IN THE HIGH COURT OF MALAYA IN JOHOR BAHRU

IN THE STATE OF JOHOR DARUL TAKZIM

CRIMINAL TRIAL NO: 45B-05-03/2017

PUBLIC PROSECUTOR

AND

1. MOHD SAPAWI BIN AB TALIB
2. SHUKUR BIN AB TALIB
3. ROSHIMA BT ABDULLAH

GROUNDS OF JUDGEMENT

A) INTRODUCTION

[1] All three accused persons were charged with the following:

"Bahawa kamu bersama-sama diantara 03.10.2016 jam lebih kurang 7.00 pagi hingga 19.10.2016 jam lebih kurang 5.30 petang dirumah No. M8, Jalan Mersing, Kampung Bukit Terkedai, di dalam Daerah Mersing, di dalam Negeri Johor Darul Takzim bagi mencapai niat bersama-sama telah membunuh Mohamad Roshammudin Bin Abdullah (No My Kid; 050227-01-1085) dan

dengan itu kamu telah melakukan kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan di baca bersama Seksyen 34 Kanun Keseksaan."

B) PERTINENT FACTS OF THE PROSECUTION CASE

[2] The prosecution's main witness was Siti Hajar Bin Abdul Talib (SP10) who is the younger sister of both the first accused and the second accused and the sister in law of of the third accused, the latter being the mother of the deceased. SP10 lived in the same house with all the accused persons together with the deceased and a child by the name of Iwan.

[3] The third accused married the first accused after having being married previously. The first accused is the step father of the deceased. The deceased is a child with special needs and possesses an "orang kelainan upaya" "OKU" card.

[4] According to SP10, the first accused worked in Syarikat South Waste Manangement ("SWM")while the second and third accused are unemployed.

[5] SP10 testified that on 19.10.2016 at around 7.10a.m., as she was about to go to school, the deceased asked her for help to get him out of a water container . SP10 testifed that she was afraid to help the deceased because she was afraid she would scolded by the second and third accused. SP10 said that it was the second and the third accused who instructed the deceased to sit in the water container.

[6] SP10 said that the whole of the deceased's body was submerged in the water container and only his head was above the water level. SP10 said that the reason the deceased was ordered to sit in the water container was because he was being punished due to his attitude in not wanting to listen to instructions.

[7] SP10 said that the deceased would normally be submerged in the water container from morning until evening or at night. SP10 also confirmed that the last the deceased was submerged in the water container was on 18.10.2016.

[8] SP10 said that she was once reprimanded by the third accused for wanting to help the deceased out of the water container when the third accused told her*"kenapa nak tolong? Dia bukan siapa-siapa*

dengan kau" translated as *"why do you want to help? He is nothing to you".*

[9] According to SP10, the deceased was often submerged in the water container in the bathroom of the house by all three accused when he was stubborn. Everytime he was ordered to be submerged, the deceased was naked and was only allowed to come out of the water container after about more than an hour.

[10] When the deceased did emerge out of the water container, his body would be wrinkled and he would look pale because he was cold. The deceased would also be beaten by all the accused persons after he complained to friends of the first accused that he was beaten by the accused persons.

[11] On 19.10.2016, from around 2.30p.m. to 4.00p.m, when SP10 returned from school, she saw the deceased in a crouched lying down position similar to the letter "C". When SP10 asked the deceased what he wanted and the deceased replied that he wanted some water.

[12] However when SP10 gave him the water to drink the deceased

vommited.SP10 also noticed that the deceased's body was black in colour. When SP10 asked him again what he wanted, the deceased replied again that he wanted some water. SP10 then noticed that the deceased was short of breath.

[13] Upon seeing this, SP10 called the third accused who at the time was resting in the kitchen. SP10 said that after she called the third accused, the third accused wanted to beat the deceased using a black rubber pipe but upon seeing the deceased gasping for breath, she relented.

[14] The third accused then removed the shirt and trousers of the deceased. SP10 and the third accused then attempted to perform cardiac pulmonary resuscitation ("CPR") on the deceased but there was no response from the deceased.

[15] SP10 then asked the third accused to send the deceased to the clinic but the third accused instructed SP10 to wait for the first accused to come back because the clinic was located far away from the house.

[16] SP10 also testified that the deceased was often beaten by the third

accused using a rubber pipe, a rattan and a stick on the chest and on his feet. SP10 also said that the deceased had been beaten by the third accused since 2014. The deceased was also beaten on the head, the palms of his hands, the sole of his feet, claves, thighs and on his back.

[17] These incidents were said to have occurred every day and there were occasions when the second and the third accused would take turns to beat the deceased. The deceased was also beaten with a rubber pipe, a rattan and a piece of wood in the same place repeatedly.

[18] SP10 said that she had seen the deceased crying after being beaten but she did not dare to help the deceased because she was told by the third accused not to interfere. SP10 also said that the second accused had also punished the deceased by placing a red ants ("kerengga") nest on his body. The deceased was also stepped upon by the third accused on his back.

[19] On 19.10.2016 at around 6.00p.m., the first accused instructed SP10 to take in her possession a black pipe and a rattan with which he used to hit the deceased.

[20] After waiting for the second accused to return home, SP10 and the second accused threw the black pipe and the rattan in an exit road to Bukit Terkedai on the instructions of the first accused.

[21] Jamal Bin Samat (SP5) is a colleague of the first accused at SWM and he testified that on 19.10.2016 at around 5.10p.m, he received a call from the third accused asking whether the first accused was with him. SP5 replied that the first accused was not with him.

[22] When SP5 asked the third accused why he called her, the third accused asked him to send the deceased to a clinic as he had fainted because he had fallen down in the bathroom.

[23] Upon hearing this, SP5 went to the said house on a motorcycle. When SP5 arrived at the house, the first accused's child from his previous marrige by the name of Iwan motioned for him to come to the door of the kitchen.

[24] When SP5 reached there he saw four persons, namely, the third accused, SP10, Iwan and the deceased. SP5 saw the deceased in a supine position on the floor and naked. SP5 was unsure at the time whether the deceased was conscious or not.

[25] SP5 saw injuries and bruises to the right and left leg of the deceased and injuries to the lips of the deceased. SP5 then slipped a pillow under the deceased's head and went to look for the first accused.

[26] SP5 did not examine the other injuries to the deceased and did not ask further concerning the matter to the third accused or SP10. SP5 observed that the third accused was crying while SP10 just sat next to the stairs.

[27] SP5 found the first accused at the road side of Bukit Terkedai. SP5 informed the first accused about the condition of the deceased and the first accsued made haste to return to the house.

[28] The first accused instructed SP5 to return to the house and take his car in order to send the deceased to the clinic. SP5 then took his wife's car from his house and went to the house where the deceased was.

[29] On arrival at the house, SP5 said that the first accused carried the deceased and placed him in the back of the car. SP5 assisted him in opening the door of the car. SP5 then drove the car with the first

and third accused in it to the Klinik Kesihatan Endau. The journey to the clinic took approximately 20 to 30 minutes.

[30] Upon arrival at the Emergency Unit of the Klinik Kesihatan Endau, the first accused took the deceased out of the car to the clinic but discovered that the clinic was closed. The third accused called the doctor on duty while the first accused waited in front of the Emergency Unit.

[31] After about 5 minutes, the doctor arrived with two or three persons and opened the door to the Emergency Unit after which the deceased was brought there. After about 10 minutes, the first accused came out of the clinic and instructed SP5 to send him back to the house in order for him to take his motorcycle.

[32] Dr. Mohd Farhan Bin Suraji ("SP12") said that on 19.10. 2019 at around 5.30p.m., while he was on call, he received a phone call from the Pembantu Pegawai Perubatan (PPP) or the Assistant Medical Officer by the name of Mohamad Akmal to refer a case involving a lifeless male child brought in by his mother. The child was found to be on a (Glasgow Comma Scale = 3).

[33] SP12 instructed PPP Mohamad Akmal to initiate resusitation using CPR while waiting for SP12 to arrive from his house. Upon arrival, SP12 examined the patient's response and discovered that the deceased was dead because there was no signs of breathing, no heartbeat and no pulse while the pupils of his eye remained dilated eventhough a light was shone in the eyes and his toes and hands were cold.

[34] The resucitation procedure continued for 20 minutes and after that the deceased was pronounced dead at 5.50p.m. Further examination conducted by SP12 on the deceased's body revealed signs of other injuries which SP12 said were injuries ("kesan lekuk") to the temporoparietal of the right side of the head, bruises to the area around the right eye, injury to the chin and the left ear.

[35] There were rounded scars resembling ciggarette butt burnt marks from the chest area to the abdomen. There were signs of scratch marks to the back of the deceased and his leg was swollen from the knee downwards. There were also signs of bruising to the back of the left knee and reddish marks on the thigh area and the left calve.

[36] SP12 said that he was informed by the third accused that the deceased had fallen down in the bathroom. SP12 was of the opinion that the cause of the injuries to the deceased was not consistent with the reason given by the third accused.

[37] As SP12 entertained doubts regarding what the third accused had told him and because he suspected that the deceased was subject to torture, SP12 instructed PPP Mohamad Akmal to contact the Endau Police Station and inform them about the incident at around 6.00p.m.

[38] Around 15 minutes later, the police arrived at the clinic where a statement was taken from SP12.

[39] The police then arranged for a vehicle to bring the body of the deceased to the Mersing Hospital. The first accused was arrested by the police on 19.10.2016 at around 8.15p.m at the house while the second and third accsued was arrested the following day, 20.10.2016 at around 4.00p.m.at No Tg Tapi 33-2, Kediaman Jln Kg Baru, Penyabong 86900 Endau.

[40] As a result of information given by the accsued persons, the police found the following items suspected to be used to inflict injuries on the deceased:

i) A rattan measuring 79 cm;

ii) A rattan measuring 60 cm;

iii) A wire measuring 66 cm;

iv) A black rubber pipe;

v) A ketchup bottle; and

vi) A blue water container.

[41] A post- mortem was conducted on the body of the deceased on 20.10.2016 from 2.55p.m. until 6.40p.m. The results of the post-mortem carried out by Dr. Rahayu Binti Shahar Adnan (SP13) revealed the cause of death to be “Blunt Force Trauma to the Chest”. SP13 also prepared a Post-Mortem Report (P53).

[42] Based on P53, there were signs of several old and recent external injuries. The heart of the deceased sustained bruises caused by blunt force trauma to the chest.

[43] The injuries were inflicted upon the deceased while he was still

alive and the objects likely used upon the deceased that resulted in his death were hands and feet and included cylindrical objects such as a rattan that caused tramline injuries.

[44] According to P53, SP13 confirmed that the deceased died as a result of external injuries which in turn caused internal injuries resulting in death.

C) DUTY OF COURT AT THE END OF THE PROSECUTION CASE

[45] The duty of the court at the end of the prosecution case is set out in Section 180(1) of the Criminal Procedure Code (CPC) which stipulates that when the case for the prosecution is concluded the Court shall consider whether the prosecution has made out a prima facie case against the accused.

[46] The cases of **Public Prosecutor v. Dato' Seri Anwar Bin Ibrahim (No.3) [1999] 2 CLJ 215**; **[1999] 2 AMR 2017**; **[1999] 2 MLJ 1**, **Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734**; **[2003] 2 AMR 89**, **Balachandran v. PP [2005] 1 CLJ 85** and **PP v. Mohd Radzi Bin Abu Bakar [2006] 1 CLJ 457**; [**2005] 6 AMR 203** respectively lay down the proposition that at the end of the case for the prosecution, their evidence must be subject to maximum

evaluation in order to determine whether a prima facie case is made out.

[47] In Looi Kow Chai v. Public Prosecutor (supra), the Court of Appeal held:

"*It therefore follows that there is only one exercise that a judge sitting alone under s. 180 of the CPC has to undertake at the close of the prosecution case. He must subject the prosecution evidence to maximum evaluation and to ask himself the question: if I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no prima facie case has been made out and the accused would be entitled to an acquittal*".

D) ANALYSIS OF THE PROSECUTION CASE

[48] Section 302 of the Penal Code prescribes the punishment for whoever commits murder. Murder itself is defined in section 300 of the Penal Code.

[49] The difference between culpable homicide and murder in

evaluating whether the prosecution has successfully made out a prima facie case against the accused for murder under section 302, it is important to first distinguish between the offence of culpable homicide under section 299 and murder under section 300.

[50] This is because all murder is culpable homicide but not all culpable homicide is necessarily murder. It is therefore imperative for the court to appreciate the fine but discernible difference between the two in order to make the correct finding as to whether or not the evidence disclosed reflects the offence of culpable homicide not amounting to murder or culpable homicide amounting to murder.

[51] Section 299 of the Penal Code defines the offence of culpable homicide as follows:

"*Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.*"

[52] Section 300 of the Penal Code describes murder in the following terms:

"*Except in the cases hereinafter excepted culpable homicide is murder-*

a)If the act by which the death is caused is done with the intention of causing death;

b)If it is done 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;

c)If it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

d)If the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid."

[53] Section 300 goes on to set out a number of exceptions which operate to reduce murder to culpable homicide not amounting to murder. These exceptions are provocation, exceeding private

defence, exceeding the powers of a public servant, sudden fight and consent.

[54] From a perusal of both sections 299 and 300, it is clear that some cases of culpable homicide will amount to murder while some will be classified as culpable homicide not amounting to murder.

[55] Because of the similarity in wording, the distinction between the two is so fine as to be almost indiscernible. This court is therefore grateful for the assistance of high authority that has emanated from one of the most distinguished legal minds in this country.

[56] In the case of **Tham Kai Yau v. Public Prosecutor [1976] 1 LNS 159**; **[1977] 1 MLJ 174**, Raja Azlan Shah J (as His Royal Highness was then) held as follows:

"....*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 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.....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 under section 300 Penal Code must necessarily fall within section 299, but all cases falling within section 299 do not necessarily fall under section 300****....*" (Emphasis added)

[57] The case of **Public Prosecutor v. Megat Sharizat Megat Shahrur [2011] 8 CLJ 893** echoed and quoted verbatim the relevant excerpts in Tham Kai Yau (supra) and added:

"*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).

Thus, ***if death is an imminent result, it falls under s. 300. If on the other hand, that death is a likely result, it falls under s. 299. It would be safe to conclude that all cases under s. 300 would fall under s. 299 as well, but this is not necessarily so vice versa***." (Emphasis added)

[58] See also **Poh Weng Nam v. Public Prosecutor [2013] 4 CLJ 1096**, **Public Prosecutor v. Thenagaran Murugan And Another Appeal [2013] 4 CLJ 364** and **Mohd Fazli Azri Jamil v. Public Prosecutor [2013] 1 LNS 1237** which espouses the same principles.

[59] Having said all of this, the distinction between section 299 and that under section 300 of the Penal Code are defined in very similar terms so as to render it fraught with practical difficulties in deciding whether a case falls under section 299 or 300 including which of the limbs are applicable.

[60] From a distillation of the abovementioned authorities however, the position appears to be as follows. The difference between section 299 and section 300 lies in the degree of probability or likelihood that death would result from a particular act i.e. the degree of risk to human life. If death is a likely result of the act, it is culpable homicide, if it is the most probable result, it is murder. If death is imminent, it is also murder.

[61] Culpable homicide may also not amount to murder where the evidence is sufficient to constitute murder, but one or more of the exceptions to section 300 apply, for example provocation, right of private defence and sudden fight and where the necessary degree of mens rea in section 299 is present but not the special degrees of mens rea referred to in section 300 of the Penal Code.

[62] Bearing the above in mind, it is now necessary to consider the ingredients of the offence of murder which the prosecution must establish in order to make out a prima facie case.

<u>The necessary ingredients to be proven in a charge of murder under section 302 Penal Code</u>

[63] The necessary ingredients that must be proven by the prosecution in a charge of murder was set out in the Court of Appeal case of **Sainal Abidin bin Mading v. PP [1999] 4 CLJ 215**; **[1999] 4 MLJ 497**, and in the context of that case were expressed to be as follows:

"*The ingredients are:*

[1]That Isnidil bin Rasin is dead;

[2]That Isnidil bin Rasin died as a result of injuries sustained by him;

[3]That the injuries of Isnidil bin Rasin were caused or the result of the act of the appellant;

[4]That in inflicting the injuries upon Isnidil bin Rasin, the appellant either:

(a)caused them with the intention of causing death; or

(b)caused them with the intention of causing such bodily injuries as the appellant knew to be likely to cause the death; or

(c)caused them with the intention of causing bodily injuries and such bodily injuries were sufficient in the ordinary course of nature to cause death."

i) <u>The said Roshamnudin Bin Abdullah is dead</u>

[64] SP13, the pathologist in her testimony confirmed that the said deceased had died citing the cause of death to be “Blunt Force Trauma to the Chest”.

ii) <u>The death of the deceased was caused by the injuries he sustained</u>

[65] SP13 also said in her testimony that it was the blow of a blunt object to the chest area of the deceased which caused his death. According to SP13, the likely objects used to inflict these injuries was the use of a hand or a leg including cylindrical objects like a rattan which caused tramline injuries.

iii) <u>The injuries to the deceased were caused or the result of the act of the accused persons</u>

[66] In order to prove this ingredient, the prosecution relied mainly on the evidence of SP10 who resided in the same house as the accused persons and the deceased.

[67] SP10’s evidence disclosed that the second and the third accused had often beaten the deceased as a means of punishing him because he did not listen to them when they instructed him to do or not to do something.

[68] According to SP10, the punishment inflicted on the deceased included placing red ants or a“kerengga” nest on him, beating him on his body and on his feet using a rattan, immersing him overnight in water up to his neck in a water container and beating him using their hands.

[69] SP10 testified that on 18.10.2016 and 19.10.2016, the deceased was immersed in water in the said water container up to his neck for a prolonged period of time.

[70] SP10 further testified that the third accused forbade her from helping the deceased whenever the latter cried and pleaded for SP10’s help. According to SP10, she did not help the deceased as she was afraid that the second and the third accused would be angry at her.

[71] SP10 said that when she called the third accused to see the condition of the deceased who was gasping for breath at the time, the third accused still wanted to beat the deceased with a rubber pipe before she actually saw the condition of the deceased and abandoned her plan to hit him.

[72] SP10 also gave evidence that the first accused instructed her to dispose of the rattan and the rubber pipe that was used previously to inflict punishment on the deceased.

[73] SP10 said that she received these instructions after it was learnt that the deceased had passed away. SP10 also said that after she received those instructions, she disposed of the items at the side of the road of Jalan Penyabong with the assistance of the second and third accused.

[74] The testimony from SP10 shows that the injuries occasioned to the deceased were inflicted over a period of time. The evidence of SP10 also indicated that most of the time, the injuries were inflicted by the second and the third accused.

[75] SP10 did however say that the first accused also beat the deceased with a rattan but not frequently. The first accused notwithstanding was well aware of the fact that the deceased was beaten by the second and the third accused.

[76] This can be justifiably inferred from the fact that after the death of

the deceased became known, the first accused instructed SP10 to dispose of the rubber pipe and the rattan.

[77] According to SP10, the deceased was inflicted with beatings using items such as a rubber pipe, a rattan and also using hands and feet.

[78] The evidence taken cummulatively therefore leads to the irresitable inference that the deceased died from injuries inflicted by the first to the third accused.

[79] Although attempts were made by learned counsel for the accused persons to discredit her by pointing out discrepancies in her testimony, on the whole the testimony of SP10 was convincing that it was the accused persons who had beaten the deceased over a prolonged period of time.

[80] This happened, according to SP10, because the deceased being a child with special needs, most of the time exhibited certain behaviour, most notably that he had trouble listening to instructions given to him.

[81] This raised the ire of the second and the third accused mainly, which then caused them to discipline the deceased with punishment that included beating him and immersing him in a water container filled with water for prolonged periods of time.

[82] There was also evidence that the second accused had brought back a red ant's ("kerengga") nest and broke it on the body of the deceased causing the red ants to come out and inflict painfull bites on the body of the deceased.

[83] The act of the first accused in instructing SP10 to dispose of the rubber pipe and the rattan constituted strong circumstantial evidence against him and also the second and third accused as well.

Circumstantial evidence

[84] Where the evidence is circumstantial, certain principles of law are called into operation. The following cases afford useful guidelines as to what they are.

[85] In the case of **Public Prosecutor v. Azilah Hadri & Anor [2015] 1 CLJ 579**, it was held:

"*The prosecution's case rests substantially or entirely on circumstantial evidence. It is trite that direct evidence of the commission of the offence is not the only source from which a trial court can draw its conclusion prior to a finding of guilt.* ***Conviction can be secured based on circumstantial evidence provided that:***

(a)the circumstances from which the conclusion of guilt is to be drawn has been established;

(b)the facts so established is consistent with the hypothesis of the guilt; and

(c)circumstances should be of a conclusive nature in that the chain of evidence is complete so as to exclude any conclusion consistent with the accused person's innocence *(See Magendran Mohan v. PP [2011] 1 CLJ 805;; [2011] 6 MLJ 1, Mazlan Othman v. PP [2013] 1 CLJ 750;; [2013] 1 AMR 615; Dato' Mokhtar Hashim & Anor v. PP [1983] 2 CLJ 10;; [1983] CLJ (Rep) 101; Chan Chwen Kong v. Public Prosecutor [1962] 1 LNS 22).*

It is worth noting that the court had this to say in PP v. Letchumanan Krishnan [2007] 1 LNS 409;; [2008] 3 MLJ 290:

It is axiomatic under our case-law, and we cite the principle repeatedly, that ***circumstantial evidence alone may be sufficient to support a conviction for murder since the law***

makes no distinction between circumstantial evidence and direct evidence and, if circumstantial evidence is used to provide for a conviction; it must be inconsistent with any other hypothesis than that of guilt of the accused. *(See e.g., Kartar Singh & Anor v. R [1952] 1 LNS 43;; [1952] 2 MLJ 85; Idris v. PP [1960] MLJ 296, Sunny Ang v. PP [1965] 1 LNS 171;; [1966] 2 MLJ; Karam Singh v. PP [1967] 1 LNS 65;; [1967] 2 MLJ 25; Chong Kim Siong v. PP [1967] 1 LNS 18;; 1 MLJ 36; PP v. Hanif Basree Abdul Rahman [2007] 2 CLJ 33;; [2007] 2 MLJ 320 and Juraimi bin Jussin v. PP [1998] 2 CLJ 383;; [1998] 1 MLJ 537.*

Faizal Ali J when delivering the judgment of the Supreme Court in Ram Avtar v. The State (Delhi Administration) AIR [1985] SC 1692, had occasion to state:

At the very outset we might mention that circumstantial evidence must be complete and conclusive before an accused can be convicted thereon. This, however, does not mean that there is any particular or special method of proof of circumstantial evidence. We must, however, guard against the danger of not considering circumstantial evidence in its proper perspective, e.g., where there is a chain of circumstances linked up with one another, it is not possible for the court to truncate and break the chain of circumstances. In other words where a series of circumstances are

dependent on one another they should be read as one integrated whole and not considered separately, otherwise the very concept of proof of circumstantial evidence would be defeated.

The above cases have clearly laid down certain guidelines, whereupon in the absence of direct evidence, the prosecution may resort to adducing circumstantial evidence to discharge its burden. Crimes are usually committed in secret and under condition where concealment is highly probable. If direct evidence is insisted under all circumstances, a successful prosecution of vicious criminals, who have committed heinous crimes in secret or secluded places, would be near impossible. In this case not only was the heinous crime committed at a secluded place but the deceased's body was blasted beyond recognition. Only fragments of bones were found." (Emphasis added)

[86] The Court of Appeal case of **Yii Soon Ho v. Public Prosecutor [2014] 1 LNS 386** considered the following leading authorities on the subject of circumstantial evidence, namely, **Sunny Ang v. Public Prosecutor [1965] 1 LNS 171**; **Jayaraman & Ors v. Public Prosecutor [1982] 1 LNS 126**; **[1982] 2 MLJ 306**; **Public Prosecutor v. Magendran Mohan [2005] 3 CLJ 592**; **Chan Chwen Kong v. Public Prosecutor [1962] 1 LNS 22**; **[1962] MLJ**

307; **Karam Singh v. Public Prosecutor [1967] 1 LNS 65**; **[1967] 2 MLJ 25**; and **Chang Kim Siong v. Public Prosecutor [1967] 1 LNS 18**; **[1968] 1 MLJ 36**.

[87] The illuminating judgement of Varghese George JCA in Yii Soon Ho v. Public Prosecutor (supra), opined that the combined effect of all these cases was that a conviction based on circumstantial evidence was good in law if the cumulative effect of all evidence lead to an irresistible conclusion that it was the accused who committed the crime. This is what His Lordship said:

"*Suffice it here to reproduce some guiding excerpts from the aforecited authorities, to support that position.*

In Sunny Ang's case (where the deceased's body was never found) the Federal Court noted:

"...The second question to which I must draw your attention is that in this case, depending as it does on circumstantial evidence, is ***whether the cumulative effect of all the evidence leads you to the irresistible conclusion that it was the accused who committed this crime. Or is there some reasonably possible explanation such, for example - was it accident? "***

Thomson CJ's comments in Chan Chwen Kong were in the following terms:

*"...**where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. The real question is: is that rope strong enough to hang the prisoner?** "*

In Karam Singh, HT Ong FJ stated:

*"...**In a case where the prosecution relies on circumstantial evidence, such evidence must be inconsistent with any other hypothesis than that of the guilt of the accused**..."*

And in Chang Kim Siong, the Federal Court emphasised that: -

*"**The onus on the prosecution where the evidence is of a circumstantial nature is a very heavy one and that evidence must point irresistibly to the conclusion of the guilt of the accused. If there are gaps in it, then it is not sufficient**."* (Emphasis added)

[88] It is thus clear that although a conviction can be sustained by reliance on circumstantial evidence, it must admit of no other possibility other than that it was the accused who committed the murder.

[89] It is also clear that where the evidence is of a circumstantial nature, the burden upon the prosecution is a very heavy one and that evidence must point irresistibly to the conclusion of the guilt of the accused and if there are gaps in it, then it is not sufficient.

[90] Reverting back to the analysis, from the evidence as a whole, namely, the direct testimony of SP10 that she had witnessed the first, the second and the third accused inflicting beatings on the deceased using various implements and also their hands and feet and various other punishments including immersing him in water up to his neck in a water container and breaking a red ant's nest on the body of the deceased and the circumstantial evidence that SP10 was instructed by the second and third accused to dispose of the rubber pipe and the rattan, the prosecution has succesfully proven the third ingredient of the offence under section 302 Penal Code against the first, second and third accused.

iv) <u>In inflicting the injuries upon the deceased, Roshamnudin Bin Abdullah, the accused persons had either possesed one of the degrees of intention under section 300 (a), (b), (c) or the required degree of knowledge under (d)</u>

[91] In conducting the analysis of the prosecution case, it was evident especially from the testimony of SP13, the pathologist, that in inflicting the injuries upon the deceased, the accused persons were possessed with the intention under section 300 (c) of the Penal Code.

[92] SP13 had concluded that the cause of death was “Blunt force trauma to the chest”. SP13 had confirmed this in her post mortem report (P53). SP13 testified that the blunt force trauma and the bruises to the deceased were a combination of old and new wounds.

[93] In P53, SP13 said that there was a “bruise to the heart” and that the bruise appreciated over the Koch’s triangle. SP13 said that the Koch’s triangle function is to control the heartbeat.

[94] SP13 also said that injury to the Koch’s triangle could cause death. SP13 said that was the reason she concluded that the cause of death was “Blunt force trauma to the chest”. SP13 said that this and the other injuries collectively resulted in infection.

[95] SP13 further said that the “Blunt force trauma to the chest” was

caused by objects such as the use of hands or a rattan. The testimony of SP10 confirmed that this was the case.

[96] Although there was a suggestion by the defence that the CPR conducted by SP10 on the deceased may have caused the “Blunt force trauma to the chest”, this was denied by SP13 in her testimony.

[97] With respect to the law on section 300 (c) in particular, the locus classicus is the Indian decision of **Virsa Singh v. State of Punjab AIR [1991] SC 467**, where the views expressed by Vivian Bose J is widely relied upon as stating the correct law on the subject where he said as follows:

"…..*To put it shortly, the prosecution must prove the following facts before it can bring a case under section 300 "thirdly" …..;*

…..First, it must be established, quite objectively, that a bodily injury is present …;

Secondly, the nature of the injury must be proved. These are purely objective investigations….

Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended …..

…..Once these three elements are proved to be present, the enquiry proceeds further and ***Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender …..***

…..Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout) the offence is murder under section 300 "thirdly". It does not matter that there was no intention to cause death. It does not matter that was no intention even to cause an injury of a kind that is sufficient in the ordinary course of nature (not that there is any real distinction between the two).It does not even matter that there was no knowledge that an act of that kind will be likely to cause death. Once the

intention to cause bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death ….." (Emphasis added)

[98] It is clear from the above case that all the three ingredients are satisfied. Once this is the case, the fourth ingredient is subjective and the intention of the accused persons is irrelevant.

[99] SP13 in her post mortem report (P53) also stated that the "External blunt and heat related injuries seen which were of different ages in combination with healing subdural and retinal haemorrahages denotes repetitive and on-going trauma over a period of time which were consistent with battered child syndrome".

[100] A combination of the evidence as analysed above entititled this court to reasonably conclude that the injuries inflicted on the deceased were done with the intention of causing bodily injuries and such bodily injuries were sufficient in the ordinary course of nature to cause death.

[101] Under all the circumstances, the prosecution had proven the fourth ingredient of the charge.

Common intention under Section 34 of the Penal Code

[102] It is also neccesary to consider the issue of common intention on the part of the accused persons.

[103] The essence of the concept of common intention was explained in the Court of Appeal case of **Sabarudin Bin Non & Ors v Public Prosecutor [2005] 4 MLJ 37** by referring to what was said by Sethi J in the Indian case of **Suresh v State of Uttar Pradesh AIR 2001 SC 1344** as follows:

"***Section 34 of the Indian Penal Code recognises the principle of vicarious liability in the criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention****. It is a rule of evidence and does not create a substantive offence.* ***The section gives statutory recognition to the common sense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually.*** *There is no gain saying that* ***a***

common intention pre-supposes prior concert, which requires a pre-arranged plan of the accused participating in an offence. Such a pre-concert or pre-planning may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence. Common intention can be formed previously or in the course of occurrence and on a spur of moment. The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case." (Emphasis added)

[104] The above passage can succinctly be summarised as follows:

i) It is the application of the principle of vicarious liability in criminal law;

ii) It is a rule of evidence;

iii) It is the recognition of the common sense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually;

iv) It pre-supposes prior concert;

v) This however can not only be formed previously but also during the course of occurrence and on a spur of moment; and

vi) Whether there is common intention is a question of fact to be proved mainly by way of inference from circumstances.

[105] Although it is in evidence that it was the second and third accused who mainly inflicted the punishments, there was evidence that the first accused also administered punishments to the deceased.

[106] The action of the first accused in also asking for the rattan and the rubber pipe to be disposed off showed knowledge on his part that these items were used to inflict punishement upon the deceased.

[107] All the accused persons lived in the same house and they all would have been aware of the punishments administered on the deceased. I therefore find that there was a meeting of minds between all the accused to inflict punishment upon the deceased everytime he misbehaved.

[108] As a result, I find that there was common intention under section 34 of the Penal Code between all accused.

Decision

[109] For the reasons enumerated, I find therefore that the prosecution had proven a prima facie case against the first, second and the third accused for murder under limb (c) to section 300 of the Penal Code. I called upon them to make their defence accordingly.

[110] After the three alternatives were explained to them, all the accused persons elected to give sworn evidence.

E) DEFENCE CASE

[111] The first accused on oath said that he is the step father of the deceased and married the third accused in October 2008. He said that on the day the deceased passed away i.e. 19.10.2016, he was at work. His work hours are from 7.00a.m. until 4.30p.m. He leaves the house in the morning at 6.00a.m.

[112] When he left the house that day, he did not see the deceased. The first accused said that he would normally send the deceased to school but on the day the deceased passed away he did not send him to school. He does not know why the deceased did not go to school that day.

[113] The first accused said that although he has beaten the deceased before by way of discipline, he only adminsters canning to the deceased's palm. He denied that he has placed red ants ("kerengga") on the deceased in order to discipline him. He also denied ordering the decceased to be submerged in water in a blue container or "tong".

[114] The first accused said that when he left the house on the day of the incident, he did not see the deceased submerged in water in the blue container. The first accused admitted that he has a temper and when the deceased made a mistake he would be angry. He however said that he never would torture the deceased.

[115] The first accused said that in a space of a day he would be angry with the deceased at least twice. This was because the deceased would often not listen to instructions and refuse to do his school homework.

[116] The first accused said that on the date of the incident, as he was on his way home from work, a friend by the name of Jamal (SP5) whom he came across told him that the deceased was lying down on the bathroom floor. He did not know why this was so.

[117] He panicked and went home where he saw the deceased lying on the floor as if he had fainted. His wife, the third accused, told him to find a car to transport the deceased to a hospital.

[118] The first accused then went over to SP5's house to ask for his help in transporting the deceased to hospital. On the way there the accused accompanied the deceased.

[119] The first accused said that he did not know the reason for the deceased's condition at the time and he was not sure when he was holding the deceased whether he was still alive or not.

[120] He said later that there was a pulse but that it was slow. The first accused said that he reached the clinic after about half an hour. When he arrived there, the clinic was closed and he asked the third accused to go behind the clinic to look for the doctor.

[121] The first accused said that coincidently there was a nurse who was about to go home and she said that she would call the doctor. The doctor then arrived shortly after and the deceased was brought in for examination in the emergency room.

[122] The first accused said that he did not go into the emergency room and left shortly thereafter. He later went to the police station upon learning that the third accused had gone there to lodge a police report.

[123] The first accused denied going back home on the day of the incident and instructing SP10 to take a rattan and dispose of it.

[124] The first accused said that he never had any problems with the deceased and that he was not in the habit of beating children. He said he still loved the decceased although he was angry with him at times. He also felt a sense of loss because the deceased was no longer around.

[125] The first accused said that the deceased had been looked after by a family in Kedah previously and they informed that they were unable to look after him anymore as he was too active and stubborn.

[126] The first accused further testified that he had never before used a ketchup bottle to hit the deceased. He referred to the photograph of the bottle P8(7) and identified the bottle but said that it was used

outside the house in order to act as a buffer to prop up earth so that water does not flow out.

[127] The second accused gave oral testimony and said that at the time of the incident he was working at a factory the name of which he does not know. He said that his working hours are from 8.00a.m. but said that the time he finishes is uncertain. He suggested that it was around 6.00p.m. as he gets one day a week off from work.

[128] At the time of the incident the second accused said that he was already married with a family. He said however that his wife and his two children do not reside with him but with his mother in law in Rompin, Pahang. He said that he stayed together with the first and third accused.

[129] He said that about 2.00p.m., his wife sent him a message on his handphone asking him to buy some things for his children and for him to bring the things over to them.

[130] After he bought the items as requested, the second accused went over to his wife's house. He later returned to his home. He said that when he arrived back to his house he saw Udin, the

deceased, sleeping in the room but said that he did not go inside the room.

[131] He said that when he arrived home, everyone including PW10 was at home. He said that he went together with PW10 to dispose of a rattan. The second accused denied that he hit the deceased repeatedly and for the whole day.

[132] The second accused said that when he used the rattan on the deceased he only hit the palm of his hand and the soles of his foot and said that he did not torture the deceased in any other manner.

[133] The second accused said that he only hit the deceased with a rattan because he always disobeyed his mother, meaning the third accused. The second accused confirmed that on the day of the incident, the deceased was alive and well. He also said that he did not notice the deceased experiencing any pain that day and he looked normal.

[134] The third accused tendered a Witness Statement (D55) in lieu of oral examination in chief. The third accused was married

previously before she married the first accused and had two children, one of whom is the deceased.

[135] She subsequently married the first accused and the latter is therefore the step father of the deceased. The third accused is also the sister in law in law of the second accused.

[136] The third accused said that in 2007 she befriended a Malay lady who told her that her relatives in Kedah still had no children. As the third accused had 2 children and could not afford to maintain them, she decided to allow the said lady to look after both of them.

[137] Sometime later however, the husband of the Malay lady named Ayob came to see the third accused to discuss about “abang” meaning the deceased. He said that “abang” had difficulties learning, was extremely naughty, did not listen to teacher’s instruction and refused to go to school (“tahfiz”).

[138] As a result, in August of 2014, the said couple from Kedah contacted the third accused and informed her that they could not look after ‘abang” any longer. The couple did not give any reason but banked in the sum of RM300.00 into the third accused’s bank

account as expenses in order that the third accused could go to Kedah and take “abang” back.

[139] The third accused and the first accused then went to Kedah by bus. The third accused said that when they met the deceased, his hair was long, he was very thin and dirty. The couple from Kedah told the third accused that the deceased was very difficult to look after because he was stubborn and refused to listen to instruction.

[140] The third accused said that while she was in Kedah, she noticed that the deceased’s physical condition was not good and that he had many injuries all over his body.

[141] When the third accused asked the couple how this came about, she was told that the deceased was naughty, always running around and fell down often. They said that he was very rough and gave no thought to his own safety.

[142] After returning to Endau, Mersing, she said that she brought the deceased to the Education Ministry in order to register him in school. At the time, the deceased was 9 years old.

[143] The third accused managed to register the deceased in Sekolah Kebangsaan Bandar Endau (Pendidikan Khas). The third accused said that she then realised what the couple from Kedah had meant because she found the deceased was “hyper” and very stubborn.

[144] The third accused said that when the deceased came to stay with her in Endau, Mersing, several persons also stayed in her house, namely, the first accused, the second accused, Siti Hajar (PW10), the younger sister to the first and second accused, and the third accused’s child with the first accused, named Mohd Ridzuan.

[145] The third accused said that the deceased was playful and clumsy. She also said that the deceased was very rough whenever he was playing and often hurt himself. She said that sometimes he would return home and PW10 would have to clean and dress his wounds.

[146] The third accused admitted to disciplining the deceased by caning his hands and legs, as well as imposing the punishment of “ketuk ketampi” on him.

[147] She however denied imposing all other forms of physical abuse

towards the deceased, including soaking him in the blue water container (P19F). The third accused said that it was the deceased himself who often played with water on his own accord, which included the water contained in the said blue water container.

[148] The third accused said that the physical injuries that were suffered by the deceased was as a result of his own doing and whenever this happened it was she who took him to seek medical attention.

[149] She said when the deceased suffered a fractured broken bone to his right radial shaft this was as a result of him having jumped from a tree which was in the house compound.

[150] The third accused took him to Klinik Kesihatan Endau ("KK Endau"), but the injuries were so severe that he had to be admitted to Hospital Tengku Ampuan Afzan, Kuantan, Pahang. The deceased was admitted there for 5 days and had a surgical implant inserted into his right arm.

[151] When the deceased was scalded with hot water, which incidents were explained in D45 and D46, the third accused took him for medical treatment twice. She said that the deceased's scalding

occurred when the deceased had run into her while she was carrying a jug of hot water when she had been preparing hot drinks.

[152] The third accused also related another incident where the deceased was playing and jumped from the 1st floor window of their house as a result of which he injured his left shoulder. The third accused said that it was she who brought him to KK Endau to seek medical attention.

[153] The third accused also related the deceased was also involved in a motorcycle accident about 10 days before he died, where both he and the third accused fell off their motorcycle. Again, she said that she sought medical attention, as explained in D48 and D49.

[154] The third accused said that throughout all these medical emergencies, it was she who took the deceased to the KK Endau, where they would meet the same doctor, Dr Mohd Farhan (SP12).

[155] The third accused said that on the day of the incident on 19.10.2016, while she was resting in the house, she saw the

deceased playing in the bathroom. She said that although the deceased loved to play with water, he did not like to bathe.

[156] At the time, the first accused was not at home but at work while the second accused was at home. She said that the second accused scolded the deceased and told him not to play with water. She also noticed that the deceased had come out of the bathroom. The second accused also left the house later.

[157] A few hours later, the deceased went back into the bathroom. The third accused said that he looked unwell and this time the deceased spent a long time in the bathroom.

[158] She said she later heard a sound like a bucket of water falling down. When she went to check what had happened, she was shocked to see that the deceased had fainted in the bathroom.

[159] The third accused said that she quickly pulled the deceased out and laid him on the kitchen floor. She said that he was still breathing and she called out to PW10 to come quickly.

[160] She said that she tried to call the first and second accused without success. Coincidently, a friend of the first accused had come to the house at the time to look for the first accused. She then told him to locate the first accused.

[161] The third accused also testified to seeing many people performing Cardiopulmonary Resuscitation “CPR” on the deceased including PW10, after the deceased had passed out at home. The third accused said that she noticed that PW10 pushed hard on the chest of the deceased while performing CPR.

[162] The third accused said that with the assistance of PW5, they took the deceased in PW5’s car to KK Endau. When they arrived there they found that the clinic was closed. A nurse however made some phone calls and not long after, a male Malay arrived. She said that at the time, she was sure that the deceased was still breathing.

[163] The male Malay then also performed CPR on the deceased. A few moments later, some other people arrived there including Dr. Farhan. She said that they all performed CPR on the deceased until Dr. Farhan told them to stop performing CPR and informed that the deceased had passed away.

[164] The third accused said that she was advised thereafter to lodge a police report which she did at the Endau police station. She said that she was arrested thereafter. The third accused said that she was unaware as to why there were no investigations carried out on the couple in Kedah who had looked after the deceased from 2008 until 2014.

[165] The third accused said that in her efforts to discipline the deceased, she had never once subjected him to torture. She said that she did this out of her responsibility as a mother and because she worried for the future well-being of the deceased.

[166] The third accused denied hitting the deceased with a rubber pipe, or immersing him in the tub of water or standing on him. She said that she never hit him on his body or caused any of the injuries that led to his death.

F) DUTY OF THE COURT AT THE CONCLUSION OF THE TRIAL

[167] The duty of a trial court at the conclusion of the defence case is set out in section 182 A of the Criminal Procedure Code (CPC) which imposes an obligation upon the court to consider all the evidence

to decide whether the prosecution has proved its case beyond reasonable doubt.

[168] See also **Prasit Punyang v Public Prosecutor [2014] 4 MLJ 282** and also **Md Zainudin bin Raujan v Public Prosecutor [2013] 3 MLJ 773**. In the former case, the Court of Appeal speaking through Azahar Mohamed JCA ("as His Lordship then was"), held:

"*In accordance with the provisions of s 182A(1) of the Criminal Procedure Code, it is the bounden duty of the learned JC, at the conclusion of the trial, to consider all the evidence adduced before him and shall decide whether the prosecution has proved its case beyond reasonable doubt.* ***The legislature has advisedly used the term all the evidence. The emphasis must be on the word all***."(emphasis added)

[169] Aside from the above, the correct thought process and stages that should be followed by a trial court in the assessment and evaluation of the defence evidence is that as encapsulated in the time honoured decision of **Mat v Public Prosecutor 1963 29 MLJ 263**, where it was held by Suffian J (as he then was) as follows:

"*The position may be conveniently stated as follows: –*

(a) If you are satisfied beyond reasonable doubt as to the accused's guilt

Convict.

(b) If you accept or believe the accused's explanation

Acquit.

(c) If you do not accept or believe the accused's explanation

Do not convict but consider the next steps below.

(d) If you do not accept or believe the accused's explanation and that explanation does not raise in your mind a reasonable doubt as to his guilt

Convict.

(e) If you do not accept or believe the accused's explanation but nevertheless it raises in your mind a reasonable doubt as to his guilt

Acquit."

[170] The approach in Mat v Public Prosecutor was endorsed by the Federal Court as being the correct one to adopt when evaluating the evidence of the defence case in **Public Prosecutor v Mohd Radzi Bin Abu Bakar [2005] 6 MLJ 393**.

G) ANALYSIS OF THE DEFENCE CASE

[171] At the conclusion of the whole case in addition to considering all the evidence, it is also incumbent upon a trial court to carry out a maximum re-evaluation of the prosecution's case but this time considered and tested as against the sworn evidence given by the accused. This was of course, something that was not possible to do at the close of the prosecution case.

[172] In **Public Prosecutor v. Iskandar bin Mohamad Yusof [2006] 6 CLJ 379**; **[2006] 5 MLJ 559**, it was held by Suriyadi J (as he then was):

"*As said above when I called the defence I was satisfied that a prima facie case had successfully been established by the prosecution. Factually and legally the prosecution had satisfied all the ingredients and requirements of s. 180 of the Criminal Procedure Code. Before arriving at that conclusion as required by the latter section, and as stated earlier, a maximum evaluation of the evidence was conducted by me. Needless to say that evaluation was totally one sided, in that it was substantially the evidence adduced by the prosecution, though peppered by the accused person's suggestions and answers elicited from witnesses*

in the course of the cross examination. Naturally, at that stage, no sworn testimony of the accused person was made available that could prematurely punch holes in the prosecution's story. Naturally too, whatever was suggested by the accused person that could be helpful to him inevitably would receive unhelpful answers. With such a scenario, the prosecution literally sauntered into the defence stage.

At the defence stage, a different scenario expressed itself. The prosecution's story had to be re-evaluated maximum-like, but this time padded by the additional defence's version, which was given under oath. At the end of the accused person's case, unless the prosecution succeeded at convincing me beyond reasonable doubt, he must be acquitted*. All the latter needed to do was to weaken the prosecution's case on a balance of probability*." (Emphasis added)

[173] The cited case above was on a charge of drug trafficking where a statutory presumption had arisen, hence, the reference to the necessity of weakening the prosecution's case on a balance of probability.

[174] However, where there are no presumptions applicable, as in the instant case, the principle enunciated of a re-evaluation of the prosecution case in the light of the defence case in order to ascertain whether a reasonable doubt has been raised, nonetheless applies with equal force.

[175] At the end of the prosecution case, this court was satisfied that the prosecution had proven all the necessary ingredients of the offence with which the accused persons were charged and consequently called for their defence.

[176] Having now heard the defence case, this court must now evaluate and assess the case for the defence as against the evidence given by the prosecution. This exercise necessarily involves a re-evaluation of the prosecution case.

[177] The common tenor of the defence of all three accused is that while they admitted to disciplining the deceased, they had never subjected him to abuse over and above that.

[178] It is not in dispute that there were numerous wounds on the body

of the deceased. The immediate cause of death however, has been determined to be “blunt force trauma to the chest”.

[179] Therefore, while there were several visible wounds to the body of the deceased, it must be nevertheless determined whether there is any evidence that show or which can be reasonably inferred from that the acts of the accused collectively or any one of them acting independently had caused injuries to the chest area or any part of the body of the deceased that could have led to blunt force trauma to the chest.

[180] PW13, the pathologist who performed the post-mortem on the deceased, testified that there was a bruised heart or (cardiac contusion) “lebam di jantung” resulting directly from a transmission of force across the chest in combination with overwhelming widespread infection resulting from improperly treated blunt and heat related injuries over a period of time that was incompatible with life.

[181] The cause of death was therefore concluded by PW13 to be as a result of “blunt force trauma to the chest”. PW13 specifically

mentioned 3 injuries as reflected in the post mortem report (P53) on page 3 as follows:

"No.21. Healing abrasions on the right back side of torso towards the right flank measuring 14 x 12 cm

No 22. Two parallel abrasions on the right side back of torso towards the right flank 1 cm apart with the superior and inferior wounds each measuring 5 x 0.4 and 4 x 0.4 respectively

No 23. Healing abrasions on the left side back of torso measuring 4 x 2 cm".

[182] PW13 said that the impact of these injuries, because it was to the torso, caused the internal injuries, namely, a bruise to the heart. This bruise was said to have appreciated over the Koch's triangle.

[183] According to an online article at https://academic.oup.com/europace/article/19/3/452/2952262, the Koch's triangle is an important area of human heart, which is located in the superficial paraseptal endocardium of the right atrium.

[184] PW13 described the function of the Koch's triangle as controlling the heartbeat or "mengawal dentutan jantung".

[185] PW13 also stated that the wounds found were a combination of blunt force trauma and incisive wounds along with scalding as a result of hot water. She further said that the wounds resulting from the blunt force trauma consisted of a combination of bruises, abrasions and tears to the face, lips, upper and lower limbs including the front part of the body and the back together with the hip.

[186] PW13 said that there were also wounds resulting from caning of the deceased consisting of tramline bruises, tramline abrasions and tramline healing lesions to the left hip, the back of the left shoulder and the back of the thighs.

[187] None of these wounds however, point directly towards any form of blunt force administered directly to the chest of the deceased with any amount of force sufficient to cause injuries that could have resulted in the fatal "blunt force trauma to the chest".

[188] SP10 was the only witness in the prosecution case to give

evidence as to the injuries inflicted by the accused persons on the deceased. SP10 said that she witnessed a pipe being used by the third accused to hit the deceased. However she also said that this was used to hit the head and the ears of the deceased.

[189] She also said that the third accused used this pipe to hit the toes of the deceased repeatedly. SP10 said that after he was hit, the deceased was unable to lift up his hand. She further said there was an operation performed on the deceased where a metal rod was inserted into the deceased's hand and thereafter he was unable to straighten his hand.

[190] The third accused herself admitted disciplining the deceased by caning his hands and legs in addition to imposing the punishment known as "ketuk ketampi" which involves the person crossing his hands while holding his ears and squatting down and rising up in sequence.

[191] The inflicting of punishment by caning by the third accused is also supported by P17, which is a chemist report revealing that the third accused's DNA was detected on one of the rattans recovered by the police.

[192] SP10 said that the third accused often beat the deceased on his chest using a rubber pipe, a rattan and a stick. There was no indication however, whether this was administered with such force sufficient to cause “blunt force trauma” to the chest of the deceased. The indication from PW13 however, is that these only resulted in tramline bruises, abrasions and healing lesions but these were not found on the chest but to the left hip back of the left shoulder and back of the deceased thighs.

[193] SP10 also said that the third accused would stand with both her feet on the body of the deceased on top and at the back and on the stomach. Although this was only said to be for a short while, the deceased would complain that it hurt. SP10 said that she had witnessed this happening a number of times.

[194] The question that arises is whether these acts had caused the internal injuries and the bruise to the heart?

[195] The act of beating the deceased across the chest with the rubber pipe, rattan and stick and the act of standing on the deceased are the closest pieces of evidence that the act of the third accused may have caused the fatal injury. There is however no evidence

from SP10 as to exactly when these acts were done. Were these acts done some months before the death of the deceased or was it as recent as the week or maybe days preceding the deceased's death?

[196] One cannot of course speculate on these matters. As it stands, there is no direct evidence nor evidence from which it can be reasonably inferred that the act of the third accused of beating on the chest and standing on the body of the deceased was the cause of the fatal injury.

[197] It is not in dispute and indeed admitted by the accused persons that they were all involved in administering some form of discipline on the deceased due to his inherent stubborn nature and his hyperactive disposition.

[198] PW13 denied that the fatal injury could have been caused by the deceased falling down as suggested because the elbow would have broken the fall and said that the injury was as a result of direct impact because it was in a protected area.

[199] The direct impact must of course mean direct impact to the chest

area of the deceased because PW13 said that the blunt force trauma was across the chest.

[200] The evidence of PW13 also indicated that a considerable degree of force was required to penetrate this protected area.

[201] However, the available evidence shows that the injuries were mostly inflicted by way of discipline to parts of the body other than directly to the chest area of the deceased.

[202] In the final analysis, while there is evidence that the blows inflicted by using the rubber pipe, rattan and stick had caused tramline injuries, there is nothing to show that these injuries or the act of standing on the deceased had penetrated the chest cavity that resulted in the fatal injury.

[203] The other issue to consider is whether the death of the deceased due to other events has been ruled out. Due to the active nature of the deceased, there is evidence that he had hurt himself on many occasions such as falling from trees.

[204] One such occasion was when the deceased had jumped from a

tree in the house compound. This is evidenced by a medical report D43 issued when the third accused took the deceased for treatment at Klinik Kesihatan Endau ("KK Endau") but as the injury was serious in nature, he was admitted to the Hospital Tengku Ampuan Afzan, Kuantan, Pahang for 5 days where he had a surgical implant inserted into his right arm.

[205] Besides this, there is also evidence that the deceased was scalded due to an accident with hot water, as explained in D45 and D46 where he underwent treatment. This piece of evidence however goes only as far as showing the deceased's hyper-activeness and his susceptibility to self-inflicted injuries.

[206] D47 is a report where the deceased injured his left shoulder after he jumped from the first floor window of the house and was brought for treatment to KK Endau.

[207] This again is evidence that the deceased was injury prone due to his hyperactive disposition and the possibility that he had suffered some internal injury to his chest area that led to the fatal injury as a result cannot totally be ruled out.

[208] There is also evidence that the deceased and the third accused were involved in a motorcycle evidence just about a week prior to his death resulting in some injuries. PW13 agreed that myocardial contusion or bruising of the heart could be caused by road accidents or falling from heights.

[209] The Doctor concerned who administered treatment on the deceased at KK Endau, Dr. Mohd Farhan (PW12) testified to these injuries.

[210] Apart from that, there is evidence that numerous persons had performed CPR on the deceased on the day of his death. Although PW13 said that the administering of CPR could not have caused the fatal injury, certain parts of her testimony during cross-examination did not totally rule out the possibility.

[211] PW13 agreed during the course of cross-examination by learned counsel for the third accused that performing CPR carries with it some measure of risk for example, rib fractures, and that if not performed properly can cause injuries.

[212] She agreed that CPR could cause myocardial contusion and a

condition known as “commotio cordis” which is the stopping of the heart caused by a blow to the front of the chest.

[213] PW13 also agreed that during the performance of CPR the chest bone is in contact with the heart. The relative small size of the deceased also would have made him more susceptible to injuries caused by excessive amount of force to his chest area. There was no evidence that PW10 was properly trained to administer CPR.

[214] A consideration of the evidence as a whole does not therefore totally rule out the possibility that the administering of CPR by various persons in succession on the deceased could have caused the fatal injury.

[215] Further, although the deceased lived with the family from Alor Star quite a while before he succumbed to the fatal injury, the possibility that he sustained the injury in some latent form while there cannot also be excluded.

[216] There was also evidence that the third accused had told PW11, the Investigating officer (“I.O”) that the family in Alor Star had explained that the injuries sustained by the deceased was of his

own doing. PW11 however admitted to not investigating this aspect of the case despite him having knowledge of the address in Alor Star.

[217] It is also not without significance that PW13 said that all the blunt force injury and blisters or scalding “luka lecur” were a combination of old and recent injuries thus not ruling out the possibility that the injuries were sustained while the deceased was in Alor Star.

[218] Although PW13 said that bacterial infection due to the other injuries contributed to the death and reduced the ability of the deceased to fight of infection, she agreed that this takes time and is not immediate.

[219] As far as the first accused is concerned, there is evidence from PW10 that the first accused had used a rattan to hit the deceased only by way of reprimand or correction. The evidence also revealed that the first accused was not at home but at work on the day the deceased collapsed in the bathroom.

[220] The second accused also admitted to hitting the deceased but by way of correction only. The evidence also discloses that the

second accused was not in the house when the deceased collapsed.

[221] The act of the accused in disposing of the rattan and the pipe after hearing of the death of the deceased was no doubt prompted by the fear that they might be implicated but in the absence of any evidence to show that these instruments were used with such force as to inflict the blunt force trauma to the chest, this evidence does not implicate the accused persons in any material way.

[222] The totality of the evidence shows that while all three accused administered punishment on the deceased, there is no direct evidence to show that any degree of force was used by way of instruments or otherwise directly to the chest of the accused sufficient to result in blunt force trauma.

[223] A consideration of the case as a whole shows that there is no direct evidence that the acts of the accused acting individually or together by way of common intention had caused the “blunt force trauma” to the chest area of the deceased.

[224] The evidence also admits of the possibility that the fatal injury may

have resulted from other causes linked to the deceased's own hyper active nature and other accidents including the possibility that the performance of CPR may have also caused the fatal injury.

[225] The inevitable conclusion therefore is that after considering all the evidence in this case, the prosecution have failed to establish the actus reus on the part of any of the accused's persons with respect to the cause of the death of the deceased.

[226] The prosecution has also failed to prove mens rea for the commission of murder pursuant to section 302 of the Penal Code on the part of the accused persons.

[227] Following the time honoured authority of Matt v Public Prosecutor (supra), the defence has therefore managed to raise a reasonable doubt in the prosecution case.

[228] I therefore find that the prosecution has failed to establish a case of murder under section 302 of the Penal Code against all three accused beyond a reasonable doubt. I therefore acquit and discharge all three accused of the charge against them.

Dated: 7th September 2020

sgd.

(COLLIN LAWRENCE SEQUERAH)

Judge

High Court of Malaya

Kuala Lumpur

Counsels:

For the Prosecution	…	Tn. Faizal@Amrin Bin Noor Hadi Public Prosecutor [Attorney General's Chambers]
For the 1st Respondent	…	En. Bernard George a/l George Mathews [Messrs. Tay, Bernard & Cheong]
For the 2nd Respondent	…	En. Norman J Fernandez [Messrs. C. Sukumaran & Co.]
For the 3rd Respondent	…	En. Bustaman Menon Bin Abdul Hamid Menon [Messrs. R.K. Menon & Co.]