Public Prosecutor v Leong Soon Kheong
[2009] SGCA 28

Case Number : Cr App 9/2008

Decision Date : 29 June 2009

Tribunal/Court : Court of Appeal

Coram : Choo Han Teck J; Kan Ting Chiu J; V K Rajah JA

Counsel Name(s) : Lau Wing Yum and Jeyendran Jeyapal (Attorney-General's Chambers) for the appellant; The respondent in person

Parties : Public Prosecutor — Leong Soon Kheong

Criminal Procedure and Sentencing – Sentencing – Group violence – Relevant sentencing considerations – Prosecution appealing against sentence – Whether sentence was appropriate – Section 304(b) read with s 149 Penal Code (Cap 224, 1985 Rev Ed)

29 June 2009

V K Rajah JA (delivering the grounds of decision of the court):

Introduction

1 These grounds of decision arise from an appeal by the Prosecution against the sentence imposed on Leong Soon Kheong ("the Respondent"). The Respondent had pleaded guilty to a charge of culpable homicide not amounting to murder, pursuant to s 304(b) of the Penal Code (Cap 224, 1985 Rev Ed) ("PC") read with s 149 of the PC. Such an offence is punishable with imprisonment for a term of up to ten years, or with a fine, or with caning, or with any combination of such punishments. A High Court judge ("the judge") crediting the Respondent with a number of "mitigating" considerations, sentenced the Respondent to a moderate term of imprisonment of four years and nine months, backdated to the commencement of his remand. Dissatisfied with this outcome, the Prosecution appealed. While an appellate court will only interfere with a sentencing decision in limited circumstances such as the application of wrong principles or a manifestly inadequate or manifestly excessive sentence (see *PP v Kwong Kok Hing* [2008] 2 SLR 684 at [13]–[14]), we were persuaded that appellate intervention was warranted in this case. We agreed with the Prosecution that the judge had seriously erred in his application of sentencing principles and increased the Respondent's punishment to a term of imprisonment of seven years.

Background facts

2 Wong Dao Jing ("the Deceased"), an 18-year-old student at Temasek Polytechnic, passed away after a group of men viciously assaulted him on 15 February 2003. Some four years later, the Respondent, one of the men involved in the assault was arrested. He pleaded guilty to the following charge:

> That you, LEONG SOON KHEONG,
>
> on the 15th day of February 2003 between 8.00 p.m. and 8.33 p.m. at the staircase landing between the 2nd and 3rd level of Lucky Chinatown Shopping Centre, Temple Street, Singapore, together with one Sean Leong Hung Chu, one Teo Guan Kah, one Toh Chu Siong and one Larry Lim Liang Long were members of an unlawful assembly whose common object was to cause hurt

to one Wong Dao Jing, male/18 years old, and in the prosecution of the common object of the said assembly, one or more of you committed culpable homicide not amounting to murder by doing certain acts, to wit, fisting and kicking the said Wong Dao Jing on the head, face and stomach after he had fallen to the ground with the knowledge that you all were likely by such acts to cause the death of the said Wong Dao Jing, and you have thereby, by virtue of section 149 of the Penal Code (Chapter 224) committed an offence punishable under section 304(b) of the Penal Code.

3 Before we deal with the legal issues, we shall set out the material facts. These are largely uncontroversial and can be adequately captured in a brief compass.

4 The Deceased, prior to the attack on him, was playing with computer game machines at "Genie Funworld" arcade at Lucky Chinatown Shopping Centre ("Shopping Centre") with two of his friends, Poh Wen Bin ("Wen Bin") and Lim Boon Kiat ("Boon Kiat"). While playing, he noticed an unattended haversack close to him. He informed Wen Bin and Boon Kiat of his intention to examine the haversack. Wen Bin and Boon Kiat, perhaps intuitively sensing danger, did not want to be involved in this misdeed. A little later, they observed him taking the escalator leading down to the second storey of the Shopping Centre.

5 Not long after this, two men, Sean Leong Hung Chu ("Sean") and Teo Guan Kah ("Teo"), appeared at the arcade. Wen Bin and Boon Kiat observed them searching for something. The men eventually confronted Wen Bin and Boon Kiat, demanding information about the whereabouts of the haversack. Wen Bin informed them that the Deceased had taken the haversack. On learning this, Sean and Teo insisted that Wen Bin immediately request the Deceased to return to the arcade with the haversack. Wen Bin did as he was told by calling the Deceased on his mobile phone.

6 The Deceased hurriedly returned to the arcade and handed the haversack to Sean and Teo. The two men, in turn, passed the haversack to Toh Chun Siong ("Toh") who had been standing in their vicinity. Sean and Teo pressed the Deceased to explain why he had taken the haversack while Toh inspected the contents of the haversack. After completing his inspection, Toh claimed that an item (which has not been identified in the appeal records) was missing. Sean and Teo then insisted that the Deceased accompany them to the stairwell of the Shopping Centre to discuss the matter further. The Deceased complied. Wen Bin and Boon Kiat followed them, as they were anxious about the Deceased's safety.

7 On arrival at the third-storey staircase landing of the Shopping Centre, Sean, Teo and Toh immediately surrounded the Deceased. They furiously accused the Deceased of stealing from them. The Deceased asserted that he was unaware that the haversack belonged to them and insisted that he would not have taken the haversack had he known otherwise. He denied having removed anything from the haversack. The trio were dissatisfied with the Deceased's explanation and reprimanded him in Hokkien for being too "cocky". They demanded that he pay for the missing item. The Deceased pleaded that he had no money and showed them his empty wallet to substantiate this.

8 While this wrangling was taking place, Toh stepped out of the stairway and made a call on his mobile phone. Toh subsequently returned to the stairway with the Respondent and Lim Liang Long Larry ("Lim"). The Respondent immediately entered the fray and angrily questioned the Deceased. The Deceased was at that juncture confronted by no less than five persons: the Respondent and the four accomplices (collectively "the Group"). The Respondent, then 28 years old, was the oldest member of the Group. He sneered at the Deceased, "*[e]ven Malaysian dared (sic) not take my things and you dare*."[note: 1] The Deceased in response plaintively asked the Respondent what else they wanted from him. The Respondent in response reprimanded the Deceased for his conduct and exclaimed,

"*[y]ou have taken somebody's thing and still that arrogant*"[note: 2]. Following that remark, the Respondent shouted out in Hokkien, "*Take weapon!*"[note: 3].

9 Moments later, Lim forcefully pushed the Deceased and asked him whether he was a member of any secret society. The Deceased denied he had any gang affiliations and pleaded with the Group not to hurt him. Unmoved, the Respondent again scolded the Deceased. He said that it was difficult to let the Deceased off so easily because so many of his men were watching him.

10 Lim, after this exchange, pushed the Deceased once more. The Deceased managed to grab hold of a railing to preserve his balance. Lim then challenged the Deceased to fight with him "*one-to-one*"[note: 4]. The Deceased declined to do so, and pleaded that he was afraid. The accomplices then surrounded the Deceased and proceeded to assault him by fiercely pummelling and kicking him.

11 The Respondent acknowledged in his police statement that he took a few steps down the stairs, intending to assault the Deceased. However, he failed to reach the Deceased because the stairwell was too narrow. As a result, the Respondent remained standing at the third-storey staircase landing with Wen Bin and Boon Kiat, while the accomplices carried out the assault on the Deceased.

12 Wen Bin and Boon Kiat observed the Deceased was seriously injured as a result of the assault. Afraid for his safety, they knelt on the floor and profusely apologised to the Respondent for what the Deceased had done. Wen Bin pleadingly held on to the Respondent's right hand and beseeched him to let the Deceased off. He noticed that the Deceased was not retaliating and was only weakly attempting to ward off the blows that were mercilessly raining down on him. Boon Kiat also knelt down, on the Respondent's left hand side, and begged the Respondent to stop the attack.

13 The Respondent could not be placated. He insisted that the Deceased deserved the beating and remarked that the Deceased could not be fatally injured so easily. The assault involving the accomplices kicking and fisting the Deceased on his head, face and stomach region continued with undiminished vigour. This relentless assault did not cease even after the Deceased lay prostrate on the floor. We note that at no point of time did the Deceased put up a fight. Finally, the Respondent shouted out in Hokkien, "*[e]nough, let's go*"[note: 5]. Immediately, the accomplices complied.

14 Just before the Group left the stairwell, the Respondent directed Wen Bin and Boon Kiat to attend to the Deceased, warning them at the same time not to report the matter to the police. He warned them ominously that they could be easily located.

15 The Deceased was pronounced dead at 9.40 pm that night. He succumbed to an injury medically classified as traumatic subarachnoid haemorrhage. This injury was consistent with blunt force trauma sustained by the head. Dr Gilbert Lau ("Dr Lau"), a pathologist attached to the Centre for Forensic Medicine of the Health Sciences Authority, recorded in his autopsy report the following external injuries sustained by the Deceased:

1. A bruise, measuring 8x6 cm, containing a superficial laceration and an abrasion, measuring 0.9 cm in length and 1.4x1.2 cm, respectively, on the right fronto-temporal region. The posterior margin of the bruise was situated at horizontal and vertical distances of 2 cm and 5 cm from the right ear, respectively.

2. A bruise-cum-abrasion, measuring 0.7x0.5 cm, over the left superiolateral orbital margin.

3. An abrasion, measuring 0.6x0.2 cm, on the left upper eyelid.

4. A bruise, measuring 2.5x1 cm, on the right mucosal aspect of the upper lip.

5. A bruise, associated with a few small abrasions, measuring 8x7 cm in all, on the right parieto-occipital region of the scalp, adjacent to the midline. The inferiolateral margin of the bruise was located at horizontal and vertical distances of 6 cm, each, from the right ear.

6. An abrasion, in the approximate shape of an inverted triangle, measuring 4x2 cm, on the left parieto-occipital region, with its lowermost point being situated at a distance of 7 cm above the left ear.

7. A left pre-auricular bruise, measuring 3.5x2 cm.

8. Extensive bruising, over an area of 13x8 cm, of the posterior aspect of the left ear and the adjacent left retro-auricular region and the left upper posterolateral aspect of the neck.

9. An abrasion, measuring 8x1 cm, transversely across the lower anterolateral aspect of the left chest wall.

10. A tramline bruise-cum-abrasion, measuring 3x1.5 cm, obliquely across the midline, on the base of the neck, posteriorly.

11. A group of abrasions and bruises, over an area of 15x10 cm, on the left upper back, occupying the posterior aspect of the left shoulder and the left scapular area. Two of these injuries were tramline bruises, measuring 7x0.8 cm and 3x0.5 cm, respectively.

12. A group of petechial bruises, over an area of 14x7 cm, along the left mid-flank, posterolaterally.

13. An abrasion, measuring 7x0.3 cm, across the left lower flank, posterolaterally.

14. A group of three triangular abrasions, with bruised margins, measuring 1x1 cm (proximal), 1.2x0.7 cm (middle) and 0.7x0.4 cm (distal), respectively, at intervals of 2 cm and 1.5 cm, along the lateral aspect of the upper part of the left arm (deltoid region).

15. Two bruises, measuring 1x0.5 cm (proximal) and 1.5x0.5 cm (distal), respectively, on the ventral aspect of the right forearm, just proximal to the right wrist.

16. A bruise, with a central abrasion, measuring 1x1 cm in all, on the dorsum of the right hand.

16 Dr Lau also recorded the following internal injuries sustained by the Deceased as a result of the assault:

(a) Scalp: showed a right fronto-temporo-parietal subgaleal bruise, measuring 11x8 cm, associated with partial bruising of the right temporalis muscle.

(b) Meninges: showed diffuse, severe, acute subarachnoid haemorrhage, generally.

(c) Cerebral cut sections: showed softening of the grey and white matter, generally, together with focal petechial haemorrhages within the deep white matter and the caudate and lenticular nuclei, as well as acute intraventricular haemorrhage.

(d) Reflection of the soft tissues of the face showed mild bruising of the gingival mucosa of the upper lip.

(e) Posterior dissection of the neck showed extensive bruising of the left paravertebral muscles of the neck.

(f) Musculoskeletal system: there was some mild bruising of the left supraspinatus muscle; no fracture was found.

17 Dr Lau concluded in the same report:

1. The body was that of a well nourished, muscular, late-teenaged, Chinese male, measuring 172 cm in height and weighing 80 kg.

2. Death was due to traumatic subarachnoid haemorrhage, consistent with blunt force trauma to the head.

3. The abrasions on the left arm and the bruises on the right hand and wrist (external injuries nos. 14–16) are consistent with defensive injuries.

4. At the time of the autopsy, there was no macroscopic evidence of any natural disease of sufficient severity to have caused or contributed to death.

18 Soon after this incident, the Respondent fled to Malaysia. On 30 November 2007, the Malaysian Police detained him and he was extradited to Singapore on 4 December 2007. On 6 December 2007, the Respondent was charged with the murder of the Deceased. Sean, Toh and Lim remain at large. The Malaysian Police have also notified their Singapore counterparts that Teo was murdered in Johor Bahru, Malaysia on 4 January 2007.

19 We note that this is not the Respondent's first brush with the law. In 1990, he was convicted for voluntarily causing hurt under s 323 of the PC and was sentenced to 18 months' probation. The Respondent was then just 15 years old.

The decision of the judge

20 In sentencing the Respondent to a moderate sentence of four years and nine months' imprisonment, the judge heavily relied on three mitigating factors: (a) the Respondent did not assault the Deceased; (b) the assailants had been provoked by the Deceased's behaviour; and (c) the Respondent had mistakenly believed that the Deceased could withstand the assault: see the grounds of decision in *PP v Leong Soon Kheong* [2008] SGHC 208 ("GD"). Given the materiality of these considerations in the judge's assessment of the Respondent's culpability, we reproduce in full what he stated (at [37] of the GD):

In all the cases cited by the learned DPP, the accused persons had personally assaulted the victim. *If the [Respondent] had actively participated in the assault together with his accomplices, I would certainly have added another one to 1½ years to the present sentence that I had imposed. Even more years of imprisonment would be added if weapons were used on a defenceless victim*. Hence, the above precedent cases referred to me by the [Prosecution] were markedly different from the facts here, where the [Respondent]'s main culpability was in:

(a) stoking the anger of the Group towards the deceased and precipitating, in part, the

assault by saying that "it was difficult for him to let the deceased off so easily because there were so many of his men watching him";

(b) failing to contain the situation when the [Respondent] knew that he wielded a significant influence on the unfolding of the tragic events; and

(c) delaying his call to the Group to stop the attack after it began despite the incessant pleas of the deceased's friends.

Indeed ***there are material distinctions to be drawn (at least for the purposes of sentencing) between active acts of violence and passive acts of violence*** *where in the latter, the [Respondent] has omitted to act or intervene to bridle further injury or even prevent death but has not directly caused the death*. ***To be borne in mind also are some mitigating elements arising from the provocation by the deceased who had wronged his assailants by misappropriating their haversack and had thereafter behaved arrogantly and remained unapologetic towards them****. A further mitigating factor in the [Respondent]'s favour is that he failed to intervene to stop the assault because* ***he was labouring under the mistaken belief that the deceased was a strong person who would be able to withstand the beating with no weapons used***. Overall, there were fewer vindictive elements in the [Respondent]'s behaviour, a contrast to the precedent cases relied on by the [Prosecution], where the accused person had personally assaulted the victim and the assault directly caused the death in circumstances where the victim had not wronged or provoked the accused person prior to the assault at all or to the extent as that which had occurred in the present case.

[emphasis added in italics and bold italics]

21 In addition, the judge granted a further sentencing discount on the basis that it was Lim, and not the Respondent, who started the whole assault (at [38] of the GD) and that the Respondent was "not devoid of conscience" as he ultimately ordered the cessation of the assault (at [31] of the GD). The judge also considered it relevant that the Respondent had cooperated with the authorities fully and appeared to be remorseful (at [39] of the GD). However, the judge acknowledged that this was a weak mitigating factor as no amount of remorse or contrition from the Respondent could begin to make up for the loss of so young a life (at [40] of the GD). The judge took great pains to carefully distinguish every sentencing precedent that the Prosecution sought to rely on. He pointed out that most of the sentencing precedents cited by the Prosecution involved greater culpability on the part the offenders as well as the offenders' active participation in the physical assault of the victims.

The appeal against sentence

22 The Prosecution submitted that the judge erred both in law and in fact by:

(a) viewing the Respondent's behaviour as a passive act of violence and attaching undue mitigating weight to this fact purely on the basis that he had not physically assaulted the Deceased;

(b) finding that the Deceased had provoked the assault;

(c) attaching undue mitigating weight to the Respondent's mistaken belief that the Deceased would be able to withstand the assault; and

(d) attaching undue mitigating weight to the Respondent's remorse.

23 The Respondent, in his written skeletal arguments, submitted that the appeal should be dismissed or alternatively the sentence should be reduced on several grounds. First, he denied that he had influence over the accomplices. He stated that he joined in but did not take over the interrogation of the Deceased. Further, he submitted that he did not effectively assert influence over the accomplices as they did not react when he shouted "*[t]ake weapon*" in Hokkien. He also denied instigating the accomplices to attack the Deceased and encouraging them while they were carrying out the assault.

24 Second, the Respondent reiterated that the Deceased provoked the Group. Finally, the Respondent submitted that his involvement in the assault was peripheral and he felt repentant shortly after the fight when he saw the Deceased struggling in pain and told Wen Bin and Boon Kiat to take the Deceased to a doctor.

25 In his oral submissions before the court, the Respondent maintained that he did not have influence over the accomplices and the fight did not break out because of his involvement in the matter. When queried whether he was disputing the Statement of Facts, he denied this. Anxious to minimise his leadership role, the Respondent also claimed, for the first time, that the accomplices did not stop the assault immediately after he gave his instructions. He claimed that he had informed the police of this fact during the police interviews.

Sentencing considerations for group offences involving violence

26 In this genre of group violence, the two most pressing sentencing considerations are the principles of general deterrence and retribution. In *PP v Law Aik Meng* [2007] 2 SLR 814, the High Court emphatically underscored the particular relevance of general deterrence in cases involving group offences. The court noted at [25(b)]:

> Examples of particular *circumstances* of an offence which may attract general deterrence include:
>
> …
>
> (b) *Group/syndicate offences*: The fact that an offence was committed by two or more persons may be regarded as an aggravating factor (see *Sentencing Practice* at p 84). Group offences generally result in greater harm. Another significant factor is that the victim is likely to be in greater fear in cases where physical intimidation is exerted. Further, group pressure to perpetuate such offences may add to their persistency, and group dynamics necessarily imply greater harm or damage: see Professor Andrew Ashworth in *Sentencing and Criminal Justice* (Cambridge University Press, 2005, 4th Ed) ("*Sentencing and Criminal Justice*") at p 157.
>
> [emphasis added in original]

27 Furthermore, the court noted (at [25(c)]), that gratuitous violence would fall under the broad category of public disquiet, which would also invoke the principle of general deterrence. As was said in *PP v V Murugesan* [2005] SGHC 160 (at [55]),"[violent] [p]erpetrators are punished not just for the physical harm they inflict but also for life-long trauma, debilitating emotional distress and anguish they callously and cruelly inflict and sentence their victims to suffer in silence." To this, we need only add that the traumatic effect of a violent crime on a victim's family and loved ones ought not to be forgotten.

28 This is not to say that other sentencing considerations such as specific deterrence and rehabilitation are invariably irrelevant in cases such as this. Their relevance and the weightage to be given will have to be assessed carefully in the light of the circumstances prevailing in each matter.

Sentencing precedents

29 A relevant precedent, at first blush, appears to be the case of *PP v Jamal anak Nyalau* [2002] 3 SLR 66. The factual similarities with the present matter are striking. There, the accused persons were convicted of culpable homicide not amounting to murder pursuant to s 304(b) read with s 34 of the PC. The three accused persons punched and kicked the deceased in the absence of any provocation. The accused persons continued the assault even though the deceased did not retaliate and slowly collapsed to the ground. At one point during the assault, the second accused took $15 from the wallet of the deceased. All three accused pleaded guilty. They were first-time offenders. The court took into consideration the charge of theft and sentenced each offender to six years and six months' imprisonment. However, this case on closer examination is not particularly instructive because the trial judge did not examine the aggravating and mitigating circumstances of the case in detail. Neither did he explicate on the applicable sentencing principles in cases of this genre.

30 Our attention was also drawn to a number of other sentencing precedents that address a variety of scenarios. We do not think it would be profitable to explain or analyse them, as they are largely case specific. Rather, we think it might be more helpful for future guidance if we set out the relevant considerations a court ought to assess contextually before settling on the appropriate sentencing equation for this genre of offences.

31 In our view, relevant considerations in sentencing (some of which may be aggravating factors) for group violence include facts such as:

(a) *the actual train of events leading to the attack*. It will be relevant to take into account the level of pre-meditation or planning involved. This is not to say, however, that incidents that erupt suddenly are to be evaluated more benignly;

(b) *the number of offenders involved*;

(c) *whether weapons were used*. This factor is usually connected with the level of planning that precedes an incident: see (a) above. The use of a weapon is often an aggravating circumstance although the absence of one is at best a neutral consideration. A fist can also be a lethal instrument of harm;

(d) *the response of the victim to the attack*. Assaulting a defenceless and vulnerable victim who offers no resistance can never be viewed lightly. This, of course, does not mean that the response of a victim who seeks to protect himself can ever justify an attack or the continuation thereof;

(e) *the duration of the attack*;

(f) *the extent and nature of the injuries inflicted on the victim*;

(g) *the role and participation of each of the offender(s) in the sequence of events leading to as well as during the attack*, assuming this can be clearly delineated;

(h) *the reasons for the assault including the existence of "provocation" by the victim*. Here,

we should add that any manner of retaliatory conduct by the accused, short of what is permissible under the PC, ought not to be condoned;

(i) *the level of public fear or alarm generated by the incident*;

(j) *the nature of violence involved*;

(k) *whether gratuitous violence was involved*;

(l) *the commission of any other offence by the offender(s) during the course of the attack*;

(m) *the prevalence of the particular offence*; and

(n) *whether the violence was directed against a vulnerable victim*.

32 It is important to calibrate the cogency of each factor based on the factual milieu, the exact combination of charges an offender faces and the facts ultimately agreed to or established. The function of the courts in sentencing is to sentence an offender for the particular offence, having regard to the nature of the crime and the individual circumstances. Due to the extraordinary range of possible factual circumstances, *rigid* adherence to sentencing precedents and/or attempts to *narrowly distinguish* them are ordinarily not very helpful and, indeed, may sometimes lead to missing the wood for the trees, as appears to have occurred here.

Analysis of the judge's decision

33 We start with the judge's pointed reference to the fact that the Respondent had a "passive" role. The judge erred in placing undue weight on the fact that the Respondent did not directly assault the Deceased and that it was Lim who initiated the physical aspect of the assault. Consequently, he erred in refraining from adding one to 1½ years' imprisonment to the Respondent's sentence (at [37] of the GD). Whether or not the Respondent *directly* participated in the assault is just one factor in assessing his culpability. What is crucial is his *real role* in the entire chain of events that led to a death of an innocent victim. Was he merely an unwilling or unenthusiastic onlooker or did he have an authoritative hand in the initiation, continuation and/or cessation of the assault? Did his presence lend support to the assault?

34 The crux of the Respondent's culpability can be summarised as follows. He *actively* participated in the menacing interrogation of the Deceased before the assault commenced. Instead of sorting out the dispute sensibly, the Respondent, with alacrity, joined in the interrogation and evinced an uncompromising and confrontational approach towards the Deceased. This can be gleaned from his statements such as "*[e]ven Malaysian dared (sic) not take my things and you dare*" and "*[y]ou have taken somebody's thing and still that arrogant*". Such emotionally charged statements were plainly calculated to further inflame the accomplices and intensify their anger towards the Deceased.

35 This was not all. The Respondent also played a pivotal role in catalysing the attack on the Deceased. First, he shouted to the accomplices, "*Take weapon!*". This was undoubtedly an instruction to launch an assault. Prior to his instruction, there had been no direct threat to inflict violence on the Deceased. However, immediately after the Respondent's instruction, Lim pushed the Deceased and asked him whether he was a member of a secret society. Second, when the Deceased pleaded with the Group not to use violence against him, the Respondent stonily retorted that it was difficult to let the Deceased off so easily.

36 Contrary to the judge's view, the law often does not benignly appraise the conduct of a "passive" participant in a group assault. In the context of determining participation under s 34 of the PC, this court in *Too Yin Sheong v PP* [1999] 1 SLR 682 declared (at [37]) that *it is clear that the potential utility of a person present as a guilty confederate at the scene of the crime cannot be underestimated*. Earlier in that decision, the court explained (at [27]) that the reason why all are deemed guilty in *typical* cases under s 34 of the PC was that the presence of accomplices gives encouragement, support and protection to the person actually committing the act. Surely, it cannot be said that a gang leader who directs an attack from the sidelines ought to be viewed more benignly and favourably than his gang members who execute his directions. Those who are not involved in executing physical attacks can carry the *same* level of culpability as the attackers, if they participate in the common objectives of the group and/or encourage the attainment of the same. We must qualify this statement by emphasising that depending on the nature of the offence, the mere presence of a group member who is *not involved in the offending act itself* at the scene may not invariably be sufficient participation to affix culpability. This is especially true where no prior planning or discussion has taken place before individuals in a group act unilaterally without reference to the group's objectives.

37 With due respect, the judge was far too charitable in assessing the Respondent's role. While it is true that the Respondent may not have landed any blows or directly injured the Deceased personally, he was, at the very least, every bit as culpable as his accomplices were. *A person, who by his presence and/or conduct authorises, instigates or supports an act of physical violence cannot avoid or limit his own personal responsibility by simply pointing to his lack of physical participation in the incident*. The use of inflammatory words in a volatile situation often aggravates violence. Such words can incite or embolden an angry group to commit inexplicable acts of brutality. *Words have the potential to generate even more harmful consequences than physical acts. The nub of the matter is that, in group offences such as this, the focus of the sentencing judge ought not to be on whether an offender has behaved actively or passively but on precisely what role he had in the incident*.

38 Here, the Respondent was the oldest member of the Group and quite overtly orchestrated the chain of events immediately after his arrival onto the scene by stoking the accomplices' anger towards the Deceased, as well as callously provoking the assault on the Deceased. He was summoned to the scene to give directions to his men and not to be a mere witness to a fray. In addition, his presence at the staircase landing while the assault was underway must be taken to have lent moral and potential physical support to the accomplices. Plainly, the Respondent had to assume substantial responsibility for the deadly assault of the Deceased. While the accomplices rained punches, the Respondent figuratively speaking, pulled no punches.

39 We cannot agree with the judge's finding (at [34] of the GD) that the Deceased "*provoked*" the Group by misappropriating their haversack and behaving arrogantly towards the Group. The Group was plainly spoiling for a fight right from the outset when Sean and Teo demanded that the Deceased "talk" at the stairwell immediately after they were informed that something was missing from the haversack. We also note that it is far from clear that anything was indeed missing from the haversack ([6] *supra*). In any event, we should add, for good measure, that even if an item was indeed missing, this cannot absolve the Group of their wanton conduct in remorselessly assaulting the Deceased. They cannot seek redress by taking the law into their own hands; savagely meting out their own brand of brutal street justice.

40 Moreover, during the course of his interrogation, when the accomplices continued to harass the Deceased even after he had proffered his explanation for taking the haversack, the Deceased expressed willingness to appease Sean, Teo and Toh. He asked them what more they wanted from him and even showed them his wallet to prove to them that he did not have money to pay for the

"missing item". Yet, Toh subsequently left the stairwell and returned with the Respondent and Lim: see [8] above.

41 The Respondent's unduly aggressive treatment of the Deceased as reflected by his provocative statement, "*Even Malaysian dared (sic) not take my things and you dare*" is unwarranted given the Deceased's return of the haversack and his inability to pay for the "missing" item. The Deceased's reply that he had already taken the haversack and his enquiry of what else the Respondent wanted from him was a conciliatory response and not a manifestation of arrogance. It must be remembered that the Deceased was by then hopelessly outnumbered and extremely anxious about his well-being. Why would he want to defy or annoy the Group?

42 Another factor militating against the attribution of any "provocation" to the Deceased is the Deceased's refusal to fight "*one-to-one*" with Lim, on the basis that he was afraid. The defensive injuries the Deceased sustained bear further objective testimony to the fact that he desperately attempted to ward off the blows raining on him instead of putting up any resistance.

43 Based on the foregoing facts, we are firmly of the view that the Deceased did not "provoke" the Group. Rather, the Group was clearly bent on assaulting him even though the Deceased had already returned the haversack, had no ability to pay for the alleged missing item and declined to fight with them. For completeness, we should add that even if the Deceased had behaved "arrogantly", this is not by any stretch what we would consider a mitigating consideration. On the other hand, the use of gratuitous violence against the Deceased constitutes a serious aggravating factor (see [55] *infra*).

44 There is yet another aspect of the judge's reasoning that invites comment. He considered it permissible to accord a measure of allowance for the Respondent's "mistaken" belief that the Deceased, who appeared well nourished and healthy, would be able to withstand the assault. This is questionable. Although an attack on an elderly person is an aggravating factor as noted by the Court of Appeal in *Purwanti Parji v PP* [2005] 2 SLR 220 (at [30]) (and see also [31] *supra*), the converse is certainly not true. *The absence of a particular aggravating consideration is usually a neutral factor and can never be a mitigating consideration*. It is wholly impermissible for an accused to claim, in circumstances such as these, that he did not expect an apparently healthy person to succumb to a vicious assault. On the contrary, given the callous, indiscriminate and unremitting nature of the attack on the Deceased, it is unsurprising that the Deceased was grievously injured and succumbed soon after to the injuries.

45 In the same vein, the judge also erred in treating the Respondent's ultimate order of cessation of the assault as another mitigating circumstance. We note that the Respondent instructed his accomplices to cease the assault only after the Deceased was so badly beaten up that he lay prostrate on the floor. In our view, this cannot lead to the inference that the Respondent had by then become contrite. On the contrary, it bears emphasis that the Respondent did not relent when the Deceased's friends begged him to stop the attack.

46 The judge (at [39] of the GD) also mistakenly accorded the Respondent a sentencing discount because of his cooperation with the authorities upon his arrest and his remorse as expressed in the psychiatric report. Not *every* plea of guilt entitles an offender to a discount in sentence. The High Court in *Angliss Singapore Pte Ltd v PP* [2006] 4 SLR 653 ("*Angliss*") at [56] was of the view that only a remorse-based approach, in discerning to whom the sentencing discount ought to apply, had any currency in the context of our current jurisprudence. In determining whether a guilty plea was a reflection of sincere and genuine expression of remorse, the court observed at [69] that:

> In this regard, the exceptions to the practice of reducing sentences for guilty pleas simply represent and reflect judicial and common experience that where the evidence against the offender is truly overwhelming or where the offender is caught red-handed or where it was only a matter of time before the offender's illegal activities would come to light, it would not be wrong to surmise that a plea of guilt in these circumstances is merely tactical and not genuine. However, it must be cautioned that these are no more than helpful analytical and evidential presumptions to assist a court in assessing whether the offender's guilty plea is activated by sincere remorse. I do not interpret the cases as laying down an inexorable principle of law that a plea of guilt cannot ever mitigate a sentence where, to use the learned district judge's language, the plea is inevitable. After all, even many obviously guilty persons do not plead guilty or express remorse.

47 In assessing whether there was genuine remorse, the court noted at [74]:

> I do, however, qualifiedly accept Prof Ashworth's criticism that it may not always be easy to discern when a plea of guilt is indicative of genuine contrition. In my view, though, the inquiry as to whether a plea of guilt is indicative of remorse is no more or less difficult than other findings of fact that a trial or sentencing judge has to grapple with. There are, however, significant and material tell tale signs that a court may look to in assessing whether the guilty plea is an expression of contrition. For instance, an early bid to cooperate with the investigating authorities and the surrender of an accused person at the early stages of investigation are persuasive indications of remorse: see *PP v Siew Boon Loong* [2005] 1 SLR 611 at [21]. An attempt at offering restitution to the victim at the earliest opportunity is another factor that the courts should look favourably upon.

48 In *R v Eamonn Patrick Byrne* (1997) 1 Cr App R (S) 165 at p 167, Ognall J astutely pointed out that an offender who absconded and remained at large was not entitled to expect a discount for his guilty plea:

> By going on the run, as you did here, whatever the promptings which led you so to do, by remaining on the run for that protracted period of time, and only coming before the court, not because at the end of it all you voluntarily surrendered but because you were detected and arrested, you have demonstrated that those well-recognised bases for discount in your case, each and all are laid forfeit.

49 The court must also consider the element of public interest before deciding whether to give a discount. The court in *Angliss* at [77] held that the mitigating effect of a guilty plea ought to be compatible with the sentencing purpose and principles the sentencing judge was seeking to achieve and observe through the sentence. In some cases, the need to protect the public might outweigh any mitigating effect to be attached to an accused's guilty plea (see *Fu Foo Tong v PP* [1995] 1 SLR 448 at [14]).

50 Bearing in mind, first and foremost, the callous nature of the assault on the Deceased, as well as the fact that the Respondent fled Singapore and remained at large for four years until he was apprehended by the Malaysian Police and then extradited to Singapore, the Respondent's cooperation with the police ought not to have been given mitigating weight on the sentencing scales.

51 For completeness, we should add that we concurred with the judge's view (at [20] of the GD) that little weight should be placed on the Respondent's only antecedent. This was committed some 13 years prior to this incident.

Assessment of the relevant aggravating factors

52 While there were no valid mitigating circumstances, there were at least three key aggravating considerations in this matter, namely: the effect of the assault on the victim; the resort to gratuitous violence; and the Respondent's role as the ringleader.

Effect of the assault on the victim

53 Stuart-Smith LJ in *R v Nottingham Crown Court, ex parte Director of the Public Prosecutions* (1996) 1 Cr App R (S) 283 at 288 in the context of common assault under s 39 of the Criminal Justice Act 1988 was faced with the question of whether the court was precluded from considering the consequences of the assault to the victim simply because a more serious charge could have been brought. In addressing this question, Stuart-Smith LJ formulated a general statement of law that emphasised the importance of taking into account the consequences suffered by the victim in assessing the gravity of the offence. He declared:

> In my judgment, it is a cardinal principle of sentencing that the court should take into account when considering the gravity of the offence and the appropriate sentence, the consequences to the victim. This is because one of the purposes of the criminal law is to assuage the feelings of victims and their friends and relations. The law must redress their grievance by inflicting an appropriate punishment and then there is no excuse for the victim or his friends to exact their own retribution.

54 The offence here is troubling because it involved an utterly senseless and brutal attack on a student by a group of men. Such an incident engenders an overriding public interest in deterring like-minded persons from committing similar offences.

Gratuitous violence

55 Wholly gratuitous violence, over and above the violence intrinsically involved in the commission of an offence, ought to be visited with a distinctly more severe sentence. Gratuitous violence is an aggravating factor that attracts both the notions of deterrence (general and specific) and retribution.

56 We are of the view that a powerful reason for the assault was the Respondent's desire to demonstrate his authority and bravado in front of the accomplices. The Respondent's refusal to let the Deceased off on the ground that so many of his men were watching him affirmed this. Bearing in mind the Respondent's unduly aggressive manner towards the Deceased right from the outset (see [34] and [35] *supra*) along with the lack of provocation by the Deceased, the violence against the Deceased was gratuitous and plainly amounts to an aggravating factor.

Respondent's role as ringleader

57 In *PP v Muhamad Hasik bin Sahar* [2002] 3 SLR 149 at [36], Tay Yong Kwang JC considered the fact that the accused was not the gang leader a relevant consideration in determining the culpability of the accused. Additionally, in *PP v Nazarudin bin Ahmad* [1993] 2 MLJ 9, one factor Visu Sinnadurai J sitting in the High Court of Kuala Lumpur took into account in concluding that the offender's culpability in the commission of the offence was greater than the other accused persons was the fact that the first accused was the ringleader of the group.

58 The judge found, at [17] and [34] of the GD, that the Respondent was the ringleader and had influence over his accomplices.

59 These are the pertinent facts. The Respondent was summoned to the scene after Toh, Sean and Teo had interrogated the Deceased but were unable to make headway in settling their differences with him. The trio were therefore expecting the Respondent and Lim to resolve the dispute. We further note that the Respondent acknowledged in his written skeletal submission that he asserted influence over the accomplices by ordering them to "*[t]ake weapon*". This leads to an ineluctable inference that he exercised a leadership role and influenced the accomplices. Moreover, it is an agreed fact that soon after his instructions, the accomplices set upon the Deceased. A further damning admission (in the Respondent's written skeletal submission) is that he was conscious that if he did not interfere, the assault would have persisted. Perhaps, the clearest evidence of the influence exerted by the Respondent is the fact that the accomplices immediately complied with his instruction to cease the attack. Notably, the Respondent's written skeletal submission did not contest the fact that the accomplices stopped the attack immediately after his order. It was only when we pointed out to the Respondent that the accomplices stopped the assault immediately after his order as evidence of his influence over the accomplices that the Respondent orally submitted that the accomplices did not stop the assault immediately. This assertion at such a late stage of the appeal indicates that it was but an afterthought.

60 We were therefore satisfied that the Respondent was the ringleader of the Group and that this was an aggravating factor.

Concluding Remarks

61 Violence in any form or of any degree must be firmly confronted. No one is entitled to exact violence in order to seek redress for grievances whether real or imagined. In particular, in cases of group violence, the judicial jaw must be set tightly against leniency to unmistakably encapsulate the public's abhorrence for such conduct. Left unchecked, such conduct can very easily morph into an uncontrollable spiral of tragic consequences that can affect the wider community.

62 Often, the dangerous dynamics set in motion by group violence exposes a victim to greater harm as well as the likelihood of an attack being prolonged. Group violence feeds upon itself and often engenders even greater violence. This is precisely what transpired here. The Deceased was plainly intimidated and numbed with fear for his safety by the confrontational and abusive behaviour of the Group. Without cause, he was mercilessly set upon and literally battered into lifelessness by the Group after being verbally abused. This matter starkly demonstrates the brutal and uncontrollable nature of group violence and underscores the need for deterrent sentencing when the power of numbers is abused.

63 We were satisfied that the Respondent played a crucial role in the remorseless and vicious attack on the Deceased. He stoked the collective rage of the accomplices. He instructed the accomplices to commence the attack on the Deceased. He callously disregarded the pleas of the Deceased's friends for the attack to stop. He allowed the attack to continue until the Deceased lay prostrate on the floor. He was, in every sense of the word, the ringleader in this brazen and dastardly attack on a young man who had the misfortune to cross the path of thugs. While the Respondent did not have the intention to cause death, there can be no doubt that he must have appreciated and intended that the Deceased be accorded severe punishment for what was in reality a trivial mistake. *The enormity of his role in orchestrating the attack dwarfed the fact that he did not personally attack the Deceased*. In these circumstances, the Respondent has to take significant responsibility for the initiation of the attack as well as the consequences that flowed from it.

64 The Prosecution indicated that a sentence of seven years' imprisonment would be appropriate. We agreed that this was in line with existing guidelines and was proper. In the result, we allowed the

present appeal and substituted the sentence imposed by the judge with an enhanced sentence of seven years' imprisonment backdated to the date of remand.

[note: 1]Para 17 of the Statement of Facts

[note: 2]*ibid*.

[note: 3]*ibid*.

[note: 4]Para 19 of the Statement of Facts

[note: 5]Para 22 of the Statement of Facts