PP

v.

MUHAMMAD KHAIRUANUAR BAHARUDDIN & ANOTHER APPEAL

Federal Court, Putrajaya
Harmindar Singh Dhaliwal, Nordin Hassan, Hanipah Farikullah FCJJ
[Criminal Appeal Nos: 05(L)-15-01-2023(W) & 05(L)-75-05-2024(W)]
29 October 2024

Criminal Law: *Penal Code (Malaysia) — Section 302 — Murder — Appeal by prosecution ('appellant') against Court of Appeal's decision substituting respondent's conviction for murder with conviction of culpable homicide not amounting to murder — Whether respondent had intention to inflict injuries on deceased — Whether s 300(c) Penal Code established against respondent — Premeditation or pre-existing malice — Defence of alibi*

This case concerned a murder charge under s 302 of the Penal Code ('PC') against the respondent for murdering a child aged 2 years and 2 months ('deceased'). The respondent was convicted by the High Court of the murder charge and was sentenced to death. However, on appeal to the Court of Appeal, the conviction under s 302 of the PC was substituted with a conviction of culpable homicide not amounting to murder under s 304(b) of the PC as the prosecution allegedly failed to prove that the respondent had the intention to inflict any injuries on the deceased or that the respondent had any knowledge that the injuries inflicted were imminently dangerous and that it must, in all probability, cause death or likely to cause death. The respondent was then sentenced to 10 years' imprisonment from the date of arrest. Aggrieved with the decision of the Court of Appeal, the Public Prosecutor ('appellant') filed the present appeal to this Court. The respondent also appealed against the Court of Appeal's decision for an acquittal and discharge of the said charge against him. There were four main issues requiring consideration: (i) whether the evidence presented by the appellant had established that the respondent had the intention to inflict the injuries on the deceased; (ii) whether the injuries intentionally inflicted by the respondent were sufficient in the ordinary course of nature to cause death, which attracted the application of s 300(c) of the PC; (iii) whether the appellant needed to establish premeditation and pre-existing malice by the respondent before an offence of murder could be established; and (iv) the respondent's notice of alibi.

Held (allowing the public prosecutor/appellant's appeal; and dismissing the respondent's appeal):

(1) The facts of this case showed that the respondent had the opportunity to inflict injuries on the deceased. The respondent was the last person seen with the deceased while the deceased was still alive and, more importantly, the

respondent's conduct after the deceased's death showed the act of covering the offence committed, which included: bringing the deceased to Idzham Clinic through the back door, requesting Dr Mohd Idzham ('PW3') to issue a death certificate so he could bury the deceased and introduced himself as a policeman when PW3 refused to accede to his demand; requesting the post-mortem to be carried out only on the chest of the deceased; and asking PW7, the mother of the deceased, to request her doctor friend to change the post-mortem result and the 29 injuries, particularly on the deceased's head which was not accidental. All of these clearly showed that the respondent had the intention to inflict the injuries on the deceased. The inference from the surrounding circumstances, including the fact that the deceased had informed her father and stepmother, when she was in their custody that it was the respondent who caused the bruises on her legs and thighs, showed that the respondent had the intention to inflict the injuries on the deceased. (paras 14 & 35)

(2) According to PW12, the pathologist in charge of the post-mortem, the injury that caused the deceased's death was blunt force trauma to the head and it was not accidental. The cumulative evidence in the present case, especially the medical evidence, showed that the injury on the deceased's head was sufficient in the course of nature to cause death. This was despite PW12 not mentioning specifically in his testimony that the injury on the deceased's head was sufficient in the ordinary course of nature to cause death. The total effect of PW12's evidence led to the said conclusion. As such, s 300(c) of the PC had been established by the appellant for the offence of murder against the respondent. (paras 37 & 42)

(3) One of the reasons the Court of Appeal substituted the conviction from the offence of murder to culpable homicide not amounting to murder under s 304(b) was that the prosecution had failed to adduce any evidence of premeditation or pre-existing malice on the respondent towards the deceased. In this regard, the reason given by the Court of Appeal was flawed for the simple reason that premeditation and pre-existing malice were not the elements of an offence of murder under s 302 of the PC. Failure to establish premeditation or pre-existing malice by the prosecution did not justify a substitution of the conviction of murder. It was settled law that, for the prosecution to establish an offence of murder punishable under s 302 of the PC, the elements to be proved by the prosecution were, 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 came within one or a combination of the limbs under s 300 of the PC. The act under any one or combination of the limbs under s 300 established the offence of murder. In the present case, the applicable limb was s 300(c) of the PC. (paras 44-46)

(4) The charge against the respondent was that the respondent murdered the deceased at his house on 6 November 2015 between 7.30am and 7.30pm. The facts stated in the notice of alibi did not exclude that the respondent was at the place and time specified in the charge. The respondent had the opportunity

to commit the murder and was not somewhere else at the material time. The respondent's presence at the place and time of the offence committed was positively identified by PW8, the respondent's driver, who was found to be a credible witness by the High Court and the Court of Appeal. Thus, the respondent's defence of alibi was untenable as he had failed to preclude himself from the possibility of being at the place and time of the offence committed. (para 53)

(5) In the circumstances and based on the aforesaid reasons, the decision of the Court of Appeal was set aside. The respondent's conviction by the High Court for the offence of murder under s 302 of the PC was safe and thereby affirmed. As for the sentence, having considered the new amendment of the Abolition of Mandatory Death Penalty Act 2023 ('new Act') and submissions by the parties, the murder of the deceased who was a child of the age of 2 years and 2 months, was an exceptional case that restrained the Court from exercising its discretion to order an imprisonment sentence under the new Act. As such, the death sentence was maintained. (paras 57-58)

Case(s) referred to:

Chan Pean Leon v. PP [1956] 1 MLRH 44 (refd)

Duis Akim & Ors v. PP [2014] 1 MLRA 92 (refd)

Illian & Anor v. PP [1987] 1 MLRA 646 (refd)

Ku Lip See v. PP [1981] 1 MLRA 336 (refd)

Lee Ah Seng & Anor v. PP [2007] 1 MLRA 784 (refd)

Mickelson Gerald Wayne v. PP [2022] 1 MLRA 656 (refd)

Mohamed Yasin Hussin v. PP [1976] 1 MLRA 603 (refd)

PP v. Sanderasegaran Nithenanham [2024] 3 MLRA 798 (refd)

PP v. Visuvanathan [1977] 1 MLRH 14 (refd)

Tan Cheow Bock v. PP [1991] 1 MLRA 746 (refd)

Tan Kim Ho & Anor v. PP [2009] 1 MLRA 200 (refd)

Virsa Singh v. State Of Punjab AIR [1958] SC 465 (refd)

Zulkiple Mohamad v. PP [2022] 2 MLRA 70 (refd)

Legislation referred to:

Abolition Of Mandatory Death Penalty Act 2023, Part 1

Criminal Procedure Code, s 402A

Penal Code, ss 300(c), (d), 302, 304(b)

Other(s) referred to:

Ratanlal & Dhirajlal, *The Indian Penal Code*, 32nd Edn, p 1274

Counsel:

For the appellant: Iznina Hanim Hashim; DPP

For the respondent: Fahri Azzat; M/s Fahri, Azzat & Co

JUDGMENT

Nordin Hassan FCJ:

Introduction

[1] This case concerns a murder charge under s 302 of the Penal Code ('PC') against Muhammad Khairuanuar bin Baharuddin ('the respondent') for murdering a child aged 2 years and 2 months old, Hanis Amanda binti Mohd Zafil ('the deceased'). The alleged offence occurred on 6 November 2015 at house No F-03, Lojing Heights 1, Jalan 1/27C, Seksyen 5, Wangsa Maju, in Wilayah Persekutuan Kuala Lumpur.

[2] The respondent was convicted by the High Court of the murder charge and was sentenced to death. However, on appeal to the Court of Appeal, the conviction under s 302 of the PC was substituted with a conviction of culpable homicide not amounting to murder under s 304(b) of the same Code. The respondent was then sentenced to 10 years' imprisonment from the date of arrest on 9 January 2018.

[3] Aggrieved with the decision of the Court of Appeal, the Public Prosecutor ('the appellant') appealed to this court against the substitution of the conviction from a conviction for an offence under s 302 of the PC to an offence under s 304(b) of the Code. The respondent also appealed against the Court of Appeal's decision for an acquittal and discharge of the said charge against the respondent.

The Case For The Prosecution

[4] The prosecution in this case, like in many other murder cases, relied on circumstantial evidence to establish its case beyond a reasonable doubt. The circumstantial evidence adduced and relied upon by the prosecution can be summarized as follows.

[5] The deceased, Hanis Amanda bin Mohd Zafil, was born on 13 August 2013 and at the age of 2 years and 2 months, at the material time of the unfortunate incident. She was the daughter of Farah Adiba binti Md Othman (PW7) and Mohd Zafil bin Ibrahim (PW1) who were married in 2011 but were divorced in August 2014. They have another daughter named Fatin Hanisa who was born in 2011. On 6 May 2015, PW7 married the respondent. PW1 married Tengku Aishah binti Tengku Nong Idris (PW2) after his divorce from PW7.

[6] The marriage of PW7 and the respondent faced difficulties as PW7 was the respondent's second wife and did not stay together. PW7 also later found out that the respondent has other wives and his first wife, Fatin, stayed with the respondent at his house in Lojing Heights 1, Wangsa Maju, Kuala Lumpur. PW7 on the other hand, stayed at her father's house in Wangsa Melawati, Kuala Lumpur.

[7] Every day before going to work, PW7, who worked as a sales agent with Perodua, sends the deceased and Fatin Hanisa to a babysitter's house near her father's house. However, in October 2015, the respondent insisted that the deceased be sent to him for him to take care of her, to which PW7 acceded. PW7 then noticed that whenever she sent the deceased to the respondent's house, she would scream and cry.

[8] The deceased's father, PW1, once in a while, will look after the deceased, and from 17 until 19 October 2015, the deceased was sent to PW1's house by PW7. Whilst the deceased was in PW1 and PW2's custody, they noticed that there were bruises on the deceased body including on the ribs and the thighs. The deceased also told them that it was painful and the respondent did it to her (akit.....akit, Papa Bi buat). When PW2 inquired from PW7 about the bruises on the deceased, PW7 responded that she was not aware of the injury as at that time the deceased was taken care of by the respondent.

[9] On 5 November 2015, the respondent, together with his driver, Muhammad Rizal bin Ghazali (PW8) known as Jan, Roslan bin Idris (PW10), and Mohd Alif Haikal (PW11) went to Terengganu as the respondent wanted to expand his farming business. They went in a car driven by PW8 and the respondent also took the deceased with him.

[10] On 6 November 2015, all of them went back to the respondent's house at No F-03, Lojing Heights 1, Jalan 1/27C, Seksyen 5, Wangsa Maju, Kuala Lumpur, where they reached there at about 6.45 am. Upon the arrival at the house, the respondent carried the deceased into the master bedroom upstairs, whilst PW8, PW10, and PW11 slept in the living room downstairs.

[11] Around 8.00 am, PW10 and PW11 returned to their hometown in Perak whilst PW8 was still sleeping on the sofa in the living hall. At about 3.00 pm, PW8 awoke and heard the deceased screaming but went back to sleep. He later woke up at about 5.20pm when he felt water dripping on his face from the ceiling. He then placed a bucket under the dripping water and went up to the master bedroom to inform the respondent about the leaking. He knocked on the door room about 5 times before the respondent opened the door. He then saw the accused dressed only in shorts and the deceased was at the edge of the bed in a slightly bent position looking at him.

[12] After informing the respondent about the water leakage, PW8 was instructed by the respondent to inform the Management Office, which was about 50 meters from the house, which PW8 did. The respondent, at that time, was in the house with the deceased and no one else. After returning from the Management Office, PW8 proceeded to clean and dry the floor of the living hall due to the water leakage. He then saw the respondent talking to one of the neighbours, Azihan bin Hussain (PW9). PW8 confirmed that the respondent did not leave the house at the material time as both the respondent's car was in the porch of the house.

[13] Thereafter, when PW8 was in the kitchen, the respondent called him out anxiously from upstairs, and when he reached upstairs, he saw the deceased lying on the floor in front of the television with her face and lips bluish. The respondent was seen standing about one and a half meters from the deceased. PW8 then asked the respondent to take the deceased to the hospital and the respondent instructed PW8 to carry the deceased to the car which the respondent himself drove to Idzham Clinic at Taman Melawati. Upon reaching the clinic, the respondent carried the deceased through the back door. The door was closed and was open after the respondent banged on the door several times.

[14] Doctor Mohd Idzham bin Ibrahim (PW3), who examined the deceased confirmed that the deceased had passed away upon arrival at the clinic and informed the respondent of this fact. The respondent then requested PW3 to issue a death certificate to enable the respondent to bury the deceased. The request was turned down by PW3 who asked the respondent to take the deceased to the hospital for a post-mortem to be carried out. PW3 also suspected a child abuse case as he noticed some injuries on the deceased's forehead and legs. The respondent then informed PW3 that he was a policeman and insisted that PW3 issue the death certificate. PW3 refused to accede to the respondent's request and responded that, as a policeman, the respondent should have known the procedure.

[15] The deceased was then brought to the Forensic Department, Kuala Lumpur Hospital ('HKL') where a post-mortem on the deceased body was carried out by Dr Ahmad Hafizam bin Hasmi (PW12) on 7 November 2015 at 3.10 pm. PW7 testified that before the post-mortem was carried out, the respondent informed Dr Fatin, one of the doctors at the Forensic Department HKL, that the post-mortem should only be conducted on the deceased's chest and no other parts of the body. However, the respondent was informed that the post-mortem would be carried out on all parts of the deceased's body.

[16] PW12 then discovered 29 external injuries on the deceased's body as listed in the post-mortem report which are as follows:

1. Lebam warna kemerahan, 2.0 x 2.0 sm pada bahagian parietal kiri atas;

2. Lebam warna kemerahan, 2.2 x 2.0 sm pada bahagian tengah atas belakang kepala (upper occipital);

3. Lebam warna merah kebiruan, 6.0 x 4.0 sm dengan sebahagian menunjukkan kesan tramline 3.5 sm panjang dan 1.0 sm lebar pada bahagian kanan kepala (temporo-parietal);

4. Calar keruping, 0.4 x 0.1 sm, 0.5 sm pada dahi kiri;

5. Parut, 0.7 x 0.3 sm pada hujung luar kening kanan;

6. Calar, 0.6 x 0.1 sm pada kanan batang hidung (nasal bridge);

7. Parut, 3.5 x 0.2 sm pada subcostal kiri;

8. 2 kesan calar post-mortem, 0.3 x 0.3 dan 0.2 x 0.1 sm pada bahagian abdomen kanan;

9. Parut, 2.5 x 2.0 sm pada sisi kiri dada;

10. 2 lebam bentuk bulat, 1.6 sm diameter setiap satu, warna kemerahan belakang tengah kiri badan, 16.0 sm di bawah garis bahu;

11. Calar (abrasi), 1.6 x 1.5 sm pada bahagian sakral. Bahagian kiri calar ini masih kemerahan;

12. Lebam kebiruan, 0.9 x 0.8 sm pada hadapan dalam 1/3 atas paha kanan;

13. Lebam, 0.9 x 0.8 sm pada hadapan 1/3 paha kanan;

14. Parut-parut lama kawasan seluas 3.0 x 3.0 sm hadapan lutut kanan;

15. Lebam merah kebiruan, 1.0 x 1.0 sm pada sisi luar lutut kanan;

16. 3 lebam warna merah kebiruan pada sisi luar 1/3 bawah paha kiri kawasan seluas 3.0 x 3.0 sm saiz ikut urutan atas ke bawah, 1.0 x 1.0, 0.9 x 1.0, 0.5 x 0.5 sm;

17. Parut, 1.5 x 0.2 sm pada 1/3 atas hadapan paha kiri;

18. 2 lebam kemerahan, 1.2 x 1.0 sm dan 1.0 x 1.0 sm pada hadapan tengah 1/3 atas keting kanan;

19. Lebam kemerahan, 1.0 x 1.0 sm hadapan dalam 1/3 tengah keting kanan;

20. Lebam kemerahan, 0.9 x 1.0 sm hadapan dalam 1/3 bawah keting kanan;

21. Parut-parut lama kawasan seluas 3.0 x 2.5 sm hadapan lutut kiri;

22. Lebam kemerahan, 1.5 x 1.0 sm hadapan luar 1/3 bawah keting kiri;

23. Parut, 1.6 x 0.2 sm pada sisi luar belakang 1/3 atas betis kiri;

24. 2 calar garis dengan keruping di bawah no 23;

25. Lebam warna kemerahan, 1.4 x 1.3 sm sisi luar lutut kiri;

26. Lebam kemerahan, 1.1 x 1.0 sm pada belakang luar 1/3 bawah lengan atas kiri;

27. Lebam kemerahan, 1.3 x 1.1 sm di bawah no 26;

28. Parut, 1.5 x 0.2 sm ½ belakang lengan bawah kiri; dan

29. Parut pada anus pada kedudukan pukul 5 dan pukul 7 urutan jam.

[17] As to the internal injuries of the deceased's head, PW12 found as follows:

> Kepala
>
> Pemeriksaan dalam kulit kepala terdapat pendarahan subgaleal warna merah gelap yang menyeluruh, 15.0 x 14.0 sm meliputi kawasan temporo-parietal kiri hingga ke occipital kanan. Otot temporalis kiri lebam manakala otot temporalis kanan utuh dan tidak cedera.
>
> Tengkorak retak pada bahagian kanan tulang occipital menjalar ke dasar tengkorak posterior kanan sepanjang 14.0 sm.
>
> Pendarahan di luar selaput otak sekitar retak tulang occipital dan pendarahan bawah selaput otak (subdural haemorrhage) dilihat pada bahagian atas tengah otak, dasar tengkorak tengah kanan dan kiri serta dasar tengkorak posterior.
>
> Otak yang diperiksa bengkak (1600.0 gram) dan lembik. Gyri otak rata dan sulci otak menyempit. Pendarahan bawah selaput otak (subarahnoid haemorrhage) dikesan pada bahagian temporo-parietal kanan. Keratan rentas otak menunjukkan pendarahan di dalam ventrikel otak. Tiada sebarang penyakit dikesan. Salur darah Willis utuh.

[18] Further, in the post-mortem report, PW12 states the following summary and conclusion:

> "1. Mayat telah dikenal pasti secara positif oleh Pegawai Penyiasat Polis dan bapa kandung si mati;
>
> 2. Pemeriksaan bedah siasat yang dijalankan pada 7 November 2015 jam 03.10 petang di Jabatan Perubatan Forensik HKL;
>
> 3. Pemeriksaan bedah siasat menunjukkan terdapat kesan trauma benda tumpul pada kepala si mati yang menyebabkan retak tulang tengkorak, pendarahan di bawah selaput otak dan bengkak otak seterusnya membawa kepada kematian si mati;
>
> 4. Trauma benda tumpul pada kepala ini boleh disebabkan oleh pukulan menggunakan objek tumpul dan keras atau kepala si mati terhempas pada permukaan yang keras;
>
> 5. Cedera pada kepala si mati ini tidak berpadanan dengan cedera akibat jatuh sendiri kerana lebam-lebam yang dikesan pada bahagian occipital atas dan bahagian parietal kiri atas bukan kawasan yang biasanya cedera akibat jatuh;
>
> 6. Lebam-lebam pada kepala dan pendarahan bawah selaput otak yang dilihat semasa bedah siasat adalah cedera baru and berusia kurang dari 3 hari; dan
>
> 7. Tiada terdapat sebarang tanda penyakit fizikal ditemui yang dilihat boleh menyebabkan atau menyumbang kepada kematiannya.

[19] PW12 further concluded that the cause of the deceased's death was severe head injury due to blunt force trauma.

[20] PW7 also testified that after the post-mortem report by PW12 was read by the respondent, he asked PW7 to request her friend, Dr Azian Liana, to change the result of the post-mortem report. However, PW7 did not accede to his request.

At The High Court

[21] The trial judge, having considered the evidence adduced by the prosecution at the close of the prosecution case, found that the prosecution had succeeded in proving a *prima facie* case for the offence of murder under s 302 of the Penal Code against the respondent as charged.

[22] In the grounds of judgment, the trial judge found that the prosecution had proved all the elements of the offence of murder, which are the death of the deceased, the deceased had died as a result of injuries sustained by her, and the respondent caused the injuries. The trial judge also accepted the theory of last seen together where the deceased was last seen with the respondent before her death. The trial judge also held that s 300(c) of the Penal Code is applicable and had been proven by the prosecution. The injuries in the present case were caused by the respondent which is sufficient in the ordinary cause of nature to cause death. Hence, the trial judge ordered the respondent to enter his defence.

[23] The respondent, in his defence under oath, essentially denied murdering the deceased. He asserted that several persons had the opportunity to commit the offence including his driver, PW8. The respondent also presented a notice of alibi to show that he was not at the place of the incident at the material time. The respondent also denied that he had requested Dr Mohd Idzham (PW3) to issue a death certificate for the deceased or informed PW3 that he was a policeman.

[24] After having analysed the defence case including the alibi defence and the evidence in totality, the trial judge found that the defence had failed to raise any reasonable doubt on the prosecution's case. Therefore, the respondent was convicted of the offence of murder under s 302 of the Penal Code and was sentenced to death.

At The Court of Appeal

[25] Aggrieved with the decision of the trial judge, the respondent filed an appeal to the Court of Appeal against the said decision. After perusing the evidence and hearing the submissions by parties, the Court of Appeal held that the evidence does not support the offence of murder under s 302 but only established an offence of culpable homicide not amounting to murder. As such, the conviction of the offence of murder against the respondent under s 302 of the Penal Code was substituted with the conviction of the offence of culpable homicide not amounting to murder under s 304(b) of the same Code.

[26] Although the Court of Appeal agreed with the trial judge that the principle of last seen together was applicable in the present case, the evidence presented is insufficient to establish the murder offence. Further, there was no evidence of pre-meditation or pre-existing malice against the deceased.

[27] The Court of Appeal was of the view that neither s 300(c) nor (d) had been fulfilled by the prosecution. The prosecution had failed to prove that the respondent had the intention to inflict the injuries on the deceased or that the respondent had any knowledge that the injury inflicted was imminently dangerous and that it must, in all probability, cause death or likely to cause death.

[28] The reasoning of the Court of Appeal in substituting the conviction of murder for one of culpable homicide can be found in paras 91 and 92 of the grounds of judgment which are as follows:

> "[91] We are not with the learned High Court Judge in his finding that the facts and circumstances raised strong inference that the accused had intention of inflicting bodily injury to the deceased and the bodily injury inflicted was sufficient in the ordinary course of nature to cause death pursuant to limb (c) to s 300 Penal Code. We find that the prosecution failed to prove the element of intention in this case. Nothing in the facts suggested that the accused had an intention to inflict the injury to the deceased. Thus, the question arose as to whether the accused's act fell within limb (d) which only require that the accused 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.
>
> [92] After careful consideration, we find that in this case, the special degrees of *mens rea* referred to in s 300(d) is not satisfied. We are of the view that the evidence by the prosecution is lacking in proving that the accused acquired knowledge that his act is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death. We have taken this from the fact that PW8 heard the child scream at around 3.00 pm. PW8 also testified that the deceased was alive at about 5.20 pm. PW8 also saw the deceased lying down holding a milk bottle in front of the television after that. Therefore, our inference from this evidence of PW8 is that the accused is lack of knowledge that the injury inflicted on the deceased is imminently dangerous that it must in all probability cause death or likely to cause death. In *Ratanlal & Dhirajlal* at p 1302, if the case cannot be placed as high as that and the act is only likely to cause death and there is no special knowledge, the offence comes under second part of s 304 of the Indian Penal Code."

The Appeal

[29] There are four main issues submitted orally and in writing by parties in this appeal which are as follows:

(i) Whether the evidence presented by the prosecution had established that the respondent had the intention to inflict the injuries on the deceased.

(ii) Whether the injuries intentionally inflicted by the respondent are sufficient in the ordinary course of nature to cause death which attracts the application of s 300(c) of the Penal Code;

(iii) Whether the prosecution needs to establish pre-meditation and pre-existing malice by the respondent before a murder offence can be established; and

(iv) The respondent's notice of alibi.

Whether The Evidence Presented By The Prosecution Had Established That The Respondent Had The Intention To Inflict The Injuries On The Deceased

[30] Before we proceed to address this issue, it is pertinent to reiterate the settled principle of law that to attract the application of s 300(c) of the Penal Code, the prosecution must prove the presence of bodily injury, the accused intentionally inflicted the injury and that the injury is sufficient in the ordinary course of nature to cause death. (See *PP v. Sanderasegaran Nithenanham* [2024] 3 MLRA 798; *Zulkiple Mohamad v. PP* [2022] 2 MLRA 70; *Mickelson Gerald Wayne v. PP* [2022] 1 MLRA 656; *Mohamed Yasin Hussin v. PP* [1976] 1 MLRA 603; *Virsa Singh v. State Of Punjab AIR* [1958] SC 465; *Tan Cheow Bock v. PP* [1991] 1 MLRA 746; *PP v. Visuvanathan* [1977] 1 MLRH 14)

[31] In the present case, the Court of Appeal held that the prosecution had failed to prove that the respondent had intentionally inflicted the injuries on the deceased. Thus, one of the elements that attracts the application of s 300(c) has not been proven.

[32] To begin with, an intention is a question of fact that cannot be proved by direct evidence. Inference from the evidence presented and the surrounding circumstances has to be made to determine this fact. This too is stated lucidly by Thompson J in *Chan Pean Leon v. PP* [1956] 1 MLRH 44 in the following words:

> "**Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances.** Whether these surrounding circumstances make out such intention is a question of fact in each individual case."
>
> [Emphasis Added]

[33] In Ratanlal & Dhirajlal, *The Indian Penal Code*, 32nd Edition, on p 1274, the issue of intention in a murder case was discussed and explained as follows:

> **"Intention how to be deduced − The intention is a question of fact which is to be gathered from the acts of the parties.** The Law books as regards intention to the natural result of a man's act, and not to the condition of his mind. So, when a normal man does an act, he should be credited with the intention of doing that which is inevitable consequence of his act. Further, **the nature of intention has to be gathered from various circumstances,** for

instance, the kind of weapon used, **the part of the body hit, the amount of force employed** and the circumstances attending upon death. **In the absence of any indication or circumstances to show that the particular injury inflicted by the accused was accidental or unintentional or that some other kind of injury was intended to be inflicted, the presumption would be that the very injury suffered by the deceased was intended. Mere absence of pre-meditation will not be enough to displace this presumption.** The question whether the offender entertained a particular type of intention or not is the question which is to be answered not from any direct evidence but from the proved facts and circumstances of the case. However, it should be borne in mind that intention with which an act should be found to have been committed is neither constructive nor presumptive in its character. Though it is true that the Court should not expect direct evidence of intention in every case and that a proper inference about existence of a particular intention can be made from the circumstances of the case, such circumstances should be such as would enable the Court to arrive at a conclusion beyond reasonable doubt that the intention in question did exist. Evidence of motive is generally found to be capable of supplying good evidence about the nature of the intention to commit the particular act. **The facts collateral to the main incident such as the manner and the method by which the offence was executed, possibility of the successful execution of the intended act, care taken by the accused to eliminate the possible mistakes in carrying out the successful execution of the intended act are some of the facts which are likely to throw good light upon the actual intention with which the act was done**."

[Emphasis Added]

[34] Reverting to the present case, the established facts by the prosecution which are relevant for consideration are the following:

(i) The respondent insisted on taking care of the deceased and at the time of the deceased's death; the deceased was under the respondent's custody and care;

(ii) The deceased informed PW1 and PW2 that the respondent inflicted the injuries when PW1 and PW2 noticed the injuries on the deceased ribs and thigh (akit, akit, Papa Bi buat);

(iii) On 6 November 2015, the day of the deceased's death, at about 3.00 pm, PW8 heard the deceased scream from upstairs of the house. The evidence of PW8 was accepted by both the High Court and the Court of Appeal. The Court of Appeal in its grounds of judgment stated as follows:

> "[93] On the other issues raised by the defence counsel, we agreed with the finding of the learned High Court Judge. It is worth to note that even though the defence argued on the point that there are two persons in a place where an alleged offence is said to have been committed (ie the accused and PW8) and the defence suggestion that it was PW8 who had killed the deceased. **However, in our view, PW8's evidence is clearly admissible.** PW8's evidence was neither

> self-exculpatory nor accusing the accused. His evidences were only as to what was within his knowledge and nothing in the record stated that PW8 was shaken when he was cross-examined. In this regard, we have to remind ourselves that a trier of fact, the learned High Court Judge had the audio-visual advantage reserved to a trial judge.
>
> [94] In the circumstances, the learned High Court Judge had correctly examined the evidence adduced before him and also correctly applied the principles when assessing circumstantial evidence. **Therefore, we do not disturb the finding of the learned High Court Judge who relied on the evidence of PW8 since PW8 was held to be a reliable witness**."

[Emphasis Added]

(iv) The respondent was last seen with the deceased when the deceased was still alive. At about 5.00pm on 6 November 2015, PW8 knocked on the door of the master bedroom to inform him of the water leakage in the living room. The respondent opened the door and PW8 saw the deceased at the edge of the bed in a slightly bent position and looking at him;

(v) PW8 also confirmed that the respondent did not leave the house that day as two of his cars were in the porch of the house;

(vi) After that, PW8 heard the respondent shout his name when he was in the kitchen, and when he went upstairs, he saw the deceased lying in front of the television with her face and lips bluish. The respondent was standing about 1 1/2 meters from the deceased;

(vii) The respondent brought the deceased to Dr Idzham's clinic through its back door;

(viii) The respondent insisted Dr Idzham (PW3) to issue the death certificate of the deceased and when the request was denied, the respondent identified himself as a policeman;

(ix) At the Forensic Department HKL, the respondent requested the post-mortem to be done only on her chest and no other parts of the body;

(x) The result of the post-mortem report by PW12 found 29 external injuries on the deceased body and the cause of death was severe head injury due to blunt force trauma;

(xi) PW12 also found that the head injuries suffered by the deceased were not accidental; and

(xii) The respondent requested PW7 to ask her friend, Dr Azian Liana, to change the post-mortem result.

[35] In this regard, firstly, the respondent had the opportunity to inflict injuries on the deceased. The respondent was the last person seen with the deceased while the deceased's was still alive and importantly, the respondent's conduct after the deceased death showed the act of covering the offence committed. The respondent brought the deceased to Dr Idzham through the back door of the clinic, requesting Dr Idzham to issue the death certificate, introduced himself as a policeman, requested the post-mortem to be carried out only on the chest of the deceased, asking PW7 to change the post-mortem result and the 29 injuries, particularly on the deceased's head, which was not accidental speaks volumes that the respondent had the intention to inflict the injuries on the deceased. The inference from the surrounding circumstances, including the fact that the deceased had informed PW1 and PW2 that it was the respondent who caused the bruises on her legs and thighs, shows that the respondent had the intention to inflict the injuries on the deceased.

[36] The trial judge had also made a finding of fact that it was the respondent who intentionally inflicted the fatal injuries on the deceased, with which we agree, based on the abovementioned reasons, and the appellate court should be slow in disturbing the finding of fact of the trial judge who had the audio-video advantage. (See *Tan Kim Ho & Anor v. PP* [2009] 1 MLRA 200; [2009] 5 MLRA 612; and *Lee Ah Seng & Anor v. PP* [2007] 1 MLRA 784)

Whether The Injuries Intentionally Inflicted By The Respondent Are Sufficient In The Ordinary Course Of Nature To Cause Death Which Attracts The Application Of Section 300(c) Of The Penal Code

[37] The next issue is whether the injuries inflicted by the respondent on the deceased are sufficient in the ordinary course of nature to cause death. The injury that caused the deceased's death was the injury to the head. This injury was found by PW12 due to blunt force trauma and it was not accidental.

[38] Here, whether the injury inflicted is sufficient in the ordinary course of nature to cause death is a question of fact to be determined by the court. An objective assessment of the evidence, particularly the medical or forensic evidence, needs to be carried out by the court. The same issue was addressed by this court in *Zulkiple Mohammad v. PP* [2022] 2 MLRA 70 where this was said:

> "[15] **Whether the injury is sufficient in the ordinary course of nature to cause death is essentially a question of fact for the court to determine.** Since however, this is a matter that is in the realm of medical science, **medical evidence is needed to assist the court in arriving at a decision.** Obviously, it is not for any layperson without the proper medical training and background to determine as a matter of scientific fact whether a particular injury is sufficient in the ordinary course of nature to cause death.
>
> .....

[20] **The crucial part of SP13's evidence was that the injuries on the deceased's head could cause direct or almost immediate fatality,** ie, death ("Kecederaan-kecederaan tersebut boleh secara terus atau sehampir secepat menyebabkan kematian"). He testified that the deceased would not be able to survive the injuries.

[21] **This effectively means that the injuries were of a kind that is sufficient in the ordinary course of nature to cause death within the meaning of cl (c) of s 300 of the Penal Code** although SP13 did not describe the injuries in those exact terms either in his post-mortem examination or in his oral evidence in court. At the trial, SP13 was shown the baseball bat (P10A) that the police seized from the scene of crime and he confirmed that it could cause injuries 1, 2, and 3 found on the deceased's head.

(See also *PP v. Sanderasegaran Nithenanham (supra)*; *Mickelson Gerald Wayne v. PP (supra)*)"

[Emphasis Added]

[39] In the present case, PW12, in his post-mortem report stated that the blunt force trauma on the deceased's head resulted in the fracture of the skull, bleeding of the underlayer of the brain, and swollen brain which had caused the deceased death. This was stated in PW12's report as follows:

"3. Pemeriksaan bedah siasat menunjukkan terdapat kesan trauma benda tumpul pada kepala si mati yang menyebabkan retak tulang tengkorak, pendarahan di bawah selaput otak dan bengkak otak seterusnya membawa kepada kematian si mati."

[40] In his oral testimony, PW12 explained that the injury to the head of the deceased was very serious, especially to a child, which resulted in her death. The following evidence by PW12 is crucial:

"Ya, YA. Faktor yang seterusnya yang menyebabkan pada pendapat saya ia bukanlah disebabkan jatuh, selalunya kecederaan akibat jatuh ini selalunya solitari ataupun satu. Tapi dalam kes ini ada 4 tempat yang cedera dan impak yang paling kuat itu seperti yang telah saya jelaskan tadi adalah pada bahagian belakang kepala. **Cedera pada kepala yang saya periksa itu memang cukup parah kerana ia menyebabkan retak tulang tengkorak, pendarahan di bawah selaput otak, bengkak otak yang memang boleh menyebabkan kematian.**

.....

YA berdasarkan kecederaan yang ada, **kecederaan ini adalah kecederaan yang parah.** Yang pertama jika berlaku kecederaan ini, kanak-kanak itu, yang pertama, boleh sahaja tidak sedarkan diri terus atau kanak-kanak itu boleh merasa sangat sakit dan kemudiannya mendapat sawan. Boleh juga kanak-kanak ini menangis oleh sebab kesakitan dan muntah. Ia pelbagai.

..**Yang saya boleh buktikan melalui bedah siasat bahawa berlakunya kecederaan parah pada kepala dan saya sahkan itulah punca kematiannya. Kecederaan kepala ini boleh mengakibatkan tidak sedarkan diri dan mati** ataupun boleh juga menyebabkan sawan dulu dan mati ataupun kalau kecederaan tidak parah dan boleh menyebabkan sakit kepala, muntah dan kabur mata."

[Emphasis Added]

[41] Further, the deceased was still alive at about 5.00pm on 6 November 2015 as testified by PW8 but was found dead a few hours later at about 7.45pm when the deceased was brought to Dr Idzham Clinic as testified by PW3 in his testimony.

[42] Based on the cumulative evidence above mentioned, especially the medical evidence, we find that the injury on the deceased's head was a kind that is sufficient in the course of nature to cause death. This is despite the pathologist, PW12, not mentioning specifically in his testimony that the injury on the deceased's head is sufficient in the ordinary course of nature to cause death. The total effect of PW12's evidence comes to the said conclusion. In the result, s 300(c) had been established by the prosecution for the offence of murder against the respondent. (see *Zulkiple Mohammad v. PP (supra)*; *PP v. Sanderasegaran Nithenanham (supra)*)

[43] The trial judge also made his finding, with which we agree, that the injury inflicted was sufficient in the ordinary course of nature to cause death. However, the Court of Appeal did not touch on this issue since it was the Court of Appeal's decision that the prosecution had failed to establish that the respondent had the intention to inflict injury on the deceased.

Whether The Prosecution Needs To Establish Pre-Meditation And Pre-Existing Malice By The Respondent Before A Murder Offence Can Be Established

[44] On this issue, one of the reasons the Court of Appeal substituted the conviction from the offence of murder to culpable homicide not amounting to murder under s 304(b) was that the prosecution had failed to adduce any evidence of pre-meditation or pre-existing malice on the respondent towards the deceased. In its grounds of judgment, this was said:

"[85] We agreed with the learned High Court Judge on the application of the last seen together principle. However, only a conviction for the lesser offence of culpable homicide not amounting to murder under s 304(b) of the Penal Code was justified considering the weight of evidence tendered by the prosecution. **There was certainly no evidence of any pre-meditation or pre-existing malice on the accused towards the deceased."**

[Emphasis Added]

[45] In this regard, we find the reason given by the Court of Appeal to substitute the conviction of murder with culpable homicide not amounting to murder is flawed for the simple reason that pre-meditation and pre-existing malice are not the elements of an offence of murder under s 302 of the Penal Code. Failing to establish pre-meditation or pre-existing malice by the prosecution does not justify a substitution of the conviction of murder.

[46] 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. In the present case, the applicable limb is s 300(c) of the Penal Code.

[47] We noted that Exception 2 and Exception 4 to s 300 of the Penal Code state to the effect that the absence of pre-meditation may result in the act being only culpable homicide not amounting to murder. However, Exception 2 applies when exercising the rights of private defence where it states as follows:

> Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given by him by law, and causes the death of the person against whom he is exercising such right of defence, **without pre-meditation** and without any intention of doing more harm than is necessary for the purpose of such defence.
>
> [Emphasis Added]

[48] Next, Exception 4 only applies in a sudden fight case, which occurs in the heat of passion and the accused had not taken unfair advantage or acted cruelly or unusually. Exception 4 is as follows:

> Culpable homicide is not murder if it is committed **without pre-meditation** in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner.
>
> [Emphasis Added]

[49] Exception 2 and Exception 4 abovementioned clearly do not apply to the factual matrix of the present case. The respondent was not relying on any of the Exceptions to s 300 of the Penal Code. Hence, the absence of pre-meditation or malice in the present case will not reduce the offence of murder under s 302 of the Penal Code to the offence of culpable homicide not amounting to murder under s 304 of the same Code.

The Respondent's Notice Of Alibi

[50] The defence of alibi and its procedures are provided for under s 402A of the Criminal Procedure Code. The alibi defence essentially is that the accused was somewhere else other than at the time and place of the offence committed. In a landmark case on alibi, this Court in *Ku Lip See v. PP* [1981] 1 MLRA 336 vide Abdul Hamid FCJ explained the issue of alibi in the following manner:

> A determination whether particular evidence is evidence in support of alibi entails a consideration **whether the evidence shows or tends to show that by reason of the presence of the accused at some particular place or area at a particular time he cannot be or is unlikely to be at the place where the offence is committed.** It is difficult if not impossible to envisage with reference to a particular charge what evidence amounts or does not amount to evidence in support of a defence of alibi. It depends very much on the facts of each particular case. It has been described that "What is ordinarily meant by an alibi is that the accused's presence elsewhere is essentially inconsistent with his presence at the time and place alleged, and therefore with participation in the crime. An alibi may absolutely preclude the possibility of presence at the alleged time and place of the act, or the alibi may not involve absolute impossibility, but only high improbability and yet be convincing." (See *Criminal Law Review,* 1978, pp 277-8 and also on p 278 where it is further stated that **"a true alibi defence consists of an affirmative proof of the defendant's presence somewhere other than at the time and place alleged."**)
>
> [Emphasis Added]

[51] The burden cast upon the accused to establish the defence of alibi is to raise a reasonable doubt only. (See *Illian & Anor v. PP* [1987] 1 MLRA 646)

[52] In the respondent's notice of alibi, the facts stated therein are as follows:

> (i) Pada 6 November 2015, Mohd Rizal bin Ghazali ('Jan') telah masuk mengetuk 2.30 petang hingga 3.00 petang, Jan telah mengetuk pintu bilik OKT mengatakan bahawa terdapat air bocor dari tangki. Mangsa baru bangun tidur dan lalu meminta OKT untuk memasang televisyen untuk beliau tengok kartun;
>
> (ii) Pukul 3.30 petang, OKT berada di luar rumah bersama Jan untuk mendapatkan nombor telefon tukang paip dan mangsa ketika itu berada di ruang menonton TV di bahagian atas rumah;
>
> (iii) Antara pukul 3.30 petang dan 3.40 petang, Encik Tan, iaitu tuan rumah sewa kepada rumah OKT telah memberi nombor telefon tukang paip tersebut bagi melakukan pembaikan. OKT dan Jan masuk ke dalam rumah selepas menelefon tukang paip untuk membersihkan tempat bocor di ruang tamu;
>
> (iv) Pada pukul 3.40 petang, OKT telah keluar seorangan untuk membeli mop dan beberapa peralatan lain di AEON Big berdekatan rumah beliau bagi tujuan membersihkan tempat bocor itu sendiri, kerana takut tukang paip akan lewat datang. Namun, sebelum beliau sempat beli peralatan

tersebut, OKT menerima panggilan telefon mengatakan tukang paip sudah siap kerja. OKT membuat pusingan u-turn dan terus pulang rumah.

(v) Pada pukul 4.00 petang OKT terus masuk ke rumah dan melihat tiada lagi kebocoran. Kemudian, OKT mendapati mangsa kekejangan di ruang menonton TV dan memanggil Jan membantu untuk memeriksa mangsa dan seterusnya membawa mangsa ke Klinik Idzham.

[53] First and foremost, the charge against the respondent was that the respondent murdered the deceased at his house No F-03, Lojing Heights 1, Jalan 1/27C, Seksyen 5, Wangsa Maju on 6 November 2015 between 7.30am and 7.30pm. The facts stated in the notice of alibi do not exclude that the respondent was at the place and time specified in the charge. The respondent had the opportunity to commit the murder and was not somewhere else at the material time. The respondent's presence at the place and time of the offence committed was positively identified by PW8 which was found to be a credible witness by the High Court and the Court of Appeal. Thus, the respondent's defence of alibi is untenable as the respondent had failed to preclude him from the possibility of being at the place and time of the offence committed.

[54] On this issue of alibi, this Court had explained extensively in the case of *Duis Akim & Ors v. PP* [2014] 1 MLRA 92 as follows:

[92] Now, the following legal principles on the defence of alibi are relevant in the present namely:

(i) **'the defence of alibi must preclude the possibility that the accused could have been physically present at the place of the crime or its vicinity at or about the time of its commission'**. (See: *Regina v. Youssef (1990) 50 A Crim R 1* at pp 2-3);

(ii) the correct 'approach to be adopted in regard to an alibi defence,... is **to consider the alibi in the light of the totality of the evidence and the court's impression of the witnesses.** If there are identifying witnesses, the court should be satisfied not only that they are honest, but also that their identification of the accused is reliable. The ultimate test, and there is only one test in a criminal case, is whether the evidence establishes the guilt of the accused beyond reasonable doubt'. (See: *Leve v. S (CA & R 163/12)* [2013] ZAECGHC 5 (31 January 2013) (South Africa);

(iii) as such 'it would be wrong to reason that if the evidence of the state witnesses, considered in isolation, is credible the alibi must therefore be rejected. The correct approach is **to consider the alibi in the light of all the evidence in the case and the court's impressions of the witnesses and from that totality to decide whether the alibi might reasonably be true'**. (See: *R v. Hlongwane* 1959 (3) SA 337);

(iv) once the trial court accepted that the alibi evidence could not be rejected as false, it was not entitled to reject it on the basis that the prosecution had placed before it strong evidence linking the appellant

to the offences. The acceptance of the prosecution's evidence could not, by itself alone, be a sufficient basis for rejecting the alibi evidence. Something more was required. The evidence must have been, when considered in its totality, of the nature that proved the alibi evidence to be false. (See: *S v. Liebenberg* 2005 (2) SACR 355 (SCA);

(vi) 'it is trite that once an accused person pleads an alibi he does not assume the burden to prove it is true. The *onus* is on the prosecution to prove by evidence the alibi is false and to place the accused squarely at the scene of crime'. (See: *Mutachi Stephen v. Uganda (supra)*. The evidence of his alibi need only raise a reasonable doubt that he committed the crime. (See: *Lizotte v. The King*, 1950 Can LII 48 (SCC); [1951] SCR 115); and

(vii) the alibi of an accused does not have to be corroborated by independent evidence in order to raise a defence (See: *R v. Letourneau* [1994] BCJ No 265 (QL) (CA), 61).

[Emphasis Added]

[55] Applying the settled principle of law on an alibi defence and the reasons above-mentioned, we find the trial judge was right in rejecting the respondent's alibi.

[56] Further, the trial judge found material contradictions between the facts stated in the notice of alibi and the respondent's testimony in court, particularly regarding the time of certain events. Therefore, the respondent had failed to show affirmative proof that the respondent was elsewhere at the time and place of the offence committed.

Conclusion

[57] In the circumstances and based on the aforesaid reasons, the appellant's appeal is allowed and the decision of the Court of Appeal is set aside. The decision of the High Court is restored that the respondent's conviction for the offence of murder under s 302 of the Penal Code is safe and thereby affirmed. The appeal by the respondent for an acquittal of the charge is dismissed.

[58] As on the sentence, and having considered the new amendment of the Abolition of Mandatory Death Penalty Act 2023 and submission by parties, we find the murder of the deceased, a child at the age of 2 years and 2 months is an exceptional case that refrains us from exercising our discretion to order an imprisonment sentence under the new Act. As such, the death sentence is maintained.