Zailani bin Ahmad v Public Prosecutor
[2004] SGCA 56

Case Number : Cr App 4/2004

Decision Date : 23 November 2004

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; MPH Rubin J; Yong Pung How CJ

Counsel Name(s) : Ismail bin Hamid (Ismail Hamid and Co) and Sadari bin Musari (Sadari Musari and Partners) for the appellant; Janet Wang (Deputy Public Prosecutor) for the respondent

Parties : Zailani bin Ahmad — Public Prosecutor

Criminal Law – Special exceptions – Diminished responsibility – Appellant convicted of charge of murder in furtherance of common intention – Appellant claiming substantial impairment of mind at time of offence – Whether appellant satisfying three limbs of exception to show diminished responsibility at time of offence – Section 300 Exception 7 Penal Code (Cap 224, 1985 Rev Ed)

Criminal Procedure and Sentencing – Appeal – Charge against appellant framed in terms of common intention – Trial judge not making finding on issue of common intention – Whether trial judge erring in law – Whether error occasioning substantial miscarriage of justice – Whether Court of Appeal can cure such errors – Section 54 Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed)

Criminal Procedure and Sentencing – Voir dire – Procedure – Trial judge remarking that appellant had not created any doubt that his statement was procured by threat – Whether trial judge correct in making such remark

23 November 2004

MPH Rubin J (delivering the judgment of the court):

Background

1 The appellant, Zailani bin Ahmad, was tried in the High Court on the charge that he:

> on or about the 28th day of June 2003, between 1.00 pm and 6.00 pm, at No 39B Lorong 28 Geylang, Singapore, together with one Rachel alias Fatimah alias Leni, in furtherance of the common intention of [he] and Rachel alias Fatimah alias Leni (as amended), did commit murder by causing the death of one Chi Tue Tiong, male/68 years old, and [he has] thereby committed an offence under section 302 read with section 34 of the Penal Code, Chapter 224.

At the conclusion of the trial, the appellant was convicted on the charge and sentenced to death. The appellant brought the appeal against the conviction and sentence.

Facts

2 The deceased, Chi Tue Tiong, was a caretaker of two apartments (37C and 39B) in an apartment block at Lorong 28 Geylang. His living quarters, which contained a bed and a chest of drawers, were an area at a staircase landing in apartment 39B. On 28 June 2003, the deceased's employer and some other persons found him lying on his bed, dead and bloodied. The police were alerted. At the scene, the investigation officer, Inspector David Ang Yeoh Tee ("Insp Ang"), found the chest of drawers in the room of the deceased smeared with blood. The hinges on the top two drawers had been tampered with,[1] and the single drawer on the second row had been pulled out. A bloodstained wooden pestle and a spanner were found inside this drawer.[2] A hammer and a

bloodstained axe were found under the chest of drawers,[3] and a fruit peeler was found about two metres away from the body.[4] Insp Ang also spotted two bloodstained shoeprints on the floor.[5]

3 In his autopsy, the pathologist noted that there were injuries found on the deceased's head, upper limbs, thorax and lower limbs. The most serious injuries were eight fractures on the head, and indications of at least nine separate blows delivered with force to the head.[6] The pathologist was of the opinion that the fractures and the underlying brain injuries suffered by the deceased were not due to a fall,[7] but were consistent with being caused by multiple blunt force trauma to the sides and the back of the head[8] of sufficient severity to cause death.[9] The injuries to the upper limbs were also caused by blunt force trauma and were defensive in nature. The pathologist certified the cause of death as "intracranial haemorrhage and cerebral contusions with fractured skull".[10] At trial, the pathologist was shown instruments recovered by the police from the scene of the crime, namely the pestle, axe, spanner and hammer.[11] The pathologist opined that the injuries could have been caused using the pestle, the handle of the axe or the hammer.[12]

4 The police received information that a male Malay, known as "Zailani", was believed to have been involved in a case of murder in Geylang.[13] Acting on this information, on 30 June 2003, a team of police officers arrived at Changi Village, where they spotted a male Malay (the appellant) who fitted the description given to them. They approached the appellant and detained him. The appellant was then brought to the Police Cantonment Complex, where an officer from the Special Investigation Section interviewed him,[14] following which the appellant gave this statement:[15]

> I have no money. I was arrested earlier for selling illegal VCD but I did not get any money for selling it. My family could not give me any money. On [*sic*] about two days ago, I could not remember the date, I could not remember the place but I was at a room in Geylang Road. I could be able to show the place. I was together with my girlfriend 'Racal' who is a female Indonesia [*sic*] in that room. Both of us have no money to pay the rent for staying at that room. We had been staying in that room for about one month plus. Racal suggested we rob the old male Chinese who looked after the rooms there. Racal told me the old Chinese man lived a room below our floor. I was drunk. Two of us went down. Racal opened the door. Two of us went inside. Actually Racal had retrieved a wooden pole from our room. I do not know where she retrieved this wooden pole from in our room. She handed the said pole to me before we went down. I beat up the old Chinese man inside with the pole and after that I could not remember what happened. Racal pulled my hand out from the room. We left the place but I could not remember where we went to.

5 Evidence adduced established that the appellant was staying in a room in apartment 37C, together with his Indonesian girlfriend, one Rachel alias Fatimah alias Leni ("Rachel"), referred to as "Racal" in the appellant's statement. Rachel was not apprehended as police investigations revealed that she had left Singapore for Batam on 29 June 2003.

6 In the event, the police managed to interview Rachel in Batam on 30 June 2003[16] and the information they received from her led them to a flat at Block 76 Telok Blangah Drive #05-282,[17] where they met one Kassim bin Rabu ("Kassim")[18] and his wife, Supiah bte Awang ("Supiah"). Supiah told the police that the appellant had visited the flat on 28 June 2003 with his Indonesian girlfriend and had borrowed a pair of shoes, leaving a pair of "Pazzo" brand shoes ("the Pazzo shoes") and a slingbag in the apartment.[19] The police took possession of these items.

7 Forensic examination confirmed that the shoeprints found at the scene of the crime were consistent with those made by the Pazzo shoes.[20] Additionally, it was found that the DNA profile of the blood on the left Pazzo shoe matched the DNA profile of the deceased's blood.[21]

8 At the trial, when the Prosecution sought to admit in evidence the statement recorded from the accused, it was objected to on the ground that it was obtained through threat, and not made voluntarily. A *voir dire* was conducted. In the result, the trial judge held that the appellant's version of the events could not be believed and that he did not create any doubt that his statement was procured by any threat. The statement was therefore admitted in evidence as having been voluntarily made by the appellant. The appellant was eventually called to make a defence to the charge.

9 The main thrust of the appellant's defence at the trial was that he was suffering from diminished responsibility at the time of the offence. As such, his testimony in court focused on issues pertaining to his mental capacity. The appellant claimed that he had a history of insomnia, and heard voices.[22] He had seen a general practitioner, Dr John Heng ("Dr Heng"), on 29 April 2003. Dr Heng testified that the appellant complained of insomnia and was prescribed 30 nitrazepam tablets ("Dima tablets"). He was told to take two tablets a night. Apart from the Dima tablets, the appellant also consumed "Ice", Roche 15 and Subutex tablets from April to June 2003.[23] On 27 June 2003, the appellant again went to see Dr Heng because he was feeling depressed.[24] That night, he took two Dima tablets and three big bottles of beer.[25] The next morning, he consumed another 12 Dima tablets because he was still feeling depressed and he was short of cash.[26] In relation to the commission of the offence, the more pertinent aspects of his evidence were as follows:[27]

> Q: So after taking the 12 tablets of Dima, what happened after that?
>
> A: After I took 12 tablets of Dima, I was unconscious of what is happening around me. When I regained consciousness, I was ransacking Ah Pek's locker. I do not know what I was looking for actually. I think I was looking for money. I only realised when Rachel called me saying "*Abang*, watch your back, Ah Pek wants to beat you up".
>
> When I turned around I saw Ah Pek swinging spanner at my head and I managed to avoid the spanner; I ducked my head. I stood up and I beat him up.
>
> Q: Do you know why did you come to be in Ah Pek's room?
>
> A: I was puzzled. I don't know why I was there. I didn't know what I was looking for.
>
> I think I was looking for money. When I opened up the drawer, I was … my vision was blur. I …
>
> My vision was blur. I couldn't see what was inside the drawer. I had a blackout.
>
> Q: When you were at Ah Pek's locker, were you aware you had … or do you know if you had anything in your hand, holding anything? Were you holding anything?
>
> A: I was … when I was opening the drawer, I had a key with me.
>
> I tried to open the drawer but I can't open. Then Rachel shouted to watch my back. Ah Pek wanted to beat me up with a spanner. I managed to duck and then I stood up. Then I beat him up. He …
>
> Q: Can you recall anything else after that?
>
> A: I remembered he fell down and I took the spanner from him. I took the spanner to open the drawer. I remembered damaging the locker, trying to open the locker.

I recall Rachel asked me to get out of the room because there's someone pressing the door bell.

So I quickly get out of the room to return to my room. I can't remember where I go to but I got out of Ah Pek's room. I returned to my room to take my things, then I ran away. That's all.

10 The appellant went on to testify that, subsequently, he woke up at a coffee shop in Kallang,[28] after which he went to Kassim's house[29] with Rachel.[30] He did not know what happened to Rachel after that,[31] but recalled having slept in a "jungle" in Marsiling with an Indonesian man.[32] Later, the Indonesian man and the appellant left for Changi because the Indonesian man had a *sampan* (a boat) there.[33] The appellant claimed that on the way to Changi, he was in a state of slumber when he was walking, as well as when he was in the mass rapid transit train and the bus.[34] When he alighted from the bus, he was arrested.[35]

11 He admitted to having had the intention to steal the deceased's money.[36] He mentioned that the intention was formed when he was feeling drowsy and high from the tablets he had consumed.[37] However, when his counsel re-examined him, he claimed that he was not sure if he had the intention to steal.[38] He maintained that he did not intend to kill the deceased.[39] He recalled Rachel bringing a wooden "pole" from outside their room[40], but could not remember if he used it to beat the deceased.[41] He reiterated that the deceased tried to attack him, and he responded by beating the deceased. However, he could not remember if he beat the deceased with his hand or a "pole".[42]

12 During cross-examination, the appellant was asked about how he felt after taking 12 Dima tablets. The appellant testified that he felt sleepy but resisted the sleepiness.[43] He then wanted to sleep, but could not sleep.[44] He had a headache,[45] was mumbling to himself[46] and felt a little aggressive,[47] although he did not harbour feelings of hostility.[48] He went on to say that he only felt aggressive when the deceased tried to hit him,[49] feeling no sense of aggressiveness prior to[50] or after[51] this incident. Additionally, the appellant testified that prior to the deceased's alleged attack on him, he only felt "high".[52]

13 Given the appellant's responses, the primary issue revolved around his mental capacity. Dr Tommy Tan ("Dr Tan"), a consultant psychiatrist from Woodbridge Hospital, recorded the following in his report:[53]

There was no abnormal behaviour observed by the nurses during the remand in Changi Prison Hospital.

When I examined Mr Zailani he had psychomotor retardation, ie his mental processes and movements were slowed down. He complained of auditory hallucinations, which were vague and inconsistent.

The mental state examination was inconsistent with the observations made by the nurses in the Prison Hospital.

With regard to the alleged offence of murder, Mr Zailani said that he had been taking many tablets of sleeping pills that day. He said that he had wanted to rob the deceased. He said he could not fully remember what happened.

In my opinion, the accused has a history of Dependence Syndrome of multiple drugs (F19.21, International Classification of Diseases.) This is characterised by the harmful use of drugs, drug seeking behaviour and difficulties in controlling the use of drugs.

He had acute intoxication with hypnotics (F13.0, International Classification of Diseases) at the time of the alleged offence of murder.

He was not of unsound mind at the time of the alleged offences as he knew what he was doing and what he was doing was wrong. He is fit to plead and is capable of making his defence. He knows the charges that he is facing and the consequence of pleading guilty. He will be able to follow the proceedings in Court. He will be able to instruct his counsel.

[emphasis added]

14 At the trial, Dr Tan elaborated on some aspects of the findings in his report. He explained that the appellant was suffering from acute intoxication with hypnotics at the time of the offence because he was "high" on sleeping pills.[54] In such a state, the appellant's judgment might be impaired.[55] However, the appellant would still know what he was doing and was probably fully conscious. Dr Tan also added that the appellant did not have an abnormality of mind which substantially impaired his mental responsibility.[56]

15 The Defence relied on the findings of Dr Lim Yun Chin ("Dr Lim"), consultant psychiatrist to Raffles Hospital. Dr Lim conducted a mental state examination on the appellant. His report[57] was as follows:

The accused admitted that after his return from Indonesia, he succumbed to the craving for drugs and used ice and subutex randomly. Because he started consuming illicit drugs, he decided to stay away from home and rented a room in Geylang with his girl partner. However, he had difficulty in sleeping and consulted Dr Heng who prescribed him Nitrazepam, a benzodiazepine drug for the treatment of insomnia. Initially, he used two tablets to help him sleep. However, on the eve the alleged offence, he was arrested for selling pirated VCDs.

He felt very "depressed" after his arrest and just before the commission of the alleged offence, he decided to indiscriminately swallow large amount [*sic*] of the Nitrazepam. He remembered swallowing 12 tablets of the Nitrazepam tablets in order to sleep and forget his "problems."

Instead of feeling sleepy, he remembered feeling more excitable and irritable. He claimed that his female partner suggested that they robbed [*sic*] the "old man" living below as they have no money to pay their rent. He agreed.

He remembered feeling "drunk" at the time when they went into the room of the house owner. He said that he was given a pole by his partner. Inside the owner's room, he claimed he was physically attacked by the owner when he tried to open the drawer. He remembered reacting to the owner's attack by beating him back. His recall after the violence in the owner's room appeared patchy and he was unable to give a coherent and reliable account of events that led to his arrest.

I agree with Dr Tommy Tan that he suffers from Dependence Syndrome of multiple drugs (F 19:21, ICD 10). I also agreed with Dr Tan that at the time of the alleged offence, his behaviour suggested that he was suffering from acute intoxication with hypnotics (Nitrazepam) (F 13.0, ICD 10). *It is also my opinion that he was not of unsound mind at the time of the offence. He is mentally fit to plead and is capable of making his defence.*

However, *I am of the opinion that he was suffering from diminished responsibility at the time of the offence because of the acute intoxication caused by the hypnotic, Nitrazepam. Although*

benzodiazepine as a class of drugs generally causes sedation when consumed, one of the known serious adverse effects is the development of Paradoxical stimulant effects particularly when consumed in excess to the point of intoxication. The characteristics of Paradoxical stimulant effects included irritability, hyperactive or aggressive behaviour. It is common to observe rage and violent behaviour, including assault and homicide because of the paradoxical stimulant effect. Such reactions are similar to those sometimes provoked by alcohol. The psychiatric literature mentioned cases of "baby-battering, wife-beating and grandma bashing" that have been attributed to the consumption of benzodiazepines.

[emphasis added]

16 Dr Lim explained that Dependence Syndrome is a psychiatric disorder where a person has the tendency to abuse a wide range of drugs to satisfy his craving,[58] develops a low threshold to frustration, and becomes more prone to disinhibited behaviour and aggression.[59] Dr Lim also explained that in arriving at his conclusion that the appellant was suffering from diminished responsibility at the time of the offence, he took into account the fact that after the appellant had consumed the 12 Dima tablets, his mind, motivation and behaviour were impaired and he had inadequate control of his mental faculties.

17 Dr Lim added that the paradoxical stimulant effects could cause a person to be disorientated, disorganised, bizarre and unpredictable.[60] At this juncture, it would be useful to mention that Dr Tan's explanation of the paradoxical stimulant effect was that this was essentially a "reversed" effect. For instance, instead of feeling sleepy after taking sleeping tablets, a person becomes more alert and more disinhibited,[61] active, hostile and aggressive.[62] However, Dr Tan noted that the paradoxical stimulant effect was not common.[63]

The decision below

18 The trial judge found that the appellant's evidence was inconsistent, and he was a poor and unsatisfactory witness prone to malingering.[64] The trial judge then went on to analyse the appellant's defence of diminished responsibility, having regard to Dr Lim's opinion that the appellant was suffering from diminished responsibility at the time of the offence because he had acute intoxication with hypnotics, which may bring about paradoxical stimulant effects, including irritability, hyperactivity or aggressive behaviour.[65] The trial judge found Dr Lim's opinion to be inconsistent with the admitted actions and manifestations of the accused at the relevant time.

19 The trial judge noted that it was significant that, when the appellant's actions were examined closely stage by stage, there were no signs of irritability, hyperactivity or aggressive behaviour and that he was actually able to decide to rob or steal, to choose which drawers to steal from, and to use the keys he had found to try to unlock them. Even after the deceased's alleged attack on him, and after disarming the deceased,[66] the appellant was able to return to the task of trying to open the drawers.

20 Dealing with the show of aggression or hostility by the accused, the trial judge did not regard this as evidence of aggression borne out of paradoxical stimulant effects. In the trial judge's opinion, the appellant's act of returning to try to open the drawers was inconsistent with the paradoxical stimulant effects or substantial impairment of the mind.[67]

21 After considering the medical evidence, the trial judge held that the appellant had not established on a balance of probabilities that he was suffering from diminished responsibility, and that the Prosecution had proved its case against him beyond a reasonable doubt. Accordingly, the

appellant was convicted on the charge and the death sentence was imposed on him.

The appeal

22 On 8 October 2004, the appellant's counsel filed a notice of motion and an affidavit, seeking an extension of time to file the Petition of Appeal. The Petition was due for filing on 24 September 2004. However, as a result of counsel's oversight, the Petition was only filed on 28 September 2004. Although s 47(4) of the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) ("SCJA") states that when "a petition is not filed within the time prescribed by this section [within 10 days[68] after service of the notice of appeal[69]] the appeal shall be deemed to have been withdrawn", the Court of Appeal can still exercise its powers under s 50 SCJA to grant the extension of time that has been sought. Section 50 SCJA reads as follows:

> **Appeals out of time and formal defects**
>
> The Court of Appeal may, in its discretion, on the application of any person desirous of appealing who may be debarred from so doing by reason of his not having observed some formality or some requirement of this Act, permit an appeal upon such terms and with such directions as it may consider desirable in order that substantial justice may be done in the matter, and may, for that purpose, extend any period of time prescribed by section 45 or 47.

23 Considering the fact that the present appeal involved a mandatory sentence of death, we felt that granting the extension of time would indeed be considered desirable within the meaning of s 50 SCJA. In the premises, we granted the extension of time that was sought, and proceeded to hear the appeal.

24 The appeal mainly revolved around the issue of whether the appellant was suffering from diminished responsibility at the time of the offence. In this regard, it was argued on behalf of the appellant that the trial judge had erred in failing to accept Dr Lim's evidence that he was suffering from acute intoxication with hypnotics to the extent that his mental faculty was substantially impaired. Further, it was submitted that the trial judge should have given greater consideration to Dr Lim's opinion that the appellant's excessive consumption of Dima tablets set off a paradoxical stimulant effect, and that his violent behaviour was attributable to this effect.

25 It was further argued that the accused had a drug dependence syndrome, a psychiatric disorder that explained his tendency to indulge in a wide range of drugs, causing him to have a low threshold to frustration. Another contention by counsel for the appellant was that the trial judge should have given greater consideration to the contention that he was fluctuating between consciousness and non-consciousness on numerous occasions on 28 June 2003, hence the discrepancies between his cautioned statement and his evidence in court, and his general inability to describe the attack and the extensive injuries sustained by the deceased.

26 From a careful examination of the evidence, it was clear to us that the appellant's arguments were devoid of merit and that he had failed to establish that he was suffering from diminished responsibility *at the time of the offence*. In this respect, we noted that the appellant's arguments essentially only listed the types of "mental" illnesses he allegedly suffered from, without explaining whether these "mental" illnesses actually resulted in his mental responsibility being substantially impaired *at the time the offence was committed*. Nevertheless, for the sake of completeness, we approached the appellant's arguments as if they had been taken to this crucial conclusion.

27 However, before stating our views and conclusions on the substantive issue of diminished

responsibility, we felt it necessary to clarify two aspects of the trial judge's Grounds of Decision. They relate to:

(a) the question whether the trial judge should make a finding on the issue of common intention as well as a finding as to the relative roles and involvement of the accused and Rachel in the offence for which the accused was tried; and

(b) the question as to the burden of proof on the accused in the *voir dire*.

Issue (a) — Common intention

28 Upon careful scrutiny of the trial judge's Grounds of Decision ([2004] SGHC 202), we noted that although the charge had clearly been framed in terms of common intention, the trial judge did not make an express finding on the issue of common intention. The only finding the trial judge made, which was somewhat to this effect, was that the appellant and Rachel went to rob or steal from the deceased, bringing with them a wooden pole that they must have intended to use on the deceased if confronted.[70] Additionally, what the trial judge said in [71] and [72] of the Grounds of Decision was this:

71 The evidence is that the fatal injuries were caused by the accused, or Rachel, or the both of them. As the charge was that the offence was committed in furtherance of their common intention, it was *not necessary for the Prosecution to establish whether the accused, Rachel or the both of them inflicted the fatal injuries*.

72 The defence of diminished responsibility was raised against the background of the accused's evidence that he could not remember what he did after he punched the deceased and Dr Lim's opinion that he was suffering from diminished responsibility at the time of the offence. Dr Lim's opinion was grounded on the assumption that the accused inflicted the injuries. If Rachel had inflicted them in furtherance of their common intention, the defence of diminished responsibility would not be available to the accused. Nevertheless the defence of diminished responsibility must be considered because the accused *might* have inflicted the injuries, and if he did, the defence could apply.

[emphasis added]

29 Apart from a brief reference to the evidence in the first sentence of [71] of the Grounds of Decision, there was no specific finding or determination by the trial judge, either as to common intention or as to the roles played and the acts committed by the appellant or Rachel, in relation to the offence under consideration. We would hasten to add that the Defence did not at any time put the question of common intention in issue.

30 The utterance in the last two lines of [72] of the Grounds of Decision that the "accused might have inflicted the injuries" was unhelpful. In this context, reference should be made to *Ratanlal & Dhirajlal's The Indian Penal Code* (29th Ed, 2002) ("*Ratanlal*") at p 194, where the learned authors state that:

Before any accused can be convicted of an offence read with this section [s 34 Indian Penal Code], the Court *must arrive at a finding as to which of the accused took what part, if any, in furtherance of the common intention. A conviction without such a finding is illegal.* [emphasis added]

Section 34 of the Indian Penal Code is *in pari materia* with s 34 of our Penal Code (Cap 224, 1985 Rev Ed) ("PC"). The authors of *Rantanlal*, in this regard, seemed to have relied on the case of *Fazoo Khan v Jatoo Khan* AIR 1931 Cal 643 ("*Fazoo Khan*") in support of their submission.

31 The views expressed in *Ratanlal* came up for discussion before the Malaysian Court of Appeal in *Chin Hon v PP* [1948] MLJ 193 and the court took issue with the phrase "which of the accused", appearing in the headnote of *Fazoo Khan*, holding that there was nothing in *Fazoo Khan* which required a court to arrive at a finding as to the part played by each individual accused. The court then referred to the Privy Council decision in *Mahbub Shah v Emperor* AIR 1945 PC 118 for the correct position in law, and said at 193–194:

> The first of the two comments [the views in *Ratanlal*] quoted above was based on the head-note to *Fazoo Khan & Others v Jatoo Khan & another*, which reads as follows:—
>
> > Penal Code section 34. Participation in action to commit offence with common intention is essential element and Court must arrive at finding as to part played by each individual accused in furtherance of common intention ... a conviction without such finding is illegal.
>
> There is nothing in the judgment in that case to support that part of the head-note which requires a Court to arrive at a finding as to the part played by each individual accused. The correct position is made clear by the decision of the Privy Council in *Mahbub Shah v Emperor*. The relevant portion of the head-note to the report of that appeal reads as follows:—
>
> > Common intention within the meaning of section 34 implies a pre-arranged plan. *To convict the accused of an offence applying section 34 it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan.*
>
> And in the judgment the following observations appear:—
>
> > *To invoke the aid of section 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in furtherance of the common intention of all: if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone.*
>
> [emphasis added]

32 Although reference by the authors of *Ratanlal* to the headnote in *Fazoo Khan* was a little "out of sync", the pronouncements in *Mahbub Shah v Emperor* are unmistakable. To summarise, what the court must do is to make a finding that the criminal act complained of was carried out by one of the accused persons in furtherance of the common intention of all. As such, it was necessary for the trial judge to find that either the appellant or Rachel had struck the fatal blow on the deceased, thereby committing an offence under one of the limbs to s 300 PC (in this case, s 300(c) PC).

33 However, the trial judge did not arrive at this finding of fact and premised his evaluation of the evidence on the hypothesis that the appellant was the person who struck the deceased dead. A hypothetical analysis cannot be equated with a finding of fact and as such, in our view, the trial judge was in error.

34 In the same vein, the trial judge also seemed to have erred in his holding at [71], where he mentioned that it was "not necessary for the Prosecution to establish whether the accused, Rachel or the both of them inflicted the fatal injuries". In our opinion, the phrase "in furtherance of common

intention" itself denotes a necessity to find that the offence in question must have been committed to advance the common intention: see *Ratanlal* at p 114. As such, to successfully satisfy a charge crafted under "common intention", at least one of the participants must have inflicted the fatal injury and thereby committed the offence of murder. By finding to the contrary, the trial judge had erred in this aspect of his holding as well.

35 However, in our view, the errors catalogued did not detract from the fact that there was clear and cogent evidence to conclude that both Rachel and the appellant arrived at the premises mentioned in the charge with the common intention to rob or steal from the deceased, and in furtherance of the common intention, the appellant inflicted the fatal blows on the deceased and thereby committed the act of murder under s 302 read with s 34 PC. In our view, the lapses in the Grounds of Decision by the trial judge had occasioned no substantial miscarriage of justice. In this respect, reference ought to be made to s 54(3) SCJA which provides that this court:

> … may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

36 In *Wong Mimi v PP* [1972–1974] SLR 73, this court applied this very provision to "cure" a misdirection of law on the part of the trial judges. In that case, the error was that the trial judges failed to arrive at a finding as to whether the appellant there had the intention to inflict the fatal injuries that were present. The court took into account the trial judges' other findings of fact, particularly the finding that the appellant deliberately, and not accidentally, inflicted the fatal injuries with great force on vital parts of the body. The court therefore applied s 54 SCJA in order to "cure" the error made by the trial judges. In this appeal, too, s 54 SCJA can be similarly applied.

Issue (b) – The voir dire

37 The next issue which exercised our mind was in relation to the burden of proof on the accused in a *voir dire*. In his Grounds of Decision the trial judge said at [32]:

> I found that the accused's version of the events could not be believed. *He did not create any doubt that his statement might have been procured by the alleged threat*. I ruled that the statement was voluntary and admitted it in evidence.
>
> [emphasis added]

38 In our view, the trial judge's remark that the appellant "did not create any doubt" was not apt. The phrase "did not create any doubt" would imply that in order for the statement to be rendered inadmissible, the *appellant* was required to prove that it was made involuntarily by raising a doubt. However, this cannot be the case, as it would always be for the Prosecution to *prove beyond reasonable doubt* that the statement was made voluntarily without any threat, inducement, promise or oppression.

39 Section 24 of the Evidence Act (Cap 97, 1997 Rev Ed) as well as the proviso to s 122(5) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) provide that the court shall refuse to admit any statement or confession if the making of it "appears to the court to have been caused" by any of the vitiating factors mentioned in the said sections.

40 A classic statement made by Lord Sumner in delivering the opinion of the Privy Council in *Ibrahim v The King* [1914] AC 599 at 609 reads as follows:

> It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.

41 In *Director of Public Prosecutions v Ping Lin* [1976] AC 574 at 599, Lord Hailsham of St Marylebone observed that before a confession was to be admitted in evidence, it must be proved by the Prosecution beyond reasonable doubt as a fundamental condition of its admissibility. In the event, the House of Lords held that the issue of whether a statement was "voluntary" was basically one of fact, and that in determining the admissibility of such statements the trial judge should approach his task by applying the test enunciated by Lord Sumner in *Ibrahim v The King* in a common sense way to all the facts in the case in their context, and he should ask himself whether the Prosecution had proved that the contested statement was voluntary in the sense that it was not obtained by fear of prejudice or hope of advantage excited or held out by a person in authority.

42 In our opinion, the entire trial within a trial is to be regarded as a composite whole. In exercising his functions as judge and jury, the trial judge should take a global approach and arrive at his conclusion as to whether the Prosecution had indeed proved its case beyond reasonable doubt and not ask himself the question of whether the accused had raised any doubt in the Prosecution's case.

43 In our view, the only requirement, if any, on the Defence is to raise an issue and bring to light the alleged offending conduct of the recording officers as well as the circumstances under which the statement was given, and if the circumstances outlined appeared to give rise to an inference or a nagging suspicion that the statement was tainted by any of the vitiating factors, then the statement must be held to be inadmissible.

45 Although we were of the opinion that the test applied by the trial judge could be misunderstood, we found on a perusal of the trial judge's Grounds of Decision that the trial judge's use of the phrase "did not create any doubt" was unfortunate at most. The trial judge's decision was otherwise obvious, based on the evidence that lay before him. After evaluating all the evidence adduced at the trial, our conclusion was that the Prosecution had indeed proved beyond reasonable doubt that the statement was made voluntarily. This being the case, apart from highlighting that the trial judge could have been a little more vigilant with the phraseology he adopted, we saw no reason to find that the statement was wrongly admitted or that it ought to be excluded.

46 Having made these findings, we proceeded to consider the substantive issue on appeal before us, whether the defence of diminished responsibility was available to the appellant.

The law

47 The defence of diminished responsibility is encapsulated in Exception 7 to s 300 PC, which reads as follows:

> Culpable homicide is not murder if the offender was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in causing the death or being a party to causing the death.

48 There are three limbs that the appellant has to establish in order to satisfy the court that he was indeed suffering from diminished responsibility at the time of the offence: *Mansoor s/o Abdullah v*

PP [1998] 3 SLR 719; and *Tengku Jonaris Badlishah v PP* [1999] 2 SLR 260 ("*Tengku Jonaris*") at [35]. They are:

(a) The appellant must have been suffering from an abnormality of mind;

(b) Such abnormality of mind must have:

(i) arisen from a condition of arrested or retarded development of mind; or

(ii) arisen from any inherent causes; or

(iii) been induced by disease or injury; and

(c) Such abnormality of mind as in (b)(i) to (b)(iii) must have substantially impaired the appellant's mental responsibility for his acts and omissions in causing the death or being a party to causing the death.

49 The legal position in relation to the defence of diminished responsibility is clear. The seminal case in this respect is the decision of the English Court of Criminal Appeal in *R v Byrne* [1960] 2 QB 396, which has subsequently been cited with approval in many cases in our jurisdiction dealing with the defence including *Tengku Jonaris*.

50 Dealing with the first limb, the key phrase is "an abnormality of mind". This phrase has been described in *R v Byrne* at 403 as "a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal". However, in coming to a decision on whether an accused is suffering from such an abnormality of mind, the court is entitled to seek guidance from available medical evidence. Where the court is faced with evidence conflicting with such medical evidence, it is within the discretion of the court to form its own conclusion on the matter, taking into account other facts such as the acts or statements of the accused and his demeanour, and any other conflicting medical opinion: *R v Byrne*, as accepted by this court in *DZ v PP* [1998] 2 SLR 22 at [21] and [22].

51 In this context, it is a settled principle that, even where such medical opinion is unchallenged, the trial judges would be perfectly entitled to reject or differ from the opinions of the medical men, if there are other facts on which they could do so: *Sek Kim Wah v PP* [1987] SLR 107, following *Walton v R* (1977) 66 Cr App R 25, *R v Byrne* and *R v Kiszko* (1978) 68 Cr App R 62. This court's decision in *Sek Kim Wah v PP* was cited with approval in its later decisions in *Contemplacion v PP* [1994] 3 SLR 834 at 844, [36] and *Zainul Abidin bin Malik v PP* [1996] 1 SLR 654 at 661–662, [29] and [30].

52 Dealing with the second limb, the law is that the abnormality of mind must have (a) arisen from a condition of arrested or retarded development of mind; or (b) arisen from any inherent causes; or (c) been induced by disease or injury. These aspects are, by their very nature, within the purview of medical experts, and must be distinguished from the reasonable man's notion of whether someone is suffering from an abnormality of mind: see Stanley Yeo, "Improving the Determination of Diminished Responsibility Cases" [1999] SJLS 27 at 38. Therefore, the second limb is reliant on the conclusion of medical experts.

53 The final and most crucial limb, *ie*, the third limb, focuses on an accused's mental responsibility for his acts. The expression "mental responsibility for his acts" points to a consideration of the extent to which the accused's mind is answerable for his physical acts, which must include a consideration of the extent of his ability to exercise will power to control his physical acts: *R v Byrne*.

There is also a further requirement that the accused's mental responsibility be *substantially impaired*: *Cheng Swee Hin v PP* [1980–1981] SLR 116. While medical evidence would be constructive in determining the presence and/or extent of impairment, the main question of whether an accused's mental responsibility was substantially impaired is ultimately one for the court to answer: *DZ v PP*, following *R v Byrne*.

Applying the law to the facts of the present appeal

54 In our opinion, the appellant has not, on a balance of probabilities, established that the defence of diminished responsibility was available to him. In this respect, we considered the three limbs mentioned to the facts of the appeal to show why this was the case.

First limb: Abnormality of mind

55 At trial, both the Prosecution and the Defence called expert medical witnesses to testify. Both doctors agreed that the appellant was suffering from acute intoxication with hypnotics, as a result of the overdose of Dima tablets, at the time of the offence. The only material difference between their opinions was the effect of the acute intoxication with hypnotics. Dr Lim gave evidence that the effect was an onset of a paradoxical stimulant effect, whereas Dr Tan, in rebuttal, stated that he could not support the contention that the appellant was suffering from such an effect at the time of the offence. However, due to the convergence in opinions between the doctors in respect of the appellant's condition (acute intoxication with hypnotics) at the time of the offence, we considered, as did the trial judge, that the court had to determine the applicability or otherwise of Exception 7 to s 300 PC to the appellant's defence.

Second limb: The cause of the appellant's abnormality of mind

56 As stated earlier, the cause of the abnormality of mind *must* be a result of a condition of arrested or retarded development of mind or any inherent causes, or induced by disease or injury. Here, we noted that the trial judge relied on Dr Tan's observation of the appellant's behaviour while he was in Dr Tan's care. Dr Tan testified that he did not spot any abnormal behaviour on the part of the appellant, there were no signs of psychiatric illnesses, disorder or disease, and even the appellant's initial slowness in his movement and mental processes were dismissed as a "show" that was "put on" by the appellant.[71] In this respect, Dr Tan concluded that the appellant was "malingering … in order to get medication".[72]

57 Dr Lim, on the other hand, seemed to have conducted only one mental state examination on the accused and put up a report on that basis. Notably, Dr Lim's report and his oral evidence were not as extensive as Dr Tan's, Dr Lim focusing only on the appellant's mental state at the time of the offence. Dr Lim's main concern was that the appellant was labouring under a paradoxical stimulant effect at the time of the offence, making him ultra-susceptible to aggressive behaviour. At trial, Dr Lim focused on this matter to state that it was *the cause* of the appellant's abnormality of mind at the time of the offence.

58 The trial judge found that there were no signs of irritability, hyperactivity or aggressive behaviour on the part of the appellant, when his actions were examined a stage at a time.[73] According to the trial judge, the only instance of aggressive behaviour displayed by the appellant was when the deceased appeared to have resisted him. The trial judge observed that this was nothing exceptional, and that it was not evidence of an aspect of aggression borne out of a paradoxical stimulant effect.

59 Further, the trial judge found that the appellant's action of turning his attention back to the drawers was inconsistent with the typical symptoms of a paradoxical stimulant effect.[74] We found that the trial judge's findings of fact were crucial in determining whether the appellant was indeed suffering from a paradoxical stimulant effect, which allegedly led to his abnormality of mind at the time of the offence. As the appellant had evinced no indication of any such suffering, his actions in fact being to the contrary, we held that the trial judge was correct in finding that the appellant was not labouring under a paradoxical stimulant effect at the time of the offence.

60 Apart from the submissions pertaining to the alleged paradoxical stimulant effect, there was hardly any explanation or submission as to the possible cause of the appellant's purported abnormality of mind. We found that this was understandable, as the appellant's abnormality of mind could not have been caused by: (a) a condition of arrested or retarded development of mind; or (b) an inherent cause; or (c) disease or injury. This was because the acute intoxication the appellant was labouring under was *self-induced*.

61 In *Tengku Jonaris* ([48] *supra*), where the issue for consideration was also whether the appellant in that case was suffering from an abnormality of mind brought about by cannabis intoxication (which was self-induced), the court observed at [62]:

> [A]n abnormality of mind brought about by cannabis intoxication could not be attributed to either 'a condition of arrested or retarded development of mind' or 'any inherent causes'. … Counsel further argued that the trial judge erred in holding that both self-inflicted injury and the transient effects of drink or drugs on the brain did not amount to 'injury' for the purposes of Exception 7. With respect, these arguments were irrelevant in the present appeal.

62 Likewise, in the present appeal, we came to the determination that since the appellant's acute intoxication was a direct result of his *own* overdose of Dima tablets and his drug and alcohol consumption, such an abnormality of mind could not have been a result of one of the specified causes in the defence of diminished responsibility.

63 From all the evidence placed before this court, it was clear that the appellant was not suffering from an abnormality of mind (as understood by the reasonable man) that was a result of any of the causes specified in the defence of diminished responsibility. Since this abnormality was essentially a result of self-induced intoxication, the appellant had failed to satisfy the second limb to the defence of diminished responsibility. Although this determination should substantially dispose of the appeal, for the sake of completeness, we made a few observations on the third limb as well.

Third limb: Substantial impairment of mental responsibility

64 Based largely on Dr Lim's evidence, it was argued by the appellant's counsel that the appellant's mental responsibility was substantially impaired at the time of the offence. However, from a perusal of Dr Lim's evidence at trial, we found that Dr Lim's evidence indicated that the appellant was actually of rational mind during much of the time span of the offence. The only time his mental responsibility became *allegedly* impaired was when he attacked the deceased as a result of an alleged onset of feelings of aggressiveness arising from the paradoxical stimulant effect. However, soon after, the appellant was found curiously capable of opening the locked drawers, almost as if he were able to "snap out" of the substantial impairment at will. It is perhaps instructive to recall presently to mind the case of *Mohd Sulaiman v PP* [1994] 2 SLR 465 at 475, where this court in finding that the appellant in that case was not suffering from a substantial impairment of his mental responsibility at the time of the offence, took into account the fact that the appellant displayed "great presence of mind in continuing with his original plan of theft after the stabbing of the deceased".

65 After examining the evidence adduced by and on behalf of the appellant, it was clear that he was vainly attempting to compartmentalise his mental responsibility *during* the time of the offence into split-second journeys of rational thinking and substantial impairment. We found this to be an artificial and convenient excuse rather than the truth.

66 This view was substantiated by further evidence from Dr Tan – which we accepted – where he testified that it was difficult to believe that there was substantial impairment of mental responsibility only for a short moment in time. Dr Tan explained that he found this to be improbable because the intoxicant that affected the appellant's mental state was carried in his blood, and it was therefore unlikely that there was a sudden peak in the intoxicant followed by a sudden drop to bring about a short and sharp moment of substantial impairment.[75]

67 At this juncture, it must be mentioned that it was clear that the trial judge had accepted Dr Tan's viewpoint over Dr Lim's opinion, although he did not state as much. In our view, the trial judge was entitled to prefer the medical evidence given by Dr Tan over that given by Dr Lim: *McLean v Weir* [1977] 5 WWR 609, endorsed in *Muhammad Jefrry v PP* [1997] 1 SLR 197 and *Tengku Jonaris*. It must also be remarked at this stage that although the views of medical men are persuasive in a court's final assessment of whether the defence of diminished responsibility applies, a decision on the third limb of the defence is essentially a question of fact left to be answered by the court.

68 From the Grounds of Decision, it was clear that the trial judge had ruled out the possibility that the appellant was suffering from a substantial impairment of his mental responsibility at the time of the offence, finding instead that his "levels of awareness and reaction were quick and sharp"[76] and that there "was nothing in his actions that was unpredictable or unmeasured".[77] This therefore led the trial judge to the conclusion that the appellant's mental responsibility was not in fact substantially impaired at the time of the offence. We found that the trial judge's conclusion, that the appellant's actions indicated that he was in full control of his faculties at the time he committed the offence, was well supported by evidence, and in our view there was no reason for us to disturb his decision.

69 Having considered all the arguments, we held that the appellant had failed to establish the defence of diminished responsibility on a balance of probabilities. Further, in our view, the Prosecution had discharged its ultimate burden in proving the charge against the appellant beyond reasonable doubt.

Conclusion

70 For the reasons given above, we dismissed the appeal and upheld the conviction and sentence imposed by the trial judge.

Appeal dismissed.

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[1]Exhibits page 193.

[2]Exhibits, pages 179, 181 & 193.

[3]Exhibits page 194.

[4]Exhibits page 189.

[5]Exhibits page 194.

[6]Notes of Evidence ("NE") page 178.

[7]NE page 180.

[8]NE pages 181–182.

[9]NE page 192.

[10]Exhibits page 67; Grounds of Decision ("GD") at [8].

[11]GD at [7].

[12]NE page 184.

[13]Exhibits page 186.

[14]Exhibits page 187.

[15]Exhibits page 110 [Exhibit P158] (handwritten statement at Exhibits pages 111–112).

[16]Exhibits page 219.

[17]NE page 304.

[18]Exhibits pages 166–168.

[19]Exhibits pages 162–165.

[20]Exhibits pages 72–74 at page 74.

[21]Exhibits pages 75–97 at page 97.

[22]NE page 726.

[23]NE page 732.

[24]NE pages 741–742.

[25]NE page 742.

[26]NE page 743.

[27]NE pages 744–747.

[28]NE page 747, paras 4–6.

[29]NE page 747, paras 7–10.

[30]NE page 747, paras 16–17.

[31]NE page 748, paras 3–4.

[32]NE pages 747–748, paras 20–21, 1–2.

[33]NE page 748, paras 5–9.

[34]NE page 748, paras 10–12.

[35]NE page 748, paras 12–13.

[36]NE page 748, paras 19–20.

[37]NE page 748, paras 21–23.

[38]NE page 799 & 802.

[39]NE page 749, paras 2–3.

[40]NE page 749, paras 16–20.

[41]NE page 750 & 753.

[42]NE page 755.

[43]NE page 783, paras 6–9.

[44]NE page 783, paras 16–19.

[45]NE page 783, para 16.

[46]NE page 783, paras 17–19.

[47]NE page 783, paras 20–21.

[48]NE page 783, paras 22–23.

[49]NE page 784, paras 3–4.

[50]NE page 784, paras 1–2, 5–6 and 18–19.

[51]NE page 784, paras 7–8.

[52]NE page 784, paras 9–19.

[53]Exhibits pages 102–109, at page 109 [Exhibit P156].

[54]NE pages 616 & 618.

[55]NE page 619.

[56]NE page 624.

[57]Exhibits pages 220–222 [Exhibit D1].

[58]NE page 816.

[59]NE page 817.

[60]NE pages 831–832.

[61]NE page 643.

[62]NE page 704.

[63]NE page 643.

[64]GD at [68].

[65]GD at [73].

[66]GD at [74].

[67]GD at [76].

[68] Section 47(1) SCJA.

[69] Sections 45 & 46 SCJA.

[70] GD at [45]; GD at [70].

[71] GD at [52].

[72] GD at [51].

[73] GD at [73]–[74].

[74] GD at [76].

[75] NE page 902.

[76] GD at [62].

[77] GD at [62].