Public Prosecutor *v* Hirris anak Martin and another
[2010] SGCA 8

Case Number	: Criminal Appeal No 10 of 2009 (Criminal Case No 19 of 2009)
Decision Date	: 03 March 2010
Tribunal/Court	: Court of Appeal
Coram	: Chan Sek Keong CJ; V K Rajah JA; Tay Yong Kwang J
Counsel Name(s)	: Lee Sing Lit, Amarjit Singh and Sharon Lim (Attorney-General's Chambers) for the appellant; The first and second respondents in person.
Parties	: Public Prosecutor — Hirris anak Martin and another

Criminal Procedure and Sentencing

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2009] SGHC 132.]

3 March 2010

Chan Sek Keong CJ (delivering the grounds of decision of the court):

1 Hirris Anak Martin ("the first respondent") and James Anak Anggang ("the second respondent") were jointly convicted on one charge of robbery with grievous hurt under s 394 read with s 397 of the Penal Code (Cap 224, 1985 Rev Ed) ("the Penal Code") ("the common charge"). The second respondent was also convicted on a separate and unrelated charge of robbery with hurt under s 394 of the Penal Code ("the second charge"). We will refer to them collectively as "the respondents".

2 The trial judge ("the Judge") sentenced the respondents to ten years' imprisonment and 24 strokes of the cane on the common charge, and the second respondent to five years' imprisonment and 12 strokes of the cane on the second charge. He also ordered the imprisonment sentences imposed on the second respondent to run concurrently (see *Public Prosecutor v Hirris Anak Martin and Another* [2009] SGHC 132).

3 The prosecution appealed against the respondents' sentences. After hearing the prosecution and the respondents in person, we allowed the appeal as follows:

(a) the respondents' sentence on the common charge was increased to 15 years' imprisonment and 24 strokes of the cane; and

(b) the second respondent's imprisonment sentences were to run consecutively.

We now give the reasons for our decision.

Facts relating to the common charge

4 On 23 January 2008 at around 11 p.m., the respondents were drinking with a group of people at No 14 Jalan Suka, off Lorong 24 Geylang. When they ran out of liquor, one member of the group known as "Ah Choi" suggested to the respondents that the three of them could look for someone to rob, to which both respondents readily agreed. Before setting off, the trio picked up a metal rod which was hidden in a drain nearby and took turns to carry it as they went around looking for a

victim.

5 The respondents and Ah Choi subsequently spotted a victim, one Abu Saleh Taser Uddin Ahmed ("the deceased"), who was sitting down in an open field next to a car park between Lorong 25 and Lorong 25A Geylang. The deceased was alone. Ah Choi suggested that the three of them beat up the deceased and rob him and the respondents agreed. At this stage, the metal rod was passed to Ah Choi. The three of them approached the deceased, who had lain down on the field by then. Ah Choi struck first, using the metal rod to hit the deceased on the back of his head twice. The deceased managed to get up, but the second respondent pushed him back down with his foot and proceeded to punch and kick him. The first respondent also rained several punches on the deceased's face. As a result, the deceased became unconscious. Ah Choi then took a brown wallet containing $50.00, an EZ-Link card, a POSB ATM card and some personal papers from the deceased and the trio fled the scene. They went to the rear of a coffee shop along Lorong 24A Geylang where they divided the contents of the wallet among themselves. Ah Choi also used some of the money from the wallet to buy six cans of beer for them to share.

6 The deceased was found lying unconscious in the open field on 24 January 2008 at 6.18 a.m. and was brought to Tan Tock Seng Hospital. Despite undergoing intensive surgery and treatment, he eventually died from his injuries on 30 January 2008. The autopsy report stated that the cause of death was severe head injury consistent with the use of a blunt object to strike the deceased's head.

7 The first and second respondents were subsequently arrested by the police on 4 February 2008. Ah Choi has not been found.

Facts relating to the second charge

8 Police investigations carried out after the arrest also revealed that the second respondent had been involved in an earlier case of robbery involving a separate victim. On 13 January 2008 at about 11.30 p.m., the victim, one Molfot Bepari Moslem Bepari, was walking along Geylang Road near City Plaza towards his dormitory at Joo Chiat Road. He was talking on his hand phone. As the victim was about to reach the bus stop in front of City Plaza, the second respondent approached him from behind and punched him on the right upper lip. When the victim turned around to see who had punched him, the second respondent kicked him to the ground and his hand phone fell out from his hand. The second respondent proceeded to punch and kick the victim several times in the head and face before fleeing with the hand phone, which he subsequently sold for $30.00.

Proceedings in the High Court

9 Both respondents pleaded guilty to the common charge and, as we have mentioned earlier, were sentenced to ten years' imprisonment and 24 strokes of the cane. The second respondent also pleaded guilty to the second charge and, as we have mentioned earlier, was sentenced to five years' imprisonment and 12 strokes of the cane, with both imprisonment sentences to run concurrently. The prosecution appealed on the following grounds:

(a) that the sentence in respect of the common charge was manifestly inadequate; and

(b) that the two imprisonment sentences against the second respondent should run consecutively.

Whether the sentence on the common charge was manifestly inadequate

10 Section 394 of the Penal Code prescribes a sentencing range of between five and 20 years' imprisonment and a minimum of 12 strokes of the cane. Section 397 provides for an additional minimum of 12 strokes of the cane where, *inter alia*, grievous hurt is caused in the course of a robbery. Since both respondents would receive the maximum number of strokes (24) in any event, the only issue here was the adequacy of the imprisonment terms.

11 In this regard, we examined the following sentencing precedents under s 394 where death was caused in committing the robbery:

Case	Sentence	Brief Facts
Public Prosecutor v Abdul Naser bin Amer Hamsah [1996] 3 SLR(R) 268	18 years' imprisonment and 18 strokes of the cane	The accused robbed a tourist in her hotel room and stamped on her face in the course of the robbery, which caused her death.
Roslan bin Abdul Rahman v Public Prosecutor [1999] 1 SLR(R) 377 ("*Roslan*")	12 years' imprisonment and 24 strokes of the cane	The accused accidentally caused the victim's death when he stuffed a towel in her mouth to prevent her from shouting. He was convicted for causing the victim to suffer fractures during an earlier struggle in the course of the robbery.
Public Prosecutor v Somrak Senkham and another [2004] SGHC 172 ("*Somrak Senkham*")	Five years' imprisonment and 24 strokes of the cane (for both accused)	The two accused had robbed the victim with an accomplice. During the robbery, the accomplice struck the victim's head with a long pole which led to his death.
Public Prosecutor v Lim Poh Lye and another [2005] 2 SLR(R) 130	20 years' imprisonment and 24 strokes of the cane (for first accused) 15 years' imprisonment and 24 strokes of the cane (for second accused)	The two accused abducted the victim in a car and forced him to sign cheques. When the victim tried to escape, the first accused stabbed his leg and severed his femoral vein, causing him to bleed to death. The second accused did not take part in the stabbing. [Note: The Court of Appeal subsequently convicted both accused on the original charge of murder.]
Public Prosecutor v Arsan s/o Krishnasamy Govindarajoo Criminal Case No 16 of 2007 (unreported)	15 years' imprisonment and 24 strokes of the cane	The accused pleaded guilty to conspiring with four others to rob a lorry. He did not take part in the actual robbery but told his accomplices to beat the driver unconscious to avoid recognition. The driver died from his injuries.

12 The above sentencing precedents show that the courts have consistently imposed sentences at the higher end of the sentencing range for s 394 offences where death was caused in the course of the robbery. Even in *Roslan*, where the victim's death was completely accidental and the accused was instead convicted of earlier acts of hurt in the robbery, he was sentenced to 12 years' imprisonment. The one anomaly in these precedents is the case of *Somrak Senkham*, which we will address shortly.

13 The Deputy Public Prosecutor ("DPP") submitted that the Judge had erred in departing from the

above sentencing precedents without sufficiently explaining his reasons for doing so. We agreed with this submission. As I stated in *Public Prosecutor v UI* [2008] 4 SLR(R) 500 at [17]:

> 17 Dealing, first, with the issue of the extent to which a lower court is entitled to disregard the guidance given by established sentencing precedents (which commonly set out "guidelines" or "benchmarks"), in our view, it would not be proper for a trial judge to depart from such precedents without, at the very least, giving cogent reasons as to why they should not be applied in the case before him. This approach is based on two basic principles. The first is that a lower court should respect the guidance given by a higher court in similar cases, even though the judge may not personally agree with the views of the higher court. … The second principle, which the Judge had expressly recognised (see [5] of the Judgment), is that like cases should be treated alike. The corollary of this principle is *consistency in sentencing*, which is achievable only by a lower court adhering, over a period of time, to sentencing guidelines or benchmarks set by a higher court. [emphasis in original]

14 While it is trite that lower courts are not required to adhere slavishly to sentencing precedents and that each case ultimately turns on its own facts (see *Viswanathan Ramachandran v Public Prosecutor* [2003] 3 SLR(R) 435 at [43] and *Tan Kay Beng v Public Prosecutor* [2006] 4 SLR(R) 10 at [45]), we would remind all sentencing judges that sentencing precedents should not simply be departed from without adequate justification. As V K Rajah JA held in *Public Prosecutor v Loqmanul Hakim bin Buang* [2007] 4 SLR(R) 753 at [22]:

> 22 … The application of sentencing principles to the factual matrix requires the judge to undertake a critical examination and evaluation of the matter to justify the legitimacy of the sentence passed. It is, after all, the court's reasoning that accords legitimacy to the sentence that is passed (see, *eg*, *Angliss Singapore Pte Ltd v PP* [2006] 4 SLR(R) 653 ("*Angliss*") at [24]). While a judge must always remain sensitive to the facts of the case, this is not, all said and done, a *carte blanche* licence for a sentencing judge to pursue his own penal philosophies.

15 In the present case, the Judge's sentence of ten years' imprisonment was markedly lower than the established sentencing range of 12 to 20 years' imprisonment for robbery cases involving death. While it is possible that the Judge might have been influenced by the low sentence imposed in *Somrak Senkham*, the DPP submitted that the sentence in that case was anomalous and should not be followed. We agreed. It is necessary to point out that in *Somrak Senkham*, no relevant sentencing precedent was cited by the court. Although the judge in *Somrak Senkham* accepted at [7] of his Grounds of Decision that the two accused had only intended to commit robbery and did not plan the victim's death, the DPP correctly pointed out that this was similarly the situation in the other sentencing precedents cited above. If the respondents had actually planned to kill the deceased in this case, they might well have been charged with murder instead. In our view, *Somrak Senkham* should not be used as a precedent for robbery cases involving death.

16 Turning to the facts of this case, we did not see any special circumstances justifying a departure from the normal sentencing range of 12 to 20 years' imprisonment. On the contrary, we were perturbed by the callous and wanton nature of the respondents in inflicting violence on the deceased when there was no real need to do so. For the sake of satisfying their urge to drink, the respondents and Ah Choi ended up causing the death of an innocent person. The courts have long recognised gratuitous violence as warranting a deterrent sentence: see *Public Prosecutor v Raffi Bin Jelan and Another* [2004] SGHC 120 at [21] and *Public Prosecutor v Leong Soon Kheong* [2009] 4 SLR(R) 63 at [55]. The rationale for this was explained by V K Rajah J in *Public Prosecutor v Law Aik Meng* [2007] 2 SLR(R) 814 ("*Law Aik Meng*") at [25]:

> 25 … Certain crimes, in addition to harming their immediate victims, also have the wider-felt impact of triggering unease and offending the sensibilities of the general public. A deterrent sentence is therefore necessary and appropriate to quell public disquiet and the unease engendered by such crimes. … It is critical that a crystal clear signal be conveyed through deterrent sentences that all such offences causing public disquiet will be unstintingly deplored and denounced by the courts. Instances of gratuitous violence will also fall under this broad category.

17 In this case, despite having the advantage of number and the use of a dangerous weapon, the respondents and Ah Choi viciously assaulted the deceased as a first resort and without warning when they could have merely threatened him first and taken his money by force. Even after the deceased was lying on the ground and unable to defend himself, the respondents continued to kick and punch him mercilessly. Although the fatal injuries were inflicted by Ah Choi with the metal rod, we did not consider the two respondents any less responsible because they had clearly intended for the rod to be used in the robbery. On the whole, we felt that the aggravating factors in this case far outweighed the fact that both respondents had pleaded guilty and had no prior antecedents. Accordingly, we were of the view that the Judge's sentence was manifestly inadequate. In our view, a sentence of 15 years' imprisonment and 24 strokes of the cane would serve as a more appropriate warning that the courts would not hesitate to punish severely those who easily resort to violence in committing robbery, especially in cases where innocent lives are lost.

Whether the imprisonment sentences against the second respondent should run consecutively

18 It is a general rule that where an accused is convicted of wholly separate offences at the same trial, a court should order any imprisonment sentences to run consecutively instead of concurrently. This is the corollary of the one-transaction rule. The aggregate sentence of imprisonment imposed should of course be tempered by the totality principle, which requires that the overall punishment should be proportionate to the gravity of the accused's criminal conduct: *Maideen Pillai v Public Prosecutor* [1995] 3 SLR(R) 706 at [11]; *Law Aik Meng* at [58].

19 In the present case, the Judge had justified the imposition of concurrent sentences against the second respondent on the ground that the total imprisonment term would be too harsh if the sentences were to run consecutively. But, at the same time, the Judge also expressed the view that he could have imposed a sentence slightly higher than ten years' imprisonment against the second respondent on the common charge if the prosecution had applied for the second charge to be taken into consideration ("TIC").

20 With respect, we thought it incongruous of the Judge to say that he could have imposed a higher sentence if the prosecution had applied for the second charge to be "TICed", and yet order the sentences to run concurrently when the prosecution had proceeded on that charge instead. As I stated in *Public Prosecutor v UI* at [36], the increase in an offender's sentence where other offences are TIC would be lighter than the sentence he would receive if the prosecution had proceeded with those other offences as well. Since the prosecution had chosen to proceed with the second charge here instead of applying for it to be TIC, the case for imposing a higher overall sentence on the second respondent was *a fortiori*. We agreed with the DPP's submission that the effect of ordering concurrent sentences was that the second respondent would essentially be getting off scot-free on the second charge when it was committed at a different time and place and against a different victim. We found this result untenable. Since the second respondent was convicted of separate and unrelated offences, the imprisonment sentences against him should have been ordered to run consecutively.

21 It was, of course, possible for the Judge to give effect to the totality principle by lowering the second respondent's sentence for the common charge and ordering it to run consecutively with the sentence for the second charge. This would give rise to the disparity of the second respondent being punished less than the first respondent for the first offence, but this disparity could still be justified on the totality principle. In *Public Prosecutor v McCrea Michael* [2006] 3 SLR(R) 677 ("*McCrea Michael*"), the accused pleaded guilty to two charges of culpable homicide not amounting to murder under s 304(b) of the Penal Code, and one charge of causing the disappearance of evidence with the intention of screening himself from legal punishment under s 201 of the Penal Code. He was sentenced to ten years' imprisonment for each of the s 304(b) offences and four years' imprisonment for the s 201 offence, with all three sentences to run consecutively. In earlier proceedings, the accused's accomplice had pleaded guilty to two charges under s 201 and was sentenced to six years' imprisonment for each of the charges. The High Court noted this disparity but justified it on the basis of the totality principle, since the accused in *McCrea Michael* was facing two additional charges under s 304(b). Similarly here, the Judge could have given effect to the totality principle by adjusting the individual sentences to arrive at an appropriate overall sentence instead of simply ordering them to run concurrently.

22 Having said that, we felt that ordering wholly consecutive sentences against the second respondent would not infringe the totality principle on the facts of this case. It was clear from the circumstances in which both his offences were committed that the second respondent was a person who was prone to wanton violence. He was not afraid to cause hurt to his victims as a first resort to satisfying his greed, even though the items he robbed were of relatively minor value. He also continued to kick and punch his victims in both cases when he could have easily made off with his loot. Violence appeared to be an integral part of his *modus operandi*. In the circumstances, we did not think that the aggregate sentence of imprisonment imposed was disproportionate to the gravity of his criminal conduct.

23 For the above reasons, we allowed the prosecution's appeal and increased both respondents' sentences for the common charge to 15 years' imprisonment and 24 strokes of the cane. We also ordered the imprisonment sentences against the second respondent for the common charge and the second charge to run consecutively, making a total of 20 years' imprisonment and 24 strokes of the cane.