Rajasekaran s/o Armuthelingam v Public Prosecutor
[2001] SGHC 275

Case Number	: MA 351/2000, Cr M 29/2001
Decision Date	: 21 September 2001
Tribunal/Court	: High Court
Coram	: Yong Pung How CJ
Counsel Name(s)	: Shashi Nathan and Chenthil Kumarasingam (Harry Elias Partnership) for the appellant; Peter Koy (Deputy Public Prosecutor) for the respondent
Parties	: Rajasekaran s/o Armuthelingam — Public Prosecutor

Judgment:

This was an appeal from the decision of district judge Wong Choon Ning ("the judge"), when she convicted the appellant of an offence under s 146 of the Penal Code (Cap 224) and acquitted him of another offence under the same section. The appellant was sentenced to 54 months imprisonment and 12 strokes of the cane. The appellant appealed against conviction and sentence.

The charge

2 The first charge against the appellant was irrelevant for the purposes of this appeal and references thereto will be omitted here. The second charge, DAC 38920/2000, read as follows:

> You,
>
> Rajasekaran s/o Armuthelingam, M/24 years old
>
> DOB: 6.11.75
>
> NRIC NO: S 7540146-I
>
> are charged that you on 7th day of March 1999 at about 3.00 am, at Sim Lim Tower, Singapore, together with at least 4 other unknown persons were members of an unlawful assembly whose common object was to cause hurt to Rajandran Balasundram, and in prosecution of the common object of the said assembly, some or all of you did use violence on the said Rajandram Balasundram, to wit, by slapping him, and you have thereby committed an offence of rioting punishable under section 147 of the Penal Code, Chapter 224.

The evidence of the prosecution

3 The story that emerged from the prosecution witnesses was as follows. On 6 March 1999, the victim, Rajandran Balasundram ("PW5"), who was a police officer, and his friends, Vailthilingam Mani

Vannan ("PW1") and Shanmugam s/o Ganesan ("PW2") went to Dunlop Street for a late supper, but parked their cars at Madras Street. About 2.30 am on 7 March 1999, they walked back to Madras Street. The Back Alley Pub ("the pub") had just closed and its clientele had spilled out onto the street.

4 Outside the pub, PW1 and PW2 were confronted by a large group of Indian men. One of them slapped PW1. On seeing this, PW5 told his friends to leave and he stayed behind to try to defuse the situation. While speaking to this group of men, PW5 was set upon by another group of Indian men. The first group left. PW5 was kicked by the second group, punched and hit with motorcycle helmets. This was the first incident of assault on PW5, but it was not pertinent to the appeal.

5 When someone shouted that the police were coming, three of PW5s assailants fled, taking him with them. PW5 said that he was too weak to resist. They took him to an isolated area behind Sim Lim Tower. On the way, they passed pedestrians and vehicles, but PW5 did not attempt to escape because he knew he could not outrun the men; nor did he shout for help, for fear of reprisals.

6 A few minutes later, four or five Indian men (including the appellant) joined them. They took PW5s wallet, and hence were able to ascertain where he lived and worked. They slapped and interrogated him. They also threatened to harm his family should he report the incident to the police. This continued for about an hour. During this time, PW5 was bleeding profusely from the injuries he had suffered in the first assault. One of the men guarded PW5 to ensure that he did not see their faces, but PW5 said he managed to steal several glances at three men, including the appellant. Finally, one of the men drove PW5s car from Madras Street to Sim Lim Tower and PW5 was allowed to leave in his car.

7 PW5 went home immediately to ensure that his family was safe. He then went to the hospital for treatment. He initially did not want to report the matter to the police because the threats were fresh on his mind. However, after speaking to his superior, DSP Sugumaran Bala ("PS9"), he decided otherwise. He lodged a report the same day at 9.25 pm.

8 The incident at Sim Lim Tower ("the second incident") was the subject of the present appeal. PW1 and PW2 corroborated PW5s account up to the point of the first incident. PW1 added that he too was assaulted and, as a result, lost consciousness. When he came round, everyone had left. PW2s recount of the subsequent events was that he fled before the first assault occurred. When he returned a while later, no one was at the scene.

9 During the trial, ASP Avadiar ("PW3") described the raid at the pub conducted on 3 April 1999, which led to the arrest of nine Indian men, including the appellant. Sgt Wong Lip Wing ("PW4") testified on the identity parade conducted on the same day, in which PW5 decisively picked out the

appellant. The defence did not suggest that the identity parade was improperly conducted.

The evidence of the defence

10 The defence case was essentially that the appellant was not present at the scene of either incident and hence was not a member of the unlawful assembly. The appellant said that he and Vasuthevan s/o Armuthelingam ("DW2") left their fathers restaurant for the pub at about 11.30 pm on 6 March 1999. At the pub, he met some acquaintances. They left at closing time, which was about 2 am. DW2 went to the washroom, so the appellant went outside the pub to wait for him. He saw a white Mercedes speeding down the road, and a crowd clamouring for its registration number. When DW2 emerged from the pub, they left for home.

11 DW2s evidence was essentially the same. He stressed that the appellant was not involved in any fight that night.

The district judges decision

12 The judge delivered her very detailed grounds of decision on 31 May 2001. She first set out the prosecution evidence and the defence evidence.

13 The judge then set out the law on identification evidence, and proceeded to examine the quality of PW5s identification evidence in relation to the second incident. She found that the quality of such evidence was good.

14 She held that the appellants credit had not been impeached. Having said that, she was of the impression that he was not a credible witness. She also ruled that PW2s credit and PW5s credit had also not been impeached. While the defence did not seek to impeach PW7s credit, the judge nonetheless noted that he was an evasive witness. The judge considered the law relating to discrepancies in witnesses evidence, and held that the discrepancies in the evidence of PW1, PW2 and PW5 were minor and could be disregarded.

15 The judge then set out the law on s 116 Illustration (g) of the Evidence Act (Cap 97). She declined to draw an adverse inference against the prosecution for failing to call PW5s friend, as the prosecution had not been shown to have withheld evidence from the appellant or the court.

16 The judge found that the evidence of the defence witnesses was inconsistent. She also did not give DW2s evidence much weight.

17 The judge then set out the ingredients of the offence in s 146 of the Penal Code. She found that the appellant was a member of an unlawful assembly, the common object of which was to hurt PW5, and that force had been used in prosecution of that common object.

18 Finally, the judge considered a few precedents on sentencing in rioting cases. In sentencing the appellant, she bore in mind the aggravating factors, which were:

a PW5 was subject to physical abuse and gruelling interrogation for about an hour.

b PW5 was not allowed to seek medical attention for his injuries, for about an hour.

c The persons comprising the unlawful assembly knew that PW5 was a police, yet continued with their behaviour regardless.

d In conducting his defence, the appellant made serious allegations about PW5s integrity.

The only mitigating factors were that the appellant himself did not physically harm PW5; and the members of the unlawful assembly did not go beyond slapping PW5.

19 Finally, the judge considered whether this was a case which warranted the imposition of the maximum sentence of five years and caning prescribed under s 147 of the Penal Code. She concluded that it did not, but that it merited a sentence close to it.

The issues

20 The issues in the appeal were:

a Did the prosecution prove beyond a reasonable doubt that the appellant was present at the scene of the second incident?

b If so, was the appellant guilty of the offence of rioting?

c Whether the following witnesses were credible:

i PW2 and PW5, against both of whom impeachment exercises were conducted;

ii PW5 and S/Sgt Abdul Halim b Haji Mohd ("PW7"), in relation to a statement contained in the Full Incident Report, allegedly made at 5.38 am on 7 March 1999;

iii PW1, PW2 and PW5 *inter se*; and

iv the appellant and DW2 *inter se*.

d Whether the judge should have drawn an adverse inference under s 116 Illustration (g) of the Evidence Act against the prosecution for failing to call PW5s friend, to whom he claimed to have spoken on Madras Street, before the first incident occurred.

e Whether the sentence imposed was manifestly excessive.

21 In dealing with this appeal, the court bore in mind certain well-established principles. Determinations by trial judges often involve an assessment of both the facts and the witnesses demeanour. The relationship between objective evidence and the trial judges findings on the veracity of a witness was set out in *PP v Yeo Choon Poh* [1994] 2 SLR 867:

> As was held by Spenser-Wilkinson J in *Tara Singh & Ors v PP* [1949] MLJ 88 at p 89, the principle is that an impression as to the demeanour of the witness ought not to be adopted by a trial judge without testing it against the whole of his evidence.

In the present case, the judge was careful to state, in relation to every witness, that her conclusions were based on both objective evidence and the witness demeanour.

22 What then, is the role of the appellate court in relation to the trial judges findings based on fact and those based on demeanour? The starting point was *Yap Giau Beng Terence v PP* [1998] 3 SLR 656:

> It is trite law that an appellate court should be slow to overturn the trial judges findings of fact, *especially where they hinge on the trial judges assessment of the credibility and veracity of witnesses*, unless they can be shown to be plainly wrong or against the weight of evidence
>
> Then again, when it comes to inferences of facts to be drawn from the actual findings an appellate judge is as competent as any trial judge to draw any

necessary inferences of fact (*emphasis added*)

23 It has however to be recognised that this dichotomy cannot be too strictly applied. The appellate court only sees the record of proceedings, which are words on a printed page. The same words can be coloured differently by different types of demeanour. The result of the interaction between the witness demeanour and his or her words cannot be overlooked. As I said in *PP v Julia Elizabeth Tubbs* MA 42/2001:

> In the normal case, a judge sitting on appeal should be sensitive to *the impressionistic nuances which invariably contribute to the inferences drawn* by the trial judge, who had the opportunity of observing and evaluating the evidence first-hand. (*emphasis added*)

The first issue: identification evidence

24 The starting point was *Heng Aik Ren Thomas v PP* [1998] 3 SLR 465, which adapted the *Turnbull* guidelines to the Singapore legal system. In dealing with identification evidence, the principles to be applied were:

> a Does the prosecutions case depend wholly or substantially on the correctness of the identification evidence?
>
> b If so, is the identification evidence of good quality, considering the circumstances in which the identification was made?
>
> c If the identification evidence is of poor quality, is there any other evidence which supports the correctness of the identification?

25 Under part (b) above, a non-exhaustive list of factors includes:

> a The length of time that the witness observed the accused: in this case, PW5 glanced at the appellant for five to eight seconds each time.
>
> b The distance at which the observation was made: in this case, the appellant was never more than seven metres away from PW5. PW5 could see the appellants entire body.
>
> c The number of times the witness had seen the accused: in this case, PW5 stole several glances at the appellant during the second incident.
>
> d Any special reasons for the witness to remember the accused: in this case, PW5 was put through a harrowing experience. As was pointed out in *PP*

v L (a minor) [1999] 3 SLR 219, this was likely t o carve the assailants image indelibly into the victims mind:

> It seemed to me that it was *precisely the fact that* she had been molested which would have caused [the witness] to take a really good look at her molester and commit his face to her memory. (*emphasis added*)

e the length of time between the original observation and the identification to the police: in this case, it was less than a month.

26 Moreover, there was sufficient lighting at Sim Lim Tower for PW5 to see the appellant clearly. There were three fluorescent lights to PW5s right, and a light from the carpark driveway above. Although there was blood in PW5s eyes, he was given some water to wash the blood off his face. The judge found that, despite his fear, PW5 was lucid enough to reason through his chances of escape and to try to look at his assailants so that he could identify them if need be.

27 There was no reason to overturn the judges finding that the quality of the identification evidence was good.

The second issue: the offence of rioting

28 The offence of rioting is defined in s 146 as:

> 146. Whenever force or violence is used by an unlawful assembly or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting.

29 The first element of the offence is that the appellant was a member of an unlawful assembly. The meaning of "unlawful assembly" most relevant to this case was in s 141(c):

> 141. An assembly of 5 or more persons is designated an "unlawful assembly", if the common object of the persons composing that assembly is
>
> (c) to commit any mischief or criminal trespass, or other offence

30 The first requirement under this element is that the common object of the assembly was, for example, to commit an offence. *Lim Thian Hor v PP* [1996] 2 SLR 258 drew a distinction between "common object" and "similar or same object". For the former, "it is essential that the object should be

common to the persons who constitute the assembly and they should be aware of it and concur in it." In the present case, there was no doubt that the group of men knew of and concurred in the plan to cause hurt to PW5. They had gathered at Sim Lim Tower for that purpose. The common object, causing hurt to a person, obviously fell within the definition of an "offence".

31 The second requirement under this element is that there must have been at least five members of the assembly. A "member of an unlawful assembly" is also defined in the statute:

> 142. Whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly.

This requirement was satisfied in the present case.

32 The second element is that violence or force was used in carrying out the common object. This need only be used by any one or more members of the unlawful assembly. This element was also present in the present case, as some of the men had slapped PW5. It was irrelevant for issues of liability that the appellant did not use force against PW5.

The third issue: the credibility of the witnesses

33 As for point (i) in paragraph 20(c) above, only PW5s credibility was dealt with in the appeal, as PW2s evidence did not extend to the second incident. Point (iii) was not dealt with, because that part of PW5s evidence which PW1 and PW2 corroborated also did not relate to the second incident.

34 Point (i) will be discussed first. The key charge which could be levelled at PW5s credibility was that he had lied to the doctors at the hospital that he had sustained his injuries from a fall. This should not greatly affect his credibility for two reasons:

> a The judge found that he was genuinely afraid of reprisals from his assailants, should the police come to know of the incident. This was not an irrational fear, for his assailants knew his address, and that he had a wife and young children.
>
> b In any case, he told the police the truth on the same day.

35 Point (ii) was also related to PW5s credibility. The defence sought to show that PW5s testimony was inconsistent with a statement he had made to PW7, which was reflected in the Full Incident Report. The entry at 5.38 am stated:

> SIO Halim informed that according to SIO Rajan, earlier he had a drinking session at the said pub and had a fall, resulting in some slight injuries on the forehead. No dispute or fight took place. Anyway, SIO Rajan is safe and sound at home.

Both PW5 and PW7 denied that PW5 had said that: one, he had been drinking at the pub; and two, he was at home at 5.38 am. The judge reasoned that, if PW5 did not want the police to find out about the assaults, he would have avoided mentioning the pub. The evidence also showed that PW5 had registered himself at the hospital at 5.03 am, and hence it was very unlikely that he was home by 5.38 am. There was no reason to doubt such logic. As for PW5s lie about his sustaining injuries from a fall, the discussion in paragraph 34 above applies.

36 The Full Incident Report showed that PW7 was more involved in the case than he would admit. Apparently he had instructed his officers to go to the pub when he heard that PW5 was missing. These were unilateral actions on his part, and there was no evidence that PW5 knew about them.

37 As regards point (iv), the defence opined that insufficient weight was given to DW2s evidence. I think the judge was correct in not placing much weight on his evidence because:

> a DW2 had been to the same pub with the appellant on several occasions, and there was nothing special about that occasion. In fact, it was the appellant who informed DW2, after he was released from the police station, that there had been an assault that night.
>
> b DW2s evidence was inconsistent with that of the appellant, PW1, PW2 and PW5. DW2 said that the scene outside the pub after closing time was calm, with people milling around. According to the others, there was a rather agitated crowd outside the pub.

The fourth issue: the prosecutions failure to call a witness

38 Section 116 Illustration (g) of the Evidence Act provides:

> The court may presume
>
> (g) that evidence which could be and is not produced would if produced by unfavourable to the person who withholds it.

39 The general principle is that a presumption will only arise if it constitutes a withholding of evidence from the accused or the court (*Yeo Choon Huat v PP* [1998] 1 SLR 217). In determining whether evidence has been withheld, the factors which should be considered include:

> a How material was the evidence of the witness who was not produced? (*Chua Keem Long v PP* [1996] 1 SLR 510)

b Did the prosecution intend to hinder or hamper the defence? (*Chua Keem Long v PP*)

c Was the witness absence from court brought about by the inaction of the defence? (*Tan Ah Lay v PP* Criminal Appeal 14/93, Unreported)

40 In the present case, PW5s friend was not a material witness, as his evidence would pertain only to matters even before the first incident. The prosecution could not be said to have hindered the defence because they made the defence aware of the existence of and role played by PW5s friend. Hence the defence could have called this witness, but chose not to.

The fifth issue: sentencing

41 The punishment prescribed for this offence is set out in s 147:

147. Whoever is guilty of rioting shall be punished with imprisonment for a term which may extend to 5 years and shall also be liable to caning.

42 According to *Sentencing Practice in the Subordinate Courts*, the sentencing range for non-secret society related cases is 18 to 24 months imprisonment. However, there were many aggravating factors and relatively few mitigating ones. The former include:

a The second incident was premeditated. Three of the assailants took PW5 to Sim Lim Tower, and must have informed the rest to join them there.

b PW5 was subject to terror for an hour, in a deserted location. There was both mental and physical abuse.

c While PW5s injuries were due to the first, not the second, assault, the members of the second unlawful assembly persisted despite the fact that PW5 was already injured.

d The appellant had criminal records, including a similar antecedent. He was sentenced to 18 months probation for attempted theft in 1995, but breached probation by committing an offence of rioting. He was sentenced to 18 months imprisonment and six strokes of the cane for that offence, and a further six months imprisonment for breaching probation.

43 The mitigating factors were those stated by the judge (see paragraph 18 above). These were far outweighed by the aggravating factors. I did not think the sentence imposed was manifestly

excessive.

Motion to adduce fresh evidence: Criminal Motion 29 of 2001

44 On 14 September 2001, the appellant filed a notice of motion that the defence would seek to admit fresh evidence at the hearing. One Kesavan s/o Seenivasan ("Kesavan"), who was convicted of criminal intimidation and rioting in respect of the second incident, was willing to testify that the appellant was not present at the scene.

45 The High Courts power to receive additional evidence is found in s 257(1) of the Criminal Procedure Code (Cap 68):

> In dealing with any appeal under this Chapter the High Court, if it thinks additional evidence is necessary, may either take such evidence itself or direct it to be taken by a District Court or Magistrates Court.

46 The principles which apply to the exercise of this power were enunciated in *Ladd v Marshall* [1954] 3 All ER 745 and adopted in *Jumaat b Samad v PP* [1993] SLR 338. The court would exercise its power only if:

> a The evidence could not have been obtained with reasonable diligence for use at the trial;
>
> b The evidence is such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; and
>
> c The evidence is credible.

47 As for the first condition, it was true that Kesavan turned himself in to the police only after the conclusion of the appellants trial. But it was the defences case that Kesavan and the appellant were childhood friends, and were still acquainted at the time of the assaults. That being so, the appellant was in a better position than any other party in this case to obtain Kesevans evidence. However, the defence could not produce evidence of any attempts which the appellant had made to contact Kesavan before the appellant was tried. I was of the opinion that the evidence could have been obtained for use at the trial, had reasonable diligence been used.

48 With regards to the second condition, it was difficult to see how Kesavans evidence could have an important influence on the result of the case. The crux of the judges decision was based on PW5s identification evidence, which was found to be reliable. Kesavans evidence would not challenge that finding. Indeed, it is rather odd for the defence to attempt to prove that the appellant was *not* at Sim

Lim Tower, rather than that he *was* somewhere else.

49 The third hurdle, too, was not cleared. It was sufficient to refer to *Chung Tuck Kwai v PP* [1998] 2 SLR 693, which disposed of the matter:

> At this stage of appeal, the prosecution would not have the opportunity of cross-examining [the witness] to determine his credibility. *The additional evidence was of such a nature that it ought not to be accepted as credible without [him] being put to cross-examination*. (*emphasis added*)

Hence I dismissed the motion to adduce fresh evidence.

Conclusion

50 In view of the above, I dismissed the appeal.

Sgd:

YONG PUNG HOW

Chief Justice

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