Public Prosecutor *v* Luo Faming
[2011] SGHC 238

Case Number	: Criminal Case No 51 of 2009
Decision Date	: 02 November 2011
Tribunal/Court	: High Court
Coram	: Lee Seiu Kin J
Counsel Name(s)	: Amarjit Singh, John Lu and Sharon Lim (Attorney-General's Chambers) for the public prosecutor; Anand Nalachandran, Jansen Lim Teck Yang and Nurul Asyikin Binte Mohamed Razali (ATMD Bird & Bird LLP) for the accused.
Parties	: Public Prosecutor — Luo Faming

criminal procedure and sentencing

2 November 2011

Lee Seiu Kin J:

Introduction

1 The accused person, Luo Faming ("Luo"), pleaded guilty to and was convicted of a charge of culpable homicide not amounting to murder punishable under s 304(*a*) of the Penal Code (Cap 224, Rev Ed 1985) ("the offence"). I did not agree with the submission of the learned deputy, Mr Amarjit Singh ("Mr Singh"), that the facts justified life imprisonment, and sentenced Luo to 18 years' imprisonment. Luo also faced a second charge under s 308 of the Penal Code to which he also pleaded guilty, and in respect of which I sentenced him to 6 years' imprisonment. I ordered both sentences to run consecutively, which meant a total sentence of 24 years' imprisonment. The Public Prosecutor has appealed against the sentence of 18 years' imprisonment for the offence and I now set out the reasons for my decision.

Background

2 Luo was employed as a production technician in a printing company ("the Company") prior to his arrest. He was a colleague of the deceased, Gong Hui Long ("Gong"). Both of them were Chinese nationals who arrived in Singapore at the end of February 2007. Luo was assigned to do laminating work while Gong was assigned to do printing work. Both worked under the same supervisor, Ng Sin Lai ("Ng"), a 57 year old woman who had worked for the Company for more than 30 years.

3 Luo and Gong lived in a flat at Henderson Road ("the flat") with six to eight other Chinese nationals. At first they slept in the same room. But in June 2007 they had some conflict at work and their relationship soured. From February 2008, they slept in different rooms in the flat. Sometime in May 2008, the Company assigned more overtime work to Gong because of his ability to do both the laminating and printing work and his general efficiency. Overtime was important as it resulted in significant increase in earnings and Luo was unhappy that Gong was assigned more overtime work than him. At that time Luo needed to send money home to construct a new house. Luo also claimed that the managing director of the Company, Suh Luan Tseng @ Chan Yah Loh ("Suh"), frequently scolded him for trivial mistakes which he committed. He felt that his supervisor, Ng, disliked him and allotted him less overtime work than Gong. He felt he was treated unfairly by Ng and Suh.

4 On 3 September 2008 at about 5.00pm, Gong and Luo were both working overtime when they had a dispute which led to a quarrel and a scuffle. Ng intervened. She called another worker to break up the scuffle and reported the matter to Suh. Luo said he tried to give his version of events but Suh scolded him and threatened to cancel his work permit and repatriate him to China if he persisted in arguing. Luo decided to keep quiet since he felt that both Suh and Ng were favouring Gong. Luo stated that he then tried to apply for two days' leave to cool down but this application was turned down. He left the Company's premises, forgoing the overtime work he was assigned that evening.

5 As Luo left the Company's premises, he said that he felt miserable and formed the intention of taking revenge by killing Gong, Ng and Suh. Later that evening, Luo met his brother-in-law, Tan Long Xiang, and a few friends and had dinner and drinks with them near the flat. He wanted to repay some loans he had taken from two of his friends. Luo told Tan Long Xiang and his friends about his problems at work and about wanting to take revenge. But he did not say how he planned to do so. They tried to dissuade him from acting impulsively, and he pretended to accept their advice in order to get them to leave him alone.

6 Later that night, Luo returned to the flat and told some of his flatmates that he intended to return to China. He also sought the return of his rental deposit from his landlady. Luo stated that he did not sleep that night and was continuously thinking about how to take revenge on Gong, Ng and Suh. He decided to kill Gong in the flat before killing Ng on the Company's premises. He then realised he would not be able to kill Suh since Suh would only be in the office after 9.00am. Hence, he planned to damage all the equipment in the Company.

7 Shortly after 6.30am on 4 September 2008, Luo went to the flat's kitchen and took a knife with a 20cm long blade. He went to Gong's room where the latter was sleeping in his bed. Luo covered Gong's mouth with his left hand and stabbed Gong several times in the chest area with the knife. He continued to stab Gong even after Gong got up and tried to struggle. After a while, a flatmate who saw Luo stabbing Gong shouted to Luo to stop. Luo ran out of the room. He grabbed his bag which contained some clothes and ran out of the flat.

8 Luo headed to the Company's premises at Block 203A Henderson Road #06-04 on foot. There was nobody present when he arrived. He took a hammer and smashed some of the printing machines and computers of the Company. Next, he took a tin of thinner, punched a hole in it and allowed the liquid to flow to the floor. He then held the hammer in his hand and waited for Ng. She reached the premises at around 7.15am and upon seeing Luo, approached him and remarked that he was early. Luo did not reply but grabbed Ng and pulled her towards him. He used the hammer to hit her head. Ng struggled to free herself but to no avail. Luo continued to hit Ng's head with the hammer while saying to her in Mandarin, "Go die". Luo stopped when Ng lost consciousness and he saw blood on her.

9 Luo then set fire to the premises by using a lighter he had in his pocket to light the thinner he had spilt on the floor. He also set fire to some of the computers and documents in the premises before he left, with Ng still unconscious on the floor.

10 The fire triggered off the sprinkler system and the jets of water roused Ng. She managed to stumble out of the premises and sought help from the security post at the ground level. She was conveyed to the hospital with multiple scalp lacerations and other injuries but did not suffer any fracture.

11 After leaving the Company's premises, Luo made his way to the roof of the building at level 12. He sat on the parapet of the rooftop and telephoned his family in China. He told them that he had killed someone and asked them to take care of his children. He also called one Tan Chuan Chuan in

Singapore and told him that he had "got rid" of two persons. The police soon arrived and arrested Luo.

12 After his arrest, Luo was examined by three psychiatrists. For present purposes, only the evidence of Dr Tommy Tan ("Dr Tan") of Tommy Tan Psychiatric Clinic, the defence's expert, and Dr Stephen Phang ("Dr Phang") Senior Consultant Psychiatrist at the Institute of Mental Health ("IMH"), the prosecution's expert, were relevant. They are analysed below.

Were there any aggravating factors which justify a sentence of life imprisonment?

13 Mr Singh submitted that there were three aggravating factors. First, Gong suffered an unprovoked attack which led to his death. Secondly, the act of killing was premeditated and deliberate. Thirdly, Gong was a "vulnerable" victim. Described in this manner, the factors are aggravating indeed. However, I did not agree that it was accurate to describe this case in those terms.

14 It was an unprovoked attack in the sense that Gong was asleep at the time. However we must be mindful of the context, that is, the series of the events leading to the killing. Luo came to Singapore solely to earn money to send to his family in China and to build a house there. In the months preceding the offences, he laboured under the belief that Gong had betrayed his trust and had maligned him before Ng and Suh. He perceived his superiors to be unfairly favouring Gong. He regularly lost out to Gong for overtime work. He was placed under immense financial pressure to provide for his family. One day before he killed Gong, Luo had an altercation with Gong concerning overtime work which proved to be the last straw. Both of his superiors were involved, and they took Gong's side. Suh refused to hear Luo out, scolded him and threatened to sack him. He left the scene thinking that he had to return to this oppressive work environment soon, since his leave application was turned down.

15 In his hopelessness and misery, Luo formed the notion of retaliating against the perceived sources of his hardship and then committing suicide. Even after he had dinner with his friends and kin and had returned home, the day's events continued to weigh heavily on his mind. He lay alone in the dark, depressed and unable to sleep, and the obsession welled up in him to "take revenge" on the people he felt were oppressing him. The flatmate who witnessed part of the attack on Gong testified that Luo stabbed Gong "very quickly and [at] almost a frenzied pace". [note: 1] This cannot be described as pre-meditation on the part of Luo. It was also undisputed that at the time of committing the offence, Luo was suffering from an abnormality of mind, *viz* a major depressive disorder, which substantially impaired his mental responsibility. Looked at from this angle, any "premeditation" on Luo's part was done with a diseased mind. Describing Gong who was asleep when he was attacked as "vulnerable" again does not take into account Luo's mental impairment. There was no evidence that Luo had deliberately attacked Gong while he was asleep to take advantage of his vulnerability in that state. Luo's emotional state was overwrought at the point that he decided to carry out the attack. He did choose to execute it only when Gong was asleep and vulnerable.

16 I must emphasise that Gong did nothing to justify his being killed. He only had the misfortune to cross paths with Luo.

17 Luo had committed the offence while suffering from his mental illness which substantially impaired his rationality and responsibility. There was therefore no basis to impose a life imprisonment term from the point of view of retribution. Neither was it justified from the point of view of general or specific deterrence because a person who suffers from a sufficiently serious abnormality of mind is unable to consider the legal consequences of his actions.

18 Counsel for Luo, Mr Anand Nalachandran ("Mr Nalachandran"), highlighted several mitigating factors which I had accepted. After his arrest, Luo cooperated fully with the police and admitted his role in the entire matter from the outset and had shown remorse. When Luo came to this country he only had plans to work hard and save money to raise his family. He also had no antecedents.

19 Offences under s 304(*a*) of the Penal Code are usually violent but there was no sadistic feature in this case. I was of the view that it clearly does not qualify as one of the "worst cases" deserving of the maximum sentence of life imprisonment. However, the prosecution submitted that even if that were the case, a life sentence could be justified on preventive grounds because the facts satisfied the *Hodgson* criteria.

The *Hodgson* criteria

20 The Court of Appeal held in *PP v Aniza bte Essa* ("*Aniza bte Essa*") [2009] 3 SLR 327 that the *Hodgson* criteria were an appropriate guide to justify the sentence of life imprisonment for mentally unstable offenders who satisfy the criteria. The Court stated (at [34]):

> … The *Hodgson* criteria fulfil two important functions. The first is that they provide an alternative (*ie*, alternative to the principle that the highest punishment should only be reserved for the worst types of cases), and equally principled, justification to impose life imprisonment when it is the highest punishment prescribed for an offence on an offender (*ie*, for the protection of society). The second is that the *Hodgson* criteria also provide a useful guide to differentiate between when it is appropriate to sentence to life imprisonment dangerous mentally unstable offenders who are a long-term threat to society and when lesser sentences may be meted out to those who suffer from a transient illness who can be rehabilitated and reintegrated into society. They reflect a humane approach to the punishment of mentally unstable offenders, without sacrificing the dominant objective of protecting the community from the likelihood of similar re-offending. Mental illnesses come in many forms and affect cognition and judgment in different degrees – some illnesses are genetic in origin, and some are situation-specific; some need long-term treatment or are not susceptible to treatment, whereas others are treatable. We need to consider, from a penal point of view, what public policy considerations justify keeping mentally unstable offenders in prison for life if it is not necessary to do so in order to protect the public. The only other justification is the need to punish them on the basis of retribution and/or deterrence. But, retribution involves the consideration of the proportionality principle which conflicts with the principle of public protection, and … deterrence is not apposite for mentally unstable offenders …

21 The paragraph quoted above encapsulates the principle of punishment in relation to mentally unstable offenders who have committed serious crimes, that is, "as long as they pose a serious danger to the public at large, they must not remain at large and must be kept in prison or a mental hospital until they are safe to be released back to society": *Aniza bte Essa* at [14]. It identifies the principle of prevention as what underpins the *Hodgson* criteria. It also expressly acknowledges that a mentally unstable offender may be subjected to a disproportionate sentence, over and above that which befits a mentally stable offender who commits the same offence under the same external circumstances, because the preventive principle would not have applied to that mentally stable offender.

22 A life sentence is at stake when the *Hodgson* criteria are invoked. This entails the convicted offender being imprisoned for an initial period of 20 years, and thereafter until such time as he is released (with or without conditions) pursuant to a Life Imprisonment Review Board's decision (see reg 125 of the Prisons Regulations (Cap 247, Rg 2, 2002 Rev Ed)). Because this review process is beyond the Court's purview, the Court must treat a life sentence as an indeterminate one which may

extend to the whole of the offender's life.

23 The *Hodgson* criteria justifies a sentence of life imprisonment under the following circumstances (*R v Rowland Jack Forster Hodgson* (1968) 52 Cr App R 113 at 114):

> (1) where the offence or offences are in themselves grave enough to require a very long sentence; (2) where it appears from the nature of the offences or from the defendant's history that he is a person of unstable character likely to commit such offences in the future; and (3) where if the offences are committed the consequences to others may be specially injurious, as in the case of sexual offences or crimes of violence.

24 The first criterion is the commission of a serious offence sufficiently grave to warrant a long term of imprisonment. That requirement is satisfied in Luo's case. There is no doubt that the third criterion is also satisfied as a life was lost and another almost lost.

25 It is the second criterion which presents some difficulty. Unlike preventive detention under the Criminal Procedure Code (Cap 68, 1985 Rev Ed), the *Hodgson* criteria are not a legislative construct. Parliament had stipulated objective standards by which an offender is judged to be at a suitably high risk of re-offending such that preventive detention should be invoked unless there are special reasons not to do so. Conversely, two sub-issues within the second *Hodgson* criterion – (a) what is the likelihood of recidivism for an individual offender (which is a question of fact) and (b) whether this probability satisfies the standard imposed by the criterion (which is a value judgment) – both fall to be decided by the Court.

26 Two related points arise. The first is empirical in nature. The risk of re-offending which confronts the Court is one which is contingent and very far in the future. Where offences prescribing a life imprisonment sentence as a possible punishment are involved, the alternative punishment is usually a long period of imprisonment of up to 20 years. Hence, this risk would materialise only much later even if the more lenient fixed sentence had been imposed. It would only materialise after the offender's deserved term of sentence for his current offence has expired and only if he remains dangerous.

27 The second point is that a judge's legal training provides him with no special skills in forecasting, and he may therefore be tempted to rely simply on the fact of the offender having been convicted of a violent crime, without further inquiry into his present condition. Of course, the latter mistake may appear to be easily avoided by requiring the submission of psychiatric reports. But the utility of psychiatric evidence, which includes testimony from psychiatrists who had examined the offender, cannot be overstated. Whilst these evidence typically address the issue of the offender's present condition capably, and therefore his present propensity for violence, it would only be in clear cases that a psychiatrist would confidently be able to pronounce on an offender's condition one or two decades into the future.

28 Professor Andrew Ashworth ("Prof Ashworth") records in his recent edition of *Sentencing and Criminal Justice* (Cambridge University Press, 5th Ed, 2010) at pp 235-236, that the difficulties of predicting whether a particular person will constitute a danger to others are well documented in criminological literature. He cited an influential study carried out by Jean Floud and Warren Young in England (*Dangerousness and Criminal Justice* (Heinemann, 1981)) ("The Floud Report") that revealed that no method of prediction had managed to do better than predicting one false positive for every true positive, *ie* there is only a fifty percent success rate in predicting recidivism of serious crimes. The Floud Report also confirmed that actuarial methods of prediction, based on selected objective characteristics of the offender, were generally more reliable than clinical predictions, based on the

judgment of experienced diagnosticians - a significant finding since judges naturally respect the judgments of experienced psychiatrists, despite this evidence of fallibility. Prof Ashworth also notes that empirical studies of predictions of serious harm by mentally unstable offenders illustrate that these predictions do not have a high rate of success.

29 It is therefore clear that many crucial problems which underlie the relationship between mental disorders and re-offending of a serious crime remain unanswered, and we have up to this time operated upon implicit and intuitive assumptions which may be mistaken. The probable existence of a significant rate of false positives raises serious questions about the justice of predictive sentencing. A mentally unstable offender's liberty should not be lost merely because some people like him will offend again, and we wrongly specify which of them will actually do so. Hence, until more empirical research is available, it will be necessary for the Court to exercise caution in making such predictive finding and to do so only when the evidence is compelling.

30 The question then is: what is the degree of likelihood of re-offending that the second *Hodgson* criterion demands? It has been held that in sentencing a mentally unstable offender who had committed a violent crime "*the paramount consideration has to be the safety and security of the community*" (emphasis in original) (*PP v Lim Ah Liang* [2007] SGHC 34 at [2] *per* V K Rajah J) and the "dominant objective" is to protect the community from the likelihood of re-offending (*Aniza bte Essa* at [34]). It is granted that the state has a duty to take reasonable steps to prevent crime. That duty, however, is subject to moral constraints on how the state may carry out this crime-prevention role, and unfair treatment of (*ie* unjustifiably imposing a disproportionate sentence on) convicted offenders will breach these constraints. Hence, those judicial statements should not be taken to mean that judges, to whom this duty is delegated, must act overzealously and to err in favour of finding any eligible mentally unstable offender suitable for a term of life imprisonment. They should instead be read as an injunction to carefully examine the balance to be struck between the rights of a known offender and the interests of society to be protected from a predicted offence, and on which side of the balance the facts of a particular case come down on.

Evidence of the psychiatrists

31 I turn to consider the evidence of the psychiatrists. Dr Sim Kang ("Dr Sim"), Consultant Psychiatrist at the IMH was the first to attend to Luo. Dr Sim examined him on three occasions in September 2009 and made a report on 29 September 2009. He diagnosed Luo to be suffering from reactive depression (F32, ICD-10) at the material time. However this did not amount to an abnormality of mind which would have impaired his responsibility for his actions. The second was Dr Tan; he examined Luo on 20 October and 23 December 2009 and produced a report dated 4 January 2010. Dr Tan opined that Luo was suffering from moderate depressive disorder (F32.1, ICD-10) or major depressive disorder, single episode (296.22 DSM IV-TR) at the time of the offence which was, in his view, an abnormality of mind that had substantially impaired his mental responsibility. In view of Dr Tan's differing opinion, the prosecution obtained a third opinion from Dr Phang. Dr Phang examined Luo on four occasions in July and August 2010. He also perused Luo's past psychiatric records as well as obtained clinical observations of the nursing staff of the Changi Prison Complex Medical Centre and interviewed Luo's brother-in-law, colleagues, friends and ex-supervisor. Dr Phang diagnosed Luo to be suffering from major depressive disorder, single episode, moderate to severe, without psychotic features (296.2x DSM IV-TR) at the material time which substantially impaired his mental responsibility for the offence.

32 In his report dated 26 October 2010, Dr Phang stated that Luo had a "pre-morbid personality" and "exhibited a consistent tendency towards a low threshold for the discharge of aggression, has low frustration tolerance, and is hardly, by all accounts, an amicable individual". [note: 2] Dr Phang

found that Luo "has already manifested an abundance of maladaptive conduct, in response to perceived slights from others. The advent of his mental illness in the instant case has further contributed to, or augmented the magnitude of his maladaptive behavioural responses, with palpably tragic consequences. It is therefore not inconceivable that the accused may well respond to future offences/slights in a not dissimilar manner." [note: 3] Dr Phang also testified in court that there was a likelihood that if Luo were released he would commit a violent offence in future. [note: 4] But Dr Phang was not asked to opine on what the *degree* of this likelihood would be ten to twenty years into the future. Dr Phang interviewed people whom had dealt with Luo before, and after taking into account what they told him, he found Luo to be a person of unstable character [note: 5] and was impulsive.

33 However, the history of impulsive and violent behaviour which Dr Phang relied upon was substantially challenged by Mr Nalachandran. Dr Phang's interviews turned up the following incidents:

(a) Tan Long Xiang (Luo's brother-in-law) claimed Luo had thrown his three year-old child into a pond in winter in China;

(b) Tan Long Xiang claimed Luo nearly assaulted an ex-employer when he perceived the latter was unfair to him;

(c) Tan Chuan Chuan (a friend of Luo's) claimed Luo tried to strangle his son after quarrelling with his in-laws; and

(d) Kwong Peng Hong (an ex-colleague of Luo's) claimed Luo knelt and offered him a tearful apology for no apparent reason.

34 Under cross-examination, Dr Phang conceded that these accounts were one-sided in that he never sought Luo's version of the events and they were uncorroborated. The incidents that Tan Long Xiang related were also hearsay as he had not witnessed them personally. Mr Nalachandran submitted that Luo in fact either had reasonable explanations for, or disputes, these incidents. For example, Luo asserted that he had never tried to strangle his son.

35 Dr Phang, however, then testified that his finding of Luo's unstable personality was based "primarily" on his own clinical observations of Luo when he was examining Luo at great length, and those interviews were merely confirmatory. [note: 6] But what was accepted was that at the time Dr Phang made his clinical observations, Luo had been remanded for two years. He was suffering from depression and had not received any form of treatment. He was also facing the death penalty. In these circumstances, the predictive value of Dr Phang's clinical observations cannot be determinative. Apart from the contrary diagnosis of Dr Tan, there was an important objective factor which supported the defence's contention that Luo was not of an unstable personality, *ie* the fact that Luo was able to cope at his previous jobs in China for many years. [note: 7]

36 Additionally, the psychiatric evidence adduced by the prosecution could not satisfactorily establish that it is highly unlikely that Luo would recover from his mental illness. This is significant because the major depressive episode he suffered at the material time was partially a cause of the offence. If it could be treated or kept under control, he would not pose any significant risk of causing grievous harm in future. Both Dr Phang and Dr Tan agreed that Luo would require at least two years of treatment but were unable to categorically state Luo's chances of complete recovery. Dr Phang, however, was willing to put Luo's chances of recovery at about one-third. [note: 8]

37 I was not satisfied that the psychiatric evidence was sufficient to place Luo within the second

Hodgson criterion. In particular I could not confidently conclude that Luo is likely to commit such offences upon his release. With a total sentence of 24 years, Luo will remain in prison for at least 16 years and while there, will be able to undergo treatment for his illness. The psychiatrists have opined that he has a chance of recovery which I considered significant. Therefore, I could see no basis for condemning him to imprisonment for the remainder of his life.

[note: 1] Notes of Evidence ("NE") Day 1, pg 37, lines 12 to 13.

[note: 2] Para 7 of Dr Phang's report dated 26 October 2010.

[note: 3] Para 9 of Dr Phang's report dated 26 October 2010.

[note: 4] NE Day 5, pg 25, lines 16-22.

[note: 5] NE Day 5, pg 29, lines 11-14; NE Day 5, pg 34, lines 20-21.

[note: 6] NE Day 5, pg 63, lines 22-28.

[note: 7] NE Day 5, pg 66, line 29 – pg 67, line 28.

[note: 8] Para 12 of Dr Phang's report dated 26 October 2010.

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