

S Balakrishnan and Another v Public Prosecutor
[2005] SGHC 146

Case Number : MA 3/2005, 4/2005
Decision Date : 17 August 2005
Tribunal/Court : High Court
Coram : Yong Pung How CJ
Counsel Name(s) : Christopher Bridges (Christopher Bridges) for the first appellant; Selva K Naidu (P Naidu) and K Mathialahan (Guna and Associates) for the second appellant; Han Ming Kuang and Christopher de Souza (Deputy Public Prosecutors) for the respondent
Parties : S Balakrishnan; Pandiaraj s/o Mayandi — Public Prosecutor

Criminal Law – Abetment – Requirements of abetment by illegal omission – Requirements of abetment by instigation – Whether abettor having to be present at scene of offence for abetment to be made out – Section 109 Penal Code (Cap 224, 1985 Rev Ed)

Criminal Law – Offences – Causing death by rash or negligent act – Whether appellant possessing mens rea of culpable rashness – Sections 304A, 338 Penal Code (Cap 224, 1985 Rev Ed)

Criminal Procedure and Sentencing – Sentencing – Appeals – Whether sentences for offences manifestly excessive – Whether abuse of position of trust and authority factor to be considered in sentencing – Sections 304A, 338 Penal Code (Cap 224, 1985 Rev Ed)

17 August 2005

Yong Pung How CJ:

1 The joint appeals before me arose from events which ensued during the 80th Combat Survival Training Course ("80th CST course") organised by the Singapore Armed Forces ("SAF") in August 2003. One trainee, Sergeant Hu Enhuai ("Sgt Hu"), died and another, Captain Ho Wan Huo ("Capt Ho"), was seriously injured, as a result of the treatment meted out to them during the course. Both appellants were charged and convicted under ss 338 and 304A of the Penal Code (Cap 224, 1985 Rev Ed). Being dissatisfied with the outcome of the trial, both appealed before me on conviction and sentence.

The charges

2 Both appellants were army officers. The first appellant, Warrant Officer S Balakrishnan ("WO Balakrishnan") claimed trial to two charges. The first charge pronounced:

You, S Balakrishnan (Male/45 years) (NRIC No. S1392115/F), are charged that you, on the 21st day of August 2003 at about 3.00 p.m., at Pulau Tekong, Singapore, as the Course Commander of the Combat Survival Training Course, did abet by intentional aiding Divanandhari s/o Ambat Chandrasekharan, Ng Chin Fong, Toh Keng Tiong, Tan Tien Huat and Shashi Kumar to cause grievous hurt to one Ho Wan Huo (NRIC No. S7824734/G) by doing an act so rashly as to endanger human life, to wit, by illegally omitting to prevent them from pushing the said Capt Ho's head several times into a tub of water, holding it down for up to 20 seconds each time and preventing him from surfacing to breathe, thus causing him to suffer near drowning with acute respiratory distress syndrome, which act was committed in consequence of your abetment and you have thereby committed an offence punishable under section 338 read with section 109 of the Penal Code (Cap 224).

3 The second charge stated that WO Balakrishnan's illegal omission to prevent the actions of the others named in the charge caused the death of Sgt Hu, and that this was an offence punishable under s 304A of the Penal Code

4 The second appellant, Captain Pandiaraj ("Capt Pandiaraj"), faced two charges of abetment by instigation. The first charge read:

You, Pandiaraj s/o Mayandi (Male/33 years) (NRIC No. S7098083/E) are charged that you, on the 21st day of August 2003 at about 2:30 p.m., at Pulau Tekong, Singapore, as the Supervising Officer of the Combat Survival Training Course and the Officer Commanding of the Commando Training Wing of the School of Commando, did abet by instigation, Divanandhari s/o Ambat Chandrasekharan, Ng Chin Fong, Toh Keng Tiong, Tan Tien Huat and Shashi Kumar to cause grievous hurt to one Ho Wan Huo (NRIC No. S7824734/G) by doing an act so rashly as to endanger human life, to wit, by instructing them to immerse the heads of trainees underwater for four times and to keep the trainees' heads underwater for up to 20 seconds each time, which act was committed in consequence of your abetment and you have thereby committed an offence punishable under section 338 read with section 109 of the Penal Code (Cap 224).

5 The second charge against Capt Pandiaraj was phrased in like vein, but related to the doing of a rash act not amounting to culpable homicide under s 304A of the Penal Code, thereby causing the death of Sgt Hu.

6 Each appellant was convicted on both charges pressed against him. WO Balakrishnan was sentenced to two months' imprisonment on each charge, whilst Capt Pandiaraj was sentenced to three months' imprisonment on each charge. The sentences were ordered to run concurrently. Both WO Balakrishnan and Capt Pandiaraj appealed against conviction and sentence.

7 Two other officers present during the 80th CST course, Lieutenant Jeff Ng Chin Fong ("Lta Jeff Ng") and Lieutenant Divanand Hari ("Lta Diva"), stood trial with WO Balakrishnan and Capt Pandiaraj. Each was convicted of two charges under ss 304A and 338 of the Penal Code read with s 34 of the Penal Code. Lta Jeff Ng and Lta Diva were both sentenced to nine months' imprisonment on each charge, with the sentences to run concurrently. Neither appealed the decision below.

The facts

The undisputed facts

8 Combat Survival Courses are conducted by the Commando Training Wing ("CTW") of the School of Commandoes. Capt Pandiaraj was the Officer Commanding ("OC") of CTW and the Supervising Officer of the 80th CST course. A Second Warrant Officer ("2WO") in CTW, WO Balakrishnan was the course commander and conducting officer for the 80th CST course. The CTW is under the command of the OC, who reports to the Commanding Officer ("CO") of the School of Commandoes, who in turn answers to the Chief Commando Officer.

9 The 80th CST course was held from 13 August 2003 to 22 August 2003. 133 trainees were selected from various units of the SAF to undergo the course. Capt Ho and Sgt Hu were among them. A regular serviceman, Capt Ho was a Scout Platoon Commander attached to the Singapore Infantry Regiment. Sgt Hu, a full-time national serviceman, was a Sniper Platoon Sergeant attached to the Singapore Infantry Brigade.

10 Other personnel involved in the 80th CST course were commando officers and non-commando officers who were there as auxiliary instructors or to enact the role of the "enemy". The commando officers were mainly from CTW, whilst non-commando officers were largely full-time national servicemen from other SAF units.

11 Classroom lessons were conducted during the first week of the course. Trainees only commenced field training on 18 August in Kampong Permatang on Pulau Tekong. Actual Prisoner of War ("POW") training began on 21 August. Sgt Hu had already passed the medical examination to qualify for the CST course. The evidence from other trainees was that he was well during the three days of combat survival training and did not complain of hunger or exhaustion. Likewise, there was no evidence that Capt Ho was unwell before POW training began.

12 The POW program began at about 5.00am on 21 August. The trainees were "captured" by other personnel posing as the "enemy". They were blindfolded and had their hands tied behind their backs with rope. Their ranks and units were identified by writings with coloured markers on their shirts, as well as white tapes tied to the backs of their uniforms. The idea behind this was that higher ranking trainees and those from certain units such as commando and sniper units would be subject to harsher treatment during the exercise.

13 The trainees were first put through "soft" interrogation, which entailed being interviewed by instructors. The "hard" interrogation phase began at about 2.30pm. One of the "hard" interrogation stations was the water treatment station. The water treatment station consisted of a water tub, which had a flat base and was tapered slightly from top to bottom. The tub had a flat rim with a width of eight to nine centimetres. The inside of the tub measured 127cm by 127cm at the top, and 119cm by 119cm at the bottom. The tub had an inside depth of 60cm and was filled to the brim with about 0.85m³ of seawater.

14 Instructors questioned trainees at this station. If trainees did not reveal the information required, their heads would be dunked into the water tub for varying periods of up to 20 seconds. They would be brought up to the surface for a short period of time and questioned. If they failed to answer, they would be submerged again. This procedure would be repeated several times before they were brought to the "jerry can" station, where they had to hold jerry cans filled with water whilst maintaining "stress" positions.

15 Prior to the "hard" interrogation phase, Capt Pandiaraj briefed the instructors. He stipulated that all trainees should be treated equally. Instructors were not to manhandle the trainees or be too harsh on them. Trainees were to be dipped three to four times each, for up to 20 seconds each time. Two of the accused in the trial below, Lta Jeff Ng and Lta Diva, as well as two other instructors, Staff Sergeant ("SSgt") Tan Tian Huat, and Lta Ryan Toh Keng Tiong, were assigned to the water treatment station.

16 Capt Ho was brought to the water treatment station sometime after 2.30pm that day. Blindfolded and with his hands bound behind his back, he was dunked several times. He was later conveyed to the Tekong Medical Centre, before being evacuated to Singapore General Hospital ("SGH") by helicopter and admitted to the Intensive Care Unit. He was diagnosed as having suffered near drowning with acute respiratory distress syndrome and was only discharged eight days later.

17 Blindfolded and bound, Sgt Hu took his turn at the water treatment station later that day. He was conveyed to the Tekong Medical Centre at 5.11pm, evacuated to SGH by helicopter at 5.43pm and declared dead at 6.17pm. His certified cause of death was asphyxia and near drowning.

Case for the Prosecution

18 The Prosecution paraded a large number of witnesses before the court. It is unnecessary to detail the evidence given by every witness in my grounds of decision. Instead, the testimony of material witnesses will be set out to reflect the chronological order of events on 21 August 2003.

The briefing

19 SSgt Chen Chye Hwa, an assistant instructor whose job was to enforce discipline during the course, was at the briefing before the “hard” interrogation phase began. He stated that Capt Pandiaraj did not talk about the sequence of the water treatment or discuss any safety measures to be taken with regard to the treatment. The briefing by Capt Pandiaraj lasted about one to two minutes, after which WO Balakrishnan took over. WO Balakrishnan explained the sequence of stations that the trainees needed to go through, but did not detail how the water treatment should be carried out.

Position of the appellants during the water treatment exercise

20 I will deal first with the evidence pertaining to the whereabouts of Capt Pandiaraj during the exercise. The evidence from various witnesses placed Capt Pandiaraj at the administration tent, which was just five metres away from the water tub, for most of the afternoon. Third Sergeant (“3Sgt”) Yen Likai (“3Sgt Yen”), who was stationed at the water treatment tub the whole afternoon, testified that Capt Pandiaraj was seated at the administration tent from 2.30pm witnessing the water treatment, and was present when water treatment was conducted on both Sgt Hu and Capt Ho. 3Sgt Yen explained that when he saw the treatment meted out to Sgt Hu, he found it especially shocking that Capt Pandiaraj was there but never interfered.

21 SSgt Chen Chye Hwa was helping out at the water treatment station that afternoon. He testified that Capt Pandiaraj was present when Capt Ho was brought to the tub, and that Capt Pandiaraj did nothing to stop the manner in which Capt Ho was dunked. Capt Pandiaraj was also present when Sgt Hu was brought to the station, even going up to Sgt Hu to ask him what the range of a Steyr (a type of gun) was before the dunking commenced.

22 Turning now to the position of WO Balakrishnan during the exercise, 3Sgt Ong Chin Wei (“3Sgt Ong”), a national serviceman stationed at the tub the entire afternoon, said that he saw WO Balakrishnan and Master Raj, another instructor, about five metres from the tub when Capt Ho underwent water treatment. They looked on but did not intervene.

23 Another full time national serviceman, 3Sgt Augustine Ow, was about 25 to 30 metres away when he witnessed the water treatment meted out to Capt Ho. He confirmed that WO Balakrishnan was standing at the tub when Capt Ho was dunked, explaining that he could identify WO Balakrishnan because of his white hair and big biceps. 3Sgt Yen likewise testified that although WO Balakrishnan moved around in the course of the afternoon, he did stay at the water tub for quite some time to take photographs of the trainees undergoing water treatment.

24 Lta Shashi Kumar, a commando attached to CTW as an auxiliary instructor for the 80th CST course, was helping out at the water treatment station. He testified that he recalled seeing WO Balakrishnan around the water treatment station most of the time, as WO Balakrishnan was taking down the names and numbers of trainees who gave away their identity. SSgt Chen Chye Hwa confirmed that WO Balakrishnan was present when Capt Ho was dunked. At one point during Capt Ho’s treatment, WO Balakrishnan told the instructors to watch their timings when they dunked

him. Apart from this, he did not interfere in Capt Ho's treatment.

General feedback on water treatment

25 Ong Thiam Seng, a senior instructor in CTW, assisted in the 80th CST course. He confirmed that the water tub used for the 80th CST course was also used for water treatment in the 79th CST course, but that both courses differed in the manner in which water treatment was carried out, as well as the instructor-trainee ratio. During the 79th CST course, trainees were dipped backward into the water tub two or three times for about five to ten seconds each time. There were only two instructors to each trainee, as opposed to at least four instructors to one trainee during the 80th CST course.

26 Various trainees who were subjected to the water treatment gave evidence in court. Lui Yong Fook was a qualified lifeguard who could swim underwater for over one minute without air. He testified that he was dunked five times for up to 30 seconds each time. He was hardly able to catch his breath and swallowed some water. When he was underwater, the instructors forced open his nostrils and mouth and splashed water into his mouth to choke him further. He was later brought to Changi General Hospital.

27 Tan Li Thong, another trainee, said of his experience:

I was traumatised. I was very afraid. I was constantly panting and at the end of water treatment I was weeping. I was weeping because I was tired, scared and afraid that I might have to go in again. As I approached the tub, I heard screaming from trainees, shouting by instructors, gasping of air by one trainee before me, and when I heard all these I felt weak and I don't wish to go through this.

28 Other trainees echoed these sentiments, testifying that they feared death was imminent as they underwent water treatment. Another common thread running through the testimonies was that although they were aware that they could "surrender" and stop the water treatment, they chose not to, as they were afraid that they would fail the course and be forced to repeat it at a later date. Although WO Balakrishnan testified that a trainee would not have to repeat the course even if he gave up at any of the stations, it appeared that the trainees were not aware of this.

Capt Ho's water treatment

29 A number of officers and recruits enacting the role of "enemy" witnessed the water treatment meted out to Capt Ho and Sgt Hu. The consensus amongst the various witnesses was that the water treatment meted out to Capt Ho and Sgt Hu was harsher than that imposed upon other trainees.

30 Various instructors who witnessed the treatment of Capt Ho testified in court. One of the instructors at the water treatment station, SSgt Tan Tian Huat ("SSgt Tan"), recalled that Capt Ho was brought from the back of the queue to the front because all the instructors knew he was a captain. When he refused to admit his rank, Lta Diva took off Capt Ho's epaulette, threw it on the ground and stepped on it. Lta Diva then pushed Capt Ho's head into the water, using both his hands to cover Capt Ho's mouth and nose. His hands were still covering Capt Ho's mouth and nose when Capt Ho's head was in the water, whilst Lta Jeff Ng pressed down on Capt Ho's upper body with both hands to prevent him from struggling and SSgt Tan held on to his legs. Capt Ho was submerged for about 20 seconds, during which time he struggled violently.

31 SSgt Tan then pulled his head out of the water by holding on to the back of his collar.

Lta Diva was still covering Capt Ho's mouth and nose with his right hand. Unable to breathe and gasping desperately for air, Capt Ho struggled to remove Lta Diva's hand from his face. Lta Diva asked Capt Ho some questions. When Capt Ho could not answer, Lta Diva pushed his face underwater again. Lta Jeff Ng held down Capt Ho's head and used his fingers to block Capt Ho's mouth, preventing him from holding his breath. Capt Ho was submerged for more than 10 seconds, struggling violently all the while. He finally answered the questions asked of him after the sixth round of dunking. WO Balakrishnan was present during Capt Ho's water treatment but did not intervene.

32 Other instructors on the course largely corroborated SSgt Tan's testimony. Lta Kong Wai Kheong was not an officer from CTW, but assisted at the water treatment station and witnessed the treatment of Capt Ho. Lta Kong observed that the water treatment conducted during the 80th CST course was different from the treatment he underwent in 1996 when he participated in the CST course. In 1996, the instructor merely sprayed water on his body. During the 80th CST course, he witnessed instances when water treatment was carried out "excessively". He opined that Capt Ho experienced "one of the worst water treatments" and said that he was "taken aback" by the manner in which the instructors conducted water treatment on Capt Ho.

33 The other witnesses who observed Capt Ho's treatment were the full time national servicemen. 3Sgt Ong and 3Sgt Yen were stationed permanently at the water treatment station during the "hard" interrogation phase. 3Sgt Yen knew Capt Ho as Capt Ho was his scout platoon commander. 3Sgt Yen saw Lta Diva cover Capt Ho's mouth, nose and eyes with both his hands, so that even when Capt Ho's head was above water, he was unable to respond to the questions asked. Capt Ho's treatment lasted between five to ten minutes and he collapsed when he was finally pulled from the tub.

34 3Sgt Ong reported that the instructors tipped Capt Ho's entire body into the tub. Lta Diva covered Capt Ho's face with his hands and pushed it into the tub. One instructor held his legs and another leaned against Capt Ho's upper body. Yet another instructor sitting on the edge of the tub would occasionally step on Capt Ho's body. Capt Ho screamed as he was dunked into the water, and when he was finally dragged from the tub, he vomited water.

35 The last person to testify to Capt Ho's ordeal was Capt Ho himself. Capt Ho said that when he was initially dunked, he was shocked, as he did not have time to take a breath. He was unable to force his head out of the water since the instructors' hands were on his head. Unable to breathe, he inhaled water. When his head was pulled out of the water, he was questioned, but before he could answer the questions, he was dunked again. He estimated that he was given about three seconds to catch his breath. The process was repeated, during which he inhaled water in his struggle to breathe. When he finally succumbed and revealed that he was a Captain, the instructors cheered and did "high fives", leaving him to crawl out of the tub himself. His chest felt tight. He was breathless and was unable to stand when instructed to do so. As the instructors dragged him back to the tub and threatened to dunk him again, he forced himself to stand and walk a few steps. He was eventually sent to the medical centre when the pain in his chest increased.

Sgt Hu's water treatment

36 SSgt Tan was in the tub with Lta Jeff Ng when Sgt Hu was brought to the water treatment station. SSgt Tan recalled that both Capt Pandiaraj and WO Balakrishnan were standing about five metres away from the tub at that point. Sgt Hu had two white tapes tied to the back of his uniform, signifying that he was a sniper. Lta Diva pushed Sgt Hu's head into the water, whilst Lta Jeff Ng blocked Sgt Hu's nose and mouth to prevent Sgt Hu from controlling his breath. Another instructor stood outside the tub holding on to Sgt Hu's legs whilst SSgt Tan pressed on Sgt Hu's upper body.

Sgt Hu struggled violently. He was in the water for about seven to ten seconds before being pulled out of the water for about three seconds. He was not asked any questions but was dunked almost immediately. He again struggled violently. In the interval between the second and third dunk, Sgt Hu tried to answer the questions asked of him, but he was vomiting and breathing heavily by then.

37 Pushed into the tub for the third time, Sgt Hu struggled even more vigorously, resulting in his whole body slipping into the tub. Lta Jeff Ng continued to press on Sgt Hu's head and to block his mouth and nose when he was in the water. Sgt Hu was submerged for about ten seconds before Lta Diva pulled him out of the water. This time, Sgt Hu was too weak to stand. He knelt down, leaning his head on the edge of the tub. Lta Diva pushed his head into the water for the fourth time and Lta Jeff Ng again blocked his mouth while SSgt Tan pressed Sgt Hu's upper body into the tub. Sgt Hu did not struggle during this fourth dip.

38 When Lta Diva pulled Sgt Hu out of the tub, SSgt Tan noticed that Sgt Hu had difficulty breathing and could not stand upright by himself. He collapsed face up outside the tub with water streaming from his mouth and nose. Lta Diva pressed Sgt Hu's chest with both hands, causing more water to come out from his mouth and nose. After lying motionless for a while, Sgt Hu responded by spitting out water. Lta Diva pulled him up and instructed two guards to assist him to the next station, which was the jerry can station. WO Balakrishnan walked to the jerry can station with him and signalled to the instructor there to allow Sgt Hu to skip the station. SSgt Tan explained that he could remember the details of Sgt Hu's treatment because Sgt Hu was the only trainee who had plenty of water flowing from his nose and mouth each time he was pulled out from the tub.

39 Lta Kong Wai Kheong was positioned directly in front of Sgt Hu when Sgt Hu was pulled out of the tub. He testified that Sgt Hu was coughing and was too weak to stand. Instead, Sgt Hu rested his face at the edge of the tub. He emitted white bubbles from his mouth and was trying desperately to breathe. Lta Diva gave him approximately ten seconds above water before dipping him into the water again. This time, Sgt Hu did not put up much of a struggle. When he was pulled out of the tub again, Lta Kong told Lta Diva to stop dunking Sgt Hu as he was clearly in bad shape. His lips had turned pale and he was breathing hard. It was only then that Lta Diva released Sgt Hu.

40 3Sgt Yen testified that Sgt Hu's treatment lasted between five to ten minutes. When he was finally pulled out of the tub, he fell to the ground, spewing water from his mouth. An instructor then came up to attend to Sgt Hu. 3Sgt Ong Zheyuan was an "enemy" during the 80th CST course. He knew Sgt Hu as they were from the same sniper platoon. Sgt Hu was handed over to 3Sgt Ong at the finishing point. 3Sgt Ong said that Sgt Hu was gasping for air and coughing badly. He fell to his knees and needed assistance to reach the holding area, where he collapsed again. 3Sgt Ong handed Sgt Hu over to 3Sgt Lin Dao Song before returning to his post.

41 3Sgt Lin testified that when he saw Sgt Hu, Sgt Hu was lying on his right side, rocking from left to right and moaning. White foam was coming out from his nose and mouth. Shortly after, Sgt Hu lost consciousness, but even then, foam kept escaping from his nose and mouth. 3Sgt Lin called for a medic, who tended to Sgt Hu and confirmed that his heart was still beating. Sgt Hu was loaded onto a stretcher and carried to a vehicle. En route to the medical centre, 3Sgt Lin pressed on Sgt Hu's bloated stomach and yet more foam came out.

42 Medical officers and medics at the Tekong Medical Centre, to which Sgt Hu was initially brought, testified that Sgt Hu was not breathing and had no pulse rate when brought in. They performed cardiopulmonary resuscitation on Sgt Hu, during which a large quantity of water gushed from his nose and mouth. Even after attempts at resuscitation, Sgt Hu's electrocardiogram trace was flat, indicating a lack of electrical activity. Atropine (commonly known as "adrenaline") was injected

into Sgt Hu, and oxygen supplied to him. A pump was used to suction out water from his mouth. He was evacuated to SGH by helicopter at 5.43pm and declared dead at 6.17pm.

The medical evidence

43 Two medical experts testified for the Prosecution. The first, Associate Professor Philip Eng ("AP Eng"), was the senior consultant and head of the Department of Respiratory and Critical Care Medicine of SGH. He was also director of the Medical Intensive Care Unit ("ICU") at SGH for the past ten years.

44 AP Eng treated Capt Ho upon his admission to SGH. His diagnosis of Capt Ho's condition was "near drowning with Acute Respiratory Distress Syndrome". He explained that Capt Ho's blood oxygen level in the first few hours upon his arrival at the ICU was between 89% to 94% pure oxygen. This indicated that Capt Ho was very sick, as a blood oxygen level of below 90% carried a high risk of heart stoppage. Capt Ho's fever took five days to settle. He was in critical condition for the first few hours on the night of 21 August 2003 and required special care for the next three days.

45 The second medical expert was Dr Wee Keng Poh ("Dr Wee"), a forensic pathologist for 33 years. Dr Wee conducted the autopsy on Sgt Hu and certified his cause of death as asphyxia and near drowning. The autopsy findings were that Sgt Hu's lips, the tips of his fingers and toes, as well as his brain, showed signs of cyanosis, suggesting a lack of oxygen as a result of drowning. His trachea contained fine froth. Both lungs were water-logged.

46 AP Eng and Dr Wee were asked for their opinion of the following scenario. Instructions were given to dunk trainees into a water tub up to four times for 20 seconds each time. The trainees were blindfolded with their hands tied behind their backs and were scared before the dunking took place. They were not given notice before being dunked. Once dunked, several instructors forcibly held them underwater. Trainees struggled violently and consumed water through their mouths or inhaled water through their nostrils whilst being held underwater. In between each dunking, they were brought up for a few seconds before being dunked again.

47 Dr Wee explained that when water is inhaled into the lungs, it prevents the normal process of respiration as well as the exchange of oxygen and carbon dioxide from the blood to the air. This decreases the level of oxygen in the blood and increases the amount of carbon dioxide, causing drowning.

48 Trainees who underwent the process described would have taken in water by swallowing and aspirating (inhalation). The fact that trainees were scared, had no notice of when they would be dunked and tired themselves out by struggling when underwater, would only have exacerbated the situation. Water would have entered through the windpipe and caused features of drowning such as cyanosis of the nails and brains, water in the lungs and a fine froth in the trachea. Foaming in the mouth was another typical feature of drowning. When water entered the lungs and the victim tried to breathe, this would have beaten up the water into a froth, which then extruded from the mouth and nose. Once foaming ensued and the victim was unresponsive, death would occur in five to ten minutes if no attempts at resuscitation were made. If fingers were used to block the victim's nose and mouth when underwater, this would have caused the victim to gag and inhale more water into his lungs, hastening his death.

49 AP Eng condemned the water treatment process as "very dangerous and unsafe". He likened it to pouring kerosene in a house, starting a fire, calling for a fire brigade and expecting them to stop the fire in time to avert any damage. In other words, it was a disaster waiting to happen. Even

though a well-trained diver might be able to hold his breath for up to a minute, this period would be shortened tremendously if, like the trainees, the diver was blindfolded and did not know when he would be dunked. He opined that even a 15-second interval between each dunk, when trainees were questioned and given a chance to respond, was inadequate time for the trainees to recover fully and handle the next instance of dunking. He also pointed out that since Capt Ho's mouth and nose were covered when he was lifted out of the water, he was prevented from taking a full breath, which would have further retarded his recovery.

Case for the defence

Capt Pandiaraj

50 Capt Pandiaraj claimed that he was not assigned as the Supervising Officer for the course, but only took over when he realised that the intended Supervising Officer, Lta Yap Kwong Weng, was not present for the POW training. As such, he had not read the CST lesson plan beforehand. He explained that he had seen the POW training session held during the 79th CST course. The tub used for water treatment then was the same tub used during the 80th CST course. During the 79th CST course, two to four instructors were assigned to each trainee and the trainees were dunked two to four times each. He testified that he did not see anything wrong with this manner of water treatment since nothing untoward occurred during the 79th CST course.

51 Accordingly, when he arrived at the training location on 21 August 2003, he approved the use of the tub. He told the instructors to dunk each trainee three to four times for not more than 20 seconds each time. He agreed that the water treatment station posed more of a risk than any of the other stations used during POW training, but insisted that since he had already set boundaries for his instructors by capping the number of dips and setting a time limit for each dip, there was no real danger to the trainees.

52 Having set the boundaries, he did not once monitor the instructors when they carried out the water treatment, since he had to trust their professionalism. On the occasions when he witnessed the water treatment of various trainees on 21 August 2003, he did not see anything which deviated from what he had witnessed during the 79th CST course. He alleged that he had not expected instructors to cover the trainees' noses and mouths to prevent them from breathing.

53 When Capt Ho's interrogation commenced, he claimed to be a private. This contravened the instructions given to trainees, which was that they should tell the truth about their rank when questioned. An "enemy" came up to Capt Pandiaraj and told him that Capt Ho was actually his platoon commander. Capt Pandiaraj then tapped Lta Diva on the shoulder to indicate that Capt Ho was a captain. He walked away after that and did not witness the epaulette incident or Capt Ho's water treatment. Likewise, although he questioned Sgt Hu about the range of the Steyr before Sgt Hu's water treatment began, he then returned to the tent area and did not observe Sgt Hu's water treatment.

WO Balakrishnan

54 WO Balakrishnan testified that the water tub was used at the water treatment station since the 78th CST course. He explained that a boot washing point had previously been used for water treatment, but proved to be dangerous because it was shallow, cutting and bruising trainees' faces when they were pushed into the water. The course commander of the 77th CST course told WO Balakrishnan to use a zodiac boat for the next course. As he could not obtain a boat in time, WO Balakrishnan obtained approval from his supervising officer, Capt Simon Tan, to use a washing tub

instead.

55 WO Balakrishnan agreed that dunking did not follow the "Do's" and "Don'ts" guidelines which were displayed during all three courses, but asserted that it was authorised because his seniors in the Ranger course had carried out water treatment in the same manner. He averred that it had never occurred to him that the use of the washing tub was dangerous, since as long as instructors maintained a dunking time of five to ten seconds and dunked each trainee three times, it would be safe. It was only after hearing the evidence given by AP Eng that he realised the dangers inherent in dunking.

56 WO Balakrishnan claimed that when Capt Pandiaraj arrived at the training ground on 21 August 2003, he showed the tub to Capt Pandiaraj and explained that the dunking should be carried out three times per trainee, for five to ten seconds each time. Capt Pandiaraj disputed this, claiming that WO Balakrishnan had told him that dunking would be carried out three to four times for up to twenty seconds each time. He did agree, however, that he had approved the use of the tub.

57 As course commander, WO Balakrishnan's main responsibility was to ensure that the course ran smoothly. He spent most of the afternoon moving from station to station or doing administrative work at the administrative tent, which was about five metres away from the tub. He did not spend much time at the water station because Capt Pandiaraj and Lta Diva were there. In the course of the afternoon, WO Balakrishnan took a series of photographs as souvenirs. These were adduced in evidence at trial.

58 Slightly past 4.00pm that afternoon, WO Balakrishnan was walking down from the jerry can station when he saw a big-sized trainee lying outside the tub. The trainee got up and complained that his hands were tied too tightly. WO Balakrishnan adjusted his handcuffs so that they were more comfortable, before telling the "enemies" to excuse him from the jerry can station and to bring him to the holding area. WO Balakrishnan was later told that there was a casualty at the holding area. When he went there, he discovered that the casualty was the same big-sized trainee he had seen earlier. The trainee was foaming from the mouth and nose. WO Balakrishnan had him sent to the medical centre before reporting the situation to Capt Pandiaraj. Capt Pandiaraj merely said, "Carry on, see how". Back at the holding area, a medic informed him that there were five or six more casualties, one of whom was Capt Ho. Capt Ho was sent to the medical centre. Shortly after this, a doctor ordered all training to cease.

59 WO Balakrishnan agreed that the scenarios depicted in the photographs he took were different from the water treatment carried out during the 79th CST course. Whilst the photographs he took showed that the trainees' bodies had slipped inside the tub, only their heads were dipped into the tubs during previous courses. Nevertheless, he did not stop the training because he felt that it was safe so long as instructors kept to the "five to ten seconds, three dips" guideline set for them and since the trainees' legs were not tied. Moreover, Capt Pandiaraj, a senior officer, was present to supervise the interrogation. WO Balakrishnan did not know that trainees had their noses and mouths blocked, and declared that if he had witnessed the treatment meted out to Capt Ho and Sgt Hu, he would have put a stop to it

Remaining defence witnesses

60 In my opinion, the evidence given by the remaining defence witnesses did not really aid the cases put forward by either of the appellants. As such, their evidence will not be set out in any detail now, but will merely be referred to as and when the need arises.

The decision below

61 The judge found that the use of the water tub for water treatment was dangerous and unsafe, and that Capt Pandiaraj had been conscious of the danger. Capt Pandiaraj had admitted to giving instructions for the dipping of trainees. His acts and demeanour after giving the briefing indicated that he intended for his instructions to be carried out. His failure to intervene during the training had encouraged the instructors to act on his instructions. Moreover, he had participated in the interrogation of Sgt Hu and triggered the harsh interrogation of Capt Ho. *Ergo*, the charges against Capt Pandiaraj for abetting by instigation the rash acts against Capt Ho and Sgt Hu were made out.

62 In relation to the charges against WO Balakrishnan, the judge found that WO Balakrishnan had witnessed the water treatment of both Capt Ho and Sgt Hu. Knowing that an offence was being committed, his failure to intervene meant that he had intentionally aided in the commission of the offences, and this omission involved a breach of a legal obligation. After due consideration, the judge rejected the defence of mistake raised by WO Balakrishnan.

The appeals on conviction

The appeal by Capt Pandiaraj

63 The main issues raised by Capt Pandiaraj on appeal can be conveniently categorised into four categories, and I will deal with them accordingly.

Issue 1 – Abetment by instigation

64 Capt Pandiaraj was charged with abetting by instigation the actions which led to the serious injury of Capt Ho and the death of Sgt Hu. For the offence of aiding and abetting to be constituted, the Prosecution must prove an intention on the part of the abettor to aid in the offence, as well as a knowledge of the circumstances constituting the offence: *PP v Datuk Tan Cheng Swee* [1979] 1 MLJ 166 at 173, followed in *Daw Aye Aye Mu v PP* [1998] 2 SLR 64.

65 Section 107(a) of the Penal Code provides:

A person abets the doing of a thing who —

(a) instigates any person to do that thing ...

66 In order to make good the offence of abetment by instigation, the Prosecution had to show the court that there was “active suggestion, support, stimulation or encouragement” of the offence: *PP v Lim Tee Hian* [1992] 1 SLR 45, approved in *Ng Ai Tiong v PP* [2000] 2 SLR 358.

67 Capt Pandiaraj was the Supervising Officer for the 80th CST course, which made him the most senior officer present. The SAF Training Safety Regulation manual stipulates that a Supervising Officer:

... supervises the training and is responsible to the Director of Exercise/Approving Authority for the smooth conduct and safety of the training. Depending on the requirements of the training, he must [*sic*] be required to be physically present to supervise the training.

68 The crux of the defence put on for Capt Pandiaraj and one of the main issues emphasised by

his counsel on appeal, was that Capt Pandiaraj had discharged his duty by setting certain limits for the instructors. Having done so, he could not be faulted if they chose to exceed those limits. He had told the instructors to treat all trainees equally and could not have known that Capt Ho and Sgt Hu would be singled out for harsher treatment. Moreover, he had set the "four dunks, twenty seconds" guideline and did not expect the instructors to go beyond this and block the mouths and noses of trainees to prevent them from breathing. In other words, he had not instigated any of the offending acts.

69 I was entirely unconvinced by these arguments. First, as I will explain in this section, I took the view that Capt Pandiaraj's failure to intervene when he witnessed the deplorable behaviour of the instructors was tantamount to his encouragement and support of the offences. Second, as I will illustrate in the next section dealing with causation, the evidence before the court suggested that the cause of the harm to Capt Ho and Sgt Hu was the dunking *per se*. If so, Capt Pandiaraj's instructions also amounted to active suggestion of the offending act.

70 Eyewitnesses attested to Capt Pandiaraj's presence at the tub when Capt Ho and Sgt Hu underwent water treatment. Although he claimed that he did not witness their treatment, the judge did not believe him. I agreed with the judge. Witnesses testified that the treatment accorded to Capt Ho and Sgt Hu was particularly harsh. Logically, the noise generated by the treatment, along with the duration of the treatment, would have attracted Capt Pandiaraj's attention, especially since Capt Pandiaraj had demonstrated a marked interest in both trainees right before their treatment began.

71 Capt Ho had disobeyed instructions to reveal his actual rank and Capt Pandiaraj had intervened by indicating to Lta Diva that Capt Ho was a captain. The epaulette incident was, as the judge found, "particularly humiliating" and certainly out of the ordinary. Moreover, Capt Ho was the highest-ranking trainee in the course. It would have been quite remarkable if Capt Pandiaraj had not displayed an ordinary measure of human inquisitiveness and had not continued to observe Capt Ho's response to his treatment. Similarly, Capt Pandiaraj had stopped Sgt Hu to inquire about the range of a Steyr. Moreover, notes taken by a medic who interviewed Capt Pandiaraj before Sgt Hu was evacuated to SGH indicated that Capt Pandiaraj had witnessed Sgt Hu's treatment. This was a finding of fact made by the judge, and counsel did not provide me with any reason to overturn the finding on appeal.

72 In any event, it was clear that even if Capt Pandiaraj did not witness the treatment meted out to Capt Ho and Sgt Hu, he had, by his own admission, observed the treatment of other trainees. Various trainees testified that their mouths and noses were blocked by the instructors and that they were not given adequate time to catch a breath between dunks. It is safe to say that their experiences were not uncommon. The fact that Capt Pandiaraj did not intervene even though he was responsible for safe conduct of the course suggested strongly that he endorsed what was being done. This must have spurred the instructors on and given them the encouragement they required for their maltreatment of the trainees.

73 As such, I was convinced that Capt Pandiaraj's very presence that afternoon, coupled with his indifference to the sadistic treatment meted out to the trainees, signified (a) his intention that his instructions be carried out; and (b) his support and encouragement of the instructors' actions, which may well have stimulated them to greater heights. In my view, these factors were more than sufficient for a finding of abetment by instigation.

Issue 2 – Causation

74 Capt Pandiaraj next argued that he did not instigate the acts which actually *caused* the harm to Capt Ho and Sgt Hu. He contended that the judge had failed to appreciate that Lta Diva and Lta Jeff Ng had disobeyed his explicit instructions when conducting the water treatment. It was not a probable consequence of Capt Pandiaraj's instructions that the instructors would block the nostrils or mouths of trainees to prevent them from catching their breaths, or that Capt Ho and the deceased would be dunked more than four times. In other words, Capt Pandiaraj argued that the judge should have perceived that what caused the harm to Capt Ho and Sgt Ng was not the four dunkings *per se*, but the aggravations practised by the instructors, such as the practice of blocking the mouths and noses of trainees.

75 This was essentially an issue of causation. The test for causation under s 304A of the Penal Code was set out in *Lee Kim Leng v R* [1964] MLJ 285 at 286, where FA Chua J held that to impose criminal liability under s 304A of the Penal Code:

... the death should have been the direct result of a rash and negligent act of the accused and that act must have been the *proximate and efficient cause* without the intervention of another's negligence. [emphasis added]

76 As I pointed out in *Ng Keng Yong v PP* [2004] 4 SLR 89, the chain of causation is not necessarily broken whenever another party's negligence intervenes. Instead, criminal liability under s 304A attaches "to the person(s) whose negligence [or rashness] contributed substantially, and not merely peripherally, to the result" (*Ng Keng Yong v PP* at [66]).

77 I found that Capt Pandiaraj did instigate the acts which were the proximate and efficient cause of the harm to Capt Ho and Sgt Hu. First, the evidence before me was that the very act of dunking was rash and dangerous. After AP Eng opined that the manner in which dunking was carried out during the 80th CST course was hazardous, defence counsel put another hypothetical scenario to him for his consideration. In this scenario, the trainee's nose and mouth were not blocked whilst in water. He was taken out of the water after 20 seconds. The instructor then waited for him to stop coughing and to respond to the question. AP Eng replied that in such a "courteous situation", there would "probably [be] some element of recovery". However, he qualified this by saying that if that same trainee was bound, blindfolded, scared, held down forcibly and given no notice of the next dunking or when he could surface, it would be "likely" that his life would be endangered and that he would end up in Capt Ho's condition.

78 When this question was posed to Dr Wee, he posited that Sgt Hu would have died even if his mouth and nose were not blocked, because the cumulative effects of the four dunkings, the psychological fear of the dunking, along with other operating factors, would have contributed to Sgt Hu taking water into his lungs. In other words, the expert evidence before the court was that even if the instructors had adhered religiously to the instructions given by Capt Pandiaraj, Capt Ho and Sgt Hu would in all likelihood have suffered the same harm.

79 Counsel for Capt Pandiaraj referred me to s 111 of the Penal Code, which states:

Liability of abettor when one act is abetted and a different act is done.

111. When an act is abetted and a different act is done, the abettor is liable for the act done, in the same manner, and to the same extent, as if he had directly abetted it:

Provided the act done was a probable consequence of the abetment, and was committed under the influence of the instigation, or with the aid or in pursuance of the conspiracy which

constituted the abetment.

80 Capt Pandiaraj argued that he had told the instructors to do one thing and they had done another thing which was not a probable consequence of the abetted act. As such, he should not be liable for the results of their actions. I disagreed.

81 Even on the assumption that the “aggravating” acts of blocking the victims’ mouths and noses and refusing them time to catch their breath between dunks qualified as “different” acts from the act of dunking four times for twenty seconds each time, I was firmly of the view that these aggravating actions were a probable consequence of Capt Pandiaraj’s instructions and his indifference to how the treatment was carried out. By his own admission, Capt Pandiaraj did not detail how the water treatment should be conducted or attempt to brief the instructors on the “Do’s” and “Don’ts” of interrogation, even though he bore the ultimate responsibility for this. It was patently irresponsible of him to lay down the “four dunks, twenty seconds” guideline and then disclaim all responsibility for events which occurred thereafter. Indeed, it seemed clear to me that he intended his instructions to be carried out and was aware of the circumstances in which they would be carried out. As I concluded earlier, his presence at the scene of the offences also led me to conclude that the aggravating acts were committed under the influence of his instigation. Pursuant to s 111, Capt Pandiaraj was therefore liable for the acts done to Capt Ho and Sgt Hu in the same manner and to the same extent as if he had directly abetted them.

82 In addition, I noted that the hypothetical scenario posed to AP Eng was not an accurate reflection of the instructions given by Capt Pandiaraj. A vital aspect of the hypothetical scenario which prompted AP Eng to say that some element of recovery was probable in such a situation was that trainees would be given time to catch their breath between dips. However, Capt Pandiaraj never enjoined the instructors to give the trainees such a break, and the evidence of the trainees who underwent water treatment was that they were not given adequate time to recover from each dip. Absent this important “safety feature”, the expert evidence was that Capt Ho would still have suffered grievous injury and Sgt Hu would still have died.

83 For the foregoing reasons, I found ample reason to support the judge’s finding that Capt Pandiaraj did instigate the acts which contributed significantly or substantially to the harm to Capt Ho and Sgt Hu.

Issue 3 – Culpable rashness

84 The next issue before me was whether the actions of Capt Pandiaraj satisfied the requirements of culpable rashness. Criminal rashness has been famously defined by two judges. In *Empress of India v Idu Beg* (1881) ILR 3 All 776, Straight J said at 780:

Criminal rashness is hazarding a dangerous or wanton act with the knowledge that it is so, and that it may cause injury, but without intention to cause injury, or knowledge that it will probably be caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences.

85 The other classic definition of the term was propounded by Holloway J in *Re Nidamarti Nagabhushanam* (1872) 7 MHC 119 at 120. It was cited by MPH Rubin JC (as he then was) in *PP v Teo Poh Leng* [1992] 1 SLR 15 at 16, [4]:

Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they will not, and often with the belief that the actor has

taken sufficient precaution to prevent their happening. The imputability arises from acting despite the consciousness (luxuria).

86 The same formula for proving culpable rashness applies to s 338 of the Penal Code, although the mischief resulting from the rashness differs. Based on the testimony presented by the Prosecution, in particular that of AP Eng and Dr Wee, the judge found at [123] of his grounds of decision that both appellants, as well as Lta Diva and Lta Jeff Ng, "clearly acted with the consciousness that submerging trainees' heads underwater may result in the trainees aspirating water leading to drowning", and that they were also conscious that "dunking may cause injury including endangering life resulting in grievous hurt".

87 Capt Pandiaraj's appeal on this limb was two-pronged. First, he argued that dunking was permitted by the rules for POW training and was therefore not a rash act. Second, he argued that even if dunking was not contemplated by the rules, an act not in compliance with those rules would not *ipso facto* amount to a rash act for the purposes of ss 304A and 338 of the Penal Code.

Whether dunking was permitted by the rules

88 All combat survival training had to comply with the approved Combat Survival Training lesson plan ("CST lesson plan"). It should be noted that although the CST lesson plan referred to Kampong Pasir School, the evidence before the court was that the CST lesson plan would apply regardless of training location. The portions of the CST lesson plan governing the conduct of hard interrogation stated:

22. Interrogation (Hard and Soft)

c. The entire course will be divided into 2 groups for the "Hard" interrogation. The "Hard" interrogation consists of WET and STRESS sessions. (Refer to Fig 5)

d. For the WET session, the PWs [prisoners of war] will kneel before the interrogators. PWs will be *doused* with cold water during questioning. [emphasis added]

Annex A

S/No.5

Wet session

a. Student will kneel before his interrogator. Student will be *doused* with water during questioning. [emphasis added]

Annex D

Do's and Don'ts of interrogation in Kampong Pasir School

Don'ts

The Don'ts provide a guide to the instructors as to the conduct of interrogation in the Kampong Pasir School. Any doubts should be clarified with the Supervising Officer concerned, especially when it poses potential risk of physical harm or deprivation of human rights and dignity.

...

2. Never have any physical contact during interrogation.

...

5. Never force water treatment into the body, other than on the body with the intent of showering the PW trainee.

6. Never manhandle the PW trainee.

7. Never target any PW trainee with the intention of breaking him down.

89 A significant portion of the arguments below and on appeal focused on the ambit of the instruction to "douse" trainees with water during interrogation. Dictionary definitions of the word "douse" encompass both showering a person with water and immersing a person in water. Counsel for both appellants played up the second definition, arguing that dunking trainees in a tub of water during the 80th CST course was consonant with the instructions in the CST lesson plan to "douse".

90 I was also referred to two provisions in the Combat Survival Training Management Plan ("TMP"), which read:

3 ... The training must be realistic and tailored to match actual hostile conditions as closely as possible; this will give the students a virtual feel of Battle Stress and accustom them to a war situation ...

...

5 ... Training must be tough and demanding both physically and mentally, as well as replicate actual battle conditions ...

91 Other statements in the CST lesson plan warned trainees that the CST course aimed to expose trainees to different types of POW treatment and that captors were likely to impose brutal treatment upon them. Capt Pandiaraj relied on these statements to argue for a purposive reading of the word "douse", saying that it was only by plunging trainees into water that instructors would be able to replicate actual battle conditions. Needless to say, this plunging would not be carried out to an extent imprudent for peacetime training.

92 The Prosecution protested that use of the word "douse" in the CST lesson plan was clearly limited to showering the trainees with water and did not permit full immersion. Various Prosecution witnesses gave testimony to this effect.

93 2WO Anbarasan assisted in a review of the CST lesson plan in September 1998. He explained that the "Do's" and "Don'ts" were included in the lesson plan to ensure that instructors adhered to procedures stated in the lesson plan. Pictures were also included in the lesson plan to guide the instructors. A picture in Figure 5 of the lesson plan depicted a trainee lying on the ground and being sprayed with water. This was to emphasise that water should only be sprayed or poured on trainees and that trainees' heads should not be dunked into water at any time. Dunking was inconsistent with Point 5 of the "Don'ts" in Annex D of the lesson plan, since it indirectly forced water into the trainees' lungs. However, upon cross-examination, he said that the TMP was of higher authority than the CST lesson plan, and that either showering or dunking would meet training requirements so long as safety was not compromised.

94 I noted, however, that most of the other witnesses took issue with this interpretation. Capt Neo Kwee Chong, an instructor of CTW from May 1998 to 1999, insisted that the trainees' heads should not be dunked into water at any time during a CST course. Major Yeo Hock Seng was OC of CTW from 1997 to 1999 and was Chief of Instructors at the School of Commandoes at the time of trial. He vetted and signed the CST lesson plan in September 1998. He agreed that both the TMP and the CST lesson plan applied to the conduct of the 80th CST course. Nevertheless, he emphasised that "at all costs", training should be conducted "professionally and safely", and that spraying water at a group of trainees adequately replicated battle conditions. Likewise, Lieutenant-Colonel ("Ltc") Ho Kian Soon, the CO of the School of Commandoes from 2001 to 2003, as well as Ltc Eugene Cheong, who was responsible for the Army Training Workplan for issuing Training Directives and Safety Regulations, explained that the reference to realism in the TMP referred to the course as a whole and not a particular component of the course.

95 Colonel Noel Cheah, Chief Commando Officer from 1999 to 2003, explained:

I believe that what is set out in the aim of CST [courses] as indicated in this TMP is to attempt to *simulate* conditions of physical and psychological stress on trainees. However, it would be very difficult to say how well we would be able to replicate actual battle condition[s]. The point I want to make is that this CST must be seen in its totality. It is one whole package of a series of activities which add up to achieve the intent and objectives of the course. Therefore, each component will have its distinct and varying degree of difficulty. But one important guiding principle must be that we are indeed carrying out peacetime training. *Hence, it is of paramount importance to ensure safety. While you want to simulate conditions like battle, the reality is that it needs to be balanced by strict safety measures to preserve life and limb.* [emphasis added]

96 When asked if plunging a trainee into water was contemplated by the instruction to replicate actual battle conditions, he replied:

This question must be seen in the context of the conduct proper of the lesson. The TMP spells out the overall framework and objectives for the training. These are then translated into an entire set of lesson plan[s]. Each lesson plan takes alignment from TMP. Having said that, when one conducts training, one primary reference has to be and must be the lesson plan itself governed by what is written inside as well as the relevant safety regulation. So, the TMP does not prescribe in details [sic] how dousing must be done or must plunge [sic]. *The lesson plan, however, is more specific and would have to be followed.* [emphasis added]

97 Faced with such forcible testimony from the Prosecution, the judge found that dunking was not permitted under the CST lesson plan. In light of the evidence that the course had to be conducted safely and professionally, spraying water on the trainees would suffice to replicate possible battle conditions, and it was "purely speculative" for the defence to argue otherwise. He found that water treatment for previous CST courses had been carried out by showering or by dipping in the boot washing bay, and not in the washing tub.

98 I saw no reason to fault the judge's findings in this regard. On a straightforward reading of the CST lesson plan, dunking as a method of water treatment was impermissible. Dunking necessarily involved physical contact between instructor and trainee that amounts to manhandling. It forced water into the bodies of trainees and was clearly used by the instructors to break down the trainees both physically and psychologically during the 80th CST course. The evidence of various high-ranking officers in SAF was that the instructions to replicate battle conditions could not be applied blindly but had to be adjusted to the requirements of each lesson. Moreover, the "Do's" and "Don'ts" set out in the CST lesson plan were specific to the conduct of water treatment and could not simply be ignored

in pursuit of the more general objective of realistic training. Lesson plans and objectives aside, it would defy all common sense and reason to subject trainees to such perilous and inhumane procedures in the name of realistic training.

99 I need only add that I was utterly unimpressed by Capt Pandiaraj's argument that "only" six of the 86 trainees who were subjected to water treatment during the 80th CST course required medical attention after the interrogation. In my view, this missed the point entirely, given that the injury or death of even one trainee would have been unacceptable.

Whether there was a rash act

100 Even if I had found that dunking was permitted by the rules, I was of the opinion that the manner of dunking instigated by Capt Pandiaraj went far beyond any permissible boundaries and qualified as a rash act. Capt Pandiaraj admitted that dunking trainees up to four times for 20 seconds each time was risky, and indeed, that the water treatment station was the most dangerous station in the CST course. He nevertheless insisted that there was no danger because the dunking was carried out by instructors who knew the rules, but then claimed that throughout the three hours when he was stationed by the water treatment station, he did not once monitor the instructors to ensure compliance with these rules.

101 In my view, this very admission contained all the ingredients necessary for a finding of criminal rashness. Capt Pandiaraj was conscious of the danger inherent in the manner of dunking stipulated by him but still instructed his subordinates to carry on with the act in that particular manner. He may have believed that he had minimised or even averted the danger by setting down certain guidelines for the instructors, but his criminality lay in his running the risk of doing the act. His failure to supervise the water treatment, or to stop the instructors from going beyond the guidelines he set, exhibited a recklessness or indifference as to the consequences of the dunking.

102 A further point raised by Capt Pandiaraj on appeal was that the judge had erred in disallowing him to adduce evidence that dunking was permitted and practised in the Ranger Course. Further, although the judge allowed the Prosecution to adduce evidence of the dissimilarities between the Ranger Course and the CST course, he did not allow the defence to adduce evidence of similarities between the two courses. In my opinion, these issues were immaterial to a finding of guilt. Even if dunking was practised during the Ranger Course, it did not excuse the fact that by his own admission, Capt Pandiaraj knew of the dangers inherent in the manner of dunking which he advocated, but failed to supervise the conduct of the treatment.

103 Having found on the evidence before me that Capt Pandiaraj did possess the requisite *mens rea* of culpable rashness, I turned my mind to the final issue on appeal, the defence of consent.

Issue 4 – Consent

104 The last ground of appeal put forward by Capt Pandiaraj was that Capt Ho had consented to his treatment. Pursuant to s 87 of the Penal Code, the harm occasioned to Capt Ho was not an offence. This line of reasoning was patently misguided. Although Capt Ho testified that he had volunteered for the CST course, Ltc Ho Kok Loke, Commander of the School of Military Intelligence, later clarified this evidence. Ltc Ho said that Capt Ho's statement that he had volunteered to attend the 80th CST course was "mistaken", as the course was compulsory for all reeve troopers and commanders.

105 Even if Capt Ho had volunteered to attend the 80th CST course, he would also have had to

consent with knowledge of the treatment which he would have had to undergo. There was no evidence that Capt Ho had possessed such knowledge and I accordingly dismissed this ground of appeal.

The appeal of Capt Pandiaraj on conviction – conclusion

106 Capt Pandiaraj's appeal on conviction was manifestly unmeritorious, and I had no difficulty in concluding that his conviction on both counts should be sustained.

The appeal of WO Balakrishnan

107 Some of the issues put forward by WO Balakrishnan on appeal mirrored those raised by Capt Pandiaraj. The remaining issues fell into four main categories.

Issue 1 – Whether WO Balakrishnan witnessed the water treatment of Capt Ho and Sgt Hu

108 The eyewitness evidence as to WO Balakrishnan's whereabouts on the afternoon of 21 August was compelling. Two national servicemen and two instructors positively identified WO Balakrishnan as being present when Capt Ho underwent water treatment.

109 Although no one could vouch for WO Balakrishnan's presence when Sgt Hu was undergoing water treatment, I saw no reason to disturb the judge's finding that WO Balakrishnan did witness the treatment accorded to Sgt Hu. WO Balakrishnan said that he was walking from the jerry can station towards the water tub when Sgt Hu was undergoing water treatment. As the judge observed, this meant that he would have seen what was happening at the water tub since the water tub was directly in his line of sight. Moreover, WO Balakrishnan testified that when he saw Sgt Hu lying on the ground next to the tub, he immediately approached Sgt Hu to loosen his handcuffs and excuse him from the jerry can station. This suggested to me that WO Balakrishnan was cognisant of the severe treatment which had been meted out to Sgt Hu, such that he did not have to approach the instructors to make any inquiries before excusing Sgt Hu from the next station.

110 In any event, as I noted in *PP v Gerardine Andrew* [1998] 3 SLR 736 at [34], there is no requirement that an abettor must be present at the immediate scene of the crime in order for there to be liability for abetment. I therefore dismissed this ground of appeal.

Issue 2 – Whether he intentionally aided in the commission of the offences with full knowledge of the circumstances

111 Section 107(c) of the Penal Code provides:

Abetment of the doing of a thing.

107. A person abets the doing of a thing who —

...

(c) intentionally aids, by any act or illegal omission, the doing of that thing.

112 To prove abetment by illegal omission, it has to be shown that the accused intentionally aided the commission of the offence by his non-interference, and that the omission involved a breach of legal obligation: Ratanlal & Dhirajlal, *The Indian Penal Code* (Wadhwa Nagpur, 29th Ed, 2002), citing *Khadim Sheikh* (1869) 4 Beng LR (Acr J) 7.

113 Used in connection with the definition of abetment, the phrase "illegal omission" refers to the intention of aiding the doing of the thing. It is therefore not enough to establish that the accused took no steps to prevent the commission of the offence if no guilty knowledge or conspiracy is proven. In other words, WO Balakrishnan's mere presence at or near the water tub without awareness that an offence was being committed would not in itself amount to abetment by aiding. Hence, the judge went on to find that by omitting to stop the conduct of water treatment on Capt Ho and Sgt Hu, WO Balakrishnan *intended* to aid the commission of the offences against them. WO Balakrishnan contested this finding on appeal.

114 WO Balakrishnan was familiar with the "Do's" and "Don'ts" in the CST lesson plan and had even constructed a new board for display of the "Do's" and "Don'ts" list when the old one was torn. He testified that he thought the procedure was safe as long as the instructors dunked each trainee up to three times, for five to ten seconds each time. However, the evidence from various eyewitnesses was that Capt Ho was dunked six times and submerged for up to 20 seconds during at least one dunk. Moreover, Capt Ho's mouth and nose were covered even when he was lifted out of the water, which must have been clearly visible to WO Balakrishnan. Given the findings that he was at the scene when both victims were dunked, he would have seen that the treatment meted out to them deviated significantly from what he believed to be "safe".

115 The only reasonable inference that I could draw from WO Balakrishnan's failure to intervene was that he intended for the treatment to continue. His actions belied his claim that he would have stopped the dunking described by witnesses if he had seen it happen to Capt Ho and Sgt Hu. In fact, several witnesses testified that they were shocked that Capt Pandiaraj and WO Balakrishnan did not intervene even though the treatment meted out to Capt Ho and Sgt Hu was exceptionally harsh.

116 WO Balakrishnan then argued that he was not in breach of any legal obligation because his superiors had approved usage of the tub. The judge found that it was incumbent upon WO Balakrishnan to take preventive action when he witnessed the water treatment of Capt Ho and Sgt Hu. His failure to do so was a breach of a legal obligation. I fully agreed with the judge. The fact that usage of the tub was approved by his superiors did not detract from WO Balakrishnan's basic responsibility as a Course Commander, which was, as stipulated by the TMP, to prevent training accident and injury, as well as to administer the discipline and general conduct of the instructors. His abysmal failure to exercise control of his instructors and to prevent the sadistic treatment meted out to the trainees could not be overlooked, let alone justified.

117 I therefore concluded that the judge was right in finding that WO Balakrishnan had the necessary knowledge that an offence was being committed, and that he intentionally aided in the commission of that offence by omitting to intervene.

Issue 3 – Whether WO Balakrishnan was rash or negligent

118 Next, WO Balakrishnan appealed the finding that he had clearly acted with the consciousness that grievous hurt or death might result from submerging the trainees underwater.

119 WO Balakrishnan made several points in support of the argument that he did not realise that the act of dunking was dangerous. First, a brigade commander visited the training centre at Kampong Pasir in 1998 and witnessed water treatment at the washing bay. He commended it as "very good training". Since the brigade commander approved of the training, there was no reason for WO Balakrishnan to believe that it was unauthorised or dangerous. Second, he argued that he did not realise the danger of dunking given that Capt Pandiaraj was present and two experienced instructors

were handling the dunking. Third, there were no casualties during the 78th and 79th CST courses even though dunking was carried out in the same water tub.

120 These arguments failed to convince me. First, the brigade commander was never called to give evidence for the defence so as to corroborate this claim. Second, the brigade commander witnessed dunking in a washing bay. The judge made a finding of fact that dunking at a washing bay was much less dangerous than dunking in a tub because the washing bay could only hold four to six inches of water whereas the tub held roughly 23 inches of water. Third, WO Balakrishnan said that he thought dunking would not be dangerous so long as the "three dips, five to ten seconds per dip" rule was adhered to. However, he was present when Capt Ho was dipped and would have seen that the dunking exceeded these parameters. He must have realised the danger, but did nothing about it. The experience of the instructors carrying out the dunking and the fact that there were no casualties during the previous two CST courses were immaterial if safety guidelines were not adhered to during the 80th CST course.

121 WO Balakrishnan also tried to play up the fact that he only had a Secondary Two education level and therefore did not realise the danger inherent in the act of dunking. It goes without saying that one does not require a university education to realise that dunking a person underwater repeatedly, covering his nose and mouth when he is in the water and not allowing him to catch his breath when he surfaces, is extremely perilous. As I stated in *Ng Keng Yong v PP* at [88], s 304A merely requires the court to consider whether "a reasonable man in the same circumstances would have been aware of the likelihood of damage or injury to others resulting from [his] conduct". In my view, any reasonable man in the same circumstances would have known that the acts carried out by Lta Jeff Ng and Lta Diva were rash, and there was no reason at all for me to believe that WO Balakrishnan would honestly have thought otherwise.

Issue 4 – Whether the defence of mistake should succeed

122 The final ground of WO Balakrishnan's appeal against conviction was that the judge had erred in rejecting the defence of mistake of fact under s 79 of the Penal Code, which reads:

Act done by a person justified, or by mistake of fact believing himself justified by law.

79. Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law, in doing it.

123 In *Ratanlal & Dhirajlal's Law of Crimes* vol 1 (Bharat Law House, 24th Ed, 1997), the authors explain at 151 that:

Good faith in act or belief requires due care and attention to the matter in hand. The law cannot mark, except in this vague way, the amount of care and attention requisite; but *if a man takes upon himself an office or duty requiring skill or care, and a question arises whether he has acted therein in good faith, he must show not merely a good intention, but such care and skill as the duty reasonably demands for its due discharge*. The degree of care requisite will vary with the degree of danger which may result from the want of care. *Where the peril is the greatest the greatest caution is necessary*.

Good faith requires not logical infallibility, but due care and attention. ... The phrase "due care and attention" implies genuine effort to reach the truth and not the ready acceptance of an ill-natured belief.

[emphasis added]

124 WO Balakrishnan reiterated the point that he had believed that he was justified by law in using the tub because his then OC, Capt Simon Tan, had approved the use of the tub during the 78th CST course, and Capt Pandiaraj had approved the use of the tub during the 80th CST course. I rejected these arguments. First, the defence did not call Capt Simon Tan to give evidence. Second, WO Balakrishnan's duty as Course Commander was to prevent training accident and injury. As an experienced soldier, he knew that he had to go through the proper channels to approve changes to the CST lesson plan. Merely showing Capt Pandiaraj the tub and not even explaining that dunking contravened provisions in the CST lesson plan was not sufficient exercise of care to discharge this duty. More importantly, any evaluation of WO Balakrishnan's culpability had always to come back to the fact that he was at the water treatment area many times that afternoon and witnessed the treatment of both victims. He could not have believed that the instructors' actions were legally justified when they clearly exceeded what he himself believed to be safe conduct. I therefore upheld the judge's finding that the defence of mistake had to be rejected.

WO Balakrishnan's appeal on conviction - conclusion

125 In light of the foregoing analysis, I dismissed WO Balakrishnan's appeal on conviction.

The appeals on sentence

126 Having dismissed both appeals on conviction, I turned my mind to the appeals on sentence.

Capt Pandiaraj

127 Capt Pandiaraj was sentenced to three months' imprisonment on each charge, with the sentences to run concurrently. He appealed, arguing that the sentences imposed were manifestly excessive and asking that the court substitute fines for the terms of imprisonment.

Whether the sentences were manifestly excessive

128 A s 304A offence "shall be punished with imprisonment for a term which may extend to two years, or with fine, or with both". A s 338 offence "shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to \$1,000, or with both".

129 A custodial sentence should be imposed when a defendant has caused grievous injury or death by a rash act, whereas a fine may suffice if the act has only been negligent: *Ngian Chin Boon v PP* [1999] 1 SLR 119 for s 338 and *PP v Gan Lim Soon* [1993] 3 SLR 261 for s 304A. A further factor considered by the judge was that since public interest was at stake, imposition of a fine would not be appropriate for the appellants. I fully agreed.

130 The judge opined that since the incidents had occurred during a demanding CST course which was required to be realistic and tailored to match actual hostile conditions, the culpability of the appellants should be considered in this context. He recognised that there were various mitigating factors in Capt Pandiaraj's favour, these being (a) the deep regret expressed by Capt Pandiaraj over the consequences of his actions; (b) Capt Pandiaraj's achievements and contributions to the Army, in particular, his participation in the SAF contingent for peacekeeping in East Timor; (c) his positive character reference from the Chief Commando Officer; and (d) the fact that he had no prior criminal convictions.

131 I took the view that, far from being manifestly excessive, the sentences imposed on Capt Pandiaraj were manifestly inadequate. A look at the sentencing precedents revealed that the sentence of three months for each offence which was imposed on Capt Pandiaraj was far lower than sentences meted out to other defendants charged for rash behaviour under s 304A of the Penal Code. In relation to the s 338 offence, I was of the opinion that since Capt Ho had nearly died from his grievous injury, the sentence meted out to Capt Pandiaraj under the s 338 charge should incline towards the higher end of the scale.

132 In particular, I considered three cases where the defendants were charged under s 304A of the Penal Code. In *Tan Choon Ming v PP* Magistrate's Appeal No 153 of 1997 (unreported), the national serviceman loaded a machine gun with live rounds. Without checking to ensure that the breech block of the gun was in a safe position, he applied pressure on the trigger and discharged a live round, causing the death of another serviceman. Convicted under s 304A for a rash act, he was sentenced to six months' imprisonment. His appeal was dismissed.

133 In *PP v Ikaeshi Dulkolid* District Arrest Case No 41395 of 2000 (unreported), the accused held an infant outside a window and lost her grip on the infant, causing the infant to fall to her death. This display of rashness was, in my view, of "the most extreme kind", deserving the maximum sentence of two years' imprisonment.

134 In a third case, *PP v Tiyatun* [2002] 2 SLR 246, the two respondents force-fed a 21 month baby boy with soft minced meat and vegetables. One of the respondents held the baby's hands to prevent his movement and pressed his nostrils together to make him open his mouth. The other respondent used a plastic cup to pour food into the baby's mouth. In the course of doing so, the baby began gasping for air. He was sent to hospital and passed away from bronchopneumonia due to inhalation of foreign materials. The respondents admitted that they were conscious that death was at least a possible consequence of their actions. When I heard their appeal, I noted that although the respondents were criminally rash, the circumstances "did not smack of their total disregard for the child's life". The child could easily have swallowed the food fed to him, and had been fed in the same manner over the past eight months without adverse consequences. As such, the culpable rashness exhibited by the respondents was of a lesser degree than that evinced by the respondent in *PP v Ikaeshi Dulkolid* and deserved a "correspondingly lower sentence" of nine months' imprisonment.

135 After careful consideration of these cases and the facts of the case before me, I concluded that the rashness displayed by Capt Pandiaraj was of a much greater degree than that manifested by the serviceman in *Tan Choon Ming* or the respondents in *PP v Tiyatun*. The respondents in *PP v Tiyatun* had been feeding the baby in the same manner for the past eight months without encountering any adverse consequence. The serviceman's actions, though rash, took place on the spur of the moment. In contrast, Capt Pandiaraj witnessed the water treatment of 86 trainees over several hours that afternoon but made no move to intervene even though he must have seen for himself that the safety guidelines were not being followed and that trainees were choking and gasping for air. SSgt Chen Chye Hwa testified that after Capt Ho went through the water treatment, Capt Pandiaraj and WO Balakrishnan were told that a few trainees were having breathing difficulties but did nothing about it. If Capt Pandiaraj had only acted to stop the treatment or to curb the instructors' actions then, Sgt Hu's death could have been averted altogether.

136 The evidence before me demonstrated very clearly that Capt Pandiaraj was intimately involved in the maltreatment of both victims. As the supervising officer of the course, he was tasked with ensuring safe conduct of the exercise. Instead, his prescription for conduct of the water treatment directly contravened the lesson plan. He was best placed to stop the water treatment and curb the instructors' excesses, but made no effort to do so. The offences committed by the

instructors were not only in blatant violation of SAF rules and regulations, but can only be described as brutish and sadistic.

137 A significant factor that I considered when sentencing Capt Pandiaraj was his abuse of his position of authority and the trust which the trainees placed in him. As a result of his actions, public confidence in the SAF was also shattered. This abuse of trust and authority has been recognised by the courts as a serious aggravating factor which may even outweigh factors that might normally go towards mitigation: *Lee Kwang Peng v PP* [1997] 3 SLR 278, *Lim Hoon Choo v PP* [2000] 1 SLR 221. As Andrew Ashworth explains in *Sentencing and Penal Policy* (Weidenfeld and Nicolson, 1983), when an offence involves a breach of trust, some of the stringent factors in mitigation, such as an unblemished career or model citizenship, do not tell greatly in the offender's favour because his offence against his office may be seen as a betrayal of those very characteristics.

138 The principle of sentencing parity provides that where the roles and circumstances of the accused persons are the same, they should be given the same sentence unless there is a relevant difference in their responsibility for the offence or their personal circumstances: *PP v Ramlee* [1998] 3 SLR 539; *PP v Norhisham bin Mohamad Dahlan* [2004] 1 SLR 48. The judge held that Capt Pandiaraj did not bear the same degree of culpability or play the same role as Lta Jeff Ng and Lta Diva. I did not concur. Although Capt Pandiaraj did not physically carry out the act of dunking on the victims, he gave Lta Jeff Ng and Lta Diva instructions for dunking, witnessed their manhandling of the trainees and did nothing to stop them. This was an egregious abuse of his power as their superior officer, and I was of the view that he was more morally culpable than Lta Jeff Ng and Lta Diva.

139 Having weighed all these factors in the balance, I decided that a sentence of 12 months' imprisonment for each offence would far better reflect the court's disapprobation of his deeds than the three months meted out by the judge. Since the offences were committed during the same training course, I ordered that the sentences should run concurrently.

WO Balakrishnan

140 WO Balakrishnan submitted that the judge had erred in rejecting his argument that his moral culpability was akin to that of negligence, not rashness. This submission was unmeritorious. While culpable rashness requires the actor to act with the consciousness that mischievous and illegal consequences may follow, culpable negligence requires him to act without that consciousness. I found that WO Balakrishnan clearly had the consciousness necessary for a finding of culpable rashness and should be sentenced accordingly.

141 The judge considered these mitigating factors when arriving at his decision on sentence: (a) WO Balakrishnan had served in the army for 25 years and the Chief Commando Officer acknowledged his contributions to the Commando Formation; (b) WO Balakrishnan had made efforts to evacuate the casualties to the medical centre; and (c) he had no prior criminal convictions.

142 Given his role in the commission of the offence, the judge deemed that WO Balakrishnan should be given a lower sentence than Capt Pandiaraj. I agreed with this, but nevertheless took the view that the sentences of two months for each offence were manifestly inadequate. Accordingly, I enhanced the sentences meted out to WO Balakrishnan to six months for each offence, with the sentences to run concurrently.

Conclusion

143 In coming to my decision to enhance the sentences of both appellants, I was not unmoved by

the shining testimonials given to both appellants by their superiors, or the fact that they had led sterling careers in the armed forces. However, it was incumbent upon me to consider that both appellants had committed appalling offences against their officers. These offences were a complete betrayal of their offices, as well as the very qualities they were lauded for in the testimonials. Saddened as I was to have to sentence these two officers to longer periods in jail, I was more grieved by the fact that it was their conduct that had resulted in the senseless death of a young serviceman and almost caused the death of another.

Appeals against conviction and sentence dismissed. Sentences enhanced.

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