Teoh Meng Kee v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-09-283-12 OF 2011
MOHAMAD ARIFF, MAH WENG KWAI AND HAMID SULTAN JJCA
5 SEPTEMBER 2014

Criminal Procedure — Coroner's inquiry — Revision — Revision of magistrate's decision — Deceased a political aide interviewed by Malaysian Anti-Corruption Agency — Deceased found dead after falling out of window — Inquiry of death — Magistrate returned with open verdict — Whether magistrate erred in returning open verdict — Whether verdict lawful — Standard of proof in inquiry of death — Whether proper verdict was death caused by person or persons unknown — Criminal Procedure Code ss 328 & 337

The deceased was a political aide to the State Assemblyman for Seri Kembangan ('the YB'). The Malaysian Anti-Corruption Agency ('the MACC') conducted an investigation on 15 July 2009 at about 3pm at the YB's office while the deceased arrived at the MACC office at about 6pm. The deceased was interviewed at the MACC office. The deceased stayed on to rest and did not go home. On 16 July 2009, he was found dead after falling out of a window on the 14th floor of the MACC office. A post-mortem revealed that the deceased had died from multiple injuries and was alive when he fell to his death. However, the police classified it as a sudden death. An inquiry into the deceased's death conducted by the magistrate returned an open verdict. The magistrate had predicated his open verdict on the beyond reasonable doubt test. The deceased's brother ('the appellant') applied to the High Court for an order of revision to set aside the open verdict and to order a finding of unlawful killing. The application for revision was dismissed and the High Court confirmed the open verdict of the magistrate. Hence, the present appeal.

Held, allowing the appeal:

(1) (per **Mohamad Ariff JCA**) The judge and the magistrate had misdirected themselves on the law by misinterpreting the standard of the *Briginshaw* sliding scale, and ultimately applying the standard of proof beyond reasonable doubt when considering the allegations of death by suicide and death as a result of homicide, whereas the scheme and structure of the interlocking provisions under Chapter XXXII of the Criminal Procedure Code ('CPC') mandate a lower standard. The applicable standard should be the civil standard of proof on a balance of probabilities (see para 70).

(2) (per **Mohamad Ariff JCA**) The magistrate had placed insufficient emphasis on the surrounding circumstances and the strong

circumstantial evidence, by inordinately insisting on direct substantive proof. The strong, compelling evidence of the pre-fall injury pointed to some unlawful act/assault by a person, or persons, unknown. The failure by the magistrate and the judge to properly evaluate the conduct of the MACC officers concerned and the evidence of the conduct to allegedly cover up, led to a serious miscarriage of justice (see para 72).

(3) (per **Mohamad Ariff JCA**) The open verdict reached by the magistrate and affirmed by the judge was not the correct verdict in light of the factual matrix of the case and in consideration of the law on the standard of proof to be followed in an inquiry of death. Both the magistrate and the judge had erred in law and had misdirected themselves on the standard of proof required in an inquiry of death. The verdict of misadventure and suicide could be ruled out. As all the evidence pointed towards a verdict of homicide, the correct verdict to be returned by the magistrate in the inquiry and by the judge on revision was a verdict of death caused by a person or persons unknown (see para 106).

(4) (per **Mah Weng Kwai JCA**) Section 328 of the CPC does not stipulate what the standard of proof is that has to be applied in an inquiry of death. There is no provision in the CPC for an open verdict to be made. However, the return of an open verdict by a coroner has been part of the established jurisprudence in inquests under common law. Accordingly, an open verdict is a lawful verdict (see para 111).

(5) (per **Mah Weng Kwai JCA**) The deceased was not free to leave the MACC office as he pleased as he was under constructive arrest by the MACC officers. His death, whilst under the custody and control of MACC, amounted to custodial death. MACC owed the deceased a strict duty of care to ensure that he was kept safe at all times while under their custody. It was incumbent on the magistrate in the inquiry to have treated the deceased's death as a custodial death when arriving at an opinion (see para 108).

(6) (per **Hamid Sultan JCA**) The magistrate had no obligation to state who was criminally liable under the CPC. The threshold for the magistrate to determine the issue was low and reasonable suspicion itself was sufficient as opposed to beyond reasonable doubt or balance of probabilities in relation to standard of proof as it relates to who is criminally concerned only and not criminally liable (see para 121).

(7) (per **Hamid Sultan JCA**) The injury to the neck prima facie must have been caused in the MACC premise before his fall more so when there was expert evidence to support the conclusion. Whether that injury was homicidal assault or sufficiently fatal to cause death or was instrumental to the death of the deceased were secondary issues. The fact that the injury had been identified was sufficient to attract some level of criminal

liability against the MACC officers who were involved and a proper police investigation would have been warranted under the CPC, taking into consideration that MACC officers are not immune to such investigation under the law or Federal Constitution (see para 153).

(8) (per **Hamid Sultan JCA**) It will be abhorrent to the notion of justice and fair play to say nobody was culpable when there was clear evidence to say otherwise. MACC or the relevant officers being a responsible body simply could not disclaim liability when its officers had taken the deceased into custody and kept the witness throughout engaging in oppressive conduct which resulted in his death. If the oppressors had been lay persons, the oppressors would have been charged by the police and/or Attorney General's Chambers for murder or culpable homicide not amounting to murder. That was not done in this case which had resulted in a public outcry and such failure breached the rule of law and several provisions of the Federal Constitution (see para 155(c)).

[Bahasa Malaysia summary

Si mati adalah seorang setiausaha politik kepada Ahli Dewan Undangan Negeri Seri Kembangan ('YB'). Badan Pencegah Rasuah Malaysia ('BPRM') telah menjalankan siasatan pada 15 Julai 2009 lebih kurang 3 petang di pejabat YB manakala si mati telah tiba di pejabat BPRM lebih kurang pada pukul 6 petang. Si mati telah ditemu ramah di pejabat BPRM. Si mati duduk di situ untuk berehat dan tidak pulang ke rumah. Pada 16 Julai 2009, dia didapati mati selepas jatuh dari tingkap di tingkat 14 pejabat BPRM. Post-mortem mendapati bahawa si mati meninggal dunia disebabkan oleh beberapa kecederaan dan masih hidup bila dia mati terjatuh. Walau bagaimanapun, polis mengklasifikasikannya sebagai mati mengejut. Siasatan atas kematian si mati yang dijalankan oleh majistret dibuat dengan keputusan terbuka. Majistret telah mengasaskan keputusan terbuka beliau berdasarkan ujian melampaui keraguan munasabah. Abang si mati ('perayu') telah memohon ke Mahkamah Tinggi untuk perintah semakan mengetepikan keputusan terbuka itu dan untuk perintah dapatan pembunuhan yang menyalahi undang-undang. Permohonan untuk semakan telah ditolak dan Mahkamah Tinggi mengesahkan keputusan terbuka majistret. Justeru, rayuan ini.

Diputuskan, membenarkan rayuan:

(1) (oleh **Mohamad Ariff HMR**) Hakim dan majistret telah tersalah arah dari segi undang-undang kerana membuat tafsiran salah piawai skala hitung *Briginshaw*, dan akhirnya mengunapakai piawai bukti melampaui keraguan munasabah apabila mengambil kira dakwaan mati kerana membunuh diri dan mati akibat dibunuh, manakala skima dan struktur peruntukan-peruntukan yang saling berkait di bawah Bab XXXII Kanun Tatacara Jenayah ('KTJ') memandatkan piawai lebih rendah. Piawai yang terpakai sepatutnya piawai sivil berhubung bukti atas imbangan

kebarangkalian (lihat perenggan 70).

(2) (oleh **Mohamad Ariff HMR**) Majistret telah meletakkan penekanan yang tidak mencukupi berhubung keadaan sekeliling dan keterangan mengikut keadaan yang kukuh, dengan berkeras untuk bukti substantif secara langsung. Keterangan kukuh dan menarik berhubung kecederaan sebelum jatuh menunjukkan tindakan/serangan yang menyalahi undang-undang oleh seseorang, atau orang-orang, yang tidak diketahui. Kegagalan oleh majistret dan hakim untuk menilai sewajarnya tingkah laku pegawai-pegawai BPRM berkenaan dan keterangan berhubung tingkah laku yang dikatakan untuk menyembunyi, membawa kepada keadilan yang tidak dilaksanakan dengan serius (lihat perenggan 72).

(3) (oleh **Mah Weng Kwai HMR**) Keputusan terbuka yang dibuat oleh majistret dan disahkan oleh hakim bukan keputusan yang betul berdasarkan fakta matriks kes dan dengan mempertimbangkan undang-undang berdasarkan piawai bukti untuk diikuti dalam siasatan berhubung kematian. Kedua-dua majistret dan hakim telah terkhilaf dari segi undang-undang dan telah salah arah berdasarkan piawai bukti yang dikehendaki dalam siasatan berhubung kematian. Keputusan kecelakaan dan bunuh diri boleh ditolak. Oleh kerana semua keterangan menunjukkan keputusan berhubung kematian itu disebabkan oleh seseorang atau orang-orang yang tidak diketahui (lihat perenggan 106).

(4) (oleh **Mah Weng Kwai HMR**) Seksyen 328 KTJ tidak menetapkan apakah piawai bukti yang terpakai dalam siasatan kematian. Tiada peruntukan dalam KTJ untuk keputusan terbuka dibuat. Walau bagaimanapun, untuk kembali kepada keputusan terbuka oleh koroner adalah sebahagian daripada jurisprudens yang tetap dalam inkues di bawah *common law*. Sewajarnya, keputusan terbuka adalah keputusan yang sah (lihat perengan 111).

(5) (oleh **Mah Weng Kwai HMR**) Si mati tidak bebas untuk meninggalkan pejabat BPRM sesuka hatinya kerana dia di bawah tangkapan konstruktif oleh pegawai-pegawai BPRM itu. Kematiannya, semasa di bawah jagaan dan kawalan BPRM, menjadikan kematian dalam tahanan. BPRM mempunyai kewajipan berjaga-jaga terhadap si mati bai memastikan dia ditahan dengan selamat pada setiap masa semasa di bawah jagaan mereka. Adalah wajib untuk majistret dalam siasatan menganggap kematian si mati sebagai kematian dalam tahanan dalam membuat dapatan tersebut (lihat perenggan 108).

(6) (oleh **Hamid Sultan HMR**) Majistret tiada kewajipan untuk menyatakan siapa yang bertanggungjawab secara jenayah di bawah KTJ. Ambang untuk majistret untuk menentukan isu adalah rendah dan syak wasangka munasabah sendiri adalah mencukupi berbanding dengan melampaui keraguan munasabah atau imbangan kebarangkalian tentang

A piawai bukti kerana ia berkaitan dengan siapa yang berkait dengan jenayah sahaja dan tidak bertanggungjawab secara jenayah (lihat perenggan 121).

(7) (oleh **Hamid Sultan HMR**) Kecederaan kepada leher prima facie pasti disebabkan dalam premis BPRM sebelum dia jatuh lebih-lebih lagi apabila terdapat keterangan pakar untuk menyokong kesimpulan itu. Sama ada kecederaan itu serangan homosidal atau cukup memudaratkan untuk menyebabkan kematian atau memainkan peranan penting dalam kematian si mati adalah isu-isu sekunder. Fakta bahawa kecederaan itu telah dikenalpasti adalah mencukupi untuk menarik beberapa peringkat liabiliti jenayah terhadap pegawai-pegawai BPRM yang terlibat dan siasatan polis yang sewajarnya adalah wajib di bawah KTJ, dengan mengambil kira bahawa pegawai-pegawai BPRM tidak kebal daripada siasatan tersebut di bawah undang-undang atau Perlembagaan Persekutuan (lihat perenggan 153).

(8) (oleh **Hamid Sultan HMR**) Ia akan menjadi kekejian bagi konsep keadilan dan adil untuk mengatakan tiada siapa yang bersalah apabila ada bukti jelas mengatakan sebaliknya. BPRM atau pegawai-pegawai berkaitan yang merupakan badan bertanggungjawab tidak boleh sewenang-wenangnya melepaskan tanggungjawab apabila pegawai-pegawainya telah meletakkan si mati dalam jagaan dan menahan saksi sepanjang masa itu dan bertindak secara menindas sehingga mengakibatkan kematiannya. Jika penindas-penindas adalah orang biasa, penindas-penindas itu mungkin akan dikenakan pertuduhan oleh polis dan/atau Jabatan Peguam Negara untuk pembunuhan atau homosid salah bukan pembunuhan. Ini tidak berlaku dalam kes ini yang mengakibatkan bantahan awam dan kegagalan tersebut melanggar rukun undang-undang dan beberapa peruntukan Perlembagaan Persekutuan (lihat perenggan 155(c)).]

Notes

For cases on coroner's inquiry, see 5(2) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 3558–3561.

Cases referred to

Anderson v Blashki [1993] 2 VR 89, SC (refd)
Anthony Chang Kim Fook deceased, Re [2007] MLJU 1; [2007] 2 CLJ 362, HC (refd)
Briginshaw v Briginshaw (1938) 60 CLR 336, HC (consd)
Derek Selby, deceased, Re [1971] 2 MLJ 277 (refd)
Fazal Din v PP [1949] MLJ 123 (distd)
Ganga Gouri a/p Raja Sundaram v PP [2014] AMEJ 0714, CA (refd)
Ganga Gowri a/p Raja Sundram lwn Pendakwa Raya [2012] 9 MLJ 733, HC (refd)

In Re Anthony Chang Kim Fook, Deceased [2007] MLJU 1; [2007] 2 CLJ 362 (refd)
Inquest into the death of Sujatha Krishnan, Deceased, in Re [2009] 5 CLJ 783 (refd)
Inquest into the death of Azaria Chantel Loren Chamberlain [2012] NTMC 020 (refd)
Inquest into the death of Charmaine Margaret Dragun (Coroners Court, New South Wales, File No 2000/07) (refd)
Inquest into the death of Liam Richard Vidler-Cumming (Coroner's Court, Brisbane, File No Bris-Cor 175/01) (refd)
Inquest into the death of Sridhar Shekar (Office of State Coroner, Southport, File No Cor 2454/08(4)) (refd)
Jayasena v R [1970] AC 618 (refd)
Loh Kah Kheng (deceased), Re [1990] 2 MLJ 126, HC (refd)
Pendakwa Raya v Kang Ho Soh [1992] 1 MLJ 360, HC (refd)
PP v Shanmugam & Ors [2002] 6 MLJ 562 (refd)
PP v Kulasingam [1974] 2 MLJ 26 (refd)
PP v Mohd Aszzid Abdullah [2008] 1 MLJ 281, HC (refd)
PP v Puspanathan a/l Sinnasamy & Ors [1996] 4 MLJ 165, HC (distd)
PP v Shahrael Amir Suhaimi [2014] 1 LNS 428, CA (refd)
PP v Shanmugam & Ors [2002] 6 MLJ 562, HC (refd)
PP v Shee Chin Wah [1998] 5 MLJ 429, HC (refd)
PP v Yuvaraj [1969] 2 MLJ 89, PC (refd)
R v Huntbash, ex p Lockley [1944] KB 606 (refd)
R v South London Coroner, ex p Thompson (1982) 126 Sol Jo 625 (refd)
Rumie Mahlie, decd, Re [2007] MLJU 280; [2007] 10 CLJ 697, HC (refd)
Shaaban & Ors v Chong Fook Kam & Anor [1969] 2 MLJ 219, PC (refd)
State of Madya Pradesh v Shyamsunder Trivedi & Ors [Appeal (crl) 217 of 1993] (refd)
Teay Wah Cheong v PP [1964] 1 MLJ 21 (distd)
Teoh Beng Hock, Re [2010] 1 MLJ 715; [2010] 2 CLJ 192, HC (refd)
Richard Evans & Co Ltd v Astley [1911] AC 674, HL (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 31, 50(2)
Criminal Procedure Code ss 323, 323(1), 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 341A
Criminal Procedure Code [IND] s 176
Federal Constitution arts 5(1), 8(1), 145(3)
Inquests Ordinance 1959
Inquests Ordinance (Cap 48)
Malaysian Anti-Corruption Commission Act 2009 s 30
Marriage Act 1928 [AUS]
Penal Code s 34

Appeal from: Criminal Review No 43–4 of 2011 (High Court, Shah Alam)

Gobind Singh Deo (Malik Imtiaz Sarwar, Mohd Haijan Omar and Joanne Chua Tsu Fae with him) (Gobind Singh Deo & Co) for the applicant.

Mohamad Abazafree bin Mohd Abbas (Nadia Hanim bt Mohd Tajuddin, Kee Wei Lon, Farah Ezlin bt Yusof Khan, Lim Kean Cheong and Al Muhammad Mukmin Abd Ghani with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Mohamad Ariff JCA:

[1] I have had the benefit of reading the separate judgments of my learned brothers, Mah Weng Kwai JCA and Hamid Sultan Abu Backer JCA, with whom I agree that this appeal from the decision of the learned judge in the High Court should be allowed.

[2] This is my separate judgment in which I wish to add to, and qualify, a number of issues addressed by my learned brothers.

PROCEDURAL BACKGROUND

[3] This appeal is an appeal against the decision of the learned High Court judge who heard the matter in His Lordship's revisionary jurisdiction (under s 341A of the Criminal Procedure Code ('CPC')) over the decision/verdict of the learned magistrate sitting as a coroner to inquire into the cause of death of one Teoh Beng Hock. The sudden death report was referred to the magistrate by the public prosecutor under s 339 of the CPC. The magistrate conducted the inquiry/inquest under s 337 of the same.

[4] The learned magistrate arrived at an open verdict after a very lengthy inquiry.

The CPC provisions

[5] For reasons that will become apparent later in this judgment, it will be relevant to consider the exact terms of these relevant provisions of the CPC. I reproduce the relevant parts below:

> S 339 Power of public prosecutor to require inquiry to be held.
>
> (1) The public prosecutor may at any time direct a magistrate to hold an inquiry under this Chapter into the cause of, and the circumstances connected with, any death such as is referred to in sections 329 and 334, and the magistrate to whom such direction is given shall then proceed to hold an inquiry and shall record his

finding as to the cause of death and also as to any of the circumstances connected with it with regard to which the public prosecutor may have directed him to make inquiry ...

S 337 Inquiries to be made by magistrate.

A magistrate holding an inquiry shall inquire when, where, how and after what manner the deceased came by his death and also whether any person is criminally concerned in the cause of the death.

[6] These provisions are broadly formulated, and it would appear, at least from the statutory wording, that the mandate of the magistrate sitting as a coroner extends beyond finding the immediate cause of death.

[7] For contextual purposes, it will be also appropriate at this juncture to consider as well s 328 which provides the statutory 'meaning' of 'cause of death', as follows:

328 Meaning of 'cause of death'

In this Chapter the words 'cause of death' include not only the apparent cause of death as ascertainable by inspection or post-mortem examination of the body of the deceased, but also all matters necessary to enable an opinion to be formed as to the manner in which the deceased came by his death and as to whether his death resulted in any way from, or was accelerated by, any unlawful act or omission on the part of any other person.

[8] I am reproducing these provisions in full to underline the thrust the appeal has taken. Subsequent to the promptings by this panel, counsel for the parties have submitted at length on the underlying principles to give meaning and effect to our own rules of law, as against the available comparative jurisprudence — in our case, the laws in the United Kingdom, the Australian States and India.

The criminal revision proceedings

[9] It has to be noted that this death inquiry under the CPC has attracted much public attention, and has been described generally by the public as 'the Teoh Beng Hock's case.' The family of the deceased, being dissatisfied with the verdict of the magistrate sought a review of the verdict before the High Court judge. The High Court heard the review proceedings/criminal revision under s 341A on the application of the deceased's brother, Teoh Meng Kee, who is the present appellant. By the operation of s 31 of the Courts of Judicature Act 1964 and s 323 of the CPC, a High Court judge 'may call for and examine the record of any proceeding before any subordinate criminal court for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings

of that subordinate court' (subs (1) of s 323).

The decision of the High Court

[10] The High Court judge after reviewing the record agreed with the verdict of the magistrate, and dismissed the application for criminal revision. Basically, the High Court judge was satisfied that the findings of the magistrate were correct and he had applied the correct standard of proof, to use His Lordship's nomenclature on a 'sliding scale'.

[11] I personally have my doubts whether the learned judge has applied the so-called 'sliding scale' correctly. I will return to this issue later in this judgment.

[12] The judgment of the High Court is fairly brief. To appreciate it better, I reproduce below the important parts bearing on the issue of proof:

> 9. Mahkamah berpendapat bahawa coroner dalam kapasitinya sedemikian hendaklah di dalam menentukan isu-isu dan perkara-perkara yang melibatkan jenayah, membuat keputusan berdasarkan keterangan dan fakta. Fungsi coroner adalah terhad dan beliau tidak boleh membuat rumusan sendiri tanpa keterangan atau fakta yang terang dan nyata kerana tugas coroner bukan seperti perbicaraan biasa di mana terdapat pendakwaan dan juga terdapat Orang Kena Tuduh. Di mana saksi-saksi datang dengan dua bentuk versi pada lazimnya iaitu Saksi Pendakwaan untuk mensabitkan Tertuduh atas pertuduhan dan Pembelaan pula untuk menimbulkan keraguan munasabah supaya OKT terlepas daripada tuduhan.
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> 10. Di perbicaraan jenayah, semua perkara-perkara adalah terikat dengan peruntukan undang-undang seperti, contoh Kanun Acara Jenayah di mana prinsip-prinsip undang-undang dan keterangan dan sebagainya adalah kukuh dan ketat sedangkan ini tidak terpakai kepada satu inkues di hadapan seorang coroner, iaitu pengikutan kepada peraturan ketat di bawah Kanun Acara Jenayah, contohnya tidak diperlukan.
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> 11. Seorang coroner boleh mengambil dan menerima keterangan-keterangan, contohnya hearsay (dengar cakap) ataupun keterangan sekunder tanpa perlu memegang kepada prinsip-prinsip yang ketat di bawah undang-undang yang sedia ada berkaitan dengan perbicaraan. Namun demikian, beliau terikat dengan apa yang ditakrifkan sebagai the sliding scale. Disatu sudut, tidak perlu mematuhi keperluan undang-undang yang ketat tetapi di aspek lain pula sebagai contohnya apabila criminality itu hendak diandaikan ke dalam mana-mana perbuatan, maka tahap pembuktian yang diperlukan adalah tahap yang biasa digunakan untuk pembuktian kes jenayah iaitu melampaui keraguan munasabah dan bukan di atas imbangan kebarangkalian. Walaupun di satu aspek ianya longgar tetapi ianya juga menjadi ketat apabila criminality hendaklah diputuskan.
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> 12. Mahkamah telah meneliti keterangan-keterangan yang diberikan dan Mahkamah berpendapat bahawa coroner yang telah mendengar dan meneliti dan menilai keterangan dan telah melihat semua saksi-saksi telah membuat keputusan yang betul dan tepat ...

[13] As can be readily appreciated from the passages quoted above, the learned judge basically came to a view that the magistrate had correctly assessed the evidence and the facts, and applying the standard of proof required, namely proof beyond reasonable doubt (the highest end of the 'sliding scale', since criminality was involved), came to the correct verdict, which in this case, was the 'open verdict'. In this brief excerpt too, one can appreciate how the learned judge in fact correctly described the nature of the jurisdiction and powers of the coroner, restating many of the accepted rules as elaborated in case authority (although none appears to be cited), such as (a) the jurisdiction is inquisitorial and of limited scope with a view to ascertain the cause of death based on clear evidence and proven facts, not suspicion, and (b) nevertheless, in exercise of this jurisdiction, the coroner is not bound by the rigid rules of evidence and may even accept hearsay, (c) the jurisdiction is both less rigid in relation to the reception of evidence but very strict in the evaluation of such evidence in the necessity to decide only on clear evidence and clear proven facts, and (d) a verdict of the coroner, although generally can be made on the standard of balance of probabilities, must rely on the higher standard of proof beyond reasonable doubt where criminality is involved or suicide is being considered.

The leave to appeal and the questions framed

[14] Leave to appeal to this court was granted by another panel of this court on 2 February 2012, for the appellant to appeal on the following issues of law (as stated in the order granting leave, in its original Bahasa Malaysia):

(a) Samada coroner yang menjalankan inkues di bawah Bab XXXII Kanun Acara Jenayah mempunyai bidang kuasa untuk bertindak ke atas inferen-inferen yang munasabah yang dapat dirumuskan melalui fakta-fakta sampingan yang dibuktikan melalui keterangan untuk membuat pencarian spesifik berkenaan sebab-sebab dan/atau keadaan-keadaan yang telah pun membawa kepada kematian mangsa.

(b) Samada coroner yang menjalankan inkues di bawah Bab XXXII Kanun Acara Jenayah terikat dengan prinsip matan undang-undang yang terpakai dalam kes-kes jenayah yang melarang satu pencarian dibuat berdasarkan keterangan yang menimbulkan syak wasangka.

(c) Samada coroner yang menjalankan inkues di bawah Bab XXXII Kanun Acara Jenayah di mana keterangan dengan jelas menunjukkan bahawa mangsa tidak membunuh diri, boleh bertindak, di dalam keadaan di mana wujud keterangan menunjukkan bahawa mangsa dikasari oleh pihak-pihak yang disyaki menyebabkan kematian mangsa, beserta keadaan-keadaan sekeliling lain yang menjurus kepada perasaan syak wasangka yang kuat, membuat pencarian bahawa sebab kematian adalah homisid.

[15] This present panel is thus presented with some important questions to decide: First, whether the coroner has the jurisdiction to rely on inferences from the evidence and rely on indirect/ancillary evidence (*keterangan sampingan*) to come to a specific finding on the cause of death and/or the circumstances which led to the death of the victim.

[16] Second, whether the coroner is bound under Chapter XXXII of the CPC by the accepted principle in criminal cases which prohibits a finding to be made where there exists a reasonable doubt.

[17] Third, whether the coroner, in exercising his jurisdiction, where the evidence clearly shows the victim did not commit suicide, can come to a finding of homicide where there exist evidence of ill-treatment by suspected persons, together with overall circumstantial evidence, which raise a strong suspicion of homicide.

[18] Aside from the wide public interest generated by this case, this appeal raises a number of important issues of law relating to coronial powers and jurisdiction (reflected in the issues framed in the leave application), and these have been fairly extensively discussed and analysed in several High Court decisions in this country. However, these issues, as far as we know, have not been argued before, and decided by, our Court of Appeal, except in a recent Court of Appeal decision in *Ganga Gouri a/p Raja Sundaram v Public Prosecutor* [2014] AMEJ 0714, where my learned brother Justice Dr Hamid Sultan Abu Backer was a member of the panel. My learned brother wrote a dissenting opinion in that case, and in that opinion, touched on the issue of whether it is open to a magistrate acting as a coroner under the provisions of the CPC to come to an open verdict. My learned brother was of the view there that under the scheme of our CPC, this option of an open verdict was not available. Aside from this, there are the other important issues of the applicable standard of proof to be applied in a coronial inquest and the width of coronial jurisdiction in this country within the scheme of the CPC. These will be separately addressed later in this judgment, but first, a summary factual background requires consideration.

BRIEF BACKGROUND FACTS

[19] The body of the deceased was found on the 5th floor service corridor of Plaza Masalam ('the Plaza'), Shah Alam in the afternoon of 16 July 2009, about 1pm–1.30pm by a cleaner. The immediate cause of death, as determined by the post-mortem reports, is death from multiple injuries consistent with a fall from a height. The Malaysian Anti-Corruption Commission ('MACC') had interrogated the deceased in the evening of 15 July 2009 until the early morning of 16 July 2009 on the 14th floor of the Plaza.

[20] It is not seriously challenged and an accepted finding that the fall was from the same 14th floor premises.

[21] The time of death, according to the medical evidence, was between 7.15am and 11.15am on 16 July 2009. This would be about 6–8 hours before the body was discovered.

[22] The deceased was last recorded seen alive by one Tan Boon Wah ('SI34') around 5am to 6am on 16 July 2009 somewhere in the pantry area on the 14th floor, and by one Raymond Nion ('SI23'), another MACC officer, outside his room at around 6am.

[23] There was an 'unexplained gap' (the term used by the magistrate) in the period from 6am to 1pm.

[24] The deceased arrived at the MACC office at the Plaza at 6pm on 15 July 2009. He had driven himself there after having been asked to be present there by the Investigating Officer of MACC, one Mohd Anuar bin Ismail ('SI16') ('IO'). The IO and four other MACC officers had gone to the SUK Building in Shah Alam earlier at around 3pm on 15 July 2009 to interview the deceased, who was the assistant of YB Ean Yong Hian, a State Assemblyman for Seri Kembangan, Selangor. The deceased had his office at the SUK Building. The MACC officers were investigating an alleged case of misuse of funds and wanted information on claim documents made by the said State Assemblyman. The MACC officers seized a laptop and CPU from the office.

[25] The deceased contacted his lawyer, Manoharan s/o Malayalam ('SI33') who came to advise him at SUK. Manoharan confirmed he did not see any injury on the deceased's person at that time.

[26] At the MACC office, the deceased had his handphone taken from him and he was also denied access to his lawyer, Manoharan, save for making one phone call to counsel.

[27] Four MACC officers (Mohd Hafiz Izhar, Mohamad Azhar Abang Mentaril, Mohd Najeib Ahmad Walat and Mohd Amin bin Mohamad) questioned the deceased. Between 6.30pm and 10pm, Mohd Najied was in contact with the deceased to obtain the password to access the CPU.

[28] Thereafter, at approximately 10.40pm Mohd Ashraf ('SI19') and Arman bin Alies ('SI29') started interviewing the deceased in a meeting room for about two hours.

[29] At around 1.30am, the deceased was brought by Mohd Nazri Ibrahim to his office for the deceased's statement to be recorded. It appeared that Mohd Nazri finished recording the written statement (under s 30 of the MACC Act) at around 3.50am. According to Mohd Nazri, he asked the deceased to go home then but the deceased told him he wanted to rest first on the sofa.

[30] Mohd Ashraf ('SI19') said he saw the deceased lying on the sofa in the *ruang tamu siasatan* at around 4.45am.

[31] The deceased was making arrangements to get married on 3 October 2009. Even on 15 July 2009 itself he had called one Woo Chuan Seng ('SI25) to request that Woo be his best man at the marriage. His girlfriend and future bride was also expecting their first child.

THE INQUIRY

[32] The magistrate, during the course of a long inquiry, heard and examined 37 witnesses who included 12 expert witnesses comprising one toxicologist, one chemist, one DNA specialist, one forensic analyst, one fingerprint specialist, one handwriting expert, and six forensic pathologists. The learned magistrate arrived at an open verdict.

The magistrate's open verdict

[33] Aside from addressing the identity of the deceased (identified and confirmed by the deceased's brother), the learned magistrate formed the opinion, based on the experts' evidence, that the deceased 'came to his death at approximately 7.15am to 11.15am on 16 July 2009'. As to the question 'where did the deceased die?' the learned magistrate found it 'irrefutable' that the deceased's body was found dead on the 5th floor service corridor of the Plaza, and observed that the deceased was alive 'before impacting the floor.' See p 15 of the verdict dated 5 January 2011 (I am reproducing the verdict as it stands unedited):

> Its (sic) irrefutable that the deceased body was found on the service corridor on the 5th floor of Plaza Masalam, Shah Alam and Dr Khairul Azman bin Hj. Ibrahim (SI10), Dr Prashant Naresh Sambekar (SI15), Dr Pomthip Rojasunan (SI30), Dr Shahidan Md Noor (SI31) and Professor Dr Peter Vanesis (SI32) have the same opinion that the deceased was alive before impacting the 5th floor.

[34] When addressing the question 'how and after what manner the deceased came to his death', the magistrate confirmed the opinions of all the pathologists that the cause of death was 'as a result of multiple injuries sustained by the deceased consistent with a fall from height.' The magistrate noted there were two theories advanced — suicide and homicide. The relevant passage in his verdict reads (unedited):

> As to how and after what manner the deceased died, there are two theories which dominate throughout the inquest propounded by interested parties ie family of the deceased and MACC, being death by homicide and death by suicide. Countless questions were asked of all the experts in the effort of establishing such theory. After the second post-mortem, the evidence of neck injury was the most crucial element to suggest death by homicide, although its been put forward by a single expert, whereas MACC relied heavily on the existence/discovery of 'suicide note' at the end stage of this inquest by the investigation officer ASP Ahmad Nazri bin Zainal (SI35).
>
> Notwithstanding such contradicting possibilities, as a coroner, I am duty bound to consider them in accordance with the proper test in place.

[35] Applying the standard of proof of beyond reasonable doubt, the magistrate ruled against finding suicide as well as homicide, and entered an open verdict.

[36] Suicide was ruled out since, according to the magistrate, to come to a finding of suicide, 'would entail some form of guesswork' on his part. The alleged suicide note was considered but the magistrate felt that 'at best' he could only *assume* that the deceased authored the note. See the following passage in the verdict (unedited):

> Was there a suicidal intention?
>
> Evidence from brother reveals that the deceased was supposed to get married soon, that he led a normal life and suffered no psychological illness ...
>
> Forensic pathologists Dr Prashant, was of the opinion that most likely that the deceased had committed suicide. However, this opinion needs to be corroborated with factual and direct evidence.
>
> A note was purportedly found in the deceased bag by ASP Nazri, marked as (1–168A), became fact in issue as to its content and whether it was in fact a suicide note.
>
> Handwriting expert, Wong Kong Yong (SI37) testified and produced 2 reports which were marked as (1–171) and (1–172). However, his evidence only goes as far as to establish that the writing in (1–168A) is similar to that documents found in the deceased's bag; two outstanding issues were not resolved:

A

a The documents have not been ascertained to contain deceased's handwriting.

b No samples of deceased's handwriting were obtained for the purpose of the examination of (I-168A) by Wong Kong Yong.

B

...

Watching brief counsel for MACC relied on the deceased's cautioned statement (SI69) as the reason for his suicidal action. It was assumed that he felt so guilty and was afraid to leave MACC office because he was ashamed that to face society especially his boss. It is also submitted that he was seen to be agitated, uneasy and looked guilty.

C

I regret to observe that no forensic psychiatrist did a report on the deceased state of mind or the impugned note (1-168A), an attempt was made at the earlier stage of inquest but was not successful. I don't think that as a coroner, I am qualified to make my own assessment purely from such assumption. At best, I can only assume that the note (1-168A) was authored by the deceased but I am not qualified to say that it's a suicide note ...

D

Thus, in considering suicide as a possibility to the deceased's manner of death, I find that there remain some unsettled issues which are still questionable and to fulfill this verdict of suicide would entail some form of guesswork on my part in order to connect the dots, so to speak, which I find not acceptable. I therefore rule out the verdict of death by way of the deceased committing suicide ...

E

[37] As for the second theory of homicide, much turned on the evidence of pre-fall injuries to the deceased's neck which came to light on the second post-mortem. The contention by the State of Selangor and the deceased's family was, as stated by the magistrate, 'the deceased was assisted/manually pushed/moved out of the window by unknown persons but most definitely MACC officers.' Assessing the evidence of the pathologists, the 'unchallenged evidence of scratch marks' on the sole of the deceased shoes, the pre-fall injury and the DNA report which found traces of a third person's DNA on the deceased's belt, the magistrate also ruled out a verdict of death by homicide. Again, it is best to see what the magistrate said exactly.

F

G

H

State and Family contentions were that the deceased was assisted/manually pushed/moved out of the window by unknown persons but most definitely MACC officers. Telling evidence was the bruise on neck came to light on second post-mortem in which Dr Shahidan bin Md Nor observed in his report (I-82):

I

A bruise on the left side of neck measured 4X3cm with underlying left platysma muscle contusion noted measured 4X3cm. The right platysma muscle was also contused measured 1X1 cm.

The conclusion in his report was that the injuries on the neck were most likely formed or produced by the impact of the fall. The pattern and severity of them were in keeping with the incident or event.

Subsequently, during examination on oath, he made further revelation that some force was applied as to the cause of the bruising on the neck. He also observed that the deceased had suffered a pre-fall injury which could have caused the deprivation of oxygen to his brain resulting in loss of consciousness and /or disorientation.

This view was shared by Dr Porntip and further she had opined that the deceased suffered blunt trauma to the neck.

Professor Dr Peter Venezis in his evidence also did not rule out the possibility of pressure to the neck region.

Counsel for Selangor State also referred to Dr Prashant's evidence regarding finger drag marks on the window as indicative of a person resisting a fall. However, no forensic examination was undertaken to prove such opinion.

Subsequently, Dr Shahidan had opined that the nature of the neck injury, could have caused a reduction in the level of oxygen reaching the deceased brain, causing a cerebral edema, mild or moderate hypoxia, confusion, fainting and decreased motor control. However, further confirmation by way of examining the edema was not possible as the neck tissue area had been dissected.

It is submitted that the consequences of such injury raise serious doubts as to the capability of the deceased exiting the window unassisted, both physically and mentally.

Dr Porntip had identified the type of ankle injuries as consistent with the fall of an unconscious or semi-conscious person due to the fact that multiple fractures were found on the right ankle only. She further concluded that the deceased could not have landed on his feet as suggested by Dr Prashant due to the lateral impact of the bones and the fact that no ring fracture was present on the skull and she used empirical evidence to support her finding that no linear fall on deceased feet had occurred and no evidence of injuries from 'transferred force'.

In addition, counsel also referred to 2nd DNA report by Dr Seah Lay Hong (SI19) concerning the DNA of 'one other unknown male contributor' was detected at deceased waistbelt as favouring the involvement of third party.

Counsel further suggested that the deceased body had fallen in a manner which was suggestive of him having been unconscious due to finding of flailed chest and lacerations on the chin.

I find that the theory suggesting deceased state of unconsciousness as not consistent with other pathologists. For instance, I refer to Dr Prashant's evidence regarding the tear on the seat of the deceased's trousers was caused by extension of the loin consistent with deceased landing on his feet, and other injuries suffered to the long bones as being consistent with deceased's 'guarding effect' ie conscious attempt to break his fall. Dr Porntip did not give her version as to the possibility of such occurrence if the deceased did not land feet first. There is also the unchallenged evidence of scratch marks at sole of the deceased shoes which were consistent with the deceased being in a sitting position on the window ledge, no evidence was given as to whether such posture is physically possible by a person in a state of unconsciousness.

> In furtherance of considering the neck injury, there was also the alleged suspicion of cover up being collectively done by MACC in denying that force was used on the deceased and in reference to the similar fact evidence of injury being inflicted on Sivanesan a/l Thangaveloo, and after evaluating the evidence of Dr Shahidan, Dr Porntip and Professor Dr Venezis, I find that there exist sufficient evidence to confirm this injury as a pre-fall injury. However, I also find that there is no sufficient evidence to confirm beyond reasonable doubt that this pre-fall injury did in fact, facilitate or result or contribute to the demise of the deceased.
>
> As for the 2nd DNA report, in the absence of direct factual evidence, to make assumption as to the existence of a third party ie other unknown male contributor in direct connection with the pre-fall injury is good as another guesswork which have no evidential value. I therefore rule out the verdict of death by way of homicide.

[38] Just as in the finding for suicide, the magistrate applied the standard of proof beyond reasonable doubt to the evidence indicating homicide, and ruled out the verdict of death by homicide. This verdict was found even though all pathologists agreed there was evidence of pre-fall injury to the deceased's neck, ie the bruise on the left side of neck measuring 4x3 cm 'with underlying left platysma muscle contusion.' Despite the strong evidence of this pre-fall injury confirmed during the second autopsy, the magistrate held there was insufficient evidence to confirm beyond reasonable doubt that this pre-fall injury facilitated or contributed to the death. Of particular interest is the finding that even the pathologist appointed by MACC 'did not rule out the possibility of pressure to the (deceased's) neck.'

[39] Dr Porntip, the expert pathologist appointed by the State Government of Selangor, was of the opinion that the neck injury was caused by blunt force trauma. The other pathologists were less specific, but Dr Shahidan was of the opinion that the nature of the neck injury could have caused a reduction in the oxygen level reaching the brain resulting in cerebral edema, mild or moderate hypoxia, fainting, confusion and decreased motor control. Counsel representing the family and the state government argued that in these circumstances, the deceased could not have possibly egressed the window on his own.

[40] Dr Porntip also held the view that the deceased did not land feet first, and was unconscious when falling, given the absence of colles fractures on the deceased's wrists, the flailed chest, lacerations on the chin, the presence of multiple fractures on the right ankle only, and the absence of any ring fracture on the base of the skull from a 'transferred force'.

[41] As against the evidence pointing to homicide, the magistrate referred to the tear on the seat of the deceased's trousers that was explained by Dr Prashant

as consistent with the deceased landing feet first resulting in an extension of the loin area. Mention was made as well to the injuries to the long bones resulting from a 'guarding effect'. The magistrate also emphasised the 'scratch marks' on the soles of the deceased's shoes as suggesting that he could have been in a sitting position on the window ledge. Then there was the suggestion of alleged finger drag marks on the glass window, but the magistrate discounted this evidence since no forensic examination had been conducted on these.

[42] The DNA evidence of a third party on the belt of the deceased was discounted since there was no direct actual evidence of the connection between the unknown male contributor and the pre-fall injury.

[43] Thus, the magistrate ultimately found both death by suicide and death by homicide not proven beyond a reasonable doubt. In these circumstances, the magistrate entered an open verdict.

[44] The important issue now is whether such an open-ended verdict is sound in law and serves to allay the legitimate interests of the family and the public as a whole in this sad episode.

[45] A young man, who was about to get married soon and was making arrangements to register his marriage, is found dead from multiple injuries which are said to be consistent with a fall from a height (a fall from the 14th floor of Plaza Masalam and the offices of the MACC) after he was investigated by the MACC from late afternoon into the early hours of the morning for a suspected offence relating to a misuse of funds allocated to a State Assemblyman involving a sum of less than RM2,000. The medical evidence strongly suggest a pre-fall injury to his neck. Death by accident or misadventure is ruled out. It can only be suicide or homicide, or if it was suicide, it will serve the public interest to know what and who drove the deceased to suicide, and what, or who, caused the pre-fall injury.

[46] I am of course mindful of the requirement of the law in relation to criminal revision jurisdiction, and this has been stated earlier in this judgment, that the court can exercise its jurisdiction only for the purpose of satisfying itself as to the correctness, legality or propriety of the verdict recorded and as to the regularity of the proceedings of the inquiry. However, in exercising this limited mandate, the court has to ascertain whether the law has been properly applied and satisfy itself whether any miscarriage of justice has been occasioned. In *Re Loh Kah Kheng (deceased)* [1990] 2 MLJ 126, Mohamed Dzaiddin J (as His Lordship then was) aptly said:

> The object of a revision is to satisfy the judge as to the correctness, legality, or propriety of any finding, sentence or order recorded or passed. In a revision, the main question to be considered is whether any order made by the lower court should be interfered with in the interest of justice *(Public Prosecutor v Kulasingam)* ...

[47] I now turn to address the applicable law, and in particular to consider the scheme of Chapter XXXII of the CPC and the question whether within this statutory scheme, the standard of proof for a verdict of death from suicide or from homicide (or any form of criminality, for that matter) must necessarily be proof beyond any reasonable doubt, and not the normal standard in an inquest of proof on a balance of probabilities.

THE LAW

[48] The learned magistrate, and to a lesser extent, the High Court judge, cited and repeated the basic principles and rules on coronial jurisdiction. These can be summarised quite easily, except the question of standard of proof to apply in cases of suicide and homicide, for which there exists some ambiguity in judicial understanding of the 'sliding scale'. The commonly accepted principles are as follows:

(a) an inquest is a fact finding exercise and not a method of apportioning guilt (*R v South London Coroner, ex p Thompson* (1982) 126 Sol Jo 625; referred to with approval in *In Re Anthony Chang Kim Fook, Deceased* [2007] MLJU 1; [2007] 2 CLJ 362 a decision of Sulong Matjeraie J (as His Lordship then was) in the High Court);

(b) in an inquest, there is no indictment, no prosecution, no defence and no trial. It is simply an attempt to establish facts;

(c) it is an inquisitorial and an investigation process, unlike a trial;

(d) a coroner's verdict is not determined by probabilities but by established facts. A coroner is bound by evidence and can only find facts proved by evidence, not guesswork (see *Public Prosecutor v Shanmugam & Ors* [2002] 6 MLJ 562, per Suriyadi J (as His Lordship then was) applying *R v Huntbash, ex p Lockley* [1944] KB 606; *Richard Evans & Co Ltd v Astley* ; [1911] AC 674 (see also *Ganga Gowri a/p Raja Sundram lwn Pendakwa Raya* [2012] 9 MLJ 733, which refers to 'conclusive proof');

(e) if the evidence is insufficient to come to a definite finding, the coroner should record an open verdict (see Sharma J in *Re Derek Selby, Deceased* [1971] 2 MLJ 277; and *Re Rumie Mahlie, decd* [2007] MLJU 280; [2007] 10 CLJ 697, per David Wong Dak Wah (as His Lordship then was));

(f) '... the function of a magistrate holding an inquiry under Chapter XXXII of the CPC is to inquire, when, where, how and after what manner the deceased came by his death and also whether any person is criminally concerned in the cause of death (s 337). The 'cause of death' is defined under s 328 to include not only the apparent cause of death as ascertainable by inspection or post-mortem examination of the body of the deceased but also all matters necessary to enable an opinion to be formed as to the manner in which the deceased came by his death and as to whether his death resulted in any way from, or was accelerated by any unlawful act or omission on the part of any person. Hence, the magistrate holds an inquiry by examining witnesses on oath and 'while usually following the ordinary rules of evidence, he may admit any evidence which he thinks fit, especially hearsay evidence ... '*Re Loh Kah Kheng,* at p 127 of the report;

(g) the verdict of the magistrate is 'only an expression of a non-binding opinion of a proceeding where there is no accusation against any party': *Re Rumie Mahlie*;

(h) it follows that a coroner's inquest is merely a 'court of law', not a 'court of justice.' Its verdict does not amount to any conviction.

(i) many of these principles are outlined in our Practice Directions No 1 of 2007: Guidelines on Inquest (as restated in Practice Direction No 2 of 2014 — *Arahan Amalan Bil 2 Tahun 2014: Pengendalian Siasatan Kematian (Death Inquiry) Selaras Denaan Penubuhan Mahkamah Khas Koroner*) To quote some of the parts immediately relevant to this appeal:

1. What is an Inquest?

(a) It is not a trial.

(b) There are no parties to prosecute and to defend.

(c) It is only an inquiry by a magistrate as to the cause of death and the Prosecuting Officer is there not to prosecute anyone but only to assist the court with the examination of witnesses for the purpose of giving evidence ...

(f) A magistrate Coroner shall not express any opinion on any matter until the conclusion of the inquest.

(g) There is no conviction or punishment at the end of it.

2. Matters to be ascertained at Inquest

The proceeding and evidence at an inquest shall be directed solely at ascertaining the following matters, namely:

(j) who the deceased was.

(k) How, when and where the deceased came by his death,

A

(l) ...

(m) The person(s) who carried out the act (s) or omission(s) causing the death, where such evidence is available without however making any finding on the criminal liability of such person(s) ...

B

14 Verdict

No verdict shall be framed in such a way to appear to determine any question of:

(a) Criminal liability on the part of a named person or

C

(b) Civil liability.

At the conclusion of the inquest, the magistrate must deliver a verdict on any one of the following:

(a) An open verdict.

D

(b) A verdict of misadventure.

(c) Death by person or persons unknown ...

The 'Open Verdict'

E

[49] To return an 'open verdict' is not a sign of failure; it is a verdict in its own right. We have been referred to a very useful text by Christopher Domes; *Coroners' Courts — A Guide to Law and Practice* (2nd Ed), which deserves quotation for its concise statement of the principles:

F

> An open verdict is a decision by the coroner or jury that the evidence 'does not fully or further disclose the means whereby the cause of death arose'. It is a verdict in its own right, indicating that the evidence is insufficient to satisfy any other conclusions. This may arise because, despite the best efforts of an investigation, it is impossible to determine whether a death was intended a suicide or came about by accident. In other cases there may be a suspicion that foul play is involved but no proof to the required level ... (at p 272 of the text)

G

The issue of standard of proof

H

[50] Whereas the main principles as stated above are not contested, the parties have taken very opposing positions when the applicable standard of proof is considered. The law in Malaysia on this issue is not clear. The applicable provisions in the CPC (ss 328, 337 and 339, earlier referred to) do not expressly provide for the requisite standard of proof.

I

[51] As noted earlier, under s 337 headed 'Inquiries to be made by magistrate', a magistrate holding an inquiry '*shall inquire when, where, how and after what manner the deceased came by his death and also whether any person is criminally concerned in the cause of the death*'. Under s 328, headed meaning of

'cause of death', the term is defined as including 'not only the apparent cause of death as ascertainable by inspection or post-mortem examination of the body of the deceased, but also all matters necessary to enable *an opinion to be formed as to the manner in which the deceased came by his death and as to whether his death resulted in anyway from, or was accelerated by any unlawful act or omission on the part of any other person.* Section 339 on 'Power of public prosecutor to require inquiry to be held' is even more neutral, referring to 'the magistrate to whom such direction is given shall then proceed to hold an inquiry and *shall record his finding as to the cause of death and also as to any of the circumstances connected with it* ... (Emphasis added.)

[52] The learned magistrate, it is to be noted, expressly addressed the standard of proof issue, and seemed at one point to veer in favour of adopting the so-called 'sliding scale' by citing and adopting the view stated by another magistrate sitting as a coroner in *In re inquest into the death of Sujatha Krishnan, Deceased* [2009] 5 CLJ 783. To quote the magistrate:

> As to the standard of proof required of me sitting as a coroner, to test the evidence in the inquest, the coroner in the Inquest into the death of Sujatha Krishnan Deceased ... had this to say and I quote:
>
> > The law in Malaysia is still young when it comes to the inquest. As far as the standard of proof in an inquest is concerned, I am of the view that the test is on a balance of probabilities sliding to the beyond reasonable doubt. The following are my reasons:
> >
> > This is not a criminal trial, but an inquiry to make a finding of fact. To do that, the evidence adduced must be credible as to become the basis of the coroner's finding. No one is on trial. Therefore, hearsay and secondary evidence is allowed but hearsay evidence must be scrutinised with caution. As the finding of the inquiry is legally binding, the facts must be proven beyond reasonable doubt.
>
> I also rely on public prosecutor's submission as to what applies in other Commonwealth countries ... Therefore after considering findings in Sujatha Krishnan's inquest, Australian and UK position, on a finding of suicide or homicide, the standard of proof is beyond reasonable doubt.

[53] The learned judge, it has been noted above, agreed with the magistrate's reading and application of the 'sliding scale':

> Namun demikian, *beliau terikat dengan apa yang ditakrifkan sebagai the sliding scale*. Di satu sudut, tidak perlu mematuhi keperluan undang-undang yang ketat tetapi di aspek lain pula sebagai contohnya apabila criminality itu hendak diandaikan ke dalam mana-mana perbuatan, maka tahap pembuktian yang diperlukan adalah tahap yang biasa digunakan untuk pembuktian kes jenayah iaitu melampaui keraguan munasabah dan bukan di atas imbangan kebarangkalian ...

[54] Counsel for the appellant here, in submitting that the applicable standard of proof is on a balance of probabilities, argues that both the magistrate and the judge 'misdirected themselves in respect of the standard of proof required in inquests to make a finding of homicide.' Counsel argues that the threshold has to be low, given the statutory scheme of our CPC. Counsel has been consistent in his submission that the standard has to be the lower standard of balance of probabilities throughout and even for verdicts of suicide and homicide.

[55] Senior federal counsel ('SFC') has been equally clear in his submission. It appears to my reading of the written submission and his oral submission, that SFC's position supports the application of the highest threshold in cases of suicide and homicide, namely proof beyond reasonable doubt, which is basically the UK position on the law. It appears to me SFC has taken a slightly different view of the 'sliding scale' (the Australian position). With respect, SFC's interpretation of the sliding scale is a more accurate reading of the Australian position. The interpretation in *Sujantha*, and its approval and application by the magistrate and the learned judge, have purported to apply the Australian position but in effect, both the magistrate and the judge ended up applying the UK position.

[56] To better appreciate SFC's arguments, and to avoid misreading it, it is best to quote the salient parts of his written submission, which I do below:

> 17.... the coroner has to put the evidences produced before him to test in order for him to come to a conclusion/finding/verdict. It must be highlighted that the law in Malaysia is silent on the standard of proof that the coroner has to apply in weighing the evidence ...
>
> 19. The learned magistrate in his written verdict had made reference to the case of *Sujantha Krishnan* ..., the position of law in Australia and the United Kingdom and acknowledged that on a finding of suicide, the standard of proof is beyond reasonable doubt ...
>
> 20. However, it must be pointed out that the verdict did not make specific reference to the difference between the standard of proof being employed in Australia and England and Wales. Death inquiry in England and Wales is governed by the Coroners and Justice Act 2009, the Coroner (Inquests) Rules and principles promulgated in case laws. Generally, the coroner or jury may return a verdict by applying the civil standard of proof, which is to say on the balance of probabilities. Specific reference is made to the English case of *R v West London Coroner's Court, ex parte Gray* ...
>
> 22. It is valuable to note that this judgment was cited with approval in the Court of Appeal in the case of *R v Wolverhampton Coroner, ex p McCurbin*. It is observed from the judgment that in relation to homicide and suicide (which are of criminal nature), the coroner has to be satisfied beyond reasonable doubt ...
>
> 26. States in Australia are given the prerogative to legislate on their coronial law. In

> Queensland, coroners are governed by the Coroners Act 2003 and the State Coroners' Guideline. The standard of proof to be applied at the conclusion of an inquest is stated in the Guideline. The coroner only needs to make a ruling on the civil standard but on a sliding *Briginshaw* scale. As Latham CJ in *Briginshaw v Briginshaw* put it:
>
> > The standard of proof required by a cautious and responsible tribunal will naturally vary with the seriousness or importance of the issue.
>
> 27. That means different levels of persuasion or satisfaction being necessary for the various matters a coroner is required to find. In other words, where the matters that are the subject of the coroner's findings are very serious or approximate criminal conduct, the finding Will be on the upper end of the balance of probabilities .

[57] SFC, however, supports the verdict of the magistrate and argues that the decision of the learned judge was correctly given, since the correct standard to apply in cases where criminality or suicide are involved, must be proof beyond reasonable doubt. After all, s 337 speaks of *whether any person is criminally concerned in the cause of the death*.

[58] SFC was therefore effectively opting for the UK legal position as the correct law to apply.

The Briginshaw sliding scale

[59] The 'sliding scale' as representing the Australian approach, and purportedly applied by the magistrate and the High Court judge is derived, of course, from the High Court of Australia case of *Briginshaw v Briginshaw* (1938) 60 CLR 336, which interestingly is not a case on coroner's jurisdiction. It concerns a divorce petition where the petition was made on the ground of adultery and an interpretation of the Marriage Act 1928 of the State of Victoria. It was there held that for proof of adultery the standard was not proof beyond reasonable doubt.

[60] I have considered this authority in some detail, but with respect, it does not support the reading placed by the magistrate and the judge on what constitutes a sliding scale. The *Briginshaw* sliding scale does not mean a scale that slides from proof on a balance of probabilities to proof beyond reasonable doubt on the highest end of the scale. It is a scale rooted on the civil standard of balance of probabilities, but the degree of persuasion needed to convince the court will vary in accordance with the seriousness or gravity of the allegation. The sliding goes to the weight and assessment of the evidence required rather than the standard of proof. The standard of proof remains the same, ie the civil standard of balance of probabilities, even in the case of investigation of a death by suicide or homicide. The Supreme Court of Victoria in *Anderson v Blashki* [1993] 2 VR 89 has made the position clear thus:

A These being civil proceedings, the assault allegation is required to be proved on the lesser standard on the balance of probabilities despite the criminal nature of the allegation. But, because of the gravity of the allegation, proof of the criminal act must be 'clear cogent and exact and when considering such proof, weight must be given to the presumption of innocence'. (The assault here resulted in death.)

B

[61] See also the other cases cited by both parties, such as *Inquest into the death of Azaria Chantel Loren Chamberlain* [2012] NTMC 020, *Inquest into the death of Charmaine Margaret Dragun* (Coroners Court, New South Wales, File No 2000/07), *Inquest into the death of Sridhar Shekar* (Office of State
C Coroner, Southport, File No Cor 2454/08(4)) and *Inquest into the death of Liam Richard Vidler-Cumming* (Coroner's Court, Brisbane, File No Bris-Cor 175/01).

[62] Appellant counsel referred us to the very pertinent passage in *Inquest*
D *into the death of Azaria Chantel Loren Chamberlain*, reading:

In the coronial jurisdiction, the test applied is a balance of probabilities test. *Briginshaw v Briginshaw* ... supports the convention that reasonable satisfaction 'increases with the seriousness of the allegation'. A further factor referred to in
E Birginshaw as affecting the answer to the question whether the facts sought to be proved have been established to the reasonable satisfaction of the fact-finder is '... the inherent unlikelihood of an occurrence of a given description' having taken place ...'

F **[63]** Equally informative is the passage from *Inquest into the death of Liam Richard Vidler-Cumming*, cited by SFC in his written submission:

Proceedings in a coroner's court are not bound by the rules of evidence ... A coroner should apply the civil standard of proof, namely the balance of probabilities, but the approach referred to as the Briginshaw sliding scale is applicable. This means that
G the more significant the issue to be determined, the more serious an allegation or the more inherently unlikely an occurrence, the clearer and more persuasive the evidence needed for the trier of fact to be sufficiently satisfied that it has been proven to the civil standard.

Of course, when determining whether anyone *should be committed for trial, a*
H *coroner can only have regard to evidence that could be admitted in a criminal trial and will only commit if he/she considers an offence could be proven to the criminal standard of beyond reasonable doubt.*

[64] I have highlighted the view presented that only where the coroner is
I determining whether a person should be committed for trial (a jurisdiction available in some countries, but not in Malaysia) that the criminal standard should be applied.

[65] For completeness, I take the liberty of citing those parts of the judgment

by Dixon J in *Birginshaw v Birginshaw,* where the idea of 'the sliding scale' can be discerned:

> At common law two different standards of persuasion developed. It became gradually settled that in criminal cases an accused person should be acquitted unless the tribunal of fact is satisfied beyond reasonable doubt of the issues the burden of proving which lie on the prosecution. In civil cases such a degree of certainty is not demanded ...
>
> This mode of stating the rule for civil issues appears to acknowledge that the degree of satisfaction demanded may depend rather on the nature of the issue ... The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. *Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the conseguences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal* ...(pp 261–362 if the report)

[66] It is clear from this passage that there is no third 'sliding scale' standard of proof intended.

DOES THE CONTEXT OF THE CPC REQUIRE PROOF BEYOND REASONABLE DOUBT IN A DEATH INQUIRY?

[67] The learned magistrate applied the standard of proof beyond reasonable doubt to both the allegations of death by suicide as well as death by homicide, with the result that he had to rule each out, leading to the 'open verdict'. Setting such a high standard of proof, although purporting to apply the 'sliding scale' variable standard of proof, has thus led to this open-ended conclusion. It is admittedly difficult to reach the level of certainty demanded by proof beyond reasonable doubt at this level of the investigation process. The question is, should the law require this high standard of proof when a death inquiry/coroner proceedings is by law merely a fact-finding exercise not in the nature of a trial? The CPC mandates the magistrate/coroner to determine the 'cause of death', not to secure a conviction, or even, under our law, to commit a person or persons for trial for a determined criminal offence.

[68] Despite some views to the contrary, the verdict passed by a coroner lacks the binding force one would expect of a decision to convict, or to acquit, after the process of a criminal trial. Earlier in this judgment, the main principles of coronial jurisdiction have been enumerated, and the point has been underlined that the court of a coroner is merely a court of law, not a court of justice. No one is convicted or acquitted at the end of the inquiry. On the contrary, the magistrate sitting as a coroner is required only to inquire 'when, where, how and after what manner the deceased came by his death and also whether any person is criminally concerned in the cause of the death.' The terms employed are broad with a purpose. The provision speaks of, inter alia, not 'who' caused the death but the more general words 'the manner the deceased came by his death', and whether any person is 'criminally concerned' in the cause of death. There is no statutory requirement for the magistrate/coroner to determine the criminal or civil liability of any person. These features are further underscored by s 328, which defines 'cause of death', which requires the magistrate to refer to all necessary 'matters' and 'also all matters to enable an opinion to be formed as to the manner in which the deceased came by his death and as to whether his death resulted in any way from, or was accelerated by, any unlawful act or omission on the part of any other person.' Whatever may be the legal rules obtaining in England and Wales, ultimately we have to be governed by our own statutory provisions, and our provisions differ from the laws of UK. For a start, Malaysian law has no provision for a jury to be part of the coronial process for some offences, or the equivalent of a committal proceeding determined by the coroner. Under our law, the magistrate is merely required to form an opinion as to the cause of death, and that opinion includes finding whether the death has resulted in any way 'from' or 'was accelerated by, any unlawful act or omission' by another person.

[69] For my part, I am also in agreement with my learned brothers that a lower standard of proof should be applied. The proper standard of proof in death inquiries under Chapter XXXII of the CPC should therefore be the civil standard of proof on a balance of probabilities. The criminal standard of proof beyond reasonable doubt can come later when, after further investigation, a charge is preferred and a proper criminal trial proceeds. The learned magistrate and the learned High Court judge who agreed with the verdict, purported to apply the 'sliding scale', and therefore the Australian rule that requires merely the civil standard, but unfortunately the Australian rule was misinterpreted. I find there is practical merit in the *Briginshaw* sliding scale. To my mind, it does not lead to uncertainty if applied. It has the merit of cautioning the magistrate/coroner to weigh the nature and quality of the evidence in accordance with the seriousness of the allegations before he or she can say with the necessary level of persuasion consistent with proof on a balance of probabilities (which really means on the preponderance of probabilities) that the verdict should be any of the alternatives under our established jurisprudence, which include the finding of an open verdict. To this extent, I

share a different view from that expressed by my learned brother Justice Dr Hamid Sultan Abu Backer in his dissenting opinion in *Ganga Gouri,* in that there cannot be an open verdict entered under our law. The open verdict is part of the established jurisprudence here as well as the other parts of the Commonwealth. I do not believe it should be removed from our law without a compelling justification. Earlier in this judgment, the character and basis of the open verdict has been analysed separately. It is not necessary to underscore it further.

EVALUATION AND CONCLUSION

[70] On the basis of the law analysed above, I agree with my two learned brothers that the learned High Court judge and the magistrate have misdirected themselves on the law by misinterpreting the standard of the *Birginshaw* sliding scale, and ultimately applying the standard of proof beyond reasonable doubt when considering the allegations of death by suicide and death as a result of homicide, whereas the scheme and structure of the interlocking provisions under Chapter XXXII of the CPC mandate a lower standard. I am therefore of the view that the applicable standard should be the civil standard of proof on a balance of probabilities.

[71] I also agree that the learned magistrate has placed insufficient emphasis on the surrounding circumstances and the strong circumstantial evidence, by inordinately insisting on direct substantive proof. The strong, compelling evidence of the pre-fall injury points to some unlawful act/ assault by a person, or persons, unknown on the 14th floor of the Plaza. The learned High Court judge in his judgment refers to 'free-fall injuries'. Perhaps this is just a glaring typographical mistake, for if it were otherwise, this mistake will be a serious misappreciation of the facts, which by itself can lead to an appellate intervention on our part. Further, we find that the learned magistrate in his verdict has discounted the evidence of unlawful assault by MACC officers on Sivanesan a/l Thangaveloo, which was allowed to be introduced as relevant similar fact evidence by another High Court (see *Re Teoh Beng Hock* [2010] 1 MLJ 715; [2010] 2 CLJ 192, a decision of Yeoh Wee Siam JC (as Her Ladyship then was)). The Court of Appeal subsequently affirmed that ruling. If the evidence of Sivanesan a/l Thangaveloo is not so proximate in time, there is additionally the evidence of Tan Boon Wah who was investigated on the 14th Floor on the same day, and also into the early hours of the morning of 16 July 2009. The treatment that he testified he received from MACC officers should have been considered and evaluated by the learned magistrate. My learned brother, Justice Dr Hamid Sultan Abu Backer has rightly emphasised the constitutional requirement of proper treatment being accorded to a person like the deceased who was effectively under constructive arrest for a duration. I fully agree and echo his comments.

[72] Tan Boon Wah in his evidence narrated how he was made to stand alone for hours in a purposely darkened room whilst the MACC officers who interviewed him left the room to watch other officers playing ping pong outside. According to this witness, he was abused and insulted. I need not quote chapter and verse the relevant parts of his evidence here since these are matters on record. In such a scenario, to insist MACC officers recognise and respect the constitutional rights of a person being interrogated cannot by any stretch of the imagination be an absurd request, and seen as an attempt to impede investigation. In the context of this appeal, the failure by the magistrate and the learned High Court judge to properly evaluate the conduct of the MACC officers concerned and the evidence of the conduct to allegedly 'cover up', according to the appellant's arguments, leads to a serious miscarriage of justice.

[73] In conclusion therefore I am minded to allow this appeal, and set aside both the decision of the High Court and the open verdict of the learned magistrate. Applying the correct standard of proof, namely the civil standard, there exist sufficient evidence, direct and circumstantial, and established facts, before the learned magistrate which go beyond mere matters of conjecture, for this court to substitute the open verdict given by the magistrate. My learned brothers and I are agreed that the proper verdict on the evidence should the following:

> Death of Teoh Beng Hock was caused by multiple injuries from a fall from the 14th Floor of Plaza Masalam as a result of, or which was accelerated by, an unlawful act, or acts of person or persons unknown, inclusive of MACC officers who were involved in the arrest and investigation of the deceased.

Such a verdict is more truthful to the statutory language, and it is not strictly necessary to mention homicide expressly.

Consequently, we are allowing this appeal by a unanimous decision. The order of the High Court and the verdict of the learned magistrate are therefore set aside.

[74] It needs to be emphasised that in coming to our conclusion, the verdict is part of the investigation process. No criminal or civil liability of any specific person or persons is established. These issues will depend on the further investigation that should be undertaken. And this further investigation should include a more thorough examination of the alleged suicide note by a handwriting expert with a clear expertise in Chinese handwriting and with sufficient copies of the deceased's original sample handwriting be made available. The interest of the family members and the public interest require that the case be further investigated by the police authorities. Ultimately, it will be the public prosecutor who will decide whether any person or persons should be charged, and for the court following a full and proper criminal trial, to

conclude whether there can be a conviction on the basis of the criminal standard of proof beyond reasonable doubt.

[75] Lastly, it remains for us to place on record our appreciation to all counsel for their diligence and professionalism in researching and providing to us useful texts and case authorities, and their able, honest and clear submissions. These have assisted us greatly.

Mah Weng Kwai JCA:

[76] The deceased Teoh Beng Hock, was employed by the State Government of Selangor as a political aide to YB Ean Yong Hian Wah, a State Assemblyman for Seri Kembangan and an Executive Councillor of Selangor.

[77] Further to some complaints against YB Ean Yong on the conduct of some contractual and financial matters, officers of the Malaysian Anti-Corruption Agency (the MACC) conducted an investigation on 15 July 2009 at about 3pm at the offices of YB Ean Yong and Teoh Beng Hock, located at the State Government of Selangor, SUK Building in Shah Alam.

[78] Teoh Beng Hock was subsequently instructed by the MACC officers to go to the Selangor MACC office located at the 14th floor of Plaza Masalam, Shah Alam (the MACC office) for further investigations.

[79] Teoh Beng Hock arrived at the MACC office at about 6pm the same evening, escorted by two MACC officers in his car. MACC maintained the position that Teoh Beng Hock was not under arrest and that he had been directed to attend the MACC office for a statement to be recorded from him as a witness.

[80] At the MACC office, Teoh Beng Hock was interviewed at length and a witness statement was recorded from between 1.30am and 3.30am on 16 July 2009 Teoh Beng Hock signed his witness statement, which was recorded by Mohd Nadzri bin Ibrahim (Mohd Nadzri). Teoh Beng Hock's witness statement was recorded in the absence of his solicitor M Manoharan who was refused permission to be present by officers of the MACC.

[81] According to the evidence of the MACC officers, Teoh Beng Hock was told that he could go home after his statement had been recorded but that he had chosen to stay on to rest and he was last seen lying on a sofa in the *ruang tetamu* near the front of the office of Mohd Nadzri at about 6am.

[82] Teoh Beng Hock did not go home on the morning of 16 July 2009 but

instead he was found dead at about 1.30pm. Teoh Beng Hock's body was discovered lying on the 5th floor Annexe service corridor by a cleaner, Siti Zabeda bt Yahya. Teoh Beng Hock's body was removed by the police at about 9pm in the evening.

[83] Teoh Beng Hock had fallen out of a window on the 14th floor of the MACC Office and landed on the 5th floor Annexe service corridor.

[84] A post-mortem was conducted on 17 July 2009 (the first post-mortem) by pathologists Dr Khairul Azman bin Hj Ibrahim (Dr Khairul) and Dr Prashant Naresh Samberkar (Dr Prashant).

[85] Both Dr Khairul and Dr Prashant concluded that Teoh Beng Hock had died from multiple injuries as a result of a fall from height.

[86] Dr Prashant, D Peter Vanezis (Dr Vanezis), Dr Khunying Porntip Rojanasunan (Dr Porntip), and Dr Shahidan bin Mohd Noor (Dr Shahidan) were all of the opinion that Teoh Beng Hock was alive when he fell to his death.

[87] As the police were uncertain as to the cause of the fall from the 14th floor, the police classified Teoh Beng Hock's case as one of 'sudden death'.

[88] The public prosecutor acting under the provisions of the Criminal Procedure Code (CPC) requested a magistrate at the Shah Alam court to hold an inquiry into the death of Teoh Beng Hock to ascertain the cause of death within the meaning of s 328 of the CPC.

[89] The inquiry commenced on 2 July 2009 and ended on 14 November 2010. After recording the evidence of 37 witnesses including 12 scientific experts, the magistrate returned an open verdict on 5 January 2011.

[90] Being dissatisfied with the verdict, the appellant, a brother of Teoh Beng Hock, applied to the High Court for an order of revision to set aside the open verdict and to order a finding of unlawful killing.

[91] On 1 December 2011 the learned High Court judge dismissed the application on revision and confirmed the open verdict of the magistrate.

[92] Being dissatisfied with the decision of the learned High Court judge, the appellant applied to the Court of Appeal for leave to refer several questions of law to the court. The questions are namely:

(a) sama ada koroner yang menjalankan inkues di bawah Bab XXXII Kanun Acara Jenayah mempunyai bidang kuasa untuk bertindak ke atas

inferens-inferens yang munasabah yang dapat dirumuskan melalui fakta-fakta sampingan yang dibuktikan melalui keterangan untuk membuat pencarian spesifik berkenaan sebab-sebab dan/atau keadaan-keadaan yang telah pun membawa kepada kematian mangsa;

(b) sama ada koroner yang menjalankan inkues di bawah Bab XXXII Kanun Acara Jenayah terikat dengan prinsip matan undang-undang yang terpakai dalam kes-kes jenayah yang melarang satu pencarian dibuat berdasarkan keterangan yang menimbulkan syak wasangka dan;

(c) sama ada koroner yang menjalankan inkues di bawah Bab XXXII Kanun Acara Jenayah di mana keterangan dengan jelas menunjukkan bahawa mangsa tidak membunuh diri, boleh bertindak, di dalam keadaan di mana wujudnya keterangan menunjukkan bahawa mangsa dikasari oleh pihak-pihak yang disyaki menyebabkan kematian mangsa, beserta keadaan-keadaan sekeliling lain yang menjurus kepada perasaan syak wasangka yang kuat, membuat pencarian bahawa sebab kematian adalah homisid.

[93] Leave was granted by the Court of Appeal on 2 February 2012 pursuant to s 50(2) of the Courts of Judicature Act 1964.

[94] Teoh Beng Hock was scheduled to be married on 3 October 2009. He had on 15 July 2009 at about 7pm after he had arrived at the MACC office invited his friend Woo Chuan Seng on his hand phone, to be his best man.The registration of the marriage had been fixed for the weekend of 18 July 2009. Teoh Beng Hock's wife to be was pregnant with his child.

[95] On arrival at the MACC office on 15 July 2009 at about 6pm Teoh Beng Hock was healthy and did not have any signs of any physical injury on his body, especially a bruise mark on his neck as testified by his solicitor, M Manoharan.

[96] Dr Khairul and Dr Prashant who had conducted the first post-mortem did not mention the bruise mark on Teoh Beng Hock's neck in their report. However, the bruise mark was noticed by the three other pathologists namely, Dr Porntip, Dr Vanezis and Dr Shahidan.

[97] A second post-mortem was conducted by Dr Shahidan on 22 November 2009 (the second post-mortem).

[98] Based on the forensic medical evidence, the time of death was said to be between 7.15am and 11.15am on 16 July 2009.

[99] According to Dr Porntip, Dr Shahidan and Dr Vanezis the bruise mark

on the neck was a pre-fall injury sustained by Teoh Beng Hock.

[100] After the discovery of Teoh Beng Hock's body on the 5th floor Annexe service corridor, the MACC Investigating Officer Anuar Ismail went to the MACC head office in Putrajaya to seek instructions on what was to be done. A police report was only lodged by Anuar Ismail much later on 16 July 2009.

[101] Both the learned magistrate and the learned High Court judge had applied the 'beyond reasonable doubt' test on the standard of proof required when arriving at the open verdict in the inquiry and the order on revision respectively.

ISSUES THAT HAD TO BE DETERMINED BY THE LEARNED MAGISTRATE AND THE LEARNED HIGH COURT JUDGE

[102] The main issues that had to be dealt with by the learned magistrate and the learned High Court judge can be summarised as follows:

(a) whether Teoh Beng Hock was semi-conscious or unconscious when he fell out of the window on the 14th floor of the MACC office;

(b) alternatively, whether Teoh Beng Hock was fully conscious and had jumped out of the window;

(c) the significance of the presence of the bruise mark on Teoh Beng Hock's neck;

(d) whether Teoh Beng Hock had instinctively 'taken action' in an attempt to break his fall;

(e) whether the death was a homicide caused by a person or persons unknown;

(f) whether Teoh Beng Hock had committed suicide; and

(g) whether the open verdict is a correct and proper verdict.

DECISION OF THIS COURT

[103] Upon reading the appeal record and the written submissions of counsel for the appellant and the deputy public prosecutor and upon hearing the oral submissions of counsel and the deputy public prosecutor aforesaid, we had decided to reserve our decision to a later date.

[104] My learned brothers Justice Mohamad Ariff bin Md Yusof and Justice Dr Hamid Sultan bin Abu Backer and I have held lengthy deliberations in this matter before arriving at our unanimous decision. We had decided to each write our separate judgments in this appeal due to the important questions of

law to be determined and in the interest of upholding and maintaining public confidence in the administration of justice as the death of Teoh Beng Hock had generated much public debate and raised many queries on the manner Teoh Beng Hock came by his death. A

[105] I have read the respective judgments of my learned brothers and I concur with them, save for the conclusion by Justice Hamid Sultan that a coroner cannot return an open verdict in law. B

[106] We are unanimously of the view that there are merits in this appeal to warrant appellate intervention. We are of the considered view that the open verdict reached by the learned magistrate and affirmed by the learned High Court judge is not the correct verdict in light of the factual matrix of the case and in consideration of the law on the standard of proof to be followed in an inquiry of death. With respect, we hold that both the learned magistrate and the learned High Court judge had erred in law and had misdirected themselves on the standard of proof required in an inquiry of death. We are of the view that the correct and proper verdict to be returned in the inquiry is one of death caused by a person or persons unknown. We accordingly substitute the verdict to one of death caused by person or persons unknown and set aside the open verdict. C D E

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GROUNDS OF DECISION

The law

[111] Inquiries of death in Malaysia are governed by Part VIII Chapter XXXII of the CPC. Section 337 of the CPC provides that:

> A magistrate holding an inquiry shall inquire when, where, how and after what manner the deceased came by his death and also whether any person is criminally concerned in the cause of the death.

'Cause of the death' is defined under s 328 of the CPC. objectives of an inquiry therefore may be stated as follows:

(a) to identify the dead body ie who the deceased was;

(b) to ascertain the date and time of death;

(c) to determine the place where the death had occurred;

(d) to find out how the death was caused;

(e) to determine after what manner the deceased came by his/her death;

(f) to identify the person(s) who caused or carried out the act or omission that resulted in the death, if any; and

(g) to inquire whether any person is criminally concerned in the cause of such death.

[112] A careful consideration of s 328 of the CPC is central to this appeal. Section 328 provides as follows:

> 328 Meaning of 'cause of death'.
>
> In this Chapter the words 'cause of death' include not only the apparent cause of death as ascertainable by inspection or post-mortem examination of the body of the deceased, but also all matters necessary to enable *an opinion* to be formed as to the manner in which the deceased came by his death and as to whether his death

resulted in any way *from, or was accelerated by, any unlawful act* or omission on the part of any other person.

It will be noted that s 328 of the CPC speaks of 'opinion'. The section does not stipulate what the standard of proof is that has to be applied in an inquiry of death. Although s 328 of the CPC is silent on the standard of proof, of course, it cannot be said that there is no standard to be applied. That would be an unacceptable position in law. I am of the view that all that is required of the magistrate is to arrive at an opinion applying the balance of probabilities (civil) standard test on an objective basis. There must be sufficient evidence to arrive at an opinion, in particular whether the death resulted in any way from or was accelerated by any unlawful act or omission on the part of any other person.

[113] Significantly, it must be understood that being criminally concerned in the death of a deceased does not necessarily mean being criminally liable. Criminally concerned imports a lower threshold of proof than criminal liability. In essence, being criminally concerned can be equated to reasonable suspicion. Even in Practice Direction No 1 of 2007: Guidelines on Inquest, para G(f) provides that 'a magistrate who conducts an inquiry must find who, if any, was/were the person/s who carried out the act/s or omission/s causing the death, without however making any finding on the criminal liability of such person/s'.

[114] It will be noted too at this juncture that the words 'inquest' and 'coroner' are not words used in Part VIM Chapter XXXII of the CPC although these words have been widely used in the earlier proceedings, and unlike the Sarawak Inquests OrdinanceChapter 48 and the Sabah Inquests Ordinance 1959 where the coroner is referred to as having conduct of an inquest. In the CPC, an 'inquest' is referred to as an inquiry of death and a 'coroner' is referred to as a magistrate conducting the inquiry. However to my mind, nothing much turns on the terminology.

[115] As noted earlier there is no provision in the CPC on the standard of proof to be applied in an inquiry of death and the type of verdict to be returned by a magistrate after conducting an inquiry of death. In particular there is no provision in the CPC for an open verdict to be made. However, I am of the view that the return of an open verdict by a coroner has been part of the established jurisprudence in inquests under common law. Accordingly an open verdict is a lawful verdict. In Malaysia we have Practice Direction No 1 of 2007, Guidelines on Inquest issued by the Chief Judge of Malaya on 5 January 2009 to all magistrates and sessions court judges in Semenanjung Malaysia which, pursuant to para H, provides for three types of verdicts to be delivered at the conclusion of an inquiry of death, namely (a) an open verdict; (b) a verdict of misadventure and (c) death caused by person or persons unknown. It was in reliance of this practice direction that the learned magistrate returned an open

verdict. Thus, save for the position at common law and Practice Direction No 1 of 2007, which was in force at the time of the inquiry into the death of Teoh Beng Hock, a verdict such as an open verdict was unknown under the laws of Malaysia. Although Practice Direction No 1 of 2007 has been superseded by Practice Direction No 2 of 2014 — *Arahan Amalan Bil 2 Tahun 2014: Pengendalian Siasatan Kematian (Death of Inquiry) Selaras Dengan Pematuhan Mahkamah Khas Koroner* — it will be observed that para H of the former practice direction has been reproduced verbatim in the latter. Interestingly, para H in both the practice directions does not include suicide as one of the verdicts a magistrate in an inquiry of death can arrive at.

[116] Reading para H of the Practice Direction No 2 of 2014, it is apparent that a magistrate may be led to think that he is confined to delivering one of the three verdicts stated therein since suicide was omitted in the paragraph as another possible verdict. Be that as it may, I am of the view that para H of the Practice Direction No 2 of 2014 is too restrictive and not consistent with the declared objective of an inquiry of death under s 328 of the CPC where a magistrate is required to form an opinion as to the manner in which the deceased came by his death and to ascertain whether his death resulted in anyway from, or was accelerated by any unlawful act or omission on the part of any other person.

[117] An inquiry of death is therefore a fact finding process by the learned magistrate to see if the provisions of, inter alia, ss 328 and 337 of the CPC have been complied with. The sole objective of an inquiry is to determine whether any person is criminally concerned in the cause of death.

[118] An inquiry of death is not like a criminal trial. There is no complainant, no prosecutor and there is no accused person on trial. It is only an inquiry by a magistrate as to the cause of death and the deputy public prosecutor is there not to prosecute anyone but only to assist the court with the examination of witnesses for the purpose of receiving the evidence. Hence the officer 'conducting' the inquiry is known as an assisting officer and not as a prosecuting officer. Counsel present is there not to defend anyone but only to look after the interest of those who have appointed him. The procedure and rules of evidence which are suitable for the accusatorial process are unsuitable for an inquiry of death which essentially is an inquisitorial process. At the close of an inquiry there is no finding of guilt, conviction or punishment of anyone. The threshold for the standard of proof in an inquiry of death must thus be lower than that for a criminal trial.

[119] While a verdict of misadventure or suicide is conclusive by definition, a verdict of death caused by a person or persons unknown is in fact a recommendation to the police authority to reopen its investigations and to the

public prosecutor to determine at the end of the further police investigations whether anyone is to be charged with an offence of homicide. In the event of an open verdict being returned by the magistrate, what this means is that the magistrate was unable to find out how the death was caused or to determine after what manner the deceased came by his/her death.

[120] As noted earlier s 337 of the CPC speaks of an inquiry as to whether any person is 'criminally concerned in the cause of the death' only. Importantly, the section does not speak of any person who is criminally liable in the cause of the death.

The power of the magistrate pursuant to s 337 of the CPC is to inquire (i) when; (ii) where; (iii) how; (iv) after what manner the deceased person came by his death and (v) whether any person was criminally concerned in the cause of the death (see *Public Prosecutor v Shanmugam & Ors* [2002] 6 MLJ 562).

Hence the degree of determination by the magistrate in an inquiry of death is merely to find out who may or may not be concerned or involved in the cause of death. It is for the police to investigate further to find out who is criminally liable or responsible in the cause of death and it is for the public prosecutor to decide whether to charge any one for an offence of homicide if sufficient evidence has been uncovered and thereafter to secure a conviction based on the evidence. It is not disputed that the power of a magistrate to inquire does not include the power to determine only a penal offence (see *Re Anthony Chang Kim Fook deceased* [2007] MLJU 1; [2007] 2 CLJ 362).

[121] Section 328 of the CPC authorises a magistrate in an inquiry of death to ascertain by inspection or post-mortem examination of the body of the deceased and all matters necessary to form an opinion as to the manner in which the deceased came by his death. The magistrate will also have to determine whether the death was accelerated by any unlawful act or omission on the part of any other person. It would almost appear to be a contradiction in terms if the magistrate is required to form an opinion on the cause of death and yet at the same time he must do so without entertaining any doubt whatsoever in coming to that opinion on a beyond reasonable doubt standard test.

STANDARD OF PROOF IN AN INQUIRY OF DEATH

[122] The next question of law of utmost importance to be determined in this case is the standard of proof to be applied in an inquiry of death. Both the learned magistrate and the learned High Court judge adopted the beyond reasonable doubt test. With respect, I am of the view that this is an error of law as the correct test to be applied is the civil standard of balance of probabilities. I say this for the following reasons:

(a) as stated earlier, an inquiry of death is not a criminal trial or proceeding. There is no accused person on trial and there is no one to be convicted and sentenced by the court upon a finding that the prosecution has proved its case beyond reasonable doubt;

(b) the rules on admissibility of evidence and procedure in an inquiry of death are not as strict as in a criminal trial. The magistrate is on a mere fact finding mission and is allowed to consider even hearsay evidence. In the case of *Re Loh Kah Kheng (deceased)* [1990] 2 MLJ 126 it was held that a coroner is not bound by the normal procedure of courts and rules of evidence;

(c) where the rules relating to evidence and procedure are lax, it will be inconsistent to require a magistrate to return a verdict at the close of an inquiry on a beyond reasonable doubt standard;

(d) it will be incorrect to require the family of Teoh Beng Hock to have to prove a case beyond reasonable doubt before the learned magistrate can return a verdict of homicide as the means to do so are severely limited. The family of Teoh Beng Hock, being members of the public, simply do not have the powers of investigation as possessed by the police. And where the threshold for proof in an inquiry of death is lower, it will not be correct nor necessary to expect members of the public to produce evidence on a beyond reasonable doubt standard and yet expect a verdict to be proved beyond reasonable doubt;

(e) a magistrate conducting an inquiry of death is merely to ascertain whether anyone is criminally concerned in the cause of death. He has no power to hold or find anyone criminally liable in the cause of death on a beyond reasonable doubt standard;

(f) in the event a person or persons is/are arrested for being criminally liable in the cause of death it is then for the prosecution to charge the person/s for an offence of homicide and where it will be incumbent upon the prosecution to prove a case beyond reasonable doubt before a conviction can be secured;

(g) for the police to effect an arrest of a suspect, all that the police have to show at that stage of investigations is that there is reasonable ground of suspicion to support the arrest. The police most certainly do not have to have reasonable grounds on a beyond reasonable doubt standard, before effecting the arrest. Now, if the police can effect an arrest based on reasonable suspicion (see *Shaaban & Ors v Chong Fook Kam & Anor* [1969] 2 MLJ 219) why then should the bar or threshold be raised in an inquiry of death to a standard beyond reasonable doubt before the learned magistrate can return a verdict of homicide? I see no basis for this approach as after all, in fact and in reality, the recording of evidence in an inquiry by the learned magistrate can be likened to an extension of

investigations by the police. In *Shaaban*'s case it was held that the police are entitled to make an arrest if a reasonable suspicion existed that the suspect was concerned with the offence. It is unnecessary for the police to show that there was prima facie proof of such offence before an arrest.

[123] It is not in dispute that in an inquest the evidence adduced must be credible so as to become the basis for the coroner's finding (see *Inquest into the death of Sujatha Krishnan, deceased* [2009] 5 CLJ 783); that the verdict must not be based on guess work but on particulars which have been proved in evidence (see *R v Huntback; exparte Lockley* [1944] KB 606, *Re Derek Selby, deceased* [1971] 2 MLJ 277); a magistrate who conducts an inquiry must confine himself to the evidence made available to him and at the end of the day must decide on that evidence alone (see *Public Prosecutor v Shanmugam & Ors* [2002] 6 MLJ 562); that a magistrate can only make a definite finding based on proved facts produced and not on mere conjectures (see *Re Rumie Mahlie, deceased* [2007] MLJU 280; [2007] 10 CLJ 69).

[124] In Victoria, Australia in the case of *Anderson v Blashki* [1993] VR 89 it was held that the standard of proof to be applied by the coroner in investigating a death is the civil standard of the balance of probabilities (see also *Briginshaw v Briginshaw* (1938) 60 CLR 336). In the infamous case of *Inquest into the death of Azaria Chantel Loren Chamberlain* [2012] NTMC 020, it was held by the High Court of Australia that 'in the coronial jurisdiction, the test applied is a balance of probabilities test'.

[125] Teoh Beng Hock was directed to go to the MACC office on 15 July 2009. According to the MACC officers, Teoh Beng Hock was there as a witness and not as a suspect. However, I am of the view that although Teoh Beng Hock had not been officially arrested yet he was not free to leave the MACC office as he pleased. He was in effect and in law under constructive arrest by the MACC officers. Teoh Beng Hock was not allowed to have his solicitor present with him and his hand phone was taken away from him at about 7pm after he had requested Woo Chuan Seng to be the best man at his wedding.

I am of the view that the death of Teoh Beng Hock whilst under the custody and control of the MACC amounted to what is commonly referred to as 'custodial death'. The MACC owed Teoh Beng Hock a strict duty of care to ensure that he was kept safe at all times while under their custody and that he did not come into harm's way such as from beatings and assault by anyone. The Court must deal with such cases in a realistic manner and with the sensitivity which they deserve, otherwise the common man may lose faith not only in the police force but in the judiciary itself (see *State of Madya Pradesh v Shyamsunder Trivedi & Ors* [Appeal (crl) 217 of 1993].

Thus it was incumbent on the magistrate in the inquiry of death to have treated the death of Teoh Beng Hock as a 'custodial death' when arriving at an opinion as mandated by s 328 of the CPC.

[126] Returning to the issue of the standard of proof applicable in an inquiry of death, a useful comparison may be made with the standard applied in preliminary inquiries into cases (namely, capital offences) triable by the High Court before Chapter XVII, ss 138–151 of the CPC were deleted by Act A908. For purposes of committal of a case for trial in the High Court, reliance used to be placed by the prosecution on the phrase 'sufficient grounds for committing' as provided for by the former s 140(i) of the CPC. What this meant was that there must be credible evidence shown by the prosecution for a case to be committed for trial. The standard of proof in a preliminary inquiry had always been on a standard lower than that of beyond reasonable doubt. In *Public Prosecutor v Puspanathan a/l Sinnasamy & Ors* [1996] 4 MLJ 165, Mohd Hishamudin J (now JCA) had occasion to say that 'for the purposes of the preliminary inquiry, the prosecution was only required to adduce sufficient evidence identifying the body of the deceased, and was not required to prove this beyond reasonable doubt. In a criminal trial, as opposed to a mere preliminary inquiry, the standard of proof is higher (see p 169 E–F,H–I; *Teay Wah Cheong v Public Prosecutor* [1964] 1 MLJ 21 and *Fazal Din v Public Prosecutor* [1949] MLJ 123 distinguished)'.

[127] Each of the three verdicts that could have been returned by the magistrate pursuant to the para H of the Practice Direction No 2 of 2014 namely, (i) misadventure (ii) homicide or (iii) open verdict and a verdict of suicide which ought to have been included in Practice Direction No 2 of 2014, after hearing all the available evidence in an inquiry of death is in fact and in reality an opinion supported by evidence or the lack of it.

I will now proceed to consider each of the four verdicts in turn.

THE EVIDENCE/FACTS

The above proposition of law reinforces my view that in an inquiry of death the standard of proof to be applied by a magistrate is one on a balance of probabilities and not on a beyond reasonable doubt test.

[128] Upon a close analysis and detailed evaluation of the undisputed facts and other facts in issue, the following conclusions, when applying the balance of probabilities standard of proof test, can be arrived at. For the record, on 18 March 2014 my learned brothers and I visited the scene, in particular the window at the 14th floor of the MACC Office and the 5th floor annexe service

corridor to see for ourselves the location of the window and the place where the body of Teoh Beng Hock was found.

MISADVENTURE

[129] This verdict can be completely ruled out simply because there is no evidence whatsoever to suggest that Teoh Beng Hock had accidentally fallen out of the window on the 14th floor of the MACC office.

[130] The window sill is 75cm above the floor which was carpeted and thus non-slippery. The glass window known as a 'hopper window' measured 97.5cm in length by 85cm in width. It is hinged at the top ends and opens outwards. The maximum gap one can open or push out the window is about 50cm, at an angle of about 30°, to about 85cm, at an angle of about 60°.

[131] Teoh Beng Hock was 170cm tall. Even if he had stood by the window the center of gravity of his body, being at the center point in the middle of the pelvis, would be lower than the height of the window sill. Assuming Teoh Beng Hock had slipped on the carpet and fell near the window it would not have been possible for him to have fallen out of the window.

[132] Dr Prashant ruled out the possibility of accidental death and that based on 'scientific observation' there was no possibility of accidental egress from the window as the level of the window sill was above the center of gravity of Teoh Beng Hock's body.

[133] Further, according to Dr Prashant the fact that no toxins, drugs or alcohol was found in the blood of Teoh Beng Hock, it eliminated the possibility of Teoh Beng Hock accidentally falling out of the window due to an impairment of balance or movement.

[134] Dr Khairul was of the similar view as Dr Prashant that Teoh Beng Hock's death was not due to an accident.

SUICIDE

[135] I will also rule out the verdict of suicide for the following reasons:

a. Teoh Beng Hock was a young man of 30 years, gainfully employed, about to be married and to be a father within a matter of months;

b. Teoh Beng Hock was up to 7pm on 15 July 2009 planning for his wedding by requesting his friend Woo Chuan Seng to be his best man.

His marriage was to be registered on 18 July 2009, in just three days time and the wedding ceremony was scheduled to be held on 3 October 2009;

c. Teoh Beng Hock was called to the MACC office for investigations into the affairs of his employer YB Ean Yong and not his own. It will be remembered that Teoh Beng Hock was only required to give a statement as a witness;

d. by all accounts Teoh Beng Hock was a healthy young man with no history of psychological illness. He led a normal life and did not suffer from any form of mental instability or psychiatric illness. Although no forensic psychiatric report was available in evidence on the state of Teoh Beng Hock's mental health yet there was nothing to suggest that Teoh Beng Hock had any suicidal tendencies during his lifetime.

e. the discovery of the purported suicide note in Teoh Beng Hock's bag was made under doubtful circumstances to say the least. The evidence revealed that Teoh Beng Hock had brought with him a bag when he went to the MACC Office. Upon the police commencing investigations and with the possibility of suicide in mind, one would have expected the investigating officer to turn the bag inside out to look for clues. The suicide note was not found by ASP Ahmad Nazri the investigating officer till 7 October 2009, that is about three months after the death of Teoh Beng Hock. It was said in evidence that as the note was written in Chinese characters, it did not occur to the investigating officer to have it translated into English or Bahasa Malaysia when he first came across the note in the bag. The delay in the discovery of the note left much to be desired in terms of efficiency of investigations by the police;

f. although the purported suicide note was sent to the handwriting expert Wong Kong Yong for analysis, he was unable to confirm that the note was in fact written by Teoh Beng Hock. No handwriting samples of Teoh Beng Hock was obtained by the expert and while he was of the opinion the writing in the note was similar to the writing in other documents found in Teoh Beng Hock's bag, it was not ascertained that the writing in the other documents belonged to Teoh Beng Hock. The expert did not discount the possibility that the signature on the note could have been forged;

g. the evidence before the magistrate in the inquiry was therefore wholly insufficient to support a verdict of suicide and the learned magistrate had

in fact correctly ruled out such a possibility. The law is clear in that a suicide must be proved and cannot be presumed.

The evidence in court did not suggest on a balance of probabilities that Teoh Beng Hock had wanted to take his own life in the early hours of 16 July 2009. On the contrary, the evidence suggests that Teoh Beng Hock had every reason to carry on living his life, with his marriage and fatherhood just around the corner;

h. if Teoh Beng Hock had the intention to jump out of the window, he would have to climb on to the window sill and balance himself on the sill before leaping. In so doing Teoh Beng Hock would have had to hold on to the frame of the window or the window glass itself in which event his fingerprints would be left on the frame or the window glass. However, as we do know from the evidence there were no fingerprints left on the frame or glass save for '1 dragged fingerprint or mark on the glass', which in any event could not be dusted for identification. In fact, Chief Insp Mazli Jusoh the fingerprint expert said in evidence that if someone *pijak mesti ada kesan* and that there was no *kesan tapak kasut* near or within the vicinity of the window which meant that there was no evidence to suggest that Teoh Beng Hock had climbed onto the window sill himself;

i. in his evidence Dr Prashant opined that Teoh Beng Hock had committed suicide. With respect, I am of the view that Dr Prashant really had no basis for saying so. I have read the notes of proceedings and cannot find the facts to support Dr Prashant's contention.

j. In any event, an obvious question that must be asked was whether Teoh Beng Hock, as a result of the ongoing investigations, felt so emotionally upset and disturbed; felt so guilty and ashamed by all the questions into the impugned contract/s valued at about RM2,000 only, that he had wanted to kill himself. It must be remembered that the MACC investigations had not been completed as Teoh Beng Hock had promised to return to the MACC Office with further documents. Thus, without any finding of culpability on the part of anyone being made by the MACC officers, I do not think Teoh Beng Hock would have been driven into a state of mind to want to kill himself to end everything.

DEATH CAUSED BY A PERSON OR PERSONS UNKNOWN

[136] As all the evidence points towards a verdict of homicide, I am of the considered view that the correct verdict to be returned by the learned magistrate in the inquiry and by the learned High Court judge on revision was

a verdict of death caused by a person or persons unknown. I say this for the following reasons:

(a) Teoh Beng Hock was under the care and custody of the MACC officers from 6pm on 15 July 2009 till he met his untimely death from between 7.15am to 11.15am on 16 July 2009.

(b) much was said in evidence as to whose room Teoh Beng Hock was taken to, where he sat and where he laid down on which sofa and so on. But a careful perusal of the evidence will show that Teoh Beng Hock was essentially dealt with by the following MACC officers:

(i) Mohd Hafiz Izhar bin Idris

(ii) Mohd Azhar bin Abang Mentaril

(iii) Mohd Najeib bin Ahmad Walat

(iv) Mohd Azmi bin Mohamad

(v) Mohd Ashraf bin Mohd Yunus

(vi) Arman bin Alies and

(vii) Mohd Nadzri bin Ibrahim — the recording officer of Teoh Beng Hock's witness statement.

(c) the last persons who saw Teoh Beng Hock alive were:

(i) Mohd Ashraf when he saw Teoh Beng Hock lying on a sofa in the ruang *tamu siasatan* at 4.45am;

(ii) Tan Boon Wah when he saw Teoh Beng Hock at the pantry between 5am and 6am; and

(iii) Raymond Nion who saw Teoh Beng Hock lying on a sofa in front of Mohd Nazri's room at 6am.

(d) if the evidence of Mohd Ashraf, Tan Boon Wah and Raymond Nion can be accepted as credible then it is obvious that something very serious must have happened to Teoh Beng Hock after 6am on 16 July 2009.

According to Dr Shahidan there was a bruise mark on the left side of the neck measuring 4cm by 3cm with underlying left platysma muscle contusion. The right platysma muscle was also contused (1cm x 1cm).

To my mind, some person or persons must have done something to Teoh Beng Hock which had resulted in the bruise mark on his neck. The bruise mark could not have appeared on the neck by itself without an external cause.

Dr Vanezis in his evidence did not rule out the possibility of pressure being applied to the neck region of Teoh Beng Hock thereby causing the bruise mark.

Dr Porntip in her evidence agreed with the finding of Dr Shahidan and said that the bruise mark could have been caused by a blunt force trauma applied to the neck.

From the evidence of the three pathologists it can be concluded, on a balance of probabilities, that some force/trauma must have been applied to the neck of Teoh Beng Hock, such as a strangle hold, which could cause an interruption to the supply of oxygen to the brain. A result of the deprivation of oxygen to the brain could have caused Teoh Beng Hock to lose some consciousness and thereby become disorientated or to lose consciousness completely. A reduction in the level of oxygen to the brain could cause 'a cerebral oedema, mild or moderate hypoxia, confusion, fainting and decreased motor control'. Even Dr Vanezis did not exclude that a 'neck hold or choke hold' could have caused the injury and bruising to Teoh Beng Hock's neck. While Dr Vanezis did not rule out the possibility of pressure to the neck area, he was however of the view that there was no prolonged pressure to the neck as there was no haemorrhaging of the eyes.

The bruise mark on the neck was categorically stated by Dr Porntip to be a pre-fall injury and was not sustained by Teoh Beng Hock as a result of the impact on his body when he landed onto the 5th floor annexe service corridor. The learned magistrate in his finding also held that there was sufficient evidence to show that Teoh Beng Hock had suffered a pre-fall injury before he fell out of the window.

I am of the view that when Teoh Beng Hock fell out of the window of the 14th floor he was alive and was either fully unconscious or semi-conscious at the least.

The bruise mark on the neck was noticed by Dr Porntip when she was shown photos of Teoh Beng Hock's body. She was of the view that the bruising on the neck was present before the first post-mortem was performed and that it was not as a result of the post-mortem itself. Dr Porntip reiterated that medically, the bruising or contusion to the neck as seen on Teoh Beng Hock required the victim to be alive as extensive bleeding cannot occur after death.

Credit must be given to Dr Porntip for having noticed the presence of the bruise mark on the neck. It was upon her expert opinion and advice that the body was exhumed so that a second post-mortem could be carried out.

Upon the second post-mortem being performed by Dr Shahidan on 22 November 2009, what was foretold by Dr Porntip was proved correct. She inspected the neck area during the second post-mortem and was of the opinion that Teoh Beng Hock had suffered blunt force trauma to the neck. However Dr Shahidan confirmed that he was unable to explore the finding of the oedema during the second post-mortem as the neck tissue area had been dissected during the first post-mortem. Such dissection had not been recorded by Dr Prashant or Dr Khairul.

Importantly, Dr Porntip was certain that the bruise mark sustained by Teoh Beng Hock on the neck was a pre-fall injury.

(e) in support of the theory of suicide it was said that the scratch mark found on the bottom of one of Teoh Beng Hock's shoes showed that he had placed his body weight while in a squatting position on the window sill. I am however of the view that the scratch mark beneath Teoh Beng Hock's shoes could have equally been caused when his body was placed in a squatting position on the said window sill by a person or persons unknown.

Being placed on the window sill before Teoh Beng Hock was pushed out of the window is consistent with the fact that there are no finger prints seen on the window frame or window glass. And being in a semi-conscious or unconscious state, Teoh Beng Hock would not have had the ability to hold onto the window frame and window glass before falling out. Either that or if there were finger prints on the window frame or window glass left by Teoh Beng Hock, the prints could have been wiped off or removed before the area was dusted for prints.

On the other hand, if Teoh Beng Hock had left his finger prints on the window frame or window glass just before he decided to commit suicide, the prints would have been available for dusting. I do not think that anyone would have wanted to wipe the finger prints away as no one may be implicated if indeed Teoh Beng Hock had committed suicide.

(f) no fracture of wrist/s.

Both the post-mortems did not reveal any fracture or injury to Teoh Beng Hock's wrist or wrists. According to Dr Porntip and Dr Khairul it was natural or instinctive for a person who is conscious to try to break his fall by stretching out his arms. By doing so the person would sustain injuries

in the form of colles fractures or fractures to the wrists. Even Dr Vanezis confirmed that Teoh Beng Hock did not sustain any injury to his wrists. This piece of medical evidence was to my mind strong probative evidence to prove that Teoh Beng Hock was either semi-conscious or unconscious at the time of the fall as there was no instinctive reaction on his part to try to break the fall.

(g) type of ankle injuries.

Teoh Beng Hock sustained multiple fractures of his right ankle only and did not have a ring fracture present on the skull.

From the multiple fractures of the right ankle Dr Porntip was of the opinion that the injuries were consistent with Teoh Beng Hock being semi-conscious or unconscious at the time of the fall. If Teoh Beng Hock was conscious and had landed on his feet, then both his feet would have sustained injuries.

Dr Porntip was also of the opinion that Teoh Beng Hock did not land on his feet, as suggested by Dr Prashant, due to 'the literal impact of the bones and the fact that no ring fracture was present on the skull'. Further there was no evidence of injuries caused by a transfer of force (upwards from his feet) suffered by Teoh Beng Hock.

Dr Porntip also noted that Teoh Beng Hock suffered a 'flailed chest' and lacerations on his chin. These findings supported her conclusion that Teoh Beng Hock was either semi-conscious or unconscious at the time of the fall and had landed on the 5th floor Annexe service corridor without breaking his fall.

(h) the evidence adduced at the inquiry suggested that there was no sign seen or detected within the area near the window on the 14th floor to show that a struggle had taken place. While this fact was relied on to show that Teoh Beng Hock had gone to the window and jumped out without a struggle, this piece of evidence could also mean that Teoh Beng Hock was either semi-conscious or unconscious and hence was not able to struggle when his body was thrown out of the window.

(i) the second DNA report prepared by Dr Seah Lay Hong stated that the DNA of 'one other unknown male contributor' was detected at Teoh Beng Hock's waist belt. This male contributor has remained unidentified and it will be of importance for the police during further investigations to investigate and find out who this person really is. It is important to the investigations as it will reveal the identity of this male person who was in close proximity to the body of Teoh Beng Hock before he died.

(j) while no finger prints could be uplifted by Chief Insp Mazli Jusuh from the window frame and the window glass on the 14th floor, however a 'finger drag mark' was seen on the window. Unfortunately this mark was not examined forensically to try to find out who could have left the mark.

(k) all the MACC officers who had dealt with Teoh Beng Hock on the night of 15 July 2009 denied any use of force. However, when the Court considered the evidence of Sivarasan Thangaveloo and Tan Boon Wah both of whom had given credible similar fact evidence of assault experienced by them at the hands of the MACC officers, it cannot be discounted altogether that the MACC officers could have used force on Teoh Beng Hock on that fatal night.

(l) the conduct of the MACC officers lacked credibility and ought to be scrutinised carefully, especially that of Anuar Ismail the MACC investigating officer, who, upon being informed of the discovery of Teoh Beng Hock's body on the 5th floor Annexe service corridor, failed to immediately inform the police and to lodge a police report. Anuar Ismail also failed to present himself to ASP Ahmad Nazri the police investigating officer for investigations on 16 July 2009. Further, it was Anuar Ismail who had removed Teoh Beng Hock's bag from the sofa and had custody of the bag thereafter. Another glaring and inconsistent conduct by Anuar Ismail was in the way he had identified the body of Teoh Beng Hock. On being informed, Anuar Ismail went to the 5th floor Annexe service corridor and from the window 'identified' the body of Teoh Beng Hock which was lying about 180cm to 240cm away from the window. He did not even bother to climb out through the window and approach the body. It was as if he knew Teoh Beng Hock would be lying there.

CONCLUSION

[137] It will be ironical to note that as the learned magistrate had predicated his open verdict on the beyond reasonable doubt test, this would have meant that the learned magistrate had no doubts about a verdict which he was not sure of.

I respectfully agree that if the beyond reasonable doubt standard is applicable, the correct verdict to be arrived at could be an open verdict. However, for reasons already discussed, applying the beyond reasonable doubt test is an error in law. I am firmly of the view that the correct test is the civil standard of balance of probabilities.

For all the reasons discussed above and finding that the correct and proper verdict in the inquiry of death of Teoh Beng Hock is one of death caused by person or persons unknown, the appeal is hereby allowed. The verdicts of misadventure and suicide must be discounted and the open verdict returned by the learned magistrate and affirmed by the learned High Court judge must be set aside.

The proper verdict on the evidence should be the following:

> Death of Teoh Beng Hock was caused by multiple injuries from a fall from the 14th Floor of Plaza Masalam as a result of, or which was accelerated by, an unlawful act or acts of persons unknown, inclusive of MACC officers who were involved in the arrest and investigation of the deceased.

Now that our unanimous verdict is one of death caused by person or persons unknown in light of all the direct and circumstantial evidence available in this very unfortunate case, it is up to the police authorities to investigate further and to bring to book the culprit or culprits responsible. Every effort must be made to track down the perpetrator or perpetrators in a thorough police investigation. No one should be spared in the investigations so that there will be no allegations of a cover up. And with that hopefully, there will be some closure of the case for the family of Teoh Beng Hock. It is paramount that the interest of the family of Teoh Beng Hock and public interest is served.

Finally, I wish to thank learned counsel for the appellant and the learned deputy public prosecutor for their research into the law and in the presentation of their written and oral arguments.

Hamid Sultan JCA:

[138] The appellant 'Teoh Meng Kee's' appeal against the decision of the High Court in respect of refusing revision against a finding of open verdict in an inquest into the death of Teoh Beng Hock (brother of the appellant) came up for hearing on 26 April 2014, 27 April 2014, 28 April 2014, 29 April 2014 and 30 April 2014. Upon hearing we reserved the judgment.

[139] The death of 'Teoh Beng Hock' in essence during the custody of MACC and/or which had originated from MACC premise has attracted public attention as well as concern leading to, among others, an appointment of 'Royal Commission' and its finding which need not be adumbrated here. In consequence of public concern, all the panel members have decided to write separate grounds of judgment setting out the law and facts as well as our

observation during the site visit to the MACC office and relevant area where the incident had taken place.

[140] In the instant case it is essential to note the following facts: (a) the deceased (who was only said to be a potential witness by MACC) was taken to custody by the MACC officers; (b) the deceased was interrogated at late hours of what we call as 'night and early hours of the morning'; (c) the MACC officers involved breached constitutional safe guards, rule of law and human rights value during the process of their official duty at the 14th floor of their then office premise, (d) the deceased was found dead on the 'extended verandah' of the 5th floor having fallen from the 14th floor; (e) the dead body was sighted at about 1.40pm and against human dignity it was left lying on the spot and was only removed at 9pm;(f) the 'MACC officers having come to know about the dead body about 2pm did not do anything to preserve the integrity of the purported crime scene at the 14th floor to ensure nothing was tampered with for proper police investigation; (g) to add insult to the injury the 'MACC' officers claimed that they were not responsible for his death; (h) the police too had failed to charge the relevant criminals upon a proper investigation according to law; (i) it was the Attorney General's office which referred the matter to the magistrate to conduct an inquiry; (j) the learned magistrate who sat in the inquiry took the position of 'coroner' as in England and reached an open verdict; (k) there is no provision in our law for open verdict; (l) how to determine the cause of death is set out in ss 328 and 337 of the CPC; (m) the learned magistrate was not properly guided on the strict provision of the law in the CPC; (n) at the most learned magistrate was only required to say who was 'criminally concerned' not 'criminally liable'; (o) on the facts the assistance of 'Sherlock Holmes' is not necessary to say who is 'criminally concerned' for further investigation by the police and prefer appropriate charges for those who are liable and/or for disciplinary action to be taken by MACC for those who are 'criminally concerned'; (p) the open verdict does not say who are 'criminally concerned' despite direct evidence as well as circumstantial evidence to implicate the MACC officers involved to attract what is referred to 'criminally concerned' in s 337 of the CPC more so when the threshold is low to ascertain the 'cause of death' as well as 'criminally concerned'.

[141] As my learned brother judges of the panel are going to deal with facts as well as expert evidence in great detail, on my part I will deal with the law relating to 'Inquiries of Death' under Part VII Chapter XXXII of the Criminal Procedure Code in particular ss 328 to 341A and briefly touch on the facts for arriving at my decision.

[142] What is essential to note in the above chapter is that there is no provision under the CPC or any other provision in 'Malaya' for the magistrate to act as a 'coroner' to deliver an open verdict; or a verdict of misadventure or

death by person or persons unknown. In addition, the CPC does not require the 'magistrate' to place a high threshold standard of proof to arrive at a finding.

[143] The above chapter and provisions are unique to us and it totally disassociates itself from the concept of 'coroner' in England or Australia inclusive of many countries which subscribe to common law jurisdiction. Commendably, our Legislature in formulating the provisions had provided a speedy, efficient, independent mechanism through the courts when police have failed to identify the cause of death or are not prepared to expose the culprits in cases where it ought to have been done so. The magistrate's findings in actual fact if done in orderly manner and with jurisprudence will exonerate any blame against investigating or prosecuting authorities and/or it will be instrumental to expose sufficient evidence for the Attorney General's Chambers to prosecute potential culprits if the magistrate identifies the persons or unnamed persons who are 'criminally concerned' relating to the death of the deceased. The magistrate under the CPC has no obligation to state who are 'criminally liable'.

[144] The threshold for the 'magistrate' to determine the issue is low and 'reasonable suspicion' itself is sufficient as opposed to 'beyond reasonable doubt' or 'balance of probabilities' in relation to 'standard proof as it relates to who are 'criminally concerned' only and not 'criminally liable'. This is evidently clear not only from the relevant sections but also other sections such as s 329 of the Code, which need not be adumbrated for the purpose of the instant case. In Malaysia 'beyond reasonable doubt' (prosecution) or 'balance of probabilities' (defence) are terms usually used in criminal trial for purpose of conviction and 'reasonable suspicion' test is used for the purpose of arresting the suspect and for investigating purpose and not for conviction (see *Shaaban & Ors v Chong Fook Kam & Anor* [1969] 2 MLJ 219; *Public Prosecutor v Mohd Aszzid Abdullah* [2008] 1 MLJ 281).

[145] During the course of submission I have brought to the attention of the learned counsel as well as learned deputy public prosecutor about our CPC to say that the magistrate's role is not one of 'coroner' and in consequence they have taken much effort to place a comprehensive submission on the role of magistrate during inquest.

[146] In essence, the learned counsel and the deputy public prosecutor were candid to say that magistrate's role under the CPC is not the same as a 'coroner' and the findings he has to make. And CPC per se does not have the phrase 'coroner', 'open verdict', 'verdict of misadventure', 'death by person or persons unknown'.

[147] The learned magistrate in the instant case had assumed the role of a 'coroner' and proceeded to deliver an open verdict relying much on the

erroneous Practice Direction No 1 of 2007 relating to Guidelines on 'Inquest'. which is inconsistent with the provisions of CPC. All relevant parties must be reminded when interpreting a statute, first consideration must be to determine what the statute says and its effect. When the statute is clear in its application, common law principles cannot be imported (see *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89; *Jayasena v R* [1970] AC 618). The failure to follow the relevant provisions of the law has resulted in erroneous result which has caused the need to appoint a 'Royal Commission' and has also attracted undue condemnation by the public of our criminal justice system. This has also led to a miscarriage of justice to the family members of the deceased.

[148] In consequence of the failure to apply the provisions of law correctly, it is patently clear there is a prima facie error on the face of record requiring appellate intervention.

[149] In *Derek Selby (deceased)* [1971] 2 MLJ 277 an application for revision in respect of a decision of magistrate relating to inquest, the High Court readily allowed the spouse of the deceased to set aside the finding of the magistrate (see s 323 of the CPC; s 31 of the CJA 1964).

[150] The term 'revision' means a re-examination or careful reading over correction or improvement. In *Public Prosecutor v Kulasingam* [1974] 2 MLJ 26 Hashim Yeop A Sani J (as he then was) observed:

> The object of revisionary powers of the High Court is to confer upon the High Court a kind of 'paternal or supervisionary jurisdiction' in order to correct or prevent a miscarriage of justice. In a revision the main question to the considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice.

Janab's Key to Criminal Procedure and Evidence, (3rd Ed) at p 469 on revision says:

> Interference in revision is justified only where a substantial question of law arises on which the correctness of the order may be effectively challenged; where there is no evidence on which the order could be made; where there has been denial of a right to fair trial; where by ignoring the substantive law which constitutes the offence; or misconception of evidence on matters of importance; grave injustice has resulted and on similar other grounds.

And on p 477 to the commentary to s 328 of CPC says:

> This section defines the meaning of cause of death in relation to inquiry of death. The meaning is wide and covers all matters necessary to ascertain the manner the deceased died and whether it resulted from any unlawful act or omission of any other person.

[151] On my part, I had the opportunity of considering the provisions relating to 'Inquest' for the first time in the case of *Ganga Gouri a/p Raja Sundaram v Public Prosecutor* [2014] AMEJ 0714 where I had this to say:

(a) the English Practice and Procedure relating to 'coroner' has no application to Chapter xxxii of the Criminal Procedure Code.

(b) there is no provision under the Code for the magistrate to deliver (i) open verdict; or (ii) verdict of misadventure; or (iii) death by person or persons unknown. In consequence, the Practice Direction No 1 of 2007 — 'Guidelines on Inquest' which inter alia states:

Verdict

No verdict shall be framed in such a way to appear to determine any question of:

(a) *criminal liability on the part of a named person*; or

(b) *civil liability*

At the conclusion of the Inquest, the magistrate must deliver a verdict on any one of the following:

(a) *An open verdict;*

(b) *A verdict of misadventure;*

(c) *Death by person or persons unknown*

is fatally flawed.

(a) The duty of the magistrate in 'inquiry of death' is set out in sections 328 and 337 of the Code and has nothing to do with the role of 'coroner' in England or elsewhere. The said sections read as follows:

Section 328

328 In this Chapter the words 'cause of death' include not only the apparent cause of death as ascertainable by inspection or post mortem examination of the body of the deceased, but also all matters necessary to enable an opinion to be formed as to the manner in which the deceased came by his death and as to whether his death resulted in any way from, or was accelerated by, any unlawful act or omission on the part of any other person.

Section 337

337 A magistrate holding an inquiry shall inquire when, where, how and after what manner the deceased came by his death and also whether any person is criminally concerned in the cause of the death.

(b) the threshold test to arrive at a finding by the magistrate is low under the Code. The magistrate is obliged to identify or say where applicable whether the death resulted in any way from or *was accelerated* by any unlawful act or *omission on the part of any other person* (Emphasis added.). If applicable, the magistrate is obliged to say who are 'criminally

A concerned' and not who are 'criminally liable'. The distinction is like apple and orange and the learned magistrate does not appear to have dealt with sections 328 and 337 of the Code in the right perspective. It will appear both the requirement was not done in this case notwithstanding there was sufficient evidence to show that the deceased was assaulted by the police while he was in custody and subsequently died. (See article 'Inquiry of Deaths' under the Malaysian Criminal Procedure Code — Dr Abdul Rani bin Kamarudin [2009] 5 MLJ lxviii).

I am not required at this stage to deal with the merits of the appeal proper save to say prima facie miscarriage of justice has occurred and it is now left to the Court of Appeal upon leave being granted to intervene to test the correctness, legality or even propriety of the finding of the magistrate.

[152] The *Concise Oxford English Dictionary*, (10th Ed) defines 'open verdict' to mean a verdict of a coroner's jury affirming the occurrence of suspicious death, but not specifying the cause. However, s 328 specifically requires the cause of death or apparent cause of death to be identified and uses the word 'include'. entrusting added responsibility to the magistrate in contrast to 'coroner' or the 'jury'. This will mean that 'open verdict' jurisprudence has been statutorily removed by Parliament by virtue of ss 328 and 337. My view is further fortified by the word 'shall' in s 337 of the CPC. The position in India under the Indian Criminal Procedure Code is the same in that it has no provision for 'coroner' or 'open verdict'. Indian courts have not imported the common law jurisprudence of 'coroner' in their decision making process. I do not think it is correct to read into our law the concept of 'coroner' because of an erroneous practice direction which has no legal effect as it is not consistent with our statutory formula. Further, it is not proper to read into the Act a high threshold 'standard of proof when the Act caters for a low threshold. In England, the position of the 'coroner' or 'jury', inter alia, is to find who is 'criminally liable'. In consequence, a high threshold is placed. In Malaysia, the role of magistrate, inter alia, is to find who is 'criminally concerned'. not 'criminally liable' and in consequence the Act caters for a low threshold. The distinction lies there.

[153] It must also be stated here that many of the courts' decision which had dealt with 'inquest' under CPC equating the 'magistrate's' role to that of 'coroner' and placing a high standard of proof for his finding may have to stand per incurium (see *Sujatha Krishnan (deceased)* [2009] 5 CLJ 783*Re Loh Kah Kheng (deceased)* [1990] 2 MLJ 126; *Public Prosecutor v Shanmugam & Ors* [2002] 6 MLJ 562].

BRIEF FACTS

[154] 'MACC' had conducted an investigation based on a corruption report lodged against a State Assemblyman. The deceased, Teoh Beng Hock, was said

to be holding documents which were relevant to the investigation and in consequence he was investigated and subsequently found dead. What is important to note is the deceased was not accused of any crime, but held in the custody of MACC in the late hours of the night as well as early morning which resulted in his death. The MACC position has always been that he was a potential witness and not a suspect. I do not see how our legal system based on rule of law as well as our country being a signatory to Human Rights Convention will permit a witness to be oppressed in the manner that has been done to the deceased. Such a conduct will also be clearly in breach of several provisions of the Federal Constitution. I do not see how any reasonable tribunal or investigating or prosecuting agency, considering the facts of the instant case will not take appropriate action against the relevant officers for causing the death of a witness in custody. This case relating to a 'witness in custody' will stand as a 'blot' on our criminal justice system if remedial measures are not taken to uphold the integrity of our criminal justice system.

[155] The learned magistrate had heard the testimony of 37 witnesses including 12 experts. The learned counsel for the appellant had meticulously summarised the facts and, inter alia, it reads as follows:

(i) The deceased in this case was positively identified as Teoh Beng Hock.

(ii) The deceased arrived at the MACC office's at Plaza Masalam around 6pm on 15 July 2009.

(iii) The body of the deceased was found by Siti Zabeda bt Yahya on 16 July 2009 at around 1pm to 1.30pm.

(iv) Based on the evidence of all experts called:-

  (a) The deceased died sometime between 7.15am and 11.15am on 16 July 2009;

  (b) The cause of death was the result of multiple injuries sustained by the deceased consistent with fall from height.

(v) As to how and the manner in which the deceased died, two theories were advanced for consideration which are suicide and homicide.

(vi) The theory of suicide could not be sustained as:

  (a) A purported suicide note was not properly ascertained to contain the deceased's handwriting.

  (b) There was no forensic psychiatrist report to reflect on the deceased's state of mind or the purported suicide note, leaving a serious gap which worked heavily against such a contention;

  (c) The evidence revealed that the deceased suffered from no psychological illness and led a normal life;

(d) The deceased was to be married soon.

Dr Shahidan bin Md Noor (SI-31)

(a) There was a bruise on the left side of the neck of the deceased measuring 4x3 cm with underlying left platysma muscle contusion. The right platysma muscle was also contused (1x1 cm).

(b) This injury indicated that some force was applied on the neck of the deceased.

(c) This injury was indeed a pre-fall injury which could have caused the deprivation of oxygen to the brain of the deceased resulting in a loss of consciousness and/or disorientation.

Dr Pornthip Roianusunand (SI-30)

(d) The above view was supported by Dr Pornthip who further opined that the deceased suffered blunt force trauma to the neck.

Dr Peter Venezis

(e) Dr Peter Venezis also did not rule out the possibility pressure to the neck region of the deceased.

(f) Finally, at p 20 the learned coroner said:

> In furtherance of considering the neck injury, there was also the alleged suspicion of cover up being collectively done by MACC in denying that force was used on the deceased and in reference to the similar fact evidence of injury been inflicted on Sivanesan a/I Thangaveloo, Dr Pornthip and Prof Dr Venezis, I find that there exist sufficient evidence to confirm this injury as a pre-fall injury. However, I also find that there is no sufficient evidence to confirm beyond reasonable doubt that this pre-fall injury did in fact, facilitated or resulted or contributed to the demise of the deceased.

(g) It is to be observed that the learned coroner adhered to the beyond reasonable doubt test at arriving his findings aforesaid.

[156] The learned counsel for the appellant has set out the background facts which are not disputed by the learned deputy public prosecutor save as to the reasoning of the learned counsel. Much judicial time will be saved if the facts as stated are repeated and it, inter alia, reads as follows:

1. The evidence in this case supports a finding consistent with that of homicide. It is not in dispute that the Deceased arrived at the MACC office at Plaza Masalam at approximately 6pm on 15 July 2009.

2. According to Mohamad Azhar Bin Abang Mentaril ('SI-17'), the Deceased drove himself to Plaza Masalam. The MACC officers namely SI-17 and Mohd Hafiz Izhar bin Idris accompanied the Deceased in his car from his office at SUK Building to Plaza Masalam.

3. According to Mohamad Azhar (SI-17), the Deceased parked his car at the parking lot and thereafter proceeded towards the lobby of Plaza Masalam

whereat he entered a lift which brought him to the 14th floor of Plaza Masalam on which MACC offices were located.

4. According to Mohamad Azhar (SI-17), the deceased arrived at the lobby of the MACC office at approximately 6pm. It is also not in dispute that at this time he had with him his hand phone and his car keys.

5. It is important to bear in mind that none of these witnesses complained that the Deceased suffered from any illnesses or injuries at the time at which he arrived at the lobby of the MACC office. Manoharan a/I Malayalam (SI-33) said in his evidence that he met the Deceased at his office before he was taken to the MACC office at Plaza Masalam that day.

6. Manoharan (SI-33) further said that he sat two chairs away from the deceased and had a good look at him. He said he saw no injuries or marks on the Deceased, in particular the neck of the deceased at that particular time.

7. In fact, the evidence further suggests that the Deceased was at that time preparing for his wedding registration on that weekend of 18 July 2009 and they were expecting their first child.

8. It is respectfully submitted that from the evidence above, it is clear that:

(i) TBH was healthy and free of injuries, in particular to his neck region when he left his office with the MACC officers for Plaza Masalam.

(ii) TBH went to the offices of the MACC for the sole purpose of assisting them in investigations.

(iii) TBH was represented by counsel, Mr Manoharan at that time.

(iv) Upon arrival at the offices of the MACC at Plaza Masalam, TBH was taken into the offices of the MACC to the exclusion of his legal representative.

(v) TBH was, we submit, detained thereat for the purpose of investigation.

(vi) TBH's hand phone was taken from him and he was not given access to counsel.

(vii) This, we submit, amounts to constructive arrest thereby making the MACC fully responsible for his safety and life at that time.

(viii) The evidence up to this point would suggest that TBH had no reason to want to remain at the offices of the MACC but was there because he was required so by the officers of the MACC.

B. Inside the Offices of the MACC

9. After his arrival at the MACC office at Plaza Masalam, TBH requested to speak to his lawyer, Manoharan a/l Malayalam (SI-33). Mohd Anuar (SI-16) allowed TBH to make one call to Manoharan (SI-33) and asked him to switch off his hand phone thereafter.

10. TBH was then brought to the Bahagian Pendidikan Masyarakat ('PENMAS area').

11. While TBH was at the PENMAS area, he was questioned by 4 MACC officers, namely Mohd Hafiz Izhar Bin Idris, Mohamad Azhar Bin Abang Mentaril (SI-17), Mohd Najeib Bin Ahmad Walat (SI-18) and MohdAmin Bin Mohamad.

12. Between 6.30 and 10.00pm, Mohamad Azhar (SI-17) testified that TBH was resting/sleeping on the sofa at the PENMAS area.

13. Between 8.00 and 10.00pm, Mohd Najeib (SI-18) testified that he met TBH a few times as he needed TBH's password to access his CPU.

14. At approximately 10.40pm, Mohd Ashraf (SI-19) brought TBH to the meeting room where he and Arman Bin Alies (SI-29) interviewed TBH for approximately 2 hours. It is significant to note here that Mohd Ashraf testified that TBH was co-operative during the said 2 hour interview.

15. Mohd Ashraf (SI-19) testified that when the interview was over, he asked TBH to go back to the PENMAS area but he did not take TBH there. Instead, Mohd Ashraf (SI-19) testified that he merely opened the meeting room door and asked TBH to go on his own.

16. About an hour later at about 1.30am, Mohd Nadzri Bin Ibrahim (SI-21) claimed that he then brought TBH from the PENMAS area to his office where TBH's statement was recorded.

17. At 3.50am, Mohd Nadzri (SI-21) said that he spoke to TBH who was sitting at the sofa and asked him to go home but TBH asked to sit at the sofa to rest.

C. After the 'Release'

18. Mohd Ashraf (SI-19) alleged that he saw TBH lying on a sofa at the 'ruang tamu siasatan' at 4.45am.

19. Tan Boon Wah (SI-34) testified that he saw TBH between 5am and 6am at the pantry on his way to the bathroom.

20. The last person who saw TBH alive was Raymond Nion (SI-23) who testified that he saw TBH lying on the sofa in front of Mohd Nadzri's (SI-21) room at 6am.

D. The Next Day

21. The body of the Deceased was found by SI-1, Siti Zabedah on 16.07.2009 at around 1pm to 1.30pm.

E. Submission

22. Based on the evidence on all experts called:

(a) The deceased died between 7.15am and 11.15am on 16 July 2009.

(b) The cause of death was the result of multiple injuries sustained by

the deceased consistent with fall from height.

(c) As to the manner in which the deceased died, various theories were advanced for consideration which are accidental death, homicide and suicide.

23. The theory of accidental death could not be sustained as:

(a) Dr Prashant Naresh Samberkar, SI-15 ruled out the possibility of accidental death. His view was based on the scientific observation that there was no possibility of accident egress (emergence from the window) ie the window was still higher.

(b) SI-15 reinforced this view by pointing to the absence of toxins, drugs or alcohol in TBH's blood, further opining that this eliminated the possibility of TBH being impaired in such a way as to lend an accidental death.

(c) SI-15's said conclusion was not challenged. Dr Khairul Azman bin Hj. Ibrahim, SI-10 expressed a similar view.

24. The theory of suicide could not be sustained as:

(a) A purported suicide note was not properly ascertained to contain the deceased's handwriting;

(b) There was no forensic psychiatrist report to reflect on the deceased's state of mind or the purported suicide note, leaving a serious gap which worked heavily against such a contention;

(c) The evidence revealed that the deceased suffered from no psychological illness and led a normal life;

(d) The deceased was to be married soon;

(e) The deceased was also about to become a father.

(f) In fact, the evidence suggests that even as late as 15.07.2009 before being taken in by the MACC officers, TBH was making arrangements for his wedding and even asked SI-25, Woo Chuan Seng to be his best man.

(g) These were all facts tendered to show that TBH had every reason to want to live.

25. As regards homicide, the learned coroner said as follows of the evidence given by the experts at the inquest:

Dr Shahidan bin Md Noor (SI-31)

(a) There was a bruise on the left side of the neck of the deceased measuring 4x3cm with underlying left platysma muscle contusion. The right platysma muscle was also contused (1x1 cm).

The injury indicated that some force was applied on the neck of the deceased.

Dr Pornthio Roianasunan (SI-30)

(b) The above view was supported by Dr Pornthip who further opined that the Deceased suffered blunt force trauma to the neck.

Dr Peter Vanezis (SI-32)

(c) SI-32 also did not rule out the possibility of pressure to the neck region of the Deceased.

(d) The foregoing lends itself to the conclusion that the manner in which TBH died was homicide. Further to this, there was evidence suggestive of a cover up by the witnesses who were called by the MACC. In this regard:

i Raymond Nion Anak John Timban, SI-22 stated that Mohd Anuar (SI-16) and Mohd Nadzri (SI-21), were seen passing by his office between 5.00-5.45am. It is submitted that this shortly before TBH's time of death;

ii The evidence of Mohd Anuar (SI-16) and Mohd Nadzri (SI-21) were contradictory to Raymond's evidence. In this regard, Mohd Anuar (SI-16) alleged that he was asleep at the hall from 5am until 8.30am and Mohd Nadzri (SI-21) alleged that he left Plaza Masalam at 4am.

iii Further, Mohd Anuar (SI-16) gave evidence that he was called to the 14th floor office from Putrajaya and arrived at approximately 12.45am after having being summoned by Tuan Hairul llham (SI-28), his superior officer for a briefing. Upon arriving and meeting with Tuan Hairul llham (SI-28), Mohd Anuar (SI-16) stated that he slept in various locations around the office and only had contact with TBH for two to three minutes at around 2.30am despite admitting that TBH was an important witness.

iv The conduct of the MACC officers after the body of TBH was found, in particular the investigating officer, Mohd Anuar (SI-16) driving away to Putrajaya to obtain instructions whilst the body of their principal witness laid at the foot of the building where their office was situated, instead of lodging a police report or even checking on the body, is again clearly conduct consistent with guilt on their part for TBH's death and knowledge that the body belonged to TBH.

v During cross-examination by counsel for the family of TBH, Mohd Anuar (SI-16) confirmed that upon finding TBH's body at around 2pm, he removed TBH's bag from the sofa, failed to immediately lodge a police report and failed to make to himself available to ASP Nadzri on 16 July 2009;

vi Hishamuddin Hashim (SI-27), the deputy director of the MACC when cross-examined by the counsel for the family of TBH admitted that he gave the instructions to Mohd Anuar (SI-16) to not lodge a police report that day.

vii All the MACC witnesses who had contact with TBH denied that the use of force was used. In particular, Mohd Ashraf (SI-19) testified that

he had never used physical force on a witness/suspect before.

viii The evidence adduced before the Coroner proved otherwise. It is crucial to note here that evidence was led through Sivanasan a/I Thangaveloo (SI-20) that he was severely assaulted at the hands of the MACC on the 14th Floor office, namely by MACC officers Mohan and Mohd Ashraf Mohd Yunos who Sivanesan identified as (SI-19).

(e) Finally, at p 20, the learned coroner said:

> In furtherance of considering the neck injury, there was also the alleged suspicion of cover up being collectively done by MACC in denying that force was used on the deceased and in reference to the similar fact evidence of injury been inflicted on Sivanesan a/l Thangaveloo, and after evaluating the evidence of Dr Shahidan, Dr Pornthip and Prof Dr Vanezis, *I find that there exist sufficient evidence to confirm this injury as a pre-fall injury. However, I also find that there is no sufficient evidence to confirm beyond reasonable doubt that this pre-fall injury did in fact, facilitated or resulted or contributed to the demise of the deceased*.

(f) It is to be observed that the learned coroner adhered to the beyond reasonable doubt test in arriving at his findings aforesaid.

[157] The learned co-counsel for the appellant had highlighted to us that there was pre-fall injury to the neck and it was Dr Pornthip who discovered it and lawyer Manoharan Malayalam who saw the deceased last in MACC confirmed that there was no injury on the neck. Common sense will dictate that the injury to the neck prima facie must have been caused in MACC premise before his fall more so when there is expert evidence to support the conclusion. Whether that injury was homicidal assault or sufficiently fatal to cause death or was instrumental for the death of deceased are in actual fact secondary issues. The fact that the injury has been identified is sufficient to attract some level of criminal liability against MACC officers who were involved and a proper police investigation would have been warranted under the CPC taking into consideration that MACC officers are not immune to such investigation under the law or Federal Constitution.

[158] I have read the appeal record, petition of appeal and the submissions of the learned counsel as well as the learned deputy public prosecutor. I am grateful to the comprehensive submissions on the law and facts. I do not propose to repeat the same save as to the core issues.

[159] After having given much consideration to the submissions of learned deputy public prosecutor, I take the view that the appeal for revision should be allowed with appropriate order to sustain substantial justice as per the relevant sections of CPC. My reasons, inter alia, are as follows:

(a) In the instant case, there is clear evidence to show that it was not the deceased who came to the office of MACC but in fact the deceased was escorted to the office of MACC by MACC officers in the deceased's car. Technically there is an arrest. Whether it is actual or constructive or the arrest was unlawful or illegal (taking into consideration that he was only a witness) has little significance in an inquest hearing save to show conduct of abuse ab initio (see *Pendakwa Raya v Kang Ho Soh* [1992] 1 MLJ 360; *Public Prosecutor v Shee Chin Wah* [1998] 5 MLJ 429).

(b) As the deceased was in the custody of the MACC officers followed by the evidence of injury in his neck, and the fact that he was subsequently found dead will prima facie attach culpability to the relevant officers of MACC. It will significantly attract the relevant provision of the CPC to initiate investigation and if justifiable prefer a charge according to law even though the prosecution case may be in reliance of circumstantial evidence only. That was not done in the instant case by the police as well as the Attorney General's Chambers. And that is the main reason for this appeal; so as to enable the police without fear or favour with the 'fiat' of the court order to enable the police to do a proper investigation and if it is satisfactory to enable the learned Attorney General to prefer charges against the culprits. I must say a charge in cases of 'police custody' or it's like does not necessarily mean the prosecution need to be sure that the purported culprits can finally be convicted. The case will rest on circumstantial evidence like any other cases on circumstantial evidence and it is for the court to decide and that process will demonstrate accountability, transparency and preserve the integrity of administration of criminal justice in cases relating to death in police custody or it's like as in the instant case. When a case rests on circumstantial evidence it is for the court to determine and it is for the persons who have been charged to explain his innocence. Support for the proposition is found in a number of cases. In *Public Prosecutor v Shahrael Amir Suhaimi* [2014] 1 LNS 428, sitting with Abdul Malik Hj Ishak JCA and Azahar Mohamed JCA, I had the opportunity to deal with jurisprudence relating to circumstantial evidence in great detail. And, inter alia, I had this to say:

> [13] It is also not in dispute that incriminating evidence as well as items belonging to the deceased were recovered from the accused and/or bag which he was said to be in possession of or at least had nexus to. This per se will attract criminal culpability pursuant to section 114 EA 1950 which states:
>
> > The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.
>
> [14] Where circumstantial evidence is in issue, as a general rule by the

application of the maximum evaluation test at the prosecution stage, the prosecution ordinarily may not be able to convince the court that the prima facie case has been established. *However, by the application of section 114 of EA 1950 the court in the instant case is obliged to look at the totality of the evidence more so when incriminating evidence as well as property of the deceased were found in the possession of the accused or were found in such circumstances where nexus can be inferred to rule that a prima facie case has been established. Section 114 presumption will require in law for the accused to speak out on his innocence at the defence stage to earn an acquittal. Section 114 actually assists the prosecution to whittle down the maximum evaluation test at the prosecution stage only.* Similarly section 37(d) or 37(da) of the Dangerous Drugs Act 1952 or even section 34 of the Penal Code has the effect of whittling down the maximum evaluation test at the prosecution stage if by law it becomes operative. Trial judges must take note of the distinction when considering the maximum evaluation test at the end of the prosecution stage (Emphasis added.).

[15] Despite strong circumstantial evidence against the accused, the learned trial judge in many parts of her judgment had attempted to reason out that it was not sufficient to establish a prima facie case without considering the statutory obligation set out in section 114 in favour of the prosecution. One example is found at p 23 which reads as follows:

> The bloodstain found on the knife bore the mixed DNA profiles of the three victims (see P89, SP13's chemist report). The knife was recovered by SP18 from the bag P15A together with other items like P14A, P39A, P74, P75B, P115A, P116A, P117A, P118A, P119A, P120A, P121A and P122A (see P111) but only a small bloodstain between the handle and the blade was found on the knife.

[16] It is well settled to find culpability based on circumstantial evidence, the evidence must be sufficiently strong to convict. When it relates to a charge of murder courts have convicted notwithstanding there was (i) no eye witness even after the crime was committed; (ii) no body of the deceased was found; (iii) no murder weapon was found; and (iv) no nexus to the murder was established save as to irresistible inference based on documentary evidence per se. (See *Sunny Ang v Public Prosecutor* [1967] 2 MLJ 195).

[17] In the instant case the conduct of the accused as well as stolen items of the deceased, the murder weapon, blood stains, and the proximity of time of the phone call as well as the conduct of the accused and his oral statement *bukan saya yang buat*, etc; will clearly warrant the defence to be called. In addition, it is not for the learned trial judge to test the truthfulness of the evidence of SP5 and/or SP6 at this stage when section 114 EA 1950 becomes operational without hearing the evidence of the accused when nexus has been established.

(c) To put it crudely it will be abhorrent to the notion of justice and fair play to say nobody is culpable when there is a clear evidence to say otherwise. MACC or the relevant officers being a responsible body simply cannot

disclaim liability when its officers had taken the deceased to custody and kept the witness throughout engaging in oppressive conduct which resulted in his death. In ordinary circumstances if the oppressors had been lay persons on the facts of the case the oppressors would have been charged by the police and/or Attorney General's Chambers for murder or culpable homicide not amounting to murder to be read with s 34 of the Penal Code relating to common intention. That was not done in this case which has resulted in a public outcry and in my view such failure breached the rule of law and several provisions of the Federal Constitution, more so arts 5(1) and 8(1) which reads as follows:

> 5 (1) No person shall be deprived of his life or personal liberty save in accordance with law.
>
> 8 (1) All persons are equal before the law and entitled to the equal protection of the law.

(d) As I have said in the case of *Ganga Gouri* above the learned magistrate is obliged to identify or say where applicable whether the death resulted in any way from or accelerated by any unlawful act or omission on the part of any other person. The learned magistrate is obliged to say who are 'criminally concerned' and not who are 'criminally liable' pursuant to ss 328 and 337 of CPC. This was not done in this case.

(e) In the instant case the deceased who was only a 'witness' was in the custody and in the premise of the MACC. The deceased had suffered a neck injury. If not for the conduct of the MACC officers and that too keeping him there the whole night without sleep, etc it will attract the word 'accelerated'. And the fact that he was not supervised in the premise will attract the word 'omission'.

(f) As it stands the law in Malaysia does not permit a witness to be arrested and oppressively interrogated for long hours of the night and early morning; and at the end to send the dead body to the family without admission of liability; and also for the investigating authority to take a unilateral position that everything done which led to the death of the deceased was done 'prim and proper' and assert that the investigating authority is not liable.

(g) The learned magistrate on the available evidence ought to have identified the person who is 'criminally concerned'. It is a low threshold and was not done in this case. In India, the magistrate's role under s 176 of Indian Criminal Procedure Code relating to inquest is only to report the 'apparent cause' of death. For example, whether in a given case, the death was accidental, suicidal or homicidal assault and in what manner or by what weapon or instrument the injuries on the body appear to have been inflicted. The role of 'magistrate' under our CPC is much wider and has a duty to identify where feasible who are 'criminally

concerned' and it will include persons who accelerated the death by unlawful act or omission. It must be stated here that ss 328 and 337, inter alia, covers criminal negligence and not restricted to murder, etc only.

(h) Even on the assumption a high threshold ought to be placed to ascertain the person or persons 'criminally concerned' the facts of the instant case requires the learned magistrate to say who are 'criminally concerned'. It will then rest on the police to do a proper investigation under the CPC and if the said investigation is satisfactory the learned Attorney General may exercise his constitutional powers to charge pursuant to art 145(3) of the Federal Constitution which states:

> (3) The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial.

(i) Under the Federal Constitution, the courts have no powers to compel the learned Attorney General to institute proceeding against the culprits save to give 'prerogative directions' which is vested in the courts. The Federal Constitution only provides sanctions when order or directions or 'prerogative directions' are not obeyed.

[160] The learned magistrate in the instant case has done a commendable assessment of the case as well as grounds for his decision save for the error mentioned earlier. And the counsel and deputy public prosecutor had taken extraordinary efforts to assist the court to decide on the relevant issues.

[161] For reasons stated above, the open verdict of the learned magistrate is set aside and by the powers vested in this court we will substitute the verdict and/or decision to read as follows:

> Death of Teoh Beng Hock was caused by multiple injuries from a fall from the 14th Floor of Plaza Masalam as a result of, or which was accelerated by, an unlawful act or acts of persons unknown, inclusive of MACC officers who were involved in the arrest and investigation of the deceased.

[162] In consequence I will allow the appeal and direct the Inspector General of Police and Attorney General's Chambers to do the needful to commence investigation under the CPC and prefer appropriate charges as they deem fit.

I hereby order so.

A *Appeal allowed.*

Reported by Afiq Mohamad Noor

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