Public Prosecutor *v* Kho Jabing
[2015] SGCA 1

Case Number	: Criminal Appeal No 6 of 2013
Decision Date	: 14 January 2015
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; Woo Bih Li J; Lee Seiu Kin J; Chan Seng Onn J
Counsel Name(s)	: Hay Hung Chun, Seraphina Fong and Teo Lu Jia (Attorney-General's Chambers) for the Appellant; Anand Nalachandran (Braddell Brothers LLP), Josephus Tan and Keith Lim (Fortis Law Corporation) for the Respondent
Parties	: Public Prosecutor — Kho Jabing

Criminal Law – Offences – Murder

Criminal Procedure and Sentencing – Sentencing – Principles

[**LawNet Editorial Note**: The decision from which this appeal arose is reported at [2014] 1 SLR 973.

The appeal to this decision in Criminal Motion No 24 of 2015 was dismissed by the Court of Appeal on 5 April 2016. See [2016] SGCA 21.]

14 January 2015 Judgment reserved

Chao Hick Tin JA (delivering judgment of the majority consisting of Andrew Phang Boon Leong JA, Chan Seng Onn J and himself):

Introduction

1 In *Public Prosecutor v Galing Anak Kujat and another* [2010] SGHC 212 ("the Trial Judge's decision"), Jabing Kho ("the Respondent"), and his co-accused, Galing Anak Kujat ("Gailing"), were convicted of murder under s 300(*c*) read with s 34 and punishable under s 302 of the Penal Code (Cap 224, 2008 Rev Ed) ("PC"), and Kan Ting Chiu J ("the Trial Judge") passed the mandatory death sentence on them accordingly.

2 On appeal, the Court of Appeal in *Kho Jabing and another v Public Prosecutor* [2011] 3 SLR 634 ("the CA (Conviction) Decision") affirmed the Respondent's conviction and sentence. This CA (which for ease of reference will be referred to as "CA (Conviction)"), however, allowed Galing's appeal and his conviction of murder was substituted with a conviction of the offence of robbery with hurt committed in furtherance of a common intention under s 394 read with s 34 of the PC. Galing's case was then remitted back to the Trial Judge for resentencing and he was eventually sentenced to an imprisonment term of 18 years and 6 months and 19 strokes of the cane.

3 The Penal Code (Amendment) Act 2012 (Act No 32 of 2012) ("the PCAA") was then enacted by Parliament to amend the PC. Pertinently, s 2 of the PCAA provide that:

> **Repeal and re-enactment of section 302**

2. Section 302 of the Penal Code is repealed and the following section substituted therefor:

"**Punishment for murder**

302.—(1) Whoever commits murder within the meaning of section 300(*a*) shall be punished with death.

(2) Whoever commits murder within the meaning of section 300(*b*), (*c*) or (*d*) shall be punished with death or imprisonment for life and shall, if he is not punished with death, also be liable to caning.".

…

As a result of these amendments, except for an accused person who is convicted of a charge under s 300(*a*) of the PC, an accused person will no longer face the mandatory death penalty and the court is given the discretion to sentence the accused to life imprisonment and caning instead.

4 Sections 4(5) and (6) of the PCAA then provided for certain transitional provisions:

Savings and transitional provisions

…

4. —(5) Where on the appointed day, the Court of Appeal has dismissed an appeal brought by a person for an offence of murder under section 302 of the Penal Code, the following provisions shall apply:

…

(*f*) if the Court of Appeal clarifies under paragraph (*c*)(ii) or (*d*) that the person is guilty of murder within the meaning of section 300(*b*), (*c*) or (*d*) of the Penal Code, it shall remit the case back to the High Court for the person to be re-sentenced;

(*g*) when the case is remitted back to the High Court under paragraph (*f*), the High Court shall re-sentence the person to death or imprisonment for life and the person shall, if he is not re-sentenced to death, also be liable to be re-sentenced to caning;

…

(6) If –

(*a*) any Judge of the High Court, having heard the trial relating to an offence of murder, is unable for any reason to sentence, affirm the sentence or re-sentence a person under this section…

…

any other Judge of the High Court… may do so.

5 On 30 April 2013, the Court of Appeal confirmed that the Respondent was convicted under s 300(*c*) of the PC and allowed his application for his case to be remitted to the High Court for re-sentencing pursuant to s 4(5)(*f*) of the PCAA.

6 The hearing for re-sentencing came before another High Court judge (as the Trial Judge had by then retired from the Bench) ("the Re-sentencing Judge"), who re-sentenced the Respondent to life imprisonment with effect from the date of his arrest (*ie*, 26 February 2008) and 24 strokes of the cane (see *Public Prosecutor v Kho Jabing* [2014] 1 SLR 973 ("the Re-sentencing Judge's Decision")).

7 The Prosecution then appealed against the Re-sentencing Judge's decision, urging this Court to impose the death sentence upon the Respondent on the ground that this was an extremely vicious attack on the victim.

Our decision

8 At the very heart of this appeal lies a critical legal question – for an offence of murder where the mandatory death penalty does not apply, in what circumstances would the death penalty still be warranted?

9 This seemingly simple question belies a great deal of difficulties and complications, along with the severe consequences and implications any answer brings. Given that this is the first case of its kind to reach the Court of Appeal since the amendments to the mandatory death penalty were enacted, previous case law was, at best, marginally helpful. In fact, both the Prosecution and counsel for the Respondent were hard-pressed, very understandably so, to suggest any local authority which might be helpful to us.

10 This appeal therefore requires this Court to set down some guidelines and principles as to how this discretion ought to be exercised. After considering the submissions made by the Prosecution and counsel for the Respondent, we allow the Prosecution's appeal and impose the death sentence on the Respondent. Our detailed reasons for this decision are set out hereunder.

The discretionary death penalty

11 During the appeal, we had raised a number of queries to both the counsel for the Respondent and the Prosecution with the objective of clarifying exactly *how* the court should come to its decision as to the circumstances when the death penalty, as compared to life imprisonment and caning, would be the more appropriate sentence in a case like this. In sum, the numerous questions can be condensed into two broad questions which accurately capture our concerns:

(a) What circumstances should the Court take into consideration?

(b) Do the normal sentencing principles apply?

Keeping these two questions in mind, we examine three areas which might be potentially helpful – (1) the parliamentary debates for the amendments to the mandatory death penalty, (2) decisions of foreign jurisdictions, and (3) analogous local case authorities.

Parliamentary debates

12 Obviously the first matter which we ought to consider in this regard would be the parliamentary debates concerning the enactment of the PCAA. In the debates during the introduction of the amendments (see Changes to the Application of the Mandatory Death Penalty to Homicide Offences (Statement by Minister for Law), *Singapore Parliamentary Debates, Official Report* (9 July 2012) vol 89), the Minister for Law explained that three factors would be relevant in deciding when the death

penalty is appropriate:

> In deciding whether and how to apply the death penalty to a particular offence, several factors have to be considered. In particular I will mention, in broad terms, three interconnected factors: (1) the seriousness of the offence, both in terms of the harm that the commission of the offence is likely to cause to the victim and to society, and the personal culpability of the accused; (2) how frequent or widespread an offence is; and (3) deterrence.
>
> These three factors must be considered in their totality. For example, the fact that an offence is not widespread or that its incidence is low may not, by itself, be a decisive factor. The overarching aim of the Government is to ensure the safety and security of Singapore, while maintaining a fair and just criminal system.
>
> Intentional killing within the meaning of 300(a) is one of the most serious offences in our books. Put simply, this is a case where the offender intends the death of the victim. It is right to punish such offenders with the most severe penalty. It is right to provide for the most powerful deterrent against such offences. It is right, therefore, that the mandatory death penalty should continue to apply to such intentional killing.
>
> In respect of other categories of murder, under section 300(b) to (d), there could be different degrees of intention, and these offences are committed in a variety of situations. Today, that is something considered by the Public Prosecutor when he decides the appropriate charge in each case. *The factors he considers include the* ***precise intention*** *of the accused, the manner in which the homicide occurred and the deterrent effect a charge may have on others. We want to move towards a framework where the court also has the discretion, to take the* ***same factors*** *into account during sentencing.*
>
> This change will ensure that our sentencing framework properly balances the various objectives: justice to the victim, justice to society, justice to the accused, and mercy in appropriate cases. … We now have a relatively low incidence of homicides – last year we had 16 recorded homicides, or about 0.3 per 100,000 population. As our society becomes safer, less violent, and more mature, we believe that today's changes are a right step to take.
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> [emphasis added in italics and bold italics]

13 In trying to show how the Re-sentencing Judge had erred, the Prosecution in their submissions for this appeal had analysed these three factors and then "categorized" the circumstances of the case according to these three factors. While the Prosecution should not be faulted for doing so, in our opinion, we find that these factors are best considered *in totality*, and should serve as guiding considerations rather than distinct factors in deciding whether the death penalty is appropriate. As can be seen, the Minister for Law had explained these three factors in "broad terms", suggesting that a broad and holistic approach should be taken. At the risk of stating the obvious, the factual matrix and circumstances of each case would be extremely varied, and Parliament could not have intended a formulistic approach in applying these three factors in deciding whether or not the death penalty would be the appropriate sentence for a particular case.

14 In any event, these three factors, by their nature, do not lend themselves to a formulistic approach – these factors are clearly not "objective" factors which can be "measured" or "fulfilled". When counsel for the Respondent and the Prosecution were asked whether there were any objective factors which could guide the Court in making its decision, both candidly admitted that apart from suggesting certain objective factors described by the courts of other jurisdictions, they were unable

to state any "objective factors" other than what the Minister for Law had stated in the parliamentary debates.

15 This further reinforces our view that deciding whether or not the death penalty is the appropriate sentence cannot be done in a formulistic manner, unlike, for example, establishing liability for a breach of the duty of care where there are specific elements of the tort which can be established. Therefore, in our opinion, the factors as explained in the parliamentary debates simply point to the general principle that the facts of the case must be considered in their totality in determining the appropriate sentence, and are not meant to be part of a legal test to establish when the death penalty would be appropriate. While there is no doubt that the court should take cognizance of the three factors, they must be considered alongside the whole plethora of circumstances prevailing in that case.

Foreign decisions

16 Next we examine the decisions from other jurisdictions where a similar discretionary death penalty for murder is also provided. Counsel for the Respondent, both in this appeal and during the re-sentencing hearing below, relied upon a number of decisions from other jurisdictions in submitting that when the court has the discretion to decide whether or not to impose the death penalty, it should only do so in the "worst of the worst" and the "rarest of the rare" cases. In response to these submissions, the Re-sentencing Judge, at [38] of his decision, held that:

> I do not find it necessary or fruitful to look at decisions in other jurisdictions as to when the death penalty would be appropriate. Each society must decide for itself what type and degree of punishment it wants and needs in the unique context of its values and the level of development on all fronts, including social, cultural and economic ones.

17 The criminal justice system of a country is the bedrock of a safe and orderly society and is designed to produce order and justice in the relationships between man and man and between man and state. It is at the very heart of a functional and flourishing society, and we cannot emphasize further that it must be built upon the society's cultural, moral, political and economic norms. This will be especially so for something as controversial and sensitive as the death penalty. On this perspective, we generally agree with the observations of the Re-sentencing Judge as stated above. That said, although decisions from other jurisdictions ought to be viewed with some degree of circumspection, they can, to a certain extent, still provide some guidance in working out our criminal justice system. After all, it is in the collective wisdom of man that perhaps each can find his own illuminating light to guide his path. It will therefore be beneficial to examine a number of decisions from other jurisdictions which have tried to work out a clear and practical approach in meting out the discretionary death penalty.

18 We start off first with India, from where our Penal Code finds its historical roots. In *Bachan Singh v The State Punjab* (1980) 2 SCC 684 ("*Bachan Singh*"), the leading case in India on the discretionary death penalty, the Supreme Court of India held (at [209]):

> Facts and Figures, albeit incomplete, furnished by the Union of India, show that in the past, courts have inflicted the extreme penalty with extreme infrequency — a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3) viz. that for persons convicted of murder, life

imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. *That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed*. [emphasis added]

19 The "rarest of rare" principle laid down in *Bachan Singh* continues to be the guiding principle for the Indian courts applying the discretionary death penalty. It is important however to understand the legislative context in which this principle arose from. Originally, pursuant to s 367(5) of the 1898 Indian Code of Criminal Procedure (Act No V of 1898) ("1898 CCP"), the Courts in India were mandated by statute to state reasons if the death penalty was not passed, whenever the accused was convicted of an offence with the discretionary death penalty. Section 367(5) of the 1898 CCP provided that:

> If the accused is convicted of an offence punishable with death and the Court sentences him to any punishment other than death, the Court shall in its judgment state the reason why sentence of death was not passed.

20 A different position was however taken when the 1973 Code of Criminal Procedure (Act 2 of 1974) ("1973 CCP") was enacted. Section 354(3) of the 1973 CPC provided that:

> When the conviction is for an offence punishable with death, or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the *special reasons* for such sentence. [emphasis added]

21 The 1973 CCP therefore effectively reversed the position as it existed under the 1898 CCP – the Indian Court now has the duty to give *special reasons* if the sentence of death is imposed. Given this legislative change, it is therefore not surprising that the Court in *Bachan Singh* was ready to find that it was only in the "rarest of rare" cases that the death penalty should be imposed.

22 Shortly after *Bachan Singh*, the Supreme Court of India fine-tuned its approach as to what would be a "rarest of rare" case. In *Machhi Singh v State of Punjab* (1983) 3 SCC 470 ("*Machhi Singh*"), the Supreme Court of India considered that five factors could be relevant. Four of them are:

(a) The manner of commission of the murder;

(b) The motive for the murder;

(c) The anti-social or abhorrent nature of the crime; and

(d) The magnitude of the crime.

23 At [33] to [36], it described the four factors as such:

> I. Manner of Commission of murder
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> 33. When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community. For instance,
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> (*i*) When the house of the victim is set aflame with the end in view to roast him alive in the house.

(*ii*) When the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death.

(*iii*) When the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

II. Motive for commission of murder

34. When the murder is committed for a motive which evinces total depravity and meanness. For instance when (*a*) a hired assassin commits murder for the sake of money or reward (*b*) a cold-blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-a-vis whom the murderer is in a dominating position or in a position of trust, or (*c*) a murder is committed in the course for betrayal of the motherland.

III. Anti-social or socially abhorrent nature of the crime.

35. (*a*) When murder of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath. For instance when such a crime is committed in order to terrorize such persons and frighten them into fleeing from a place or in order to deprive them of, or make them surrender, lands or benefits conferred on them with a view to reverse past in justices [sic] and in order to restore the social balance.

(*b*) In cases of "bride burning" and what are known as "dowry deaths" or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

IV. Magnitude of crime

36. When the crime is enormous in proportion. For instance when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

24 The Supreme Court of India also felt that the "personality of victim of murder" would be a relevant factor. Eventually, the Supreme Court of India endorsed a "balance sheet" approach (at [38(*iv*)]), where:

> A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances has to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

25 By identifying the factors above, it would appear that the Supreme Court of India was placing emphasis on both the crime and the criminal in evaluating the appropriateness of the death penalty. The "balance sheet" approach in determining whether a case was the "rarest of the rare" continued to apply for a period of time. It would later however transpire that there was much practical difficulty in applying this test. We do not propose to go through an extensive review of Indian case law, but suffice it to say that in *Sangeet v State of Haryana* (2013) 2 SCC 452, the Supreme Court of India discussed a number of cases ever since *Bachan Singh*, and found that there had been "little or no uniformity in the application of this approach" (referring to the "balance sheet approach" advocated in *Machhi Singh*). At [77], it conclusively did away with this balance sheet approach, stating that:

77.1. This Court has not endorsed the approach of aggravating and mitigating circumstances in *Bachan Singh*. However, this approach has been adopted in several decisions. This needs a fresh look. In any event, there is little or no uniformity in the application of this approach.

77.2. Aggravating circumstances relate to the crime while mitigating circumstances relate to the criminal. A balance sheet cannot be drawn up for comparing the two. The considerations for both are distinct and unrelated. The use of the mantra of aggravating and mitigating circumstances needs a review.

77.3. In the sentencing process, both the crime and the criminal are equally important. We have, unfortunately, not taken the sentencing process as seriously as it should be with the result that in capital offences, it has become judge-centric sentencing rather than principled sentencing.

…

Clearly, while the "rarest of rare" principle endorsed in *Bachan Singh* continues to be the guiding principle in India, its history has shown that the practical application of such a principle is fraught with difficulty.

26 We note that the "rarest of rare" principle is not unique to India. In *R v Trimmingham* [2009] UKPC 25 (an appeal from the Court of Appeal of St Vincent and the Grenadines), the Privy Council likewise endorsed a similar principle. In observing that the approach a sentencing judge should follow in a case where the imposition of the death sentence is discretionary was relatively well-established by the Caribbean Courts, the Privy Council at [21] held that:

[i]t can be expressed in two basic principles. The first has been expressed in several different formulations, but they all carry the same message, that the death penalty should be imposed *only in cases which on the facts of the offence are the most extreme and exceptional, "the worst of the worst" or "the rarest of the rare"*. In considering whether a particular case falls into that category, the judge should of course compare it with other murder cases and not with ordinary civilised behaviour. The second principle is that there must be no reasonable prospect of reform of the offender and that the object of punishment could not be achieved by any means other than the ultimate sentence of death. The character of the offender and any other relevant circumstances are to be taken into account in so far as they may operate in his favour by way of mitigation and are not to weigh in the scales against him. Before it imposes a sentence of death the court must be properly satisfied that these two criteria have been fulfilled. [emphasis added]

Given the additional requirement that there must be no reasonable prospect of reform of the offender and no other means by which to achieve the object of punishment, it could even be said that the Caribbean Courts apply a stricter test than the "rarest of the rare" approach in India.

27 In the United States, a similar "rarest of the rare" principle seems to apply. The death penalty is only awarded in the most extreme of circumstances – in *Roper v Simmonds* 543 US 551 (2005) at 568, the US Supreme Court citing its previous decision in *Atkins v Virginia* 536 US 304 (2002) at 319, held that:

[c]apital punishment must be limited to those offenders who commit "a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution."

28 Furthermore, a non-exhaustive list of factors the US Courts must consider is also statutorily

provided for in Title 18, Chapter 228, Section 3592 of the United States Code. These factors include impaired capacity, duress, minor participation, equally culpable defendants, heinous, cruel, or depraved manner of committing offense, pecuniary gain and substantial planning and premeditation, to name a few.

Local case authorities

29 Finally, we turn to local case authorities. As mentioned above, this is the first case of its kind (brought about by the amendments to the PC – see [3] above) to be decided by us and there are no reported local case authorities *directly* on point. There is however, a decision based on the offence of gang-robber with murder in the Penal Code (Cap 224, 1985 Rev Ed) ("PC (1985)") which provides:

> **Gang-robbery with murder**
>
> **396.** If any one of 5 or more persons who are conjointly committing gang-robbery, commits murder in so committing gang-robbery, every one of those persons shall be punished with death or imprisonment for life, and if he is not sentenced to death, shall also be punished with caning with not less than 12 strokes.

30 Section 396 of the PC (1985) which is similarly worded to s 302(2) of the PC (the provision under consideration in the present case), was interpreted and applied by the Court of Appeal in *Panya Martmontree and others v Public Prosecutor* [1995] 2 SLR(R) 806 ("*Panya*"). In dismissing the appeal and confirming the sentences of death passed by the High Court, the Court of Appeal at [66] noted that:

> When the appellants went to the Tampines site to steal valuable equipment, like surveying equipment, as was in fact stolen, armed with lethal weapons they must have intended to cause grievous bodily harm and even death to anyone who stood in their way. This is what they in fact did. *Their acts of violence were mercilessly executed and gravely abhorrent in their execution*. In our view, *these acts of violence were amply sufficient to "outrage the feeling* [*sic*] *of the community"*. Further in our judgment there was no reason to discriminate between them as they were all in it together and it cannot be said with any certainty which of them inflicted the fatal blows and which of them took a passive role. The learned judge had not erred. [emphasis added]

31 We note the strong language used by the Court of Appeal in *Panya* to describe the acts of the offenders in its decision to uphold the death penalty. Particularly, the Court of Appeal had used the phrase "outrage the feeling[s] of the community" in evaluating the acts of the offenders.

32 This phrase originated from the decision in *Sia Ah Kew and others v Public Prosecutor* [1974 – 1976] SLR(R) 54 ("*Sia Ah Kew*"), which was cited with approval in *Panya*. *Sia Ah Kew* was a case involving kidnapping for ransom, an offence under s 3 of the Kidnapping Act (Cap 101, 1970 Rev Ed) which provided:

> Whoever, with intent to hold any person for ransom, abducts or wrongfully restrains or wrongfully confines such person shall be guilty of an offence and shall be punished on conviction with death or imprisonment for life and shall, if he is not sentenced to death, also be liable to caning.

33 Here, the court likewise had the discretion in deciding whether or not to impose the death penalty. The Court of Appeal first noted at [3] that given the wording of the statute, the courts had:

> … a very limited discretion with regard to sentence, the discretion being limited to the imposition

of one of three sentences, the maximum being death and the minimum being imprisonment for life. The third is imprisonment for life with caning.

34 In deciding when to impose the maximum penalty, that is, the death penalty, the Court of Appeal held at [5] that:

> … [i]t is a long and well established principle of sentencing that the Legislature in fixing the maximum penalty for a criminal offence intends it only for the worst cases. *However*, in the case of the offence of kidnapping for ransom *the discretion given to the courts as regards the sentence is, as earlier stated, very limited in scope*. In our opinion the maximum sentence prescribed by the Legislature would be appropriate where the manner of the kidnapping or the acts or *conduct of the kidnappers are such as to outrage the feelings of the community*. [emphasis added]

The Court of Appeal, after reviewing the facts of the case, eventually held that the circumstances did not point to a case where the maximum sentence of death would be the appropriate sentence to impose.

The decision to impose the death penalty

35 We will now review the points that we have raised above and set out our views as to their relevance in this appeal.

36 First, the three factors alluded to in the relevant parliamentary debates are non-exhaustive and are just guiding considerations which the court should bear in mind when determining whether the death penalty is an appropriate sentence in a specific case. In our opinion, the parliamentary debates do not suggest that the courts should only pay or pay particular credence to these three factors.

37 It is our judgment that the trite and well established sentencing principle that all the circumstances and factors of the case must be taken into consideration in meting out an appropriate sentence continues to apply, and this is supported by the fact that the Minister for Law had stated the three factors in broad terms and specifically mentioned that they were to be considered in totality. As we see it, these three factors were highlighted because they will very likely surface in any evaluation of a case involving the discretionary death penalty.

38 Second, the leading principle in other jurisdictions, as the survey above touching on the positions in India, St Vincent and Grenadines, and the United States shows, is that the death penalty should only be imposed for the "rarest of rare" or the "worst of the worst" cases. To follow this principle would mean that it is only in the most extreme of circumstances and the narrowest of cases that the death penalty would be imposed. The practical implication of this principle can be illustrated briefly by a number of cases.

39 In *Manohar Lal alias Mannu & Another v State (NCT) of Delhi* (2000) 2 SCC 92, the offenders burned four sons alive in front of their mother. On appeal, the death penalty was set aside because the Supreme Court of India felt that the assassination of Prime Minister Indira Gandhi had "blinded" the offenders, leading them to a rampage triggered by a demented psyche. The offenders "had no special or personal animosity towards anyone of the deceased individually" (at [7]). Pertinently, the Supreme Court of India also (at [9]) cited a previous decision, *Kishori v State of Delhi* [1999] 1 SCC 148, where the facts were analogous and where the death penalty was not imposed.

40 In *Ravindra Trimbak Chouthmal v State of Maharashtra* (1996) 4 SCC 148, the victim was

murdered, her head severed from her body, and her body cut up into nine pieces and kept in two suitcases which was subsequently disposed of. This was a case of "dowry death", where the murder was the result of the husband's family being unhappy with the dowry received from the marriage. The Supreme Court of India overturned the High Court's decision to impose the death penalty, and at [9] and [10], observed that:

> 9. The present was thus a murder most foul, as pointed out by us in the opening paragraph. The motive was to get another girl for the appellant who could get dowry to satisfy the greed of the father. Dowry-deaths are blood- boiling, as human blood is spilled to satisfy raw-greed, naked greed; a greed which has no limit. Nonetheless, question is whether the extreme penalty was merited in the present case?
>
> 10. We have given considered thought to the question and we have not been able to place the case in that category which could be regarded as the "rarest of the rare" type. This is so because dowry death has ceased to belong to *that* species of killing. The increasing number of dowry deaths would bear this. To halt the rising graph, we, at one point, thought to maintain the sentence; but we entertain doubt about the deterrent effect of a death penalty. We, therefore, resist ourselves from upholding the death sentence, much though we would have desired annihilation of a despicable character like the appellant before us. We, therefore character like the appellant before us. We, therefore, commute the sentence of death to one of RI for life imprisonment.
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> [emphasis in original]

It is clear therefore that the "number" of occurrences of the crime features as a consideration in deciding what is the "rarest of the rare".

41 In our respectful opinion, we do not find that the "rarest of rare" principle is appropriate for Singapore. To adopt this principle would be to artificially confine and sequester the death penalty to the narrowest of regions and to restrict the imposition of the death penalty based on whether the actions of the offender are "rare" in comparison with other offenders. This should not be the case in our context. Admittedly, the often cited sentencing principle is that the maximum penalty is only intended for the worst form of cases (see for example, *Sim Gek Yong v PP* [1995] 1 SLR(R) 185 at [13], which was cited with approval in the Re-sentencing Judge's Decision at [12]).

42 However, the context in which this principle was laid down is different in the sense that in the normal case the sentencing judge has a much wider discretion and a range of penalties from which to choose from. In such a scenario, given that there is a range of penalties reflecting differing degrees of moral culpability, it would make sense that it is only in the worst form of cases that the maximum penalty should be meted out. However, this is not the case with the discretionary death penalty. To quote the Court of Appeal in *Sia Ah Kew* at [5], the "discretion given to the courts as regards the sentence is… very limited in scope"; the court does not have the luxury to choose from a range of penalties.

43 Given the fact that the discretion is confined to only the imposition of either the death sentence or life imprisonment with caning, we do not find that the "rarest of the rare" principle effectively meets the objective of having the discretionary death penalty in our sentencing regime. As explained by the Minister for Law in the parliamentary debates, the objective behind introducing the discretionary death penalty was to balance "the various objectives: justice to the victim, justice to society, justice to the accused, and mercy in appropriate cases". All these considerations must be taken into account, and we do not think that they would be properly reflected if we should adopt the

"rarest of the rare" principle.

44 In our judgment, a more appropriate principle to follow would be that laid down by the Court of Appeal in *Sia Ah Kew*, which is, whether the actions of the offender would *outrage the feelings of the community*. Undoubtedly, capital punishment is an expression of society's indignation towards particularly offensive conduct, and the fact that the death penalty continues to be part of our sentencing regime is an expression of society's belief that certain actions are so grievous an affront to humanity and so abhorrent that the death penalty may, in the face of such circumstances, be the appropriate, if not the only, adequate sentence. It would therefore, in our judgment, be correct to consider the strong feelings of the community in deciding whether or not to impose the death penalty.

45 In determining whether the actions of the offender would outrage the feelings of the community, we find that the death penalty would be the appropriate sentence when the offender has acted in a way which exhibits viciousness or a blatant disregard for human life. Viewed in this light, it is the *manner* in which the offender acted which takes centre stage. For example, in the case of a violent act leading to death, the *savagery of the attack* would be indicative of the offender's regard for human life. The number of stabs or blows, the area of the injury, the duration of the attack and the force used would all be pertinent factors to be considered.

46 We would observe that the significance of each of these factors would invariably vary, depending on the circumstances of the case. For example, the factors to consider would be extremely different in a case of non-violent acts leading to death, such as where the death was caused by poisoning. It is the offender's (dis)regard for human life which will be critical. This explains why an offence under s 300(*a*) of the PC, where the offender had the clear *intention* to cause death, still carries the mandatory death penalty.

47 Therefore when an offender acts in a way which exhibits a blatant disregard for human life which is just shy of the requisite intention to sustain a charge under s 300(*a*) of the PC, the imposition of the death penalty would be the appropriate sentence to reflect the moral culpability of such an offender. This approach would also be in accordance with what the Minister for Law had explained as being the *seriousness of the offence, personal culpability of the accused* and *the manner in which the homicide occurred* in the parliamentary debates.

48 That said, the court should still take into consideration all the other circumstances of the case. While the offender's regard for human life remains at the forefront of the court's consideration, other facts such as the offender's age and intelligence continue to be relevant.

49 In *Public Prosecutor v Ellarry bin Puling and another* [2011] SGHC 214 ("*Fabian*"), F and E were foreigners on work permits in Singapore. On 22 August 2008, they set out on bicycles to find victims to rob. F was armed with a piece of wood which he had picked up the night before, with the intention of striking his victims with it before robbing them. In the early morning of 23 August 2008, F and E spotted the deceased sitting alone at a bus stop using his phone. F approached the person from behind and hit him on the head three times, before tripping him and kicking him when he was on the ground. The victim was then robbed. The victim later fell into a coma, and eventually succumbed to his injuries. The cause of death was certified to be intracranial haemorrhage and cerebral contusions due to a fractured skull. F was convicted of murder under s 300(*c*) of the PC.

50 F's conviction was upheld on appeal (in Criminal Case Appeal No 15 of 2011) and his case was subsequently sent back for resentencing under the relevant provisions of the PCAA. At the resentencing hearing (Criminal Case No 40 of 2009), the trial judge in that case found that although the attack was vicious, he took into account the fact that the accused was young (18 years old at

the time of offence) and had sub-normal intelligence in eventually deciding not to impose the death penalty. This is an example of how the court must continue to take into consideration all the other circumstances of the case.

51 We summarize our views on the principles guiding this court in determining when it would be appropriate to impose the death penalty as follows:

(a) The factors alluded to by the Minister for Law in the parliamentary debates are clearly relevant considerations. However, no especial credence should be placed on them. The well-established sentencing principle that all the circumstances and factors of the case must be taken into consideration in meting out an appropriate sentence continues to apply.

(b) The "rarest of rare" principle is not applicable in our legislative scheme of things. A more appropriate principle to follow would be the one laid down by the Court of Appeal in *Sia Ah Kew*, which is to discern whether the actions of the offender would *outrage the feelings of the community*.

(c) In determining whether the actions of the offender would outrage the feelings of the community and in turn warrant the imposition of the death penalty, the court must consider whether the offender has acted in a way which exhibits a *blatant disregard for human life*. Thus the *manner* in which the offender acted would be critical. The factors to be taken into consideration to determine this would vary depending on the circumstances of the case. In the case of a violent act leading to death, the *savagery of the attack* would be indicative of the offender's disregard for human life.

(d) In any event, all the circumstances of the case must be weighed including the motive and intention of the offender at the time he committed the offence. While the offender's regard for human life remains at the forefront of the court's consideration, other factors such as the offender's age and intelligence could well tilt the balance.

With these principles in mind, we now turn to consider the facts of the present appeal.

The manner in which the murder was committed

The decisions below

52 Central to our inquiry is the manner in which the Respondent had committed the murder. To do this would require revisiting the facts of the case. Keeping in mind the role of an appellate court and that, as far as possible, we should not be disturbing findings of fact, we turn first to the findings of facts concerning the attack as found in the Re-sentencing Judge's Decision, the CA (Conviction) Decision, and the Trial Judge's Decision. It is important to note that the Re-sentencing Judge had relied entirely on the Trial Judge's Decision and the CA (Conviction) Decision where the facts of the case were concerned. At [35] of his decision, the Re-sentencing Judge stated that:

> As I was not the trial Judge in this case, I relied entirely on Kan J's judgment… and the Court of Appeal's judgment… where the findings of fact were concerned. I do not think I should look further into the evidence adduced at the trial and make further conclusions on the facts.

He later concluded at [40(c)] of his decision that:

> There was no clear sequence of events concerning the attack. There was no clear evidence that

the convicted person went after the deceased from behind without warning and started hitting him on the head with the piece of wood. There was evidence that a struggle could have taken place first between Galing and the deceased before the convicted person stopped chasing Wu Jun and returned to assault the deceased.

53 The Re-sentencing Judge's conclusion that "there was no clear sequence of events concerning the attack" was therefore his interpretation of the findings made by the CA (Conviction). At [8] to [10] of the CA (Conviction) Decision, the court had observed that:

> 8 The exact chain of events which occurred during the assault is disputed. Galing stated that Jabing led the way in:
>
> (a) crossing the road (in order to reach the victims);
>
> (b) intimating that the appellants (Galing and Jabing) should rob the victims;
>
> (c) picking up the piece of wood; and
>
> (d) striking the deceased with it.
>
> Further, according to Galing:
>
> (a) he told Jabing not to rob the victims but was ignored by Jabing;
>
> (b) he assaulted Wu Jun (after the deceased had already been assaulted by Jabing with the piece of wood) because Wu Jun seemed to be about to attack Jabing;
>
> (c) he chased Wu Jun for some distance before returning to where Jabing and the deceased were located;
>
> (d) Wu Jun returned to the scene of the assault, and Jabing chased Wu Jun away a second time before he (Galing) called Jabing back.
>
> 9 Jabing, however, stated that:
>
> (a) it was Galing who first crossed the road to approach the victims;
>
> (b) Galing had by then already wrapped his belt around his hand;
>
> (c) Galing was already about to strike the deceased with the belt in his hands by the time Jabing picked up the piece of wood;
>
> (d) he (Jabing) chased after Wu Jun, who had fled the scene of the assault;
>
> (e) he (Jabing) gave up the chase and returned to the scene of the assault, where he saw Galing struggling with the deceased; and
>
> (f) he (Jabing) then struck the deceased with the piece of wood twice, after which he then fled the scene of the assault, but not before noticing Galing hitting the deceased with his belt and having taken the deceased's mobile phone.
>
> 10 To complicate matters, Wu Jun's evidence in his statement was that, while walking together

with the deceased at the material time, he felt something hard hit him at the back of his head. He ran a few steps forward, turned round, and saw a man with a tanned complexion, wearing a cap, coming towards him in a menacing manner with a clenched fist, whereupon he (Wu Jun) fled the scene. Wu Jun's evidence was that he could hear the deceased groaning in pain. After running for a while, Wu Jun called for the police on his mobile phone, and subsequently returned to the scene of the assault, where he discovered the deceased lying unconscious and vomiting blood. Wu Jun also noted that the deceased's mobile phone was missing. At trial, Wu Jun stated that he noticed only one assailant that night, and was unable to say whether he or the deceased was attacked first, how the deceased was attacked or who attacked the deceased.

[emphasis in original omitted]

54 Even though the accounts of the Respondent and Galing are clearly contradictory, neither the CA (Conviction) nor the Trial Judge made findings as to the exact sequence of events. Though unfortunate, this is understandable because at that point in time there was no need for the court to decide conclusively and exactly how the events took place as the charge against the Respondent and Galing was under s 300(*c*) of the PC. All that was needed for the Prosecution to prove was that the Respondent had intended to inflict the injury which led to the death of the deceased. As the law then stood, whether an accused was found guilty of an offence under s 300(*a*) or s 300(*c*), the punishment would be the same, *ie* the death penalty.

55 We also note that the Re-sentencing Judge did not make any findings as to the number of times the Respondent had struck the deceased. There are however a number of observations concerning this in the CA (Conviction) Decision. After considering the statements given to the police by Galing, the CA (Conviction) observed at [25] to [27] that:

25 … Although Galing later attempted to question the accuracy of these statements in what appears to be a belated attempt to downplay Jabing's culpability… there was little reason to doubt that they had been correctly recorded. Galing's statements, therefore, *were evidence that Jabing struck the deceased more than twice, and with considerable violence*.

26 The violent assault on the deceased was corroborated by the medical evidence (summarised at [22]-[29] of the [the Trial Judge's Decision]), which was that the deceased had sustained life-threatening injuries to his head and brain. *There was evidence from the forensic pathologist, Dr Teo Eng Swee ("Dr Teo"), that there could have been more than five blows to the deceased's head*, and both Dr Teo and Dr Ho Chi Long (the physician who first attended the deceased at the accident and emergency room) were of the opinion that at least some of the injuries required "very severe" or "huge" blunt force from several blows to be inflicted. Dr Teo added that one of the fractures that resulted in the initial fragmentation of the skull required "severe force".

27 In light of all this evidence, as well as the fact that the severe injuries found on the deceased were concentrated at the region of his head, *it is clear beyond a reasonable doubt that Jabing intended to, and did, inflict multiple head injuries on the deceased*, and that such injuries were certainly not accidental or unintentional.

[emphasis added]

56 The paragraphs above, read together, clearly show that the CA (Conviction) found that the Respondent had struck the deceased on the head with severe force *more than two times*. Of course, as earlier explained, neither the CA (Conviction) nor the Trial Judge was required to make a specific finding as to the exact number of times the Respondent had struck the deceased on the head. We

also note that the Trial Judge (at [24] to [28] of his decision) had made similar observations as to the medical evidence before him, but did not conclusively state the number of strikes the Respondent had inflicted upon the deceased:

> 24 Pathologist Dr Teo Eng Swee ("Dr Teo") performed the autopsy on the deceased. In his autopsy report he noted that there were fourteen fractures of the skull with three areas of severe haemorrhage, and that the brain was soft and severely oedematous (swollen). Dr Teo certified the cause of death to be severe head injury.
>
> 25 Dr Teo explained that the severe head injury recorded in his autopsy report did not refer to the fractures of the skull. The fractures by themselves were not the fatal injury. The fatal injury was the injury to the brain…
>
> 26 Dr Teo was of the opinion that the skull fractures could have been caused by five impacts or more, and that one fracture could have resulted from a blow or a fall on the back of the head, and that the initial fragmentation of the skull required severe force, but when the skull was fractured, the further fractures could be caused by less severe force.
>
> 27 The prosecutor showed Dr Teo the belt and buckle that Galing used in the assault, and sought Dr Teo's assistance to make connections between the buckle and the deceased's injuries, but Dr Teo was cautious and declined to draw any conclusions.
>
> 28 When Dr Teo was informed of Galing's account in his statement that a severed tree branch about two feet long was used by Jabing to strike at the deceased, Dr Teo agreed that such a weapon was capable of causing the injuries that were found on the deceased's skull.

Our findings

57 The specific issue which we must now address is: do the facts discussed above show that the Respondent acted in a way which demonstrated a blatant disregard for human life in committing the murder? As we see it, two points can be made concerning the injuries that were inflicted upon the deceased.

The Respondent approached the deceased from behind

58 First, although it is true that the sequence of events is unclear, we find that the Re-sentencing Judge had erred in finding at [40(c)] that:

> … [t]here was no clear evidence the [Respondent] went after the deceased from behind without warning and started hitting him on the head with the piece of wood …

While it remains uncertain whether a struggle indeed occurred beforehand between Galing and the deceased, the evidence clearly shows that the Respondent had approached the deceased from behind and struck him without warning. In fact, the Respondent himself had admitted to this at various occasions during the trial. The following parts of the Respondent's evidence (given during oral testimony) are telling:

(a) First, on day 9 of the trial [note: 1] :

> Q: When you picked up the wood, the two male Chinese, did they have---*did they have their backs facing you?*

A: Yes.

Q: So if that's the case, which part of the head did you hit the male Chinese? Which part?

A: I cannot remember because at that time I was drunk.

(b) Second, on day 10 of the trial [note: 2] :

Q: And, Mr Jabing, when you first used the wood as a weapon against the now deceased, *you had actually approached him from his rear*, isn't it?

A: Yes.

Q: And *you did not give the deceased any forewarning of your approach*, did you?

A: Yes.

Q: And *you did not even utter any threats to the deceased before hitting him*, did you?

A: Yes, that's correct.

(c) Third, on day 10 of the trial again [note: 3] :

Q: Both of you then *crept up behind* the two Chinese---two male Chinese who were walking abreast of each other on the cement foothpath of the open field.

A: Yes I agree.

[emphasis added]

59 Read together, even if it is assumed that there was a struggle between the deceased and Galing, there remains no doubt that the Respondent had admitted to coming from behind and hitting the deceased from the back. In our opinion, the Re-sentencing Judge had therefore erred by finding that there was no clear evidence showing that position. In any case, whether or not there was a struggle beforehand is of little significance to the Respondent's culpability, given how the injuries were eventually inflicted. First, it must be borne in mind that this alleged struggle was between the deceased and Galing, and not with the Respondent – any claims that the strikes were made "in the heat of the moment" would therefore be unpersuasive. Second, even if some consideration could be given to the fact that the Respondent was returning to "aid" Galing, this might only explain the Respondent's first strike at best. However, it does little to explain or mitigate the additional strikes the Respondent dealt to the deceased given that *after* the first strike by the Respondent, the deceased had fallen onto the ground and was not retaliating. After the first blow, there was effectively no more struggle. Why was there a need to rain further blows on the head of the deceased then?

The number of blows

60 With this, we turn to our second point, which is the number of times the Respondent had struck the deceased. Throughout the proceedings, the Respondent maintained his position that he had struck the deceased only twice – once when he approached the deceased from the back (regardless of whether or not it was in the midst of a struggle), and once after the deceased had fallen down and

turned over to the front. However, as mentioned above (at [56]), the CA (Conviction) found that the Respondent had taken more than two strikes at the deceased. In particular, the CA (Conviction) had considered Galing's statements to the police, where Galing had mentioned that he:

> … saw [the Respondent] hitting the [deceased] *several times* and his head *cracked open*. … I really regretted that [the Respondent] hit him *so many times* until he died … [emphasis in original]

and also (in another statement) that:

> … I gave up the chase and turned back towards Jabing who was hitting the other Chinese with the wood in his hands *repeatedly* … [emphasis in original]

61 For completeness, we note that during the trial, Galing changed his evidence to state that he had only seen Jabing strike the deceased once, and sought to explain that his police statements were recorded inaccurately. However, the Trial Judge was of the opinion that this allegation was unsustainable and found that the police officers had accurately recorded Galing's statements (see [47] of the Trial Judge's Decision). This was noted and affirmed by the CA (Conviction) (see [25] of the CA (Conviction) Decision).

62 As discussed above, the CA (Conviction) also took note of the evidence of the pathologist, Dr Teo Eng Swee ("Dr Teo"), who testified that the skull fractures could have been caused by five impacts or more. Similar observations were made by the Trial Judge. However, during the hearing before us, counsel for the Respondent sought to persuade us that those observations were not conclusive of the number of strikes that the Respondent dealt, as it could not be said for certain that all five impacts (or more) were caused by the Respondent, *ie*, they could have been caused by other forces, such as a fall. As a result, counsel for the Respondent submitted that the benefit of doubt should be given to the Respondent and it should not be readily assumed that the Respondent had rained *multiple strikes* upon the deceased's head as submitted by the Prosecution. Between the two positions, counsel for the Respondent was trying to show that the Respondent had only struck the deceased twice or at the most thrice before running away, while the Prosecution was trying to show that the Respondent had mercilessly dealt blow after blow on the deceased even after he had fallen onto the ground.

63 In our opinion, the exact number of blows that the Respondent inflicted on the deceased and the manner in which they were carried out while certainly relevant to our inquiry are not necessarily decisive. As the Trial Judge and the CA (Conviction) did not have to (and thus did not) conclusively decide on how many blows the Respondent had inflicted on the deceased's head in coming to their decisions, and neither did the Re-sentencing Judge do so, we will first turn to the evidence surfaced during the trial itself to better understand and reconstruct what exactly happened on that fateful day (bearing in mind the very important point (see especially below at [77] and [78]) that such reconstruction *cannot* contradict (and, indeed, must be *consistent* with) the findings of fact already made by the CA (Conviction)).

64 We start with the observations made by Dr Teo that a "severe force" would be required in order to cause fragmentation of an intact skull. Commenting on the pattern of the fractures as found on the skull of the deceased, Dr Teo identified *at least* five "separate" groups of fractures which he felt were due to separate impacts. However, he also qualified this by explaining that "once the skull has been fractured, much less severe force is required to cause further fracturing of the skull." Therefore, Dr Teo said that he could not *conclusively* rule out the possibility that some fractures might have been caused by either a fall or the belt buckle. He did, however, express the view that the fractures

were "unlikely to be due to the belt buckle."

65 We also note that Dr Teo had highlighted certain "unusual" injuries on the deceased. These unusual injuries were either "paired" or had "some patterning" to them. Dr Teo later explained that the "paired" markings could be attributable to the pattern on the belt buckle, which was the face of the skull having two eyes and a nose which was slightly hooked. Critically, we further note that one of these unusual injuries was on the right eyebrow, which corresponded to one group of fractures on the skull of the deceased which Dr Teo identified (the other injuries with similar markings were found not on the head but on various other areas of the body of the deceased). Galing had also admitted that after he had returned to the scene, he had struck the deceased (at least) once before taking the deceased's phone and running away. Describing this, Galing mentioned that: [note: 4]

> At that time the deceased was sitting down and he wanted to get up. And as he was about to get up, I hit him. After hitting him, I wanted to run away but at that time I saw his handphone. When I saw his handphone, I picked up his handphone and ran off.

Galing however, asserted that he could not remember exactly where he had struck the deceased.

66 We will now consider whether it is possible to determine the number of blows landed by the Respondent on the deceased's head. Starting first with the objective medical evidence *alone*, it could be said that, *prima facie*, the Respondent had landed at least five blows onto the head of the deceased – thus the five separate groups of fractures mentioned by Dr Teo. What raises doubt as to this *prima facie* position appear to be two matters. First is the allegation that the fall of the deceased onto the ground after the first blow by the Respondent could be the cause of some fractures. Second is the fact that at some later point Galing hit the deceased using his belt buckle.

67 On the first matter, it stands to reason that if the fall could cause a group of fractures, it would mean that the first blow by the Respondent onto the deceased's head must have been of such a tremendous force that it literally cracked the skull and weakened it so much so that just a fall could cause a further set of fractures. Even then, on the Respondent's own evidence, he went on to deliver a second blow to the deceased's head. What this means, is that even if we are to give the Respondent the benefit of the doubt and find that certain groups of fractures were attributable to a fall, in line with the severity of his first blow, it must follow that the second blow of the Respondent would also have been of considerable force. There was nothing to indicate that he had suddenly turned merciful as to lessen the force of the subsequent blow. Pausing here for a moment, and assuming that the Respondent had only inflicted two blows, the picture which emerges before us is a person, while his intention was only to rob the deceased, did not care at all whether his severe blows to the deceased would cause him to die. This is even more apparent considering that the Respondent had chosen to hit the deceased in an extremely vulnerable region *ie* his head.

68 Thereafter, we have the evidence of Galing where he said that he struck the deceased with his belt buckle. It is true that Dr Teo had opined that, once the skull is fractured, a much less severe force is required to cause further fracturing, and therefore, a strike from the belt buckle, after the Respondent had delivered the first severe blow, could very well have caused further fracturing, although he also had some reservations, stating that this would be unlikely (see [64] above). Galing testified that he had struck the deceased only *once* when he returned to the scene where the deceased and the Respondent were. Assuming that Galing was not involved in a struggle with the Respondent earlier, Galing's position cannot be true as there were multiple injuries with a pattern (see [65] above) on other parts of the deceased body (not the head) with only one injury with a pattern appearing on the right eyebrow of the Deceased. Taking these into consideration, all it means is that *one* set of fractures could possibly be attributed to the belt buckle, and even then, we hasten to add

that Dr Teo had his reservations as to this possibility (the belt buckle causing a set of fractures). The net result is that, at the very most, one group of fractures would have been caused by the fall, and another group by the belt buckle. That leaves three more group of fractures to account for, leading us to draw the irresistible conclusion that the Respondent had struck the deceased at least three times on the head, which was also the finding of the CA (Conviction) when it held that that the Respondent had struck the deceased on the head more than twice (see [56] above).

69 Apart from the medical evidence, the only other evidence which suggests that the Respondent had struck the deceased multiple times are the statements of Galing to the police. As observed above, Galing had changed his evidence during oral testimony at the trial to state that he had only seen the Respondent strike the deceased once (which is even contrary to what the Respondent himself admitted).

70 We would only note that this claim of Galing that the statements were recorded inaccurately was rejected by *both* the Trial Judge and the CA (Conviction). The Trial Judge had the opportunity to observe Galing during his oral testimony and to draw his conclusions from that, and there is no reason why this court at this re-sentencing stage should refuse to accept that finding. There are obviously a variety of reasons why Galing could have been motivated to change his story at the trial to help the Respondent, and an exercise in speculation would be futile, bearing in mind that even the Respondent admitted that he had struck the deceased on the head twice. In the light of the totality of the evidence, we are satisfied that the Respondent had struck the deceased head with the tree branch with much force at least three times. We say "at least" because we have borne in mind Dr Teo had opined that it was unlikely that the belt buckle could have caused the fractures. More importantly, we have absolutely no doubt that when the Respondent landed the three blows on the head of the deceased, he did not care at all whether the blows would kill the latter.

Did the Respondent act in a way which showed a blatant disregard for human life?

71 We have focused thus far on the exact number of blows the Respondent had inflicted on the head of the deceased, although that is not the defining question that needs to be answered. The key question which we must answer is – did the Respondent act in a manner which showed a blatant disregard for human life? While, as we have stated above, that the question as to the number of blows which the Respondent had landed on the head of the deceased is not *decisive*, it remains very relevant to the key question. The following considerations are critical to our decision:

(a) First, we find that the Respondent had approached the deceased from behind, and struck him without any warning. Whether or not this was prefaced with a struggle, between Galing and the deceased, is of little significance to the Respondent's culpability. After the first blow was inflicted which caused the Respondent to fall to the ground, there was effectively no more struggle.

(b) Second, after the deceased fell to the ground after the first blow and then turned around to face upwards, the Respondent struck him once more. It is not disputed that the Respondent was not retaliating. In our judgment, we are of the view that the Respondent continued to hit the deceased at the very least two more times, before leaving the scene. When Galing returned to the scene after chasing Wu Jun he hit the Deceased with his belt buckle.

(c) In any case, even if the Respondent's assertion that he had only struck the deceased twice is to be believed and accepted, then the force he exerted in the two blows must have been so great as to cause fracturing of such severity and magnitude, so much so that a fall, or a strike with Galing's belt buckle, could have caused further fracturing.

72 In our judgment, and consistent with the finding of CA (Conviction), the Respondent had struck the deceased on the head not once, but at least three times altogether. Even if the Respondent did not intend to hit the deceased on his head the first time when the Respondent approached the deceased from the back (we would only add that we cannot see how that could be the case since he approached the deceased stealthily from the back and there was no evidence that the deceased had dodged), we cannot accept that, after the deceased fell and then turned round facing upwards, the Respondent likewise was unaware that he was going to hit the head of the deceased. Given the manner in which the attack was carried out, this was not a case where the Respondent had merely hoped to disable his victim in order to rob him of his belongings. Neither was this a case where the injuries were sustained in the course of a fight or a struggle. This was a case where even after the deceased was no longer retaliating (after the first blow), the Respondent went on to strike the deceased an additional number of times, completely unnecessary given that his initial intention was merely to rob him. In light of the sheer savagery and brutality exhibited by the Respondent, we are completely satisfied that the Respondent exhibited a blatant disregard for human life in the way he attacked the deceased.

Other circumstances of the case

73 At [40(c)] of his decision, the Re-sentencing Judge observed that the Respondent was relatively young, being 24 years of age, at the time of the offence. The Re-sentencing Judge also rightly observed that the Respondent was not as young as the convicted person in *Fabian* (who was 18 years of age). In our opinion, the Respondent's age (at 24 and not 18 as the offender in *Fabian*) is at best a neutral factor, and does little to change the gravity of the case. The Re-sentencing Judge had also observed (at [40(a)] of his decision) that the Respondent's choice and use of the piece of wood was "opportunistic and improvisational", citing the CA (Conviction) Decision at [35(b)]. Likewise, we found this to be at best a neutral factor, given the way and manner the attack was eventually carried out. The fact that the choice of weapon happened to be opportunistic pales in comparison with the savage and callous manner in which the Respondent had wielded it.

Comments on dissenting judgments

74 The difference in views between the majority and the minority is a matter of fact and not of law. As a matter of law, there is a concurrence in views on the test that is to be employed in determining when the death penalty should be imposed. It is common ground, however, that the disagreement is one of fact. Particularly, we note that the minority found that there was insufficient evidence to establish beyond reasonable doubt that the Respondent had hit the deceased on the head at least three or more times, or that the Respondent had hit the deceased with such huge force as to cause most of the fractures in the deceased's skull. Given this insufficiency, the minority was of the opinion that therefore, the threshold of the test (*ie*, whether the Respondent had acted in a way which exhibits viciousness or a blatant disregard for human life), had not been crossed.

75 In order to reach their conclusion, the minority undertook an extensive review of the evidence that had surfaced during the very first trial. That being so, we emphasise that since this appeal arises from a re-sentencing proceeding pursuant to the PCAA, the first port of call must be the CA (Conviction) Decision. The findings of fact made by that court *should not* be *revisited* in the present proceedings. Indeed (and for the avoidance of doubt), all the issues as well as concerns raised by the minority were *also* raised by counsel during the hearing before the CA (Conviction) *and* were *ruled upon* by that court. We wish to highlight that at the hearing before CA (Conviction), Jabing's counsel had submitted, *inter alia*, the following points: [note: 5]

(a) "…there was no way that [Jabing] could have caused the 14 or so fractures which Dr Teo

testified about";

(b) "For the 14 fractures to happen dispersed over the head of the deceased there must have been several strikes on the deceased's head and definitely more than two";

(c) "…there is a strong possibility that Galing did not only use the belt buckle but also the piece of wood which Jabing had discarded when fleeing the scene";

(d) "…there is a doubt that it was [Jabing] who caused those injuries which resulted in the death of the deceased."

Admittedly, as that court was dealing with the pre-amendment position, there was no reason for it to assess the savagery (or otherwise) of the Respondent's actions; put simply, it was merely making its findings of *fact* based on the evidence and submissions raised by the counsel concerned. Clearly, the CA (Conviction) had found that the Respondent had inflicted *more than two blows* on the head of the deceased. As the law then stood, there was no need for the court to be more specific then. What is also clear is that the court did not accept the Respondent's counsel suggestion that Galing could also have used the piece of wood discarded by the Respondent to hit the deceased, because the court acquitted Galing of the murder charge and instead convicted him of only the offence of robbery with hurt.

76 What *this* court ought to be concerned about in the present proceeding is whether based on *those* findings of fact, the discretion ought (or ought not) to be exercised in favour of the Respondent under the (amended) s 302(2) brought about by the PCAA.

77 Viewed in this light, in this proceeding, this court should only *supplement* the findings of the CA (Conviction) with *further* findings of fact to the extent – and *only* to the extent – that the CA (Conviction) had been silent and/or ambiguous on matters that are germane to the resolution of the present appeal. As stated above, the CA (Conviction) had accepted Galing's statements and found "that Jabing struck the deceased ***more than twice*** *, and* ***with considerable violence*** " [emphasis added in italics and bold italics]. We would reiterate that Galing's attempt to question the accuracy of his statements at trial was rejected by both the Trial Judge and the CA (Conviction). Having scrutinised the evidence, the CA (Conviction) concluded (at [27]) that:

> In light of all this evidence, as well as the fact that the severe injuries found on the deceased were concentrated at the region of his head, it is ***clear beyond a reasonable doubt that Jabing intended to, and did*** , *inflict* ***multiple head injuries*** *on the deceased, and that such injuries were certainly not accidental or unintentional*. [emphasis added in italics and bold italics]

78 With the greatest respect, the minority have embarked on *a total reconsideration of all the findings of fact* made by the CA (Conviction); they have, in effect, *not only re-opened as well as questioned those findings but also sought to reverse them*. Indeed, if the analysis in these judgments is taken to its logical conclusion, there might be at least a strong case for finding that the Respondent ought *not* to have even been convicted under s 300(*c*) in the first place. Even if we were to accept the position that it was unclear as to how many times the Respondent had struck the head of the deceased, what is vitally important to bear in mind is that what we have here was a *completely shattered skull*. Bearing in mind the fact that the alleged intention of the Respondent and Galing was merely to *rob* the deceased, what the Respondent did underscores the *savagery* of the attack which was characterised by *needless violence that went well beyond the pale*.

79 Returning to our position, as we have observed, at the very least, the Respondent had chosen

to strike the deceased with such immense force at an extremely vulnerable region, so much so that a simple fall or a strike from a buckle could have led to further shattering. To us, this alone, already shows the Respondent's complete disregard of human life. To say that the fall (after the first blow by the Respondent) and the hit by Jabing on the deceased's right eyebrow with the use of the buckle could have caused further fractures and thus mitigated the viciousness of the attack is, with respect, a non-plus to us. The evidence is clear – severe force, from more than two blows, had caused the kind of fractures which were found on the head of the deceased.

Conclusion

80 The result of the amendments to the mandatory death penalty regime is that, in certain circumstances, it is the court who is now the final arbiter of whether an offender is deserving of the ultimate penalty. The punishment of death is an unusually severe punishment in its finality and enormity. The irrevocability of this punishment demands that in the exercise of this discretion, the court should be guided by clear and practicable principles in order to prevent any form of capriciousness and arbitrariness.

81 At the same time, we recognise that the nature of the crime is such that it does not lend itself to a situation where the court could lay down a set of specific objective factors which are determinative. By its very nature, what would constitute a blatant disregard of human life would be very fact-sensitive. The punishment of a crime must be proportionate to the gravity of the crime.

82 In our judgment, the punishment of death will be appropriate when the offender had committed the murder in a manner which clearly demonstrates a blatant disregard for the sanctity of human life. In this appeal, the Respondent had struck the deceased in a vulnerable region (the head). We find (as did the CA (Conviction) in dismissing his appeal against conviction) that the Respondent had struck at the deceased's head at least three times. Although it is impossible to reconstruct exactly what had occurred on that fateful day, given the evidence before us, we are inclined to think that the Respondent had struck the deceased more times than that.

83 While the possibility of additional injuries being caused by another force cannot be *conclusively* ruled out (for example, by the belt buckle of Galing or a fall), in our judgment, the medical evidence clearly shows that the fatal blows are attributable to the Respondent. The sheer savagery and brutality displayed by the Respondent shows that during the course of the attack, the Respondent just simply could not care less as to whether the deceased would survive although his intention at the time was only to rob. He did not stop attacking the deceased even after the latter was incapacitated and was no more in a position to respond after the first blow. His actions were utterly vicious.

84 In the result, we find that the Respondent had shown a blatant disregard for human life. Therefore, we allow the Prosecution's appeal and impose the death penalty on the Respondent.

Lee Seiu Kin J:

Introduction

85 At the invitation of Woo Bih Li J, I am delivering my judgment ahead of him. I have had the benefit of reading the judgment of my learned colleagues, Chao Hick Tin JA, Andrew Phang Boon Leong JA and Chan Seng Onn J ("the Majority Judgment"). In the paragraphs that follow, I have adopted the nomenclature in the Majority Judgment, save that I refer to the Respondent as "Jabing".

86 The key issue in this appeal is whether the death penalty should be imposed on Jabing under s 302(2) of the PC. I should state at the outset that I respectfully agree with the analysis in the Majority Judgment of the law in relation to the imposition of the death penalty on a charge under s 300(c), and punishable under s 302(2), of the PC. In particular, I agree that the "rarest of rare" principle is not appropriate for Singapore (see [43] above). I agree with the formulation of the test set out in the Majority Judgment at [44] above, *ie*, it is a question of whether the offender's acts are "so grievous an affront to humanity and so abhorrent" that the death penalty is the only adequate sentence. I also am further in complete agreement that, in the context of the present case, capital punishment would be appropriate where the offender had "acted in a way which exhibits viciousness or a blatant disregard for human life" (see the Majority Judgment at [45] above).

87 As is usually the case in these matters, the outcome of the appeal hinges on the findings of fact. It is solely in relation to the findings of fact that I must respectfully depart from the Majority Judgment. I now give the reasons for my dissent on this point.

88 Prior to the enactment of the PCAA, all that the Prosecution was required to prove in a trial on charge under s 300(*c*) was that the accused had intentionally inflicted the injury on the deceased, which injury was sufficient in the ordinary course of nature to cause death. It was neither necessary for the conviction nor the sentence to prove any details of the acts of the accused beyond this. While evidence of the accused's intention to inflict the fatal injury would be found in the manner in which he had attacked the deceased, in certain circumstances it is possible for an accused to be convicted without evidence providing a blow-by-blow account of the incident. The fact that such evidence is not before the court is often not due to the fault of the Prosecution. Very often, as was the situation in the present case, there are no witnesses available to give this evidence. If there is evidence to prove all the elements of the offence, the lack of a detailed account of the incident will not stand in the way of a conviction under s 300(*c*). And once a person is convicted under s 300(*c*) of the PC, under the previous incarnation of s 302 of the PC, the only punishment that could be imposed was the death penalty. However, with the amendment brought about by the PCAA, the new s 302(2) of the PC gave the court the discretion to impose the death penalty or life imprisonment (with or without caning). As a result of this legislative change, the details of the attack on the deceased by an accused person became crucial on the issue of sentence, even though it was not at the time of the trial.

89 The problem in this case lies with the fact that we are now trying to reconstruct, from the evidence given under those circumstances, the sequence of events in order to determine the extent of Jabing's role in causing the death of the deceased. However difficult the task may be, it must be done on the basis of the criminal standard of proof, *ie*, beyond a reasonable doubt. Where any evidence is ambiguous, the benefit of the doubt must be given to Jabing. Some of these ambiguities could have been resolved had the relevant witnesses been asked questions at the trial from this point of view; but this was not done and we can only look at the evidence at hand and make such findings of fact as we can based on the criminal standard of proof. In my view this court is entitled to revisit any findings of fact made in the CA (Conviction) decision in view of this crucial difference in the nature of the inquiry pointed out in the preceding paragraph.

90 I shall first examine the two key findings of fact in the Majority Judgment upon which the majority of this court concluded that Jabing had acted in blatant disregard for human life. These are (a) Jabing had approached the deceased from behind without warning, and (b) Jabing had struck the deceased in the head at least three times (as stated in [70] of the Majority Judgment) and with such force as to cause most of the extensive fractures found in the deceased's skull. I intend to show that there is insufficient evidence to find beyond reasonable doubt that Jabing had caused most of the skull fractures (either by multiple strikes or two strikes with huge force). Following that, I shall set out

the findings of fact which this court can find to be established beyond reasonable doubt by the evidence before the trial court, upon which the sentencing decision should be based. My conclusion is that, based on this set of facts, it cannot be concluded that Jabing had acted in blatant disregard of human life.

First key finding: Whether Jabing approached the deceased from behind without warning

91 On this first question, in my opinion there is sufficient evidence to establish beyond reasonable doubt that Jabing had approached the deceased from behind without warning and hit the deceased in the head. There is clear and consistent evidence from the factual witnesses even though the medical evidence is, at best, neutral on this point.

Factual witnesses

Jabing

92 Jabing's evidence is that he approached the deceased from behind without warning and struck him in the head.

93 It was recorded in Jabing's statement dated 4 March 2008 that: [note: 6]

> Like I have stated in my earlier statement, soon after Galing and I crossed the road to the open field, I picked a wood which I found on the ground. When I looked up, I saw a smaller built victim was running away and I started to chase him. By then Galing had started to hit the other male Chinese who is bigger built. I gave up the chase and turned around to help Galing who was by then was struggling with the said male Chinese. *I came from behind and used the wood that I was holding on the head of the bigger built male Chinese.* ... [emphasis added]

94 Jabing had also admitted at least three times during the trial that he approached the deceased from the back:

(a) 30 July 2009, page 60, line 31:

> Q: When you picked up the wood, the two male Chinese, did they have---did they have their backs facing you?
>
> A: Yes.

(b) 31 July 2009, page 23, line 32:

> Q: And, Mr Jabing, when you first used the wood as a weapon against the now deceased, you had actually approached him from his rear, isn't it?
>
> A: Yes.
>
> Q: And you did not give the deceased any forewarning of your approach, did you?
>
> A: Yes.
>
> Q: And you did not even utter any threats to the deceased before hitting him, did you?

A: Yes, that's correct.

(c) 31 July 2009, page 43, line 32:

Q: Both of you then crept up behind the two Chinese---two male Chinese who were walking abreast of each other on the cement footpath of the open field.

A: Yes, I agree.

95 Apart from whether there was a struggle between the deceased and Galing, Jabing's evidence on this point is consistent with Galing's evidence in his statements and during the trial. I now turn to consider Galing's evidence on this point.

Galing

96 It was recorded in Galing's statements that he saw Jabing approach the deceased from behind and hit him with the wood:

(a) Statement dated 26 February 2008: [note: 7]

... I then asked Jabing what we are going to do. Jabing replied that we robbed the two male Chinese. I told Jabing not to do it. Jabing did not reply and just *walked behind the two male Chinese*. I then saw Jabing took a piece of wood near a tree. *After a few steps, Jabing used the wood to hit on the male Chinese who has a bigger built on his head*. ... [emphasis added]

(b) Statement dated 3 March 2008: [note: 8]

... The said wood is about 2 feet long. Jabing carried it with his right hand by his side and *walked hurriedly towards the rear of the 2 male Chinese*. I would like to say that one of the male Chinese was smaller in built whilst the other was bigger built. *When Jabing neared both of them, he used both his hands and swung the wood towards the right side of the bigger built male Chinese*. ... [emphasis added]

97 Galing's statements were consistent with his evidence during the trial:

(a) 27 July 2009, page 11, line 17:

A: After picking up the piece of wood, he went straight to the two Chinese persons.

Q: Carry on.

A: I then saw him hitting one of the two Chinese.

Q: Where did he hit the Chinese gentlemen?

A: I'm not sure where he had hit the Chinese person but---but I think he had hit the Chinese person on the back---on the back part of his body.

(b) 27 July 2009, page 32, line 23:

Q: Prior to my client hitting the deceased, would I be correct to say that both the Chinese persons had their back facing both you and Jabing?

...

A: Yes.

Wu Jun

98 To some extent, the evidence of Jabing and Galing (*ie*, that Jabing approached the deceased from behind) is consistent with Wu Jun's account of the attack. Wu Jun's evidence would suggest that:

(a) Wu Jun was attacked by Galing using the belt buckle from behind. This is based on Wu Jun's evidence that he was hit once by something hard at the *back* of his head (near his left ear), [note: 9] which he thought was a chain, [note: 10] and that he saw his assailant with "a clenched *fist*" [emphasis added] and "raising his *hand* as if he was going to attack me". [note: 11] [emphasis added].

(b) The initial strike to the deceased was by Jabing. This can be inferred from Wu Jun's evidence that he heard his friend groaning as if he was in pain shortly after he was attacked by Galing. [note: 12] The logical conclusion, given that Jabing and Galing were the only two assailants, was that Jabing was the one who struck the deceased.

(c) Jabing did not approach the deceased from the front. This can be inferred from Wu Jun's evidence that he was walking beside the deceased, [note: 13] and he did not see any other person apart from his assailant (which was identified as Galing). [note: 14]

99 While Wu Jun does not say specifically that he saw Jabing approach the deceased from behind and hitting him in the head, his account of the attack is consistent with the evidence of Galing and Jabing (apart from the alleged struggle).

Medical evidence

100 There is, however, one concern that ought to be addressed here, that is, the medical evidence is neutral on whether the deceased was struck in the head from behind.

101 The evidence of Dr Teo Eng Swee (forensic pathologist) and Dr Ho Chi Long (neurosurgeon) would suggest that the deceased might not have suffered a *direct* blow to the back of his head. Dr Teo's evidence was that he could not rule out the possibility that fracture (14) at the back of the head might have been caused by a *fall*. [note: 15] On the other hand, Dr Ho took the view that fracture (14) could have been an *extension* of the fractures on the left side of the skull. [note: 16]

102 However, this may not necessarily be inconsistent with the fact that Jabing had approached the deceased from behind without warning. The deceased could well have turned his head to the side when Jabing approached from the back such that Jabing's initial strike landed on the side instead of the back of the deceased's head. Indeed, it is not difficult to imagine that the deceased might have heard someone approaching from behind and wanted to turn around to see who it was. It is also possible that the initial strike by Jabing to the deceased's head did not cause any fractures. It should

be noted that Dr Teo could not give evidence of the order in which the injuries were sustained (except that fracture (8) might have occurred after the other fractures). [note: 17] Accordingly, the medical evidence neither proves nor dispels the proposition that Jabing approached the deceased from behind without warning.

Summary of the evidence

103 While the medical evidence does not show that the deceased was struck in the back of the head, it may not necessarily be inconsistent with the fact that Jabing had crept up behind the deceased without warning and attacked him. More importantly, there is clear and consistent evidence from all three key factual witnesses (*ie*, Jabing, Galing and Wu Jun) that would support a finding beyond reasonable doubt that Jabing had approached the deceased from behind without warning and hit him on the head.

Second key finding: Whether Jabing hit the deceased on the head at least three times or with such huge force as to cause most of the fractures

104 In my view, there is insufficient evidence to establish beyond reasonable doubt that Jabing had hit the deceased on the head at least three times, or that Jabing had hit the deceased with such huge force as to cause most of the fractures in the deceased's skull. The evidence would, taken at the highest, show that Jabing had hit the deceased in the head twice and caused the skull to fracture.

105 I shall consider firstly, the evidence relating to the number of blows *sustained* by the deceased, and secondly, the evidence on the number of blows *inflicted* by Jabing.

The number of blows sustained by the deceased

106 For the reasons that follow, I am of the view that the evidence only supports a finding that deceased sustained two blows to the head. This comes primarily from Jabing's evidence (see [107] below). The medical evidence does not establish beyond reasonable doubt the exact number of strikes that the deceased sustained or if the deceased in fact sustained more than two strikes to the head (see, in particular, [111] and [121] below).

Factual witnesses

107 The evidence of Jabing, Galing and Wu Jun would not support a finding of fact that the deceased sustained more than *two* strikes to the head:

(a) Wu Jun's evidence suggests that the deceased was struck but not necessarily on the head. This is because Wu Jun only *heard* the deceased groaning in pain shortly after he was assaulted by Galing. [note: 18]

(b) Jabing's evidence, both in his statements and during the trial, was that he had only hit the deceased *twice*. [note: 19] While it was recorded in Jabing's statements that he saw Galing hit the deceased with the belt buckle, [note: 20] he did not mention the number of times. In one of his statements, Jabing was recorded as having said that he was not sure how many times Galing hit the deceased. [note: 21] At trial, Jabing said that he did not see Galing hit the deceased. [note: 22] On Jabing's evidence, then, the deceased would have only been hit in the head twice.

(c) Galing's evidence suggests that the deceased sustained one or two blows. Galing's evidence was that he had only hit the deceased *once either in the chest or head*. [note: 23] As for the number of times Jabing hit the deceased, Galing changed his evidence during the trial to say, consistently, that he only saw Jabing hit the deceased *once*. [note: 24]

108 Based on the evidence of Jabing, Galing and Wu Jun, the deceased would have sustained only two blows to the head.

Medical evidence

109 The key issue is whether the medical evidence supports the finding that the deceased sustained at least five *direct* strikes to the head. Neither Dr Teo nor Dr Ho could state the exact number of blows sustained by the deceased, but merely concluded that it would take "several blows" or a "huge force".

110 Firstly, the medical evidence does not support a finding that the skull fractures were caused by *five* impacts or more. [note: 25] A closer look at the Notes of Evidence would show that Dr Teo had identified not only five but a total of *eight* points of impact:

(a) First, the laceration above the left eyebrow/forehead region and the fragmentation of the skull suggest blunt force impact. [note: 26]

(b) Second, fractures (5) and (6) indicate an impact on the right side of the skull. [note: 27]

(c) Third, fractures (2), (3), (4) and (7) could be due to one impact or more. [note: 28]

(d) Fourth, fracture (8) could be due to a separate impact. [note: 29]

(e) Fifth, fracture (1), which is a comminuted fracture of the frontal bone above the right eye, is probably due to another impact. [note: 30] Fracture (12) could have been a continuation of fracture (1) as well. [note: 31]

(f) Sixth, fracture (9), which is a V-shaped fracture, could be due to another impact. [note: 32]

(g) Seventh, fracture (14) could be due to another impact (Dr Teo said he does not exclude that it might be due to a fall). [note: 33]

(h) Eighth, the fragmentation on the left side of the skull (where the left-sided craniectomy was performed) could be due to one or more impacts. [note: 34] However, fractures (10), (11), (12) and (13) at the base of the skull could have been "continuations of the fractures" from the part of the skull where the craniectomies were performed. [note: 35]

111 More importantly, however, Dr Teo ended that discussion with an important caveat that did not appear to have been picked up in any of the previous proceedings: [note: 36]

> ...based on the injuries, these are the possible impacts, *but I cannot say whether it is just one particular blow or multiple blows*. [emphasis added]

112 Dr Teo also explained that "[o]ne impact may cause multiple fractures but the impact would have to be of very great force". [note: 37] To be fair, Dr Teo did say subsequently during re-examination that, in his view, one blow with a blunt object would not have caused all the fractures present in this case. [note: 38] Nevertheless, it should be noted that Dr Teo did not go on to say the number of blows that it would have taken to cause the fractures. He certainly did not say specifically that the deceased sustained five *direct* blows to the head.

113 Secondly, Dr Teo did not have the opportunity to examine the entire skull of the deceased during autopsy as *significant* parts of it had been removed during the two craniectomies that were performed on the deceased. As a result of the injuries caused to the head which led to cerebral oedema (*ie*, swelling of the brain), the deceased had to undergo decompressive craniectomy twice. During the trial, Dr Teo's evidence was as follows: [note: 39]

Court:	In other words, you don't even know where the fracture started because the craniectomy---you did---you didn't have a look at what was removed?
A:	Exactly, your Honour.

114 This is consistent with Dr Ho's evidence on what was done to the removed part of the deceased's skull: [note: 40]

Court:	When you say "remove", you remove it for the surgery. But if the patient has survived and conti---you will reinstate all these eventually, right?
A:	Oh, previously it was a practice to reinsert these bones back.
Court:	Yes.
A:	Er, but in recent times, we do not reinsert these bones back because they were---these---these bones became a source of infection---
Court:	Yes.
A:	---if we reinsert it back. And if---if these patients were to recover, they will undergo another surgery to put a metal kind of skull or plastic kind of skull, yah.
Court:	Okay. Right. So they are actually removed.
A:	*They---they were removed, er, and, er, sort of, er, thrown away.*

[emphasis added]

115 Dr Ho's evidence is pertinent as he was the doctor who attended to the deceased during the surgery. [note: 41] Dr Ho explained that the part of the skull removed during the left-sided craniectomy was in "multiple fragments" and that it would have required "very huge force" to cause such an injury. [note: 42] Significantly, Dr Ho took the view that some of the other fractures may have been *extensions* of the fracture caused by the blow(s) to the left side of the skull: [note: 43]

> There is not only skull fragments on the left side but that there were skull fractures *extending towards the right side also and the front part* of the skull bone too. [emphasis added]

116 For the fractures on the right side of the skull, Dr Ho said that: [note: 44]

Q: Again, can you describe to us the nature of the fractures that you witnessed over the right side?

A: Now, the right side is less complicated fractures. Er, *it's actually an extension from the left side*. Er, I may use the---if I can use the analogy of an egg. You smash on---on one side, sometimes you may see cracks running down towards the other side. It's kind of same like a skull. *The---the multiple fragments on one side, there were, er, crack extension down towards the other side*. So on the right side there were, er, skull fragments---I'm sorry, there---there were lines, skull cracks running down the right side.

[emphasis added]

117 As for the back of the skull, Dr Ho's view was that: [note: 45]

Q: Now, the crack on the occipital bone, can you tell if that was result of a direct force applied at that area?

A: *That I cannot say for sure but I believe it can be an extension of the, er, left parietal, er, fractures*.

[emphasis added]

118 Three observations can be made here.

119 First, Dr Ho's opinion is that some of the fractures on the back and front of the skull may not have been caused by *direct* blows, but could have been an extension of the fractures caused by blow(s) to the left side of the deceased skull where the craniectomy was performed.

120 Second, Dr Teo considered that the fractures to the deceased's skull could have been caused by distinct blows, but he arrived at the conclusion without having the opportunity to examine the deceased's skull in its entirety (see [113] above). Unfortunately, Dr Teo was not asked if he agreed with Dr Ho's opinion that the other fractures could have been extensions from the fracture to the left side of the skull where the craniectomy was performed. However, Dr Teo does not appear to disagree with the possibility that certain fractures could have been extensions of the fractures to the left side of the skull; in fact, he was of the view that fractures (10), (11), (12) and (13) at the base of the skull (that is, the part which is in contact with the bottom of the brain) could have been "continuations of the fractures" from the part of the skull where the craniectomy was performed. [note: 46]

121 For completeness, I should add that even though Dr Ho suggested several times during the trial that the fractures would require several blows, [note: 47] he could not be certain and eventually acknowledged that he can only say that it was a "huge force". [note: 48] Like Dr Teo, he could not specify the number of blows that would have been necessary in order to cause such fractures.

122 Third, it cannot be ruled out that some of the fractures could have been caused by *indirect* force, *eg*, the deceased falling and knocking his head against the ground. Dr Teo does not rule out the possibility that at least one of the fractures (*ie*, fracture (14), at the back of the skull) might have been caused by a fall. [note: 49] Dr Ho also makes the point that the fracture to the right side of

the skull (*ie*, fractures (5) and (6), at the right side of the skull) could possibly have been caused by the deceased knocking himself on the ground: [note: 50]

> Q: So would you say if there was any *direct force* applied to the right side of the skull from what you saw?
>
> A: Now, from what I saw, I cannot be a hundred per cent sure if there's a direct force or an indirect force, but there's kind---there's some kind of force, er, also directed on the right side of the skull because I saw the---that there was also scalp swelling on the right side too. *So he was either someone who was hit and then fell down and knocked on the other side or a force going through the right side. That we cannot say for sure*.
>
> [emphasis added]

123 Even though Dr Ho subsequently testified that it is "impossible just a simple fall can cause that severe injury", it was an answer in response to counsel's question whether the injuries suffered by the deceased could have been as a result of "a fall or several falls". [note: 51] It should not be understood to mean that Dr Ho is saying that *none* of the fractures might have been caused by a fall.

Summary of the evidence

124 From the analysis above, it is clear that the medical evidence does not support the finding of fact that the deceased sustained at least five *direct* strikes to the head. There is a possibility that some of the fractures were caused by indirect force like a fall. There is also a possibility that some of the fractures were extensions of the fractures on the left side of the skull. Significantly, Dr Teo's evidence was based on his assessment of the incomplete skull (due to the craniectomies). In any event, neither Dr Teo nor Dr Ho was able to specify the number of blows that would have been necessary to cause the skull fractures sustained by the deceased.

125 If it is accepted that there is insufficient evidence to establish that the deceased has *sustained* more than two blows to the head, then it follows that there cannot be a finding that Jabing had *inflicted* three or more blows to the deceased's head.

126 I now move on to the next point, *ie*, there is insufficient evidence to establish beyond reasonable doubt that Jabing had inflicted more than two strikes to the deceased's head.

The number of blows inflicted by Jabing

Factual witnesses

127 The evidence of Jabing, Galing and Wu Jun on the number of blows inflicted by Jabing on the deceased's head have been discussed above (at [107]) and they can be summarised as follows:

	Blows by Jabing	**Blows by Galing**
Wu Jun's evidence	Unknown	Unknown
Jabing's evidence	2 only	0 or more*
Galing's evidence	1 or repeatedly*	0 or 1 only*

*evidence changed during trial

128 It is apparent that the evidence of Jabing, Galing and Wu Jun, without more, would only show that Jabing had, at best, struck the deceased on his head *two* times. It should be recalled that Wu Jun had only *heard* the deceased groaning in pain ([107(a)] above), but this might not have been caused by a blow to the head. Jabing had confessed to having struck the deceased in his head twice and no more. [note: 52] The only point of contention lies with Galing's evidence. As discussed earlier ([107(c)] above), Galing had changed his evidence during trial to say that he only saw Jabing hit the deceased in the head *once*. The crucial question is whether it is safe to rely on Galing's statements to support the finding that Jabing had hit the deceased multiple times in the head with the wood.

Weight to be placed on Galing's statements

129 For the reasons that follow, I am of the view that little weight should be placed on Galing's statements in relation to the number of times Galing saw Jabing hit the deceased in the head.

(1) Co-accused's statements

130 It is commonly accepted that the evidence of a co-accused (like Galing) would have to be treated with caution as he may lie or distort the truth to preserve his own interests. In Chin Tet Yung, "Criminal Procedure Code 2010: Confessions and Statements by Accused Persons Revisited" [2012] 24 SAcLJ 60 at para 53, the learned author stated that:

> Even if the statements were to be ruled admissible, the weight to be attached to them is another matter. Judges have to give detailed reasons of how they arrived at their findings of fact especially in criminal trials where the accused may face the death sentence. In the case of statements by accused persons, it may be thought that the probative value would be especially high if the statement were truly voluntarily given. However, as case law has repeatedly shown, *statements may contain self-serving exculpatory accounts, as well as shifting of blame to accomplices or co-accused.* There can be no hard and fast rule about the weight to be attached in such cases – as Woo Bih Li J pointed out in *Lee Chez Kee v PP* [[2008] 3 SLR(R) 447 at [294]] *there may be cases where no weight or only minimal weight can be attached to statements where the accused blamed others and exonerated himself*.
>
> [emphasis added]

131 Galing's statements consistently and unequivocally stated that he saw Jabing hit the deceased on the head multiple times, [note: 53] while at the same time played down his own role by saying that he only hit the deceased once in the "front part of the body". [note: 54] It should be noted that Galing later admitted during the trial that he might have hit the deceased once either in the chest *or head*. [note: 55]

132 Based on Galing's statements and his testimony in court alone, there is no way to ascertain if he did see Jabing hit the deceased on the head multiple times. In fact, there is every reason to doubt Galing's version of facts in those statements given that they are exculpatory in nature as he had every reason to play down his role. Unless it can be shown that Galing's evidence in court should not be accepted for some reason, there is no basis to prefer Galing's statements over his testimony in court. This necessitates an examination into Galing's change of evidence during trial.

(2) Galing's volte-face during trial and his explanation

133 In the witness box, Galing retreated from the position he took in the statements and explained at trial repeatedly (at least eight times) and consistently that he only saw Jabing hit the deceased once. [note: 56] It should be noted that Galing's volte-face during the trial is *not* favourable to him, since it could lead to the inference that he was the one who inflicted the injuries suffered by the deceased. Indeed, Galing had maintained during the trial that he only saw Jabing hit the deceased once, very shortly after the Prosecution had suggested to him that the most of the fractures must have been inflicted by Jabing if he had only hit the deceased once. [note: 57] This would have alerted Galing to the fact that his evidence on this point might not be advantageous to his case. Despite this, Galing maintained throughout the trial that he only saw Jabing hit the deceased on the head once.

134 Galing's initial explanation to the change in evidence is found in the following exchange: [note: 58]

> Q: Now, Mr Galing, you have told the Court, based on your Court testimony, your version is you only saw Jabing hit the deceased once. Now, in the three statements that I have read out---the parts that have been read out to you, it is clearly stated by you that you saw Jabing hit the deceased multiple times, multiple strikes. What have you got to say?
>
> A: *I told the IO that Jabing hit the deceased only once* but the IO told me, "How can one strike could result in the head being cracked open?" *So I had to tag along with him and say that Jabing hit the deceased several times.*
>
> Q: So you are pinning the blame now on the investigating officer, Zainal. Correct?
>
> A: Yes, *I admit saying this in my statement* but it was the IO who suggested it that I was not saying the right thing.
>
> [emphasis added]

135 Galing repeated at least five more times, when cross-examined by the Prosecution, that he told the investigating officer recording his statements that he saw Jabing hit the deceased on the head repeatedly:

(a) 29 July 2009, page 8, line 6:

> Q: You mentioned that the IO told you "How can one strike result in the head being cracked open?" So you had to tag along with the IO and said that Jabing hit many times. This is your allegation made yesterday in Court.
>
> A: Yes.

(b) 29 July 2009, page 11, line 32:

> Q: So can you tell the Court how was this---how did this come to be recorded that you saw him hitting the Chinese man several times and his head crack open?
>
> A: After I was arrested, the IO told me that the victim had died and his head was broken. And in the course of making this statement, I told the officer what I heard from the IO.

(c) 29 July 2009, page 12, line 11:

Q: Mr Galing, is that all?

A: Whatever I heard from the IO, I said that in the statement because at that time I was frightened.

(d) 29 July 2009, page 15, line 23:

Q: At paragraph 16, line 3, you---it's stated in your statement that:

[Reads] "I gave up the chase and turned back towards Jabing who was hitting the other Chinese with the wood in his hands repeatedly at the end of the open space where there is an electricity sub station."

Mr Galing, you said this, didn't you?

A: Yes, I did say this in my statement but I also remember the IO saying that it must be several blows. But I recall that I---seeing Jabing hitting only once.

(e) 29 July 2009, page 16, line 16:

Q: Now Mr Galing, you said this on---on your own accord.

A: Yes, that's correct. I did say this to the IO but what I told the IO are totally not what actually happened.

136 Later, Galing appeared to change his position on at least four occasions when examined by his counsel:

(a) 29 July 2009, page 40, line 1:

Q: ---"continue to beat him", was these the words that he used, and if so, what was said in Malay?

A: I did tell the officer that I saw Jabing hitting him but I did not say that Jabing continue to hit him.

(b) 29 July 2009, page 41, line 7:

Q: Now, witness, did anyone suggest to you on this word "continue to beat him"?

A: I think no, your Honour.

Q: Did SIO Razali in any way record in this line something that you did not say?

A: I'm not sure about that, your Honour.

...

Q: Was SIO Razali involved in any way for this word "continue" to be used?

A: I don't know.

(c) 29 July 2009, page 45, line 18:

Q: Looking at this statement now, the words "hitting the Chinese man several times and his head cracked open", did you believe in this statement?

A: As regards to the "several times", Jabing inflicted the blows on the Chinese man, I myself was in doubt whether I did say that to the officer.

Q: And how about the "head cracked open"?

A: That is---that was what I heard from the IO and that was playing on my mind.

(d) 29 July 2009, page 56, line 13:

Q: Did you use the word "repeatedly"?

A: I did not use the words "repeatedly" to---in my statement. What I said is that I saw Jabing hit the Chinese person only once.

137 At first blush, there appears to be an inconsistency – this was picked up by the Trial Judge: [note: 59]

> There is some---now based on what I can see, uncertainty whether he used the word "continue" because at one level, I seem to hear him and say "I didn't use the word at all." At another level, looking at other parts of his evidence is, "I used it because it was suggested to me."

138 With the benefit of considering the entirety of Galing's evidence as set out above, I am of the view that there is no real inconsistency. It seems that what Galing was trying to say was that he told the officer that he saw Jabing hit the deceased once but later (for whatever reason) accepted the officer's suggestion that he saw Jabing hit the deceased repeatedly, and only the latter was recorded in his statements.

139 On this point, it should also be noted that Galing's counsel had confirmed that Galing would rely on the statements without qualifications for his defence, [note: 60] and that the statements were made voluntarily even though some parts may not have been properly recorded. [note: 61]

(3) Cross-examination of recording officers and interpreter

140 As a result of Galing's change in evidence, the recording officers and interpreter were recalled and cross-examined on this point. Unfortunately, the cross-examination did not reveal much. They merely testified that there was no suggestion made to Galing on the number of times that Jabing had hit the deceased and that the statements were accurately recorded. [note: 62] Therefore, they do not assist in determining if Galing was telling the truth in the statements or during the trial.

141 Even if we accept that the statements were properly recorded, it does not necessarily mean that full weight should be given to the contents of the statements. It is possible that Galing told the officers that he saw Jabing hit the deceased multiple times in the head even though that may not be the truth. In fact, Galing would have every reason to lie in the statements in order to exculpate

himself, especially if, according to him, the officers had made certain suggestions which were favourable to him. Galing's explanation for his change in evidence during the trial is not incredible, and it follows that the change in evidence *per se* is not sufficient basis to prefer Galing's evidence in the statements to his evidence in court.

142 I move on to consider an alternative basis that might explain why Galing's evidence in the statements should be preferred over his evidence in court, namely, the possibility of collusion between Jabing and Galing.

(4) No evidence of collusion

143 Both Galing and Jabing had changed their evidence during trial in favour of each other:

(a) Jabing said he did not see Galing hit the deceased, even though it was recorded in his statements that he saw Galing hit the deceased; and

(b) Galing said he only saw Jabing hit the deceased once, even though it was recorded in his statements that he saw Jabing hit the deceased repeatedly.

144 However, there is nothing to suggest that Jabing and Galing could possibly have agreed to change their evidence to help exculpate each other. Indeed, the highly inconsistent versions of fact given by Jabing and Galing, parts of which are detrimental to the other, would suggest that they have not colluded in any way.

Medical evidence

145 Dr Teo's evidence on the likely causes of the injuries, understood in light of the fact that Jabing had attacked the deceased first, would suggest that the belt buckle might have caused some of the fractures. This possibility creates a reasonable doubt on whether Jabing might have actually caused most of the fractures sustained by the deceased on the head (either by multiple strikes or two strikes of huge force).

146 During the trial, Dr Teo was reluctant to link any particular injury to the weapons used in this case. In relation to the wood, Dr Teo said that: [note: 63]

> … this sort of object [ie the piece of wood], if used as a weapon is capable of causing a fracture of the skull. *But there is nothing---there's no real specific injury, er, that I would say that would match, er, for example, the surf---the texture---the rough texture of this, er, piece of wood*. All---all I can really say is that if this object is used as a weapon, it is capable of causing bruising, abrasions, lacerations and a fracture of the kind that is seen in this---in the deceased. [emphasis added]

147 When Dr Teo was asked if any of the injuries or abrasions on the deceased's body can be identified as being caused by the belt buckle, he pointed out, among others, the two abrasions on the right eyebrow of the deceased would appear to match the design of the belt buckle. [note: 64] Nonetheless, this has to be taken in light of the fact that Dr Teo had repeated over *eight times* that he would caution against over-interpreting these injuries. [note: 65] Dr Teo explained that this is because "ana sarca" (swelling caused by retained fluid) and the healing process over the six days might have distorted or change the shape and pattern of the injuries. [note: 66] Furthermore, he acknowledged the possibility that the patterned injuries might be a matter of "coincidence". [note: 67]

In fact, Dr Teo acknowledged that he is "really speculating" on whether the belt is the cause of the injuries over the right eyebrow/eyelid. [note: 68]

148 As between the belt buckle and the wood, Dr Teo took the view that the wood was more likely to cause the fractures, but did not rule out the belt buckle as a cause, especially if the skull was already fractured: [note: 69]

> Q: Those severe head injuries is caused to the deceased, are you able to tell this Court what might---which instrument might have caused those injuries?
>
> A: The skull fracture, your Honour, would have been caused by a blunt object. … As to the object that caused a blunt force---the blunt force, the---of the two objects, er, that I've been shown, the belt buckle and the piece of wood, er, I---*my opinion is that the---the piece of wood is---would be, er, more likely to cause these fractures*. I do not think this belt buckle would be capable of causing these fractures. However, I---I had earlier mentioned that once the skull has been fractured, much less severe force is required to cause further fracturing of the skull. So while I do not definitively rule out the belt buckle, I would state that I think it is unlikely to be due to the belt buckle.
>
> [emphasis added]

149 Significantly, there is some evidence to suggest that Galing started hitting the deceased only *after* Jabing had hit the deceased. While this suggests that the skull must have been fractured *before* Galing attacked the deceased, there is very little evidence to show the extent of damage that had been caused by Jabing. Furthermore, there is no clear evidence on the number of times and the manner in which Galing attacked the deceased (except the possible link to the fracture over the right eyebrow). There is no reason to assume that Galing could only attack the deceased with the belt buckle; he could, for instance, have slammed the deceased's head against the floor or kicked/stepped on the deceased's head. I should also highlight that Galing had admitted that he was the last person to have attacked the deceased, not Jabing. [note: 70]

150 In my opinion, Dr Teo's evidence, taken at its highest, would suggest that Jabing had hit the deceased in the head first and caused the deceased's skull to fracture. He does not say how much damage was attributable to Jabing and Galing respectively. As mentioned earlier ([122] above), the medical evidence also does not rule out the possibility of a fall causing some of the fractures.

Summary of the evidence

151 In my view, therefore, there is insufficient evidence to establish beyond reasonable doubt that Jabing had inflicted more than two strikes to the deceased's head. Besides the uncertainty as to the number of blows sustained by the deceased ([124] above), there is also no clear evidence, factual or medical, to support the finding that Jabing had hit the deceased on the head at least three times or with such huge force as to cause most of the fractures. The factual evidence (*ie*, Jabing, Galing and Wu Jun) would, at best, suggest that there were two strikes or more, and the medical evidence would only support a finding that Jabing had hit the deceased first, and caused fractures in the skull (the extent of which is unknown).

152 Accordingly, the evidence would suggest that Jabing's involvement is, with respect, less extensive than the finding in the Majority Judgement at [67]–[70]. For convenience, the attribution is reflected in the table below:

	Blows by Jabing	Fall	Blows by Galing
Factual evidence	2 only	N.A.	1
Medical evidence	1 or more (causing fracture)	Possible	1 or more
Majority's finding	3 or more	N.A.	1

Ancillary point: What happened after Jabing first struck the deceased but before Galing began to attack the deceased?

153 As discussed earlier, the medical evidence is unable to show the extent to which the injuries were caused by Jabing as opposed to Galing. It would only show that Jabing had hit the deceased first and caused the skull to fracture (to an unknown extent). However, the evidence of Jabing and Galing on the sequence of events (as opposed to the number of strikes) might shed some light on the severity of the injuries inflicted by Jabing and Galing respectively.

154 The evidence suggests that the deceased had not fallen on his face after being first struck by Jabing, and might have been able to stand up after that. This casts a doubt on whether Jabing had, in fact, struck the deceased multiple times in the head or with such huge force that would have caused most of the skull fractures.

Jabing's evidence

155 Jabing testified during the trial that after he hit the deceased on the head for the first time, the deceased "fell to the ground", [note: 71] and the deceased's face hit the ground first. [note: 72] Jabing claimed that the deceased "turned his body around to face upwards" with his hands covering his head and Jabing then hit the deceased "one more time". [note: 73] When asked to elaborate, Jabing's evidence was that he "cannot remember" what the deceased was doing before his second blow and "do not know" if the deceased was bleeding from the head. [note: 74]

156 It should also be noted that Jabing gave a slightly different account in his statements:

(a) Statement dated 26 February 2008: [note: 75]

> … I then swung the wood towards the head of the male Chinese. I am not sure I swung it at the back or the front of his head. Upon being struck by the wood, *he fell to the ground facing up*. [emphasis added].

(b) Statement dated 4 March 2008: [note: 76]

> … I came from behind and used the wood that I was holding on the head of the bigger built male Chinese. I am not sure whether I swung it hard or not since I was drunk. *The single blow on the head by me caused the said male Chinese to fall onto the ground facing up.* [emphasis added]

157 This casts doubts on whether the deceased had actually fallen on his face after being struck by Jabing the first time.

Galing's evidence

(1) After Jabing's first strike

158 Galing testified during the trial that he had only saw Jabing hit the deceased once, and it occurred at the start when they first approached the deceased and Wu Jun. Galing also testified during trial that the deceased did not fall face down after Jabing's initial strike; instead, he repeated at least three times that he saw the deceased "moving forward" or "running forward" after being struck. [note: 77] This was largely consistent with his evidence in the statements, where he said that the deceased "ran forward" after being hit. [note: 78] Galing's evidence on this point would suggest, to some extent, that Jabing's initial strike that was witnessed by Galing may not have been with such huge force.

(2) Before Galing's first strike

159 After Jabing's first strike, Galing said he went after Wu Jun but as he could not catch up with Wu Jun, he decided to turn back. [note: 79] Galing testified that he saw the deceased holding onto his head while Jabing was walking towards Galing (to chase after Wu Jun who was allegedly coming after Galing from behind). [note: 80] Galing's evidence during the trial was that he saw the deceased standing up or stood up and was going to attack him:

(a) 27 July 2009, page 12, line 19:

Q: Did you hit the other Chinese gentleman at all who was hit by Jabing earlier?

A: Yes, I did him---I did hit him because *he had got up and try to hit me*.

Q: That would have been subsequently but when you hit the Chinese gentlemen, did you hit the deceased at all at that time?

A: Yes, I did hit the deceased *because he had got up and tried to hit me*. I hit him and---on the back part of his body.

[emphasis added]

(b) 27 July 2009, page 16, line 8:

Q: When you first hit the deceased, what position was he in? Was he standing, lying down or what?

A: *At that time, the deceased was sitting down and he wanted to get up. And as he was about to get up, I hit him*. …

[emphasis added]

(c) 28 July 2009, page 27, line 24:

Q: Now, when you returned, where was the deceased? Was he lying on the---lying on the grass? Still standing?

A: *At that time I saw the deceased at this spot in a sitting position*.

…

Q: Now what was the deceased doing, seated down on the ground?

A: *He was sitting down holding his head*.

Q: He was still conscious at that time?

A: *With---with his hand on his head*.

Q: One hand or both hands were on his head?

A: I'm not sure whether he was hold---whether one hand was on his head or both hands were on his head.

Q: Can you tell what was his condition then? Serious or not serious?

A: I---what I can recall is that I cannot say for sure his condition at that time.

Q: So what happened immediately after this?

…

A: Then Jabing went forward to---to go after the person who was behind me and *when I approached the deceased---when I approached the---where the deceased was, I saw the deceased getting up and as if he wanted to attack me*.

[emphasis added]

160 Again, this would suggest, to some extent, that Jabing might not have struck the deceased multiple times or that Jabing's strikes (whether witnessed by Galing or not) may not have been with such huge force.

161 However, some caution must be exercised when approaching Galing's evidence on this point. First, Galing's evidence was slightly inconsistent on whether the deceased actually managed to stand up or was just trying to stand up (contrast [159(a)] and [159(b)]–[159(c)] above). When asked to elaborate, Galing clarified that the deceased was able to stand up but he "was not able to say whether he was standing steadily or not" even though they were only about 3.8 metres apart. [note: 81] He also could not explain what the deceased did which led him to think that the deceased wanted to attack him. [note: 82] Second, one might argue that Galing was trying to reduce his culpability by asserting that the deceased was trying to attack him (such that it appears he acted in retaliation when he hit the deceased). Nevertheless, it is doubtful if this argument carries much weight as Galing could well have denied hitting the deceased in the first place if he actually wanted to exculpate himself.

Medical evidence

162 The medical evidence is more consistent with Galing's version, that is, the deceased did not fall forward and hit his head, and might have been able to stand up even after Jabing's attack.

163 There is evidence to suggest that the deceased did not fall face down after the first strike. First, as highlighted earlier at [101], Dr Teo and Dr Ho do not rule out the possibility that the fracture at the back of the head might not have been due to a direct blow. Second, and more importantly, Dr Teo took the view that fracture (1) at the forehead region, a comminuted fracture, was unlikely to have been caused by a simple fall. [note: 83] Further, Dr Teo also rejected the suggestion that the laceration and abrasion on the face might have been due to the deceased falling face down. [note: 84] When taken together, it would suggest that the deceased did not fall forward with his face first after being struck by Jabing.

164 While some blood was found on the kerb near where the deceased was lying, there is no evidence indicating that the deceased had actually hit his forehead on the kerb when Jabing first hit the deceased on the head. Dr Teo's evidence on this point is pertinent: [note: 85]

> Q: Yes. Doctor, same diagram, the one at the top, that's fracture number 1. You said that's… also another fracture?
>
> A: Yes.
>
> Q: Yes. *Could it have resulted due to a fall while the deceased was standing, falling down smack on his face and hitting, for example, a kerb?*
>
> A: This fracture, your Honour, is comminuted. It is fragmented. *I think it is very unlikely that a simple fall to the ground would cause fragmentation like this*. If the forehead did hit the edge of a kerb, er, the edge of the kerb might cause a linear abrasion on the forehead or even a cut or a laceration of the skin. The---the only laceration on the forehead, er, is the one above the left eyebrow. I think that the fracture number 1, which is the comminuted fracture is unlikely to be due to just a simple fall. And because there was described fragmentation to the left side of the frontal bone, the forehead, which had been removed at the craniectomy, I do not think that this fracture is due to just a simple fall.
>
> Q: Doctor, I'm just suggesting to you that it---the fracture could have resulted from a fall.
>
> A: *It could but unlikely*.
>
> [emphasis added]

165 It should also be noted that Jabing's evidence at trial was that he is "not sure whether [the deceased's] head hit the kerb". [note: 86]

166 For completeness, it should be added that there was no clear explanation for the blood on the kerb. Wu Jun's evidence was that he found the deceased on the grass patch and not the kerb. The paramedic who first responded also said that the deceased was lying in a supine position with his head on the grass patch and not the kerb. Nonetheless, it does not mean that the deceased must have hit his forehead on the kerb upon Jabing's first strike simply because there is no alternative explanation based on the available evidence.

167 Further, Dr Ho's evidence was that a person who suffered a severe blow to the head may not succumb immediately: [note: 87]

Q: Now, Dr Ho, now, assuming the patient when he was still well and alive, now, if he was walking and he was hit at the head with a very hard blow, now, would---would he be flawed immediately or it would be---it would take sometime before he would be flawed?

A: *Well, er, there were---because of the blow, er, one may not immediately, er, succumb to it on the spot*. Er, the person can remain with some amount of, er, consciousness but also, er, in a sub-comatose condition before going into the full coma state because the blow and the bleeding will take some time to build up to a high pressure in the brain before the patient goes into deep coma. So in some cases, it can take 1 hour or half an hour before the patient, er, goes into deep coma. It's not always the same case, but, er, generally, it takes some time for the pressure to build up in---in the brain because cerebral oedema or brain swelling doesn't occur immediately. Let's take an analogy. If you hit me on my, er, back, it will not swell immediately. It will take---certainly, it will take a few minutes or a few, er, 15 minutes before it becomes blue and black.

Q: *So if there's an application of a very huge force, would the person still be able to stand or walk some distance before he---he drops*?

A: *Possibly, not all cases but possibly*.

[emphasis added]

168 To some extent, Dr Ho's evidence is consistent with Galing's version that the deceased did not fall after Jabing's initial strike, and might have been able to stand up even after Jabing's attack.

Summary of the evidence

169 Jabing and Galing gave contradicting accounts of what transpired immediately after the deceased was first hit by Jabing. The medical evidence is more consistent with Galing's account that the deceased did not fall immediately after being struck by Jabing. It is also consistent with Galing's evidence that the deceased might have been able to stand after Jabing's attack.

170 In my opinion, the fact that the deceased did not fall face first after Jabing's initial strike, and might have been able to stand up even after Jabing's attack would cast a reasonable doubt on whether Jabing struck the deceased multiple times on his head and, more importantly, the force he had used. One might argue that the court must be cautious when assessing the weight that should be placed on the fact that the deceased was able to stand up shortly after he was attacked by Jabing, as it may not necessarily be an accurate indicator of the severity of the injuries caused by Jabing. However, it must be noted that Dr Teo's evidence on this point ([167] above) must be considered in the proper context, that is, Dr Teo was asked a hypothetical question (whether a person would succumb immediately to a huge force to the head) to which he answered that there is a possibility. He was not asked to comment specifically on the likelihood in the present case. Moreover, Dr Teo only said that there was a possibility that a person struck by a huge force at the head might not succumb immediately but "not all cases".

The findings of fact that can be established beyond reasonable doubt

171 Taking into account the evidence, and bearing in mind the discussions on the two key findings and the ancillary point above, in my judgment, the findings of fact that can be established beyond reasonable doubt are as follows:

(a) Jabing followed the deceased and Wu Jun with the intention of robbing them;

(b) Jabing picked up a piece of wood when he was approaching the deceased and Wu Jun;

(c) Jabing and Galing approached the deceased and Wu Jun from behind, and Jabing struck the deceased in the head without warning;

(d) At around the same time, Galing struck Wu Jun from behind; Wu Jun ran and Galing gave chase;

(e) After the initial blow by Jabing, the deceased did not fall and hit his forehead but moved forward;

(f) Jabing hit the deceased again in the head at least once, and the deceased's skull was fractured;

(g) Galing did not manage to catch Wu Jun, so he turned back and walked towards the deceased; Jabing walked pass Galing and headed towards the overhead bridge;

(h) Galing found the deceased in a sitting position, trying to stand up and he hit the deceased once or more; and

(i) Galing took the deceased's handphone.

172 While the key findings of fact have been discussed above, it would be crucial to consider, as much as possible, the sequence of events in its totality so as to fully appreciate the nature of the attack on the deceased.

173 The evidential basis for each factual finding will be examined in greater detail below.

Factual finding 1: Jabing followed the deceased and Wu Jun with the intention of robbing them

174 This finding of fact is uncontroversial. Jabing maintained consistently in his statements and during the trial that he had followed the deceased and Wu Jun with the intention of robbing them.

175 It was recorded in Jabing's statements that:

(a) Statement dated 27 February 2008: [note: 88]

> … My intention is only to rob [the deceased]. After I had reached Kallang MRT, the 5 of us walked and looked out for victims that is easy to rob. About half an hour later, we met the victim. At that time, I and the rest, followed the victim from behind. After that, I and 'Galing' followed the victim. ...

(b) Statement dated 26 February 2008: [note: 89]

> … We loitered around Lorong 4 Geylang Road to look for a suitable victim. This was the 1st time I followed them to commit robbery. ...
>
> …

About ½ hour after we loitered at Lor 4, Galing signaled [sic] to me towards 2 male Chinese who were walking from Lor 4 towards Kallang. Both the male Chinese were crossing the road and walking towards the open space. Galing immediately ran and crossed the road. I followed suit. …

(c) Statement dated 4 March 2008: [note: 90]

… The five of us loitered around Lor 4 to look for a suitable victim to rob. …

About ½ hour later, I was walking behind Galing along the main road beside Lor 4. … Galing spotted 2 male Chinese crossing the road and signaled [sic] to me. I saw 2 male Chinese crossing the road towards the open field. On seeing this opportunity that we were looking for, I crossed the road behind Galing. …

176 The same was repeated by Jabing during the trial: [note: 91]

Q: Okay. Okay. When you followed the Chinese from behind, okay, can you tell us or can you remember at which point did you think he was---for---… I'll---I'll rephrase that… who trailed the Chinese first?

A: Mr Galing.

Q: And you followed suit?

A: Yes.

Q: *Why did you follow him*?

A: *Because we wanted to rob*.

[emphasis added]

177 This was corroborated by Galing's evidence at trial: [note: 92]

Q: Yes, carry on. Tell us, until you met the two Chinese gentlemen.

A: We walked on and on and until we passed by a bridge. Suddenly Jabing crossed the road. I followed Jabing in crossing the road until I reached the middle of the road.

Q: Please carry on.

A: I remember asking Jabing where was he going to, after that *Jabing pointed to the other side of the road, and say that he wanted to rob the two persons*. I did tell him not to do it. He ignored what I told him, maybe at that time he was drunk. After that Jabing continue to cross the road, I saw him, bending down and picking up something from the ground.

[emphasis added]

178 Jabing and Galing disagree on who initiated the plan to rob the deceased and Wu Jun. However, they both agree that Jabing approached the deceased and Wu Jun with the intention to rob them.

Factual finding 2: Jabing picked up wood when he was approaching the deceased and Wu Jun

179 This finding of fact is also uncontroversial. Jabing's evidence was that he picked up the wood as they were approaching the deceased and Wu Jun:

(a) 30 July 2009, page 39, line 21:

Q: Did you pick up a piece of wood at the centre of the road?

A: No.

Q: So did you pick up any piece of wood at the roadside while you were trailing the two Chinese?

A: Yes. Yes, I did.

Q: Okay. When you picked up at the road side, where were the two male Chinese which both of you were trailing? How far away were they?

A: Maybe they were about 3 or 4 metres away.

(b) 30 July 2009, page 58, line 30:

Q: So the minute you saw---I would say---would I be correct to say that the time in which you saw Galing wrap around---wrap the belt round his right palm between the time you picked up the wood was in a matter of a split second? Would I be correct?

…

A: No.

Q: And could you tell us what do you mean by "No"?

A: At the time when I saw Galing---when at the time when I saw Galing had the belt in his right hand, I had not taken the wood yet.

Q: So and then? Could you just go on?

A: At the time when we---at the time on arrival at the place of the incident, I saw the piece of wood there. And then I pick up the wood.

(c) 31 July 2009, page 22, line 1:

Q: So when you saw Mr Galing with the belt wrapped around his hand and the buckle exposed, you knew that he was about to take some action to carry out the robbery plan, isn't it?

A: Yes.

Q: And the action that you took, your part upon seeing that was to pick up the wood, isn't it?

A: Yes, it's true that I picked up the piece of wood. It happened that I saw the piece of wood. The wood was on the ground.

180 Jabing's evidence at trial on this point is consistent with his evidence in the statements. [note: 93]

181 Jabing's evidence on this point is also corroborated by Galing's evidence:

(a) 24 July 2009, page 28, line 2:

Q: Carry on.

A: Whilst I was still at the centre of the road, I saw Jabing pick up something from the ground. I saw him, after picking the object from the ground, I saw him proceeding towards the two persons, to the two Chinese.

Q: Please carry on, yes.

A: I saw him hitting one of the two Chinese persons.

(b) 27 July 2009, page 11, line 4:

Q: Yes, carry on. Tell us, until you met the two Chinese gentlemen.

A: We walked on and on and until we passed by a bridge. Suddenly Jabing crossed the road. I followed Jabing in crossing the road until I reached the middle of the road.

Q: Please carry on.

A: I remember asking Jabing where was he going to, after that Jabing pointed to the other side of the road, and say that he wanted to rob the two persons. I did tell him not to do it. He ignored what I told him, maybe at that time he was drunk. *After that Jabing continue to cross the road, I saw him, bending down and picking up something from the ground*.

Q: What---what did he pick up?

A: Maybe it was wood.

[emphasis added]

182 Galing's evidence during the trial was consistent with his statements. [note: 94]

183 There was nothing to suggest that Jabing and Galing were not telling the truth in this respect.

Factual finding 3: Jabing and Galing approached the deceased and Wu Jun from behind, and Jabing struck the deceased in the head without warning

184 This point has been addressed above at [91]–[103].

Factual finding 4: At around the same time, Galing struck Wu Jun from behind; Wu Jun ran and

Galing gave chase

185 The evidence indicates that Galing struck Wu Jun at around the same time when Jabing struck the deceased, and Galing gave chase when Wu Jun tried to flee:

(a) Galing's evidence was that he struck Wu Jun because Wu Jun (who saw Jabing hit the deceased) was going to hit Jabing; [note: 95]

(b) Jabing's evidence at trial was that he did not see Galing hit Wu Jun, but he saw Galing chasing after Wu Jun after he hit the deceased on the head twice; [note: 96] and

(c) Wu Jun's evidence was that the deceased was groaning in pain very shortly after he was struck by Galing. [note: 97]

186 From the evidence above, especially taking into account the evidence of Wu Jun, it can be said that Galing struck Wu Jun at around the same time when Jabing struck the deceased.

Factual finding 5: After the initial blow by Jabing, the deceased did not fall and hit his forehead but moved forward

187 This point has been addressed above at [153]–[170].

Factual finding 6: Jabing hit the deceased again in the head at least once, and the deceased's skull was fractured

188 This point has been addressed above at [104]–[152].

Factual finding 7: Galing did not manage to catch Wu Jun, so he turned back and walked towards the deceased; Jabing walked pass Galing and headed towards the overhead bridge

189 As mentioned earlier (at [185]), the evidence suggests that Galing chased after Wu Jun. Galing's evidence was that he gave up chasing Wu Jun, started walking back towards the deceased and saw Jabing walking in the opposite direction:

(a) 24 July 2009, page 30, line 28:

Q: So---so tell us what happened after [Wu Jun] ran off. You chased him. Tell us what happened after that.

…

A: After I hit him, he ran off. I went after him. I was not able to get him because he ran too fast. I went back to Jabing---I went back to where Jabing was. As I was about to go to where the deceased was, I passed by Jabing. He was walking from the opposite---we were walking from---on---on opposite sides.

(b) 27 July 2009, page 12, line 25:

Q: Did you chase any of the Chinese gentlemen?

A: Yes, I did chase the Chinese person who I had hit the first time---whom I had hit the

first time.

Q: Was that PW44, Mr Wu Jun---was who gave evidence in Court last week.

A: Yes, that was the---that is the person whom I chased.

Q: So did you hit the deceased prior to chasing PW44?

A: No.

Q: When did you hit the deceased?

A: *After I had---I chased after the---the Wu Jun but I did not get---was able to get him, after that I went back to where Jabing and the deceased were fighting. At that time Jabing and I were walking towards each other* and we---at that time when---at that point of time when we were close I did tell Jabing in the Sarawat [sic] dialect, I did ask Jabing in the Sarawak dialect where he was going to.

[emphasis added]

(c) 27 July 2009, page 35, line 3:

Q: I am putting it to you once again, you hit Wu Jun did not turn back to attempt---to try to attack Jabing, he ran for his life followed by you.

A: Before I hit him, I saw that he was---he wanted to hit Jabing. And after I had hit him, he ran off.

Q: So coming to the point where you stopped chasing Wu Jun, all right, let's start from there, okay. You turned back after you stopped chasing Wu Jun and you walked towards the place of the incident and you saw, according to your testimony, you saw Jabing walking towards you in the opposite direction to that effect.

A: Yes.

(d) 28 July 2009, page 24, line 16:

Q: Mr Galing, Wu Jun ran very fast after being hit and you ran after him?

A: Yes. In my opinion, he was running very fast.

Q: So did you pursue, did you run after him?

A: Yes.

Q: You could not catch up with him, right?

A: Correct.

190 This is corroborated by Jabing's evidence at trial:

(a) 30 July 2009, page 66, line 31:

Q: Okay. When he stopped chasing after the Chinese man, what did Galing do?

A: After Galing stopped chasing the man, he went back to the place where I had hit the victim.

Q: So Jabing, he, according to you, he went back to the place where the victim was?

A: Yes, he went back to where the victim was.

Q: Okay.

Court: He, meaning who?

A: Galing.

Q: What about yourself?

A: At that time we bypass each other, I was going towards the overhead bridge and Galing was---

Court: Slowly, you bypass each other, I was going toward the overhead bridge going, slowly---

A: The direction of the overhead bridge and Galing was going to the direction of the victim where the victim was.

Q: So you were going towards the direction of the bridge, that's right, just to confirm?

A: Yes.

(b) 31 July 2009, page 9, line 3:

Q: After running the distance chasing the Wu Jun---chasing Wu Jun, you---Galing came back and he met you as he---as he came back where you were in-between the deceased and Galing.

A: Yes, I agree we crossed each other's path.

191 There is, however, some doubt on how far Galing actually went to chase after Wu Jun before turning back. Galing said that he "chased him until the side of the road" (*ie*, Sims Way), [note: 98] but could not give an estimate of the distance. [note: 99] Earlier, Galing said it was somewhere between the electric substation and Sims Way. [note: 100] Wu Jun's evidence was that Galing appeared to have the intention of chasing him but he does not know if Galing did as he "did not turn around to look". [note: 101]

192 There is also some uncertainty as to why Jabing left the deceased and started walking towards the overhead bridge. Jabing never explained in his statements. Neither was Jabing questioned on this during the trial. Galing said that it was because Wu Jun was coming back for him and Jabing wanted to chase him away. [note: 102] However, Wu Jun said went back only after he saw that "there was nobody around", [note: 103] and Jabing denied seeing Wu Jun coming back. [note: 104]

193 On the evidence available, it can only be concluded beyond reasonable doubt that Galing tried to chase after Wu Jun, turned back and walked pass Jabing who was going towards the overhead bridge.

Factual finding 8: Galing found the deceased in a sitting position, trying to stand up and he hit the deceased once or more

194 This point has been addressed above at [159]–[170].

Factual finding 9: Galing took the deceased's handphone

195 It is undisputed that Galing was the one who took the deceased's handphone. Galing admitted that he took the deceased's handphone after hitting him, [note: 105] and Jabing said he was told by a friend that Galing had taken a handphone. [note: 106]

196 There is some doubt as to whether Galing took the deceased's handphone from the floor next to the deceased, or from his waist pouch. During the trial, Galing contested the accuracy of his statements (in which he stated that he took the handphone from the waist pouch). [note: 107] Like the earlier instance involving the number of strikes he saw Jabing hit the deceased, Galing explained that he was influenced by the officer's suggestion when the statements were recorded. [note: 108] There is no corroborating evidence apart from Wu Jun's statement which stated that the deceased would usually put his handphone in his waist pouch. [note: 109] It appears that Wu Jun did not say specifically that the deceased kept his handphone in his waist pouch on the day of the incident. In fact, no waist pouch was ever recovered (either from the scene or Galing's possession), and the waist pouch (if it existed) did not form part of the exhibits. [note: 110] The evidence of the IO, SSI Zainal Abidin Ismail, was that he was "not aware" of the waistpouch and had only requested to seize the deceased's clothes. [note: 111]

197 As such, the limited evidence available would only support a finding that Galing took the deceased's handphone.

Conclusion

198 The two key findings that would point towards the conclusion that Jabing had acted in blatant disregard for human life are: first, Jabing approached the deceased from behind and hit him on the head, and second, Jabing hit the deceased repeatedly or with such force as to cause most of the fractures.

199 As discussed above, there is insufficient evidence to conclude beyond reasonable doubt that Jabing had caused most of the fractures (either by multiple strikes or by two strikes with huge force). The evidence available would, at best, prove beyond reasonable doubt that Jabing had hit the deceased twice and with such force as to cause the skull to fracture. The question is whether this set of facts cross the threshold of the test established at [45] of the Majority Judgment, *ie*, whether Jabing had "acted in a way which exhibits such viciousness or a blatant disregard for human life".

200 The Majority Judgment had concluded that the threshold was crossed based on a finding that Jabing had inflicted at least three or more blows causing extensive fractures to the deceased's skull. I have attempted to demonstrate that a proper analysis of the evidence discloses reasonable doubt on the validity of that finding and that the evidence could only prove beyond reasonable doubt that

Jabing had struck the deceased on the head twice. There is also doubt as to whether those two blows were the cause of most of the extensive injuries found in the skull, as opposed to causing it to fracture and resulting in death.

201 Based on the evidence that I have shown to be proven beyond reasonable doubt, I am of the view that the threshold is not crossed. Jabing, along with Galing, had intended to rob the deceased and his companion, Wu Jun. Jabing had approached the deceased from behind and struck him with two wicked blows to the head with the intention, at the very minimum, to incapacitate him. But he had stopped after that. It was not a case in which he had repeatedly hit the deceased after he was down, which would justify the conclusion that he had acted with viciousness and blatant disregard for human life. I must therefore, with the greatest of respect, disagree with the decision of the majority of this court to allow the appeal of the Public Prosecutor.

Woo Bih Li J:

202 I have had the benefit of reading the judgments of my learned colleagues Chao Hick Tin JA, Andrew Phang Boon Leong JA and Chan Seng Onn J ("the Majority Judgment") and of Lee Seiu Kin J. I adopt the nomenclature in the Majority Judgment but I will refer to the Respondent as "Jabing".

203 I agree with the principles set out in [44] and [45] of the Majority Judgment as to when it would be appropriate to impose the death penalty for an offence of murder where the conviction is made under s 300(*c*) of the PC.

204 However, like Lee J, I will respectfully depart from the Majority Judgment on the imposition of the capital punishment. I also agree with Lee J that this court is entitled to revisit any findings of fact made in the CA (Conviction) decision in view of the difference in the nature of the inquiry then and now.

205 The evidence is clear that Jabing attacked the deceased from behind without warning. However, it is less clear how many times Jabing hit the deceased with a piece of wood.

206 In so far as the factual non-medical evidence is concerned, the most damaging of such evidence against Jabing was the cautioned statement given by Galing dated 26 February 2008 where he said that, "Jabing was too violent when hitting the Chinese man until he bled profusely. I saw him hitting the Chinese man several times and his head cracked open". Galing's cautioned statement was vivid.

207 I agree that Galing's cautioned statement had been correctly recorded as was an investigation statement of his in which he said that, " … I gave up the chase and turned back towards Jabing who was hitting the other Chinese with the wood in his hands repeatedly …".

208 On the other hand, it must be remembered that Galing did not repeat the allegation of repeated blows by Jabing with violence when he gave oral testimony at trial. On the contrary, he said Jabing hit the deceased once. It was Jabing himself who said at trial that he hit the deceased twice. In my view, it is unsafe to place too much weight on Galing's statements which he did not repeat at trial. While these statements might have been accurately recorded and his oral testimony might have been an attempt to help Jabing, the statements might also have been embellishments by Galing if he was initially trying to push the blame for the deceased's death onto Jabing. I cannot rule out the latter.

209 I come now to the medical evidence. Lee J noted (see [110] above) that the forensic pathologist, Dr Teo Eng Swee, had identified eight points of impact which resulted in many fractures.

The Majority Judgment said Dr Teo had identified at least five separate groups of fractures which he felt were due to separate impacts. I note that what Dr Teo had said was that the injuries "might be" due to separate impacts. [note: 112] Furthermore, as Lee J noted, Dr Teo had also testified that:

> … these are the possible impacts, but I cannot say whether it is just one particular blow or multiple blows. [note: 113]

210 Dr Teo also said:

> To cause a fracture of a intact skull, would require severe force. Once the skull has fractured, the further fractures of the skull could occur with less severe forces …. [note: 114]

211 There was also evidence that Galing himself had hit the deceased with a belt buckle although it is not clear whether he did so only once. As for the use of the belt buckle, Dr Teo said that:

> … I do not think that this belt buckle by itself would be capable of causing fragmented fractures of the skull or---or a severe head injury as in the case of the deceased. [note: 115]

212 He elaborated that:

> … my opinion is that the---the piece of wood is---would be, er, more likely to cause these fractures. I do not think this belt buckle would be capable of causing these fractures. However, I--I had earlier mentioned that once the skull has been fractured, much less severe force is required to cause further fracturing of the skull. So while I do not definitively rule out the belt buckle, I would state that I think it is unlikely to be due to the belt buckle. [note: 116]

213 As regards the question whether a fall could be the cause of the fractures, he did not think so. [note: 117] However, for one of the fractures, ie, fracture (14), he said this might be due to an impact but he was not able to rule out that it was due to a fall. [note: 118]

214 Therefore, Dr Teo's evidence was that there would be at least one hard blow with severe force which fractured the skull. It was likely that that blow was caused by a piece of wood and not the belt buckle. However, once the skull was fractured (whether by one or two or more blows), it was not clear what caused the other fractures. In particular, it was not clear whether the other fractures were caused by Jabing using the piece of wood or Galing using the belt buckle or a combination of the two and perhaps also a fall as well. Furthermore, Dr Teo could not say that there were definitely five separate blows to the deceased's head. I should mention for clarification that Dr Teo had also explained that the fractures of the deceased's head were not in themselves the fatal injury. The fatal injury was injury to the brain. [note: 119]

215 In my view, the medical evidence does not necessarily corroborate any suggestion that Jabing inflicted more than two blows to the deceased's head although I agree that Jabing was responsible for fracturing the skull. Therefore, it is unclear just how many blows Jabing had inflicted on the deceased's head.

216 For the reasons stated in Lee J's Judgment, I am of the view that there is also a reasonable doubt whether Jabing's blows were all inflicted when the deceased was lying on the ground.

217 In the circumstances, and even though Jabing's blows would have been of considerable force,

it is in my view unsafe to conclude beyond a reasonable doubt that he acted in a way which exhibited a blatant disregard for human life. I would therefore dismiss the Prosecution's appeal for capital punishment for Jabing.

[note: 1] See NE, day 9, p 60 – 61, line 31 onwards.

[note: 2] See NE, day 10, p 23 – 24, line 32 onwards

[note: 3] See Ne, day 10 p 43 – 44, line 32 onwards

[note: 4] See NE, day 6, p 16 line 10-13.

[note: 5] Counsel for Jabing's skeletal arguments before the CA (Conviction) in CCA 18/2010 at paras 36, 37, 38, and 43.

[note: 6] P149 at para 6.

[note: 7] P136 at para 1.

[note: 8] P147 at para 14.

[note: 9] PS18 at para 5; NE, 21.07.09, 84/32; NE, 22.07.09, 5/3.

[note: 10] NE, 22.07.09, 5/17.

[note: 11] PS18 at para 5; NE, 22.07.09, 10/14.

[note: 12] PS18 at para 6; NE, 22.07.09, 6/3; 6/32; 7/12.

[note: 13] NE, 21.07.09, 84/24.

[note: 14] NE, 22.07.09, 3/28. See also 6/20; 7/3.

[note: 15] NE, 23.07.09, 30/11; 51/29; 54/21. See also NE, 23.07.09, 51/9.

[note: 16] NE, 21.07.09, 18/32.

[note: 17] NE, 23.07.09, 52/2.

[note: 18] PS18 at para 6; NE, 22.07.09, 6/3; 6/32; 7/12.

[note: 19] See, *eg*, P149 at para 6; NE, 30.07.09, 64/17; 65/7.

[note: 20] P135; P145 at para 5; P149 at para 6.

[note: 21] P149 at para 6.

[note: 22] NE, 31.07.09, 9/13; 38/25.

[note: 23] P148 at para 16; NE, 24.07.09, 31/1; NE, 27.07.09, 15/18; NE, 28.07.09, 29/18; 35/3; NE, 29.07.09, 19/12; 20/1; 29/1.

[note: 24] NE, 27.07.09, 41/8; NE, 28.07.09, 36/23; 38/18; NE, 29.07.09, 3/9; 8/5; 11/30; 28/9; 37/15.

[note: 25] See Majority Judgement at [45] and [47]; *Public Prosecutor v Galing Anak Kujat and another* [2010] SGHC 212 at [26]; *Kho Jabing and another v Public Prosecutor* [2011] 3 SLR 634 at [26].

[note: 26] NE, 23.07.09, 24/29; 25/30; 29/15; 51/22.

[note: 27] NE, 23.07.09, 29/31; 51/25.

[note: 28] NE, 23.07.09, 30/2; 51/25.

[note: 29] NE, 23.07.09, 30/4; 51/27.

[note: 30] NE, 23.07.09, 30/ 8; 30/31; 51/26.

[note: 31] NE, 23.07.09, 30/28.

[note: 32] NE, 23.07.09, 30/10; 51/28.

[note: 33] NE, 23.07.09, 30/11; 51/29; 54/21. See also NE, 23.07.09, 51/9, which appears to be a typographical error.

[note: 34] NE, 23.07.09, 30/16; 51/30.

[note: 35] NE, 23.07.09, 30/26.

[note: 36] NE, 23.07.09, 31/1.

[note: 37] NE, 23.07.09, 62/19.

[note: 38] NE, 23.07.09, 69/31.

[note: 39] NE, 23.07.09, 22/26.

[note: 40] NE, 21.07.09,16/7.

[note: 41] NE, 21.07.09, 4/20.

[note: 42] NE, 21.07.09, 17/4.

[note: 43] NE, 21.07.09, 17/7.

[note: 44] NE, 21.07.09, 18/6.

[note: 45] NE, 21.07.09, 19/6.

[note: 46] NE, 23.07.09, 30/26.

[note: 47] NE, 21.07.09, 17/17; 23/26.

[note: 48] NE, 21.07.09, 23/24; 26/17.

[note: 49] NE, 23.07.09, 30/11; 51/29; 54/21. See also NE, 23.07.09, 51/9, which appears to be a typographical error.

[note: 50] NE, 21.07.09, 18/21.

[note: 51] NE, 21.07.09, 23/27; 24/17.

[note: 52] See, *eg*, P149 at para 6; NE, 30.07.09, 64/17; 65/7.

[note: 53] P136 at para 2; P137; P148 at para 16.

[note: 54] P148 at para 16.

[note: 55] P148 at para 16; NE, 24.07.09, 31/1; NE, 27.07.09, 15/18; NE, 28.07.09, 29/18; 35/3; NE, 29.07.09, 19/12; 20/1; 29/1.

[note: 56] NE, 27.07.09, 41/8; NE, 28.07.09, 36/23; 38/18; NE, 29.07.09, 3/9; 8/5; 11/30; 28/9; 37/15.

[note: 57] NE, 28.07.09, 40/27; 36/23.

[note: 58] NE, 28.07.09, 40/27. See also NE, 29.07.09, 8/6; 11/30; 12/12; 15/28; 16/17; 16/24.

[note: 59] NE, 29.07.09, 40/15.

[note: 60] NE, 28.07.09, 41/11.

[note: 61] NE, 29.07.09, 1/11.

[note: 62] NE, 29.07.09, 80/3; 81/30; NE, 30.07.09, 3/6; 5/5; 46/1; 47/18.

[note: 63] NE, 23.07.09, 48/5.

[note: 64] NE, 23.07.09, 42/28.

[note: 65] NE, 23.07.09, 37/22; 40/12; 41/7; 41/28; 42/20; 43/14; 46/1; 50/19.

[note: 66] NE, 23.07.09, 37/22; 42/9.

[note: 67] NE, 23.07.09, 40/4.

[note: 68] NE, 23.07.09, 43/17.

[note: 69] NE, 23.07.09, 51/3. See also NE, 23.07.09, 31/7.

[note: 70] NE, 27.07.09, 40/21; NE, 28.07.09, 35/25.

[note: 71] NE, 30.07.09, 61/5.

[note: 72] NE, 30.07.09. 63/7.

[note: 73] NE, 30.07.09, 64/10; NE, 31.07.09, 24/30.

[note: 74] NE, 31.07.09, 35/4.

[note: 75] P145 at para 5.

[note: 76] P149 at para 6.

[note: 77] NE, 27.07.09, 34/24; 34/32; NE, 28.07.09, 20/11; 23/7.

[note: 78] P147 at para 14. See also P136 at para 2.

[note: 79] NE, 27.07.09, 13/1.

[note: 80] NE, 27.07.09, 13/1.

[note: 81] NE, 28.07.09, 34/9.

[note: 82] NE, 28.07.09, 35/3.

[note: 83] NE, 23.07.09, 54/28.

[note: 84] NE, 23.07.09, 56/12.

[note: 85] NE, 23.07.09, 54/28.

[note: 86] NE, 30.07.09, 64/9.

[note: 87] NE, 21.07.09, 20/28.

[note: 88] P135.

[note: 89] P145 at paras 3 and 4.

[note: 90] P149 at paras 4 and 5.

[note: 91] NE, 30.07.09, 36/9. See also NE, 31.07.09, 17/27; 20/21; 43/15.

[note: 92] NE, 27.07.09, 11/4. See also NE, 24.07.09, 27/20; NE, 28.07.09, 13/28.

[note: 93] P145 at para 5; P149 at para 6.

[note: 94] P136 at para 1; P137; P147 at para 14.

[note: 95] P136 at para 1; P147 at para 14; NE, 24.07.09, 29/25; NE, 27.07.09, 12/10; NE, 28.07.09, 18/1; 19/17.

[note: 96] NE, 30.07.09, 66/3; NE, 31.07.09, 33/2; 44/3.

[note: 97] PS18 at para 6; NE, 22.07.09, 6/3; 6/32; 7/12.

[note: 98] NE, 28.07.09, 24/31.

[note: 99] NE, 28.07.09, 24/28.

[note: 100] NE, 27.07.09, 33/32.

[note: 101] NE, 22.07.09, 8/16.

[note: 102] NE, 27.07.09, 13/18; 36/13.

[note: 103] NE. 22.07.09, 8/24.

[note: 104] NE, 30.07.09, 67/20; 76/19; 77/18.

[note: 105] NE, 27.07.09, 16/11; 44/7; 46/12; NE, 28.07.09, 29/18.

[note: 106] NE, 30.07.09, 69/31.

[note: 107] NE, 27.07.09, 52/10.

[note: 108] NE, 27.07.09, 52/14; 53/4; 54/20.

[note: 109] PS18 at para 9.

[note: 110] NE, 29 July 2009, 83/12.

[note: 111] NE, 29 July 2009, 84/5.

[note: 112] NE 23.07.09 p 51 line 22

[note: 113] NE 23.07.09 p 31 lines 1-3

[note: 114] NE 23.07.09 p 31 lines 8-10

[note: 115] NE 23.07.09 p 50 lines 29-31

[note: 116] NE 23.07.09 p 51 lines 12-18

[note: 117] NE 23.07.09 p 70 line 4

[note: 118] NE 23.07.09 p 54 lines 21-22

[note: 119] NE 23.07.09 p 26 lines 28-29

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