IN THE COURT OF APPEAL OF MALAYSIA
[APPELLATE JURISDICTION]
CRIMINAL APPEAL NO. : S-05(LB)-110-03/2016

BETWEEN

PUBLIC PROSECUTOR **APPELLANT**

AND

1. KADIR BIN UYUNG
2. LATING BIN TIONG **RESPONDENTS**

Heard Together With

CRIMINAL APPEAL NO. : S-05(LB)-111-03/2016

BETWEEN

PUBLIC PROSECUTOR **APPELLANT**

AND

MASIR BIN AIDIN **RESPONDENT**

Heard Together With

CRIMINAL APPEAL NO. : S-05(LB)-112-03/2016

BETWEEN
PUBLIC PROSECUTOR **APPELLANT**

AND

ANWAR BIN SALIB AKHMAD **RESPONDENT**

Heard Together With

CRIMINAL APPEAL NO. : S-05(LB)-113-03/2016

BETWEEN

PUBLIC PROSECUTOR **APPELLANT**

AND

BINHAR BIN SALIB AKHMAD **RESPONDENT**

Heard Together With

CRIMINAL APPEAL NO. : S-05(LB)-114-03/2016

BETWEEN

PUBLIC PROSECUTOR

APPELLANT

AND

SALIB AKHMAD BIN EMALI **RESPONDENT**

Heard Together With

CRIMINAL APPEAL NO. : S-05(LB)-115-03/2016

BETWEEN

PUBLIC PROSECUTOR **APPELLANT**

AND

ABD HADI BIN MAWAN **RESPONDENT**

Heard Together With

CRIMINAL APPEAL NO. : S-05(LB)-116-03/2016

BETWEEN

PUBLIC PROSECUTOR **APPELLANT**

AND

RIJMAL BIN SALLEH **RESPONDENT**

Heard Together With

CRIMINAL APPEAL NO. : S-05(LB)-117-03/2016

BETWEEN

PUBLIC PROSECUTOR **APPELLANT**

AND

ABDUL MAJIL BIN JUBIN **RESPONDENT**

Heard Together With

CRIMINAL APPEAL NO. : S-05(LB)-118-03/2016

BETWEEN

PUBLIC PROSECUTOR **APPELLANT**

AND

RIZMAN BIN GULAN **RESPONDENT**

Heard Together With

CRIMINAL APPEAL NO. : S-05(LB)-119-03/2016

BETWEEN

PUBLIC PROSECUTOR **APPELLANT**

AND

TOTOH BIN HISMULLAH **RESPONDENT**

Heard Together With

CRIMINAL APPEAL NO. : S-05(LB)-120-03/2016

BETWEEN

PUBLIC PROSECUTOR **APPELLANT**

AND

SAIDALI BIN JAHARUL **RESPONDENT**

Heard Together With

CRIMINAL APPEAL NO. : S-05(LB)-121-03/2016

BETWEEN

PUBLIC PROSECUTOR **APPELLANT**

AND

DANI BIN ISMAIL **RESPONDENT**

Heard Together With

CRIMINAL APPEAL NO. : S-05(H)-351-10/2016

BETWEEN

PUBLIC PROSECUTOR **APPELLANT**

AND

1. ATIK HUSSIN BIN ABU BAKAR
2. BASAD BIN MANUEL
3. ISMAIL BIN HJ YASIN
4. VORGILIO NEMAR PATULADA
5. SALIB AHMAD BIN EMALI
6. AL WAZIR BIN OSMAN
7. TANI BIN LAHAD WAHI
8. JULHAM BIN RASHID
9. DATU AMIRBAHAR HUSHIN KIRAM **RESPONDENTS**

Heard Together With

CRIMINAL APPEAL NO. : S-05(SH)-355-10/2016

BETWEEN

JULHAM BIN RASHID **APPELLANT**

AND

PUBLIC PROSECUTOR **RESPONDENT**

Heard Together With

CRIMINAL APPEAL NO. : S-05(SH)-357-10/2016

BETWEEN

VIRGILIO NEMAR PATULADA **APPELLANT**

AND

PUBLIC PROSECUTOR **RESPONDENT**

Heard Together With

CRIMINAL APPEAL NO. : S-05(SH)-358-10/2016

BETWEEN

SALID AKHMAD BIN EMALI **APPELLANT**

AND

PUBLIC PROSECUTOR **RESPONDENT**

Heard Together With

CRIMINAL APPEAL NO. : S-05(SH)-359-10/2016

BETWEEN

TANI BIN LAHAD DAHI **APPELLANT**

AND

PUBLIC PROSECUTOR **RESPONDENT**

Heard Together With

CRIMINAL APPEAL NO. : S-05(SH)-360-10/2016

BETWEEN

BASAD BIN SAMUEL **APPELLANT**

AND

PUBLIC PROSECUTOR **RESPONDENT**

Heard Together With

CRIMINAL APPEAL NO. : S-05(SH)-362-10/2016

BETWEEN

DATU AMIRBAHAR HUSHIN KIRAM **APPELLANT**

AND

PUBLIC PROSECUTOR **RESPONDENT**

Heard Together With

CRIMINAL APPEAL NO. : S-05(SH)-364-10/2016

BETWEEN

ISMAIL BIN HJ YASIN **APPELLANT**

AND

PUBLIC PROSECUTOR **RESPONDENT**

Heard Together With

CRIMINAL APPEAL NO. : S-05(SH)-365-10/2016

BETWEEN

ATIK HUSIN BIN ABU BAKAR **APPELLANT**

AND

PUBLIC PROSECUTOR **RESPONDENT**

Heard Together With

CRIMINAL APPEAL NO. : S-05(SH)-366-10/2016

BETWEEN

AL WAZIR BIN OSMAN **APPELLANT**

AND

PUBLIC PROSECUTOR **RESPONDENT**

Heard Together With

CRIMINAL APPEAL NO. : S-05(LB)-370-10/2016

BETWEEN

PUBLIC PROSECUTOR **APPELLANT**

AND

BASIL BIN SAMIUL **RESPONDENT**

(High Court of Sabah and Sarawak at Kota Kinabalu
Criminal Trial No.B45SO-1/3-2013, 45SO-4/3-2013, 45SO-7/3-2013, 45SO-9/4-2013, 45SO-10/4-2013, 45SO-11/4-2013, 45SO-12/4-2013, 45SO-13/4-2013, 45SO-15/4-2013, 45SO-16/4-2013, 45SO-17/4-2013, 45SO-18/4-2013, 45SO-19/4-2013, 45SO-20/5-2013, 45SO-21/5-2013, 45SO-22/5-2013, 45SO-23/5-2013, 45SO-24/5-2013, 45SO-29/5-2013, 45SO-30/5-2013)

CORAM

MOHD ZAWAWI SALLEH, JCA
ABDUL RAHMAN SEBLI, JCA
KAMARDIN HASHIM, JCA

JUDGMENT OF THE COURT

PROCEDURAL ANTECEDENTS

[1] There were twenty three separate appeals before us which arose from the judgment and orders passed by the High Court in Sabah and Sarawak at Kota Kinabalu (Justice Stephen Chung Hian Guan, presiding). The orders passed by the High Court were impugned by both the accused and the Public Prosecutor ("PP").

[2] To better appreciate the legal issues raised in these appeals, it is necessary to first state the procedural antecedents of the case.

[3] Thirty accused were charged with various offences under the Penal Code ("PC") in connection with the armed incursion at Kg. Tanduo, Lahad Datu, Sabah between February 12 and April 10, 2013. Twenty two accused were charged under section 121 of the PC for waging war against the Yang di-Pertuan Agong and under section 130KA of the same Code for being members of a terrorist group.

[4] Among the twenty two accused, one of them faced two additional charges, under section130E of the PC for recruiting members of a terrorist group and under section 130K for harbouring persons knowing they were members of a terrorist group.

[5] Apart from that, five other accused were charged under section 130KA of the PC for being members of a terrorist group. One accused was charged under section130K of the PC. The remaining two accused were charged under section130K of the PC read together with section 511 of the PC for attempting to harbour persons knowing they were members of a terrorist group. The table below contains particulars of the charges preferred against the accused persons:

Accused / Name	Charges (Penal Code)
1. Atik Hussin bin Abu Bakar	section121 & section130KA
2. Lin bin Mad Salleh	section 130KA
3. Holland bin Kalbi	section 130KA
4. Basad bin Manuel	section121 & section130KA
5. Habil bin Suhaili	section 130KA
6. Timhar bin Hadil	section 130KA
7. Kadir bin Uyung 8. Lating bin Tiong	section 130KA read together with section 511
9. Masir bin Aidin	section121 & section130KA
10. Ismail bin Hj Yasin	section121 & section130KA
11. Anwar bin Salib	section121 & section130KA
12. Binhar bin Salid	section121 & section130KA
13. Virgilio Nemar Patulada @ Mohammad Alam Patulada	section121 & section130KA
14. Aiman bin Radie	section130KA
15. Salib Akhmad bin Emali	section 130E & section 130K section121 & section130KA
16. Al Wazir bin Osman @ Abdul	section121 & section130KA
17. Abd Hadi bin Mawan	section121 & section130KA
18. Tani bin Lahad Wahi	section121 & section130KA
19. Julham bin Rashid	section121 & section130KA
20. Datu Amirbahar Hushin Kiram	section121 & section130KA

Accused / Name	Charges (Penal Code)
21. Rijmal bin Salleh	section121 & section130KA
22. Abdul Majil bin Jubin	section121 & section130KA
23. Rizman bin Gulan	section121 & section130KA
24. Basil bin Samiul	section121 & section130KA
25. Totoh bin Hismullah	section121 & section130KA
26. Norhaidah binti Ibnahi	section130K
27. Pabblo bin Alie	section121 & section130KA
28. Mohamad Ali bin Ahmad	section121 & section130KA
29. Saidali bin Jahrul	section121 & section130KA
30. Dani bin Ismail	section121 & section130KA

[6] On 5.2.2016, the learned trial judge ordered nine of the accused to enter their defence for the offence of waging war against the Yang di-Pertuan Agong under section 121 of the PC which carries the death penalty or imprisonment for life. They were the 1st, 4th, 10th, 13th, 15th, 16th, 18th, 19th and 20th accused. They, together with six other accused, were also ordered to enter their defence on the charge of being members of a terrorist group. The other six accused were the 2nd, 3rd, 5th, 6th, 14th and 17th accused.

[7] At the close of the prosecution case, the learned trial judge found that the prosecution failed to establish a *prima facie* case

against the 24th, 27th and 28th accused for the charge of waging war against the Yang di-Pertuan Agong under section 121 of the PC and of being members of a terrorist group under section 130KA of the PC. However, the learned trial judge ordered the 24th and 28th accused to enter their defence on an amended charge under section 130J(1)(a) of the PC for soliciting or giving support to a terrorist group. The learned trial judge also amended the charge against the 27th accused to a charge of soliciting property for the benefit of a terrorist group, an offence under 130G(c) of the PC.

[8] Meanwhile, the sole female accused, i.e. the 26th accused was ordered to enter her defence on a charge under section 130K of the PC.

[9] On the same day, the learned trial judge acquitted and discharged nine accused i.e. the 7th, 8th, 9th, 11th, 12th, 21st, 22nd, 23rd, 25th, 29th and 30th accused of the respective charges preferred against them.

[10] The learned trial judge also acquitted and discharged the 15th accused of two charges, one under section 130E of the PC for recruiting members of a terrorist group and the other under section 130K for harbouring persons knowing they were members of a terrorist group. The 17th accused was also acquitted and

discharged of the offence of waging war against the Yang di-Pertuan Agong under section 121 of the PC.

[11] Aggrieved by the said orders of acquittal and discharge, the Public Prosecutor ("PP") appealed to this court, urging a reversal of the orders.

[12] The trial took a new twist when seven of the accused, namely the 1st, 2nd, 3rd, 4th, 10th, 13th and 14th accused pleaded guilty to the offence of being members of a terrorist group under section 130KA of the PC. The 27th and 28th accused also pleaded guilty to the amended charges. Their sentencing was postponed till the end of the trial.

[13] On 23.4.2016, the 5th accused, who had been ill throughout the trial, died from an asthma attack.

[14] At the end of the defence case, nine of the accused i.e. the 1st, 4th, 10th, 13th, 15th, 16th, 18th, 19th, and 20th accused were found guilty and convicted of the offence of waging war against the Yang di-Pertuan Agong under section 121 of the PC and sentenced to life imprisonment.

[15] The 15th, 16th, 18th, 19th and 20th accused were also convicted of a second charge of being members of a terrorist group and were sentenced to eighteen years imprisonment. The other four accused i.e. the 1st, 4th, 10th and 13th accused, who

pleaded guilty to the same offence, each received 13 years imprisonment. They were ordered to serve the jail sentence concurrently from the date of their arrest.

[16] Also convicted of being members of a terrorist group were the 6th and 17th accused. They were sentenced to 15 years imprisonment each. The learned trial judge, after having considered the guilty pleas of the 2nd, 3rd and 14th accused for the same offence, sentenced them to thirteen years imprisonment each.

[17] The 27th and 28th accused who pleaded guilty to the amended charges were each sentenced to 15 years imprisonment. The 26th accused was sentenced to 10 years imprisonment after being found guilty of harbouring a member of a terrorist group that intruded Kg. Tanduo. The 24th accused, who was ordered to enter his defence on an amended charge, was acquitted at the end of the trial.

[18] All seventeen accused appealed against conviction and sentence. The PP cross-appealed against the sentence of life imprisonment imposed on each of the nine accused convicted under section 121 of the PC for waging war against the Yang di-Pertuan Agong. The PP also appealed against the acquittal of the 24th accused. On 19.5.2017, the 26th accused withdrew her appeal against sentence and the matter was struck out by this Court.

[19] Earlier in the proceedings, sixteen accused withdrew their appeals against conviction and sentence of between 13 and 18 years imprisonment for being members of a terrorist group and other terrorist-related offences without any objection by the prosecution. Accordingly, we struck out the appeals and affirmed the decision of the High Court.

[20] We then proceeded to hear the appeal by the PP against the acquittal of the fourteen accused by the High Court and also the appeal by the PP against the sentence of life imprisonment imposed on the nine accused who were convicted under section 121 of the PC. The nine accused also proceeded with their appeals against conviction for the said offence.

[21] Having given careful and anxious consideration to all the issues raised by the parties, we reached a unanimous decision and made the following orders:

i. We dismissed the prosecution's appeal against acquittal and affirmed the acquittals of the fourteen accused;
ii. We dismissed the nine accused's appeal against conviction and upheld their convictions for waging war against the Yang di-Pertuan Agong; and
iii. We allowed the prosecution's appeal against sentence and set aside the sentence of life imprisonment imposed

by the High Court against the nine accused and substituted it with the death penalty.

[22] We now give the detailed reasons for our decision.

FACTS OF THE CASE

[23] Shorn of unnecessary details, the relevant facts giving rise to these appeals may be shortly stated as follows:

23.1. On 12.2.2013, Mohd Ali bin Asmali (PW2) stumbled upon a group of armed intruders dressed in camouflaged uniform at Kampung Tanduo and subsequently lodged a police report about the intrusion.

23.2. The armed group, later identified as the "Royal Security Forces ("RSF") of the Sultanate of Sulu and North Borneo" and led by Datu Agbimuddin Kiram, was sent by Sultan Jamalul Kiram III from the southern Philippines to assert his territorial claim over Sabah.

23.3. Immediate action was taken and the police blockaded roads leading from Lahad Datu to the remote village of Tanduo, where the armed group was encircled. The navy also patrolled the coast of Kg. Tanduo, to prevent the intruders from leaving and to prevent foreign reinforcements from entering our shores.

23.4. Codenamed “Ops Sulu”, the operation saw negotiations being held between Senior Assistant Commissioner of Police Datuk Abdul Rashid (PW1) and Sabah Special Branch Deputy Chief Assistant Commissioner of Police Zulkifli Abd Aziz with Datu Agbimuddin. Datu Amirbahar Hushin Kiram (the 20th accused), a nephew of Datu Agbimuddin, was also present during one of the negotiations.

23.5. After several weeks of negotiation and unmet deadlines for the intruders to withdraw, the Malaysian security forces launched a major operation to flush out the militants.

23.6. On 1.3.2013, a confrontation took place at Kampung Tanduo between the Malaysian security forces and the armed intruders, with shots being exchanged. The Malaysian police suffered two casualties while the armed intruders suffered fifteen casualties. Various weapons, including M16 rifles, pistols, SLR rifles and ammunition were recovered.

23.7. On 2.3.2013, the Malaysian security forces entered Kg. Simunul to arrest a suspect known as Iman Tua. They were ambushed by a group of gunmen resulting in the death

of six Malaysian police. The bodies of the policemen were mutilated, with one beheaded.

23.8. On 5.3.2013, “Ops Sulu” was renamed “Ops Daulat” and the mopping operations began to flush out the armed intruders. Security forces launched the attack using F-18 and Hawk fighter jets on the group of armed intruders at Kampung Tanduo and searches in the village area were carried out.

23.9. After a week of bombardment and firefight, Kampung Tanduo was finally secured on 11.3.2013. At the end of the standoff, around eighty deaths were reported, with ten Malaysian security personnel being among the casualties.

23.10. Since “Ops Daulat” was launched, more than five hundred individuals, including the thirty accused, were arrested under the Security Offences (Special Measures) Act 2012 (“SOSMA”).

THE APPEALS

[24] We shall deal with the appeals in three parts, namely Part I, Part II and Part III.

PART I – THE PROSECUTION'S APPEAL AGAINST ACQUITTAL

[25] The prosecution's appeal was against the acquittals of the 7th, 8th, 9th, 11th, 12th, 15th, 17th, 21st, 22nd, 23rd, 24th, 25th, 29th and 30th accused . All the respective accused, with the exception of the 24th accused, were acquitted at the close of the prosecution's case, whereas the 24th accused was acquitted at the end of the trial.

[26] To recapitulate, all the accused were charged separately with various offences and they were jointly tried under SOSMA. The charges preferred against them respectively were either for committing offences punishable under section 121 of the PC for waging a war against the Yang di-Pertuan Agong or under section 130E of the PC for recruiting persons to be members of a terrorist group or to participate in terrorist acts or under section 130KA of the PC for being members of a terrorist group or for an attempt thereof. The offences carry with them punishments ranging from the death penalty to various imprisonment terms and fine.

[27] We must say at the outset that the challenge by the prosecution in its appeal against acquittals was essentially against findings of fact made by the learned trial judge. We reiterate the well-established principle that findings of fact made by a trial judge are not to be disturbed by the appellate court unless it can be shown that the trial judge's assessment of the evidence was

plainly wrong *(see* ***Tan Kim Ho & Anor v. PP*** **[2009] 3 MLJ 151**; ***PP v. Thenegaran Murugan & Another Appeal*** **[2013] 4 CLJ 364**; ***PP v. Mohd Radzi Abu Bakar*** **[2006] 1 CLJ 457** and ***Dato' Seri Anwar Ibrahim v. PP*** **[2002] 3 CLJ 457**).

[28] In ***Mohd Radzi Abu Bakar (supra)***, the Federal Court held at page 475 as follows:

> *"[31] We were then invited by the learned deputy to make our own findings on the evidence and to restore the conviction entered by the learned trial judge on the basis of the proviso to s. 92(1) of the Courts of Judicature Act 1964. Reliance was placed on the decision of this Court in* ***Tunde Apatira (supra).***
>
> *[32] Now, it settled law that it is no part of the function of an appellate court in a criminal case – or indeed any case – to make its own findings of fact. That is a function exclusively reserved by the law to the trial court. The reason is obvious. An appellate court is necessarily fettered because it lacks the audio-visual advantage enjoyed by the trial court.*
>
> *[33] The further principle established by this court in* ***Muhammed bin Hassan v. PP*** *is that where s. 37(da) is relied on by the prosecution, it is for the trial court to make a specific finding that the accused was in possession in the legal sense. In the absence of such a finding, it is not open to an appellate court to fill the gap and make the finding. A suggestion by counsel for the prosecution that this court is entitled to make its own findings of fact was firmly rejected. In that case Chong Siew Fai CJ (Sabah & Sarawak) said:*

> *"As regards the alternative submission of the learned deputy public prosecutor that, independently of s. 37(d), there was sufficient evidence of possession of the cannabis on the part of the appellant, all we need to say is that on the evidence, the learned trial judge did not make a finding of possession (i.e. possession as understood in criminal law) either factually or by way of inference. We, at the appellate stage, not having had the opportunity of observing the witnesses in giving evidence, did not consider it appropriate and safe to arrive at conclusion in this regard.*
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> *[34] Now,* ***Muhammed bin Hassan*** *was a case of a first appeal from the High Court to this court exercising the powers of the former Supreme Court under s. 17 of the Courts of Judicature (Amendment) Act 1995 (Act A909). If the principle adverted to a moment ago holds good in a first appeal, it applies with greater force in a second appeal. To put the matter beyond any doubt, we state that it is not the function of this court to make primary findings of fact. Of course, we may examine the record to see if the trial court drew the proper inferences from proved or admitted facts. But is quite a different principle and has no application to the present instance."*

[29] In ***Swiss Garden Rewards Sdn. Bhd. v. Mohamed Ashrof Tambi bin Abdullah & 4 Others,*** **Rayuan Sivil No. P-01(A)-196-05/2016 (CA)**, this Court had this to say:

"[35] The correct approach of an appellate court or a reviewing court when invited to intervene with the factual findings of a trial judge was restated by the Supreme Court of United Kingdom in ***Mcgraddie v. Mcgraddie [2013] WLR 2472*** *and accurately summarised in the head note –*

> *"It was a long settled principle, stated and restated in domestic and wider common law jurisprudence, that an appellate court should not interfere with the trial judge's conclusions on primary facts unless satisfied that he was plainly wrong."*

Lewison L.J. returned to the topic in ***Fage UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5; [2014] ETMR 26****. In a vivid passage at para [114] he said:*

> *"Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applied not only to findings of primary fact, but also the evaluation of those facts and to inferences to be drawn from them. … The reasons for this approach are many. They include*
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> *i. The expertise of the trial judge in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed;*
>
> *ii. The trial is not a dress rehearsal. It is the first and last night of the show;*

iii. Duplication of the trial judge's role on appeal is a disproportionate use the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case;

iv. In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.

v. The atmosphere of the court room cannot, in any event, be recreated by reference to documents (including transcripts of evidence); and

vi. Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."

[30] The trial judge's assessment of the credibility of the witnesses is entitled to great weight. The simple reason for this is that the trial judge had the opportunity of observing their demeanour and manner while giving evidence and was therefore in the best position to determine if they were telling the truth or otherwise. The assessment is binding on the appellate court in the absence of clear evidence showing that the trial judge had plainly overlooked or misinterpreted some material facts which if considered might have affected the result of the case. (See ***Dato' Seri Anwar Bin Ibrahim v Public Prosecutor & Another Appeal*** **[2015] 2 CLJ 145**, ***Muniandy & Ors v P.P*** **[1966] 1 LNS 110 (FC)**

and ***Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd*** **[2012] 4 MLJ 149, 154 (CA)**).

[31] It is pertinent to note that the prosecution's case against all the accused is predicated purely on circumstantial evidence. The learned DPP argued that the learned trial judge had failed to take into consideration the prevailing circumstantial evidence as well as the admissions made by some of the accused that warranted the calling of their defence.

[32] It was therefore incumbent upon us to revisit the evidence adduced by the prosecution or, where applicable, as against the accused's defence to determine the correctness of the learned trial judge's decision in acquitting the accused.

Evidence against the 7th and 8th accused

[33] Both accused were arrested together on 4.3.2013 at about 4.30 pm by Ancillary Corporal Mohammad Asran bin Madong (PW57) in front of the PGA Post at Tg. Labian, Lahad Datu. They were charged jointly with an amended charge under section 130K of the PC read together with section 511 of the same Code for attempting to harbour a group of persons having reason to believe that they were members of a terrorist group. The evidence of PW57 was that he saw two men in civilian clothes and the 8th accused was carrying a green plastic package. According to PW57, they were behaving suspiciously, as if they were lost.

[34] PW57 further testified that he identified himself as a police officer and asked both accused to stop. The two accused started to run away towards Tg. Batu. PW57 saw the 8th accused throwing away the green plastic bag. PW57 and his team managed to stop both accused that the 8th accused threw away. PW57 found dried fish (*ikan kayu*) inside the green plastic bag. When he enquired about the dried fish, both accused answered that they were supplying the fish to their friends who had escaped from Kg. Tanduo to Tg. Batu. PW57 then told his superior, ASP Rohana Anak Nanu (PW123) about the matter. However, PW123 in her evidence testified that she did not even meet PW57.

[35] PW57 conceded that he did not say anywhere to the effect that both accused had admitted orally that the six dried fish were meant to be supplied to their friends who escaped from Kg. Tanduo to Tg. Batu. Neither did PW57 state this fact in his police report, Chendrawasih Report No: 195/2013 (exhibit P293) nor in his investigation diary or in any document whatsoever.

[36] The learned trial judge rejected PW57's testimony in relation to the alleged admission made by both accused. His Lordship said this in his grounds of judgment:

> *"19.20. This alleged admission was made after questioning by PW57, after he had arrested them. At the material time he did not caution and no caution was administered to them. He did not inform them of their*

rights or their rights to remain silent or not to give any answers or explanations to questions asked or that they were entitled to legal advice. The alleged admission was not in accordance to procedures, highly prejudicial and not admissible as evidence against the 7th and 8th accused: see ***Krishnan Raman v PP [1987] 1 CLJ 28; PP v Rosyatimah Niza & Anor [1989] 1 CLJ 481****. Without the alleged admission, there was no evidence against the 7th and 8th accused that they were or attempted to harbour or rendered assistances to terrorists.*

19.21. Further, although the 7th and 8th accused had said in their statements that they were bringing the fish to their grandmother and they had given several names of persons who could vouch for them, the police did not investigate these allegations and whether they were true. If they had done so, and if they were true, these would have exonerated the 7th and 8th accused and would have contradicted PW57 that they had admitted to him that they were supplying the fish to the armed intruders escaping from Kg. Tanduo to Tg. Batu: see ***PP v. Lian Ah Bek [1989] 2 CLJ 1090****;* ***Lee Kwan Woh v. PP [2009] 5 CLJ 631****. Again these raised some doubts on the prosecution's case against them.".*

[37] In acquitting both accused of the amended charge, His Lordship reasoned as follows:

"19.22. Apart from what PW57 had alleged against the 7th and 8th accused, there was no evidence that they were members of or sympathizers or supporters of the Sultanate of Sulu and North Borneo or of the Royal Security Force. There was no evidence that they were

involved in any way with the armed intruders or armed intrusion at Kg. Tanduo or Kg. Simunul. There was no evidence that they acted or were involved or intended to or attempted to supply food or harbour a person knowing this person to be a member of a terrorist group or attempted to endanger a person's life or national security which involved the use of firearms, explosives, lethal devices, dangerous, hazardous, radioactive, biological or harmful substance in advancing a political or religious or ideological cause.

19.23. The evidence showed that at the time of their arrest, they were walking on the main road in front of and in full view of the police personnel on duty at the PGA post at Tg. Labian. Nothing was found on them after the body search was conducted on them except one of them who carried the plastic bag containing the fried fish had thrown it away while running when confronted by PW57 and another policeman. There was nothing incriminating in the plastic bag which contained the fried fish. The 7th accused said in his statement that he was bringing some of the fish to his grandmother in Kg. Labian and the 8th accused in his statement said he was bringing some of the fish back to his house at Kg. Tanduo. There was nothing wrong or sinister or incriminating for both of them to be walking in broad daylight on the road and carrying fried fish."

[38] Based on the evidence before the court, we found no cogent reason to disagree with the findings of the learned trial judge. We therefore agreed with the learned trial judge that the prosecution

failed to establish a *prima facie* case against both accused on the amended charges preferred against them.

Evidence against the 9th, 11th, 12th and 15th accused

[39] The 15th accused was the father of the 11th and 12th accused whilst the 9th accused was the son-in-law of the 15th accused. They were arrested on 25.2.2013 following a raid in Ladang Atlas, Ulu Tungku, Lahad Datu. The operation was led by Supt. Mohd Sahari bin Sidek who had organised the police officers into four teams, each led by ASP Mohamad Hasnal bin Jamil (PW33), ASP Noraidin bin Ag. Maidin (PW58), ASP Mohammad Asram bin Asmat (PW63) and an officer from K9, IPK Sabah.

[40] The arrest was made possible through intelligence obtained from intercepted communications between Datu Agbimuddin and the 15th accused. Based on the interception, PW33 managed to generate the GPS coordinates and to determine the location of the house where the 15th accused was in. After having confirmed the location of the 15th accused, PW33 signalled the police to move into the house and arrest the accused. PW63 seized one black Nokia mobile phone from the 15th accused (exhibit P300C) and a pink coloured Nokia mobile phone from the 9th accused (exhibit P301C). PW58 recovered and seized three *parangs* (exhibits P302B – P302D) from the kitchen of the house.

[41] All four accused were charged with two offences under section 121 and section 130KA of the PC. The 15th accused faced two additional charges under section 130E of the PC for recruiting persons to be members of a terrorist group or to participate in a terrorist act, and under section 130K for harbouring persons committing a terrorist act. In respect of the 15th accused, this section of the judgment is only concerned with the acquittal of the 15th accused of the two charges. We shall deal with the 15th accused's appeal against conviction later in this judgment.

[42] Before acquitting all the four accused, the learned trial judge had considered all the prosecution's evidence as adduced through PW33, PW58, PW63 and PW158. In essence, the learned trial judge found that the investigation carried out by the police against the accused was unsatisfactory. No investigation was carried on the phone numbers saved on the seized mobile phones, especially the number save under the name 'Ampun' which means 'Tuanku'' in the Suluk language. The learned trial judge also dealt with the admissibility of the confessions allegedly made by the accused before a Sessions Court Judge and also the contradictions in the testimonies of witnesses produced by the prosecution.

[43] In respect of the two mobile phones, the learned trial judge commented as follows:

"20.22. He said when he made the arrest he found a black Nokia phone, next to and to the left of the 15th accused. He said he inspected the phone and found one contact under a name 'Ampun' which in Suluk means 'tuanku'. PW63 speaks Suluk. He did not testify who or what was this contact known as Ampun, whether it was the Sultan or Datu Agbimuddin or Datu Amir Bahar or whether it had any connection with the armed intrusion at Kg. Tanduo or the significance of this contact found in the phone. He did not investigate this contact or phone number. The investigation officer also did not do so. PW63 found another Nokia phone, pink and dark in colour, next and to the right of the 9th accused. He handed the two phones to PW58.

20.23. In cross-examinations, PW58 and PW63 were asked and agreed that a piece of white paper tendered as P300G was found inside the plastic package which was tendered as P300A which contained a black Nokia phone seized from the 15th accused. It was written on this piece of white paper with the words "Julham Rasid No. Report Tanjung Aru 001139/13". PW58 and PW63 also agreed that a piece of white paper tendered as P300F was found inside the plastic package which was tendered as P301A which contained the Nokia phone seized from the 9th accused. This piece of paper was written with the words "Salib Akhmad Emali".

20.24. It was submitted that based on these two pieces of paper found inside the respective plastic package that the exhibits had been tampered with or mixed up with some other exhibits. It was submitted that based on the two pieces of paper written with the names, the black Nokia phone did not belong to the 15th accused but belonged to Julham Rasid and that

the pink and dark coloured phone did not belong to the 9th accused.

20.25. It was to PW58, who agreed that based on the document P297 prepared by him, it stated that the three parangs and one Nokia phone were found in the kitchen. The defence submitted that this contradicted the evidence of PW58 and PW63 that the two phones were found next to the 15th and 9th accused. Based on the testimonies of PW58 and PW63 and the photographs P296 (1-5), the two phones were seized from the 15th and 9th accused. Clearly P300G had been wrongly put inside P300A and P300F had been wrongly put inside P301A. There was no explanation for this mixed-up, which was fatal to the prosecution's case."

[44] With regard to the evidence on the three *parangs* recovered from the kitchen of the house, the learned trial judge commented as follows:

"20.30. The prosecution had also referred to the three parangs found and seized in the kitchen and to the testimony of PW58 that the 15th accused had admitted that the parangs belonged to him. Assuming the parangs belonged to the 15th accused, mere possession of the parangs did not make him or them into terrorists or in waging war against the King. The prosecution referred to a conversation between the 15th accused and Datu Agbimuddin asking Salib to sharpen the knives. However, there was no evidence led whether they referred to these three parangs or other parangs or knives.

20.31. In Sabah and Sarawak the natives and others used their parangs to cut through the undergrowths when walking in the jungles or forests and to protect themselves against snakes and wild animals. A parang can be used for cutting grass or trees or as a tool in an oil palm plantation. It can be used as a weapon or for defence. These four accused were working or staying in Ladang Atlas, Ulu Tungku. Where several inferences can be drawn based on the parangs found in the kitchen, any favourable inferences drawn should be given to them and any doubt whether they used or did not use the parangs to wage war or to affect national security must be given to them. In any event the three parangs did not belong to the 9th, 11th and 12th accused."

[45] In respect of the confession allegedly made by the accused, this is what the learned trial judge said:

"20.28. PW158 testified that the 9th, 11th, 12th and 15th accused had admitted in their confessions given to the Sessions Court Judge that they supplied food to the armed intruders at Kg. Tanduo and that they knew the group led by Datu Agbimuddin. There was no evidence and PW158 did not say that he was present during the confessions and that he heard the confessions. It was unlikely for him to be present because police officers were not allowed during the recording of the confessions. Without confirming that he was present and he heard the confessions, what he had testified were hearsay, not admissible and as to the truths of these confessions.

20.29. Although PW158 and the prosecution had referred to the confessions of these four accused and had submitted that based on the confessions they knew Agbimuddin and had supplied food to the armed intruders, the prosecution chose not to produce or tender these confessions as evidence against these four accused, notwithstanding that s.28 of SOSMA specifically provides for confessions to be used. The prosecution also chose not to call the Sessions Court Judge who had recorded the confessions to confirm what PW158 had said. The failure to do so would raise doubts on the testimony and credibility PW158 and the merits of the submission of the prosecution in this respect. The reasonable conclusions could be drawn were that they did not make the confessions or that they did not confess to supplying food to the armed intruders or that they did not supply food to the armed intruders as alleged by PW158."

[46] As for the intercepted communications in relation to exhibits P300C and P301C, the learned judge made the following observations:

"20.32 As stated above, although the DFD or Cyber Security Malaysia had performed an analysis on the two phones seized from the 15th and 9th accused and extracted the data from the digital devices, the prosecution did not refer to nor explain the significance of the data in particular the contact 'Ampun', whether it concerned the armed intrusion at Kg. Tanduo, whether they were involved in the armed intrusion or whether they incited or supported the war waged against the

King or that their actions had prejudiced national security."

[47] As alluded to earlier in this judgment, the learned trial judge had decided that there was sufficient evidence to call the 15th accused to enter his defence on two charges under sections 121 and 130K of the PC. However, the learned trial judge found that the prosecution failed to establish a *prima facie* case against the 15th accused on the charges under section 130E and 130K of the PC. The reasons proffered by the learned trial judge were as follows:

"20.44. However, the prosecution did not lead any evidence that the 15th accused knowingly recruited or agreed to recruit another person to be a member of a terrorist group or to participate in the commission of a terrorist act. It did not adduce the name or this person who was or had been recruited by the 15th accused to be a member of terrorist group. It did not lead any evidence on his act(s) or conduct in recruiting this person. The prosecution had failed to establish the essential ingredients against the 15th accused under s.130E of the Panel Code.

20.45. Similarly, the prosecution did not lead any evidence of a person or the name of any person who was a terrorist or who was believed to be a terrorist or a member of a terrorist group being harboured by the 15th accused. It did not lead any evidence that the 15th accused had harboured a person knowing or having reason to believe that such person was a member of a terrorist group or who had committed or

planning or likely to commit a terrorist act. The prosecution had failed to establish the essential ingredients against the 15th accused under s.130K of the Penal Code.

20.46. For the reasons given, the prosecution had failed to make out a prima facie case against the 15th accused under s.130E and under s.130K of the Penal Code. He had been acquitted and discharged as such."

[48] With respect to the acquittal of the 9th, 11th and 12th accused, the reasons given by the learned trial judge were as follows:

"20.47. Next, the evidence against the 9th and 12th accused. Although the 9th and 12th accused were re-arrested under s.4(1) of SOSMA because they were suspected to be involved in the intrusion, the prosecution did not lead any direct or circumstantial evidence as such against them. As stated above, the testimony of PW158 that the 9th and 12th accused had confessed to the Sessions Court Judge that they supplied food to the armed intruders could not be true and also not admissible against the 9th and 12th accused.

20.48. The 9th accused is the son-in-law of the 15th accused and 12th accused is the son of the 15th accused. They together with their wife and children stayed with the 15th accused at the rumah kongsi at Ladang Atlas at the time of the arrest. Based on the police report P299, they were arrested because they did not have valid documents. Although the 11th and the 15th accused were in the list of suspects for the communications interceptions, the 9th and 12th accused were not included in the list.

20.49. Although they are family and might know or had reason to believe that the 11th and or the 15th accused were involved in the intrusion, the prosecution did not lead and there was no evidence that they knew or had reason to believe that the 11th and 15th accused were involved in the armed intrusion or were members of a terrorist group or that the 11th and the 15th accused had incited or supported the war waged against the King. There was no evidence that they supported the 11th and 15th accused in their aim to wage war against the King. There was also no allegation or evidence that they supported or harboured the 11th and 15th accused or the armed intruders as members of a terrorist group. They should not be tainted with the allegations made against the 11th and 15th accused and no such inference should or could be drawn against them just because they are family members.

20.50. The 9th and 12th accused were not seen in the photographs in ID2(1-50) or in Kg. Tanduo or had occupied Kg. Tanduo together with the armed intruders to claim Sabah by force. The prosecution did not lead evidence that they had associated with or had supported the armed intruders or members of the RSF of the Sultanate of Sulu and North Borneo in Kg. Tanduo. The prosecution did not lead any evidence that they prepared or had prepared for war or had participated in waging war against the King. There was no evidence that they were members or joined or belonged to the RSF or a member of a terrorist group. Their involvements in the intrusion were not set out in the summaries of the communications interceptions in respect of the 11th and 15th accused: see exhibits P472A-P472H and P473A-P473B.

20.51. Based on the evidence at the end of the prosecution's case, the prosecution had failed to make out a prima facie case against the 9th and 12th accused under s.121 and s.130KA of the Panel Code. The 9th and 12th accused were acquitted and discharged as such. Being illegals in the country, they were referred to the Immigration Department for their deportations.

20.52. Although the 11th accused was in the SB's list of suspects for the communications interceptions and the prosecution had submitted that there was direct and circumstantial evidence against him, PW49 did not explain why the 11th accused was in the list or of his involvement in the armed intrusion or the reliability of the information which made him a suspect to be in the list.

20.53. The prosecution referred to a phone conversation in Item 2 of P475B (see page 106 of its submission) on 24.2.2013 at 8.23 a.m between Salib and 'L/Sabah' where this person said that 'They were people of Nur Misuari and 'they' informed that if the claim made by the Sultan is not given tomorrow, 'they' would start war". The prosecution could not be correct because P475B is not the summary of this conversation; it is the summary of a conversation between Tani and a 'L/Sabah'. The prosecution did not explain that this was a typing mistake. This particular conversation referred to is in item 2 of P473B, not P475B. This conversation is also in Item 1 of P472H.

20.54. The prosecution submitted that based on item 8 in P472C, PW134 had identified the receiver of this call as Anuar Salib Akhmad (Anak Salib) because Salib

addressed the receiver as Anuar Salib Akhmad and Anuar Salib Akhmad addressed Salib as father. It is not specifically stated as such in Item 8 of P472C.

20.55 After 12.3.2013, SB commenced interceptions of the phone number 014-8594510 believed to be used by the 11th accused. PW132 and PW134 did not testify how many interceptions were carried out on this phone number from 12.3.2013 until 8.00 am on 24.3.2013. They set out only seven interceptions on this phone number believed to be used by the 11th accused in the summaries tendered as P473A-P473B. However PW134 did not include Item 8 of P472C as being used by the 11th accused in P473A-473B. No explanation was given for this omission.

20.56. The conversation in Item 8 of P472C was purportedly between the 15th and 11th accused on 19.2.2013. PW134 identified the 11th accused as the receiver of this call. If she could or had identified the 11th accused in the conversation on 19.2.2013, then she should be able to identify the 11th accused in subsequent phone conversations intercepted. In P473A-P473B, the intercepted conversations were between 23.2.2013 and 24.2.2013, after the alleged conversation on 19.2.2013. In P473A-P473B, PW132 and PW134 did not and could not identify the 11th accused as the caller or receiver of these calls. Therefore it raised some doubts whether the identification of the 11th accused in Item 8 of P472C was correct or otherwise.

20.57. The prosecution submitted that the 11th accused was involved in the intrusion by referring to the conversation between Salib (15th accused) and the

11th accused talking about going to war with the support of the Nur Misuari fighters in Item 2 of P473B. As stated, there were some doubts on the identification of the 11th accused in this conversation and there was no confirmation on the identification made.

20.58. Based on the summaries in P473A-P473B, they could not identify the user of this phone number believed to be used by the 11th accused. The user was only known to them as 'L/Sabah' or as 'L/Sabah (2)'. On one occasion the user was identified as 'Ilmon'. In Item 2 of P473B, the user or receiver was only known to them as 'L/Sabah'. They could not and did not identify the 11th accused as the user or receiver or caller of this phone number in the said summaries. The benefits of any doubts should be given to the 11th accused. Further, based on the summaries, there was nothing incriminating against the 11th accused.

20.59. The 11th accused was not seen in the photographs in ID2(1-50) or in Kg. Tanduo or that he had occupied Kg. Tanduo together with the armed intruders to claim Sabah by force of to wage war against the King. He stayed with his father at the rumah kongsi. Even if the 15th accused were guilty, the 11th accused could not be guilty as such by virtue of their father-son relationship.

20.60. There was no evidence or indication that the 11th accused was a member or had joined or belonged to the RSF or a supporter of the RSF or that he was a member of a terrorist group. There was no evidence that he had associated with the armed intruders or with the RSF. There was no evidence that he prepared or participated in waging war against the King.

20.61. There was no evidence that he had acted or had threatened with the intention of advancing a political or ideological cause or which involved prejudice to national security or public safety.

20.62. The strands of circumstantial evidence woven into a rope by the prosecution were not strong enough to hang the 11th accused with it: see ***Chan Chwen Kong v. PP*** **(1962) 28 MLJ 307***.*

20.63. For the reasons given, the prosecution had also failed to make out a prima facie case against the 11th accused under s.121 and s.130KA of the Panel Code. The 11th accused was acquitted and discharged and being an illegal in this country had been referred to the Immigration Department for his deportation."

[49] The learned trial judge had minutely scrutinized the evidence before acquitting the 9th, 11th, 12th and 15th accused of the charges preferred against them. We were not persuaded that the decision of the learned trial judge was wrong. It was clear to us that the learned trial judge had carefully analysed the evidence before him and his findings should be affirmed.

Evidence against the 17th accused

[50] The 17th accused is a Malaysian. He was charged with two offences. The first charge was under section 121 at the PC for waging war against the Yang di-Pertuan Agong and the second charge was under section 130KA of the same Code for being a

member of a terrorist group. He was convicted of the second charge but was acquitted of the first charge. We shall first deal with his acquittal in respect of the first charge.

[51] The evidence against the 17th accused came from four witnesses, namely Inspector Mohsin bin Mohd Idit (PW50), ASP Nik Adzian bin Wan Ismail (PW51), DSP Khairul Azhar Bin Nuruddin (PW50), ASP Wan Kamal Rizal bin Wan Daud (PW95) and protected witness No.7 (PW165). PW165 who was also a member of the RSF (the terrorist group that attacked Lahad Datu, Sabah), had identified the 17th accused as being a member of that group. The evidence of PW165 was not challenged in cross-examination.

[52] On 14.3.2013, Insp Mokhsin bin Mohd Sidit (PW50), ASP Nik Adzian bin Wan Ismail (PW51) and a special branch personnel conducted surveillance on an intermediate terrace house at No.3, Taman Keilah 1, Semporna where the 17th accused was believed to be in. The gate was locked from the inside with a padlock and a chain. DSP Khairul Azhar bin Nuruddin (PW60) and his men came and made a forced entry into the house by cutting the chain and padlock and shouting “Polis”. They did not find anyone on the ground floor of the house.

[53] PW60 then went up to the second floor and found the 17th accused together with his son-in-law, Salleh Bin Mohd Salleh at

the living room. The 17th accused resisted arrest by putting up a struggle but was overpowered. He was angry when he was handcuffed. PW60 later found three women and six children in the master bedroom but he did not arrest any of them.

[54] PW60 seized four mobile phones (exhibits P333C, P334C, P335D and P336C) that were found in the living room. The phones were analysed by Cyber Security Malaysia and the reports and CDs were tendered as exhibits P873-P876. Evidence and information from the exhibits showed that the 17th accused was a close associate of the Sultan's family. The evidence further shows that in 2012, the 17th accused attended the installation of Muedzul–Lil Tan Kiram (Datu Butch) as 'Raja Muda' in the Philippines.

[55] The 17th accused was acquitted of the first charge of waging war against Yang di-Pertuan Agong on the ground that there was no evidence that he and his son-in-law were involved in the skirmishes at Kg. Tanduo. The learned trial judge held:

> *"25.24. The 17th accused was arrested in the house of his son-in-law who was also arrested at the same time. There was no evidence that they were in Kg. Tanduo or that they were with the armed intruders. There was no evidence that they were involved in the skirmishes in Kg. Tanduo or in Kg. Simunul.*

25.25. Although he was a member of the RSF of the Sultanate of Sabah and North Borneo, there was no direct or circumstantial evidence that he was involved in planning or participated in the war or that he had waged war against the King.

…

25.30. For the reasons given, the prosecution had failed to make out a prima facie case against the 17th accused under s.121 of the Penal Code. He was acquitted and discharged as such."

[56] We were satisfied that there was insufficient evidence to link 17th with the skirmishes in Kg. Tanduo or in Kg. Simunul. The intercepted communications relied on by the prosecution could not establish that the 17th accused had planned or participated in the war. The prosecution also did not adduce evidence to show that the 17th accused had used the seized mobile phones to converse with the 20th accused and/or other suspects. Therefore, the learned trial judge's decision cannot be said to have suffered from any infirmity and should be affirmed.

Evidence against the 21st, 22nd, 23rd and 24th accused

[57] All four accused were arrested on 13.3.2013 at about 11.00 am in front of the Forestry Office, Semporna by a team of policemen from the Special Branch led by ASP Budy Jurman bin Osman (PW77) and Inspector Holob Bin Wan Ahmad (PW85).

[58] Based on the intelligence gathered from the intercepted communications, the four accused were suspected to be members of the RSF and they were trying to escape from the police at the time of their arrest. The 22nd and 24th accused were suspected to be involved in the armed intrusion at Kg. Tanduo.

[59] The evidence of Protected Witness No.5 (PW141) was that he owned a Perodua Viva which he used to operate as a private taxi. At the material time, the 24th accused approached PW141 with the intention of renting two cars from PW141 to go to Kg. Sejati 2 at Semporna. PW141 agreed to rent his own Perodua Viva to the 24th accused. Kimarin Bin Sibil, the brother of PW141, also agreed to provide the service.

[60] PW141 asked his cousin, the 22nd accused to accompany him to Semporna because he was not familiar with the 24th accused. The 22nd accused agreed to PW141's request and all three of them left for Semporna in PW141's Viva. PW141 stopped at Kg. Lihak-Lihak to fetch the 24th accused's wife. When they reached a junction at the kampong, the 24th accused's wife together with three children and the 23rd accused (the 24th accused's brother in-law) went inside PW141's car. Four other persons including the 21st accused boarded Kimarin's Myvi. On their way to Semporna, they were stopped and detained by the police.

[61] PW77 testified that he saw two objects that looked like hand phones being thrown out of the Perodua Viva into a swamp. However, the police could not recover the two objects. A Samsung Galaxy phone was found in the boot of the Perodua Viva. The phone belonged to the late Supt. Ibrahim Bin Lebar who was killed in the skirmish at Kg. Simunul. However, no evidence was led by the prosecution as to how the cell phone ended up in the boot of PW141's car. PW141 did not testify against the 22nd accused (his cousin) as he was merely accompanying PW141 for the journey to Semporna.

[62] The learned trial judge, in acquitting the 21st, 22nd and 23rd accused at the end of the prosecution's case, reasoned as follows:

> *"29.39. … The prosecution did not lead any evidence and did not explain how the phone found in Kg. Simunul came to be in the plastic bag in the boot of the Viva. PW77, PW85 and PW95 were not present during the operation in Kg. Simunul.*
>
> *29.40. The prosecution did not adduced any evidence that any of these four accused were seen in Kg. Simunul or in Kg. Simunul on that day or that they were involved in the skirmish or that they picked up or retrieved the phone during or after the skirmish in Kg. Simunul. There was no evidence that someone gave this phone to them or that they bought it from someone who took it in Kg. Simunul.*

29.41. When PW141 drove the Viva to pick up the wife and children of the 24th accused at Jalan Lihak-Lihak the green plastic bag was not and had not been placed in the boot or in the car. PW141 did not say that the green plastic bag containing the clothes and the phone was already in the boot of the Viva. That would exclude the 22nd and 24th accused to have put it there or to have owned it.

29.42. The prosecution did not lead any evidence who put the bag inside the Viva but presumably it was put inside the boot when PW141 stopped at the junction to pick up the wife, children and brother-in-law of the 24th accused. There was no evidence who put it inside the boot and who owned it.

29.43. The prosecution did not submit that the 21st or 23rd accused had put the bag inside the boot in the Viva or that the bag and phone belonged to the 21st or 23rd accused and no such inference could be drawn against them that they took the phone from the late Supt. Ibrahim in Kg. Simunul and in possession of this phone in the Viva and or Myvi.

29.44. The wife of the 24th accused might or might not have put it in the boot but she was not called to exclude this as a fact. There was no evidence that the 23rd accused who was seated in the Myvi had put it inside the Viva. These raised some serious doubts on the possession of the bag which allegedly contained the phone.

29.45. The evidence showed that after the armed intrusion at Kg. Tanduo, the police had applied to intercept the communications of several persons

including the 22nd and 24th accused persons suspected to be involved in the said intrusion. The prosecution contended that all four were members of the armed intruders and involved in the intrusion at Kg. Tanduo.

29.46. Although the prosecution had submitted that they were members of the armed intruders and PW159 had testified that he had seen several persons in Kg. Tanduo, PW159 did not testify that he had seen these four accused in Kg. Tanduo during his stay there on that they were members of the RSF or had associated with the armed intruders. PW1 and PW58 did not testify that they had seen the four accused during their visits to Kg. Tanduo. None of the four accused were seen in the photographs in ID2(1-50). There was no evidence that they were in Kg. Tanduo at all material times.

29.47. Although the 22nd accused was included in the list for the communication interceptions and the prosecution had tendered the summaries (P479A-P479D) of the conversations intercepted on a phone number 012-8066842 believed to be used by the 22nd accused, the prosecution in its submission did not refer to P479A- P479D or to the contents of these summaries to incriminate the 22nd accused.

29.48. Reading these summaries, there were many users of this phone number and the conversations were between Uttu Jan whom the processors believed to be Abdul Majil bin Jubin and 'L/Sabah', Nul, Anti Nung, Kak Pai, Lin and 'W/Sabah'. The processors were not able to identify or confirm these persons in the conversations, whether Uttu Jan was in fact the 22nd

accused, whether they were the intruders, supporters or members of a terrorist group.

29.49. The conversations in the summaries included whether it was safe to travel to the Philippines, buying things for the kitchen, the price of rice and whether Uttu Jan had boarded a blue boat.

29.50. Based on these conversations, there was nothing to show that the 22nd accused was one of the armed intruders or that he was preparing of waging war or had waged war against the King or that he had carried out or participated in any acts or threats which prejudiced the national security of this country.

29.51. PW141 (PRW5) and Kimarin are the cousins of the 22nd accused and probably would be the best persons to know the 22nd accused or his background or of his involvement in the intrusion. However they were not asked to testify that he was one of the armed intruders or a member of a terrorist group preparing to wage war against the King. The prosecution did not lead any such evidence from PW141 or Kimarin against the 22nd accused.

29.52. PW141 had testified that when he went back to his village to ask Kimarin whether Kimarin agreed to provide the service to transport Basil and his family, he saw his cousin (22nd accused) had just come down from his house (22nd accused house) and going to his work place. PW141 said he asked his cousin to accompany him for the journey because he did not know Basil.

Based on the testimony of PW141, the 22nd accused was in the Viva because he was asked by PW141 to do

so and not because the 22nd accused wanted to go together with Basil (24th accused). There was no evidence that the 22nd and 24th accused knew each other or had conspired or planned or arranged to travel together in the Viva or had planned to escape together from the police.

29.54. Based on P479A-P479D and the testimony of PW141, there was no evidence of the involvement of the 22nd accused in the intrusion at Kg. Tanduo. There was no evidence that he had waged war against the King or that he was a member of a terrorist group.

29.55. Similarly, there was no evidence that the 21st and 23rd accused were involved in the intrusion or that they had prepared or waged war against the King or that their acts or threats had prejudiced the national security of this country.

29.56. For the reasons given, the prosecution had failed to make out a prima facie case against the 21st, 22nd and 23rd accused under s.121 and s.130KA of the Panel Code. They were acquitted, discharged and referred to the Immigration Department for their deportation.

29.57. What was the evidence against the 24th accused? Similarly, there was no evidence that the 24th accused was in Kg. Tanduo or that he was one of the armed intruders in Kg. Tanduo or in Kg. Simunul. There was no evidence that he was a member of the RSF or of the Sultanate of Sulu and North Borneo. There was no evidence that he was involved or had participated in or had waged war against the King.

29.58. For the reasons given, the prosecution had failed to establish the essential ingredients under s.121 and s.130KA of the Penal Code against the 24th accused."

[63] However, the learned trial judge held that there was sufficient evidence against the 24th accused for the offence of knowingly giving support to a terrorist group and accordingly called upon him to enter his defence on the amended charge under section 130J(1)(a) of the PC.

[64] The 24th accused elected to give evidence under oath. Briefly, the defence of the 24th accused as recorded by the learned trial judge was as follows:

"45.2. The 24th accused (DW1) is a Tausug of Suluk discent from Siasi, Sibangkat, in the Philippines. He chose to give evidence first at the defence stage. He chose to give evidence under oath. He also produced and tendered his s.112 statement as exhibit D192 to substantiate or corroborate his sworn testimony.

45.3. He said he came to Sabah in 2010 and had been in Sabah for the past three years before his arrest. He lived with his wife and six children in Kg. Sejati, Semporna. His borther-in-law Rizmal bin Salleh (21st accused) and Nijmal Gulam (23rd accused) lived next door. He sold fish, fruits and plastics at Semporna market.

45.4. He said on 3.3.2013 at about 9.00 am he and his family went to stay at his cousin's house, namely Hassan, at Lihak-Lihak because of the chaotic situation

in Semporna because there was a fight in Kg. Simunul, which was about one and a half miles from Kg. Sejati. He said they did not have identification documents and they wanted to stay safe. He said Lihak-Lihak was about 20 miles from Kg. Sejati. They stayed in Hassan's house until 13.3.2013.

45.5. On that day at 6.00 am he looked for a pirate taxi to go to Simpang Kunak to look for a van to fetch his family to go back to Kg. Sejati. He said that no one was willing to take them because they did not have identification documents. He then went to Bandar Sri Salim where he met PW141 who operated a private taxi using his Viva and who agreed to take him and his family but his Viva was to small to accommodate all of them. He said PW141 told him that he would take another car from Kg. Air.

45.6. They went to PW141's older brother's house to take the second car. PW141's brother (Kimarin), their cousin Abdul Majil (22nd accused) and Abdul Majil's wife then came in the two cars. He, PW141 and Abdul Majil were in the Myvi, following behind. They went to fetch his family at the junction of Lihak-Lihak. They brought foodstuff and clothes inside a black bag which he put behind him, inside the car. After he had fetched his family, about a mile from the junction, the police stopped them and they were arrested.

45.7. He said he had a Nokia hand phone using a phone number 012-6418816. He said he did not know Datu Amir Bahar and was not familiar with the phone number 019-7569906. He was shown P478A to P478I and he said he did not speak and did not use the phones as stated in the summaries. He said his phone

which was seized by the police was returned to his wife. The prosecution did not produce or tender this phone in court. The prosecution did not produce any other phones alleged to be used by him in contacting Datu Amir Bahar or Datu Agbimuddin.

45.8. The 24th accused said he was not the Basil referred to in the summaries, that he did not know about Tanduo and never went to Tanduo. He heard the news from the public that there was a skirmish at Tanduo. He denied any involment with the RSF of the Sultanate of Sulu and North Borneo.

45.9. In his cross-examinations, the 24th accused said that he and his family came to Sabah illegally and they did not have any identification documents because they were very poor and could not afford to apply for one.

45.10. He denied that he knew about the existence of the Sulu Sultanate and he did not know Datu Agbimuddin, Datu Amir Bahar and Datu Piah. He denied that he came as a member of the RSF of the Sultanate of Sulu and North Borneo to claim Sabah and had nothing to do with them.

45.11. It was put to him that he took a hand phone which belonged to one security personnel who was killed in Kg. Simunul to which he denied. He said he did not join them and knew nothing. He also said he did not know anything about the green plastic bag and he only carried the black bag in the car. I have dealt with these issues at the end of the prosecution's case.

45.12. It was put to him and he denied he bought and used a phone number 019-7569906 through a person

by the name of Datu Murbasir BN Datu and that he did not carry out the conversations referred to in the summaries P478A to P478I."

[65] The learned trial judge, after considering the evidence of the 24th accused, found that he had succeeded in casting a reasonable doubt in the prosecution's case. Accordingly the 24th accused was acquitted and discharged of the amended charge under section 130J(1)(a) of the PC.

[66] In his analysis of the 24th accused's evidence, this is what the learned judge said:

"45.13. The evidence showed that the 24th accused was on the list of suspects whose phone numbers were to be intercepted to obtain evidence against them. The phone number 019-7569906 was alleged to be used by him. The police had applied and given approval to intercept this phone number which was intercepted. The conversations made on this phone were set out in the summaries tendered as exhibits P478A-478I.

45.14. The prosecution relied on these summaries to make out its case against him. As stated, there was insufficient evidence against the 24th accused that he had waged war against the King or that he was a member of a terrorist group. The processors had identified the user of this phone number 019-7569906 as a male person by the name of Basil. The prosecution submitted that the 24th accused is this Basil. Reading P478A to 478I, the processors had

identified this person as Basil only. They did not and never identify him as Basil bin Samiul.

45.15. The 24th accused had denied that he was the Basil referred to in the telephone conversations in the summaries. As stated, the 1st accused had testified that while he was running in the jungle he saw a man with a pistol in his hand who told him that his name was Basil whom he referred to as Al Basil. The prosecution asked the 1st accused whether the 24th accused is Basil and the 1st accused said that 24th accused was not the Al Basil he met in the jungle. He said that Basil could run fast while the 24th accused is limping. He said Al Basil is a Bajau while the 24th accused is a Suluk.

45.16. The 24th accused had testified that in 2009 he worked as a fisherman in the Philippines and had an accident. He fell from the boat and his leg was injured after it was hit by the boat propeller which prevented him from doing manual job. He said he decided to come to Sabah to look for lighter work to support his family. It was not in dispute that throughout the trial that the 24th accused walked with a limp. It apparent that the 24th accused is not the Al Basil referred to. He has casted some doubts that he was involved with the armed intrusion at Kg. Tanduo.

45.17. Although the processors had referred to the user of the phone number 019-7569906 as Basil, they did not identify him as Basil bin Samiul. The prosecution did not lead any evidence that the Basil referred to in the summaries is Basil bin Samiul i.e. the 24th accused. There is some doubt whether the 24th accused is the Basil referred to in the summaries.

45.18. In item 1 of P478A, a L/Sabah referred to the receiver as 'Sir' believed to be the son of Datu Agbimuddin. The prosecution did not lead any evidence that the 24th accused is the son of Datu Agbimuddin and there is no evidence that he is the son of Datu Agbimuddin. The prosecution did not call Murbasir Bn Datu to testify that he bought the phone number and gave it to the 24th accused to use it or that the 24th accused was the user of this phone number. The 24th accused had denied that he had used this phone number. As stated, this phone was not recovered nor produced in court and PW141 had testified that he did not see the 22nd accused throwing the two phones out of the Viva.

45.19. On the evidence adduced, there were some doubts raised that the 24th accused had used this phone number or that he had contacts with and spoke with Datu Agbimuddin or with Datu Piah or that he had knowingly gave support to the terrorist group.

45.20. On the totality of the evidence adduced and for the reasons given, the 24th accused has raised a reasonable doubt on the prosecution's case against him. The prosecution had failed to establish beyond reasonable doubt its case against the 24th accused under s.121 or s.130KA or s.130J (1)(a) of the Penal Code. The 24th accused is acquitted and discharged and to be referred to the Immigration Department to be deported."

[67] The learned trial judge's findings cannot be faulted. His Lordship had considered the evidence before him from all angles and found that there was insufficient evidence to convict the 24th

accused or to order the 21st, 22nd and 23rd accused to enter their defences on the charges preferred against them.

Evidence against the 25th accused

[68] The evidence against the 25th accused came from a navy officer, Khairolrizal bin Ahmad (PW72) who was attached to KD Sri Semporna at Semporna, Sabah. On 28.3.2013 at around 8.00 am, PW72 and his team carried out surveillance duties around the shores of Kg. Simunul. PW72 saw the 25th accused and his wife pacing in front of a house which PW72 believed was their house. PW72 saw three other men at the kitchen. PW72 went over to the 25th accused and enquired about those three men. The 25th accused informed PW72 that the three men were his workers but the wife of the 25th accused told PW72 that the three men were relatives of her husband.

[69] PW72 became suspicious and checked the 25th accused's identification document. His name was found to be Totoh bin Hismullah, which was on the watch list of suspected persons. These three persons had no identification document. PW72 instructed the 25th accused and the three men to be handcuffed and he proceeded to search the house. PW72 did not find any dangerous weapon and there were also four children in the house. Thereafter PW72 handed the 25th accused and the three men to Inspector Roslan Bin Sarail (PW65) for further action.

[70] Protected Witness No.6 (PW159), testified that he was brought into the armed group by one Herman. Herman had led PW159 and eighty other Filipinos to Kg. Tanduo in February 2013. Herman had told PW159 of the intruders' names, including 'Totoh'. According to PW159, he had seen and spoken to 'Totoh' during his stay at Kg. Tanduo.

[71] After scrutinising the evidence adduced by the prosecution, the learned trial judge acquitted the 25th accused at the end of prosecution case. We reproduce below the learned judge's evaluation of the evidence against the 25th accused:

> *"30.8. PW72 said at a glance he saw the name was Totoh bin Hismullah and he realized that the name belonged to one of the suspects. He instructed his men to ask the man to kneel down and handcuffed his hands at the back using plastic handgrip.*
>
> *30.9. He said he asked the women about the 3 men who told him that they were the relatives of the man. He said he became suspicious because the man had told him that they were his workers. The 3 men could not produce any identification documents and were not conversant in Bahasa Malaysia. He said he instructed the 3 men to be handcuffed.*
>
> *30.10. He searched the men and the house and did not find any dangerous weapon but he saw four children in the house. After he had completed inspections of 4 to 5 houses, he instructed for the 4 men who had been*

arrested to be brought out to an open space which was marked as 'H' in P202.

30.11. In his cross-examinations, PW72 said he recalled there were twelve names out of which six with photographs, in the list given to him and he could not recall the names except for Totoh.

30.12. He was referred to a search from the Jabatan Pendaftaran Negara dated 4.2.2015 which stated that Totoh bin Hismullah is a Malaysian and his current status is still active. This was marked as IDD99.

30.13. PW72 was asked and said that he did not seize the licences for both fishing boats belonging to Totoh but the wife had given to him the licences which he handed to PW65. The licences were not produced in court.

30.14. PW65 testified that after they had completed the operation and had assembled at a basketball court near to Lorong 4 of Kg. Simunul, he found that the PASCAL team led by PW72 had arrested four men, three of whom could not produce their identification documents. He said the man gave their name as Maikil, Poney and Mohd Yusuf. The fourth person produced his identity card. The name stated in the card was Totoh bin Hismullah. PW65 identified Totoh bin Hismullah in court as the 25th accused. The four men were placed under guard at the basketball court. He said he made a body search on the 25th accused and did not find anything on him. He brought these men back to IPD Semporna.

30.15. He explained that he was instructed by his superior to lodge a police report on the arrest of the 4 men because the PASCAL team which made the arrest

was not willing to make the arrest report. The police report was tendered as exhibit P347. He handed the 4 men to PW151 who was an assistant investigation officer at IPD Semporna.

30.16. He was asked why there was no mention in his report that Totoh was believed to be involved in the incident at Kg. Simunul and he answered that he believed that the person was using a false identity card and he had to verify whether this person was the Totoh who was believed to be involved in the incident. This identity card was not produced and not tendered as an exhibit in court.

30.17. During cross-examination it was put to PW65 that the 25th accused came to Sabah when he was 10 years old and had been living in Kg. Simunul for the past 40 years. It was put that he was a fisherman who owned two boats and was married with six children. It was put to him that the 25th accused lived in a house which was light blue in colour seen in photograph 2 of P214 (1-10). PW65 said that he was not aware of these.

30.18. He was asked whether he was aware that a Totoh mentioned during interrogations was the son of General Hj Musa whereas Totoh bin Hismullah had no connection whatsoever with General Hj Musa. PW65 said he was not sure.

30.19. PW151 had also lodged a police report on the arrest of the 25th accused which was previously marked as IDD82. The prosecution tendered it as exhibit P946 and the defence tendered it as 082.

30.20. It was the contention of the defence that the person whom the operation teams was looking for was

actually the son of General Musa who was connected with the intrusion. It was submitted that there was nothing in P347 and P946 to link the 25th accused with the incident at Kg. Simunul and that the police failed to conduct a proper investigation on the 25th accused.

30.21. The police relied on the testimony of PW159 (PW6) to link the 25th accused to the armed intrusion at Kg. Tanduo. PW159 had testified that during his stay at Kg. Tanduo Herman told him the names of Haji Musa, Agbimuddin, Patulada, Aiman, Holland, Salleh, Yassin, Tani, Julham, Atik, Totoh, Harry and Kekeng and he had seen them during his stay. He said he had spoken to some of them including Totoh.

30.22. PW159 was asked whether he could identify these persons whom he had seen in Kg. Tanduo and he had identified these persons in court via video link. Some of them were in the photographs ID2(1-50) whom he also identified. Totoh is not in the photographs. When he was asked to identify Totoh in court, he said Totoh was not in court although the 25th accused was sitting in the dock. Clearly PW159 could not identify Totoh or the 25th accused. The defence submitted that since PW159 could not identify Totoh, the police had made a grave error in arresting the 25th accused.

30.23. The prosecution also referred to the testimony of PW163 on the interrogation conducted on Totoh. PW163 testified that Totoh had said that he was brought by one Panglima to the Philippines to attend a ceremony organized by the Sulu Sultan, that he had given money to be channelled to the Sulu Sultan, and he had met the 20th accused and was appointed a Panglima for Semporna.

30.24. It should be noted that the prosecution did not lead any evidence on the interrogation conducted on Totoh during the evidence-in-chief of PW163. What PW163 had testified on the admissions or confessions made by Totoh were not put to the 25th accused during the evidence-in-chief. These were asked and raised during his cross-examinations.

30.25. In any event PW163 did not testify that he himself had conducted the interrogation on Totoh. He did not say that he asked these questions and Totoh gave the admissions to him. He did not say that he was present and personally heard the admissions. If the 25th accused had made the admissions or gave the confessions to a police officer or judicial officer, these would have been recorded. The prosecution did not produce any written statement or confessions of the 25th accused. In the absence of such confirmations, what he had said were hearsay and not admissible.

30.26. Further, the alleged interrogation was conducted after the 25th accused had been arrested. PW163 did not say that he had cautioned or had administered any caution before conducting the interrogation. He did not say that he had told the 25th accused that he had the right to legal advice and the right to remain silent."

[72] The learned trial judge then concluded:

"30.29. In the absence of the alleged admissions and the failure by PW159 to identify the 25th accused to be one of the armed intruders seen in Kg. Tanduo there was no evidence of his involvement in the armed intrusion or in waging war against the King or that he was a terrorist or a member of a terrorist group.

30.30. The evidence showed that the 25th accused is a Malaysian living in Kg. Simunul. He is married with children. He was a fisherman with two licensed fishing boats. At the time of his arrest he was outside his house with his wife and three of his workers were eating in the kitchen. The prosecution submitted that based on his conduct that he was shivering and scared that he knew of his wrong doing whereas the defence submitted that they had just come back from fishing and this explained why the 25th accused was cold and shivering. The fact that he was shivering did not make him into a terrorist waging war against the King.

30.31. On the evidence adduced and for the reasons given, the prosecution had failed to make out a prima facie case against the 25th accused under s.121 and s.130KA of the Panel Code. He was acquitted and discharged."

[73] We found the findings of the learned trial judge to be amply supported by the evidence. No reasonable tribunal applying its mind to the same evidence would have come to a different conclusion.

Evidence against the 29th accused

[74] The 29th accused was arrested by Constable Abdul Omar bin Utoh (PW92) on 16.3.2013 at about 6.30 am at the housing Complex of Felda Cendrawasih, Lahad Datu. The said housing complex was located about 20km from Kg. Tanduo. PW92 and Constable Shah Rizal bin Likah were on guard duty at the material time. PW92 received information from the public that a man

dressed in t-shirt and shorts with a white water container in his hand was asking for money to pay for his fare to Lahad Datu. PW92 informed his superior.

[75] At about 6.30 am on the same day, he saw a man (later identified as the 29th accused) who fitted the description. PW92 conversed with the 29th accused in Bajau. The 29th accused identified himself to PW92 and told PW92 that he wanted to go to Lahad Datu. He told PW92 that his boss was Ali and he came to Sabah by boat. PW92 observed that the 29th accused had bruises on his hands and legs. PW92 asked the 29th accused for his identification document to which the 29th accused replied that he had none. PW92 found two amulets at the 29th accused's waist and one in his left hand. He was wearing a wrist watch. PW92 suspected the 29th accused to be one of the armed intruders. PW92 did not find any firearm or any dangerous weapon on the 29th accused.

[76] The learned trial judge acquitted the 29th accused for lack of evidence. His Lordship found as follows:

> *"34.7. Based on the testimony and the police report lodged, the 29th accused was arrested because he was asking for money and creating a nuisance at the housing complex. PW92 did not find any firearm or dangerous weapon on the 29th accused. He also did not find any incriminating item or article on the 29th accused except the amulets and wrist watch. This*

items did not make him to be a terrorist and or in waging war against the country.

34.8. The prosecution did not lead any evidence that at the material times the 29th accused was at Kg. Tanduo or that he was one of the armed intruders at Kg. Tanduo. He was not seen in the photographs in ID2(1-50) taken at Kg. Tanduo. There was no evidence that he took part in the skirmishes at Kg. Tanduo or at Kg. Simunul or Tg. Batu or Tj. Labian against the security forces.

34.9. There was no evidence that he planned or prepared for war or participated or took part in the war or any war between the armed intruders and the security forces. There was no evidence that he waged war against the King or against the nation.

34.10. There was no evidence that he planned or prepared or participated or took part in any terrorist activities or carried out any terrorist activities in Sabah or in the country. There was no evidence that he associated with the armed intruders at Kg. Tanduo or had provided assistance or supplies or support to the armed intruders. There was no evidence that he was a member of a terrorist group.

34.11. The only evidence against him was begging and causing a nuisance at the housing complex. That did not make him to have waged war against the King or that he was a member of a terrorist group.

34.12. The prosecution had failed to make out a prima facie case against the 29th accused under s.121 and s.130KA of the Penal Code. He was acquitted and

discharged. He was referred to the Immigration Department to be deported."

[77] We agreed with the findings and decision of the learned trial judge. The fact that the 29th accused begged for assistance to go to Lahad Datu does not automatically make him a terrorist.

Evidence against the 30th accused

[78] The evidence against the 30th accused came from Captain Kamarul Harith bin Abu Hurairah (PW96) who was from the 5th Brigade, Markas Taktikal at Felda Sahabat. PW96 testified that on 3.4.2013, at 7.00 pm, Major Haizdar of the 7th Royal Ranger Mechanized Regiment handed to him an arrested person (later identified as the 30th accused). Major Haizdar informed PW96 that the 30th accused was arrested by Captain Mohd Haisan at Kg. Tanjung Batu near Kg. Pasusun on the ground that he was found in the operation area without any legal document. Nothing incriminating was found on the 30th accused. According to PW96, another man by the name of Abdul Rashid bin Shahirul was also handed to him. Abdul Rashid was arrested by a personnel from the 21st Royal Malay Regiment because he was found in the operation area without any legal document.

[79] Later PW96 handed over the two persons to Corporal Pg. Tajuddin bin Pg. Yunus (PW91) at Balai Polis Cenderawasih. PW96 did not lodge any police report as he was in a hurry to go

off. Acting on the instruction of the investigating officer, Inspector Mohd Faris bin Hj Mohd Sairi (PW87), PW91 lodged an arrest report (exhibit P484) under the Immigration Act against the 30th accused for not having any valid identification or travel document.

[80] After considering the evidence of the prosecution's three witnesses against the 30th accused, the learned trial judge held that the prosecution failed to establish a *prima facie* case against him in respect of both charges and acquitted him.

[81] In his grounds of judgment, the learned trial judge proffered the following reasons for acquitting the 30th accused:

> *"35.9. Capt. Mohd Haisan and Major Haizdar were not called to testify when, where, how and why the 30th accused was arrested by them or by the army. Based on the testimony of PW96 and PW91, the 30th accused was arrested because he was in the operation area and did not possess any valid identification document. Both of PW96 and PW91 did not have any personal knowledge and were not able to testify when, where, how and why the 30th accused was arrested.*
>
> *35.10. The prosecution did not lead any evidence that at the material times the 30th accused was at Kg. Tanduo or that he was one of the armed intruders at Kg. Tanduo. He was not seen in the photographs in ID2(1-50) taken at Kg. Tanduo. There was no evidence that he took part in the skirmishes at Kg. Tanduo or at Kg. Simunul.*

35.11. There was no evidence that he planned or prepared for war or participated or took part in the war or any war between the armed intruders and the security forces. There was no evidence that he waged war against the King or against the nation.

35.12. There was no evidence that he planned or prepared or participated in any terrorist activities or carried out any terrorist activities in Sabah or in the country. There was no evidence that he associated with the armed intruders at Kg. Tanduo or had provided assistance or supplies or support to the armed intruders. There was no evidence that he was a member of a terrorist group.

35.13. The only evidence against him was that he was caught in the operation area without any valid documents. That did not make him to have waged war against the King or that he was a member of a terrorist group.

35.14. The prosecution had failed to make out a prima facie case against the 30th accused under s.121 and s.130KA of the Penal Code. He was acquitted, discharged and referred to the Immigration Department to be deported."

[82] We agreed with the findings and decision of the learned trial judge in acquitting the 30th accused of both charges. Both PW91 and PW91 could not confirm as to how and why the 30th accused was arrested as they had no personal knowledge of the arrest. No evidence was forthcoming to link the 30th accused with the intrusion at Kg. Tanduo.

[83] It is clear to us that the prosecution's case against the 30th accused, being circumstantial in nature, does not point irresistibly to involvement in the offences with which they were charged.

[84] We were satisfied that the learned trial judge was right in holding that no *prima facie* case had been established against the following accused, namely the 7th , 8th, 9th, 11th, 12th, 15th, 17th, 21st, 22nd, 23rd, 25th, 29th and the 30th accused.

[85] In respect of the 24th accused, we agreed with the findings of the learned trial judge that the explanation proffered by him in his defence had succeeded in raising a reasonable doubt in the prosecution case.

[86] Having considered the appeal against acquittal by the prosecution and for the reasons aforesaid, we found no merit in the prosecution's appeal. Consequently we affirmed the acquittals of the respective accused of the respective charges preferred against them.

PART II – THE APPELLANTS' APPEAL AGAINST CONVICTION UNDER SECTION 121 OF THE PC

[87] This part of our judgment deals with the appeals by nine of the appellants, namely:

(1) Atik Hussin bin Abu Bakar;
(2) Basad bin Manuel;
(3) Ismail bin Hj Yassin;

(4) Virgilio Nemar Patulada @ Mohammad Alam Patulada;
(5) Salib Akhmad bin Emali;
(6) Al Wazir bin Osman;
(7) Tani bin Lahad Dahi;
(8) Julham bin Rashid; and
(9) Datu Amirbahar Hushin Kiram.

[88] At the trial, they were the 1st, 4th, 10th, 13th, 15th, 16th, 18th, 19th and 20th accused respectively. They had been found guilty under section 121 of the PC waging war against the Yang di-Pertuan Agong and were each sentenced to life imprisonment. The offence carries the death penalty or imprisonment for life, and if not sentenced to death shall also be liable to a fine. Their appeals were against conviction only, having withdrawn their appeals against sentence at the commencement of the hearing of these appeals. Having heard arguments by the parties, we dismissed their appeals against conviction. These are our grounds.

[89] Three issues were raised on their behalf by Datuk N. Sivananthan, and they were the following:

(i) Burden of proof;

(ii) The effect of the guilty plea of the 1st, 4th, 10th and 13th accused under section 130KA of the PC; and

(iii) The authenticity of the intercepted communications.

Issue (i) - Burden of proof

[90] All nine appellants chose to give sworn evidence when called upon to enter their defence to the charge under section 121 of the PC. The learned trial judge rejected their defence and found that their explanation failed to raise a reasonable doubt in the prosecution case. He found that the prosecution had proved its case beyond reasonable doubt. Before we go into the legal issues pertinent to this ground of appeal, we think it is necessary, to provide context, to set out in full the defence put up by each of the appellants in answer to the charge. This is important to determine if their convictions are safe.

Defence of the 1st appellant (1st accused)

[91] The 1st appellant explained that he was a fisherman from Pulau Sibutu, Taungu, Philippines. He said he was brought to Sabah by Hj. Musa who promised to provide him with a good job and a Malaysian identity card (IC). He was promised that if he completed three months in the job, he was free to move anywhere in Sabah.

[92] Before they left for Sabah, they assembled at the house of Agbimuddin in Simunul, Bohe Indangan, Philippines. There were four groups of more than one hundred people. The first group which consisted of twenty-eight persons from Pulau Sibitu was led

by Herman; the second group of eighteen by Edie was from Zamboanga; and the third group of sixty led by Datuk Pak was from Jolo and the fourth group of about fourty led by Salib Enggal was from Simunul. He said Agbimuddin was the leader of the group going to Sabah.

[93] While assembled at the house, he saw some of them were carrying rifles such as Armalite, M16, Garand, M14 and pistols. Some were carrying parangs. He thought they were the security guards of Agbimuddin. If he was not mistaken, they left for Kg. Tanduo on 11.2.2013 at about 7.00 p.m. in a big boat. Herman was his leader in the boat. They arrived at about 11.00 p.m. and assembled at a surau near the beach. From there, they walked for about twenty minutes to reach Hj. Musa's house.

[94] After two nights, weapons were brought into Kg. Tanduo by thirteen persons in a speedboat. He said he did not know or recognize these people. He heard about a negotiation with the police led by Tuan Zul who came to Kg. Tanduo asking Agbimuddin to return to the Philippines. He said he did not know the details of the negotiation.

[95] After that there was a meeting at Hj. Musa's house. It was decided to divide them into six groups, led by Herman, Edie, Datu Pak, Salib Enggal, Hj. Musa and Agbimuddin respectively. Each group was given between eight to eleven camouflaged uniform

except those in Hj. Musa's and Agbimuddin's groups all of whom wore full uniform. Agbimuddin told them not to move around in uniform and carry firearms except a small flag of the Sultanate of Sulu and North Borneo to avoid detection by the Malaysian Government.

[96] In Herman's group, Herman himself carried a Colt .45 pistol and Basil carried a .38 pistol. Basil was given the pistol to control them. Except for Herman and Basil, none of them had any firearm. When they were required to carry out the chores, they had to return the uniforms. He said that while he and Basil were walking at kampong Tg. Labian, he was arrested by the police but Basil managed to run away. He could not remember the date of the arrest. When he was arrested, the police seized a pistol belonging to Basil found inside his bag.

Defence of the 2nd appellant (4th accused)

[97] He said he had a degree in computer from the College of Isabela City and Furigay College Institute. He said it was difficult to find a job at his place and he became a motorcycle rider. He resided in Kg. Basilan, the Philippines. He said Eddy went to their village with offers of office jobs in Sabah. He recruited fifteen persons in his village. So he followed his friends to come to Kg. Tanduo, Lahad Datu, Sabah.

[98] Before they left for Sabah, they assembled in a 'lansa' (big boat) at Kg. Simunul in the Philippines. He saw many people inside the boat. He heard there were more than hundred people in the boat but he did not see Edie inside the boat. He did not see any weapon except the butt of a firearm which was covered by other things. They left at about 5.00 p.m. He could not remember the date but it was in mid-February. Apart from Edie, his friends in the boat were Felis, Haji Abdullah, Haji Gapur, Bara and Hamid.

[99] When they arrived at Kg. Tanduo at 5.00 a.m. the next morning, there was no one to meet or welcome them. They made their way to the house of Hj. Musa. He noticed that many houses were empty and he did not know whose houses they were.

[100] At Kg. Tanduo, he saw Hj. Musa and Agbimuddin. He saw weapons such as Garand, M16, Carbine pistols and barung brought to the house of Hj. Musa. He did not know when the weapons were brought to the house. He saw people wearing camouflaged uniform and uniform being washed. He also saw a flag with yellow, green and white colours, with an emblem of a kris and the words 'Kalimah Allah' near the house. He said someone put one such small flag inside his bag. He said he did not use the flag. He did not carry any weapon and he did not wear any uniform.

[101] He said that on that morning, he and Felis planned to escape. They ran away. He arrived first and waited for Felis at two empty houses but Felis did not turn up. He said many people had also collected the safe passage leaflets to run away for a better life. He was hoping that he would be sent back to his kampong. He said he was then arrested by the police in the afternoon. He said nothing was seized from him except his wallet, his hand phone and his cloths including a 'Lotto' T-shirt and a 'Diesel' T-shirt.

Defence of the 3rd appellant (10th accused)

[102] He was a farmer in his village at Kg. Sibutu, Tandok Banak, the Philippines. He said he was brought by Herman to Sabah who promised him a job and to make him a ketua kampong whereas a relative of Raja (Agbimuddin) promised him a Malaysian IC if they could claim Sabah. Others were promised money or made generals. He said this relative of Agbimuddin claimed that Sabah belongs to him and promised that there would be no war or fighting. He said if he knew there would be war, he would not have come to Sabah.

[103] He said he came to Sabah on 22.2.2013 in two boats, one hundred and thirty in one boat and twenty-eight in the other. He said the people in the boats were all adults. There were no women and children. They came from Tubig Indangan, Bongao, Sulu, Basilan and Zamboanga in the Philippines. Herman was his leader

in the boat. He saw two Carbine and two Colt .45 in the boat. Herman had one Colt .45. The boats left at about 5.30 p.m. from Sibutu and arrived at Kg. Tanduo at about 3.00 a.m.

[104] When he arrived at Kg. Tanduo, he saw that the houses were empty. There was no villager. He went to the house of the son of Hj. Musa. There were two hundred and thirty people staying there. They brought weapons and uniform with them. He said two persons by the name of Aziz and Buyong were carrying a carbine each but they only had ten bullets. He asked them why they carried very few bullets and they said the rest would be brought by the Sultan. He said he himself did not carry any weapon.

[105] He said he was afraid of skirmishes and that he wanted to escape on that day. He said he knew there would be boats in the area because the people there were fishermen. He took a small boat at Sg. Bilis and rowed out to sea at Tg. Batu where he was arrested. He said nothing was seized from him except a bag containing his personal belongings.

Defence of the 4th appellant (13th accused)

[106] He was a carpenter by profession, residing at Sitangkai, the Philippines. He said he was brought by his father-in-law to come to Kg. Tanduo to work as a security guard for the Sultan who promised that there would be no war. He said he agreed to follow the Sultan because of the promise that there would be no war.

[107] He assembled at Pondok Banak, Sibutu, the Philippines and left for Kg. Tanduo on 10.2.2013 together with hundred people in two boats. There were thirty people in one boat led by Herman Kalun. He was in another boat with seventy people led by Raja Muda Agbimuddin whose son was the skipper of the boat. There were twenty security personnel in army uniform carrying Armalite, Carbine, M14, pistol and barong. He did not carry any weapon in the boat but he was told that he would be given weapon after they arrived in Sabah. The weapons would be brought by another group.

[108] When they arrived at Kg. Tanduo, they looked for a place to stay and for food. He said Pedro, who was related to Herman, brought cooked rice from Sg. Bilis. Three days later another boat arrived. Toto, the son of Hj. Musa also arrived. He also saw Ampun Piah (Datu Piah) who arrived from Semporna. He said he could recognize him because he had seen him with the Sultan in Tubig Indangan in the Philippines.

[109] He said there were seven groups at the kampong, one led by Herman, one by Raja Muda, the other groups from Basilan, Jolo, Zamboanga, Guru Batak and Ubik Bangao. The groups were provided with camouflaged uniform, combat boots, firearms such as Colt .45. He was wearing a uniform which he bought in Bangao.

He said if they won and took Lahad Datu, Semporna and Tawau, he was free to move anywhere in Sabah.

[110] He said it was only later that he found that there would be war. After the war, he tried to run away to Tg. Batu with Pedro Cabilin. It was on a Saturday. On Sunday, they went back to Kg. Tanduo and there were many soldiers there. He said they decided to run away. He ran to the oil palm estate. He did not know where Pedro ran to.

[111] As he came out from the oil palm estate, he was seen by the soldiers who called out to him. He said he ignored them and tried to run away. They shot him but missed. He raised both his hands, surrendered and was arrested. When he was arrested, nothing was seized from him except a ring and amulets. He said he was threatened and assaulted by the police.

Defence of the 5th appellant (15th accused)

[112] Apart from giving oral evidence under oath, the 5th appellant also tendered his written confession to corroborate his testimony. He originated from Tawi-Tawi in the Philippines. He said he came to Sabah in 1985 and resided in kg. Singgamata, Lahad Datu. In 2012, he moved with his wife, two sons (11th and 12th accused), two daughters by the name of Vilin and Bililin, a son-in-law (9th accused) and grandchildren to Kg. Ladang Atlas,

Ulu Tungku, Lahad Datu. He worked as a harvester at the oil palm plantation.

[113] He testified that in January, 2012, Sultan Esmail came to Sabah to discuss with the Malaysian Government on the status and welfare of the Suluk people who have resided in Sabah for a long time. The Sultan wanted the Malaysian Government to issue ICs to the Suluks so that they could legally stay and work in Sabah.

[114] He said his friends by the name of Tahir and Asbudi brought him to meet the Sultan. He said he attended the meeting with the Sultan who told him that he would discuss with the Malaysian Government to issue ICs to the Suluk people residing in Sabah so that they could legally stay and work in Sabah. He said he believed the Sultan and was happy to hear what the Sultan had told him.

[115] He said the Sultan appointed him as the Panglima of the Sultanate of Sulu and North Borneo. However, he said he did not receive any document on his appointment because it was done orally. He said he was appointed as such because of his royal (Sharif) family bloodline.

[116] He said the Sultan asked him to take down the names of the Suluk people so that an ID would be issued to identify them as

the followers of the Sultan of Sulu and North Borneo. Based on this, the Sultan would know how many of his followers were in Sabah. If the Malaysian Government agreed to issue ICs to the Suluk people in Sabah, this would be based on the IDs issued by the Sultanate of Sulu.

[117] He said that was the first and only time he met the Sultan and his son Datu Amir Bahar. He said he did not know and he never met Datu Agbimuddin. He said he heard the news that Agbimuddin led his people to come to Kg. Tanduo but was asked to leave Sabah but refused. He said he did not know and had never been to Kg. Tanduo.

[118] He said he had a hand phone which he used and shared with his two sons. He could not remember the phone number except that it started with 012 under Maxis. He said he did not have nor used any other hand phone. He denied having or used a phone number 014-8594510 or 019-5398122. He said he did not talk on the phone number 019-5398122 and denied the contents of the telephone conversation set out in P472A-P472J.

[119] He said there was a time when he received a phone call from Datu Piah and heard about a war. He said he felt angry and afraid because a war would affect everyone in Sabah.

[120] He said in 25.2.2013 he was sleeping in his quarters at Ladang Atlas when he was arrested together with his sons and son-in-law. He said the police seized his phone which contained a battery and SIM card. He said he could recognize his phone which was seized by the police. He identified P300C. He said when the phone was produced in court, the SIM card was missing. However, the SIM card was tendered as exhibit P300D via PW58 and PW63.

Defence of the 6th appellant (16th accused)

[121] He also produced his written confession to corroborate his testimony in court. At the time of his arrest, he was 58 years old and a fisherman by profession. He was from Sulu, Parang, in the Philippines. He said he is related to the Sultan but a distant relative. He came to Semporna in 1987 with his mother to visit family. He returned to the Philippines in 1990 but came back to Sabah in 1991 to work as a fisherman.

[122] He said in 2007 Sultan Esmail and Datu Agbimuddin came to Sabah to discuss with the Malaysian Government on the rights of the Suluk people in Sabah. He said he was invited to meet Sultan Esmail and Datu Agbimuddin at Kg. Sri Aman, Semporna. They told him about the discussion with the Malaysian Government. He said if the discussion was successful, they would be given ICs and could legally stay and work in Sabah.

[123] He said in 2008 he was appointed as a Panglima by Sultan Esmail. However, he did not have any power or authority in Sabah and a Panglima is a community leader of the Suluk community. He said he was merely a Ketua Kampung of Kg. Selamat in Semporna.

[124] He said he did not know Hj. Musa. Nor did he know about the intrusion at Kg. Tanduo and he was not at Kg. Tanduo when the intrusion took place. He said he did not have any hand phone and did not know how to use one. He denied that he had or used phone number 012-8284091. He denied the contents of the products of communication interceptions set out in P471A-P471J.

[125] He said he was not known as Adu and did not use the name of Adu. He said he did not talk to Datu Agbimuddin on the phone at the material times. He said he did not use this phone number and did not talk on this phone number. He said there was a misunderstanding between the Sultan and Agbimuddin and that was the reason why Agbimuddin did not attend the discussion.

Defence of the 7th appellant (18th accused)

[126] He was a 63 year old Suluk from Jolo, Sulu in the Philippines. He said he came to Sandakan, Sabah by boat in 1982 together with his wife and children. They initially stayed at Kg. Bubul and then moved to Kg. Perigi, Semporna. Prior to his arrest he was a farmer.

[127] He said his grandfather was a Panglima of the Sultanate of Sulu and North Borneo. After his grandfather died, his father took over. In 2001 he was appointed a Panglima by Sultan Esmail Kiram die to his bloodline. He testified that in 2003 there was a misunderstanding between Sultan Esmail Kiram and Datu Agbimuddin and Datu Agbimuddin asked the Sultan to issue IDs to the Suluk people in the Philippines but the Sultan refused. He said Datu Agbimuddin then asked him to issue the IDs but he did not want to because the IDs could only be issued by the Philippines Government and he was afraid of being caught. He did not want to be involved in the misunderstanding between the two.

[128] That was why according to him he left them and did not have any role after that. He said in 2010 he was appointed a Panglima by Sultan Muedzul-Lail Tan Kiram in Jolo. As a Panglima he was only a representative of the Suluk community in Semporna. He did not have work, office, salary or power as a Panglima.

[129] He said in February, 2013 he was at home when he heard the news from the people that Datu Agbimuddin came to Sabah but was asked to leave Sabah. He also heard of the skirmishes at Kampung Tanduo and Kg. Simunul. He said he never went to Kg. Tanduo and he did not do anything because he was not involved.

[130] He said one day while he was sleeping in his house, the police came and arrested him, his wife and children. He said the police asked whether they had documents and he replied they did not have any and so they were arrested. He said the police did not seize anything from the house.

[131] He said he did not have any mobile phone as he did not know how to use it. He said he did not know and did not use the phone numbers 012-8388304 and 012-8659270. He was referred to P475A to P475J and he denied that he made the conversations on these two phone numbers. The phone numbers were registered under the name of Jessica Sanchez and Abdul Said bin Jala. He said he did not know them.

Defence of the 8th appellant (19th accused)

[132] He was 69 years old at the time of the trial. He said he was a carpenter residing at Simpang Gua Madai, Kunak. He originated from Lapa, Maimbong, Jolo. In 1981 he came to Tawau, Sabah before moving to Kunak. He too tendered his confession to substantiate his testimony.

[133] He said that in 2005 Sultan Esmail Kiram and the 20th accused came to Sabah to discuss with the Government of Malaysia on the status and welfare of the Suluk people in Sabah, in particular whether IC could be issued to them to enable them to legally stay and obtain employment in Sabah.

[134] He said he was not interested and did not want to be involved because he had to work to support his family. However, his friend by the name of Ali brought him to attend a meeting with the Sultan. He said he attended the meeting and he felt happy because he would be given IC and could work legally in Malaysia.

[135] In 2007, he was appointed a Panglima for Kunak by the Sultan. In 2008, he was appointed the Maharaja. During his meeting with the Sultan, the Sultan told him not to follow any other Sultans who came to Sabah including his brother Raja Muda Agbimuddin. He testified that as a Panglima or Maharaja he had no duty or power and did not receive any salary. He said he was only a representative of the Suluk community in a particular area, like a Ketua Kampung. He was asked to give IDs to the Suluk people so that they could be identified as the Suluk people under the Sultan. He said the IDs were issued by a person by the name of Hassan Bacho whom the Sultan trusted in Semporna.

[136] It was put to him that a Maharaja is higher in rank than a Panglima. He disagreed and explained that a Panglima is higher in rank and controlled a Maharaja. He explained that due to his work he was not able to fully perform his obligations as a Panglima and wanted to resign. He said the Sultan then appointed him as the Maharaja instead so that his responsibility would not be so heavy.

[137] He said he had never been to Kg. Tanduo and did not know where it was. He only heard about Kg. Tanduo in court. He said he heard that there were people who came to claim Kg. Tanduo but he did not do anything and was not involved with them.

[138] He testified that on 1.3.2013 the police went to his house to ask him to produce his documents but he could not do so. He said he was then arrested. He said at that time there were twelve people in the house, four of them were his workers, four his children, two grandchildren, his wife and himself.

[139] He said nine hand phones were taken by the police from the house. He used one of the phones with the number 017-8664394. He bought the SIM card from a shop near to his house. He identified his phone in court which was tendered as P428C. He said three of the phones seized were used by his children, two by his workers and three of the phones were without batteries.

[140] He said that after his arrest, he was told that there was fighting in Kg. Simunul and Kg. Tanduo between the people of Raja Muda Agbimuddin and the Malaysian security forces. He was referred to the summaries of telephone conversations in exhibits P474A-P474J. He said the phone number 014-6774273 did not belong to him and he did not make those telephone calls.

Defence of the 9th appellant (20th accused)

[141] He was 53 years old at the time of the trial and is the son of Sultan Esmail Kiram II (deceased) of the Sultanate of Sulu and North Borneo. He has a Bachelor of Science in Agriculture and married PW165 in 1985 and has two sons from the marriage. He gave a brief account of the history and institutions of the Sulu Sultanate. He said there are five stars in the flag of the Sulu Sultanate which represent five regions under the Sultanate, one star symbolizes Sulu Tawi-Tawi, the second star for Basilan, the third for Zamboanga Peninsular, the fourth for Palawan and the last star represents North Borneo, now known as Sabah.

[142] He said the government of the Sultanate of Sulu is made up of three divisions, namely the judiciary, the political and the military divisions. The judicial division consists of the Royal Council of Datus, the Rumah Bicara, the Imams and the Kadi who is the principal advisor to the Sultan. The political division consists of (i) the Panglima who is the Governor of a province or district and (ii) the Maharaja who is a mayor. However, he said that the Sultanate of Sulu now has no power and the people of Sulu considers the Sultan as a traditional and ecclesiastic leader whereas a Panglima is equivalent to a Ketua Kampung or community leader and a religious leader in that particular area.

[143] He said that the Royal Security Force (RSF) of the Sultanate of Sulu is its military division led by Datu Agbimuddin Kiram (deceased) who was the then Defence Minister and he himself was the Chief of Staff. The RSF was established after the installation of his father as the Sultan of Sulu to secure and preserve the security of the Sultan and the sovereignty of the Sultanate.

[144] In 2001, his father was installed as the Sultan of Sulu and he assisted his father in his activities. After his father was installed as the Sultan, and pursuant to their law of succession and chronological age, Datu Agbimuddin automatically became the Crown Prince, the Defence Minister, the Chairman of the Royal Council of Datus and Chairman of the Rumah Bicara. He said Datu Agbimuddin being the Defence Minister led, controlled and managed the RSF of the Sulu Sultanate.

[145] By virtue of his seniority, his brother Datu Phugdar was appointed the Chief of Staff of the RSF. The role of the Chief of Staff was to implement any military matter in respect of the RSF. He said he was appointed as the Chief of Staff by his father to replace his brother Datu Phugdar who was a school teacher with the Philippine Department of Education and could not perform dual positions.

[146] He said when he was appointed the Chief of Staff, he removed all the ranks of the RSF. He wanted to run it in a different manner so that they must abide by the command of the Sultan and to co-operate with the Philippines Government. He said Datu Agbimuddin did not agree with his implementations because Datu Agbimuddin complained that he did not have any background and experience in military affairs. Under the chain of command, he was to report to Datu Agbimuddin. Instead, he reported directly to his father because he and Datu Agbimuddin were 'not compatible' with regard to his implementations of the RSF.

[147] He said the Sulu Sultanate did not intend to challenge the sovereignty rights of Malaysia as an independent country but is only concerned with their propriety rights over Sabah. He said Datu Agbimuddin told his father that his father had been fooled by the Government of Malaysia. He also said that Datu Agbimuddin wanted to take an aggressive approach to the Sabah issue and wanted to bring the RSF to Sabah to claim Sabah. He said Datu Agbimuddin wanted to appoint Hj. Musa as the Chief of Staff who was an ex-military man, retired from the intelligence unit of the Philippines army. Further, Hj. Musa is the cousin of the wife of Datu Agbimuddin and Hj. Musa's son was married to the daughter of Datu Agbimuddin.

[148] He explained that this caused a split or misunderstanding between his father and his uncle. He said his father did not agree with his uncle to claim Sabah by force. His father wanted a peaceful approach to claim Sabah and therefore they distanced themselves from what Datu Agbimuddin wanted to do in claiming Sabah.

[149] He said he first came to Malaysia in 2005. In September 2012, he went to Sabah by ferry because his father asked him to arrange for his father's trip to Sabah. He met with the District Officer of Semporna to make the arrangements for his father.

[150] In December 2012, his father came over to Sabah to discuss the Sabah issue and their claim to Sabah with ACP Zul. After the discussion, his father went back but he and his wife stayed on in Sabah. He testified that on 14.2.2013, Datu Naufal, his father's cousin and his uncle, who lived in Kampung Likas, Kota Kinabalu called him on behalf of ACP Zul to tell him that the Malaysian Government required the presence of his father to talk to Datu Agbimuddin who had led a group of members of the RSF to occupy Kg. Tanduo to claim Sabah. He said he called his father who told him to represent his father in the negotiation because his father could not travel due to the typhoon season.

[151] He said that on 15.2.2013 a person from the special branch by the name of Yusof fetched him from the house of Hajjah Asma

to go to Kg. Tanduo to talk to Datu Agbimuddin. He said Datu Piah happened to be at the house of Hajjah Asma and Datu Piah decided to follow. They stayed overnight at Felda Sahabat 16. On 16.2.2013 they entered Kg. Tanduo.

[152] He said after the negotiation ended, Datu Agbimuddin took him to a room and advised him to convince their people to make problems in Semporna. He said he told Datu Agbimuddin that he respected his father's decision for him not to be involved in anything which went against the Malaysian authorities. He said Datu Agbimuddin became angry with him and said that nobody could dictate to him, not even his father.

[153] He was asked who were the members or followers of his father known to him in his position as the Chief of Staff of the RSF and he listed several names. He said he knew Timhar bin Habil (6th accused) who was an ex-bodyguard of his father. Timhar was employed from 2007 to 2009. In 2009 Timhar left and was hired by the Mayor of Jolo as a security officer. He said he only knew Habil bin Suhaili (5th accused) as the father of Timhar.

[154] When Timhar left in 2009, he and his family would not come to their house anymore and there were some family issues. After that they did not see each other. They only met in prison here after they were all arrested. He said they (the family of Habil and Timhar) could not wait for the Sabah issue to be resolved. As

far as he knew, Timhar had transferred to Sultan Muedzul-Lail T Kiram who is his second cousin and the grandson of Sultan Esmail Kiram I.

[155] He said Salib Akhmad bin Emali (15th accused) was appointed by his father as Panglima in Kg. Tungku, Lahad Datu. The last time they spoke to him was in 2012 in Kg. Sri Aman, Semporna when the 15th accused submitted the names of members under his father. He said his father would issue an identity card to these members so that they would be identified as members of the Sultanate of Sulu.

[156] He went on to say that Al Wazir bin Osman (16th accused) was appointed by this father as Panglima in Kg. Selamat, Semporna. He said they saw each other sometimes because he stayed in the house of his cousin Hajjah Asma whose house was near Kg. Selamat.

[157] Julham bin Rashid (19th accused) was appointed by his father as Panglima in Kg. Madai, Kunak. He said they did not meet because he did not usually come to the house as he was busy with his work. He said they only talked on their cellphones.

[158] Tani Lahab bin Dahi (18th accused) was appointed as Panglima in 2001 in Sulu but he left in 2003. He said the 18th accused left because he could not wait for the Sabah issue to be resolved. He said the 18th accused transferred to Sultan Aranan

Puyu, who was one of the many claimants to the throne of the Sulu Sultanate.

[159] He said his wife accompanied him wherever he went. Her role was only to take care of him and laundered his cloths when they were in Semporna and to serve drinks when they had visitors.

[160] He was then asked whether it was true that his wife had specifically identified some of the accused as the followers of his father but who had left to follow Datu Agbimuddin and he replied it could not be true because she had no role with regard to the Sulu Sultanate and not the type to know the affairs of the members of his father. He said he did not know why she gave that kind of evidence and not giving the true evidence under oath in court. He said maybe she had been persuaded by the police to testify as such. He was asked and he said he did not know whether she was lying or not.

[161] As can be seen, the defence put up by the nine appellants was, by and large, a total denial of their involvement in the intrusion at Kg. Tanduo, i.e. of waging war against the Yang di-Pertuan Agong. Despite the nature of the defence, the record at page 1383-1443 (60 pages) of the record of appeal shows that the learned judge proceeded to carefully and meticulously consider every aspect of the explanation put up by each of them and found that their denial could not be true.

[162] This is a finding of fact which an appellate court is loathe to interfere with. We have, in this regard, alluded to the relevant principles of law in Part I of this judgment and we do not wish to repeat them save to say that we found no valid reason to interfere with the finding of the learned trial judge.

[163] Procedurally, the law is that if the nine appellants had chosen to remain silent when called upon to enter their defence to the charge under section 121 of the PC, the learned trial judge would have had no option but to convict them of the offences: (See ***Balachandran v. PP*** **[2005] 1 CLJ 85 FC**. In ***Junaidi bin Abdullah v. PP*** **[1993] 4 CLJ 201**) the then Supreme Court held as follows at page 206:

> *"By calling an accused to enter his defence, the trial judge must on evaluation of the evidence, have been satisfied that the prosecution had, at the close of the prosecution's case, established a prima facie case which, if unrebutted, would warrant a conviction of the accused."*

[164] This is consonant with section 180(4) of the Criminal Procedure Code which reads:

> *"180(4) For the purpose of this section, a prima facie case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which* ***if unrebutted or unexplained would warrant a conviction****."*
>
> (emphasis added)

[165] Thus, it is a requirement of the law that once a *prima facie* case has been established and the accused is called upon to enter his defence, he must rebut or explain the case already established against him by the prosecution, failing which his conviction is warranted. If he gives an explanation, it is up to the trial judge whether to accept or reject the explanation having regard to the evidence before the court. In the present case, the convictions of the appellants under section 121 of the PC were warranted as the learned trial judge rejected their explanation as not being reasonably and probably true.

[166] Back to issue (i) raised by the appellants, i.e. the burden of proof. The appellants' complaint was over the following pronouncements made by the learned trial judge in his grounds of judgment:

> <u>As against the 1st, 4th, 10th and 13th accused</u>
>
> *"38.58 For these reasons,* ***on a balance of probabilities****, their explanations could not be true and the court could not accept the explanations given. Their explanations did not raise a reasonable doubt of their involvement in waging war against the King."*
>
> (emphasis added).

As against the 15th accused

"40.18 For the reasons given, ***on a balance of probabilities****, his testimony could not be true and had failed to raise any doubt on the prosecution's case against him under s. 121 and s. 130KA of the Penal Code."*

(emphasis added).

As against the 18th accused

"43.15. ***On a balance of probabilities*** *and for the reasons given, the explanation of the 18th accused could not reasonably or probably be true and had failed to raise a doubt on the prosecution's case made against him."*

(emphasis added).

As against the 19th accused

"44.17. ***On a balance of probabilities*** *and for the reasons given, the testimony of the 19th accused could not reasonably or probably be true and failed to raise any doubt on the prosecution's case against him."*

(emphasis added).

As against the 20th accused

"37.41. ***On a balance of probabilities****, his defence could not be true and his explanations that he was not*

involved in waging war against the King or that he was not a member of a terrorist group could not be accepted which were against the weight of evidence. And for the same reasons he has also failed to raise any doubt on the prosecution's case against him."

(emphasis added).

[167] It was submitted that the learned trial judge misdirected himself by breaching the guideline laid down by Suffian J (as he then was) in ***Mat v. PP*** **[1963] MLJ 263**, which was in the following terms:

"The position may be conveniently stated as follows:-

(a) If you are satisfied beyond reasonable doubt as to the accused's guilt	*Convict*
(b) If you accept or believe the accused's explanation	*Acquit*
(c) If you do not accept or believe the accused's explanation but consider the next steps below	*Do not convict*
(d) If you do not accept or believe the accused's explanation and that explanation does not raise in your mind a reasonable doubt as to his guilt	*Convict*
(e) If you do not accept or believe the accused's explanation but nevertheless it raises in your mind a reasonable doubt as to his guilt	*Acquit".*

[168] It was submitted that by using the term “on a balance of probabilities”, the learned judge had imposed on the appellants the legal burden of proving their defence on the balance of probabilities when their duty was merely to discharge their evidential burden of raising a reasonable doubt in the prosecution case.

[169] It was urged upon us that in view of the misdirection, the proper order that this court should make was to acquit and discharge the appellants. It was submitted that an order of retrial would not be appropriate in the circumstances. Reliance was placed on the Federal Court case of ***Olier Shekh Awoyal v. PP*** **[2017] 2 CLJ 141** where it was held that the proviso to section 92 of the Courts of Judicature Act 1964 (similar to section 60(1) of the same Act) was not applicable as there were no exceptional circumstances to warrant such an application where the wrong burden of proof had been applied by the learned trial judge.

[170] In that case the learned trial judge had said this in dealing with the defence case:

> *“Secara ringkas, landasan pembelaan OKT adalah bukan beliau yang melakukannya tetapi telah dilakukan oleh orang lain. Jika OKT dapat meyakinkan Mahkamah tentang kewujudan orang lain dalam bentuk keterangan maka OKT layak untuk dibebaskan. Mahkamah berpendapat semata-mata*

"vague conjecture" atau inferen kemungkinan OKT tidak bersalah bukanlah reasonable doubt. Pihak pembelaan mestilah menunjukkan "hard evidence" yang kemudiannya boleh mewujudkan keraguan sehingga terputusnya elemen-elemen yang perlu dibuktikan."

[171] Other than that, the learned judge had also said:

"Secara amnya, pada peringkat pembelaan, beban adalah di bahu pihak pembelaan untuk membawa keterangan atau keterangan pihak pembelaan mestilah mampu untuk menyangkal keterangan prima facie pihak pendakwaan. Dengan itu pihak pembelaan hanya perlu membangkitkan suatu keraguan yang munasabah atas imbangan kebarangkalian dalam pembelaannya."

[172] From these two passages, it is clear, as indeed found by the Federal Court, that the learned trial judge in that case had misdirected himself when he imposed on the accused the legal burden of proving his defence on the balance of probabilities.

[173] The law is trite that in criminal cases, unless the accused has a legal burden to prove a particular fact, such as the burden imposed by section 103 illustration (b) or section 106 illustration (b) of the Evidence Act 1950, or to rebut a statutory presumption, the accused has no burden to prove or to disprove anything. He is entitled to an acquittal if his explanation succeeds in casting a

reasonable doubt in the court's mind as to his guilt and this is so even where the court is not convinced of the truth of his explanation.

[174] The distinction between legal and evidential burden of proof has been explained in the following terms by the ***Oxford Dictionary of Law*** (Seventh Edition):

> *"A distinction is drawn between the persuasive (or legal) burden, which is carried by the party who as a matter of law will lose the case if he fails to prove the fact in issue; and the evidential burden (burden of adducing evidence or burden of going forward), which is the duty of showing that there is sufficient evidence to raise an issue fit for the consideration of the trier of fact as to the existence or nonexistence of a fact in issue."*

[175] In ***Popple's Canadian Criminal Evidence*** the following passages on burden of proof can be found at pages 416 and 417:

> *"In a criminal case it is always the duty of the prosecution to prove the guilt of the accused "beyond reasonable doubt". But the expression "burden of proof" has two aspects – (a) that of "establishing a case" (a matter of "law"); (b) that of "introducing evidence" (a matter of "procedure"). The onus of "establishing a case" against the accused rests upon the Crown throughout the trial. It must prove every "essential ingredient" of the crime. But the burden of "introducing evidence" will be satisfied by the production of evidence which, if unanswered and*

> *believed, raises a "prima facie" case upon which the jury might be justified in finding a verdict. And where the Crown has established such facts as without more will justify the jury in finding the accused "guilty", he is not entitled to an "acquittal" unless he does satisfy the burden which is then cast upon him of introducing evidence, but the extent of that evidence is not to prove his innocence or honesty but merely to raise a "reasonable doubt" in the minds of the jury as to his guilt. And where an onus is placed upon him by statute to establish his innocence or some other fact, the extent of that onus is only to satisfy the jury of the "probability" of that which he is called upon to establish, for he is not required to prove any fact "beyond reasonable doubt".*

[176] The question before us was whether the learned trial judge had imposed on the appellants the legal burden of proving, on the balance of probabilities, that they were not guilty of the offences charged. If he did, then he would have fallen into the same error that the learned trial judge in ***Olier Shekh Awoyal*** (supra) had fallen into.

[177] The first thing to note with regard to this issue is that the learned trial judge did not say that the appellants had a legal burden to prove their innocence. He said nothing close to what the learned trial judge in ***Olier Shekh Awoyal*** had said. Nowhere in the judgment did he say that the burden was on the appellants to prove their defence. What the learned judge said was, on the

balance of probabilities, the appellants' explanation could not reasonably or probably be true. He then went on to say, most importantly, that their explanation failed to cast any doubt in the prosecution case.

[178] In the manner that the issue was raised before us, the pertinent question to ask is this: What was the context in which the learned judge used the term "on a balance of probabilities"? Was he imposing a legal burden of proof on the appellants to prove their innocence, or was he merely weighing the reasonable probabilities of the case?

[179] We have gone through the grounds of judgment carefully and we were unable to say with conviction that in using the term "on a balance of probabilities", the learned judge was imposing on the appellants the legal burden of proving that they did not commit the offences charged. It was clear to us that in using the term, the learned judge was merely weighing the probabilities of the case. This is clear from the fact that right after saying that the appellants' explanation could not, "on a balance of probabilities", reasonably or probably be true, he went on to say that the appellants' explanation did not raise a reasonable doubt in the prosecution's case. The learned judge had also said that on the totality of the evidence adduced, the prosecution had proved its case beyond reasonable doubt.

[180] The learned judge further made it clear that he did not accept or believe the appellants' explanation, nor did the explanation cast any doubt in his mind as to the guilt of the appellants. He was in fact applying paragraph (d) of the guideline laid down in ***Mat v. PP*** (supra). He cannot therefore be said to have offended the ground rules as laid down in that case. We found nothing in the judgment, read as a whole, to suggest that the learned trial had imposed on the appellants the legal burden of proving their innocence on the balance of probabilities.

[181] What is also clear from the grounds of judgment is that the term "on a balance of probabilities" was used by the learned judge after he had meticulously assessed and evaluated the entire evidence to determine whether the appellants' explanation could reasonably or probably be true. In the end, he found the appellants' explanation be untrue and failed to cast any doubt in the prosecution case.

[182] As we mentioned earlier, the defence put up by each of the appellants was that they were not involved in the intrusion at Kg. Tanduo. In determining whether the denial was credible and whether it had succeeded in casting a reasonable doubt in the prosecution case, it was certainly necessary for the learned judge, as a trier of fact, to test their evidence against the rest of the evidence and the probabilities of the case. This was to determine

whether their explanation could, in the words of the learned judge, “reasonably or probably be true”. He was not using the words “on a balance of probabilities” in the context of a legal burden of proof.

[183] The principle is that in determining whether an accused person had succeeded in casting a reasonable doubt in the prosecution case, the trial judge is bound to consider the reasonable probabilities of the case and to disregard fanciful possibilities, regard being had to the totality of the evidence, and this includes the defence put up by the accused. That was exactly what the learned trial judge in this case did and this is the context in which the term “on a balance of probabilities” that the learned judge used must be understood. It was a rather unfortunate choice of words but to suggest that the learned judge had applied the wrong burden of proof is incorrect.

[184] At the risk of repetition, it needs to be emphasized that in all those passages where the learned judge used the term “on a balance of probabilities”, he concluded by saying that the appellants failed to raise any doubt in the prosecution’s case. Taken in its proper context, it was in fact a finding by the learned judge that the prosecution had proved its case beyond reasonable doubt, without imposing on the appellants the burden of proving their defence on the balance of probabilities.

[185] We would agree with learned counsel's contention if the learned judge had used the term "on a balance of probabilities" without directing his mind at all to the question whether the appellants had succeeded in raising a reasonable doubt in the prosecution case. But that was not the case here. We therefore found no merit in issue (i) raised by the appellants.

Issue (ii) - The guilty plea

[186] We now come to issue (ii) raised by the appellants. The complaint was that the learned trial judge was wrong to rely on the guilty pleas of the 1st, 4th, 10th and 13th accused to the offence under section 130KA of the PC in considering whether all nine accused were guilty of the offence under section 121 of the PC. We were referred to the following pronouncements by the learned judge:

> *"38.42. As stated above, after a maximum evaluation of the evidence at the end of the prosecution's case. I have found that the prosecution had made out a prima facie case against these accused for waging war against the King and as members of a terrorist group. They were called to enter their defence.*
>
> *38.43. At the commencement of the defence these four accused together with the 2nd, 3rd and 14thaccused decided to change their plea to the charge under s. 130KA of the Penal Code. They had pleaded*

guilty to the charge under s. 130KA of the Penal Code that they were members of a terrorist group.

38.44. These confirmed my findings that they were members of a terrorist group, namely being members of the RSF of the Sultanate of Sulu and North Borneo which came to claim Sabah to belong to the Sultanate of Sulu and North Borneo by force. These contradicted their explanations that they were not the armed intruders or that they did not associate with the armed intruders or they were not members of the RSF. These also contradicted their testimonies that they came with promises of offers of jobs and IC but found out that they were cheated and guarded by the armed men and tried to run away.

"38.54. The fact that they had pleaded guilty to being members of the terrorist group had contradicted their claims that they were innocent or their purpose for coming to Sabah or that they had been cheated by Datu Agbimuddin, Hj. Musa or Herman in coming to Sabah."

[187] It was submitted that the learned judge had wrongly interpreted the significance of the evidence given by and on behalf of all nine accused. Reference was made to ***Mohd Amin bin Mohd Razali & Ors v. PP*** **[2003] 4 MLJ 129** where it was held by the Federal Court that in determining whether an accused person had committed an offence under section 121 of the PC, the following factors need to be taken into account:

(i) No specific number of persons is necessary to constitute an offence under section 121 of the PC;

(ii) No actual fighting is necessary to constitute the offence. Enlisting, marching and making preparation without coming to battle are sufficient;

(iii) The manner in which they are equipped or armed is not material;

(iv) There is no distinction between principal and accessory and all who take part in the unlawful act incur the same guilt; and

(v) The offence is a continuing offence and any person can be guilty of the offence at any point of time of his involvement provided such person is aware that the object or purpose for which the gathering had assembled is to stage an insurrection or to challenge the Government's authority.

[188] Particular emphasis was placed on factor (v) above to support the argument that the prosecution must prove *mens rea* on the part of all nine accused, i.e. that they knew that their presence in Kg. Tanduo was to wage war against the Yang di-Pertuan Agong or to claim Sabah.

[189] It was argued that since the prosecution was required to prove *mens rea* on the part of all nine accused in proving the offence under section 121 of the PC, the learned judge should not have allowed his mind to be influenced by the guilty pleas of the 1st, 4th, 10th and 13th accused to the offence under section 130KA of the PC. It was contended that by doing so, the learned judge had allowed his mind to be clouded by irrelevant factors in considering whether the offence under section 121 of the PC had been proved against all nine accused.

[190] Now, the undisputed fact is that all nine appellants were charged with both the offence under section 121 and the offence under section 130KA of the PC. It is true that only the 1st, 4th, 10th and 13th accused pleaded guilty to the offence under section 130KA of the PC while the 15th, 16th, 18th, 19th and 20th accused did not, but what needs to be borne in mind is that the offence under section 130KA (of being members of a terrorist group) was inextricably linked to the offence of waging war against the Yang di-Pertuan Agong under section 121 of the PC with respect to which all nine accused were charged with.

[191] It is not as if the evidence relating to the offence under section 130KA of the PC had no nexus whatsoever with the evidence relating to the offence under section 121 of the Code. The fact is, the two offences were committed by all nine appellants

in the same transaction, within the same time frame, i.e. between February 9 and March 23, 2013 and were both committed in furtherance of their common object of waging war against the Yang di-Pertuan Agong.

[192] Given the fact that the offence under section 130KA of the PC was inextricably linked to the offence under section 121 of the same Code, with which all nine appellants were charged, clearly the guilty pleas of the 1st, 4th, 10th and 13th accused under section 130KA (being members of a terrorist group) were relevant for the learned judge to determine whether there was any truth to their defence (to the charge under section 121 of the PC) that they were not the armed intruders, that they were not members of the RSF, that they only came to Sabah for jobs, and that they had been cheated by Datu Agbimuddin, Hj. Musa or Herman.

[193] In any event, the learned trial judge had considered appellants' defence separately and had made separate findings as to their guilt under section 121 of the PC. It would therefore be incorrect in the circumstances to say all nine accused had been prejudiced by the learned judge's reference to the guilty pleas of the 1st, 4th, 10th and 13th accused in finding them guilty under section 121 of the PC.

[194] No authority was cited by learned counsel for his proposition that the guilty plea of a co-accused to a different

offence but committed in the same transaction as the offence with which they are jointly charged cannot be used against the other accused. With due respect to the learned counsel, we do not think that is a correct statement of law applicable to the peculiar facts and circumstances of the present case. In the premises, we do not think any valid criticism can be leveled at the learned judge for referring to the guilty pleas of the 1st, 4th, 10th and 13th accused.

[195] Learned counsel for the appellants also took umbrage at the following statements by the learned judge:

> *"38.40. Although they had a copy of their confessions, they chose not to produce them at the earliest opportunity or tender them during the prosecution's case to explain that they were cheated or that they were not members of a terrorist group or that they did not wage war against the King. If they did, they might have raised doubts on the prosecution's case against them at that stage."*

[196] It was submitted that this remark shows that the learned trial judge had given weight to the confessions of the appellants (which were recorded during the police investigation), and that he had in fact entertained doubts on the truth of the prosecution's evidence. This according to learned counsel, begged the question: If the confessions were capable of raising a doubt in the prosecution's case against the appellants, does it mean that they were incapable of raising a doubt if the confessions were tendered

at a later stage of the trial, bearing in mind the defence was not an afterthought?

[197] We found no merit in the complaint. In the first place, the learned judge did not say that the confessions had cast doubts in his mind as to the truth of the prosecution case. He was merely saying that the confessions might have raised doubts in the prosecution case had they been tendered during the prosecution stage of the case.

[198] Nor can the statements be construed to mean that the learned judge had made up his mind that the confessions were incapable of raising a doubt in the prosecution's case for the reason that they were tendered at the defence stage of the case instead of the prosecution stage. It was for the learned trial judge to weigh all the evidence before him before coming to his ultimate finding of guilt or otherwise. For this purpose, it was incumbent on him to take into consideration the confessions which were tendered as evidence during the course of the defence case.

[199] As for learned counsel's contention that the prosecution needed to prove *mens rea* on the part of the appellants, i.e. that they knew that their presence in Kg. Tanduo was to wage war against the Yang di-Pertuan Agong or to claim Sabah, the proved facts speak for themselves. There can be no doubt whatsoever that the purpose of the armed intrusion was to claim Sabah by

force. This was clearly an act of waging war against the Yang di-Pertuan Agong. Having regard to what transpired before, during and after the intrusion, it is the height of naivety to suggest that the appellants did not know what their purpose was in coming to Sabah.

[200] For these reasons, we found not merit in issue (ii) raised by the appellants.

Issue(iii) – Communication interception

[201] This ground of appeal only concerns the 15th, 16th, 18th, 19th and 20th accused whilst the 1st, 4th, 10th and 13th accused had no issue with the intercepted communication evidence as it was not raised in their petitions of appeal. By virtue of section 53(2) of the Courts of Judicature Act 1964, they were precluded from raising the issue without leave. This section reads:

> *"(2) Every petition of appeal shall be signed by the appellant or his advocate and shall contain particulars of the matters of law or of fact in regard to which the High Court is alleged to have erred, and,* ***except by leave of the Court of Appeal, the appellant shall not be permitted on the hearing of the appeal to rely on any ground of appeal other than those set out in the petition****."*
> (emphasis added)

[202] Nevertheless, we have, in fairness to the 1st, 4th, 10th and 13th accused, considered the issue in considering their appeals: ***PP v. Jitweer Singh Ojagar Singh*** **[2014] 1 CLJ 433 (FC)**. As for the 5th, 6th, 7th, 8th and 9th appellants, their common ground of appeal on this issue was as follows:

> *"The learned High Court erred in law when the Learned Trial Judge held that it was not mandatory to fill in or complete Paragraph 4 Part C in the communication interception application forms under the First Schedule [Regulation 2] of the Security Offences (Special Measures) (Interception of Communications) Regulations 2012."*

[203] It is obvious that the attack was on the procedural defect in the interception process. The appellants' contention was that the intercepted communications should not have been admitted in evidence as there was failure to comply with the requirements of the First Schedule [Regulation 2] to the Security Offences (Special Measures) (Interception of Communications) Regulations 2012.

[204] In their petitions of appeal, the appellants reproduced those parts of the judgment which they alleged were erroneous in law, and they were the following:

> *"12.19. Reading s. 6 of the Act which states that notwithstanding any other written law, this includes Regulations 2012, the discretion is on the PP to decide whether the communication interception is*

likely to contain any information relating to the commission of a security offence. When such an application is made to PP, the application or basis for the application is not provided to the court and it is not in a position to assess and determine whether the communication interception is likely to contain any such information relating to the commission of a security offence.

12.20. The courts have consistently held that legislations for the prevention and detection of terrorism are valid and legal subject to safeguards on intruding individual liberty and the risk of arbitrary misuse of power: 1 see ***Beghal v Director of Public Prosecutions [2015] 3 WLR 344****. The provisions of s. 6 of SOSMA should be construed in accord with its intended purposes. It has been held that where national security is involved the ordinary principles of natural justice are modified for the protection of the realm:* ***R v Home Secretary, Ex parte Hosenball [1977] 1 WLR 766****. It is also for the executive and not the courts to decide whether, in any particular case, the requirements of national security outweigh those of fairness:* ***Council of Civil Service Unions & Others v. Minister for the Civil Service [1985] 1 A.C. 374****.*

12.21. Further, it has been held that the court is not concerned with how the evidence is obtained. Even if it is illegally obtained, it is admissible provided it is relevant: ***Kuruma v. The Queen [1955] AC 197****;* ***Public Prosecutor v. Gan Ah Bee [1975] 2 MLJ 106****.*

12.22. For the reasons given, it was not mandatory to fill or complete section 5.4 of the form before the interception could be carried out."

[205] The power to intercept communication is provided by section 6 of SOSMA, which provides as follows:

"6. POWER TO INTERCEPT COMMUNICATION

(1) Notwithstanding any other written law, the Public Prosecutor, if he considers that it is likely to contain any information relating to the commission of a security offence, any authorize any police officer or any other person-

(a) to intercept, detain and open any postal article in the course of transmission by post;

(b) to intercept any message transmitted or received by any communication; or

(c) to intercept or listen to any conversation by any communication.

(2) The Public Prosecutor, if he considers it is likely to contain any information relating to the communication of a security offence, may –

(a) require a communications service provider to intercept and retain a specified communication or communications of a specified description received or transmitted, or about to be received or transmitted by that communications service provider; or

(b) authorize a police officer to enter any premises and to install on such premises, any device for the interception and retention of a specified communication or communications of a specified description and to remove and retain such evidence.

(3) Notwithstanding subsection (1), a police officer not below the rank of Superintendent of police may –

(a) Intercept, detain and open any postal article in the course of transmission by post;

(b) Intercept any message transmitted or received by any communication; or

(c) Intercept or listen to any conversation by any communication,

Without authorization of the Public Prosecutor in urgent and sudden cases where immediate action is required leaving no moment of deliberation.

(4) If a police officer has acted under subsection (3), he shall immediately inform the Public Prosecutor of his action and he shall be deemed to have acted under the authorization of the Public Prosecutor.

(5) The court shall take cognizance of any authorization by the Public Prosecutor under this section.

(6) This section shall have effect notwithstanding anything inconsistent with Article 5 of the Federal Constitution.

(7) For the purposes of this section –

"communication" means a communication received or transmitted by post or a telegraphic, telephone or other communication received or transmitted by electricity, magnetism or other means;

"communications service provider" means a person who provides services for the transmission or reception of communications.".

[206] A rightly pointed out by learned counsel for the appellants, there are two types of communication interception, one under section 6(1) and the other under section 6(3) of SOSMA. Information that is required to be given in an application for communication interception is regulated by section 31 of SOSMA. For communication interception under 6(1), the requirements of the First Schedule of the Regulations have to be followed and for communication interception under section 6(3) of SOSMA, the requirements of the Second Schedule of the Regulations have to be followed.

[207] Section 2 of the Regulations states that any police officer applying for authorization under section 6(1) shall submit a written application which shall contain information as specified in the First Schedule. It was submitted that this is a mandatory requirement as intended by Parliament.

[208] On the admissibility in evidence of intercepted communication, section 24 of SOSMA provides as follows:

> *"24 ADMISSIBILITY OF INTERCEPTED COMMUNICATION AND MONITORING, TRACKING OR SURVEILLANCE INFORMATION*
>
> *(1) Where a person is charged for a security offence, any information obtained through an interception of communication under section 6 whether before or after such person is charged shall subject to subsection (2), be admissible at his trial in evidence.*
>
> *(2) The information obtained through an interception of communication under section 6 shall only be admissible where tendered under a certificate by the Public Prosecutor stating that the information so obtained had been authorized by the Public Prosecutor.*
>
> *(3) A certificate by the Public Prosecutor issued under subsection (2) together with any document or thing may be exhibited or annexed to the certificate shall be conclusive evidence that the interception of communication had been so authorized, and such certificate shall be admissible in evidence without proof of signature of the Public Prosecutor.*
>
> *(4) No person or police officer shall be under any duty, obligation or liability or be in any manner compelled to disclose in any proceedings the procedure, method, manner or the means or devices used with regard to-*
>
> *(a) anything done under section 6; and*
> *(b) any matter relating to the monitoring, tracking or surveillance of any person.*

(5) The information obtained through an intercepted communication under section 6 may be in narrative or verbatim form whether in the original language or as a translation into the national language or the English language.".

[209] It was submitted that the learned judge erred in interpreting the intended purpose of section 6 of SOSMA and the Regulations. It was argued that under the First Schedule (Regulation 2) to the Regulations, it is plain that all information shall be filled in except in circumstances where it expressly states that such information is only "if applicable". For instance, under Part A, Paragraph 2(f) and 2(g). We reproduce below Regulation 2 of the First Schedule.

"FIRST SCHEDULE

[Regulation 2]

INFORMATION FOR APPLICATION FOR AUTHORISATION TO INTERCEPT COMMUNICATION UNDER SUBSECTION 6(1) OF THE ACT

PART A: DETAILS OF APPLICATION AND PERSON, POSTAL OR TELECOMMUNICATION OR INTERNET SERVICE PROVIDER WHOSE COMMUNICATION IS REQUIRED TO BE INTERCEPTED

2. Particulars of the person, postal or telecommunication or internet service provider, if known whose communication is required to be intercepted:

(a) name

(b) address

(c) telephone number

(d) fax number

(e) e-mail address

(f) company/business registration number (if applicable)

(g) registered address (if applicable)

(h) address of operating office (if different from registered address)

(i) contact person.".

(emphasis added)

[210] It was submitted that if paragraph 5.4 ("the basis for believing that the evidence relating to the ground on which the application will be obtained through interception") is not a mandatory requirement or such information is unnecessary or negligible, Parliament would have added "if applicable" at the end of the paragraph. Since this was not done, it was submitted that this information is mandatory in the communication interception application forms.

[211] It was argued that the information required in section 5.4 would not in any way threaten the national security as demonstrated in ***R v. Home Secretary, Ex Parte Hosenball*** **[1977] 1 WLR 766**. It was submitted that the information required under section 5.4, i.e. Paragraph 4 Part C was merely to

demonstrate that the police had no other means to get information but by the communication interception.

[212] We were invited to examine section 24 of SOSMA before and after amendments. It was pointed out that under the new amendments, section 24(4)(a) of SOSMA states that "*no person or police officer shall be under any duty, obligation or liability or be in any manner compelled to disclose in any proceedings the procedure, method, manner or the means or devices used with regard to anything done under section 6*".

[213] It was further submitted that the principles of natural justice can be modified in cases involving national security but in this instance where Parliament had used the clear and unambiguous word "shall", it must mean that such information is compulsory for a communication interception application under section 6(1) of SOSMA. To hold otherwise would be to contradict section 2 of the Regulations as well as Paragraph 2(f) and 2(g) of Part A. In the circumstances, it was submitted that all communication interception applications that had been referred to PW128 by PW49 were defective and all the authorisations that had been given were consequently null and void.

[214] It was submitted that the learned judge failed to critically evaluate the oral testimonies given by the processors and the investigating officer (PW158) with the oral testimony given by the

defence witness (DW6) which clearly demonstrated that there was a serious doubt as to the authenticity of the summaries of the intercepted communications.

[215] We have gone through the grounds of judgment carefully and we were not persuaded that the learned trial judge had mishandled the issue of interception of communications as alleged. In fact the learned judge had dealt with the issue admirably and we can do no better than to reproduce verbatim what he said in full below, parts of which we have reproduced earlier in this judgment:

> *"12.9. I shall deal with these. Regulation 2 states that any police officer intending to apply for authorization from the Public Prosecutor under subsection 6(1) of the Act shall submit a written application in the form as provided by the Public Prosecutor which shall contain information as specified in the First Schedule. The form in the First Schedule contains three parts. Part A states 'Details of applicant and person, postal or telecommunication or internet service provider whose communication is required to be intercepted'. Part B states 'Grounds for application' and Part C states 'Particulars of all facts and circumstances alleged by the applicant in support of the application'.*
>
> *12.10. Paragraph 4 Part C states 'The basis for believing that evidence relating to the ground on which the application is made will be obtained through the interception'. The defence had submitted that this*

requirement is mandatory and failure to comply with this requirement would void the application and or the authorization of the PP. The evidence showed that paragraph 4 of Part C was left blank in all the applications for authorization to intercept communication under s.6(1). The court had to decide whether it was mandatory.

12.11. Under s.6(7) of SOSMA, "communication" means a communication received or transmitted by post or a telegraphic, telephonic or other communication received or transmitted by electricity, magnetism or other means and "communications service provider" means a person who provides services for the transmission or reception of communications. The 'communication service provider', in the context of this trial, would include Telekom Malaysia, Celcom, Maxis and Digi.

12.12. S.6 provides three modes or procedures under subsections (1), (2) and (3) for communication interception to be carried out in relation to the commission of a security offence.

12.13. S.6(1) states that notwithstanding any other written law, the PP, if he considers that it is likely to contain any information relating to the commission of a security offence, may authorize any police officer –

(a) to intercept, detain and open any postal article in the course of transmission by post;

(b) to intercept any message transmitted or received by any communication; or

(c) to intercept or listen to any conversation by any communication.

12.14. Under subsection (2), the PP may (a) require a communications service provider to intercept and retain a specified communication or to be received or transmitted by that communications service provider or (b) authorize a police officer to enter any premises and to install any device for the interception of a specified communication.

12.15. Under s.6(3), in urgent and sudden cases where immediate action is required leaving no moment of deliberation, a police officer not below the rank of Superintendent of Police may intercept including to listen to any conversation by any communication. Under s.6(4) such police officer who has acted under subsection (3) shall immediately inform the PP of his action and he shall then be deemed to have acted under the authorization of the PP. Under Rule 3 of the Regulations, the police officer shall submit a written report to PP containing information as specified in the form in the Second Schedule of the Regulations in respect of the communication interception carried out.

12.16. Regulations 2012 provide for an application to PP for authorization to intercept communications under s.6(1) of the Act whereas s.6(3) only requires a police officer to report to PP after he has intercepted communications in urgent and sudden cases. The Regulations do not provide for or silent on an application for authorization under s.6(2) of the Act

and the form under the First Schedule only refers to s.6(1) but not to s.6(2) of the Act although Part A of the form refers to postal or telecommunication or internet service provider whose communication is required to be intercepted. It was apparent that there was a lacuna in the Regulations.

12.17. Comparing the form under the First Schedule and the application forms used in this case, for example P235 (IDD43) and P236 (IDD44), there are differences. The forms used i.e. P236 inserted new sections which are not in the form prescribed by the First Schedule. Probably it was an attempt to remedy the lacuna.

12.18. Although paragraph 5.4 of the application forms was left blank in Part C, the police had given the reasons for the applications in these two documents (P235 and P236) used. These formed the basis for believing that evidence relating to the ground on which the applications were made would be obtained through the interceptions. It should be emphasized that there was no requirement to set out the basis for believing that evidence relating to the ground on which the application was made would be obtained through the interception under s.6(3) of the Act for the interception to be carried out. A report would be made after the interception.

12.19. Reading s.6 of the Act which states that notwithstanding any other written law, this includes Regulations 2012, the discretion is on the PP to decide whether the communication interception is likely to

contain any information relating to the commission of a security offence. When such an application is made to PP, the application or basis for the application is not provided to the court and it is not in a position to assess and determine whether the communication interception is likely to contain any such information relating to the commission of a security offence.

12.20. The courts have consistently held that legislations for the prevention and detection of terrorism are valid and legal subject to safeguards on intruding individual liberty and the risk of arbitrary misuse of power: 1 see ***Beghal v Director of Public Prosecutions [2015] 3 WLR 344.*** *The provisions of s.6 of SOSMA should be construed in accord with its intended purposes. It has been held that where national security is involved the ordinary principles of natural justice are modified for the protection of the realm:* ***R v Home Secretary, Ex parte Hosenball [1977] 1 WLR 766****. It is also for the executive and not the courts to decide whether, in any particular case, the requirements of national security outweigh those of fairness:* ***Council of Civil Service Unions & Others v Minister for the Civil Service [1985] 1 A.C. 374.***

12.21. Further, it has been held that the court is not concerned with how the evidence is obtained. Even if it is illegally obtained, it is admissible provided it is relevant: ***Kurana (sic) v The Queen [1955] AC 197; Public Prosecutor v Gan Ah Bee [1975] 2 MLJ 106.***

12.22. For the reasons given, it was not mandatory to fill or complete section 5.4 of the form before the interception could be carried out."

[216] We fully agree with the learned judge. In the circumstances, we likewise found issue (iii) raised by the appellants to be without merit.

[217] Before we conclude on the issue of liability, both in the acquittal and conviction of the respective accused of the respective charges preferred against them, we must say that the learned trial judge had given adequate consideration to the evidence in its totality. The learned trial judge had delivered a well-reasoned judgment which accounted for all the proved facts as discussed in Parts I and II of this judgment. We could not detect any misappreciation of the facts or of any misdirection on the law by the learned trial judge serious enough to vitiate the judgment. The learned trial judge had covered all the substantial issues raised by the parties. We must bear in mind that no judgment can ever be perfect and all-embracing. As stated in the South African case of ***S v. Noble*** **2002 NR 67 (HC)**:

*"[No] judgment can ever be "perfect and all embracing, and it does not necessarily follow that, because something has not been mentioned therefore it has not been considered". (**See S v Dee Beer 190 Nr 379 (HC)** at 381 – J quoting from **S v Pillay, 1977 (4)***

SA(a) at 534H – 535G *and* ***R v Dhlumayo and Others, 1948 (2) SA 677 (A) at 706)****…"*

PART III – THE PROSECUTION'S APPEAL AGAINST SENTENCE

[218] We now proceed to deal with the appeal by the PP against the sentence of life imprisonment imposed by the learned judge on the nine accused (respondents in this appeal by the PP) who had been convicted under section 121 of the PC. A conviction under section 121 of the PC carries with it two penalties in the alternative, death or life imprisonment, and a third sentence that if death penalty is not pronounced, a convicted person shall be liable to a fine. In sentencing all nine accused to life imprisonment, the learned trial judge held as follows:

> *"47.15. I refer to the Indian Supreme Court's case of* ***Machhi Singh v State of Punjab*** **1983 AIR 957** *where it ruled that "Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances." It went on to say that the extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.*

*47.16. In **Amin's case (supra)**, three of the accused were sentenced to death because they were the leaders and masterminds of the Al-Ma'unah group which waged war against the King under s.121 of the Penal Code. These three accused also led and were involved in the attack and exchange of fire with members of the security forces and tortured four persons, two of whom were later brutally killed at Bukit Jenalik. The other accused persons in that case who were also convicted for the offence under s.121 of the Penal Code were sentenced to life imprisonment. They were not the masterminds but only followers. The learned trial judge (as he then was) said that in exercising his discretionary powers, it was the only choice of sentence that he could pass on them under s.121.*

47.17. On appeal, the Federal Court overturned the life imprisonment imposed on the 5th accused in that case because he had shot Trooper Matthew in cold blood and his disregard for human life: see [2003] 4 MLJ 129.

47.18. In this case, similarly, it is onerous task in exercising its discretion in passing sentence under section 121 of the Penal Code. Although the 20th accused is the Chief of Staff of the RSF whereas the 15th , 16th, 18th and 19th accused are the Panglima of the RSF of the Sultanate of Sulu and North Borneo and that some of the other accused had occupied Kg. Tanduo to claim Sabah by force and they had waged war against the King, on the evidence adduced, the key persons in the intrusion were Datu Agbimuddin, Hj Musa and Herman who actively recruited the members

to come to claim Sabah by force and in waging war against the King.

47.19. There was no evidence that any of these accused were personally involved in the skirmishes or had pulled the trigger in the exchanges of fire with the security forces which resulted in casualties in Kg. Tanduo or in Kg. Simunul.

47.20. There was no evidence that any of them had killed the police and army personnel who were killed during the skirmishes. There was no evidence that they had done so in cold blood. There was no evidence that they had personally injured the personnel who were injured during the skirmishes.

47.21. In passing sentence I have taken into consideration the sentencing principles, the facts and circumstances of the case, their role and involvement, the penalty prescribed and their mitigations. I bear in mind that the victims had suffered and badly affected by the intrusion. I also bear in mind that the prosecution chose not to call them to give their victims' impact statements in this case.

47.22. In my view, the sentence of life imprisonment is adequate based on the facts and circumstances of this case, in particular on their role and involvement, and bearing in mind that they will be in prison for the rest of their life. This should send a strong message to others not to commit a similar offence."

[219] It would appear that learned trial judge's decision to impose the life imprisonment sentence instead of the death penalty was mainly influenced by the following considerations:

(i) The 'rarest of the rare' doctrine; and

(ii) The roles played by all the nine accused.

[220] The learned Deputy Public Prosecutor ("DPP") submitted that the sentence imposed by the High Court was manifestly inadequate considering the severity of the offence committed and that the national security had been put at stake. The learned DPP posited that this particular case falls under the bracket of the 'rarest of the rare cases'. All the nine accused are foreigners. Their action was an act of gross aggression against a sovereign nation. They challenged the security forces and showed no remorse nor indication that they would surrender when given the opportunity to leave the country peacefully. It was the prosecution's submission that the case of ***Mohd Amin*** is distinguishable from the facts of the present case.

[221] Learned counsel for the nine accused, in his reply, submitted that the adequacy or inadequacy of sentence imposed on the accused must take into account the roles that they played, as propounded in the Federal Court case of ***Mohd Amin***. Based on the facts of the case, it was pointed out that all nine accused were not personally involved in the skirmishes. It was submitted

that the extreme penalty of death should be reserved for the actual perpetrators of the intrusion. Learned counsel cited the Indian Supreme Court judgments in ***Bachan Singh v. State of Punjab*** **1983 AIR 957** and ***Machhi Singh v. State of Punjab*** **AIR 1980 SC 898** in support of the proposition that the death penalty should only be imposed in the rarest of rare cases.

[222] In the case of ***Mukesh & Anor v State of NCT of Delhi & Ors*** **(Criminal Appeal Nos: 609-610 of 2017)**, the Indian Supreme Court observed:

> *"116. Question of awarding sentence is a matter of discretion and has to be exercised on consideration of circumstances aggravating or mitigating in the individual cases. The courts are consistently faced with the situation where they are required to answer the new challenges and mould the sentence to meet those challenges. Protection of society and deterring the criminal is the avowed object of law. It is expected of the courts to operate the sentencing system as to impose such sentence which reflects the social conscience of the society. While determining sentence in heinous crimes, Judges ought to weigh its impact on the society and impose adequate sentence considering the collective conscience or society's cry for justice. While considering the imposition of appropriate punishment, courts should not only keep in view the rights of the criminal but also the rights of the victim and the society at large.*

*117. In State of **M.P. v Munna Choubey and Anr. [2005] 2 SCC 710**, it was observed as under:*

> *"10. Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc. This position was illuminatingly stated by this Court in Sevaka Perumal v. State of Tamil Naidu [1991] SCC 471)."*

*118. In **Jashubha Bharatsinh Gohil and Ors v. State of Gujarat [1994] 4 SCC 353**, while upholding the award of death sentence, this Court held that sentencing process has to be stern where the circumstances demand so. Relevant extract is as under:*

> *"12 … The courts are constantly faced with the situation where they are required to answer to new challenges and would the sentencing system to meet those challenges. Protection of society and deterring the criminal is the avowed object of law and that is required to be achieved by imposing appropriate sentence. The change in the legislative intendment relating to award of capital punishment notwithstanding, the opposition by the protagonist of abolition of capital sentence, shows that it is expected of the courts to so operate the sentencing*

system as to impose such sentence which reflects the social conscience of the society. The sentencing process has to be stern where it should be."

[223] Before we proceed to examine the merits of the prosecution's appeal, it is necessary to discuss the legalese of the matter. The "rarest of the rare" doctrine has its origin in the Indian Supreme Court case of ***Bachan Singh v. State of Punjab*** **AIR 1980 SC 898**, where it upheld the constitutional validity of capital punishment but observed that the death penalty may be invoked only in the "rarest of rare" cases. This principle came up for consideration and elaboration in another Supreme Court decision, ***Machhi Singh v. State of Punjab*** **1983 AIR 957**. The brief facts of that case are that the main accused along with eleven accomplices, killed seventeen people, men, women and children, for no reason other than they were related to one Amar Singh and his sister Piyaro Bai. The Bench opined at pages 965 - 966 that there may be demand for death penalty in the following circumstances:

"32. …It may do so (in rarest of rare cases) when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entertain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the

crime, or the anti-social or abhorrent nature of the crime, such as for instance:

I. Manner of Commission of Murder

When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community. For instance,

(i) When the house of the victim is set aflame with the end in view to roast him alive in the house,

(ii) When the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death

(iii) When the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

II. Motive for commission of murder

When the murder is committed for a motive which evinces total depravity and meanness. for instance when (a) a hired assassin commits murder for the sake of money or reward; (b) a cold-blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-à-vis whom the murderer is in dominating position or in a position of trust; (c) a murder is committed in the course for betrayal of the motherland.

III. Anti-social or socially abhorrent nature of the crime

(a) When murder of a member of a Schedule Caste or minority community etc., is committed not for personal

reasons but in circumstances which arouse social wrath. For instance when such a crime is committed in order to terrorize such persons and frighten them into fleeing from a place or in order to deprive them of, or make them surrender, lands or benefits conferred on them with a view to reverse past injustices and in order to restore the social balance.

(b) In cases of bride burning and what are known as dowry-deaths or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

IV. Magnitude of crime

When the crime is enormous in proportion. For instance when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

V. Personality of victim of murder

37.When the victim of murder is (a) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder; (b) a helpless woman or a person rendered helpless by old age or infirmity; (c) when the victim is a person vis-a-vis whom the murderer is in a position of domination of trust; (d) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons."

[224] The above principles are generally regarded as the broad guidelines for imposing the death sentence and had been followed by the Indian Supreme Court in many subsequent decisions. In the Indian Supreme Court case of ***Mohammed Ajmal Mohammad Amir Kasab @ Abu Mujahid v. State of Maharashtra*** **[2012] 8 S.C.R. 295**, the appellant (a Pakistani national) and his accomplices, were members of Lashkar-e-Taiba, a militant organisation based in Pakistan. They had carried out a series of 12 coordinated shooting and bombing attacks across Mumbai including the Taj Mahal Palace Hotel and the Oberoi Trident. He was charged with multiple offences including waging war against the Government of India, an offence punishable under section 121 of the Indian Penal Code. The Supreme Court examined the facts of the case in the light of the ***Machhi Singh*** decision and held that it had satisfied all the conditions laid down for the imposition of the death sentence and had also presented other reasons in a more magnified way. They waged war against the Government of India by launching an attack on Indian soil in order to demand that India should withdraw from Kashmir, to give rise to communal tension and to create internal strife and insurgency.

[225] If we examine the case at hand in light of the ***Machhi Singh*** decision, it is clear that all the conditions laid down in that case had been satisfied. This case has the element of conspiracy

like no other case. The nine accused were part of a conspiracy hatched across the border to wage war against the Government of Malaysia and/or the King, with intent to weaken the country from within so that they could reclaim Sabah.

[226] The case presents the element of pre-planning and preparation like no other case. The intrusion was meticulously planned and executed. The route from the Philippines to Sabah, the landing site at Kg. Tanduo, the different targets at Sabah were all pre–determined. A channel of communication between the attacking terrorists and the appellants was put in place before and during the intrusion.

[227] The case was of a magnitude like no other and has shocked the collective conscience of Malaysians. Nine Malaysian security personnel were killed and many seriously injured. The bodies of six Malaysian policeman were mutilated, with one beheaded. The local kampong folks were forced to leave their homes because of the intrusion. Heavy lethal weapons such as M-16 rifles, 9mm pistols and grenades were used during the intrusion.

[228] In short, this was an attack by a foreign enemy which is unprecedented in Malaysian history. The conspiracy behind the attack was as deep and large as it was vicious and the execution was ruthless. Negotiations were held between the Malaysian

security forces and the armed group at Kg. Tanduo but the negotiations failed. The intruders chose not to leave Sabah, but instead chose bloodshed and war. In terms of loss of life and property, not to mention its traumatizing effect, this case stands apart from any other case, and is the rarest of the rare since the birth of the nation. It should therefore attract the ultimate penalty of death.

[229] Against all this, the learned trial judge found, in agreeing with learned counsel, that the nine accused played a minimal role in the intrusion and that the persons responsible for the skirmishes were Datu Agbimuddin, Hj Musa and Herman, who, unfortunately, are not before the a court till now. We found it difficult to appreciate this argument. It is true that unlike the accused persons in ***Mohd Amin***, who were the perpetrators, the nine accused in our present case were mere conspirators. However, "waging war" need not necessarily be accompanied by the pomp and pageantry that is usually associated with warfare such as the attackers forming battle-lines and arming themselves with heavy weaponry. The conspiracy in the present case had many dimensions. The accused persons were members of the RSF and continued to be its members till the end. They had a clear and unmistakable intention to be part of a terrorist group and had participated in its design by offering labour and supplies, providing shelter, transmitting information and providing help whenever necessary.

Having known about the plans and the terrorist activities, they refrained from informing the police and their concealment had facilitated the war that was waged against the Yang di-Pertuan Agong. We were unable to accept the submission that the appellants were mere scapegoats. Short of participating in the actual attack, they did everything to set in motion the diabolic mission.

[230] Criminal cases do not fall into set-behaviouristic pattern. Even within the same category of offence, there are infinite variations based upon its configuration of facts. The aggression by a foreign terrorist organisation against the sovereignty of our nation was not a factor that called for consideration in ***Mohd Amin***. To launch an attack on a sovereign democratic State is a terrorist act of the gravest severity and it presents to us in crystal clear terms a spectacle of the rarest of rare cases.

[231] The sentence imposed must reflect the abhorrence and condemnation of the Malaysian community against such crime. We were firmly of the view that this was a fit and proper case to impose the death penalty against the nine accused. In this regard, we take note of the observations made by the Indian Supreme Court in the case of ***Dhananjay Chatterjee @ Dhana v. State of West Bengal*** **[1994] 2 SCC 220** at para 15:

" … Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment fitting to the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment."

[232] For the foregoing reasons, we allowed the prosecution's appeal and set aside the sentence of life imprisonment passed by the learned judge and substituted it with the death penalty. Order accordingly.

Dated: 8th November 2017

sgd.

(DATO' SETIA MOHD ZAWAWI SALLEH)
Judge
Court of Appeal
Malaysia

sgd.

(DATO' ABDUL RAHMAN SEBLI)
Judge
Court of Appeal
Malaysia

sgd.

(DATUK KAMARDIN HASHIM)
Judge
Court of Appeal
Malaysia

Criminal Appeals No: S-05(LB)-110-03/2016, S-05(LB)-111-03/2016, S-05(LB)-112-03/2016, S-05(LB)-113-03/2016, S-05(LB)-114-03/2016, S-05(LB)-115-03/2016, S-05(LB)-116-03/2016, S-05(LB)-117-03/2016, S-05(LB)-118-03/2016, S-05(LB)-119-03/2016, S-05(LB)-120-03/2016, S-05(LB)-121-03/2016 and S-05(LB)-370-10/2016

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Criminal Appeal No. S-05(H)-351-10/2016

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