banking Corporation a gratification of $25,000 cash through Haji Ahmad Razali on or about August 16, 1972 at the airport.
(c) that the accused accepted from the Hongkong & Shanghai Banking Corporation a gratification of $225,000 in his office in Kuala Lumpur on or about March 27, 1973.
(d) that the accused accepted the gratification as an inducement to do any official act connected with the State Government.

That the accused accepted from the Hongkong & Shanghai Banking Corporation a gratification of $25,000 through Haji Ahmad Razali at the airport on or about August 16, 1972.

The evidence on this point is overwhelming. As I have indicated, there are discrepancies between the evidence of the principal witness for the prosecution, but it cannot be seriously contended that such discrepancies affect the crux of the prosecution case, that is, that $25,000 was paid and received by Haji Ahmad Razali at the airport on August 16, 1972, on behalf of the accused.

On that day, Peter Lim was told by Rosedin over the phone to get ready with the first $25,000 of the contribution. It is here that counsel for the defence suggested, not very strenuously, I find, that that could not be true as Rosedin did not support that part of the story. Rosedin seemed to say that before he left the office, he received a phone call from Peter Lim saying that he (Peter Lim) had $25,000 from Hongkong & Shanghai Banking Corporation to be donated to UMNO. That may be so; reading the evidence of both these two witnesses in isolation, there appears to be a discrepancy. But after a thorough scrutiny of the entire evidence, I am satisfied that unless Rosedin had phoned Peter Lim concerning the first part of the contribution, Peter Lim would not have known the amount of the donation and the place and time to hand it. Peter Lim said, and I believe him, that he was not personally concerned with the matter. The question then arises as to whether the instruction originated from Rosedin himself or whether it was given to him by the accused. I have considered this aspect of the case very carefully and I find as a fact that it could not possibly have originated from Rosedin; as I have said, he is not a man of very strong initiative; he is only an 'errand boy', always acting at the accused's behest. To call for the first $25,000 on the eve of the accused's departure is, to my mind, a bit too much of a coincidence.

The conflict in testimony between Sim and Smorthwaite and that of Peter Lim with regard to the sequence of events on this issue is neither

here nor there. It does not affect the substratum of the prosecution.

The prosecution has established that the $25,000 was paid by the bank to Peter Lim on August 16,1972, that Peter Lim handed the money to Haji Ahmad Razali at the airport, and it was properly acknowledged, that the accused was told about it, and he just said 'put it in the bank'.

If there is one thing which is perfectly clear to my mind, it is that the moment the $25,000 was mentioned to the accused, he did not inquire about the substantial sum of money, if it was true that that was the first time he ever heard of such a donation. He did not even convey his thanks to Peter Lim, if he was that busy to do it in person. One seldom gets a donation of that amount every day. It seems clear on the evidence that far from making inquiries on the nature of the donation, he welcomed it as a matter of course. When I have considered what he has said and done, and what he has omitted to say and do, I have no doubt left in my mind that all along he knew what the $25,000 was about; that it was the first part of the donation connected with the bank's new building project.

That the accused on or about March 27, 1973, accepted from the Hongkong & Shanghai Banking Corporation, a gratification of $225,000 in his office in Kuala Lumpur.

On August 30, 1972 a single account, the New Building — Property Suspense Account was opened to cater for the many accounts connected with the 'Development Charges' (Exhibit P39). The whole amount of money shown in the various accounts were debited to this new account and because out of the $260,000, $35,000 was already withdrawn from this account, the balance of $225,000 in cash was kept in the cash safe under the control of Batson, the accountant.

Sometime at the end of 1972, Smorthwaite's attention was drawn to the fact that Batson was still holding the cash in his safe. It was then decided to ask Peter Lim to inquire what the Menteri Besar wished them to do with the cash. Smorthwaite said that after a few days Peter Lim came to the office and said that he had been asked to obtain a receipt from the bank concerning the money. The bank officials held a discussion and decided that the receipt would be ideal in the circumstances because that would ensure that when the money was released, they would get a proper acknowledgement. The bank then purchased a tin-box with a pad-lock and the balance of $225,000 cash was placed in it. The box was locked and kept in the securities safe in the security department under the custody of Batson who held the keys to it. Peter Lim was asked to find out whether it was acceptable to the authorities concerned — Datuk Harun — if the receipt was to state one locked tin-box contents unknown. Peter Lim subsequently informed the bank that that was acceptable to Datuk Harun. Sim's testimony was to the same effect; he was not cross-examined on this point.

It was about this time, *i.e.*, on January 23, 1973, Raja Azman who had assumed office as PHTKL on January 1, 1973, received a phone call from the accused *bertanyakan kedudukan file permohonan tanah Hongkong Shanghai Bank,* and indicating that the matter needed urgent attention.

On January 31, 1973, Batson was instructed by Smorthwaite to register the locked tin-box in the name of Datuk Harun bin Haji Idris and to indicate that it was one locked tin-box contents unknown to be made available to Datuk Harun or his personally authorised representative. Baston prepared a receipt in triplicate. The original, Exhibit P19, was meant for the accused, the duplicate copy, Exhibit P22 and the 3rd copy remained in the bank's records. A delivery order Exhibit P20, which would enable the staff of the bank to record the item as having been removed from the records, was also prepared. Baston gave the keys and Exhibit P19 to Smorthwaite who handed them to Sim with a request to have them sent to the Menteri Besar's office for Datuk Harun. Sim handed both the items contained in an envelope to Peter Lim who acknowledged receipt of them by indorsing on the reverse of Exhibit P22 on February 19, 1973.

Peter Lim said in evidence that he could have phoned Rosedin regarding the keys because he would like to hand them as soon as possible. However, Rosedin confirmed that Peter Lim phoned him on February 20, 1973 before the latter came to his (Rosedin's) office to hand him the envelope containing Exhibit P19 and the keys with a request to hand them to the accused. Rosedin acknowledged receipt of the keys (Exhibit P7) which he prepared on Pejabat Menteri Besar's letter-head and he signed it on behalf of Menteri Besar, Selangor. Rosedin handed Exhibit P7 to Peter Lim. Peter Lim also told him that the keys concerned a locked tin-box containing $225,000 cash representing the balance of the donation, and that the accused or his representative could go to the bank to collect it, bringing Exhibit P19. Peter Lim further told Rosedin that he was prepared to introduce him to an official of the bank. He caused a copy of Exhibit P7 to be sent to the bank.

Rosedin said he handed the envelope containing the keys and Exhibit P19 to the accused. He said he related to the accused what Peter Lim had told him. He further said the accused accepted the keys and Exhibit P19 and kept them; the accused did not say anything; he did not give him (Rosedin) any form of acknowledgment. It is noteworthy that this part of the prosecution was not seriously challenged by the defence.

On March 27, 1973, Rosedin said the accused called him into his (the accused's) room and handed him Exhibit P19 and the keys with the instruction to collect the money from the bank. Before Rosedin went to the bank and in line with the indication made by Peter Lim to him earlier that Peter Lim would introduce him (Rosedin) to a bank official, he phoned Peter Lim telling him that he was going to the bank to collect the money and asking Peter Lim to be there so that he could be introduced to the bank official. Peter Lim agreed.

Rosedin went to the bank escorted by the accused's personal bodyguard Yusoff bin Man. Peter Lim met him at the bank and was introduced to IMH Scott, who had been told by Smorthwaite earlier that Peter Lim and a representative from Datuk Harun would be coming to collect the 'tin-box'. Rosedin handed Exhibit P19 to Scott who then left his room and returned with the tin box. Rosedin unlocked the box and confirmed that it contained $225,000 in cash. He then placed the

money in his brief case. He acknowledged receipt of the money by endorsing on the reverse of Exhibit P19. He then returned to his office escorted by Yusoff.

On Rosedin's return to his office, he said he kept the money in his office safe. He recollected that he handed the money to the accused on the same day or the next day. No one else was present. The accused did not give him any acknowledgement. Rosedin also said he did not receive any money from the accused. Nor was he given any instruction concerning the $225,000.

Is there some additional evidence rendering it more probable that the story of Rosedin is true? As I have indicated, it is enough if there is independent evidence of relevant circumstances connecting the accused with the receipt of the $225,000. The evidence need not be direct; it is sufficient if it is merely circumstantial evidence of the accused's connection with the crime.

The crux of the prosecution case is that the bank officials were requested to give a donation to the accused. All arrangements were therefore made in that direction. Exhibit P19 was prepared when Peter Lim was asked to find out, in the first place, what the accused wished the bank to do with the balance of the money, and secondly, whether the nature of the receipt would be in order if it was made available in the name of the accused or his personally authorised representative. Now, where would Peter Lim obtain such information in the first place? Was it from Rosedin, or from the accused through Rosedin? Here again, as I have indicated, Rosedin was not in position to give the information unless he had asked for it from the accused and as a matter of probabilities, it is more probable than not that he did just that. When the bank was informed of the propriety of the receipt, they prepared it in the form that now appeared in Exhibit P19. That document was an authority for payment in favour of the accused or his personally authorised representative. The placing of the money in the tin-box was only a method devised by the bank of keeping the money in safe custody on behalf of the accused. Rosedin acknowledged receipt of the keys to the locked tin-box, Exhibit P7. He prepared Exhibit P7 on the official letter-head and signed it on behalf of the accused. On March 27, 1973 he appeared at the bank to collect the money; he was escorted by the accused's personal body-guard. The question arises whether the accused's personal body-guard was indeed necessary to accompany Rosedin to the bank because of the amount of money which was substantial, or because it concerned the accused's own affair. To me it does suggest the latter. If that is so, then it is irresistible to conclude that the accused accepted the money from the bank when it has been established that Rosedin armed with the authority of Exhibit P19 withdrew $225,000 from the bank, and when Rosedin said that he handed it to the accused on March 27, 1973 or the following day. There can be no doubt that he handed the money to the accused and could give a narrative of the event that happened on that day. To suggest that he pocketed such a big sum of money is a travesty of facts. At any rate the bank was not informed or put on inquiry that the money did not reach

the accused. There was on the other hand complete silence from the accused which the bank must have interpreted to mean that he had received the money. Furthermore, the bank's accounting machinery supports the prosecution case that the money was released to the accused.

These are damning circumstantial evidence that connected the accused with acceptance of the $225,000.

That the accused accepted the gratification of $25,000 and $225,000 as an inducement to do any official act in connection with the bank's application for alienation of the TOL land.

The emphasis here is on the gratification demanded and received as an inducement for official conduct. It is not the receipt of any gratification alone that constitutes the offence; it must be received as an inducement to do any official act. That phrase evidently means on the understanding that the gratification is received in consideration of some official act or conduct. Such an understanding may be inferred from the surrounding circumstances. Thus, if official conduct unduly favouring a person without any assignable reason be established against a member of a public body, and a payment by the person favoured to the public official before the official act is done is also established, the inference might fairly be drawn that the payment was received on an implied understanding that it was in consideration of that act. This inference would be strengthened to the extent of reasonable certainty, if it is further established that the person making the payment and the official, have been conferring together at a time when the transaction is pending, if the official can assign no reason for his taking part in such conferences. In such a case the inference that the unexplained payment is in consideration of the unexplained favour is irresistible.

It has been suggested by learned counsel for the defence that the proximity of the time factor between the two meetings and the first payment is not a consideration to draw an inference of 'inducement' and the case of *Chempan Varkey* v *State of Kerala*[4] was cited in support of the proposition. In my opinion, that case speaks for itself and can be justified on the facts. In my judgment time factor is relevant in arriving at an inference whether there is or is not an inducement because a connection between the payment and the official act as being by way of inducement for procuring such act must be clearly established by direct or circumstantial evidence. If the payment is entirely independent of the official act sought to be procured, and that it was accepted solely as a donation, the offence is not committed. It is possible in cases of corruption to envisage a bribe being corruptly offered and innocently accepted and possible even the other way round: see *R* v *Andrews-Weatherfoil Ltd.*[5]

In *Crown Prosecutor* v *R K Pillai,*[6] it was held that since the payment of money was entirely independent of the application for an export permit that was made and that it was given solely as a donation to the Sabha, and since contributions were being publicly invited for the building fund of the Sabha and were pouring in, the offence was not

committed.

The *sine qua non* is the establishment of a connection between the performance of the official duty and the demand of the gratification before it can be said that the gratification demanded is an inducement for doing favour in relation to the official act. In *Imperatrix* v *Appaji*[7] the amount was demanded directly for the restoration of the mahars in office; in *B K Sen* v *Prasad,*[8] the investment in government war loans asked for specifically for the performance of the arm clerk's duty of putting up the paper to the higher officer who had the power of granting the licence; and in *R* v *Swemmer,*[9] the bribe was given so that the official, whose duty it was to receive, classify and lay the tenders before the director of supplies, and to give any information of importance bearing on the tenders, could put up the tender before the said director whose duty it was to recommend it to the tender board which was the approving authority.

Did the accused ask and receive the gratification as an inducement to give favoured treatment in respect of the bank's new building project? The whole thing revolves itself into a matter of fact; it turns upon the question of evidence, whether there was or was not an implied understanding that the gratification was demanded and received in consideration of the official act sought to be favoured. The question here is not so much what the accused did, but what he professed to do, and what the bank believed they could do, upon which they made the payment.

Smorthwaite got the impression that the donation and their new building project were interconnected by reason of the short period of time that had elapsed between his first meeting with the accused on February 22, 1972 and the suggestion in April 1972 of a political donation, even though nothing was actually said. That is also borne out by his letters of April 24, 1972 and July 24, 1972 which speak for themselves. If the donation (which was later made) and the project was not connected I do not think the bank would have made the political donation. In this connection Smorthwaite has this to say:

> The decision I had to make, having taken into question that the request for a donation was probably connected with our new building, was not so much what we might gain by making the donation, but what we might lose if we did not,and I advised my head office accordingly.

Smorthwaite said for want of a better word he used the words 'extra development charge' in his letter of April 24, 1972 to indicate that a political donation was requested of them. He did not consider it a bribe; if a bribe had been suggested he said he would not have assented to it. But as I have said before, in a corruption case, it is possible to envisage a bribe innocently offered and corruptly received: see *R* v *Andrews Weatherfoil Ltd, supra.*

Administrative delay was the main cause of the precariousness felt by the bank officials which led them to ask for an appointment with the accused. The first meeting stands as visible evidence of the accused's commitment in the matter. That is reflected in Smorthwaite's letter of

February 22, 1972:

> All this may take time although the Chief Minister had already summoned the various authorities concerned before we left his office, so it may well be that things will now move a little faster than previously. The main thing is that we have the agreement in principle of both the Federal and State governments and now that we have got beyond the departmental stage, we should be in a position to submit our drawings to the town planners in the not too distant future.

But things did not move faster; on March 7, 1972 the application concerning the TOL land was still under consideration by the Land Office. In April 1972, the request for a political donation was communicated to the bank officials. That was reflected in Smorthwaite's letter of April 24, 1972 stating, *inter alia* , that a 99 year lease for that part of Benteng over which the bank wished to erect the cantilevered podium block was indicated; that he had managed to find out the State Government's idea on the extra 'development charge' and a figure of 2% had been mentioned; and that as they had got down to fundamentals; they did not anticipate any further hold up and firm approval should be given fairly soon. On July 4, 1972 the Standing Committee which processed all land applications recommended approval of the application for alienation of the TOL land. The accused who normally presided over the meetings of the Committee did not attend that meeting. But on July 7, 1972, he summoned the Chief Administrative Officer, Bandaraya and a number of government officials to discuss the bank's new building project. On July 13, 1972 he presided over the meeting of the Executive Council which deferred decision concerning the application for alienation of the TOL land, pending an application by the bank for alienation of the State land on part of Jalan Benteng. Learned counsel for the defence argued that the decision was a wise one since the two matters were inseparably connected and it was only prudent to defer the decision pending an application from the bank,so that both applications could be dealt with together. There was nothing, he said, incriminating about it.On the other hand the learned Solicitor-General contended that consideration of alienation of the State land could have been made at the proper time, but the application for alienation of the TOL land which was then before the Executive Council should have been approved as recommended by the Standing Committee. It is here, he stressed that the accused was holding the trump-card — 'no donation, no land'. Whatever the arguments indicate, one thing certainly stands out, that is, the matter was still not resolved. Smorthwaite felt that the matter concerning the air-space and the underground car-park was still being held up. He therefore asked for the second meeting (July 24, 1972) which was attended by the government officials concerned, and he brought up the subject of the air-space and the car-park. He gained the impression that the problems were resolved on the spot. The accused declared in round terms 'that he wanted it settled once and for all with no more arguments'. Those were not just plain words but were uttered with a definite meaning and purpose — they carried home a particular

message. The accused's conduct on that occasion showed beyond doubt that he was only too willing to exercise his official influence to expedite the application when as a matter of fact the application for alienation of the State land had yet to be submitted and processed by the departments concerned. (It may be noted here that the application was submitted only on January 30, 1973). It surely showed perceptible sign of bending on major issues which had yet to be raised. Is not such conduct unduly favouring the bank?

The bank in due course received the message. It need not be by express words. Barely twenty-two days had passed after that meeting, i.e., on August 16, 1972 on the eve of the accused's departure for overseas, words came from his office that a sum of $25,000 was needed on that day. The bank willingly and readily made the payment knowing very well that was part of the $250,000 deal. The circumstances in which the money was raised and given at the airport lends credence to the prosecution case that the accused knew all along that the money was received as part of the donation connected with the bank's new building project.

The government officers concerned also read the message. Between July 24, 1972 and the end of the year events moved with startling rapidity. On August 7, 1972 PHTKL informed the bank of the Executive Council's decision and indicated that the application would be re-considered when the bank have made a formal application for alienation of the State land on Benteng. On August 21, 1972 the bank's architect wrote to PT&G enclosing a copy of the site plan of the State land on Benteng which the bank wished to apply for a 99 year lease. On October 14, 1972 the bank's architect submitted their plans to construct a 28-storey building to Bandaraya. On October 18, 1972 PT&G wrote a letter to PHTKL enclosing the architect's letter of August 21, 1972 with a copy to the architect directing them to communicate direct with PHTKL. On November 3, 1972 there was a minute in the Land Office file (Exhibit P9A) directing one Johari to send the application forms urgently. The minute following that was to this effect; the writer, could be Johari, had discussed with one Mohd Din of Hongkong & Shanghai Banking Corporation on December 4, 1972 and the forms had been handed to him for necessary action and that the (Land) office at the moment was awaiting them. It was about this time that the bank asked for and received the message that the accused wished them to issue a receipt concerning the balance of the $225,000. It was also during this period (January 23, 1973) that the accused phoned PHTKL Raja Azman to expedite the bank's application and to treat it as a matter of urgency.Raja Azman must have studied the file since he just assumed office on January 1, 1973, and on January 30, 1973 the bank made a formal application for alienation of State land on Benteng. On February 17,1973 PHTKL asked Bandaraya to comment on the bank's application. It was during this month (February 20, 1973) that Exhibit P19 and the keys to the locked tin-box were handed to the accused who in the following month (March 27, 1973) asked Rosedin to withdraw the money from the bank's security safe. Between January 29, 1973 and

October 18, 1973 there were a series of correspondence between the bank's architect and PHTKL, PP&T and Bandaraya, concerning the bank's matter. A notable but rather curious one was a letter to PHTKL dated April 6, 1973 notifying the latter that the bank would vacate their premises on April 16, 1973 on the assurance given in writing that their application of the TOL land and the State land on Benteng would be approved soon so that they could commence their building project.

Considering these events in isolation, it may well be that they mean nothing; those are routine matters concerning the various government departments, and routine matters for the accused as head of the State Government to take a keen interest in the development of Kuala Lumpur. But when these events are cumulatively considered it is quite obvious to me that those Government departments had read the accused's message on the wall and that the accused had taken an unduly active part in favouring and expediting the bank's application concerning their new building project. The facts also demonstrate acceptance by the accused of the balance of the donation, done discreetly and not by overt coercion, in consideration of the said application.

In the circumstances, I am satisfied that the prosecution has proved its case in relation to all three principal charges, which if unrebutted, would warrant his conviction.

I only made a few amendments to the word 'TOL 6450' to read 'TOL 6540' and with regard to the second and third principal charges the words 'for a political party, namely, United Malays National Organisation — (UMNO),' were deleted as they were not apt in consideration of section 9 of the Prevention of Corruption Act, 1961.

The only point worth mentioning at this stage is a submission of counsel for the defence that the prosecution's failure to call Ishak, the representative of the bank's quantity surveyor, who it is alleged was present at the first meeting with the accused on February 22, 1972, would raise the presumption under section 114(g) of the Evidence Act. Without going into detail, it is sufficient for me to say that an adverse inference against the prosecution can be drawn only if it withholds certain evidence and not merely on account of its failure to call certain evidence. In my view, it is a misconception to speak of prosecution as having a duty to the accused to call all witnesses who will testify as to the events giving rise to the offence charged. The misconception has arisen from treating some observations in the decided cases, which have been made with a view of offering guide lines to the prosecution in how to approach its task, as the prescription of an inflexible duty to call all material witnesses, subject to certain exceptions or to special circumstances. I am sure this case is not one of these exceptions. In any event, Ishak was made available to the defence at the end of the prosecution case.

In essence, the defence is that the accused received the two sums of money as donation for UMNO, pure and simple, and not as an inducement for the approval of the bank's application. If anybody had told the accused that those donations were made as an inducement for approval of the bank's application, he said he would not have accepted

them. The accused further said that the UMNO Constitution encourages donations and that from time to time he had received donations for UMNO, normally in cash, but had always made sure that there were no strings attached. In his own mind he said there was no connection between the donation and the bank's application. He had never asked for a donation or solicited one from anybody. He denied taking an active part concerning the bank's application after receiving the donation.He further said that it is not unusual for a person to give him a donation today and months later that peron would make an application for some matters connected with his own affairs; he would never connect the two together.

What is the evidence for the defence?

The accused said that sometime in early 1972, Rosedin informed him that certain representatives of the Hongkong & Shanghai Banking Corporation wanted to see him concerning their new building project. Prior to that he said he was not aware that the bank had made any application to the State. He agreed to a meeting on February 22, 1972 where Smorthwaite and a Chinese man, possibly 2, came and discussed with him the problems regarding the bank's application for a small strip of land between lots 76 and 77 and in connection with the road in front of Jalan Benteng for purpose of putting a cantilever on the road. He was very enthusiastic about the project because of its usefulness from the City's point of view but he said two problems emerged, *i.e.*, concerning the night hawkers and the public roadway, and if those two problems could be solved he said the State Government would have no objection to the project.

He categorically denied any mention or discussion of a political donation at the meeting. He denied that Rosedin asked him after the meeting regarding the amount of the political donation and that he had said $250,000.

He did not attend the Standing Committee meeting on July 4, 1972 but on July 7, 1972 he had discussions with the Chief Administrative Officer of Bandaraya, Ahmad Hussein bin Adbul Jalil, because he wanted to know the problems concerning the night hawkers. He said it was not unusual for him to have discussions with District Officers and Assistant District Officers. That happened always.

He presided at the Executive Council meeting on July 13, 1972. The Standing Committee had recommended approval of the bank's application for the small strip of land but did not deal with the problem of the air-space. He briefed the meeting on the interview he had with the bank's representatives on February 22,1972. The meeting then deferred decision until the problem of the air-space had been processed. He denied deferring the decision because the bank had not given any firm indication regarding the donation.

He then said he did not remember meeting Smorthwaite on July 24, 1972 but that was possible. He further said he called government officials concerning the bank's project but could not recall if the bank officials were present, but it was possible they were present.

Between the two meetings of February 22, 1972 and July 24, 1972 he

did not meet the bank officials; he did not meet Peter Lim; he did not ask anybody to ask any donation from the bank; he did not arrange with anybody to suggest a donation by the bank to UMNO, or to himself, or to anybody else.

He then described the payment of the $25,000 at the airport on August 16, 1972. It more or less tallies with the evidence led by the prosecution. He however, added that he had no time to think of the $25,000 as there was a crowd of well-wishers around him and there were lots of matters to be looked into.

He admitted phoning Raja Azman on January 23, 1973 but could not remember if he had asked him to expedite the application.

Regarding Khalil Akasah's letter — (Exhibit P52) he said he received a note from Khalil Akasah regarding the bank matter requesting him to look into the land application fearing that the bank would shift their head office to Singapore.

He then said he was a member of the Board of Management of UDA and was told at one of its board meetings either in late 1972 or early 1973 of the bank's project. Eventually UDA obtained 30% participation in the joint-venture with the bank and the Hongkong Land's Company He remarked that subsequent developments strengthened his view that the bank's project was a good thing for Kuala Lumpur generally. It was in accordance with general government policy.

With regard to the first charge, the accused denied soliciting a political donation at any time between February 22, 1972 and July 24, 1972. He said he did not at any time give any indication by way of solicitation or otherwise that he required a donation from the bank for UMNO. The donation came voluntarily from the bank.

The accused was chairman of the Selangor UMNO Liaison Committee and was authorised as the only person to operate the Special Fund. He was the sole authority to receive donations. Not even Haji Ahmad Razali, his political confidant and secretary of Selangor UMNO Liaison Committee because Haji Ahmad Razali had no authority to receive donations. That was the reason why he asked the accused at the airport what to do with the $25,000. Haji Ahmad Razali said in evidence that even as a member and secretary of the committee he was not in a position to say how much money was donated to the Special Fund or how much money was taken out; although at times he had received money from the accused for party expenses, but did not know if it came from the Special Fund or the General Fund. The operation of the Special Fund was secretive and within the sole knowledge of the accused in that it was never tabled at the Selangor UMNO Liaison Committee meetings. It is true to say that it is a secret fund and being operated discreetly.

We can leave Rosedin out of the picture altogether because he never had authority to accept donations on behalf of UMNO.

The bank officials categorically said that the request for a political donation was conveyed to them in April 1972, hence Smorthwaite's letter of April 24, 1972:

> I have also managed to find out the State Government's ideas on the extra

development charge and the figure of 2% has been mentioned....

Evidently the request never originated from any of them. Of that, I am certain. The penetrating question is who had made the request to the bank to make an offer of a political donation. It is not easy to determine from the mass of evidence who had made the request, but on the other hand, it is not usually difficult to infer it from the established facts and the surrounding circumstances. It is a mistake to think that because a fact cannot be established by direct evidence, it cannot therefore be readily inferred from proven facts. In my opinion, to request for a political donation of that magnitude from a large expatriate firm is no easy task for any 'light-weight' politican or even the secretary of the Selangor UMNO Liaison Committee. It takes a 'heavy-weight', a person in the position of the accused to do that; and the accused had the authority and the opportunity to do it. If the Special Fund is a secret fund, being operated discreetly not overtly, it is well within the range of reasonable possibility that it may have been requested in similar vein- and only by the person at the top. Such bald assertions that the accused did not at any time solicit a political donation from the bank do not create much confidence in the mind of the court. When all the evidence are considered as a whole, I have no doubt left in my mind that the charge against the accused has been proved beyond all reasonable doubt.

With regard to the second and third charges the accused denied the offence and also refuted the allegation that he accepted the two sums of money as an inducement for securing official favour in connection with the bank's application. He said he received the two sums as donation for UMNO, pure and simple; with no strings attached. In other words the donation had no connection with the official act sought since it was made 14 months and 7 months respectively before the Executive Council decision.

I am constrained to say that the argument is entirely fallacious. If that view is correct then it will be the easiest thing for a person in such a position to stipulate for payment long before the official act is done and escape from committing an offence. In my judgment, such a construction of the law is not in keeping with either the language or spirit of section 9 of the Prevention of Corruption Act, 1961. What is forbidden generally is accepting any gratification as an inducement to do any such thing as is described in the section. Any other construction would lead to an absurdity.

The accused said that the first time he had ever heard of the donation was either on August 16, 1972 when Rosedin told him at the airport that a Chinese wanted to give a donation of $25,000 to UMNO or on March 27, 1973 when he said Rosedin told him that he (Rosedin) had received $225,000 cash donation for UMNO from the bank. It is in this connection that his statement to Sebastian (Exhibit P10) assumes much importance. There he said Rosedin told him that Hongkong & Shanghai Banking Corporation wanted to donate $250,000 to the party and he could not remember the date. He continued, the only thing he further remembered was that when he was leaving for Munich sometime in

1973 he was at the airport Subang, Kuala Lumpur, when a male Chinese whose name he did not know approached him at the airport lounge and wanted to give him an envelope which he knew to contain money. Obviously there is a contradiction and he explained in this court that when the police statement was made, he was caught by surprise, and was not therefore in a position to tell the truth; and only on looking back he recollected that what he had there said was not the truth, and his version in court is the unadulterated truth.

In the first place, the accused is not just any other man; he is legally qualified, having held legal and judicial appointments; and he was then the Menteri Besar of Selangor, and had the benefit of two senior counsel to advise him. To suggest that he may have made an untruthful statement is, to my mind, difficult to swallow. That is an insult to his sanity. It is highly improbable that the statement in court, as pleaded by him, is the true version. The inference is that the court version must have been given to create evidence, if possible, in his favour.

The accused stated in evidence that he was surrounded by a large crowd of people at the airport, and had a lot of things in his mind that he had no time to think of the $25,000. The odd thing about it is that he expressed no concern, he did nothing about it other than asking Haji Ahmad Razali to accept the money on his behalf and put it in the bank. Is that the conduct of a man who said that was the first time he had ever heard of the donation? No attempt was made in evidence to qualify or explain away that fact so as to make it any different in its result from that which I think it must necessarily be.

The accused then said that he remembered the day he was in his office-room when Rosedin came in and said that he (Rosedin) had received $225,000 cash donation for UMNO from the bank, that the money was with him (Rosedin) and had asked him (the accused) what to do with the money, and the accused had instructed him to credit $220,000 into the Special Fund and to keep $5,000 for political expenses. In my view this statement involves an element of conjecture. Firstly, it has been established that Rosedin had no authority to receive or accept donations, let alone a cash donation of that amount. It follows that the accused's statement falls to the ground. Again, if the accused's statement is true that it was the first time he had heard of the donation, again he expressed no concern, he did not put on any inquiry, but seemed to welcome it as a matter of course. In whatever way one looks at it, it does seem a little bit far-fetched. Would a donor of a substantial sum of money just leave it at the door-step of the Menteri Besar's office and leave? Would not the accused convey his gratitude to the donor by word or letter? It appears to me that a story which leaves entirely unexplained important facts such as these cannot be wholly true. Secondly, I cannot myself see any plausible ground for saying that the $220,000 came from the donation of $225,000. Rosedin's evidence on this point is so nebulous that I feel quite dubious about the whole thing. He has given two versions and put it at different dates. He said he might have given the donation to the accused either on March 27, 1973 or on the following day. If the latter, then it cannot be true that the $220,000

was part of the donation, since it was paid into the bank the previous day. The accused is not certain when he received the donation. His remark was that he remembered the day when Rosedin told him about it, but could not specify any day. In my judgment his statement, like so much else that was alleged by him, is very extraordinary and bare. It does not carry much weight.

The accused denied Rosedin handed him Exhibit P19 and the keys on February 20, 1973. He denied handing the two articles back to Rosedin on March 27, 1973 with instruction to collect the $225,000 from the safe-deposit box. The accused realised the odds were simply overwhelming. The evidence was substantial. He attempted to seek an explanation and fix blame on Rosedin, and the most beguiling explanation was that Rosedin was incriminating him to save his own skin since he had been called many times by the Biro Siasatan Negara officers. His explanation is, in my opinion, palpably unreasonable. It is in evidence that the accused's body-guard Yusoff bin Man, escorted Rosedin to the bank that day. To my mind a body-guard to the Menteri Besar, Selangor, is rather a personal matter in the sense that he guards the Menteri Besar round the clock, unless directed to be released or go at his command. Was not the visit to the bank on the accused's errand and with his knowledge? In my opinion, no personal body-guard would go visiting any bank on a frolic of his own. I think the defence here is manifestly puerile.

It really boils down to the fact that the accused received the two sums knowing fully well what they were for and that he welcomed them with open arms; it was a large firm's generous donation to a politician in return for the favourable and expeditious treatment by the accused to get the application on the Executive Council table.

The argument that the two sums of money were received as donation for UMNO, pure and simple, is no defence if they were received as an inducement to show favour to the bank in connection with their application for the T O L land. The proven facts clearly militate against the idea of a gratuitous donation. Modern law attaches little importance to innocuous terms like donation, but will get into the core of the matter, and see what the nature of the payment is and if it is an illegal gratification taken by a public officer for doing a favour in the exercise of official functions it will come within the scope of section 9: see *In re MS Mohiddin,*[10] In re *Varadadesikachariar.*[11]

It is also no defence to urge that the Executive Council decision was in line with the recommendations of the PT&G and PHTKL; that the Executive Council did not do anything that it should not have done. The gist of the offence is the inducement to show favour irrespective of the fact that the decision is a just one. Thus, it guards against such a plea as was set up as an excuse by Lord Bacon, the Lord Chancellor. 'It is pretended,' says Hume in his history, that Bacon had, still in the seat of justice, preserved the integrity of a judge, and had given just decrees against those very persons from whom he had received the wages of iniquity. It may be recalled that the Lord Chancellor was charged with receiving bribes and presents from parties in suits before him. He was

condemned to pay a substantial fine and to be imprisoned in the Tower during the King's pleasure.

The accused has made the most contradictory statements and anomalies never realising that the court might compare notes and wonder what is the real explanation of all the contradictions and anomalies.

He said he was not aware that the bank had made any application to the State. That is not true. There is indubitable evidence that he received Khalil Akasah's letter dated October 2, 1971, the last line of the third paragraph reads: 'They have already written to the District Officer about it.' Indeed they had; the bank's application was submitted on June 18, 1971.

He next said that Khalil Akasah wanted him to look into the bank's matter and give a decision soon fearing that the bank would transfer their head office to Singapore. That is also not true. That letter mentions no such thing.

He further said that the Special Fund originated from the late Tun Abdul Razak who encouraged him to establish the fund at State level for purposes connected with party politics and to increase the image of the party such as providing for scholarships, the poor, sports, supporting the P L O but the main purpose is for election expenses. He said that the fund being a secret fund there is no statement of account. I can well understand that contention but it loses sight of one thing. For his own personal satisfaction, to say the least, it is only prudent that he keeps some note or account to show how the money came in and how it went out. His note concerning the sums of money received from Sai Wai Realty bears me out (Exhibit P51). A naked statement that there is no account at all is, to my mind, not a plausible suggestion. It might carry some weight at a Selangor UMNO Liaison Committee meeting but it certainly does not carry much weight in a court of law. That kind of evidence contains inherent weaknesses which become more apparent the more one probes. I cannot bring myself to come to the conclusion that the accused comes within the category of the 'poor' so as to get a bounty of $2,500 (Exhibit P44) and $25,000 (Exhibit P45) from the Special Fund. If he said that he had used his own money to the extent of those 2 sums for an authorised purpose or purposes and that those sums were the reimbursement from the Special Fund, then the evidence is wanting. It is not possible to accept the accused's immaculate words. They are a classic piece of mendacity. His credibility, because of those payments to himself, if nothing else, is battered and discredited. I think the circumstances established by the evidence are sufficient to warrant the reasonable inference that he pocketed party funds.

The statement concerning the non-receipt for the $225,000 is another curious feature of the defence. He said not all donors claimed receipts; there were also those who did not wish their names disclosed. In the case of Hongkong & Shanghai Banking Corporation he said Rosedin did not ask for a receipt, and as far as he was concerned he did not find out if the bank required a receipt. It is in evidence that Rosedin acknowledged receipt of that sum by endorsing on the reverse of Exhibit P19. As far as he was concerned, he has given an explanation. It is also

in evidence that Haji Ahmad Razali issued a receipt for that $25,000 (Exhibit P8) and also that both he and the accused signed a receipt for the $500,000 (Exhibit P50). If Haji Ahmad Razali and/or the accused could have issued receipts for the two donations, there is no earthly reason why either Haji Ahmad Razali or the accused could not have issued a receipt for that $225,000. It is quite apparent that Haji Ahmad Razali knew nothing about the $225,000. The donation given by Malayawata is against the accused. It goes to show that the donation was given publicly and acknowledged publicly. That much cannot be said with regard to the $225,000. The suggestion that the bank did not ask for a receipt is so exiguous and consists of very vague and evasive answers by the accused.

The salient qualification demanded of a member of the Executive Council is honesty and incorruptibility, and that is reflected in the mandatory provisions of Article LIII(8) of the Laws of the Constitution of Selangor, 1959.

It is not disputed that elected members are only human with the ordinary frailties of human nature, and that sometimes, if not in most cases, where a member's personal or private interest are concerned, he may become subject to a blindness often intuitive and compulsive. That is the reason why Article LIII(8) is embedded in the Constitution. It is designed to prevent corruption at the Executive Council level, and does not, in my opinion, exclude the common law principle that a member of a government must be free from bias and must not be judge in his own cause. The spirit and intention of the article is wide enough to extend to any business in which it can be reasonably regarded as likely to influence a member and that includes any business connected with a member's political party.

The conception of the task of a member of the Executive Council finds its finest expression in the words of the oath of office, taken by him on his appointment, that he 'will to the best of his judgment at all times freely give his counsel and advice to His Highness the Sultan for the good management of the public affairs of the State', and the guiding words are 'freely give his counsel and advice', which means that the member gives his advice and counsel untainted from any personal or private interest, thus enshrining the impartiality and independence of his judgment.

It does seem to me that the moment the bank's application was before the Executive Council, there was an obligation imposed on the accused to bring it to the notice of the meeting that he had received a donation from the bank, even if he received it with no strings attached, so as to give colour or countenance to the belief that he was not doing anything which Article LIII(8) forbids. In my opinion, that would be the simplest way of telling the whole world that he participated in the decision-making uninfluenced by the donation. On the other hand, such grave departure from the mandatory provisions of Article LIII(8), conveys but one conclusion and that is that he demanded and received the donation for the corrupt exercise of his public duty.

The accused has shown the utmost disregard for truth but then he is

fighting for his integrity and honour. In the face of the numerous defects and anomalies in his evidence, all of which appear to be very material, I cannot say that he has created a doubt in the truth of the prosecution case.

During the course of the trial and at the stage when the prosecution sought to bring in evidence of similar facts under sections 14 and 15 of the Evidence Act to rebut the defence of corrupt intention, I did say that I would give a ruling in due course. I now do so, and I rule that Exhibit P48 and Exhibit P49 are not cogent and credible enough to merit consideration.

I find the accused guilty on all 3 charges.

Sentence.

It is painful for me to have to sentence a man I know. I wish it were the duty of some other judge to perform that task.

I believe the very extensive coverage of this hearing in the press has permeated all levels of our society. To me this hearing seems to re-affirm the vitality of the rule of law. But to many of us, this hearing also suggests a frightening decay in the integrity of some of our leaders.

It has given horrible illustrations of Lord Acton's aphorism "power tends to corrupt, and absolute power corrupts absolutely", and has focussed concern on the need of some avowed limitations upon political authority.

I repeat what I had said before — the law is no respector of persons. Nevertheless it will be impossible to ignore the fact that you are in a different category from any person that I have ever tried. It would be impossible to ignore the fact that, in the eyes of millions of our countrymen and women, you are a patriot and a leader. Even those who differ from you in politics look upon you as a man of high ideals. You had every chance to reach the greatest height of human achievement. But half-way along the road, you allowed avarice to corrupt you. It is incomprehensible how a man in your position could not in your own conscience, recognise corruption for what it is. In so doing, you have not only betrayed your party cause, for which you have spoken so eloquently, but also the oath of office which you have taken and subscribed before your Sovereign Ruler, and above all the law of which you are its servant.

You insisted that the pay-offs were in fact political contributions given and received in keeping with long-established practices and they had been made to look criminal by a hostile witness, scuttling to save his own skin. But the evidence plainly show that you devised a scheme of unparallel cunning and committed an almost perfect crime. But crime, though it hath no tongue, speaks out at times. Your method is your own doing because even the long arm of coincidence cannot explain the multitude of circumstances against you, and they destroy the presumption of innocence with which the law clothed you.

Political contributions have been a highly-organised professional obligation in Europe and in the States; they are a sign of the times. Malaysia, it seems to me, is emulating that way of life. Whatever may be the moral of it, so long as they are not given and received for the corrupt

exercise of official functions, they are not a crime.

I believe that for the past few months you have suffered something like tortures of hell. The deprivations and sufferings you and your family went through should be enough penance.

It is also true that for a public official who rose so high, disgrace and banishment from public life are severe punishment indeed. I have duly taken that into consideration and also what has been said by your counsel.

I sentence you to one year's imprisonment in respect of the 1st Charge and 2 years in respect of each of the 2nd and 3rd Charges. All these sentences to run concurrently.

I also order the payment of $225,000 to UMNO Selangor — if not paid within a month, execution to issue.

Order accordingly.

Tan Sri Datuk Hj Mohamed Salleh Abas (Solicitor-General) for the Public Prosecutor.
RR Chelliah for the Accused.

PENAL CODE
(a) Extortion: meaning of 'injury' in sections 44 and 385

Public Prosecutor
v
Kang Siew Chong

[1968] 2 MLJ 39 High Court, Raub

Case referred to:-
(1) *B Appalasami* (1892) 1 Weir 441.

RAJA AZLAN SHAH J: The accused was charged with attempted extortion by putting a courting couple in fear of injury and thereby inducing them to deliver cash $50 to him, an offence punishable under section 385 of the Penal Code.

The learned president acquitted him at the end of the whole case on the sole ground that one of the ingredients of the section that is fear of injury, was not proved beyond reasonable doubt. He observed that he should have acquitted the accused at the close of the prosecution case had he been aware of the provisions of regulation 7(1) of the National Registration Regulation, 1960, which *inter alia* , empowers a police officer at any time to require any person to produce his identity card for inspection. It is necessary to reproduce his reason:-

> It has been held by the High Court that the exercise or the threat to exercise a legal power legally is not 'injury' reference March issue MLJ 1962 at pages xxix & xxx, under the title 'Legal Logic'.
>
> From the prosecution evidence, I find that accused No 1 had threatened to take both PW1 and PW2 to the police station in order to obtain their

particulars Accused No 1 was a police officer in uniform. He was merely exercising his legal power under regulation 7(1) quoted above in requiring PW1 and PW2 to produce their NRIC to him. Even if he had taken PW1 and PW2 to police station in order to obtain or establish their identities, accused No 1 was still exercising his legal power in a legal manner.

Therefore the threat by accused No 1 that he would take both PW1 and PW2 to police station did not amount to putting a person 'in fear of injury'.

It was proved that at about 8.00 pm on 25th February 1965 a couple were sitting in close proximity to each other on a bench in a football field in such circumstances that their behaviour was open to question. The man was a married man and the girl was unmarried. At about 10.00pm the accused entered the field. He was a police constable and was in uniform. He questioned the couple as to their misconduct and demanded their identity cards. The couple did not have their identity cards with them. He threatened to take them to the police station unless they gave him $50. He allowed the man to go home to fetch the money, but the girl was left behind to act as hostage. The man instead went to the police station and lodged a report.

In my view the learned president had properly directed his mind on the law that the threat to exercise a legal power does not constitute injury within the meaning of section 44 of the Penal Code. But where he had erred was in failing to consider the exercise of the legal power. Under the section it is incumbent to distinguish between the threat to use the process of law and the exercise of that process. The former, for example, as in the present appeal the threat to take the couple to the police station in order to obtain their particulars, does not constitute injury as prescribed in section 44. But if, as in this appeal, the threat is made with the object of exacting payment of money that is not due, it is an abuse of the exercise of that power and is therefore illegal, and such a threat made with such an object constitutes a threat of injury within the meaning of the section. A close parallel is afforded by the case of *B Appalasami*[1] which is briefly reported in *Ratanlal* on 'The Law of Crimes' (21st edn), p.86:

Threat to use the process of law for the purpose of enforcing payment of more than is due is illegal and such a threat made with such an object is a threat of injury.

It is equally a threat of injury where money is exacted where none whatever is payable, as where a greater fee is exacted than what is legally due.

The prosecution had, in my view, established a *prima facie* case which, if unrebutted, would warrant a conviction.

The defence was a mere denial. The accused said he did not extort or attempt to extort $50 from the couple. He did not threaten them at all. He did not say that he would arrest them if they refused to produce their identity cards. On the facts, a court, acting reasonably, is entitled to conclude that the accused had failed to raise a reasonable doubt as to his

guilt. Both the couple vehemently said that the accused exacted the fee, and that was corroborated by PW4 who was then in the vicinity of the crime and who heard people talking and asking for money although he could not say who had uttered those words.

The appeal against acquittal is therefore allowed.

Appeal allowed.

Abdullah Ghazali (Deputy Public Prosecutor) for the Appellant.
R C M Rayan for the Respondent.

Note

In *Public Prosecutor* v *Kang Siew Chong* [1968] 2 MLJ 39 Raja Azlan Shah J (as he then was) shed light on the vexed question as to whether a threat to exercise a legal power can be an 'injury' within the meaning of section 44 of the Penal Code. It is necessary to distinguish between the threat to use the process of the law and the exercise of that process. If the threat is made with object of exacting money that is not due, it is an abuse of the exercise of that power and is therefore illegal, and such a threat made with such an object constitutes a threat of injury within the meaning of that section.

(b) Possession of stolen property: section 414

Abdul Manap
v
Public Prosecutor

[1967] 1 MLJ 182 High Court, Raub

Case referred to:-
(1) *Public Prosecutor* v *Seong Chak Sung* [1955] MLJ 144.

RAJA AZLAN SHAH J: The appellant was convicted under section 414 of the Penal Code and sentenced to six months imprisonment. He appealed against both conviction and sentence and set up thirteen grounds most of which, to my mind, can be grouped under one or two heads. I have heard the arguments of counsel on behalf of the appellant and I am satisfied that most of them do not require discussion on the ground that they are devoid of substance. However, I feel that there are two substantial grounds of appeal which merit consideration, namely, whether there is enough evidence to support the learned magistrate's conclusions of fact, and whether the presumption under section 114 of the Evidence Ordinance had been properly invoked and, if so, what are the consequences.

The facts as relied upon by the learned magistrate are as follows. The

complainant, who runs a chicken farm on a large scale, discovered one morning that the fowl shed had been broken into and twenty fowls and six turkeys were missing. It has not been suggested that so far the facts are not borne out by the evidence. Some eight hours later a fowl dealer (PW4) bought four turkeys from the appellant. That was witnessed by a lady who was called as a prosecution witness (PW3). That evidence has not been challenged by the accused in the lower court. To my mind, that conclusion of fact was also borne out by the evidence and I see no reason to dispute it. In due course the police took possession of the four turkeys and they were later identified by complainant as his by the nails which had been cut. It was argued on behalf of the appellant that that finding is not supported by the evidence. It therefore follows that I must review the evidence whether, as a matter of law, it is sufficient to justify the learned magistrate's finding of fact.To my mind, the learned magistrate has delivered an elaborate and, in my view, considered judgment in which, after examining all the evidence, in particular the evidence with regard to identification, he stated his conclusions of fact. The evidence before him was such as to entitle him to say that there was ample evidence that the appellant was in possession of property recently stolen. So far as the evidence is concerned, I share the view expressed by the learned magistrate. So far as his conclusions of fact are concerned, they possess the sanctity of pure findings of fact with which, of course, this court will not interfere.

The learned magistrate went on to apply the law to the facts as found by him, and I quote his conclusion:

> There was ample evidence that the second accused (appellant) was in possession of the stolen turkeys. This was borne out by the evidence of the fowl dealer (PW4) who bought the turkeys from the second accused. PW4 could identify second accused without any room for mistake. The transaction was also observed from a distance by another witness (PW3). The turkeys were identified by PW 1 as the missing ones. Based on the finding of fact that the second accused was in possession of the stolen turkeys I invoked section 114 illustration (a) of the Evidence Ordinance No 11 of 1950 and presumed that he had received the stolen property knowing them to be stolen.

He therefore called upon the apellant to enter upon his defence. The learned magistrate considered the defence which was one of *alibi* and concluded in these words:

> The defence of accused No 2 (appellant) was one of *alibi.* He said that on 17th and 18th May he was all the time in the house of one Shamsuddin (DW1) as at that time Shamsuddin was ill. Shamsuddin said when he was sick second accused used to visit him. Another witness (DW2) saw accused No 2 in Shamsuddin's house but he could not remember the date. Another defence witness (DW3) said he did not know if second accused was in Shamsuddin's house at 2.00pm on 18.5.66.
>
> In my opinion the defence of *alibi* was a fabricated one and that not one of the defence witnesses could create a reasonable doubt to rebut the evidence of the prosecution. No one of the defence witnesses could say with certainty that the second accused was in Shamsuddin's house at the

> time when he was alleged to be selling those four turkeys to PW 4, in the face of very strong and honest evidence of PW 4 and PW3 I am strongly of the opinion that the defence of *alibi* as put up by the second accused had failed to rebut the case for the prosecution and I therefore found him guilty on the alternative charge under section 414 of the Penal Code and sentenced him to six months imprisonment.

The words used by the learned magistrate in giving his decision indicate, in my view, that he was following the test laid down in *Public Prosecutor* v *Soong Chak Sung*[1] which was concerned with the degree of explanation which would entitle a person in possession of property recently stolen to an acquittal. I see no reason to think that in reaching his decision he applied the wrong test or that he failed correctly to apply the presumption under section 114 of the Evidence Ordinance. As a variant or possibly as an extension of his argument, counsel on behalf of the appellant submitted that the learned magistrate had erred in law in invoking the presumption under section 114 of the Evidence Ordinance to the facts as found by him. He argued that once the learned magistrate had found as a fact that the appellant was in possession of property recently stolen, he could, under the presumption, either be the thief or a receiver but not a person voluntarily assisting in disposing of stolen property under the provisions of section 414 of the Penal Code. Counsel contended that to consider otherwise would be an unjustifiable extension of the presumption. Up to that point I am prepared to express my approval with counsel's proposition. Be that as it may, I am of the view that a receiver can be charged with receiving under section 411 of the Penal Code and also under section 414 of the Penal Code, but he cannot be convicted for both offences on the ground that those two offences are parts of one continuous transaction. It follows, therefore, that once the learned magistrate had invoked the presumption, it was open to him to find, which he did, that the appellant was a receiver. Once the learned magistrate did so find that the appellant was a receiver it was equally open to him to find, in view of the peculiar evidence of the present case which went a bit further than mere retaining of stolen property, that he was disposing of the same. In the view which I have taken, the argument of counsel on this point cannot succeed.

Assuming that section 114 of the Evidence Ordinance does not arise, being improperly invoked by the learned magistrate, I am satisfied that there is sufficient evidence to support the conviction under section 414 of the Penal Code. That being the evidence of the lady who witnessed the transaction, the evidence of the fowl dealer who bought the four turkeys from the appellant, and the evidence of the complainant who identified his four turkeys.

Counsel for the appellant has submitted that the sentence is manifestly excessive in view of the proved facts. In my view, the decision of the learned magistrate in regard to sentence is clearly a decision in the exercise of his discretion. It is now accepted that interference with such an exercise can only be justified if the learned magistrate had acted on some wrong principle, committed some error of law, or failed to consider matters which demanded consideration. I cannot think that in

dealing with matters of sentence the learned magistrate committed any error of law. Nor did he fail to consider all matters demanding consideration. Nor did he act on any wrong principle.

Both the appeals against conviction and sentence are dismissed.

I have been told by counsel on behalf of the appellant that his client had been imprisoned for 71 days. The circumstances leading to his imprisonment are that his counsel had failed to file the notice of appeal in time, whereby the appellant was re-arrested and remanded for 71 days, after which he successfully applied for bail. Therefore, in my view, this period of 71 days which he has undergone should be deducted from the term of imprisonment imposed by the lower court.

Appeal dismissed.

Wan Mustapha Hj Ali for the Appellant.
Hashim Abdul Majid (Deputy Public Prosecutor) for the Respondent.

(c) Robbery: section 392 — identification of accused

Chan Koo Fong
v
Public Prosecutor

[1971] 4 MC 190 High Court, Kuala Lumpur

Cases referred to:-
(1) *Leong Ah Seng* v *Rex* [1956] MLJ 225.
(2) *RV Raju & Ors* v *Public Prosecutor* [1953] MLJ 21.

RAJA AZLAN SHAH J: The appellant was convicted under section 392 of the Penal Code and sentenced to 2 years' imprisonment. He appealed against both conviction and sentence. Only one ground was taken on appeal viz., that the evidence of identification of the accused by the complainant five days later was not satisfactory.

In a nutshell the facts are as follows: On May 12, 1970 at about 11.30 am the complainant was washing clothes at a public stand-pipe by the roadside. The accused came on a motor-cycle, stopped near the stand-pipe, went up to the complainant and dispossessed her of her gold chain. Beyond shouting 'ayoh, ayoh, churi, churi' she did not lodge a police report. It is surprising that no one saw the alleged act or heard her shouts. She said she informed her people and friends about the incident but none came forward to testify. At least that would show consistency of her conduct with her evidence Five days' later the accused was arrested by a group of Indians near a shop for an alleged theft. His hands were tied to a chair. At this time the complainant was in the vicinity. A Chinese man who was involved in the arrest asked the complainant whether it was the accused who had robbed her of her gold chain five days earlier. The complainant identified the accused as the

culprit. This story leaves unexplained how the Chinese man came to know of the accused's conduct. There is no evidence on record to explain it satisfactorily.

The only link which connects the accused with the crime is the evidence of identification by the complainant some five days later. If the identification is satisfactory that would constitute corroboration of the complainant's evidence. Here, the evidence of identification is most unsatisfactory: see *Leong Ah Seng* v *Rex*[1]. There is another objection. Evidence prejudicial to the accused was let in. To suggest that such evidence was in any way relevant is absurd, and no serious attempt was made before the court to maintain that it was admissible. Evidence cannot be given which goes merely to show that the accused is the kind of man who is likely to have committed the offence charged. It is highly objectionable in a criminal case to introduce a matter which has no probative value in relation to any issue but is calculated to create prejudice in the mind of the court. The objectionable evidence is that the accused was alleged to have committed another theft. Obviously that fact, if it were a fact, could not make it more probable that on the specific occasion in question the accused had committed the specific offence charged. Here we have just the kind of evidence which the law rigidly and rightly excludes. You cannot, in order to prove that A committed theft on a specific date, call evidence that he committed another theft on another day. Where evidence of 'similar acts' is properly admitted: see *RV Raju & Ors* v *Public Prosecutor*[2] it is because the effects of repetition tend to make it more probable that some necessary element of the offence charged was present on the occasion actually in question. The present case is remote from that class of cases.

For the above reasons it cannot be said that the prosecution's case had been proved beyond reasonable doubt and accordingly I will allow the appeal.

Appeal allowed.

R P S Rajasooria (Jr) for the Appellant.
Nik Mohd bin Nik Yahya (Deputy Public Prosecutor) for the Respondent.

(d) Causing death by negligent act — section 304A — particulars of alleged negligence

Loh Thye Choon
v
Public Prosecutor

[1967] 2 MLJ 252 High Court, Kuala Lumpur

Cases referred to:-
(1) *Public Prosecutor* v *Ahmad bin Din* [1956] MLJ 235.
(2) *Public Prosecutor* v *Marimuthu* (K L Criminal Appeal No 43 of 1961 unreported).
(3) *Todrick* v *Dennelar* (1905), 42 Sc LR 199.
(4) *Kurban Hussein* v *State of Mahrashtra* [1965] 2 SCR 622; AIR (1965) SC 1616.

RAJA AZLAN SHAH J: The appellant was charged with an offence under section 34A of the Road Traffic Ordinance, 1958. At the end of the case for the prosecution the charge was amended to one under section 304A of the Penal Code. He was found guilty and was convicted and fined a sum of $1,000 in default six months' imprisonment and disqualified from driving for a period of twelve months. The amended charge read:

> That you on or about 20.1.1965 at about 5.45 pm at Jalan Birch, in the District of Kuala Lumpur, being the driver of motor-lorry NB 1596 did cause the death of one Low Chuen alias Liew Chuen, by doing a negligent act not amounting to culpable homicide and thereby committed an offence punishable under section 304A of the Penal Code.

At the hearing the following facts were proved. On 20th January 1965 at about 5.45 pm the deceased was riding a scooter with a pillion rider along Birch Road and was heading towards Merdeka Circle from the direction of Edinburgh Circle. A lorry driven by the defendant emerged from a row of shop-houses on the (deceased's) left and cut across the path of the on-coming scooter. The lorry intended to cross to the other side of Birch Road. A collision occurred between the two vehicles and both the deceased and his pillion rider were thrown on to the road. The deceased was admitted to hospital and died eight days later. The scene of the accident is a straight stretch of road 49 feet wide and there is a white dividing line in the centre. The length of the lorry was 25 feet — slightly more than one-half of the width of the road. The weather was good and the road dry. There were no marks on the road.

I can dispose summarily of the appellant's first submission that as the amended charge contained no particulars of negligence it is bad in law and a conviction cannot therefore be sustained. The essence of the charge is the negligent driving and it is not either usual or necessary to particularise the alleged negligence in the charge. I need hardly say that in arriving at this decision I am adopting the principle laid down in *Public Prosecutor* v *Ahmad bin Din*[1] which was followed in *Public Prosecutor* v *S Marimuthu.*[2] In the United Kingdom the same principle would seem to apply (see footnote (h) in Vol 2, *Stone's* Justices' Manual, 1965, at p 2333 where the case of *Todrick* v *Dennelar*[3] is mentioned).

The second ground of appeal relates to the admission of the post-mortem report. It is said that the provisions of section 332 and section 340 of the Criminal Procedure Code have no application to the circumstances of this case and had that evidence been rejected, as it should have been, there is no evidence as to the cause of death. For reasons best known to the prosecution, the pathologist was not called to give evidence at the trial. In the view which I take of this case it is not necessary to express any opinion on this point. On the assumption that the medical report was properly admitted it cannot be said that the essential ingredient that the death of the deceased was the direct result of the negligent act of the appellant had been proved to the hilt: see *Kurban Hussein* v *State of Mahrashtra*[4]. The cause of death which reads, 'Small abrasions over front of right chest about the middle' is not consistent with probability that the deceased met his death as the direct

result of a road accident. Where there is a doubt in the prosecution case, it must be resolved in favour of the appellant. On this ground the conviction under section 304A Penal Code cannot stand.

It is my opinion that the facts as found by the learned president warranted a finding of inconsiderate driving. I will therefore set aside the conviction and sentence imposed by the learned president under section 304A Penal Code and substitute a conviction and a fine of $200 under section 36(1) of the Road Traffic Ordinance. The order of disqualification is also set aside and in its place I order endorsement of his driving licence. Any excess of payment of fine will be refunded to the appellant.

Appeal allowed.

Edgar Joseph Jr for the Appellant.
Hashim Majid for the Respondent.

(e) Scope of section 218

Lim Boon San
v
Public Prosecutor

[1968] 2 MLJ 45 High Court, Kuala Lumpur

Cases referred to:-
(1) *Raghubansh Lal* v *State of UP* [1957] SCR 696.
(2) *R* v *Prater* [1960] 1 All ER 298.
(3) *R* v *Stannard* [1964] 1 All ER 34.

RAJA AZLAN SHAH J: The appellant was an inspector in the Royal Malaysian Police Force and thus a public servant. He was tried with two charges for offences punishable under section 218 Penal Code, and with one charge for an offence punishable under section 204 Penal Code. He was convicted on all charges and has now appealed.

The facts of this case are very simple. On July 13, 1966 at about 10.50 am traffic police constable 72 brought in a lorry containing wet sand which was suspected of being overloaded. On duty at the enquiry office were the sergeant-in-charge (PW1), a corporal (PW4), and a police constable (PW2). PW 2 made an entry in the station diary regarding the said lorry (serial No 7238, time 10.55am). The appellant was the duty officer. Inspector Sakunathan (PW5) then weighed the said lorry and found it to be in excess of 1 ton 4 cwt 2 qt of the permissible laden weight. The maximum permissible weight of the lorry was 8 tons. The excess weight was punched on the weighing cards (Exh P3). Three such cards were issued, one to the driver of the said lorry, the second was affixed to the original report, and the third was inserted in the weight register. The excess weight was duly recorded by PW 2 in the station diary (serial No 7250, time 12.00 noon). No such entry was made in the

weight register because it could not be traced at that time. The said lorry was released at about 12.10 pm with the direction that the excess load was to be transferred to another lorry. That was also entered in the station diary (serial No 7254). In the afternoon the owner of the lorry came to see the appellant. As a result, the appellant confronted PW 5 concerning the said lorry. PW 5 told him that the lorry had already been weighed, action had been taken, and there was nothing that could be done. The appellant suggested that the lorry should be re-weighed. As PW5 was in a hurry to attend a funeral he told the appellant to do whatever he liked. At about 9.20 pm the appellant came to the enquiry office with two male Chinese. He asked PW1 for the keys to the weighbridge and these were handed to him. He left the building and returned twenty minutes later. He then took from PW1 the weight register and station diary and entered his office. He came out ten minutes later and returned the register and diary to PW 1. PW1 discovered a new weighing card (Exh P5A) attached to the weight register which bore the following entries:

8 tons 3 cwt 1 qt 7 lbs.
8 tons 0 cwt 0 qt 0 lbs.
0 tons 3 cwt 1 qt 7 lbs.

He also discovered that the excess weight as recorded in the station diary, viz 1 ton 4 cwt 2 qt, had been amended to read 0 ton 3 cwt 1 qt. The learned magistrate was satisfied that the entries in the station diary (serial No 7250) and in the weight register were made by the appellant. He accepted the evidence of PW1 and PW3 and after duly considering the whole case came to the conclusion that the appellant had made incorrect entries knowing them to be likely that he would thereby save the registered owner and driver from legal punishment.

With regard to the offences punishable under section 218 Penal Code, two points requires consideration.

First, it was argued that the prosecution had failed to prove that the station diary and the weight register were framed in a manner which the appellant knew to be incorrect. It is well established that in order to sustain a conviction under section 218 Penal Code it is not sufficient that the entry is incorrect, it is essential that the entry should have been made with intent thereby to save, or knowing it to be likely that he will thereby save any person from legal punishment: see *Raghubansh Lal* v *The State of UP*[1]. It was therefore submitted that in the present appeal the primary question is whether the appellant did weigh the said lorry. If he did not, then it was submitted the entries were false. If he did, then the prosecution must prove that the entries were false. The only link in the evidence which connected the appellant with the offence was the evidence of PW1, who counsel had labelled as an unreliable witness. The learned magistrate on the other hand had placed reliance on his evidence. He was of the view that he had no reason to doubt his evidence. PW 1 testified that if the said lorry was brought back to the station that night he would inevitably have seen it. That is a matter of inference for the trial court and the question is whether it is a necessary

inference deducible from the facts. It is not in dispute that the only access to the weighbridge after office hours was by way of the only gate leading to the police station and that gate was situated directly in front of the enquiry office. Anybody on duty in the enquiry office would certainly have noticed it if it was brought back that night, for it was not a small thing but an 8-ton vehicle. Further, PW1 would, as a matter of duty, have made an entry in the station diary if such an event had taken place. The learned magistrate also took the view that the new weighing card (Exh P5A) was fabricated by the appellant since the evidence of PW5 clearly indicated that a weight card could be punched at the weighbridge without any lorry being placed on it. In my view there is ample evidence in the case to sustain the findings of the learned magistrate that the said lorry was not weighed that night if he believed PW1 and PW5 as apparently he did, having seen and heard them.

The next contention of counsel was this. It was submitted that PW3 was an accomplice. His evidence showed that he was told by the appellant that the said lorry belonged to the appellant's friend and that he was to keep quiet about the first report that he made earlier in the morning. As a result he was asked by the appellant to alter his pocket diary with regard to the weight of the said lorry. In such situation counsel argued that since there was ample evidence to suggest that PW3 was an accomplice the learned magistrate ought in the nature of things to have approached his evidence with a sense of caution. As the learned magistrate had failed to direct his mind on accomplice evidence, the conviction must be set aside. It cannot be said that PW3 had under any circumstances to obey the unlawful orders of his superior. He is not that unintelligent enough to be able to distinguish between what was right and what was wrong. In any event I am of the opinion that more than that is required to cloak him with the garment of an accomplice. At the very highest, I consider him as a witness having a purpose to serve, and therefore the warning against uncorroborated evidence should be given. However, in the final analysis, the rule being only a rule of practice, each case must be looked at in the light of its own facts and that, if there be clear and convincing evidence to such an extent that an appellate court is satisfied that no miscarriage of justice has arisen by reason of the omission of the direction, the court will not interfere: see *R* v *Prater*[2]; *R* v *Stannard*[3]. In my opinion, there was ample and overwhelming evidence of a compulsive nature which would have enabled the court to arrive at the conclusion that the conviction under section 218 Penal Code ought to be set aside. No injustice can possibly have flowed from the absence of such warning.

I shall now consider the conviction under section 204 Penal Code. Counsel argued that there was only the evidence PW3 to connect the appellant with the offence. That point is tenable. Having ruled that he was a witness having a purpose to serve, is there other independent and cogent evidence to establish his guilt? I am satisfied and so hold that in this instance the prosecution had failed to prove the charge.

The appeal against conviction under section 218 Penal Code is dismissed.

The appeal against conviction under section 204 Penal Code is set aside and the fine which was paid is to be refunded.

Order accordingly.

N H Chan for the Appellant.
Hashim Majid (Deputy Public Prosecutor) for the Respondent.

(f) Armed robbery: sentence — section 392 and 394

Public Prosecutor
v
Abdul Majid

[1968] 2 MLJ 44 High Court, Malacca

Case referred to:-
(1) *Public Prosecutor* v *Yap Chong Fatt* [1963] MLJ 136, 137.

RAJA AZLAN SHAH J: This is an appeal against conviction. The appellant was found guilty under section 392 Penal Code read with section 394 and was sentenced to nine months imprisonment. Shortly stated, the facts are that the accused with three other persons at large committed armed robbery on July 26, 1967 and in the course of the robbery he assaulted one of the victims. The learned president in imposing sentence of nine months imprisonment was influenced by the observations of the learned Chief Justice in the case of *Public Prosecutor* v *Yap Chong Fatt.*[1] I quote the relevant passage:-

> If the offence is too serious for that and merits imprisonment then a sentence of imprisonment should be imposed which will have some effect not only on the offender but also as a deterrent and which will give the prisons department some opportunity of trying to remedy such defect of character of there may be. In my opinion the proper sentence in this case, if the accused was not to be bound over and if imprisonment was thought necessary (and it probably was necessary) was one of something from nine months to a year.

Now, that was a case of house-breaking where the accused was sentenced to two weeks imprisonment which he duly served. The amount of property involved was $50. The accused was a first offender. In my view, the present case is on a different plane altogether. This is a case of armed robbery by night in the course of which one of the victims was badly assaulted. The facts are therefore different from that of *Yap Chong Fatt's* case and therefore different considerations apply in order to strike a fair balance between the interests of the accused on the one hand and the interests of the public on the other.

It is my judgment that the observation relied upon by the learned president should be understood as stating a general proposition relating

to the peculiar circumstances of that case. It merely lays down broad principles of law in the assessment of punishment and it may form a useful guide in similar cases. The sentence in the present case is manifestly inadequate. I increase the sentence to two years to take effect from the date of arrest.

Sentence enhanced

Abdullah Ngah (Deputy Public Prosecutor) for the Appellant.
In Person for the Respondent.

(g) Obscene publication: strict liability-section 292(a)

KS Roberts
v
Public Prosecutor

[1970] 2 MLJ 137 High Court, Kuala Lumpur

Case referred to:-
(1) *Ranjit D Udeshi* v *State of Maharashtra* AIR (1962) Bombay 268; on appeal AIR (1965) SCCR.

RAJA AZLAN SHAH J: The appellant was convicted for an offence under section 292(a) of the Penal Code viz. publicly exhibiting for sale an obscene book, to wit one copy of *Majallah Filem Malaysia* October 1969 issue. He was fined $60/- in default 2 years imprisonment. I dismissed the appeal against conviction and intimated that I would give my reasons later. I now proceed to do so.

Majallah Filem Malaysia is an approved publication but an article appearing in it offends against the recognised standards of propriety and is therefore obscene. That is not challenged.

One of the grounds of appeal is that the publication is an approved publication by the Government and therefore not an obscene publication. Counsel's argument is that a publication which contains an obscene article is not obscene because it is an approved publication. I think there is a fallacy in the argument. In my view the word 'approved', strong as it is, cannot be read without any qualification. It does not mean *extra legem.* We boast of being a free democratic country but that does not mean that we are not subject to law. The impugned article is clearly obscene and a publication is an obscene publication even if only a part of it is obscene: see *Ranjit D. Udeshi* v *State of Maharashtra.*[1]

The conviction is impugned on another ground that the appellant has no knowledge that the publication is obscene as he is only a retailer and therefore not expected to know what is contained in every publication. The argument is based on the false premise that before a person is found guilty of selling or keeping for sale any obscene publication, the

prosecution must prove that he 'knows' that the publication is obscene. In a case under section 292(a) of the Penal Code knowledge that the publication is obscene need not be proved. If the law is otherwise it would place an intolerable burden on the prosecution. The difficulty of obtaining legal evidence of the offender's knowledge of the obscenity of the publication has made the liability strict. Absence of knowledge may only be taken in mitigation of sentence.

A third ground of appeal is that the learned magistrate had failed to direct his mind as to the identification of the appellant. The evidence shows that the police constable (PW1) who raided the shop saw the impugned publication displayed for sale but when giving evidence in court he had failed to identify the accused. The investigation officer (PW3) in his testimony said that in the course of investigation he went to the said shop where he saw the accused and that he checked the business license, which he produced as Exhibit P3. The said license discloses the name of the accused.

Identification is a fact or circumstance which must be proved against an accused person before it can be relied upon and used against him. A fact or circumstance is held to be proved only when it fulfils the definition of the word 'proved' given in section 3 of the Evidence Ordinance. The evidence of identification is as much subject to this definition as any other kind of evidence but it would appear to me that in assessing the evidence of identification the trial court does not apply the tests provided in this section. It is true that an absolute certainty is not required but the court has to test the evidence with prudence and accept it only when it is so highly probable that its truth can safely be accepted. The test excludes from its orbit blind faith of a true believer, because prudence and credulity do not go together.

In my view and so is the view of the lower court the evidence of identification has fulfilled this test. There is sufficient evidence to establish the accused's identity.

Appeal dismissed.

R Ponnudurai for the Appellant.
Hashim Abdul Majid (Deputy Public Prosecutor) for the Respondent.

(h) House breaking and theft: section 454

San Soo Ha
v
Public Prosecutor

[1968] 1 MLJ 34 High Court, Kuala Lumpur

Cases referred to:-
(1) *Wang Kia Heng* v *Public Prosecutor* [1951] MLJ 109.
(2) *Rama* v *State* AIR (1952) Bom. 299
(3) *Hashim & Anor* v *Public Prosecutor* [1956] MLJ 233.
(4) *Vidya Prakash* v *State* AIR (1954) Pepsu 72.

(5) *Mamun* v *Emperor* AIR (1930) Lah 530.
(6) *Bashir* v *Emperor* AIR (1932) All 185.
(7) *Bhattacharjee* v *Emperor* AIR (1940) Cal 85.

RAJA AZLAN SHAH J: This is an appeal against conviction and sentence.

The appellant was charged with house-breaking and theft of property to a total value of $5,270 under section 454 of the Penal Code, alternatively with dishonestly retaining stolen property to wit, cash $1,464.20 under section 411 of the Penal Code. At the end of the prosecution case the learned president found that a *prima facie* case under the principal charge was established. The facts justifying his conclusion can be summarised as follows. The complainant is an ice-seller residing at Pudu Road, Kuala Lumpur. He is also an agent selling Social Welfare Lottery tickets. In the course of his business both he and his wife had saved about $5,000 mostly in coins. The wife had in the past ten years kept the coins rolled in paper and had indicated on each roll the amount therein. On the morning of July 7, 1965 the house was broken into and the said coins and some currency notes as well as a Titus wrist watch were stolen. Two plastic bags were also missing from the said house. On September 13, 1965 the appellant was arrested. He gave a statement to a police officer to the effect that the stolen money was kept in his room. As a result of such information, the appellant led a police party to his flat at Jalan Pasar Bharu, Kuala Lumpur. In his room the police recovered two plastic bags in which were found the coins wrapped in paper with writing on each roll. In an almeirah nine $50 notes were also recovered. The writing on the rolls was sufficiently identified by the complainant's wife; so were the bags, one of which had been mended with thread by her.

The appellant in his defence stated that at the material time he was a stage man, living at the said flat with one Mr Wong whose present whereabouts are unknown. He said that the money which was recovered by the police was his. The learned president considered the defence and gave the following explanation in his grounds of judgment:

> The accused in his defence attempted to offer explanation to court for his possession of the exhibits. I was satisfied that the explanation offered by the accused was untrue. He said he was a stage man and yet he was earning $300 to $350 a month. On 7.7.1965 he said he was working, but under cross-examination he said, " On 7.7.1965 I cannot remember if I was working". The accused's story was not only contradictory but was also inconsistent with innocence. His story was untrue. It did not raise any reasonable doubt in the prosecution case at all.

After properly directing his mind to the case of *Wang Kia Heng* v *Public Prosecutor,*[1] he rejected the defence and sentenced the appellant to three years' imprisonment.

The judgment which has been attacked on a number of grounds can be summarised under three heads. First, that the facts do not justify the finding of guilt under section 454 of the Penal Code; secondly, that a

piece of prejudicial evidence was admitted by the learned president; and thirdly, that a search list as required by section 64 of the Criminal Procedure Code was not prepared by the officer who conducted the search.

I shall take ground two first. In the court below, counsel for the appellant objected to the word 'stolen' being admitted in evidence. The learned president nevertheless admitted the following statement of the appellant to the police officer: 'the stolen money was kept in his room'. On the legal position that arises in such circumstances there is a wealth of weighty Indian authorities. It is established law that such words as 'I have concealed.' 'I have hidden,' 'I have kept' are admissible in evidence as evidence coming within the purview of section 27 of the Indian Evidence Act: see *Rama* v *State*[2]. Thus, in the present case if the words used are 'the money was kept in his room', they are admissible on the ground that those words distinctly and positively relate to the fact discovered and which is necessary to be proved in order adequately to explain such discovery. Does the inclusion of the word 'stolen' provoke section 27 of the Evidence Ordinance? Reference was made by counsel to the local case of *Hashim & Anor* v *Public Prosecutor*[3] in which it was held that the words 'used in the murder' were not admissible. The facts in that case are different from present consideration although the principles are of general application. In the final analysis each case of this kind depends on the particular facts to which the general principle must be applied. In a Pepsu High Court case the statement of the accused that he had concealed the abducted woman Md Surjit Kaur in the house of Gobind Singh and that he could get her recovered from that place was allowed under section 27 of the Indian Evidence Act. The court did not accept the suggestion that the words 'abducted woman' connected that the woman had been abducted by the accused. They only meant 'an abducted woman' and that the accused did not say that he had abducted the woman in which case perhaps that portion would have been liable to be excluded from consideration: see *Vidya Prakash* v *State*[4]. One of the cases referred to in that judgment is the case of *Mamun* v *Emperor*.[5] There, the statement of the accused that he had buried the dead body of the murdered person at the place pointed out by him was held to be admissible under section 27 of the Indian Evidence Act. In the case before us the statement of the appellant, 'the stolen money was kept in his room' cannot be taken as a confession of guilt. The appellant did not say that he stole the money, in which case, perhaps, that portion would be liable to be excluded from circulation. It only means 'a stolen property'. In my judgment that statement is unobjectionable.

The third ground of appeal is that the provisions of section 64 of the Criminal Procedure Code had not been complied with. In my view, the provisions of the section are to be strictly followed to the extent it is possible to ensure that the incriminating articles obtained as a result of the search were recovered as alleged and leaves no room for doubt and to exclude the possibility of any concoction or malpractice of any kind. This section bears some resemblance to section 103 of the Indian Criminal Procedure Code which is more exhaustive than ours. Convic-

tion or acquittal of an accused person invariably depends upon the credibility of witnesses as assessed by the trial court and never on the question whether a particular legal procedure has been complied with. The most that can be said about the failure to comply with the provision relating to search list is that it may cast doubt upon the *bona fides* of the parties conducting the search and accordingly afford ground for scrutiny; but if after close scrutiny the court arrives at the conclusion that the stolen articles were recovered from the possession of the accused person, it is obviously no defence to say that the evidence was obtained in an irregular manner. There is nothing in the law which makes such evidence inadmissible: see *Bashir* v *Emperor;*[6] *Bhattacharjee* v *Emperor*[7]. In the present case the learned president had explored the evidence and came to the conclusion that the stolen articles were recovered from the possession of the appellant.I am therefore unable to see how the failure to prepare a search list by itself would entitle the appellant to an acquittal.

The facts do not justify the conclusion of guilt under section 454 of the Penal Code. Nine weeks is quite a long time to justify the presumption that the appellant stole the money. It is not possible to dismiss from my mind that during that period the stolen articles had not passed from hand to hand. Be that as it may, the facts favour the inference that the appellant dishonestly retained the stolen articles. It is my view that there is ample material before the court to justify the conclusion that the appellant dishonestly retained the stolen articles.

The conviction under section 454 of the Penal Code is therefore set aside.

Instead, I substitute it with a conviction under section 411 of the Penal Code.

The facts of this case do not justify a sentence of three years' imprisonment. A more appropriate sentence in the circumstances would be that of 18 months.

Order accordingly.

V Oorijitham for the Appellant.
Zaiton Osman (Deputy Public Prosecutor) for the Respondent.

(i) Criminal breach of trust: section 408.

Sathiadas
v
Public Prosecutor

[1970] 2 MLJ 241 High Court, Kuala Lumpur

Cases referred to:-
(1) Yap Sow Keong and Anor v *Public Prosecutor* [1947] MLJ 90.
(2) *Sinaraju* v *Public Prosecutor* [1961] MLJ 33.

RAJA AZLAN SHAH J: The appellant was convicted of criminal breach of trust under section 408 of the Penal Code. Three charges were preferred against him. The first charge relates to a period between 5th April 1966 and 8th April 1966 of cash amounting to $450.10; the second charge is in respect of a period between 17th May 1966 and 26th May 1966 of a sum of $291.00 and the third charge relates to a period between 2nd June 1966 and 3rd June 1966 of a sum of $415.10. He was convicted on all three charges and sentenced to 12 months' imprisonment, the sentences to run concurrently. This is an appeal against both conviction and sentence.

The appellant was the traffic clerk employed by the Malaysia-Singapore Airways. He was at the relevant time posted to the Customs Warehouse, Railways Goods Shed, Kuala Lumpur. His duties were to receive inward parcels from the airport and to contact the consignees to take delivery of the goods and in due course to receive payments in respect of air-freight charges. It was then his duty to prepare the daily sales returns *i.e.* , red returns together with all the payments. He was required to submit them to the Kuala Lumpur head office at Campbell Road. The learned president found as a fact that on all three separate occasions mentioned in the charges the appellant received the monies from the consignees but he did not make any relevant entries in the sales returns and up to this day he had not remitted the monies to the Kuala Lumpur head office.

I must now inquire whether such findings are justified.

With regard to the first charge the evidence shows that the goods did arrive and the consignees had taken delivery and paid for the air-freight charges. That is borne by evidence of Shanmugam (PW 9) the despatch clerk of the East Asiatic Company, the consignees of the goods. He testified that he took delivery of the goods from the appellant and paid the money to him and that he obtained a signed receipt from the appellant, which was produced as Ex P10. His evidence was not seriously challenged. The learned president saw no reason to disbelieve him.

With regard to the second charge the evidence also shows that Societa Commissaria, Kuala Lumpur,the consignees, had taken delivery of the goods and had paid $291.00 representing air-freight charges. Sabtu bin Haji Othman (PW14) the clearance clerk of the consignees testified that he took delivery and paid the appellant the sum of $291.00 and obtained the receipt, which was produced as Exh P11. His evidence was not shaken.

The third charge relates to a consignment of sports shoes ordered by Messrs Nahar & Co, Kuala Lumpur. They had received the goods for which they had paid $515.10 representing air-freight charges, but Muniandy (PW 16), the salesman, who took delivery could not remember to whom he had paid the money.

The prosecution further relies on the appellant's alleged statement which is one of the grounds of appeal. It was said that the statement was taken after one hour of grilling and that was sufficient to make the 'appearance' that the statement was not voluntary. It was further

suggested that the procedure adopted by the learned president was not in strict compliance with normal procedure in that the appellant was never given an opportunity to rebut the statement.

In my judgment two matters require consideration. First, was the statement voluntary and secondly the probative value of the statement. Before ruling on the admissibility of the statement the learned president heard 4 witnesses who were connected with the taking of the statement. He heard the evidence of Enche Suleiman bin Haji Musa (PW1) the accountant of Malaysia-Singapore Airlines, who discovered the discrepancy in the sales returns. Enche Suleiman said that no inducement, threat or promise was ever held out to the appellant before signing the statement. He admitted in cross-examination that it took him nearly an hour to go through the various documents with the appellant and the staff but the time taken to write the statement was between 5 to 10 minutes. He said this in evidence:

> Then I asked the cargo staff concerned i.e., Enche Sathiadas whether he had collected the amounts involved to which he replied that he had collected the money to pay his personal debts. I then asked him whether he would like to put that in the form of a letter to the company as to the verbal discussion. Enche Sathiadas mentioned that he will settle the amount he had taken within November 1966; to this he wrote a note (Exh P7) on the company's memo.

The statement is to this effect:

> From: JJ Sathiadas,
> Air Cargo Customs Warehouse,
> Kuala Lumpur.
>
> To: The Area Accountant,
> MAL Kuala Lumpur.
>
> c.c. Cargo Officer, MAL Airport, K.L.
>
> Subject: Re: $1,254.40 Date: 29.10.1966
>
> The above amount was taken by me to settle my debts. I beg to advise you that this will be settled to you within November 1966.
>
> 160-373375 — $291.00 dated 17.5.1966
> 160-367582 — $449.30 dated 5.4.1966
> 057-1946620 - $514.10 dated 2.6.1966 Sd. Sathiadas.

The learned president held the view that Enche Suleiman was not shaken by the lengthy and inconsistent cross-examination. He accepted his evidence. The next witness he examined was Mazlan bin Haji Daud (PW8), the other traffic clerk whom he regarded as an unreliable witness. He was of little help to either the prosecution or the defence. The learned president's impression of the witness was that he was reluctant to reveal anything that would be of help to either side. He rejected his evidence in toto. Palaniasamy (PW10), the cargo hand also testified that he had heard Enche Suleiman telling the appellant to sign something but beyond that nothing turned on this witness's evidence. The learned president also heard the evidence of Joseph Low Chong Teck (PW17) who was at that time present in the warehouse. He was the

cargo officer employed by the Malaysia-Singapore Airways and based at Subang Airport. The learned president treated him as a reluctant witness. He took the view that whatever was said by this witness in connection with the alleged statement was told to him by the appellant and therefore he attached no weight to PW17's evidence.

At that stage the appellant did not elect to go into the witness box as he might have done because at that stage it would have been open to him and his then counsel would have advised him to go into the witness box to tell the court his version of the circumstances under which the alleged statement was recorded. But he was not obliged to do that. He was perfectly entitled to say nothing. As he did not say anything at that stage the learned president saw no reason for refusing to admit that statement on the ground that it was not voluntary. Since the statement had been admitted the accused had in the course of his evidence in the witness box said that he was forced to make it. The learned president did not think that that would resonably be true because it would have involved disbelieving Enche Suleiman and believing the appellant. He saw no reason to disbelieve Enche Suleiman.

I am satisfied from the perusal of the evidence that the statement was voluntary.

The appellant's present counsel then took the stand that the appellant was not given the opportunity to rebut the statement and he therefore quite properly submitted that such omission is a good ground to reject the statement as evidence.

I have anxiously perused the record and it would appear that the appellant did not give evidence to rebut the statement. The learned president after hearing submissions from both sides admitted the statement. There was nothing on record to suggest that there was a request by counsel to put the appellant in the witness-box. Had there been a request by counsel I have every reason to believe that the learned president would not have disallowed him to take the stand. Since the record is silent on the point I fail to see any merit in counsel's submission.

It was further said that the alleged confession having been retracted, the learned president erred in not considering whether there was sufficient corroboration before accepting the same. The submission is no doubt based on Indian authorities. There is a manifest distinction between our law and the Indian authorities and that has been set at rest by the judgment in the case of *Yap Sow Keong* v *Public Prosecutor*[1] where Willan CJ observed that an accused person can be convicted on his own confession, even when retracted, if the court is satisfied of its truth. Our courts do not agree with the Indian case which laid down that before a person can be convicted on his retracted confession, there must be corroborative evidence to support it. The learned president in the present case had given his reasons in a clear, careful and comprehensive judgment as to the evidentiary value of the retracted confession. Once the statement was admitted he treated it as a retracted confession and after due caution he accepted it as true. In my view he rightly followed the principles set out by Thomson CJ (as he then was) in

Sinaraju v *Public Prosecutor.*[2] That was a murder case tried by a jury and the only evidence tendered against the accused at the trial was a retracted confession. Thomson CJ in delivering the judgment of the court said that the jury must consider the confessions with care and unless they were satisfied in the first place that the confessions were voluntary and in the second place they were true, they should not believe the confessions. Once the correct principles are applied, as they have been in this case, the matters possessed the sanctity of a pure finding of fact. In my view there was ample evidence to sustain the finding of the learned president if he believed the witnesses who gave it, as apparently he did, having seen and heard them.

The gist of the offence of criminal breach of trust is entrustment and dishonest misappropriation or conversion to own use. Once the prosecution have succeeded in proving the receipt of the money for a particular purpose the case of entrustment is made out. Dishonest misappropriation or conversion to own use involves wrongful gain to the appellant or wrongful loss to his employers for the period of the retention of the money. That must depend on the facts and circumstances of each case. Criminal breach of trust is not an offence which counts as one of its factors, the loss that is the consequence of the act, it is the act itself, which in law, amounts to an offence. The offence is complete when there is dishonest misappropriation or conversion to one's own use, or when there is dishonest user in violation of a direction, express or implied, relating to the mode in which the trust is to be discharged.

It may be observed that mere retention of money would not necessarily raise a presumption of dishonest intention but it is a step in that direction. The fact that money entrusted to be used for a particular purpose, was not used for such purpose; that there was retention for a sufficiently long time would, together with other facts and circumstances justify the inference that the appellant had dishonestly misappropriated or converted the money to his own use. There was the intention in the appellant to deprive his employers of their monies, and the appellant misappropriated the monies for a time, intending to make it good eventually when any further retention became impossible.

In the light of the above observations which are in the nature of principles of general application in cases of criminal breach of trust, and after giving careful consideration to the facts and circumstances of the case before this court, I have reached the conclusion that the result of the evidence on record is that what was done or omitted by the appellant was moved by a guilty mind. On two occasions he had received the monies but had failed to carry out the trusts reposed in him. On the third occasion there exists strong circumstantial evidence of guilt.

It remains now to consider the other ground of appeal. It was submitted that the learned president erred in drawing the inference of guilt from the fact that the monies had not reached the Kuala Lumpur head office on the dates specified in the three charges. Counsel argued that the monies might have been handed on subsequent dates which

accordingly would have been recorded in subsequent returns and which have not been examined by Enche Suleiman. The learned president held the view that this fact by itself did not point to guilt but was a factor to be considered in establishing guilt.

That, in my opinion, is the right approach; the learned president is not guilty of any error of principle and I certainly do not take the view that his judgment reveals any misapprehension of the effect of the evidence which was called before him.

It is settled law that mere failure of the appellant to account for the monies entrusted to him on the dates specified in the three charges might not be a foundation of his conviction in all cases but where he was unable to account and render an explanation for his failure, which was not true, an inference of misappropriation with dishonest intent might readily be made. In my opinion if there was such subsequent payments then the Singapore office of Malaysia-Singapore Airways which did the processing of all daily returns would have discovered the same. The learned president found as a fact that the Singapore office did not find that the monies were subsequently paid. The other aspect of the matter is that since this is within the knowledge of the appellant, whose duty it was to prepare these returns, it was up to him to show the existence of such fact which is consistent with his innocence. He has failed to do that. For the purpose of establishing dishonest intention, it is not the law in this country, any more than it is the law in India, that the prosecution should go further and also prove the actual mode of misappropriation or conversion. Once the prosecution have proved that the appellant was entrusted with money for a specific purpose and that he has failed to account for it or has done something which is clearly indicative of his dishonest intention, the charge of dishonest misappropriation must be held to have been established unless the appellant shows the existence of some fact or circumstance within his own knowledge which is consistent with his own innocence. It must be stated here that for the purpose of establishing dishonest intention the prosecution is not required to eliminate all possible defences and circumstances which might exonerate the appellant, or that apart from proving the appellant's possession of the money and his inability to account for it, it has also to prove the exact manner of his disposal of the money in a manner contrary to the purpose for which he received it.

The offence of criminal breach of trust has so polarized the country that we can no longer accept it with the same passivity we have displayed towards such evil before. Unless the offence is met with substantial sentence adequate deterrence will not be achieved. As I have said before and I say it again, the sentence must reflect the gravity of the offence. The present case is one of extreme premeditation. The appellant whose duty it was to account for all monies entrusted to him, had failed to discharge his responsibilities. In my view the sentence of 12 months is not adequate. However, I would not interfere with the sentence. My observation is directed to would-be offenders and to those whose duty it would be to hear similar cases.

The appeal is dismissed.

Appeal dismissed.

R Ponnudurai for the Appellant.
Ajaib Singh (Senior Federal Counsel) for the Respondent.

Notes

In *Sathiadas* v *Public Prosecutor* [1970] 2 MLJ 241 Raja Azlan Shah (as he then was) dealt with the ingredients of the offence of criminal breach of trust. The gist of the offence of criminal breach of trust is entrustment and dishonest misappropriation or conversion to own use, or when there is dishonest user in violation of a direction express or implied, relating to the rule in which the trust is discharged. It is settled law that mere failure of a person to account for moneys entrusted to him might not be a foundation for his conviction in all cases but where he was unable to account and renders an explanation, which was not true, an inference of misappropriation with dishonest intent might readily be made.

The decision in this case was referred to with approval by Shankar J is *Abdul Kadir bin Abdul Rahman* v *Public Prosecutor* [1984]1 MLJ 80.

(j) Theft: section 379

Tan Foo Su
v
Public Prosecutor

[1967] 2 MLJ 19 High Court, Raub

Cases referred to:-
(1) *R* v *Virasami* (1896) ILR 19 Mad 375.
(2) *Goh Ah Yew* v *Public Prosecutor* [1949] MLJ 153.
(3) *Abu Bakar* v *R* [1963] MLJ 288

RAJA AZLAN SHAH J (delivering oral judgment): The appellant was convicted of the offence of theft of 21 old wooden beams to the value of $10.50 belonging to one Abdullah bin Mukim Mat, an offence under section 379 of the Penal Code. He was found guilty and convicted, and fined a sum of $300, in default three months imprisonment. The facts are as follows: the complainant found that 21 old wooden beams which he had placed on his land were missing and the missing beams were subsequently traced to the appellant, in the circumstances which *prima facie* established an offence under section 379 of the Penal Code.

There are two grounds of appeal. Firstly, that the learned trial magistrate erred in law in not exercising his discretion under section 259 (i) of the Criminal Procedure Code (Cap 6) in adjourning or

postponing the case to enable the appellant to call a witness by the name of Kamal Ariffin. Secondly, that the learned trial magistrate was wrong in presuming that under section 114(g) of the Evidence Ordinance that if Kamal Ariffin were called to give evidence his evidence would be unfavourable.

The appellant gave evidence on oath to the effect that the beams were given to him by a contractor named Kamal Ariffin and that he did not steal them from the complainant. In cross examination he said that Kamal Ariffin had no land near his place and that he took the said beams by the side of a bridge. That was all he said in the court below. Kamal Ariffin was not called as a defence witness and there is no mention in the record that the appellant had asked for an adjournment in order to call that witness.

Section 259(i) of the Criminal Procedure Code gives a magistrate an unfettered discretion to postpone or adjourn a criminal trial where a witness is absent or for any other reasonable cause. Reasonable cause is a term of art for lawyers and no definite ruling can be laid down; each case must be dealt with according to its own peculiar circumstances. It is no doubt an important adjunct to the administration of justice that there will be the least possible delay in trying a criminal case. However, considerations may occur when a postponement or adjournment of a trial becomes desirable, namely, that a witness who has been named by an accused person is absent on the date of trial. It has been held in a similar case that the absence of a witness affords a reasonable cause for adjourning a criminal trial: see *R* v *Virasami*[1]. Every latitude must be given to an accused person to defend his case and to call witnesses, more so when the accused person is not represented. In my view, the circumstances of this case warranted an adjournment so that the witness named by the appellant may be called.

With regard to the second ground of appeal, it was said by counsel on behalf of the appellant that the adverse comment made by the learned magistrate amounts to a misdirection which justifies the appeal to be allowed. In the grounds of judgment the learned magistrate said, and I quote:

> In his defence the accused denied taking those beams from the land of PW 1 and said that they were given to him by one Kamal Ariffin. He did not call any witness to substantiate his evidence.

Up to that point no criticism can be levelled against the judgment of the learned magistrate. However, the learned magistrate went further to say, and I quote:

> I think it is not enough for the accused simply to deny taking those beams in order to create a reasonable doubt in the case for the prosecution. Furthermore, if Kamal Ariffin did exist why he did not call him to give evidence for the defence. From this failure I invoked the provision of section 114 illustration (g) of the Evidence Ordinance 1950 and presumed that if he were called to give evidence his evidence would be unfavourable to the accused.

That, to my mind, is a misdirection. It is the duty of the court to consider the defence story which may produce one of three results, namely, that if the court is convinced of the truth of the accused's story or that it created a reasonable doubt as to guilt, then the court must acquit the accused person. Sometimes the defence story strengthens the prosecution case and in that case the court has to find the accused guilty. But it is not the duty of the accused person to prove his innocence, far less to produce or to bring a particular witness to support his story. Failure of the defence to produce a particular witness must not be made the subject of adverse comment by the court, otherwise it would amount to a misdirection. In my view, the learned magistrate overlooked the authorities on that point which are afforded by the case of *Goh Ah Yew* v *Public Prosecutor*[2] and the case of *Abu Bakar* v *R*[3] where the comments made by the trial district judge in the latter case is almost similar to the present case. In that case the appellate court said that there is no duty cast upon the defence in a criminal case to call any evidence and no inference unfavourable to him can be drawn. There the learned trial district judge appeared to have drawn an unfavourable inference because the absent witness was not called by the defence. And so in this particular case. If the learned magistrate had not over-looked those two authorities I am sure he would not have misdirected himself on this point.

In the circumstances this appeal is allowed. The conviction and sentence are set aside, and the fine paid by the appellant is to be refunded to him.

Appeal allowed.

Loo Sim Soo for the Appellant.
Abdullah Ghazali (Deputy Public Prosecutor) for the Respondent.

(k) Murder and culpable homicide: section 299 and 300.

Tham Kai Yau & Ors
v
Public Prosecutor

[1977] 1 MLJ 174 Federal Court, Kuala Lumpur
Coram: Gill CJ (Malaya), Ali and Raja Azlan Shah FJJ

Case referred to:-
(1) *Lee Choon Huat* v *Public Prosecutor* [1971] 2 MLJ 167.

RAJA AZLAN SHAH FJ (delivering the judgment of the Court): The appellants were charged with murder under section 302, read with section 34, Penal Code and after a trial extending over fifteen days they were convicted on that charge and sentenced to death.

The incident giving rise to this case took place at about 9.00 am on

April 9, 1974 at the New Market, in the Old Town of Petaling Jaya. However, two days before that date there was an altercation between the deceased and appellant 1 and his brother who kept a pork stall opposite that of deceased, a pork-seller by profession, resulting in deceased assaulting both of them. A police report was lodged by appellant 1. With that background showing the estranged relationship between deceased and appellant 1 it is alleged by the prosecution that the appellants and probably one other made an attack with choppers and saw on the deceased. The appellants were brothers and worked and lived separately, and a point stressed to us by the prosecution and indeed to the trial court was that on that fatal morning they converged at the same time and at the same place and attacked the deceased inflicting multiple deep incised wounds, two of these being head wounds of a serious nature, thus showing that they were acting in concert in pursuance of a pre-arranged plan. The only witness who spoke of the occurrence is PW8, the son of the deceased, a student of La Salle Secondary School, then aged 13 years, and 14 years at the date of trial. He was allowed to give evidence on affirmation as the learned judge held that he understood the nature and meaning of the oath. He said that morning he was assisting his father at the stall. Appellant 1 came and challenged his father to a fight. He knew the appellant as he had seen him before that date in the market at his brother's stall. His father did not accept the challenge; the appellant then went away and returned almost immediately with 3 men (in cross-examination he said 4 men). He identified one of them as appellant 4. He said appellant 1 was armed with a saw and the others were armed with choppers. They slashed his father; PW8 said he saw two blows landed on his father, but could only say one landed on his cheek; the father then ran to the first floor; three of the assailants, one of them being appellant 1, pursued him. He ran out of the market and shouted for help. He then rushed to the first floor. On the way up, he saw the same three men coming downstairs — appellant 1 carrying a saw and the other two carrying choppers. He found his father lying on the floor in a pool of blood. With the help of his aunt, PW9, the deceased was carried downstairs and taken to hospital where he died some $1^1/_2$ hours later.

PW9, deceased's elder sister who had a vegetable stall in another area of the market testified that she was attracted by the commotion upstairs and by someone shouting to her that her younger brother was attacked. She rushed upstairs. On the landing which separated the first flight of stairs and the second, she saw four persons coming down the stairs. She identified appellant 3 who she said she had seen once before that date, as one of the 4 persons. He was holding a chopper and his clothes were covered with blood. After deceased was sent to hospital, PW 9 went to his stall and picked up some money from the floor and stall. She also picked up three choppers — two from the stall and one from the floor. She wrapped them, took them home and later handed them to the police. On the blade of one of the choppers was 9 strands of human head hair and 2 strands of pig hair; on another 6 strands of human head hair and 2 strands of pig hair.

PW11, deceased's brother-in-law, a vegetable-seller at the same market, identified appellant 4 who was then going down the stairs. He said when he heard the commotion had spread to the first floor he rushed upstairs. He saw 3-4 persons going down by the other staircase nearer the pork stalls. They had almost reached the ground floor. He noticed appellant 4 was just about to go down. He was holding a chopper and his clothing was stained with blood.

PW10, a seamstress, living at the same address as appellant 4 at Setapak testified that at about 9.45 am of the fatal day, appellants 1, 2 and 3 came in. She noticed appellant 2 had a severe head wound and appellant 1 had a leg injury. She dressed and bandaged the wounds. Appellants 2 and 3 then left. Appellant 4 returned and later at about 1.00 pm both appellants 1 and 4 left the house.

Appellants 1 and 2 went to General Hospital Kuala Lumpur to get treatment. Both were arrested at about 2.30 pm. Appellant 3 had a head injury and one on upper part of right arm. He was arrested at 7.16 pm. Appellant 4 was arrested at 10.00 pm.

At about 4.00 pm on the same day appellant 1 led a police party to appellant 4's house where 3 choppers were recovered; one had human blood (insufficient for grouping) and the other two had human blood and human head hairs on the blades, and a saw stained with human blood on the handle. The blade was dented.

It was stressed to us in argument that all these 3 prosecution witnesses were relatives of the deceased, and therefore interested witnesses. PW8 picked out appellants 1 and 4 at an identification parade held 8 days later. No identification parade was held for PW9 and PW11 in respect of appellants 3 and 4.

As to the actual subject-matter of the charge, it cannot be disputed that the deceased was attacked by the appellants and probably one other armed with choppers and saw, at the time and place alleged by the prosecution and he died the same day as a result of the multiple injuries he received. These facts were not controverted by the defence, and in fact they were proved beyond reasonable doubt by PW8, corroborated by PW9 and PW11, and the medical evidence.

The pathologist testified that in his opinion the probable cause of death was multiple injuries leading to shock and haemorrhage. On the question whether the appellants intended to cause such bodily injuries as they knew to be likely to cause death or such as is sufficient in the ordinary course of nature to cause death, the medical witness should have been asked to give his opinion on the nature of the injuries and its likely and natural effect, but in this respect his evidence is silent.

The appeal was brought on several grounds. We did not intend to deal with all of them as we felt there was not much substance in them. We needed to consider only two. One of them was that the jury were not given due warning against accepting the evidence of PW8 who was 13 years of age at the time of the incident and 14 when he gave evidence, without corroboration. In cases involving child evidence of tender years, we are of the opinion that it would not be necessary to give a formal warning that it is dangerous to convict on the uncorroborated

evidence of a child of tender years. It is sufficient if the judge adopts the prudent course of advising the jury to pay particular attention to or to scrutinise with special care, the evidence of young children and explains the tendencies of children to invent and distort. The objection in such a case as this, is not on the grounds of complicity, as in the case of an accomplice, or on the grounds of an oath against an oath, as in the case of a prosecutrix in a sexual offence against her, but on the ground of tendency of a child of tender years to confuse fantasy with reality: see *Loo Chuan Huat* v *Public Prosecutor*.[1]

In the present case, however, the learned judge did not consider PW8, a child of tender years and he was satisfied that he possessed sufficient intelligence to understand the meaning and significance of an oath. The absence of such warning therefore was not fatal as there was in fact substantial corroboration of the boy's evidence. The appeal on this ground, we thought, must therefore fail.

A more difficult question that called for decision in this case was the offence of which the appellants should have been convicted. That was the other important ground of appeal, namely, that the learned trial judge failed to direct the jury properly or sufficiently or at all that where there is more than one inference which can reasonably be drawn from a set of facts, the inference most favourable to the accused should be adopted. In amplification of this ground of appeal we feel that it is the proper practice in cases of personal violence resulting in death for the judge to direct the jury on the right issue, in such a case as this, to arrive at a conclusion as to the degree of *mens rea* in the minds of the appellants. It cannot be disputed that intention is a matter of inference. The deliberate use by some men of dangerous weapons at another leads to the irresistible inference that their intention is to cause death. This inference should therefore make it a simple matter to come to a decision as to intention, in any case, such as the present, where the weapons used by the appellants were deadly weapons and where the person killed was struck more than one blow. In actual practice however it is frequently a matter of considerable difficulty to arrive at a conclusion by application of this principle in view of the close connection that the Penal Code makes between intention and knowledge. The provisions relating to murder and culpable homicide are probably the most tricky in the Code and are so technical as frequently to lead to confusion. Not only does the Code draw a distinction between intention and knowledge but subtle distinctions are drawn between the degrees of intention to inflict bodily injury.

We therefore intend to deal at some length to emphasise and to discuss the distinctions between the provisions of section 299, section 300 of the Penal Code.

Section 299, Penal Code enacts that a person commits culpable homicide, if the act by which the death is caused is done: (a) with the intention to cause death; (b) with the intention of causing such bodily injury as is *likely* to cause death; (c) with knowledge that ... the act is *likely* to cause death.

Section 300, Penal Code defines murder as follows. Except in the

cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done: (1) with the intention of causing death; (2) with the intention of causing such bodily injury as the offender *knows to be likely* to cause the death of the person to whom the harm is caused; (3) with the intention of causing such bodily injury to any person, and ... *is sufficient in the ordinary course of nature* to cause death; (4) with the knowledge that the act is *so imminently dangerous that it must in all probability cause death,* or such bodily injury as is likely to cause death.

The words which I have italized show the marked differences between the two offences. Where there is an intention to kill, as in (a) and (1), the offence is always murder. Where there is no intention to cause death or bodily injury, then (c) and (4) apply. Whether the offence is culpable homicide or murder depends upon the degree of risk to human life. If death is a likely result, it is culpable homicide, if it is the most probable result, it is murder. Illustration (d) of section 300, Penal Code is a case of this description. Where the offender knows that the particular person injured is likely, either from peculiarity of constitution, immature age, or other special circumstances, to be killed by an injury which would not ordinarily cause death, it is murder. Illustration (b) of section 300, Penal Code is a good example. The essence of (b) and (3) is this. It is culpable homicide if the bodily injury intended to be inflicted is likely to cause death, it is murder, if such injury is sufficient in the ordinary course of nature to cause death. Illustration (c) given in section 300, Penal Code is an example. It is on a comparison of these two limbs of section 299 and section 300 that the decision of doubtful cases as the present must generally depend. The distinction is fine, but noticeable. In the last analysis, it is a question of degree of probability.

A comparison that frequently arises in the application of sections 299 and 300 is the tenuous contention that section 299 is not a substantive offence and therefore an offence is either murder or culpable homicide according to whether or not one of the exceptions to section 300 apply, and if by reason of the absence of the necessary degree of *mens rea* an offence does not fall within section 300, it cannot be one of culpable homicide not amounting to murder punishable under section 304, Penal Code, but would amount to causing grievous hurt. In our view, the correct approach to the application of the two sections is this. Section 299 clearly defines the offence of culpable homicide. Culpable homicide may not amount to murder (a) where the evidence is sufficient to constitute murder, but one or more of the exceptions to section 300, Penal Code apply, and (b) where the necessary degree of *mens rea* specified in section 299 is present, but not the special degrees of *mens rea* referred to in section 300, Penal Code. We would like in this connection to express the need to bear in mind that all cases falling within section 300, Penal Code must necessarily fall within section 299, but all cases falling within section 299 do not necessarily fall within section 300. The first part of section 304, Penal Code covers cases which by reason of the exceptions are taken out of the purview of section 300, clauses (1), (2) and (3) but otherwise would fall within it and also cases

which fall within the second part of section 299, but not within section 300, clauses (2) and (3). The second part of section 304, Penal Code covers cases falling within the third part of section 299 not falling within section 300, clause (4).

In the present appeal we think that in view of the nature of the injuries sustained by the deceased and the time and place of the incident there was evidence of an intention on the part of the appellants to cause bodily injury to the deceased. Therefore in those circumstances, the fine distinction between section 299 and section 300 is very important and that point should have been put clearly to the jury in such a way that they would be able to come to a correct conclusion. The forensic practice of reading section 299 and section 300 to juries is likely to confuse rather than help. In view of what we have stated above, a case such as the present must therefore fall within the second part of section 299 or the third clause of section 300. Speaking generally, if the act must in all probability cause death, the offence is within section 300, Penal Code, and if the act is only likely to cause death, the offence falls within section 299, Penal Code. None of the exceptions to section 300, Penal Code were established. In ordinary circumstances we should probably have had little difficulty in upholding the convictions of the appellants for murder but in view of the nature of the medical evidence which we have touched on earlier, we felt the case might not unreasonably be brought within the lesser offence of culpable homicide not amounting to murder, falling within the first part of section 304, Penal Code. We have thought it necessary to deal with this matter at some length to ensure if possible that our finding shall not be construed as a declaration that in all cases such as the present the offence is culpable homicide not amounting to murder.

We set aside the convictions for murder, and substitute them with one under the first part of section 304, Penal Code read with section 34, Penal Code and sentenced each of the appellant to 10 years' imprisonment effective from their dates of arrest.

Order accordingly.

Edmund Yong Joon Hong for the Appellants.
Abdul Malik Mohamed Salleh (Deputy Public Prosecutor) for the Respondent.

Note

In *Tham Kai Yau & Ors* v *Public Prosecutor* [1971] 1 MLJ 174 light was shed on the distinction between murder and culpable homicide not amounting to murder — in particular the difference between a case which would fall within the second part of section 299 or the third clause of section 300 of the Penal Code. If the act must in all probability cause death the offence is murder within section 300 of the Penal Code but if the act is only likely to cause death, the offence falls within section 299 of the Penal Code. As the medical evidence in the case did not make it clear whether the bodily injuries were sufficient in the ordinary course of nature to cause death or only likely to cause death, the

conviction for murder was set aside and a conviction for culpable homicide not amounting to murder substituted.

(1) Obstructing public servant 'voluntary': sections 186 and 39

Tan Teck Yam
v
Public Prosecutor

[1968] 1 MLJ 57 High Court, Selangor

Cases referred to:-
(1) *Hinchliffe* v *Sheldon* [1955] 3 All ER 406.
(2) *Rice* v *Connolly* [1966] 2 All ER 649 at p 651.

RAJA AZLAN SHAH J (delivering oral judgment): The appellant was charged with obstructing the chief assistant district officer, Kuala Lumpur, in the discharge of his public function, an offence punishable under section 186 of the Penal Code. He was unrepresented in the court below. He claimed trial and was duly convicted and sentenced to three months' imprisonment.

The facts are sufficiently stated in the learned magistrate's judgment. The appellant had for the last $3^1/_2$ years been frequenting the district office in order to apply for a piece of land on Mountbatten Road. It is not disputed that he pestered the district officer with his claim about four times a week during that period; I now quote a passage from the learned magistrate's judgment:

> After being in the chief assistant district officer's office for half-an-hour, that officer requested the appellant to leave his room as there were others outside his office who were waiting to see him. He told the appellant that he would have to call the police if he did not leave. The appellant dared him to do so and stood up and banged his file on the table. He then raised his fists and challenged the officer to a fight. He said that he could even call in his wife, and just then the wife rushed in with her hands ready for a fight. Both of them were threatening the said officer and he realised then that he had to call in the police.

Subsequently the police arrived and the appellant was apprehended. From the record,there is no doubt that the learned magistrate disbelieved the appellant's version.

For an offence under section 186 of the Penal Code the prosecution has to prove the following: (1) that there was obstructing of a public servant, (2) that the public servant was at that time discharging his public functions, and (3) that the person obstructing did so voluntarily. It is in my view clear that to obstruct under section 186 of the Penal Code is to do an act which makes it more difficult for a public servant to carry out his duties. I take that definition of 'obstruction' from the case

of *Hinchliffe* v *Sheldon*.[1] It is therefore quite clear that the appellant was making it more difficult for the chief assistant district officer to discharge his public function and that the said officer was at that time involved in discharging his public functions. The only remaining element of the alleged offence is whether the obstruction was voluntary. That brings me to section 39 of the Penal Code which defines 'voluntarily' as:

> A person is said to cause an effect 'voluntarily' when he cause it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it.

The definition of the term 'voluntarily' bears resemblance to the definition of 'wilfully' current in the English law: see Raltanlal, *The Law of Crime* 21st Ed p 82). In *Rice* v *Connolly*[2] Lord Parker, CJ said:

> 'Wilful' in this context in my judgment means not only 'intentional' but also connotes something which is done without lawful excuse.

It is clear in the present case that the appellant had a licence to be in the chief assistant district officer's office. When he was told to leave, the licence expired and thenceforth he became a trespasser and consequently he had no lawful excuse for his presence in that office. In my judgment the learned magistrate has given full effect to the law under section 186 of the Penal Code. The appeal against conviction is dismissed.

I now come to sentence. It has been said over and over again that an appellate court is reluctant to interfere in matters of sentence unless it can be shown to be manifestly excessive. Each case must be decided on its merits. For my part, I am of the opinion that the circumstances of this case do not warrant a severe sentence of three months. No harm has been done to anybody except the appellant himself. It is not improper to say that the appellant has allowed passion to take the place of reason, and I think that the sentence imposed by the learned magistrate is unduly excessive. In the circumstances I would allow the appeal against sentence, set aside the sentence of three months imprisonment, and substitute an order of binding over under section 294 of the Criminal Procedure Code to keep the peace for a period of one year in the sum of $500.

Appeal against conviction dismissed.
Appeal against sentence allowed.
Sentence of imprisonment set aside.
order of binding over substituted.

T Selvarasan for the Appellant.
Zaiton Osman (Deputy Public Prosecutor) for the Respondent.

(m) Dishonestly using a forged identity card

Cheong Khean Sheng
v
Public Prosecutor

[1970] 2 MLJ 175 High Court, Kuala Lumpur

RAJA AZLAN SHAH J: The charge against the appellant was that he dishonestly used as genuine a Singapore identity card in order to exchange it for a Federation identity card and that he knew or had reason to believe it to be forged.

The learned magistrate convicted him under section 471 of the Penal Code read with section 465 of the Penal Code and sentenced him to 6 months' imprisonment.

The facts of the case may now briefly be stated. The appellant claimed to be the holder of a Singapore identity card No S M 08722. He applied to the registration officer Petaling Jaya for an exchange of his Singapore identity card. He was interviewed and he presented his Singapore identity card to the registration officer as evidence. The Singapore identity card was later verified from the Singapore registration office to be a forgery. The real Singapore identity card bearing that number was issued to a Chinese lady who gave evidence for the prosecution. There was therefore in this case sufficient 'use' of a forged document as genuine. On these facts, the appellant was charged and convicted as stated earlier.

The defence was that the identity card was not forged; that his uncle, since deceased, had obtained it for him at the Singapore National Registration Office, that he never doubted its genuiness nor could he believe it to be forged. He therefore pleaded that he never knew, nor had reason to believe that the identity card was a forged document. He called no witness.

The first contention on behalf of the appellant was that his identity card is not forged, but I have no doubt that it is forged. The identity card told a lie about itself. The learned magistrate has given good and cogent reasons for his conclusion on the point and in my view, they correctly answer all the criticisms of the appellant.

It is next contended that the circumstances established in the case do not establish that the appellant knew or had reason to believe that the identity card which he was dishonestly using was forged. The mere fact that the identity card was forged would not conclude the matter unless it was also established that the appellant knew or had reason to believe that at the time it was alleged to be used it was a forgery. The learned magistrate found as a fact that at the time when the impugned identity card was obtained by his uncle he knew it was a forged document and that he retained that knowledge when he made the present application. Putting it in a compendious term, the learned magistrate was satisfied that at the time when the appellant 'used' the forged document he knew

that it was forged. I agree with his conclusion but not with his reasoning. The duty of a court hearing an appeal from the decision of a lower court is to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of the witnesses come in question but with full liberty to draw its own inference from the facts proved and to decide accordingly.

In the present case there is no question of the credibility of witnesses. The material facts so far as they are known, are not disputed and this court is at liberty, and indeed, is bound to draw its own inference from them. It is sufficient to say that once one looks at the issues before the court, which one can gather from the facts which have already been stated, it is only too plain to conclude that there was no such uncle as the appellant had suggested and that there would therefore be no such person who had obtained the identity card for him; then taking the evidence as a whole, including that for the prosecution, any court acting reasonably would have come to the inescapable conclusion that at the time the identity card was alleged to be used the appellant knew that it was a forgery.

Appeal against conviction dismissed.

Appeal dismissed.

T Ariarajah for the Appellant.
Ajaib Singh (Senior Federal Counsel) for the Respondent.

SEDITION
(a) Whether of seditious tendency

Public Prosecutor
v
Ooi Kee Saik & Ors

[1971] 2 MLJ 108 High Court, Kuala Lumpur

Cases referred to:-
(1) *McFarlane* v *Hulton* [1899] 1 Ch 884.
(2) *Wallace-Johnson* v *The King*[1940] AC 231, 240.
(3) *Queen Express* v *Balagangadhar Tilak* ILR (1897) 22 Bom. 112.
(4) *Burns* v *Ransley* (1949) 79 CLR 101.
(5) *Niharendu Majamdar* v *King Emperor* (1942) FCR 38.
(6) *Kedar Nath* v *State of Bihar* AIR (1962) SC 955.
(7) *King Emperor* v *Sadashiv Narayan* LR 74 IA 89.
(8) *Queen Empress* v *Amba Prasad* (1898) ILR 20 AR 55, 69.
(9) *Maniben* v *Emperor* AIR (1933) Bom 65, 67.
(10) *New York Times Co* v *Sullivan* 376 US 255 (1964).
(11) *A K Gopalan* v *State of Madras* AIR (1980) 27.
(12) *Duncan* v *State of Queensland* (1916) 22 CLR 536, 576.
(13) *Freightlines etc Ltd* v *State of New South Wales* [1967] 2 All E R 436.
(14) *Adegbenro* v *Akintola* [1963] 3 All E R 544, 550-551.
(15) *Special Reference No 1 of 1964* [1965] 1 SCR 413.
(16) *Bhagat Singh* v *King Emperor* (1930-33) 58 IA 169.

(17) *King Emperor* v *Benoari Lal Sarma* [1945] AC 14.
(18) *Australian Communist Party* v *The Commonwealth* (1951) 83 CLRI, 178-179.
(19) *Wijeysekera* v *Festing* [1919] AC 646.
(20) *Land Realisation Co Ltd* v *Post Office* [1950] 1 All ER 1062.
(21) *Akar* v *Attorney-General of Sierra Leone* [1969] 3 All ER 384, 394.
(22) *Stephen Kalong Ningkan* v *Government of Malaysia* [1968] 2 MLJ 238.

RAJA AZLAN SHAH J: Dr Ooi Kee Saik (accused No 1) is charged before this court with an offence under section 4(1)(b) of the Sedition Act, 1948, in that on November 22nd, 1970, at Sun Hoe Peng Restaurant, 25 Light Street, Penang, he uttered seditious words, namely:

> ALLIANCE POLICY OF SEGREGATION: 'EVIDENCE GALORE': Tonight's dinner is in celebration of Sdr. Lim Kit Siang's release from detention by the Alliance Government. While it is a matter for celebration, it is also an occasion to highlight the grave Alliance error in putting away a man whose speeches during the last election campaign, especially his warnings, have been more than borne out by the events since then. To say that Sdr. Lim Kit Siang's arrest was a mindless over-reaction on the part of the Alliance Government is to be kind to the Alliance Government. The fact that a true Malaysian like Sdr. Lim Kit Siang can be summarily put away without trial, is indeed a very sad testimony to the way democracy is being practised in this country.
>
> The question I keep asking myself, and I am sure there must be thousands of other thinking people in this country who feel the same way that I do, in this "Is the Alliance Government making any headway in the problem of forging a new Malaysian nation, of creating a Malaysian identity which truly and honestly reflects the various racial strands in our country?" The answer, sad to say, is a firm and categorical NO. And one of the main reasons for this is because the Alliance Government practises a policy of segregation. While we in the DAP preach a sincere and honest policy of integration, the Alliance policy merely pays lip service to it.
>
> There is evidence galore of the Alliance policy of segregation.
>
> No 1. TAKE OUR MALAYSIAN ARMY. New and better battalions are being formed from members of one ethnic group. Here you have an excellent opportunity for integration in a vital part of our national structure but this opportunity is being missed.
>
> No 2. NEW POLICE CONTINGENTS. Here again recruitment mainly from one ethnic group. Another excellent opportunity for integration being missed.
>
> No 3. SCHOOLS, COLLEGES AND UNIVERSITIES are being organised by different ethnic groups, and everybody is moving along his own separate path. Therefore, the cleavage between our future leaders and intellectuals will be all that more difficult to bridge in years to come.
>
> No 4. PUBLIC HOUSING. Another avenue for integration not being exploited. Instead, housing and shopping complexes for one ethnic group are still being built all over the country.
>
> No 5. LAND SCHEMES. Vast land schemes with real opportunities for people of all races to live and work and grow up together. Here again a golden opportunity being missed.
>
> No 6. GIGANTIC BUSINESS AND INDUSTRIAL CONCERNS are being organised, not for the benefit of ALL poor Malaysians, but again only for the benefit of one ethnic group. The latest of these is the National

Corporation. Even the Prime Minister, Tun Abdul Razak, says blatantly that this is for the benefit of one ethnic group, although this huge multi-million dollar corporation is called a 'national' corporation. Can't the Alliance Government imagine for a minute what the reaction of the country will be, and the far reacting implication of this huge corporation a 'national' corporation when it serves the interests of only one ethnic group? Is it being suggested that other groups in this country are not part of the national structure? Or is this another bad example of governmental arrogance?

Therefore, while we in the DAP strive for a policy of integration, the formation of a solid infra-structure, a solid mesh-work, which will make it physically impossible for anyone in this country to act and to behave in any way except as a Malaysian citizen, the Alliance Government prefers to hold tea-parties.

The DAP is a clear-cut party with a clear-cut policy. But more than anything else, the DAP is a pro-Malaysian party, pro-every single Malaysian citizen irrespective of his racial origin. In fact, the more exotic his racial origin, the more he is to be welcomed because in essence we are multi-racial.

It seems obvious to me that if our nation is to survive,in fact if any nation is to survive, then we must have a common denominator. A Malaysian citizen is a Malaysian citizen, full stop, and without a whole list of restrictive clauses. Therefore, whenever there are soothing but unnecessary pronouncements by Alliance ministers to the effect that 'there is a place for all under the Malaysian Sun', one begins to suspect that there are people in high places who do not agree that we all have a common denominator, that these people may be thinking in terms of comfortable shady places for one group of citizens, and hot uncomfortable places for other groups of citizens.

Fan Yew Teng (accused No 2) is charged with publishing the alleged seditious words in the December (1970) issue of *The Rocket* (English edition), the official publication of the Democratic Action Party, an offence under section 4(1)(c) of the Act.

Kok San and Lee Teck Chee (accused Nos 2 and 3) are charged with printing the alleged seditious words in the December (1970) issue of *The Rocket* (English edition) an offence under section 4(1)(c) of the Act.

The evidence tendered by the prosecution is to the effect that on the evening of November 22, 1970, the Democratic Action Party, Penang Branch held a subscription dinner at the Sun Hoe Peng Restaurant, 25 Light Street, Penang, in honour of the release from detention of Mr Lim Kit Siang, the secretary-general of the party. It was attended by approximately 380-400 members and sympathisers. Several speakers spoke at the dinner including the vice-chairman of the branch, accused No 1. Two prosecution witnesses gave evidence that accused spoke at the dinner. The first was Peter Paul Dason, an Advocate and Solicitor and a member of the Democratic Action Party. He was one of the organisers of the dinner. He testified that accused No. 1 was one of the speakers. But he said he cannot remember the exact words of accused No 1's speech that night. Only after he was referred to the publication (Exh P3) did he say 'that something to this effect was said'. The other witness was Chew Hock Chye, a licensed appraiser and a member of the

Democratic Action Party. He attended the dinner. He testified that accused No. 1 spoke at the dinner. He identified the article that appeared on page 8 of *The Rocket* (Exh. P3) as 'accused No 1's speech.'

In support on this aspect of the prosecution case, the prosecution tendered the statement of accused No 1 recorded under section 75 of the Internal Security Act, 1960 which I have ruled was made voluntarily. That statement admits that every word that was published in the December 1970 issue of *The Rocket* (English edition) was the full text of his speech. This piece of corroborative evidence established beyond doubt that the words complained of or words equivalent in substance to those words, had been spoken by accused No 1 at the dinner.

The following facts are proved against accused No 2. He is the editor of *The Rocket*. An application to publish, sell and distribute *The Rocket* was approved by government (Exh P5 and Exh D7). The name of accused No 2 is stated therein as its editor and publisher. Miss Chia Sai Teng (PW5), a clerk employed by accused Nos 3 and 4 received the impugned article from accused No 2 who took it back from her after printing. The impugned article was printed by Life Printers. In his voluntary statement to the police he admitted receiving the impugned article from Dr Ooi Kee Saik and later sending it to Life Printers for printing. *The Rocket* containing the impugned article was offered to the public for sale. The publication of the impugned article is not disputed. What is disputed is that accused No 2 is the publisher. In my opinion, when an editor offered a printed article to the public, that is sufficient evidence that he published it: see *McFarlance* v *Hulton.*[1] I am satisfied that there is evidence which is amply corroborated that accused No2 published the impugned article in the December 1970 issue of *The Rocket.*

I now come to accused Nos 3 and 4. In the application form (Exh P5) it was stated that the name and address of the printer is Life Printers of No 2, Jalan 19/1, Petaling Jaya, Selangor. Evidence was given to the effect that both accused Nos 3 and 4 jointly on October 7, 1969 applied for a printing press licence under section 3(1) of the Printing Presses Ordinance, 1948 (Exh P8). They were issued with a licence for the year 1970 (Exh P9). Miss Chia Sai Teng further testified that accused Nos 3 and 4 are the proprietors of the printing press. At the bottom of page 8 of the impugned publication there are printed the words:

> Published by the Democratic Action Party of Malaysia, 77, Jalan 20/9, Paramount Garden, Petaling Jaya, Selangor and printed by Life Printers, 2 Jalan 19/1, Petaling Jaya.

No doubt these words are inserted so as to comply with the provisions of section 5(1) of the Printing Presses Ordinance, 1948. I am satisfied beyond reasonable doubt that accused Nos 3 and 4 printed the words complained of in the same issue of *The Rocket.*

The next major question to determine is whether the words complained of were seditious within the meaning attributed to it in the Sedition Act. The Sedition Act 1948 came into force on July 19, 1948. Section 4(1) enacts:

> Any person who — (b) utters any seditious words; (c) prints, publishes... any seditious publication... shall be guilty of an offence.

Section 2 defines seditious words when applied to or used in respect of any act, speech words, publication having a seditious tendency. Section 3(1) contains the following provisions:

> A 'seditious tendency' is a tendency — (a) to bring into hatred or contempt or to excite disaffection against any Ruler or against any Government; (b) to excite the subjects of any Ruler or the inhabitants of any territory governed by any Government to attempt to procure in the territory of the Ruler or governed by the Government, the alteration, otherwise than by lawful means, of any matters as by law established; (c) to bring into hatred or contempt or to excite disaffection against the administration of justice in Malaysia or in any State; (d) to raise discontent or disaffection amongst the subjects of the Yang di-Pertuan Agong or of the Ruler of any State or amongst the inhabitants of Malaysia or of any State; or (e) to promote feelings of ill-will and hostility between different races or classes of the population of Malaysia.

On May 15, 1969, the Yang di-Pertuan Agong issued a Proclamation of Emergency — *vide* PU (A) 145/1969. On August 3, 1970, the Yang di-Pertuan Agong promulaged the Emergency (Essential Powers) Ordinance No 45/1970, which came into force on August 10, 1970. In pursuance of Ordinance No 45 certain sections of the Sedition Act were amended. A new paragraph (f) was added to section 3(1) of the Sedition Act. The amended section now provides:

> A 'seditious tendency' is a tendency — (f) to question any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III of the Federal Constitution of Article 152, 153 or 181 of the Federal Constitution.

Section 3(2) of the Act, as amended by ordinance No 45 provides:

> Notwithstanding anything in sub-section (1) an act, speech, words, publication or other thing shall not be deemed to be seditious by reason only that it has a tendency — (a) to show that any Ruler has been misled or mistaken in any of its measures; (b) to point out errors or defects in any Government or constitution as by law established (except in respect of any matter, right, status, position, privilege, sovereignty or prerogative referred to in paragraph (f) of sub-section (1) otherwise than in relation to the implementation of any provision relating thereto) or in legislation or in the administration of justice with a view to the remedying of the errors or defects; (c) except in respect of any matter, right, status, position, privilege, sovereignty or prerogative referred to in paragraph (f) of sub-section (1):
>
> (i) to persuade the subjects of any Rulers or the inhabitants of any territory governed by any Government to attempt to procure by lawful means the alteration of any matter in the territory of such Government as by law established; or
>
> (ii) to point out, with a view to their removal, any matters producing or having a tendency to produce feelings of ill-will and enmity between different races or classes of the population of the Federation,

> if the act, speech, words, publication or other thing has not otherwise in fact a seditious tendency.

Section 3(3) is not affected by Ordinance No 45/70. It provides:

> For the purpose of proving the commission of any offence against this Act the intention of the person charged at the time he ... uttered any seditious words or printed, published ... any publication ... shall be deemed to be irrelevant if in fact the ... words, publication ... had a seditious tendency.

In interpreting the Sedition Act, 1948, I have been urged by Sir Dingle Foot to follow the common law principles of sedition in England. In England it can now be taken as established that in order to constitute sedition the words complained of are themselves of such a nature as to be likely to incite violence, tumult or public disorder. I can find no justification for this contention. The opinion of the Judicial Committee of the Privy Council in *Wallace-Johnson* v *The King*[3] demonstrated the need to apply our own sedition law although there is close resemblance at some points between the terms of our sedition law and the statement of the English law of sedition. I can find of no better reason than that of Stratchey J who pointed out in *Queen Empress* v *Balagangadhar Tilak*[3] that the Indian law of sedition which is found in section 124A of the Indian Penal Code (which is quite similar to section 3(1) of our Sedition Act) is a statutory offence and differs in that respect from its English counterpart which is a common law misdemeanour elaborated by the decisions of the judges. The English common law of sedition was received in Australia but the offence is now statutory. The statutory definitions of sedition which are to be found in the Crimes Act 1914-1946 of Australia are almost identical with the common law definition and yet in the prevailing decision in *Burns* v *Ransley*,[4] Latham CJ found it unnecessary to consider the common law of sedition. In my view there is a good deal to be said for the enlightened view. Although it is well to say that our sedition law had its source, if not its equivalent from English soil, its waters had, since its inception in 1948, flowed in different streams. I do not think it necessary to consider the matter in great detail because I have been compelled to come to the conclusion that it is impossible to spell out any requirement of intention to incite violence, tumult or public disorder in order to constitute sedition under the Sedition Act. The words of subsection (3) of section 3 of our Sedition Act and the subject-matter with which it deals repel any suggestion that such intention is an essential ingredient of the offence.

I reject the liberal interpretation of the provisions of section 124A of the Indian Penal Code as adopted by courts in India which brought the Indian law of sedition at par with English law: see *Niharendu Majumdar* v *King Emperor;*[5] *Kedar Nath* v *State of Bihar*[6] I rely on the strict and literal interpretation as adopted by the Privy Council cases: see *Tilak's* case, *supra; Wallace-Johnson, supra; King Emperor* v *Sadashiv Narayan*[7].

In my view what the prosecution have to prove and all that the prosecution have to prove is that the words complained of, or words equivalent in substance to those words, were spoken by accused No 1 at

the dinner party. Once that is proved the accused will be conclusively presumed to have intended the natural consequences of his verbal acts and it is therefore sufficient if his words have a tendency to produce any of the consequences stated in section 3(1) of the Act. It is immaterial whether or not the words complained of could have the effect of producing or did in fact produce any of the consequences enumerated in the section. It is also immaterial whether the impugned words were true or false: see *Queen Empress* v *Ambra Prasad*[8]. And it is not open to the accused to say that he did not intend his words to bear the meaning which they naturally bear: see *Maniben* v *Emperor.*[9]

Before I proceed to deal with the facts there is one point which assumes importance in the defence submission. Sir Dingle Foot has stressed the need to give the greatest latitude to freedom of expression. Dato Seenivasagam, as I understand him, said that the Sedition Act strikes at the very heart of free political comment. It is of course true, as a general statement, that the greatest latitude must be given to freedom of expression. It would also seem to be true, as a general statement, that free and frank political discussion and criticism of government policies cannot be developed in an atmosphere of surveillance and constraint. But as far as I am aware, no constitutional state has seriously attempted to translate the 'right' into an absolute right. Restrictions are a necessary part of the 'right' and in many counries of the world freedom of speech and expression is, in spite of formal safe-guards, seriously restricted in practice. In the United States all types of speech 'can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment': see *New York Times Co* v *Sullivan*[10]. The Supreme Court of India too has conceded that fundamental rights are subject to limitations in order to secure or promote the greater interests of the community. If I may quote a passage from *A K Gopalan* v *State of Madras:*[11]

> There cannot be any such thing as absolute or uncontrolled liberty wholly free from restraint; for that would lead to anarchy and disorder. The possession and enjoyment of all rights ... are subject to such reasonable conditions as may be deemed to be, to the governing authority of the country, essential to the safety, health, peace and general order and moral of the community .... What the Constitution attempts to do in declaring the rights of the people is to strike a balance between individual liberty and social control.

In England too, there is no unrestricted freedom of expression. *Dicey's* summary of the situation still holds good:

> Freedom of discussion in England is little else than the right to write or say anything which a jury of 12 shopkeepers think it expedient should be said or written. Such 'liberty' may vary at different times from unrestricted licence to severe restraint ... the amount of latitude conceded to the expression of opinion has in fact varied greatly according to the condition of popular sentiment.

(See *Law of the Constitution,* 3rd edition, p231). In this connection it is not out of place if I quote the well-known words of Sir Samuel Griffith

CJ in *Duncan* v *State of Queensland*,[12] which were quoted in the Privy Council case of *Freightlines, etc Ltd* v *State of New South Wales*:[13]

> But the word 'free' does not mean extra *legem* any more than freedom means anarchy. We boast of being an absolutely free people, but that does not mean that we are not subject to law.

My purpose in citing these cases is to illustrate the trend to which freedom of expression in the constitutional states tends to be viewed in strictly pragmatic terms. We must resist the tendency to regard right to freedom of speech as self-subsistent or absolute. The right to freedom of speech is simply the right which everyone has to say, write or publish what he pleases so long as he does not commit a breach of the law. If he says or publishes anything expressive of a seditious tendency he is guilty of sedition. The Government has a right to preserve public peace and order, and therefore, has a good right to prohibit the propagation of opinions which have a seditious tendency. Any government which acts against sedition has to meet the criticism that it is seeking to protect itself and to keep itself in power. Whether such criticism is justified or not, is, in our system of Government, a matter upon which, in my opinion, Parliament and the people, and not the courts, should pass judgment. Therefore, a meaningful understanding of the right to freedom of speech under the Constitution must be based on the realities of our contemporary society in Malaysia by striking a balance of the individual interest against the general security or the general morals, or the existing political and cultural institutions. Our sedition law would not necessarily be apt for other people but we ought always to remember that it is a law which suits our temperament.

A line must therefore be drawn between the right to freedom of speech and sedition. In this country the court draws the line. The question arises: where is the line to be drawn; when does free political criticism end and sedition begin? In my view, the right to free speech ceases at the point where it comes within the mischief of section 3 of the Sedition Act. The dividing line between lawful criticism of Government and sedition is this — if upon reading the impugned speech as a whole the court finds that it was intended to be a criticism of Government policy or administration with a view to obtain its change or reform, the speech is safe. But if the court comes to the conclusion that the speech used naturally, clearly and indubitably, has the tendency of stirring up hatred, contempt or disaffection against the Government, then it is caught within the ban of paragraph (a) of section 3(1) of the Act. In other contexts the word 'disaffection' might have a different meaning, but in the context of the Sedition Act it means more than political criticism; it means the absence of affection, disloyalty, enmity and hostility. To 'excite disaffection' in relation to a Government refers to the implanting or arousing or stimulating in the minds of people a feeling of antagonism, enmity and disloyalty tending to make government insecure. If the natural consequences of the impugned speech is apt to produce conflict and discord amongst the people or to create race hatred, the speech transgresses paragraphs (d) and (e) of section 3(1).

Again paragraph (f) of section 3(1) comes into play if the impugned speech has reference to question any of the four sensitive issues — citizenship, national language, special rights of the Malays and the sovereignty of the Rulers.

The speech begins by reference to Lim Kit Siang who had been detained without trial. It goes on to say that his arrest was a mindless over-reaction on the part of the Alliance Government. After saying that his detention without trial reflects the way how democracy is practised in Malaysia, we come to the second paragraph which shows the standpoint of the speech. It says the reason why the Alliance Government is not making any headway in the problem of forging a new Malayisan nation, of creating a Malaysian identity which truly and honestly reflects the various racial strands in our country is because the Alliance Government practices a policy of segregation. It then cites six instances of the Alliance Government's policy of segregation. The third and fourth paragraphs refer to the Democratic Action Party's stand in building a multi-racial Malaysian nation. The fifth paragraph stresses the need to have a common denominator. It says a Malaysian citizen is a Malaysian citizen full-stop and without a whole list of restrictive clauses. It goes on to say that when Alliance Ministers made pronouncements that there is a place for everybody under the Malaysian sun, those pronouncements are tainted with partiality, favouring one group of citizens in place of another.

My purpose in making the citation from the impugned speech is to show why I think that the speech which is certainly full of hatred and bitterness is clearly directed against the Government. It is doing exactly what Stratchey, J in *Tilak's* case said must not be done:

> But if he goes on beyond that, and, whether in the course of comments upon measures or not, holds up the Government itself to the hatred or contempt of its readers — as for instance, by attributing to it every sort of evil and misfortune suffered by the people, or imputing to it base motives, or accusing it of hostility or indifference to the welfare of the people — then he is guilty under the section, and the explanation will not save him.

There can be no doubt that Dr Ooi's speech was very carefully prepared. It was not made casually and without purpose. The real gravamen of the charge which Dr Ooi brings against the Government is that Government is siding the Malays. Dr Ooi refer to six instances in which it is said that the Malays are in a privileged position. The speech seems to me to be a sustained attempt on the part of Dr Ooi to hold the Government in hatred and contempt and to excite disaffection. I must point out that allegations of partiality (and we are not concerned with its falsity or truth) in favour of one ethnic group is of itself clear evidence on the part of Dr Ooi to bring the Government into hatred or contempt, or excite feelings of disaffection against the Government. To accuse the Government of gross partiality in favour of one group against another is, in my opinion, calculated to inspire feelings of enmity and disaffection amongst the people of this country. I further find that Dr Ooi's scurrilous attacks on one ethnic group and disseminating false views

played a significant part in creating racial tensions that on another occasion had resulted in race riots. Such speech is apt to promote feelings of ill-will and hostility among the different races in this country. The speech also touches on the special rights of the Malays. The baseness of its motives lies in the readiness of Dr Ooi to touch on this sensitive issue. That, in my view, is caught within the mischief of paragraph (f) of section 3 (1) of the Act.

In my view the speech taken as a whole, after making all allowances for the enthusiasm of the speaker, goes very much beyond the limits of freedom of expression. It proceeds upon well worn lines — partiality of Government in favour of the Malays. I am satisfied that the impugned speech is expressive of a seditious tendency.

That is not the end of the matter. Sir Dingle Foot has attacked the validity of the Emergency (Essential Powers) Ordinance No 45 of 1970, on the ground that it infringes the legislative authority of the Federal Parliament which is vested in a Parliament consisting of the Yang di-Pertuan Agong and both Houses of Parliament Article 44. In other words, learned counsel says Parliament only can legislate emergency laws and any legislative power assigned to the executive is unconstitutional amounting to an abrogation by Parliament of its power to legislate. With due respect I think that contention is untenable. Were learned counsel reviewing the situation in England I would have agreed with his proposition. In England the executive does not possess such independent power of legislation. Nor is there a precedent of such a power existing in the Dominions except in India: see Article 123 of the Indian Constitution. It is true that like the Queen in England, the Yang di-Pertuan Agong is a component part of Parliament. But our Constitution is framed in such language as by known intentions of the draftsman to allow for far-reaching powers in the Yang di-Pertuan Agong in the sphere of legislation when Parliament is not sitting. Article 150 confers on His Majesty powers to promulgate emergency laws. His Majesty is the sole judge of the necessity of issuing emergency laws and he is not to give reasons for promulgating it. It is therefore clear that the power of the Yang di-Pertuan Agong to legislate by Ordinance when Parliament is not sitting is co-extensive with the power of Parliament itself.

That brings me to one point taken by Dato SP Seenivasagam. Learned counsel's argument is based on the premise that since emergency laws promulgated when Parliament is not sitting have a temporary existence, such laws must receive legislative sanction on the re-covening of Parliament and that implies that the Yang di-Pertuan Agong must summon Parliament as soon as possible and not wait until 1 year and 9 months after the proclamation of emergency. Clause (2) of Article 150 is enacted in two parts. The first part provides:

> If a Proclamation of Emergency is issued when Parliament is not sitting, the Yang di-Pertuan Agong shall summon Parliament as soon as may be practicable.

'When Parliament is not sitting' must mean 'when Parliament is not in session', in other words 'when Parliament is prorogued or dissolved'.

The phrase 'as soon as may be practicable' reduces the obligation of the Yang di-Pertuan Agong to summon Parliament from being absolute and unqualified to being what is possible having regard to existing conditions including the circumstances that the general Parliamentary election was not yet completed. Any other view would render inept the provisions of clause (2) of Article 150. His Majesty is again the sole judge of 'when it is possible' to summon Parliament and the matter is above judicial review. In my opinion the long delay in summoning Parliament does not affect the validity of Ordinance No 45.

The learned Solicitor-General in his submission quite properly submitted that in interpreting a written constitution such as the Federation of Malaya Constitution the court must look at the expressed wording of the written constitution itself rather than be guided by extraneous principles of other constitutions. The principle of interpretation of a written constitution was enunciated by Viscount Radcliffe in *Adegbenro* v *Akintola.*[14] In view of the fact that Ordinance 45 was purportedly to have been promulgated under Article 150 of the Constitution, it is to the wording of that article that I must look for an answer.

Clause (1) of Article 150 gives the Yang di-Pertuan Agong power to proclaim a state of emergency if satisfied that a grave emergency exists whereby the security of the Federation is threatened. It is common knowledge that the civil disturbances broke out in Kuala Lumpur on May 13, 1969 and spread all over the country. On May 15, 1969 the Yang di-Pertuan Agong proclaimed a state of emergency throughout the country *vide* PU (A) 145/69. The fact that the Yang di-Pertuan Agong issued the proclamation showed that he was so satisfied that a grave emergency existed whereby the security of the whole country was at stake: see *Special Reference No 1 of 1964*[15]. Counsel have not challenged the validity of the proclamation. Indeed the proclamation is not justiciable: see *Bhagat Singh* v *King-Emperor*[16] and *King-Emperor* v *Benoari Lal Sarma*[17]. The same principles governing discretionary powers confided to subordinate administrative bodies cannot be applied to the Yang di-Pertuan Agong and are inapplicable. His Majestry occupies a special position. This reasoning equally applies to the question of justiciability of Ordinances promulgated under clause (2) of Article 150.

There is a further consideration on this aspect of the case which is equally applicable to the provisions of clause (1) of Article 150. Clause (2) of Article 150 gives power to the Yang di-Pertuan Agong during the period an emergency proclamation is issued when Parliament is not sitting to promulgate ordinances which have the force of law 'if satisfied that immediate action is required'. I will now refer to an Australian case which has expressed the view that action taken by the Governor-General in Council under such power 'if he is satisfied ' that a certain state of affairs exist is not justiciable so long as the declaration recites the statutory formula. That is the case of *Australian Communist Party* v *The Commonwealth*[18] which concerns the constitutional validity of the Communist Party Dissolution Act, 1950. Section 5(2) of the Act gave power to the Governor-General in Council to declare a body of

persons to be an unlawful association where 'the Governor-General-in-Council is satisfied' that the body of persons had certain specified characteristics. The Australian High Court held the Act unconstitutional because the declaration was not properly framed. Dixon J said at p 178-179:

> ... the expression by the Governor-General in Council of the result in a properly framed declaration is conclusive. In the case of the Governor-General in Council it is not possible to go behind such an executive act done in due form of law and impugn its validity upon the ground that the decision upon which it is founded has been reached improperly, whether because extraneous considerations were taken into account or because there was some misconception of the meaning or application as a court would view it, of the statutory description of the matters of which the Governor-General in Council should be satisfied or because of some other supposed miscarriage.

Wijeysekera v *Festing*[19] is an older case to the same effect. Another case which supports this view is *Land Realisation Co Ltd* v *Post Office.*[20]

What the court is interested is to examine the emergency law in question and see whether it has been issued within the scope of the powers conferred by the Constitution. Once the court has determined that such law lies within the province of a competent authority, the court is not authorised to reweigh what a competent authority has weighed. The court will not assume the role of a third legislative chamber. I cannot forbear quoting a passage from the opinion of Lord Guest in *Akar* v *Attorney-General of Sierra Leone:*[21]

> Although the courts are the guardians of the Constitution I believe that in interpreting the Constitution the ground has to be trod warily and with great circumspection. ... The courts cannot go behind the scene and enquire what were the motives or policy behind a particular piece of legislation. They can only as a matter of construction decide whether the Act is or is not within the powers of the Constitution. This question must be decided on the terms of the Act in conjunction with the provisions of the Constitution.

Adopting the principles of law enunciated by Dixon, J in the *Australian Communist Party's* case and applying them to the present case there can be no doubt that Ordinance No 45 was promulgated within the four corners of clause (2) of Article 150. The Ordinance had recited the statutory formula. The recital is conclusive and that closed the door to all review. The onus now shifts to those who wish to challenge its validity by proving *mala fides* or bad faith: see *Stephen Kalong Ningkan* v *Government of Malaysia*[22]. That has not been done. In my judgment Ordinance No 45 is not violative of clause (2) of Article 150.

I now call on the defence of the four accused.

Accused Nos 1 and 2 elect to remain silent.

Accused No 3 gave evidence and so did accused No 4. They say they did not know the contents of the impugned article was seditious. They do not read or write English nor do they employ English translators.

Now section 6(2) of the Sedition Act enacts:

> No person shall be convicted of any offence referred to in section 4(1) (c) or (d) if the person proves that the publication in respect of which he is charged was printed ... without his authority, consent and knowledge and without any want of due care or caution on his part, or that he did not know and had no reason to believe that the publication had a seditious tendency.

It may be stated here that the onus on the accused is not as heavy as that which rests on the prosecution to prove the facts which they have to establish and may be discharged by evidence satisfying the court of the probability of that which they are called upon to establish. In my judgment they have not satisfied the burden of proof imposed upon them by the sub-section inasmuch as bare words to the effect that they did not know the contents of the impugned article was seditious is not even *prima facie* evidence of absence of knowledge or reasonable belief.

I therefore find each of the accused guilty and I convict them.

I now come to the most painful task of the trial i.e., to impose a suitable sentence on each of the accused. Although intention to incite violence, tumult and public disorder is not the criterion of guilt that is a relevant factor in assessing sentence. Dr Ooi in his statement to the police has stated that he had no intention to incite feelings of hatred, enmity or hostility among the races. He is a responsible man and I accept his words.

In imposing sentence it is necessary to consider the public interest as well as the interests of the accused. It has been stated that speeches of this nature were permitted and indeed fashionable prior to May 13,1969. The Attorney-General's department has now deemed fit to enforce the law of sedition in recognition of the changing conditions in this country.

I have seriously considered what sentence to impose on each of the accused. I think a term of imprisonment would not be appropriate in the circumstances of this case. In my view a fine would be adequate. Since this court has drawn a line between political criticism and sedition, let that in future be the yardstick.

I impose on each of the accused a fine of $2,000 in default six month's imprisonment.

Order accordingly.

Dato Mohd Salleh Abas (Solicitor-General) for the Public Prosecutor.
Sir Dingle Foot QC for the 1st Accused.
Dato SP Seenivasagam for the 2nd Accused.
Lee Beng Cheang for the 3rd & 4th Accused.

Notes

In *Public Prosecutor* v *Ooi Kee Saik* [1971] 2 MLJ 108 Raja Azlan Shah FJ (as he then was) dealt with the law of sedition. The dividing line between lawful criticism of Government and sedition is that — if upon reading the impugned speech as a whole the Court finds that it was intended to be a criticism of Government policy or administration with a view to obtain its change or reform the speech is safe. But if the Court

comes to the conclusion that the speech used naturally, clearly and indubitably has the tendency of stirring up hatred, contempt of disaffection against the Government then it is caught within the ban of paragraph (a) of section 3(1) of the Sedition Act. Although the decision in this case was set aside, the statement of the law relating to sedition was specifically approved in the subsequent retrial.

The decision in this case was held to be a nullity, as no preliminary inquiry was held: see [1971] 2 MLJ and [1973] 2 MLJ 1. A retrial was held before Abdul Hamid J who referred with approval to the judgment of Raja Azlan Shah J. He said:

> I respectfully subscribe to the views expressed by His Lordship Raja Azlan Shah J and I see no reason whatever to disagree with the interpretation that he has placed upon the relevant provisions of the Act. There is nothing that I can usefully add.

CORROSIVE AND EXPLOSIVE SUBSTANCES AND OFFENSIVE WEAPONS ORDINANCE

(a) Whether kitchen knife an offensive weapon

Public Prosecutor
v
Sundaravelu

[1967] 1 MLJ 79 High Court, Kuala Lumpur

Cases referred to:-
(1) *Veerasingam* v *Public Prosecutor* [1958] MLJ 76.
(2) *Abdul Manap* v *Public Prosecutor* [1952] MLJ 140.

RAJA AZLAN SHAH J (delivering oral judgment): This is an application by the deputy public prosecutor by way of motion to file the petition of appeal out of time. The circumstances leading to this application are as follows:

The respondent was charged in the magistrate's court at Kuala Selangor with an offence punishable under section 6(1) of the Corrosive and Explosive Substances and Offensive Weapons Ordinance, 1958. The case eventually came before the learned magistrate at Kuala Selangor. He heard evidence for the prosecution and at the end of the case he acquitted and discharged the respondent without calling for the defence. On March 29, 1966 a notice of appeal was filed by the deputy public prosecutor against that decision, and I may say that the notice was filed in good time. On June 27, 1966 the notes of evidence and grounds of judgment of the learned magistrate were received by the learned deputy public prosecutor, and on July 5, 1966 the learned deputy posted his petition of appeal to the Officer in Charge of Police

District, Kuala Selangor. The latter delivered it to the magistrate's court on July 9, 1966, i.e., a slight delay of two days.

This application brings into review the provisions of section 310 of the Criminal Procedure Code (Cap 6). It is clear from the provisions of that section that this court has a discretion whether or not to allow the application, but to my mind emphasis is laid on the phrase 'in order that substantial justice may be done in the matter'. I think the provisions of this section have been well gone into by the Court of Appeal in *Veerasingam's* case.[1] There it was said that the section is one of discretion and no hard and fast rules can be laid down, otherwise it ceases to be a discretion and becomes a rule of law. The definition of substantial justice has been stated by the learned Chief Justice in the following words:

> Nor would we attempt any definition of what is substantial justice beyond suggesting in this connection that substantial justice is done when a rightful conviction is upheld and a wrongful one is quashed.

It is unfortunate that the learned deputy public prosecutor posted the petition to the Officer in Charge of Police District instead of direct to the magistrate's court at Kuala Selangor. Bearing in mind the words of the learned Chief Justice (above), I am satisfied that this is a proper case in which to exercise my discretion, and I will allow the application.

Counsel for the respondent urged me to treat the application as an appeal. I have complied with counsel's request; I have considered the notes of evidence and judgment of the learned magistrate. It transpired that the prosecution called two witnesses, the first was a police corporal. He testified that on February 6, 1966 at about 10.45 pm, while on his rounds at Batang Berjuntai town, he saw four male Indians talking among themsleves on the five-foot way of a cinema. The respondent was one of them.Then the corporal observed the respondent taking out a knife and holding it waist-high. The corporal demonstrated to the learned magistrate how that was done. The corporal went up to the respondent, arrested him, and dispossessed him of the knife. He was then taken to the police station. The other prosecution witness was the OCS Batang Berjuntai Police Station,who received the report of the corporal and placed the respondent in custody. On those facts the respondent was charged 'with possession of an offensive weapon in a public place otherwise than for a lawful purpose' under section 6(1) of the Corrosive and Explosive Substances and Offensive Weapons Ordinance, 1958. The learned magistrate acquitted him without his defence being called; he based his decision on three grounds. Firstly, he was of the view that the knife was an ordinary kitchen knife obtainable in most shops selling kitchen-ware and consequently was not an offensive weapon. I disagree with him. In view of its size and shape the knife was undoubtedly a lethal weapon and , if so minded as a weapon of offence was likely to cause hurt. Secondly, the learned magistrate was of the view that the presumption under subsection (2) of the section should not be invoked in order to supplement a *lacuna* in the prosecution case on the ground that the case was not fully investigated. In my opinion the

learned magistrate took a wrong view of the law. What the prosecution had to prove was to establish a *prima facie* case in the sense of adducing evidence that the respondent was in possession of an offensive weapon in a public place. It is not essential for the prosecution to prove the absence of lawful purpose. The onus of negativing the averment was for the defence to prove that he had a lawful purpose to possess the knife. Lawful purpose must here be used in the sense of purpose supported by law and to avail as a defence must relate to the actual time the weapon was found in the respondent's possession. An analogy can be drawn from the many decisions under the Emergency Regulations, 1951, notably the Court of Appeal case of *Abdul Manap* v *Public Prosecutor*.[2] Thirdly, the learned magistrate took the view that no dangerous situation existed at the time of the arrest and therefore came to the conclusion that there was reasonable doubt as to whether the respondent kept the knife for an unlawful purpose. That, to my mind, was a finding of fact based on speculation since the respondent had not given evidence to explain his purpose for possessing the knife.

I am therefore of the view that on the evidence as it stands a *prima facie* case has been adduced and by virtue of sub-section (2) it is for the defence to negative any unlawful purpose. The learned magistrate was clearly in error. I therefore revise his decision and make an order that he should call for the defence.

Order accordingly.

Ajaib Singh (Deputy Public Prosecutor) for the Appellant.
Lall Singh Muker for the Respondent.

CRIMINAL PROCEDURE
(a) Effect of plea of guilty

Chen Chong & Ors
v
Public Prosecutor

[1967] 2 MLJ 130 High Court, Kuala Lumpur

Cases referred to:-
(1) *Koh Mui Keow* v *R* [1952] MLJ 214.
(2) *Low Hiong Boon* v *Public Prosecutor* [1948-49] MLJ Supp 135.
(3) *Ahmad bin Haji Tahir & Ors* Penang — Criminal Revision No 11 of 1958 (unreported).
(4) *R* v *Cole* (1965), 49 Cr App R 199; [1965] 2 QB 388; [1965] 2 All ER 29.
(5) *R* v *Durham Quarter Sessions, ex p Virgo*, [1952] 1 All ER 466, 469.

RAJA AZLAN SHAH J: The appellants who are in their late thirties were charged under section 392 of the Penal Code read with section 34 of the Penal Code, to wit, in furtherance of the common intention robbed one Chin Tong Kan of a lorry registration number BL 9776 carrying 188

bags of tin ore valued at $52,000. This involved the existence of a pre-arranged plan which is to be proved from conduct or from circumstances or from any incriminatory facts to commit the crime actually committed, that is, robbery. Robbery is defined under section 390 of the Penal Code as, *inter alia,* the causing of wrongful restraint in the commission of theft. It is significant to note that the appellants were never charged with voluntarily causing hurt in committing the robbery under section 394 of the Penal Code nor with armed robbery under section 397 of the Penal Code. They were unrepresented in the court below and each pleaded guilty to the charge.

The record reads as follows:

> Charge read over and explained to all four accused who understand the charge.
>
> 1st accused — Pleads guilty and UN & C of P — I accept his plea.
>
> 2nd accused — Pleads guilty and UN & C of P — I accept his plea.
>
> 3rd accused — Pleads guilty and UN & C of P — I accept his plea.
>
> 4th accused — Pleads guilty and UN & C of P — I accept his plea.

The prosecuting officer then proceeded to outline the following facts which were recorded by the learned president:

> On 31.1.67 at about 5.00 pm lorry No BL 9776 left Gambang, Pahang, for Kuala Lumpur carrying 188 bags of tin ore valued at $52,000. The lorry was driven by one Chin Tong Kam who had an attendant Leow Soo Sang with him.
>
> At about 11.15pm the lorry crossed the Selangor-Pahang boundary and when it was near the 16th milestone Bentong-Kuala Lumpur Road a taxi, an Austin car No H 4319, overtook the lorry and after travelling a short distance blocked the path of the lorry and forced the lorry to stop.
>
> As soon as the lorry stopped, 3 male Chinese rushed out, one armed with a pistol and one with a parang. They ordered the driver and attendant out of the lorry, herded them together into a ravine beside the road and tied them with rope and also gagged them.
>
> The Austin taxi was driven by the 3rd accused.
>
> Two other Chinese were left guarding the driver and attendant.
>
> The lorry was driven away and so was the taxi which was later abandoned on the way to Kuala Lumpur.
>
> At about 3.00 am the following morning the two persons who guarded the lorry driver and attendant heard the sound of a car approaching and left the victims behind and went away. A short while later the lorry driver and attendant got a lift and went to Gombak police station where they lodged a report at 3.55 pm
>
> Investigation started and as a result of information received a police party led by Supt Ko Kim Cheng raided a place near Leong Fatt Tin Mine in Serdang where the police recovered 179 bags of the 188 bags of tin ore. The 9 bags are still not recovered. 179 bags of ore P2 and lorry No BL 9776, P3. The same day the police arrested the 1st, 2nd and 3rd accused at Serdang New Village, the 4th at Sungei Besi New Village.
>
> The four accused took part in the robbery and the 3rd was the one who drove the taxi which had been stolen on 31.1.67.
>
> All four accused admit the facts.

Each of the appellants was convicted and sentenced to three years imprisonment. They now appeal against conviction and sentence.

The only substantial ground put forward by counsel on behalf of the appellants was that the provisions of section 34 of the Penal Code, which is one of the ingredients of the charge, were never adequately explained to the appellants. It was said that the record must show in what way the charge was explained to the appellants who must admit a pre-arranged plan while proceeding in the taxi. It was further said that the taxi driver could have been an innocent party for there was nothing to show he took part in the robbery. He never admitted he was mixed up with the robbery. A passage from the judgment of Brown J in *Koh Mui Keow* v *R*[1] was cited in support of a re-trial:

> In a case where the charge contains one or more ingredients or questions and the accused is not represented by counsel each ingredient and each question involved should be explained by the magistrate himself through the interpreter to the accused.

In 1948 Spenser-Wilkinson J had occasion to say that except in a case where the facts are simple and the law applicable to those facts is beyond doubt it would be impossible to expect an accused person unversed in the law and unrepresented by counsel to be able to say, yes or no, whether he has been guilty of an offence involving difficult questions of law: see *Low Hiong Boon* v *Public Prosecutor.*[2]

The provisions of section 173(b) of the Criminal Procedure Code seem to establish the salutary rule that before a court records a plea of guilty in reply to the common form question asking the accused to plead, it is necessary for the court as a matter of discretion to consider whether it is safe to accept the plea. The court can do that, firstly, by considering each and every ingredient of the charge; secondly, by satisfying itself by questioning the accused whether he really understands the charge and intends to admit without qualification each and every ingredient that constitutes it; and finally that he clearly understands the nature and consequences of his plea. The court then records the facts as presented by the prosecuting officer to ascertain whether admission of the facts amounts to a plea of guilty in law. Detailed attention to the facts to be recorded must obviously depend on the nature of the charge and the seriousness of the case: see the judgment of Rigby J in the unreported cases of *In the matter of Ahmad bin Haji Tahir & Ors*[3]. If the facts establish the offence charged, the accused is asked whether he admits such facts. If he does admit, then the court records the plea and proceeds to consider the question of sentence. Once the accused is sentenced then the plea ranks as a conviction: see *R* v *Cole*[4]. The plea must be an unequivocal plea of guilty. It is important that there should be no ambiguity in the plea. If there are elements in the case which indicate that the accused is really trying to plead not guilty or, as Lord Goddard put it, 'Guilty, but....', then the court has, in my view, no discretion but to record a plea of Not Guilty: see *R* v *Durham Quarter Sessions, ex parte Virgo*[5].

If those principles are applied to the present case the answer seems

very clear. The experienced president obviously through the interpreter read and explained the charge to the appellants who clearly understood it. They freely and voluntarily confessed that they were guilty of the offence of which they were charged. They understood the nature and consequences of their pleas. The facts tendered by the prosecution can be briefly stated: the appellants overtook the said lorry in a stolen taxi along the Bentong-Kuala Lumpur road and after a short distance blocked its passage and forced it to stop. Three Chinese rushed out of the said taxi and held up their victims at gun-point. The other Chinese remained at the wheel of the said taxi. Their victims were gagged, bound, and herded into a ravine and were guarded by two of the three Chinese, while the third drove away the lorry with its valuable cargo. The stolen taxi was also driven away and later abandoned. This was obviously not a one-man job and the facts clearly indicate that the appellants had a prearranged plan to commit the offence of which they were charged. They were men of mature years and they clearly admitted having committed the crime actually committed. In my judgment their pleas were unequivocal pleas of guilty made in open-court to facts which amounted to pleas of guilty in law. The appeal against conviction is dismissed.

The sentence is unduly benevolent to the appellants. The appeal against sentence is also dismissed.

Appeals dismissed.

SP Seenivasagam for the Appellants.
Che Thairah binte Suleiman (Deputy Public Prosecutor) for the Respondent.

EVIDENCE
(a) False evidence

Shangara Singh
v
Public Prosecutor

[1967] 1 MLJ 15 High Court, Kuala Lumpur

Cases referred to:-
(1) *Mohamed Hanifah* v *Public Prosecutor* [1956] MLJ 83.
(2) *Wong Kok Keong* v *R* [1955] MLJ 13 at p 15.

RAJA AZLAN SHAH J (delivering oral judgment): The appellant was charged with an offence under section 193 of the Penal Code and was convicted and sentenced to one day's imprisonment and fined $500 in default one month's imprisonment.

The charge relates to what the appellant had said at the trial before the president of the sessions court when he stated in evidence that he did not make a statement to the police officer whereas in fact he did make a

statement to that officer. The appellant has appealed on a number of grounds but counsel wishes to argue only on ground 3 which reads:

> The learned president ought to have held that the omission on the part of the prosecution to tender in evidence the alleged statement of the appellant to senior inspector Michael Khaw (PW7) was fatal to the case for the prosecution.

It was argued that Exh P3 (i.e. the record in Arrest Case No 138 of 1964, the case which came before the learned president) should not have been admitted because not only was it not signed as a certified copy but it was undated as well. I do not think that there is any point in citing any cases in support of counsel's proposition as the principle is firmly established: see *Mohamed Hanifah* v *Public Prosecutor*[1]

The learned deputy public prosecutor urged upon me to invoke the provisions of section 167 of the Evidence Ordinance and she also cited the case of *Wong Kok Keong* v *R.*[2] Section 167 clearly states that the improper admission of evidence shall not by itself be a ground for a new trial or reversal of any decision. However, that section is qualified by the proviso that there must be sufficient evidence to justify the decision arrived at by the court below independently of the evidence objected to as being improperly admitted. That was said by Spenser Wilkinson J in the case cited above:

> In my opinion, therefore, the sole test as to whether or not the judgment of the court below should be reversed or altered on account of the wrongful admission of this certificate is whether or not without that evidence there was sufficient evidence to justify the conviction.

I have no alternative but to allow the appeal. The conviction is quashed, and the fine is to be refunded to the appellant.

Appeal allowed.

Edgar Joseph Jr for the Appellant.
Zaiton binte Othman (Deputy Public Prosecutor) for the Respondent.