Mohamed Abdullah s/o Abdul Razak v Public Prosecutor
[2000] SGHC 77

Case Number : MA 211/1999

Decision Date : 03 May 2000

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Rudy Gunaratnam (Rudy & Partners) for the appellant; Lee Lit Cheng (Deputy Public Prosecutor) for the respondent

Parties : Mohamed Abdullah s/o Abdul Razak — Public Prosecutor

Criminal Law – Offences – Unlawful assembly – "Common object" – "Common intention" – Distinction between common object and common intention – ss 141, 146 Penal Code (Cap 224)

Criminal Law – Offences – Unlawful assembly – Members of unlawful assembly armed with deadly weapons – Whether sufficient evidence to establish charge – ss 146, 148 Penal Code (Cap 224)

Evidence – Witnesses – Failure of defendant to call material witnesses – Whether adverse presumption should be drawn against defendant – Effect of presumption – s 116 (g) Evidence Act (Cap 97)

Evidence – Previous inconsistent statements – Human fallibility in observation and recollection of events – Whether discrepancies sufficient to destroy credibility of witness

: ***Introduction***

In the proceedings below, the appellant was charged, with one other, under ss 146 and 148 of the Penal Code (Cap 224), for rioting and being a member of an unlawful assembly armed with deadly weapons. He was found guilty of the charge by the district judge and received a sentence of two years` imprisonment and six strokes of the cane. I dismissed his appeal against conviction and sentence. I now set forth my reasons.

The undisputed facts

The incident for which the appellant was charged occurred in the early hours of 14 January 1999. On that morning, the police received a 999 call from the public at about 1.08am. This first information report (`FIR`) stated:

> *About ten men are fighting - using parangs (Line disconnected).*

The incident had taken place in the back alley of a shop, called `Abdullah & Sons`, at Blk 3, Geylang Serai. Two police officers responded to the 999 call. When they arrived at the scene at around 1.25am, they were met by three people in the back alley, namely, Amjad Ali (`Amjad`), Mohamed Naushad Ali (`Naushad`), and their father Abdullah s/o Gulabdin (`PW5`). The two brothers, Amjad and Naushad, had sustained some injuries. One of the police officers, PW9, spoke briefly to one of the brothers, and then conducted a search of the back alley. He found a broken bottle neck under one of the tables in the back alley. He also found a few small fragments of glass and a few fresh drops of blood on the floor. He left the scene at about 1.40am. At about 2am, another police officer, PW7, arrived at the scene. He searched and checked the back alley, and discovered the broken bottle neck under the table.

After carrying out investigations, the police arrested one Mohamed Rizuan bin Abdul Aziz (`DW1`). Some days after DW1`s arrest, the appellant turned up on his own accord at Geylang Police Station, whereupon he was immediately detained and put in the lock up. Subsequently, charges were brought against both the appellant and DW1 for rioting and being members of an unlawful assembly armed with deadly weapons. The charge against the appellant read as follows:

> *You, ... Mohamed Abdullah s/o Abdul Razak ... are charged that you, together with one Mohammad Rizuan bin Abdul Aziz and five other persons on 14 January 1999 at or about 1.08am, at Blk 3 Geylang Serai, Singapore, were members of an unlawful assembly, armed with deadly weapons, to wit, broken bottles and parang, your common object was to cause hurt to one Amjad Ali s/o Abdullah and one Mohd Naushad Ali s/o Abdullah, and in prosecution of the common object of such assembly, you or a member thereof caused hurt to the said Amjad Ali s/o Abdullah and Mohd Naushad Ali s/o Abdullah and you have thereby by virtue of s 146 of the Penal Code committed an offence punishable under s 148 of the aforesaid code (Cap 224).*

The prosecution`s case

The key witnesses for the prosecution were the two brothers, Amjad and Naushad. They alleged that at about 1am on 14 January 1999, they were assaulted by a group of about seven to ten Malay men, in the back alley behind their father`s shop house at Blk 3 Geylang Serai. The appellant and DW1 were part of that group of assailants. At least two of the assailants were armed with broken beer bottles and another one had a parang.

The incident occurred during the Muslim fasting month of Ramadan. Amjad and Naushad`s father, PW5, had rented the space in the back alley of his shop to sell his goods as part of the Ramadan bazaar being held in the area. Each night, when the shop was closed, the goods which were displayed at the stall in the back alley would be covered by canvas, and one of the brothers would sleep on the tables in the back alley to guard the goods. Naushad testified that sometime in the late hours of 13 January 1999, he had closed the stall, swept the back alley, and then gone upstairs to take a shower. After his shower, it was close to 1am, and he went downstairs to the back alley to wait for Amjad, who was taking a shower after him. At that time, his father was asleep on the second storey of the shop house. When he went out to the back alley, he saw the appellant and two other Malay men seated on one of the tables in the back alley. He recognised the appellant, as he had seen him on several occasions in the past month, hanging out with a group of people at a coffee shop around the corner (`the coffee shop`). Naushad said he then went to sit on the table opposite the three men. He was waiting for Amjad to come down, to decide who would sleep outside for that night. He was also waiting for the three Malay men to leave on their own accord. After a few minutes, he was joined by Amjad.

Amjad testified that when he went out to the back alley to join Naushad, he also saw the three men chit-chatting and sitting on a table in the back alley. Like Naushad, he recognised one of the three men as the appellant. He had seen all three men before at the coffee shop, but he did not know any of their names at that time. After talking to each other for a short while, Naushad approached the three men and asked them to leave, and informed them that he wanted to lay something out on the table, and to sleep there. Naushad claimed that he spoke in a polite and quiet tone. However, the three Malay men became aggressive, and started swearing and uttering vulgarities in Malay. One of them spoke roughly and loudly, saying in Malay: `Is this your father`s place or what?` Another one of

them challenged Naushad to a fight. At this point, Naushad stepped back, but the three men grabbed him and started dragging him towards the car park outside the back alley. One of the men pulled him by his shirt and one hand, the second man pulled him by his shirt and the other hand, and the third man pulled him by the back of his shirt.

Amjad testified that when he saw the three men grab his brother, he rushed to his brother`s aid. When the appellant saw Amjad rushing towards them, he let go of Naushad and went towards Amjad. Around this time, Amjad saw another three Malays arrive at the entrance of the back alley. One of these men was DW1. These three Malays went to the aid of the appellant, and together, the four of them proceeded to assault Amjad with their fists. In the midst of this, DW1 ran off for a short while, and came back with a beer bottle. Amjad saw DW1 breaking the beer bottle against one of metal poles at the entrance of the back alley, and then charging towards him holding the neck of the broken bottle. He managed to dodge DW1`s blow, but one of the other assailants then hit him on the left part of his neck with a broken beer bottle. At this point, he fell backwards, twisting his right ankle as he fell. At the same time, he heard the sound of glass falling to the floor near him. Suddenly someone shouted `Police`, and the men ran away. Thereupon, Amjad got up, went to the metal poles at the entrance of the back alley, and saw about nine to ten male Malays running away. One of them was carrying a parang. They were shouting `Sar Kong Sar` (translated from Hokkien: `three zero three`). All this happened within the space of about four to five minutes. After the assailants had run off, Amjad went into the shop and called the police. He was the one who lodged the FIR.

Meanwhile, Naushad was struggling with his other two assailants. They dragged him to the car park, whereupon he managed to break free. When he turned around to run back towards the back alley, he saw three persons beating Amjad up in the back alley. Before Naushad could get to the back alley, his two original assailants were joined by two other persons and these four men came towards him. One of them was carrying a broken bottle and another carried a parang. When Naushad saw this, he quickly squatted down and shielded his face with his arms. The four persons proceeded to punch and kick him, shouting vulgarities in Malay. He felt an extreme pain in his left elbow, and he also recalled someone shouting `police`. After the shouting, he felt one or two of the four assailants continue to beat him, then he pushed one of them away and ran into the back alley. He passed Amjad, who was standing alone in the back alley at that time. He hid himself in a corner at the end of the alley. When all was quiet, he emerged from his hiding place and went to the shop. Amjad was inside the shop, and told him that he had called the police. Their father was also standing inside the shop, and he gave Naushad a cloth for his bleeding elbow.

Amjad and Naushad`s father, PW5, testified that he had closed the shop at the usual time on the night of 13 January 1999 at around 11pm. Around the time of the incident, he was sleeping on the second floor of his shop. He heard some commotion outside, but he did not get up at first because he thought it was the normal sound of the thoroughfare outside. Subsequently, he heard the sound of bottles breaking close by, and he quickly got up and went downstairs. He saw his son Amjad bleeding from the left side of his neck, and his other son Naushad bleeding from his hands. He quickly went out of his shop, to the entrance of the back alley, and he saw about eight to nine men a short distance off running away in the same direction.

PW4, who worked in a mosque located near the scene of the incident, was also called as a witness for the prosecution. At the time of the incident, PW4 had a temporary stall selling drinks and food opposite Blk 3 Geylang Serai. He was acquainted with Amjad, Naushad and PW5, but he was not close to them. Apparently, they only spoke to each other during the Ramadan month when they sold things at their respective stalls. PW4 testified that on the night of the incident, he was closing his stall, when he heard some shouting coming from Blk 3. The shouting was in Malay, and it was a challenge for a fight. He was on a ladder behind his stall and he could not see what was happening. He climbed

down from the ladder and walked towards Blk 3, whereupon he saw about seven to eight persons running away. He did not see the faces of the persons running away. He could make out that one of them was holding a bottle, although he could not tell whether the bottle was broken or not. He also saw one of them wearing the uniform of Global Airfreight. Thereafter he went back to close his shop. It was only when he saw the police and ambulance arrive shortly thereafter that he realised that someone had been injured. At the trial, he added that he had also seen one of the persons running away holding a `long object`.

The police arrived shortly after receiving the FIR. Amjad spoke briefly to the police, and told them that he had been hurt by a broken bottle. Naushad did not speak to the police. The police officers found a broken bottle neck under one of the tables in the back alley, and a few fresh drops of blood and two small glass fragments on the floor. No glass fragments were found around the metal poles (where, according to Amjad, DW1 had smashed a glass bottle).

Amjad and Naushad were subsequently conveyed to Changi hospital, where they were examined by Dr Jeremy Tan. Naushad was found to have sustained three lacerations on his upper right arm, measuring 4 cm, 2 cm and 3 cm, and a 1.5 cm laceration on his left elbow, which required stitching. Amjad suffered a 3 cm laceration on the left portion of his neck and a twisted right ankle. Dr Tan was of the opinion that these injuries were consistent with the brothers` complaint of being assaulted by a broken bottle or a parang.

The defence case

The appellant did not dispute that there was a fight between himself and Amjad and Naushad, but his version of what happened was completely different from theirs. First, he alleged that the fight had been initiated by Amjad and Naushad. Secondly, he claimed that he was not part of any unlawful assembly. He also alleged that no parangs or broken bottles had been used in the course of the fight. The appellant`s evidence was that he was with his friend, `Arab`, and Arab`s girlfriend just before the incident. He had gone into the back alley to call his mother from Arab`s handphone, as it was quieter in the alley. At that time, Naushad was sitting on a table in the back alley, while PW5 was sleeping on a chair. Naushad told the appellant to leave as that was his `area`. The appellant then told Naushad to `give him a minute` to finish his call, but Naushad pushed him, so that he fell, and dropped the hand phone. The appellant said that he then stood up and pushed Naushad back whereupon Naushad punched him and they started punching and kicking each other. His friend, Arab, came and picked up the handphone and ran away. While they were fighting, PW5 woke up and told them to stop fighting. Amjad then came and joined in the fight, punching the appellant in the face. Suddenly, a group of about four or five men came into the alley. The appellant did not know any of the men, and he thought they were coming after him, so he ran off to the coffee shop. Thereafter, he walked home. He suffered only minor injuries and did not seek medical treatment. Two days after the incident, DW1`s father came to look for him and asked him to go to Geylang Police Station. At first, he refused to do so but subsequently he did. When he arrived at the police station, he was put in the lockup and subsequently charged with the offence of rioting. The appellant claimed that he did not know DW1 before the incident, and had not noticed whether DW1 was one of the men in the group that night.

The only other defence witness was the co-accused, DW1. His evidence was that before the incident, he was sitting alone at the coffee shop waiting for a drink when he saw Amjad punch the appellant. He recognised the appellant, who often frequented the coffee shop. Next, he saw the appellant hit Amjad back and then Naushad joined in. DW1 said that he ran to stop Naushad and told him to relax. The brothers asked him whether he wanted to interfere and then they started pushing

him and punching him. The appellant ran away at this point. DW1 fought with the two brothers for a few minutes, during which he saw three Malay men approaching. At first, he thought that the three Malay men were going to attack him, but they attacked the two brothers instead. In his statement to the police, he said that he then joined in with the three Malay men to punch the two brothers, who fought back. Thereafter, the two brothers ran off into the market behind Blk 3 Gelang Serai, and the three Malays ran off elsewhere. He then ran to the main road, and took a taxi home. During the trial, DW1 changed his evidence and said that he did not join in with the three strangers to punch and kick Amjad and Naushad. Instead, he had thrown a few punches out of necessity, to get away, and then he had run off.

Decision of the court below

The district judge found that the prosecution had proven the case against the appellant and DW1 beyond reasonable doubt. In coming to his decision, he chose to believe the prosecution witnesses, and in particular, Amjad and Naushad, over the appellant and DW1. He found major discrepancies between the appellant and DW1`s versions of evidence. He also found inconsistencies within the evidence which they gave at the trial and their earlier statements to the police. On the other hand, he found that Amjad and Naushad were consistent in their evidence, despite being subject to lengthy cross-examination by the defence counsel.

Issues in the appeal

Several issues of appeal were raised before me, which may be subsumed into two main grounds. First, counsel for the appellant argued that the district judge erred in fact and law when he held that the charge under ss 146 and 148 of the Penal Code (`PC`) had been made out against the appellant, as (a) there was no common object to cause hurt to both Amjad and Naushad; and (b) there was no evidence of `deadly weapons` having been used. Secondly, it was submitted that the district judge should not have believed Amjad and Naushad`s evidence over the versions given by the appellant and DW1. In particular, it was alleged that the district judge had failed to consider the following factors: (a) that there were material contradictions between Amjad and Naushad`s versions; (b) that the appellant had himself gone to see the police after the incident to assist in investigations; (c) that the appellant`s testimony was corroborated by his s 121 statement to the police; and (d) that Naushad`s description of how he was attacked was inconsistent with the injuries he had sustained.

The relevant provisions

The appellant was charged under s 148 of the PC, for an aggravated form of rioting. The section states:

> *Whoever is guilty of rioting, being armed with a deadly weapon, or with anything which, used as a weapon of offence, is likely to cause death, shall be punished with imprisonment for a term which may extend to 7 years and shall also be liable to caning.*

The offence of `rioting` is defined in s 146 of the PC, which states:

> *Whenever force or violence is used by an unlawful assembly or by any member thereof, every member of such assembly is guilty of the offence of rioting.*

By definition, the offence of rioting can only be committed by an `unlawful assembly`. The definition of `unlawful assembly` is, in turn, set out in s 141 of the PC. It postulates an assembly of five or more persons, having a common object, viz one of those objects specified in paras (a) to (e) of s 141. Paragraph (c) of s 141 was relevant in the present case, and it states:

> *An assembly of 5 or more persons is designated an `unlawful assembly`, if the common object of the persons composing that assembly is -*
>
> *(c) to commit any mischief or criminal trespass, or other offence;*

Elements of the offence

Applying the relevant provisions, the following elements must be proved beyond reasonable doubt in order to establish the charge against the appellant:

(i) that there was an assembly of five or more persons;

(ii) that the appellant was a member of that assembly;

(iii) that the common object of that assembly was to cause hurt to Amjad and Naushad; and

(iv) that one or more members of that unlawful assembly was armed with a deadly weapon.

Element 1: `assembly of five or more persons`

The district judge found that there were altogether seven assailants involved in the attack against Naushad and Amjad. The appellant did not appeal specifically against this finding. In any event, I agreed with the district judge that the prosecution had proved that there was an assembly of five or more persons involved in the assault against Amjad and Naushad. The witnesses called by the prosecution did not state with total certainty the exact number making up the assembly that night. That was understandable, since everything took place suddenly and in a short space of time. What was important, though, was that they all agreed that there was a large group of at least seven men involved in the assault against Amjad and Naushad.

Element 2: the appellant was a `member` of that assembly

To establish the charge, the prosecution also had to show that the appellant was a `member` of the unlawful assembly of men involved in the assault that night. Section 142 of the PC states:

> *Whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly.*

From evidence given by Amjad and Naushad, the appellant was clearly a `member` of the unlawful assembly. He was sitting with two other men on a table in the back alley, chit chatting and laughing. Together with the other two men, he subsequently assaulted Amjad and Naushad, and at least five others arrived and joined in. According to Amjad and Naushad, there were altogether about eight assailants - Amjad was attacked by the appellant, DW1 and two others, whereas Naushad was attacked by four other men. In addition, Amjad and Naushad recognised both the appellant and DW1, whom they had seen on several occasions hanging out together at the coffee shop, in the same group. In fact, a few hours before the assault, Amjad had seen the appellant, DW1 and another one of his assailants together in a group of about eight to ten Malay men at the coffee shop. Naushad said that he, too, had seen this group earlier that evening at the coffee shop, and that his assailants were all part of that group.

In contrast, the appellant`s evidence was such that he was completely dissociated from the group of four to five men. He would have the court believe that the group of strangers descended upon Amjad and Naushad abruptly and for some unknown reason. Like the appellant, DW1 also attempted to dissociate himself from the unlawful assembly. However, the veracity of their evidence became questionable, when their versions were compared. There were material discrepancies in their accounts of what actually happened. DW1`s version of evidence was as follows: he saw Amjad and Naushad beating up the appellant, and he approached them alone, and told them to stop. As he was exchanging words with the brothers, the appellant ran off. Then, Amjad and Naushad attacked him, he alone fought with them for a few minutes. Thereafter, a group of three men arrived and attacked Amjad and Naushad. In contrast to DW1`s version, the appellant made no mention of a single stranger (DW1) coming up to intervene on his behalf. Instead, he said he was being beaten up by Amjad and Naushad, when a group of about four to five men approached. He ran off at this point, and while making his escape, he saw the group talking to the brothers. He did not stay long enough to see whether they fought.

Faced with such material and glaring discrepancies in the appellant and DW1`s evidence, it was not surprising that the district judge disbelieved them, and believed Amjad and Naushad, whose versions were consistent and matched each other`s.

Element 3: common object was to cause hurt to Amjad and Naushad

Having found that there was an assembly of at least seven men, and that the appellant and DW1 were part of that assembly, the district judge proceeded to find that the assembly was `unlawful` within the definition of s 141 of the PC, as there was a `common object` among the members of that assembly to cause hurt to Amjad and Naushad. Before me, the appellant appealed against this specific finding. Counsel for the appellant submitted that, based on Naushad`s evidence, it was inconceivable that the appellant and the rest of the group had the common object of hurting Amjad and Naushad. The argument ran as follows: Naushad testified that he was sitting alone for about ten minutes and was about 3.5 metres away from the three Malay men. He further gave evidence that Amjad joined him and they chatted to each other for another ten minutes before he approached the three Malay men. In view of the close proximity between the three Malays and Amjad and Naushad, and the opportunity to attack earlier, the appellant and the group would have attacked the brothers much earlier if there was a real common object to cause hurt to them. There was no evidence by Amjad and Naushad to suggest any intervening factors that caused the delay in the alleged attack.

I found no merit in this submission. At the most, it only showed that the appellant and his friends did not have a pre-conceived plan to cause hurt to Amjad and Naushad. However, it is well established that in order to show `common object` for the purposes of s 141 and s 146 of the PC, no pre-

arranged plan is necessary. The meaning of `common object` is different from `common intention`, in that the former does not require prior concert, or a common meeting of minds before the attack. Thus, the Court of Criminal Appeal ruled in **Chandran v PP** [1992] 2 SLR 265 that:

> *In our view, it is erroneous to suggest that the prosecution must prove the common object of killing in a prosecution involving s 149 of the Code. All the necessary ingredients to sustain the convictions were properly found by the trial judges. Section 149 does not require proof of a pre-arranged plan and a common intention which a prosecution involving s 34 of the Code would require. The `common object` under s 149 of the Code must not be confused with the `common intention` under s 34 of the Code.*

Once `common object` is differentiated from `common intention`, one immediately sees the flaws in the argument that the fact that there had been a `delay` in the attack negated any `common object` to cause hurt to Amjad and Naushad. The common object of the group was to inflict injury on Naushad and Amjad, and this common object would have been formed at or about the time when Amjad came to the aid of Naushad.

Counsel for the appellant also submitted that there could not have been a common object to cause hurt to Amjad and Naushad, since the assailants were divided into two groups. He argued that if the common object to cause hurt was real, the two groups of assailants would not have been separated. He also pointed out that if the common object was to cause hurt to Amjad and Naushad, there would have been evidence adduced to show that they were attacked at the same time. He argued that it was inconceivable that Amjad was only attacked when he went to the aid of Naushad. Again, I found no merit in this second submission. The timing and co-ordination of the attack on the two brothers, the circumstances leading up to it and the overt acts of the assailants allowed the court to draw the irresistible inference that the men shared a common object to cause hurt to Amjad and Naushad. I did not find it either incredible or surprising that the assailants had been divided into two groups - indeed, this fact flowed naturally from Amjad and Naushad`s evidence - Amjad and Naushad testified that, first, Naushad was attacked and dragged off towards the car park by the appellant and two other assailants. When Amjad rushed forward to save his brother, the appellant released his hold on Naushad and went for Amjad. Thereafter, four men (including DW1) joined the appellant and started beating up Amjad. Two men joined Naushad`s two original assailants and punched and kicked Naushad. Clearly, the two groups were part of the same unlawful assembly with the common object to inflict injury on Amjad and Naushad.

Element 4: One or more members of that unlawful assembly was armed with deadly weapons

The next issue for me was whether credible evidence had been produced by the prosecution that any of the assailants had been armed with `deadly weapons` at the material time. A `deadly weapon`, as shown in s 144 of the PC, is anything which, used as a weapon of offence, is likely to cause death. In this case, there was no evidence that the appellant himself was armed with any deadly weapon. However, by virtue of s 149 of the PC, he would nevertheless be liable under s 148 of the PC for the aggravated offence of rioting armed with a deadly weapon, so long as one member of that unlawful assembly was so armed.

The prosecution alleged that broken bottles and parangs were used in the assault against Amjad and Naushad, but counsel for the appellant argued that there was no evidence whatsoever to support this allegation. In brief, he made the following points before me:

(a) Amjad failed to mention any glass breaking in his statement to the police;

(b) Amjad failed to point out the broken bottle to the police when they arrived at the scene, notwithstanding that he was a police officer himself;

(c) PW4 testified that he did not hear the sound of bottles being broken. He also failed to mention any long object in his statement to the police. He only recalled having seen the long object at trial. In any event, he did not catch a clear view of the long object and was unable to identify what it was;

(d) the photographs taken by the police showed that the floor of the back alley was littered with rubbish, despite Naushad`s claim that he had swept the floor prior to the incident. The broken bottle and glass fragments were part of the rubbish on the floor of the back alley prior to the incident, and had probably been lying there for some time before the incident;

(e) the police officers who conducted the searches of the back alley on the evening of the incident testified that they had looked for physical evidence at the scene but did not find anything besides the broken bottle neck and two small fragments of glass. The two small glass fragments were smaller than the size of a palm. They did not find any other evidence of dangerous weapons. They also did not find any glass fragments near the metal poles where Amjad alleged that DW1 had smashed a glass bottle. One of the police officers, PW7, also testified that he had found it strange at that time that the walkway and back alley was clear of broken glass;

(f) The prosecution did not adequately explain the lack of glass fragments around the metal poles, where DW1 had allegedly smashed the beer bottle before attacking Amjad with it. PW5 testified during his cross-examination that, from the time he first saw the glass fragments on the floor to the time the photographs were taken by the police, he was present at the scene of the incident. He further testified that he did not see anyone sweeping the area or removing the glass or anything else from the scene. Thus the prosecution`s suggestion that someone might have swept the area after the police initially arrived and before the photographs were taken by the scene-of-crime officer was not sustainable.

As counsel for the appellant rightly pointed out, no parangs were found on the scene, and there was also a lack of large amounts of broken glass at the scene to indicate that a broken bottle had been smashed in the vicinity of the back alley. However, having perused all the evidence before the court, I found that the prosecution had nevertheless adduced sufficient evidence to show beyond reasonable doubt that some of the members of the unlawful assembly had been armed with such deadly weapons. Quite apart from Amjad and Naushad`s oral evidence on the issue, the prosecution also adduced the following evidence: first, PW4 testified that one of the men that he saw running off was holding a bottle in his hand. This was recorded in his statement to the police. He confirmed at the trial that he had clearly made out the shape of a bottle in the hand of one of the men he had seen running off. PW4, who was merely a casual acquaintance of Amjad and Naushad, had no interest in the case, and there was no suggestion that he had fabricated the evidence about the bottle. At the trial, PW4 also mentioned that he saw one of the men carrying a long object and swinging his arms as he ran off. Although he had failed to mention this in his earlier police statement, there was again no suggestion that he had deliberately made up this evidence, as indeed he had no reason to do so.

Secondly, the FIR received by the police stated that parangs had been used in the course of the fight. In the present case, the FIR emanated from the 999 call received at the Radio Division of the Singapore Police Force, and it fell within s 115 of the Criminal Procedure Code (Cap 68) (`CPC`). A certified true copy of the original recorded FIR was admissible under s 117 of the CPC to prove the

content of the original report, and of the date, time and place at which the information was received. Apart from its main purpose of setting off police investigations into an offence, the FIR is also valuable evidentially as it is a record of the initial information of the offence without subsequent embellishment. Although it could not constitute substantive evidence, the FIR in this case corroborated the evidence of the prosecution`s witnesses that at least one of the assailants had been armed with a parang.

Thirdly, I found that the medical evidence before the court supported the prosecution`s case that the assailants had been armed with weapons like broken bottles and parangs. Counsel for the appellant pointed out to me that during Dr Tan`s cross-examination, he had said that the injuries were consistent with those caused by a `blunt object` and that this was inconsistent with the prosecution`s case, since a broken bottle and a parang were not blunt objects. However, I disagreed with him. Having examined the record of evidence below, I found that the crux of Dr Tan`s evidence was that the injuries sustained by Amjad and Naushad were consistent with their complaints, which was that they had been attacked by persons armed with parangs and bottles. This was what the doctor stated in his written report, and when he gave evidence at the trial during his examination-in-chief. I also disagreed with counsel for the appellant that Dr Tan had testified during his cross-examination that the injuries could only have been caused by blunt objects, and therefore that bottles and parangs could not have caused those injuries. If one was to read Dr Tan`s evidence carefully in its entirety, it would become clear that what he actually said in cross-examination was that although the injuries were consistent with those caused by an assault with bottles and parangs, it was possible for those same injuries to have been caused by some other object, which was blunt, like a wooden stick, for example. The crucial point, it seemed to me, was that Amjad and Naushad had sustained cuts and lacerations, one of which was even deep enough to require stitching. Those injuries could not have been inflicted by punches and kicks from the assailants` bare fists and feet alone. Although the injuries could have been caused by blunt objects like a wooden stick, for example, Dr Tan had clearly testified that those injuries were consistent with injuries caused by an assault with a bottle, or even a parang, if the appropriate impact had been made. Notably, when the defence counsel suggested that the injuries should have been more serious if a parang was used, Dr Tan disagreed and pointed out that the severity of the injury depended on several other factors, including the amount of area contacted during impact. In any event, it was not necessary for the prosecution to prove that parangs had actually been used to inflict the injuries found on the victims - the question in this case was whether any member of the assembly had been armed with deadly weapons like broken bottles or parangs. In my judgment, the complaint in this case, as supported by other evidence, was that the assailants had been armed with broken bottles and a parang, and the medical evidence was clearly consistent with the complaint.

The trial judge`s decision to believe Amjad and Naushad`s evidence over the appellant`s evidence

I now move on to deal with the appellant`s argument that the district judge had erred when he chose to believe Amjad and Naushad`s evidence over that of the appellant.

The district judge found that Amjad and Naushad were consistent with their evidence throughout, and their versions of what happened matched each other`s. However, counsel for the appellant submitted that the district judge had failed to consider that there were material contradictions between Amjad and Naushad`s versions. He cited four instances of such material contradictions.

The first three instances can be easily dispensed with, for I found that they did not constitute material contradictions at all. Counsel for the appellant pointed out, first, that Naushad said in his

examination-in-chief that, after he asked them to leave the back alley, one of the three Malay men challenged him to a one-on-one fight. Yet, Amjad did not mention this in his evidence, notwithstanding the fact that he had been standing a few metres away at that time. Secondly, Amjad testified that Naushad had moved back when he was shouted at by the three Malays, but Naushad failed to mention the fact that he had moved back. Thirdly, Amjad testified that upon seeing Naushad being manhandled by the three Malays, he tried to stop them but was stopped by the appellant, who was soon joined by another three Malays (including DW1). This contradicted Naushad`s evidence that it was only when he was pulled to the car park that the appellant let go of him to go to Amjad. In my judgment, these were only minute details, and the fact that they varied did not change the consistency or credibility of Amjad and Naushad`s evidence. In view of the fact that everything happened abruptly and in a short span of time, it was not surprising at all that Amjad and Naushad did not have the same recollection of every minute detail that transpired. Moreover, no two persons can describe the same event in exactly the same way. In weighing the evidence of witnesses, human fallibility in observation, retention and recollection will be recognised by the court: see **Chean Siong Guat v PP** [1969] 2 MLJ 63 . The question for the court in each case is whether the alleged discrepancies are sufficient to destroy the credibility of the witnesses, and I found that they were not in the present case. In my judgment, counsel for the appellant failed to achieved anything by such hair-splitting and microscopic dissection of the evidence.

The fourth instance of material contradiction cited by counsel for the appellant was Amjad`s testimony that, when he went to save Naushad, another three Malays (one of who was DW1), had arrived at the scene and were standing at the entrance of the back alley. Counsel for the appellant pointed out that Naushad had testified that he had only seen DW1 entering the alley and not three men. However, I found that this was not an entirely accurate portrayal of Naushad`s evidence. What Naushad actually said at the trial was that, as he was being pulled towards the car park, he was busy trying to break free, and he was not really aware of what was happening behind him, or what was happening to Amjad, or who was there. He did testify that at one point of time he noticed DW1 entering the back alley, and he had not noticed anyone else. But he then went on to say that, shortly after, when he broke free, he saw Amjad being beaten up in the back alley by three men. A witness`s evidence must be taken in its entirety, and parts of it should not be lifted out of context. Naushad`s testimony was simply that, while he was struggling with his assailants, it registered in his mind at one point that DW1 was there going into the back alley, and then at another point, when he managed to break free and he turned to flee to the shop, he saw three men assaulting Amjad in the back alley at that point in time. I did not find this evidence to be inconsistent with Amjad`s evidence, especially since Naushad could not possibly have observed everything that was happening around him while he was being assaulted and manhandled.

It was also submitted that the district judge had failed to consider that the appellant had gone to see the police on his own accord after the incident to assist in investigations. In relation to this point, it suffices to point out that while it was a relevant fact that the appellant went to the police station on his own accord, there is no rule that his evidence must be believed simply on this basis. In fact, in this case, the appellant himself said in his s 121 statement that when he was initially approached by DW1`s father, he had refused to `surrender to the police because it was nearing Hari Raya`. Subsequently, DW1`s father went to look him up again, and together with the appellant`s brother again advised him to `surrender`. It was only then that he went to Geylang Police Station to `surrender`. Even if I was to ignore the use of the word `surrender` in the appellant`s s 121 statement, the obvious question that came to my mind was, why didn`t the appellant simply go to the police station when DW1`s father first looked him up ? If he really had nothing to fear or to hide, he would have gone immediately to tell the police his side of the story, when he learnt that the police were investigating into the incident. For that matter, why should the fact that Hari Raya was approaching stop him from going to the police station, unless he was afraid that he would be promptly

arrested for the part he played in the incident?

Counsel for the appellant also submitted that the district judge should have believed the evidence given by the appellant at the trial, as it was corroborated by his s 121 statement to the police. In Singapore, prior consistent statements of a witness are now admissible by virtue of s 159 of the Evidence Act (Cap 97) (`EA`), and this circumvents the old common law rule that corroborative evidence must emanate from an independent source and a witness could not corroborate himself. However, as I have already cautioned in the case of **Khoo Kwoon Hain v PP** [1995] 2 SLR 767 , the court should bear in mind that, while previous consistent statements are now admissible under s 159 EA, corroboration by virtue of such evidence is not corroboration by independent evidence, and can only be given little weight. In the present case, even though the appellant`s evidence at the trial was supported by his previous s 121 statement to the police, it was for the court to determine the overall veracity and credibility of his testimony, and to weigh all the evidence, as the district judge rightly did.

Finally, counsel for the appellant submitted that Naushad`s description of how he was attacked was inconsistent with the injuries sustained by him. The argument was that, if Naushad had really been surrounded by four persons, one armed with a parang and another with a broken bottle, it was inconceivable that he had not suffered more serious injuries than those that he sustained. The appellant`s counsel went so far as to say that it would take a `miracle` for Naushad to escape with only the injuries that he had. I disagreed with him. The evidence showed that the men forming the unlawful assembly had no pre-conceived plan to attack Amjad and Naushad, and that there was no great enmity between them. The assault arose abruptly simply because Naushad had asked the appellant and his two friends to leave the back alley. The assailants` common object was to cause hurt to Naushad and Amjad, and their intention was probably to teach them a lesson, not to kill them. Thus, it was not inconceivable that the four assailants could have been armed with such deadly weapons like broken bottles or a parang, but upon surrounding the defenceless Naushad, simply kicked and beat him without inflicting fatal wounds on him. Moreover, as I pointed out earlier (supra, [para] 31), it was not imperative that the prosecution prove that the deadly weapons had all been used to actually inflict injuries on Amjad and Naushad. All that had to be proved to establish the charge was that at least one member of the unlawful assembly was armed with such weapons.

Thus, I found no merit in the appellant`s contentions that the district judge should not have believed Amjad and Naushad`s evidence over the appellant`s evidence. Amjad and Naushad`s evidence were, on the whole consistent, clear and logical. Minor variations in minute details could be explained by the fact that the entire incident had happened in a very short span of time, and the fact that they were fending off their assailants, and were no doubt in shock. Moreover, the district judge had the advantage of observing the demeanour of the witnesses, and he did not think that Amjad and Naushad were lying. He noted that they were subjected to lengthy cross-examination and were not broken down on the material aspects of their evidence. Their evidence was also corroborated by other evidence adduced by the prosecution, and in particular, the evidence of PW 4, who was an independent witness with nothing to gain from implicating the appellant.

In contrast, there were major discrepancies in the versions given by the appellant and DW1 (supra, [para] 21). Moreover, DW1`s evidence at the trial was also inconsistent in many material aspects with his previous statement to the police, especially on the important issue of whether he had joined in with the other `strangers` to punch and kick Amjad and Naushad. The appellant`s other option would have been to call Arab and Arab`s girlfriend to substantiate his defence. Those two witness could have testified that they were with the appellant that evening, and that the appellant had entered the back alley alone to make a telephone call. For some inexplicable reason, the appellant did not make any reasonable effort to locate Arab and the girlfriend. He conceded during cross-

examination that Arab was an employee of his brother`s company, and that his brother would have kept a record of Arab`s address and telephone number. When asked why he did not make any attempt to contact Arab and call him as a witness, he merely said that Arab had stopped working for the company some time after the incident, and that they had then lost touch with each other. He also mentioned vaguely that Arab mighty have been sent to drug rehabilitation centre. I found that these reasons did not adequately explain his failure to make a reasonable effort to locate these indispensable witnesses who could have refuted the grave charge against him.

Effect of the appellant`s failure to call material witnesses

What effect should be attributed by the court to the appellant`s failure to call material witnesses ? In criminal matters, it is well established that where the prosecution fails to call a material and essential witness, the court has the discretion to draw an adverse presumption against it under s 116 illustration (g) of the EA. In deciding whether it is appropriate to draw such an adverse presumption against the prosecution, all the circumstances of the case will be considered, to see whether its failure to call that material witness left a gap in its case, or whether such failure constituted withholding of evidence from the court. In contrast, due to the allocation of the burden of proof in criminal matters, great caution should be exercised when applying s 116 illustration (g) EA to the defence`s failure to call a material witness. Whereas the prosecution has the burden to prove its case beyond reasonable doubt, the defendant has no such burden to prove his innocence. Instead, all that he has to do, is to cast a reasonable doubt on the prosecution`s case. Even if the defendant has failed to call a material witness, and there are gaps in his defence, the court must still consider whether he has nevertheless succeeded in casting a reasonable doubt on the prosecution`s case. In the Malaysian cases of **Illian v PP** [1988] 1 MLJ 421 and **Tan Foo Su v PP** [1967] 2 MLJ 19 , it was held that the failure of the defence to call a witness should not be made subject to adverse comment by the court, and that s 114 illustration (g) of the Malaysian Evidence Act (in pari materia with Singapore`s s 116 illustration (g) EA) should not be invoked against the accused person.

Therefore, it is clear that s 116 illustration (g) of the EA does not apply with the same vigour to the defence as to the prosecution. Otherwise, it would be tantamount to placing a duty on the defence to call every material witness, and to prove the defendant`s innocence. When faced with a situation where the defence has failed to call a material witness, the court should bear in mind that such failure on the part of the defence does not add anything to the prosecution`s case, in that it does not operate to raise any presumption which would help the prosecution to prove its case beyond reasonable doubt when it has otherwise failed to do so. Instead, the defence`s failure to call a material witness will only affect its own ability to cast a reasonable doubt on the prosecution`s case. Section 116 illustration (g) of the EA does not change this fundamental principle. In every case, the court will ask, in view of all the facts and evidence before it, whether the defence has succeeded in casting a reasonable doubt on the prosecution`s case despite its failure to call a material witness.

In **Choo Chang Teik & Anor v PP** [1991] 2 MLJ 423 , the Supreme Court of Malaysia distinguished the previous cases of ***Illian v PP*** and ***Tan Foo Su v PP*** , and drew an adverse inference against the accused under s 114 illustration (g) of the Malaysian Evidence Act. Mohamed Yusoff SCJ, delivering the judgment of the court, stated that where the prosecution had made out a complete case against the accused person, and had adduced rebuttal evidence against the accused`s evidence, and the case disclosed that there was evidence that could be produced by the accused to negate the charge against him, then the natural conclusion flowing from the accused`s failure to offer such evidence was that the evidence, if produced, instead of rebutting would sustain the charge. In my view, this was really another way of saying that the defence had failed to cast a reasonable doubt on the prosecution`s case. Section 114 illustration (g) of the Malysian Evidence Act was simply used by the

Malaysian Supreme Court to draw the `natural conclusion`, from the facts of that case, which ordinary prudence required them to draw.

Thus, when the Singapore court is faced with a situation where the prosecution has made out a complete case against the defendant, or has adduced rebuttal evidence against the defence, and the case discloses that the defence has failed to call a material witness, s 116(g) of the EA merely allows the court, where appropriate, to draw the natural conclusion that the evidence which could have been adduced but was not would have been unfavourable to the defendant. If such a natural conclusion can indeed be drawn, then it would go towards the court`s consideration of whether the defence has cast a reasonable doubt on the prosecution`s case. However, in deciding whether it is appropriate to draw this conclusion, all the facts and circumstances of the case will be considered. For example, if the witness could not be located despite reasonable efforts, no such `natural conclusion` can be drawn.

In our present case, the prosecution had adduced evidence to prove a complete case against the appellant, which, left unrebutted, made out the charge against him. His defence was a different version of what happened. At the trial below, the only other witness apart from himself was the co-accused, DW1. Not only were there material discrepancies between their versions of evidence, there were also material inconsistencies between DW1`s evidence at trial and his earlier statement to the police. Added to this, the appellant failed to call Arab or Arab`s girlfriend, who could have substantiated his evidence. He gave no viable explanation for his failure to call these material witnesses, and did not even make reasonable efforts to locate them. On the facts of this case, I found that it was appropriate to draw the natural conclusion under s 116(g) of the EA that the evidence of Arab and the girlfriend would have been unfavourable to the appellant.

On the totality of the evidence, I found that the district judge was right to hold that the prosecution had proven its case against the appellant beyond reasonable doubt. Thus, I dismissed the appeal against conviction.

Appeal against sentence

The appellant also appealed against his sentence of two years` imprisonment and six strokes of the cane. However, the sentence was not manifestly excessive for a case of this nature, and I found no mitigating factors which the district judge had failed to take into account. There was no reason for me to tamper with his exercise of discretion. Therefore, I dismissed the appellant`s appeal against his sentence.

Outcome:

Appeal dismissed