Tan Chee Wee v Public Prosecutor
[2004] SGCA 2

Case Number : Cr App 13/2003

Decision Date : 10 January 2004

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Choo Han Teck J; Yong Pung How CJ

Counsel Name(s) : Peter Yap (Peter Yap) and Teo Choo Kee (CK Teo and Co) for appellant; James E Lee (Deputy Public Prosecutor) for respondent

Parties : Tan Chee Wee — Public Prosecutor

Criminal Law – Offences – Murder – Whether sufficient that intention to kill formed on the spot

Criminal Law – Special exceptions – Sudden fight – Whether blow struck in sudden fight in heat of passion occasioned by sudden quarrel

Criminal Law – Special exceptions – Sudden fight – Whether striking deceased on head with hammer constitutes taking undue advantage

Criminal Law – Special exceptions – Sudden fight – Whether striking deceased on head with hammer repeatedly constitutes acting in cruel or unusual manner

Words and Phrases – "Fight" – Meaning

Yong Pung How CJ (delivering the judgment of the court):

1 The appellant was convicted on the following charge and sentenced to death:

> That you, Tan Chee Wee, on the 9th day of January 2003, between 10.42 am and 12.25 pm, at Block 45 Chai Chee Street #09-168, Singapore, committed murder by causing the death of one Thabun Pranee, female/26 years old, and you have thereby committed an offence punishable under section 302 of the Penal Code, Chapter 224.

2 He appealed against his conviction. We heard his appeal and dismissed it for the reasons that we now give.

Background

3 The appellant, a Malaysian, was 29 years old on the date of the offence. He was married to Goh Ai Hoon ("Goh"), also a Malaysian. The couple worked at Polycore Optical (Pte) Limited ("Polycore"), a Singapore company. Despite being married, they lived separately in the male and female quarters provided by Polycore for its employees at Hougang.

4 The deceased, Thabun Pranee, was a Thai national holding a long-term pass. She was married to one Ler Lee Mong ("Ler"). Ler had brought the deceased to Singapore shortly after their marriage. The deceased could not speak English and could only manage a little Hokkien. They stayed at a flat at Chai Chee Street ("the flat").

5 The appellant was a friend of Ler. He was a regular visitor to the flat. He came by two to three times a week to play mahjong with Ler and two other friends, namely Seow Chiak Kwang ("Seow") and Alveen Ong, as well as to watch soccer matches. During these visits, the appellant hardly spoke to the deceased and they had merely nodded at each other owing to communication problems.

Prosecution's case

6 At the trial below, the Prosecution's case was simple. They contended that the appellant had gone to the flat to rob the deceased. In the course of the robbery, he had attacked her and intentionally inflicted several blows to her head. The injuries caused by those blows were sufficient in the ordinary course of nature to cause death. As such, the Prosecution contended that the appellant was liable under both limbs (a) and (c) of s 300 of the Penal Code (Cap 224, 1985 Rev Ed) ("s 300"), which reads:

> **Murder.**
>
> 300. Except in the cases hereinafter excepted culpable homicide is murder —
>
> (a) if the act by which the death is caused is done with the intention of causing death;
>
> (b) …
>
> (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
> …

7 We now turn to examine the evidence presented by the Prosecution in greater depth. Their case begins on 9 January 2003 when the appellant was not feeling well. He went to see Polycore's company doctor and was given one day's medical leave. The appellant returned to Polycore's office premises to submit the medical certificate and to issue some instructions to his staff. He then hailed a taxi and went to the flat. He reached the void deck of the flat at about 10am.

8 At that time, the deceased was alone at home as Ler had already left home for work. The appellant managed to gain access to the flat. The story then moves to about 5.50pm when Ler called home. No one answered his calls. He reached home at about 6.10pm and found the main wooden door to the flat wide open. The left side of the iron gate was also open and the padlock to the iron gate was hanging on the hinge with the keys dangling from the keyhole. He immediately entered the flat and walked to the master bedroom. He found his wife lying in a pool of blood on the floor next to the bed. She was lying on her left side. She was only wearing a black T-shirt and panty. He tried to wake her up, but failed to elicit any visible response. He immediately ran out of the master bedroom and called the police.

9 While waiting for the police to arrive, Ler noticed that the wardrobe drawers had been forced open. He also found that his wife's jewellery box and wallet were empty. Upon the arrival of the police, they asked Ler to check his belongings thoroughly. Ler complied and discovered that other items including one gold Rolex watch, gold chains, gold bracelets, the gold rings that his wife normally wore, a red packet containing $120 and cash of about $300 were all missing.

10 A paramedic arrived on the scene at 6.31pm and the deceased was pronounced dead at 6.38pm. The officers from the Special Investigation Section, Criminal Investigation Division ("SIS") arrived at the flat at about 8pm. ASP Christopher Jacob was the investigating officer. In the course of his investigations, he activated the caller-ID display screen of the master bedroom telephone and noticed that there were two incoming calls that day. The first was at 10.42am from a mobile telephone number 98773531 and the second was from Ler in the evening.

11 Further investigations revealed that the mobile phone number was registered to Seow who told the police that he had subscribed to the line on behalf of the appellant. At 11.30pm, the SIS officers went to Polycore's male quarters and confirmed that the appellant was in possession of a mobile phone carrying the said number. They invited him back to the station for an interview. The appellant did not object and went along.

12 The next morning, the appellant gave a statement to the SIS officers in which he admitted to entering the flat for the purpose of robbery. He further admitted that a struggle occurred in which he had used a hammer to hit her head and the deceased had rolled onto the floor, following which the appellant left the flat. The SIS officers then placed the appellant under arrest for murder.

13 The appellant was brought back to his quarters where a black haversack was recovered. In that haversack, the police found four gold chains, five bracelets, three rings, one Buddha pendant, one bangle and one gold Rolex watch, which were identified by Ler as being the items taken from his flat. The police also found a hammer, spanner, screwdriver and test pen which the appellant identified as the tools that he had brought along for the robbery.

14 The police subsequently recovered from a rubbish collection centre the T-shirts that the appellant had worn during the robbery and from Senoko Incinerator Plant the gloves, string and knife that the appellant had used during the robbery. All these items were identified by the appellant. A subsequent analysis by the DNA Profiling Laboratory at the Centre of Forensic Science revealed that blood was found on the hammer, knife, strings and glove. This blood was found to match the blood of the deceased.

15 On the same day, the police recorded a cautioned statement under s 122(6) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) from the appellant at about 7pm. In that statement, which was admitted without challenge, the appellant stated:

> On that day, when I went up, it had never occurred to me that the matter would become so serious. On that day, she had run out of the room and I pointed the knife at her. She struggled. I only pointed the knife at her and she was struggling away. I do not know how my knife ended up stabbing her throat. On that day when I went up, I had only wanted money. I did not intend to kill her…

16 As their final witness, the Prosecution called Dr Gilbert Lau, the forensic pathologist who had conducted the autopsy. He testified that from his preliminary examination of the body on 9 January 2003 at 11pm, he estimated the post mortem interval to be in the region of 6–12 hours. He further testified that he established at the autopsy that the victim's attire was heavily stained with blood. He found 18 scalp lacerations of varying dimensions, with the most severe being "Injury No 1" which was a "gaping, deep stellate laceration measuring 6x4cm across the lower central and right occipital regions". There was also an underlying fracture measuring 3x3cm from which a linear fracture 6cm in length radiated from. In addition, there was a stab wound across the lower neck and several fine scratch marks around the stab wound, as well as several more minor injuries such as bruises on her face and ligature marks on both her wrists.

17 Dr Lau testified that the deceased's death was due to "blunt force trauma of the head, with resultant bilateral, diffuse, acute subdural and subarachnoid haemorrhage". In plain terms, this meant that death had resulted from the blows to the victim's head, which had caused damage to the brain. He further opined that the stab wound to the neck was "unlikely to have caused or contributed to death".

18 Dr Lau further testified that he was of the opinion that the hammer found in the appellant's quarters could have been used to inflict the lacerations of the scalp and the underlying fractures of the skull. Dr Lau also noted that while it was, in theory, possible for one or two of the scalp lacerations to have been caused by the deceased's head falling onto the spanner, this would require the deceased to have been pushed with considerable force. Further, it was highly unlikely given the wide splatter of blood in the bedroom, which instead suggested to him that repeated blows were inflicted upon the victim's head by "up and down movements of the bloodstained instruments" at various locations in the room.

19 Lastly, Dr Lau testified that he was of the opinion that the head wounds (in particular, the injuries caused to the brain by the blows) would be sufficient in the ordinary course of nature to cause death.

20 After hearing the Prosecution's evidence, the trial judge found that the Prosecution had made out a case against the appellant which, if left unrebutted, would warrant his conviction. As such, he called upon the Defence to present their case.

Defence's case

21 At trial, the appellant put forward several defences. First, the appellant, while admitting that he had struck the deceased on her head with the hammer, denied inflicting all the head wounds. Instead, he contended that another person had entered the flat after he had left and inflicted the wounds (for reasons unknown). Second, the appellant contended that the Prosecution had failed to establish beyond a reasonable doubt that he had the necessary *mens rea* under s 300. Third, it was argued that the appellant was entitled to be acquitted as he had inflicted the fatal wounds in the exercise of his right to private defence. Lastly, the appellant submitted that he fell within the ambit of Exception 4 of s 300: the sudden fight exception, and thus should only be convicted of the offence of culpable homicide not amounting to murder and not the offence of murder.

22 In support of their case, the Defence called upon the appellant, who was the only witness for the Defence. The appellant testified that he had, on 9 January 2003, owed more than $11,000 to friends, colleagues and moneylenders. The due date for the debts was drawing near and he was growing desperate. As such, his thoughts turned to crime. The appellant had previously seen Ler give loans of $1,000 on two separate occasions. On each occasion, Ler had taken the money from his bedroom. Thus, the appellant concluded that there must be money in the flat and he decided to get hold of that money.

23 On the evening of 8 January 2003, the appellant was not feeling well. He decided to see a doctor the next day and resolved to get his hands on the money by whatever means necessary (including robbery), if he managed to obtain medical leave. On the morning of the fateful day, he left his quarters and brought with him the various implements that he would use in the robbery. These included, *inter alia*, a knife, hammer, spanner, screwdriver, test pen, strings, shorts, gloves and T-shirt. The appellant testified that he had brought the knife along to intimidate the deceased and the other metal implements to break open the locks and force open cupboards.

24 He proceeded to Polycore's company doctor and successfully obtained medical leave. He then returned to his office to submit the medical certificate. While he was at his workplace, he cut and took along some tape which was just long enough to cover a mouth.

25 The appellant then took a taxi to the flat. He established that Ler's car was not in the car park before taking the lift up to the flat. He walked to the flat and found that the metal gate was

locked and the wooden door shut. At that point, he hesitated and walked back to the staircase landing because he was not sure whether there was anyone in the flat.

26 The appellant decided to use his handphone to call the flat phone. He called three times. On his third attempt, the deceased picked up the phone and said "hello". The appellant did not answer and switched off his handphone. Upon realising that there was someone at home, his resolve wavered. However, he swiftly realised that he had no other options available to him and resolved to continue with his original plan.

27 When questioned as to how he was going to deal with the deceased, who would have been able to identify him, he stated that he would tell the deceased not to report him to the police and instead to tell her husband that someone had hit her while she was on her way out to buy things.

28 The appellant knocked on the door and when the deceased opened the door, he pointed into the flat and said in English, "Toilet, toilet". The deceased unlocked the gate and opened the door for him to enter. The appellant went to the toilet in the kitchen where he took out his knife and walked back into the living room. At that point, the deceased was standing near the main door. The appellant walked towards her, brandishing the knife and told her in Hokkien, "Robbery". He then locked the metal gate and shut the wooden door.

29 The appellant told the deceased that he wanted money. She told him that the money was kept in two drawers in the wardrobe located in the master bedroom. The deceased searched for the key to the drawers, but could not find it. She then picked up her wallet and gave him the money inside her wallet. In the meantime, the appellant saw a gold Rolex watch lying on the cupboard beside the bed and took it.

30 The appellant then told the deceased to sit down on the bed and she complied. She began to remove all the jewellery that she was wearing and handed them to him. One of the bracelets was difficult to remove and the appellant forcefully pulled it off her wrist. The appellant then opened his bag and took out the spanner, screwdriver and test pen and put them on the bed beside his knife. The bag was left on the floor. He then used the screwdriver to prise open the drawers.

31 He successfully prised open the first drawer and emptied its contents. He then started on the second drawer. At that moment, the deceased ran out of the bedroom. The appellant dropped the screwdriver, grabbed his knife and gave chase. He caught up with her in the living room. He told her to return to the bedroom and she complied, returning to the same spot on the bed. The appellant then remembered the tape and strings that he had brought along to restrain the victim.

32 He took out the tape and strings, but the strings were all knotted up. He tried to use his knife to cut the strings. The deceased then told him in Hokkien "Give you once, then you go". He turned to look at the victim and saw that she had pulled down her pants and panties to her ankles. He put down the knife, walked over and proceeded to have sex with her. He ejaculated into his hand. He looked around, but could not find any tissue. As such, he took out a glove from his bag and used it to clean his hand.

33 At this point, the deceased ran out of the bedroom again. The appellant put down the glove, picked up his knife and gave chase. He caught up with her near the door frame of the bedroom. He used his left hand to grab her upper right arm and pointed his knife at her throat. She struggled and his knife cut her throat. Blood oozed out of the wound and he hurriedly pulled the knife out. The deceased stopped struggling. He helped her into the bedroom and lay her across the bed. The deceased then started to move and the appellant climbed back onto the bed and pressed down her

hands. He did so as he was concerned that she might hit herself against his tools that were on the bed and injure herself. At that point, he was still holding the knife in his hand.

34 The deceased continued to struggle and in the midst of the struggle, she managed to get hold of the knife. The appellant was shocked. He jumped off the bed and retreated a few paces away to the wardrobe. He testified that he was not thinking of whether she might use the knife on him. The deceased sat up while holding the knife and glared at the appellant. She did not actually move forward nor lunge at him. The appellant said that the deceased looked very fierce, as if she wanted to attack him with the knife. He looked around and saw a wooden handle protruding from his bag. It was the wooden handle of the hammer. He reached out and grabbed the wooden handle and used it to hit her on her head. The deceased fell onto the bed and let go of the knife. She then rolled across the bed and fell onto the floor.

35 The appellant wrapped up his knife in some newspapers and placed it, together with the rest of his things, into his bag. He went to the kitchen to wash his hands. He stated that it did not occur to him to check on how seriously injured the deceased was. He then unlocked the main door and left the flat. As he was about to leave the flat, he noticed movements in the bedroom. He walked back to the doorframe of the bedroom and saw the victim sit up. He then turned and left the flat without closing or locking the main door or the iron grille.

36 The appellant took a lift down and boarded a taxi back to his quarters. He washed the tools used in the robbery and threw away the items that were subsequently discovered by the police. He called his wife and arranged to meet her in the evening. In the evening, he met his wife. They had dinner together and he sent her back to her quarters. He then returned to his quarters where he was subsequently visited by the SIS officers.

Decision of the court below

37 The trial judge rejected the entire gamut of the defences relied upon by the appellant. He rejected the appellant's contention that he had only hit the deceased once or twice on the head with the hammer without intending to kill her. He further dismissed the Defence's suggestion that another person could have entered the flat after the appellant had left and inflicted the fatal wounds as being unsupported by the evidence. He found that the appellant's conduct was consistent with that of a person who believed that he would get away with his crimes as he had eliminated the only eyewitness. The trial judge found that there was no reasonable doubt that the appellant had inflicted the blows with the hammer that had caused the 18 scalp lacerations and skull fractures which led to the deceased's death. He found that the appellant had done so intentionally to silence her.

38 He further rejected the Defence's contention that the appellant had inflicted the wounds in exercising the right of private defence. Similarly, he dismissed the Defence's reliance on the exception of sudden fight. As such, the trial judge convicted the appellant on the charge and sentenced him to suffer death.

The appeal

39 In the petition of appeal, the appellant raised three main arguments. First, he contended that the trial judge had erred in discounting the evidence showing that other parties could have entered the flat after the appellant had left. Second, he challenged the trial judge's finding of *mens rea*. Lastly, he submitted that the sudden fight exception ought to apply. As such, the petition of appeal essentially rehashed the arguments raised at the court below. We would just note that the appellant had given up on the defence of the right of private defence. In any case, the facts of this case could

not have sustained the defence given the requirements under the principle of proportionality: *PP v Kwan Cin Cheng* [1998] 2 SLR 345.

40 Before us, counsel for the appellant indicated that he would not be pursuing the first argument, conceding that it was not possible to dispute that the injuries were caused by the appellant. In any event, it was clear to us that the blows to the deceased's head were inflicted by the appellant. Even if we accepted (and we did not) that the evidence showed that an unknown person had entered the flat, there was completely no evidence that showed that this unknown person had inflicted any of the wounds or suggested why that person would have assaulted the deceased. Instead, all the evidence pointed to the appellant having inflicted the blows: first, the appellant had admitted to striking the deceased with the hammer; second, the injuries inflicted were found to be consistent with their being inflicted by the hammer; third, the hammer was found in the possession of the appellant; and lastly, the blood on the hammer was found to match that of the deceased.

41 Counsel for the appellant thus turned to the other two remaining arguments. We would begin with his arguments contesting the trial judge's finding on the appellant's *mens rea*.

Mens rea

42 The Prosecution had in this case proceeded on both limbs (a) and (c) of s 300. The key difference between these two provisions is one of intention. Section 300(a) provides that the act by which the death is caused must be done with the intention of causing death. In contrast, the *mens rea* required under s 300(c) is lower in that the intention need only be to cause bodily injury and that bodily injury so inflicted is sufficient in the ordinary course of nature to cause death. Section 300(c) thus envisions that the accused subjectively intends to cause a bodily injury that is objectively likely to cause death in the ordinary course of nature. There is no necessity for the accused to have considered whether or not the injury to be inflicted would have such a result. It is in fact irrelevant whether or not the accused did intend to cause death, so long as death ensues from the bodily injury or injuries intentionally caused. This was stated clearly in *Tan Joo Cheng v PP* [1992] 1 SLR 620 where S Rajendran J delivering the judgment of this court adopted the judgment of Bose J in *Virsa Singh v State of Punjab* AIR (45) 1958 Supreme Court 465 at [16] that:

> *The question is not whether the prisoner intended to inflict a serious injury or a trivial one but whether he intended to inflict the injury that is proved to be present.* If he can show that he did not, or if the totality of the circumstances justify such an inference, then, of course, the intent that the section requires is not proved. But if there is nothing beyond the injury and the fact that the appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness, or intended serious consequences, is neither here nor there. The question, so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of a particular degree of seriousness, but whether he intended to inflict the injury in question; and once the existence of the injury is proved the intention to cause it will be presumed unless the evidence or the circumstances warrant an opposite conclusion. But whether the intention is there or not is one of fact and not one of law. *Whether the wound is serious or otherwise, and if serious, how serious, is a totally separate and distinct question and has nothing to do with the question whether the prisoner intended to inflict the injury in question.* [emphasis added]

43 As such, in examining whether s 300(c) has been made out, the court's approach to *mens rea* is only to determine whether the accused had intended to cause the injury that resulted in the victim's death. This approach has been articulated in *Virsa Singh v State of Punjab* at [12] that:

To put it shortly, the prosecution must prove the following facts before it can bring a case under s 300 "thirdly";

First, it must establish, quite objectively, that a bodily injury is present;

Secondly, the nature of the injury must be proved. These are purely objective investigations.

Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

Once these three elements are proved to be present, the enquiry proceeds further and,

Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

44 We would gratefully adopt this approach and note that the first and second requirements are not in dispute here. In any case, they are matters of objective inquiry which have been established by the prosecution witnesses. We would further jump ahead and add that the fourth element is similarly also not in dispute. Instead, the only issue at hand is whether the appellant had intended to inflict the bodily injury, *ie* the 18 scalp lacerations and the underlying fractures to the skull.

45 Counsel for the appellant submitted that the appellant had only intended to commit robbery. Thus he had no intention to cause any form of injury to the deceased. Further, he argued that as there were no other eyewitnesses to the incident, the entire sequence of events was based solely on the appellant's testimony and police statements. In all these statements and testimony, the appellant had continually denied having had any such intention whatsoever of hurting the deceased. Instead, he had always claimed that the injuries caused to the deceased arose as a result of the struggle between the deceased and him. Hence the trial judge had erred in finding that the appellant had the requisite *mens rea*.

46 We had no hesitation in dismissing counsel's arguments. From a perusal of the appellant's statements and testimony, we noted that the appellant had stated in all these documents that he had only intended to rob the victim. Even if we accepted this testimony at face value, this did not then necessarily mean that the accused could not later have formed the intention to kill the deceased. This point had previously been made by this court in *Mohd Sulaiman v PP* [1994] 2 SLR 465, where the accused had broken into a coffee shop similarly for the purpose of committing theft. He had been surprised by the victim, the security guard, and in the course of their struggle had stabbed the victim with a screwdriver. Karthigesu JA, delivering the judgment of the court, said at 473:

As for the assertion that the appellant had broken into the coffee-shop only intending to commit theft therein, we could not see how this in any way advanced the appellant's case. The prosecution has not attempted to argue that the intention to cause injury to the appellant was conceived at the moment of breaking into the coffee-shop and indeed it would be absurd for them to do so. The appellant could hardly have formed an intention of any sort towards the deceased at the moment of breaking into the coffee-shop, since he was not even aware at that moment of the deceased's presence inside. What the prosecution had to prove was that the deceased's fatal injuries were caused intentionally by the appellant and not accidentally; and in our opinion the learned judge was justified in finding that they had been so proved. [emphasis

added]

48 Indeed, it is not a necessary element of s 300(c) that the act be premeditated. It is sufficient that the intention was present even if it was formed instantly or on the spot. In this, we would respectfully adopt the words of Taylor J in *Ismail bin Hussin v PP* (1953) 19 MLJ 48 who stated at 49 that:

> The most probable explanation is that the accused's first statement to the magistrate is wholly true – that he saw a man and fired at once – on impulse – without any conscious or reasoned thought. *But however suddenly the intention was formed, the intention was to kill. That amounts to murder.* [emphasis added]

49 Moving on, it was clear to us that the appellant did possess the intention to inflict the wounds on the deceased. Of particular significance was Dr Lau's testimony in which he stated that the nature, severity and extent of the head injuries indicated that very considerable force must have been applied to the head, even after taking into account the fact that the hammer itself was fairly heavy. Furthermore, the appellant had himself admitted in a police statement that he "then took a hammer from [his] bag and hit her on the head because [he] was not sure how much of strength she had left in her. Naturally, [he] did not wait for her to hit [him] first".

50 As such, we were of the opinion that the appellant did intend to inflict the wounds on the deceased as he was seeking to pre-empt the deceased, whom he claimed was armed with a knife and appeared as if she was about to attack him. As such, we found that the necessary elements under s 300(c) have been made out. We now turn to deal with Exception 4 to s 300.

Exception 4 to s 300

51 The appellant's last ground of appeal rested on Exception 4 to s 300 which reads:

> *Exception* 4.—Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner.
>
> *Explanation*.—It is immaterial in such cases which party offers the provocation or commits the first assault.

52 This exception deals with the defence of sudden fight and it must be discharged by the Defence on a balance of probabilities. It envisions situations where, notwithstanding the fact that provocation may have been given or that a blow may have been struck or for whatever other reasons the quarrel may have started, the subsequent conduct of both parties implies mutual provocation and aggression which renders the task of apportioning blame between the parties impossible and they must thus be placed on equal footing with respect to blameworthiness.

53 However, sudden fight is only a partial excuse in that the accused is regarded as being less blameworthy because his judgment was clouded by the dust of conflict or inflamed by the heat of passion. It does not completely exculpate him from the consequences of his actions.

54 This court recently had the opportunity in *Tan Chun Seng v PP* [2003] 2 SLR 506 to examine the operation of the defence of sudden fight. In that case, we stated at [16] that:

> There are three main ingredients which prompt the operation of this defence:

(a) sudden fight, heat of passion, sudden quarrel;

(b) absence of premeditation;

(c) no undue advantage or cruel or unusual acts.

55 Having reviewed the facts and evidence of this appeal, we fully agreed with the trial judge's observations that the defence of sudden fight did not apply. Although we accorded the benefit of doubt to the appellant as far as the issue of premeditation was concerned, (see *PP v Seow Khoon Kwee* [1988] SLR 871, *Chan Kin Choi v PP* [1991] SLR 34 and *Mohamad Yassin v PP* [1994] 3 SLR 491), we were of the opinion that the appellant had not satisfied the other elements of the defence of sudden fight to successfully invoke its aid.

56 It was our opinion that the appellant's defence failed on two levels. First, we were unconvinced as to the existence of a sudden fight in the heat of passion upon a sudden quarrel. The word "fight" is not defined in the Penal Code. However, the word "fight" is also used in s 159 of the Penal Code which relates to the offence of affray. It states:

Affray.

159. When two or more persons, by fighting, in a public place, disturb the public peace, they are said to "commit an affray".

57 Our High Court had in relation to this provision stated in *Eldon v PP* [2001] 1 SLR 710 at [49] that:

> 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* 1978 SCC (Cri) 428). 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. [emphasis added]

58 This definition of "fight" must be contrasted to that given in the case of *Hans Raj Singh v Emperor* AIR (33) 1946 Lahore 41 where Mohammad Sharif J took a different position when he stated at 43 that:

> No authority was cited to show that in order to apply Exception 4 it is essential that there should have been blows on each side. A word or a gesticulation may be as provocative as a blow.

59 The approach taken in *Hans Raj Singh* is not without support locally. In *Chan Kin Choi v PP* [1991] SLR 34, this court held that the defence of sudden fight applied. The facts there involved the accused meeting the victim, a moneylender, at a restaurant. Four other persons from the victim's gang were also present in the restaurant. The victim got upset after the accused revealed that he could not pay back his loans and punched the accused's cheek. The accused immediately pulled out a

knife and stabbed the victim once on the throat before fleeing. Lai Kew Chai J, delivering the grounds of the court, stated at 45 that:

> The prosecution witnesses from the restaurant confirmed that two or three members of the gang of the deceased had joined them. *A sudden fight broke out immediately after the deceased was joined by his gang.* Tables and chairs were overturned. Glasses were broken. There was no reason to disbelieve the appellant when he said that it was the deceased who had started the fight. The absence of any evidence of injury on the appellant was an innocuous fact as the appellant had stated in his statement that the deceased had only slightly injured him. *Faced with the danger posed by the gang he stabbed the deceased only once on the neck.* [emphasis added]

60 From this, it would appear that there was no exchange of blows. At best, there was a single punch followed by the fatal stabbing. Hence, the court appeared to have taken into account the surrounding circumstances before the fatal stabbing: namely the fact that the victim's gang had moved into the restaurant and the prevailing tension caused by the offer of violence. This point had been referred to in Professor Koh Keng Lian's article "Trends in Singapore Criminal Law" found in *Review of Judicial and Legal Reforms in Singapore Between 1990 and 1995* (Singapore Academy of Law, 1996) where she commented at 382 that:

> On the facts, there does not appear to be a sudden quarrel and sudden fight in the legal sense. Rather, *it was in anticipation of a fight with the deceased and his gang* that the appellant struck the fatal blow on the neck. [emphasis added]

61 Having considered these cases, it is our opinion that "fight" implies mutual provocation and blows on each side. It is not sufficient that there is, in the words of the court in *Jusab Usman v State* (1983) XXIV Guj LR 1148, "at least an offer of violence on both sides". After all, the wording of Exception 4 states "a sudden fight in the heat of passion upon a sudden quarrel". We would note that the word fight and quarrel appear side by side in the provision. As such, this clearly indicates that it must have been the intention of the Legislature that "fight" must mean something more than just a mere quarrel.

62 It is further our view that where a person strikes another, then there will only be a fight if the other hits him back or at the very least prepares himself to strike back, even if he ultimately does not strike back because of the lack of opportunity. There cannot be a fight if the victim keeps quiet and does nothing. That is simply a one-sided attack. Such an attack was illustrated in *Mohamad Yassin v PP* [1994] 3 SLR 491 where the accused had, after a quarrel, sharpened a toothbrush and waited for the victim and stalked him to a staircase, where he attacked the victim from behind and by surprise. Such a sneak attack cannot be regarded as a fight regardless of what position one takes on the meaning of fight. The position may however be different, if the victim had managed to retaliate.

63 In the instant appeal, the appellant had struck the deceased on the head with the hammer. In our opinion, it is doubtful that this attack can be regarded as a fight. While the attack had supposedly arisen after the victim had grabbed the knife, we would note that there was no evidence that there was an exchange of blows. The case of *Chan Kin Choi* is easily distinguishable from the present appeal as it was not in dispute that the victim had punched the accused there.

64 In any event, even if we did characterise the brief struggle as a fight, there is nothing to show that the blow fell in a sudden fight in the heat of passion upon a sudden quarrel. This is crucial because the operation of the exception requires that there must be a killing whilst both parties are gripped by the inflammation of passions caused by a sudden quarrel. The appellant had gone to the

deceased flat to rob her. She had already tried to escape twice. It was clear that the deceased was not co-operating fully. It cannot be said that this sequence of events constituted a sudden quarrel. There may well have been a quarrel, but it certainly could not be said to have been sudden. Thus, we are unable to hold that the blow was struck in the heat of passion upon a sudden fight.

65 Secondly and more importantly, it could not be said that the appellant had met the third requirement of "without the offender having taken undue advantage or acted in a cruel or unusual manner". We turn first to the issue of "cruel or unusual manner".

66 It is not possible to articulate any hard and fast rule as to what constitutes a "cruel or unusual manner". Instead, the court has to examine the individual factual matrix in coming to its decision. Further, the penumbra of uncertainty in the evidence before the court, as in this appeal where the appellant is the only eyewitness to the incident, means that any definitive principles, even if they existed, cannot be applied with mathematical exactitude.

67 In this appeal, the appellant had struck the deceased many times on her head using a fairly hefty hammer so as to cause 18 lacerations and several underlying fractures. In our view, this was *prima facie* an indication that the appellant had acted in a cruel or unusual manner. However, we noted that this court had previously in *Soosay v PP* [1993] 3 SLR 272 allowed the application of the defence despite the fact that the accused had inflicted several stab wounds. We were of the opinion that the case of *Soosay* offers the appellant little assistance. The factual scenario there involved the accused confronting the victim over drinks regarding a missing gold chain and money. The victim pulled out a knife and made threatening motions. The accused kicked the victim in the stomach, whereupon the victim fell and dropped the knife. The accused picked up the knife and the victim charged at him. The accused had then stabbed the victim. Notwithstanding that, the victim continued to rush towards the accused, getting stabbed repeatedly before the accused managed to escape. The key distinction here is that the victim was completely undeterred not only by the knife, but by the first and subsequent stabbing. This point was highlighted (at 280) by Karthigesu J, as he then was, when he delivered the judgment of the court that:

> In our judgment the learned trial judge has overlooked a vital aspect of the evidence which was uncontroverted at the trial and that is that Lim kept coming at Soosay each time he was repulsed and Soosay was unable to disengage himself from the fight which in fact was started by Lim drawing the knife from his handbag and threateningly pointing it at Kuppiah. Further in our judgment it cannot be said that Soosay had taken "undue advantage" or acted in a "cruel or unusual manner" as the injuries he inflicted on Lim were inflicted while he was involved in a fight with Lim during which Lim could well have taken hold of the fallen knife before Soosay did or even wrested it from him in which case judging from Lim's temperament shown earlier he would have used it on both Soosay and Kuppiah with devastating effect; furthermore the tenacity with which Lim kept charging at Soosay gave Soosay little chance to disengage himself from the fight, which he ultimately achieved in a momentary lull in the fight.

68 This distinction was similarly emphasised in *Roshdi v PP* [1994] 3 SLR 282, a case in which the court again allowed the application of Exception 4 despite the fact that the accused had delivered multiple blows with a heavy mortar. Karthigesu JA, delivering the grounds of the court, noted at 293 that:

> The impression we get from a reading of the appellant's evidence is that the assault on him was relentless and he was fearful for his life, of being strangled and shot as well. We see no reason for not accepting the appellant's evidence of the sequence of events as narrated by him. In the absence of other evidence, it is not so incredible to be rendered unworthy of credit.

69 In this appeal, Dr Lau's testimony stated that the "generally low disposition of the blood splatter" suggested "that most of these blows would probably have been inflicted with the deceased either lying upon the floor or, perhaps, in a stooping position". This clearly indicated to our minds that the appellant was obviously not in a situation where he was pressed or put under relentless pressure. Instead, it pointed to the clear conclusion that the appellant had attacked the deceased even after she had collapsed to the ground, when she was clearly of no threat or danger to him. This to our minds clearly indicated that the appellant had acted not only cruelly and unusually, but also vindictively and murderously. In coming to this conclusion, we were guided by our earlier decision in *Chandran v PP* [1992] 2 SLR 265 where a key consideration in finding that the defence did not apply was the fact that "[t]he deceased was attacked, even after he was staggering following the first blow from the third appellant".

70 This would be sufficient to deal with the requirement of "without the offender having taken undue advantage or acted in a cruel or unusual manner". However, for the sake of completeness, we would just address the point on undue advantage.

71 The phrase "undue advantage" had been previously defined by the Privy Council on appeal from Singapore in *Mohamed Kunjo v PP* [1975–1977] SLR 75 as meaning unfair advantage. Applied to this appeal, we would note that the appellant had used a hammer to hit the deceased. However, the question of unfair advantage cannot be determined solely by any single factor. Instead, all the facts of the case must be taken into consideration especially those attributes unique to the other party in the fight, *ie* his physique, age, ability, aggression, *etc*.

72 This is nothing new. Our courts have in many previous decisions adopted this approach. For example, in *PP v Seow Khoon Kwee* [1988] SLR 871 at 882, L P Thean J, as he then was, noted:

> … that the deceased was of a bigger size and was stronger than [the accused]; *that [the accused] knew that the deceased had beaten up other prisoners on previous occasions*; [and thus the accused] therefore prepared the piece of glass for his own protection. [emphasis added]

73 Similarly, this point was made in the first instance unreported decision of *PP v Arun Prakash Vaithilingam* [2002] SGHC 295, which was subsequently affirmed by the Court of Appeal. Choo Han Teck JC, as he then was, stated at [17]:

> Finally, we must ask whether Arun had taken an unfair advantage over Lenin? There are many forms of uneven fights. A man who is 1.6m tall pitted against a man who is 1.9m tall is ostensibly disadvantaged, but we ought to ignore advantages of nature in a contemplation of Exception 4 especially when the smaller man picks on the larger one. *Matters may be complicated where, say the bigger man is professionally trained in unarmed combat, or even where it is the smaller man who is so trained.* These aspects are interesting and might be relevant in the appropriate case, but not in the present one. [emphasis added]

74 It must however be noted that in most of the cases where the defence of sudden fight was allowed, even though the accused was armed, the victim was larger or stronger than the accused. In that sense, the accused can be regarded as fighting an uneven battle. At this juncture, we would return to the case of *Tan Chun Seng* ([54] *supra*) where this court held that the defence of sudden fight applied. There, the accused had confronted the victim after his car window had been hit by the victim's companion. The accused shouted vulgarities at the victim and the victim had then pushed the accused onto the floor. After the accused fell, he spotted a wooden pole lying on the floor, picked it up and struck the victim on his head and back, continuing his assault even after the victim had fallen to the ground.

75 In holding that the defence of sudden fight applied, this court noted that the accused was of a much smaller size and build than the victim and thus held that there had been no undue advantage taken by the accused. In contrast, the deceased in this appeal was a petite lady who was smaller and weaker than the appellant. However, we do not think that this alone necessarily resolves the issue of whether there has been undue advantage here. In our opinion, *Tan Chun Seng* is distinguishable on the facts of this appeal as the parties in this appeal were *both* armed (the deceased wielding a knife). In such circumstances, where both parties are armed, the weightage to be placed on considerations of physical strength and size must be lessened. We would also add that the court in *Tan Chun Seng* did not apparently treat the issue of cruel or unusual behaviour as being distinct from that of undue advantage. For these reasons, we would confine the application of *Tan Chun Seng* to its particular facts.

76 As such, we are of the view that it cannot be said that the fact that the appellant had used a hammer to assault the deceased meant that he had taken undue advantage. However, this does not assist the appellant as we had, for the earlier mentioned reasons, come to the opposite conclusion on the issue of whether he had acted in a cruel or unusual manner.

Conclusion

77 At the end of the day, the benefit of doubt that an accused is entitled to is that of reasonable doubt. It is not the doubt of a vacillating mind who remains seated on the fence. There was no reasonable doubt to our minds that the appellant had quite deliberately caused the injuries which were sufficient in the ordinary course of nature to cause the death of the deceased, and that the defence of sudden fight was not available to him. As such, we dismissed the appeal and affirmed the sentence of death passed.

Appeal dismissed.

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