Took Leng How v Public Prosecutor
[2006] SGCA 3

Case Number : Cr App 10/2005

Decision Date : 25 January 2006

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Kan Ting Chiu J; Yong Pung How CJ

Counsel Name(s) : Subhas Anandan, Anand Nalachandran, Sunil Sudheesan (Harry Elias Partnership) and Chung Ping Shen (H A and Chung Partnership) for the appellant; Jaswant Singh and David Khoo (Deputy Public Prosecutors) for the respondent

Parties : Took Leng How — Public Prosecutor

Criminal Law – Special exceptions – Diminished responsibility – Abnormality of mind – Whether accused suffering from abnormality of mind at time of offence – Whether abnormality impairing accused's cognitive functions or self-control – Section 300 Exception 7 Penal Code (Cap 224, 1985 Rev Ed)

Criminal Procedure and Sentencing – Trials – Adverse inferences – Accused appealing against conviction and death sentence for murder – Accused opting to remain silent at trial – Accused only person capable of shedding light on certain aspects of trial – Accused relying on defence of diminished responsibility – Whether appropriate to draw adverse inference in such circumstances – Section 196(2) Criminal Procedure Code (Cap 68, 1985 Rev Ed)

Evidence – Proof of evidence – Standard of proof – Reasonable doubt – Accused convicted and sentenced to death for smothering deceased to death – Accused appealing against conviction and sentence – Pathologist giving evidence that deceased could have suffered sudden onset of fits that could account for deceased's suffocation and death – Whether evidence casting reasonable doubt on Prosecution's case – Section 300 Penal Code (Cap 224, 1985 Rev Ed)

25 January 2006 *Judgment reserved.*

Chao Hick Tin JA (delivering the judgment of the majority):

1 The accused was convicted in the High Court for having committed murder under s 300 of the Penal Code (Cap 224, 1985 Rev Ed) and was sentenced to suffer the mandatory death sentence. The charge on which the accused was convicted read:

> That you, TOOK LENG HOW … on or about the 10th day of October 2004, between 1.40 p.m. and 10.00 p.m., at the Pasir Panjang Wholesale Centre, Singapore, did commit murder by causing the death of one Huang Na, female/8 years old, and you have thereby committed an offence punishable under section 302 of the Penal Code, Chapter 224.

2 He has appealed against the conviction and sentence.

The facts

3 The accused, Took Leng How, worked as a vegetable packer at Messrs All Seasons Fruits and Vegetables Supplier ("the shop") located at Block 7 of Pasir Panjang Wholesale Centre ("the Wholesale Centre"). His employer, Eng Chow Meng, also employed a Chinese National, Huang Shuying, to work part time at the shop. Huang Shuying is the mother of the deceased, Huang Na. At the relevant time, both mother and child were residing with some other Chinese nationals at an apartment in Block 8 of the Wholesale Centre.

4 On 27 September 2004, Huang Shuying departed for China and left the deceased in the care of one of her housemates, Li Xiu Qin ("Li"). That was to be the last time she saw the deceased alive. At about 1.30pm on 10 October 2004, the deceased informed Li that she wanted to make an overseas call to her mother. The deceased then left the apartment alone. Li did not find this unusual as the deceased had made frequent phone calls to her mother previously. Li did, however, become increasingly worried when the deceased failed to return by 2.30pm. She searched for the deceased at the blocks near to the Wholesale Centre and the area surrounding the deceased's school, but to no avail. By about 10.00pm, Li reported the deceased's disappearance to the police.

5 Over the course of the next few days, the police conducted a massive search with their primary focus on the areas surrounding the Wholesale Centre. The accused was placed under intensive questioning as the police had received information that the deceased was last seen in his company. However, no formal arrest was made at the time.

6 Police investigators further interviewed the accused on 19 and 20 October 2004. He confirmed that he had met the deceased on 10 October 2004 at Block 13 of the Wholesale Centre. He also indicated his willingness to assist the police investigators and showed them the spot where he had last seen the deceased. According to the accused, after talking to the deceased that day, he saw her making her way home. He then returned to the storeroom at Block 15 of the Wholesale Centre.

7 On 20 October 2004, the accused disclosed to police investigators for the first time that, while he had not committed any offence, he knew the persons who were responsible for the disappearance of the deceased. He claimed that someone who worked at the Wholesale Centre had abducted the deceased in order to "teach [her] mother a lesson" as the latter had "created disharmony amongst the traders". The accused further claimed to have some influence in the "underworld" and could arrange to have the deceased released. But first he had to collect his two mobile telephones, as the relevant contact numbers were stored in them. In the meantime, arrangements were made for the accused to undergo a polygraph test the next day.

8 In the early hours of 21 October 2004, the investigating officers accompanied the accused to his residence at Telok Blangah to collect one of his mobile telephones and then to the shop at the Wholesale Centre to pick up his other mobile telephone. There, he was made to show the route he had taken with the deceased on 10 October 2004 and the location where they had parted company. The investigating officers then offered to let the accused remain at the Wholesale Centre on condition that he turn up later that morning for the polygraph test. The accused, however, indicated his preference to follow the police investigators back to their office at the Criminal Investigation Department ("CID"), as he was concerned that he might not be able to wake up in time for the test.

9 En route to the CID, the accused informed the police investigators that he was hungry and they stopped at a restaurant along Pasir Panjang Road for some food. The accused, on the pretext of going to ease himself in the toilet, left the restaurant through the back door and made his getaway.

10 The accused managed to make his way to Penang, Malaysia where he hid until 30 October 2004 when he surrendered to the Malaysian authorities. A team of Singapore police officers escorted him back to Singapore.

11 On 31 October 2004, the accused led the police investigators to a slope at Telok Blangah Hill Park ("the Park"). A systematic search at the downhill, forested area of the Park by officers of the Gurkha Contingent of the Singapore Police Force led to the retrieval of a sealed carton box, which was later established to contain the decomposed remains of the deceased. The accused was

subsequently charged with murder.

The trial below

12 The Prosecution's case rested essentially on the statements given by the accused while he was in custody, the video recording of the accused's re-enactment of the events that took place in the storeroom and the expert evidence of the forensic pathologist, Dr Paul Chui ("Dr Chui"). It could be briefly stated as follows. On 10 October 2004, the accused stayed behind at the Wholesale Centre after he had completed his work. At about 1.30pm he saw the deceased at Block 13 and lured her into the storeroom at Block 15 of the Wholesale Centre on the pretext of playing hide-and-seek with her. In the storeroom, the deceased was stripped of her clothes, had her limbs bound with raffia string and was sexually assaulted. In order to silence the deceased, the accused smothered her mouth and nose with his bare hands until her body went limp. He further stomped and kicked her head to make doubly sure that she was dead. The accused then packed the deceased's naked body into multiple layers of plastic bags and sealed the bundle in a cardboard box with adhesive tape before disposing of it by tossing the box down the slope at the Park.

13 At the close of the Prosecution's case, the Defence made the submission of no case to answer. This was rejected by the trial judge as the onus on the Prosecution at that stage of the trial was merely to adduce some evidence (not inherently incredible) which, if it were to be accepted as accurate, would establish each essential element of the alleged offence. This was held by the trial judge to have been established by the Prosecution and the accused was called upon to enter his defence.

14 While the accused chose not to testify at the trial, his counsel nevertheless raised two defences. The first was that the Prosecution had failed to prove beyond a reasonable doubt that the accused had in fact caused the death of the deceased, and secondly, that the symptoms exhibited by the accused entitled him to raise the defence of diminished responsibility. The first contention was premised on the assertion that Dr Chui had admitted in cross-examination that the death of the deceased could have been due to other causes. The second contention of diminished responsibility rested on the claim that the accused was suffering from schizophrenia at the time of the offence.

15 On the issue of the cause of the deceased's death, the trial judge reviewed Dr Chui's evidence and found the injuries present on the body of the deceased to be largely consistent with the Prosecution's case, namely, that the accused had smothered the deceased with his bare hands. The judge further held that the accused's refusal to take the stand entitled the court to draw an adverse inference under s 196(2) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("the CPC") that the acts of the accused caused the deceased's demise. The court below was convinced beyond a reasonable doubt that the accused had murdered the deceased. It did, however, refrain from making any finding as to whether the deceased had been sexually assaulted.

16 As for the defence of diminished responsibility, the court held that the Defence failed to prove on a balance of probabilities that the accused was suffering from schizophrenia or any mental disorder of any kind at the time of the commission of the offence. In the result, the court found the accused guilty of the murder charge and he was accordingly sentenced to suffer the punishment of death.

17 The accused has appealed against his conviction and the sentence. He has raised essentially three issues before us, namely, the question of causation, the question of adverse inferences and the defence of diminished responsibility. We will deal with these issues *seriatim*.

Whether the accused had caused the death of the deceased

18 The Prosecution's case was that the accused had sexually assaulted the deceased and, having achieved his goal, silenced her by smothering her with his bare hands. He also "chopped" her neck with his hands and stomped on her head to make sure that she was dead. Thereafter, he set about disposing of the body by wrapping it up in layers of plastic bags, sealing it in a carton box and casting the box down the slope at the Park.

19 The Prosecution's case pertaining to the accused's disposal of the deceased's body was clearly established from the forensic evidence of Dr Chui and the admissions made by the accused in his police statements. It was only in relation to the cause of the deceased's death that some contention arose. The Defence took the position that the accused was not responsible for the death of the deceased and that her demise was or could have been due to other causes. This, it was contended, was borne out by the statements of the accused and the concessions made by Dr Chui.

20 In his statements to the police, the accused explained that he was playing hide-and-seek with the deceased in the storeroom and, having bound the deceased's ankles with string, switched the room lights off and left the room to allow the deceased to hide. He went on to describe what transpired thereafter as follows:

> 16. … After a short time, I went back into the office. … While I was beating on the table I suddenly heard a loud thud. I knew that the thud did not come from my beating on the table. It clearly came from within the office. I immediately went to switch on the lights in the office. I saw her lying on the floor. She did not seem alright. Something was amiss. She seemed to have vomited blood because blood was trickling out from the right corner of her mouth. She seemed to be going into a spasm. Her eyes were wide open and there was urine all over the floor. … I did not know what to do. I wanted to untie her ankles but I did not know how to undo the knots. I sat on the chair in a daze and looked at her.
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> …
>
> 18. … When I was seated there, my mind went blank. Her body was shaking and on seeing her in that position, I suddenly recalled some scenes that I have seen on television. I recalled that people who were given a chop on the neck with the back of one's hand would lose consciousness momentarily and then come to again. I immediately tried it out on her by chopping at the back of her neck with the back of my left hand. After the first chop there was no reaction. I tried again the second time with a bit more force – again no reaction. I then tried the third time with more force than the second. This time when I looked at her I saw that she had vomited more blood. … My mind was totally blank. I did not know why but I put both my hands round her neck and pressed it. I pressed it momentarily with my eyes closed. I let go of my hands and looked at her. She looked no different. I put my hands round her neck again and closed my eyes. I pressed her neck harder this time. After sometime, I relaxed my hands. I opened my eyes and looked at her. This time I noticed that her face was greyish white although her eyes were still open.
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> 19. Thereafter, I moved her position so that her head was resting on the opposite side to the original position. … This time she was hiccupping ("urg"). *This went on for very long and it scared me*. I stood up and stamped on her neck about three times with my foot. *She continued to hiccup and each time she hiccupped I would become very scared because her face would be ashen grey and her eyes would still be open.* I took off the jacket that she was wearing and covered her face. … I think she was wearing some kind of pants. I could not take it off since her

ankles were bound. I really do not know why I was trying to strip off her pants at the time. At that point of time, I lifted the jacket a little to peep at her and she was still hiccupping. I put my right hand on her backside and inserted my third finger into an opening. I am not sure whether it was the anus or the vagina. To my mind that must be the anus. I did not know why I inserted my finger into it. I removed my finger from the opening and looked at it (finger) in a daze. *When I looked down again, I was shocked to see blood on her lower body*.

[emphasis added]

21 In his autopsy report and testimony in court, Dr Chui opined that the real cause of death was "acute airway occlusion" caused by the accused pressing his hand over the mouth and nose of the deceased. He premised his conclusion on several factors which he elaborated upon in the course of his examination-in-chief:

> Having examined the body, one can safely [conclude] that there was no natural disease that would have caused death at the material point in time. Then one notes that there are a number of injuries about the face which have been listed as injuries 1 to 5 [in the autopsy report]. … One also notes that the body was discovered or found in a plastic bag or set of nine plastic bags.
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> From the findings alone one could also exclude some degree -- some head injury for [*sic*] a lack of -- because of the absence of fractures of the skull or bleeding in the subdural or extradural space, which is commonly associated with serious head injuries. One explanation in which to [*sic*] in order to exclude -- sorry, one explanation to -- or the cause of death could be inferred from the presence of the injuries around the face and the lower mouth region. …
>
> Smothering in the manner I have demonstrated [earlier] would explain one such possibility. As I mentioned [before], one could also have been strangled -- the victim could also have been strangled leaving little trace, but then because of the absence of injuries, I cannot speculate on that aspect. So based on those findings, that is the cause of death.

22 Dr Chui further explained that the condition of the deceased's body, such as the bruised tongue, the vomitus found in the oral cavity and the faecal staining over the anal region, as well as the spasms and loss of bowel control described by the accused, were all manifestations of the dying process.

23 Counsel for the accused did, however, manage to extract several concessions from Dr Chui in the course of cross-examination. First, Dr Chui conceded that it was possible for a person with no prior medical history of fits, to suffer a fit or a seizure. If so, the symptoms identified by Dr Chui could possibly be mere evidence of a fit that the deceased had suffered at the material time. Secondly, it was possible that the deceased had suffered from a fit resulting from trauma to the head. This was supported by the injuries identified as injuries 6 and 7 in the autopsy report, which were located at the back of the deceased's head. Thirdly, Dr Chui agreed that it was possible for a person experiencing a fit to swallow her tongue and this could lead to acute airway occlusion. He also admitted to the possibility that the injuries sustained by the deceased to the lower facial region could have been inflicted after the deceased had died; for example, while the accused was in the process of packing the deceased's body into the layers of plastic bags. Finally, it was possible that the deceased had not died as a result of manual smothering but had, instead, died from oxygen deprivation after she was wrapped in the layers of plastic bags.

24 We start with the injuries identified in the autopsy report as injuries 1 to 5. As explained by Dr Chui, injuries 1 to 5 were a series of bruises located around the lower facial region of the

deceased's face. According to the pathologist, the arrangement of these bruises were consistent with occlusion of the nose and mouth by an object such as a hand. He further confirmed that for airway occlusion to have occurred, it was necessary for both the deceased's nose and mouth to have been covered.

25 At this juncture, we would refer to a point on which our learned brother, Kan Ting Chiu J, has expressed some concern; namely, the absence of any bruising on the deceased's nose. In Kan J's view, the absence of any injuries to the deceased's nose indicates the lack of complete blockage of all the air passages and, in turn, raises some doubts as to whether the deceased was smothered in the first place. However, we do not share the same concern. It should be borne in mind that Dr Chui had demonstrated to the trial judge how the five injuries were consistent with the accused having cupped his hand over the deceased's nose and mouth. More importantly, it should be noted that the Defence had never once challenged this aspect of the pathologist's evidence. Furthermore, it is not the task of this court to second-guess the various ways in which the accused could have blocked the deceased's nose and mouth without having caused any injury to the nose. That has to be established on the evidence. On this, Dr Chui's evidence is quite clear. We therefore accept, as did the trial judge, Dr Chui's description of the manner in which the smothering of the deceased had taken place.

26 We next turn to consider whether the Defence had, in any way, raised a reasonable doubt about the pathologist's version as to how the deceased had died. This is yet another point on which Kan J holds a different view. The defence sought to suggest that the deceased's death could have been due to a sudden onset of a fit and, in support of this contention, relied on the evidence of Dr Chui. The issue arose from a series of questions posed to Dr Chui by the defence counsel:

> Q: You agree with me that a person can get fits even if there is no history of fits in the family?
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> A: That is possible.
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> Q: And the fact that we talk about the history of the family you do not confine yourself to the parents, you can go up to the grandparents and further, right?
>
> A: Really, I think in terms of medical history the closer is the relationship to the person who is having the fits -- of course the history is stronger, and also it is a question of how far back it can be traced.
>
> Q: But it can be traced back to the parents too. I believe that certain generations skip?
>
> A: Possible.
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> Q: So if the mother does not have fit [*sic*], the daughter can have it, because the grandmother had it; correct?
>
> A: I think --
>
> Q: It can happen; right? It is possible. There are some situations where it skips generations?
>
> A: Yes.
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> Q: And you also agree that it is possible for a person who comes from a family with no fits

to have fits, right?

A: I mean -- I already explained yesterday in the majority of cases you need to look at all the other cases and having excluded all these, yes, the possibility does exist but then it may not be in the majority.

…

Q: Right. But you know, doctor, there is a saying that there is a first time for everything. So the deceased could have got fits; right?

A: Many things are possible for the first time.

27 Do the above answers from the pathologist give rise to a reasonable doubt as to the cause of the deceased's death? The answer to this question requires an understanding of the burden of proof that is imposed on the Prosecution. It is a fundamental principle of law that the legal burden lies upon the Prosecution to establish its case against the accused beyond a reasonable doubt. In the familiar words of Lord Sankey in *Woolmington v Director of Public Prosecutions* [1935] AC 462 at p 481:

> Throughout the web of the English Criminal Law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal.

This *dictum* was approved by this court in *Syed Abdul Aziz v PP* [1993] 3 SLR 534 which was, in turn, cited in *Ramakrishnan s/o Ramayan v PP* [1998] 3 SLR 645.

28 Having said that, it nevertheless bears repeating that not every doubt that is raised by the Defence will amount to a reasonable doubt. In this regard, we find the following passage by Denning J in *Miller v Minister of Pensions* [1947] 2 All ER 372, at 373, highly instructive:

> That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. *If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible but not in the least probable," the case is proved beyond reasonable doubt, but nothing short of that will suffice*. [emphasis added]

Similar sentiments were expressed by Yong Pung How CJ in *Teo Keng Pong v PP* [1996] 3 SLR 329 where he said (at 339, [68]):

> It bears repeating that the burden on the prosecution is to prove its case beyond reasonable doubt. It is not to prove the case beyond all doubts. That standard is impossible to achieve in the vast majority of cases. In almost all cases, there will remain that minutiae of doubt. Witnesses, apparently independent, could have conspired to 'frame' an accused. *Alternatively, an accused could be the victim of some strange, but unfortunate, set of coincidences. The question in all cases is whether such doubts are real or reasonable, or whether they are merely fanciful.* It is only when the doubts belong to the former category that the prosecution had not

discharged its burden, and the accused is entitled to an acquittal. [emphasis added]

29 We would also allude to Prof Tan Yock Lin's work, *Criminal Procedure* vol 2 (LexisNexis, 2005) at ch XVII para 2952, where he makes the following comments with reference to reasonable doubt in general and the decision of the High Court in *Chua Siew Lin v PP* [2004] 4 SLR 497 in particular:

> It needs no elaboration to state that reasonable doubt is a doubt which is material, which counts. Not any mere possibility of the prosecution case being false will amount to a reasonable doubt in the prosecution case.

He further adds in the accompanying footnote:

> A mere doubt, as opposed to a reasonable doubt, must frequently be conceded in the nature of things but because *it cannot yet concretely be articulated in relation to the evidence in the case*, it remains *an untested hypothesis* and may be rejected. [emphasis added]

30 The words emphasised in [29] above are of significant import for they aptly depict the circumstances of the present case. From the evidence of Dr Chui quoted at [26] above, it will be noted that he essentially made two points. First, he agreed that there could be a skip in generation such that a child could inherit a latent predisposition to fits from her grandparents even if her parents did not. Dr Chui also opined that the closer the relationship the higher would be the risk; namely, that there was a higher risk of the daughter having fits if the mother had it rather than if it was only the grandmother. Second, he said that even if there was no family history at all, a person could still suddenly have fits; there could always be a first time.

31 In the context of the cross-examination, the answers given were just possibilities. Moreover, there was undisputed evidence that neither the deceased nor her biological parents had any history of fits. Furthermore, as Dr Chui has clarified that he is not a clinician, his views in this regard should not be, with respect, accorded the same weight as his opinions relating to pathological matters. In our opinion, what was suggested before the trial judge was, at best, a possibility that was unsupported by any tangible evidence or basis.

32 Granting that the Prosecution could have asked the deceased's mother if she knew whether her own parents or the deceased's father's parents suffered from fits, we do not think the answer would have taken the point any further. Supposing that the deceased's mother were to have answered the question in the affirmative, it would still be a long shot to link that possibility to what had happened on that fateful day. This is even more so, bearing in mind the five injuries on the deceased's lower facial region and the clear evidence of Dr Chui. The Defence, however, sought to explain the presence of these injuries as having been caused while the accused was stuffing the body of the deceased into the carton. While Dr Chui said that that was a possibility, we note the accused's own evidence where he said that the body was cold by the time he started to wrap it in the layers of plastic bags. Moreover, it should be noted that the deceased's body was curled up in a foetal position when it was removed from the box. In this position the face would have been shielded and we do not see how the injuries to the lower part of the face could have been caused. If the accused's counsel's contention were accepted, it would amount to suggesting that as the deceased was being smothered by the accused, she had a sudden onset of a fit not brought about by the smothering. There is no basis to assume that such an extreme coincidence had occurred. This is entirely speculative.

33 Kan J placed emphasis on the accused's description of the symptoms experienced by the deceased at the material time such as vomiting, spasms and the discharge of urine. In his view, these symptoms were consistent with a fit resulting in the deceased choking on her own vomit. This was

confirmed by the vomitus, bruised tongue and faecal discharge discovered during the post-mortem examination. These symptoms, together with Dr Chui's evidence, that fits could come on suddenly if there was a family history, persuaded Kan J to come to the view that there was a reasonable doubt as to whether the smothering by the accused was the true cause of death of the deceased.

34 We would first point out that Dr Chui's unwavering testimony was that a cut-off of oxygen to the brain could be one of the causes of fits. As such, the symptoms manifested by the deceased at the material time were equally consistent with the symptoms experienced by a person during the agonal phase immediately prior to death due to oxygen starvation. Secondly, a careful scrutiny of the accused's own statement at [20] above shows that the deceased was vomiting blood as opposed to vomiting the contents of her stomach. That would indicate that the deceased had choked on her own blood. However, there was no blood found in the deceased's oral cavity during the post mortem. Instead, the vomitus that was discovered by the pathologist consisted of stomach contents. More illuminating was Dr Chui's explanation that the vomitus could have been expelled from the deceased's stomach into the oral cavity during post-mortem decomposition. Thirdly, and more importantly, and as pointed out earlier, there exists no plausible explanation for the five injuries to the lower region of the deceased's face, which in the pathologist's view is consistent with manual smothering of both the nose and the mouth. In light of the foregoing, it is our opinion, that the symptoms purportedly displayed by the deceased, and the vomitus found in the oral cavity, are *per se* equivocal and do not support the supposition of a sudden onset of fits. In contrast, the five injuries on the lower region of the deceased's face were real and were in the pathologist's view, evidence of smothering of the deceased by the accused. Accordingly, we do not think that any reasonable doubt had been raised that the death of the deceased was due to smothering. The Defence's suggestion, of a sudden onset of fits, may at best be described as a hypothesis which remains untested on the established facts.

35 In any event, we would further add that the trial judge, in making an express finding that the accused was the one who had caused the death of the deceased, had implicitly rejected the defence's suggestion of a sudden onset of a fit. As there was sufficient evidence to support the trial judge's finding, this court should be slow to interfere with his findings of fact: see *Lim Thian Lai v PP* [2005] SGCA 50 at [42].

36 We shall now proceed to deal briefly with the remaining contentions raised by the Defence in relation to the issue of causation. It was contended by the Defence that the "thud" allegedly heard by the accused before he switched on the lights in the storeroom was that of the deceased knocking her head against a hard surface. The surface presumably refers to the underside of the table. This in turn could be the trigger that set off the fit. This contention was met, however, by Dr Chui's evidence that first, the amount of clearance between the floor and the underside of the table was narrow and would not be sufficient to create such force, when a child gets up and bangs her head against it, as to be severe enough to cause much harm to the child, and secondly, that while there was scalp bruising over the back of the deceased's head, the pathologist did not find anything more serious like a fracture of the skull or bleeding in terms of the extradural or subdural region which would be more likely to result in a seizure or fit. Defence counsel rightly pointed out that the deceased's brain had decomposed so badly that by the time of the autopsy it was simply impossible to determine if there was any bleeding in the region of the brain. However, this also meant that there was no evidence that the Defence could point to in order to substantiate its claim that the deceased had suffered an injury which triggered the fit. It is of interest to note that in a five-year survey conducted by Dr Chui on the unnatural deaths amongst children, not a single case had occurred where a child had died after banging his or her head against a table.

37 We are likewise unpersuaded by the Defence's suggestion that the deceased could have suffered acute airway occlusion from having swallowed her own tongue. The bruising to the anterior

of the deceased's tongue is not indicative that she had swallowed it. More importantly, the autopsy report did not state that the deceased's tongue was in the reverse position. Such a fact, if present, would certainly have been noted by the pathologist. In the absence of such a notation, we cannot even begin to give any consideration to this contention.

38 The final point raised in argument was that the deceased had died from oxygen starvation whilst wrapped in the plastic bags. For one thing, the accused himself admitted in his own statements that the deceased's limbs were cold and rigid at the time he commenced packing the body. This is more consistent with the onset of rigor mortis which is a clear indication of death. Furthermore it was the firm view of Dr Chui, given the injuries over the lower facial region, that he would exclude the cause of death as being due to the deprivation of oxygen in the plastic bag.

39 In the premises, we find that the Defence has failed to raise a reasonable doubt as to the cause of death of the deceased. On the contrary, there is sufficient evidence to support the Prosecution's case that the accused had smothered the deceased and thereby caused her death.

The drawing of an adverse inference from the accused's silence

40 Having determined that the various alternative causes of death thrown up by the Defence must be regarded as mere conjectures, this court is entitled to regard as established, beyond a reasonable doubt, that the accused had caused the death of the deceased. That would suffice to dispose of this aspect of the appeal. However, the trial judge had gone one step further in drawing an adverse inference against the accused from his refusal to give evidence. For the sake of completeness, we will comment briefly on the trial judge's application of s 196(2) of the CPC.

41 The concept of adverse inference was first introduced into the CPC by the Criminal Procedure Code (Amendment) Act 1976 (No 10 of 1976) which allows the court to draw whatever inferences "as appear proper" from an accused's failure to testify when called upon by the court to give evidence.

42 In the seminal case of *Haw Tua Tau v PP* [1982] AC 136, the Privy Council opined, at 153, that "[w]hat inferences are proper to be drawn from an accused's refusal to give evidence depend on the circumstances of the particular case, and is a question to be decided by applying ordinary commonsense". Such inferences can, of course, go towards many things; the strongest inference being one of guilt itself: see *Chai Chien Wei Kelvin v PP* [1999] 1 SLR 25 and *Syed Yasser Arafat bin Shaik Mohamed v PP* [2000] 4 SLR 27.

43 An adverse inference should only be drawn in appropriate circumstances. A court would be in grave error if it were to draw an adverse inference of guilt if such an inference were used solely to bolster a weak case. As was observed by Prof Tan Yock Lin, citing the Australian decision of *Weissensteiner v R* (1993) 178 CLR 217, the silence of the accused "cannot fill in any gaps in the prosecution's case; it cannot be used as a make-weight". He further opined that "[t]he inference is properly drawn where the silence of the accused affects the probative value of the evidence which has been given. Where evidence which has been given calls for an explanation which the accused alone can give, then silence on his part may lead to an inference that none is available and that the evidence is probably true": see [29] *supra* at ch XV para 3003.

44 Section 196(5) of the CPC expressly forbids the drawing of inferences where it appears to the court that the accused's physical or mental condition makes it undesirable for him to be called upon to give evidence. The defence thus contended that no such inference should be drawn in the present case as the accused was alleged to have suffered, and is purportedly still suffering, from schizophrenia. However, we would note that both psychiatrists who examined the accused filed

reports stating that he was fit to plead. Secondly, the psychiatric observation charts recorded over the course of the accused's remand in Changi Prison Hospital show that he was lucid, cogent and capable of engaging in conversation. Thirdly, the detailed statements given by the accused to the police evidenced his ability to recollect events that occurred between 10 October 2005 and the date of his eventual arrest and remand. While this means that the accused was capable of taking the stand at the commencement of the trial, one must also remember that s 196(5) states that the court may not draw inferences when it *appears* undesirable. One can envisage an instance where an accused is diagnosed as fit to plead yet still exhibit certain mental or physical symptoms in the course of the trial. The drawing of inferences in such circumstances may be unwarranted. This, however, would fall to be determined by the trial judge. In the present case, the trial judge had at no time in the course of the trial, or, more specifically, when the defence was called, indicated that the accused was in such a state as to make it undesirable for him to have given evidence. There was nothing to indicate that it would be undesirable for the accused to give evidence. As such, the trial judge was entitled to draw such inferences as he deemed appropriate in the circumstances.

45 Returning to the facts of the present appeal, it is patently clear that the accused was the only person who could shed some light on the events that transpired between the deceased and himself in the storeroom that fateful day. The evidence of Dr Chui remains largely unshaken despite cross-examination. We accordingly find the trial judge justified in having drawn the inference that the accused had caused the deceased's death, or, at the very least, that the failure of the accused to challenge Dr Chui's evidence enhanced its probative value.

Diminished responsibility

46 It is trite that for an accused to successfully plead the defence of diminished responsibility, he must satisfy the three-limb test, namely, (a) the accused was suffering from an abnormality of mind at the time he caused the victim's death; (b) the abnormality of mind arose from a condition of arrested or retarded development of mind or any inherent causes, or was induced by disease or injury; and (c) the abnormality of mind substantially impaired the accused's mental responsibility for his acts and omissions in causing the death: see *Tengku Jonaris Badlishah v PP* [1999] 2 SLR 260. Equally established is the rule that limb (b), otherwise known as the aetiology or root cause of the abnormality, is largely a matter within the purview of expert opinion. Limbs (a) and (c), however, are matters which cannot be the subject of any medical opinion and must be left to the determination of the judge, as the finder of fact. As the finder of fact, the trial judge is:

> entitled and indeed bound to consider not only the medical evidence but the evidence upon the whole facts and circumstances of the case. These include the nature of the killing, the conduct of the defendant before, at the time of and after it and any history of mental abnormality … That task is to be approached in a broad common sense way.

see *Walton v The Queen* [1978] AC 788 at 793 and *Chua Hwa Soon Jimmy v PP* [1998] 2 SLR 22 at [28].

47 In considering limb (a) of the test (*ie*, abnormality of mind), one immediately recalls the guidance given by Lord Parker CJ in *Regina v Byrne* [1960] 2 QB 396 at 403:

> "Abnormality of mind," which has to be contrasted with the time-honoured expression in the M'Naughten Rules "defect of reason," means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. *It appears to us to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment as to whether an act is right or wrong,*

but also the ability to exercise will power to control physical acts in accordance with that rational judgment. [emphasis added]

What warrants emphasis is that limb (a) requires the court to be satisfied not only of the fact that the accused was suffering from a condition that a reasonable man would consider abnormal, but further that the abnormality was of such a degree as to impair the accused's cognitive functions or self-control. This latter requirement focuses on the "extent" of the alleged abnormality. It is necessary because a person who suffers some sort of malady that may be deemed as abnormal need not necessarily suffer from any impairment of his or her cognitive functions or ability of self-control. Limb (a) should never be deemed satisfied unless the extent of the purported abnormality is also established.

48 It must be remembered that the role of the court is to determine the state of the accused's mind *at the time of the offence*. As such, more emphasis should be placed on scrutinising the evidence pertaining to that period.

Inferences from the accused's silence

49 Before moving on to consider the arguments raised by the accused in relation to the defence of diminished responsibility, we wish to refer to an observation made by Kan J with regard to the accused's refusal to give evidence in respect of this defence. Kan J appears to accept the proposition that an accused is entitled to refrain from entering the witness box, but goes on to suggest that the accused's election not to give evidence may have some effect on the evaluation of the applicability of the defence. While there may be occasions where an accused's refusal to testify will leave a negative impact on the pleaded defence of diminished responsibility, we think that such instances are probably few and far between.

50 There are relatively few cases that discuss this particular aspect, but we find some guidance in the case of *Regina v Bathurst* [1968] 2 QB 99. In that case, the accused, having pleaded the defence of diminished responsibility, elected not to give evidence. Instead, medical experts were called by both the accused and the prosecution to ascertain if the defence was made out. The trial judge, in summing up to the jury, made a strong comment against the accused's failure to give evidence and intimated that the jury was entitled to question why the accused had abstained from adding to the medical evidence upon which the jury would make its verdict. On appeal, Lord Parker CJ made the following comments at 106:

> One has only to go back to one's own experience at the Bar, and I think the experience of all practising barristers today, to realise that in almost every case counsel defending a prisoner raising this defence would prevent him if he could from going into the witness box. He may well be suffering from delusions, he may be on the border of insanity, it would be the last thing that any counsel would do to allow his client to go into the witness box, and in those cases at any rate any comment on his failure to do so would be clearly unfair.
>
> Having said that, the court is prepared to concede that there may be cases where a defendant ought to go into the box, and where his failure to do so may be commented on, albeit the plea is one of diminished responsibility. There might be a case where the prosecution, by cross-examining the psychiatrist called for the defence, indicated that they were challenging some particular point, and a point which could only be spoken to by the defendant as opposed to some relations, friends, or the like, and in such a case, probably a very rare case, some comment might be justified.

51 Accordingly, in an issue such as this, there can be no rigid norms. Much would depend on the circumstances. But in a case where a particular aspect of the defence is challenged by the Prosecution, and where the accused is the sole party able to shed some light on the matter, the court may well be entitled to draw the appropriate inferences from the accused's silence. In most cases, however, there will be other parties capable of testifying as to the accused's conduct before, during and after the murder. As such, there would be little reason to hold the accused's silence against him as far as this defence is concerned.

52 We now return to the facts of the present case. Counsel for the accused has contended that the trial judge had erred in rejecting the defence of diminished responsibility. Counsel highlighted the following: first, there was insufficient evidence to establish any motive for the accused's acts, thus proving that the act of killing was a "disorganised" or "catatonic" event; secondly, the accused had a prior history of suffering from mental disorders; thirdly, the disposal of the deceased's body subsequent to the killing may not necessarily indicate that the accused was of sound mind at the material time; and fourthly, the accused had displayed a symptom known as "blunting of affect" which was observed by both psychiatrists who interviewed him.

53 Before going into each of these points, it is helpful to recap the primary grounds upon which the defence's expert, Dr Nagulendran, formed the view that the accused was suffering from an abnormality of mind. Citing the *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Association, 4th Ed, 2000), Dr Nagulendran explained that three key symptoms of schizophrenia which were displayed by the accused were (a) grossly disorganised or catatonic behaviour, (b) negative symptoms such as the flattening of affect (*ie*, the absence of emotion or display of inappropriate emotions) and (c) delusions. It is against this backdrop that we evaluate the evidence to determine if the trial judge had reached a conclusion that was unsupported by the medical evidence as well as the objective facts.

54 With respect to the first contention, that the act of killing was apparently committed in the absence of motive and therefore evidenced disorganised behaviour, we think that the failure on the part of the Prosecution to prove beyond a reasonable doubt that the killing was done to silence the victim of a sexual assault does not mean that there was no motive whatsoever. As observed by the trial judge, motive is not an essential element of the crime. But where the accused seeks to rely on the absence of motive to substantiate a particular defence, it is for the accused to prove the absence. This was not done. Furthermore, even if allowance is made for the possibility that the accused was suffering from an acute onset of schizophrenia and thereby committed what, in Dr Nagulendran's view, amounted to a senseless act, it does not stand to reason that the accused would only exhibit a single disorganised act and nothing more. If one were to subscribe to Dr Nagulendran's belief that the accused remains to this day in the grips of schizophrenia, surely one can expect the accused to display other forms of disorganised or catatonic behaviour. None was observed or recorded by the accused's colleagues, the police, the nurses at Changi Prison Hospital or the attending psychiatrists, including Dr Nagulendran.

55 Turning to the second point concerning the accused's purported mental history, it is our opinion that the trial judge was correct to have rejected it. There was nothing to indicate that the accused's earlier behaviour was anything but normal. As explained by the trial judge, the observations by the accused's mother, that the accused was seen smiling to himself during his brief homecomings in Penang were contradicted by the preponderance of evidence from his working colleagues and friends that the accused's behaviour, before and after the crime was entirely normal. The accused's complaints of seeing flashes of human form and insomnia could be explained by the tension headaches which resulted from his unusual working hours as a vegetable packer. Moreover, the accused had also admitted that his visits to the fortune teller and the medium in Geylang were more to do with his own

superstitious beliefs than anything else. The facts paint a picture of a man suffering from the rigours of a demanding job rather than one who is suffering from some form of mental abnormality.

56 As for the third contention, we accept that it is possible for a person who had suffered an acute onset of schizophrenia to suddenly regain his senses after committing the act of killing and attempt to hide the damning evidence. However, such acts may also be consistent with the attempts of a cold-blooded murderer to evade detection by disposing of the evidence. This possibility was explored by Choo Han Teck J in *PP v Juminem* [2005] 4 SLR 536 where he said at [32]:

> [T]he evidence of planning cannot be lightly dismissed, and that must feature in the consideration of every aspect of the defence of diminished responsibility – especially when the burden of proving the defence rests with the accused – and that evidence continues to feature until every part of the case has been considered, and the question last remaining is whether the accused suffered from a diminished responsibility in spite of [the] apparent cogent and rational planning of the homicide.

Any inferences to be drawn from the accused's conduct in disposing of the deceased's body must be drawn from the evidence in its entirety.

57 The final contention concerning the "blunting of affect", otherwise described as the absence of appropriate emotions, must be assessed against the evidence of the accused's colleagues. Many of them testified that the accused had expressed anger, irritation and frustration when questioned about the deceased shortly after her disappearance. The accused had also related to the police the emotions he felt when the act of killing had taken place: see [20] above. All these facts show that the accused was fully capable of expressing his emotions during the commission of the offence and shortly thereafter. This flies in the face of the Defence's expert's theory that the accused suffered from a blunting of affect during the killing. The accused's lack of emotion when talking to both the Prosecution and the Defence's psychiatrists about the deceased was more likely to be a sign of anxiety or, worse still, a deliberate attempt to suppress his feelings.

58 In assessing the question whether the accused has made out a case of diminished responsibility on a balance of probabilities, the court must view the medical evidence in the light of the totality of the objective facts. It is also important to bear in mind that what is sought to be established was his state of mind at the time of the offence. In the present case, the accused had exhibited no mental symptoms prior to the killing of the deceased. Immediately after the commission of the offence, he disposed of the evidence in a methodical and calculating manner. In the days following the disappearance of the deceased, aside from drinking more and appearing listless, his friends and colleagues observed him to be otherwise normal. He did, however, show signs of anger and irritation when queried about the deceased. He lied to the police in order to evade detection. He escaped to Penang and, upon being confronted by his wife and parents, surrendered himself and assisted the police in their investigations. During his remand in Changi Prison Hospital, he displayed no signs of disorganised or catatonic behaviour or any form of mental disturbance. Just before his final interview with Dr Sathyadevan, he changed his version of events and blamed the death of the deceased on three Chinese men. The absence of any mental symptoms prior to the offence and the lack of any disorganised or catatonic behaviour subsequent to the killing preclude any finding that the accused had lost the ability to control his physical acts. The fact that he was able to relate to the police how he had chopped, squeezed and kicked the deceased shows that he was capable of appreciating the nature of his acts. Finally, the fact that the accused deceived the police and fled to Penang establishes his ability to appreciate that his acts were wrong. Having taken all the above into consideration, we are of the opinion that the trial judge was well justified in finding that the accused was not suffering from an abnormality of mind at the time of the offence. Therefore the defence of

diminished responsibility is not available to him.

Conclusion

59 For the reasons we have given, we hold that the trial judge had not erred in finding that the accused caused the death of the deceased and in rejecting the defence of diminished responsibility. The appeal is accordingly dismissed and the imposition of the mandatory death sentence is affirmed.

Kan Ting Chiu J (delivering the dissenting judgment):

60 The appellant, Took Leng How, is appealing against his conviction for the murder of an eight-year-old girl, Huang Na ("the deceased").

Background facts

61 The appellant, a Malaysian, worked as a vegetable packer at All Seasons Fruits and Vegetables Supplier which carried on business at a shop at Block 7 and at a storeroom at Block 15 in the Pasir Panjang Wholesale Centre ("the Wholesale Centre").

62 The deceased and her mother, Huang Shuying, were Chinese nationals. The latter was a co-worker of the appellant. The appellant was a friend to them and he and the deceased would play games together.

63 The deceased's mother left for a visit to China on 27 September 2004, while the deceased remained in Singapore under the care of a housemate. On 10 October 2004, the deceased went missing. The police were notified. Extensive efforts were made to find her, which received wide media coverage.

The police investigations

64 The police, acting on information that the deceased was last seen with the appellant, questioned him on her disappearance. On 19 October 2004, the appellant told them that he had met the deceased on 10 October 2004 at Block 13 of the Wholesale Centre after she had made a telephone call to her mother. After he advised her to return home, they parted company and he went to the storeroom.

65 On 20 October 2004, the appellant told the police that he had seen the deceased being abducted. He suspected that the deceased was abducted because her mother had grievances with some traders at the Wholesale Centre. He claimed that he was able to arrange for the deceased's release, but he had to collect his two mobile phones in which some contact numbers were stored. On the following day, the police escorted the appellant to collect the two mobile phones. When they were at a restaurant, he excused himself to go to the toilet, and absconded.

66 The appellant left Singapore and made his way home to Penang. On 30 October 2004, he surrendered himself to the Malaysian police and was then brought back to Singapore. On 31 October 2004, he led the police to Telok Blangah Hill Park, where a cardboard carton containing the deceased's body was recovered down a slope.

The investigation statements

67 After the recovery of the body, the appellant made a series of investigation statements to the police which were admitted in evidence at the trial without objection.

68 In a statement made on 9 November 2004, he recounted that on 10 October 2004, the deceased was with him in the storeroom. They were playing hide-and-seek. In the game, the deceased had her ankles tied together and the lights were turned off. He narrated:

> 16. ... After a short time I went back into the office. It was still in darkness as the lights were off. I started beating on the table with my hand and calling her name at the same time. While I was beating on the table I suddenly heard a loud thud. I knew that the thud did not come from my beating on the table. It clearly came from within the office. I immediately went to switch on the lights in the office. I saw her lying on the floor. She did not seem alright. Something was amiss. She seemed to have vomited blood because blood was trickling out from the right corner of her mouth. She seemed to be going into a spasm. Her eyes were wide open and there was urine all over the floor. I immediately went over to call her name but she did not reply and she was still having her spasm. I did not know what to do. I wanted to untie her ankles but I did not know how to undo the knots. I sat on the chair in a daze and looked at her. …
>
> 17. ... To my mind the police would not believe that such a thing happened. There was no grudge between Huang Na and myself and I loved her as a kid. …
>
> 18. ... When I was seated there my mind went blank. Her body was shaking and on seeing her in that position, I suddenly recalled some scenes that I have seen on television. I recalled that people who were given a chop on the neck with the back of one's hand would lose consciousness momentarily and then come to again. I immediately tried it out on her by chopping at the back of her neck with the back of my left hand. After the first chop there was no reaction. I tried again the second time with a bit more force – again no reaction. I then tried the third time with more force than the second. This time when I looked at her I saw that she had vomited more blood … I was at a loss. My mind was totally blank. I did not know why but I put both my hands round her neck and pressed it. I pressed it momentarily with my eyes closed. I let go of my hands and looked at her. She looked no different. I put my hands round her neck again and closed my eyes. I pressed her neck harder this time. After sometime, I relaxed my hands. I opened my eyes and looked at her. This time I notice her face was greyish white although her eyes were still open.
>
> 19. Thereafter, I moved her position so that her head was resting on the opposite side to the original position. I sat down on the floor and watched her again. This time she was hiccupping ("urg"). This went on for very long and it scared me. I stood up and stamped on her neck about three times with my foot. She continued to hiccup and each time she hiccupped I would become very scared because her face would be ashen grey and her eyes would still be open. I took off the jacket that she was wearing and covered her face. I did not dare look at the face. She was wearing only a jacket and no other tops then. I think she was wearing some kind of pants. I could not take it off since her ankles were bound. I really did not know why I was trying to strip off her pants at the time … I put my right hand on her backside and inserted my third finger into an opening. I am not sure whether it was the anus or the vagina. To my mind that must be the anus. I did not know why I inserted my finger into it. …

69 Subsequently, he left the storeroom and went to the shop. He said he was in a daze and rested there for a time. He then returned to the storeroom, and touched the deceased's limbs and discovered that they felt stiff. He left the storeroom again and went first to the shop, and then to his lodging, where he had a bath and watched television. After that, he returned to the shop and took a cardboard carton, some plastic bags, a roll of adhesive tape and a pair of scissors, and brought them with him to the storeroom.

70 He continued with his account in his statement of 10 November 2004:

> 29. ... I was dwelling on how to handover this kid to the police. The kid was already dead. After thinking for a while I put my thoughts aside. I next went into the office [in the storeroom]. I bent over the kid and clasped my hand over both her wrists. With my other hand I clasped her ankles. I lifted her in this manner and took her out of the office and put her on the floor.
>
> 30. After putting her on the cement floor near the washing area where there was a tap, I got hold of the scissors and snip the string binding her ankles. I removed the strips of string and shifted her so that her legs were in the washing area. I washed her feet under the tap by spraying water through the rubber hose because the base of her feet were very dirty. Just before moving her nearer the washing area, I had removed her shorts after snipping the strings. Actually I am not sure what kind of pants she was wearing. She was not wearing panties. China people don't wear panties. She was only a kid so she was not wearing one. From the box I brought along, I took a plastic bag, 20 by 30, and put the strings and her clothes, i.e. the blue jacket and pants into it. I took another plastic bag of the same size and squatted down beside her.
>
> 31. Following this, I put the plastic bag over her head by pulling it down all the way to her legs. She was still in a lying position on the cement floor. The bag only came up to some where around her legs. I am not sure which part of the legs it came to. I cannot remember. As her legs were still sticking out of the edge of the plastic bag, I held on to the edge of the plastic bag around her legs and stood up. …

and he went on to describe how he placed the body into several plastic bags, tying each one in turn. He then placed the body into the cardboard carton, and sealed the carton with the adhesive tape.

71 He put the deceased's clothes into a plastic bag and threw them into a rubbish dump at Block 16 of the Wholesale Centre. He loaded the cardboard carton on a motorcycle, rode to Telok Blangah Hill Park and threw the carton down the hill from a spot where there was a lamp post with a triangular sign. He chose that spot because it would be easier for him to bring the police to recover it. He also said that he had put the body in the plastic bags to slow down decomposition and had chosen a sturdy carton so that the body would not be eaten by wild dogs.

72 In addition to his statements, he also re-enacted what he did to the deceased in the storeroom and how he subsequently packed her in the box, and the re-enactment was recorded on video.

The forensic evidence

73 After the cardboard carton was recovered, plain radiography revealed that there was a body inside.

74 The carton was opened at the mortuary by Dr Paul Chui, Senior Consultant Forensic Pathologist, Centre for Forensic Medicine, Health Sciences Authority. The naked body of the deceased was revealed, curled in a foetal position, inside nine layers of plastic bags.

75 Dr Chui conducted a post-mortem examination of the body and prepared a report. The findings of direct relevance to the trial were:

(a) vomitus in the mouth;

(b) bruising over the left side of the tongue;

(c) faecal staining around the anal orifice; and

(d) five areas of bruising referred to as injuries 1 to 5 in the autopsy report:

(i) injury 1 – elliptical area of bruising over the left mandible;

(ii) injury 2 – oval-shaped bruising 2cm? by 1cm over the left angle of jaw;

(iii) injury 3 – bruising of 1cm diameter over the left mastoid process;

(iv) injury 4 – bruising of 1.5cm diameter over the right angle of jaw; and

(v) injury 5 – bruising over the upper lip region in the midline.

76 Dr Chui's examination of the neck region revealed no musculature injuries or fractures consistent with the forceful chopping, pressing and stamping the appellant described. The absence of fractures or soft-tissue injuries raised serious doubts that these assaults took place. It was not the Prosecution's case that the assaults described contributed to the deceased's death.

77 Dr Chui certified the cause of death to be "Acute Airway Occlusion", *ie*, the blockage or closure of the air passage. That finding was not disputed. The point of contention was the cause of the blockage. According to Dr Chui, the deceased died because she was smothered. He pointed to injuries 1 to 5 described in [75] herein as evidence that the appellant had cupped the mouth and nose of the deceased and explained that "[i]f one obstructs the air passages of the nose and mouth together", it would be sufficient to cause death.

78 During cross-examination, he was asked:

> [Y]our finding that you came to the conclusion that it could be smothering, it is based on these five injuries; correct?

and he confirmed:

> In essence, yes.

79 In re-examination, he went on to say:

> If I had not found the five injuries and the body was in the plastic bag I would most likely have concluded based on the evidence or based on the findings, that she died as a result of suffocation within the plastic bag.

(It should be pointed out that if the deceased had died from being suffocated in the plastic bag, the cause of death would not be acute airway occlusion as the airway would not have been occluded.)

80 On his evidence, Dr Chui had made a connection between the five injuries and the smothering of the mouth and nose, and agreed that if the five injuries were absent, smothering could not be inferred. He had also agreed that for smothering to take place, the nose and the mouth have to be obstructed.

81 Of the five injuries, while the bruise over the upper lip region may indicate the obstruction of

the mouth, there was nothing which suggested that the nose was obstructed. The other four injuries were in the areas of the ear and jaw. There was no bruising to the nose, and that must raise a doubt whether there was smothering of the nose. Dr Chui conceded that the appellant's re-enactment did not show any action that fitted his description of the smothering. The appellant did not mention smothering the deceased by her mouth and nose in his investigation statements and his account of the events to psychiatrist, Dr G Sathyadevan.

82 The Defence contended that the deceased was not smothered by the appellant, but had died because vomitus discharged in a fit had choked her.

83 The Defence referred to the vomitus, bruised tongue and faecal discharge and raised with Dr Chui the likelihood that the deceased could had died from an onset of a fit. Dr Chui did not agree with that, and maintained that the effective cause of death was the blockage of the airways through the smothering of the mouth and nose.

84 Dr Chui cited four factors to justify his conclusion. One, that there was no natural disease which could have caused death; two, that the five facial injuries were consistent with the deceased having been smothered by a hand over the nose and mouth; three, the absence of fractures of the skull or bleeding in the subdural or extradural space related to serious head injuries; and four, the symptoms displayed by the deceased as described by the appellant such as the vomitus, urine and faecal incontinence, spasm and bruising of the tongue could be suffered by a person in the throes of death.

85 In the course of cross-examination, Dr Chui conceded that it was possible for a person with no prior medical history to suffer fits and seizures, but he added the caveat that it was not common for a child without any medical or family history to have a fit spontaneously.

86 He also agreed that the bruising of the tongue, the presence of vomitus and the faecal discharge were consistent with a fit, as was the discharge of urine described by the appellant, and that if the deceased had a fit and vomited, the vomitus could cause occlusion of the airway and cause death. In re-examination, he added that a seizure could also occur in the last minutes before death, in the agonal phase, as a pathological process in the dying event.

87 Dr Chui is not a clinician, and did not state any views on the likelihood of a fit as a cause of death in his autopsy report or his conditioned statement. When questions were put to him in court, he answered them. For example, when he was questioned about a person with no history of suffering a fit, his answer was:

> For a child to just spontaneously develop fits and without any medical or family history, in my mind, is not common, not common at all.

There was no indication that he had done prior reading up on the matters that were raised to him, and he did not indicate the degree of the probability of a fit being the cause of death or an incident to dying. Similarly, no elaboration or authority was offered on the opinion that it was unlikely for a young child without a medical family history to have a spontaneous fit.

88 In fact, Dr Chui did not have knowledge whether the deceased had a medical history or family history of fits. The deceased's mother said that the deceased was a healthy child with no medical condition, and that she herself and the deceased's father did not suffer from fits.

89 The information, limited to the deceased and her parents, fell short of being a proper or

complete family history. Dr Chui acknowledged that there can be skipped generations, so the status of the grandparents and other forebears must also be considered. Within the same generation, it is not sufficient just to know about the two parents. The conditions of the siblings of each parent are equally relevant.

90 One is left to wonder why, when the Prosecution questioned the deceased's mother on this issue, it confined its queries to the three of them and did not go further.

91 It should also be noted that Dr Chui's answer that a seizure could be a manifestation of the dying process was made in reply to a general question, not against the background of the events described by the appellant, where the deceased was vomiting and going into spasms even before the appellant touched her. If the fits and spasms happened at that initial stage, they would not be a part of the dying process. There was also no clarification on the likelihood of a person like the deceased having a seizure in the course of dying from an occlusion of the airway.

92 Although this issue was raised at the trial, there was no finding in the grounds of decision on the possibility of a fit being the cause of the occlusion of the airway. The issue must be addressed now on the evidence that has been adduced. There was apparently nothing inherently unbelievable in the appellant's narration of the vomiting and spasms the deceased experienced. If there were, Dr Chui would have drawn attention to it when the appellant's statement was read to him. To the contrary, Dr Chui confirmed that the description was consistent with a seizure.

93 Dr Chui rejected the fit as a cause of death on the basis that it is not common for a young child of eight without a medical history or family history of fits to have a spontaneous fit. But he also conceded that it could happen, and there was no clear evidence that there was no history of fits in the deceased's family. The evidence available only covered the deceased and her parents.

94 The account of the appellant of the early vomiting, spasms and the discharge of urine was consistent with a fit resulting in death by choking, and not as part of the dying process. There was also the vomitus, the bruised tongue and the faecal discharge found in the post-mortem examination, which were consistent with a fit and seizure.

95 There was no conclusive evidence on the cause of the occlusion of the airway. If it was caused by smothering as Dr Chui had concluded, murder was made out. If it was the result of a fit, no offence of murder is disclosed. Had the Prosecution proved a case of murder beyond a reasonable doubt?

96 Denning J in *Miller v Minister of Pensions* [1947] 2 All ER 372 at 373 gave the classic exposition on proof beyond a reasonable doubt:

> Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable," the case is proved beyond reasonable doubt, but nothing short of that will suffice.

97 The absence of injuries to the nose when bruises to other regions were present raised a doubt whether there was smothering of the nose. The vomitus, bruised tongue and faecal discharge, the possibility of a spontaneous fit and the incomplete family history also created a doubt whether death resulted from smothering. This is not a fanciful possibility. It was a serious doubt the Prosecution had to remove if it were to prove its case, and the Prosecution had not done that.

The psychiatric evidence

98 In the handling of this issue at the trial, one important development did not receive the attention it ought to receive. The appellant did not give evidence. While an accused does not have to give evidence to raise diminished responsibility, his election not to give evidence may affect the evaluation of this aspect of his defence. The Defence relied largely on the evidence of Dr R Nagulendran, a consultant psychiatrist in private practice who was called as a defence witness to present evidence in support of its defence that the appellant came within Exception 7 to s 300 of the Penal Code (Cap 224, 1985 Rev Ed). Exception 7 states that:

> Culpable homicide is not murder if the offender was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in causing the death or being a party to causing the death.

99 The psychiatric evidence came from Dr Nagulendran for the Defence, and Dr G Sathyadevan, Senior Consultant and Chief of the Department of Forensic Psychiatry, Institute of Mental Health, for the Prosecution. Their conclusions drew heavily on their reading and interpretation of the appellant's investigation statements and his statements to them.

100 There was other evidence that was relevant. There was the evidence of the appellant's mother, the appellant's employer and colleagues at work, his behaviour before 10 October 2004, between 10 and 21 October 2004, and after his return to Singapore, but this evidence did not give any insight into the events relating directly to the deceased's death. Both psychiatrists arrived at their respective conclusions by referring to the appellant's narration of the events. Without that, there was little for them to work on.

101 When the appellant elected not to give evidence, he did not attest to the truth of the contents of his investigation statements, and he did not open himself to be cross-examined by the Prosecution. The situation was exacerbated by the fact that the appellant was not consistent, and had also given an entirely different account that the deceased was beaten to death in the store by three Chinese men who also assaulted him. He was also not consistent in the presentation of the account of the events. He did not mention to Dr Nagulendran anything about the hide-and-seek game with the deceased and the spasms and vomiting the deceased had experienced. With Dr Sathyadevan, he started by narrating the events described in his investigation statements, but gave the account of the three men at a subsequent interview.

102 The court was left in doubt as to whether he even stood by his accounts of the events. His counsel stated that he was not standing by the version of the events involving the three Chinese men. There was no reliable evidence on the events surrounding the deceased's death. The trial judge considered all the evidence and the arguments made before him before rejecting this part of the defence.

103 Dr Nagulendran had in his written opinion concluded that the appellant was suffering from schizophrenia which affected his thinking, emotion and behaviour.

104 He arrived at his conclusion after he found three of the five characteristic symptoms set out in the *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Association, 4th Ed, 2000). These three characteristics are:

(a) delusions,

(b) grossly disorganised or catatonic behaviour, and

(c) blunting of affect (no expression of feeling),

when the presence of two symptoms was sufficient to support a finding of schizophrenia.

105 Dr Nagulendran regarded the account of the three men as a delusion. This conclusion is open to question. The appellant had given to him that version of the events, and had not informed him that he was retracting it. If indeed it was a delusion, the appellant was not deluded when he made his investigation statements or in his initial interviews with Dr Sathyadevan. He only gave that account of the events in his fifth interview with Dr Sathyadevan on 21 December 2004, after all his investigation statements had been recorded. The trial judge accepted Dr Sathyadevan's finding that the appellant was lying, and not deluded when he talked about the three men. If he was deluded, he would have told the police, his work colleagues and the nurses who observed him about the three men, but he only mentioned that to the two psychiatrists, and in the case of Dr Sathyadevan, only after he had repeated the account he gave to the police.

106 Dr Nagulendran found grossly disorganised or catatonic behaviour because the death of the deceased was senseless and motiveless. He was apparently relying on the accounts the appellant gave to the police on the assumption that they are true and complete. However, as it has been noted, that account was not affirmed by the appellant, and not subject to examination. As the question of motive could not be raised and addressed with the appellant, this finding was unsubstantiated.

107 The trial judge noted that Dr Sathyadevan did not find any evidence of grossly disorganised behaviour. The appellant's description, of the manner in which he wrapped and placed the body in a carton selected for its strength and of his selection of the spot to deposit it, presented a picture of behaviour that is far from being grossly disorganised.

108 Dr Nagulendran's finding of blunting of affect was also based on the appellant's investigation statements. However, his co-workers and others who met him before and after the fateful events did not observe any evidence of inappropriate mood. When he was interviewed by Dr Sathyadevan, he was emotional when he talked about his relationship with his family, and he also displayed signs of anxiety. Dr Sathyadevan was of the opinion that an onset of blunting of affect was insidious and usually took place over a year or two and could not happen all of a sudden.

109 To bring himself under Exception 7 to s 300 of the Penal Code, an accused person has to prove on a balance of probabilities that:

(i) he was suffering from an abnormality of mind at the time he caused the victim's death;

(ii) his abnormality of mind arose from a condition of arrested or retarded development of mind or any inherent causes, or was induced by disease or injury; and

(iii) his abnormality of mind substantially impaired his mental responsibility for his acts and omissions in causing the death.

(see *Tengku Jonaris Badlishah v PP* [1999] 2 SLR 260 at [35]).

110 The matters to be considered are set out in *Regina v Byrne* [1960] 2 QB 396 at 403–404 that:

> Whether the accused was at the time of the killing suffering from any "abnormality of mind" in the broad sense which we have indicated above is a question for the jury. On this question medical evidence is no doubt of importance, but the jury are entitled to take into consideration all the evidence, including the acts or statements of the accused and his demeanour. They are not bound to accept the medical evidence if there is other material before them which, in their good judgment, conflicts with it and outweighs it.
>
> The aetiology of the abnormality of mind (namely, whether it arose from a condition of arrested or retarded development of mind or any inherent causes, or was induced by disease or injury) does, however, seem to be a matter to be determined on expert evidence.
>
> Assuming that the jury are satisfied on the balance of probabilities that the accused was suffering from "abnormality of mind" from one of the causes specified in the parenthesis of the subsection, the crucial question nevertheless arises: was the abnormality such as substantially impaired his mental responsibility for his acts in doing or being a party to the killing? This is a question of degree and essentially one for the jury. Medical evidence is, of course, relevant, but the question involves a decision not merely as to whether there was some impairment of the mental responsibility of the accused for his acts but whether such impairment can properly be called "substantial," a matter upon which juries may quite legitimately differ from doctors.

and in *Walton v The Queen* [1978] AC 788 at 793:

> These cases make clear that upon an issue of diminished responsibility the jury are entitled and indeed bound to consider not only the medical evidence but the evidence upon the whole facts and circumstances of the case. These include the nature of the killing, the conduct of the defendant before, at the time of and after it and any history of mental abnormality.

These propositions apply in Singapore with the substitution of the judge for the jury.

111 The trial judge had applied his mind to these issues and found that the appellant had failed to prove on a balance of probabilities that he was suffering from schizophrenia or any mental disorder, and rejected the defence without going into the second and third elements. He was, on the evidence, truly justified in making the finding and coming to the conclusion.

Conclusion

112 My conclusion is that the appellant's conviction for murder should be set aside as there was a reasonable doubt whether the appellant caused the deceased's death by smothering her mouth and nose, or whether she died as a result of a fit. In place of that, the appellant should be convicted for an offence of voluntarily causing hurt, an offence under s 323 of the Penal Code on the basis of the admissions in his investigation statements, as corroborated by the post-mortem findings.