Public Prosecutor v Fazely Bin Rahmat and Another and Another Case [2003] SGCA 13

Case Number	: Cr App 10/2002, CC 12/2002
Decision Date	: 17 March 2003
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Tan Lee Meng J; Yong Pung How CJ
Counsel Name(s)	: Ng Cheng Thiam, Imran Abdul Hamid, Lee Ti-Seng Desmond (Attorney-General's Chambers) for Appellant; James Bahadur Masih, Amarick Gill (James Masih & Co) for first respondent; Subhas Anandan, Anand Nalachandran (Harry Elias Partnership) for second Respondent
Parties	: Public Prosecutor — Fazely Bin Rahmat; Khairul Famy bin Mohd Samsudin

Criminal Law – Complicity – Common object – common intention – limit to constructive liability.

Criminal Law – Offences – Murder – rioting – grievous hurt.

Evidence – Weight of evidence – Decisions of trial judge – Whether trial judge correct in accepting testimony of accused in court over previous incriminating statements to police – Whether trial judge correct in admitting statements of co-accused but choosing not to attach any weight to it

Delivered by Chao Hick Tin JA

1 This is an appeal by the Public Prosecutor against a decision of the High Court acquitting the two respondents of a capital charge of murder and convicting them of an offence of rioting under s 147 of the Penal Code (PC) (Cap 224). Each of the respondents were sentenced to a term of imprisonment of five years and twelve strokes of the cane for the offence. We heard the appeal on 21 October 2002 and reserved judgment.

The facts

2 On the evening of 30 May 2001, the two respondents, Fazely and Khairul, were with six other persons, namely Mohamed Hasik bin Sahar (Hasik), Mohammed Fahmi bin Abdul Shukor (Fahmi), Mohammad Ridwan bin Samad @ Chemong (Ridzwan), Muhammed Syamsul Ariffin bin Brahim @ Aki (Syamsul), Norhisham bin Mohamed Dahlan @ Baby (Norhisham) and Sharulhawazi bin Ramy @ Boy Sharul (Sharulhawazi) at a pub called "Club 7", located along Mohamed Sultan, celebrating Syamsul's birthday. They were members of the secret society known as "369". These eight persons are hereinafter referred to collectively as "the group". Two other persons, with their girlfriends, were apparently also there with the group at "Club 7" but they were not involved in the subsequent events.

3 The group stayed on at the pub until the early hours of the next morning. At about 3.00am (on 31 May 2001), when the pub closed, they left for a nearby coffee shop for supper. It was at this point that Norhisham commanded all members of the group to follow him to the "Rootz" discotheque (the Rootz) at Boat Quay. Fahmi and Ridzwan were sent ahead to do a reconnisance of the Boat Quay area. Upon receiving information from the advanced party that there were rival gang members present there, the other members of the group proceeded to Boat Quay in two taxis. But by then, the Rootz had also closed for the night. So they just walked about in the vicinity.

4 In the meantime, one Sulaiman bin Hashim, the deceased, a 17 year old student who was also a national youth soccer player, and two friends, Mohammed Shariff bin Abdul Samat (Shariff) and Mohamed Imran bin Mohamed Ali (Imran), were at the Rootz. When the discotheque closed at 3.00am, the trio went to a 24-hour coffee shop situated behind a pub known as "Bernie Goes to Town". At about 4.30am, the trio left the coffee shop and walked along South Bridge Road in the direction of the City Hall MRT Station. As the trio were walking past "Bernie Goes to Town", members of the group, who were on the opposite side of the road, spotted them. Norhisham then crossed the road, followed by the rest.

5 Norhisham confronted the trio and asked them in Malay which "gang" they belonged to and before the trio could answer, Norhisham rained blows on Sulaiman. On seeing this, the two friends of Sulaiman, Shariff and Imran, ran away with Fazely, Syamsul and Khairul hot on their heels. Fortunately for Sheriff and Imran, they managed to escape from their pursuers. But we should add that before Shariff ran from the scene, he was hit by a member of the group. He thought it was a punch but it turned out to be a stab wound.

6 Soon thereafter the police and an ambulance arrived. Sulaiman was pronounced dead at 5.00am. The Consultant Forensic Pathologist who conducted the post mortem found 13 stab wounds to the head, neck, shoulder, back, upper and lower limbs of the deceased. The causes of death were the stab wounds to the neck and chest.

7 The charge brought against the two respondents was one of murder on the basis that they, together with the six others, were members of an unlawful assembly whose common object was to cause hurt with dangerous weapons to rival gang members and in prosecution of the common objective one or more members of the unlawful assembly caused the death of Sulaiman.

Decision below

8 The trial judge in acquitting the respondents of the capital charge found that the common object of the gang in going over to Boat Quay was only to find rival gang members and beat them up as there was no evidence indicating that the use of weapons were either discussed or contemplated. While it was clear that after the group started to assault the deceased, some of the members did use knives to stab him, the question that arose was whether the two respondents did partake in the object of causing hurt by using weapons. Having scrutinized the evidence, the trial judge held that the prosecution had not established that the respondents did share in the object of those who used weapons to cause hurt to Sulaiman. He noted that Shariff did not see any knife being used and, when stabbed, did not feel it. The trial judge entertained a reasonable doubt as to whether the respondents, in fact, saw any of the other members of the group bringing out their knives and stabbing Sulaiman before the respondents assaulted the latter.

9 The trial judge then examined Fazely's evidence in court which contradicted with what he said in his statements to the police, where Fazely appeared to suggest that he kicked the deceased after the latter had been stabbed by others, indicating his concurrence to the formation of a new common object. The trial judge reconciled the contradictions. The relevant passage of the trial judge's grounds of decision where he dealt with this point is produced later in ¶20.

10 As for the second respondent, Khairul, he maintained in his statement that he stopped assaulting the deceased as soon as he realized that some members of the group had used knives. While the statements of Hasik implicated both the respondents, the trial judge did not consider it prudent to rely on Hasik's statements.

11 The trial judge concluded by holding that the respondents had raised a reasonable doubt as to whether they were guilty of murder in having a common object with others to cause hurt to the deceased with dangerous weapons. Instead he found them guilty of an offence of rioting under s 147 of the Penal Code and sentenced each to five years imprisonment and twelve strokes of the cane.

Arguments of Public Prosecutor

12 The Deputy Public Prosecutor (DPP) submitted that the trial judge committed the following errors in coming to his decision to acquit the respondents of the capital charge:-

(i) failure to appreciate the difference between liability under s 34 and that under s 149 of the Penal Code, and that, in the latter, liability is based on membership of an unlawful assembly.

(ii) that the finding of the trial judge, that he had a reasonable doubt whether the respondents did see the use of knives by the other members of the gang before they partook in the assault, is against the weight of the evidence, bearing in mind not only the written statements of the respondents, but also those of Hasik.

Alleged errors of law

13 The DPP submitted that the trial judge had erred on a point of law when he made the following propositions:-

"It is important to remind ourselves that even if the written statements are accepted as stating the truth of what happened, specifically, namely that the two (respondents) carried out their parts in the assault even after the armed members had drawn their knives the prosecution has still to prove that a common object to do so had been formed." (para 16)

"… even if (the respondents) had carried on hitting Sulaiman after their friends had stabbed him, there

is insufficient evidence to convince me beyond reasonable doubt that the two (respondents) had, there and then, formed a new common object of causing hurt with dangerous weapons as charged." (para 17).

14 The DPP argued that the trial judge had placed an impossible burden on the prosecution. Citing *Barendra Kumar Ghosh v Emperor* [1925] AIR PC 1, he said that liability under s 149 followed from membership of the assembly at the time of the commission of the offence. Therefore, even if an unarmed gang member was aware only at the time of the attack, that some of the others had carried weapons, that unarmed member would nevertheless be liable under s 149 unless he "had taken reasonable steps to clearly dissociate" himself from that object. During the attack by the group members on Sulaiman, neither respondents showed any intention, nor did they take any positive steps to dissociate themselves from the attack when they realised that it was carried out with the use of weapons by three members of the group.

15 It is settled law that there is a limit as to the constructive liability which is imposed under s 149. It does not follow that just because a person is a member of an unlawful assembly that he is, therefore, responsible for every act done by any other member. The "common object" circumscribes the limits. The position is succinctly set out in Dr Gour's commentry on *The Penal Law of India* (2000) at p 1414-5 and 1398 as follows –

"A person may join an unlawful assembly with an unlawful object, but it does not necessarily follow that he indorses all that the other members say or do. Nor is he therefore responsible for their acts of which he was not clearly cognisant. The members of an unlawful assembly may have a community of object only up to a certain point, beyond which they may differ in their objects, and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object will vary not only according to the information at his command, but also according to the extent to which he shares the community of object and as a consequence the effect of this section may be different on different members of the same unlawful assembly. In dealing with such cases, it is, on the one hand, necessary for the protection of accused persons that they should not, merely by reason of their association with others as members of the unlawful assembly, be held criminally liable for offences committed by their associates which they themselves neither intended nor knew to be likely to be committed; on the other hand, it is equally necessary for the protection of peace that members of an unlawful assembly should not lightly be let off from suffering the penalties of offences for which, though committed by others, the law has made them liable for reason of their association with the actual offenders with one common object."

"Where the common object of the assembly is not murder but some other unlawful object and death is caused in the course of achievement of that object, the question arises whether the evidence discloses that in achieving the common object which was not the commission of murder, the members of the assembly were determined to go to any length, even to the length of committing murder. If the answer to the question is in the affirmative, the commission of the murder must be deemed to have been included within the common object of the assembly. On the other hand, if the answer to the question is in the negative, and yet on the sudden coming into existence of an unexpected situation, death is caused by the isolated act of one of the members of the assembly, that member alone will be liable for the killing and the aid of s 149 cannot, in such a case, be invoked to fasten liability for the murder on the other members of the assembly."

16 It is clear from the grounds of judgment that the trial judge was very conscious that while the initial object of the group was to inflict injury on rival gang members through the use of fists and legs, that common object could have changed on the spot when some members drew out knives which they carried. That was why he was at great pains to determine at which point the respondents had formed the new object of causing hurt with the use of weapons. This is evident from the following statement of the trial judge:-

> "the question as to whether the two accused or either of them had formed a new common object with their knife-wielding friends is one that must be answered by the evaluation of all the evidence, each in detail, and all in connection with one another, without losing sight of the context and circumstances of the events."

17 The remarks made by the trial judge that "even if (the respondents) had carried on hitting Sulaiman after their friends had stabbed him, there is insufficient evidence to convince me beyond reasonable doubt that the two (respondents) had, there and then, formed a new common object of causing hurt with dangerous weapons as charged" (see ¶13 above) must be viewed in the context. All he was saying was that even if the respondents had seen their friends using knives to attack Sulaiman, he was not convinced, in all the circumstances, that they had formed a new common object of causing hurt with dangerous weapons. Of course, such circumstances could indicate the formation of a new common object. But the trial judge did not feel it safe to hold that a new common object had been formed as far as the respondents were concerned, and instead preferred to give the benefit of the doubt to the respondents. The burden of proof of the ingredients of a charge always rests with the prosecution, including that of establishing "common object". Of course, the question of "common object" is often a matter of inference. In any event, this view is wholly irrelevant, as the trial judge did not find (discussed below) that the respondents continued to assault Sulaiman after seeing the use of knives by some group members.

Did the respondents see the use of knives?

18 We now turn to the most important question of fact. When did the respondents come to realise that some members of the group had used knives in their attack on Sulaiman? We shall first consider the position of Fazely. In his s 121 CPC statement recorded on 28 June 2001 he stated, inter alia,

> "… I saw them attacking a male Malay who was lying down on the floor. 'Baby' who was armed with a dagger and he was stabbing the head of the male Malay lying on the floor. As for 'Aki' he too was armed with a folded knife and he too was stabbing the said male Malay at the neck. … <u>They were stabbing the subject several times on the head and neck area. When I was near, I swung the chain at the male Malay. The chain did not hit the subject and instead, hit 'Baby's hand. The chain also broke to pieces upon hitting the ground</u>.
>
> … as the chain has broken to pieces, I kicked and punched the subject two to three times on his head. While I was attacking the subject, I too saw 'Hasik' and 'Fami' kicking the male Malay on his head. In other words, we surrounded the male Malay who was then lying face up on the floor. "Baby", "Aki" and

"Boy Sharul" continued to stab the subject and "Hasih", "Fami" and myself were kicking and punching the subject."

19 On 9 July 2001, in a further statement, Fazely furnished the following additional clarification to the answers he gave earlier –

"Question 8: Can you describe to me the knives used by 'Baby', 'Aki' and 'Boy Sharul' as mentioned in paragraph 8 of your statement?

Answer: I only saw the blade of the knives used by them. I am unable to describe, I think 'Aki' bought the knife from Sungei Road There was an occasion when I accompanied him to Sungei Road as he wanted to buy a folded knife. However, on that occasion, he did not manage to buy the one he wanted. Subsequently, I learned from him that he had bought the knife."

20 The DPP submitted that these statements should be treated to be *prima facie* true. In this regard, he relied upon the pronouncement made by this Court in *Lau Song Seng v Public Prosecutor* [1998] 1 SLR 663 that where an accused's evidence in court was at variance with what he stated in his earlier statements to the police, the former should *prima facie* be treated as less reliable than the latter. But this is only a *prima facie* position. Moreover, it is important to bear in mind that in *Lau Song Seng* the trial judge did not explain how he treated the accused's statements which were retracted. Here, the trial judge did carefully consider them, as can be seen from the following two passages in his grounds of judgment (at ¶¶16 and 17):-

"Written statements to the police were once inadmissible because of the thinking that a man ought not to incriminate himself. That line was modified when it became accepted view that the evil we wish to avoid is the coercion of the accused and not his statement. Hence, the rules were changed so that statements of the accused are admissible if the court is satisfied that they were made voluntarily. But it does not follow that once the court admits the statement into evidence it stands as incontrovertible evidence – just because the court is of the view that it was not made under a threat, inducement or promise (as the courts have defined them to be). The statement becomes another piece of the evidence before the court. What is stated may or may not be true. That is what the court has to consider, like any other evidence before it. There are two more points to be made in this regard. First, even when a statement has been admitted in evidence, the maker is entitled to explain what he said and why he said what he said. Secondly, the courts finding of guilt or otherwise does not depend solely on whether the statements carry the truth although it must be recognised that generally, a written statement forms a forceful piece of evidence unless the persuasiveness of the explanation matches that force, but there is little point in listening to the oral explanation if the written statement is to be preferred as a matter of course.

The incriminating (from the prosecution's point of view) statements in this case are sparse; no more than a paragraph or two, and the oral evidence including that under cross-examination is not much more; but there is nothing exceptional about this. The point in issue, crucial as it may be, is a very narrow one. Taking all the evidence into account, I find little difficulty in finding that the attack took place swiftly and was over very quickly. Although the DPP takes the view that there was adequate light for the knives to be seen clearly, I think that it is not unreasonable to accept the accused person's

contention that the lighting was poor. It may be sufficient for the knives to be seen clearly, but it may not be sufficient for the knives to be clearly seen. This is not intended as a play on words. I shall explain. Taking a step back to consider from a broader perspective, the circumstances in which the attack took place, one must recall that there was a fairly large group of people involved (although a few began to run away and others gave chase) in an incident occurring under a street lamp as opposed to natural light, the action was swift as it was furious. It was not the sort of occasion where those involved (on either side) had the luxury of time nor the comfort of safety to observe in detail what the others were doing. I had considered the evidence of the accused persons against this background, and am of the view that there was nothing in the way or manner of their testimony that disinclines me from granting them the benefit of doubt. This is a case which, but for the inconsistency in their written statements, I would have said that I believe their testimonies."

21 It is therefore not correct to say that the trial judge did not give due consideration or weight to Fazely's statements. The trial judge had expressly stated that he recognised that generally a written statement forms a forceful piece of evidence. However, giving a statement due consideration does not mean that the court must necessarily accept what are stated in the statement as true and accurate. The admissibility of a statement and the weight to be given to it are distinct matters. In explaining the discrepancy between what he said in court and what was stated in his statements, Fazely said "it was drafted and I was guided along by the IO (referring to the Investigating Officer)" as the IO had already known what happened. However, in court he was allowed "to give the whole narration freely." What Fazely seemed to suggest was that he was led through the statement. In as much as a trial judge, after hearing all the evidence, is entitled, if he is so inclined, to give more weight to what an accused stated in his statement than his oral evidence in court, the position could also be in the reverse. It is entirely a matter of evaluation of the evidence by the trial judge. We must emphasise here that there is no other objective or independent evidence to contradict what Fazely had said in court.

22 The DPP also criticised the trial judge for giving undue weight to the lighting condition at the scene. Surely, this is a relevant point in the consideration of the respondents' claim that they did not see the use of knives at the early stage. Witness for the prosecution, Suraini bte Mohd Idris (PW15), who saw the fight said that the place was "dim". What she saw was only a group of people attacking Sulaiman. She could not even say how many.

Turning to the second respondent, Khairul, the relevant portions of his statements are the following:-

Section 122(6) statement of 12 Sep 2001

"I am not the main person who had caused the death to the victim. I was not carrying any weapon at that time. I did beat him up by using my right leg once or twice. At that time, the victim was already lying down on the floor and protecting himself. After I kicked him, a friend of mine 'Syamsul Ariffin' whom known commonly (sic) to me as Aki came and he used a knife and stabbed the victim a few times. Among the group, the persons who were armed with knives were Aki, Baby and Sharul. I stopped kicking the victim while the stabbing (sic) in progress"

Section 121 statement of 18 September 2001

> "A short distance away, I saw 'Aki' stopped chasing and was walking back to 'Bernie'. On seeing 'Aki' returning, I turned around and saw one person lying on the steps in front of 'Bernie', 'Hasik'; 'Pendek', 'Boy Sharul' and 'Baby' were surrounding that person and were kicking him. On seeing that, I also joined in and kicked the person once or twice. Just then, 'Aki' came to us and at this point, I saw him holding onto a knife. He squatted down beside the person lying on the floor, lift up his hand that was holding the knife and repeatedly stabbed the person's head. While 'Aki' was stabbing the person, 'Baby' came along and he too was holding onto a knife. He too used the knife and delivered one or two stabs at the person's head. The incident happened very fast and I was standing there shocked at what I saw."

24 It is true that Khairul saw Syamsul (Aki), Norhisham (Baby) and Sharulhawazi (Sharul) using knives to stab Sulaiman. But this was after Khairul had assaulted Sulaiman. He withdrew from attacking Sulaiman after seeing knives being used by the three persons. If that were so, as the trial judge was inclined to believe, then it would be difficult to infer that Khairul shared the common object of using dangerous weapons to cause hurt to Sulaiman.

25 The only other evidence which implicated Khairul are the statements of Fazely and Hasik. We have set out above the reasons why the trial judge preferred the evidence given in court by Fazely over what he said in his statement.

26 As regards the statements of Hasik, which implicated both Fazely and Khairul, the trial judge could not place any reliance on them because, in the words of the judge, Hasik –

> "was a figure of dejection and had no interest whatsoever in giving any evidence in the spirit that was required of a material witness. He was thus unable to provide any further information or explain any part of his written statements."

Hasik imply refused in court to confirm his statements, often saying "I can't recall" or "I have forgotten everything".

27 Section 147(6) of the Evidence Act gives the trial judge the discretion to determine what weight he would accord to such a statement and in that connection regard "shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement". The trial judge had clearly focussed on the statements of Hasik and we cannot appreciate how the DPP could submit that the trial judge had failed to address his mind to the contents of Hasik's statements. The trial judge would have perused the contents thereof, but was unable to give weight to them because Hasik did not back up the statements at the trial. How could a statement acquire sanctity, or the aura of truth, when the person who gave it was not willing to verify it in court? This would be turning logic on its head.

28 Moreover, even taking Hasik's statements on their face value, the following points must be noted. First, Hasik did not say that prior to the actual attack, there was any discussion among the group members as to the use of weapons. Second, even if Hasik did at a certain point, see the use of weapons by some other gang members, it does not necessarily follow that the two respondents would also have, at that point, seen the use of knives by those members. Hasik would not be in a position to know whether the respondents did see the use of knives at the time when he himself did. Here, we must highlight the fact that Shariff, who was stabbed, did not even know he was stabbed and neither did he see any knife being used. Is it that unlikely, or incredible, that the two respondents did not, at the first part of the assault on the deceased, see the use of knives by some of the gang members?

29 Finally we would stress that all that the prosecution witness, Yasmin bte Abdul Rahim (PW16), who saw the attack on Sulaiman, could say was that "they were punching and kicking the said male Malay."

Finding of fact

30 It is vitally important to bear in mind that the finding here is one of fact and it is trite law that on a question of fact an appellate court would not disturb such a finding unless it is plainly wrong or wholly against the weight of the evidence. This principle of law was enunciated in many cases and it suffices for us to quote the following passage of Yong Pung How CJ in *Arts Niche Cyber Distribution Pte Ltd v PP* [1999] 4 SLR 111 at 120:-

> "It is trite law that an appellate court will not interfere with a trial judge's findings of fact unless they are plainly wrong (*Lim Ah Poh v PP* [1992] 1 SLR 713). As I observed in *PP v Azman bin Abdullah* [1998] 2 SLR 704:-
>
> > '[i]t is well settled law that in any appeal against a finding of fact, an appellate court will generally defer to the conclusion of the trial judge who has had the opportunity to see and assess the credibility of the witnesses. An appellate court, if it wishes to reverse the trial judge's decision, must not merely entertain doubts whether the decision is right but must be convinced that it is wrong.'
>
> Where the trial judge's finding of fact are based on his assessment of the witnesses' veracity and credibility, the appellate court will be even more reluctant to overturn his findings: *Yap Giau Beng Terrence v PP* [1998] 3 SLR 656."

31 This appellate court would have to have regard to the fact that findings of fact are invariably based on the credibility of witnesses, which the trial judge here had the opportunity to observe: *Ameer Akbar v Abdul Hamid* [1997] 1 SLR 113. There is no objective or credible evidence of another witness which the trial judge could rely upon to hold that either or both the respondents had seen the use of knives by other gang members in attacking the deceased and yet continued to physically

assault the deceased. As far as Fazely is concerned, all there is is his self-incriminating statements. But he had explained to the trial judge who was prepared to give him the benefit of the doubt. As for Khairul, he had always maintained that upon noticing the use of knives by others, he stopped attacking the deceased. There is no dispute that neither Fazely, nor Khairul, had used any knife to attack Sulaiman.

32 It is not a sufficient ground to reject findings of the trial judge just because an appellate court, if it were to have heard the case, would have been inclined towards the opposite conclusions: *Tan Tek Yan v Samuel* [1964] 1 MLJ 283. Here again, we are further reminded of the exhortation of the Privy Council in *Sheo Swarup & Ors v King-Emperor* [1934] AIR 227(2) PC, where Lord Russell of Killowen said, at 240, that an appellate court, in exercising its power to review evidence and order a reversal of an acquittal, should always give proper weight and consideration to the following matters:-

(i) the views of the trial judge as to the credibility of the witnesses;

(ii) the presumption of innocence in favour of the accused, a presumption not evidenced by the fact that he has been acquitted at his trial;

(iii) the right of the accused to the benefit of the doubt; and

(iv) the slowness of the appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses.

Grevious hurt

33 In the result, we do not think there is sufficient basis for us to upset the findings of the trial judge. The capital charge against the respondents has not been made out. The question that remains is whether, on the facts, the respondents are only guilty of the offence of rioting under s 147 of the Penal Code.

34 The autopsy report of the Forensic Pathologist listed the following injuries to the deceased's head:-

"2. Small abrasions measuring 0.1 cm diameter, 0.2 cm diameter, 0.2 cm diameter, 0.1 cm diameter, and scratch abrasion 0.5 cm long over left parietal scalp.

3. Reflection of the scalp revealed Rectangular bruise 3 x 3 cm right of midline over frontal scalp.

4. Bruise 3 x 2.5 cm with subaponeurotic haemorrhage over the midline, near the vertex.

5. Bruise 3 x 1 cm over left forehead."

35 The head is a vital part of the human body and to repeatedly attack the head of a person with one's might can hardly be considered to be an act to cause only simple hurt. The respondents' statements clearly show that they had kicked and punched Sulaiman when he was lying helplessly on the floor. Fazely, in his statement, said:-

> "When I was near, I swung the chain at the male Malay. The chain did not hit the subject and instead, hit 'Baby's hand. The chain also broke to pieces upon hitting the ground … as the chain has broken to pieces. I kicked and punched the subject two to three times on his head. While I was attacking the subject, I too saw 'Hasik' and 'Fami' (the second respondent) kicking the male Malay on his head. In other words, we surrounded the male Malay who was then lying face-up on the floor."

36 Similarly, Khairul, in his statement said:-

> "'Hasik', 'Pendek' [the First Respondent], 'Boy Sharul' [Sharulhawzi] and 'Baby' [Norhisham] were surrounding that person and were kicking him. On seeing that, I also joined in and kicked the person once or twice."

37 Bearing in mind that here was a group of seven to eight individuals who clearly intended to bash Sulaiman up, without regard to whatever injuries they might cause to him, they could not have had the object of only inflicting simple hurt on the victim. To our mind, it was clear that the common object of the group was to teach Sulaiman, whom they thought belonged to a rival gang, a severe lesson.

38 Accordingly, we would instead convict the respondents of the offence of causing grievous hurt under s 325, read with s 149, of the Penal Code. We will now hear the respondents' mitigation on this finding.