Kho Jabing and another *v* Public Prosecutor
[2011] SGCA 24

Case Number	: Criminal Appeal No 18 of 2010
Decision Date	: 24 May 2011
Tribunal/Court	: Court of Appeal
Coram	: Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: James Bahadur Masih (James Masih & Co) and Zaminder Singh Gill (Hilborne & Co) for the first appellant; N Kanagavijayan (Kana & Co) and Gloria James (Hoh Law Corporation) for the second appellant; Lee Lit Cheng and Gordon Oh (Attorney-General's Chambers) for the respondent.
Parties	: Kho Jabing and another — Public Prosecutor

Criminal Law

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2010] SGHC 212.]

24 May 2011 Judgment reserved.

V K Rajah JA (delivering the judgment of the Court):

Introduction

1 This is an appeal from the decision of the trial judge in *Public Prosecutor v Galing Anak Kujat and another* [2010] SGHC 212 (the "GD"), where the learned trial judge convicted Galing Anak Kujat ("Galing") and Jabing Kho ("Jabing") (collectively "the appellants") of murder in furtherance of the common intention of both of them, under s 302 read with s 34 of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code"), and sentenced them both to suffer the mandatory death penalty.

2 The trial judge's decision was given before this Court delivered its judgment in *Daniel Vijay s/o Katherasan and others v Public Prosecutor* [2010] 4 SLR 1119 ("*Daniel Vijay*"). It was therefore necessary for us to reserve our judgment in this case in order to carefully consider the trial judge's reasons and conclusions in light of *Daniel Vijay*, where this Court comprehensively reviewed both local and foreign case law on s 34 of the Penal Code, and laid down what is required to be proved in order to make out the requisite "common intention" (see [32] and [33] below) to render two or more persons jointly liable for an offence. For ease of reference, s 34 of the Penal Code is reproduced here:

> **Each of several persons liable for an act done by all, in like manner as if done by him alone**
>
> **34**. When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

Facts

3 Unless otherwise stated, the following facts are undisputed.

4 Both appellants are from Sarawak, Malaysia. Galing is 26 years of age, and was employed to load oil onto ships. Jabing is 24 years of age, and worked in Singapore for a rag and bone company.

5 In the afternoon of 17 February 2008, the appellants agreed, together with three other Sarawakians, Vencent Anak Anding (also known as "Vincent" or "Vencent") ("Vencent"), a construction worker; Anthony Anak Jaban ("Anthony"); and Alan Anak Ajan ("Alan"), a colleague of Jabing's, to rob two Bangladeshi co-workers of Vencent's at a worksite at Tiong Bahru. The robbery was aborted because the two targets fortuitously left the worksite with their supervisor in his van. Despite this, the appellants, Vencent, Anthony and Alan remained at Tiong Bahru for some time, consuming liquor known as "Narcissus Ginseng Wine Tonic".

6 Eventually, at about 7:00 pm, the five of them left Tiong Bahru and travelled to Geylang. There was some dispute as to whether or not there had been a plan to commit robbery at Geylang after the earlier plan was aborted. In his various statements, and during the trial, Galing maintained that there was no intention to commit robbery at Geylang, and that the intention (of all five individuals) in going to Geylang was to continue drinking. Jabing, however, stated to the police and at trial that the intention among them all in going to Geylang was to rob.

7 At Geylang, along Lorong 4, the appellants walked some distance away from Vencent, Anthony and Alan. The appellants spotted two persons, Wu Jun and Cao Ruyin ("the deceased") (collectively "the victims"), walking along a pathway in an open space near Geylang Drive, and assaulted them. Wu Jun was assaulted by Galing, by means of a belt wrapped around Galing's hand or fist, with the metal belt buckle exposed. The deceased was assaulted by Jabing with what was variously described as a piece of wood or a tree branch (the "piece of wood"), which Jabing had picked up while approaching the victims. The deceased was also assaulted by Galing using the metal belt buckle. The deceased suffered severe head injuries inflicted from the piece of wood (from which he died on 23 February 2008), and his mobile phone was taken by Galing. Wu Jun escaped with minor injuries.

8 The exact chain of events which occurred during the assault is disputed. Galing stated that Jabing led the way in:

(a) crossing the road (in order to reach the victims);

(b) intimating that the appellants should rob the victims;

(c) picking up the piece of wood; and

(d) striking the deceased with it.

Further, according to Galing:

(a) he told Jabing not to rob the victims but was ignored by Jabing;

(b) he assaulted Wu Jun (*after* the deceased had already been assaulted by Jabing with the piece of wood) because Wu Jun seemed to be about to attack Jabing;

(c) he chased Wu Jun for some distance before returning to where Jabing and the deceased were located;

(d) Wu Jun returned to the scene of the assault, and Jabing chased Wu Jun away a second time before he (Galing) called Jabing back.

9 Jabing, however, stated that:

(a) it was Galing who first crossed the road to approach the victims;

(b) Galing had by then already wrapped his belt around his hand;

(c) Galing was already about to strike the deceased with the belt in his hands by the time Jabing picked up the piece of wood;

(d) he (Jabing) chased after Wu Jun, who had fled the scene of the assault;

(e) he (Jabing) gave up the chase and returned to the scene of the assault, where he saw Galing struggling with the deceased; and

(f) he (Jabing) then struck the deceased with the piece of wood twice, after which he then fled the scene of the assault, but not before noticing Galing hitting the deceased with his belt and having taken the deceased's mobile phone.

10 To complicate matters, Wu Jun's evidence in his statement was that, while walking together with the deceased at the material time, he felt something hard hit him at the back of his head. He ran a few steps forward, turned round, and saw a man with a tanned complexion, wearing a cap, coming towards him in a menacing manner with a clenched fist, whereupon he (Wu Jun) fled the scene. Wu Jun's evidence was that he could hear the deceased groaning in pain. After running for a while, Wu Jun called for the police on his mobile phone, and subsequently returned to the scene of the assault, where he discovered the deceased lying unconscious and vomiting blood. Wu Jun also noted that the deceased's mobile phone was missing. At trial, Wu Jun stated that he noticed only one assailant that night, and was unable to say whether he or the deceased was attacked first, how the deceased was attacked or who attacked the deceased.

11 After the assault, the appellants, Vencent, Anthony and Alan eventually regrouped at a coffeeshop at Lorong 24 Geylang. Galing's and Jabing's versions of how each of them ended up at the coffeeshop differed. Galing stated that, after he had called Jabing back from pursuing Wu Jun (see [8] above), he and Jabing subsequently met the others at the coffeeshop. Jabing, however, claimed that he had become separated from the others (including Galing) after the assault, and only joined them at the coffeeshop after receiving a call from Vencent telling him where they were. There was also some dispute as to what transpired at the coffeeshop, such as whether Jabing had been chastised by Galing and the others for using excessive force against the deceased. What is not disputed, however, is that Galing sold the deceased's mobile phone to Vencent for $300, and that all five individuals received $50 from the proceeds (with the remaining $50 being used to buy food and drink). Galing and Jabing were only arrested several days after the incident.

12 Neither appellant challenged the admissibility or voluntariness of their statements. At trial, only Wu Jun and the two appellants gave direct evidence as to what had transpired. Jabing was largely content to stand by the contents of his statements (although there were some discrepancies, such as whether he had seen Galing hitting the deceased); however, Galing challenged the veracity or accuracy of various parts of his statements relating to Jabing's assault on the deceased, and his taking of the deceased's mobile phone (see [39]–[47] of the GD), claiming that these had been made by him in response to suggestions made by the investigating officer ("IO"). This claim was raised rather late in the day, during the case for the Defence, after these statements had already been admitted into evidence during the Prosecution's case (when the relevant witnesses, the IO and the interpreter, were not cross-examined on this issue) and after the Prosecution had closed its case.

The Defence then recalled the relevant witnesses, but they rejected Galing's allegations that the recording of his statement was inaccurate or improper. The trial judge rightly accepted their evidence, as Galing was unable to provide any evidence or explanation as to why the statements would have been recorded in the fashion he had alleged, or why he would have agreed to them if they were.

Decision below

13 The trial judge identified four key issues for determination:

(a) whether there was a common intention to rob the deceased;

(b) whether the appellants knew that death was likely to be caused;

(c) whether the appellants had the necessary common intention under s 34 of the Penal Code; and

(d) whether murder was committed in furtherance of the common intention.

14 In relation to the first issue, the trial judge (at [54] of the GD) rejected Galing's evidence that there was no intention to rob the victims, and found that Galing was "a willing participant in the robbery with Jabing".

15 In relation to the second issue, the trial judge found (at [55] of the GD) that *the appellants' intention was to rob the victims by the use of force*, and that Galing knew that when he and Jabing robbed the deceased, the deceased would be assaulted and serious injuries might be inflicted on him. Against this background, the trial judge found (at [58] of the GD) that:

(a) *the appellants had the common intention to commit robbery*;

(b) *each of them knew that it was likely that serious injury might be inflicted on the victims in the course of the robbery*;

(c) Jabing intentionally inflicted head injuries on the deceased; and

(d) the injuries inflicted were sufficient in the ordinary course of nature to cause death, and did cause the deceased's death.

16 In relation to the third issue, the trial judge reminded himself of the law relating to common intention as it was articulated in *Lee Chez Kee v Public Prosecutor* [2008] 3 SLR(R) 447 ("*Lee Chez Kee*") (at [253]), and reiterated (at [59] of the GD) that while *the common intention of the appellants was to rob, and not to kill*, they knew that there was the likelihood that serious injury might be inflicted.

17 In relation to the fourth issue, the trial judge held (at [62] of the GD) that Jabing's actions satisfied s 300(*c*) of the Penal Code, and concluded from this that the murder was therefore committed in furtherance of the common intention.

18 The foregoing summary of the trial judge's decision reveals that he, unfortunately, fell into the same error as the trial judge in *Public Prosecutor v Daniel Vijay s/o Katherasan and others* [2008] SGHC 120, in that there was a specific finding that the appellants did *not* have a common intention to *kill* the deceased, but only to rob him; and that the findings relating to the common intention of the

appellants were referable only to the *robbery*, and not to the *killing* (see [4], [44], [45], [59], [66], [148] and [164] of *Daniel Vijay*). The trial judge's approach in this case was based on what was termed in *Daniel Vijay* the "putative *Mimi Wong (CCA)* test", which was rejected by this Court in *Daniel Vijay* as a misunderstanding of what was truly decided and/or stated in *Wong Mimi and another v Public Prosecutor* [1971–1973] SLR(R) 412 ("*Mimi Wong (CCA)*"). The putative *Mimi Wong (CCA)* test, as expressed in [35] of *Daniel Vijay*, is that:

> [F]or the purposes of imputing constructive liability to secondary offenders pursuant to s 34, there does not need to be a common intention between C (the actual doer) and A and B (the secondary offenders) to commit the criminal act done by C which gives rise to the offence that A, B and C are charged with; all that is required is that the criminal act committed by C is in furtherance of and is not inconsistent with the criminal act commonly intended by A, B and C.

19 As the trial judge's judgment rested on a misapprehension of the law, on that basis alone the convictions of the appellants are unsafe. What follows, therefore, is a *de novo* examination of how the appellants' convictions ought to be dealt with under the law on common intention as stated in *Daniel Vijay*.

Issues

20 The main issues for our consideration are:

(a) Jabing's conviction for murder;

(b) Galing's conviction for murder, which entails a consideration of:

(i) the criminal act;

(ii) the common intention;

(iii) whether the criminal act was done in furtherance of the common intention; and

(iv) whether there was the requisite participation by Galing in the criminal act.

Jabing's conviction for murder

21 We are of the view that Jabing was rightly convicted of murder under s 300(*c*) of the Penal Code, as the evidence shows that he had intentionally inflicted on the deceased, using the piece of wood he had picked up, a s 300(*c*) injury which caused the death of the deceased.

22 The requirements of s 300(*c*) are set out in the hallowed passage from [12] of *Virsa Singh v State of Punjab* AIR 1958 SC 465 ("*Virsa Singh*"), which was referred to by the trial judge (at [61] of the GD):

> First, [the prosecution] must establish, quite objectively, that a bodily injury is present;
>
> Secondly, the nature of the injury must be proved; These are purely objective investigations.
>
> Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

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

23 The first two *Virsa Singh* requirements are clearly satisfied in this case: the deceased had suffered horrific head injuries consisting of multiple skull fractures, swelling of the brain, and severe haemorrhaging.

24 In relation to the third *Virsa Singh* requirement, Jabing's evidence throughout was that he had hit the deceased (with the piece of wood) twice, and in court he maintained that he had not been aiming for the deceased's head, nor was he aware of the force he had used (see [50] of the GD). Although he testified in court that he could not remember where the second blow landed, this was inconsistent with his statements, in which he admitted hitting the deceased on the head on both occasions, and, indeed, his statements indicate that Jabing was in fact aiming for the deceased's head, or was intending to strike it. The trial judge in evaluating the evidence noted that Jabing had admitted in his first statement of 26 February 2008 that he swung the piece of wood towards the head of the deceased and that the single blow caused the deceased to fall onto the ground (see [56] of the GD).

25 This account was confirmed by Galing's statements to the police as follows: [note: 1]

> [M]y friend Jabing was *too violent* when hitting the Chinese man until he bled profusely. I saw him hitting the Chinese man *several times* and his head *cracked open*. … I really regretted that Jabing hit him *so many times* until he died ...

Galing also stated: [note: 2]

> When Jabing neared both of them, *he used both his hands* and swung the wood towards the right side of the bigger built male Chinese …
>
> … I gave up the chase and turned back towards Jabing who was hitting the other Chinese with the wood in his hands *repeatedly* …

Although Galing later attempted to question the accuracy of these statements in what appears to be a belated attempt to downplay Jabing's culpability (see [12] above), there was little reason to doubt that they had been correctly recorded. Galing's statements, therefore, were evidence that Jabing struck the deceased more than twice, and with considerable violence.

26 The violent assault on the deceased was corroborated by the medical evidence (summarised at [22]–[29] of the GD), which was that the deceased had sustained life-threatening injuries to his head and brain. There was evidence from the forensic pathologist, Dr Teo Eng Swee ("Dr Teo"), that there could have been more than five blows to the deceased's head, and both Dr Teo and Dr Ho Chi Long (the physician who first attended the deceased at the accident and emergency room) were of the opinion that at least some of the injuries required "very severe" or "huge" blunt force from several blows to be inflicted. Dr Teo added that one of the fractures that resulted in the initial fragmentation of the skull required "severe force".

27 In light of all this evidence, as well as the fact that the severe injuries found on the deceased

were concentrated at the region of his head, it is clear beyond a reasonable doubt that Jabing intended to, and did, inflict multiple head injuries on the deceased, and that such injuries were certainly not accidental or unintentional.

28 As for whether the injuries were sufficient in the ordinary course of nature to cause death (the fourth *Virsa Singh* requirement), this was affirmed to be the case by Dr Teo.

29 Consequently, the trial judge found as a fact that Jabing had struck the deceased on the head in order to rob him, and that the blow with the piece of wood was struck by Jabing with such force that Galing saw his head crack open, and concluded from this that Jabing's actions fell within s 300(*c*) of the Penal Code (see [62] of the GD).

30 Applying the *Virsa Singh* test to the facts found by the trial judge, we affirm his decision, and hold that Jabing was properly convicted of murder under s 300(*c*) of the Penal Code, since his actions satisfied the *actus reus* and *mens rea* required by that subsection. On appeal, the only arguable defence raised by Jabing's counsel was that he was drunk and therefore not responsible for his actions. We reject this and agree with the trial judge that the events and Jabing's statements to the investigators clearly showed that he knew what he was doing. The defence of intoxication under s 85(2) of the Penal Code applies in very narrow circumstances, for the intoxication must result in the accused not knowing that his actions were wrong or not knowing what he was doing, and the intoxication must either have been involuntary or the accused must have been, as a result of the intoxication, insane at the material time (see *Tan Chor Jin v Public Prosecutor* [2008] 4 SLR(R) 306 ("*Tan Chor Jin*") at [18]–[26]). Nor was there credible objective evidence of Jabing's level of intoxication at the material time, and it could not be said that the surrounding facts showed that Jabing was so intoxicated that he could not form the intention required by s 300(*c*) of the Penal Code, *ie*, the intention to inflict head injury. Hence, Jabing could not avail himself of s 86(2) of the Penal Code by contending that he was so intoxicated that he lacked the necessary *mens rea* under s 300(*c*) (see *Tan Chor Jin* at [27]–[29]).

Galing's conviction for murder

31 Given the clear evidence that Jabing was the one who inflicted the fatal injuries on the deceased, the trial judge did not find, and the Prosecution did not argue, that Galing's assault on the deceased caused or contributed in any way to the latter's death. Consequently, the Prosecution has failed to establish that Galing's blow caused any serious injury to the deceased. Therefore, convicting him of the murder of the deceased under s 302 of the Penal Code is only sustainable in law if he is deemed to be constructively liable under s 34 of the Penal Code.

The common intention

32 It is clear from *Daniel Vijay* (at [93], [107], [119], [143], [176] and [178]) that, in order for Galing to be convicted of murder under s 302 read with s 34 of the Penal Code, the common intention that Galing must have shared with Jabing is *a common intention to do the criminal act done by the actual doer which results in the offence charged* (what was termed the "*Barendra* test" (after *Barendra Kumar Ghosh v Emperor* AIR 1925 PC 1) in [107] of *Daniel Vijay*), *ie*, a common intention to commit *murder*. This common intention can be contingent or remote (see [159] of *Daniel Vijay*), can even be predicated upon (or encompass) a common intention to commit robbery (see [104] of *Daniel Vijay*), and implies a "pre-arranged plan" pursuant to which the criminal act was done (see [108] and [109] of *Daniel Vijay*).

33 When murder is committed in the course of robbery by two or more persons, a secondary

offender is constructively liable for the murder actually committed only if he has the common intention with the actual doer to commit murder (as defined in s 300 of the Penal Code). Such a common intention may, depending on the circumstances, be inferred if the secondary offender is found to have subjective knowledge that "one in his party *may likely* commit the criminal act (murder) constituting the collateral offence in furtherance of the common intention of carrying out the primary offence (robbery)" (see [89] and [168(f)] of *Daniel Vijay*). This requirement of subjective knowledge derives from [253(d)] of *Lee Chez Kee*, and was termed the "*LCK* requirement" in *Daniel Vijay* (at [42]). Such a common intention may, of course, be also found as a fact from the conduct of the secondary offender on the evidence before the court.

34 In the present case, what is clear is that Jabing and Galing had a common intention to rob the two victims. This is not disputed. However, the trial judge found that Galing had an intention in common with Jabing to commit a s 300(*c*) injury on the deceased because he assaulted the deceased with his belt buckle after Jabing had struck the deceased several blows to the head. It was argued by the Prosecution that Galing's conduct evinced an intention in common with Jabing to kill or to inflict an s 300(*c*) injury on the deceased in order to rob him. Hence, there was a common intention between them to rob as well as to murder.

35 We consider that the evidence does not support the Prosecution's case on this basis for the following reasons:

(a) While Galing and Jabing had a common intention to commit robbery at Geylang, there was no evidence of any prior discussions or planning between the two of them as to how the robbery would be carried out, whether any weapons would be used, what force should be used if the victims resisted, *etc*.

(b) Galing and Jabing were unarmed when they decided to rob the two victims. Jabing's picking up and using the piece of wood was opportunistic and improvisational and Galing's use of his belt was equally so (*ie*, hardly part of a "pre-arranged plan" (see [32] above)).

(c) There was insufficient evidence as to what kind of injury was caused by Galing using his belt buckle and, unless Galing had used it to strike the deceased very hard on the head (and there was no evidence that this had occurred) it could not have been a s 300(*c*) kind of injury.

(d) Although Galing was in a position, and afforded the opportunity, to inflict more severe wounds on the deceased, the fact that he did not do so suggests that his intention all along was to *rob*, as well as cause hurt while doing so, and not to inflict a s 300(*c*) injury.

(e) Galing did not assault the deceased in a manner which would have made it easier for Jabing to cause the s 300(*c*) injury, *eg*, by distracting the deceased, or restraining or incapacitating him so that Jabing would have been presented with a more vulnerable victim.

36 In our view, a common intention to rob, and if necessary, to inflict a s 300(*c*) injury on two random victims, as here, cannot be made out unless there is evidence of some kind of planning or understanding between Jabing and Galing as to what they would do and how they would do it in order to rob the victims. There is no such evidence before us. The trial judge appeared to have held (see [55] of the GD) that Galing had a common intention with Jabing to inflict a s 300(*c*) injury on the deceased because "Galing had not said in his statements and his evidence that he was surprised when Jabing held the branch in both hands and struck the deceased with it." This led the Judge to find (at [55] of the GD) that:

> Galing knew that when he and Jabing robbed the deceased, the deceased would be assaulted and serious injuries might be inflicted on him.

We do not agree that this inference, even if supportable, is sufficient to satisfy the *Barendra* test. As this Court has said in *Daniel Vijay* (at [65]), knowledge is not intention, although it is a basis on which intention could be inferred. All that can be said at the highest is that Galing failed to stop Jabing from hitting the deceased so viciously on the head.

37 Nothing we have said, however, should be taken to mean that Galing's role in this robbery-murder does not require severe condemnation. Such violent crimes cannot be condoned in any civilised society, and Galing was fortunate that the evidence adduced by the Prosecution was insufficient to support the charge brought against him.

Conclusion

38 For these reasons, we agree with the finding of the trial judge that Jabing committed murder, but under s 302 of the Penal Code, and dismiss his appeal. We allow Galing's appeal but substitute for his conviction of murder a conviction of the offence of robbery with hurt committed in furtherance of a common intention under s 394 read with s 34 of the Penal Code. Galing's conviction is remitted to the trial judge for sentencing.

[note: 1] Record of Proceedings, vol 4, pp 236 and 237

[note: 2] Record of Proceedings, vol 4, pp 252 and 255