Jubang ak Usin v Public Prosecutor [2025] MLJU 3389

Malayan Law Journal Unreported

COURT OF APPEAL (PUTRAJAYA)

SUPANG LIAN, AZIZUL AZMI ADNAN AND MOHD FIRUZ JAFFRIL JJCA

CRIMINAL APPEAL NO Q-05(SH)-600-12 OF 2023

17 October 2025

Jonathan Jalin ak Empading (Jonathan Jalin And Company) for the appellant.
Zander Lim Wai Keong (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Mohd Firuz Jaffril JCA:

JUDGMENT OF THE COURT

INTRODUCTION

[1] The Appellant in this case was charged for the act of smuggling 10 migrants under Section 26A of the ATIPSOM 2007.

[2] The charge preferred against him (as subsequently amended by the prosecution in the High Court) read as follows:
CHARGE

[3] That you, on the 8th day of April 2021, at about 1837 hours, at Simpang Amir Lachau, in the district of Sri Aman, in the state of Sarawak, had carried out smuggling of migrants towards:

(1) Hermanan Hardi (25) (Passport No.: NIL) (Indonesia);

(2) Jama Ismail (39) (Passport No.: NIL) (Indonesia);

(3) Jumardi Silan (42) (Passport No.: NIL) (Indonesia);

(4) Nunung Haji Subari (45) (Passport No.: NIL) (Indonesia);

(5) Elmi Siun (31) (Passport No.: NIL) (Indonesia);

(6) Teddi Tebin (20) (Passport No.: NIL) (Indonesia);

(7) Sunil Saina (25) (Passport No.: NIL) (Indonesia);

(8) Rofiih Nasrudin (20) (Passport No.: NIL) (Indonesia);

(9) Herman Umar (28) (Passport No.: NIL) (Indonesia);

(10) Yahya Zikrullah Samsul (30) (Passport No.: NIL) (Indonesia);

and that you have thereby committed an offence punishable under Section 26A Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ("the Atipsom Act").

[4] At the end of the trial, the High Court found the Appellant guilty as charged, whereby he was then duly convicted and sentenced to six (6) years imprisonment.

[5] Upon review of the Record of Appeal and having heard counsel for both parties on 21.04.2025, we unanimously found that there are no merits in this appeal for us to intervene on the conviction and sentenced by the learned High Court Judge ("HCJ"). We therefore dismissed the appeal and affirmed the decision of the learned HCJ for reasons set out in this judgment.

BACKGROUND

[6] On 8.4.2021, a team of police personnel from the Pasukan Gerakan Am (PGA) was conducting patrol and observation duties in an operation called Op Benteng Sektor C Sri Aman. In the course of patrol, PW3 who was leading the police team saw a suspicious looking bonded truck at Simpang Amir, Lachau bearing registration number QBE 2236 bearing the logo of KFF LOGISTIC SDN BHD. Upon inspection, PW3 found two (2) men in the driver's cabin namely Mohd Arizan Bin Abdullah (the driver of the bonded truck) and Duffson anak Jeffryfin. Both men are Malaysians. Upon inspection on the cargo section of the lorry, PW3 found eleven (11) Indonesians (10 males and 1 female) without any travelling documents. Both the two (2) Malaysians and eleven (11) Indonesians were arrested and brought back to Sri Aman police station.

[7] Investigation was duly carried out resulting in the ten (10) Indonesians (as named in paragraph 2 above) being charged under section 6(1)(c) of the Immigration Act 1959/63. Nine (9) of them were sentenced to three (3) months imprisonment while another Indonesian was sentenced to seven (7) months imprisonment. Their depositions under section 61A of Atipsom Act were also taken before a Sessions Court Judge at Sri Aman before being deported back to their country of origin. As for the two (2) Malaysians involved, they were charged under section 55E of the Immigration Act 1959/63 and sentenced to sixty (60) months imprisonment. The results of the investigation also led to the arrest of the Appellant on 22.4.2021 and arraignment in the High Court. During the trial, it was revealed that the accused had contacted Mohd Arizan bin Abdullah (PW5) to pick the migrants up from Bintulu to be sent to Serian. Further investigation also revealed that the accused was having contact with a person named Hadi in the arrangement for the migrants to be brought. The evidence tendered by the prosecution showed that the accused had carried out smuggling activity by providing assistance or other service for the purpose of arranging and facilitating the exit of the illegal immigrants from Malaysia.

Ingridients for purposes of proving the offence of 'smuggling' under the Atipsom

[8] From the definition of "smuggling of migrants" under section 2 of the Atipsom Act, the prosecution must prove the following elements:

i. the accused had facilitated or organized;

ii. directly or indirectly;

iii. the unlawful exit of the ten (10) Indonesians (not being the citizen or permanent resident of Malaysia);

iv. knowing or having reason to believe that the ten (10) Indonesians exit from Malaysia unlawfully; and

v. providing any other assistance or service for the purpose of carrying out the act of facilitating or organizing the unlawful exit of the ten (10) Indonesians.

THE HIGH COURT'S FINDINGS

[9] At the trial, the prosecution called seven (07) witnesses to prove the offence committed by the Appellant. Having considered the evidence adduced by the prosecution, the learned HCJ then addressed issues (i), (ii), and (iii) as stated in paragraph 7 above together and found as follows:

a. It was not disputed that the ten (10) Indonesians did not possess any passport or travelling document;

b. It was also proven from the fact that they were charged under section 6(1)(c) of the Immigration Act; and

c. that the Order of Removal under section 33(1) of the Immigration Act has been issued against the ten (10) Indonesians.

[10] From the evidence of PW5 and the deposition of the ten (10) Indonesian citizens, the learned High Court Judge made following inferences:

i. the ten (10) Indonesians had entered Sarawak illegally and had worked in the oil palm plantations.

ii. the ten (10) Indonesians had no valid passports or any valid travelling documents. They wanted to return to Indonesia.

iii. PW5 was offered the job of transporting the ten (10) Indonesians from a sawmill in Bintulu to Serian bus station. The ten (10) Indonesians admitted in their depositions that from Serian, they will use the illegal route (jalan tikus) to enter Indonesia.

iv. PW5 did receive a call from Hadi on 8.4.2021 instructing him to pick up the ten (10) Indonesians at the sawmill. PW5 did pick up the ten (10) Indonesians and transported them inside the cargo compartment of the bonded truck.

v. PW5, his assistant, and the ten (10) Indonesians were stopped and arrested at Lachau.

[11] The learned HCJ then went on to consider what is the nexus between the Appellant and the act of smuggling of migrant. Based on the evidence before the court, the HCJ was of the considered opinion that the Appellant had facilitated the commission of the act of smuggling of migrants **by offering the job to transport the ten (10) Indonesians to PW5 and also by giving PW5's handphone number to Hadi**. Upon PW5 receiving the telephone call from Hadi, PW5 was able to go and pick up the ten (10) Indonesians at the sawmill at Bintulu and transported them to Serian before they were arrested by the police at Lachau. **Without first securing the services of PW5 to transport the ten (10) Indonesians, Hadi would not have any means to send them to Serian before their unlawful exit from Malaysia**.

[12] It was the learned HCJ's opinion that there was credible evidence that the Appellant had facilitated, directly or indirectly, the unlawful exit of the ten (10) Indonesians (not being the citizen or permanent resident of Malaysia).

[13] For issue (iv), the learned HCJ found that PW5's evidence stating that the Appellant had told him that someone would call him (PW5) regarding the transportation of the ten (10) Indonesians was not challenged by the Appellant. The Appellant also did not challenge PW5's evidence of the discussion between him and PW5 whereby the Appellant was said to have offered PW5 the job to transport Indonesian citizens to be sent to Serian. Further, from PW5's testimony, it was reasonable to infer that the Appellant knew that PW5 was a lorry driver. As such, it is unreasonable for him to offer a job to PW5, a lorry driver, to transport people instead of goods from Bintulu to Serian.

[14] The bonded truck driven by PW5, as can be seen from the photographs Exhibit P2(3), (4), (5), and (6), was meant to transport frozen items. PW5 stated that his job involved transportation of MCD supply which, during cross-examination, he explained that MCD stands for Mc Donald. The learned HCJ found it safe for the court to assume that Mc Donald is the fast food restaurant operating all over Malaysia. Hence, while it is not reasonable for the Appellant to offer PW5 to transport people from Bintulu to Serian, it makes no sense if such job is offered to a driver of a bonded truck designed for transporting frozen goods. The only explanation why a bonded truck was used to transport the ten (10) Indonesians is to **deceive the enforcement agencies from detecting their illegal activities**.

[15] From the evidence adduced by the prosecution, the learned HCJ made an inference that the Appellant had the knowledge that the ten (10) Indonesians were about to exit Malaysia unlawfully. The surrounding facts of the case show that the Appellant was using PW5 to arrange for the unlawful exit from Malaysia. It was the learned HCJ's view that the element of knowledge can be proven by way of inference from the surrounding facts and circumstances of the case as decided in *PP v Badrulsham Bin Baharom* [1988] 2 MLJ 585. Hence, the Learned HCJ found that ingredient (iv) was proven by the prosecution.

[16] As for issue (v), the evidence led by the prosecution clearly shows that the Appellant had played an important role in facilitating the unlawful exit of the ten (10) Indonesians. By offering PW5 the job to transport the Indonesian citizens with promise to pay him for the job and by informing PW5 that someone will contact him (PW5) regarding the transporting of the ten (10) Indonesians, the Appellant had in fact collaborated with one Hadi in coordinating the picking up of the ten (10) Indonesians at a sawmill at Bintulu thereafter transporting them to Serian before the ten (10) Indonesians could exit Malaysia through illegal route. The learned HCJ took note that the Appellant did not really challenge the evidence of PW5. There was also no challenge on the admissibility of the depositions of the ten (10) Indonesians. In the circumstances, there is credible evidence that the Appellant had facilitated in the act of unlawful exit of the ten (10) Indonesians.

[17] At the end of the prosecution stage, the learned HCJ found no reason to disbelieve the evidence adduced by the prosecution's witnesses. Their evidence was consistent and not inherently improbable. The learned HCJ then concluded that the prosecution has established a prima facie case against the Appellant and ordered the Appellant to enter his defence.

Defence Stage

[18] In entering his defence, the Appellant gave evidence on oath. In support of his defence, he called two (2) other witnesses to testify. Having carefully considered the evidence adduced on behalf of the Appellant, the learned HCJ found that the crux of the Appellant's defence was a

bare denial. In his evidence, the Appellant maintained that he was not present at Simpang Amir, Lachau where PW5 and the Indonesians were arrested by the police on 8.4.2021. He denied knowing PW5 and claimed that he was at the construction site at all times in March 2021. Only at this stage did the Appellant dispute PW5's evidence that he is also known as Igat and that they knew each other from the WhatsApp chat group "Berpangan Jauh Menua".

[19] The learned HCJ stressed that, except for the fact that he did not know PW5, the Appellant had never challenged PW5 on the important facts pertaining to the ingredients of the offence as discussed earlier. For example, PW5 was never challenged on the offer made by the Appellant for PW5 to transport Indonesian citizens and that PW5 would be paid by way of online transfer. The Appellant too, never challenged PW5's evidence that he had instructed PW5 to pick up the Indonesians.

[20] The learned HCJ formed the view that the failure to cross examine PW5 would effectively confirm the prosecution's case that the Appellant had offered PW5 the job to transport the ten (10) Indonesians and that the Appellant had arranged for Hadi to call PW5 in coordinating the transportation of the ten (10) Indonesians at the sawmill in Bintulu, which in essence, constitutes the act of smuggling of migrant in the context of the offence under section 26A of the Atipsom Act.

Defence of alibi

[21] In the course of his deliberation, the learned HCJ had also considered the Appellant's defence of alibi by referring to the definition of "smuggling of migrants" under section 2 provides, among others, that the act of arranging, facilitating, or organizing may be committed either "directly or indirectly" by the Appellant. Based on the said definition, it was concluded that the offence under section 26A can be committed even if the Appellant was not present at the scene of crime. The relevant question to be considered is whether the act committed by the Appellant is related to the unlawful exit of the ten (10) Indonesians. Hence, the defence of alibi was not relevant in this case.

PW5 is an accomplice

[22] In his deliberation, the learned HCJ found that PW5 was obviously an accomplice. However, as the evidence of PW5 was not seriously challenged by the accused, the learned HCJ concluded that notwithstanding the fact that PW5 was an accomplice, he is a credible and reliable witness.

Failure to call Hadi as a witness

[23] This issue was also deliberated and taken into consideration by the learned HCJ. The defence had submitted that the court should invoke the adverse presumption under section 114(g) of the Evidence Act against the prosecution for failing to call Hadi as a witness. According to counsel for the Appellant, Hadi is a material witness and key person to be investigated. Since Hadi was the mastermind of this case, the prosecution should by all means locate him and produce him either as an accused person or as a witness.

[24] On this issue, the learned HCJ found that this issue was not raised at the end of the prosecution's case and was an afterthought. While the learned defence counsel did suggest to the Investigating Officer (PW7) that Hadi was the mastermind in this case, he did not challenge PW7 on his investigation regarding the role of Hadi. Neither did the defence suggest that Hadi is a fictitious person.

[25] The learned HCJ further opined that even without the evidence of Hadi, the prosecution has successfully proved a prima facie case against the Appellant. Thus, it was concluded that adverse inference under section 114(g) should not be invoked against the prosecution.

CONCLUSION AND SENTENCE OF THE HIGH COURT

[26] Having considered the evidence as a whole, the learned HCJ was of the opinion that the Appellant had failed to raise any reasonable doubt on the prosecution's case and that the prosecution has successfully proved its case beyond reasonable doubt against the accused. The Appellant was found guilty and convicted as per the charge.

[27] In passing sentence, the learned HCJ took into consideration the fact that the offence committed is a serious offence simply because it is classified / categorized under the SOSMA. Hence, public interest demands that severe punishment to be imposed on the Appellant person. The learned HCJ also considered the mitigating factors as submitted by learned counsel for the Appellant especially the fact that the Appellant was a first-offender and he had been remanded for almost one year (from his arrest on 22.4.2021) before the learned counsel made an application for bail. He was released on bail on 8.3.2022. It was the learned HCJ's view that the court must weigh the public interest in the light of the Appellant's mitigating factors so as to arrive at a just sentence.

[28] At the end of day, the learned HCJ sentenced the Appellant to six (6) years imprisonment.

THE APPEAL

[29] In his written submission, learned counsel for the Appellant raised several issues in support of the appeal.

> ***First issue:***
>
> *The Trial Judge erred in law and fact by failing to classify main/key prosecution witness (PW5), Mohd Arizan Bin Abdullah, the lorry driver transporting 11 illegal immigrants, as an accomplice*.

[30] PW5 was the sole driver of the 10-ton lorry with registration no. QBE2236 bearing the Syarikat KFF Logistic Sdn. Bhd. logo, which was found carrying 11 illegal immigrants in its cargo section during an inspection by Sgt. Wilson Anak Aman (PW3). PW5 is therefore an accomplice in this case.

[31] Referring the decision *of Lord Simonds in Davies vs DPP* [1954] 1 ALL ER 507 that an accomplice is participes criminis (parties to a crime), the Appellant submitted that PW5 is an accomplice who participated in the commission of the crime but was later invited by the prosecution to give evidence against the accused person.

[32] The Appellant also referred to the case of *Chao Chong & Ors vs PP* [1960] 1 MLJ 238, where Thompson CJ held that the test for determining whether a witness is an accomplice is not merely whether the witness could be convicted for the offence, but whether, having regard to his participation in the offence and to all circumstances of the case, his evidence was to be regarded with suspicion and as possibly so tainted as to invite if not to demand corroboration before it was accepted.

[33] The Appellant then referred to Section 133 of the Evidence Act 1950 and Section 114(b) of the Evidence Act 1950. According to the Appellant under Section 133 of the Evidence Act 1950, an accomplice is a competent witness and a conviction can be based solely on their testimony. However, read together with Section 114(b), the law presumes that an accomplice is unworthy of credit unless corroborated in material particulars. Further reference was made to the decision of Hasan Lah JCA in *Chong Chee Liong v PP* [2008] 2 MLJ 797, who quoted Sarkar on Evidence (14" Edn) at p 1924 in giving reasons as to why the evidence of accomplice is not reliable.

[34] Based on the above, the Appellant submitted that PW5 who is the sole and key witness in the case against the Appellant, is an accomplice witness who is unworthy of credit.

Second issue:

The Trial Judge erred in law and fact in admitting the evidence of PW5, an accomplice, and failed to warn himself as to the danger of convicting the Appellant in the absence of corroborated evidence.

[35] On this issue, the Appellant contended that PW5 had known a person nicknamed as **"Igat"**. During the trial, PW5 referred to "Igat" as the Appellant. However, PW5 never mentioned the real name of "Igat" raising the possibility that "Igat" was a fictitious identity.

[36] PW5 had testified that a person named **"Hadi"** instructed him to collect 11 immigrants in Bintulu on 8 April 2021, but the police never investigated this individual to corroborate PW5's claim regarding the existence of "Igat". It was argued that it created a break in the chain of evidence linking "Igat" to the Appellant.

[37] Appellant then referred to *PP v Sarjet Singh & Anor* [1994] 2 MLJ 290, where the Court held that although Section 133 of the Evidence Act stipulates that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice, the Courts have consistently held that the judgment must reflect awareness of the danger of so convicting. Similarly, in *R v Baskerville* [1916] 2 KB 658, it was established that failure of the Court to administer the warning is ground of appeal for the accused, where on appeal, the conviction shall be quashed.

Third issue:

The Learned Trial Judge erred in law and fact in admitting the evidence of PW5, without treating it with suspicion, notwithstanding that PW5 had an obvious motive to divert blame from himself to the Appellant.

[38] The argument put forth was that PW5, an accomplice, had an obvious interest in diverting blame from himself to the Appellant, having being called as a prosecution witness upon been convicted under Section 55E of the Immigration Act 1959/63.

Fourth issue:

The Learned Trial Judge erred in law and fact by failing to invoke the presumption under Section 114(b) of the Evidence Act 1950, *which provides that an accomplice is unworthy of credit unless corroborated in material particulars.*

[39] The Appellant contended that PW5 is an accomplice and pursuant to Section 114(b) of the Evidence Act 1950 that an accomplice is unworthy of credit unless he is corroborated in material particulars.

[40] it is an undisputed fact that PW5 was the driver of the lorry which carried the immigrants who was then charged and convicted under Section 55E of the Immigration Act 1959/63 and sentenced to six (6) years imprisonment together with the assistant driver (Duffson Anak Jeffryfin).

[41] Again, the case *Chong Chee Liong v PP* (*supra)* is referred by the Appellant, in supporting the contention that the evidence of accomplice is not reliable.

Fifth issue:

The Learned Trial Judge erred in law and fact by rejecting the Appellant's contention that an adverse inference should be drawn against the prosecution for failing to call "Hadi", (the person identified by PW5), as the one who arranged for the 11 immigrants to be picked up in Bintulu.

[42] The Appellant contended that Insp. Santro Mathew Latius – the Investigating Officer (PW7) failed to investigate or call "Hadi", who was identified by PW5, as the person who arranged the collection of the immigrants in Bintulu. The Appellant submits that, the absence of Hadi's evidence to corroborate PW5 is fatal to the prosecution's case, and an adverse inference should have been drawn against the prosecution in failing to call "Hadi" as a witness.

Sixth issue:

The Learned Trial Judge had erred in law and fact in his decision when he failed to consider the defence of alibi under Section 402A of Criminal Procedure Code *brought by the defence and dismissing the evidence of the alibi witness on the basis that the Appellant was allegedly indirectly involved*

[43] The Defence had raised the notice of alibi through two witnesses, Thomas Kanyan Anak Mengga and Usin Ak Ulah, who testified that the Appellant was working with them on 8 April 2021. The Appellant later surrendered himself to the police on 22 April 2021 after being instructed to report at Kuching Police Headquarters, before being escorted to Sri Aman on the same day.

Summary of the Prosecution's Submission

[44] In response to the Appellant's submission, the Prosecution contended as follows:

(i) there is overwhelming evidence to prove that the offence was committed by the Appellant. The prosecution submitted that to this Court should focus on the issue as to whether the Appellant facilitated, directly or indirectly, the unlawful exit of the said illegal migrants' exits from Sarawak to Indonesia rather than the involvement of other individual who also play a part in this illegal scheme.

(ii) On the credibility of PW5 and the role of "Hadi", the prosecution submitted that they were never put to or suggested to any of the Prosecution witnesses and were raised for the first time during submission at the close of the Prosecution's case. As such, the prosecution contended that the defence amounts to a mere afterthought and a bare assertion which is insufficient to cast any reasonable doubt on the Prosecution's case.

(iii) Failure to challenge or put relevant questions regarding a crucial part of PW5's evidence would amount to an acceptance of his testimony. The prosecution referred to the case of *Ranjit Singh Jit Singh v PP* [2012] 10 CLJ 128 and *Yusri Pialmi v PP* [2010] 6 CLJ 878.

(iv) that the Learned High Court Judge was correct in ruling that PW5 was a credible and truthful witness. It is well- established law that an accomplice is a competent witness against the accused, and a conviction is not rendered illegal merely because the Learned Judge relies on the uncorroborated testimony of an accomplice. In this appeal, based on the evidence adduced, the testimony of PW5 has, in fact, been corroborated by the Appellant's own cautioned statement (D37), which was admitted into evidence pursuant to section 18A of the Security Offences (Special Measures) Act 2012 ("SOSMA 2012").

(v) with regard to the issue on an adverse inference under section 114(g) of the Evidence Act 1950 against the Prosecution for its failure to call "Hadi" as a witness, the prosecution submitted that the learned High Court Judge had expressly stated his reasons for not drawing an adverse inference against the Prosecution.

(vi) The prosecution further submitted that the act of the Appellant clearly falls within the definition of act of smuggling of migrants. Even without Hadi's testimony, the Prosecution has adduced overwhelming evidence linking the Appellant to the offence.

(vii) On the issue of defence on alibi, the learned High Court Judge had considered the defence. The prosecution stood firm with the finding of the learned High Court Judge that the Notice of Alibi by the Appellant was irrelevant."

Statutory legislation

[45] At this juncture, we find it necessary to state the meaning of 'smuggling of migrants' as defined under the Atipsom Act.

[46] Section 2 of the Act defines "smuggling of migrants" as –

> "(a) arranging, facilitating or organizing, directly or indirectly, a person's unlawful entry into or through, or unlawful exit from, any country of which the person is not a citizen or permanent resident either knowing or having reason to believe that the person's entry or exit is unlawful; dan
>
> (b) recruiting, conveying, transferring, concealing, harbouring or providing any other assistance or service for the purpose of carrying out the acts referred to in paragraph (a)."

[47] It is of relevance to take note of Section 6 of the Immigration Act 1963 which reads:

> *"6. (1) No person other than a citizen shall enter Malaysia unless-*
>
> (a) *he is in possession of a* ***valid Entry Permit*** *lawfully issued to him under* section 10;
>
> (b) *his name is endorsed upon a* ***valid Entry Permit*** *in accordance with* section 12, *he is in the company of the holder of the Permit;*
>
> (c) *he is in possession of a* ***valid Pass lawfully*** *issued to him to enter Malaysia; or*
>
> (d) *he is exempted from this section by an order made under* section 55." (emphasis ours)

[48] Section 2 of the Immigration Act 1963 defines "Entry Permit" as "a Permit to enter and remain in Malaysia issued under section 10". Section 10 of the Immigration Act 1963 states that:

"10 (1) Any person seeking to enter Malaysia who is not entitled so to enter as a citizen or seeking to remain in Malaysia after the expiry of such a Pass may make an application in that behalf in the manner prescribed to the Director General or to such other person whether within or outside Malaysia as the Director General may, from time, appoint for the purpose.

(2) Upon application made under subsection (1) and upon payment of the prescribed fees the Director General may issue to the applicant an Entry Permit of such terms and conditions as the Director General may think fit in the prescribed form and shall, if the applicant is required by any written law relating to passports for the time being in forece in Malaysia to ***have a visa to enter Malaysia, issue a visa to the applicant*** *on the production by him of his passport or other travel document and on payment of the fee prescribed by the written law and the visa shall remain valid until the expiry or cancellation of the Entry Permit issued to him.*

(3) ……" (emphasis ours)

OUR FINDINGS

[49] First, is the contention that the High Court had convicted the accused on the basis of the uncorroborated testimony of an accomplice, and that the court had either committed an error of law in failing to warn itself of the dangers of doing so, or that the judge had come to a wrong finding of fact by giving undue weight to the testimony of PW5 (the accomplice).

[50] We are of the view that the identification evidence of PW5 was in fact corroborated by the cautioned statement recorded from the accused himself. This statement showed that the accused had in fact met with PW5, and that they had had a conversation pertaining to the transportation and conveying of the migrants. This was sufficient to establish an offence under section 26A of ATIPSOM. Thus, there was in fact corroboration of PW5's testimony, as found by the learned judge at the end of the prosecution's case (see E11/140). The cautioned statement recorded from the accused was admissible by reason of section 18A of SOSMA, which prevails over the provisions of the CPC relating to the admissibility of confessions (see *PP v Koh Chin Wah* [2022] 1 LNS 1877).

[51] Second, is the contention that the judge had failed to invoke an adverse inference under section 114(g) of the Evidence Act 1950 against the prosecution for its failure to call Hadi as a witness. Hadi was said to be the mastermind who had orchestrated the smuggling of the migrants in question. In this regard we are guided by the case of *Public Prosecutor v Sanderasegaran a/l Nithenanham* [2024] 3 MLJ 629 in which the Federal Court held as follows:

"It is settled law that the invocation of this provision is at the discretion of the court under the circumstances of the case. It can be drawn if there is withholding or suppression of material witnesses or documents. It is also applicable if the non-calling of the material witness or the non-production of the material document has created a gap in the prosecution case."

As decided by the Federal Court in the case of *Amri bin Ibrahim & Anor v Public Prosecutor and another appeal* [2017] 1 MLJ 1, the power of the court to draw an adverse inference under s 114(g) of the Evidence Act 1950 is discretionary. It depends on the circumstances of the case and particularly in cases where the material witnesses are not produced. The scope of s 114(g) has been explained by the Supreme Court in the case of *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 at p 494:

"… It is essential to appreciate the scope of s 114(g) lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to

obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case."

In our view, the offence was complete without the evidence of the involvement of Hadi. It is our view that even if the allegation by the accused that Hadi was the mastermind was true, it did not in any way exculpate the accused from the offence for which he was charged. To our minds, the narration of the prosecutions' case against the Appellant was complete despite the non calling of Hadi as a witness at the trial would not create gap in the prosecution case. This is sufficient to address the second ground of appeal.

[52] Third, Is the allegation that the Judge had come to a wrong finding of fact when he ruled that the defence of alibi was an afterthought. In this case, the alibi defence had not been put to the material witnesses of the prosecution during the prosecution's case. This offended the rule in *Browne v Dunn* (1894) 6 r 67, and hence the judge was correct to have ruled that the alibi defence was an afterthought. The requirement to put the defence case during the prosecution's case can be seen best in the decision of Raja Azlan Shah FCJ (as his Majesty then was) in *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 ; [1980] 1 LNS 138 at p. 213 paragraph B as re-produced below:

"Mr. Jagjit Singh also raised as one of his main grounds of appeal that the trial judge erred in law when he held that the failure of the defence to cross examine the two prosecution witnesses on the ammunition actually found in the trouser pockets of the appellant at the time of his arrest (the subject- matter of the third charge) constituted a ***clear admission*** *of the charge of possession by the appellant. We consider that statement of the law as a misdirection. A correct statement of the law is that failure of the defence to cross-examine the prosecution witnesses on the matter merely goes to the credibility of their testimony, to wit, the fact that they found the ammunition in the appellant's trouser pockets remains unshaken. On this point we need only say there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony. But as is common with all general rules there are also exceptions as pointed out in the judgment of the Supreme Court of New Zealand in Transport Ministry v Garry* [1973] 1 NZLR 120*, 122 where Haslam J. said at page 122:—*

> "*In Phipson on Evidence 11th edition paragraph 1544 the learned authors suggest examples by way of exception to the general principle that failure to cross-examine will amount to an acceptance of the witness's testimony, viz, where*
>
> *'… the story is itself of an incredible or romancing character, or the abstention arises from mere motives of delicacy … or when counsel indicates that he is merely abstaining for convenience, e.g., to save time. And where several witnesses are called to the same point it is not always necessary to cross-examine the mall.*'"

[53] We thus find that there is no appealable error by the High Court in convicting the appellant, and we dismiss the appeal, and affirm the decision of the court below.

Sentence imposed

[54] With regard to appeal against sentence, both the learned counsel of the appellant and the Public Prosecutor did not submit on sentence despite the notice of appeal being against both the conviction and sentence by the HCJ. Despite no submissions being proffered on this issue, we have also considered this matter and are of the considered opinion that a sentence of six years imprisonment for this offence was not manifestly excessive taking into consideration the nature of the offence which violate the sovereignty of this country.

REQUEST FOR STAY PENDING APPEAL

[55] Upon delivery of our decision, Mr. Jalin, counsel for the Appellant prayed for a stay of execution and ask for the appellant to be released on bail.

[56] The learned DPP had no objection but pray for RM30,000.00 bail with RM15,000 to be deposited.

[57] In the above premise, we unanimously allow the application for stay in the following terms:

(i) bail is set at RM30,000.00 with one surety; and

(ii) RM10,000.00 is to be deposited in Court by 22.4.2025.

[58] As the Appellant has already deposited a sum of RM5,000.00 in Court, only a balance of RM5,000.00 needs to be deposited. We order so accordingly.

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