Sim Yew Thong v Ng Loy Nam Thomas and other appeals
[2000] SGHC 186

Case Number : MA 319/99

Decision Date : 11 September 2000

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Francis Xavier and Adrianna Tan (Rajah & Tann) for the appellants; B Ganesh and A Jeyapalan (Ganesha & Partners) for the respondents

Parties : Sim Yew Thong — Ng Loy Nam Thomas

Criminal Law – Offences – Voluntarily causing hurt – Mens rea – Knowledge – Intention – Accidental injuries – Assailant pushing first victim causing second victim holding onto first victim to fall – No intention to cause hurt to second victim – Whether guilty of offence even though no intention to hurt second victim – s 321 Penal Code (Cap 224, 1985 Rev Ed)

Criminal Procedure and Sentencing – Sentencing – Voluntarily causing hurt – Victim suffering vertebra fracture – Whether three months' imprisonment excessive

: ***Facts***

The appellants in this case, two brothers, were convicted under s 323 of the Penal Code (Cap 224) (`PC`) of voluntarily causing hurt to the respondents. The respondents were one Thomas Ng Loy Yam (`Thomas Ng`), and his mother Madam Sim Ng Siew (`Madam Sim`).

On 10 October 1998, the respondents, together with about ten of their relatives, went to Bee Low See Temple at 71B Jalan Jurong Kechil, Singapore (`the temple`), to pray for a deceased relative. On that same day, the appellants and their relatives were praying and conducting rites for the appellants` deceased father at the same temple. The first appellant was annoyed by the noise that the respondents` group was making. A scuffle broke out abruptly between Thomas Ng and the appellants over this, in the course of which Thomas Ng and Madam Sim were hurt. Thomas Ng sustained minor injuries. Unfortunately, Madam Sim sustained injuries that were of a more serious nature, namely, a fracture in the lowest vertebrae of her thoracic spine.

The day after the incident, Thomas Ng lodged an official complaint with the police about that incident, alleging that he and his mother had been assaulted by the appellants. The police carried out investigations, but no charges were preferred by the State. Thomas Ng and Madam Sim then took out a private summons, and brought the matter to trial in the magistrate`s courts.

During the trial, two different versions of evidence emerged. Each party made different allegations as to who had been the aggressor, who threw the first punch, and who had in fact caused Madam Sim`s injuries.

The prosecution`s version of evidence

The prosecution`s key witnesses were Thomas Ng, Madam Sim and Thomas Ng`s cousin, one `Ah Hai` (PW4). All three witnesses testified as follows: upon entering the temple, the respondents and their relatives were talking amongst themselves and searching for their deceased relative`s tablet on the shelves. At that time, the appellants and their relatives were chanting and carrying out rituals a few feet away. Suddenly, the first appellant shouted angrily at the respondents in Hokkien:

You are talking so loudly. Do you know what place is this?

At this, PW4 replied in a calm and polite tone:

Brother we can talk over this matter - don`t have to be so loud.

The first appellant continued to shout at PW4, so PW4 walked away and sat down in a chair nearby. Thomas Ng, upon observing this, went up to the first appellant and repeated what PW4 had said. Before he finished his sentence, the first appellant swung his right fist at him, and punched him hard on the left part of his forehead. He fell down to the ground. Madam Sim, who was 67 years old at the time, and hard of hearing, had been oblivious to this, as she was searching for her relative`s tablet on the shelves. At this point, she turned around to talk to Thomas Ng, and saw him lying on the ground. She hurried over to his side, and helped him up by his left arm. The second appellant came charging towards them, and pushed both of them to the ground. As they were lying on the ground, the second appellant kicked Thomas Ng in the lower abdomen. Thereafter, the respondents` relatives intervened and put a stop to the incident. They attended to Madam Sim, who was crying out in pain. An ambulance was called and Madam Sim was conveyed to the hospital. According to the respondents, no one from their group had assaulted either of the appellants at any time.

The other two witnesses called by the prosecution were medical officers who had attended to Thomas Ng and Madam Sim immediately after the incident. The medical evidence showed that Madam Sim had fractured a vertebrae in her lower back. This injury was consistent with her falling down and landing on her bottom. Thomas Ng sustained the following injuries: a bruise on the left side of his forehead, a bruise between his eyebrows, tenderness over his right lower chest, two bruises on his left foot, and abrasions over his upper arm and right wrist.

The defence`s version of evidence

The appellants` version of evidence was different from that given by the respondents. The first appellant gave the following account of the incident, and his evidence was essentially echoed by the second appellant and their sister, DW3: the respondents` group was talking noisily in the temple, and the appellants` younger sister had said `Shhh !` This quietened the respondents` group for a while, but their noise level went up again soon after. The first appellant stood up, stepped forward and told the respondents` group in Mandarin:

Oi. Can you all please not talk so loudly. This is not a supermarket.

At this, PW4 approached him and said something to the effect of

Why are you talking so loudly, we can discuss matters.

To this, the first appellant replied that the respondents were the ones who were disturbing him and not the other way around. Three other persons from the respondents` group joined PW4. Together, the four of them surrounded the first appellant, and were arguing with him. Suddenly, Thomas Ng,

who had been outside the temple up to this point, was alerted by the commotion and charged into the temple. He stood behind PW4 and his other three relatives, and joined in the argument. He made an insulting gesture, by pointing his middle finger in the first appellant`s face. The first appellant pushed Thomas Ng`s hand away, whereupon PW4 and the other three persons raised their fists as if to assault him. Then, Thomas Ng, who was still behind his relatives at this point, `jumped up and hit the first appellant`s head with his fist`. Thereafter, the first appellant warded off the blows of his five attackers by blocking them with his arms. Then he heard someone cry out, and the fighting stopped. He saw Madam Sim lying on the ground. The second appellant added that, when he saw Thomas Ng jump up and hit the first appellant, he intervened and defended the first appellant. He parried the blows of the five assailants. Suddenly he heard someone cry out, and he saw Thomas Ng and Madam Sim lying on the ground. Thereafter, one of his sisters called an ambulance, and Madam Sim was conveyed away in the ambulance.

The decision below

At the conclusion of the trial, the learned magistrate who heard the case believed the prosecution`s version of evidence over that of the defence. However, he found that there was no element of `common intention` between the appellants to voluntarily cause hurt to the respondents. Thus, he amended the original charges which they faced, which were charges of voluntarily causing hurt to the respondents with a common intention under s 323 read with s 34 of the PC, to charges of voluntarily causing hurt to the respondents under s 323 of the PC. Thereafter, he convicted the first appellant for one offence of voluntarily causing hurt to Thomas Ng and sentenced him to two weeks` imprisonment. He convicted the second appellant for two offences of voluntarily causing hurt to Thomas Ng and Madam Sim, and passed a sentence of three months` imprisonment for each offence, the sentences to run concurrently. Being dissatisfied with their convictions and sentences, the appellants appealed to me.

Issues in the appeal

Before me, counsel for the appellant argued that the appellants` convictions were against the weight of evidence in the case. He submitted that the magistrate had erred in believing the respondents` version of evidence over that of the appellants`, for there were several material inconsistencies in the testimonies of the respondents` witnesses. He argued that in any event the second appellant should not have been convicted of the second charge for voluntarily causing hurt to Madam Sim, for she had been hurt accidentally. Alternatively, it was argued that the sentences received by both appellants were manifestly excessive.

The appeal

The alleged `material inconsistencies` in the respondents` evidence

Faced with two versions of evidence, which differed in details, the learned magistrate had to decide which version to believe. Having heard and observed all the witnesses, and having reviewed all the evidence before him, he believed the respondents` witnesses and their version over that of the appellants`. At the appeal, counsel for the appellants argued that the magistrate had erred in this respect, for there were material inconsistencies in the respondents` testimonies.

First, counsel for the appellants submitted that the respondents had been evasive as to how the confrontation between the two parties had arisen. He argued that, on the one hand, the respondents had said that there was no reason for the first appellant to be upset on that day, but, on the other hand, the evidence showed that they had clearly known that the first appellant was upset by the noise they were making. I disagreed that these aspects of the respondents` evidence were evasive or contradictory. Although they had been aware that the first appellant was angry because of the noise level emanating from them, there was no reasonable cause for his anger as they had not been talking very loudly. This was their subjective opinion, and they were entitled to it, especially in view of the fact that even the first appellant himself had testified in cross-examination that the respondents` group was merely talking `slightly louder than normal`.

According to the respondents, no one in their group had assaulted either of the appellants. Counsel for the appellants submitted that this aspect of their evidence was highly incredible, for, if that had been the case, there would have been no reason for the second appellant to have lost his composure and rushed in to help the first appellant. I was not convinced by this submission. The second appellant`s motive for getting involved was obviously to take the side of his brother against Thomas Ng. That was reason enough for his involvement. Moreover, neither appellants had complained to the police of any bruises or injuries. Although the first appellant claimed at the trial that he had suffered superficial injuries, like pain on his head and red marks on his face from being punched by Thomas Ng, he could produce no medical record of this. He had not sought any medical attention after the incident. In contrast, Thomas Ng had suffered bruises on his forehead and between his eyebrows, tenderness in his chest and bruises and abrasions on his arms and legs. These injuries were consistent with his complaint of having been punched on his left forehead, pushed hard on the chest and kicked while he was lying on the ground. Thomas Ng had been physically examined by PW2, and he had also complained of these injuries to the police. These factors undoubtedly supported the respondents` evidence that no one had laid a finger on the appellants.

Thomas Ng and Madam Sim testified that Madam Sim was trying to help Thomas Ng to his feet at the time when the second appellant charged towards them and pushed both of them down. Counsel for the appellants said that this evidence was contradicted by PW4, who did not say that Madam Sim was trying to help Thomas Ng to his feet at the relevant time. Instead, he said that Madam Sim was trying to restrain Thomas Ng from going towards the first appellant at that time. Counsel also pointed to Madam Sim`s medical report, which recorded that she had told the doctor that she had been `trying to separate family members caught in an argument` when she was pushed. I accepted the possibility that Madam Sim may have been trying to restrain Thomas Ng from walking towards the first appellant just before her fall. However, even if this constituted an inconsistency in the respondents` evidence, it was only a minor and trifling one. In my mind, what was important, was that all three witnesses had testified that the second appellant had charged towards Thomas Ng and Madam Sim, and had used both hands to shove them - he had used his right hand to push Madam Sim (who was standing on Thomas Ng`s left and holding on to Thomas Ng`s left arm), and his left hand to push Thomas Ng. Both Thomas Ng and Madam Sim had fallen down as a result. Then, while Thomas Ng was lying on the ground, the second appellant kicked him. All three witnesses were consistent and unswerving as to these pertinent aspects of the evidence.

Thus, I found no basis for the allegation that there were material inconsistencies in the testimonies of Thomas Ng, Madam Sim and PW4. I agreed with the magistrate that their testimonies were consistent in all material aspects. I also agreed with the magistrate that the appellants` version of evidence was unbelievable. Thomas Ng was of small build, and significantly shorter than the first appellant. According to the appellants` own testimonies, Thomas Ng was, at the relevant time, separated from the first appellant by a `wall` of four persons, comprising PW4 and three other relatives. The

appellants would have the court believe that Thomas Ng had hopped up from behind this wall of four men, reached out through them and swung his arm down in a thumping motion, from sideways, so as to punch the first appellant on the left temple. Like the magistrate before me, I found this ludicrous. In view of the fact that Thomas Ng was significantly shorter than the first appellant, I could not think how he could have executed the requisite jump, high enough to reach the first appellant`s forehead from behind the wall of four men, and at the same time stretch out his right fist from behind the four persons, so as to successfully thump the first appellant on his left temple. During the trial, the magistrate even conducted a live demonstration in his courtroom, to show that this move was impossible. Even if I accepted that Thomas Ng had indeed executed the requisite jump, I was still unable to see how he could have swung his fist from behind the four persons so as to hit the first appellant on his left temple. The allegation was not that the first appellant had been thumped on the crown of his head or punched straight in his eyes or nose or mouth, or hit from under his chin. Instead, he said he had been knocked on the side of his head on his left temple, which, incidentally, was where Thomas Ng himself had a bruise from an alleged punch from the first appellant. The entire sequence, as recounted by the appellants, was unnatural, contrived and implausible.

The learned magistrate also noted that the defence counsel had not put material details such as Thomas Ng`s odd jump and punch to PW4 in cross-examination. This cast a measure of doubt on the cogency of the defence`s case, and indicated that the appellants had formulated those details in the witness box. According to the cases of **Browne v Dunn** [1893] 6 R 67 and **Liza bte Ismail v PP** [1997] 2 SLR 454 , the magistrate was fully entitled to make this finding. Nonetheless, counsel for the appellants was dissatisfied with this aspect of the magistrate`s judgment. He argued before me that the failure to cross-examine PW4 on those material aspects of the evidence was simply the result of an omission on the part of the defence counsel, and should not have been held against the appellants. This submission, however, was not enough to convince me, at the appeal stage, to overturn the magistrate`s assessment of the evidence, which was sound in legal principle.

The second appellant`s appeal against conviction for the second charge

The other submissions made by the appellants` counsel related to the second appellant`s conviction on the second charge, for causing hurt to Madam Sim. The argument was that, by all accounts, Madam Sim had most likely fallen accidentally, and that the second appellant had only pushed Thomas Ng, if at all. Madam Sim had said in her evidence that she was pushed on her palm, which was on Thomas Ng`s arm. From this, counsel for the appellants argued that, in all likelihood, Madam Sim was holding on to Thomas Ng and trying to restrain him, and Thomas Ng was then pushed, and as a result Madam Sim fell down. Thus, it was argued that Madam Sim`s fall was an `accident` and the second appellant should not have been convicted for voluntarily causing hurt to her.

The question for me, at this stage, was this: if, as the appellant`s counsel claimed, the second appellant had only ***intended*** to push Thomas Ng, and had also ***actually*** only pushed Thomas Ng, would he still be liable under s 323 of the PC for voluntarily causing hurt to Madam Sim, who was hurt in the process of Thomas Ng being pushed ? Under English law, the position would have been straightforward, for the appellant would clearly have been liable by operation of the English common law doctrine of `transferred malice`. The English doctrine of `transferred malice` states that where the actus reus and mens rea elements of the same crime coincide, in that a defendant, with the mens rea of a particular crime, has caused the actus reus of the same crime, then the defendant is guilty of that crime, even though the result, in some respects is an unintended one (see **R v Latimer** [1886-87] 17 QBD 359; **R v Mitchell** [1983] QB 741[1983] 2 All ER 427). Thus in the English case of ***Mitchell*** , where D struck O, who fell against P, who also fell and sustained a fatal injury, D was guilty of manslaughter, for `[t]he criminality of the doer of the act is precisely the same whether it is [O] or [P] who dies`. In Singapore law, however, there is no general common law doctrine of `transferred

malice`, as there is in English law. Under local law, the closest principle to the English doctrine of `transferred malice` is a limited one, inculcated in s 301 of our Penal Code, and dealing specifically with the offence of culpable homicide.

Despite the absence of a general doctrine of `transferred malice`, I had no doubt that the second appellant was guilty under s 321 of the PC for Madam Sim`s injuries, simply on a plain reading of that section itself. It is pertinent that s 321 of the PC has been deliberately worded in a wide manner. It states:

> *Whoever does any act with the **intention** of thereby causing **hurt to any person**, or with the **knowledge** that he is likely thereby to cause **hurt** to **any person**, and does thereby cause hurt to any person, is said `voluntarily to cause hurt`. [Emphasis mine.]*

The requisite mens rea element for the offence is either `intention` or `knowledge`. In the first place, intention, being purely an operation of the mind, can only be proved by drawing inferences from the surrounding circumstances and the acts of the person. A person is said to intend the natural consequences of his act. Thus, if the second appellant had indeed pushed Madam Sim on her palm, then the law can indeed infer that he had intended to cause her to lose her balance and to fall down. Even if I gave the second appellant the benefit of the doubt, and entertained the possibility that he had not actually pushed Madam Sim, and had really only pushed Thomas Ng, he would still not escape liability, for he would still possess the requisite mens rea of `knowledge`. The medical evidence revealed that Thomas Ng had suffered tenderness over his right chest immediately after the incident. This indicated that the second appellant had not merely given Thomas Ng a light push on the chest, but had shoved the latter very hard. When the second appellant charged at Thomas Ng and thus shoved Thomas Ng, Madam Sim, who was a frail and small old woman, was holding on to Thomas Ng`s arm. In the circumstances, Madam Sim`s fall was clearly a foreseeable and reasonably likely result of the second appellant`s actions. All this indicated that the second appellant possessed the knowledge that he was, by his acts, likely to cause hurt to Madam Sim by causing her to fall. There is no definition of the term `knowledge` in the Penal Code. In my judgment, for the purposes of s 321 of the PC, the term `knowledge` encompasses both recklessness (where an accused knows he is likely to cause a result) and negligence (when an accused has reason to believe that he is likely to cause a result). I was reinforced in this view by the general definition of the term `voluntarily` in s 39 of the PC, which states:

> *A person is said to cause an effect `voluntarily` when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, **he knew or had reason to believe to be likely to cause it**. [Emphasis added.]*

Be it recklessness or negligence, the evidence revealed clearly that the second appellant ***knew*** that, by pushing Thomas Ng in the manner which he did, he would thereby cause hurt to Madam Sim. Without question, he was liable under s 321 of the PC for voluntarily causing hurt to her.

In any event, s 321 of the PC is worded in such a way that the ***intended*** victim need not be the ***actual*** victim - the section does not state that the accused must cause hurt to that same person whom he had the intention to hurt, or knew would be hurt by his conduct. Instead, the requisite mens rea for an offence under s 321 of the PC is possessing either `the intention to cause hurt to ***any person*** ` or `the knowledge that one is likely thereby to hurt ***any person*** `, and the ***actus reus*** of

the offence is the act of causing hurt to `any person` (as opposed to ` ***the person*** ` or ` ***that same person*** `). Undoubtedly, the use of the words `any person` throughout the section was deliberate. The purpose of this must have been to allow the section to cover cases where the defendant, with the intention to cause hurt to O, or knowing that he was likely by his act to cause hurt to O, actually causes hurt to P in the process. In effect, this is a very specific and limited statutory application of the doctrine of `transferred malice`.

Sentences

Thus, I dismissed the appeals against conviction of both appellants. Under s 323 of the PC, each appellant could have been imprisoned for up to one year, or fined up to $1,000, or both.

The first appellant, a first-time offender, was sentenced to two week`s imprisonment by the magistrate. On the facts, as found by the magistrate, he was guilty of punching Thomas Ng on the forehead. By all accounts, the incident had arisen over a very trivial matter. The first appellant`s conduct had been the result of an impulsive outburst rather than a premeditated attack. Moreover, Thomas Ng had sustained only slight and superficial injuries as a result of the first appellant`s conduct. These were mitigating factors in his favour. On the other hand, the circumstances showed that the first appellant should not have been provoked to the extent that he was. Having balanced all these factors, I found it fit to commute the first appellant`s sentence of two week`s imprisonment to a fine of $1000.

The second appellant was sentenced to three months` imprisonment on each of the two charges, the sentences to run concurrently. Like his brother, he had no previous record of any indictable misconduct. His actions were not premeditated, but resulted from impulse. However, there was one key factor which weighed heavily against him, and that was the gravity of the injuries he caused to Madam Sim, by virtue of his violent and ill-tempered outburst. The injuries suffered by Thomas Ng were superficial. However, Madam Sim, who was 67 years old at the time of the incident, suffered a fracture of the lowest vertebrae in her thoracic spine (somewhere in the middle of her back). She was hospitalised on 10 October 1998 and discharged a week later on 18 October 1998. She received outpatient treatment on 21 October 1998, by which time her condition had apparently improved. There was no record before the Court of further medical attention after that date. According to Madam Sim, however, she had wanted to seek further medical treatment, but did not have the financial means. Prior to the incident, she was active, healthy and mobile for her age. She testified at the trial that, as a direct result of the incident, she could walk only with the support of a walking stick, and felt great pain after standing up for 20 to 30 minutes. She was comfortable lying around and in a wheelchair, and could only venture out of her residence in a wheelchair. There was no evidence of any intervening event which could have contributed to her poor physical condition.

It is significant to note that under s 320(g) of the PC, a `fracture or a dislocation of a bone` falls within the definition of `grievous hurt`. Therefore, I considered the fracture suffered by Madam Sim to be a serious injury. The second appellant`s conduct in causing such a vulnerable and aged victim, as Madam Sim, to fall down and fracture a bone in her back was wholly irresponsible, and intolerable in the eyes of the law. In the circumstances, a custodial term of imprisonment imposed against him was more appropriate than a fine. Moreover, the fact that he had kicked Thomas Ng was also a serious and aggravating factor. Therefore, the concurrent sentences of three months` imprisonment on each charge was well within the ambit of the Magistrate`s discretion and could not be considered manifestly excessive. I dismissed his appeal against the sentence that he had received.

On a final note, any apparent disparity in the sentences received by the first appellant and the

second appellant was only commensurate with the level of guilt and the gravity of the injuries that they had caused. The first appellant was not convicted for causing hurt to Madam Sim. Moreover, the magistrate had found no element of `common intention` shared by the two appellants to cause hurt to the respondents, and he had amended the original charges against them to exclude the operation of s 34 of the PC. On the facts of this particular case, the first appellant was not prejudiced by the injuries that his brother had caused to Madam Sim, when it came to sentencing.

Conclusion

Thus, I dismissed both appellants` appeals against conviction. I reduced the first appellant`s sentence from two weeks` imprisonment to a fine of $1000. But I dismissed the second appellant`s appeal against sentence.

Outcome:

Appeals against conviction dismissed; first appellant`s appeal against sentence allowed; second appellant`s appeal against sentence dismissed.

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