Privy Council Appeal No. 14 of 1994

(1) Mohd Ali Bin Burut
(2) Ak Metassan Bin Pg Metussin and
(3) Madtassan Bin Lamat *Appellants*

v.

The Public Prosecutor *Respondent*

FROM

THE COURT OF APPEAL OF BRUNEI DARUSSSALAM

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.
Delivered the 25th April 1995

Present at the hearing:-

Lord Goff of Chieveley
Lord Jauncey of Tullichettle
Lord Mustill
Lord Nicholls of Birkenhead
Lord Steyn

*[Delivered by **Lord Steyn**]*

INTRODUCTION

On 8th December 1962 there was a rebellion in Brunei. It was suppressed. Since that date there has been a state of emergency in Brunei. Investigations into suspected firearms offences are treated in a specially rigorous way because of the security aspects. Stringent precautions are taken to find illegally held firearms and to apprehend offenders, particularly about the time of the anniversary of the rebellion.

In early December 1990 serving soldiers of the Royal Brunei Armed Forces were arrested. The arrested soldiers included: (1) Mohd Ali Bin Burut ("Mohd Ali"), the first appellant; (2) Duraman Bin Burut ("Duraman"), who is not an appellant; (3) Ak Metassan Bin Pg Metussin ("Ak Metassan") the second appellant; (4) Madtassan Bin Lamat ("Madtassan"), the third appellant.

Mohd Ali was attached to the Combat Engineer Squadron as a military instructor in Penanjong. Duraman was the brother of Mohd Ali and he was a gunner based in Penanjong. Ak Metassan was a gun fitter in the Armoured Reconnaissance Squadron in Penanjong. Madtassan was an armourer in the Bolkiah Armoury Workshop, at Bolkiah Camp, where his job included repairing firearms.

After their arrest these four soldiers were repeatedly interrogated. Three police forces were involved in the investigation, namely, the ordinary Police, the C.I.D. and the Special B anch. It is common ground that a so-called "special procedure" was applied to the three appellants. It was a standard procedure in Brunei in cases involving suspicion of the commission of firearms offences. The procedure involved arrested persons being manacled with their hands behind their backs and hooded during interrogation. The four soldiers eventually made written statements in which they confessed to having committed firearms offences. The penalty for such offences is death.

The four soldiers should have been brought before a magistrate within 48 hours after their arrest so that a magistrate could determine whether their continued detention was justified. That was not done. Instead the appellants were illegally held in custody for more than a year without being brought before magistrates.

The four soldiers, together with another soldier whose case is not material to this appeal, were charged with firearms offences under section 28 of the Public Order Act in a joint indictment. On the seventh day of the trial a *nolle prosequi* was entered against Duraman in respect of three charges. He was then called as a witness against the remaining three defendants (the appellants). There were a total of 8 charges against the remaining defendants. It is necessary to set out those charges in some detail so far as they are still material on this appeal.

The charges against Mohd Ali were as follows:-

"Charge 1

Section 28 Public Order Act, Cap. 148 - Possession of a firearm without lawful authority therefor and in a special area without lawful excuse.

That you on the 12 day of December 1990, at about 20.05 hours, in the vicinity of Flat F7 of the Royal Brunei Armed Forces Barracks, Penanjong Garrison, Tutong, Brunei Darussalam, in a special area without lawful excuse did have in your possession a firearm without lawful authority therefor, to wit:-

One Browning pistol 9 mm with the identification serial number filed off complete with one Browning magazine ..."

The second charge against Mohd Ali was in all respects identical except that it related to 80 rounds of 9 mm ammunition. For reasons which will subsequently emerge it is not necessary to set out the third charge against Mohd Ali. The fourth charge against Mohd Ali read as follows:-

"Charge 4

Section 28 Public Order Act, Cap. 148 - control of ammunition without lawful authority therefor and in a special area without lawful excuse

That you between the month of May 1990 and 12th December 1990, at Kg. Menengah Lamunin, Tutong, Brunei Darussalam, together with one person named Duraman bin Burut, without lawful excuse did have in your control ammunition without lawful authority therefor, to wit:-

8 rounds of 9 mm calibre ammunition ..."

The charges against Ak Metassan were as follows:-

"Charge 8

Section 28 Public Order Act, Cap. 148 -read with section 36 of the same - Abetting the possession of a firearm without lawful authority therefor and in a special area without lawful excuse.

That you one night in the month of May, 1990, at Penanjong Garrison, Tutong, Brunei Darussalam, in a special area without lawful excuse did abet the possession of a firearm by Awang Duraman bin Burut without lawful authority therefor, namely one Browning pistol with the identification serial number filed off which you delivered to the said Duraman bin Burut ...

Charge 9

Section 28 Public Order Act, Cap. 148 - Possession of a firearm without lawful authority therefor and in a special area without lawful excuse.

That you one night in the month of May 1990, at the Barracks of the Royal Brunei Armed Forces Penanjong Garrison, Tutong, Brunei Darussalam, in a special area without lawful excuse did have in your possession a firearm without lawful authority therefor, namely one Browning pistol with the identification serial number filed off ..."

It will be observed that these two charges were based on the same event but respectively charged Ak Metassan with abetting possession of a firearm by Duraman and personal possession of a firearm.

The charges against Madtassan were respectively numbered 10 and 11. These charges relate to what allegedly happened on the same occasion in May 1990, in the Barracks, as particularised in respect of the two charges against Ak Metassan. Following the same technique as before charges 10 and 11 respectively charged Madtassan with illegally abetting possession of a firearm and illegal possession of a firearm.

The trial commenced on 10th February 1992 before Roberts C.J. and Commissioner Pang. The defendants all pleaded not guilty. After several days of evidence the prosecution case against Duraman was abandoned. The prosecutor proceeded with all other charges against the remaining defendants. Essentially, the prosecution case was that the offences arose from the bartering of arms for cough mixture. It was alleged that the firearms were made up from parts, both old and new, which were taken by some of the soldiers from the army store. The Court of Appeal subsequently characterised the prosecution case as revealing "a squalid affair of the theft of ammunition and firearm components subsequently assembled, for the purpose of securing [in exchange for] 'cough mixture' apparently for its codeine content". The trial lasted 24 working days. On 20th April 1992 the court delivered a judgment finding Mohd Ali, Ak Metassan and Madtassan guilty on all charges. The court passed compulsory sentences of death on each charge.

The three defendants appealed against their convictions. The Court of Appeal allowed Mohd Ali's appeal against his conviction on charge 3, quashed his conviction on that charge and set aside the sentence on that charge. That is why it was unnecessary to describe that charge. On all other charges the Court of Appeal dismissed the appeals by all three defendants. The three defendants now appeal by special leave from the judgment of the Court of Appeal.

AN ACCOUNT OF THE TRIAL

In order to put the issues that arise on this appeal in context it is necessary to give an account in outline of the trial. Since the difference in the cases against and for each defendant must be firmly kept in mind their Lordships eschew a chronological approach. Instead the evidence for and against each defendant will be described separately.

Mohd Ali.

On 12th December 1990 a number of officers visited the soldiers' quarters at Penanjong. They had reason to believe that firearms had been obtained and hidden in the vicinity of the soldiers' quarters. They spoke to Mohd Ali in the presence of Duraman. Major Kamaludin and SSP Yahya testified that Mohd Ali said in Malay:-

> "All right. I kept the Browning pistol downstairs and I'll show you."

Only SSP Yahya made a note. The note was in English. The relevant statute required that a note be made by a police officer, read over to the arrested person and that the arrested person should be asked to sign it. That was not done. Inspector Bagol testified to the following confession:-

> "Duraman: Surrender it Ali. It is of no use to keep it.
>
> Mohd Ali: All right. We go down and I'll show."

Inspector Bagol's note in his diary recorded Mohd Ali as saying:-

> "OK. Let's go downstairs. I will show you."

The officers testified, and the defence admitted, that Mohd Ali then led the officers to a bushy area near his flat. He pointed out a Shelltox box, i.e. a box used for storing pesticides. The box contained a Browning pistol and 80 rounds of live ammunition. This was the pistol and ammunition referred to in charges nos. 1 and 2.

Mohd Ali was arrested and taken to Tutong Police Station. Later on the same day he was transferred to the Central Police Station BSB. Like all prisoners he had to surrender his trousers and shirt. He was allowed to retain his underpants. He had to sleep on a concrete floor. He received three meals a day.

The evidence as to what happened to Mohd Ali during the early days of his detention - and for that matter to Ak Metassan and Madtassan - was sparse. Except for some diaries, which were produced at the trial, no discovery was given by the state of material documents regarding events that took place during the custody of Mohd Ali and the others. It is also unsatisfactory that the diaries, which were produced at the trial, were not produced on the appeal to the Board. Nevertheless, it is possible to piece together a significant chronology of events from references in the record to diary entries.

At 19.19 hours on 15th December Mohd Ali was taken out of his cell to see police officers. There is no direct evidence that he

was interrogated. It may, however, be realistic to infer that there must have been some form of interrogation. It is not known precisely when Mohd Ali was returned to his cell but it must have been before 20.49 hours. At 20.49 on 15th December Mohd Ali was "taken out for investigation" by other officers. He was handcuffed and hooded. He was taken out of the building in which he was detained to a nearby police station. At 23.00 hours he was returned to the Central Police Station. He was probably interviewed for about two hours. It was admitted by the prosecution that he was hooded while he was interviewed. Relying on the evidence about the standard procedure in firearms case, it seems possible that he was also manacled with his arms behind his back while he was interviewed.

On 16th December Inspector Mastor of the Special Branch interviewed Mohd Ali at the Central Police Station about the firearm and ammunition that had been found. The interview lasted from 08.38 hours to 13.30 hours, i.e. some five hours. Mohd Ali signed no statement. It seems unlikely that no note of any kind regarding this lengthy interview existed. But none was produced at the trial.

Between 14.00 hours and 16.30 hours on 17th December ASP Wahab interviewed Mohd Ali in the presence of Corporal Sabtu. The evidence was that he was fully dressed. He was not handcuffed or hooded. During this interview Mohd Ali signed a detailed written statement. That statement was in due course to prove the primary evidence against Mohd Ali at his trial. It contained a comprehensive confession of the events underlying charges nos. 1, 2 and 4. It also directly implicated Ak Metassan and Madtassan in illegal dealings with a view to exchanging firearms for cough syrup. When the admissibility of this statement was challenged a voir dire was held. The police officers testified. Mohd Ali did not testify. The reason for Mohd Ali not testifying may have been that counsel considered that in view of the earlier "special procedure" applied to Mohd Ali the court would exclude the written statement. Counsel was wrong. The court admitted the statement.

Later on 17th December at the Central Police Station Inspector Mastor of the Special Branch again interviewed Mohd Ali. No details are available about this interview. No written record of it was produced at the trial. On 19th December Inspector Mastor again interviewed Mohd Ali. Again, no details are available about this interview. No written record of this interview was produced at the trial.

On 25th December charges were formally put to Mohd Ali. He signed a statement saying that he understood the charges but

that he did not wish to make a statement since "the statement which I gave earlier is sufficient". The admissibility of this statement was challenged. The judge ruled it admissible.

On 12th March 1991 police officers asked Mohd Ali and Duraman "Is it true you have test-fired this Browning?" They both replied "Yes". They were both taken to the their mother's house in an outlying district. They went to a banana grove three chains from the house. Inspector Kamis testified that Mohd Ali said:-

> "This is the area where we fired the cartridges."

His notebook did not record that reply: it simply recorded that Mohd Ali and Duraman showed a place behind their mother's house. In any event, the police testified that after a search they found 8 empty cartridges: 6 had been fired from the Browning pistol which had been found on 12th December.

This account is a sufficient description of the prosecution case against Mohd Ali. He testified in his own defence during the main trial. Dealing with the events of 12th December 1990, Mohd Ali said that he had thrown things belonging to Duraman into the bushes. He did not know what the things were. He believed the police officers were from the Narcotics Bureau and that they were therefore looking for drugs. He said:-

> "Duraman said to me 'Do surrender my things which you kept to them'. I replied to Duraman 'All right. I'll show them the place where I have kept your things'."

He agreed he did tell SSP Yahya that he had thrown the things in the bushy area and that he led them to it. He said that he did not know what was in the Shelltox box. Turning to his written statement of 17th December, he said the officer asked him questions and told him what Duraman had said. He agreed to it because he was afraid although at no time did he make any reference to being subjected to the "special procedure". He was forced to sign the later formal statement of 25th December. He then dealt with the events of 12th March 1991. He said he did not know where they were going, or what they were looking for. He agreed that he and Duraman accompanied the police to an area behind his mother's house. Duraman showed the police where the test-firing had taken place. Mohd Ali said he had not been present when Duraman test-fired the pistol. His statement of 17th December 1991 was not true. He did not show the police where the rounds were fired nor talk to his brother at the scene. By way of summary, his case was that his two written statements were not voluntarily made and were not true; and that he did not make the oral statements attributed to him.

Ak Metassan.

It will be recalled that charges nos. 8 and 9 against Ak Metassan related to events which allegedly took place in May 1990 in the soldiers' quarters at Penanjong Garrison at Tutong. Corporal Sabtu said he saw Ak Metassan in his room. Ak Metassan was holding the frame of a Browning pistol with other tools and a slide for a Browning pistol. Madtassan was sitting on the bed. Later, on the same day Bakri, a soldier in the armoured reconnaissance unit, went to Ak Metassan's room. He said that Madtassan was there. Duraman came in later. Madtassan took out a Browning pistol. Ak Metassan took the pistol from Madtassan and showed it to Duraman. Ak Metassan demonstrated how it worked.

On 12th December SSP Yahya spoke to Ak Metassan. According to this officer Ak Metassan orally admitted that he had stolen parts of small arms like a Browning. Ak Metassan was arrested.

On 15th December Ak Metassan was taken to a police station some 10 minutes drive from the police station when he was detained. He was interviewed for a period of about one and a half hours. He was hooded and handcuffed throughout this interview. There is no written record of this interview.

On 17th December Inspector Mohd Don of the Special Branch interviewed Ak Metassan. The first interview lasted about two hours and the second interview lasted about one and a half hours. The evidence was that Ak Metassan was not handcuffed or hooded. No written record relating to these interviews was produced at the trial.

On 18th December Ak Metassan was interviewed for three hours. He was not handcuffed or hooded during this interview. Ak Metassan signed a written statement. In that statement Ak Metassan confessed to the events covered by charges nos. 8 and 9. He broadly confirmed the oral evidence which Sabtu and Bakri were eventually to give at the trial.

On 26th December Ak Metassan was formally notified of the charges. Unlike Mohd Ali he made a substantial statement. Again, the statement amounted to a comprehensive confession to the prosecution case against him.

The defence challenged the voluntariness of both the written statements. Relying perhaps on the "special procedures" adopted, counsel did not call Ak Metassan to testify on the voir dire. The judge ruled that both statements were admissible.

It is necessary to explain that it is common ground that under section 30 of the Evidence Act of Brunei the confessions of Ak Metassan were admissible against Madtassan because they were facing charges for the "same offence". But Mohd Ali's confession was only admissible against himself.

It is now necessary to turn to Ak Metassan's case. He gave oral evidence in the main trial. He comprehensively denied the accounts of Sabtu and Bakri. He said he never had a Browning pistol, a frame or a slide in his possession. Turning to his statements, he described "the special procedure" as applied to him. He said the officers made threats to him before he signed the statements. He said that the content of both statements were suggested to him. He denied that he read through the statements. He said he signed out of fear.

Madtassan.

It will be recalled that charges 10 and 11 covered the same events as the charges against Ak Metassan, i.e. they related to events which took place in May 1990 in the soldiers' quarters. The evidence of Sabtu and Bakri relating to those events have already been described.

On 15th December Madtassan was arrested. He was taken to the Central Police Station. On 16th December ASP Azahari took Madtassan to another police station. He interrogated him. It is not known how long the interrogation lasted. Madtassan was hooded and handcuffed throughout the interview. There is no written record of what transpired during this interview. Later on 16th December Inspector Mohd Don interviewed Madtassan. Virtually nothing is known about this interview.

On 17th December ASP Wahab interviewed Madtassan. During this interview Madtassan signed a detailed written statement. It amounted to a confession in respect of charges nos. 10 and 11. In particular he admitted the substance of Sabtu's account of the events in May 1990, i.e. to the alleged handling of a pistol by Ak Metassan and Madtassan in Ak Metassan's room.

On 25th December a police officer formally notified Madtassan of the charges. Madtassan signed a statement acknowledging that he understood the charges, and that "the evidence which I had given earlier was sufficient".

Madtassan gave oral evidence. He denied the accounts of Sabtu and Bakri. He said that during his detention he was threatened. The context of his first detailed written statement was suggested to him. It was not a true statement. He said that he signed both statements because he was afraid. He said he told police officers he was not involved but they would not accept his explanation.

The judgment of the trial court.

The critical issues at the trial were (1) whether the defendants' six written statements were voluntarily made and (2) whether the defendants acted in the way, and made the statements, attributed to them by police witnesses and military personnel. The issues regarding the written statements had to be considered under section 117 of the Criminal Procedure Code of the Laws of Brunei (Cap.7). So far as relevant section 117 reads as follows:-

> "117. (1) In any criminal proceedings any statement made by any person, whether it amounts to a confession or not or is oral or in writing, made at any time, whether before or after that person is charged and whether in the course of a police investigation or not, by that person to or in the hearing of any police officer shall be admissible in evidence and, if that person tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit.
>
> (2) The court shall admit under subsection (1) a statement made by an accused, only if the prosecution satisfies the court that the statement was voluntary, that is to say that it was not obtained by violence, inducement, threat or oppression by a person in authority."

There is an overlapping provision in the Evidence Act of the Laws of Brunei (Cap. 108), which does not contain any reference to "oppression": section 24. That does not matter: section 117(2) governs the matter. In order to be admissible the statements must not have been obtained by oppression. It is common ground that the burden of proof is on the prosecution to prove the voluntariness of the statements. The standard of proof required was proof beyond reasonable doubt.

The defendants did not testify on the voir dire. At that stage the court had to consider the voluntariness of the statements in the light of the prosecution evidence and in particular the "special procedure" to which all defendants were subjected. The defendants did testify in the main trial. At that stage it was incumbent on the court to reconsider the issue of voluntariness in the light of all evidence. In this context the court stated:-

> "In reaching our conclusion, we considered whether any of the acts which were established by the prosecution witnesses, for example that the defendants were kept in illegal custody, that they were only allowed to wear underpants, that they were hooded; by another officer who did not take their statements, and that they were refused visitors for 24 hours, must necessarily have so affected them that their statements were not voluntary because they were obtained by oppression. We are not prepared to make this assumption.

> In the absence of testimony from any of the defendants, there is no evidence in support of the argument that any of them was affected by anything said or done by anyone in authority and we do not accept that they must necessarily have been. So far as their custody in police cells is concerned the defendants were all treated in the same manner as applies to every one in such custody."

The court rejected the testimony of each defendant that he signed statements as a result of fear caused by oppressive conduct. The court affirmatively accepted the evidence of the prosecution witnesses that no threats were made to any of the defendants.

The oral admissions and conduct attributed to the defendants by police witnesses and military personnel fall into a different category. Subject to the qualification that the court placed no reliance on the evidence of Duraman, who became a prosecution witness instead of a defendant during the course of the trial, the court accepted the evidence of all prosecution witnesses and rejected the evidence of the defendants.

The judgment of the Court of Appeal.

Subject to the quashing of Mohd Ali's conviction on charge no. 3, the Court of Appeal dismissed the appeals of all three defendants. The Court of Appeal described the "special procedure" as "inherently oppressive". The Court of Appeal described the passage from the trial court's judgment, which their Lordships have quoted, as "infelicitously expressed". But the Court of Appeal declined to interfere with the trial court's findings of fact that the written statements were not obtained by oppression. The Court of Appeal also declined to interfere with the trial court's findings of fact in respect of the oral statements and conduct attributed by prosecution witnesses to the defendants.

The issues on appeal.

On the face of it the three defendants each made two unambiguous written confessions to the charges brought against them. If those statements were voluntarily made, and reliable, the guilt of the defendants was obvious. On the appeal before the Board the principal issue was whether the trial court rightly admitted the written statements in evidence, particularly in the light of the "special procedures" to which the defendants were subjected. Their Lordships propose to address this issue first. If the statements (or some of them) should have been ruled inadmissible, the next issue to be considered is the impact on the trial of the introduction of the inadmissible evidence. A number of other more technical issues were debated but their Lordships

propose to concentrate first on the major issues, which they have identified, before deciding whether it is necessary to consider other issues.

The admissibility of the written statements.

The first question is whether the "special procedure" to which the defendants were subjected was inherently oppressive. The court of first instance made no express finding to this effect. The Court of Appeal did make such a finding. Mr. Martin Thomas Q.C. conceded that the procedure was inherently oppressive in the context of statements during police interviews. Reference was made to authorities on the meaning of the word oppression in the context of statutory provisions excluding statements obtained by oppression. It is unnecessary to examine the decided cases. For the police to interview an arrested person while he is manacled and hooded is plainly oppressive conduct calculated to sap the will of the person being interviewed.

The question then arises whether the statements were obtained by oppression. The statements were not obtained in interviews conducted while the defendants were subjected to the "special procedure". In the case of Mohd Ali it was conceded that the special procedure was applied to him on 15th December. On the next day he was questioned for 5 hours. On 17th December he signed a written statement. Eight days later he signed a formal statement confirming the first statement. In the case of Ak Metassan the "special procedure" took place on 15th December and he signed detailed statements on 18th and 26th December. In the case of Madtassan the "special procedure" was applied on 16th December, and he signed written statements on 17th and 25th December.

In the gaps between the application of the "special procedure" and the signing of the written statements the defendants were questioned by police officers. As their Lordships have observed virtually nothing is known about those interviews. Moreover, during those gaps the defendants remained deprived of visits of relatives. Nothing had happened to remove the implied threat of further sessions subject to the "special procedure". The trial court misdirected itself by finding that in the absence of oral evidence from the defendants on the voir dire there was no evidence that the statements were obtained by oppression. Even without evidence from the defendants the very nature of the "special procedure", and the relatively short gaps between the application of the "special procedure" and the taking of the statements, inferentially suggested that the statements were, or may have been, obtained by oppression. In these circumstances their Lordships are free to depart from the findings of fact of the trial court. The correct conclusion is that, against the background of the "special

procedure", the prosecution upon whom the burden rested failed to prove to the requisite standard that the statements were not obtained by oppression. It follows that the trial court should have ruled all the written statements inadmissible.

Their Lordships have been referred to related criminal proceedings in Brunei, which tend to reinforce their Lordships' conclusions about the written statements. In view, however, of those conclusions it is unnecessary to consider the related proceedings.

The impact of the wrongful admission of the written statements.

It is now necessary to assess the impact of the wrongful admission of the written statements on the verdicts. The matter is governed by section 167 of the Evidence Act of the Brunei Laws (Cap. 108). Section 167 reads as follows:-

> "The improper admission ... of evidence shall not be ground of itself for a new trial or reversal of any decision in any case if it appears to the court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision."

Taking into account the criminal burden and standard proof, the correct test is whether a trial court, which properly addressed the relevant issues of law and fact, must have convicted on the remainder of the evidence.

This was not a jury trial: it was a trial by two professional judges, who gave a reasoned judgment. Concretely, the issue arises whether it is right and proper to rely on the findings of fact of the trial court in respect of the oral admissions and conduct attributed to the defendants. Two problems arise. In the first place, the court erred in taking the view that there was no evidence that the statements had been obtained by oppression. In that respect the court's approach was flawed. These considerations are not directly applicable to the court's findings of fact on the oral statements and conduct attributed to the defendants. But they cannot be ignored in squarely facing the question whether, in all the circumstances of the case, it is right to place reliance on the court's findings of credibility and reliability in respect of the remainder of the evidence.

The second problem is that in making favourable credibility and reliability findings in respect of prosecution witnesses and unfavourable credibility findings in respect of the defendants the court was influenced by its view of the voluntariness of the

written statements. The written statements constituted the prime evidence against each defendant: this body of evidence, if accepted as reliable, compellingly pointed to the guilt of the defendants. Given that the written statements ought not to have been admitted, the question is whether the Board is entitled to rely on the findings of the trial court on the remainder of the evidence. The problem is whether it is right and fair to place reliance, so far as Mohd Ali is concerned, on the favourable credibility and reliability findings in respect of the police officers and unfavourable credibility finding in respect of Mohd Ali. Similarly, so far as Ak Metassan and Madtassan are concerned, the question is whether it is right in particular to rely on the favourable credibility and reliability findings in respect of Sabtu and Bakri, and the unfavourable credibility findings in respect of these two defendants.

Despite the admission of inadmissible evidence a conviction can sometimes be sustained on the basis of real or circumstantial evidence unaffected by the admission of the disputed evidence. Sometimes the remainder of the direct evidence is absolutely overwhelming. But there are cases where it is impossible to conclude with confidence that the conviction can be sustained because it cannot be shown that the jury or trial court's view of credibility on the remainder of the evidence was not affected by the inadmissible evidence. Speaking generally, the greater the volume of inadmissible evidence, the more prejudicial its effect, and the less compelling the remainder of the evidence, the greater is the risk that one will not fairly be able to say that the credibility findings would have been the same.

It is important to bear in mind that in deciding on guilt or otherwise a trial court will not usually compartmentalise the evidence. It will make its findings of credibility and reliability in respect of particular witnesses against the possibilities, probabilities and certainties emerging from the whole body of evidence before it. In *Attorney-General of Hong Kong v. Wong Muk Ping* [1987] A.C. 501, Lord Bridge explained the intellectual process underlying such a decision. He said (at page 510E-F):-

> "It is a commonplace of judicial experience that a witness who makes a poor impression in the witness box may be found at the end of the day, when his evidence is considered in the light of all the other evidence bearing upon the issue, to have been both truthful and accurate. Conversely, the evidence of a witness who at first seemed impressive and reliable may at the end of the day have to be rejected. Such experience suggests that it is dangerous to assess the credibility of the evidence given by any witness in isolation from other evidence in the case which is capable of throwing light on its reliability ..."

This is the way in which the trial court would probably have proceeded.

Given this context the question must be faced: can it fairly be said that the trial court's decisions on credibility and reliability of the defendants and prosecution witnesses were influenced by its views on the voluntariness of the written statements? The judgment of the trial court relied heavily on the written statements. The stark question is: how would the trial court have responded if the written statements had been excluded? The only realistic answer is that it is impossible to say how the trial court would have proceeded. In these circumstances their Lordships conclude that it would not be right or fair to rely on the findings of fact of the trial court on the remainder of the evidence.

Can the convictions be sustained on the record?

It follows that the convictions can only be sustained if it can be said that on the written record, unassisted by the trial court's findings of fact, the guilt of the defendants was established beyond reasonable doubt. Their Lordships have given careful consideration to the strengths and weaknesses of the case against each defendant. The evidence of the police witnesses, who testified to the oral statements made by Mohd Ali, suffered from the fact that virtually none of the statements were recorded contemporaneously as they should have been. In the context of the case this category of evidence is not evidence of compelling quality. Similarly, the evidence of the two soldiers, who testified as to the statements and conduct of Ak Metassan and Madtassan, was not of the highest calibre. Against the remainder of the prosecution case, on the basis of the written statements being excluded, their Lordships must take into account the oral evidence of the defendants. Ultimately, their Lordships have concluded that it is impossible to say that the defendants' accounts, however unlikely, might not have been accepted as reasonably possible if the court had not proceeded along the wrong path of admitting the written statements. It is impossible to sustain the convictions on the record.

The other issues.

In view of their Lordships' conclusions it is unnecessary to consider other submissions advanced on behalf of the defendants.

Conclusion.

Their Lordships will advise His Majesty the Sultan and Yang Di-Pertuan that the appeal should be allowed, the convictions should be quashed, and the sentence should be set aside.