

Mohammed Zairi Bin Mohamad Mohtar and Another v Public Prosecutor
[2002] SGHC 23

Case Number : MA 207/2001
Decision Date : 08 February 2002
Tribunal/Court : High Court
Coram : Yong Pung How CJ
Counsel Name(s) : Alagappan Arunasalam (A Alagappan & Co) for the appellants; Peter Koy (Deputy Public Prosecutor) for the respondent
Parties : Mohammed Zairi Bin Mohamad Mohtar; Anor — Public Prosecutor

Criminal Law – Offences – Voluntarily causing hurt – Prison officers assaulting prisoner in course of duty – s 323 read with s 34 Penal Code (Cap 224)

Criminal Procedure and Sentencing – Sentencing – Policy considerations – Serious aggravating factors – Police brutality – Prison officers assaulting defenceless prisoner – Need for deterrence

Evidence – Admissibility of evidence – Conflicting evidence – Whether court can reject one part of evidence and accept the other – Whether legal presumption that witness having criminal antecedents unworthy of credit exists

Evidence – Witnesses – Impeachment of credit – Inconsistencies in testimony and police statements – Whether inconsistencies serious and contradictions material – Relevant considerations in determining whether credit impeached

Judgment

GROUNDS OF DECISION

Introduction

The two appellants, Mohammed Zairi Bin Mohamad Mohtar ('Zairi') and La Ode Indra Karnain Bin Jomain ('Indra') were charged, together with two other persons, Subramanian s/o Annamalai ('Subra') and Mohammed Ali Bin Elias ('Ali'), before Mr Gilbert Low in the magistrate's court of voluntarily causing hurt to one John s/o Vettamooto ('John'). All four accused persons were junior officers of the Singapore Prison Emergency Action Response ('SPEAR') force trained in riot control, suppression of illegal activities and the escorting of high-risk prisoners. The charges against the two appellants read as follows:

You,...

Are charged that you on or about the 13th day of January 2000, between 6.30 pm to 6.45 pm, at the toilet of Ward 34, Changi General Hospital, Singapore, and in furtherance of the common intention of you all did voluntarily cause (sic) hurt to one John s/o Vettamooto, to wit, by fisting on this face, and you have thereby committed an offence punishable under section 323 read with Section 34 of the Penal Code, Chapter 224.

Both appellants were sentenced to nine months' imprisonment and appealed against both conviction and sentence. I dismissed the appeal and now give my reasons.

The facts

2 The complainant, John, was an inmate who had been convicted and detained at Jalan Awan Prison for drug possession. On 9 January 2000, he was admitted to Changi General Hospital suffering from severe asthma attacks. His condition was apparently so bad that he required intubation and mechanical ventilation and was warded at the Intensive Care Unit for several days. On 11 January 2000, he was extubated and then transferred to the prison ward in the hospital (ward 34) where he occupied bed no.8. At that time, the ward was guarded around the clock by the SPEAR force. The guards were divided into three shifts; the morning shift from 8 am to 3 pm, the afternoon shift from 3 pm to 10 pm and the night shift from 10 pm until the next day. On 13 January 2000, the second appellant Indra was on the morning shift together with Ali while the first appellant Zairi was to take over in the afternoon together with Subra. However, the shift change only took place at about 6.20 pm that day because Indra and Subra had to undergo training which ended late.

3 It was undisputed that John was involved in an argument with one George s/o Chinnakannu (Cpl George) on 12 January 2000. John took offence over the latter using the word "Dei" on him, which he considered derogatory and told Cpl George to call him by his name and not 'dei, dei'. Other than this incident, there was no other trouble between John and the guards during the morning shift on 13 January 2000. It was from this point on that the prosecution's version of facts differed from that of the defence.

The Prosecution's version of facts

4 According to John, trouble began when Subra and the first appellant Zairi commenced duty at 6.20 pm when he was eating his dinner. Subra came to the entrance of the ward and shouted to him, asking whether his name was John to which John replied in the affirmative. Subra then told John "you eat first, later you know" and returned to the guardroom. Once John finished his dinner, all four guards, Subra, Zairi, Ali and Indra entered the ward even though John had not called out for them. Subra was holding a pair of handcuffs and he uncuffed the leg-cuffs of John and told him to get out of the bed before fastening one end of the handcuffs on his left hand. The other end was held by Subra. Subra then led John into the toilet while the other three guards followed behind.

5 In the toilet, Subra handcuffed John's left hand to the left railing of the toilet before cuffing John's right hand to the same railing with a long cuff such that John was now bent over the toilet bowl. Subra then asked John what he wanted now, to which John replied by asking if it was wrong to ask someone to call him by his name. Subra then punched John on his left jaw. Zairi delivered a second punch. John testified that Ali and Indra also joined in to punch him. This first assault lasted for several seconds until John tried to get up and ask Subra why he had tied him and hit him. In reply, Subra only started to punch him in earnest. This was the second assault. A punch landed on the left side of John's mouth causing one of his teeth to break and another to be dislodged. John was enraged and attempted to fight back but Subra held onto his right handcuff and Zairi and Indra then punched and kicked him. Ali who was behind shouted "don't see" to one of the other prisoners who was lying on one of the beds near the entrance of the toilet. The entire sequence of events lasted for about four minutes before the four guards left John in the toilet shouting for help. Subsequently, Zairi, Ali and Indra returned and tried to force John to bath and to change into fresh clothes. John resisted and refused to do so until he had seen the doctor. The four guards finally left him alone in the toilet. They returned about 15 to 16 minutes later to bring him back to his bed. When they returned, Subra unlocked the handcuffs and asked John "How now?" to which John replied that he would see him in court for this.

6 At about 7 pm, Staff Nurse Grace Annie Vijayarani Stephens ('Staff Nurse Grace') entered the ward to give the patients their normal medication. None of the SPEAR force had informed her that John had been injured. She only heard John shouting for the nurse when she was entering the ward. She saw that John was bleeding at the mouth and nose. John said that he had been assaulted but he did not mention any names. Before entering the ward, Staff Nurse Grace said that she had asked Subra what had happened to John and the latter had replied that an inmate had suddenly turned violent, and it had become necessary to subdue him. She called a doctor, Dr Loh Zhi Ming ("Dr. Loh") to attend to John. According to Dr. Loh, John was very agitated and persistently wanted to make a police complaint regarding the assault. He also complained of pains and tenderness on the left side of his body, the left side of his head below the ear, his eyes, nose, mouth, shoulders and back. Dr Loh subsequently tendered a medical report detailing the injuries that had been sustained by John. According to this report, John suffered a cephalo hematoma at the left mastoid region (swelling in the region behind the left ear), an uprooted left upper incisor with a blood clot in the socket, and a dislodged left upper incisor and mild tenderness over his lower cervical spine and both scapulas. A supplementary medical report was also tendered stating that the injuries sustained by John could have been caused by fists.

Prosecution witnesses' version of facts

7 The two prosecution witnesses Zainali Bin Yahya ('Zainali') and Lim Chye Tze ('Lim') were prisoners warded together with John in ward 34 on 13 January 2000. Both Zainali and Lim testified that on the day in question, Subra had approached John at about dinnertime, even though John had not shouted or indicated that he wished to visit the toilet. Zainali said that Subra called out to John but, as John was still eating, Subra told him to continue eating and then left. Lim testified in largely similar terms that Subra had scolded John with Tamil vulgarities, asked John to finish his food quickly and then left. Both were also sure that, once John had finished his meal, the officers entered the ward and 'forced' him to go to the toilet. Subra had uncuffed John's legs before handcuffing John's hands behind him. Lim further said that he heard Subra rebuking John, "yesterday you were quite arrogant".

8 However, Lim and Zainali differed as to the identities of the persons who led John handcuffed to the toilet. Zainali testified that Subra and Zairi entered the toilet with John while Ali waited at the entrance and Indra only entered the ward to take a look before leaving the ward. Conversely, Lim said that it was Subra, Zairi and Indra who pulled John into the toilet, hitting him on the head as they were doing so. Both also testified to having heard 'sounds of fighting' emanating from the toilet before the officers left the ward leaving John alone in the toilet. Zainali described it as the sound of punches and something hitting the wall. Lim said he heard thumping sounds from the toilet together with John's shouts for help. Lim also added that he heard John continue to shout for help and that, when the guards returned later to bring John back to his bed, John had blood on his body and blood oozing from his mouth with two or three teeth missing.

The Defence's Case

9 The defence's case was essentially one of denial that the alleged assault had ever taken place. All four officers testified that it was John who wanted to go to the toilet, however he suddenly turned violent in the toilet when Subra attempted to cuff his left hand to the toilet railing. This necessitated the use of Control and Restraint Techniques ('C & R') and the formation of a three-man C & R team to subdue him. Force was exerted in the process because John was struggling violently, hence resulting in his bodily injuries. Therefore they did not voluntarily cause hurt to John but were merely acting within the scope of their official duty as warranted by the circumstances.

Testimony of the first appellant Zairi

10 The first appellant Zairi testified that he was warned by Ali to keep an eye out for John in bed no. 8, as he was argumentative and rude to the officers. As part of the process of taking-over, Zairi said that he entered the ward to check on the prisoners and to ask each one of them for their personal particulars. He alleged that John simply stared at him without replying when he came to his bed. This incident was reported to Subra who then went to the door of the ward to speak to John in Tamil. Subsequently, Zairi said that he re-entered the ward to check on the toilets. He was in the ward when John raised his hand to go to the toilet. Zairi testified that John failed to mention at that time whether he wanted to urinate or to 'pass motion'. Zairi then went into the guardroom to inform Subra of the prisoner's request, upon which the latter offered to help him bring John to the toilet because John had been rude to him earlier. Zairi said that he had not asked for any assistance and was slightly puzzled by this. Nevertheless he did not feel it necessary at that time to question Subra's decision.

11 Once in the ward, Subra cuffed John's left hand before uncuffing the leg-cuffs. He also held onto the other side of the handcuff with his right hand. John was then led into the toilet by Subra followed by Zairi and Indra. In the cubicle, John was facing the toilet-bowl with his back to the entrance of the toilet. There was no trouble from John and Zairi said he anticipated none at that time. However when Subra wanted to cuff John's left hand to the railing, John pulled his left hand away towards his body. An argument in Tamil then started between the two. Zairi said that it was John who started the quarrel, although he could not be sure if John had scolded Subra. In the midst of the argument, John raised his free right hand, twisted his waist and struck a blow at Subra. According to Zairi, Subra managed to block the blow and pushed John's hand away using his left hand. Throughout the confrontation, Subra continued to hold onto the other side of the handcuff which was cuffed to John's left hand. He then turned John around and managed to arm-lock the latter's left hand using the straight-arm lock applied from the back with pressure exerted on the wrist and shoulder. Zairi only reacted when he saw that Subra was unable to balance himself well upon application of the lock because John was struggling violently and pushing himself forwards and backwards. According to Zairi, John was using his free right hand to push the wall to turn and at one point of time, the right hand momentarily left the wall. It was at this moment that Zairi came in from the front through the gap between John and the door of the cubicle to grab hold of John's right hand. He turned the hand, pulled it behind John's back and pushed the elbow up to lock the wrist with the words 'lock on'.

12 When John was fully subdued, he was chained to the left railing in the toilet and was left there by the guards. Although it would have been more logical for John to be brought back to the bed, so that there was no need to risk facing him again if he turned violent, this was not done because Subra as the man-in-charge decided to inform their Adjunct Chua Cheng Wah ('Mr Chua') . None of the other officers had the power to chain both the arms and legs of the prisoner to the bed without obtaining instructions from Subra or Mr Chua.

Testimony of the second appellant Indra

13 Indra said that he was in the guardroom reading newspapers and was unaware of what had happened between John and Zairi at about 6.20 pm. He heard conversation between Subra and Zairi outside the guardroom but not what they said. He did not see John raise his hand to go to the toilet. He only remembered that Subra had asked for his assistance to bring John to the toilet. Subra brought along a pair of handcuffs and he entered first followed by Zairi. He himself was the last to enter and he closed and locked the gates. The key of the ward was left in the guardroom because they were not allowed to bring it into the ward.

14 In the ward, Indra saw Subra handcuff John's left hand before releasing the leg-cuffs. All three of them led the prisoner to the toilet; Subra was holding on to the left handcuff and walking side-by-side with John. Zairi was behind them and he in turn was behind Zairi. In the toilet Subra wanted to cuff the other ring of the handcuff that he was holding on to the left railing of the toilet. According to Indra, John refused to be so cuffed and a conversation started between them in Tamil that he could not comprehend. When Subra attempted to cuff John's left hand to the railing, John refused and raised his right hand in an attacking manner towards Subra. Subra blocked the blow using his left hand. Subra then pulled John's left hand to apply a straight arm lock. John struggled aggressively, moving to the right and left and causing Subra to lose his balance. Zairi entered the cubicle and grabbed hold of John's right hand. Indra then entered the cubicle and got hold of John's head. He said that he told John not to struggle and then tilted John's head to the left, facing Subra. Subra and Zairi then applied the ultimate lock on John. John, Subra and Zairi went to a kneeling position while Indra told all three of them to turn around slowly. From there, Subra then handcuffed John's left hand to the railing.

The decision below

15 After a careful evaluation of all the evidence, the magistrate preferred John's version of facts to the appellants' and found that he had been assaulted in the manner as described to the court. Although the defence had attempted to cast doubts on the prosecution's case, by highlighting the apparent discrepancies between the evidence of John and the two prosecution witnesses, Zainali and Lim, the magistrate was of the opinion that these discrepancies were not deliberate attempts by the three prisoners to lie. He was of the view that Zainali and Lim were witnesses of truth and the discrepancies were only to be expected, considering that the incident had happened one and a half years ago by the time of the trial and they had no opportunity to discuss their testimonies, as the prisoners were not allowed to talk to each other in ward 34. Neither could they discuss or tailor their evidence as, before the incident in ward 34, all three prisoners did not know one another and were subsequently incarcerated in different penal institutions. Zainali and Lim were also lying on and chained to their beds when they witnessed the incident and heard the sounds coming from the toilet which happened within a relatively short period of time. Furthermore, these witnesses had nothing to gain by making false allegations against the appellants; in fact the converse was to be expected.

16 The magistrate was of the view that he was entitled, according to the case authorities, to accept one part of the evidence of a witness and to reject another part. He accepted Lim's evidence, which was corroborated by the testimonies of the appellants that Subra, Zairi and Indra first entered the ward. He found that Zainali was mistaken when he testified that Indra came to the ward and left subsequently and accordingly rejected that part of his evidence. He also found that John made a genuine mistake when he said that all four accused had entered the ward together and assaulted him in the toilet. John's error was attributed to the fact that he was nervous when the four SPEAR officers forcibly led him to the toilet when he had not asked to go there and that he was still recuperating from a severe asthma attack which left him physically and mentally weak. Furthermore, John's evidence that Ali stood at the entrance of the toilet and shouted "don't see" was supported by Zainali's evidence that he saw Ali standing at the entrance of the toilet throughout the incident. Hence taking into account John's condition, the fact that he saw Ali standing at the entrance of the toilet together with the fact that he was being beaten at the time, the court found that it was reasonable for John to assume that he was being assaulted by all four officers.

17 The magistrate noted that there were certain parts of John's evidence that were questionable; for instance, whether there was really an Indian inmate at bed number 12 to whom he allegedly shouted and John's admission that he had lied to his mother as to the number of officers who assaulted him.

However, he found that these did not detract from the credibility and truthfulness of John's version of facts as it was supported in material aspects by the other witnesses. Lim's evidence that there was an argument on 12 January 2000 between John and another officer corroborated John's assertion that he had quarrelled with Cpl George. Both Zainali and Lim also testified that Subra spoke to John whilst the latter was having his dinner. Furthermore, the sounds of 'fighting' which Zainali and Lim heard whilst John was in the toilet with the officers was also consistent with his testimony that he had been assaulted by the officers. Dr Loh's report also essentially supported his testimony that he had been punched and kicked.

18 Turning to the defence witnesses, the magistrate was of the view that all four accused persons were not truthful. He declined to accept the evidence that John had turned violent in the toilet when Subra wanted to cuff his left arm to the railing in the toilet. He noted several factors: (1) John was not a person of violent disposition (2) Zainali had specifically admitted that they did not anticipate any trouble (3) None of them had previously had trouble with John during their shifts. Furthermore, the magistrate felt that it was illogical for three well-trained SPEAR guards to lock themselves in with the prisoners in the ward just to escort one sick prisoner to the toilet. In addition he also refused to believe that John, who was still recuperating from his asthma attack, was capable of struggling against three fit and strong SPEAR officers for some five to six minutes. It was also improbable that the alleged violence was to such an extent that the officers were not able to administer the mandatory warning prior to the use of force. He referred to Mr Chua's testimony that the warning should only be dispensed with only in very limited circumstances. That was when there was an urgent need to subdue the inmate and reduce the level of commotion or if there was life in danger. The incident in the toilet would not fall within any of those situations. The alleged need to use C & R techniques was hence questionable. He drew the inference that the real reason behind forming the three-man C & R team and entering the ward was to teach John a lesson for 'talking back' to Cpl George.

19 In particular, the magistrate found that the credit of Ali, the first appellant Zairi and second appellant Indra had been impeached by the prosecution as there were material inconsistencies between their oral testimonies in court and previous statements made to the police. He rejected Zairi's explanation that he had informed the recording officer, Sergeant Sani, that he wished to make certain amendments to his police statement but was instead told by Sergeant Sani to wait for his call which never came. On the contrary, it was obvious from the evidence that the first appellant had the opportunity to make amendments and in fact did so. Therefore any allegation that he had not been afforded a reasonable opportunity to correct the material inconsistencies could only be an afterthought and a lie. The magistrate also rejected Indra's explanation that he realised that he had made mistakes in both of his police statements after the second statement was recorded and after the trial had started. This was an obvious indication that Indra's subsequent testimony in court was tailored.

20 The magistrate also placed much weight on the fact that the defence had changed its position halfway through the trial. He noted that it had been put to John during his cross-examination that only his left hand had been handcuffed to the railing. This was inconsistent with the subsequent testimonies of all four accused persons. Each insisted that Subra never managed to handcuff John's left hand at all. The magistrate found that the change must have come about upon realisation that it was impossible to perform C & R in the manner described if John had one hand chained to the railing. He also found that it would have been impossible for John to put up such a violent struggle requiring C & R if one hand had in fact been handcuffed to the railing.

21 In view of the strength of the prosecution's case and the material discrepancies in the defence case, the magistrate found that C & R was not in fact performed on John and John did not turn

violent in the cubicle. He was satisfied that the prosecution had proven its case beyond a reasonable doubt against all four accused persons and convicted them as charged.

The appeal

22 The following issues arise for consideration in this appeal:

- (1) Whether the magistrate should have preferred the prosecution's evidence and witnesses over the defence's;
- (2) Whether the magistrate erred in giving undue weight to the discrepancies in the evidence and the police statements of the appellants.

The appellants were essentially challenging the magistrate's findings of fact by alleging that the testimonies of the prosecution witnesses were inconsistent while those of the defence witnesses were. Further points were raised upon argument by the appellants (1) the magistrate erred in his assessment of John as a credible witness (2) the magistrate drew inferences adverse to the appellants from the medical evidence which was equally capable of construction in their favour and (3) the magistrate gave excessive weight to the evidence of Lim and Zainali who did not witness the alleged assault in the toilet and whose evidence differed in certain respects from John's.

First Issue: Should the Magistrate have preferred the prosecution's version of facts to that of the defence?

23 I started off with the premise that the extent of inquiry which can be conducted by an appellate court when determining whether a trial judge has erred in his findings of fact is closely circumscribed. It is settled law that an appellate court will defer to the trial judge's finding of facts unless they can be shown to be clearly wrong, reached against the weight of the evidence or that the trial judge has not taken proper advantage of his having seen and heard the witness: *Lim Ah Poh v PP* [1992] 1 SLR 713, *PP v Hla Win* [1995] 2 SLR 424, *Ng Soo Hin v PP* [1994] 1 SLR 105. There is a sound rationale for this rule. Unlike the trial judge sitting below, the appellate court does not have the advantage of observing the demeanour of the witnesses in the light of all the relevant evidence of the case. Therefore due weight must be given by the appellate court to the findings of facts of the court below.

A Suspicious circumstances not reasonably explained by appellants

24 From the outset, I had great difficulty in accepting the defence that it was John who had suddenly turned violent in the toilet. There were several suspicious circumstances in the facts of this case which were not reasonably explained by the appellants. They provided the background context with which the evidence should be viewed as a whole. I shall now highlight these features before going onto an evaluation of the defence's evidence proper.

- (1) First, the appellants failed to provide any reasonable explanation as to why John would have taken issue with being handcuffed to the railings in the toilet which Senior Prisons Officer RO2 Chua Cheng Wah (PW6) had testified is standard operating procedure. One must bear in mind that Ward 34 in Changi General Hospital is a ward housing prisoners. It does not form part of the

'ordinary' world where such transgressions of privacy and freedom of movement will not be tolerated. There was therefore no reason why John would have reacted by trying to punch Subra.

(2) John was recuperating from asthma and had been discharged from the ICU only two days before the alleged fight on 13 January. It was observed by Lim that "it was not possible (for John to fight) because he was sick then. He was suffering from asthma." I therefore accepted the magistrate's reasoning that it was difficult to believe that John was capable of turning so violent as to require the combined efforts of three SPEAR officers to subdue him. This was especially if one of John's hands had been handcuffed to the railing which was the original position taken by the defence.

(3) There was a camera in the toilet cubicle, which was linked to CCTV and a video. From this CCTV the guards in the guardroom would be able to see what the prisoner was doing in the toilet cubicle. The video would also record all movements in the toilet. However, on the day when the assault took place, the video was not in operation and nothing that happened in the toilet cubicles was recorded. This was recorded by Ali and Indra in an entry at 1448 hours of the Hall Journal (exhibit P9) as 'reported video deck out of order in error to Sergeant Jayiadi.'

(4) From all accounts John was a difficult and argumentative prisoner. This was reflected in the entry at 1921 hours on 12 January 2001 of the Hall Journal (exhibit P9) as follows, "Cpl George came and reported that L 50060/99 was very argumentative for every single thing and not carrying out any instructions. Reported to Sergeant Chong K.L." However even though John was rude and argumentative, he had never been physically aggressive or violent, yet the guards saw fit to form a three-man C & R team just to escort him to the toilet. One must bear in mind that both appellants were seasoned SPEAR guards with at least five years experience who would have encountered more violent characters than John.

(5) Assuming that John was indeed such a violent character, why did both appellants together with Subra not see it fit to comply with the standard procedure of first handcuffing both hands of the prisoner before uncuffing his leg cuffs? This is a standard precaution that officers will take for all prisoners, not least of all prisoners with suspected violent tendencies. On the contrary, John, Lim and Zainali clearly testified that Subra actually uncuffed John's leg cuffs *first* before handcuffing him. All the accused also admitted that Subra *only* handcuffed John on the *left* hand.

(6) The magistrate also rightly pointed out that it was suspicious for the three guards to effectively 'lock' themselves in with the prisoners when they left the key in the guardroom without anyone outside to let them out. Was John's request so urgent that they had to attend to him immediately without first informing Ali as they alleged? There was also the problem that the nurses and doctors would not be able to enter the ward if an emergency arose.

B Did the magistrate err in assessing the credibility of John?

25 Defence counsel urged this court to hold that the magistrate below erred in assessing the credibility of John because he had lied to his mother about the number of his assailants.

26 I was of the opinion that the magistrate was right in not placing undue weight on John's lie to his mother that he was assaulted by only two officers. The effect of this inconsistency must be viewed in all the circumstances of the case and not be interpreted out of context. A distinction should rightly be drawn between lies made to police in the course of formal investigations and harmless 'white lies' told so as not to hurt someone else. It is the fact that the witness had made an oath, an affirmation or a statement representing that what he had said was correct and accurate, which attracts the legal consequences that adverse inferences would be drawn and his credibility impugned if he is subsequently proved to have lied in court or to the police in the course of such investigations. Conversely no such promises are made when statements are made in the casual and familial context e.g. when a son is confiding to his mother which is the situation in the present case. However it is not every 'white lie' that can be readily excusable, the witness must support it by credible and reasonable explanations. The courts will look into the context and the sufficiency of the explanations in determining whether or not there was such a lie which adversely affected the credibility of the witness. The conduct of the witness is also a relevant factor.

27 On the facts, John's explanation that he had lied because his mother would have been sad and shocked to hear that four officers had assaulted him and that he had cried for help was not so incredible or unreasonable. Furthermore there was evidence that he had, immediately upon his discharge from the hospital and prior to his conversation with his mother on 16 February 2000, informed the intelligence unit at Jalan Awan Prison that he had been assaulted by four SPEAR guards. John had also consistently adhered to his evidence throughout the trial that all four officers had assaulted him. His conduct hence added weight to his explanation that he had deliberately lied so as to protect his mother. Accordingly, I rejected the appellants' contention that John's lie to his mother went 'to the heart's of the prosecution case'.

28 Even accepting the fact that John had lied to his mother as to the number of assailants, I reiterated the point that I had made in *Lewis Christine v PP* [2001] 3 SLR 165 that a flawed witness does not equate to an untruthful witness. I agreed with the magistrate that it was reasonable for John to assume that he was being assaulted by all four officers, as he saw Ali standing at the entrance of the toilet while he was being beaten by the other three officers. The magistrate was perfectly entitled for good and cogent reasons to accept one part of John's evidence (that he had been assaulted by SPEAR guards) and reject the other part of his evidence (that he had been assaulted by *four* SPEAR guards). There is no rule of law that the testimony of a witness must be believed in its entirety or not at all: *Jiminia Jacee d/o CD Athanasius v PP* [2000] 1 SLR 205, *Sundara Moorthy Lankatharan v PP* [1997] 3 SLR 465 following *PP v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15. To quote the words of Thomson C.J. in *Khoon Chye Hin v PP* [1961] MLJ 105:

If a witness demonstrably tells lies on one or two points then it is clear that he is not a reliable witness and as a matter of prudence the rest of his evidence must be scrutinized with great care and indeed with suspicion. To say, however, that because a witness has been proved a liar on one or two points then the whole of his evidence 'must in law be rejected' is to go too far and is wrong

29 The defence also attacked John's character and urged this court to find that he had a violent disposition and was an unreliable witness because of his previous antecedents (armed robbery with a broken bottle and causing hurt) and poor disciplinary record in prison. I was of the view that this argument was unsustainable on several counts. First, it is established law that the fact that a witness has a prior criminal record is not per se a basis for treating his evidence as unreliable. There is

no legal presumption that such a person is unworthy of credit. An analogy can be drawn from the law's treatment of accomplice evidence. In *Chia Chien Wei Kelvin v PP* [1999] 1 SLR 25 the Court of Appeal held that, despite s 116 of the Evidence Act, the court has a discretion whether or not to treat accomplice evidence as unreliable. Whether or not the court should believe the evidence of the accomplice must depend on all the circumstances of the case and his evidence must be tested against the objective facts as well as the inherent probabilities and improbabilities. This principle is equally applicable here. Secondly, the Superintendent in charge of Jalan Awan Prison Mr. Abdul Majid Abdul Rahim (DW5) testified that John did not have a violent disposition as alleged. His file only had records of him being argumentative during counselling. The offences he committed at Jalan Awan Prison; activating a distress alarm without any reasonable cause, signalling to another prisoner and placing his mug in a locker not assigned to him were not violent crimes.

C Did the magistrate misread the medical evidence?

30 I moved on to deal with the appellants' second submission that the magistrate had misread the medical evidence. The most telling aspect of the medical evidence was that *all* of the injuries, except for the mild tenderness at the spine and both scapulas were sustained by John on the *left side of his body*. This was largely consistent with John's account that he was made to bend over the toilet bowl with the left side of his body directly facing the entrance of the cubicle where the appellants were standing and from where the blows were inflicted. Conversely, if the appellants' accounts were to be accepted as the truth, there seemed no reason why injuries were sustained on the left and not also the right side of John's body. In fact, this would be contrary to Subra's evidence that John's left hand was handcuffed and that he held tightly onto the other ring of the handcuff throughout the struggle before locking the arm. If that was indeed the case, it would be difficult for the handcuff to knock onto John's mouth and, even if it did, it would have been obvious to Subra who was controlling the left handcuff at all material times. However, it was clear from the evidence that Subra was unable to testify as to how John sustained the injuries. In addition, if a great amount of force was applied by Subra on John's left hand (which must have been the case because Subra was able to turn John around simply by pulling on his left handcuff) and John was also struggling violently at the same time, bruise marks would have appeared on John's left hand. However none were observed. The DPP made the pertinent point that the mild tenderness which John sustained on his spine and shoulder blades was inconsistent with the appellants' accounts that John had struggled very violently, even when C & R technique was applied. If this was true, John would have sustained far more serious injuries to his neck, wrists, shoulders and elbows than was the case, since the prisoner would be in an awkward and vulnerable position once the locks were applied.

31 The appellants allege that the loss of John's tooth could have been due to a fall on the floor or when he came into contact with any sharp edge of the handcuff. However, both appellants did not testify that John had fallen onto the ground or had been hit by the handcuffs. They were also unable to provide a reasonable explanation as to how the injuries were caused even though both of them were together with John within the narrow confines of the toilet cubicle. Indra as the headman who controlled John's head testified that John's head never hit anything when he was holding onto it, he did not see John's face hit the door-frame or the handcuff hit his mouth, yet he subsequently suggested that John might have sustained the injuries during the struggle. This was altogether unsatisfactory.

D Did the magistrate place excessive reliance upon the evidence of Lim and Zainali?

32 There were several discrepancies between the evidence of Lim, Zainali and John as set out above.

These were :

(1) Lim testified that Zairi and Indra rushed towards John *after* he was handcuffed by Subra whereas John said that all four staff came to his bed *before* Subra uncuffed his legs and applied his handcuff.

(2) Lim testified that Subra, Zairi and Indra pulled John to the toilet and were hitting his head throughout. Neither John nor Zainali testified to this.

(3) Zainali testified that Subra and Zairi entered the toilet with John while Ali waited at the entrance and Indra only entered the ward to take a look before leaving the ward. Conversely Lim said that it was Subra, Zairi and Indra that pulled John into the toilet and Ali remained in the guardroom.

(4) Lim also stated that Subra and Zairi left the toilet clearing blood off their hands first. They were then followed by Indra a short while later. Conversely John's story was that all four guards left at the same time while Zainali said that Subra, Zainali and Ali left the ward together.

33 It is settled law that the credibility of a witness cannot be impeached unless there are serious discrepancies or material contradictions between his oral testimony and his previous police statements: *Muthusamy v PP* [1948] MLJ 57. 'Material' inconsistencies are those inconsistencies that go to the crux of the charges against the appellants: *Kwang Boon Keong Peter v PP* [1998] 2 SLR 592. In determining whether the credit of the accused or a witness has been impeached, the court will compare the oral evidence with the previous statement to assess the overall impression which has been created as a whole: *PP v Heah Lian Khin* [2000] 3 SLR 611.

34 I considered that the discrepancies in (1), (2) and (4) were not material as they had no direct bearing on the facts in issue i.e. nothing to do with the question whether the appellants assaulted John in the toilet. They merely related to the sequence of events before and after the assault in the toilet and did not detract from the general veracity of Lim and Zainali on the material issues: *Ng Kwee Leong v PP* [1998] 3 SLR 942. Therefore they could not aid the appellants here. The inconsistencies in (3) as to the *identities* of the guards who entered the toilet with John were more fundamental. Zainali said that the three assailants were Subra, Zairi and Ali whereas Lim said that they were Subra, Zairi and Indra. On the other hand, there were explicit admissions from both appellants that they accompanied Subra in escorting John to the toilet. Hence neither was this aspect of Lim's and Zainali's evidence objectionable. The magistrate was convinced that Lim and Zainali were truthful, as their testimonies in court, even when tested under cross-examination, remained clear and consistent. He also rightly identified the various factors that contributed to the discrepancies in testimonies. It would be helpful to recall the words of Abdul Hamid J. in *Chean Siong Guat v PP* [1969] 2 MLJ 63 at p. 63-64 as accepted by this court in *Sundara Moorthy Lankartharan v PP* supra.

Discrepancies may, in my view, be found in any case for the simple reason that no two persons can describe the same thing in exactly the same way. Sometimes what appears to be discrepancies are in reality different ways of describing the same thing, or it may happen that the witnesses who are describing the same thing might have seen it in different ways and at different times and that is how discrepancies are likely to arise. These discrepancies may either be minor or serious discrepancies. *Absolute truth is, I think beyond human perception and conflicting versions of an incident, even by honest and disinterested witnesses, is a common occurrence. In weighing the testimony of*

witnesses, human fallibility in observation, retention and recollection are often recognised by the court. Being a question of fact, what a magistrate needs to do is to consider the discrepancies and say whether they are minor or serious discrepancies...On the other hand, if a magistrate finds the discrepancies do not detract from the value of the testimony of the witness or witnesses, it would be proper for him to regard the discrepancies as trivial and ignore them.
(emphasis added)

35 I was also of the view that it was incorrect for the appellants to assert that the sounds heard by Lim and Zainali were sounds of John struggling violently in the toilet and their efforts to subdue him. Lim and Zainali clearly testified that they heard 'sounds of fighting', 'thumping sounds' and the sound of 'a body hitting against the wall'. I note from the evidence that the appellants had testified that no blows were ever exchanged between John and Subra as Subra had managed to ward off the blow allegedly delivered by John with his right hand before locking John's left hand. If the sequence of events as testified by the appellants was to be accepted by this court, there would have been no opportunity at all for John to punch anyone. Furthermore, if the C & R technique was truly applied upon John, there would not have been such sounds. Assistant Superintendent 1 Mark Jason Jevanathan (PW8) had testified that C & R had never failed in his years of service and he failed to understand why it should have failed in John's case. Essentially the three-man C & R team consisting of the 'head man' would hold onto the head of the prisoner and tilt it to one side, the right-hand man would grab the right hand around the wrist and bend the prisoner forward and similarly for the left-hand man. Once the locks were in place, the prisoner would be effectively subdued and immobilised. I was satisfied that the trial judge did not err in accepting the testimony of Lim and Zainali nor did he place undue reliance upon it.

Second Issue: Did the court give undue weight to the discrepancies between the evidence of the appellant in court and previous s121 statements?

36 The credit of the appellants was impeached at trial. Now on appeal, they argued that the inconsistencies between the police statements and their oral testimony were immaterial and were due to human fallibility in recollection. I shall not reiterate the legal principles dealing with this area of the law and will now consider the inconsistencies in the evidence of each appellant in turn.

37 The inconsistencies between Zairi's police statements and testimony in court were as follows:

- (1) In his police statement, Zairi said that John had wanted to pass motion. However in court he said that John did not mention whether he wanted to urinate or otherwise.
- (2) In his police statement, Zairi stated that he had asked Subra for help in escorting John to the toilet. However under cross-examination Zairi first testified that Subra had offered him help and he did not ask Subra for help before changing his mind to state that it was Subra who asked him for help.
- (3) In his police statement, Zairi said that he heard John scold Subra "Pundek" which he knew was a 'vulgar word in Tamil'. In court, he denied ever hearing this and testified that he could not understand whatever John and Subra were saying.
- (4) In his police statement, Zairi said that he came to catch hold of John's right

hand and applied a straight-arm lock when he saw Subra trying to defend himself from John's punch. In court, Zairi testified that he only came in to lock John's right hand using a hammer-lock *after* Subra had warded off the blow *and he saw Subra losing his balance after turning John around because the latter was pushing the wall to turn against Subra.* (emphasis added)

38 The inconsistencies between Indra's police statements and his testimony in court were:

(1) In his police statement, Indra said that he was inside the guardroom looking through the glass panel into the ward and that he could see Zairi having problems with John. Conversely, in his testimony in court, Indra said that he was reading the newspapers and was unaware that any trouble had happened between John and Zairi from 6.20 p.m. till the time he helped escort John to the toilet. He only heard conversation between Zairi and Subra outside the guardroom

(2) In his police statement Indra said that, at about 6.38 p.m., he saw John put up his hand to go to the toilet and he felt that he should help Zairi after seeing the trouble between them earlier. Conversely, in his oral testimony he said that he never saw John putting his hand up and that he only went along because Subra asked him for help.

39 With respect to the first discrepancy between Zairi's testimony in court and his police statements, I shared the view of the magistrate below that it was material because it directly affected the evidence of both appellants. It would have made it impossible for the entire sequence of events to happen as alleged by the appellants to have taken place, if John was facing outwards rather than inwards (if he had wanted to use the toilet). Subra could not have attempted to handcuff his left hand to the toilet railing but rather his right hand. The second discrepancy was also material because it related to events just prior to the commission of the offence charged. Zairi's vacillation also impugned upon the bona fides of motives; whether or not assistance to escort John to the toilet was really necessary in the first place. His credit was not saved by his subsequent explanation that the third version was the correct statement of events because he was able to remember the events more clearly 'when the trial took place and from the evidence produced'.

40 With respect to the fourth point, there was a discrepancy as to the timing when Zairi came to help and an omission of the sequence of events which led to Subra losing his balance. In court, Zairi testified that he *only* reacted when he saw that Subra was unable to control John, but there was no mention of this at all in his police statements. I adopted the position I took in *PP v Heah Lian Khin supra*. that an omission will amount to an inconsistency when it would have been natural for the person to make the assertion in question. I was of the opinion that it would only be natural for Zairi to have mentioned that Subra was unable to control John in his police statement because he had couched it as the reason for entering the 'fray' in his oral testimony. This was an essential and crucial aspect of his defence, which clearly called for an explanation and, when none was given, the omission thereof would be capable of being construed as a material inconsistency. Therefore I had no doubt that the numerous discrepancies taken cumulatively impugned upon the general veracity and credibility of the first appellant.

41 Similarly, the discrepancies in Indra's testimony were material because they affected his intention and reasons for escorting John. It was also evident that Indra was trying to minimize his involvement in the entire affair and to fit his evidence to that of Subra and Zairi. This much he had admitted to in court when he testified that he only realised the mistakes in his statement and started recalling the

events properly only during the trial when he heard the evidence of the other accused persons.

42 A successful impeachment of a witness's credit goes only to the weight of his oral testimony in court and not its admissibility. It does not mean that all his oral testimony will be expunged. This point was elucidated by Chao Hick Tin JC (as he then was) in *PP v Somwang Phattanaseng* [1992] 1 SLR 138 at p.148

Having regard to these material discrepancies, we found that the prosecution had successfully impeached the credit of the accused. We would, however, say that the fact that the credit of an accused person or a witness has been impeached does not necessarily mean that all his evidence must be disregarded. The court must carefully scrutinize the whole of the evidence to determine which aspect might be true and which aspect should be disregarded.

The position was subsequently reinforced by *Yeo Choon Huat v PP* [1998] 1 SLR 217, *PP v Mohammed Faizal Shah* [1998] 1 SLR 333 and *Kwang Boon Keong Peter v PP* supra.

43 With this in mind, I turned to consider the impact which the impeachment exercises had upon the evidence of Zairi and Indra. At this juncture, some consideration must be given to the case of *PP v Mohammed Faizal Shah* which was cited to me by counsel during the appeal. The accused in that case faced three charges of employing three foreign workers without a valid employment pass to one Palms Shuttle Caf (PSC). He allegedly brought the three workers to a line-up from which they were picked to work by one Charlie Lim who was the operations manager of the caf. He maintained throughout the trial that the three workers were supplied by one Robin and not by him. This was supported by one Cheong. Conversely, the prosecution's case was weak. The evidence of the main prosecution witness, Charlie, was bedevilled with inconsistencies; he was unsure if the workers were supplied by the respondent or Robin and the date of commencement of work of these workers. Although all three workers identified the respondent as their employer, one Delower denied being part of any line-up and Jeevan testified that Delower and Sahajahan had already started work before him, therefore casting doubt on Sahajahan's testimony that he was present at the line-up. Delower was also inconsistent as to when he received wages from the respondent.

44 The district judge held that the many discrepancies in the testimonies of the prosecution's witnesses made it unsafe to conclude that they were employed at the line-up. A reasonable doubt was also raised as to whether the respondent was correctly identified as the employer of the three workers because Charlie was obviously unsure. Although the credit of the accused had been impeached, its effect was minimal, as the court could not convict on the bare assertions of the prosecution witnesses. Other than the inconsistencies in the respondent's evidence, the prosecution had also failed to adduce other evidence to show that the evidence of the accused was unreliable. The district judge acquitted the accused of all three charges. This was reaffirmed by me sitting in the High Court upon appeal.

45 With respect, the present case was clearly distinguishable from *Mohammed Faizal Shah*. We were not dealing with a case where the prosecution was pulling itself up by the bootstraps of the defence. John's evidence was bolstered by objective medical evidence and corroborated by the independent evidence of Lim and Zainali who had no reason to lie. Conversely, the appellants' evidence was only supported by the evidence of their co-accomplices, which were found by the magistrate to be unreliable. As evaluated above, numerous suspicious circumstances of the appellants' case were not satisfactorily explained and neither was their version of facts consistent with the injuries suffered by John. The impeachment of the appellants' credit dealt another fatal blow to their case. Therefore I had no doubt that the trial judge was correct in holding that the prosecution had established their

case beyond a reasonable doubt and convicting the appellants.

The appropriate sentence

46 The appellants were also appealing against the trial judge's sentence of nine months. I noted that the sentence that can be imposed by the court under s323 of the Penal Code (Cap 224) is imprisonment for a term which may extend to one year or with fine which may extend to \$1,000 or both. This was the first case I had tried involving SPEAR officers who had acted contrary to their public duty by setting upon a defenceless prisoner to teach him a lesson. They are persons empowered to place prisoners under confinement and who are expected to abide by the law, but yet they had chosen to take matters into their own hands. Although both of the appellants had impeccable service records and no prior antecedents, these factors could but have minimal mitigating effect in cases, like the present, when public interest was affected.

47 I was of the view that a clear message had to be sent to all, that prison brutality cases will not be condoned and will be met with harsh penalties especially when committed in the course of duty. How else could the prison officers fulfill their much publicized mission of being the 'captain of lives' in the rehabilitation and reformation of prisoners? Inmates incarcerated within prisons for long periods of time have a right to know that they will not be abused. Similarly their relatives and the public at large also need to be assured that prison officers will not abuse their positions of trust vis--vis the prisoners and the public. Furthermore the appellants in this case had obviously exploited their positions of power shamelessly when they 'ganged up' to inflict blows mercilessly on a sick and powerless prisoner in the toilet of a prison ward. They had also connived to 'cover up' their act by putting false entries in the Hall Journal and calling their superiors immediately thereafter to lend credence to their story that John suddenly became violent and attacked them. The fact that the video recorder was not working on that particular day of the assault could not be mere coincidence. All these pointed towards careful planning and devious minds. Therefore, taking into account all the aggravating factors of this case, I was not persuaded that the sentence of nine months imprisonment was so manifestly excessive as to justify its overturn.

Appeal dismissed.

Sgd:

YONG PUNG HOW
CHEIF JUSTICE

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