Public Prosecutor *v* Ellarry bin Puling and another
[2011] SGHC 214

Case Number	: Criminal Case No 40 of 2009
Decision Date	: 26 September 2011
Tribunal/Court	: High Court
Coram	: Chan Seng Onn J
Counsel Name(s)	: Han Ming Kuang and Victor Lim (Attorney-General's Chambers) for the Prosecution; B Rengarajoo (B Rengarajoo & Associates) for the first accused; Anand Nalachandran (Braddell Brothers LLP) and Jansen Lim (ATMD Bird & Bird LLP) for the second accused.
Parties	: Public Prosecutor — Ellarry bin Puling and another

Criminal Law

26 September 2011 Judgment reserved.

Chan Seng Onn J:

Introduction

1 The first accused is Ellarry Bin Puling ("Ellarry"), a 27-year–old male Malaysian who was employed as a cleaner by Twin Creations Pte Ltd at the time of his arrest. The second accused is Fabian Adiu Edwin ("Fabian"), a 22-year-old male Malaysian employed by R Glazen Singapore Pte Ltd as a construction worker at the time of his arrest. Both Ellarry and Fabian were working in Singapore on work permits. They were friends who had known each other back in Sabah.

2 Both accused persons were committed to stand trial in the High Court on the following joint charge:

> [O]n the 23rd day of August 2008, sometime between 3.00am and 3.50am at bus-stop B13 along Sims Avenue, Singapore, in furtherance of the common intention of both of you, committed murder by causing the death of one LOH EE HUI, male 35 years old, and you have thereby committed an offence punishable under Section 302 read with Section 34 of the Penal Code, Chapter 224.

3 The trial lasted ten days and took place over three tranches. It concluded on 18 April 2011.

Background facts

4 The deceased, Loh Ee Hui, was a 35-year-old male Singaporean.

5 On 23 August 2008, the police received a call at 3.53am reporting that the deceased was lying in a pool of blood at the bus-stop B13 along Sims Avenue. A Singapore Civil Defence Force ambulance arrived about 10 minutes later and immediately conveyed the deceased to Changi General Hospital. The deceased had severe head injuries and was in coma. The deceased eventually succumbed to his injuries at 8.32pm on 23 August 2008.

6 Following investigations, Fabian was arrested in an ambush at Boon Lay Mass Rapid Transit ("MRT") station on 7 September 2008 and the deceased's EZ-Link card (a contactless stored value ticket used on several forms of public transport) was subsequently recovered from the rear pocket of Fabian's pair of jeans (which was hanging in Fabian's living quarters). Ellarry was arrested at his workplace on 8 September 2008 and the deceased's Nokia N5610 XpressMusic hand phone was recovered from him.

Forensic evidence

7 The autopsy was performed by Dr Teo Eng Swee ("Dr Teo"). Dr Teo certified in his autopsy report that the cause of death was intracranial haemorrhage and cerebral contusions with a fractured skull. [note: 1]

8 The deceased suffered complex fractures to his skull. The following four fractures were detailed in the autopsy report:

1) There were two fracture lines of the calvarium, extending from the left mastoid process

   a) One fracture line extended medially for 5 cm towards the posterior midline of the inferior edge of the skull

   b) One fracture line extended superiorly for 7 cm towards the left parietal eminence.

2) There was a fracture extending from the midline of the occipital bone, 3 cm above the internal occipital protuberance, to the left transverse sinus groove 3.5 cm from the midline, to the left jugular foramen. From a point on this fracture at the left posterior cranial fossa (3 cm from one end of the end of this fracture line above the internal occipital protuberance), there was another fracture line extending laterally for 3 cm across the left posterior cranial fossa.

3) There was a hairline crack fracture of the body of the sphenoid.

9 The autopsy report also revealed that the deceased had suffered severe brain injuries:

The brain was soft and severely oedematous.

There was a midline shift to the left.

There was a right uncal sub-tentorial herniation.

There were bilateral cerebellar tonsillar herniations at the foramen magnum.

There were contusions of the left cerebellar hemisphere inferiorly, both temporal lobes, the right temporal lobe laterally, the right frontal lobe inferiorly, and the right frontal pole.

Cut sections of these contused areas showed haemorrhage in the underlying grey matter and superficial white matter.

Cut sections of the rest of the cerebrum and cerebellum showed no gross haemorrhage.

The cerebrospinal fluid was bloodstained.

10 Dr Teo gave oral evidence that the force that caused the above injuries would have been very great. [note: 2] According to Dr Teo, a simple fall alone could not have caused the skull fractures and brain injuries that were found on the deceased. [note: 3] In fact, the brain injuries suffered by the deceased were *contracoup* injuries where a "force from one side has caused a subdural haemorrhage on the opposite side". [note: 4]

11 For completeness, it should be noted that the deceased had other injuries present on him, which did not cause his death: a frontal laceration on his scalp, a contusion on his lungs, bruises on his upper back and underlying bleeding in his lower back. [note: 5]

12 According to Dr Teo, the injuries on the back were consistent with the deceased being hit with a blunt object. When Dr Teo was shown the broken piece of wood and the brick found at the crime scene, he opined that it was unlikely that the brick was used to cause the injuries on the deceased's head. [note: 6] However, with regard to the frontal laceration on the scalp, both the piece of wood and the brick were possible weapons. [note: 7]

13 Dr Kim Guowei ("Dr Kim"), who attended to the deceased at Changi General Hospital, was of the opinion that the deceased's brain injury appeared to be very severe from the initial scan carried out. As such, he felt that it was very unlikely that the deceased would have recovered from the injury. [note: 8]

14 Lastly, Ms Ang Hwee Chen, the senior forensic scientist attached to the Forensic Biology Laboratory of the Health Sciences Authority ("HSA") confirmed that the deceased's blood was found on the two broken pieces of wood and the brick [note: 9] which were recovered from the crime scene. As the two broken pieces of wood fitted nicely together, I am satisfied that they originally constituted a single piece of wood. I further noted that the single piece of wood (if unbroken) was fairly heavy, and had a substantial solid cross-section. If indeed it were the case that the original piece of wood had broken into two pieces as a result of its use as a weapon, then the assailant must have used considerable force to hit the deceased with it.

Statements of both accused persons

15 Both accused persons did not raise any issues regarding the recording of the statements (for instance, that the statements were recorded without the aid of interpreters, were poorly recorded or were obtained under threat, inducement or promise, *etc*). In other words, the admissibility and accuracy of recording of the statements were not challenged at trial.

Ellarry's statements

16 Seven statements from Ellarry were admitted in evidence as part of the Prosecution's case:

(a) Statement recorded by SSI Razali Bin Razak on 8 September 2008 at about 2.10pm. [note: 10]

(b) Section 122(6) statement recorded by Inspector Alvin Phua Kia Jong on 8 September 2008 at about 5.23pm ("Ellarry's s 122(6) statement"). [note: 11]

(c) Section 121(1) statement recorded by Inspector Roy Lim Eng Song on 11 September 2008 at about 10.35am ("Ellarry's 1st s 121(1) statement"). [note: 12]

(d) Section 121(1) statement recorded by Inspector Roy Lim Eng Song on 11 September 2008 at about 3.40pm ("Ellarry's 2nd s 121(1) statement"). [note: 13]

(e) Section 121(1) statement recorded by Inspector Roy Lim Eng Song on 12 September 2008 at about 3.30pm ("Ellarry's 3rd s 121(1) statement"). [note: 14]

(f) Section 121(1) statement recorded by Inspector Roy Lim Eng Song on 15 September 2008 at about 3.30pm ("Ellarry's 4th s 121(1) statement"). [note: 15]

(g) Section 121(1) statement recorded by Inspector Roy Lim Eng Song on 17 September 2008 at about 3.05pm ("Ellarry's 5th s 121(1) statement"). [note: 16]

17 The material portions of Ellarry's statements are reproduced below:

(a) Ellarry's s 122(6) statement:

I admit I was involved in the case, but I did not do the murder. I wish to appeal to be freed from the charge because my intention was only to rob. I did not expect Fabian to cause the person's death.

(b) Ellarry's 1st s 121(1) statement:

Question 3: On 23 August 2008 (Saturday) at about 3.53am, a male person was found unconscious at the bus-stop along Sims Avenue, opposite Lorong 39 Geylang. The unconscious male person was thereafter conveyed to hospital where he was subsequently pronounced dead. Preliminary investigations revealed that the said male person had suffered serious head injuries. Can you relate what you know about the facts of this incident in detail?

Ans: I was there on that day. I was there with a friend. His name is Fabian. Our intention was to rob the man and not to cause his death. I was not involved when the incident happened but I saw what happened. I saw Fabian hit the man with a wood at the neck region. Fabian hit the man with the wood about 2 to 3 times. Then the wood broke into two pieces. After that, the man was screaming in pain. The man fell to the floor when Fabian continued to kick and punch the man. I cannot remember which part of the body that Fabian had kicked and punch. Maybe Fabian had kicked the man's body and punched the man's face. I think the man was unconscious then as he had stop screaming and moving.

3.1 The man was lying faced up and I saw Fabian checking the pockets of the man's shirt and pants pocket. I then saw Fabian holding the man's wallet, but i do not know which pocket Fabian had retrieved the wallet from. I also saw Fabian holding the man's hand-phone. I kept my distance from the two of them.

3.2 After seeing Fabian take those things from the man, I cycled away towards a mosque. Fabian was also cycling and he followed me from behind. We both then stopped somewhere near the mosque and sat on the cement floor. It was dim. I then asked Fabian to show me the hand-phone which was dark in colour. I then asked Fabian to show me the hand-phone that he had taken from the man. I think Fabian took out the man's hand-phone from his trouser pockets and showed it to me. It was a Nokia Express Music which was black and blue in colour. It was a 'slide' phone.

3.3 I was scared at that time as I was afraid that Police will come. Fabian was checking the contents of wallet. I recalled that there was a S$6.00/- in the wallet in the denominations of two S$2.00/- note and two S$1.00/- note. I also saw one STARHUB and one SINGTEL 'SIM' card. There was also a blue Bank card but I do not know from which bank. I also saw a pink Singapore NRIC card. There was also a small photograph of a male Chinese. I took the photograph and looked at it and it resembled the person who Fabian had just hit. All these items were taken out from the wallet by Fabian and he was the one who showed it to me.

3.4 Fabian gave me the S$6.00/- from the wallet and for the rest of the items, Fabian put the items back into the wallet and threw it away on the side where we sat.

3.5 I wanted to take the STARHUB SIM card, but Fabian wanted it. Instead, Fabian gave me the SINGTEL SIM Card. I took the SINGTEL SIM card and kept it in my back jeans pocket.

3.6 Thereafter, we both cycled away and arrived at a coffee-shop that was near a condominium. Although the coffee-shop was closed, we still sat outside the coffee-shop. At the coffee-shop we rested a while and I smoked the cigarette. I then asked Fabian to show me the handphone taken from the man again. Fabian took out the hand-phone from the pocket of his shorts and showed it to me. I told Fabian that I liked the phone and I wanted to keep it. Fabian told me that he would give it to me later.

...

3.8 We sat the coffee-shop for about 15 to 20 minutes. There was no one at the coffee-shop. We both then cycled to the vicinity of Aljunied MRT and looked for another victim to rob.

Question 4: Could you relate in detail, like what you have just said in your statement, what Fabian and you did before you robbed the deceased?

Ans: I finished work at Secret Recipe at Jurong East IMM at about 11.00pm on Friday, 22 August 2008. From Jurong East MRT, I took the train to Paya Lebar MRT Station. During this train journey, i SMS'ed to Fabian. I cannot recall Fabian's hand-phone number now. In the SMS which was in Malay I recalled I asked something like '**Macam mana mala mini. Jadi Jalan tak'** (meaning: "Tonight how. Going or not"). Fabian replied '**OK boleh**' (meaning: "OK can"). I SMS'ed Fabian that I was in the train on the way home and Fabian replied that he would meet me at my house.

4.1 I wish to say that when I SMS Fabian in such a way, it would be understood by Fabian that I was asking him whether he wants to commit robbery that night. This was not the first time that we have done this. This is our way of communicating when we want to rob.

...

4.4 At the Paya Lebar MRT station, we sat and chit-chatted while looking out for people to rob. We targeted people who would be walking alone. Their race or nationality was not an issue. So long as they were walking alone while using their handphone. Another thing we look out for is that the victim cannot be too big sized or else we might be overpowered by the victim.

(c) Ellarry's 2nd s 121(1) statement:

Question 7: From where we stopped earlier in your statement at para 4.11, what happened after Fabian cycled towards the male Chinese at the bus-stop?

Ans: When Fabian cycled towards the bus-stop where the male Chinese was sitting, I also followed from behind on my bicycle. I was about 2 to 3 metres behind Fabian.

7.1 As we approached nearer to the male Chinese, I told Fabian not to continue with the robbery as there were many cars passing by. Fabian stopped cycling and I also stopped behind Fabian. He did not respond to my suggestion. At this point, we were about 5 metres or so from the bus-stop where I saw another male person walked to the bus-stop. We just waited and a few minutes later, the same male person who walked to the bus-stop flagged and boarded a taxi. The male Chinese was still sitting at the bus-stop and using his hand-phone. I presumed that he was using his phone as his right hand was against his right ear. I did not notice whether this male Chinese was carrying any bag with him or not.

7.2 Following that, Fabian left his bicycle where we were and he walked towards the bus-stop. I did not follow and remained on the bicycle. I saw Fabian walking behind the male Chinese and at that juncture, I saw Fabian taking out a piece of wood from his sling bag. Fabian then walked around the right of the male Chinese to face the male Chinese. I did not notice whether the male Chinese saw Fabian walking to his front or not.

7.3 I want to mention that when Fabian came to meet me at my house earlier, he had already brought along a sling bag. He always carried that bag with him, particularly for his work. The bag is either dark grey or green in colour. At the time that Fabian took out the piece of wood from the sling bag, I recalled that the strap of the sling bag was on his right shoulder. The strap went across his chest to his left waist. The bag was behind him. The wood was already in his bag when he came to my house and it was wrapped in newspaper. Due to the length of the wood, it protruded out from the bag. Fabian used another black t-shirt to cover up the protruding shirt. This piece of wood is about half a metre in length and tapered. It is about ½ inch thick and 2 to 3 inch broad. This piece of wood was picked up at the vicinity of Paya Lebar MRT station the night before the incident. I was together with Fabian at that time as we also wanted to rob and were looking out for victims. However, we did not find any and that is why I decided to commit robbery the next day.

7.4 I then saw Fabian who was standing more to the right side of the male Chinese, raise his right hand while holding onto the wood and swung it towards the male Chinese once. The wood hit the left side of the neck of the male Chinese. I cannot recall whether Fabian used both hands to hold onto the wood or just his right hand. After the wood hit the neck of the male Chinese, I saw the male Chinese slump to his right side but still on the sear the bus-stop. I heard the male Chinese shouting "**ahhhh**....". That was when Fabian continued to hit the male Chinese about 3 more times. This was when the wood broke into two. From where I

was, it looked to me that Fabian was hitting the same spot on the neck of the male Chinese. The male Chinese then fell onto the ground. The male Chinese was still shouting "**ahhhh**..**ahhhh**..."

7.5 The male Chinese shouted very loudly. I felt scared and I actually used my feet to push my bicycle backwards while I was still on it. I wanted to distant myself further from the bus-stop. I was scared also because there were many cars passing and if they saw it, they would call for the police.

7.6 As I was moving backwards, I was still looking at what Fabian was doing. When the male Chinese was lying on the ground, I saw Fabian punched the face of the male Chinese and kick the body. By that time, I did not hear the male Chinese shouting anymore. The male Chinese was no longer moving.

7.7 The male Chinese was facing upwards while lying on the ground. As explained earlier, I saw Fabian checking through the body of the male Chinese. That was how he got the wallet and the hand-phone.

7.8 Thereafter, Fabian walked in a calm manner towards his bicycle. As Fabian was walking to his bicycle, he kept turning back to look at the bus-stop. I could see that the male Chinese at the bus-stop did not move at all. Fabian picked up his bicycle and cycled towards me. Before Fabian reached me, I already turned around and cycled along the path towards the direction of the mosque. I cycled slowly until Fabian caught up with me. We both then stopped somewhere along the cement path near the mosque and sat down. As this point, we looked through the items that were inside the wallet taken from the male Chinese at the bus-stop. Thereafter, as mentioned in my earlier statement, we went to a coffee-shop that was closed. Also as mentioned earlier, I took the S$6/- and a SINGTEL SIM card. Both these items were placed inside my jeans pocket that time.

7.9 As we feared that the police would be around the vicinity of the bus-stop, which was also near to my house, we decided to cycle around and therefore, we headed for Aljunied MRT station. Before leaving the coffee-shop, I asked Fabian to let me keep the Nokia hand-phone. Fabian again said "**nanti**" (meaning: wait or later). Fabian then said that we should go to look for another victim to rob. I do not know the reason why he wanted to look for another victim, but I just followed. We did not cycle along Sims Avenue back to Aljunied MRT station, instead, we took another route that runs parallel behind Sims Avenue. As we did not go pass or near the bus-stop where Fabian robbed the male Chinese, I was not aware that there were ambulance and police there.

7.10 We cycled quickly to Aljunied MRT station and after reaching there, we rested at the bus-stop next to the MRT station and remained on our bicycle. There was no one around there except for some adults doing stunts with their BMX bicycle nearby. We rested at the MRT station for about 10 minutes. Then both of us cycled around the vicinity of the MRT station, including the lorongs of Geylang. However, we did not spot any potential victims.

7.11 All in all, I think we cycled around for about an hour before returning back to Aljunied MRT station. When we arrived at Aljunied MRT station, Fabian saw a male India or Bangladeshi about 30 over years old. This dark skinned person was walking along the pathway in front of Aljunied MRT station, towards the direction of Kallang. We cycled near to this person and followed him, but in the end, there was no opportunity to rob him, so we decided to choose another victim. From there, we again cycled around the vicinity of

Geylang to spot for potential victims to rob. We cycled continuously for a long time around Geylang and rested on several occasions but could not find anybody to rob.

(d) Ellarry's 3rd s 121(1) statement:

Question 10: **Following from paragraph 7.11 of your statement dated 11 September 2008, can you relate the events that took place after that?**

Ans: After cycling around the vicinity of Geylang, both of us ended up in one of the lorongs of Geylang. I cannot remember which lorong was in, but I know that it was near Aljunied MRT station. From where I was, I could also see the MRT track. There were some make-shift tents either blue and white or blue and red in colour along the side of the lorong. There were also some chairs there and these shops were already closed. We rested there.

10.1 As we were resting, on the opposite side of the road of Sims Avenue, I spotted a male Chinese walking towards the MRT track. He appeared to be walking towards the direction of one of the opposite lorongs that run beneath the MRT track. Fabian also saw this male Chinese as he said "**Itu ada orang. Macam mana**" (meaning: how, there's someone there). I replied "bah, boleh, bah" (meaning: can. The word 'bah' is an expression as explained by the accused that carries no meaning).

10.2 We waited until this male Chinese walked deeper into the opposite lorong before both of us cycled across Sims Avenue to follow the male Chinese. I was just cycling behind Fabian along the opposite lorong where we came across three '**bulat**' (meaning: concrete barriers) in the middle of the lorong. These were to prevent vehicles from passing through. Fabian stopped and left his bicycle on the ground near one of the 'bulat'. He alighted from his bicycle and chased the male Chinese on foot. I also stop but was about 3 to 4 metres before the 'bulat'. I remained on my bicycle and cycled in circles near the 'bulat'. I saw Fabian running up right to the back of the male Chinese and kicked the male Chinese once with his right leg on the back of said male Chinese. Fabian and the male Chinese were less than 10 metres away from me. This male Chinese fell forward and I saw Fabian kick the man while the man was on the ground. I do not know whether the man was struggling with Fabian or was he trying to get up, but I saw this male Chinese moving.

10.3 The place was dim so I was not able to see clearly certain actions of Fabian or the male Chinese. I was also at the same time looking around to make sure that no one was near-by to see what was happening. During this time, I also heard the male Chinese shouting "ahhh...ahhh" in pain many times. I do not know exactly how many times Fabian kicked and stepped on the man, but it was certainly many times.

10.4 From the time Fabian gave the first kick until he stopped kicking and stepping on the male Chinese was about 4 to 5 minutes. When the male Chinese stopped moving, I saw Fabian searching the man with his hands. Quickly, he ran back towards me. As Fabian was coming towards me, I saw the male Chinese trying to get up, but later fell back onto the ground.

10.5 When Fabian reached me, I saw him carrying a dark colour waist pouch, Fabian then opened the waist pouch and look through the things inside. I told him to do it elsewhere as I was afraid other passer-bys would have heard the commotion and come to take a look. I was also afraid the male Chinese would get up and approach us. Fabian then took only a dark coloured wallet from the pouch and left the pouch on the ground. Fabian retrieved his bicycle

and immediately, I cycled across Sims Avenue towards lorong 15 Geylang. Fabian was cycling behind me. As I was cycling away, I did turn back to look at the male Chinese and I saw him moving but unable to stand-up.

10.6 I stopped somewhere at the side in the middle of lorong 15 Geylang. There were still a few people walking pass. When no one was near us, Fabian opened up and looked into the wallet. Fabian told me that there was some money inside. I did not really notice, but either from his bag or his pocket, Fabian took out a Sony Ericsson hand-phone (recorder's note: 'Sony Ericsson' was the words said by the accused) and showed it to me. It looked silver in colour to me. Fabian was playing with the phone and he even took a picture of me with it. Fabian then said "Ada Cyber shot la" (meaning: there's a cyber shot). I also had a look at the phone and told Fabian that I wanted this phone and suggested that he take the Nokia Music Express which I had taken from the other male Chinese earlier at the bus-stop opposite lorong 37 Geylang. Again, Fabian told me to wait as he wanted to decide which phone to take.

10.7 Fabian then took out the Nokia phone either from his bag or his pocket and held both phones in each hand to compare. Fabian than spoke aloud to himself "**mana satu nak bagi kamu, yang ini cantek, yang ini pun cantek**" (meaning: which one should I take, this one nice, this one also nice). I then said to him that he could give me anyone of those two. He thought about it and a short while later, he gave me the NokiaMusix Express. I kept this phone in my pocket.

10.8 Thereafter, I decided to sell my own hand-phone and use the Nokia Music Express. My own hand-phone was a Nokia 3110. Fabian also agree. From there, we headed further into the lorong and there was a 2nd hand hand-phone shop round the corner which was still open. A male Chinese attended to me at the shop and I sold my Nokia 3110 for S$70.00/-.

10.9 After that, both of us cycled to lorong 25 Geylang and sat at a 24-hour coffee-shop. There were many other customers there. Fabian took out the wallet and counted the money inside. At the same time, I handed over the S$70.00/- to Fabian. I handed over the money to him because the Nokia 3110 was also stolen from a drunkard about 2 months ago near Eunos MRT station. Fabian then took out all the money from the wallet of the 2nd male Chinese that we robbed and place the money on the coffee-shop table, including the S$70.00/- for selling the phone.

10.10 Fabian then distributed the money evenly between the both of us, meaning if there were two pieces of S$50.00/- , he would take one and I would take one. Altogether, I received about S$120.00/-. If I recall correctly, I received about one S$50.00/-, four pieces of S$10.00/-, four pieces of S$5.00/- and five pieces of S$2.00/-. We both then ordered beer. Altogether we bought about 6 bottles of Tiger beer. We both took turns to pay for the beer and the money used to pay for the beer was from the robbery we committed. While drinking, Fabian again looked through the wallet. I do not know what else was there inside as I did not see.

10.11 We drank till about sometime after 6.00am. I could remember this time because there was a clock in the coffee-shop. Thereafter, I suggested that we go look for prostitute. Fabian agreed. From the coffee-shop we walked to lorong 24 Geylang. We left the bicycle at the coffee-shop. At lorong 24 Geylang, each of us engaged the services of an Indonesian prostitute. I paid the prostitute S$25.00/- for the services. Both of us then walked back to the coffee-shop and retrieved our bicycle. As Fabian stayed somewhere in Joo Chiat, we

both cycled together along Sims Avenue. When I arrived home, it was about 7.00am.

(e) Ellarry's 4th s 121(1) statement:

Question 15: Who decided to rob this male Chinese at the bus-stop?

Ans: I was the one who alerted Fabian about the male Chinese who was sitting at the bus-stop. I was also the one who said to '**Check**' (recorder's note: this word was used by the accused) the male Chinese. This word 'Check' is frequently used between Fabian and myself. When the word 'check' is used, we meant to proceed to take a closer look at the intended victim and later to decide whether to rob the intended target or not. So for the male Chinese at the bus-stop, Fabian was the one who first suggested that I go and rob the male Chinese. However, I was scared as there were a lot of cars passing by. Fabian just went forward and robbed the male Chinese himself.

Question 16: Following from your answer to question 15, since there was no one who actually decided to rob, how would Fabian or yourself know what to do or where to position yourself?

Ans: It was my own spontaneous action to follow from behind and observe what Fabian was doing to the male Chinese at the bus-stop. It was also a natural reaction for me to act as the look-out and alert Fabian if anyone was coming or any vehicle stopping to see what was happening at the bus-stop.

Question 17: In your statements, it appears to me that Fabian decides what items are shared with you from each robbery and it also appears to me that he is the one making the decisions. What do you have to say to this?

Ans: For these two robberies that I have described in my statements, Fabian was the one who committed the robbery as he was the one who confronted the victims. I acted as the look-out. That is the reason why I left it to Fabian to decide who should take what items taken from the victims. There were times that I was the one who committed the robberies while Fabian acted as the look-out. After getting what I could from the victims, I would still hand it over to Fabian who will then decide what my share would be.

17.1 I never committed robberies until I became friends with Fabian. He was the one who introduced me to robbery. That is also the reason why I kind of became his follower and let him decide.

Question 18: **You mentioned in your statement (para 7.3 – dated 11 Sept 2008) that the piece of wood was picked up at the vicinity of Paya Lebar MRT station the night before the incident. What was the purpose of picking up and keeping this piece of wood?**

Ans: That night, we picked up the wood because we had the intention to rob. The piece of wood was to be used as a weapon to hit the victims to cause the victim to fall. Once they fall, it would be easier to search and take their belongings. If we do not make the victim fall and just approached them to rob, the victims might retaliate. So we strike first.

18.1. Before we picked up the piece of wood to commit robberies, both of us only used our hands and legs to make the victim fall. It was that night that Fabian suggested to use a

piece of wood so that the victims would fall easier.

Question 19: **Apart from the robberies that you committed together with Fabian in the morning of 23 August 2008, how many other robberies have you committed together with Fabian and where were they committed?**

Ans: About 8 or 9 times. Places we robbed were usually at the vicinity of Eunos, Paya Lebar and Aljunied MRT Station; Geylang Serai and Tanjong Katong area. I have never done any robberies without Fabian being around. We did have one or two others who joined us in some of the robberies.

...

Question 23: **How do you go about planning such robberies with Fabian?**

Ans: It was not always planned. Sometimes during a drinking session, Fabian and I would talk about wanting to commit robbery and decide which location to wait for intended victims. We do not plan who should strike the victim or who should act as the look-out. We only plan the place to rob. The rest just happens naturally when committing the robberies.

Question 24: **How do you target your victims?**

Ans: As this is Singapore, we tend not to rob Singaporeans. The better choice would be to rob other nationalities. I am not able to give an answer as to why, but I just prefer robbing foreigners. As for the male Chinese at the bus-stop, he was holding a good hand-phone that is why we robbed him. Sometimes we also see how thick the wallet is. The thicker the wallet the victim has, the more possibility of me robbing him. I do not target ladies as they scream very loud and will definitely attract people nearby. The size of the victim also cannot be big so that we can overpower them easily.

Fabian's statements

18 A total of six statements from Fabian were admitted in evidence as part of the Prosecution's case:

(a) Statement recorded by SSI Razali Bin Razak on 7 September 2008 at about 8.55pm. [note: 17]

(b) Section 122(6) statement recorded by Inspector Kwok Charn Kong on 8 September 2008 at about 5.10pm ("Fabian's s 122(6) statement"). [note: 18]

(c) Section 121(1) statement recorded by ASP Steven Wee Chee Keong on 11 September 2008 at about 3.45pm ("Fabian's 1st s 121(1) statement"). [note: 19]

(d) Section 121(1) statement recorded by ASP Steven Wee Chee Keong on 12 September 2008 at about 2.45pm ("Fabian's 2nd s 121(1) statement"). [note: 20]

(e) Section 121(1) statement recorded by ASP Steven Wee Chee Keong on 15 September 2008 at about 10.45am ("Fabian's 3rd s 121(1) statement"). [note: 21]

(f) Section 121(1) statement recorded by ASP Steven Wee Chee Keong on 15 September 2008 at about 4.50pm ("Fabian's 4th s 121(1) statement"). [note: 22]

19 The material portions of Fabian's statements are reproduced below:

(a) Fabian's s 122(6) statement:

When the incident happened, I was there. I remembered the man was hit by me on twice on the head with an old wooden wood. After I hit him, he scream. After that, he fell flat on the ground. When he is laying on the ground, I took his handphone and his wallet. The man turned left and then turned right. At that time, we were walking away. While we were walking away, we turned around and saw him sitting down and his hands were holding his head and he was looking around. That was the last we saw him. When we left him, he was still alive.

(b) Fabian's 1st s 121(1) statement:

Question 2: **On Saturday, 23 August 2008 at about 3.53am, Police was informed of a case whereby a male subject was found lying in blood at a bus-stop along Sims Avenue, opposite Lorong 39 Geylang. The said subject was conveyed to the hospital, but he subsequently passed away. What do you know about the facts of this case in detail?**

Ans: Yes, I was the one who did it. I was with Ellarry that morning. I think it was about 3.00am or maybe 2.00am. At that time, Ellarry and I were sitting and talking outside his house along Sims Avenue, near to Lorong 37 Geylang. I stood up and walked a few steps to my left. I saw a man sitting on a seat at the bus-stop. The bus-stop is about 30 to 40 metres away from Ellarry's house.

2.1 I turned to Ellarry and asked him: "Ini macam mana?" (means "This one how" in English). Ellarry replied" "Tengok dulu" (means "See first" in English). When I asked Ellarry "Ini macam mana?", I meant to ask him whether we should rob the man at the bus-stop. Ellarry and I then rode our bicycles towards the bus-stop. Almost reaching the bus-stop, Ellarry cycled slightly ahead of me. I cycled behind him.

2.2. Ellarry cycled behind the bus-stop, followed by me. I saw the man at the bus-stop was a Chinese. He was wearing long trousers, but I cannot remember if it was pants or jeans. I also cannot remember the colour. I do not remember what top he was wearing. The man was pressing his handphone in his hand. The handphone was blue and black in colour. He also had an earpiece in his ears.

2.3 When I cycled past the man, his back was facing me. I was about 2 metres away from him, when I stopped my bicycle. I turned to the right to look at the man. He was also looking at me. Ellarry was about 2 steps away from me. He also stopped cycling and looked at me. I walked nearer to Ellarry and told him: "Dia ada telefon" (means "He has a telephone"

in English). Ellarry said" "Cantik telefon dia tu" (means "His telephone is beautiful" in English).

2.4. I then leaned my bicycle on the fence and walked back to the bus-stop. Ellarry stood there with his bicycle. I walked behind the bus-stop, but I do not think that the man saw me. I then approached him from behind. I used my left hand to pull his shirt near his right shoulder. He tried to stand up and I hit the rear right side of his head with a wooden object in my right hand [Recorder's note: At this juncture, I asked the accused through the interpreter to sketch the wooden object on a plain sheet of paper, which he did].

2.5 The man shouted and stood up, and tried to run away. I was still pulling his shirt at that time. I then pulled him to the back of the bus-stop where there is a pedestrian pavement. I let go of my grip on his shirt and hit the back of his head with the same wooden object, which broke. The man shouted. I pushed his chest and used my left leg to trip him. He fell onto the pavement and laid face-up. I kicked him 2 or 3 times near his left upper arm. He continued to shout. After I stepped on his chest once, he stopped shouting, but I saw his eyes were still opened.

2.6 At this time, I took the handphone from his right hand. I then *checked* his trousers pocket and I took a black wallet. I think it was from his front pocket. I then walked to my bicycle. As I walked away from the bus-stop, I turned around to look at the man. He was still lying on the pavement. He was holding onto his head and his body was turning left and right. When I reached my bicycle, I saw Ellarry had started to cycle off. I got onto my bicycle and cycled behind him.

2.7 Ellarry and I cycled straight on the same side of the road and later turned left into a small lane. We stopped in front of a mosque. We then *checked* the wallet. Inside the wallet, there was cash of S$6/- (3 pieces of S$2/- note), one Ezlink card, one red Singapore IC, two bank cards, one Singtel SIM card, and some papers. The bank cards are from *UOB* and *POSBank*. I also looked at the photo on the Singapore IC, and it is the man that I robbed at the bus-stop.

2.8 I only took the cash, Ezlink card and the Singtel SIM card, and left the rest of the things in the wallet. I threw the wallet on the pavement of this small lane. I gave the cash of S$6/- and the Singtel SIM card to Ellarry, while I kept the Ezlink card for myself. We then cycled about 5 minutes and reached a coffee shop near the condominium. The coffeeshop was already closed. Ellarry and I then sat on the ground outside the coffeeshop.

2.9. Ellarry asked me about the handphone. I took out the handphone and *checked*. It was black and blue Nokia handphone. I saw the words "*Express Music*" on the phone (Recorder's note: The accused said the words "*Express Music*" but did not know how to spell. He also demonstrated with his right hand fingers, indicating that it was a slide phone). At this time, the handphone rang. I answered the call but I kept quiet. I heard a man's voice saying "*hello*" and I immediately switched off the phone. As I did not want anymore calls, I took out the SIM card from the handphone, and replaced it with my SIM card. I then switched on the handphone and checked what was stored inside. Ellarry then asked me to give the handphone to him, but I told him to wait. I then told him we would find some more victims to rob later.

2.10 After about 10 minutes, we left the coffeeshop and cycled towards Aljunied MRT station. We wanted to look for more victims to rob, but did not manage to find anyone. We continued to cycle to somewhere beneath the MRT track near Lorong 21 Geylang, where

Ellarry and I robbed another Chinese man. After this second robbery, I gave Ellarry the blue and black handphone earlier robbed from the man at the bus-stop.

(c) Fabian's 2nd s 121(1) statement:

Question 5: **Can you now relate in details on the events leading to the commission of the robbery on the man at the bus-stop along Sims Avenue, opposite Lorong 39 Geylang in the morning of 23 August 2008?**

Ans: On 22 August 2008 at about 10pm or 10.30pm, Ellarry contacted me. I cannot remember if he telephoned or SMSed me. He wanted to see me but I cannot really remember what our conversation or SMS was about. Maybe he had said he wanted to rob. At that time, I was at home. I was then staying at my company's workers' quarters in Joo Chiat. There is a pub at the ground floor of the building. About 2 weeks before my arrest, I started to stay at 101 Pioneer Road. My company moved me there.

5.1 I replied to Ellarry that I would meet him at his house and when I arrive, I would call him. After about 15 minutes later, I left home. I wore a round-neck black T-shirt. There are 3 rectangles with designs at the front of my T-shirt. I either wore a pair of blue jeans or a pair of brown knee-length shorts. I put on a pair of white slippers. I also carried a grey cloth bag containing a wooden object. One end of the wooden object stuck out of my bag. I used some newspapers to wrap that end, so that it would not be seen.

Question 6: **You mentioned in para 2.10 of your statement recorded on 11 Sep 2008 that after the robbery at the bus-stop along Sims Avenue, Ellarry and you committed another robbery somewhere near Lorong 21 Geylang. Can you relate in details what happened?**

Ans: From the coffeeshop, we cycled towards Aljunied MRT station. After passing the Aljunied MRT station, we continued to cycle to somewhere near Lorong 21 Geylang. There, I saw a Chinese man. He was crossing the road from Lorong 21 Geylang, and walking into a small road towards some blocks of flat. I could see that he was pressing his handphone. He was also carrying a plastic bag. I asked Ellarry: "Yang ini macam mana?" [means "How about this one??" in English]. I meant to ask Ellarry if we should rob that Chinese man. I cannot remember if Ellarry replied, but he just followed me when I cycled across the road.

6.1 Ellarry and I then cycled in the direction of the Chinese man. He was still walking along that small road leading to a dead end. There is an overhead MRT track near the end of this road. After crossing the road, Ellarry and I continued to cycle along the small road. As the man walked beneath the MRT track, I put down the bicycle. I was about 10 metres away from him. Ellarry stood with his bicycle near where my bicycle was.

6.2 I then ran towards the man and when I reached him, I jumped and kicked him on his back (Recorder's note: Accused pointed somewhere between his shoulder blades). The man fell onto the *cement*, and landed on his right. From sideways, he turned his boy and faced up. He raised one leg and tried to fight back. I pushed his leg away and kicked his head 2 or 3 times. After a while, his body stopped moving, I think he fainted.

6.3 I then took his handphone which has slipped onto the ground. It was a "*Sony Ericsson*" handphone [Recorder's note: The accused mentioned the words "*Sony Ericsson*" but he did not know how to spell]. It is either a white or blue handphone or a white and

green handphone. I think the model is *C702* because I had seen the same model at a handphone shop in Boon Lay sometime after I had shifted to Pioneer Road.

6.4 I took his *wallet* from his bag around his waist. It was a black *wallet*. I then turned and walked back towards Ellarry's direction. At that time, he was still standing with our bicycles. Ellarry started to walk towards me when we were about 10 metres apart. As I stepped back onto the small road, I *checked* the *wallet* and took out 1 Ezlink card and cash of S$70/-. Ellarry saw me taking out the items from the wallet. There were pieces of S$10/- and S$5/- notes, but I do not remember the exact number. I did not take out the rest of the things inside the *wallet*. There were a *POSBank* card, *My Bank* card, a green work permit and some papers. I saw the photo in the work permit. It was the same man I robbed.

6.5 I placed the *wallet* by the side of that small road. Ellarry and I then cycled back to Lorong 21 Geylang. Along that journey, I gave Ellarry the black and blue Nokia "*Express Music*" handphone [Recorder's note: The accused said the words "*Express Music*" but he could not spell]. We then went to a restaurant at Lorong 25 Geylang where I gave Ellarry S$35/-. There, we had beer till about 5.30am or 6am. We then cycled to Ellarry's house.

6.6 It was almost daybreak when we reached Ellarry's house. Outside his house, I saw a police car parked in front of the bus-stop, where Ellarry and I earlier robbed the Chinese man. I did not want to pass the police car at the bus-stop. To avoid the police, I cycled to my workplace in Eunos using another road behind Ellarry's house.

(d) Fabian's 3rd s 121(1) statement:

Question 9: **You stated at paragraph 2.4 of your statement recorded by me on 11 Sept 2008 the following: "He tried to stand up and I hit the rear right side of his head with a wooden object in my right hand". Where did you get that "wooden object" from?**

Ans: In the night of 21 August 2008, I was with Ellarry near Paya Lebar MRT station. We came across a tentage area opposite that MRT station. I know it is meant for Hari Raya Bazaar. There, I found quite a long piece of wood and we broke it into two. I cannot remember whether it was Ellarry or me who broke. Each of us had about 1½ feet of the wood. The wood was to be used to hit the victims. We looked around for victims to rob in that area, but did not find any. We then went home.

Question 10: Is the piece 1½ feet wood you described in your answer to Question 9 the same as the "wooden object" you had stated in your statement recorded on 11 Sep 2008?

Ans: Same.

Question 11: **Where did you retrieve the "wooden object" from before you hit that Chinese man's head at the bus-stop?**

Ans: It was from the grey cloth bag that I was carrying. It is the same bag that the police had taken.

Question 12: **At paragraph 2.4 of your statement recorded on 11 Sep 2008, I had invited you to sketch the "wooden object" you used to hit that Chinese man at the**

bus-stop in the morning of 23 August 2008. Can you describe this "wooden object" in greater details?

Ans: The length is about 1½ feet. It is about 2 inches wide. The thickness is about 1½ inches.

Question 13: **You mentioned at paragraph 2.5 of your statement recorded on 11 Sep 2008 that the "wooden object" broke after to hit that Chinese man's head while at the pavement behind the bus-stop. How many pieces did the "wooden object" break into?**

Ans: I cannot remember. When the wood broke, the end that hit the man's head fell off near where the man was standing. I was still holding the other end of the wood in my right hand. I then threw the wood away around the same area.

Question 14: **How many times in all did you hit the Chinese man's head with the "wooden object"?**

Ans: 2 or 3 times.

Question 15: **Did you hit the same spot on that man's head all that 2 to 3 times?**

Ans: I am not sure, but I did not hit the front of his head, I only hit the back and top of his head.

Question 16: **Did you hit any other parts of that Chinese man's body using the "wooden object"?**

Ans: No.

Question 17: **Why did you only hit that Chinese man's head and not other parts of his body with the "wooden object"?**

Ans: So that he would fall and faint faster.

Question 18: **How hard did you hit that Chinese man with the "wooden object"?**

Ans: I just used half of my energy to swing the wood at that man's head, so that he would not be hurt badly.

Question 19: **You also stated at paragraph 2.5 of your statement recorded on 11 Sep 2008 that you kicked the Chinese man's left upper arm and stepped on his chest. How many times altogether did you do that?**

Ans: I kicked his left upper arm 2 to 3 times. I stepped on his chest once.

Question 20: **How long did it take from the time you first hit that Chinese man's head with your "wooden object" until you stopped hurting him?**

Ans: I estimate it was within 40 seconds.

Question 21: What was the condition of that Chinese man when you walked away from the

bus-stop after you took his handphone and wallet?

Ans: He was lying on the path where people walk. His body was turning left and right, and his hands were holding his head. Maybe he was trying to sit up.

Question 22: **Why did you stop hurting that Chinese man after you stepped onto his chest?**

Ans: He was already holding the back of his head, and turning his body left and right. He was already weak at that time, and so I stopped hurting him.

Question 23: **Why did Ellarry and you choose to rob that particular Chinese man at the bus-stop?**

Ans: Because we could not find anyone before that. This man was sitting there alone. He was easy to rob. He is small-sized. At that time, it was already late and he was the only one there. So we did it on him.

Question 24: **Did Ellarry cause any bodily hurt to that Chinese man in any way?**

Ans: No.

Question 25: **What was Ellarry's role when you robbed that Chinese man?**

Ans: He was just stood at his bicycle. He was supposed to help me hold onto the man. He did not help me, maybe because he saw that the man had already fallen.

Question 26: **What was the plan between Ellarry and you on robbing that Chinese man?**

Ans: For this case, there was no plan. Ellarry and I did other robberies before. Most of the time, I would be the one to do it. If the victim did not fall or faint, Ellarry would then help. Sometimes, Ellarry would be the one to do it. I would help him in the same way. Sometimes, we discuss on what to do if the victim does not faint but usually the decision on who to do it is made just before we rob. At times, we do not even decide who to do it. When we decide to rob a victim, one of us would just do it while the other would be looking out for people or police. We understand each other, so there was no discussion for the bus-stop robbery.

...

Question 32: **Following on from paragraph 5.1 of your statement recorded on 12 Sep 2008, why did you bring the "wooden object" in your bag before you left home to meet Ellarry?**

Ans: To hit people during robbery.

Question 33: **Why did you cover with newspapers one end of the "wooden object" that stuck out of your bag?**

Ans: So that it would not be seen that it was wood. I am afraid that people might think I want to hit someone with that wood.

Question 34: **Other than the newspapers, did you use any other thing to wrap up the wood?**

Ans: Only newspapers.

(e) Fabian's 4th s 121(1) statement:

Question 47: **Other than the two robberies you committed with Ellarry in the morning of 23 Aug 2008, did you two commit any other robberies together?**

Ans: I think there should be another 4 or 3. We started to rob together in June or July this year.

Question 48: **When was the last robbery you committed together with Ellarry?**

Ans: The robberies on 23 Aug 2008 were our last two, because I had moved on 24 Aug 2008, which was a Sunday. Since I had moved, I had told myself that I would not do it again.

Question 49: **What would Ellarry and you look out for before robbing the victims?**

Ans: We would see if they have a handphone, but sometimes we do not choose. If we think they have a handphone and money, we would rob them. If not, we would not rob.

Question 50: **How would Ellarry and you rob your victims?**

Ans: Usually, we do not use wood. Sometimes, we would approach the victims from behind by kicking their back to make them fall. Sometimes, we approach them from the front and punch their neck area. We always try to make that our victims faint, so that it would be easier to take their things.

Question 51: **Do you have anything else to add in this statement?**

Ans: Most of the time, it was Ellarry who suggested we rob. I just followed him to beat people up and take their things. When we robbed the Chinese man at the bus-stop, we did not plan to cause his death. We have no intention to kill him. We only wanted to take his things.

Case for the Prosecution

Fabian – s 300(c) murder

20 The Prosecution's case against Fabian rests on s 300(*c*) of the Penal Code (Cap 224, 2008 Rev Ed) which stipulates that:

> Except in the cases hereinafter excepted culpable homicide is murder —
>
> ...
>
> (*c*) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death...

21 The Prosecution submitted that it had discharged the burden of proving beyond reasonable doubt that Fabian had committed the offence of murder under s 300(*c*) of the Penal Code.

Ellarry – s 34 common intention

22 The Prosecution's case against Ellarry rests on s 34 of the Penal Code, which stipulates that:

> When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

23 The Prosecution submitted that there wass enough evidence to show that Ellarry shared a common intention with Fabian to inflict a s 300(*c*) injury on the deceased in order to rob him.

24 At the third tranche of the trial on 18 April 2011, the Prosecution made an application under s 399 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) for the court to allow the two accused persons to be further cross-examined in light of the decision in *Daniel Vijay s/o Katherasan and others v Public Prosecutor* [2010] 4 SLR 1119 ("*Daniel Vijay*"), a case concerning s 34 common intention.

25 The Prosecution submitted that because the cross-examination of the two accused persons took place before the decision in *Daniel Vijay* was released, further cross-examination of the two accused persons was necessary for a just decision of the case in relation to Ellarry. The Defence objected to the Prosecution's application, stating that the accused persons would suffer prejudice and that the Prosecution was trying to have "two bites of the cherry".

26 Section 399 of the Criminal Procedure Code stipulates that:

> **Power of court to summon and examine persons**
>
> 399. Any court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness or examine any person in attendance, though not summoned as a witness or recall and re-examine any person already examined and the court shall summon and examine or recall and re-examine any such person, if his evidence appears to it essential to the just decision of the case.

27 Upon a careful consideration of the circumstances, I did not allow the application made by the Prosecution. In my view, further cross-examination of the two accused persons was not essential to a just determination of the case. The Prosecution had had ample opportunity to cross-examine both accused persons, and had in fact cross-examined them at length, in relation to (a) the extent of their participation in the criminal acts in question and (b) their states of mind, including their intentions at the material time.

28 I did not think it was fair to recall the accused persons some nine months after they completed giving their evidence and to allow them to be cross-examined again by the Prosecution on their states of mind at the material time. In my view, the cross-examination would be repetitive and cover largely the same ground. As it was not likely to add substantially to the evidence that was already before the court, I dismissed the Prosecution's application.

Case for the Defence

Fabian – s 300(c) murder

29 The Defence conceded that Fabian intended to rob the deceased. However, it was emphasised that he had only hit the deceased to facilitate the robbery, and that the killing was neither premeditated nor intentional.

30 The Defence insisted that Fabian did not strike the deceased without warning. According to the Defence, Fabian had confronted the deceased and demanded his hand phone. Fabian was holding the piece of wood for the purpose of intimidating the deceased into handing over his hand phone and only struck the deceased when the deceased failed to surrender his hand phone and began to shout and struggle.

31 Thus, the Defence submitted that when Fabian struck the deceased, he did not have the *mens rea* for an offence under s 300 of the Penal Code.

32 Indeed, the Defence contended, on the authority of *Public Prosecutor v AFR* [2010] SGHC 82 ("*AFR*"), that there must be a subjective inquiry into the question of intention, *ie*, whether Fabian had the intention to cause the bodily injury that was actually found to be present on the deceased. The Defence further suggested that Fabian's profile (age, education and intelligence) should be taken into account in determining whether he could have formed the requisite intention.

Defence of diminished responsibility

33 The Defence also urged me to consider whether the defence of diminished responsibility was made out on the facts. The Defence relied principally on (a) the evidence of their expert witness Dr Tommy Tan, who opined that the defence of diminished responsibility may not be wholly excluded; and (b) the fact that Fabian is of below average intelligence (with an intelligence quotient ("IQ") in the range 77-85 on the Wechsler Adult Intelligence Scale ("WAIS")), has a very low education level and was only 18 years old at the time of the offence. In the circumstances, the defence contended that Fabian should be entitled to the defence of diminished responsibility.

Causation

34 The Defence further submitted that it was possible that the injuries which caused the deceased's death may have been caused when he fell onto the pavement *after* being hit on the head with the wooden stick.

Ellarry – s 34 common intention

35 The Defence submitted that Ellarry and Fabian lacked a common intention to commit s 300(*c*) murder for the following reasons:

(a) the robberies prior to 23 August 2008 committed by the two accused persons did not involve the use of weapons of any kind;

(b) while Fabian had used his half of the wooden stick to hit the deceased, Ellarry had discarded his half of the wooden stick on 21 August 2008;

(c) there was no plan to rob the deceased;

(d) Ellarry did not cause the deceased any bodily hurt nor did he restrain the deceased while Fabian hit him;

(e) Ellarry was shocked when he saw Fabian using the piece of wood to hit the deceased;

(f) Ellarry had stated in his s 122(6) statement that his intention was only to rob and that he did not expect Fabian to cause the death of the deceased.

36 The Defence submitted that the only common intention the two accused persons shared was to rob the deceased.

Decision

Fabian – s 300(c) murder

The law

37 The seminal authority on the interpretation of s 300(*c*) of the Penal Code is the decision of the Supreme Court of India in *Virsa Singh v State of Punjab* AIR [1958] SC 465 ("*Virsa Singh*"). At [12] of *Virsa Singh*, the four elements of s 300(*c*) are set out:

> Firstly, [the Prosecution] must establish, quite objectively, that a bodily injury is present;
>
> Secondly, the nature of the injury must be proved; These are purely objective investigations.
>
> Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or otherwise unintentional, or that some other kind of injury was intended.
>
> Once these three elements are proved to be present, the enquiry proceeds further and,
>
> Fourthly, it must be proved that the injury of the type just described made up of the three elements above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

38 This analysis has been affirmed by the Court of Appeal in *Public Prosecutor v Lim Poh Lye* [2005] 4 SLR(R) 582 ("*Lim Poh Lye*") and most recently in *Public Prosecutor v Kho Jabing and Anor* [2011] SGCA 24 ("*Kho Jabing*").

Analysis of the evidence

39 The first two elements of the *Virsa Singh* test have been made out in the present case. The autopsy report by Dr Teo and the medical report by Dr Kim show that the deceased suffered four fractures to his skull and severe *contracoup* brain injuries (see [10] above).

40 The next (*ie*, third) element that must be proved is Fabian's "intention to inflict that particular

bodily injury, that is to say, that it was not accidental or otherwise unintentional, or that some other kind of injury was intended" (*Virsa Singh* at [12]).

41 At [16] of *Virsa Singh*, Bose J elaborated on this third element of the offence:

> The question is not whether the prisoner intended to inflict a serious injury or a trivial one but whether he intended to inflict the injury that is proved to be present. If he can show that he did not, or if the totality of the circumstances justify such an inference, then, of course, the intent the section requires is not proved. But if there is nothing beyond the injury and the fact that the appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness or intended serious consequences, is neither here nor there. The question is, so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of a particular degree of seriousness but whether he intended to inflict the injury in question; and once the existence of the injury is proved the intention to cause it will be presumed unless the evidence of the circumstances warrant an opposite conclusion.

42 In *Lim Poh Lye*, the Court of Appeal emphasised at [22] that:

> ... Whether a particular injury was accidental or unintended (for the purposes of section 300(c)) is a question of fact which has to be determined by the court in the light of the evidence adduced and taking into account all the surrounding circumstances of the case.

43 In his statements to the police, Fabian admitted to hitting the deceased on the back and top of his head so as to make him "*fall and faint faster*" (see Questions 14-18 of Fabian's 3rd s 121(1) statement, reproduced at [19] above).

44 However, at trial, Fabian claimed that he did not actually intend to hit the deceased on the head, and that his blows had just happened to land on the deceased's head. [note: 23]

45 Under cross-examination, Fabian was unable to explain the inconsistency between his oral evidence in court and the statements he gave to the police. In fact, Fabian had admitted during cross-examination that he had intended to hit the deceased on the head:

> Q: The answer to question 50. In this answer, you said:
>
> [Reads] "Usually, we do not use wood. Sometimes, we approach victims from behind by kicking their back to make them fall. Sometimes, we approach them from the front and punch their neck area."
>
> And then you say:
>
> [Reads] "We always try to make that our victims faint, so that it would be easier to take their things."
>
> This was your intention, correct?
>
> ...
>
> A: Yes.
>
> Q: And you used that piece of wood to cause the fellow to faint.
>
> A: Yes.
>
> Q: And you wanted him to faint.

A: Yes.

Q: And you wanted to hit his head, correct?

A: Yes.

46 I am of the view that Fabian did have the intention to cause the head and brain injuries that were found on the deceased. His evidence in court that the blows just happened to land on the deceased's head appeared to be a mere attempt to absolve himself of liability for murder under s 300(*c*).

47 I find it quite hard to believe that Fabian never intended to hit the deceased on the head, when in actual fact all three strikes of the wooden stick landed *nowhere else on the deceased's body* but squarely on the back and top of the deceased's head. It was clearly not a random raining of blows on the deceased's body but a targeted series of blows to the deceased's head. I am thus driven to infer that Fabian specifically intended to hit the deceased on the head using the heavy wooden stick with sufficient force so as to render the deceased unconscious. The fact that he had chosen to hit the deceased a few times *on the head* to achieve his professed aim of making the deceased "fall and faint faster", suggested that he was plainly aware that the head was a vulnerable part of the body.

48 In addition, Ellarry's oral evidence in court and his statements to the police corroborate the other evidence showing that Fabian had used the piece of wood to hit the deceased on the head with the intention of inflicting those fatal injuries to the head (see Question 18 of Ellarry's 4th s 121(1) statement, reproduced at [17] above).

49 I reject the Defence's suggestion that Fabian did not strike the deceased without warning (see [30] above). I am of the view that this was a clear case of Fabian "striking first" without any warning to catch the deceased totally by surprise so as to minimise the chances of retaliation from the deceased.

50 I also reject the Defence's argument (see [32] above) that Fabian could not have formed the subjective intention to cause the particular injuries that caused the death of the deceased. In my opinion, this argument must be rejected once the circumstances giving rise to and the manner of the attack are *also* taken into consideration. I cannot ignore the evidence that Fabian hit the deceased on the back and top of the head a few times with a heavy wooden stick with considerable force to cause him to fall and faint so that the deceased's valuables could be taken away easily. At 18 years of age and despite his low average IQ and his low educational level, I find that he knew exactly what he was doing at that time and that he fully understood why he had to hit the deceased on the head to achieve their common purpose. No complex reasoning or high IQ is needed for a simple realisation of the kind of consequences that would naturally follow from inflicting multiple heavy blows to the head. Even after giving due consideration to his young age, his low educational level and low average IQ, I believe that it is not beyond Fabian's knowledge and comprehension that using a heavy wooden stick to hit the deceased's head several times with such force as he did would result in severe internal injuries to the head that might well be fatal. I have no difficulty in concluding that Fabian is sufficiently mature and he is intellectually capable of and had indeed formed the subjective intention at the material time to inflict the head injuries that eventually caused or resulted in the death of the deceased. Fabian had a clear purpose in mind *ie* to make the deceased "fall and faint" and he carried out that purpose in a cold-blooded manner.

51 In *AFR* at [32] to [37], the High Court drew a distinction between injuries which were "ordinary

and natural consequences" of the accused person's acts and thus "well within the contemplation of any normal person" and those which were not.

52 For the first category of injuries, the law would, in the absence of evidence that would indicate to the contrary, "infer an intention ... to cause the fatal injuries as such injuries would be the ordinary and natural consequences of that act and well within the contemplation of any normal person" (see *AFR* at [36]). This was the category of injuries which caused the deaths of the deceased persons in the cases of *Public Prosecutor v Visuvanathan* [1977-78] SLR(R) 27 ("*Visuvanathan*"), *Tan Joo Cheng v Public Prosecutor* [1992] 1 SLR(R) 219 ("*Tan Joo Cheng*"), *Tan Cheow Bock v Public Prosecutor* [1991] 2 SLR(R) 608 ("*Tan Cheow Bock*"), *Tan Chee Wee v Public Prosecutor* [2004] 1 SLR(R) 479 ("*Tan Chee Wee*") and *Lim Poh Lye*.

53 At [36] of *AFR*, Lee Seiu Kin J explained that:

> In *Visuvanathan*, *Tan Joo Cheng*, *Tan Cheow Bock*, and *Lim Poh Lye*, the accused persons there had stabbed the deceased persons with knives. The stab wounds were also in particularly vulnerable parts of the body; in *Visuvanathan* it was aimed at the heart region of the chest, in *Tan Joo Cheng* it was at the neck. Or they were particularly deep as in *Tan Cheow Bock* and *Lim Poh Lye*. In the latter, it was deep enough to cut the femoral vein in the leg. In *Tan Chee Wee*, multiple blows with a hammer were visited upon the head of the deceased and one of those caused a large crack in the skull ... There is no question that in such circumstances, unless the appellants could produce the evidence to the contrary, the inference would be that those fatal injuries were intended to be inflicted on the victims as they would be the clear outcome of such actions. The situations in these cases accord with everyday human experiences and conform with the words of Bose J in *Virsa Singh* where he said (at [11]) that the analysis should be "broad-based and simple and based on commonsense: the kind of inquiry that "twelve good men and true" could readily appreciate and understand."

54 This justifies the apparently "strict" approach towards s 300(*c*) in the cases of *Visuvanathan*, *Tan Joo Cheng*, *Tan Cheow Bock*, *Lim Poh Lye*, *Tan Chee Wee* (see Annual Review of Singapore Cases 2010 (Teo Keang Sood, ed) (Academy Publishing, 2011) ("*Annual Review of Singapore Cases 2010*") at para 12.80).

55 As for the second category of injuries, the law should not draw the inference that the mere presence of such injuries means that the accused person must have intended to cause them. When the injuries that actually resulted in death are not within the "ordinary and natural consequences" of the accused person's acts, the accused person would not ordinarily be imputed with the knowledge that, by carrying out such acts, he would cause those fatal injuries in question because such knowledge would not be "within the contemplation of a normal person". As such, in the absence of any credible evidence proving to the contrary, an inference that the accused person intended to cause such unexpected and unusual fatal injuries through his criminal acts should not be drawn.

56 In *AFR*, a father had caused the death of his 1 year and 11 month old daughter when he struck her repeatedly with his fist and feet. Lee J observed that, in the circumstances of the case, "[e]ven an experienced pathologist with expert training could not be certain as to how it had happened in this case" (*AFR* at [37]). Given the highly unusual nature of the fatal injury *ie* the rupture to the young child's inferior vena cava ("IVC"), Lee J could not infer from the mere presence of the injury that the accused had the intention to cause that particular fatal injury (although it could only have been factually caused by the accused's actions). In Lee J's view, the accused person, a poorly educated young man with at best average (but more likely below average) intelligence, could not reasonably have known or foreseen that the beating that he was unleashing on the deceased could have caused

the unusual and unexpected fatal rupture to the IVC.

57 In the present case, the injuries found on the deceased were those in the first category – it is clearly well within the contemplation of a normal person that striking someone on the head a few times with a heavy wooden stick so as to render that person unconscious would likely cause skull fractures and severe brain injuries. Although Fabian has a low IQ, he must have known the consequences of his actions. Indeed he had *intended* those very consequences to happen as his stated objective was to make the deceased "fall and faint faster". Such injuries were thus the "ordinary and natural consequences" of Fabian's acts.

58 In the absence of evidence to the contrary, the very presence of the injuries found on the deceased allows me to draw an inference that Fabian intended to cause those head and brain injuries. Based on Fabian's admissions to the police, his evidence in court that he wanted to hit the deceased on the head to make him "fall and faint faster" and Ellarry's statements to the police that Fabian had suggested using the "piece of wood so that the victims would fall easier", I find beyond a reasonable doubt that the Fabian intended to cause the head and brain injuries found on the deceased.

59 The last (*ie*, fourth) element to be proved is that the injuries found on the deceased were sufficient to cause his death in the ordinary course of nature. Dr Teo testified unequivocally that the head and brain injuries inflicted by Fabian were sufficient in the ordinary course of nature to cause the death of the deceased. Dr Teo was of the opinion that the degree of force used by Fabian to hit the deceased's head must have been very severe (and see [10] above). [note: 24]

60 The Defence has merely speculated that the injuries were not sufficient in the ordinary course of nature to cause death, without adducing any evidence of the same. In the circumstances, I am of the view that the Prosecution has established that the deceased's head and brain injuries were sufficient in the ordinary course of nature to cause death.

61 Given that all the elements of the *Virsa Singh* test are satisfied, Fabian will be convicted of s 300(*c*) murder unless the Defence can prove that any defences apply in Fabian's case.

Defence of diminished responsibility

62 Exception 7 to s 300 of the Penal Code stipulates that:

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

63 In *Ong Pang Siew v Public Prosecutor* [2011] SGCA 37 ("*Ong Pang Siew*"), the Court of Appeal stated (at [58]) the criteria for establishing the defence of diminished responsibility:

> It is trite law that the appellant bears the burden of proving the defence of diminished responsibility on a balance of probabilities: see *Chua Hwa Soon Jimmy v PP* [1998] 1 SLR(R) 601 (at [8]) ("*Jimmy Chua*"). In *Took Leng How v PP* [2006] 2 SLR(R) 70, this court reiterated (at [46]) the three-limb test which an accused has to satisfy to establish the defence of diminished responsibility:
>
> (a) the accused was suffering from an abnormality of mind at the time he caused the victim's death;

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

(c) the abnormality of mind substantially impaired the accused's mental responsibility for his acts and omissions in causing the death.

64 The definition of an "abnormality of mind" is laid out in the case of *R v Byrne* [1960] 2 QB 396 at 403:

> 'Abnormality of mind' ... means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment as to whether an act is right or wrong, but also the ability to exercise will power to control physical acts in accordance with that rational judgment.

This judicial elaboration of "abnormality of mind" has been cited by our Court of Appeal in *Zailani bin Ahmad v Public Prosecutor* [2005] 1 SLR(R) 356 ("*Zailani bin Ahmad*") at 374 and *Took Leng How v Public Prosecutor* [2006] 2 SLR(R) 70 ("*Took Leng How*") at 86.

65 The Defence adduced no evidence to prove on a balance of probabilities that Fabian was suffering from an abnormality of mind at the time he caused the death of the deceased. Initially, Defence witness, Dr Tommy Tan, speculated that Fabian might have mild mental retardation but he required an IQ assessment to confirm this finding. [note: 25] Subsequently Ms Koo Shen Lin ("Ms Koo") administered the WAIS test on Fabian and found his full scale IQ to be in the low average range (77-85). [note: 26] Based on Ms Koo's finding, Dr Tommy Tan concluded that Fabian did not suffer from mental retardation and as such would probably not qualify for the defence of diminished responsibility. [note: 27]

66 In the present case, Fabian cannot even cross the first hurdle of *Ong Pang Siew*'s three-limb test, as the Defence failed to show that Fabian was suffering from an abnormality of mind at the time he caused the death of the deceased. Indeed, the objective evidence leads me to the conclusion that Fabian fully understood the nature of his actions and made a rational decision to use the wooden stick to hit the deceased on the head to render him unconscious in order to facilitate the robbery. After the deceased was incapacitated, Fabian searched the deceased's pockets for his hand phone and wallet. Fabian and Ellarry then split the loot between them. In my view, Fabian was clearly not suffering from any abnormality of the mind at the time he caused the death of the deceased. The chain of events before, during and after the robbery and attack on the deceased was the work of a calculated and rational mind.

67 As such, the defence of diminished responsibility is not made out.

Conclusion

68 I find Fabian to be guilty of the charge against him. I convict him of murder under s 300(*c*) of the Penal Code and I am compelled to impose the mandatory death penalty on him.

Ellarry – s 34 common intention

The law

69 Section 34 of the Penal Code stipulates that:

> When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

70 The recent Court of Appeal decisions of *Daniel Vijay*, *Kho Jabing* and *Muhammad bin Kadar and another v Public Prosecutor* [2011] SGCA 32 ("*Muhammad bin Kadar*") have clarified the law on the interpretation and application of s 34.

71 It is apposite at this juncture to lay out the present state of the law on s 34 as summarised in *Kho Jabing* at [32] and [33]:

> *The common intention*
>
> 32 It is clear from *Daniel Vijay* (at [93], [107], [119], [143], [176] and [178]) that, in order for Galing to be convicted of murder under Section 302 read with Section 34 of the Penal Code, the common intention that the Galing must have with Jabing is ***a common intention to do the criminal act done by the actual doer which results in the offence charged (what was termed the "Barendra test"* (after *Barendra Kumar Ghosh v Emperor* AIR 1925 PC 1) in [107] of *Daniel Vijay*)**, ***ie*, a common intention to commit *murder*. This common intention can be contingent or remote (see [159] of *Daniel Vijay*), can be predicated upon (or encompass) a common intention to commit robbery (see** [104] **of *Daniel Vijay*), and implies a "pre-arranged plan" pursuant to which the criminal act was done (see [108] and [109] of *Daniel Vijay*)**.
>
> 33 **When a murder is committed in the course of a robbery by two or more persons, a secondary offender is constructively liable for the murder actually committed only if he has the common intention with the actual doer to commit murder (as defined in s 300 of the Penal Code)**. Such a common intention may, depending on the circumstances, be **inferred if the secondary offender is found to have subjective knowledge that "one in his party *may likely* commit the criminal act (murder) constituting the collateral offence in furtherance of the common intention of carrying out the primary offence (robbery)" (see** [89] **and [168(f)] of *Daniel Vijay*). This requirement of subjective knowledge derives from [253(d) of *Lee Chez Kee*, and was termed the " *LCK* requirement" in *Daniel Vijay* (at** [42]**). Such a common intention may, of course, be also found as a fact from the conduct of the secondary offender on the evidence before the court**.
>
> [Emphasis added in bold]

72 At [36] of *Kho Jabing*, the Court of Appeal opined that:

> a common intention to rob, and if necessary, to inflict a s 300(*c*) injury on two random victims, as here, cannot be made out unless there is evidence of some kind of planning or understanding between [the secondary offender] and [the actual doer] as to what they would do and how they would do it in order to rob the victims.

73 In light of these recent decisions, Ellarry will only be found constructively liable for the murder actually committed by Fabian if the Prosecution can prove beyond a reasonable doubt that Ellarry shared the common intention with Fabian to commit a s 300(*c*) injury on the deceased. In particular, the Prosecution has to prove the existence of some kind of *planning* or *understanding* between Fabian

and Ellarry as to what they would do and how they would do it in order to rob the deceased.

74 Crucially, a *high degree of specificity* is demanded of Ellarry's intent. In *Daniel Vijay* at [73]-[76], the Court of Appeal applied the *Barendra* test to s 300(*c*) murder:

> 73 … [W]here s 34 is invoked to hold a secondary offender constructively liable for murder the subjective knowledge which he must have is subjective knowledge of the likely commission of the criminal act that is relevant to the particular limb of s 300 relied upon by the Prosecution. At first glance, this may seem to require fine distinctions to be drawn between the various limbs of s 300 for the purposes of imposing constructive liability on a secondary offender pursuant to s 34. We are, however, of the view that in terms of application, there is, in substance, little or no difference between subjective knowledge of the likelihood of one of the criminal acts in s 300 occurring and subjective knowledge of the likelihood of another of those criminal acts occurring. Subjective knowledge that any one of the criminal acts set out in s 300 might likely be committed, whether that criminal act is the one delineated in s 300(*a*), s 300(*b*), s 300(*c*) or s 300(*d*), is in effect simply subjective knowledge that the victim might likely be killed or fatally injured, whatever the specific criminal act concerned might be.
>
> 74 Leaving aside subsections (*a*), (*b*) and (*d*) of s 300 (all of which are not applicable in the present case as Bala's criminal act was found to have given rise to the offence of s 300(*c*) murder specifically), **where a secondary offender is sought to be made constructively liable pursuant to s 34 for s 300(*c*) murder, the *LCK* requirement would only be satisfied if the secondary offender has subjective knowledge of the likelihood of the victim receiving, specifically, s *300(c) injury*** . This corresponds to the type of bodily injury which must be inflicted on the victim for the purposes of s 300(*c*) murder. **In *this respect, it is not* sufficient *, in our view, for s 34 to* apply if the secondary offender merely has subjective knowledge that the victim might likely suffer *an injury* (or, for that matter, if the secondary offender shares a common intention with the actual doer to inflict an injury on the victim), and that injury is subsequently shown to be of a type which is sufficiently serious to amount to s 300(*c*) injury**.
>
> 75 In this regard, it bears emphasis that the *mens rea* requirement for s 300(*c*) murder is an *element* of the *substantive offence* of s 300(*c*) murder. In contradistinction, s 34 does not create a substantive offence but merely lays down a principle of liability (see *Mahbub Shah v Emperor* AIR 1945 PC 118 ("*Mahbub Shah*") at 120), and the *LCK* requirement is only a *factor* in determining whether that principle of liability applies.
>
> 76 Section 34 imputes constructive liability to a secondary offender by reference to the doing of a criminal act by the actual doer in furtherance of a common intention shared by both the actual doer and the secondary offender, whereas s 300(*c*) imputes direct liability to the actual doer by reference to an intentional act done by him. **Different policy considerations apply when imputing direct liability for murder and when imputing constructive liability for that offence**. It may be just to hold the actual doer liable for the offence arising from his actions, but, in our view, it may not be just to hold the secondary offender constructively liable for an offence arising from the criminal act of another person (*viz*, the actual doer) if the secondary offender does not have the intention to do that particular criminal act. This is especially true of serious offences like murder or culpable homicide not amounting to murder. **It does not necessarily follow that the *Virsa Singh* interpretation of s 300(*c*), which is applicable to the actual doer, is or should be equally applicable to a secondary offender, especially where the secondary offender did not inflict any injury on the victim at all**. In other words, as a principle of criminal liability, it may not be unjust or unreasonable to hold the actual doer liable for

s 300(*c*) murder by applying the *Virsa Singh* test since (as just mentioned) he was the one who inflicted the s 300(*c*) injury sustained by the victim. **However, it may not be just or reasonable to apply the *Virsa Singh* test to hold a secondary offender constructively liable for s 300(*c*) murder where he had no intention to do the specific criminal act done by the actual doer which gave rise to the offence of s 300(*c*) murder, and also did not subjectively know that that criminal act might likely be committed or that that criminal act would result in s 300(*c*) injury to the victim**.

[Emphasis added in bold]

75 It is useful to briefly recall the facts of *Daniel Vijay* and to see how the Court of Appeal dealt with the constructive liability of the secondary offenders in that case. In *Daniel Vijay*, the three appellants – Daniel, Christopher and Bala –were part of a plan to rob a cargo of mobile phones. They brought along a baseball bat but it was disputed whether there was any prior agreement to beat up the driver of the cargo lorry to the extent that he could not identify the assailants later on. In the course of the robbery, the driver was repeatedly hit on the head and other parts of his body by Bala. Daniel and Christopher did not attack the driver. The trio looted the cargo and left the victim inside the lorry. The victim eventually died of his head injuries.

76 The High Court found Bala liable for murder under s 300(*c*) and no defences were available to him. The trial judge, applying s 34, convicted Daniel and Christopher on a joint charge of murder arising from Bala's act of attacking the driver even though they did not plan to kill the driver. The Court of Appeal disagreed with the trial judge on the convictions of Daniel and Christopher, noting that even though the trial judge found that Daniel and Christopher knew that the driver would be assaulted as part of the robbery plan, he did not find as a fact that they had a common intention to knock the driver unconscious. *They only had a common intention to commit robbery with hurt, and not to kill*. As such, the Court of Appeal substituted the charge of murder read with s 34 to a charge of robbery with hurt under ss 394 read with 34.

77 In respect of the application of the *Barendra* test to a charge of s 300(*c*) murder, the Court of Appeal emphasised (at [145] and [147]) that:

> 145 ... **Where the secondary offender is concerned, however, we are of the view that he should not be made constructively liable for the offence of Section 300(*c*) murder arising from the actual doer's criminal act unless there is a common intention to cause, specifically, a s 300(*c*) injury, and not any other type of injury** (in this regard, see our observations at [74] – [76] above on why our courts should not, where constructive liability under s 34 for s 300(*c*) murder is concerned, apply the *Virsa Singh* test and hold that a common intention to inflict any type of injury is sufficient for a secondary offender to be found guilty of s 300(*c*) murder).
>
> ...
>
> 147 ... **[I]t should also be noted that in *Mohamed Yasin* (**[61] ***supra*), the Privy Council held (at** [9]**) that it must be proved " *as a matter of scientific fact* " [emphasis added] that the injury inflicted on the victim amounted to s 300(*c*) injury**. Applying this requirement (which may be satisfied by scientific evidence, including medical or forensic evidence) to that part of the Prosecution's case against Daniel and Christopher which is premised on the contention that the Appellants had a common intention to beat Wan on the head to render him unconscious (a contention which the Judge did not find to be supported on the facts), **an issue would arise as to whether the injury caused to a person by beating him on the head can be regarded**

as a s 300(*c*) injury if no scientific evidence (which would necessarily included medical evidence) is called (as counsel for Daniel pointed out (see [49] **above)) to show as a *scientific fact* that *any knock on the head with a weapon akin to the baseball bat* is sufficient in the ordinary course of nature to cause death. Thus, even if the Judge had found on the evidence that the Appellants had a common intention to beat Wan on the head to render him unconscious, it would not necessarily follow that this common intention was a common intention to inflict s 300(*c*) injury on Wan**.

[Emphasis added in bold]

78 Bearing the above principles in mind, I shall proceed to an analysis of the evidence before me.

Analysis of the evidence

79 The Prosecution submitted that there was enough evidence to show that Ellarry shared a common intention with Fabian to inflict a s 300(*c*) injury on the deceased in order to rob him:

(a) both Fabian and Ellarry had armed themselves with one half of the wooden stick each the night before the deceased was killed;

(b) Ellarry knew that Fabian was armed with the weapon on the night of the robbery;

(c) Ellarry was acting as a lookout;

(d) there was evidence of prior planning and an understanding between Fabian and Ellarry;

(e) Ellarry knew and intended that Fabian would use the piece of wood to attack their next victim;

(f) Ellarry was not disappointed, angry, shocked or upset that Fabian had attacked the deceased with the piece of wood; and

(g) Ellarry and Fabian had shared the loot after robbing the deceased.

80 The Defence submitted that Ellarry and Fabian only shared a common intention to rob the deceased. There was no common intention to commit s 300(*c*) murder for the following reasons:

(a) the robberies prior to 23 August 2008 committed by the two accused did not involve the use of weapons of any kind;

(b) while Fabian had used his half of the wooden stick to hit the deceased, Ellarry had discarded his half of the wooden stick on 21 August 2008;

(c) there was no plan to rob the deceased;

(d) Ellarry did not cause the deceased any bodily hurt nor did he restrain the deceased while Fabian hit him;

(e) Ellarry was shocked when he saw Fabian using the piece of wood to hit the deceased;

(f) Ellarry had stated in his Section 122(6) statement that his intention was only to rob and that he did not expect Fabian to cause the death of the deceased.

81 Following a careful consideration of the evidence, I find that Ellarry did not share a common intention with Fabian to cause the deceased a s 300(*c*) injury. The Prosecution wrongly conflated the intention to cause hurt using the wooden stick (so as to cause the deceased to fall down to the ground) with the intention to cause a s 300(*c*) injury. At the highest, the Prosecution was only able to prove that Ellarry shared a common intention with Fabian to cause the deceased hurt with the wooden stick so as to make him fall down to the ground for the purpose of robbing him.

(1) Common intention to cause the deceased hurt with the wooden stick to make him fall down to the ground for the purpose of robbing him

82 I have set out my analysis of the evidence in three parts:

(a) conduct of the accused persons *before* the robbery and attack on the deceased;

(b) conduct of the accused persons *during* the robbery and attack on the deceased; and

(c) conduct of the accused persons *after* the robbery and attack on the deceased.

(A) Conduct of the accused persons before the robbery and attack on the deceased

83 Both Ellarry and Fabian had admitted in their statements that they shared a common intention to hit the deceased with the stick so as to make him fall down to the ground and thereafter to rob him (see, respectively, Question 18 of Ellarry's 4th s 121(1) statement, reproduced at [17] above; and Questions 9 and 17 of Fabian's 3rd s 121(1) statement, reproduced at [19] above).

84 However, at trial, Ellarry claimed that he did not know that Fabian would use the stick to attack the deceased. When cross-examined, his version of events broke down:

Q: ... So isn't it correct that on the 23rd early morning, you knew that Mr Fabian, when he went ahead to the person at the bus stop, you knew that Mr Fabian will hit the person at the bus stop with the piece of wood to cause him to fall?

A: No, I disagree.

Q: And I put it to you that you did know that the victim would sustain injury as a result of being struck with the piece of wood.

A: Yes.

Q: Now you said earlier also during examination-in-chief that Mr Fabian told you the wood is for protection.

A: Yes.

Q: For his protection.

A: Yes.

Q: That's not true, isn't it?

A: I do not know.

Q: No, what you are saying is not true.

A: I do not know whether he was telling the truth or not but what I --- but what I do know is that he told me that the piece of wood for --- was for his safety --- protection.

Q: Did you ask him protection from what?

A: I cannot remember.

Q: Did you ask him protection from who?

A: No, I did not ask.

Q: Did you ask him why he needed protection?

A: No, I cannot remember.

Q: Mr Ellarry, I put it to you that you are giving these answers – "you cannot remember", "no" or whatever because this was not the reason for the piece of wood.

A: That you --- what I said was what I know.

85 I disbelieve Ellarry's evidence that he did not know that Fabian was going to use the stick to attack the deceased. Given that they had always picked victims smaller than themselves and were thus always able to overpower them, it did not make sense for Fabian to suddenly arm himself with a wooden stick for "protection". They had always successfully attacked and robbed their victims by punching and kicking them. Ellarry's *volte-face* at trial is nothing more than an attempt to absolve himself of the crime.

86 From the totality of the evidence, I find that Ellarry was obviously aware that Fabian had brought along the wooden stick which, due to its length, was protruding out of the bag that Fabian was carrying when they looking for a victim to rob on that night. I further find that Ellarry expected and intended that Fabian would use the stick to attack and make their next victim fall down to the ground as part of their plan to facilitate their robbery. Ellarry clearly admitted in his own voluntary

statement that "*the piece of wood was to be used as a weapon to hit the victims to cause the victim to fall. Once they fall, it would be easier to search and take their belongings. If we do not make the victim fall and just approached them to rob, the victims might retaliate. So we strike first*." That also explains why on the night the deceased was attacked and robbed, although Ellarry himself did not bring his half of the wooden stick, he neither suggested that Fabian dispose of the other half of the wooden stick (which he knew Fabian had brought along to attack their next robbery victim), nor attempted in any way to dissuade or stop Fabian from using the weapon to commit their robbery.

87 Given the extent and nature of the voluntary disclosures in Ellarry's and Fabian's statements regarding their plan to use the wooden stick as a weapon to attack their next robbery victim and to make the victim fall down to the ground, it is my view that Ellarry must have realised that it was *almost a certainty* that Fabian was going to use the stick he was carrying to attack the next victim.

88 With the knowledge and full realisation that Fabian was going to use the wooden stick to attack their robbery victim, and instead of dissociating himself entirely from what Fabian intended to do, Ellarry continued to assist Fabian in looking for a suitable victim and was even prepared to act as a look-out for Fabian so that Fabian could successfully carry out the robbery and thereafter share the loot with him. I thus find that at the material time, Ellarry shared a common intention with Fabian to attack their next robbery victim with the wooden stick to cause the victim to fall down to the ground in order to commit the robbery.

89 However, it must be stressed that, on the evidence, the Prosecution failed to show any common intention for (a) the stick to be used to hit the deceased on a specific part of his body, or for (b) the deceased to be rendered unconscious as a result of the attack. From Ellarry's voluntary statement, it is clear that he only admitted to sharing the common intention with Fabian to cause the deceased to fall down to the ground. While the Prosecution had proven that Fabian intended to cause the deceased injuries on his head so as to render him unconscious (see above at [40] – [58]), no evidence was adduced to prove that Ellarry shared the common intention with Fabian to cause the injuries on the deceased's head so as to render him unconscious.

(B) Conduct of the accused persons during the robbery and attack on the deceased

90 Ellarry's role *during* the actual robbery and attack was significant. Even though he did not cause the deceased any physical injury, his role must still be regarded as one of *active participation*, because he:

(a) actively scouted for a victim;

(b) was acting as a look-out while Fabian attacked the deceased with the wooden stick before robbing the deceased in accordance with their plan; and

(c) was ready to step in to assist Fabian to subdue the deceased if the deceased had retaliated and struggled.

91 Ellarry himself admitted as much in his statements to the police (see Questions 15 and 16 of Ellarry's 4th s 121(1) statement, reproduced at [17] above). Fabian's statements to the police also

support this version of the events (see Questions 25 and 26 of Fabian's 3rd s 121(1) statement, reproduced at [19] above)

92 However, at trial, Ellarry, in an attempt to absolve himself of criminal liability, did another *volte-face* and claimed that he was not acting as look-out for Fabian. Under cross-examination and after some questions from the court, his oral testimony was shown to be inconsistent with his statements to the police. [note: 28]

93 The evidence clearly showed that the ill-fated robbery and attack on the deceased was conducted in accordance with a common plan. Ellarry and Fabian acted instinctively on the basis of a shared understanding which had been developed over the course of a number of previous successful robberies. The objective of the ill-fated robbery and attack on the deceased was the same as the previous robberies: to cause the victims to fall down to the ground so as to facilitate the act of robbery. However, on this occasion, there was a further understanding between them that a wooden stick was to be used as a weapon to cause the victim to fall down to the ground.

(C) Conduct of the accused persons after the robbery and attack on the deceased

94 The conduct of Ellarry *after* the robbery and attack on the deceased is additional supportive evidence showing that Ellarry and Fabian had the common intention to cause the deceased hurt using the stick so as to cause him to fall down to the ground. If Ellarry did not intend that the deceased be attacked with the stick, it would have been natural for him to have been shocked, angered, scared and disappointed at Fabian for hitting the deceased with the stick. He would have confronted Fabian and asked him why he did what he did.

95 Instead, from Ellarry's and Fabian's statements to the police, it is undisputed that they had proceeded to rob another victim together on the same night. They then calmly split the loot and sold the stolen hand phones. At the end of the night, they shared about six bottles of Tiger Beer and thereafter solicited prostitutes in Geylang (see Ellarry's 3rd s 121(1) statement, reproduced at [17] above, and Fabian's 2nd s 121(1) statement, reproduced at [19] above).

96 At trial, Ellarry was cross-examined on why he had not confronted Fabian even though he felt disappointed or angry after Fabian had attacked the deceased with the stick. Ellarry's only response was that after the robbery, they were "only interested in the loot", and therefore he did not express his feelings of disappointment or anger. [note: 29]

97 Once again, I find that this evidence of his at the trial is a clear afterthought. First, I have already found that Ellarry knew and intended that Fabian would use the stick to make their next victim fall down to the ground. Second, if indeed Ellarry was as angry, disappointed and upset as he claimed to be, he would naturally have confronted Fabian. He would not have robbed another victim with Fabian, drunk beer and solicited prostitutes together. The totality of Ellarry's and Fabian's conduct after the robbery and attack on the deceased leads to the conclusion that things turned out as they had planned insofar as the deceased had been attacked with the wooden stick. This is further corroborative evidence of their common intention to cause the victim to fall down to the ground so as to rob him.

98 For the above reasons, it is thus clear that Ellarry and Fabian shared the common intention to hit the deceased with stick so that he would fall down to the ground and thereafter to rob him.

(2) No common intention to cause a s 300(*c*) injury on the deceased

99 Given the high level of specificity required of the secondary offender's intent following the decision in *Daniel Vijay*, which in the case of s 300(*c*) murder requires proof that the secondary offender specifically intended to cause a s 300(*c*) injury, the *Annual Review of Singapore Cases 2010* noted at para 12.56 that the case of *Daniel Vijay*:

> may be seen as a further step in limiting the circumstances in which criminal responsibility can be attributed to individuals in group crimes. *Lee Chez Kee* restricted the scope of liability by requiring subjective knowledge (as opposed to constructive knowledge) of the likelihood of the collateral offence being committed. *Daniel Vijay* now requires no less than proof of an intention to commit the collateral offence. In the scenario presented by *Daniel Vijay*, Daniel and Christopher must be proved to have a common intention to cause a "section 300(*c*) injury, and not any other type of injury": *Daniel Vijay* at [145].

100 The *Annual Review of Singapore Cases 2010* also noted, at para 12.58, that:

> in practice, "a section 300(*c*) injury" would generally require an intention to cause death since a s 300(*c*) injury is one which is sufficient in the ordinary course of nature to cause death: *Daniel Vijay* at [73] and [146]. **The threshold set for a secondary offender is, therefore, raised to that of s 300(*a*) even though he would be held jointly liable for murder under s 300(*c*) read with s 34**. [emphasis added in bold]

101 On the facts of the present case, while the Prosecution can prove that Ellarry shared a common intention with Fabian to hit the deceased with the stick to cause him to fall down to the ground, I find that they are unable to prove that Ellarry and Fabian shared the common intention to cause, specifically, a Section 300(*c*) injury (see *Daniel Vijay* at [147], reproduced at [77] above).

102 While I am able to accept that Fabian and Ellarry had the common intention to hit the deceased with the stick so as to cause him to fall down to the ground, it does not necessarily follow that this common intention was a common intention to inflict a s 300(*c*) injury on the deceased. Adopting the language and reasoning of the Court of Appeal in *Daniel Vijay* at [147], in the present case the Prosecution has not adduced medical or forensic evidence to show as a *scientific fact* that hitting a person using the wooden stick with enough force required to cause the person to fall down to the ground is *sufficient in the ordinary course of nature to cause death*.

103 Instead, the Prosecution's submission wrongly conflated the common intention to inflict hurt using the wooden stick so as to cause the victim to fall down to the ground with the common intention to cause a s 300(*c*) injury to the deceased. The Prosecution has not proved the high degree of specificity required of the secondary offender's intent following the decision in *Daniel Vijay*: it had failed to prove that Ellarry had the intention to do the specific criminal act done by Fabian, *ie* hitting the deceased *on the head* with the wooden stick to *render him unconscious*. Ellarry also did not subjectively know that that specific criminal act might likely be committed or that that criminal act would result in a s 300(*c*) injury to the victim. The Prosecution has only been able to prove that the common intention of Fabian and Ellarry extended only to hitting the deceased with the wooden stick so as to cause him to fall down to the ground and thereafter to rob him. Post-*Daniel Vijay*, such a finding is insufficient to find Ellarry guilty of s 300(c) murder read with Section 34. As the Court of Appeal in *Daniel Vijay* opined (at [74]):

> … it is *not* sufficient, in our view, for s 34 to apply if the secondary offender merely has subjective knowledge that the victim might likely suffer *an injury* (or, for that matter, if the secondary offender shares a common intention with the actual doer to inflict an injury on the victim), and that injury is subsequently shown to be of a type which is sufficiently serious to

amount to s 300(*c*) injury.

Conclusion

104 Given my findings above, I shall, in substitution, convict Ellary of the offence of robbery with hurt under ss 394 read with 34. Sentencing for Ellarry shall be adjourned to a date to be fixed.

[note: 1] Exhibit P146, pp 63 to 70 of the Agreed Bundle ("AB").

[note: 2] Notes of Evidence ("NE"), Day 3, p 68, line 32.

[note: 3] NE, Day 3, p 70, lines 23 to 32.

[note: 4] NE, Day 3, p 76, lines 28 to 32.

[note: 5] Exhibit 146, pp 63 to 70 of the AB.

[note: 6] NE, Day 3, p 111, lines 19 to 27.

[note: 7] NE, Day 3, p 106, lines 2 to 10.

[note: 8] NE, Day 2, pp 14 to 15.

[note: 9] NE, Day 5, p 20, lines 2 to 3.

[note: 10] AB(2), pp 200 to 205.

[note: 11] AB(2), pp 222 to 228.

[note: 12] AB(2), pp 248 to 256.

[note: 13] AB(2), pp 257 to 263.

[note: 14] AB(2), pp 264 to 272.

[note: 15] AB(2), pp 273 to 279.

[note: 16] AB(2), pp 280 to 289.

[note: 17] AB(2), pp 196 to 199.

[note: 18] AB(2), pp 214 to 218.

[note: 19] AB(2), pp 373 to 378.

[note: 20] AB(2), pp 379 to 384.

[note: 21] AB(2), pp 385 to 392.

[note: 22] AB(2), pp 393 to 398.

[note: 23] Notes of Evidence, Day 8 , Pages 35 to 36

[note: 24] Notes of Evidence ("NE"), Day 3, p 68, line 32.

[note: 25] Exhibit D1

[note: 26] Exhibit D2

[note: 27] Exhibit D3

[note: 28] Notes of evidence, Day 7, Pages 44 to 45

[note: 29] Notes of evidence, Day 7, Pages 61 to 62