Public Prosecutor v Tan Lian Tiong
[2002] SGHC 155

Case Number : MA 14/2002

Decision Date : 22 July 2002

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Hamidul Haq (Deputy Public Prosecutor) for the appellant; Joan Lim Pheck Hoon (Chan Kam Foo & Associates) for the respondent

Parties : Public Prosecutor — Tan Lian Tiong

Criminal Law – Offences – Causing death by negligent act – Culpability – Road accident – Whether respondent should have seen deceased earlier – Whether respondent keeping proper lookout – Whether respondent acting imprudently – s 304A Penal Code (Cap 224)

Criminal Procedure and Sentencing – Charge – Amendment of original charge to lesser one – Whether appropriate in circumstances – s 65 Road Traffic Act (Cap 276, 1997 Ed)

Evidence – Witnesses – Effect of failure to put to witness a matter which contradicts his evidence-in-chief

JUDGMENT

GROUNDS OF DECISION

The respondent was charged in the district court with causing the death of one Mohd Yassin bin PM Sultan (the 'deceased') by doing a negligent act not amounting to culpable homicide, an offence under s 304A of the Penal Code (Cap 224). After calling for the defence, the trial judge acquitted the respondent of the charge. The prosecution appealed to the High Court and, after hearing their arguments, I dismissed the appeal against acquittal. I now give my reasons.

The facts

2 On 23 December 2000 at about 9.38 pm, the respondent was riding on his motorcycle along Commonwealth Avenue in the direction of Queensway when he was involved in a traffic accident with the deceased. The deceased, who was dressed in green pants and a purple shirt, was 72 years of age, 1.52m tall and weighed 40.5 kg. He was brought by ambulance to Alexandra Hospital and pronounced dead at 10.44 pm. The autopsy report showed that the deceased had suffered two fractured left ribs and fractures of his left leg. The forensic pathologist took the view that the deceased had died from the injuries sustained in the accident.

3 Commonwealth Avenue comprises two separate carriageways which are divided by a canal and the elevated MRT tracks. The carriageway in question had three lanes, and the accident took place in the extreme right lane, which is the lane closest to the MRT tracks. Two arrows, indicating the direction of the traffic flow, are marked on each lane before the pedestrian crossing. Photographs adduced at the trial showed that there are shrubs planted along the roadside, measuring about 0.8 m high at the time of the accident. It can also be seen from the photographs that the edge of the MRT track runs directly above the edge of the road. Finally, while there are streetlights on the side of the carriageway opposite the MRT tracks, there are none on the same side of the carriageway as the MRT track.

The adduced evidence

4 At the trial before the district judge, the prosecution only called two witnesses. The first, SSSgt Zainuddin M Saleh ('SSSgt Zainuddin'), testified that he arrived at the scene of the accident at about 11.20 pm that evening. It was still raining at the time, and while lighting was dim, it was not in pitch darkness. Although he found that it was possible to see a pedestrian standing at the traffic light, he did not take measurements of the maximum distance from which such a person could be seen. SSSgt Zainuddin was also unable to shed any light on the point of the accident, or the positions of the deceased or the motorcycle after the accident, as the deceased had already been conveyed to hospital before he arrived, and the motorcycle had been moved. Finally, he confirmed that the photographs of the accident scene which had been taken at his direction had been taken with a powerful flash.

5 The prosecution's second witness, Sgt Max Ong Gak Boon ('Sgt Ong') was the investigating officer for the case. Although he visited the scene of the accident in the course of his investigations, he was unable to shed any light as to the height of the bushes, the height of the kerb, or whether it was possible for the respondent to have seen the deceased. It was also not raining and the road surface was dry when Sgt Ong visited the scene of the accident. However, he noted that the lighting on the road was dimmer than on other roads which had street lights on both sides of the road.

6 The respondent was the only person who could give an account of the accident as there were no witnesses apart from a Chinese man who helped call the ambulance for the deceased, but who remained anonymous. He stated that he was on his way to Holland Village to meet a friend when the accident happened. It was drizzling at the time, and although the respondent wiped his visor twice to get rid of the raindrops, his visor continued to be blurred by the rain. He decided to ride in the extreme right lane, so that he could be sheltered by the MRT track as he rode. The respondent was travelling at a speed of 40 to 50 km/h as he was on third gear. As he approached the pedestrian crossing where the accident occurred, he slowed down to approximately 30 km/h as he approached the first arrow, and checked for pedestrians at the crossing. The lights were green in the respondent's favour, and as he approached the second arrow, he checked the lights and for pedestrians again. This time, he turned his head to the left to perform his check, and when he turned his head back, he saw that the deceased had stepped off the right side of the road and taken two steps onto the road.

7 At the time, the respondent was about three metres away from the deceased. He did not sound his horn as he had no time to do so, and instead applied his brakes and swerved to the left to avoid the deceased. However, the deceased kept walking forward and the respondent felt an impact on his right shoulder before the motorcycle fell over. The deceased was then still alive but unconscious, and the respondent asked the anonymous Chinese man to call the ambulance, which brought the deceased to the hospital, where he was pronounced dead. The respondent also explained that he had not seen the deceased as the shrubs planted by the side of the road were about the same height as the deceased.

The trial judge's decision

8 The trial judge accepted the respondent's unchallenged evidence that the traffic lights at the signal were green in his favour, that he had not seen the deceased step off the kerb, that he only saw the deceased when he was about three metres away from the deceased, and that the deceased's body was lying about one metre past the stop line after the accident. The direction the deceased was facing, and the manner in which the collision occurred was also corroborated by the autopsy report. Finally, in light of the position of the accused's body and the respondent's evidence, he found that the respondent had not been speeding at the time.

9 Although the Road Traffic (Pedestrian Crossing) Rules state that pedestrians have right of way at signalised pedestrian crossings, even when the lights are not in their favour, the trial judge took the position that the Rules did not impose strict liability on motorists. Instead, the respondent was obliged to exercise the care which would have been exercised by a reasonable and prudent motorcyclist, namely to take all reasonable steps to ensure the safety of a pedestrian at a pedestrian crossing. The trial judge was of the view that, in the circumstances of the case, the respondent had not failed to do anything which a reasonable and prudent motorcyclist in his circumstances would have done.

10 The trial judge also had serious doubts as to whether the respondent could have seen the deceased before the accident, noting that the prosecution had not been able to tender satisfactory evidence on the maximum distance from which such a pedestrian could be seen. Accordingly, he acquitted the respondent of the charge, and also turned down a request by the prosecution to amend the charge to one under s 65 of the Road Traffic Act (Cap 276), viz., driving a motor vehicle without due care.

The appeal to this Court

11 Although the prosecution raised several grounds of appeal before me, the main contentions underlying these grounds of appeal were that the respondent should have seen the deceased, that he had not kept a proper lookout for pedestrians, and that he had not acted prudently when riding his motorcycle. Alternatively, the prosecution argued that the evidence disclosed the offence of driving without due care and attention, in contravention of s 65 of the Road Traffic Act, and urged me to convict the respondent on the reduced charge.

Whether the respondent should have seen the deceased

12 The prosecution's argument under this head was that the surrounding circumstances were such that the deceased should have been seen by anyone who kept a proper lookout. Since the respondent did not see the deceased until the deceased was three metres away, it followed that the respondent had not in fact performed a check as he claimed to have done. Two issues were hence raised in relation to this contention: whether the deceased was visible when the respondent carried out a check for pedestrians when he was 15 metres away from the pedestrian crossing; and whether the respondent had in fact performed the check as he said that he did.

13 Having looked at the evidence, I was not convinced by the prosecution's argument that the deceased should have been visible from 15 metres away. It is trite law that that an appellate court will be slow to disturb the findings of a lower court unless they are clearly reached against the weight of evidence – *Lim Ah Poh v PP* [1992] 1 SLR 713, applied in *PP v Tubbs Julia Elizabeth* [2001] 4 SLR 75, and I was of the view that the trial judge's findings on this issue were not in error. The prevailing weather conditions at the time of the accident, the poor lighting and the shrubs planted by the roadside would all have affected the respondent's ability to detect pedestrians.

14 The physical attributes of the deceased would have made his detection even more difficult, as more than half of his body would have been concealed by the shrubs, and the photographic evidence showed that the deceased was of dark-complexion and dressed in dark clothing. I also noted that there had been some uncertainty in the court below as to whether the deceased had been carrying a black umbrella when he was struck by the respondent's motorcycle. The prosecution argued that, if the deceased had been carrying a black umbrella, that would have made him all the more detectable, but I was of the contrary view. I felt that, if the deceased had indeed been carrying a black umbrella, that would have served to further conceal him from the respondent's view.

15 In rejecting the prosecution's argument that the deceased was visible from 15 metres away, I was also conscious of the fact that the prosecution had been unable to adduce any evidence as to the maximum distance from which the respondent, under the prevailing weather and light conditions, ought to have been able to see the deceased. The photographs of the accident scene which had been adduced in the court below were of no help, as SSSgt Zainuddin had conceded that the photographs had been taken with a powerful flash. I considered the absence of such evidence to be a major obstacle towards proof of the prosecution's contention that the respondent should have been able to see the deceased much earlier than when he actually did.

16 Having rejected the prosecution's first proposition, namely that the respondent ought to have detected the deceased much earlier, it followed that there was no basis from which it could be inferred that the respondent had not actually carried out the pedestrian check the way he said he did. I would in any event have been extremely reluctant to accept such an inference. The prosecution had proceeded in the court below on the basis that the respondent had been negligent since he failed to spot the deceased until the deceased was three metres away. The issue of whether the respondent had or had not checked the right side of the road for pedestrians had not arisen at all, since the prosecution did not challenge the respondent's evidence that he had indeed carried out a check.

17 The rule in *Browne v Dunn* [1893] 6 R 67 states that any matter upon which it is proposed to contradict the evidence-in-chief given by the witness must normally be put to him so that he may have an opportunity of explaining the contradiction, and failure to do this may be held to imply acceptance of the evidence-in-chief. Although I said in *Liza bte Ismail v Public Prosecutor* [1997] 2 SLR 454 that the rule in *Browne v Dunn* is not an inflexible rule, I was of the opinion that in the circumstances of the present case, it would have been extremely unfair to the respondent to accept such an argument.

18 It was for this same reason that I was disinclined to consider the effect of white railings located at the right side of the road (which were intended to channel pedestrians) on the detectability of the deceased. The railings had not been brought up in the court below, and the respondent had not been questioned on the effect, if any, that they had on his perception, or whether he could even have seen them from 15 metres away. In such circumstances, it would have been extremely inappropriate for me to have taken the railings into account when considering the issue of the deceased's visibility.

Whether the respondent had kept a proper lookout

19 Related to the foregoing was the prosecution's contention that the accident had occurred because the respondent had not kept a proper lookout. Much reliance was placed upon *Public Prosecutor v Er Wee Kok* (unreported), where the accused was convicted under s 304A for causing the death of a pedestrian. I was also referred to *Public Prosecutor v Teo Lian Seng* [1996] 1 SLR 19, in which I had commented that on normal roads, there was a need to be alert at all times to the possibility of persons crossing the road indiscriminately.

20 With respect, I did not find the two cases cited to me to be helpful. In *Er Wee Kok*, the deceased had checked for vehicles before he started to cross the road, and the road had actually been clear when he began to make his way across. The accused was also observed to be travelling quite fast, such that after the impact, the deceased was thrown up into the air. In light of the trial judge's finding that the deceased had not dashed across the road, as claimed by the accused, the trial judge was "driven to the inescapable conclusion" that the accused had not seen the deceased because he was not keeping a proper lookout. The finding was as such closely related to the facts of the case, and given the very different facts in the present case, I did not find *Er Wee Kok* to be relevant to the

present inquiry. Certainly, I was of the view that the many factors at play in the present case (as already discussed in the preceding section) militated against an "inescapable conclusion" that the respondent had not been keeping a proper lookout.

21 I also did not find *Teo Lian Seng* to be of particular help, as it was to my mind clear that in the present case, the respondent was in fact alert to the possibility of the deceased crossing the road indiscriminately, and had in fact taken precautions in order to ward off that eventuality. For example, apart from carrying out two pedestrian checks, the respondent had also slowed down his speed from about 40 or 50 km/h to 30 km/h as he approached the pedestrian crossing in question. Further, although the prosecution also referred me to public policy on the protection of pedestrians at signalised crossings, as exemplified by Rules 5 and 7 of the Road Traffic (Pedestrian Crossing) Rules, I took the view that such public policy had not been compromised by the respondent's behaviour in approaching the fateful crossing.

Whether the respondent had behaved prudently

22 The third contention made by the prosecution before me was that the respondent had not behaved prudently as he had persisted in riding on when it was his evidence that the rain was affecting his vision. The prosecution also took issue with the respondent's moving into the right-most lane when such lane is meant only for overtaking.

23 I did not agree with either of the prosecution's contentions under this head. With regard to the first contention, the rain at the time of the accident was not heavy, the respondent having testified that, while his T-shirt had water droplets on it, it was not drenched. The respondent had also taken precautions to counteract the effect of the rain, namely to wipe his visor at every given opportunity, and had also testified that, after he sought shelter by riding under the overhang of the MRT track, his vision improved. Under such circumstances, I was of the opinion that it was not imprudent of the respondent to continue riding. Indeed, given the light rain conditions at the time of the accident, if I accepted the prosecution's submission on this issue, it would mean that all motorcyclists would be obliged to stop riding once rain progressed beyond a mere drizzle, and I considered such a proposition to be completely untenable.

24 As for whether the respondent had been imprudent in choosing to ride in the overtaking lane, while it was clear that such action was in violation of traffic rules, I did not see how such a violation could be said to bear a direct relation to the accident that subsequently happened. The accident did not occur because the respondent chose to ride in the overtaking lane, but because he did not have the opportunity to see the deceased until it was too late. Riding in the overtaking lane, while certainly not to be encouraged, in fact gave the respondent a better opportunity to see the deceased as his vision improved once he made the change in lanes. The respondent nevertheless failed to see the deceased, a failure more properly attributable to the confluence of prevailing conditions at the time. As such, I was of the opinion that such imprudence bore no relation to the issue of the respondent's negligence.

Alternative conviction under s 65, Road Traffic Act

25 Turning finally to the prosecution's request for an alternative conviction under s 65 of the Road Traffic Act, it seemed to me that s 65 might have been a more appropriate section for the present case to have been brought under. I did not feel that the nature of the accident warranted the harsh criminal sanctions of a charge under s 304A. Having said that, I was unwilling to grant an amendment to the charge at such a late stage, given both that the entire trial in the court below had proceeded on the basis of s 304A, as well my view that the respondent's alleged culpability under s 65 was at best speculative in light of the circumstances of the present case.

Conclusion

26 For the foregoing reasons, I dismissed the appeal against the respondent's acquittal.

Sgd:

YONG PUNG HOW

Chief Justice

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