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To Members of the Malaysian Bar

Highlights from the Appellate Courts (No 10/2025)

The Publications Committee is pleased to circulate the tenth edition in this case note series for the year.

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Sincerely,

**Gregory Das
Chairperson
Bar Council Publications Committee**

Highlights from the Appellate Courts

Live Capital Sdn Bhd v Pioneer Conglomerate Sdn Bhd (FC)

Civil procedure — Evidence — Marking of exhibits

In the case of **Live Capital Sdn Bhd v Pioneer Conglomerate Sdn Bhd (Civil Appeal No: 02(f)-65-11/2023(W))**, the Federal Court decided on several issues relating to the law of evidence and procedure.

Four (4) questions of law were posed to, and answered by, the Federal Court, as follows:

- (1) Where the contents/notations written on a document are disputed and/or alleged to have been added after the document was signed/initialled, are the contents/notations deemed proven upon the document being marked as an exhibit at trial?

Answer: No.

- (2) Where the contents/notations written on a document are disputed and/or alleged to have been added after the document was signed/initialled, is it incumbent upon the party relying on the document and the disputed contents/notations to call the maker of the document and/or the author of the contents/notations to prove the same?

Answer: Yes.

- (3) When a document is tendered and marked as an exhibit during a trial, is it incumbent upon the court to treat the entire contents of the said document as having been proven?

Answer: No.

- (4) Where a document has been tendered and marked as an exhibit during a trial and part of its contents are disputed, is the court obliged to assess the veracity, truthfulness of the contents of the said document and the weight to be given to the said document on the basis of the oral and other documentary evidence adduced before the court?

Answer: Yes, provided the document has been properly admitted in evidence.

The Federal Court acknowledged that these are not novel questions of law. However, the need for further argument arose due to the manner in which the Court of Appeal dealt with the disputed documentary evidence, which may cause confusion and uncertainty at trials, considering that the Court of Appeal's written grounds of judgment would bind all courts below the Court of Appeal. Thus, the questions posed were questions of importance upon which a decision of the Federal Court would be to public advantage.

Background Facts

The Respondent (as Plaintiff) filed a civil suit against the Appellant (as Defendant) for the return of an interest free loan of RM7 million, which it had advanced to the Appellant *vide* two (2) cheques in the sums of RM5 million and RM2 million respectively.

While the Appellant admitted it had received the said sum of RM7 million from the Respondent, the Appellant denied that it was an interest free loan. Instead, the Appellant contended that it was a commission fee for the brokerage services it provided to the Respondent for the acquisition of a public-listed company, which was non-refundable.

Issues at Trial

At the trial, the Respondent primarily relied on two (2) vouchers ("**the Vouchers**") that were prepared by the Respondent for the issuance of the abovementioned cheques. The Vouchers were classified as Part C documents, i.e. both the authenticity and contents of the documents were disputed. During examination-in-chief of the Respondent's witness ("**PW1**"), the Vouchers were first marked as IDP1 and IDP2. However, PW1 was not the maker of the vouchers, and the originals of the Vouchers were never produced at trial.

The Appellant's witness ("**DW2**") confirmed that the signatures on the Vouchers (acknowledging the Vouchers on behalf of the Appellant) were his. However, DW2 alleged that the typewritten and handwritten notations on the Vouchers, which gave the impression that the said sums were an advance and not commission, were not there when he signed the Vouchers.

After DW2 confirmed that the signatures on the Vouchers were his, the Respondent's counsel requested for the Vouchers to be marked as exhibits. The learned Judicial Commissioner ("**JC**") thereafter marked IDP1 and IDP2 as exhibits P1 and P2 "conditionally", recording the Appellant's position disputing the correctness or otherwise of the description of the Vouchers.

Decision of the High Court

The High Court dismissed the Respondent's claim on, amongst others, the following grounds:

- (1) The Respondent's case rested entirely on the Vouchers, which were disputed by the Appellant due to the abovementioned notations. No evidence was led by the Respondent to explain when these notations were made and/or who added the notations. The Respondent did not lead any evidence to prove the authenticity and genuineness of the Vouchers; and
- (2) As the Respondent failed to produce any cogent evidence to prove the genuineness of the Vouchers, it failed to discharge its burden of proof. The evidential burden remained with the Respondent to prove the disputed contents of the Vouchers and the identity of the person who made the notations. On the balance of probabilities, the Respondent failed to discharge its legal and evidential burden of proving that the RM7 million was an advance.

Decision of the Court of Appeal

On appeal, the Court of Appeal reversed the High Court's decision, for the following reasons:

- (1) The allegation of tampering of the Vouchers was not pleaded by the Appellant;
- (2) The evidential burden had already shifted to the Appellant to prove that the RM7 million was not an interest free advance but a non-refundable commission. The Appellant failed to rebut that evidence of the Respondent;
- (3) The originals of the Vouchers had been produced at the hearing. If the Appellant wanted to examine the originals, they could have filed a discovery application for the originals to be produced and inspected;
- (4) The Appellant's averment that the handwritten notes were added after DW2 had acknowledged the Vouchers amounted to an allegation of forgery, which had to be proven by the Appellant on a balance of probabilities;
- (5) The Appellant's solicitor failed to immediately take steps to notify the Respondent's solicitor that the Vouchers were forged, altered or tampered with. The Appellant also failed to commence court proceedings to challenge the Vouchers; and
- (6) Since the Appellant failed to discharge its evidential burden of proving forgery of the Vouchers, it was incumbent on the learned JC to accept the contents of the Vouchers as the truth and to enter judgment for the Respondent.

Decision of the Federal Court

On appeal, the Federal Court allowed the appeal and restored the High Court's decision for, amongst others, the following reasons:

- (1) It was factually incorrect for the Court of Appeal to say that the Respondent had produced the originals of the Vouchers, as they were never produced at the trial;
- (2) The Court of Appeal erred in imposing such evidential burden of proof on the Appellant. Before any legal or evidential burden shifted to the Appellant, the Respondent must first establish a *prima facie* case against the Appellant; failing which, the Appellant need not even call evidence in answer to the Respondent's claim, as the Respondent would have failed to discharge its legal and evidential burden under Sections 101 and 102, Evidence Act 1950 to prove its pleaded case;
- (3) The other documents produced by the Respondent to support its claim were merely supporting documents, which were insufficient on their own and by themselves to justify a judgment in the Respondent's favour if there was no other evidence;

- (4) For the Vouchers to be used as evidence in support of the Respondent's claim, they must first be properly admitted in evidence. It was not the duty of the Appellant to ensure proper admission of the Vouchers as exhibits, let alone to prove that they had been forged, altered or tampered with;
- (5) Nonetheless, the Federal Court explained that the learned JC did not follow the correct procedure in admitting and marking the Vouchers as exhibits. The proper procedure would be to postpone the marking of IDP1 and IDP2 as exhibits until after the maker(s) of the documents were called to give evidence, which was never done. Until then, the Vouchers should remain as IDP1 and IDP2, i.e. for identification purposes only and not for the purpose of proving the truth of their contents, as they were disputed both as to authenticity and contents;
- (6) Unless the authenticity of the Vouchers were verified by calling the maker(s) of the documents, the contents of the documents remained hearsay, as the purpose of producing them was to prove the truth of the contents and not merely to prove that the notation and alterations were made;
- (7) A document cannot be admitted in evidence and marked as such until it has been properly proved. Such document has no evidential value, is irrelevant and should not be admitted in evidence and, if admitted, must be disregarded;
- (8) The Appellant had neither the legal nor evidential burden to prove forgery of the Vouchers or to prove anything at all if the Respondent had failed to establish a *prima facie* case at the close of its case. The fact that the Appellant opted to call evidence instead of submitting no case to answer at the close of the Respondent's case does not change the equation; and
- (9) While the Court of Appeal correctly disallowed the Appellant from raising the issue of forgery as it was not pleaded, it was contradictory for it to then place the evidential burden of proof on the Appellant to prove forgery of the Vouchers, on the ground that the contents of the Vouchers had been proven once they were produced and marked as exhibits, despite the fact that the authenticity (let alone the truth) of the documents was never established by the Respondent.

In view of the above, the Federal Court allowed the appeal, set aside the decision of the Court of Appeal, and restored the High Court's decision.

Written by
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Mahathir Usman v Public Prosecutor (CA)

Criminal law — Section 39B(1)(a) Dangerous Drugs Act — Sentencing — Abolition of Mandatory Death Penalty Act 2023

FACTS

In **Mahathir Usman v Public Prosecutor (CRIMINAL APPEAL NO.: S-05(M)-508-12/2021)**, the Appellant was charged under section 39B(1)(a) of the Dangerous Drugs Act read with Section 34 of the Penal Code (i.e. common intention) for trafficking methamphetamine with another co-accused.

The High Court found that the prosecution proved its case beyond reasonable doubt – the Appellant had custody and control of the drugs, and had attempted to flee upon arrest which indicated guilty knowledge on his part. The High Court judge then invoked the statutory presumption of trafficking under Section 37(da)(xvi) DDA which presumes trafficking based on the quantity of drugs.

Hence, the Appellant was convicted and sentenced to death, which was mandatory at the time.

IN THE COURT OF APPEAL

The Appellant appealed against the sentence following the enactment of the Abolition of Mandatory Death Penalty Act 2023.

The Appellant sought to substitute the death penalty with life imprisonment and raised the following issues in support of his position:

- (i) the weight of the drugs in the context of sentencing trends in several cases;
- (ii) there were no evidence of actual drug buying/selling on his part;
- (iii) the Appellant does not have prior criminal record; and
- (iv) the Appellant was not appealing against his conviction.

CONCLUSION

The Court of Appeal allowed the appeal against the sentence, replacing the death penalty with life imprisonment of 30 years and 12 strokes of the cane.

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Lambang Kelana Sdn Bhd v Tenaga Nasional Berhad & Ors (CA)

Electricity law — Sections 11 and 16(2) of the Electricity Supply Act 1990 — Wayleave procedure — Late payment charges and interest

In **Lambang Kelana Sdn Bhd v Tenaga Nasional Berhad & Ors (Civil Appeal No.: N-01(A)-491-07/2022)**, the Appellant was the registered proprietor of approximately 100 acres of land in Seremban, Negeri Sembilan (“**the Appellant’s land**”). The 1st Respondent was TNB, a licensee under the Electricity Supply Act 1990 (“**ESA 1990**”) licensed to undertake projects and works in supplying electricity. Around 2007, TNB had prematurely entered the Appellant’s land without complying with wayleave procedures under section 11 of ESA 1990. The Appellant was not paid any proper compensation for its loss of the portion of the Appellant’s land acquired as wayleave for TNB.

The parties were unable to agree on the compensation amount for the acquisition of a portion of the Appellant’s land, leading to litigation between 2008 to 2015 spanning all the way to the Federal Court, based on Appellant’s claim of trespass and objection to TNB’s improper entry. At the conclusion of litigation, the Appellant ultimately had no option but to succumb to the acquisition.

Despite the Appellant’s repeated requests from 12.10.2015 to 17.12.2018, the Land Administrator failed to conduct the statutory enquiry under Section 11 of ESA 1990 to determine compensation to the Appellant for the loss of a portion of its land. The Appellant had to initiate an originating summons against the Land Administrator to hold the statutory enquiry, only then did the Land Administrator agree to do so.

On 17.07.2020, the Land Administrator awarded the Appellant RM2,105,335.00 (without any late payment interest) (“**the Initial Sum**”). The Appellant appealed against the award before the State Authority. Before the appeal was decided, TNB paid the Appellant the initial sum. Subsequently, the State Authority held that the Appellant was entitled to late payment interest from 2007 to 2020 (13 years), amounting to RM1,369,332.95 (“**the State Authority’s Decision**”).

Being dissatisfied with the State Authority’s Decision, TNB filed an application for judicial review before the High Court. The High Court allowed TNB’s judicial review application and held that:

- (a) The State Authority’s award for late payment charges was ultra vires of section 16(2) of ESA 1990 as the provision precludes (by omission) the award of any other remedy aside from ‘compensation’ as the provision had limited the scope of remedy to only ‘compensation’; and
- (b) There were no delays that were attributable to TNB and that TNB was unable to timeously remit the compensation until and unless the Land Administrator performs its duty and hold the inquiry under Section 11 of ESA 1990.

Dissatisfied with the High Court’s decision, the Appellant appealed to the Court of Appeal. The Court of Appeal determined the following 2 issues:

- (1) Whether the High Court was correct in its appreciation, interpretation and application of Section 11 and Section 16(2) of ESA 1990?
 - (a) It was held that the ESA 1990 does not have any specific provisions governing or precluding the award of late payment interest. There isn’t an express mention of the award of late payment interest within ESA 1990 to ‘exclude’ the State Government’s award for late payment interest.
 - (b) The Court of Appeal favoured the holistic and purposive interpretation of the ESA 1990 in awarding late payment interest, so as to award “full compensation” as stated under Section 11 and Section 16(2) of ESA 1990.
 - (c) The legislative purpose of these provisions is to govern and justly protect (and balance) the authority of a licensee to enter into lands and the rights of landowners to be compensated for the loss of their land that had to be acquired. Thus, just and appropriate compensation is at the forefront of the purpose of the provisions.
 - (d) It was also held that the literal term of “full compensation” under ESA 1990 must necessarily be read together with the term “adequate compensation” under Article 13(2) of the Federal Constitution. To deprive the Appellant of its rightful late payment charges would certainly transgress upon the Appellant’s constitutional rights.
- (2) Whether the High Court was correct in its appreciation between the issue of attribution of delay and the Appellant’s entitlement for late payment charges or interest?
 - (a) It was held that the delay was not caused by the Appellant. In any event, the delay by the Land Administrator would directly cause unjust enrichment to the unjust benefit of TNB for being able to earn monies; and unjust losses to the detriment of the Appellant from being deprived of use of the monies that belongs to the Appellant. Crying foul over the Land Administrator’s delay does not nullify the fact that TNB had been unjustly enriched at the expense of the Appellant.

The Court of Appeal found the High Court’s decision warranted appellate intervention. The appeal was allowed, and the High Court’s decision was set aside.

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Eng Han Engineering Sdn Bhd v Toshiba Elevator (M) Sdn Bhd and two other appeals (CA)

Arbitration — Setting aside of arbitral awards — Section 37 of the Arbitration Act 2005 — Breach of natural justice

In **Eng Han Engineering Sdn Bhd v Toshiba Elevator (M) Sdn Bhd and two other appeals [2025] CLJU 1148** (Civil Appeal No: W-02(C)(A)-1082-07/2023 heard together with Civil Appeal No: W-02(C)(A)-1083-07/2023 and Civil Appeal No. W-02(IM)(C)-1084-07/2023), the Court of Appeal affirmed the guiding principles in respect of the courts' discretionary powers to set aside an arbitral award under s. 37 of the Arbitration Act 2005 ("**AA 2005**").

Background of the Appeal

Eng Han Engineering (supra) revolved around an arbitral award rendered in respect of a dispute between a main contractor (the Appellant) and a sub-contractor (the Respondent) regarding delays in the completion of works for a construction project that had been sub-contracted to the Respondent, namely the supply, delivery, installation, testing, commissioning and maintenance of lift and escalator services in the project.

The Appellant claimed liquidated damages due to the non-completion of the works by the Respondent. The Respondent denied liability on, among others, grounds that the alleged delays were caused by the Appellant due to obstructions on the site which affected the Respondent's ability to carry out the relevant works, and delays and/or failures on the part of the Appellant in handing over the relevant lift shafts to the Respondent and in providing power supply to the construction site. The Respondent also raised a counterclaim for amounts due to it for works which had been performed and for a portion of the retention sum said to be owed by the Appellant.

The Appellant's claim was dismissed and the Respondent's counterclaim was allowed. On the issue of the cause for the alleged delay, the Arbitrator's reasons, as set out in her final arbitral award, included the following (hereinafter referred to as the "**Reasons in Question**"):

1. *"An experienced Main Contractor should be aware that installation of the large components of lift equipment brought to the top of the Block by tower crane then suspended in the lift shaft from a hoisting beam above the shaft can only take place when the lift motor room is nearly complete (for access of the lift equipment). After the large lift equipment are placed in the Lift Motor Room, the walls are completed, the room is made watertight and the [sic] completed with door and door lock for security. Lift components and installation require dry environment to avoid rust and surface damage, and short circuit to the wiring and cables."*
2. *"Issue of Clearing of Debris. . . Considering all the facts and circumstances available to the Arbitrator for this arbitration, the photographs recorded in the Bundle of Documents, and in accordance with Clause 34.8(e) of the Conditions of Sub-Contract, I find and hold that the Claimant is responsible to provide a clean and dry site for the respondent to install the lift, escalator and components to avoid rectification and replacement caused by building debris and water leakage."*

The Appellant filed an Originating Summons in the High Court for an order to set aside the arbitral award ("**Setting Aside OS**"). The Respondent too filed an Originating Summons in the High Court seeking recognition and enforcement of the Award ("**Enforcement OS**"). In the Enforcement OS, the Appellant also filed a Notice of Application for the High Court to refuse enforcement of the arbitral award ("**Enforcement NOA**"). The Appellant's primary ground in support of its Setting Aside OS and Enforcement NOA was that there had been a breach of natural justice in the making of the arbitral award as the Reasons in Question involved matters which were not adduced as evidence in the arbitration and which were not submitted upon by the Appellant and Respondent before the Arbitrator.

The High Court dismissed the Setting Aside OS, allowed the Enforcement OS and consequently, dismissed the Enforcement NOA. Hence, the three current Appeals against the High Court's said decisions were lodged by the Appellant.

Issues at the Court of Appeal

The **first issue** before the Court of Appeal was whether the Appellant had proven on a balance of probabilities that there was a breach of the **second rule of natural justice** in connection with the making of the arbitral award under s. 37(1)(b)(ii) AA 2005 read together with s. 37(2)(b)(ii) AA 2005. The said sections of the AA 2005 provide that an award may be set aside if it is in conflict with the public policy of Malaysia (s. 37(1)(b)(ii)), which includes circumstances where a breach of the rules of natural justice occurred in connection with the making of the arbitral award (s. 37(2)(b)(ii)).

At the forefront of this first issue was the question of whether the Arbitrator had considered the Reasons in Question (alluded to above) which were not adduced as evidence in the arbitration and which were not submitted upon by the Appellant and the Respondent during the arbitration.

The **second issue** before the Court of Appeal was whether, in the event that there was a breach of the second rule of natural justice, the Court should refuse to exercise its discretion to set aside the Award on the grounds that all the parties had been afforded a right to (i) adduce all documentary evidence in the Arbitration; (b) examine all the witnesses called to testify in the Arbitration; and (c) present submissions, including oral submissions, prior to the making of the arbitral award.

The Court of Appeal's Decision

In determining the main issues at play, the Court of Appeal followed the guiding principles set out in the Federal Court's decision in **Master Mulia Sdn Bhd v Sigur Ros Sdn Bhd [2020] 12 MLJ 198** regarding the exercise of the court's discretion when faced with an application for setting aside an award grounded on a breach of natural justice (quoted by the Court of Appeal at **paragraph 33** of the judgment in **Eng Han Engineering** (supra)).

The Court of Appeal found that there was indeed a breach of the second rule of natural justice, for the following reasons (see **paragraphs 34 and 35** of the judgment):

1. The cause of the delays in the completion of the relevant construction works was a clear live issue in the dispute between the parties (see **paragraph 34** of the judgment); and
2. The Reasons in Questions were not adduced as evidence in the Arbitration nor were they submitted upon by the Appellant and Respondent before the Arbitrator, and both **the Appellant and Respondent did not know** about the Reasons in Questions **nor could they reasonably have expected** the matters raised in the Reasons in Questions to be in issue at all.

The latter reason is reflective of a scenario described in the Singapore Court of Appeal's decision in **Glaziers Engineering Pte Ltd v WCS Engineering Construction Pte Ltd [2018] 2 SLR 1311** (quoted by the Court of Appeal at **paragraph 32(2)(b)** of its judgment), namely where "*an outcome of a dispute may be surprising to the parties by reason of the fact that they have not even addressed the very question which the decision-maker has posed as being a decisive issue, because they (a) did not know; and (b) could not reasonably have expected that it would be in issue at all*" (Emphasis added). This scenario can be contrasted with the following scenario, which in **Glaziers Engineering** (supra), was said not to constitute a breach of natural justice: "*where the outcome of a dispute is surprising to the parties because they have omitted to address a particular issue even though they could reasonably have foreseen that the issue would form part of the court's decision*".

The Court of Appeal also found that **the breach of the second rule of natural justice by the Arbitrator was serious and material to the outcome of the Arbitration** as, among others, the Arbitrator "*could (not would) have reached a different conclusion if, before the Award was made, she had given to the Appellant and Respondent*" reasonable notice regarding the Reasons in Question and a reasonable opportunity to submit upon the same. The reasoning of the Court of Appeal here reflects a central consideration alluded to by the Federal Court in **Master Mulia** (supra), namely the likelihood of a breach of natural justice having a real impact on the outcome of the arbitration (see **paragraph 36** of the judgment).

In such circumstances, the Court of Appeal held that this was a case which did warrant the exercise of the court's discretion to intervene and set aside the arbitral award under s. 37 AA 2005. Accordingly, the Appellant's appeal against the High Court's dismissal of the Setting Aside OS and the granting of the Enforcement OS were allowed (whilst the Appeal against the High Court's dismissal of the Enforcement NOA was struck out).

Other Issues Decided by the Court of Appeal

In relation to other issues which arose in the Appeal:

1. The Court of Appeal did not accede to a contention by the Appellant that the Arbitrator had, pursuant to s. 21(3)(b) AA 2005, drawn upon her own knowledge and expertise in arriving at her award, holding that it was not stated in the award that the Arbitrator had indeed done so and that this was not a matter that could be implied into the award. Nevertheless, the Court of Appeal did state that in such circumstances where an arbitrator does intend to rely on their own expertise, knowledge and/or experience, the arbitrator ought to inform the parties to the arbitration of such an intention and give the parties a reasonable opportunity to be heard on the same, including an opportunity to put forward their own expert evidence to confirm, vary or rebut such expertise, knowledge and/or experience (see **paragraphs 38 to 40** of the judgment).
2. The Court of Appeal also addressed the issue of whether a failure on the part of an arbitrator to provide reasons for its award, as required under s. 33(3) AA 2005, would in itself constitute proof of a breach of natural justice and/or that the arbitral award is in conflict with the public policy of Malaysia. Whilst the Court of Appeal found that the Arbitrator on the facts of this case had complied with s. 33(3) AA 2005 (see **paragraph 43** of the judgment), at **paragraph 42** of its judgment, the Court of Appeal stated that a failure to provide reasons in an award does not, by itself, constitute a breach of natural justice nor does it automatically result in an award being in conflict with the public policy of Malaysia.
3. Lastly, the question of whether an arbitral tribunal was required to expressly and in detail set out in its award all the issues and evidence adduced in the arbitration, even in circumstances where such issues and evidence did not support the award given, was answered in the negative (see **paragraph 44** of the judgment). To the Court of Appeal, although such an exercise would be helpful to parties, counsel and a court faced with an application to set aside or enforce the award, an omission to do so does not conflict with the public policy of Malaysia nor would it tantamount to a breach of the second rule of natural justice.

Written by
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Wong Zing Haw v Public Prosecutor (CA)
Criminal Law — Murder — Mens rea and motive

In **WONG ZING HAW v PUBLIC PROSECUTOR (Criminal Appeal No.: Q-05(M)-456-12/2020)**, the Court of Appeal had to determine whether; (1) the appellant had inflicted injury/injuries on the deceased that was/were sufficient in the ordinary course of nature to cause the deceased's death, (2) the appellant had the necessary mens rea and (3) there was a complete absence of motive for the appellant to murder the deceased.

The appellant and the deceased, a Chinese national were a married couple with two young children and resided in the third floor of a shophouse in the district of Sri Aman. The appellant was a qualified pharmacist and operated a pharmacy at the ground floor of the same shophouse. The parents and friend of the deceased gave evidence that the nature of the relationship between the appellant and the deceased was stormy.

The deceased was last seen alive by the appellant's staff at 9.30am on 25/02/2018 when she delivered food to the deceased. On 26/08/2018, the appellant informed his pharmacy staff that the deceased had to leave for Kuching for immigration matters. The deceased's mother also contacted the appellant on the same day and was informed that he had chased the deceased from the house following an argument. On 27/08/2018, the deceased's father spoke to the deceased's daughter via video call, in the presence of the appellant who maintained that he had chased the deceased out.

On 28/02/2018, the appellant's staff gave evidence that there was a foul smell of carcass coming from the back of the pharmacy and she was instructed by the appellant to purchase "Clorox" to clean the backyard. On the same day, a shop staff gave evidence that the appellant had purchased a 16 inch heavy duty pot, an 8 inch chopping knife, a 10 inch handle knife, a kitchen knife, a wooden round chopping board, heating gel, 2kg of charcoal, a saw blade, a tabular frame hacksaw; and a 14 inch handsaw.

Between 28/02/2018 to 02/03/2018, the appellant left the care of his two children to his staff in the pharmacy. On 02/03/2018, at 7.40pm the appellant had asked for 3 boxes to be left in front of his house and by 9.40pm the boxes were no longer there.

The deceased's father arrived in Kuching on 04/03/2018 whereupon he was shown a photo of the deceased's severed head by a friend of the appellant. The deceased's father went to the police station and sent a message asking the appellant to go to the police station as well. At the police station the appellant insisted that he should be the one to identify the head, claiming there was no need for the deceased's father to do so. The appellants did not identify the head as his wife's but the deceased's father immediately identified the head as that of his daughter. DNA analysis confirmed the head to be that of the deceased.

During the investigation, the police seized several items from the appellant's house and car including; wooden chopping board (with strands of human hair), 2 iron chains (with the deceased's DNA), silver pot, knife and a notebook with the

appellant's handwriting (confirmed by appellant's staff and an expert witness) with notes as follows:

- i. Legs - x 2
- ii. Hands - x 1
- iii. Head - x 1
- iv. Shoulder bone - x 5
- v. Finger - x 1
- vi. Thorax - x 1
- vii. Skin - x 1
- viii. Pelvic - x 1
- ix. Organ - x 1
- x. Yellow - organ
- xi. Small blue
- xii. Skin big blue

The learned High Court Judge inferred that the appellant's relationship with the deceased was strenuous which led to the appellant's aggressive behaviour in tying up the deceased with the iron chain (corroborated by the DNA and evidence of the daughter) and thereafter, cutting up the deceased's body into several parts based on the pathologist's report having ruled out that the head had been severed by crocodiles. Although the pathologist could not determine the cause of the death, the pathologist gave evidence that the knife seized from the appellant's home could have been used to sever the deceased's head. The learned High Court Judge concluded that there was a direct connection between the accused's actions and the fatal injury that led to the deceased's death, which falls under Section 300 of the Penal Code, and therefore, held that the accused deliberately caused the injuries leading to the deceased's death, a prima facie case proven for the prosecution.

The appellant chose to give evidence wherein he stated that the deceased had damaged her phone following an argument and thereafter packed her things. He was informed by his daughter that the deceased had left with her luggage. He left on 02/02/2018 for Kuching to look for the deceased but left on 04/03/2018 back to Sri Aman after picking up the deceased's father, and on receiving a Whatsapp image of a severed head. He was subsequently arrested and interrogated. When he was taken to the scenes of the crime, he alleged that he was asked to point and thereafter, photographs of him pointing were taken by the police photographer. He had not made a police report on the deceased's disappearance as the deceased needed to go to Kuching for immigration matters and had friends there with whom she could have stayed.

The learned High Court Judge concluded that the appellant's defences were mere denials and that he had failed to cast any reasonable doubt on the prosecution's case and found the appellant guilty of murder and sentenced him to death by hanging.

On appeal, the Court of Appeal was faced with three points of appeal:

1. What injury/injuries were inflicted on the deceased that was/were sufficient in the ordinary cause of nature to cause the deceased's death;

2. The absence of mens rea and/or finding of the same; and
3. A complete absence of motive for the appellant to murder the deceased.

On appeal point 1, Counsel for the appellant contended that the Pathologist was unable to determine the actual cause of death and could not establish whether the deceased had sustained any additional injuries or underlying health condition that must have contributed to her death. Therefore, the learned High Court Judge had misdirected himself by assuming that the accused had caused or inflicted the injuries leading to the deceased's death under section 300 (c) of the Penal Code.

In addressing point 1, the Court of Appeal relied on decided cases wherein the bodies of the victims were either not recovered or in a state where it was impossible to ascertain the cause of death. The fact remains in all the cases that the victims were dead. Therefore, the Court of Appeal found no appealable errors in the learned High Court Judge's findings as he had correctly concluded that the only reasonable inference is that the accused caused the death of the deceased; with no one else having had contact with the deceased before her disappearance and she was last seen in the matrimonial home. This was supported by the testimony of the pathologist on the knife and the evidence of the daughter who saw the deceased chained to the bed.

On appeal point 2, Counsel for the appellant submitted that the learned High Court Judge had given a *non-speaking* judgment as there was no affirmative finding of *mens rea* in his judgment, and even assuming that the injuries suffered by the deceased were sufficient in the ordinary course of nature to cause death, there was no implication that the appellant had the intention to cause those injuries.

In addressing Point 2, the Court of Appeal reiterated that it is impossible to prove mens rea by direct evidence as it is a factual question that must be established by inferring from the circumstances of the case. Reliance was made on the recent Federal Court decision in *PP v Muhammad Khairuanuar Baharuddin [2025] 1 CLJ [517]* with emphasis on the discussion on intention; *"the intention is a question of fact which is to be gathered from the acts of the parties. The Law looks 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."* The Court of Appeal looked at the findings of the learned High Court Judge and found that the learned High Court Judge had correctly concluded that the accused had the intention to inflict the injuries that caused the death of the deceased.

On Point 3, Counsel for the appellant argued that while motive was not an essential ingredient of the murder charge, it should be a relevant consideration. The appellant argued that there was no single evidence to suggest that the appellant had any motive.

In addressing Point 3, the Court of Appeal held that while motive will lend more credence in proving the appellant's intention to murder the deceased, motive is not a sine qua non of intention; the absence of motive does not negate the presence of intent. The Court of Appeal relied on the discussion on motive in the Federal Court case of *Pathmanabhan Nalliannan v PP [2017] 4 CLJ 137* wherein it was found that *"motive may be helpful in assisting the court in coming to its decision but the absence of such evidence is not fatal to the prosecution case."* The Court of Appeal found that the circumstantial evidence viewed collectively led to the undeniable conclusion that the appellant had murdered the deceased.

The Court of Appeal also looked at the sentencing following the Abolition of Mandatory Death Penalty Act 2023 but unreservedly inclined to maintain the death penalty on the following grounds:-

- a. The crime was committed against a woman who was not only the appellant's wife but also the mother of their 2 children;
- b. The appellant had mistreated the deceased by chaining her to the bed where her children could see;
- c. The appellant had brutally cut the deceased's body into several pieces and disposed of the parts in the river; a gruesome act; and
- d. The appellant attempted to conceal his crime and showed no remorse.

The Court of Appeal therefore dismissed the appeal and upheld the conviction and the death sentence.

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