Eldon v Public Prosecutor
[2001] SGHC 13

Case Number : MA 211/2000

Decision Date : 15 January 2001

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Suresh Damodara and K Sureshan (Colin Ng & Partners) for the appellant; Tan Boon Gin (Deputy Public Prosecutor) for the respondent

Parties : Eldon — Public Prosecutor

Criminal Law – Offences – Affray – Whether appellant involved in a fight – s 160 Penal Code (Cap 224)

Criminal Procedure and Sentencing – Appeal – Findings of fact by trial judge – Whether appellate court should overturn findings

Criminal Procedure and Sentencing – Sentencing – Whether analogy with road-rage cases appropriate -Whether custodial sentence warranted

: The appellant was tried before magistrate Gilbert Low for having committed the offence of affray. The charge against him read as follows:

> *You, Guy Ermer, are charged that you, on or about 23 May 1999, at or about 6.40pm, at the vacant land off Loyang Way, Singapore, which is a public place, did commit an affray, to wit, by fighting with one Ng Chin Tong and disturbed the public peace, and you have thereby committed an offence punishable under section 160 of the Penal Code, Cap 224.*

He was convicted and sentenced to two weeks` imprisonment and ordered to pay a fine of $1,000 in default of which he was to spend two weeks in prison. He appealed against both conviction and sentence and, for the reasons set out below, I dismissed his appeal against conviction but allowed his appeal against sentence.

The appellant`s story

Mr Eldon said that he was riding his off-road motorcycle on a track built for such purposes at the time of the incident. While practising to jump off a ramp known as `the big table-top`, he saw one Ng Chin Tong wheeling a motorcycle across the area where he would land. But he managed to avoid colliding into Mr Ng and his motorcycle, missing by about five feet.

He completed the circuit and returned to the start and finish area and saw Mr Ng beginning a lap on the circuit. He shouted his name and said `that was a bloody stupid thing to do` and proceeded to tell him that what he had done was dangerous and unacceptable as he was an experienced off-road motorcyclist.

This rebuke took place while the appellant was on his motorcycle about six feet behind Mr Ng`s motorcycle. They were stationery at this time. Mr Ng then rode off but stopped about four metres away. He then got off and walked back towards the appellant, who then got off his motorcycle. Mr Ng raised his voice and asked why he was being called stupid. The appellant responded by pointing

out that he was not calling him stupid but was saying that what he had done was stupid. Mr Ng said that it was his fault and asked him what he wanted, to which the appellant replied that he wanted an apology.

A Malay boy was present at this confrontation and the parties were standing in a triangle with Mr Ng to the appellant`s left and the Malay boy to his right. The Malay boy insisted that it was the appellant`s fault and the appellant began to remonstrate with him when suddenly Mr Ng grabbed hold of his helmet and pulled his head towards him and punched him in the face which resulted in, among other injuries, a fractured nose. In self defence, the appellant held onto Mr Ng by his shirt in an effort to prevent further blows. Mr Ng then pushed him backwards and fell with him, landing on top of him and struggling to hit him more.

At some point, others got involved and were trying to kick the appellant. The Malay boy tried to pull his helmet off. The whole struggle lasted a minute and a half. Other people intervened to pull the two of them apart and it was over. At no time did the appellant hit Mr Ng.

Mr Ng`s story

Mr Ng said that he had to cut across the track in order to wheel a broken-down motorcycle away from the circuit. He was experienced enough and had had the presence of mind to look out for riders jumping off the top of the ramp, `the big table-top`. However, as he was crossing, he looked up to see the appellant jumping off the ramp. He swerved to the side to avoid being hit. He saw the appellant land safely and proceed down the circuit.

Mr Ng returned to the circuit later to practise. Suddenly, a rider came up from behind him and scolded him and overtook him so closely that the rider brushed the right side of his motorcycle and caused him to fall. The rider was the appellant who then walked towards him. Mr Ng got up and asked what the matter was. The appellant then pushed him on the chest and they started fighting. They grappled with each other and fell to the ground. The appellant then punched him.

The appellant was the aggressor and the fighting back which Mr Ng engaged in was done in self-defence. The fight lasted for five to ten minutes. Other people then intervened and stopped the fighting.

The magistrate`s decision

The prosecution relied on the testimony of Mr Ng and others to establish that there had indeed been a fight. In particular, the prosecution called Mr Patrick Lim Boon Hua (investigating officer); Mr Ng Chin Tong; Mr Sahrin bin Topan, and Mr Samad bin Ismail (all eyewitnesses).

Mr Sahrin testified that he saw the appellant ride past and brush Mr Ng`s motorcycle, causing the latter to fall. From a distance of about 30 metres, he witnessed the ensuing argument and the fight. He could not remember many of the details but he was emphatic that there was a fight. Mr Sahrin identified the appellant and Mr Ng as the parties involved.

Mr Samad testified that he was with Mr Sahrin watching the motorcycles go through the circuit when he witnessed the whole incident. He said he saw the motorcycles collide, the argument and both the appellant and Mr Ng fighting on the ground. The fight lasted for five to ten minutes. He claimed to have been 15 metres away at the time and he also identified the appellant and Mr Ng as the parties

involved. Mr Samad also witnessed something of what happened after the fight.

For the defence, the appellant, Mr Christopher Sullivan, Miss Ong Choon Yen (both eyewitnesses); and Dr Ivor Gunaseelan Thevathasan (an expert witness) were called to testify.

Mr Sullivan is a friend of the appellant and testified that he saw him narrowly miss hitting Mr Ng when the former jumped off the ramp. Subsequently, he saw him ride over to Mr Ng and he saw them start to argue. He then intervened and told the appellant to return to the truck. As the appellant turned to pick up his motorcycle from the ground, Mr Ng `swung a punch at Guy in the face near his nose`. A scuffle followed and they wrestled one another on the ground. Then a Malay boy came over and started to twist the appellant`s helmet off. Mr Sullivan intervened and pulled the Malay boy away. The crowd then managed to stop the fight.

Miss Ong is also the appellant`s friend. She was at the scene and witnessed the near collision between him and Mr Ng. She saw him return to the starting point. She witnessed Mr Ng shouting at him and after he laid his motorcycle down, she saw Mr Ng `raise his hand against Guy and they were both on the floor`. She saw others running to the scene and some tried to separate them but others kicked the appellant.

At this point she saw Mr Sullivan intervene. He pulled away someone who was kicking the appellant and proceeded to have a heated argument with him. The crowd then managed to break up the two parties.

Dr Thevathasan was called as an expert to explain the cause of the injuries suffered by the appellant. He testified that the fracture of the nasal bone could have been caused by the impact of a blunt object such as a fist. The swelling and bruising to his right upper eyelid were caused by a `blow injury`. He testified that the injuries were not consistent with injuries usually associated with such motor sports.

The magistrate noted that the defence`s case was that the appellant did not fight with Mr Ng but was merely exercising his right of private defence in response to an attack by Mr Ng.

The magistrate therefore dealt with the question of whether or not there had been a fight. He examined the conflicting accounts of what had happened and concluded:

> *The defence contended that [Mr Ng] was an accomplice and his evidence should be viewed with caution. Although [Mr Ng`s] evidence is unclear on some aspects (for example, whether in the course of the fight, the accused did hit him on the head with a stick), it was still his evidence in Court that there was a fight between him and the accused. Even if I were to discredit [Mr Ng`s] evidence as being unreliable, this does not detract from the evidence of the other prosecution witnesses, [Mr Sahrin] and [Mr Samad], who testified that there was a fight between the accused and [Mr Ng]. I was also satisfied that [Mr Sahrin] and [Mr Samad] were not personally known to [Mr Ng]. Further, the presence of injuries on [Mr Ng] lend [sic] support to the contention that there was a fight.*

The magistrate continued by finding that the injuries suffered by Mr Ng `were inflicted during the course of the fight with the accused`. This is because `[i]f the defence version that the accused did not fight with nor hit [Mr Ng] were to be believed, it does not explain the presence of the injuries on [Mr Ng`s] body. In addition, [Mr Ng] also alluded to his injuries in his police report and to Dr Lim the

next day.`

The magistrate also found that there was a material discrepancy between the defence witnesses as to the time of Mr Sullivan`s intervention. Mr Sullivan himself had testified that he intervened as the appellant and Mr Ng were arguing while Miss Ong had testified that Mr Sullivan had intervened after the fight had started. These testimonies were maintained throughout cross-examination. The appellant himself had not mentioned that Mr Sullivan intervened during the argument. The magistrate concluded that `this discrepancy as regards the time of intervention of Christopher Sullivan is a material one`.

Another discrepancy the magistrate thought worth noting was that Mr Sullivan did not mention that some in the crowd had joined in to kick the appellant, whereas both of them had mentioned that. The magistrate found:

> *the prosecution`s version more reliable. Both [Mr Sahrin] and [Mr Samad] testified that the fight was only between the accused and [Mr Ng]. The crowd only intervened to break up the fight. Neither did they mention about a third party (the Malay boy) being involved in the fight. If the crowd were to participate in kicking the accused, why then should they also break up the fight? My finding was that the fight was only between the accused and [Mr Ng]. The crowd merely intervened to break up the fight. There was no Malay boy involved in the fight. It appears that the defence`s allegation that the crowd participated in kicking the accused is merely an excuse to diminish the accused`s involvement in the accident, by making him the victim of the whole thing.*

The magistrate concluded by finding in favour of the prosecution as he found its version of the story to be more credible. He also rejected the appellant`s plea of private defence. Thus, the magistrate convicted him.

Regarding the sentence, the magistrate found that the appellant was the person responsible for the fight, which he initiated by brushing Mr Ng`s motorcycle with his own and causing Mr Ng to fall. Apart from sparking off the fight it was, in itself, a dangerous act. As an alternative, the magistrate accepted Mr Ng`s evidence that the appellant pushed him on the chest first before the fight started. As a result, the magistrate thought that a custodial sentence was appropriate. He cited from the judgment in **PP v Lee Seck Hing** [1992] 2 SLR 745 at p 748 and, drawing an analogy with road-rage violence, applied its reasoning to the circumstances of the instant case.

The appellant`s case on appeal

Mr Ng`s injuries

Mr Damodara argued that the magistrate had erred when he concluded that Mr Ng`s injuries were the result of a fight between him and the appellant. He pointed out that the doctor examining Mr Ng could not confirm that the injuries were sustained in a fight. Mr Damodara suggested that Mr Ng`s injuries could have been caused by his falling off his motorcycle. This, he submitted, was very likely, considering the nature of off-road motor sports.

Mr Ng`s testimony

Mr Damodara`s next argument was that the magistrate erred in accepting Mr Ng`s testimony. In the police report which Mr Ng made he had said clearly that the appellant `pick up a wooden stick, less than a meter and hit on my head`. In cross-examination however, this was shown to have been an embellishment. Mr Ng confessed that all he saw was the stick lying on the ground next to the appellant and that he had simply assumed that he had picked it up and used it to hit his helmet. `This major discrepancy alone, on the circumstances of the incident, should have categorized the testimony of [Mr Ng] as highly suspect and incredulous.`

Mr Ng had also said that, after the appellant had brushed his motorcycle and caused him to fall, he got up and `ask him what`s the problem in a friendly manner`. Mr Damodara argued that this was clearly a lie because such a response in such circumstances was highly unusual.

Further, Mr Damodara argued that Mr Ng was technically an accomplice of the appellant and that the magistrate should have treated his evidence with caution.

Mr Sahrin`s testimony

Mr Damodara argued that Mr Sahrin`s testimony was weak and did not corroborate Mr Ng`s story. Mr Sahrin could not remember the details of the fight and could only assert that there had been a fight. Mr Damodara also questioned the veracity of this witness as he was brought in at a late stage and `under dubious circumstances`.

Mr Samad`s testimony

Again Mr Damodara argued that Mr Samad`s testimony did not corroborate Mr Ng`s story. Mr Samad`s statement that both the motorcycles had collided and that both the riders had fallen contradicted Mr Ng and Mr Sahrin.

Mr Damodara therefore argued that the evidence of Mr Sahrin and Mr Samad was irrelevant and materially inconsistent. The magistrate had therefore erred in accepting their evidence. Again, Mr Samad`s late introduction as a witness was a cause of concern to Mr Damodara.

The appellant`s testimony

Mr Damodara argued that his testimony was unshakeable and that he even volunteered to undergo a polygraph test. He asserted that he was merely exercising his right of private defence and that his injuries were far more serious than Mr Ng`s.

Mr Damodara then argued that the appellant`s testimony was largely corroborated by Mr Sullivan and Miss Ong.

Mr Damodara argued that the magistrate had erred when he used the inconsistency between the stories of the defence witnesses `to completely disregard their entire testimonies`. This showed that the magistrate applied a double standard to the assessment of the veracity of the witnesses. When it came to the inconsistency in Mr Ng`s testimony, the magistrate had been far more `forgiving`.

Sentence

Mr Damodara`s argument was that the imposition of a custodial sentence in this case was `manifestly excessive, inordinate, inappropriate and not fitting the circumstances of the case`. The imposition of the custodial sentence was based upon the erroneous reasoning that:

a the appellant had started the fight;

b he had caused Mr Ng to fall off his motorcycle;

c the road rage analogy was appropriate;

d he was found guilty after a full trial; and

e his version of the story was `totally at odds with the evidence adduced by the Prosecution`.

Furthermore, the magistrate had failed to take into consideration the fact that it was the appellant`s first conviction and that Mr Ng was not a first offender.

The prosecution`s case in the appeal

The conviction

Mr Tan cited the usual cases which are relied upon for the proposition that an `appellate court should be slow to overturn a trial judge`s findings of fact, especially where they hinge on the trial judge`s assessment of the credibility and veracity of witnesses, unless they can be shown to be plainly wrong or against the weight of the evidence`: **Yap Giau Beng Terence v PP** [1998] 3 SLR 656 at p 653.

Mr Ng`s testimony

Mr Tan admitted that there was an apparent contradiction in Mr Ng`s testimony regarding the attack with a stick. However, he submitted that Mr Ng had satisfactorily explained himself. The inference which Mr Ng had drawn from his sensory experiences - the sound and feel of something hard hitting his helmet and the sight immediately after of a stick lying next to the appellant - was `perfectly reasonable`. As Mr Ng was `perfectly candid` in court during cross-examination, `[n]o adverse inference should be drawn against [Mr Ng] in this respect`. Mr Tan added that the magistrate had considered this contradiction and had exercised his prerogative to disregard it as immaterial and to accept the rest of Mr Ng`s testimony as true.

The cumulative effect of the testimonies of Mr Ng, Mr Sahrin and Mr Samad

Mr Tan then dealt with the inconsistencies in the testimonies of the prosecution witnesses. Both Mr Ng and Mr Samad had testified that when the appellant`s motorcycle had brushed Mr Ng`s, there was a collision between the machines. Mr Sahrin, however, had said that there had been no contact between the motorcycles at all. Mr Tan`s submission was that this discrepancy was immaterial. In addition, he cited Abdul Hamid J in **Chean Siong Guat v PP** [1969] 2 MLJ 63 for the proposition that `allowances must be made for human fallibility in the giving of evidence and that discrepancies in evidence are common`.

Mr Tan argued that the discrepancy was `not serious and can be easily explained by human fallibility in observation, retention and recollection. This is especially so in the instant case where (a) things happened very fast (b) [the witnesses] were observing the event from different places and (c) Mr Sahrin and Mr Samad were some distance away`.

Mr Tan submitted that the discrepancies did not affect the evidence relating to the essential elements of the offence which was consistent between the three witnesses. The only question in

issue was whether there had been a fight and this, he submitted, had been adequately proved by the evidence of the prosecution`s witnesses.

Mr Ng`s injuries

Mr Tan submitted that, just as the doctor was unable to confirm that the injuries were inflicted in a fight, she was unable to confirm that they were self-inflicted. He admitted that there was no conclusive evidence that the injuries were inflicted in a fight but it was a reasonable inference to make and that the magistrate was entitled to believe Mr Ng`s testimony that the injuries were inflicted by the appellant in the fight.

Treating the evidence of Mr Ng, Mr Sahrin and Mr Samad with caution

Mr Damodara had argued that the magistrate had failed to treat the evidence of Mr Ng with the caution which accomplice evidence demands. Mr Tan simply dismissed this contention as `utterly without merit` because the magistrate had considered the matter at p 7, [para] 16 of his judgment.

Mr Tan also dealt with the argument that Mr Sahrin and Mr Samad`s appearance at the trial was `suspicious` because they were introduced very late and were not on the original list of witnesses tendered at the pre-trial conference. Mr Tan dismissed this argument as `utterly without merit`. He argued that the change of witnesses after a pre-trial conference was `hardly sinister in itself`. Post PTC investigations may reveal new witnesses and the prosecuting officer may not be the same as the one who participated in the PTC and may wish to call different witnesses. Therefore, the magistrate was entitled to accept them as independent witnesses.

The defence witnesses` testimonies

Mr Tan submitted that the magistrate was `perfectly justified` in rejecting the evidence of the appellant, Mr Sullivan and Miss Ong.

First, he argued that Mr Sullivan and Miss Ong were `interested witnesses`, being friends of the appellant. Secondly, he pointed to `inherent improbabilities in the evidence of the defence witnesses`. Thirdly, `there are material inconsistencies in the evidence of the defence witnesses, which cannot be easily explained by human fallibility alone`.

Sentence

Mr Tan submitted that the road-rage analogy was appropriate and therefore the rationale behind the sentencing rules in road-rage cases was applicable here. The people who participate in such sport form a `self contained micro-community` who have to operate in circumstances not unlike those in which normal everyday motorists operate. The public interest in maintaining law and harmony among members of such micro-communities, who have to share a small plot of land to enjoy the riding of their motorcycles, is no different from the public interest in maintaining law and harmony among motorists on Singapore`s roads. A prison sentence was called for here to act as a deterrence, both to the appellant and to others as well.

My determination

Conviction

The gist of the appellant`s case was that he had been the victim of Mr Ng`s assault and that he had not responded in like manner. I found this suggestion difficult to accept. A man who is being assaulted would certainly not lie passively and do nothing in response. To expect a court to believe that this was the case was unrealistic at best. Indeed, the appellant`s argument was that he was acting in the exercise of his right of private defence. This postulated that he had indeed responded to Mr Ng`s assault. If this was the case, then it could be said that a `fight` took place and therefore that the offence of affray was made out. A `fight` has been defined simply as a `bilateral transaction in which blows are exchanged` (**Bhagwan Munjaji Pawade v State of Maharashtra** (Unreported)). The defence of private defence, if made out, would defeat the argument that there had been no fight because it was based upon there being some culpable conduct on the part of an accused person which was justifiable in the circumstances.

The proposition that an appellate court will be slow to overturn a trial judge`s findings of fact is well established in Singapore. It is also well established in English jurisprudence and found eloquent expression by Lord Shaw in the case of **Clarke v Edinburgh and District Tramways Co Ltd** (Unreported) . He said:

> *When a judge hears and sees witnesses and makes a conclusion or inference with regard to what is the weight on balance of their evidence, that judgment is entitled to great respect ... I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances ... is the duty of the appellate court? In my opinion, the duty of an appellate court in these circumstances is for each judge of it to put to himself, as I now do in this case, the question, am I - who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case - in a position, not having those privileges, to come to a clear conclusion that a judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.*

Having examined the case in great detail, I could not say that I was satisfied that the magistrate was plainly wrong in coming to the conclusion he did. Coupled with the inherent improbabilities in the appellant`s story, I had no hesitation in dismissing the appeal against conviction.

Sentence

I then dealt with the appellant`s appeal against his sentence. Mr Tan`s main submission in support of the magistrate`s imposition of a custodial sentence was that such a sentence was necessary here for the same reasons as those which apply in road-rage cases. He therefore argued that the case of ***PP v Lee Seck Hing*** was applicable as a precedent.

That case, however, was an extreme example of violence on our roads. The facts which justified a custodial sentence were very different from the facts of the instant case and a parallel could not be correctly drawn between the two cases. Furthermore, I took judicial notice of the nature of off-road

motorcycle sport and noted the dissimilarities between such activity and the use of motor vehicles for more mundane purposes on Singapore`s roads.

Off-road motor sport attracts a certain type of person. He is the rough and ready outdoor type. The people who indulge in such activity enjoy the thrills and spills of the sport. When a dispute ends in fisticuffs, the situation is very different from that of an innocent motorist who is beaten up by another motorist simply because the former cut into the latter`s path. I therefore disagreed that it was appropriate to apply the road-rage sentencing rules to this case.

I therefore allowed the appeal against sentence to the extent that the two weeks` imprisonment term was set aside.

Outcome:

Appeal against conviction dismissed; appeal against sentence allowed.