Md Anverdeen Basheer Ahmed and Others v Public Prosecutor [2004] SGHC 233

Case Number : MA 49/2004, 50/2004, 51/2004, 53/2004, 54/2004, 64/2004

Decision Date : 18 October 2004

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Ramesh Tiwary (Edmond Pereira and Partners) for first appellant; N Sreenivasan (Straits Law Practice LLC) for second and fourth appellants; Rakesh Vasu (Gomez and Vasu) for third appellant; Thangavelu (Rajah Velu and Co) for fifth appellant; Sixth appellant in person; Janet Wang (Deputy Public Prosecutor) for respondent

Parties : Md Anverdeen Basheer Ahmed; Rupesh Kumar; Rajendran s/o Rajagopal; Sambalingam T; Natarajan s/o Chinnaiah; Retnam Mohandas — Public Prosecutor

Criminal Procedure and Sentencing – Charge – Essentials of content – Failure to state violence in charge – Whether this threw into doubt Prosecution's contention that rioting committed

Criminal Procedure and Sentencing – Charge – Particulars – Charge did not state who appellants fought with – Whether charge was vague and caused prejudice to appellants.

Criminal Procedure and Sentencing – Sentencing – Appeals – Appeal against sentence imposed – Whether sentence imposed was manifestly excessive

Criminal Law – Criminal intimidation, insult and annoyance – Sixth appellant convicted for criminal intimidation – Whether trial judge had erred in accepting evidence that sixth appellant attacked another person – Section 506 Penal Code (Cap 224, 1985 Rev Ed)

Criminal Law – Offences – Public tranquillity – Appellants convicted of rioting whilst armed with deadly weapons – Whether certain witnesses' evidence could be relied upon – Whether elements of offence made out – Sections 148 and 149 Penal Code (Cap 224, 1985 Rev Ed)

Criminal Law – Statutory offences – First appellant convicted for disorderly behaviour – Whether court should have relied on evidence of certain witnesses – Section 20 Miscellaneous Offences (Public Order & Nuisance) Act (Cap 184, 1987 Rev Ed)

Evidence – Proof of evidence – Confessions – Trial judge relied on statements of fifth and sixth appellants in rejecting first appellant's evidence – Whether exculpatory statements of co-accused could be taken into consideration – Section 30 Evidence Act (Cap 97, 1997 Rev Ed)

18 October 2004

Yong Pung How CJ:

1 The appellants, Md Anverdeen Basheer Ahmed ("the first appellant"), Rupesh Kumar ("the second appellant"), Rajendran s/o Rajagopal ("the third appellant"), Sambalingam T ("the fourth appellant"), Natarajan s/o Chinnaiah ("the fifth appellant") and Retnam Mohandas ("the sixth appellant"), were convicted by District Judge Roy Grenville Neighbour of rioting whilst armed with deadly weapons under s 148 of the Penal Code (Cap 224, 1985 Rev Ed) ("the PC"). In addition, the first and third appellants were convicted for behaving in a disorderly manner in a public place under s 20 of the Miscellaneous Offences (Public Order & Nuisance) Act (Cap 184, 1987 Rev Ed), and the sixth appellant was convicted of criminal intimidation under s 506 of the PC: see *PP v Perumal Naidu Surendra Sean Clinton* [2004] SGDC 129. The appellants appealed against both conviction and sentence. I dismissed all the appeals, and now give my reasons.

The facts

2 This case revolved around the events that occurred on the morning of 20 October 2001 along Prinsep Street. The six appellants, together with two other accused persons, Perumal Naidu Surendra Sean Clinton ("Sean Clinton") and Manogaran s/o Amirpan Ramaiah ("Manogaran"), were alleged to have rioted whilst armed with deadly weapons that morning. The six appellants, Sean Clinton and Manogaran ("the eight accused persons") all knew each other prior to the incident that occurred on 20 October 2001. The fourth appellant was the father of the second appellant and Sean Clinton was the second appellant's uncle. The first appellant was Sean Clinton's friend. The fifth appellant was a close friend of the fourth appellant. The sixth appellant and Manogaran worked in the fourth appellant's company, and the third appellant was a friend of the fourth appellant. The eight accused persons were all patrons of Mohican's Pub, a pub along Prinsep Street which the second appellant was a partner of.

The Prosecution's case

3 The Prosecution's case was that on the night of 19 October 2001, Sean Clinton, Manogaran and the appellants, with the exception of the second appellant, were having a drinking session together at Jalan Berseh Food Centre ("JBFC"). Subsequently, at about 3.00am on 20 October 2001, the first appellant, third appellant and Sean Clinton went to Mohican's Pub for drinks. However, they were not served drinks at the pub, and they left, looking disappointed and unhappy.

4 A while later, the second appellant, one of the owners of the pub, arrived at Prinsep Street. He met up with Mohan s/o Ranjangam ("Mohan"),[1] Rajendran s/o Nagarethinam ("Rajendran")[2] and Selvarajoo s/o Gopal Sellamuthoo ("Appu Rajah")[3] outside the gate of the pub. An argument ensued between the second appellant and Mohan. The third appellant was present during this argument, and came in between. Thereafter, the second appellant made a telephone call to his father, the fourth appellant.

5 Around this time, the sixth appellant arrived at Prinsep Street in a taxi, and walked towards the second appellant. The fourth appellant also turned up at Prinsep Street around this time. A few minutes later, four vehicles turned in from Middle Road on to Prinsep Street. Sean Clinton, the owner of the first vehicle, alighted and proceeded to talk to the second appellant. He was seen shouting aggressively at a group of male Indians standing outside Mohican's Pub. Two to three other persons alighted from each of the four vehicles, the fourth appellant being one of them. A knife was also taken out from the boot of Sean Clinton's car. Thereafter, these persons walked towards Mohican's Pub. An argument and subsequently a full-blown fight ensued between this group and the staff of Mohican's Pub. During this fight, wooden poles, knives and an ice pick were used.

6 In addition, Sean Clinton, the third appellant, the sixth appellant and Manogaran were seen climbing over the wall of Mohican's Pub. They threw beer barrels and metal chairs at the glass panel of the pub, causing it to shatter. The first appellant was seen armed with a dagger and telling the patrons of Mr Bean's Café, a café oppose Mohican's Pub, not to interfere. The second appellant was also seen pacing up and down outside Mr Bean's Café, telling the patrons not to interfere.

7 The sixth appellant, who was armed with a chopper, then approached one Marc Christopher Oliveiro ("Marc")[4] while he was sitting in his vehicle. The sixth appellant grabbed Marc by the shirt and raised the chopper at him. Marc opened the door of his car and managed to escape. For this act, the sixth appellant was charged with criminal intimidation.

8 After the events, the appellants, together with Sean Clinton and Manogaran, left the scene

in three vehicles. The police intercepted the vehicles at the junction of Prinsep Street and Middle Road. The first appellant was arrested for disorderly behaviour, and the other appellants, Sean Clinton and Manogaran were subsequently placed under arrest.

The Defence

9 All the appellants denied the charges made against them. The first appellant said that he was with Sean Clinton at the Indian Association on the night of 19 October 2001. They left after midnight for JBFC. At JBFC, they did not see any of the other accused persons. After staying at JBFC for more than an hour, they went to Mohican's Pub. The first appellant drove Sean Clinton's car, as Sean Clinton was tired. As the car entered Prinsep Street, there was some human movement along the road, such that the car had to travel at a very slow pace. The car was then stopped by police officers, who asked the first appellant and Sean Clinton for their identification and particulars. The first appellant subsequently heard a police officer calling out to the sixth appellant, who was walking by, in a rude manner. The first appellant thought that this was improper, and identified himself as a customs officer, telling the police officer that he should address members of the public in a more polite manner. Thereafter, the first appellant was placed under arrest for disorderly behaviour.

10 The second appellant said that he was attending the opening ceremony of a pub on the night of 19 October 2001, and at the opening ceremony, he received several prank calls stating that there was trouble at the pub. He then informed the fourth appellant of the calls so that the fourth appellant could check on the pub. Subsequently, when the second appellant arrived at Prinsep Street, he saw Inspector Sajjad Hussein Shah[5] advising Appu Rajah to lock up the pub, as there were complaints of a commotion at the pub. Appu Rajah did so. As the second appellant was returning to his car, Mohan came towards him and hurled vulgarities at him. He dismissed these rantings and got back into the car. He then saw a scuffle amongst ten to 15 people outside a pub at 72 Prinsep Street. He parked his car directly opposite Prinsep Link. He noticed the fourth appellant's vehicle coming towards him at that point. The fourth appellant told the second appellant to go home. The fourth appellant then drove off in his car. Subsequently, the second appellant saw the fourth appellant's and Sean Clinton's vehicles being stopped at the traffic light. The fourth appellant was subsequently arrested. The second appellant drove the fourth appellant's car to the police station and the second appellant was arrested after that.

11 The third, fourth and fifth appellants said that they were having drinks at JBFC on the evening of 19 October 2001, together with Manogaran. At JBFC, the fourth appellant received a call from the second appellant, informing him of the prank calls that the second appellant had received. At about 3.30am the next morning, they left JBFC, with the fourth appellant driving the rest home. The third appellant and Manogaran both fell asleep at the back of the vehicle as they were drunk.

12 The fourth appellant then turned into Prinsep Link to check on the pub. He saw the second appellant standing by his car ahead of him, and alighted to speak to him. The fifth appellant also alighted to have a smoke, while the third appellant and Manogaran remained in the car. The fourth appellant told the second appellant to go home. Upon reaching the junction, the fourth appellant's vehicle was stopped by the police who wanted to check their particulars. They subsequently moved on, but were stopped again by a police patrol car sounding its horn continuously behind them. The fourth appellant's car was searched and an ice pick was recovered. The third, fourth and fifth appellants and Manogaran were later arrested.

13 The sixth appellant said that he met up with the fourth appellant on the evening of 19 October 2001 for a drinking session. He then became drunk, and could not remember anything else of that evening. The next thing he remembered was being told to go home by a male Indian voice,

and subsequently he was arrested at Prinsep Street.

The decision below

14 The trial judge believed the testimony of the Prosecution witnesses who saw the eight accused persons at the scene before and at the time the armed fight broke out. He was satisfied that the witnesses' identification of all the accused persons was good. He held that the accused persons had taken the law into their own hands by damaging Mohican's Pub and attacking Mohan. He further held that there was a common object to cause hurt, as some of the accused persons were armed and seen fighting at the scene. The eight accused persons were therefore convicted of rioting with deadly weapons. The sixth appellant was further convicted of criminal intimidation, and the first and third appellants were convicted of disorderly behaviour, the third appellant's offence being committed at a separate time and place. As the fourth and fifth appellants were above the age of 50 years, they were not liable for caning. The sentence imposed on each of the appellants is summarised in the table below:

Appellant	*Charge*	*Sentence imposed*
First appellant	Rioting whilst armed with deadly weapon	36 months' imprisonment and six strokes of the cane
	Disorderly behaviour	Fined $500 with one week's imprisonment in default
Second appellant	Rioting whilst armed with deadly weapon	36 months' imprisonment and six strokes of the cane
Third appellant	Rioting whilst armed with deadly weapon	36 months' imprisonment and six strokes of the cane
	Disorderly behaviour	Fined $500 with one week's imprisonment in default
Fourth appellant	Rioting whilst armed with deadly weapon	36 months' imprisonment
Fifth appellant	Rioting whilst armed with deadly weapon	36 months' imprisonment
Sixth appellant	Rioting whilst armed with deadly weapon	Eight years' preventive detention and six strokes of the cane
	Criminal intimidation	

The appeal

15 The appeal was brought against both conviction and sentence. The appeal against conviction

will be dealt with first, followed by the appeal against sentence.

Appeal against conviction

16 As all the appellants have appealed against their convictions for rioting whilst armed with deadly weapons under s 148 of the PC, I found it appropriate to set out the elements of the offence. The following elements had to be proved beyond reasonable doubt in order to establish the charge of rioting whilst armed with deadly weapons against the appellants:

(a) That there was an assembly of five or more persons.

(b) That each appellant was a member of that assembly.

(c) That the common object of that assembly was one of those enumerated in s 141 of the PC.

(d) That the unlawful assembly used force or violence in prosecution of the common object.

(e) That each appellant was armed with a deadly weapon.

By virtue of s 149 of the PC, an appellant would be liable under s 148 of the PC if it could be shown that one or more members of the unlawful assembly was armed with a deadly weapon: *Mohamed Abdullah s/o Abdul Razak v PP* [2000] 2 SLR 789. As s 149 of the PC was listed in the charge against the appellants, it was only necessary to show that one or more members of the unlawful assembly was armed with a deadly weapon for the charges against the appellants to be made out. In this appeal, the appellants had essentially disputed elements (a), (b), (c) and (e) of the offence of rioting whilst armed with deadly weapons.

17 I also found it appropriate to revisit the well-established principles of law relating to the approach of an appellate court in dealing with an appeal against findings of fact, as the appellants were dissatisfied mainly with the findings of fact made by the trial judge. The general principle is that an appellate court will not disturb findings of fact unless they are plainly wrong or clearly reached against the weight of evidence. In examining the evidence, an appellate court has to bear in mind that it has neither seen nor heard the witnesses and has to pay due regard to the trial judge's findings and his reasons. This principle was laid down in the seminal case of *Lim Ah Poh v PP* [1992] 1 SLR 713, and I have endorsed the principle in various cases since then: *Teo Kian Leong v PP* [2002] 1 SLR 147 and *PP v Tan Lian Tiong* [2002] 3 SLR 461. In particular, where findings of fact hinge on the trial judge's assessment of the credibility and veracity of witnesses, an appellate court should be slow to overturn these findings of fact: *Yap Giau Beng Terence v PP* [1998] 3 SLR 656.

18 With these principles in mind, I turned to examine each appellant's grounds of appeal.

The first appellant

19 The first appellant's main contention was that there were serious doubts as to the evidence of the two main witnesses which was relied on by the trial judge in convicting the first appellant. The two witnesses were Sergeant Yeo Kiat Leng ("Sgt Yeo")[6] and Goh Joo Kuan ("Goh").[7]

20 With regard to Sgt Yeo's evidence, the first appellant argued that Sgt Yeo's identification of the first appellant at the scene must be wrong, as his evidence was inconsistent with Goh's evidence as to the sequence of events. Also, according to Sgt Yeo, the first appellant arrived at the scene

before Sean Clinton, whereas the Prosecution and the trial judge both accepted that the first appellant and Sean Clinton had arrived at the scene together. Further, Sgt Yeo did not identify the first appellant at the scene or at the police station, but identified him only during the hearing which was held more than two years after the incident. I did not accept this submission. Considering the lapse of time between the incident and the hearing, some minor inconsistencies in the evidence of two witnesses were likely. As I have held in *Ng Kwee Leong v PP* [1998] 3 SLR 942 at [17], following the decision of *Chean Siong Guat v PP* [1969] 2 MLJ 63:

> Absolute truth is, I think beyond human perception and conflicting versions of an incident, even by honest and disinterested witnesses, is a common occurrence. In weighing the testimony of witnesses, human fallibility in observation, retention and recollection are often recognised by the court.

21 The crucial question here was whether the identification evidence given by Sgt Yeo and Goh was good. To this end, the guidelines laid down in *R v Turnbull* [1977] QB 224 as to the factors that the court should consider in determining the reliability of identification evidence are instructive. These guidelines were reworked in the Court of Appeal case of *Heng Aik Ren Thomas v PP* [1998] 3 SLR 465 at [33]–[35] into the following three-step test:

> [(a)] The first question which a judge should ask when encountering a criminal case where there is identification evidence, is whether the case against the accused depends wholly or substantially on the correctness of the identification evidence which is alleged by the defence to be mistaken.
>
> [(b)] If so, the second question should be this. Is the identification evidence of good quality, taking into account the circumstances in which the identification by the witness was made? A non-exhaustive list of factors which could be considered include the length of time that the witness observed the accused, the distance at which the observation was made, the presence of obstructions in the way of the observation, the number of times the witness had seen the accused, the frequency with which the witness saw the accused, the presence of any special reasons for the witness to remember the accused, the length of time which had elapsed between the original observation and the subsequent identification to the police and the presence of material discrepancies between the description of the accused as given by the witness and the actual appearance of the accused. …
>
> [(c)] Where the quality of the identification evidence is poor, the judge should go on to ask the third question. Is there any other evidence which goes to support the correctness of the identification.

22 In the present case, the case against the first appellant depended substantially on the correctness of the identification evidence given by Sgt Yeo and Goh. Sgt Yeo said that he was at Mr Bean's Café, and he observed the commotion that the first appellant was involved in for about five minutes. His view of the commotion was not obstructed. Further, he was seated facing Prinsep Street, where the commotion occurred. Goh was also at Mr Bean's Café, sitting at a table that was situated on the pavement facing Mohican's Pub. He was sitting facing the road. There was evidence from other witnesses that the road was illuminated by streetlights and light from the surrounding pubs. I was therefore convinced that the identification evidence of Sgt Yeo and Goh could be relied upon.

23 The first appellant brought up several points in his contention that Goh's evidence was unreliable. The first appellant argued that no one else but Goh had given evidence that the first

appellant had told the patrons of Mr Bean's Café not to interfere in the fight; that Goh did not identify the first appellant who was armed with the knife that morning at the scene; that if Goh's version of events were true, the police would have arrived by 2.30am instead of at 4.00am when they actually arrived; and that there were discrepancies between Goh's evidence and the evidence of the other prosecution witnesses.

24 In my opinion, the points brought up by the first appellant did not show that the trial judge was plainly wrong in believing Goh's evidence. It must be borne in mind that the whole incident happened in the early hours of the morning. There was a large crowd of people at the scene, the situation was chaotic, and it would have been difficult to distinguish one person from another. Given this state of affairs, one had to look at the whole picture in deciding whether a particular person's testimony was credible. I had no doubt that this was what the trial judge did. The trial judge held in his grounds of decision ([1] *supra*, at [148]) that: "On the totality of the evidence, I found that Goh Joo Kuan was a honest witness who had nothing to gain by falsely testifying against the [first appellant] and the others." As the trial judge had the opportunity to observe the demeanour of Goh and was therefore in a better position to determine the credibility of Goh's testimony, I was unable to hold that the trial judge was plainly wrong in believing Goh's evidence. In any case, the discrepancies raised by the first appellant in relation to time and the evidence of the other prosecution witnesses were immaterial discrepancies which had no direct bearing on whether the first appellant had committed the offence. As I noted in *Ng Kwee Leong v PP* ([20] *supra*), trial judges in such cases are perfectly entitled to find that discrepancies of this nature do not detract from the general veracity of prosecution witnesses on the material issues.

25 Another point raised by the first appellant was that the trial judge should not have relied on the statements of the fifth and sixth appellants in rejecting the first appellant's defence that he was not at the scene during the fight, as the statements made by the fifth and sixth appellants were exculpatory statements. I agreed that the trial judge should not have relied on these statements, as s 30 of the Evidence Act (Cap 97, 1997 Rev Ed) only allows confessions to be taken into consideration against co-accused persons. However, even without relying on these statements, the trial judge would still have been able to find that the first appellant was at the scene. Sgt Yeo and Goh both gave evidence that they saw the first appellant that night. Further, Sean Clinton was spotted at the scene by Sgt Yeo, Sergeant Peh Soon Wah ("Sgt Peh")[8] and Daniel Vijay.[9] If the first appellant had really been with Sean Clinton at that time, as the first appellant had claimed, then the logical conclusion would be that the first appellant was also at the scene during the fight.

26 In addition, the first appellant's arguments that the judge had erred in holding that the boot of Sean Clinton's car was opened and some things were taken out, and in disbelieving that the first appellant had driven Sean Clinton's car, were without merit. The points raised by the first appellant were not sufficient to overturn the findings of fact made by the trial judge. In any case, these were not arguments that went towards the crux of the issue as to whether the first appellant had committed the offence.

27 The first appellant also appealed against his conviction on the charge of disorderly behaviour. He said that the court should not have relied on the evidence of Sergeant Mohd Ameer ("Sgt Ameer")[10] and Sergeant Mohd Sarwani ("Sgt Sarwani"),[11] and that the evidence of Sergeant Quah Boon Keat ("Sgt Quah")[12] that the first appellant was shouting loudly was questionable because none of the other officers had heard or noticed the first appellant's behaviour.

28 My response to this was that although Sgt Ameer's evidence, that those present were rowdy and were shouting at the top of their voices, had indeed related to a period of time before the disorderly behaviour was alleged to have happened, this formed part of the background evidence that

could be taken into account when deciding if the first appellant had committed the act in question. As for Sgt Sarwani's evidence, although he was not able to identify the first appellant, he gave evidence that a male Indian person had shouted at Sgt Quah querying why he had to produce his personal particulars. He also gave evidence that this male Indian person was unco-operative and had ignored the police officers' warnings to lower his voice. Sgt Sarwani's evidence was substantially similar to that given by Sgt Quah. Therefore, the trial judge was not wrong to rely on Sgt Sarwani's evidence to establish the fact that someone had indeed shouted at Sgt Quah, was unco-operative and did not heed the police officers' warnings to lower his voice. With regard to Sgt Quah's evidence, the fact that other officers did not notice the behaviour of the first appellant did not make Sgt Quah's evidence any less reliable. Sgt Sarwani had testified in court that he could not hear what other suspects were saying to other officers, as everyone was shouting at the top of their voices. This was a good explanation as to why no one else had noticed the first appellant's behaviour. Accordingly, I dismissed the first appellant's appeal against his conviction for disorderly behaviour.

The second and fourth appellants

29 I dealt with the appeals of the second and fourth appellants together, as there were joint submissions for these two appellants. A number of grounds of appeal were raised, which could be divided into the following five broad categories.

30 The first argument put forth by these two appellants pertained to the charge. It was argued that the charge was amended to state that the appellants shared a common object to commit affray, and affray, by its very nature, was spontaneous. It did not require the formation of intent to cause hurt or damage. I found that this was a philosophical argument which did not make a real difference to the case and had no practical effect on the charge. It was also argued that the charge did not mention who the appellants had fought with, and as such, the charge was too vague and caused prejudice to the appellants. In my opinion, there was no prejudice, because the charge that the appellants had to meet was very clear. In order to escape conviction, it was clear that they had to show that there was no common object to commit affray. Even though the charge did not state the parties with whom they were alleged to have fought, the appellants would have known the charge they had to meet.

31 The second and fourth appellants also argued that the charge was flawed because it did not provide details about the alleged violence caused by the members of the illegal assembly. It was argued that as violence or harm is an important ingredient of the offence of rioting, the failure to state this in the charge threw the Prosecution's contention that the accused persons had committed rioting into doubt, and this was prejudicial to the accused. At best, the ingredients of the charge only supported a charge under s 144 of the PC, which is the offence of joining an unlawful assembly armed with a deadly weapon.

32 It is not in dispute that a charge should state all the essential ingredients of an offence: *Assathamby s/o Karupiah v PP* [1998] 2 SLR 744. However, in my opinion, the argument raised by the second and fourth appellants was unmeritorious. The charge had stated that the appellants' "common object was to commit affray, and in prosecution of the said common object, [they] were armed with deadly weapons…" Section 159 of the PC states that to commit affray is to fight in a public place and disturb the public peace. Violence is the essence of a breach of peace: *Goh Ang Huat v PP* [1996] 3 SLR 570. If so, the violence alleged was listed in the charge because violence is inherent in the very concept of committing an affray. Therefore, although a fight *per se* would not constitute the offence of rioting, an unlawful assembly which had a common object to commit affray and which used deadly weapons to achieve this object would have naturally used violence, and this would constitute the offence of rioting. This was reflected in the charge. Further, no prejudice was caused to the

second and fourth appellants. Although specific details of the alleged violence were not stated in the charge, the charge that the appellants had to meet, which was that they had no common object to commit affray, was very clear.

33 The second argument brought up by the second and fourth appellants was that the evidence did not show that the accused persons shared a common object to attack Mohan and the staff of Mohican's Pub. I did not accept this submission, because the appellants were charged with having a common object to commit affray. As such, the prosecution merely had to establish that the common object was to commit affray.

34 The third broad argument raised by the second and fourth appellants concerned evidence that was adduced from Mohan, Goh, Sgt Yeo and Sgt Peh. In relation to evidence from Mohan, the trial judge had impeached Mohan's testimony and substituted his oral evidence with his police statements pursuant to s 147(3) of the Evidence Act. The second and fourth appellants contended that the Prosecution failed to establish why Mohan's out of court statements should be preferred to his evidence in court. It was argued by the appellants that the Prosecution did not adduce evidence from Appu Rajah and Rajendran to contradict Mohan's testimony that he had made his police statements based on their narrations of the events to him, and it was also argued that Mohan could very well have been briefed by Appu Rajah and Rajendran since the police statements were taken eight months after the event. In addition, it was argued that there were inconsistencies in Mohan's statement because no one else but Mohan had testified that an axe was used. It was also argued that the Prosecution did not adduce any evidence from Vengadeswaran Gobi ("Gobi")[13] to corroborate Mohan's evidence that Gobi's desire to resolve the dispute between the second appellant and himself was misinterpreted by the second appellant who called for backup.

35 In my opinion, the impeachment of Mohan's testimony and the substitution of his oral evidence with his police statements was justified, as the trial judge had found that there were material discrepancies between Mohan's oral evidence and his police statements, and had found that Mohan's testimony was unreliable and his police statements were closer to the truth. The trial judge was not plainly wrong in preferring Mohan's out of court statements to his oral testimony. Sergeant Vikneshwaran[14] had testified that he told Mohan to relate only what he saw, and Mohan had agreed. Taking this into account, it could not be said that it was plainly wrong for the trial judge to disbelieve Mohan's testimony that his recollection of events was based on a narration by Appu Rajah and Rajendran. In relation to the point that no one else mentioned the axe, I noted that in the case of *Osman bin Ramli v PP* [2002] 4 SLR 1, I had observed that it would not be unusual for witnesses to come up with different accounts of the same event, particularly where the situation was chaotic and the time interval short. These were the circumstances in the present case. Hence, it was not unusual that different witnesses saw the appellants holding different weapons.

36 In relation to evidence from Gobi, I was of the opinion that Gobi's evidence was similar to Mohan's, although it was not identical. Gobi had stated that after the second appellant had argued with Mohan, he saw the second appellant making a telephone call to his father, and the second appellant was not happy when he spoke to his father. As such, I was of the view that the submission by the second and fourth appellants that Mohan's police statements should not be used to substitute his oral testimony in court was unmeritorious.

37 The second and fourth appellants also objected to the trial judge's reliance on the evidence of Goh, because there were major inconsistencies in Goh's evidence. I had already addressed the issue of whether the trial judge had erred in relying on the evidence of Goh, and I was of the opinion that he had not. It could not be said that the trial judge's evaluation of Goh's evidence was plainly wrong or against the weight of the evidence. In particular, the second and fourth appellants raised a

point that was not dealt with earlier: that Goh had lied about his previous conviction and was not to be believed.

38 I was of the view that the fact that Goh had lied did not mean that his entire testimony was to be disbelieved. In *Ng Kwee Leong v PP*, [20] *supra*, at [15], I had approved of the principle in *PP v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15 that:

> [t]here is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other.

Therefore, as the trial judge had the benefit of observing the demeanour of Goh on the witness stand and had concluded that, in totality, Goh's evidence was credible, this finding of fact should not be disturbed.

39 Another objection raised by the second and fourth appellants was that the evidence of Sgt Yeo and Sgt Peh showed that the appellants did not attack Mohan and the staff of Mohican's Pub. The second and fourth appellants submitted that the evidence of Sgt Yeo and Sgt Peh showed that the appellants were attacked by a group of ten men, and this group of aggressors was not in court. They argued that Sgt Yeo and Sgt Peh were clearly unbiased witnesses, yet this important aspect of their evidence was ignored by the trial judge. I did not accept this submission, as the charge against the second and fourth appellants did not centre on an attack on Mohan and the staff of Mohican's Pub, but that the appellants had a common object to commit affray. Therefore, even if they were attacked, the second and fourth appellants could still be convicted if they had the common object to commit affray. The point remained that the second appellant had indeed called the fourth appellant, and subsequently all the other appellants arrived at the scene. An inference could be made that they had the common object to commit affray. Further, it was not necessary to prove who the ten armed men were. What had to be proven was that there was a fight, and the appellants had participated in this fight. There was also nothing wrong with the trial judge picking parts of a witness's testimony which he believed were closer to the truth. As such, the trial judge was not plainly wrong when he believed Sgt Yeo and Sgt Peh's evidence that the appellants had fought with a group of ten male Indians, while at the same time believing other witnesses' evidence that weapons were used and that a large group of people arrived after the second appellant had called the fourth appellant.

40 The fourth submission brought up by the second and fourth appellants was that the lack of weapons seized and the lack of injuries showed that the appellants were not engaged in the fight. In my opinion, too much weight should not be placed on these factors. Various people had given evidence of weapons being used: Goh, Marc, and Daniel Vijay. Further, in Mohan's police statement, Mohan had said that the second appellant told him that the weapons used in the fight were concealed in his car and his brother had driven the car away. This could be the explanation for the missing weapons. As for the lack of injuries, Mohan had testified in his police statement that he had been injured by a sharp object, which left a scar on his arm. Moreover, if indeed as the two appellants alleged, there were so many other people involved in the fight, these people could have been the ones who suffered injuries. In any case, for the charge under s 148 of the PC to be made out against the appellants, it was not necessary that the weapons were actually used to inflict injury. The fact that the appellants were armed with deadly weapons was sufficient to make out the charge: *Mohamed Abdullah s/o Abdul Razak v PP* ([16] *supra*).

41 The two appellants have also argued that the chopper was allegedly held by the sixth appellant, and the trial judge should not have taken this into account when deciding if the charge of

rioting with deadly weapons was made out against them, especially since they were not armed with deadly weapons. I found this argument unmeritorious, because as I have mentioned earlier, by virtue of s 149 of the PC, so long as one member of an unlawful assembly was armed with a deadly weapon, the other members of the unlawful assembly could be liable for rioting under s 148 of the PC. I had stated this clearly in the case of *Mohamed Abdullah s/o Abdul Razak v PP*.

42 The fifth argument brought up by the second and fourth appellants was that the trial judge had failed to consider their evidence. A perusal of the trial judge's grounds of decision shows that this was patently untrue. The trial judge had considered their evidence, but had come to the conclusion that they were untruthful in their account of the events. Accordingly, I dismissed the second and fourth appellants' appeal against conviction.

The third appellant

43 The third appellant raised several grounds of appeal that I will deal with in turn. First, the third appellant argued that the trial judge's finding, that he was not truthful when he said that the sixth appellant had left the food centre when the fifth appellant had arrived, was only a minor discrepancy that did not go towards the crux of the issue. My response to this was that while this was a minor issue, the trial judge could certainly take this factor into account in deciding if the third appellant's version of events was true.

44 Second, the third appellant argued that the trial judge had erred in holding that he had gone with the first appellant and Sean Clinton to Mohican's Pub earlier that night asking for a drink. In this respect, the third appellant questioned the reliability of Mohan's statements. In my opinion, as Mohan's testimony in court was impeached, weight should not be placed on what he said in court but on his police statements. In Mohan's police statement, he had said that the third appellant was at the pub earlier that night. Rajendran had also given evidence to this effect._

45 The third and fourth submissions raised by the third appellant were that Goh's evidence that the third appellant had chased someone with a knife, and his evidence that the third appellant had climbed over the front wall into the pub, should not be believed, as Goh's evidence was contradictory. I have dealt with these points above and have found that these submissions were unmeritorious. In particular, I would reiterate that this incident happened in the early hours of the morning, there was a large group of people at the scene, and many of them would have been drinking before the incident took place. The situation was chaotic and confusing. In circumstances such as these, it would be expected that the evidence given by the witnesses was unclear. As such, it would not be right to nit-pick the evidence given by each witness. Instead, the whole picture had to be looked at in its entirety in deciding whom to believe. Even if inconsistencies in Goh's testimony were observed when he was cross-examined, the trial judge had the advantage of observing Goh's body language and demeanour in court, and he had come to the finding of fact that Goh was a credible witness. In these circumstances, I found that the trial judge's finding of fact should not be overturned.

46 The fifth submission raised by the third appellant was that the trial judge had erred in holding that Sgt Peh had seen the third appellant together with Manogaran and the second, fourth and sixth appellants. In my opinion, the trial judge had indeed erred in making this finding of fact. Sgt Peh had not mentioned seeing the third appellant at all. This argument was related to the sixth submission that was raised, which was that the trial judge was wrong in holding that three persons had seen the third appellant actively participating in the riot. In my view, this finding of fact could not stand, in light of the fact that Sgt Peh had never said that he saw the third appellant at the scene. However, the trial judge was entitled to rely on Sgt Yeo and Goh's evidence in holding that the third appellant had participated in the riot. The third appellant sought to throw doubt on Sgt Yeo's evidence by

pointing out the fact that Sgt Yeo had said that he could not recall when he saw the third appellant, but only recalled having seen him somewhere along Prinsep Street. However, in Sgt Yeo's evidence-in-chief, he had said that the third appellant was part of a group of people creating a commotion along Prinsep Street. The trial judge was thus not plainly wrong in relying on Sgt Yeo's evidence to convict the accused, as it was fully open to him to accept one part of Sgt Yeo's testimony over another.

47 I found the next three submissions to be completely unmeritorious, and I disposed of them summarily. The seventh submission raised by the third appellant was that the trial judge had erred in holding that the third appellant had lied to Sgt Ameer that he was preparing for a fire-walking ceremony. I found that this was not a crucial point to the case of whether the third appellant had indeed committed the offence of rioting. The eighth submission was that the trial judge had erred in holding that the third appellant had lied in saying that he was drunk and had slept in the fourth appellant's car. I found that this finding of fact was not plainly wrong or against the weight of evidence, as evidence was adduced from Mohan and Rajendran to show that the third appellant had gone to the pub earlier that night, and Goh and Sgt Yeo had seen the third appellant at the scene. The ninth submission, that the trial judge had failed to address the issue as to between whom the affray had been committed, was addressed above in [30]; the crucial factor was whether there was a common object to commit affray, and the trial judge had found that there was.

48 The tenth submission brought up by the third appellant was that the trial judge had erred in placing great weight on Mohan's statement. It was argued that the contemporaneity of Mohan's police statements was in issue, as the first police statement was made by Mohan only about ten months after the incident. However, my opinion was that a statement made ten months after the event was not necessarily unreliable. Cases frequently take such a length of time before they are heard in court, but weight can still be placed on the evidence given by witnesses.

49 The last submission brought up by the third appellant was that the prosecution had not established that the third appellant formed part of an unlawful assembly, and that there was reasonable doubt that the third appellant was aware of or concurred in the common object. I found this submission to be without merit. The trial judge had accepted the Prosecution witnesses' evidence that the third appellant was at the scene and had climbed over the front wall into Mohican's Pub. The large group of people there that night, of which the third appellant was a member, would go towards proving that the third appellant was part of an assembly of five or more people. Further, the fact that the eight accused persons had ended up in Prinsep Street after their night out at JBFC, the fact that they were seen to be involved in various acts of fighting, as well as the fact that all the eight accused persons had later left the scene together, were facts from which an inference could be drawn that there was a common object to commit affray and the third appellant was aware of and concurred in this common object.

The fifth appellant

50 The fifth appellant raised four main points in his appeal against his conviction. The first argument raised was that the Prosecution had not established a *prima facie* case against him. This was because Mohan's evidence did not in any way implicate him; Goh was a confused witness and his evidence was unreliable; the fifth appellant's alleged "orchestration" of the fight was questioned; and the Prosecution had assessed the evidence on a set of primary facts but had called for the defence on an amended charge.

51 I did not accept these arguments. While Mohan's evidence indeed did not implicate the fifth appellant, the trial judge had chosen to believe Goh's evidence, and I did not think that I should

overturn this finding of fact, as I had pointed out above. Goh's identification of the fifth appellant was therefore good. Furthermore, it could not be said that the fifth appellant's orchestration of the fight lacked the particulars which imputed his culpability in the fight. If there had been a fight going on, and a person had been seen "pointing here and there", as Goh had testified, the reasonable inference would be that he had been telling the others what to do and that he had been orchestrating the fight. This would mean that the fifth appellant was involved in the commission of the affray. In addition, the fact that the word "orchestrate" was inserted by the police officer recording the statement, and was not the word that Goh had used, was not a relevant consideration. Goh had testified that the investigating officer had read the statement over to him before he agreed to it, and he had also testified that he understood everything in the statement when he signed it. As such, there was no objection to the fact that the word "orchestrate" did not originate from him.

52 In relation to the charge, there was nothing wrong with amending the charge at the close of the Prosecution's case. In fact, it was said in *Chin Siong Kian v PP* [2001] 3 SLR 72 that it was at the close of the Prosecution's case that the court was in the best position to decide exactly what was the case that the accused was required to meet. It was not the case, as the fifth appellant alleged, that the evidence was adduced by the Prosecution on a set of distinct primary facts while the defence was called on an amended charge with a distinctively different set of primary facts. A careful examination of the amended charge reveals that it was not substantially different from the original charge. As such, I did not accept the fifth appellant's argument that the Prosecution had not established a *prima facie* case against him.

53 The second objection raised by the fifth appellant was that the trial judge had erred in placing too much reliance on the facts of his association with the other accused persons at JBFC, and that the gathering at JBFC was not an unlawful assembly. My view was that the trial judge had not erred in this respect. I had held in *Lim Thian Hor v PP* [1996] 2 SLR 258 at [19] that mere presence in an assembly of persons does not make an accused a member of an unlawful assembly unless there is direct or circumstantial evidence to show that the accused shared the common object of the assembly. From the fact that the fifth appellant was with the other accused persons at JBFC, the trial judge could have inferred that the fifth appellant had associated himself with the offending members, and the trial judge could have then inferred that the fifth appellant had shared the common object of the assembly and was thus a member of an unlawful assembly.

54 The third objection raised by the fifth appellant was that there was no evidence to show that he was at the vicinity of the pub where the fight had taken place. The fifth appellant admitted that he had been at the scene, but he said that he had merely been standing by the fourth appellant's car and having a smoke as he waited to take a ride from the fourth appellant, and he had not been at the pub itself. In my view, the trial judge was entitled to believe Goh's evidence that he saw the fifth appellant orchestrating the fight. Moreover, the trial judge was not wrong to make an inference that the fifth appellant was involved in the fight near the pub, based on the fact that the fifth appellant was present at the scene, as it was very unlikely that the fifth appellant was simply standing by one side surveying the scene when there were so many people fighting with weapons near him and he was running the risk of being injured by them.

55 The fourth argument raised by the fifth appellant was that the trial judge had erred in drawing certain inferences on primary facts which were not adduced by the Prosecution. In my opinion, these objections were without merit. Although the trial judge had no direct evidence on these points, he was entitled to come to the conclusions that he did from the mass of evidence that was before him. In particular, I would highlight the fifth appellant's objection to the trial judge's holding that if there had been a fight, the fifth appellant must have shared the common object to commit affray. In my view, this was a reasonable inference of fact. As I have mentioned above, a person is a

member of an unlawful assembly if he is aware of the common object and concurred in it. In the present instance, the facts were such that the group of accused persons was at JBFC drinking. After the call from the second appellant came, the appellants all went down to Prinsep Street. The appellants were spotted by various witnesses doing different things, and in particular, the fifth appellant was seen orchestrating the fight. In these circumstances, the inference that the fifth appellant had shared the common object to commit affray was sound.

The sixth appellant

56 The sixth appellant made many submissions which dealt mainly with findings of fact. I found all of these arguments to be unmeritorious. The sixth appellant's first argument was that the trial judge had erred in accepting Mohan's evidence when it was not contemporaneous in nature and was not conclusively substantiated. My short answer to this was that in convicting the sixth appellant, the trial judge had placed reliance on the evidence of other witnesses like Rajendran, Appu Rajah, Sgt Peh and Sgt Yeo. The trial judge had only used Mohan's evidence to substantiate the other witnesses' evidence that the sixth appellant was seen at the scene.

57 The sixth appellant's second argument was that the trial judge had erred in finding that he had lied in his statement. His argument was that he was drunk at the time he made the statement, and he was oblivious to what had actually happened. In my view, the sixth appellant, by this argument, was admitting that his statement was unreliable. As such, there was no dispute here as the trial judge had similarly felt that his statement was unreliable.

58 The third argument raised by the sixth appellant, that he did not deny the fact that he was at JBFC and later at Prinsep Street, was similarly without merit. The trial judge had not held that the sixth appellant denied this fact. The trial judge had merely said that he did not believe that the sixth appellant was with Manogaran and the third, fourth and fifth appellants the whole evening, and had gone to Prinsep Street in the fourth appellant's car. The reason for the rejection of this defence was that the sixth appellant was seen by witnesses arriving in a taxi on his own.

59 The fourth argument raised by the sixth appellant was that the trial judge did not consider that the sixth appellant had arrived in a taxi after the fight. In my view, this argument was unmeritorious. Rajendran and Appu Rajah had both testified that the sixth appellant had arrived after the police came for the second time. This was before the fight took place.

60 The fifth argument that was raised was that the trial judge had erred in concluding that Sgt Yeo's evidence indicated that the sixth appellant had participated in the fight. I was unable to agree with this submission. Having gone through Sgt Yeo's evidence, I found that the conclusion that the sixth appellant had participated in the fight was a reasonable one to draw, as Sgt Yeo had testified that he saw a commotion in which people in a group were talking in a hostile manner and gesturing, and that the sixth appellant was part of this group of people. As I have mentioned earlier, even though mere presence in a group does not make an accused a member of an unlawful assembly, there could be direct or circumstantial evidence to show that the accused shared the common object of the assembly: *Lim Thian Hor v PP* ([53] *supra*). Therefore, the trial judge was entitled to draw the inference that the sixth appellant had associated himself with the group of people who were talking in a hostile manner and gesturing, and from there infer that he was a member of the unlawful assembly and had participated in the fight.

61 The sixth submission of the sixth appellant was that the trial judge had erred in relying on Sgt Yeo's and Sgt Peh's evidence to conclude that the sixth appellant had climbed into Mohican's Pub and smashed the glass panel with a beer barrel, as he did not take into account the inconsistencies

between their statements and Goh's statement. In my opinion, this finding by the trial judge was not against the weight of evidence. The weight of evidence actually supported the trial judge's finding, because both Sgt Yeo and Sgt Peh had testified that they saw the sixth appellant committing the act. Further, I did not accept the argument that Sgt Yeo and Sgt Peh were not credible witnesses, as the trial judge had the benefit of observing the demeanour of these witnesses and had come to the conclusion that they could be believed.

62 The next submission of the sixth appellant related to his conviction for criminal intimidation. It was argued that the trial judge had erred in accepting Goh's and Marc's evidence that they had identified the sixth appellant at the scene of the crime as the chopper-wielding assailant. In this regard, several inconsistencies were brought up. First, it was said that Marc's evidence and Goh's evidence were inconsistent, as Goh had testified that Marc was attacked whilst he was outside the car, whereas Marc had said that he was attacked when he was in the car. Second, the sixth appellant brought up the fact that both Marc and Goh could not recall the colour of the assailant's shirt. In my opinion, the court should not place too much weight on this inconsistency in detail and the inability to furnish details about the colour of the assailant's shirt. The incident had happened very quickly, and as held in *Chean Siong Guat* ([20] *supra*), allowance must be given for human fallibility in observation and recollection of events.

63 Third, the sixth appellant argued that Marc had given inconsistent answers when asked if the car door had hit the assailant. My response to this was that this was an immaterial detail which had no direct bearing on the facts in issue, and little weight should be placed on this inconsistency.

64 In addition, the sixth appellant argued that Marc had told the policemen at the scene that he was attacked with a parang and not a chopper; that he had said that he was assaulted in front of Mr Bean's Café; and that the policemen at the scene did not record any information about the identity of the assailant. While these consistencies might lead one to question whether Marc's testimony could be believed, my view was that it was not possible to say that the trial judge was plainly wrong in believing Marc's testimony. This was especially since Goh had given evidence to substantially the same effect. Given that the trial judge had the additional advantage of observing Marc's and Goh's demeanour, the trial judge's finding of fact that the sixth appellant had attacked Marc should not be overturned. Accordingly, I found that there was sufficient evidence to convict the sixth appellant of criminal intimidation.

Appeal against sentence

65 The appellants have all appealed against the sentence that was imposed on them for the offence of rioting. In my opinion, the sentence of 36 months and six strokes of the cane imposed by the trial judge was not manifestly excessive, as there were various factors to indicate that this was a serious offence: violence was involved, deadly weapons were used, there was a certain amount of premeditation to commit affray, there was a large group of people, and the offence was committed in a public place that was relatively busy due to the large number of pubs and restaurants lining Prinsep Street which operate at night.

66 A comparison of this case with sentencing precedents would also reveal that the sentence imposed was not manifestly excessive. An examination of the cases involving convictions under s 148 of the PC reveals that the courts have imposed heavier sentences on offenders than in the present case: see *Toh Ah Chong v PP* Magistrate's Appeal No 208 of 1994; *Raj Kumar s/o Sivalingam v PP* Magistrate's Appeal No 322 of 2000; and *Mohamed Amirruddin v PP* [2002] SGDC 66. In *Mohamed Abdullah s/o Abdul Razak v PP* ([16] *supra*), I sentenced the offender to the relatively lighter punishment of two years' imprisonment and six strokes of the cane. The facts in that case were that

the assailants were armed with broken bottles and a parang, and they had attacked the victims because they were told to leave the back alley of the victims' father's shop. The victims suffered lacerations and a twisted ankle. In my opinion, the present case was more serious as the offence was committed at a public place with a greater number of people. Even though few injuries were reported in the present case, the damage done to the pub was comparable to the relatively minor injuries suffered by the victims in *Mohamed Abdullah s/o Abdul Razak*. Hence, it was appropriate that a heavier sentence be imposed on the appellants in the present case. The sentence of 36 months and six strokes was thus not manifestly excessive.

67 I found that the mitigating factor brought up by the first appellant against the charge of rioting, which was that he was the sole breadwinner and financial hardship would be caused to his family, was not relevant. This was because financial hardship is only a mitigating factor in the most extreme of circumstances: *Lai Oei Mui Jenny v PP* [1993] 3 SLR 305.

68 The second appellant submitted that he was the owner of Mohican's Pub and had invested considerably in the pub. I failed to see how this could be a mitigating factor in favour of the second appellant, especially when the second appellant had, through his own acts, caused damage to the pub. The fourth appellant submitted that he had a host of medical problems and ailments. I found that this factor was not relevant, because the cases have stated that ill-health would only be a mitigating factor in exceptional cases as an act of mercy, such as where the offender suffers from a terminal illness: see *PP v Ong Ker Seng* [2001] 4 SLR 180. The fact that these two appellants had no antecedents was also not relevant, because the presence of antecedents would lead to an enhanced sentence being imposed on them.

69 With regard to the third and fifth appellants, the same factor of the lack of antecedents was cited. The fifth appellant also brought up his medical problems. As stated above, these factors were not relevant. In addition, the fifth appellant argued that he was merely present at the scene and that there was no evidence to suggest that he participated in the affray, hence a lighter sentence should be imposed on him. As the evidence has shown that the fifth appellant was orchestrating the fight, I found that he was not merely a passive bystander and this argument therefore could not stand.

70 As for the sixth appellant, I found that his sentence of eight years of preventive detention and six strokes of the cane was not manifestly excessive, given that he had a whole string of antecedents. He had been imprisoned five times before for house-breaking, theft and various drug-related offences. He was a habitual offender, and a long sentence was merited in this case in order to protect the public from such a person. In addition, it was stated in his preventive detention report that he was in the moderate to high-risk group of re-offending, and it was recommended that he be sent for preventive detention. I thus found that his appeal against sentence should similarly be dismissed.

Conclusion

71 For the aforementioned reasons, all the appeals against conviction and sentence were dismissed. The second and fourth appellants requested that their sentence be deferred by two weeks, so as to enable them to wind up their labour supply business and sort out their affairs. As this was a departure from normal practice, I decided to defer the sentence of only one of these two appellants. Accordingly, I ordered a two-week deferment of the fourth appellant's sentence only.

Appeals dismissed.

[1]PW10.

[2]PW11.

[3]PW12.

[4]PW15.

[5]PW13.

[6]PW17.

[7]PW14.

[8]PW16.

[9]PW18.

[10]PW3.

[11]PW5.

[12]PW6.

[13]PW20.

[14]PW21.

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