

Sahadevan s/o Gundan v Public Prosecutor
[2002] SGHC 248

Case Number : MA No 174 of 2002
Decision Date : 21 October 2002
Tribunal/Court : High Court
Coram : Yong Pung How CJ
Counsel Name(s) : Peter Keith Fernando (Leo Fernando) for the appellant; G Kannan (Deputy Public Prosecutor) for the respondent
Parties : —

Criminal Law – Offences – Robbery with hurt – Whether Prosecution has proven its case beyond reasonable doubt – Penal Code (Cap 224, 1985 Rev Ed) s 394

Evidence – Proof of evidence – Standard of proof – Inconsistencies in complainant's and accused's testimonies – Whether Prosecution has proven beyond reasonable doubt the charge against accused

Evidence – Witnesses – Failure to call material witness – Whether adverse inference should be drawn – Evidence Act (Cap 97, 1997 Rev Ed) s 116 illustration (g)

Judgment

GROUND(S) OF DECISION

The appellant, Sahadevan s/o Gundan was jointly charged with his friend, Jayakumaran s/o Saminathan Retinam ("Kumar"), for committing robbery with hurt, of \$50 in the possession of one Vellaikkannu Pandi ("Pandi"), under s 394 of the Penal Code (Cap 224). They were both convicted of the charge by a district judge and sentenced to six years imprisonment each. The appellant appealed against his conviction and sentence. On 10 September 2002, I heard his appeal and allowed it. I now give my reasons.

The prosecution's case

2 It was the prosecution's case that on 7 January 2002, at about 10.30 pm, Pandi had been dropped off after work at Yishun MRT station, upon which he decided to go and visit his friend, who lived in Sembawang. Pandi was an illegal immigrant offender, who had been issued a special pass by the immigration department. Along the way, he stopped by a 'Cheers' outlet, at Blk 291 Yishun Ring Road, to buy a bottle of beer. Subsequently, he changed his mind about visiting his friend and went back to Yishun MRT station to take a look at the 'pasar malam' that was going on there. At about 1 am, in the early hours of the morning of 8 January 2002, he stopped by the same 'Cheers' outlet to buy a second bottle of beer. On his way into the store, he was called by the appellant and Kumar, who were sitting on the compound wall, facing the front entrance of the 'Cheers' outlet. He waved at them and asked them to "hold on". After buying his beer, he came out and joined them on the compound wall. They enquired after his nationality and he replied that he was from India.

3 At about 2.15 am, the appellant and Kumar got up and went to the side entrance of the 'Cheers' outlet. They then returned and the appellant asked Pandi how much money he had with him. When Pandi replied that he had no money, Kumar spoke to him in a very harsh tone "big brother is asking, why don't you hand over your money". About 10 minutes later, Kumar moved four to five metres away from Pandi and the appellant, towards the shop next to the 'Cheers' outlet. The appellant then asked again whether Pandi had any money. When Pandi gave a negative reply, the appellant slapped him on his cheek. Pandi asked the appellant why he had slapped him and the

appellant slapped him again. Being fearful, Pandi opened his wallet for the appellant to see. The appellant then took a \$50 note and what later turned to be a copy of the special pass belonging to Pandi and moved off to join Kumar.

4 Pandi went to call the police, using the public phone located at the side entrance of the 'Cheers' outlet. When he returned to where the appellant and Kumar were previously, he found only the appellant there. He approached the appellant and pleaded with him at least, to return the special pass to him. At this point in time, the appellant used a lighter and burnt the copy of the special pass before throwing its remains over the compound wall.

5 Pandi gave evidence that he called the police three times in total. At 2.40 am, two police officers arrived at the scene, PW2 Sgt Zulkarnaian ("Sgt Zul") and PW3 Cpl Azhar Sukaimi ("Cpl Azhar"). Upon their arrival, Pandi told them that he had been robbed and assaulted by the appellant, whereupon the appellant was placed under arrest.

6 On 9 January 2002, Pandi returned to the scene of crime with the Investigating Officer, PW3, Cpl M. Saravanan ("Cpl Saravanan"). Whilst inside the 'Cheers' outlet, they met Kumar, who was coincidentally there as well. Cpl Saravanan overheard Kumar asking Pandi "what happened the other night. Are you ok?". When Pandi identified Kumar as the second Indian man on the night that he was robbed and assaulted, Kumar was also placed under arrest by Cpl Saravanan.

The appellant's defence

7 The appellant maintained that on the night of 7 January 2002 he was with Kumar at a coffee shop at Blk 291 Yishun Ring Road, drinking alcoholic drinks with some friends. Prior to that, he had taken some Chinese wines at home. Subsequently, the appellant and Kumar went to another coffee shop at Blk 285 to meet other friends. From the coffee shop, the appellant gave evidence that he and Kumar moved off to the 'Cheers' outlet. He could not recall the time they arrived at the outlet.

8 A CCTV recording together with a set of 10 still photographs taken from the recording, were produced by the defence and admitted in court. They were taken from the video cameras at the 'Cheers' outlet, facing the cashier, the side entrance and the main entrance. One of the photographs had shown the appellant wheeling his bicycle, near the side entrance of the 'Cheers' outlet, at about 12 midnight.

9 The appellant testified that he and Kumar had gone to the compound wall outside the front entrance of the 'Cheers' outlet, near a blue dustbin and sat down. He took another drink. Because of all the alcoholic drinks he had, as well as some Chinese wines he had drunk at home prior to setting off for the coffee shop, he dozed off. He only woke up at about 2 am.

10 When the appellant was told that the CCTV recording showed that he was seen going towards the side entrance of the 'Cheers' outlet at about 2.17 am and joining Kumar, the appellant testified that both of them had intended to go home, and he was pushing his bicycle.

11 Both of them then moved off from the scene. According to the appellant, he had not noticed the presence of Pandi. After Kumar left, the appellant returned to the scene with his bicycle, intending to rest further before going home. It was then that Pandi came up to him and threatened to "finish him off". Being terrified, he rushed into the 'Cheers' outlet to call the police. He testified that the staff at the 'Cheers' outlet called the police for him on his behalf and he too called the police from inside the 'Cheers' outlet. While waiting inside the store for the police to arrive, suddenly, someone from outside came and pushed him and he fell outside the store.

12 When the police arrived, he went towards them and complained of the threat on his life by Pandi. However, he was arrested and charged for jointly committing robbery of \$50 and hurting Pandi.

The decision below

13 The district judge was of the view that he had no valid reason to disbelieve Pandi and accepted his evidence that he was robbed and assaulted. He rejected the defence of the appellant and Kumar that they were not involved in robbing and causing hurt to Pandi as he had difficulty in accepting various aspects of their evidence and that they had contradicted each other on the following material aspects of the case :-

i whether the appellant was sleeping at the compound wall at the material time;

ii whether the appellant was at all aware of the presence of Pandi at the compound wall at the material time;

iii whether Pandi had seen Kumar at all at the compound wall at the material time.

14 The district judge found that the appellant and Kumar had failed to raise a reasonable doubt in the prosecution's case and convicted them of the charge, sentencing them to six years imprisonment each. In view of the age of the appellant and Kumar, who were both over 50 years old, no sentence of caning was imposed.

The appeal

15 For the charge under s 394 of the Penal Code to be made out, the prosecution had to prove the following elements against the appellant; first, that the appellant committed robbery of \$50 in the possession of Pandi and secondly, that the appellant voluntarily caused hurt in doing so, by slapping Pandi twice on the cheek.

16 Before me, counsel for the appellant's submissions were essentially that on the totality of the evidence before the district judge, the prosecution had not proven its case beyond a reasonable doubt and that the district judge had erred in fact and in law to hold so. Counsel for the appellant further urged this court to review and examine the evidence in order to come to an independent finding on each issue of fact.

17 The principles applicable whenever an appellate court carries out the unenviable task of evaluating a trial judge's findings of fact are well entrenched. It is trite law that an appellate court will not disturb the findings of fact of the trial judge unless they can be shown to be against the weight of evidence : *Ng Soo Hin v PP* [1994] 1 SLR 105. If the appellate court wishes to reverse the trial judge's decision, it must not merely entertain doubts as to whether the decision is right but must be convinced that it is wrong : *PP v Poh Oh Sim* [1991] 3 MLJ 416; *PP v Azman bin Abdullah* [1998] 2 SLR 704. Nevertheless, while an appellate court should be reluctant to interfere with a finding of fact, it is always free to form an independent opinion about the proper inference to be drawn from a finding of fact. The circumstances of this case required me to keep this firmly in mind and, having lay out the principles, I will now move on to examine the evidence proper.

18 Counsel for the appellant submitted that the district judge had totally failed to appreciate that the first information report (FIR) of Pandi was contrary to his evidence in court. The time that

this FIR was made was recorded at 02.21.40 on 8 January 2002 and the text read "Two Indian man unknown to me stole my special pass and running off".

19 The first thing to note about the FIR was that it was conspicuously silent on the loss of \$50 through robbery and the slapping incident. No doubt, the main purpose of an FIR is merely to give information of a cognizable offence to set the police in motion and need not contain the entire case for the prosecution : *Tan Pin Seng v PP* [1998] 1 SLR 418; *PP v Pardeep Singh* [1999] 3 SLR 116. Nevertheless, it cannot be said that omissions in the FIR would always be of no significance, since the FIR, while not being substantive evidence, is after all a piece of corroborative evidence. Omissions as to material facts in the FIR could, *ceteris paribus*, deprive the prosecution of the most valuable corroboration and thereby make the complainant's story suspicious : *Herchun Singh v PP* [1969] 2 MLJ 209. I further noted that in the present case the FIR did not contain mere omissions of material facts, but that the offence disclosed in it had been entirely inconsistent with that of which the appellant was charged and convicted, in relation to both the act and the subject matter of the offence.

20 At paragraph 198 of his judgment, the district judge stated that he did not regard this inconsistency as a major one, discrediting the victim's evidence completely. He dealt with the inconsistency as such :

it appeared to me that having been convicted as an illegal immigrant, the victim was more concerned at that time about his Special Pass. Even in his evidence in chief, the victim stated that he asked [the appellant] to at least return his Special Pass. He told [the appellant] that "they can keep the money".

21 With due respect to the district judge, in drawing such an inference, he had failed completely to consider that the special pass allegedly taken away from Pandi was merely a copy of the original. Cpl Saravanan confirmed that Pandi had produced the original special pass on 9 January 2002 at the police station. To concentrate, in making the call to the police, on the theft or robbery of a copy of the special pass, when a relatively large sum was taken away (Pandi earns \$10 a day as a cleaner at the Seletar Golf Country Club) and hurt was caused, seemed to me to be open to doubt.

22 In addition, even though Pandi had mentioned in P3 that the two Indian men were "running off", he testified during trial that the appellant was in a drunken stupor and, after robbing and assaulting him, the appellant had walked with faltering steps to join Kumar, who had moved away towards the shop next to the 'Cheers' outlet. Pandi confirmed in court that he did not see anybody running off and that he was keeping an eye over the appellant when making the call to the police, as he was worried that the appellant would run away. It was also his evidence that, after he finished the call, he turned around and saw the appellant walking to and fro, even though Kumar was no longer at the scene.

23 During his testimony in court, Pandi attempted to explain that he did tell the police during the call that "my special pass go already, my \$50 go already". Even if I were to accept that this was so and that there were communication difficulties due to Pandi's mother tongue being Tamil, it did not make any sense that the location, like the text, should be incorrect as well. This was because of what was revealed when Pandi was cross-examined on the inconsistencies in the FIR:

Q : I am asking you about the first time when you called the police. P3 (the FIR) was shown to you and the caller's name was Pandi and you confirmed that it was you.

A: Yes, but I did not mention anything about the location.

Q: You took 2 to 3 minutes to tell them two Indian men took your pass and ran off.

A: I could not communicate in English and I was stammering and stuttering. They managed to trace the location of the phone from the number I called.

24 Pandi had stated quite clearly that he had not mentioned anything about the location. If it was true that nothing was mentioned about the location, the logical conclusion to draw from that must be that the police had managed to trace the call, since the location in the FIR was clearly stated as "301, Yishun Ave 2, 769093, Yishun Mrt stn". And yet this was not the correct location where the alleged offence of robbery with hurt, was committed. This raised some suspicions as to whether Pandi was, altogether, a truthful witness.

25 In my view, the inconsistencies relating to the FIR could not be lightly disregarded, affecting the credibility of Pandi to a large extent. The district judge was not able to reach the same conclusion as me, with respect to the credibility of Pandi, as he had placed insufficient weight on the inconsistencies between the FIR and Pandi's evidence in court. It followed that Pandi's evidence should be placed under greater scrutiny, especially when the prosecution's case rested primarily on his evidence that it was the appellant who had robbed him of \$50 and slapped him.

26 The circumstances under which the police came to arrive at Blk 291 Yishun Ring Road, where the alleged offence took place, further complicated the case for the prosecution. Cpl Saravanan gave evidence that when the police were dispatched to Yishun MRT station, they found no sign of a case there. Another mobile patrol was able to arrive at the correct location, at the 'Cheers' outlet, only because of the FIR of the appellant, who had called the police at 2.35 am on 8 January 2002 from the 'Cheers' outlet itself. Sgt Zul and Cpl Azhar, who arrived at the scene, testified that the appellant was waiting for them outside the 'Cheers' outlet and he approached them first, followed by Pandi. In my view, the actions of the appellant in waiting for and approaching the police were certainly not consistent with those of someone who had just committed an offence of robbery with hurt.

27 No doubt, it seemed strange that the appellant should complain of a threat on his life by someone who was a stranger to him. However, to draw the conclusion from that, as the district judge did, that the appellant must have seen Pandi calling the police and called the police as well in order to avoid any suspicions, was erroneous for the simple reason that it was unsupported by any evidence. There was no evidence whatsoever that the appellant had seen Pandi making a call, not to mention a call to the police. In fact, it was Pandi's own evidence that, whilst he was making the call to the police, the appellant had walked with faltering steps towards Kumar, as he (the appellant) was drunk. It was highly improbable that, while being drunk and unsteady on his feet, the appellant still managed to observe Pandi making a call at the telephone booth, concluded that it was a call to the police and then devised his own strategy to call the police in order to throw them off his tracks.

28 In relation to the copy of the special pass, there was no evidence to corroborate that it had been burnt by the appellant or that it even existed at all. Sgt Zul confirmed that he searched the area at the scene that night for evidence of any burnt paper but was unable to find anything. Cpl Saravanan testified that, when he went to the scene the following day, the place had already been

washed and cleaned, so he would not know whether there was any evidence of any burnt paper. Before me, the prosecution submitted that it was not at all surprising that the police officers were unable to find anything since it was in the early hours of the morning and ash was essentially what they were looking for. I must say, however, that the evidence on this point was rather equivocal and any reservations as to whether the special pass had indeed been burnt by the appellant should be resolved in favour of the appellant, since the prosecution bore the burden of proof.

29 The \$50 that was allegedly robbed from Pandi was also never recovered. Sgt Zul and Cpl Azhar testified that they had each conducted a search on the appellant at the scene that night but both of them were unable to find anything other than a lighter, cigarettes and some personal belongings. In the district judge's view, that the \$50 note from the victim was never found did not mean that the victim was not robbed of the \$50. He went on further to say (at para 188) :

it is pertinent to note here that after B1 (the appellant) had physically robbed the victim, he was seen going towards B2 (Kumar). B1 had testified that he did go away with B2 before returning to the scene, while B2 had completely disappeared from the scene.

30 The district judge then drew the inference that the appellant must have given the cash to Kumar as there was no one else who was seen near the appellant and Kumar. Such an inference presupposed that the appellant had indeed robbed Pandi of the \$50 note. With due respect to the district judge, this was unsupported by any evidence and should be rejected for being entirely speculative. Even though I agreed with the prosecution that there is really no rule of law that the fruits of a crime must be recovered before the charge against an accused is proven, I was of the view that, taking into account the surrounding circumstances of this case and the need to place a greater scrutiny on Pandi's evidence, the failure to recover the \$50 from the appellant considerably weakened the prosecution's case.

31 Next, I come to Pandi's claim that the appellant had slapped him twice on his cheek. Pandi testified in court that the appellant had used his right hand to slap him. There is no medical evidence to corroborate this allegation other than the testimony of Sgt Zul, who informed the court that both the cheeks of Pandi were swollen. Cpl Azhar gave evidence that he had not been able to see clearly whether Pandi had any visible injury, as it was dark. As for Cpl Saravanan, he testified that, when he first saw Pandi on 9 January 2002, he did not see any swelling. Pandi informed Cpl Saravanan that he did not seek medical attention, as he did not know that the cost would be borne by the police and thought that he would have to pay.

32 Counsel for the appellant submitted that the district judge erred in that Sgt Zul's testimony should not be relied upon as the basis to find that hurt was caused to Pandi. It was further submitted that hurt, pain and swelling are issues requiring proof by medical experts and Sgt Zul was not a doctor who could testify on this crucial aspect of the case against the appellant. I was unable to accept this contention. Whether hurt is caused, is a finding of fact, which is not necessarily to be always corroborated by evidence given by medical experts. A trial judge is entitled to find that hurt has been caused, with or without medical evidence, if he is convinced that it has been proven, in light of all the evidence before him.

33 In the present case, it was the evidence of Pandi that there was a passer-by at the scene that night, who was watching the whole incident from a distance. He testified that it was the passer-by who had advised him to call the police. He further testified that the passer-by had pushed the appellant to the ground and that he went forward to try and help the appellant up but was brushed

aside. When asked during cross-examination why he still wanted to help the appellant up when the appellant had robbed and slapped him, Pandi replied that it was the passer-by who asked him to help the appellant up. The appellant confirmed that someone had pushed him while he was waiting in the 'Cheers' outlet for the police to arrive and that he fell outside the store as a result. This was corroborated by the CCTV recording. The still photograph at 02:42:39 showed a man in a vertically-striped shirt with his hand on the appellant's shoulder. The next still photograph at 02:42:43 showed the appellant on the ground. The same man in the vertically-striped shirt was seen talking to the police, in the still photograph at 02:46:56.

34 By Pandi's own account, this passer-by was there all the while, being the only one at the scene that night other than himself, Kumar and the appellant. In my view, the passer-by was very much a material witness. Since he was at the scene and had, apparently, observed the entire incident, he would have been able to witness *the appellant slapping Pandi*. The passer-by would also have been able to shed some light as to why he had pushed the appellant to the ground and then subsequently asked Pandi to help him up. The failure on the part of the prosecution to call such a material witness to give evidence, entitled me to draw an adverse inference against the prosecution under s 116(g) of the Evidence Act (Cap 97).

35 It was true that the appellant was not able to give proper explanations, with respect to his actions during the material time and, in this regard, his defence was not entirely up to scratch. He claimed to have dozed off while Kumar gave evidence in court that between 12 midnight and 2 am on 8 January 2002, they had been conversing on family and personal problems. The appellant's evidence was also inconsistent with Kumar's, as to whether the appellant was aware of the presence of Pandi and whether Kumar had seen Pandi at all outside the 'Cheers' outlet. It must be remembered, however, that the appellant had been somewhat intoxicated at the material time and during his testimony in court, Pandi had confirmed several times the appellant's state of intoxication. It was not improbable that his account of the events could be somewhat affected by his intoxication. More importantly, the burden of proof was still on the prosecution to prove the appellant's guilt beyond a reasonable doubt, however tenuous the defence might have been : *Tan Edmund v PP* [1995] 2 SLR 102. In discharging this burden, it was not at all sufficient for the prosecution to merely point to the inadequacies of the appellant's testimony.

36 Having examined the evidence carefully and assessed the case in its entirety, I was of the view that, even though the appellant was unable to establish an affirmative defence to prove his innocence, his conviction was unsafe and an acquittal would be in order, as the prosecution had not succeeded in proving its case beyond a reasonable doubt : *Tan Buck Tee v PP* [1961] MLJ 176; *Ang Kah Kee v PP* [2002] 2 SLR 104. The FIR was full of inaccuracies. Neither the special pass nor the \$50 note was ever recovered by the police. The prosecution also failed to call a material witness to corroborate Pandi's version of events, even though it was claimed by Pandi that the material witness had watched the entire incident and had advised Pandi to call the police. In the circumstances, I allowed the appeal and set aside the conviction and sentence.

Sgd:

YONG PUNG HOW

Chief Justice

Republic of Singapore

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