Tan Chun Seng v Public Prosecutor
[2003] SGCA 26

Case Number : Cr App 2/2003

Decision Date : 06 June 2003

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; MPH Rubin J; Yong Pung How CJ

Counsel Name(s) : Subhas Anandan, Anand Nalachandran (Harry Elias Partnership) for the Appellant; David Chew Siong Tai (DPP) for the Respondent

Parties : Tan Chun Seng — Public Prosecutor

Criminal Law – Offences – Murder – Sudden fight – Ingredients of defence – Penal Code (Cap 224, 1985 Rev Ed) s 300(c) Exception 4

Criminal Procedure and Sentencing – Sentencing – Culpable homicide – Whether life imprisonment appropriate – Penal Code (Cap 224, 1985 Rev Ed) ss 304(a), (b)

Delivered by Yong Pung How CJ

1 This was an appeal by Tan Chun Seng (the appellant) against his conviction in the High Court of murder under s 300(c) of the Penal Code punishable under s 302 of the Penal Code.

Facts

2 The deceased, Krishnan s/o Sengal Rajah (Krishnan), had at about 8.30pm on 30 June 2001 met a friend Chandrasegaran s/o Raman (Chandrasegaran) for drinks at Rajini Wines, which was a bar along Dunlop Street within the vicinity of Little India. Krishnan was a deaf-mute, a fact which, at all material times, the appellant did not know. Whilst at Rajini Wines, Krishnan and Chandrasegaran consumed four quarter-litre bottles of gin. They left Rajini Wines at about 10.30pm, and had another drink at the Back Alley Pub. After leaving the pub, the two of them walked down Dunlop Street. At about this time the appellant was parking his newly-purchased Nissan Sunny car along Dunlop Street. The appellant had intended to have Teochew porridge at a coffee shop at the end of Dunlop Street before heading off to Johor Baru for the weekend. Just as he was parking the car, he saw two Indian males walking towards his car. These two Indian males were Krishnan and Chandrasegaran. The appellant had never met them before. Just as they approached the car, Chandrasegaran hit the glass window on the front passenger side of the car.

3 The appellant was furious at this. He turned his head and saw that Chandrasegaran and the deceased had moved to the rear of the car, where they stopped. Chandrasegaran was seen gesturing to the appellant to come down from his car, with Krishnan standing beside him. The appellant parked his car swiftly. He was set on confronting Chandrasegaran. He walked a short distance to catch up with the two men but soon realised that the one wearing the black T-shirt, Chandrasegaran, was no longer in sight. He had turned into one of the many side alleys which ran off from the road they had been walking on. Krishnan however had not turned into a side alley – he continued to walk down Dunlop Street.

4 Not being able to confront Chandrasegaran about why he hit his car, the appellant went to catch up with Krishnan, and shouted to him, asking him why his friend had hit his car. The fact that Krishnan continued walking, unperturbed at the appellant's outburst, only enraged the appellant. He started to hurl Hokkien vulgarities at Krishnan. When he had almost caught up with Krishnan, the latter turned around and faced the appellant. Krishnan, now facing the appellant, just stood his

ground and looked at the appellant. The appellant kept on hurling Hokkien vulgarities at Krishnan. He coupled his verbal outburst with expressive hand gestures. He noticed at this point that Krishnan was of a big physical build. The autopsy report later showed that Krishnan weighed 94 kg and was 172 cm tall. As the appellant continued his verbal onslaught and hand gesturing, he moved forward thereby closing the gap between himself and Krishnan.

5 Krishnan then pushed the appellant with great force such that the appellant immediately fell to the ground. This push was not an ordinary shove. It was meant to fell the appellant to the ground. Evidence of the fact that this push was of great force was seen in the trial judge's grounds of decision, the appellant's evidence at trial and two of the appellant's statements to the police. The importance of this fact needed to be stressed. Therefore, we tabulated the evidence which clearly showed that Krishnan's push was an aggressive one which resulted in the appellant being thrown to the ground.

Table 1: Proof that Krishnan's push was aggressive and forceful

Reasons	Explanations
Trial judge's grounds of decision	The trial judge stated: 'In these circumstances, I will assume, without casting blame on Krishnan, that he did push the accused a little harder than he ought to.'
The appellant's evidence at trial	When on the stand the appellant stated in Hokkien: 'As I walked nearer towards him, this man used his right hand and pushed me on the chest. The force he used was very great and I fell onto the ground.'

The appellant's police statements	The appellant recounted the force with which Krishnan pushed him in two separate police statements. In the first statement, he stated in Hokkien: 'When I walked near him, he pushed me with his hand and I fell to the ground…I realised that I could not overpower him with my bare hands.' In the second statement, he stated in Hokkien: 'He used his right hand to push at my chest. I fell on the ground due to his pushing.'

6 When the appellant was on the ground, he spotted a wooden pole on top of a pile of rubbish at the side of the street. He had realised that he was not going to be able to overpower Krishnan in a bare-handed fight, and so grabbed the pole, got up, and gave chase with the pole in hand. Krishnan had advanced a few steps from the place where he had pushed the appellant. Thus, the appellant had a slight distance to make up before he hit Krishnan on the head with the pole. The appellant stated in his police statements that he hit Krishnan numerous times with it.

7 Krishnan fell to the ground and was motionless. The appellant then threw the wooden pole to the side of the road, walked back to his car and drove to Johor Baru. Jahangeer s/o Jamaludden, a bystander, saw Krishnan collapse on the ground, and immediately called the police. This was at 10.46pm. Lyn John Pereira, a paramedic with the Singapore Civil Defence Force, received instructions at 10.49pm to go the scene. The paramedic arrived at 10.59pm and after examining the body pronounced Krishnan dead at 11.03pm. When the police took over investigation of the case, they handed over to the Health Sciences Authority (HSA) three sachets of green substance and a straw of yellow substance for testing. These were found in Krishnan's haversack. HSA analysis confirmed that the straw contained 0.21 grams of powdery substance which contained diamorphine. The three sachets contained 5.67 grams of fragmented vegetable matter which contained tetrahydrocannanibol and cannanibol.

8 Dr Paul Chui, a Consultant Forensic Pathologist with the Health Sciences Authority, confirmed in his autopsy report that the death had stemmed from a constellation of injuries over the right side and back of the head. He stated that these injuries could be explained by a single blunt blow over the right side of the head. He maintained throughout his time on the stand that the autopsy report did not reveal any other injuries elsewhere on the body, and that the constellation of injuries to the right side of the head was consistent with just one blunt blow. Thus, there was prima facie an inconsistency between the appellant's evidence and the medical evidence. This issue will be addressed in the judgment below.

The Decision Below

9 The trial judge found that the prosecution had made out all the elements needed to crystallise the appellant's culpability under s 300(c) of the Penal Code. Section 300(c) states:

> Except in the cases hereinafter excepted culpable homicide is murder 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.

10 Having come to this conclusion, the trial judge addressed the defence of provocation under Exception 1 to s 300 of the Penal Code. He found that it was Chandrasegaran who had hit the appellant's car and then gestured to him to come out of his car. These two facts showed that the defence under Exception 1 was not available to the appellant since the provocation did not stem from the deceased. That the provocation must come from the deceased is a clear pre-requisite, as seen in Illustration (a) to the provocation exception. The trial judge stated that the only provocation that emanated from Krishnan was his pushing of the accused with such force that he fell. However, this act had been provoked by the accused himself. Thus, there was no room for the partial defence of provocation to apply. Accordingly, the accused was found guilty of murder under s 300(c) and was sentenced to suffer death.

The Appeal

11 The appellant raised three broad points at the appellate stage. We were of the opinion that only one of these points was of merit. To this end, we dealt summarily with the other two points.

Section 300 (c) of the Penal Code

12 Counsel for the appellant argued that the trial judge was wrong to find that the necessary elements for a s 300(c) offence were made out by the prosecution. We dismissed this argument. This court recently re-emphasised in the case of *Arun Prakash Vaithilingam v PP* (Criminal Appeal No. 23 of 2002) that it is trite law that to prove an accused guilty of murder under s 300(c) of the Penal Code, one of the essential elements which must be established is that 'there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended'. This interpretation was grounded in the cases of *Virsa Singh v State of Punjab* AIR 1958 SC 465 and *Tan Cheow Bock v PP* [1991] SLR 293. It was clear that the appellant intentionally struck a blow to Krishnan's head. The injuries sustained caused the death. The requirements for an offence under s 300(c) were made out.

Provocation

13 Counsel for the appellant argued that the trial judge was incorrect to dismiss the partial defence of provocation. We dismissed this argument. The provocation stemmed from Chandrasegaran. As regards Krishnan's violent push, this act was provoked by the appellant. Thus, it was clear that the defence of provocation did not apply.

Sudden Fight

14 This was the crux of the appeal. We were of the view that the partial defence of sudden fight applied in this case.

15 The statutory defence of sudden fight resides in Exception 4 to s 300 of the Penal Code (Cap 224). Exception 4 states:

Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation - It is immaterial in such cases which party offers the provocation or commits the first assault.

16 There are three main ingredients which prompt the operation of this defence:

a) Sudden fight, heat of passion, sudden quarrel

b) Absence of premeditation

c) No undue advantage or cruel or unusual acts

This case possessed all three ingredients. It must be pointed out that counsel for the appellant at trial below did not raise the defence of sudden fight. It was first raised only at the appeal stage, by newly briefed counsel. We studied the evidence in great detail and found that there were several indicators that the defence of sudden fight was operative in this case. These indicators included, inter alia, the fact that the appellant had in his numerous police statements stated that there was a fight and that the appellant stood by what he said in his statements when he was later called to give evidence at trial.

17 Ideally, the defence should have been addressed at the trial stage. Murder carries with it the death penalty. To this end, the Courts are called upon to perform an exacting study of whether any of the defences – whether partial or full – to murder are operative in the case at hand. This duty is as applicable to the Court of Appeal as it is to the trial court.

18 Two Malaysian Court of Appeal decisions – *Ahmad Raduan bin Awang Bol v PP* [2003] 1 MLJ 372 and *Haji Talib v PP* [1969] 1 MLJ 94 – proposed that where there was evidence from the record of proceedings that a defence of sudden fight ought to have been addressed by the trial judge, but was not, the proper way for the appellate court to decide the case was to give the benefit of the doubt to the appellant. The Malaysian Courts' reasoning was that the proper forum for the assessment of the sudden fight defence's applicability was the trial court. The Court of Appeal, in their view, was ill-equipped to make this finding of fact.

19 We were of the view that the best forum to decide whether or not an exception to s 300 existed was the trial court, but where for some reason the defence was not pleaded and addressed at the trial court, we were of the view that the Court of Appeal was still in a very credible position to make a decision on the defence's operation. This is especially so when the Court of Appeal has all the evidence it needs to come to a decision on the operation of the defence. In such situations, there is no need to give the benefit of the doubt to the appellant since the evidence can be studied afresh.

20 Section 54 of the Supreme Court Judicature Act (SCJA) deals with the powers of the Court of Appeal. It states:

The Court of Appeal may thereupon confirm, reverse or vary the decision of the trial court, or may order a retrial or may remit the matter with the opinion of the Court of Appeal thereon to the trial court, or may make such other order in the matter as it may think just, and may by such order exercise any power which the trial court might have exercised.

There was sufficient evidence before this Court to ascertain whether the defence of sudden fight existed in this case. We did not question the credibility of the witnesses as assessed by the trial judge.

21 Whether or not there was in fact a sudden fight in any given case depends on the unique factual matrix in that case. However, over the years, the Court of Appeal and the High Court in Singapore have laid down guidelines as to what factors are good and credible indicators that a defence of sudden fight does or does not exist in each case. The cases involving the defence of sudden fight over the past 12 years show that there are three main guidelines in this regard:

(1) Premeditation

Whether the fight and injuries suffered by the deceased were pre-meditated by the appellant.

(2) Armed beforehand

Whether the appellant was armed with the relevant weapon before the fight began – i.e. whether he came armed.

(3) *Undue advantage*

Whether, during the fight, the appellant had reason to resort to a weapon – i.e. here the Courts have placed substantial emphasis on the disparity of size between the deceased and the accused.

22 We were unable to find one case on sudden fight in the past 12 years, which, when compared to the facts of the current case, signalled that the defence should not apply in this case. We analysed the cases of *Jin Yugang v Public Prosecutor* [2003] SGHC 37; *Arun Prakash Vaithilingam v Public Prosecutor* [Criminal Appeal 23 of 2002]; *Asogan Ramesh s/o Ramachandran & Ors v Public Prosecutor* [1998] 1 SLR 286; *Ranwilage Fernando v Public Prosecutor* [1998] 3 SLR 893; *Samlee Prathumtree & Anor v Public Prosecutor* [1996] 3 SLR 529; *Phua Soy Boon v Public Prosecutor* [1995] 1 SLR 285; *Sivakumar v Public Prosecutor* [1994] 1 SLR 671; *Mohd Sulaiman v Public Prosecutor* [1994] 2 SLR 465; *Roshdi v Public Prosecutor* [1994] 3 SLR 282; *Mohd Yassin v Public Prosecutor* [1994] 3 SLR 491; *Mohd Bachu Miah & Anor v Public Prosecutor* [1993] 1 SLR 249; *Soosay v Public Prosecutor* [1993] 3 SLR 272; *Public Prosecutor v Ramasamy a/l Sebastian* [1990] SLR 875; *Public Prosecutor v Seow Khoon Kwee* [1988] SLR 871. To this end, the key facts surrounding this case must be re-emphasised:

(1) No premeditation

It was clear from the evidence that the appellant had no intention of getting into a fight that evening. He had never met the two Indian men before. Having had his car window hit by Chandrasegaran, he wanted to confront the latter as to why the latter hit his car. However, the appellant had lost sight of him and therefore decided to confront his companion Krishnan. It was at this point of time that the defence of provocation failed. It was clear from his police statements and his evidence at trial that he wanted to ask Krishnan why Chandrasegaran had hit his car. The appellant then started to swear at Krishnan, and, when he finally caught Krishnan's attention, he continued to shout and gesture vulgarities at him. Krishnan, now face-to-face with the appellant, then forcefully pushed the appellant to the ground. It was clear that this fight was not planned unlike the facts of many cases in which sudden fight was pleaded unsuccessfully.

(2) Not armed beforehand

It was clear from the evidence and from the grounds of decision that the appellant had not come armed. It was only after he was felled by Krishnan that he picked up the wooden pole. In fact, he spotted the wooden pole when he was on the ground after being pushed by Krishnan. The pole was in a pile of rubbish by the side of the road. This was not disputed. (One could have argued that it was the appellant's vulgarities and gesturing that provoked Krishnan into aggressively pushing the appellant. This would correctly negate a provocation defence. But it ought not to negate a sudden fight defence since it is clearly explained in the Penal Code that the defence of sudden fight does not depend on which party provoked the other into the fight. In this regard, the defence of sudden fight augments rather than overlaps the defence of provocation). Thus it was clear that the appellant was not armed beforehand.

(3) No undue advantage

The appellant stated that he hit Krishnan numerous times with the pole. This was confirmed by Eric Chew and Wilfred Chen, eye-witnesses who were having supper at a coffee shop on the corner of Dunlop Street. Dr Paul Chui stated on the stand that the constellation of injuries to the right back of Krishnan's head was consistent with one single blunt blow. He maintained throughout his examination and cross-examination that there was no medical evidence showing that Krishnan was hit more than once. He stated that the bruises and cuts which showed up on the autopsy report could have been caused by the deceased falling down. However, the overwhelming evidence captured in the appellant's police statements and the statements of the two eye-witnesses showed that the appellant did in fact hit Krishnan numerous times. On the totality of the evidence, we were of the view that the reason why the autopsy report showed that there were no bruise marks on the deceased's back, which was the area of the body the appellant concentrated his hits on, stemmed from the fact that Krishnan was wearing a haversack at the time of the confrontation. Dr Paul Chui said that it was possible that the haversack could have protected Krishnan from the hits to his back, but maintained that the medical evidence confirmed that there was only one blunt blow to the head. Nothing more. Nonetheless, we were of the view that this case was one where the appellant hit the deceased numerous times. Even in light of this fact, we were of the opinion that there was no undue advantage here. Of factual importance was the fact that there was a considerable disparity in size between the accused and the deceased. The autopsy report showed that the deceased weighed 94 kg and was 172 cm in height. At the time of admission to prison, the appellant weighed 61 kg and was 168 cm in height. In terms of weight, this made Krishnan 150% the weight of the appellant. The appellant stated in his numerous police statements and on the stand that he picked up the weapon because he was convinced after being pushed to the ground that he would not overpower Krishnan in a bare-handed fight. This was an important fact because the cases over the past 12 years have shown that the Singapore Courts have placed substantial emphasis on the physical sizes of the deceased and the accused when assessing whether the use of the weapon by the latter procured an undue advantage.

23 Of the 12 years' worth of case law studied, one case needed specific mention. This was the case of *Arun Prakash Vaithilingam v Public Prosecutor* [Criminal Appeal 23 of 2002]. The facts were these: the victim, Lenin, was fast asleep in his room. Arun, the appellant, was still smarting from a remark which Lenin made about him earlier in the day. Arun then went into Lenin's room, armed with a knife to confront him. Vulgarities were exchanged. There was some pushing of shoulders. The trial judge, with some hesitation, found this pushing constituted a fight. The aggressor was at all times Arun who eventually stabbed the victim in the chest. The defence of sudden fight was pleaded unsuccessfully.

24 The case of *Arun Prakash Vaithilingam* worked to the advantage of the appellant in the current case for three reasons. First, the trial judge in *Arun Prakash Vaithilingam* found that 'pushing'

did constitute a fight and this was not disapproved by the Court of Appeal. Secondly, the Court of Appeal affirmed the trial judge's assessment as regards what constituted an undue advantage in a sudden fight. In his grounds, the trial judge stated:

> I hold the view that generally a person who picks a quarrel or fight with an unarmed person, who is not substantially bigger or stronger than he, is deemed to have taken an unfair advantage when he uses a deadly weapon that he had armed himself with prior to the fight. By no account can two such protagonists be considered to be fairly or evenly matched. The post-mortem description of Lenin and my assessment of Arun do not indicate that Lenin was substantially bigger than Arun.

Thirdly, unlike Arun, the current appellant was not armed when he confronted Krishnan.

25 There was evidence in the current case that the appellant hit Krishnan when the latter was on the ground. We were of the opinion that the appellant's actions were borne out of a fight and thus were carried out in the heat of passion. To this end, the fact that the appellant continued to hit the deceased when the deceased was on the ground did not prevent him from claiming the defence of sudden fight. It must be remembered that the appellant did not premeditate the fight and that the fight was started by the deceased's push. Also, the appellant picked up the stray pole in the course of the fight. He was therefore not armed beforehand. The appellant was of a much smaller build than the deceased. In these circumstances, the fact that the appellant continued to hit the deceased while the latter was on the ground did not prevent the appellant from claiming the defence of sudden fight. Neither did the fact that when the appellant struck the deceased, the latter had turned and walked away, should deprive the appellant of the defence of sudden fight. The fight had begun.

26 On a thorough analysis of the case law, we were of the opinion that the defence of sudden fight was available to the appellant.

Sentence

27 Our next step was to look at the requisite punishment for the offence. This was captured in s 304 of the Penal Code. We had a choice of whether to sentence the appellant to life imprisonment which was the maximum punishment under s 304(a) of the Penal Code or to sentence him up to ten years' imprisonment, which was the maximum sentence under s 304(b) of the Penal Code.

28 Thus, there is a broad margin between the maximum sentences attached to each of these provisions – ss 304(a) and 304(b) of the Penal Code. This disparity exists within s 304(a) itself since the Court has, within the section, the ability to sentence the appellant to ten years' imprisonment or life imprisonment – but nothing in between. If, for example, the appellant was 26 years' old, as was the case in the current appeal, this could mean a disparity of over forty years between the two 'peg marks' of ten years and life – assuming the appellant lived until the age of say 76. The reason for this broad margin was borne out of the Court of Appeal's decision in *Abdul Nasir bin Amer Hamsah v Public Prosecutor* [1997] 3 SLR 643. In *Abdul Nasir* the Court held that life imprisonment meant imprisonment for the remainder of the appellant's natural life.

29 The Court of Appeal in *Public Prosecutor v Tan Kei Loon Allan* [1999] 2 SLR 288 highlighted the lack of judicial discretion to deliver a sentence between ten years and life for the offence of culpable homicide not amounting murder. To this end, the Court of Appeal stated:

> In serious cases the court must choose between the two options for a weighty sentence: ten years or life imprisonment. Under the old position, the effective choices would be up to seven

years' imprisonment (after remission) or about 13 years' imprisonment for a 'life sentence' (after remission), a gap of about six years. Without remission, the gap would be ten years. Now, the gap is very much wider. Even assuming a positive outcome after review by the Life Imprisonment Review Board, the gap between the sentencing options is between 7 and 20 years, more than double the old position. Assuming a negative outcome by the Review Board, or that the sentence was not commuted, the gap widens…There is no discretion for the court to impose a sentence of more than ten years, but less than life imprisonment. This compares to the position in England, where, in respect of manslaughter (murder without intent), the court has a discretion to impose a sentence up to and including a sentence for life (see the English Offences Against the Person Act 1861, s 5, as amended by the Criminal Justice Act 1948)…In a situation in which the court is desirous of a sentence greater than ten years, but feels that a sentence of life imprisonment is excessive, we have no choice but to come down, however reluctantly, on the side of leniency. Otherwise, the punishment imposed would significantly exceed the offender's culpability. It would, in our view, be wrong to adopt an approach in which the court would prefer an excessive sentence to an inadequate one.

30 The evidence in the current case pointed to the conclusion that the maximum sentence of ten years' imprisonment under the s 304(b) limb was the appropriate punishment for the appellant. Our use of the s 304(b) limb did not neutralise the problem of sentence-disparity surrounding the punishment options embodied in s 304. In line with the jurisprudence of *Tan Kei Loon Allan*, we would have to have erred on the side of leniency due to the excessiveness of the only other option (excluding caning) of life imprisonment. It seems prudent therefore that s 304 of the Penal Code is revamped to allow the judiciary the ability to sentence between the range of ten years' imprisonment and life.

Conclusion

31 The appellant killed Krishnan. The death was the result of a sudden fight. The facts in this case were unique and tight – there was no premeditation; the appellant was overpowered by the strength of the deceased; the appellant was not armed beforehand; there was parity in numbers; and the fight was sudden. We allowed the appeal and convicted the appellant of culpable homicide not amounting to murder. We sentenced him to ten years' imprisonment.

Appeal allowed.