MALAYSIA

IN THE HIGH COURT IN SABAH AND SARAWAK

AT KOTA KINABALU

CRIMINAL TRIAL NO.: BKI-45B-2/3-2021

BETWEEN

PUBLIC PROSECUTOR ... PROSECUTION

AND

ARSIT BIN INDANAN ... ACCUSED

BEFORE THE HONOURABLE

HIGH COURT JUDGE

JUSTICE LEONARD DAVID SHIM

GROUNDS OF DECISION

[1] The accused in this case is charged with murder under section 302 of the Penal Code. The amended charge marked as PW2 reads as follows:

> *"Bahawa kamu pada 25 Mei 2019 di antara jam lebih kurang 4.00 pagi hingga 5.00 pagi, bertempat di dalam sebuah kenderaan Proton Saga FLX warna merun No. Pendaftaran SAC6404F, di tepi Jalan Marabahai, di dalam Daerah Tuaran, di dalam Negeri Sabah, telah membunuh Mohammad Hanafiee bin Jaffar, No. Kad Pengenalan: 920224-12-6043 dan dengan itu, kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan."*

[2] The Prosecution had called 23 witnesses in order to prove the charge against the Accused.

BURDEN OF PROOF

[3] The following authorities are relevant in construing the burden of proof on the Prosecution's shoulders at the end of the Prosecution's case.

[4] The meaning of prima facie had been elaborated in the case of **DALIP BAGHWAN SINGH V PP [1997] 4 CLJ 645**, pg. 658-659 as follows:

> *"…the meaning of the test of prima facie case at the end of the prosecution's case is, 'on the assumption that the prosecution evidence was accurate, could the accused be lawfully convicted? The word 'accurate' could mean or should mean 'true' and the words 'prosecution evidence' could be said to refer to the evidence of 'primary facts' which could logically refer to evidence or evidence sufficient enough to prove each ingredient of an offence. Once there is sufficiency of such evidence, so long as it is not inherently incredible, a prima facie case is made out. Therefore, the test of prima facie case would not entitle one to assess the veracity or credibility of evidence of witnesses as the session had done.".*

[5] The explanation as to what is 'primary facts' and 'inherently incredible' is stated in the same case at page 659 as follows:

> *"Such evidence of primary facts could logically refer to evidence or evidence sufficient enough to prove each*

ingredient of an offence, such as death as one of the ingredients in a murder case. One there is sufficiency of such evidence, so long as it is not inherently incredible such as the landing of a flying saucer from outer space on Dataran Merdeka in Kuala Lumpur, a prima facie case is made out.".

[6] The meaning of prima facie is also decided in the case of **LOOI KOW CHAI & ANOR V PUBLIC PROSECUTOR [2003] 1 CLJ 734,** pg. 736 as follows:

"The correct test to be applied in determining whether a prima facie case had been made out under s 180 of the Criminal Procedure Code [and this would apply to a trial under s 173 of the Code] was that as encapsulated in the judgement of Hashim Yeop Sani FJ [as he then was] in Dato Mokhtar bin Hashim Anor v Public Prosecutor. Therefore, a judge sitting alone under s 180 of the CPC 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 was negative, then no prima

facie case had made out and the accused would be entitled to an acquittal. Subjecting the evidence of the prosecution to maximum evaluation to determine if the defence was to be called did not mean that the prosecution had to prove its case beyond a reasonable doubt at this intermediate stage.".

[7] Reference can also be made to the Federal Court's decision in the case of **BALACHANDRAN V. PP [2005] 1 CLJ 85,** pg. 99, where YA Augustine Paul JCA had stated, among others, as follows:

"A prima facie case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal.".

ELEMENTS TO PROVE FOR AN OFFENCE UNDER SECTION 302 OF THE PENAL CODE

[8] Section 300 of the penal Code provides as follows:

"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 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."

[9] Proving any one of the limbs provided under section 300 of the Penal Code is sufficient to prove a charge under section 302 of the Penal Code.

[10] In **PP v Sanderasegaran Nithenanham [2024] 4 CJL 823 FC**, the Federal Court succinctly stated the elements of an offence under s.302 read with s.300 (c) of the Penal Code as follows:

*"**[38]** Reverting to the present case, it is settled law that for the prosecution to establish an offence of murder punishable under s. 302 of the Penal Code, the elements to be proved by the prosecution are, the death of the deceased, the deceased died as a result of the injuries suffered, the injuries were caused by the accused, and the accused's act comes within one or a combination of the limbs under s. 300 of the Penal Code. The act under any one or combination of the limbs under s. 300 establishes the offence of murder.*

***[39]** Next, the following facts must be proved by the prosecution to bring a case under s. 300(c), which are, the presence of bodily injury, the accused inflicted the injury voluntarily, not by accident or unintentionally and the injury is sufficient in the ordinary course of nature to cause death."*

[11] Based on section 300 and 302 of the Penal Code, the following elements need to be proved by the Prosecution:

(a) the deceased who is Mohammad Hanafiee bin Jaffar had died;

(b) the deceased died due to the injury suffered; and

(c) the accused had caused the death of the deceased or had inflicted bodily injury on the victim in which the bodily injury inflicted is sufficient in the ordinary course of nature to cause death.

First Element - The deceased who is Mohammad Hanafiee bin Jaffar had died

[12] The deceased in this case is Mohammad Hanafiee bin Jaffar who was the Grab driver that the accused and PW1 hired on 25th May 2019 around 4.30 a.m. There is no dispute by the defence that the deceased, Mohammad Hanafiee bin Jaffar had died.

[13] The deceased was identified in Court by PW1 (the accused's friend), PW8, PW9, PW10 and PW12 based on the picture in the identity card of the deceased [Exh. P15A]. The car, Proton Saga FLX (Car Reg. No.: SAC6404F), was also identified in Court through the photographs of the car [Exh. P65 (1-49)]. The Investigation Officer (IO) of this case (PW23) also confirmed that the deceased is Mohammad Hanafiee bin Jaffar.

[14] The evidence of identification of the deceased can also be found in with the testimony of PW9 (page 187 NOP, line 4903-4908) and PW10 (page 194, line 5114-5118). As for PW12 (the deceased's mother), she testified that she went to the Queen Elizabeth Mortuary to identify the deceased's body and she identified the deceased through the boxers worn by the deceased.

[15] The evidence of PW2 (DNA Analysis Chemist) also confirms that based on the DNA analysis from the body found in Shahbandar, shows that the body is the body of the deceased. Refer to page 57 of NOP, line 1498-1512.

[16] From the undisputed evidence above, the Court finds that the first element is proved.

Second element – The deceased died due to the injury suffered

[17] PW11, a forensic pathologist, in his testimony had stated that the deceased cause of death is multiple slash and stab wounds. PW11 testimony is as follows (refer page 215 NOP, line 5650-5653):

"Q: Based on the post mortem conducted, what are your conclusion as to the cause of death of the deceased?

A: In my opinion, the cause of death of the deceased was multiple slash and stab wounds.".

[18] In his testimony, PW11 further explain on the injuries found on the deceased upon examination by PW11 as follows:

(a) Page 213 NOP, line 5604-5614

"Q: Refer you to your autopsy report under the title head and neck. You stated there that the cervical spine was intact apart from non-displaced fracture of the body of the 6 cervical vertebrae with surrounding haematomas. Can you tell the Court what can cause this type of injury?

A: This injury is consistent with a blunt injury and can be caused by blunt force trauma such as an impact by a blunt object or weapon, fall on to a hard surface or a combination thereof.

Q: In your opinion, if the neck of the deceased has been twisted, can it cause the non-displaced fracture?

A: With sufficient force, I believe this is possible.".

(b) Page 222 NOP, line 5842-5846

"Q: From your examination on the deceased's body, is it possible for you to determine from which way the weapon insertion that causes the stab wound?
A: From my examination, stab wounds 3 and 4 penetrated the chest cavity, was directed right to left in an oblique trajectory.".

(c) Page 223 NOP, line 5867-5887

"So, the two stabs occurred on the right side just below where the rib cage is. So, we are talking from the right side going up towards the left and because at the autopsy findings, there were cuts to the diaphragm, you can see here this round curve structure, so it has gone through that structure directed to the left side of the chest and resulted in a cut on the left with a sharp weapon or object on the left side. So, we are talking about entry here going to the diaphragm and cutting the way to the left curve. So, its upward oblique from the right to left.

So, in this diagram, it shows the diaphragm is a domed shaped structure. We have to take into account that the diaphragm will move as we breathe. So, when we inspire, the diaphragm moves down, so the knife could have easily penetrated at the diaphragm, so the diaphragm will be moving up and down as we breathe.

So, autopsy shows that it is an incision of the right side of the diaphragm and the left side. So, the two stabs would be directed oblique from right to left upwards towards the left side and also towards the left diaphragm. So, in this direction, in an oblique trajectory, in this direction from the right side.".

(d) Page 224-225 NOP, line 5908-5921

"So, for this demonstration, we have to assume possibilities of an attack through the front or an attack from the back. So, if it was an attack from the back, so for example, if I have a knife or a sharp object penetrated just below the rib cage, this way and it is going up directed towards the left. So, it's cut the right hemi diaphragm, directed this way and left hemi diaphragm directed this way. So, the steps I mentioned are oblique from

right to left upward motion not downward motion. If it was a downward motion. So, it is an attack from the back.

If from the front, same directed upwards, towards here, towards here and another attack here, towards here. So, to the right and left diaphragm. So, it is still the same, oblique right to left upwards directed this way. These are the 2 possible trajectories."

[19] PW11 also states that the injuries inflicted on the deceased is caused by sharp object or weapon such as a knife. PW11 testimony is produced as follows (refer page 215 NOP, line 5655-5662):

"Q: In your opinion, what caused the slash and stab wounds?
A: The slash and stab wounds seen here are consistent with sharp force injuries and can be caused by impact by sharp objects or weapons such as a knife.

Q: If a knife was used to stab and slash, what type of edge of the knife that can cause the slash and stab wounds?
A: The edge of the alleged knife would have to be sharp.".

[20] Based on the evidences submitted above, the Court finds that the deceased had died due to the injuries suffered and inflicted on him. Thus, the second element is proved.

Third Element - The accused had caused the death of the deceased or had inflicted bodily injury on the victim in which the bodily injury inflicted is sufficient in the ordinary course of nature to cause death

[21] To prove this element, the Prosecution relied on direct and circumstantial evidence based on the evidences produced through the Prosecution's witnesses.

[22] In this regard, PW1 is the main eye witness for the Prosecution. PW1 is the accused's friend who hired the Grab car driven by the deceased. Both of them hired the Grab car from Kingfisher to Tuaran. However, mid-way, the Grab car stopped and PW1 alight from the car. While PW1 was closing the car door, he saw the accused suddenly grab the accused neck and twist it. The accused then took out a knife and stabbed the deceased's chest from behind the driver's seat using the accused's right hand. According to PW1, he saw the accused stabbed the deceased two to three times.

[23] PW1 then further testifies that after the accused stabbed the deceased, the accused told PW1 to drive the car and PW1, out of fear and shocked, followed the accused instruction. PW1 also testifies that the accused told him to find a bush area to dump the body.

[24] With regards to the car, PW1 testified that he left the car at the parking lot at Giant Indah Permai. PW1 did that in order to allow the deceased family to find the car.

[25] The testimony of PW1 is in line with the testimony of PW11 (the forensic pathologist) who testified that the deceased cause of death is multiple slash and stab wounds. PW11 also testified that the stab wound can be caused by sharp object such as a knife.

[26] Further, according to PW1, the accused stabbed the deceased using his right hand and at that time the accused was standing at the back seat of the car (on the driver's side). This is again is in line with the testimony of PW11. According to PW11's testimony, the trajectory of the stab wound was directed from right to left in an oblique trajectory. This trajectory of the stab wounds shows that the assailant used his right hand to stabbed the deceased which is in

line with PW1's testimony. Furthermore, PW11 also testifies that based on the trajectory, there are two possibilities where the attack towards the deceased came from i.e. an attack through the front or an attack from the back. This again, the Prosecution submits, supports the testimony of PW1.

[27] The Prosecution submits that any reasonable man knows that by stabbing any person on the chest can cause bodily injury which in the ordinary course of nature can cause death, what more if it was done multiple times.

[28] On this point, the Prosecution referred the Court to the testimony of PW11 who testified that the injuries suffered by the deceased can in the ordinary course of nature cause death and could have been immediate. PW11 testimony is as follows (refer page 226 NOP, line 5950-5957):

"Q: The Counsel just now asked you with regards to injuries No. 3 and 4, the stab wounds. You have also demonstrated the trajectory of the wounds. Can these wounds with all the trajectories in the ordinary course of nature can cause death?

A: Yes, I believe so.

Q: Would the death be immediate?

A: The death could have been immediate."

The evidence of an accomplice

[29] In this case, the prosecution heavily relies on the evidence of PW1 who is the co-accused in this case. Previously, PW1 was charged together with the accused under section 302 of the Penal Code read together with section 34 of the same Code. However, before the start of the trial, the Prosecution withdrew the charge against PW1 and make him as a Prosecution witness.

[30] The law of evidence on the evidence of an accomplice is clearly stated in section 133 of the Evidence Act 1950 [Act 56] whereby the law provides that an accomplice is a competent witness. The law further provides that even if the evidence of the accomplice is uncorroborated, a conviction which was based on the uncorroborated evidence of an accomplice will not be illegal. The said section is produced as follows:

"Accomplice

133. An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.".

[31] At the same time, illustration (b) of section 114 of the Evidence Act also provides that the court may presume that an accomplice evidence is not to be given credit unless that evidence is corroborated in material facts. Illustration (b) of section 114 of the Evidence Act 1950 is produced as follows:

"Court may presume existence of certain fact

114. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.

ILLUSTRATIONS

The court may presume— (b) that an accomplice is unworthy of credit unless he is corroborated in material particulars;".

[32] It is undeniable that PW1 is an accomplice in this case. Therefore, the court must be cautious to evaluate and accept PW1's evidence. The Prosecution refers to the case of **DATO' SERI ANWAR IBRAHIM v. PP & ANOTHER APPEAL [2004] 3 CLJ 737** whereby the Federal Court in this case had laid down the principle to be applied in accepting the evidence of an accomplice.

[33] In that case, Justice Abdul Hamid Mohamad FCJ held in a majority decision as follows (refer line g-h, page 788 of the case):

> *"We have also found Azizan to be an accomplice. Therefore, corroborative evidence of a convincing, cogent and irresistable character is required. While the testimonies of Dr. Mohd. Fadzil and Tun Haniff and the conduct of the first appellant confirm the appellants' involvement in homosexual activities, such evidence does not corroborate Azizan's story that he was sodomised by both the appellants at the place, time and date specified in the charge. In the absence of any corroborative evidence, it is unsafe to convict the appellants on the evidence of an accomplice alone unless his evidence is unusually convincing or for some reason is of special weight which we find it is not. Furthermore, the offence being a sexual*

offence, in the circumstances that we have mentioned, it is also unsafe to convict on the evidence of Azizan alone.".

[34] The Federal Court in that case also referred to another Federal Court case of **YAP EE KONG & ANOR v. PUBLIC PROSECUTOR [1981] 1 MLJ 144** whereby Raja Azlan Shah CJ (as his Majesty then was) held that:

"It is trite law that although an accomplice is a competent witness a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. All leading authorities have stated in clear terms that it has long been a rule of practice or rule of prudence which has become virtually equivalent to a rule of law for the judge or jury to be warned of the danger of convicting on the uncorroborated testimony of an accomplice. It is a matter of prudence except where circumstances make it safe to dispense with that there must be corroboration of the evidence of an accomplice.".

[35] Justice Abdul Hamid Mohamad further quoted the same case on the nature and extent of the corroboration needed as follows (refer page 785 of the case):

"Regarding the "nature and extent of corroboration", his Lordship then said: The rules are lucidly expounded by Lord Reading in Baskerville's case, supra.

The rules may be formulated as follows:

(1) There should be some independent confirmation tending to connect the accused with the offence although it is not necessary that there should be independent confirmation of every material circumstance;

(2) The independent evidence must not only make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particular the testimony of the accomplice; and

(3) The corroboration must come from independent sources, thus bringing out the rule that ordinarily the testimony of an accomplice would not be sufficient to corroborate that of another.".

[36] Based on the provision and case law cited above, it is clear that the Court can accept the evidence of PW1 even though it was

uncorroborated. However, as a law of prudence, the law requires the evidence of PW1 to be corroborated.

[37] In the present case, PW1's evidence is corroborated by evidences from other witnesses. The evidence of PW1 is corroborated by the evidence of PW2 (DNA Analysis Chemist), PW4 (Grab Manager), PW7 (civilian), PW8 (deceased's girlfriend), PW9 (deceased's friend), PW10 (deceased's father), PW11 (Forensic Pathologist) and PW12 (deceased's mother).

[38] DNA analysis clearly shows that the DNA of the accused was found on the identity card of the deceased which was found hidden by the accused inside his undergarment. The DNA analysis also shows that the body found at Shahbandar is the deceased's body. This evidence corroborates PW1's evidence on the part that he went to Shahbandar with the accused to dump the deceased's body.

[39] The Grab Manager (PW4) in his testimony confirms that there was booking made under the e-mail nash@yahoo.com (accused's e-mail) with the mobile phone number 60111-4181957 (accused's phone number). PW4 also confirms that the deceased accepted the booking and went to picked up the customer at Kingfisher. However,

the journey was not completed. The evidence of PW4 corroborates the evidence of PW1 on the part where the accused and PW1 booked a Grab car on 25.5.2019 and later they stopped at the roadside of Jalan Marabahai (the destination was set at 7-Eleven Tuaran).

[40] The evidence of PW1 is further corroborated by the evidence of PW7, PW8, PW9, PW10 and PW12 (the deceased's friends and family members). All the evidence of these witnesses confirms PW1's evidence on the part where he left the car at parking lot of Giant Indah Permai and the condition of the car.

[41] According to PW1, after dumping the deceased's body at Shahbandar, PW1 and the accused went to Shahbandar beach. There, the accused had use sea water to clean the blood in the car (car mirror, car driver seat and places with a lot of bloodstains) (refer page 16-17, line 421-449).

[42] Whereas the evidence from PW7, PW8, PW9, PW10 and PW12 clearly shows that when the deceased's car was found at the Giant Indah Permai parking lot, there were bloodstains on the driver seat,

the front car mirror (looks like it has been wiped off) and the steering wheel and the safety belt was cut off.

[43] As for the evidence of the pathologist, PW11, the findings of PW11 on the nature of the injuries and cause of death of the deceased supports PW1's version of the incident where the accused twisted the deceased/Grab driver's neck from the backseat and stabbed the deceased with a knife several times. There is no dispute that the accused was seated at the backseat and PW1 had gone out of the car (apparently, to urinate) when the deceased was attacked from behind. There was no one else in the car besides the Accused and the deceased after PW1 alighted from the car. The evidence of the attack points directly to the Accused as he was the only person in the car with the deceased driver and the accused was seated at the backseat at the material time.

[44] From all these evidences highlighted above, the Court finds that PW1's evidence is sufficiently corroborated in material particulars and could be accepted by the Court to prove the charge against the Accused.

[45] Therefore, based on the above evidence including the evidence of PW1 which the Court accepts as credible, it is the finding of the Court that the third element of an offence under s.302 is proved. The Court also finds that the bodily injuries found on the deceased's body was voluntarily and intentionally inflicted by the Accused and the said injuries is sufficient in the ordinary course of nature to cause death. Thus, the factual requirements under s.300(c) has been proven by the Prosecution.

[46] As the elements of an offence of murder has been proven, on 10.01.2024, this Court found that upon a maximum evaluation to the evidence adduced by the Prosecution and after considering the submissions at the close of Prosecution's case by both parties, the Prosecution has established a prima facie case under section 302 [read with s.300(c)] which, if unrebutted, would warrant a conviction of the Accused person. Hence, the Accused is called upon to enter his defence.

Defence's case/evidence

[47] The Defence's case is that the Accused, DW1 was drunk and asleep during the journey from Kingfisher to Tuaran and DW1 woke up

upon reaching Kg. Marabahai and saw the deceased was already at the front passenger's seat and unconscious. The Accused contends that he did not stab the deceased and it was PW1 who stabbed him (deceased's driver).

The whole of the accused's defense is only of bare denial

[48] The defence called one witness, DW1 (the Accused) who gave evidence under oath. The Court will now consider the evidence given by the Accused, DW1.The Accused in his testimony denies that he was involved in the murder of the deceased, Mohammad Hanafiee bin Jaffar. According to the accused, he was with PW1 on 25.5.2019 at Kingfisher. They then hire a Grab car to go to Tuaran, to PW1's house.

[49] The accused testified that he fell asleep while on the way to Tuaran. He woke up when they have reach Kg. Marabahai. At Kg. Marabahai, the accused testified that he saw PW1 step out of the Grab car and at that time he saw the deceased was already at the front passenger side. The accused however did not know whether the deceased was already dead at that time or not.

[50] The accused also denies that he had a fight with the Grab driver. All he knew was that he fell asleep and when he woke up the deceased was already at the front passenger side whereas PW1 was outside the car. Further in his testimony, the accused admits that he had consumed alcohol that night and was drunk.

[51] During cross-examination, the accused only denies what the prosecution suggested to the accused.

[52] Based on the testimony of the accused, the Prosecution submits that the defence of the accused is only of bare denial denying that he stabbed the deceased. He even testifies that he was asleep throughout the journey. His only answer in Court when suggested by the Prosecution was either he denies it or he can't remember the incident.

[53] The accused evidence was unsupported by any other independent evidences, direct or circumstantial. Whereas the prosecution evidence, especially the evidence of PW1 (eye-witness) and PW11 (post-mortem pathologist), clearly shows that the Accused did stab the deceased, the accused did hire a Grab ride using his Grab

account and later he dump the body and also the deceased's car with the help of PW1.

[54] It is trite law that a defence of bare denial is not a defence. In the case of **LIM CHUN JIE v. PP & OTHER APPEALS [2022] 3 CLJ 543,** pg. 579, the Court of Appeal held as follows:

> *"[133] We do not agree with learned counsel for the second appellant. It is trite that a bare denial is when the accused did not offer any explanation to the charge and merely denied the evidence of the prosecution. The defence of bare denial is no defence. Hence, it cannot be said that the learned trial judge had imposed a higher burden than what is legally required against the appellants in the present case.*
>
> *[134] This court in Losali v. PP [2012] 2 CLJ 178; [2011] 4 MLJ 694 (CA) made the following observation:*
>
> > *[54] The learned trial judge rightly held that the defence of the appellant was a bare denial. It is trite law that the defence of bare denial is no defence. What this amount to is this. That the appellant did not offer any explanation*

to the two charges and merely denied the evidence advanced by the prosecution. That was indeed a perilous course to undertake."

[55] In another case of **PP v. LING TEE HUAH [1980] 1 LNS1 212** where it was held that—

"A mere denial without other proof to reasonably dislodge the prosecution's evidence is not sufficient.".

[56] With the cases referred above, the Prosecution submits that the accused had failed to raise any reasonable doubt to the Prosecution's case since the defence raised is only of bare denial.

The accused's defense that he did not stab the deceased but instead he was asleep all the way from Kingfisher to Tuaran and when he woke up, he saw the deceased was already unconscious is an afterthought and devoid of any merits.

[57] The Prosecution contends that the Accused had also stated in his testimony that he can't remember anything because he was asleep throughout the journey from Kingfisher to Tuaran. The Accused

further stated that he only woke up when they arrive at Kg. Marabahai and at that time he saw that PW1 was already outside of the car and the deceased was already at the front passenger side. The accused also testified that he was drunk at the time of the incident.

[58] With regards to this defence, the Prosecution submits that the defence of the accused that he was asleep due to his drunken condition and the deceased was already at the front passenger side when he woke up and therefore it wasn't the accused who stabbed the deceased is an afterthought which was never raised during prosecution stage.

[59] Throughout the prosecution stage, the defence contention was that the accused did stab the deceased but with the assistance of PW1.

[60] However, the Prosecution submits that the defence stated by the accused under oath was never put during prosecution stage. Even if they did put their contention during cross-examination, the defence raised unfortunately does not raise any doubt on the prosecution's case.

[61] It is the submission of the prosecution that the one which has the most possibility of causing injury to the deceased which then caused the deceased death is the accused. Therefore, the accused contention that he was asleep, he did not stab the deceased and it was PW1 who stabbed the deceased is merely an afterthought which was never put during cross-examination to the prosecution's witnesses at prosecution stage.

[62] The Prosecution refer the Court to the case of **LIM CHUN JIE v. PP & Other Appeals [2022] 3 CLJ 543,** pg. 569 where it was held that—

> *"[86] However, we agree with the learned Deputy that this issue was not put forward during the prosecution's case and was only raised during the defence. We would therefore dismiss it as a mere afterthought.".*

<u>Statement by the accused is involuntary and coerced</u>

[63] The defence in their submission submits that the statement given by the accused is involuntary and he was coerced. The defence contended that the accused was asked to signed several documents

while he was detained and the accused does not know whatever documents that was presented before the accused to sign.

[64] On this point, the Prosecution submits that this issue is irrelevant to this case. Whether it was voluntary or otherwise, it does not affect the narratives of the prosecution's case.

[65] It is important to note that the defence had never, at any stage of the trial, produce and tendered the accused's statement in court. The accused gave sworn statement in court in which he gives it voluntarily but alas, fail to state his version of the story while giving evidence under oath. Therefore, there is no relevancy as to the issue of the accused giving statement during investigation involuntarily.

[66] If the defence contention is to show that the accused conduct of leading the police to the findings of the exhibits tendered in court was made involuntarily and he was coerced, the prosecution submits that there is nothing in evidence to show that the accused was coerced. From the evidence of the arresting officer who brought the accused to the places where the exhibits tendered in this court were found, there was nothing to show that the accused was

coerced nor was there evidence to show that the accused had given the information to the police involuntarily.

[67] The Prosecution refer to the case of **PP v. SAIMIN & ORS. [1971] 1 LNS1 115** where it was held that—

> *"The following definition of 'reasonable doubt' is often quoted: It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.*
>
> *It has again been said that "reasonable doubt' is the doubt which makes you hesitate as to the correctness of the conclusion which you reach. If under your oaths and upon your consciences, after you have fully investigated the evidence and compared it in all its parts, you say to yourself I doubt if he is guilty, then it is a reasonable doubt. It is a doubt which settles in your judgment and finds a resting place there.*

Or as sometimes said, it must be a doubt so solemn and substantial as to produce in the minds of the jurors some uncertainty as to the verdict to be given. A reasonable doubt must be a doubt arising from the evidence or want of evidence and cannot be an imaginary doubt or conjecture unrelated to evidence.".

[68] Having considered the Accused's evidence and submissions of the parties, the Court finds that the defence case that the accused did not stab the deceased but instead he was asleep all the way from Kingfisher to Tuaran and when he woke up at Kg. Marabahai, he saw the deceased was already unconscious and it was PW1 who stabbed the deceased is an afterthought and a bare denial. As alluded above, there is a lack of credible evidence to support the defence's version or narrative. The Accused's version that he was drunk and asleep at the back of the car and does not know anything about how the deceased was attacked and killed was not put to PW1 during the prosecution's case. On the contrary, during cross examination of PW1, the Accused contended that PW1 held the driver's hand after he went out of the Grab car whilst the Accused attacked and stabbed the deceased from the rear passenger seat.

[69] Having seen and observed the demeanour of the Accused in Court during the trial and having regard to the serious inconsistency of the Accused's version during the prosecution's case and the defence stage, the Court finds that the accused's version amounts to a bare denial and an afterthought and such evidence is not credible.

[70] From the totality of the evidence adduced by the Prosecution and the defence which the Court has carefully evaluated, the Court finds that the Accused has failed to raise a reasonable doubt in the prosecution case for the offence of murder under s.302 of the Penal Code. Thus, the Court finds that the Prosecution has proven their case (both actus reas and mens rea of murder) beyond reasonable doubt.

[71] Based on the aforesaid reasons, the Court finds the Accused guilty of the charge preferred against him in the amended charge (P2A) and convicts him under s.302 of the Penal Code. The accused is called upon to make his plea in mitigation.

Mitigation

[72] In mitigation, the learned Counsel for the Accused submitted that a custodial sentence should be imposed and urge the Court to follow the recent cases such as the case of **Mohd Hafiz Mohamad v Public Prosecutor [2024] CLJU 167 CA** and **Md Masud Rana v Pendakwa Raya [2024] CLJU 148 CA** which was decided in 2024 and the Court had given the offender custodial sentence.

[73] The defence further submitted that each case have their own facts and for the first and second case referred to by the prosecution, in the case of **Alowone Oluwajuwon Gilbert v Public Prosecutor [2024] 1 LNS 2391 CA**, the victim has 17 wounds and the second case which is **Philip Uja v Pendakwa Raya [2023] 1 LNS 1937**, the victim had 28 wounds which is different from the present case. Therefore, the defence urged the Court to mete out a lenient custodial sentence.

[74] The learned Deputy Public Prosecutor submitted that Section 34 of the Abolition of Mandatory Death Penalty Act 2023 (Act 846) provides a discretion to the Court to impose the death sentence or imprisonment for a term not less than 30 years but not exceeding 40

years and if not sentenced to death, the accused shall also be punished with whipping of not less than 12 strokes of whipping. The guiding principle for the Court to consider which penalty to impose depends on the facts of the case. In the case of **Alowonle Oluwajuwon Gilbert v PP [2023] 1 LNS 2391**, the Court of Appeal summed on when to impose the sentence of death as follows:

> ***"[26]*** *It can be gleaned from the cases discussed in the preceding paragraphs that the sentence of death has been imposed where the murders committed were extremely savage, heinous, diabolical, gruesome, cruel, horrendous or brutal and which shocks not only the judicial conscience but even the collective conscience of the society. As a broad guideline, it is our view, that the death penalty would be justified in dealing with, among others, hired and serial killers, those who rape and kill their victims for purposes of sexual gratification, dismember the bodies of their victims, dangerous criminals who use firearms, and those who plan a murder and execute it in a cold-blooded manner."*

[75] In the present case, the Accused has snapped the deceased's neck and then while the deceased was still alive and struggling due to the

pain, the Accused stabbed the deceased. PW11 found multiple slash and stab wounds on the deceased. This itself shows the brutality of the act. In addition, the Accused and PW1 then dumped the body and the car at 2 separate locations. The body was found a few days later whereby the body had begun to decompose. In the post mortem report (P70), there is evidence to show the body had predation marks which shows that the body was eaten by animals at the dump site.

[76] The Prosecution produced the impact statement of the deceased's parents and girlfriend with no objection from the defence.

[77] The Prosecution submits that any sentence passed should be a deterrent sentence so as to deter any future or would be offender. The sentence should portray and be seen by the public that the State is serious in combatting crimes especially murder. The Court should consider the trend of sentencing for cases which are similar to the current case.

[78] The Prosecution refer to the case of **Philip Uja v PP [2023] 1 LNS 197**. In that case, the High Court convicted the accused for the charge of murder and sentenced the accused to death. The

conviction and sentence to upheld by the Court of Appeal. In the case of Philip Uja, there were 28 external marks of injuries on the head, face and neck and there were also bruising under the deceased's scalp.

[79] In the present case, the incident is not a regular or typical murder case. It is the first case in this country, in particular in Sabah where a Grab driver was murdered while he was driving his customer to the assigned location.

[80] Therefore, it is the submission of the Prosecution that this case falls under the cases which are the rarest among the rare and the death penalty should be imposed on the accused. However, in the event the Court decides to impose custodial sentence, the prosecution refers to the following cases:

1. **Mohd Hafiz Mohamad v PP [2024] CLJU 167** where the Court of Appeal set aside the death sentence and sentenced the accused to 35 years and 12 strokes of whipping.

2. **Md Masud Rana v PP [2024] CLJU 148**. In this case, the Court of Appeal sentenced the accused to imprisonment for a term of 35 years and 12 strokes of whipping.

[81] The Court is mindful that the Accused has committed a heinous offence of murder and a young life is lost in tragic circumstances. The evidence shows that the Accused booked a Grabcar from Kingfisher to Tuaran using his personal email and handphone number registered with Grab which could be easily traced back to the Accused. The evidence adduced by the parties show that there was no pre conceived plan to kill the deceased. During the journey to the destination at Tuaran, there is evidence of verbal fight or argument between the Accused and the deceased over the former having no money to pay the fare for the ride and Accused may have intended to rob the deceased when the car stopped but things went out of control when he attacked the driver and resulted in the fatal stabbing of the deceased. The identity card of the deceased was later found in the Accused's possession whereas the personal belongings of the deceased was disposed of by the Accused. The manner in which the deceased was killed and the deceased's body dumped by the Accused at a bush near Shahbandar with the aid of

PW1 after the attack was cruel and merciless. It warrants a deterrent sentence to be imposed.

[82] The Prosecution is seeking a death sentence to be imposed or alternatively, life imprisonment of 35 years following the case of Mohd. Hafiz Mohammad and Md. Masud Rana above. The body of evidence before the Court shows that the killing of the deceased was not pre planned and there is no evidence on any previous conviction of the accused. In Alonwonle Oluwajuwon Gilbert's case above cited by the prosecution where the deceased had 17 bruises, cuts, slash wounds to her chest, neck and head, the Court of Appeal held:

> ***"[31]*** *… It is true that the deceased was killed in a brutal manner. The brutality of the manner in which the deceased was killed is a relevant consideration but not the sole criterion for deciding whether the death sentence is warranted.*
>
> ***[32]*** *On these facts, and keeping in mind that the judicial discretion to impose the death penalty has been conferred, reserving its imposition for the most heinous and most exceptional cases, we are of the view that the circumstances*

of the present case, does not warrant the imposition of the death penalty. It is true that an innocent victim has lost her life, but if the legislative purpose of section 302 is ignored and the death sentence is continued to be imposed on every person convicted of murder, it would render the change in law redundant.

…..

[33] *Taking into account that the killing of the deceased was not pre planned, as well as the fact that the appellant was a first time offender and that the prosecution had not produced any evidence to show that he was a hardcore criminal incapable of reform and rehabilitation and was a continuing threat to the society, it was our view, that a sentence of imprisonment of 35 years together with 12 strokes of the cane would be appropriate."*

[83] In **PP v Sanderasegaran Nithenanham [2024] 4 CLJ 823 FC**, the deceased was beaten repeatedly on the body and head by her boyfriend with a hard/blunt object causing excessive bleeding in the head which resulted in the death of the deceased. The accused/Respondent's defence that the deceased was beaten by robbers was rejected by the Court. The Federal Court held:

> ***"[66]*** *In the upshot, there is merit in this appeal and as such, the appeal is allowed, the decision of the Court of Appeal is set aside and the decision of the High Court in convicting the respondent under s. 302 of the Penal Code is restored. As regards to the sentence, having considered submissions by both parties, the application of the Abolition of Mandatory Death Penalty Act 2023 (Act 846), and the amended s. 302 (Act 574), the respondent is sentenced to 35 years of imprisonment from the date of arrest and 12 strokes of whipping."*

[84] The above cases show that life imprisonment was imposed even though the murder was carried out in a more brutal manner. In the present case, not only was the deceased killed in a brutal manner, his body was dumped in a bush at Shahbandar by the Accused and PW1.A few days later, the deceased's remains was found partially eaten by animals in the vicinity. The Court also noted the young age of the Accused and the lack of evidence to show that he could not be rehabilitated and desist from crime if a custodial sentence with whipping is imposed.

[85] Having considered the mitigating and aggravating factors of the present case and the public interest and having regard to the Abolition of Mandatory Death Penalty Act 2023 (Act 846), the Court sentenced the Accused to life imprisonment of 40 years and 12 strokes of whipping. The sentence shall commence from the date of arrest.

[86] As the Accused is undocumented person, the Court directs that the Accused be referred to the Immigration Department for deportation after serving his sentence.

Dated 29th April, 2024.

Signed

Leonard David Shim

Judge

High Court Kota Kinabalu

For the Prosecution : DPP Azreen Yas Binti Mohamad Ramli together with DPP Rozanna Binti Abdul Hadi and DPP Siti Hajar Binti Mazlan

For the Accused : Mohd Ari Nadzrah Bin Abd Rahman of Aril Rizidah & Co. [Assigned counsel]