

Seah Kok Meng v Public Prosecutor
[2001] SGCA 40

Case Number : Cr App 26/2000
Decision Date : 21 May 2001
Tribunal/Court : Court of Appeal
Coram : Chao Hick Tin JA; L P Thean JA; Yong Pung How CJ
Counsel Name(s) : Surian Sidambaram and Mylvaganan Mahendran (Surian & Partners) for the appellant; Khoo Kim Leng David (Attorney General's Chambers) for the respondent
Parties : Seah Kok Meng — Public Prosecutor

Criminal Law – Special exceptions – Provocation – Accused's girlfriend complaining man disturbing her – Accused going to scene – Staring between accused and man – Accused getting wooden pole and attacking man – Death of man from injuries – Murder charge – Whether accused deprived of self-control by provocation – Whether provocation grave and sudden – Whether an accused's acts of retaliation always of an extreme degree where provocation defence to murder charge raised – Whether test of proportionality a factor to take into account or distinct and separate test – s 300 Penal Code (Cap 224)

Criminal Law – General exceptions – Intoxication – Consumption of beer by accused – Accused getting wooden pole and attacking man – Death of man from injuries – Murder charge – Whether accused so intoxicated he does not know of own acts – s 85 Penal Code (Cap 224)

JUDGMENT:

Grounds of Judgment

1. On 24 November 2000, the appellant was convicted of the charge of murder that on 2 May 1999, between 4.00am and 5.19am, outside Nikmath Restaurant, located at 24 Sims Avenue, Singapore, he caused the death of one S Salim Bin Ahmed. He was sentenced to suffer death. He appealed and the appeal was heard on 23 April 2001, and it was dismissed. We now give our reasons.

The facts

2. The facts leading to the killing on the fateful morning were these. On 1 May 1999, at about 9.00pm, some seven to eight hours before the incident, three persons, the appellant, his girlfriend Bok Swee Hoon (Bok) and the appellants friend Chan Kam Seong (Chan), were drinking beer at a hawker centre at Lorong 2, Geylang. An argument ensued between the appellant and Bok and to avoid further quarrelling, the appellant and Chan slipped away from the hawker centre leaving Bok behind. He also switched off his handphone so that Bok could not contact him.

3. The appellant and Chan spent considerable time loitering in the area between Lorong 2 and Lorong 12 Geylang until the early hours of the next morning. When they were at Lorong 12, the appellant switched on his handphone. Soon he received a call from Bok, who asked him where he was. He refused to answer her and just told her to go home.

4. Shortly after, at about 4.00am, and by then it was already 2 May 1999, the appellant received a second call from Bok, who told him that a Malay man was following her and had touched her. She complained that the man would not leave her alone and continued to be a nuisance. She also informed him that she was then at a coffee shop at the corner of Sims Ave and Lorong 5, Geylang.

5. On hearing that, the appellant was very worked up and, together with Chan, took a taxi to the coffee shop where Bok said

she was. On arrival, the taxi stopped on the other side of the road and the appellant and Chan alighted from it. The appellant walked across Sims Road towards the coffee shop where Bok was. The coffee shop bore the sign "Nikmath Restaurant". Chan remained where he was and did not follow the appellant in crossing the road.

6. At that moment, Bok was talking on a public telephone, which was located at the front right corner of the coffee shop as one faces the shop. The appellant approached Bok and asked who was the person disturbing her. She pointed to a Malay man [later established to be S Salim Bin Ahmad (Salim)] who was standing near another public telephone, a very short distance away. The appellant and Salim then stared at each other. Following this, the appellant went to the alley at the back of the coffee shop where he found a wooden pole, which was quite heavy. Armed with that, he returned to where Salim was and attacked him on his head and body. There was no retaliation by Salim. The appellant then left the scene with Bok and went into hiding in Malaysia. About a year later he was arrested in Malaysia and on 12 May 2000 he was brought back to Singapore to face the charge.

7. We ought to mention that the evidence of Chan was slightly at variance with the above. According to him, upon alighting from the taxi, the appellant told him that he was going to beat up the Malay man. He saw the appellant going into the lane behind the Nikmath Restaurant. Shortly afterwards, the appellant was seen carrying a wooden pole about two feet long. He then approached Bok, presumably asking her to identify the man who was harassing her. He next saw the appellant hitting Salim on the back of his head. Salim then fell onto the ground and the appellant continued to hit him two to three times on the head and four to five times on the legs. The appellant also used his right leg to kick the waist of Salim, and said "pergi mati" ("go and die" in Malay). As far as Chan saw it, there was no staring incident. Salim did not retaliate when the appellant was attacking him. The appellant then left the coffee shop with Bok. However, the trial judge did not accept the evidence of Chan as he felt that Chan appeared hostile and was not reliable.

8. The owner of Nikmath Restaurant, one Mr Assinar s/o Mamu (Assinar), was at the relevant time behind the counter. He saw the appellant approach Salim and use a wooden stick to hit Salim. He was not able to say where the blows landed. He did not hear any quarrelling between the appellant and Salim. He then came out of the counter and saw Salim sitting on the ground and leaning against the orange coloured coin phone stand. He shouted "Jangan" (meaning "don't" in Malay) three times and ran to make a call to the police. The evidence of Bok was along similar lines to that of the appellant.

9. Salim died several hours later in hospital. He was unconscious from the time the Civil Defence team came to the scene. The pathologist, Dr Paul Chui, who examined the body of Salim found, besides other injuries on the body, three major injuries to the head as follows:-

(i) a fracture of the skull over the right forehead with fragmentation of the nasal bones and fractures over the cheek area and injury to the brain with bleeding;

(ii) a fracture of the skull beneath the occipital scalp with bleeding over the surface of the brain;

(iii) a fracture of the base of the skull.

It was Dr Chui's opinion that these injuries were caused by the blunt force of an object which could have been a stick with a square or rectangular cross-section and the force used would have been moderately severe. It was also his opinion that each of these injuries would, in the ordinary course of nature, cause death.

10. In passing, we should mention that there was, moreover, one other set of significant injuries a fracture to Salim's ribs, and a tear in his kidney which was bleeding. In Dr Chui's opinion, these injuries were also sufficient in the ordinary course of nature to cause death, although in the present case, the actual cause of death were the head injuries.

11. The appellant gave several statements to the Police in the course of their investigation and three were sought to be admitted by the prosecution and not objected to by the appellant:-

- (i) a statement recorded on 15 May 2000;
- (ii) another statement recorded on 15 May 2000;
- (iii) a statement recorded on 17 May 2000.

12. The pertinent parts of the second statement recorded on 15 May 2000 were the following:-

As I was walking to the coffeeshop, I saw my girlfriend was on a silver colour public phone and she was facing the main road (Recorders note:- refers to Sims Ave). She did not see me as I came from the back of the coffeeshop. At the same time, I also saw a Malay man standing in front of my girlfriend. Both of them were about 2 feet away from each other. The Malay man (deceased) was alone.

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I hurried my girlfriend to put down the phone so that we could go back home. I was then rather unhappy with her behaviour and my tone also sounded unhappy. The Malay man (deceased) mistook me that I had passed remarks against him while I was talking to my girlfriend. As such, he uttered something at me in Malay which I could not understand. I wish to say that I do not either understand or speak Malay language. The Malay man (deceased) tone sounded angry just like me. When the Malay man (deceased) stopped talking, we started staring at each other for a short while. He appeared to be very fierce and I became frightened. I then walked away to the back of the coffeeshop. At that time, my girlfriend was still talking on the phone. While at the back of the coffeeshop, I saw a square-shaped wooden plank lying on the cemented floor.

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I wish to say that I picked up the wooden plank for self defence in case there is a fight between the Malay man and me.

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On my return, the Malay man (deceased) remained standing in front of my girlfriend. He stared hard at me as if he was going to hit me. Before the Malay man (deceased) could make any move, I immediately hit him with the wooden plank. I first hit him on one of his arms about one to two times. After that, he fell sideways onto the ground. I continued to hit him a few times with the wooden plank on his legs, shoulder and head. I believed I had hit the Malay man (deceased) on the side of his head as he was then lying sideways on the ground. The Malay man (deceased) did not retaliate at all as he was lying on the ground

13. The statement recorded on 17 May 2000 was in the form of questions and answers and we need only quote the following:-

Q2: When you were at Nikmath Restaurant located at 24 Sims Ave, why did you want to arm yourself with a wooden plank?

A2: The Malay man kept staring at me as if he was going to start a fight. As such, I walked to the back of the restaurant and by chance, I saw a piece of wooden plank lying on the ground and I picked it up. I took the wooden plank for self-defence in case a fight erupted between the Malay man and me.

Q3: Did the Malay man whom you referred to in your statement (Recorders note:- refers to the deceased) pose any threat or harm to you at Nikmath Restaurant located 24 Sims Avenue?

A3: His behaviour towards my girlfriend and the way he stared hard at me made me felt frightened. As a result, I must get myself prepared and to protect myself.

Q6: Do you know that the wooden plank as described by you in Q5 can cause serious injury to a person when it is used as a weapon?

A6: I only know that it can cause serious injury. However, I have never thought that it could cause death. This is the first time that I have used a wooden plank in a fight. If I know it can cause death, I would not have used it.

Q7: Did the Malay man whom you referred to in your statement (Recorders note:- refers to the deceased) retaliate while you were hitting him with the wooden plank?

A7: The Malay man fell onto the floor after I had hit him once or twice on one of his arms with the wooden plank. He did not retaliate at all.

Q8: Why did you continue to hit the Malay man whom you referred to in your statement (Recorders note:- refers to the deceased) after he had fallen onto the ground?

A8: I was afraid that he would stand up and hit me back.

Q14: Do you have anything else to say?

A14: I wish to say that I do not have any intention to cause the deceaseds death. I do not know him and bear no grudge against him. I just wanted to teach him a lesson. I never expected that it would cause his death. I beg for leniency and hope the judge would give me a chance.

14. In his defence, the appellant made basically two points. First, that when he went to "rescue" his girlfriend, Bok at Nikmath Restaurant, he was "a bit high on beer" But he knew where he was, what the time was and what he was doing. Second, that he went to the back lane behind the restaurant to get something to protect himself, and this was after he had chided Bok and asked her to hang up the phone and leave with him. Salim had appeared thereby to be angry and had said something. He had also stared at the appellant. Upon his return from the back lane with the wooden pole, he again asked Bok to hang up and leave and Salim did not like that. According to the appellant, at that point Salim raised his right hand to the shoulder level and as he felt that Salim was going to hit him, he struck Salim on the shoulder. As he was feeling high and frightened, he did not know thereafter how many times he struck Salim.

15. The appellant denied saying to Chan that he was going to beat up Salim. When he was referred to his answer to question 14 given on 17 May 2000, where he stated "I just wanted to teach him a lesson", the appellant said that that was suggested to him by the recording officer and he just signed. But when the recording officer and the interpreter gave evidence this was not

put to them.

Decision below

16. In evaluating the evidence of the witnesses, the trial judge felt that Assinar, though an earnest witness, had rather poor recollection of the events. As for Bok, while some of her evidence was corroborated by others, the trial judge was not able to rely on her evidence as she was under the influence of Erimin or Upjohn tablets and her recollection was also unclear. As for Chan, in view of contradictions in his evidence and his apparent hostility towards the appellant, the trial judge did not think it safe to rely on his evidence.

17. Turning to the appellant, the trial judge accepted that what the appellant stated in his statements was an honest account of the events. It was not suggested to the recording officer or the interpreter that there was anything incorrect in those recordings. Thus, to the extent that the appellants evidence in court was at variance with what was set out in his statements, the trial judge preferred the latter.

18. The trial judge found that the defence had not shown that there was grave and sudden provocation. It was not shown that when the appellant attacked Salim, he was deprived of self-control. He also went on to say that, even if there was provocation, the appellants actions were out of all proportion to it, and thus did not come within Exception 1 to s.300. He further found that there was nothing to show that the appellant was so intoxicated that he could not have possessed the intention to commit an offence under s 300.

Issues on appeal

19. Before us, as in the court below, the same two issues were raised : first, that of grave and sudden provocation, and second, that because of his intoxication, the appellant did not have the requisite intention to commit the offence of murder. Counsel submitted that the trial judge erred when he found that the appellant had not established that there was grave and sudden provocation. He also fell into error for holding that the appellant was not so intoxicated that he did not know what he was doing.

Provocation

20. Provocation, as a defence to a charge of murder, is set out in Exception 1 to s 300 of the Penal Code and the provision reads:-

Culpable homicide is not murder if the offender whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident.

The Explanation to that Exception provides that "whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact."

21. In *PP v Kwan Cin Cheng* [1998] 2 SLR 345 and *Lau Lee Peng v PP* [2000] 2 SLR 628, this Court laid down that there are two distinct requirements which must be satisfied before the defence of provocation can be successfully raised. First, is the subjective requirement that the accused was deprived of his self-control by provocation. Second, is the objective requirement that the provocation must have been grave and sudden which involved the application of the reasonable man test. The question involves considering whether an ordinary person of the same sex and age as the accused, sharing such of his characteristics as

would affect the gravity of the provocation and placed in the same situation, would have been so provoked as to lose his self-control.

22. Counsel for the appellant contended that on the evidence both the requirements were satisfied to enable the appellant to raise the defence of provocation. Counsel argued that what constituted provocation here was a series of acts, starting with the molestation of Bok by Salim and the appellant being informed by Bok about it, followed by Salim standing close to Bok when she was talking on the phone, Salim uttering something in Malay angrily when the appellant asked Bok to hang up and staring at the appellant, and finally, when the appellant returned from the back lane holding the wooden pole, Salim raising his right hand as if wanting to strike.

23. It would be appropriate if we should at this juncture set out the manner in which the trial judge viewed the situation (51 and 52 of the Grounds of Decision):-

The alleged molestation had ceased before the accused arrived at the coffee shop. The accused said that the deceased stared at him, and he stared back at the deceased. The act that precipitated the assault was the deceased raising his hand as though to hit him. This was not consistent with the accused's statement that Before the Malay man (deceased) could make any move, I immediately hit him with the wooden plank and his answer when asked whether the deceased posed any harm or threat to him, that His behaviour towards my girlfriend and the way he stared hard made me felt frightened with no mention of any gesture, hand or arm movements.

The evidence showed that he was angry with the deceased for accosting his girlfriend and annoyed at her for not leaving the coffee shop with him immediately. He did not say that he was so provoked that he had lost his self-control when he attacked the deceased.

24. Counsel urged us to bear in mind that, while the appellant and Bok were not married, their relationship was de facto that of a married couple. That was not disputed. Nowhere did the trial judge indicate a different view. The fact that the appellant was not married to Bok played no part in the determination of the trial judge. Counsel reiterated that the provocation was a continuous one. First the molestation, then Salim continued to stand close to Bok disturbing her, followed by the utterance and the stare, and eventually the raising of the arm. The appellant obviously lost his control and the attack was carried out in a frenzy as the appellant did not even know where and how many times he hit Salim. Counsel also pointed out that the appellant only went to arm himself with a wooden stick and not a knife or a broken bottle. That only went to show the defensive nature of that move.

Our decision

25. Like the trial judge, we did not think that it had been established that the appellant had, in fact, lost his self-control due to provocation. The circumstances showed that he was very much in control of the situation. Upon being informed by Bok that she was being disturbed by someone, he had the presence of mind to do the only proper thing : to go there to rescue her. On arrival at the scene, there was no altercation although Salim was standing close by. After the appellant asked Bok to hang up the phone and leave the place, there was some staring between the appellant and Salim. Whereupon the appellant went to the back lane and came back armed with the wooden pole. Thereafter, he attacked Salim. To justify his striking first, he alleged that Salim lifted his right hand up to his shoulder. But in his statement of 15 May 2000, he merely stated that before the Malay man could make any move, I immediately hit him with the wooden plank. More important to note was that Salim was not carrying any weapon or instrument which could be used as such. It seemed to us that every move of the appellant was very deliberate. He knew what he wanted to do. He found his implement and took the offensive against Salim, literally to teach the latter a lesson.

26. Turning to the second requirement, the objective requirement laid down in *Kwan Cin Cheng*, again, we did not think whatever provocation there was in the circumstances was "grave and sudden". A reasonable person, who was not out to get even, would not, in the circumstances, have gone on to search for some weapon and carry out an assault of this kind. The severity of the physical assault which the appellant inflicted on Salim, which eventually led to his death, showed, in the circumstances, that the appellant was bent on teaching Salim a lesson. The appellant might well not have appreciated that striking Salim with the wooden pole would lead to his death, but that did not matter as it was clear that he intended to cause the three fractures to the skull of Salim, as there was nothing accidental about the fractures, and any one of the fractures was sufficient in the ordinary course of nature to cause death: see *Virsa Singh v State of Punjab* (1958) AIR SC 465 and *PP v Visuvanathan* [1978] 1 MLJ 159. Accordingly, the appellant was rightly convicted of murder.

Drunkenness

27. In the light of our views above, there was really nothing meritorious in the defence of intoxication. It was not in dispute that the appellant had, before the incident, consumed a fair amount of beer. While he was "high" because of the effect of beer, he was not completely drunk. He was in fact conscious of the surroundings and knew what he was doing. This came out from his evidence:-

Q: When your girlfriend called you for the first time when you were at Lorong 12 Geylang coffee shop, were you drunk?

A: I was not completely drunk. I was a bit high. My gait was not steady.

Q: But Mr Seah, you were aware of your surroundings; you knew what was going on, am I correct, at that time? You were aware of the surroundings that means you know what time it was, where were you, what were you doing?

A: Yes.

Q: In fact when your girlfriend called you the first time you had the presence of mind to ask her to go back by herself?

A: Yes.

28. By s 85 of the Penal Code, intoxication as a defence is rather restricted. It applies only if by virtue of intoxication the accused did not know

that the act or omission, which constituted the offence was wrong, or did not know what he was doing and, (a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or (b) he was then, by reason of intoxication, insane, temporarily or otherwise.

29. The circumstances of the present case did not satisfy the condition laid down in s 85 for the defence of intoxication to be invoked. In our judgment, it was clear that the appellant knew what he was doing. Even according to the appellant, he appreciated the danger and had the presence of mind to get a wooden pole for his own protection. He could not have been so intoxicated. The truth of the matter was that the appellant wanted to teach Salim a lesson for disturbing or trying "to get fresh" with Bok and getting the wooden pole was the means by which he sought to achieve that objective. In the result, the appeal was dismissed.

30. Before we conclude, there is a matter we ought to refer to. The judge below had expressed some concern on the following

passage of this Court in *Lau Lee Peng v PP* [2000] 2 SLR 628:-

In the light of the discussion in *Kwan Cin Cheng*, the test of proportionality is probably not a distinct requirement for raising the defence of provocation. It is a factor to be taken into account in determining whether the objective test of gravity and suddenness is fulfilled. Therefore, the fact that the retaliatory acts may have been out of proportion to the provocation offered does not necessarily mean that the defence must fail. This is because where the provocation defence in Exception 1 to s 300 is raised, the accuseds acts of retaliation would ex hypothesi always have been of an extreme degree, resulting in the death of another person. An inquiry into proportionality does little to answer the essential question of whether an ordinary person would, upon receiving the provocation in question, have reacted in the same way the accused did. (Emphasis added).

In particular, the two sentences underscored above.

31. The judge seemed to think that it did not follow that an accuseds acts of retaliation "would *ex hypothesi* always have been of an extreme degree." He pointed out that under s 300 there are four classes of acts which constitute murder, and of those four classes, one of them (s 300(d)) relates to an act which the accused knows is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, with no requirement that there should be any intention on his part to cause death or bodily injury. Accordingly, an act which falls within s 300(d), and which was brought about as a result of provocation, may not necessarily have been "of an extreme degree".

32. His second point would appear to be that the test of proportionality is a distinct and separate test and, if an accuseds act of retaliation was out of proportion to the provocation, the defence under Exception 1 would not be available to him.

33. We agree with the trial judge that the resulting act of provocation may not always be of an extreme degree just because death ensued, though it invariably is. We accept his contention that an act which falls within a s 300(d) is essentially the doing of a dangerous act and that act need not necessarily be of an extreme degree.

34. As regards the question of proportionality, we would reiterate what is stated in the passage in *Lau Lee Peng* that the test of proportionality is a factor to be taken into account in determining whether the objective condition is satisfied. All we stated was that the fact that the act of retaliation may be out of proportion to the provocation offered does not mean that the defence must fail. In as much as there are degrees of provocation, the same applies to the severity of the response. Besides, there are also degrees of disproportionality. In an issue such as this, which is a question of fact, one cannot be so clinical or emphatic as to say that the provocation and the response must always be matched, otherwise the defence will fail. It is the overall circumstances which the trial judge must weigh, and superimposed into that consideration how a reasonable person in those circumstances would have reacted, and then come to a conclusion.

Yong Pung How

LP Thean

Chao Hick Tin

Chief Justice

Judge of Appeal

Judge of Appeal