

Public Prosecutor

AND

**Muhammad Firdhaus Bin Hamid (D1)
Masnani Binti Haji Masri (D2)**

**(High Court of Brunei Darussalam)
(Criminal Trial No. 32 of 2013)**

**Steven Chong, Ag. C.J.
11 January 2014**

Criminal law – Child abuse – Culpable homicide not amounting to murder –
Kidnapping – Cheating by personation – Causing grievous hurt – Depositing
corpse in a public place – Failure to report death – Appropriate sentence.

DPP Suhana Bte Sudin, DPP Pg Norsuzanawati Bte Pg Abas and DPP
Shamsuddin Bin Hj Kamaluddin for the Public Prosecutor.
Defendant unrepresented.

Cases cited:-

Bensegger v R [1979] WAR 65.
Public Prosecutor v Firdaus [2010]3 SLR 225.
Public Prosecutor v Hamidun bin Ibrahim [1996]1 JCBD 103.
Public Prosecutor v Rosli Bin Tahiruddin [1996]2 JCBD 134.
Public Prosecutor v Matnoor Bin Tengah [1998]1 JCBD 46.
Public Prosecutor v Mohammad Zini Bin Sulaiman [2012]1 JCBD 31.
R v Ambler [1976] Crim Cr 266.
R v Tait and Bartley [1979] 24 ALR 473.
Sim Gek Yong v Public Prosecutor [1995] 1 SLR S37.

Steven Chong, Ag. C.J.

The charges

The defendants pleaded guilty to these charges:

“1st Charge (against D1 only):

That you, sometime between the 13th September 2013 and the 14th day of September 2013, in Brunei Darussalam, did cause the death of Miss X (Nurul Faa’izah Aaqilah bte Hj Shaliheen, F 3 yrs old, D.O.B. 20th July 2010) with the knowledge that your act was likely to cause death but without the intention to cause death and without the intention of causing such bodily injury as was likely to cause death and you have hereby committed an offence committed of culpable homicide not amounting to murder punishable under section 304(2) of the Penal Code.

2nd Charge (against D1 & D2):

That you, sometime between the 9th and 10th day of June 2013, at a government flat No. 789, D2, Spg 41-38, Jalan Pandan Lapan, Kuala Belait in Brunei Darussalam, did kidnap Miss X (Nurul Faa’izah Aaqilah bte Hj Shaliheen, F 3 yrs old, D.O.B. 20th July 2010) from the lawful guardianship of her father Hj Shaliheen bin Hj Kassim without his consent, and both of you have thereby committed an offence under section 361 of the Penal Code punishable under section 363 of the same.

3rd Charge (against D1 & D2):

That both of you, on the 16th day of June 2013, at about 10 p.m. at a government flat No. 789, D2, Spg 41-38, Jalan Pandan Lapan, Kuala Belait in Brunei Darussalam, did kidnap Mr Y (Muhammad Faa’iz Soliheen bin Hj Shaliheen, M 7 months old, D.O.B. 24th October 2012) from the lawful guardianship of her father Hj Shaliheen bin Hj Kassim without his consent, and both of you have thereby committed an offence under section 361 of the Penal Code punishable under section 363 of the same.

4th Charge (against D1 & D2):

That both of you, sometime in the month of June 2013, at a government flat No. 789, D2, Spg 41-38, Jalan Pandan Lapan, Kuala Belait in Brunei Darussalam, did cheat Hj Shaliheen bin Hj Kassim and Dyg Zarirah bte Awg Bakar by pretending yourselves to be a member of a Brunei Royal Family by the name of one Yang Amat Mulia Pg Anak Hashim bin Yang Amat Mulia Pg Anak Cheteria Dr Haji Shahibul Al Najabah and Magistrate Dk Masnani, respectively, who were desirous of adopting their daughter, and fraudulently inducing the said Hj Shaliheen bin Hj Kassim and Dyg Zarirah bte Awg Bakar so deceived, to give their daughter, Miss X (Nurul Faa'izah Aaqilah bte Hj Shaliheen, F 3 yrs old, D.O.B. 20th July 2010), to both of you for adoption, which they would not do if they were not so deceived, and both of you have thereby committed an offence under section 416 of the Penal Code punishable under section 419 of the same.

5th Charge (against D1 & D2):

That both of you, on the 16th day of June 2013, at about 10 p.m. at a government flat No. 789, D2, Spg 41-38, Jalan Pandan Lapan, Kuala Belait in Brunei Darussalam, did cheat Hj Shaliheen bin Hj Kassim and Dyg Zarirah bte Awg Bakar by pretending yourselves to be a member of a Brunei Royal Family by the name of one Yang Amat Mulia Pg Anak Hashim bin Yang Amat Mulia Pg Anak Cheteria Dr Haji Shahibul Al Najabah and Magistrate Dk Masnani, respectively, who were desirous of adopting their daughter, and fraudulently inducing the said Hj Shaliheen bin Hj Kassim and Dyg Zarirah bte Awg Bakar so deceived, to give their daughter, Mr Y (Muhammad Faa'iz Soliheen bin Hj Shaliheen, M 7 months old, D.O.B. 24th October 2012), to both of you to be handed over for adoption by another member of the Royal Family, which they would not do if they were not so deceived, and both of you have thereby committed an offence under section 416 of the Penal Code punishable under section 419 of the same.

6th Charge (against D1 only):

That you, sometime between the month of June 2013 and 13th September 2013, in Brunei Darussalam, did take part in a transaction the object of which is to transfer permanently, the custody of a child, to wit, by offering Miss X (Nurul Faa'izah Aaqilah bte Hj Shaliheen, F 3 yrs old, D.O.B. 20th July 2010) for adoption to one Asmadi bin Hj Puteh for a valuable consideration, to wit,

B\$3,000 in cash, and you have thereby committed an offence punishable under section 35(1) of the Children and Young Persons Act, Chapter 219.

7th Charge (against D1 & D2):

That both of you, between the month of June 2013 and 13th September 2013, in Brunei Darussalam, being persons having the care of a child, to wit, Miss X (Nurul Faa'izah Aaqilah bte Hj Shaliheen, F 3 yrs old, D.O.B. 20th July 2010), did abuse the said child in a manner likely to cause her physical injury, and both of you have thereby committed an offence punishable under section 28(1)(a) of the Children and Young Persons Act, Chapter 219.

8th Charge (against D1 only):

That you, between the month of June 2013 and 13th September 2013, in Brunei Darussalam, cause grievous hurt by means of heated substance, to one, Miss X (Nurul Faa'izah Aaqilah bte Hj Shaliheen, F 3 yrs old, D.O.B. 20th July 2010), to wit, by scalding her upper lip and causing such injury as listed in No. 16 of paragraph 3 of the Post Mortem Report (attached as "Annex A"), and you have have thereby committed an offence punishable under section 326 Penal Code, Chapter 22.

9th Charge (against D1 only):

That you, between the month of June 2013 and 13th September 2013, in Brunei Darussalam, did voluntarily cause hurt by means of heated substance, to one, Miss X (Nurul Faa'izah Aaqilah bte Hj Shaliheen, F 3 yrs old, D.O.B. 20th July 2010), to wit, by burning her various parts of her body and causing such injuries as listed in No. 7, 15, 17, 42, 62 and 109 of paragraph 3 of the Post Mortem Report (attached as "Annex A"), and you have have thereby committed an offence punishable under section 324 Penal Code, Chapter 22.

10th Charge (against D1 & D2):

That both of you, together with one other person, on the 14th day of September 2013, in the early morning, at a jungle area by a roadside at Jalan Ulu Kuala Belait in Brunei Darussalam, in furtherance of your common intention, did deposit a corpse of a three year old to wit, Miss X (Nurul Faa'izah Aaqilah bte Hj Shaliheen, F 3 yrs old, D.O.B. 20th July 2010), in a public place, and all of you have thereby committed an offence punishable under section 17 of the Minor

Offences Act (Chapter 30) and read with section 34 of the Penal Code (Chapter 22).

11th Charge (against D1 & D2):

That both of you, on the 14th day of September 2013, being legally bound under section 17 of the Criminal Procedure Code (Chapter 7) to furnish information about the death of a three year old girl to wit, Miss X (Nurul Faa'izah Aaqilah bte Hj Shaliheen, F 3 yrs old, D.O.B. 20th July 2010), under suspicious circumstances, intentionally omits to furnish such information to the officer in charge of the nearest police station of such death, and the both of you have thereby committed an offence punishable under section 176 of the Penal Code (Chapter 22).

The facts

The defendants admitted to the following “Statement of Facts”

- “1. D1 and D2 are married since 2008 and have no biological children. D1 is a Bruneian, and is currently unemployed since 1st May 2013. He was previously employed with the Royal Brunei Police Force as PC 4981, earning a salary of B\$1,200. D2 is an Assistant Farm Instructor at the Entrepreneurial Development Centre of the Ministry of Primary Resources in Anggerek Desa. She was then seconded as a counter staff at the Business Facilitation Centre, Information Management Unit of the same Ministry, earning a salary of B\$1,800. Sometime in 2008, they adopted a baby by the name of Siti Noor Bazilah binti Abdullah, who is now 5 years old (“Bazilah, D.O.B. 19.10.2008), and she has been living with and under the care of D1’s biological mother and stepfather at No. 10, Spg 128-11-10 Kg Pengkalan Gadong since the day she was adopted.*
- 2. After they got married in 2008, D1 and D2 lived with D1’s biological mother and his stepfather at the said address in Kg Pengkalan Gadong. Sometime in 2011, D1 got into an argument with his stepfather, which caused D1 and D2 to be kicked out of the house. They then moved in with D2’s mother in No. 13, Spg 1046, Kg Tanah Jambu, Jalan Muara. Sometime in 2012, D2 was given a government rented bungalow at Sinaut Agricultural Training Centre, Km 33, Jalan Tutong, and both D1 and D2 moved in to this said house. Sometime in 2013, they moved back into D2’s house in Kg Tanah Jambu because of frequent intrusions*

of snakes and monitor lizards into their rented house in Sinaut. Not long after that, they were told to move out of the said house by D2's brother because D2's brother said the house belonged to him and he was just recently married. Thereafter, D1 and D2 have no permanent address, and would alternately stay in Kg Pengkalan Gadong, sleep in their car or they would check into a hotel.

- 3. Sometime in June 2013, D1 contacted Dayang Zarirah bte Awang Bakar ("Zarirah") via Facebook, through her Facebook account "Rizqun Halalan" in order to purchase some holy "Zam Zam" water. D1 was using his own Facebook account called "Sham Fz One", "Rizqun Halalan" offers massage services and spiritual healing services called "Ruqyah".*
- 4. Zarirah is a Bruneian, married to one Haji Shaliheen bin Hj Kassim ("Hj Shaliheen") on 31st August 2007. They lived with their four children at Flat 789 D2, Spg 41-38, Jalan Pandan Lapan, Kuala Belait. Their four children were then aged 4 and a half years, 2 years 11 months, 1 year 9 month and 7 months old. Zarirah was previously employed as a religious teacher at Sg Liang Religious School and Hj Shaliheen was employed as an Imam in Kg Sg Liang Mosque. Both were suspended from their jobs, before they got married, sometime in 2007, soon after they were caught in close proximity ("berkhalwat"). Hj Shaliheen was terminated from his post sometime in 2012, upon the conclusion of his trial in Syariah court.*
- 5. D1 went to Zarirah's flat on Friday, 7th June 2013, sometime after the Asar prayer and introduced himself as "Pg Anak Hisham", a nephew of His Majesty The Sultan and Yang Di-Pertuan of Negara Brunei Darussalam, and a son of Yang Teramat Mulia Paduka Seri Pengiran Anak Puteri Hajah Amal Rakiah. At the flat, D1 was received by Hj Shaliheen. D1 bought 4 bottles of holy "Zam Zam" water for B\$20 each, and gave Hj Shaliheen B\$100 and told him to keep the change as his gift ("sedekah").*
- 6. Whilst at the said flat, D1 saw one of Hj Shaliheen's and Zarirah's daughter calleh Nurul Faa'izah Aaqilah bte Hj Shaliheen ("Aqilah", then aged 2 years 11 months, D.O.B. 20th July 2010, affectionately known to her parents as "Amoi"), the deceased, who was sleeping in the living room. D1 commented on her beauty and asked Hj Shaliheen if he could have the said child. Hj Shaliheen politely refused.*

7. *The next day, Hj Shaliheen and Zarirah received text messages via Whatsapp on a mobile phone (8112159) which they shared from a person introducing himself as His Majesty The Sultan and Yang Di-Pertuan of Negara Brunei Darussalam. The profile picture of the number these text messages were sent from displayed a photo of His Majesty The Sultan and Yang Di-Pertuan of Negara Brunei Darussalam. In these text messages, Hj Shaliheen and Zarirah were commanded to explain his background. They replied in their text messages also via Whatsapp that Hj Shaliheen was a former Imam and his service was terminated. Hj Shaliheen was then told to give a copy of the Termination Letter so that "His Majesty" can take action to have him reinstated. Hj Shaliheen also informed "His Majesty" that he is in a lot of debt and that he and his wife have been in financial hardship for the last 7 years. "His Majesty" promised to clear his debt and his name. "His Majesty" also promised to make him an Imam in As-Solihin Mosque, and promised to promote him as Pehin Udana Khatib in due course.*
8. *Hj Shaliheen and Zarirah were also asked to explain how they knew His Majesty's nephew, Pg Anak Hisham and they informed by "His Majesty" that Pg Anak Hisham is his favourite nephew. "His Majesty" told them that Pg Anak Hisham likes children and commanded Hj Shaliheen and Zarirah to give Amoi to Pg Anak Hisham to be adopted. Hj Shaliheen discussed about this with Zarirah. They were initially hesitant, however, as they were convinced that the said person they were communicating with via Whatsapp at the time was in fact His Majesty The Sultan and Yang Di-Pertuan of Negara Brunei Darussalam, they consented to give their daughter, Aaqilah, to Pg Anak Hisham to be adopted as commanded by His Majesty. They then told "His Majesty" that they consent to give Aaqilah to Pg Anak Hisham to be adopted the next day. Investigation on the mobile phones of D1 and Hj Shaliheen revealed that "His Majesty" was in fact D1.*
9. *Between the 9th and 10th of June 2013, D1 and D2 came to Hj Shaliheen and Zarirah's flat in order to get Aaqilah. They went there in a Mitsubishi Evo with dark tinted windows. D1 introduced D2 to them as his wife by the name of Dk Masnani bte Pg Hj Masri, and works as a Magistrate. In the said flat, they gave \$200 to Hj Shaliheen and Zarirah, and also gave them groceries in the form of 6 bags of rice, 1 bag of sugar, chicken and some other food stuff. Hj Shaliheen and Zarirah*

handed to D1 and D2 original copies of Aaqilah's Birth Certificate and Hospital Card. After the said adoption, D1 sent text messages to Hj Shaliheen and Zarirah several times in order to convince them that Aaqilah was safe.

- 10. On 15th June 2013, Hj Shaliheen and Zarirah received more text messages via Whatsapp from "His Majesty". In these messages, "His Majesty" told them that he had wanted to adopt their youngest child, Muhammad Faa'iz Soliheen bin Hj Shaliheen ("Faa'iz", at the time aged 7 months, D.O.B. 24th October 2012). Since they believed that the request came from His Majesty The Sultan and Yang Di-Pertuan of Negara Brunei Darussalam, they consented to give Faa'iz up to "His Majesty" for adoption. "His Majesty" commanded them to hand Faa'iz over to Pg Anak Hisham to be given to "His Majesty". Investigation again revealed that "His Majesty" was in fact D1.*
- 11. On 16th June 2013 at round 10 p.m. , D1 and D2 again went to Hj Shaliheen's and Zarirah's flat to get Faa'iz. D1 and D2 came together in one car, but following their car was another car with 3 people inside. When they arrived, D1 and D2 went up to Hj Shaliheen's flat, whilst the 3 people in the other car just waited inside the said car. In the flat, D1 and D2 gave Hj Shaliheen and Zarirah some groceries in the form of 2 bags of rice, diapers, bottled chilli sauce and Sustagen milk formula. D1 also showed a Letter of Agreement for Adoption to Hj Shaliheen and Zarirah and explained to them that the said Letter is the personal letter of His Majesty The Sultan and Yang Di-Pertuan of Negara Brunei Darussalam. D1 then told them to affix their signature on the said Letter to show their consent for the adoption, and they did as instructed by D1; please find this Letter attached and marked as **"Tab 1"**. Hj Shaliheen and Zarirah then handed the original copies of Faa'iz Birth Certificate and Hospital Card to them, and handed Faa'is over to D2. D1 and D2 told them that they were not allowed to go down because they said that Pengiran Anak Puteri Rashidah Sa'adatul Bolkiah and Babu Raja were waiting in a separate car downstairs. D2 then brought Faa'iz downstairs and sent him to the said car. The said car then drove away soon after. After about one week this said adoption, Hj Shaliheen and Zarirah received another text message via Whatsapp from "His Majesty" assuring them that Faa'iz is already safely with "His Majesty". Investigation also revealed that "His Majesty" was in fact D1.*

12. *Further investigation revealed that the 3 people waiting in the other car was one Asmadi bin Hj Puteh ("Asmadi"), his wife and his mother in law. Investigation revealed that Asmadi is a work colleague of D1's mother, Linah bte Hj Ali ("Linah"). It was also later revealed that Asmadi had made an arrangement with D1 through Linah to adopt Faa'iz on behalf of Asmadi's brother, Abd Aji bin Hj Puteh ("Abd Aji"). It was further revealed that Linah had told Asmadi about the little girl adopted by her son D1, and showed him a picture of the girl and her siblings on her handphone. When Asmadi looked at the picture, he was interested in the youngest siblings on her handphone. When Asmadi looked at the picture, he was interested in the youngest sibling and asked if the said child had already been adopted. Linah then called up D1 to ask about this matter, and D1 confirmed to her that the said child is still not taken for adoption yet. Asmadi then contacted D1 to enquire more about the said child, and he was informed by D1 that the parents of the said child had agreed to give him to Asmadi for adoption. This said child was later identified as Faa'iz. Investigation also revealed that the said Letter of Agreement for the Adoption of Faa'iz was prepared by Asmadi himself. It was also revealed that the groceries given to Hj Shaliheen and Zarirah by D1 and D2 that day were in fact bought by Asmadi, which he was made to understand from D1, were things which had been requested by Faa'iz's parents. Asmadi had been earlier informed by D1 that Faa'iz parents had refused to go down to meet them because they were embarrassed of their poor condition.*
13. *Following the adoption of Faa'iz, D1 had once again offered to Asmadi a little girl for adoption. D1 sent a picture of the said girl to Asmadi via Whatsapp and told Asmadi that the said girl was being abused by her parents and her hair had been shaved bald as a result. D1 told him that the said girl's parents had asked for B\$3,000 in cash for the adoption, and told him that the said girl was Faa'iz's elder sister, by the name of "Aqilah". Investigation revealed that this "Aqilah" was in fact Nurul Faa'izah Aaqilah bte Hj Shaliheen.*
14. *On 10th September 2013, D1, D2, Bazilah and Aqilah checked in at the Holiday Lodge Hotel. D1 and D2 had decided to stay there for a few days because Bazilah likes to go swimming, and they also needed some time to think of where to go next as they did not really have a place to live in. however, only D1, D2 and Aqilah slept there as they would send Bazilah back to Kg Pengkalan Gadong every night before going to bed*

and they would pick her up again the next day back to the hotel. In their hotel room, D1 and D2 slept on the bed whilst Aqilah slept on a sofa.

- 15. On their first day at the said hotel on 10th September 2013, D1 and Bazilah had decided to go for a swim, and asked Aqilah if she wanted to come along. Aqilah however, did not answer him, and this made him angry whereby he then went to Aqilah and pinched her leg. Sometime during the next day, D1 asked Aqilah what she wanted. When Aqilah did not reply, D1 became angry at her again and hit on her right and left legs. D1 became angry at Aqilah again the following day when Aqilah refused to eat, so he hit her on her arm, leg and ears as punishment. D1 hit Aqilah again the day after that by slapping her face, kicking her left and flicking her wrist because she had refused to eat when D2 tried to feed her.*
- 16. They checked out of the said hotel at about 4 p.m. on 13th September 2013. By this time, Aqilah was having difficulty breathing and was doing so heavily. After checking out, they dropped off Bazilah back in Kg Pengkalan Gadong, and the three of them continued driving around after that.*
- 17. At around 8 p.m. that day, D2 called up Zarirah and told her that Pg Anak Hisham and her wanted to return Aqilah to Hj Shaliheen and Zarirah because Aqilah had passed motion on Pg Anak Hisham's head who got really angry.*
- 18. At around 8.30 p.m., D1 and D2 decided to stop by at a Thai restaurant in Kg Jerudong to eat and to get some food for Aqilah whom was at the time in the car sleeping. When they returned to the car, they tried to give Aqilah her food but she refused. This made D1 really angry at her and he hit her several times as a result. D2 was also angry and had pinched her as a result.*
- 19. At around 10 p.m. that same day, D2 discovered that Aqilah was playing with D2's pills which were kept in a plastic drawer at the back seat of the car. When D2 confronted her about it, Aqilah just kept quiet and started throwing the said pills onto the floor. This made both D1 and D2 angry, and D1 hit Aqilah.*

20. *Sometime around 1 a.m. on 14th September 2013, when D1, D2 and Aqilah were in the car on their way to buy some rice, D2 heard Aqilah whom was sitting in the back seat, breathing heavily and sounding out of breath. D2 then went to the back seat, lay her down and covered her with a towel. It was then when D2 noticed that her body felt cold. D2 then returned to the front passenger seat, but a short while later when she asked Aqilah if she wanted to eat, Aqilah did not reply. So D2 returned to the back seat and did a mouth to mouth resuscitation on Aqilah. Seeing this, D1 instructed D2 to press down her chest, which she did, but Aqilah still did not say anything. D1 then reached back and touched Aqilah's leg and told D2 that Aqilah is already dead. They were in the vicinity of the highway in Jerudong at the time, on the lane heading towards Tutong.*
21. *When they discovered that Aqilah had already died, they both discussed on what to do with Aqilah's body. They went to see Hj Shaliheen's flat and D1 told Hj Shaliheen, in the presence of D2, that Aqilah had died after a fall from a window. D1 asked Hj Shaliheen about how to handle the burial of Aqilah and the person who would know how to prepare a body for burial. He Shaliheen told D1 that he could not afford to bury Aqilah because he had no money. Hj Shaliheen then told D1 to handle the burial. D1 then told Hj Shaliheen that "God willing", Aqilah would be buried in Kubah Makam Diraja according to the rites of the royalty.*
22. *At around 3 a.m., D1 decided that they should go to D1's stepmother's Ros Tinah binti Hj Mohd Ali @ Awang Adi ("Ros Tinah"), house at No. 2, Spg 363-30-24-4, RPN Kg Pandan 8, Kuala Belait to ask for help.*
23. *On 14th September 2013 at around 4 a.m., D1 and D2 arrived at Ros Tinah's house and told her that they needed her help to look for someone to arrange the funeral of a dead 3-year-old girl. They told her that the girl was their adopted daughter, and that she was possessed by a spirit, which they believed, made her jump off a flat she was living in with her biological parents and had died as a result. D1 and D2 also informed her that the biological mother of their said adopted daughter had called them to pick up the body to be dealt with, and that the corpse was in their car.*

24. *Ros Tinah said that she knew someone whom might be able to help and called up her friend, Yussof bin Hj Ibrahim ("Yussof"). When Yussof arrived, D1 repeated the same explanation to Yussof and asked for his help. Yussof asked D1 why the matter was not reported to the police, and D1 replied that it will just complicate matters and that he did not want the police to investigate. Yussof also suggested for their deceased adopted daughter to be brought to the hospital, but D1 objected to his suggestion. Yussof then asked to see the flat where their said adopted daughter had jumped off from, and both D1 and Yussof left Ros Tinah's house to look at the place.*
25. *Before they left, Yussof and D1 went to D1's car, which was parked in front of Ros Tinah's house, to look at the deceased, who was lying on the back seat of the said car.*
26. *D1 and Yussof then headed to Hj Shaliheen's and Zarirah's flat in Kg Pandan 8 where D1 told Yussof that that is where the biological parents live at. They then left to go to a house belonging to someone according to Yussof knows was able to help arrange with the funeral. However, after Yussof knocked on the door several times, nobody came to open the door. So they left to head back to Ros Tinah's house.*
27. *Back in Ros Tinah's house, the four of them continued their discussion on how best to deal with the body. D1 initially suggested disposing off the body at the beach, but later changed his mind when D2 said that she preferred the body to be properly buried. D1 then asked Yussof if he knew of any suitable place for them to place the body and Yussof suggested an isolated place in Kuala Balai and D1 then asked him to show them the place.*
28. *D1, D2 and Yussof then all left Ros Tinah's house at around 6 a.m. Yussof left in his own car, followed by D1 and D2 in their own car, with Aqilah's body in their car. Ros Tinah opted to stay as she was due to leave for work that morning.*
29. *They drove to an area by a roadside at Jalan Ulu Kuala Balai and stopped their respective cars in the vicinity. They all went out of their cars, and D1 and Yussof then walked around the area to look for a suitable place to dispose of the said body. Yussof suggested an isolated jungle area in the bush by a roadside in the said vicinity to D1 and the*

latter agreed to the suggestion. D1 told Yussof to get the dead body from his car, which he did, and carried it to the bush. By then, Aqilah's dead body felt cold and there was foam coming out of her mouth. D1 then told Yussof to strip Aqilah's clothes off, which he did. After taking off the clothes, he handed the clothes to D1 and placed the said body on the ground in the bushes. They then left the said place in their respective cars.

30. *Later on the same day, a police report was lodged by Yussof about his discovery of a corpse of a little girl near a road in Kuala Balai. Police investigation was conducted which subsequently revealed the identified of the said little girl and also led to the arrests of D1 and D2.*
31. *In their statements, D1 and D2 confessed to causing hurt to Aqilah repeatedly throughout the course of her short stay with them as their adopted daughter. According to D1, he hits her because he had wanted Aqilah to be able to tell them if she was hungry or thirsty or if she wanted anything. D1 also confessed that the first time he hit Aqilah was within a week after they had adopted her at his biological mother's house in Pengkalan Gadong. He said that he would hit her hands and legs every time she refuses to talk. He also confessed to have hit her with a thin metal rod when they stayed over their house in Sinaut, using a metal broomstick to hit her legs and smacking her thighs with rolled up books, and to flicking her hand using rubber bands. According to him, he and D2 would lock her up in the store room at their rented bungalow in Sinaut as punishment. He also confessed to abusing Aqilah between 10th to 13th of September 2013 when they were staying at the Holiday Lodge Hotel.*
32. *He further confessed to pretending to be Pg Anak Hisham in order to convince Hj Shaliheen and Zarirah to give Aqilah to him for adoption and to give Faa'iz to him to be adopted by "His Majesty" when in actual fact, he had arranged for Faa'iz to be adopted by Asmadi's brother.*
33. *In her statement, D2 said that D1 had been beating Aqilah up at the hotel during their stay on 10th to 13th September 2013. According to D2, Aqilah suffered injuries as a result and these injuries were so obvious, that when they checked out of the said hotel on 13th September 2013, D1 had Aqilah wrapped in a towel and carried her out to the car, in order to hide her injuries. D2 confessed to witnessing D1 punching and*

kicking Aqilah on her left thigh several times on 13th September 2013. She also saw D1 hitting Aqilah on her legs and face which had caused a cut on her left leg, her thighs to be bruised, both her eyes to be swollen and her mouth to bleed. She also saw him punching Aqilah on her swollen right leg several times when he became irritated at having to listen to Aqilah's heavy breathing.

- 34. The injuries sustained by Aqilah which were inflicted by both D1 and D2 are listed out in the Post Mortem Report (**see Tab 2**) by Dr P. U. Telesinghe, a Consultant Pathologist at RIPAS Hospital dated 16 September 2013. According to Dr Telesinghe, the cause of death was "shock following multiple soft tissue injuries to the body". He also found 121 injuries on a large part of Aqilah's body.*
- 35. One of the injuries, listed in No. 16 of paragraph 3 of the Post Mortem Report, was a 4 x 3.0 cm scar over the upper lips which Dr Telesinghe classified as "old healed burn mark probably caused by hot liquid". This injury caused a permanent disfiguration of the face.*
- 36. Dr Telesinghe also found 7 injuries which were caused by heated substances. These injuries listed in No. 7, 15, 17, 41, 42, 62 and 109 of paragraph 3 of the Post Mortem Report. These injuries were classified as hurt by heated substances.*
- 37. The remaining 113 injuries classified as simple hurt, were caused by pinching, punching, pulling, kicking, assault with stick or cane, bite marks, nail marks, grip marks.*
- 38. Dr Telesinghe is of the opinion that "the injury pattern and distribution is consistent with those seen in physical child abuse."*
- 39. Further investigation also revealed that D1 and D2, fully aware of Aqilah's death, did not forthwith give information to the police.*
- 40. D1 admits that he caused the death of Aqilah between 13 and 14 September 2013 by beating her on numerous occasions, knowing that his actions were likely to cause death. But he did not intend to cause the death and he did not intend to cause such bodily injury to Aqilah as was likely to cause death.*

41. *The police also seized 2 T-shirts with 'Pg Anak Hisham' embroidered on the front from D1's car and D2's house. The police seized a portable gas blow torch from D1's car which he admits was used to cause some of the injuries on Aqilah.*
42. *Upon police investigations on the biological parents of Aqilah and Faa'iz, Zarirah and Hj Shaliheen, and upon the revelation of the true identities of D1 and D2, Zarirah and Hj Shaliheen would not have consented to giving up the 2 children for adoption to them. (Section 90 of the Penal Code is referred) and were thus clearly deceived by the D1 and D2.*
43. *On record, D1 and D2 are first offenders.*

Penalty

The sentences for the above offences under the law are:

1. Culpable homicide not amounting to murder contrary to section 304(2) of the Penal Code: Imprisonment for a term which may extend to 15 years, or with fine, or with both.
2. Kidnapping contrary to section 361 of the Penal Code: Imprisonment for a term which may extend to 10 years and shall also be liable to fine.
3. Cheating by personation contrary to section 416 of the Penal Code: Imprisonment for a term which may extend to 7 years, or with fine.
4. Unlawful transfer of custody of a child contrary to section 35(1) of the Children and Young Persons Act: Fine not exceeding \$20,000, imprisonment for a term not exceeding 5 years with or without whipping not exceeding 10 strokes, or both.
5. Child abuse contrary to section 28(1)(a) of the Children and Young Persons Act: Fine not exceeding \$20,000, imprisonment for a term not exceeding 10 years with or without whipping not exceeding 10 strokes, or both.
6. Causing grievous hurt by means of a heated substance contrary to section 326 of the Penal Code: Imprisonment for a term which extend to 15 years and with whipping.

7. Causing hurt by means of a heated substance contrary to section 324 of the Penal Code: Imprisonment for a term which may extend to 7 years and with whipping.
8. Depositing corpse in a public place contrary to section 17 of the Minor Offences Act: Fine of \$2,500 and imprisonment for 6 months.
9. Failure to report death to the police contrary to section 176 of the Penal Code: Imprisonment for a term which may extend to 6 months, or with fine which may extend to \$4,000, or with both.

Previous cases

In cases of child abuse resulting in the death of the victim sentences of between 3½ to 15 years' imprisonment have been imposed: *Public Prosecutor v Hamidun bin Ibrahim* [1996]1 JCBD 103, *Public Prosecutor v Rosli Bin Tahiruddin* [1996]2 JCBD 134, *Public Prosecutor v Matnoor Bin Tengah* [1998]1 JCBD 46 and *Public Prosecutor v Mohammad Zini Bin Sulaiman* [2012]1 JCBD 31.

And in *Public Prosecutor v Firdaus* [2010]3 SLR 225, in the Singapore High Court, Chan Sek Keong CJ imposed an overall sentence of 12 years and 12 strokes where the defendant was convicted of three offences relating to the ill-treatment of a 3 year old child resulting in death.

Maximum sentence

In *R v Ambler* [1976] Crim Cr 266, the Court of Appeal in England said that:

“it is to be borne in mind that when judges are asking themselves whether they should pass the maximum sentence, they should not use their imagination to conjure up unlikely worst possible kinds of cases. What they should consider is the worst type of offence which comes before the court and ask themselves whether the particular case they are dealing with comes within the broad band of that type.”

This approach was adopted by the Federal Court of Australia in *R v Tait and Bartley* [1979] 24 ALR 473, where the court referred to the decision of Burt CJ in *Bensegger v R* [1979] WAR 65, in which he said:

“A maximum sentence prescribed by statute is not reserved for the worst offence of the kind dealt with that can be imagined. If such were the case it would never be imposed as the addition of non-existing but aggravating. Circumstances would never be beyond the reach of imagination. The true rule as I understand it is that the maximum sentence should be reserved for the worst type of cases falling within the prohibition or ‘for the worst cases of the sort.’ That expression should be understood to be making out a range and an offence may be within it notwithstanding the fact it could have been worse than it was.”

In *Sim Gek Yong v Public Prosecutor* [1995] 1 SLR S37, a decision of the Singapore High Court. Yong Pung How CJ cited with approval the reasoning in *R v Tait and Bartley* and *Bensegger v R*, and said at p. 542:

*“To restrict the maximum sentence to the ‘worse case imaginable’ would only invite an endless permutation of hypotheses..... The possibilities are limitless and the uncertainty intolerable. All that a court can realistically do – and all that it should do – when deciding whether or not to impose a maximum sentence is to identify a range of conduct which characterizes the most serious of the instances of the offence in question. This would, as the court in *R v Tait and Bartley* pointed out, involve consideration both of the nature of the crime and of the circumstances of the criminal.”*

Applying the principles enunciated in the cases referred to above, insofar as D1 concerned, I am of the view that this case falls comes within the broad band of the worst type of cases of child abuse. The aggravating circumstances are that the victim was a defenceless and vulnerable 3 year old child and the assaults were cruel and prolonged and included the use of a metal rod, broomstick and blow torch which caused multiple serious injuries.

In respect of the offences of violence committed by D1 on Aqilah, I therefore think that the nature of the crime warrants the maximum sentences prescribed under the law to be imposed.

D1 is a wicked and dangerous man and it is in the public interest that he be imprisoned for a very long time.

The assaults by D2 on Aqilah were not as serious in comparison to that perpetrated by D1. Nevertheless, any act of violence towards a child must be strongly condemned and a substantial custodial sentence is to be expected where the assaults are repeated and injuries are caused to the victim.

Turning to the kidnapping and cheating offences, I am of the view that the nature of the crime justifies severe punishment. The elaborate scheme used to unduce the parents to part with their two children reveals the deviousness of the defendants who were motivated purely by greed. I accept that D2 played the lesser role in these offences.

On the facts I consider the following sentences appropriate, with a reduction in the starting point given to the defendants for their guilty pleas and clear records:

1st Charge: D1: 15 years reduced to 10 years.

2nd Charge: D1: 9 years reduced to 6 years.
D2: 6 years reduced to 4 years.

3rd Charge: D1: 9 years reduced to 6 years.
D2: 6 years reduced to 4 years.

4th Charge: D1: 5 years reduced to 3 years and 4 months.
D2: 3 years reduced to 2 years.

5th Charge: D1: 5 years reduced to 3 years and 4 months.
D2: 3 years reduced to 2 years.

6th Charge: D1: 3 years reduced to 2 years.

7th Charge: D1: 10 years and 10 strokes reduced to 6 years and 8 months and 6 strokes.

D2: 6 years reduced to 4 years.

8th Charge: D1: 15 years and 15 strokes reduced to 10 years and 10 strokes.

9th Charge: D1: 7 years and 5 strokes reduced to 4 years and 8 months and 3 strokes.

10th Charge: D1 and D2: 3 months reduced to 2 months.

11th Charge: D1 and D2: 3 months reduced to 2 months.

Having regard to the overall criminality of the case, in relation to D1, I order the sentences of imprisonment on the 1st and 2nd Charges to be consecutive but concurrent to the 3rd to 11th Charges and the strokes to be non-cumulative resulting in a total of 16 years and 10 strokes.

As to D2, I order the sentences of imprisonment on the 2nd and 7th Charges to be consecutive but concurrent to the 3rd, 4th, 5th, 10th and 11th Charges resulting in a total of 8 years.

Had D1 and D2 been convicted after a trial the sentences would have been 24 years and 12 years respectively.

DATO PADUKA STEVEN CHONG
Acting Chief Justice