Shamsul bin Abdullah v Public Prosecutor
[2002] SGHC 191

Case Number : MA 145/2002

Decision Date : 26 August 2002

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Khor Wee Siong (Khor Thiam Beng & Partners) for the appellant; Jaswant Singh (Deputy Public Prosecutor) for the respondent

Parties : Shamsul bin Abdullah — Public Prosecutor

Courts and Jurisdiction – Appeals – Trial judge's findings of fact – Standard of trial judge's scrutiny of evidence and witnesses' demeanour – Whether and when appellate court can intervene

Criminal Law – Offences – Unlawful assembly – Weapon used – Prosecution not producing all the weapons used or actual weapon causing relevant injury – Whether necessary for prosecution to do so in such offences – Nature of offence – s 149 Penal Code (Cap 224)

Criminal Law – Offences – Unlawful assembly – Number of participants – Whether unlawful assembly proven if assembly consists of convicted persons and other unidentified persons – s 149 Penal Code (Cap 224)

Criminal Procedure and Sentencing – Sentencing – Voluntarily causing grievous hurt – Factors taken into account when sentencing – Relevance of premeditation – Relevance of group action – Relevance of prior violent offence record of accused – Whether poles qualified as 'weapons' – s 326 Penal Code (Cap 224)

have substituted her judgment for the professional judgement of a medical doctor. The case cited is totally irrelevant to the case at hand. An alert man has a lot more poise than an alert man who is in a terrible amount of pain. There is no need for long-term empirical research to arrive at such a conclusion (see 10 -11).

(4) As regards the doctor's opinion that the injury suffered by the victim could also have been caused by a fall backwards, the trial judge rightly pointed out that the appellant stated that Thomas (who was alleged by the appellant to have been there) was behind Nicholas when the appellant caused Nicholas to fall. If this is so, then Thomas would have broken Nicholas's fall, and the chance of a serious cut on top of his head would be extremely unlikely (see 12).

(5) The arrangement of bricks at the time Nicholas fell, the appellant argues, was one single row along the wall, of one brick height. Naturally, this arrangement is more conducive to his story that Nicholas fell backwards and cut the top of his head on the row of bricks. He contends this despite a) the fact that the police took the photos at 4.45am the same morning and b) that the police arrived on the scene almost immediately. In short, if the bricks were re-arranged as the appellant contends, they would have to have been re-arranged right under the noses of the police officers. This, of course, is unlikely. Even if we allow the appellant's argument, how can the appellant explain the second lot of injuries on Nicholas's face – ie the fracture of the facial structure/orbit on the right? (see 12-13).

(6) There is nothing so incredible about Nicholas's explanation for the absence of injuries on his hands. The absence of injuries to the victim's hands does not prompt the conclusion that he must have been the assailant himself (see 14).

(7) The district judge was aware that Lim and Nicholas had been drinking prior to the events at

the appellant's home. However, the doctor who examined Nicholas at hospital testified that the victim did not show signs of disorientation (see 15).

(8) It is the appellant's case that it is due to his elite training that he was able to fend off four men without a scratch. But if the commando was not deferent to fear why did he switch off his lights in order to lead the supposed gang to the belief that he was not in? And if he wanted to lead them to believe that he was not in, why didn't he shut and lock the metal grill and door? Instead he left the door and the grill unlocked. There was no gang which came to attack the appellant (see 16).

(9) There was no blood to be found in the house. This might tally with the appellant's claim that Nicholas fell backwards hitting his head on its vertex. This theory is rejected. The two pools *outside* the house and there being no blood trails in the house can be explained by the trial judge's description of what could very actually have taken place. Nicholas only testified that he fell unconscious in the appellant's house. Thus, it could be that he was continually beaten even outside the flat, but not to his knowledge (see 17).

(10) The total number of weapons is not important. The two poles could have been the weapons which rendered the injury to Nicholas. But they need not have been – this is so because of the nature of the unlawful assembly offence and how it aims to attribute culpability through the medium of (potentially) just one act (see 18).

(11) All other members, though using weapons which did not administer the fateful blow, are vicariously liable through that one relevant action. Following this philosophy, there need not be presented and accounted at trial the full compliment of weapons, and there need not be present the one key weapon which dealt the fateful blow. It is not imperative that the prosecution produce the actual weapons used in an assault. It could very well have been the case that more poles than these two were used (see 18-19).

(12) It is noteworthy that Nicholas stated on the stand that if need be he would fight with the appellant at his home. The Court does not approve of Nicholas's desire to resolve issues through the fist as a last resort, but the bottom line is this – he was not even given a chance to speak with the appellant (see 25).

(13) The sentence delivered by the trial judge was in line with the *Practitioner's Library, 'Sentencing Practice in the Subordinate Courts', 2000* (see 23).

Case(s) referred to

Yap Giau Beng Terence v PP

[1998] 3 SLR 656

Lim Ah Poh v PP

[1992] 1SLR 713

Teo Keng Pong v PP

[1996] 3 SLR 329

Sundara Moorthy Lankatharan v PP

[1997] 3 SLR 464

Ng Soo Hin v PP

[1994] 1 SLR 105

Kwan Peng Hong v Public Prosecutor

[2000] 4 SLR 96

Dr James Khoo and Others v Gunapathy d/o Muniandy

[2001]

Legislation referred to

Penal Code (CAP224) ss149, 326

Textbooks referred to

Practitioner's Library, 'Sentencing Practice in the Subordinate Courts', 2000.

Ratanal & Dhirajlal's 'Law of Crimes : A Commentary on the Indian Penal Code' 2002 Delhi

Judgment

GROUNDS OF DECISION

By virtue of s 149, Cap 224, and s 326 of the Penal Code, the appellant was sentenced by District Judge Lee Poh Choo to 4 years and 6 strokes of the cane for participating as a member of an unlawful assembly whose common intention was to cause grievous hurt to one Perez Nicholas. He appealed against both conviction and sentence. I dismissed the appeal. I now give my reasons.

The Facts

2 The three main characters in this case – the appellant, the victim, and the fifth prosecution witness, Lim Ong Kim (Lim) – all knew each other. On the night of 28 November 2001, the victim (Nicholas), Lim, and a few others were drinking at a coffee shop at Block 412 Bedok North Street 3 when four persons came to the coffee shop. One of them pointed to the accused and challenged him to a one on one fight. The appellant (Shamsul) was reluctant to take up the offer of a fight, but nonetheless went out of the coffee shop where a quarrel began. This soon developed into a fight. The appellant called for Nicholas and Lim to help him, but the latter two did not get involved. According to Lim, the fight was an 'inside matter' and since neither Lim nor Nicholas had anything to do with the reason behind the brawl, they left after finishing their drinks. Lim and Nicholas departed whilst the brawl was still in progress. As a consequence, the appellant suffered the worse for it, and was resentful of the fact that the two did not aid him in his hour of need.

3 On the evening of 4 December 2001, Lim and Nicholas went to Bedok Interchange to have a few drinks. At about 1 am the appellant rang Lim on his hand phone and asked to speak with Nicholas.

4 The conversation over the phone consisted of a heated quarrel which stemmed from the appellant's dissatisfaction that Nicholas did not help him when he (the appellant) was trying to fend off an attack on 28 November 2001. Both Lim and Nicholas went to the appellant's place by taxi. Lim waited downstairs since he did not have anything to do with this matter between Nicholas and the appellant. Nicholas made his way up the staircase, and when he reached the appellant's unit on the third floor,

he found the door wide open. The metal gate was closed but the wooden door was open. He saw the appellant in the kitchen and decided to open the metal gate to enter the flat. This he did. When motioning through the living room on the way to the kitchen, four males pounced on him, and very quickly began to hit him. Nicholas was sure he was being beaten with poles. At least two of the four men carried poles. He knew this because these two men were directly in front of him. Nicholas did not see these four men when he entered the unit, and expressed that they must have been waiting for him in the two rooms next to the living room.

5 Thus, an ambush was carried out on Nicholas by four men. The appellant was stationed in the kitchen. Including the appellant, there were five in total.

6 In the scuffle, Nicholas tried to protect his head from the blows by raising his hands in front of his head in a defensive fashion. He was continually beaten by poles until he felt a heavy whack on his head. This was the last thing he remembered of the scuffle. His next conscious moment was in hospital.

7 The victim suffered 'fracture of the facial bones and fracture on the skull following the sagital suture'. The victim also suffered 'a deep 5cm laceration on the vertex of his head with bone seen underlying the wound.' The victim was warded in hospital for 11 days.

The decision below and the appeal

8 The appellant contends that the District Judge overlooked or misconstrued a total of eight matters in coming to her findings. It is apt here to re-visit the principles governing this Court in the sphere of appellate intervention. In the case of *Yap Giau Beng Terence v PP* [1998] 3 SLR 656 this Court ruled:

> It is trite law that an appellate court should be slow to overturn the trial judge's findings of fact, especially where they hinge on the trial judge's assessment of the credibility and veracity of the witness, unless they can be shown to be plainly wrong or against the weight of the evidence

This principle has been articulated in *Lim Ah Poh v PP* [1992] 1SLR 713 at 719, *Teo Keng Pong v PP* [1996] 3 SLR 329 at 342, *Ng Soo Hin v PP* [1994] 1 SLR 105, *Sundara Moorthy Lankatharan v PP* [1997] 3 SLR 464. The standard required of the District Judge's scrutiny of the evidence and the witnesses before him is an extremely demanding one, as emphasised by this Court in the case of *Kwan Peng Hong v Public Prosecutor* [2000] 4 SLR 96. Without such a strict test at the trial stage, it would be a nonsense to have a principle such as that expressed in *Yap Giau Beng Terrance*. Quite to the contrary, the two cases have a similar aim – a strict standard at the trial stage, which once met, should signal the appellate court not to intervene unless, of course, something is seen to be plainly wrong. It is precisely because the trial judge is under such a strict standard that once it is reached, the appellate court tends not to interfere. One of the reasons for the inclination not to interfere is the fact that the appellate court does not have the advantage of observing the demeanour and behaviour of the witnesses. The appellant refers to the case of *Kwan Peng Hong*. They are correct to. But the trial judge has matched the standard required, as laid down in that case by this Court.

9 I turn to the matters which the appellant contends were misconstrued or overlooked by the trial judge.

10 The first matter involves the doctor's testimony and medical report. When Nicholas arrived at hospital he was in pain. He told the doctor he had been assaulted by *three* men. This is reflected in the doctor's report, which was recorded at 3am on 15 December 2001. The report also stated that the victim was alert, conscious and responsive, and the doctor knew this because a) he examined the appellant and b) the appellant's Glasgow Coma Scale was 15/15. The Glasgow Coma Scale assesses the conscious level of a patient and 15/15 meant that the appellant was responsive. In court, Nicholas stated that he saw *four* males rush to him in the appellant's home. It seems from the material that the appellant is trying to contend that there is a discrepancy between what Nicholas said to the doctor upon arrival at the hospital and what he said in Court with regard to the number of people he was assaulted by. The appellant's hope, it seems, is that this discrepancy might damage Nicholas's credibility as a witness. To this end, the appellant contends that the trial judge was incorrect not to rely on Nicholas's initial utterance to the

doctor that there were *three* men. The appellant used the case of *Dr James Khoo and Others v Gunapathy d/o Muniandy* [2001] to argue that the trial judge should not have substituted her judgment for the professional judgement of a medical doctor who had stated during cross examination :

> He (Nicholas) was in pain, he (Nicholas) was able to answer my questions.

By using this case, the appellant hopes to show that *three* was the correct number and this therefore a) discredits Nicholas as a witness and b) questions whether there were sufficient persons for an unlawful assembly charge (five are needed in total). Firstly, the case cited is totally irrelevant to the case at hand. To quote from the judgement of the Court of Appeal :

> A judge, unschooled and unskilled in the art of medicine, has no business adjudicating matters over which medical experts themselves cannot come to agreement. This is especially where, as in this case, the medical dispute is complex and resolvable only by long-term research and empirical observation.

The trial judge was without a doubt in her league when she ruled that Nicholas (who whilst alert and responsive, was also in a terrible amount of pain) would be in a better position to give a more accurate description of what happened after he had been treated.

11 An alert man has a lot more poise than an alert man who is in a terrible amount of pain. There is no need for long-term empirical research to arrive at such a conclusion. The *Dr James Khoo* case is irrelevant.

12 The second matter involves the doctor's opinion that the injury suffered by Nicholas could also have been caused by a fall backwards. The trial judge did not overlook this point. The doctor when cross-examined did say that Nicholas could have sustained an injury at the top of his head by falling backwards. But the trial judge decided that though the possibility existed, this was not what happened. The trial judge rightly pointed out that the appellant stated that Thomas (who was alleged by the appellant to have been there) was behind Nicholas when the appellant caused Nicholas to fall. If this is so, then Thomas would have broken Nicholas's fall, and the chance of a serious cut on top of his head would be slim. Then there is the appellant's contention that the bricks were arranged differently as what was reflected in the photos. The arrangement of bricks at the time Nicholas fell, the appellant argues, was one single row along the wall, of one brick height. Naturally, this arrangement is more conducive to his story that Nicholas fell backwards and cut the top of his head on the row of bricks. He contends this despite a) the fact that the police took the photos at 4.45am the same morning and b) that the police arrived on the scene almost immediately. In short, if the bricks were re-arranged as the appellant contends, they would have to have been re-arranged right under the noses of the police officers. This, of course, is unlikely.

13 Even if we allow the appellant's argument a) that he did not actually see Nicholas fall backward, head first, into the bricks, and b) that this head-hitting-brick argument was just speculation, and c) that what actually happened was that he fell backwards onto the ground, how can the appellant explain the second lot of injuries on Nicholas's face – ie the fracture of the facial structure/orbit on the right? I maintain that the trial judge did not err in her finding that Nicholas was injured by men wielding poles. The doctor's report did conclude that the injuries sustained were consistent with blow(s) from a blunt object. And at trial, the doctor stated that a metal pole or a wooden pole would have been able to cause the injury to the vertex of Nicholas's head and to his face.

14 The third matter involves Nicholas's allegedly incredible explanation for the absence of injuries on his hands. There is nothing so incredible about his explanation. He had a major cut on the vertex of his head, and injuries to his face. He was using his hands to fend off the blows, and just because he did not sustain injuries to his hands does not lead to the conclusion that he could not have been whacked on the head and face. After all, the doctor did say that if the assailant was standing near the victim, there is the possibility that the victim not sustain injuries to his hand. The absence of injuries to the victim's hands does not prompt the conclusion that he must have been the assailant himself.

15 The fourth matter involves the half-drunken condition of Nicholas on the morning of 5 December 2001. The District Judge was aware that Lim and Nicholas had been drinking prior to the events at the appellant's home. However, they were not

so intoxicated that they did not know what they were doing. The doctor who examined Nicholas at hospital testified that the victim did not show signs of disorientation. In fact, he was 'alert, conscious, and responsive.'

16 The fifth matter involves the appellant's commando training and relative sobriety. The appellant had been trained as a commando and was stationed in Greece as part of his career tour. It is the appellant's case that it is due to his elite training that he was able to fend off four men without a scratch. But if the commando was not deferent to fear why did he switch off his lights in order to lead the supposed gang to the belief that he was not in? And if he wanted to lead them to believe that he was not in, why didn't he shut and lock the metal grill and door? Instead he left the door and the grill unlocked. He had ample time in between the time he alleged he saw the gang downstairs from his window and the time the alleged gang arrived at the front of his flat. Instead of ensuring his safety, he left his grill and door unlocked. This does not tally with his switching off the lights. There was no gang which came to attack the appellant. It was the appellant who enrolled a gang to ambush and beat up the victim at the appellant's house.

17 The sixth matter involves the position of the two pools of blood. As shown in the photos, there were two pools of blood. The two pools were in the corridor. There was no blood to be found in the house. This might tally with the appellant's claim that Nicholas fell backwards hitting his head on its vertex. I reject this theory. The two pools *outside* the house and there being no blood trails in the house can be explained by the trial judge's description of what could very actually have taken place. Nicholas only testified that he fell unconscious in the appellant's house. Thus, it could be that he was continually beaten even outside the flat, but not to his knowledge. This is not inconsistent with the trial judge's findings. What the assailants did to Nicholas when he was unconscious we do not know. Neither does Nicholas. But the absence of blood in the house should not affect the conclusion that Nicholas was attacked and fell unconscious in the flat.

18 The seventh matter involves the failure to find the alleged third weapon. The total number of weapons is not important. The two poles could have been the weapons which rendered the injury to Nicholas. But they need not have been – this is so because of the nature of the unlawful assembly offence and how it aims to attribute culpability through the medium of (potentially) just one act. All other members, though using weapons which did not administer the fateful blow, are vicariously liable through that one relevant action. Following this philosophy, there need not be presented and accounted at trial the full compliment of weapons, and there need not be present the one key weapon which dealt the fateful blow.

19 The eighth matter involves the absence of blood on the poles. Following from my point in the last paragraph, it is not imperative that the prosecution produce the actual weapons used in an assault. It could very well have been the case that more poles than these two were used. The victim stated in evidence:

> I am not sure whether all the four guys carried poles but I saw that the two of them who were in front carried poles. I can't tell if the two behind carried poles.

There was therefore the very real possibility that there were more than these two poles used. The appellant's story fails to convince this court that he was not the assailant in this ordeal.

20 I move onto the inconsistencies in the appellant's case. The appellant's story that the victim's injury was sustained by his falling backwards is put in very serious doubt by the fact that the appellant testified that there was someone behind the victim before the fall took place. In cross-examination, the appellant was asked :

> Q When you pushed Perez Nicholas out, you must have also indirectly pushed Vela Thomas who was behind out?
>
> A I believe so. Vela Thomas who was behind Perez Nicholas moved backwards himself.

If this Thomas (who was alleged present by the appellant) was behind Nicholas, it would logically follow that Thomas would break, in whole or in part, Nicholas's fall. With the high likelihood of Thomas cushioning Nicholas's fall, the appellant's story that Nicholas sustained his injury by falling backwards becomes even less convincing than it already is.

Section 149 of the Penal Code states :

> If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.

21 There being five people – the appellant and four others – involved in the incident, the ingredients of the offence have been proved. There is nothing in law which prevents the Court from finding that the unlawful assembly consisted of the convicted persons and some unidentified persons (see *Ratanal & Dhirajlal's 'Law of Crimes : A Commentary on the Indian Penal Code'* 2002 Delhi at Chapter 8 page 602).

Section 326 of the Penal Code

22 The weapons used in committing the offence were wooden and metal poles. These poles, if used in the manner which they were, are likely to cause death – this confirms the appellant's culpability under s326 of the Penal Code. To this end, this Court should not disturb the finding of the trial judge. The conviction should stand. I now turn to sentence.

23 According to the textbook, *Practitioner's Library, 'Sentencing Practice in the Subordinate Courts', 2000* the factors to be taken into account when sentencing the accused under s 326 of the Penal Code are as follows :-

1 Seriousness and permanence of injuries

2 Group action

3 Premeditated

4 Weapon used

5 Vulnerable victim

6 Offender in position of authority

7 Racial motivation

8 Prior record of violence

24 It must be stressed that this attack was carried out by a group. It was premeditated. The appellant had enrolled others into his intention. This was not a one-off vengeful act but a planned one. And the weapons used were poles – both wooden and metal. The appellant also has a prior record of violence. He was convicted of voluntarily causing hurt under s323 of the penal Code, and sentenced to one month imprisonment.

25 It is noteworthy that Nicholas stated on the stand that if need be he would fight with the appellant at his home. But it must be stressed that his aim of going over to the appellant's home was to talk sternly to him in order to come to the bottom of the disagreement. I stress here that before Nicholas could even talk with the appellant he was pounced upon by four other men. I do not approve of Nicholas's desire to resolve issues through the fist, but in this case he was not even given a chance to speak to the appellant. Thus, the fact that Nicholas wanted to settle the matter by means of a fight, as a last resort, ought not to prompt this Court to lessen the sentence. The bottom line is this – he was not even given a chance to speak with the appellant. Instead he was pounced on by a pack of men.

The sentence should stand at 4 years imprisonment and six strokes of the cane.

For these reasons I dismiss the appeal.

Appeal dismissed

Sgd:

YONG PUNG HOW

Chief Justice