Khor Kok Soon v Public Prosecutor
[2005] SGCA 51

Case Number : Cr App 4/2005

Decision Date : 11 November 2005

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Choo Han Teck J; Yong Pung How CJ

Counsel Name(s) : Edmond Pereira (Edmond Pereira and Partners) and Chia Boon Teck (Chia Yeo Partnership) for the appellant; Han Ming Kuang and Lee Cheow Han (Deputy Public Prosecutors) for the respondent

Parties : Khor Kok Soon — Public Prosecutor

Criminal Law – Statutory offences – Arms Offences Act 1973 (Act No 61 of 1973) – Use of firearm with intent to injure – Trial judge finding that appellant used firearm with intent to injure – Whether trial judge should have given appellant benefit of doubt in view of long lapse in time and alleged inconsistencies in evidence – Section 4 Arms Offences Act 1973 (Act No 61 of 1973)

11 November 2005

Choo Han Teck J (delivering the judgment of the court):

1 The appellant, aged 52, was convicted for an offence punishable under s 4 of the Arms Offences Act 1973 (Act No 61 of 1973) ("the 1973 Act") and sentenced to suffer the death penalty. He appealed against the conviction solely on the ground that the prosecution evidence was inconsistent and unreliable and the trial judge, therefore, erred in not giving him the benefit of the doubt. It will be obvious from the charge which we now set out verbatim for convenience, that the appellant was tried for an offence that was committed 21 years ago:

> on or about the 30th day of July 1984, at about 2.40pm, at Shenton Way, Singapore, [the appellant] did use an arm, by discharging bullets from a gun with intent to cause physical injury to one Detective Sergeant Lim Kiah Chin, and [he had] thereby committed an offence punishable under section 4 of the Arms Offences act, 1973 (No. 61 of 1973).

2 On 30 July 1984, the appellant and his accomplice planned to commit an armed robbery in Shenton Way. They were looking out for persons who had just withdrawn money from their banks, but they were unable to find any suitable victim. In the meantime, two police officers, Sergeant Lim Kiah Chin ("Sgt Lim") and Corporal Quek Chek Kwang ("Cpl Quek") were in the vicinity looking for two suspects. They appeared to know that the motorcycle used by the appellant's accomplice was a stolen one used by the suspects they were looking for. The officers saw the appellant and became suspicious of him for reasons that were not given at the trial. One of the officers grabbed hold of him but he broke free after a struggle. It was not clear whether it was Cpl Quek or Sgt Lim who grabbed the appellant. The defence and prosecution witnesses gave conflicting evidence. The Defence's case was that it was Cpl Quek, but the Prosecution's case was that it was Sgt Lim. Whether it was Sgt Lim or Cpl Quek who grabbed the appellant was an important fact to be established from the point of view of the Defence because the gravamen of the Prosecution's case was that the appellant had fired two shots, both aimed at Sgt Lim. The first shot was fired after he had broken free from the officer who had grabbed him, and the second, after he had climbed onto a passing lorry. Hence, in this respect, it was crucial for the Defence if it could show that it was Cpl Quek and not Sgt Lim who grabbed the appellant. The trial judge, however, was satisfied that it was Sgt Lim who grabbed the appellant. He also found as a fact that when the appellant fired the first shot, he had aimed the shot at Sgt Lim.

The appellant had given different accounts of this first shot. In his written statements to the police, he had stated that he had fired four shots into the air to make the police officer release his grip on the appellant. His version in court was that he fired only after he had broken free. There was no dispute that the weapon used by the appellant was a .22 Browning automatic handgun.

3 The Defence also denied that the appellant had aimed his second shot at Sgt Lim. It maintained that, as with the first shot, the appellant had fired upwards into the air, as a warning shot. The trial judge did not accept this evidence and found that the appellant had also fired his second shot at Sgt Lim. In doing so, the court took into account inconsistencies in the evidence of the appellant, including another version in which he said the second shot was not fired because he did not feel the recoil. The only spent cartridge that was produced in evidence was a .25 inch cartridge which did not match the appellant's weapon. There was no evidence as to which weapon that cartridge was connected with. On these findings, the trial judge convicted the appellant. A person convicted under s 4 of the 1973 Act (prior to the statutory amendment in 1993) would be liable to the mandatory sentence of death. Section 4 provided that, "[s]ubject to any exception referred to in Chapter IV of the Penal Code which may be applicable, any person who uses or attempts to use any arm shall on conviction be punished with death".

4 In s 2 of the 1973 Act, "use" is defined as:

> (*a*) in relation to a firearm, air-gun, air-pistol, automatic gun, automatic pistol and any kind of gun or pistol from which any shot, bullet or other missile can be discharged or noxious fluid, flame or fumes can be emitted — to cause such shot, bullet or other missile to be discharged or such noxious liquid, flame or fumes to be emitted with intent to cause physical injury to any person; …

Hence, the death penalty would not apply had the appellant been able to raise a reasonable doubt as to his having any intention to cause physical injury when he opened fire with his pistol. Thus, the entire defence was founded on the case that the appellant fired both shots into the air. Counsel had hoped that there would have been sufficient weakness and discrepancy in the evidence to establish that doubt. In addition to the evidence of Sgt Lim, the Prosecution also relied on the evidence of Snr Insp Sta Maria, an off-duty police officer, who was driving by Shenton Way when he saw Sgt Lim and the appellant "weaving in and out of traffic". The trial judge referred to the written statement of Snr Insp Sta Maria in which he stated that "the gunman went to the front passenger door of a passing blue motor lorry and he shot at [Sgt] Lim, who fell to the ground … [after] boarding the back of the motor lorry, the gunman opened fire once more towards the direction of [Sgt] Lim". This evidence was repeated orally at trial. The trial judge noted some discrepancies between the evidence of Snr Insp Sta Maria and Sgt Lim. These he set out in [50] and [51] of his judgment ([2005] SGHC 125) as follows:

> There were discrepancies in the Prosecution's evidence. In his conditioned statement, Snr Insp Sta Maria referred to the chase involving Sgt Lim and the accused, but made no mention of the grabbing, the struggle and escape that both Sgt Lim and the accused referred to, despite their disagreement over the identity of the grabbing party.
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> Sgt Lim's evidence that he was trying to climb the lorry when the accused fired at him the second time was contradicted by Snr Insp Sta Maria's evidence that Sgt Lim was still where he was on the road after the first shot. Snr Insp Sta Maria also recalled Cpl Quek as the person who fired at the accused, and made no mention of Sgt Lim returning fire.

The trial judge then considered the discrepancies in the defence evidence and accepted the

prosecution evidence. He concluded by holding at [61] that:

> I could not accept the accused's evidence that the gun did not discharge when he tried to fire it a second time because of the accused's own evidence about the recoil; and because both Sgt Lim and Snr Insp Sta Maria gave evidence to the contrary.

5 There being no question of law in this appeal before us, Mr Edmond Pereira, counsel for the appellant, argued that the trial judge had erred on the facts in finding that it was Sgt Lim who first grabbed the appellant, and that the appellant had fired at Sgt Lim twice, once before he boarded the lorry and once after he was on the lorry. Counsel submitted that the evidence ought to have been sufficient for the court to find that the Defence had succeeded in raising a reasonable doubt in respect of these key issues of fact. Counsel submitted that the Prosecution had relied principally on the testimonies of Sgt Lim and Snr Insp Sta Maria whose evidence was "riddled with inconsistencies". One example of these inconsistencies concerned the question whether it was Sgt Lim or Cpl Quek who grabbed hold of the appellant before any shot was fired. Mr Pereira pointed out that contrary to Sgt Lim's claim that he was the one, the appellant had testified that the man who grabbed him was big and burly, a description that fitted Cpl Quek and not Sgt Lim. Furthermore, counsel submitted that the evidence of the contemporaneous report on 31 July 1984, from the man who reported it, referred to Cpl Quek as the man who first held the appellant. Cpl Quek was bedridden and too ill to testify at the trial.

6 In cases where an appellant's appeal involved issues of fact, the appellate court would often remind itself and counsel that it would not lightly disturb the findings of fact by the trial judge unless they were clearly against the weight of the evidence, or were plainly wrong. We would like to elaborate on this basic appellate principle. First, it is important to distinguish the two broad categories of facts – logical facts and empirical facts. A person who fires a gun is a gunman. The appellant fired a gun. The appellant is therefore a gunman. That is an example of a logical fact. Whether the appellant actually fired a gun is an empirical fact. Why he fired the gun is also an aspect of empirical fact that is established by inference. The diverse nature of "facts" requires different means and measures to evaluate whether a finding of a fact was wrong or against the weight of the evidence. Scientific facts, for example, would usually require proof by expert scientists. Where the fact finding is the result of the judge's assessment of a witness's reconstruction of past events, the result itself (the finding of the fact) is necessarily merely an opinion. For example, whether an accused fired a gun 20 years ago is a question that involves the reconstruction of events of that time. Whichever way the court answers that question is really the opinion of that court. Similarly, inferences drawn by the court are also opinions of the court. Such findings and inferences establish the facts necessary for the court to come to its final conclusion of the big fact – whether the Prosecution has proved its empirical (as opposed to legal, that is to say, on the law) case. The finding of fact is not the same as an exercise in the finding of truth, although that is an ideal which every court is required to seek, even if it cannot always be achieved. Hence, the rules of evidence in court proceedings permit findings of fact to be made where the level of certainty, and therefore, truth, is less than absolute. In the case of civil proceedings, the burden of proof is discharged on a balance of probabilities; in criminal trials, the Prosecution has to prove its case beyond reasonable doubt, and correspondingly, the Defence need merely raise a reasonable doubt to secure an acquittal. Under such conditions, the imposition of more rules on how a court ought to make its finding of facts may only increase the probabilities of a bad decision.

7 A primary, empirical fact is determined, generally, by the trial judge from an evaluation of what was said (or left unsaid) and the manner in which the witnesses say it. In practice, it is a much more complicated exercise than that. The evaluation of any evidence is always done in comparing and contrasting it with the rest of the evidence. Sometimes it might have to be evaluated without the

benefit of other relevant evidence, and the trial judge's duty is not only to determine from the evidence what was revealed, but also what was concealed. The judge's finding of a fact is not only an evaluation of what was said but how it was said, in the context in which the evidence arose, that is, the circumstances of the facts at the time they occurred, as well as the context in which the evidence was being reconstructed in court. If the evidence of the material witnesses was part of the reconstruction of the relevant history, the trial judge's opinion of those witnesses is an evaluation of that reconstruction. When an appellate court interferes with such opinion, it would have done so from one dimension further removed from the actual event. It is because of the difficulties inherent in the assessment of a reconstruction of historical events that an appellate court would not interfere with findings of fact unless they are "plainly wrong or against the weight of the evidence".

8 Mr Pereira's arguments before us were based on two broad premises, namely, that the long lapse in time had taken its toll on the memories of the witnesses; and secondly, that the instances of oral evidence adduced in court were too inconsistent and contradictory and, therefore, unreliable. In such circumstances, counsel submitted that the trial judge ought to have given the appellant the benefit of the doubt. These were not complaints that the trial judge had drawn the wrong inferences from clear facts. Nor were they complaints that the court had found *x* when the evidence showed *y*. On the contrary, they were complaints that in view of the difficulties in the reconstruction of the event, the court ought to have a reasonable doubt as to the guilt of the accused. In this regard, Mr Pereira and the trial judge exchanged views as to the difference between the phrase "there could be a reasonable doubt" and "there is a reasonable doubt" (from pp 747 to 749 of the Record of Appeal), but any hint of a brilliant exposition on the nature of a reasonable doubt was quickly lost in the exchange. What appears quite clearly as a result of it, however, was that the judge was not troubled by any doubt at all in the prosecution case. The fact that the trial took place 20 years after the crime was noted by the trial judge at the outset of the proceedings. The fragility of memory in circumstances such as these had been noted and given such latitude as the court thought fit. The imperfect recollections of events, in themselves, involved no general principle that required the trial judge to make, or decline to make, any specific findings of fact. On the contrary, it might be remarkable if every detail of a fast-moving event that occurred 20 years ago was recalled with absolute clarity, precision and consistency. Since accuracy in the recollection of an event tends to deteriorate with time, the more recent the event, the more accurate the recollection can be expected. But this is not a scientific principle. Although judicial decisions are not uncommonly made under conditions of uncertainty, the trier of fact can, however, reach a decision firmly and with certainty; and he does so partly by instinct, and partly by the rules of law and procedure.

9 The question on appeal before us was whether by reason of the discrepancies that Mr Pereira referred to, this court ought to find that the trial judge was "plainly wrong" or had delivered a verdict "against the weight of the evidence". Counsel regarded, and hoped to persuade us similarly to find, that Sgt Lim's testimony of his "heroic attempt" to board a moving lorry was incredible. Likewise, he said that it was unbelievable that Sgt Lim had exchanged six shots with the appellant at close range and all shots missed their marks. Counsel also drew our attention to the different accounts of the incident by Snr Insp Sta Maria. The main one concerned where Sgt Lim was when the appellant fired at him from the lorry. In one version, Sgt Lim was on the roadside, and in the other he was boarding the lorry. Counsel submitted that "the exact sequence of events in relation to the alleged exchanges of gun fire between [Sgt Lim] and [the appellant] is difficult to reconcile". These inconsistencies were in respect of what the persons concerned were doing and where they were exactly when the shots were fired. Counsel referred to evidence such as Sgt Lim's evidence in court in which he had said that the appellant "turned around and saw me running towards him" and "he [the appellant] fired one shot at me". Counsel submitted that that implied that Sgt Lim was at the rear of the lorry when on another instance he had said that he was "in front left side of the lorry". If that were the case in fact, it could also be implied that the trial judge had regarded it as insufficiently

material in the context of the evidence. One need only be reminded that the evidence in question related not to a static situation or a slow-moving event. It concerned a fast and furious chase with exchanges of gunfire at midday, in the midst of a busy business district.

10 Reviewing the record in the light of counsel's submission, we find that the trial judge had kept his focus on the one key issue in the proceedings before him, namely, did the appellant fire his shots at Sgt Lim or did he fire into the air? All the instances of inconsistencies that counsel complained of before us had been placed before the trial judge in the lengthy and forceful closing address by Mr Pereira himself. The judge was not persuaded and had no doubt that the appellant fired at Sgt Lim. We are of the view that, on the evidence as a whole, the trial judge was entitled to form his opinion on the direct evidence of Sgt Lim and Snr Insp Sta Maria. Furthermore, as no rule of law or procedure had been breached, we do not see any reason to doubt the judge's assessment of the facts that he so found. This appeal was therefore dismissed.