Public Prosecutor *v* Astro bin Jakaria
[2010] SGHC 131

Case Number : Criminal Case No 6 of 2010

Decision Date : 29 April 2010

Tribunal/Court : High Court

Coram : Chan Seng Onn J

Counsel Name(s) : Ng Cheng Thiam and Cassandra Cheong (Attorney-General's Chambers) for the Public Prosecutor; Shashi Nathan and Tania Chin (M/s Harry Elias Partnership) and Satwant Singh (Sim Mong Teck & Partners) for the Accused.

Parties : Public Prosecutor — Astro bin Jakaria

Criminal Law – Offences – Murder

Criminal Law – Offences – Culpable Homicide

Criminal Law – Special Exceptions – Provocation

Criminal Law – Special Exceptions – Sudden Fight

29 April 2010 Judgment reserved.

Chan Seng Onn J:

Introduction

1 The accused, Astro Bin Jakaria, is charged as follows:

> That you, ASTRO BIN JAKARIA,
>
> Between the 19th day of June 2008, at about 8.26pm, and the 21st day of June 2008, at about 6.15pm, at Block 508 Ang Mo Kio Avenue 8 #09-2602, Singapore, did commit murder by causing the death of one Abdul Khalid Bin Othman, male, 61 years old, to wit, by strangling the said Abdul Khalid Bin Othman with a ligature, and you have thereby committed an offence punishable under section 302 of the Penal Code, Chapter 224.

The background facts

(a) The relationship between the Deceased and the Accused

2 The accused, Astro Bin Jakaria (FIN No G8098952R) ("the Accused"), is an East Malaysian who first came to Singapore on August 2007. He first met the deceased, Abdul Khalid Bin Othman (NRIC No S2148066E) ("the Deceased"), sometime in September 2007 while working as a cleaner for Sengent Company. The Accused referred to the Deceased as "Kak Mie" and knew that the Deceased was a transvestite. In the course of the following one month, their relationship developed rapidly and they became closer.

3 In October 2007, due to poor job performance, Sengent Company terminated the Accused's

employment. The Accused requested for the Deceased's assistance as he no longer had a place to stay. This led to the Deceased inviting the Accused to stay with him at his flat. Thereafter, the Accused resided at the Deceased's flat until he left for Malaysia on 6 November 2007.

4 The Accused returned to Singapore on several occasions and on each visit, he stayed at the Deceased's flat until his return to Malaysia. The Accused's passport (D4) showed that he had entered Singapore on 14 December 2007 and exited on 19 December 2007. He re-entered Singapore on 24 December 2007 and left on 29 December 2007.

5 On 9 January 2008, the Accused again returned to Singapore and visited the Deceased at his flat. The Deceased recommended a factory job in Tampines which was taken up by the Accused. Afterwhich, the Accused stayed at the company's accommodation until he left Singapore on 24 February 2008. This was the only period of time the Accused was employed in Singapore after his termination by Sengent Company.

6 For the duration of each stay in Singapore, the Accused had never contributed to the rent of the Deceased's flat. In other words, the Deceased provided free lodging to the Accused whenever the latter was in Singapore.

7 It was evident that the Deceased was deeply caring towards the Accused. Apart from providing him with shelter, the Deceased's generosity extended to buying him new clothes, cooking him meals and giving him money when he was short of it (and this was usually the case given the Accused's unemployment).

8 The Deceased lived in a one bedroom HDB flat. His flatmates, one Taher Bin Ahmad and one Kak Timah, slept in the living room/hall of the flat. The Accused slept in the Deceased's bedroom and shared the same bed with the Deceased during his stay.

9 It was the Accused's evidence that from the first night he started sharing the bed with the Deceased, the latter would touch and caress him to arouse his sexual desires. The Accused, prior to 19 June 2008, had always warded off his sexual advances.

(b) Events leading up to the scuffle between the Deceased and the Accused on 19 June 2008

10 The Accused returned to Singapore again on Sunday 15 June 2008 and stayed at the Deceased's flat.

11 At about 6 pm on 19 June 2008, the Accused met the Deceased at the latter's workplace at the SMRT Clubhouse. The Accused was told to wait until the Deceased was done with work. While waiting in the store room, the Accused drank one whole bottle of Royal Stout and one third of a bottle of Carlsberg.

12 At about 8.26 pm, the Deceased and the Accused left for the Deceased's flat. They reached the flat at about 9 p.m., after which, the Deceased gave the Accused $20 to buy some drinks. The Accused then proceeded to a nearby coffee shop and bought a bottle of Carlsberg (P234) and a bottle of Guinness Stout (P235).

13 The Accused returned to the flat at about 9.05 pm to 9.10 pm. When he reached the flat, he saw the Deceased clad in a red towel and was applying lotion to his thighs and hands. The Accused then placed the drinks he purchased aside and sat on the bed.

14 The Deceased got up and sat next to the Accused. He started to caress the Accused's hands and thighs and attempted to touch his penis. The Accused pushed the Deceased's hand away and told him '*Nanti*', which means 'wait' in Malay.

15 The Accused then requested for a bottle opener and a glass on two separate occasions. The Deceased obliged and went back and forth twice to get the requested items from the kitchen. After opening and pouring his drink into the glass, the Accused placed the glass on the floor and then removed his T-shirt as he felt warm.

16 The Deceased left the room again and brought back a bottle of Drambuie (a type of whisky liquor) (P236). The Accused declined the Deceased's offer to have the liquor as it was too strong for him. The Deceased then took a sip of the said liquor and sat beside the Accused. The Accused drank the whole bottle of Guinness Stout (P235).

17 The Accused then put on a concert CD into the VCD player. The Deceased, within a few minutes, changed the concert CD to a "blue" VCD which showed man-on-man pornography and proceeded to fondle the Accused. He removed the Accused's jeans, pulled down his boxers and started performing fellatio on the Accused. All the while, the Accused lay on his back and imagined that it was a woman who was performing fellatio on him. He became sexually aroused and sustained an erection.

18 The Deceased then stopped. The Accused then realised that the Deceased was sitting next to him. When the Accused asked "Why?", the Deceased propositioned to him and said, "Come play my backside". The Accused flatly declined, saying, "I don't want, I'm not used to this" and pulled up his boxers. He then went to take his pair of jeans that was hung behind the bedroom door.

19 The Deceased tried to cajole the Accused. He also mentioned that he had given the Accused what he wanted and provided him with lodging. As he started caressing the Accused, the Accused pushed him and he fell backwards into the cupboard and let out a scream. As the Deceased tried to stand up, the Accused saw the Deceased gripping something in his hand and was looking angrily at him.

20 The Accused then punched the Deceased's face. The Deceased fell again and covered his face with his hand while mumbling something and trying to stand up. The Accused pounced on him again and gripped the Deceased from the back of his neck. The Deceased's head was positioned under the Accused's right armpit and the Deceased was then pushed onto the bed.

21 The Accused went up on to the bed, held the Deceased's right shoulder, crossed over the Deceased's body and positioned himself to the right side of the Deceased. He gripped the Deceased's neck using his left arm and punched the Deceased again. His grip was released as the Deceased was struggling. The Deceased then used his right elbow to strike the Accused's chest region while struggling at the same time. The Accused fell backwards and tried to grab hold of the Deceased. The Deceased scratched the Accused's left cheek, left arm and left hand.

22 The Accused then punched the Deceased's chest. The Deceased fell backwards onto the mattress. He tried to sit up and the Accused pushed the Deceased again causing him to fall on the floor beside the bed with one foot on the bed. The Deceased groaned in pain.

23 During the course of the scuffle, the Deceased let out a shriek which alerted his neighbours, one Madam Sua Joo Eng (PW13) and one Madam Sarah Binte Aman (PW21). The Deceased's denture was also dislodged from his mouth at some point of the scuffle. The Accused, in his attempt to

prevent the Deceased from calling the police, grabbed a long-sleeved brown striped T-shirt and tied up the Deceased. The details of how this was done and how it caused the Deceased's death will be dealt with below.

(c) Sequence of events after the Deceased was tied up by the Accused

24 After tying up and immobilising the Deceased, the Accused removed the Deceased's gold bracelet (P154) from his wrist, took his own jacket (P243), and placed it into a black sling bag (P242). He then gathered the clutter of clothes that had been strewn on the floor in the course of the scuffle and hurriedly placed them into the wardrobe. While doing so, the Accused found a gold chain (P162) belonging to the Deceased and took it. He also appropriated the Deceased's handphone (P146).

25 As the Accused exited the bedroom, he switched off the lights and locked the bedroom door by pressing the lock and shutting the door behind him. He later hailed a cab and went to Geylang. There, he checked into Hotel 12 Pte Ltd under the name of one Lawrence Anak Nyuak and stayed there from 19 June 2008 until the time of his arrest. All the while, the Accused had his passport in his possession.

(d) Events leading up to the discovery of Deceased's body

26 After being told by the Deceased's flatmate Taher Bin Ahmad ("Taher") (PW26) that the Deceased was not seen inside the flat since 19 June 2008 and being informed by the Deceased's sister, one Norita Binte Abdul Latiff that the Deceased was not contactable on 20 June 2008, the Deceased's adopted daughter, Aini Binte Karim ("Aini") (PW29) made several attempts to contact the Deceased by calling his mobile phone and residential number.

27 On 21 June 2008 at around 2 pm, Aini decided to lodge a missing person report with the police. Her boyfriend, Ishak Bin Mohamed ("Ishak") (PW24) however suggested that they should first inspect the Deceased's flat before lodging the report.

28 At about 5.45 pm, Aini and Ishak arrived at the Deceased's flat and let themselves in using Taher's keys. As Taher had earlier informed them that he did not have the keys to the Deceased's bedroom door, they brought along with them two screwdrivers. Ishak then unsuccessfully tried to pry open the Deceased's bedroom door using the two screwdrivers, a chopper and a pair of scissors which were found in the Deceased's kitchen. After his failed attempts, he decided to force his way in by kicking down the bedroom door.

29 Upon entering the bedroom, Aini switched on the lights. Ishak spotted a blue bag (P233) on the floor. He placed it on the bed and checked the contents of the said bag. The bag contained a silver metal box (P231), a black box (P232) with a 'Heineken' watch inside and some male garments.

30 Aini, on the other hand, opened the Deceased's wardrobe and found that it was in a state of disarray. This was unusual as the Deceased's clothing were normally hung neatly inside the wardrobe. The metal rod which was used to hang the Deceased's clothing had fallen off and a pile of clothing was cluttered up at the base of the wardrobe.

31 Aini then looked around the Deceased's bedroom and caught a glimpse of a portion of hair on the floor next to the bed. She immediately pointed it out to Ishak and asked if that was the Deceased. Aini became hysterical and Ishak quickly brought her to the corridor to calm her down.

32 Ishak then returned to the Deceased's bedroom. He removed a red blanket (P199) and a small yellow cushion (P200) and found a human body lying face-down. Ishak placed the items he had

removed back to their respective positions and swiftly exited the Deceased's bedroom. He called the police at about 6.15 pm.

33 Staff Sergeant Mohammad Ridzwan Bin Taib ("SSgt Ridzwan") (PW12) and Corporal Ryan Lim Chong Jen ("Cpl Lim") (PW15) were dispatched to the Deceased's flat. Ishak led SSgt Ridzwan and Cpl Lim to the Deceased's bedroom. Ishak removed the same items, which he had removed earlier, that were on top of the body. SSgt Ridzwan and Cpl Lim then saw a body, clad in a brassiere, lying motionless in a prone position. They observed that both of the Deceased's hands were tied to his back with a long-sleeved brown striped T-shirt. Ishak then replaced the items in the same order as he had found them.

34 As foul play was suspected, SSgt Ridzwan instructed Ishak and Cpl Lim to leave the flat to prevent the contamination of the scene. He then contacted duty Senior Investigation Officer, Station Inspector Goh Tia Eng (PW17) and informed him of their findings. The scene was immediately cordoned off.

35 Sergeant Mohamed Nasir Bin Mohaideen Arabi Noordin ("Sgt Nasir") (PW16), a paramedic, arrived at the Deceased's flat at about 6.25 pm. As a long-sleeved brown striped T-shirt was tied around the circumference of the Deceased's neck, Sgt Nasir was unable to take the carotid pulse and had to look for an arterial pulse from the Deceased's hands instead. Sgt Nasir removed some of the materials covering the Deceased's lower body which exposed the Deceased's hands, bound together by the said T-shirt, and took the Deceased's pulse. No pulse was detected and the Deceased was pronounced dead at 6.30 pm.

36 At about 10 pm, Associate Professor Gilbert Lau ("A/P Gilbert Lau"), (PW25) a Senior Consultant Forensic Pathologist attached to the Centre for Forensic Medicine, Health Sciences Authority ("HSA"), arrived at the flat and proceeded to examine the scene. At about 11.05 pm, he conducted an external examination of the Deceased's body at the scene. The estimated post-mortem interval was pronounced to be within the region of 1–2days.

37 On 22 June 2008 at about 9.45 am, the Accused was arrested at Hotel 12 Pte Ltd by Senior Station Inspector Zainal Abidin Ismail ("SSI Zainal Abidin") (PW33), Assistant Superintendent Christopher Jacob (PW18) and some other officers. After his arrest, the Accused gave the following statements to the police:

(a) First Statement recorded on 22 June 2008 at 10.35 am (D3);

(b) Cautioned Statement recorded on 22 June 2008 at 8.35 pm (P144);

(c) Investigation Statement recorded on 25 June 2008 at 2.05 pm (P159);

(d) Investigation Statement recorded on 26 June 2008 at 9.25 am (P160);

(e) Investigation Statement recorded on 26 June 2008 at 3.05 pm (P161); and

(f) Investigation Statement recorded in the field book on 27 June 2008 during the scene investigation (P165).

Case for the Prosecution

38 It was the Prosecution's case that during the scuffle, the Accused used a long-sleeved brown striped T-shirt and tied it around the Deceased's neck. In doing so, the Accused had committed murder by way of strangulation and was therefore liable for the offence under section 300(c) of the Penal Code (Cap 224, 2008 Rev Ed) ("the Penal Code") which stipulates that:

> **Murder**
>
> **300**. Except in the cases hereinafter excepted culpable homicide is murder —
>
> …
>
> (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death

39 The Prosecution submitted that it had discharged the burden of proving beyond reasonable doubt that the Accused had committed the offence of murder under section 300(c) of the Penal Code:

(a) That the Accused did an act which caused the death of the Deceased;

(b) That the said act was done with the intention of causing bodily injury; and

(c) That the injury caused:

(i) Was intended and was not accidental or otherwise unintentional; and

(ii) Was sufficient in the ordinary course of nature to cause death.

40 The Prosecution based their case, *inter alia*, on:

(a) Forensic evidence such as the autopsy report, toxicology report and various HSA reports;

(b) Oral evidence of the Prosecution's witnesses;

(c) The sobriety of the Accused at the time of alleged murder; and

(d) The police statements recorded subsequent to the Accused's arrest.

The Accused did an act which caused the death of the Deceased

Forensic Evidence

(I) Autopsy Report

41 A/P Gilbert Lau conducted the autopsy on the Deceased and testified that the cause of death was strangulation by ligature. He observed that the ligature was a long-sleeved, crew neck T-shirt that was applied circumferentially to the Deceased's neck in a single loop and was secured by a partial slip knot tightly applied at the back of the neck.

42 It was found that the ligature was tightly constricting:

(a) The ligature measured an approximate 30cm in circumference whereas the corresponding ligature mark (measured immediately after the ligature had been removed) was 36cm;

(b) Despite the bloating and swelling of the Deceased's face and other body parts, the ligature mark directly beneath the ligature was actually indented.

(b) Moreover, due to the highly constricting nature of the ligature, the overlying skin around the area where the ligature was applied was well-preserved as compared to other body parts which exhibited signs of decomposition; and

(d) Extensive fractures were found on the hyoid bone and thyroid cartilage (as seen in photographs P80 and P81 respectively). The extent of the damage to the laryngeal structures suggested that severe force had been applied.

43 A/P Gilbert Lau testified that the severe force that had caused such structural damage would certainly have closed off the airways and blood vessels around the Deceased's neck completely, thus depriving the Deceased's brain, heart and vital organs of oxygen. He opined that strangulation by ligature of this nature was sufficient in the ordinary course of nature to cause death.

(II) Toxicology Report

44 Dr. Leong Hsiao Tung ("Dr. Leong") (PW5) prepared the Toxicology Report (P132) in which it was found that, *inter alia*, the concentration of ethanol in the Deceased's blood was 9mg/100ml. Dr. Leong's evidence was that the amount of ethanol was not significant and was likely a result of consumption of alcohol before death or post-mortem production of ethanol. Based on this post-mortem toxicology report, A/P Gilbert Lau was able to rule out the possibility that the Deceased might have been in some way incapacitated before he was set upon by the assailant. This finding combined with the absence of typical defensive injuries on the Deceased's body suggested that the Deceased

was taken by surprise or overpowered very quickly by the assailant.

(III) Other HSA Reports

45 The following HSA Reports confirm that there was contact transfer between the Deceased and the Accused.

46 Dr. Christopher K C Syn ("Dr. Syn") (PW11), a forensic scientist, gave evidence based on his Laboratory Report DN-2008-00755 (P133) that the DNA of the Accused was found on the nail clippings (P225) of the Deceased marked "L1" to "L5" and "R5". The Accused's blood was also detected (albeit of trace amount) on the said nail clippings marked "R5" and "L4".

47 Ms Kee Koh Kheng ("Ms Kee") (PW28), a Forensic Scientist attached to the Forensic Science Division of the HSA, compiled the Laboratory Report No. CR-2008-00119 (P137) which revealed the following findings:

Exhibits recovered from deceased

	Description of Deceased's item	**Matches found on Deceased's item**
Khalid/05/2008	A pair of black panties (P207)	16 fibres were found to be similar to those constituting the control fabric of the Accused's denim jeans marked "Astro/01/2008" (P217)
Khalid/06/2008	Dark blue brassiere (P208)	1 fibre was found to be similar to those constituting the control fabric of the said Accused's denim jeans
Khalid/09/2008	Brown striped long-sleeved T-shirt (P211)	29 fibres were found to be similar to those constituting the control fabric of the said Accused's denim jeans
Khalid/10/2008	Orange baju kurung (P212)	16 fibres were found to be similar to those of constituting the control fabric of the said Accused's denim jeans and 1 fibre was similar to the control fabric of the Accused's white singlet marked "Astro/03/2008" (P219)

Exhibits recovered from the accused

	Description of Accused's item	**Matches found on Accused's item**
Astro/01/2008	A pair of denim jeans (P217)	4 brown fibres were found to be similar to the fibres of the brown striped long-sleeved T-shirt marked "Khalid/09/2008" (P211)

Astro/04/2008	White "Converse" long-sleeved jacket (P220)	3 brown fibres were found to be similar to the fibres of the said brown striped long-sleeved T-shirt and 1 black fibre was found to be similar to the fibres constituting the pair of black panties marked "Khalid/05/2008" (P207)

48 Thus, the HSA Reports read with A/P Gilbert Lau's evidence show that the Accused was the person present at the scene and was the one who had applied the ligature onto the Deceased. The defence does not dispute this.

The said act was done with the intention of causing bodily injury

49 The Prosecution maintained that the Accused was sober when he committed the alleged offence in the sense that he was not so intoxicated that he was not aware of what he was doing or that what he was doing was wrong. The Accused was also not so intoxicated that he could not have formed the necessary intention to cause bodily injury to the Deceased.

50 The Defence conceded this point and did not rely on the defences of sections 85(2)(b) or 86(2) of the Penal Code, *ie*, insane intoxication and intoxication negating intention respectively. In other words, the Defence conceded that the Accused had the intention of applying and tying up the ligature on the Deceased. The main issue which divides the Prosecution and Defence is: *where* the Accused intended to apply and tie the ligature.

The injury caused was sufficient in the ordinary course of nature to cause death

51 The fatal injury in this case was strangulation caused by the ligature found on the Deceased's neck. Considerable force was used in tying the ligature such that acute compression led to the fracture of the laryngeal structures located in the neck.

52 A/P Gilbert Lau's evidence was that the said injury was sufficient, in the normal course of nature, to cause death. He was able to comment, with reasonable confidence, that the application of a ligature of this nature would in all likelihood caused the Deceased to have lost consciousness within a matter of seconds and death would have taken place in a matter of minutes.

The injury caused was intended and was not accidental or otherwise unintentional

53 The prosecution submitted that: the tying of ligature was not unintentional; the tying of the partial knot was not unintentional; the winding of the remaining part of the T-shirt around the Deceased's forearms and wrists was not unintentional.

54 Three possible scenarios as to what might have happened on the night of 19 June 2008 were presented to the court:

(a) The Accused knowingly tied the T-shirt around the Deceased's neck;

(b) After tying the T-shirt around the Deceased's mouth, the T-shirt became dislodged and ended up on the neck of the Deceased and was subsequently tightened around the neck by the Deceased's movements while he was struggling; or

(c) During the placing of the T-shirt around the mouth, the T-shirt was accidentally or mistakenly placed onto the neck.

55 It was the Prosecution's case that the Accused had knowingly tied the ligature around the Deceased's neck, thereby suggesting that the Accused's evidence that he only intended to tie the Deceased's mouth and that he might have accidentally tied it around the Deceased's neck was untrue. The Prosecution found it pertinent to note that when A/P Gilbert Lau was being cross-examined by the Defence, the Defence had adopted possibility (b). It was only after A/P Gilbert Lau raised the possibility of scenario (c) that the Defence sought to build their case on it.

56 The Prosecution also submitted that the Accused's inconsistent statements (those recorded during investigative stages and those made in court) formed the bulk of lies which were conjured in order to exculpate himself and escape the death penalty.

57 Given the inherent inconsistencies of the Accused's statements, it was thus the Prosecution's position that the Accused's statements should be disregarded, and the court should therefore base its decision on the evidence of A/P Gilbert Lau and the objective evidence presented before the court. On such a basis, the Prosecution submitted that it has discharged the burden of proving beyond reasonable doubt that the Accused had committed murder under section 300(c) of the Penal Code against the Deceased.

Case for the Defence

58 It was the Defence's case that:

(a) The Accused only intended to tie the ligature around the Deceased's mouth;

(b) The Deceased and the Accused were not lovers;

(c) The Prosecution did not discharge its burden of proving beyond reasonable doubt that the Accused had committed an offence under section 300(c) of the Penal Code; and

(d) In any event, the Defence had, on a balance of probabilities, made out the defences of sudden fight and provocation.

Accused only intended to tie the ligature around the Deceased's mouth

59 During cross examination, Defence counsel suggested to A/P Gilbert Lau a possible scenario of the tightening of ligature around the Deceased's neck: that the Deceased had in the course of struggling, suffered the misfortune of killing himself by tightening the ligature (initially applied around the mouth) that had slipped around his neck.

60 A/P Gilbert Lau rejected Counsel's suggestion, reasoning that:

(a) If the T-shirt had slipped to the Deceased's neck, the partial slip knot would have been loosened even further as opposed to being tightened by his struggle. In fact, the T-shirt should be hanging loosely around his neck if this were the case;

(b) Furthermore, the free ends of the ligature were wound around the Deceased's upper limbs and wrists in a loose manner. Therefore, if the Deceased had been conscious or alive when the T-shirt slipped to his neck, he could have easily unwound the free end around his hands and release the ligature; and

(c) In any case, it was almost inconceivable for the gag which was placed over the mouth to slip and then to be tightly constricted by the Deceased's own movements. This was because severe force must have been used to cause the fracture of the greater cornua of the hyoid bone, superior horns and laminae of the thyroid cartilage. A person would have, in all probability, passed out before he could apply such severe force to himself.

61 The suggestion that the Accused saw the Deceased shaking and frothing at the mouth when the latter had fallen backwards and hit himself against the wardrobe in the course of the scuffle was also refuted by A/P Gilbert Lau. He opined that the Deceased did not suffer from any natural disease that could have accounted for such a reaction. Furthermore, such reaction could not have come from a person suffering from a mild state of shock.

62 A/P Gilbert Lau, however, opined that he would not dispel the possibility that the Accused might have thought that he had applied the ligature to the mouth with the intention of applying a gag, when it had actually been applied to the neck instead.

63 The Defence submitted that the Accused did not have the intention to tie the ligature around the Deceased's neck. The following statements recorded from the Accused supported this position:

(a) The Accused's statement recorded by Inspector Kwok Charn Kong ("Inspector Kwok") (PW31) on 26 June 2008 (P160) in which he specifically stated that it was not his intention to kill the Deceased and that when he was arrested, he was under the impression that he was being apprehended for theft of the Deceased's jewellery. If he had known that the Deceased had died, he would not have stayed in Singapore;

(b) The Accused also repeated that he had no intention to cause the Deceased's death and that he did not expect his punches to cause the Deceased to die because when he left him, he was still alive; and

(c) In his examination-in-chief, the Accused testified that he had only intended to gag the Deceased's mouth as the Deceased was making a lot of noise. He further stated that he did not know whether the T-shirt went around the Deceased's mouth or not but his intention was just to tie the Deceased's mouth.

Finding of the court

64 The *locus classicus* of section 300(c) of the Penal Code is the decision of the Indian Supreme

Court in *Virsa Singh v State of Punjab* AIR 1958 SC 465 *("Virsa Singh")* where it was held at [12] that four elements must be proved to establish murder under section 300(c):

> Firstly, it 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.

65 In further explaining the third element, which is the element in dispute in the present case, Bose J at [16] held that:

> The question is not whether the prisoner intended to inflict a serious injury or a trivial one but *whether he intended to inflict the injury that is proved to be present*. If he can show that he did not, or if the totality of the circumstances justify such an inference, then, of course, the intent the section requires is not proved. But if there is nothing beyond the injury and the fact that the appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness or intended serious consequences, is neither here nor there. *The question, so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of a particular degree of seriousness but whether he intended to inflict the injury in question*; and once the existence of the injury is proved the intention to cause it will be presumed unless the evidence or the circumstances warrant an opposite conclusion.
>
> [emphasis added]

66 In the case of *PP v Lim Poh Lye* [2005] 4 SLR(R) 582 ("*Lim Poh Lye*") the accused was found to have intended to stab the victim's thigh to prevent him from struggling and escaping. Although it was true that the fatal stab wound was caused to a body part which was not commonly known to be a vulnerable region of the body, that was not a consideration that affected the operation of section 300(c). The crucial question to ask is whether the wounds that were caused were in fact wounds which the accused intended to cause. As the court in *Tan Chee Wee v PP* [2004] 1 SLR(R) 479 ("*Tan Chee Wee*") at [42] stated:

> Section 300(c) thus envisions that the accused subjectively intends to cause a bodily injury that is objectively likely to cause death in the ordinary course of nature ... It is in fact irrelevant whether or not the accused did intend to cause death, so long as death ensues from the bodily injury or injuries intentionally caused.

67 The Defence rigorously sought to demonstrate that the Accused did not have the intention to cause the injury which caused the death of the Deceased, *ie*, his intention was to tie the ligature around the Deceased's mouth and such a tying over the mouth does not, in the ordinary course of nature, cause death. Hence, the Defence's position was that the applying and tightening of ligature

around the neck was accidental or unintentional.

68 Chao Hick Tin JA at [22] of *Lim Poh Lye*, emphasised that the third limb of *Virsa Singh*, *ie*, whether a particular injury was accidental or unintended is a question of fact which has to be determined by the court in light of the evidence adduced and taking into account all the surrounding circumstances of the case. If the court should at the end of the day find that the accused only intended to cause a particular "minor injury", to use the term of the court in *Tan Joo Cheng v PP* [1992] 1 SLR(R) 219, which injury would not, in the normal course of nature, cause death, but in fact caused a different injury sufficient in the ordinary course of nature to cause death, section 300(c) would not be attracted. Thus, it is incumbent upon this court to decide *on the totality of the evidence having regard to all the surrounding circumstances*, whether the requisite intention in section 300(c) had been proved beyond a reasonable doubt by the Prosecution.

Accused's police statements and evidence in court

69 Notably, the Prosecution strongly urged the court to disregard the Accused's statements.

70 In relation to the mixed statements of an accused containing incriminating as well as exculpatory parts, the decision of *Tan Chee Hwee and another v PP* [1993] 2 SLR(R) 492 ("*Tan Chee Hwee*") is instructive: the court had to approach the incriminating portion with the exculpatory or explanatory parts of the accused's statements together with all the surrounding circumstances to decide where the truth lay.

71 The Accused was depicted by the prosecution as a conniving liar who was capable of lying unabashedly even in the face of a statutory warning. His ability to breathe life into two wholly fictitious, non-existent characters (*ie*, Zulkarnian and Khairul) and to vividly recount a robbery (filled with titillating details from its conception to execution) that had never taken place were tell-tale signs of a master of fabrication. In his first investigation statement (D3) and cautioned statement (P144), Zulkarnian and Khairul were seen as the masterminds behind the plot whereas he was just an accessory, a mere passive look-out. He then confessed to SSI Zainal Abidin that he had lied to relieve himself from shouldering the burden or responsibility of having caused the death of the Deceased.

72 With regard to the Accused's other statements, *ie*, P159, P160 and P161, the Prosecution submitted that these were mixed statements. Although the Accused, at this juncture, admitted to being the sole assailant, he had however sought to exonerate himself by claiming that he had merely tied the ligature around the Deceased's mouth and not the neck. The Accused also stressed in court, numerous times, that the Deceased was still alive when he left the bedroom.

73 Furthermore, the Accused, during his examination-in-chief had adopted different stances as to what happened *during* the act of tying up the Deceased:

(a) That he tied one loop around the mouth;

(b) He pulled the T-shirt but did not know whether it went around the mouth or not, although his intention was to tie it around the Deceased's mouth;

(c) The Accused tied a complete knot (D5) during his demonstration in court;

(d) While answering the court's question, the Accused's reply was that he did not tie the Deceased's neck; he only tied the Deceased's mouth; and

(e) When counsel related the evidence of A/P Gilbert Lau, the Accused's reply was that he disagreed with his evidence because he was certain that he tied up the Deceased's mouth. This was despite the fact that he did not check after tying up the Deceased.

The Accused's constant change in stance before the court was, according to the Prosecution, a clear illustration of how he would subtly tailor his evidence in order to convince the court that he did not kill the Deceased as he 'intended to only cover the Deceased's mouth'.

74 The Prosecution's impeachment of the Accused's credibility and veracity was based on the fact that all his lies, from the start of investigation to the proceedings in court, pertained to one of the most crucial aspects of the case: *how* did the Accused apply the ligature on the Deceased. Was it merely coincidental that the Accused had, throughout the case, conveniently invented characters and varied his statements as to how and where the ligature was applied at the most critical junctures?

75 The prosecution submitted that it was trite law that lies could be corroborative of guilt. Adverse inference should be drawn against the Accused as warranted under section 123 Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("the CPC") in respect of his lie in his section 122(6) cautioned statement (P144). Thus, the court should not accept the Accused's defence that he had only intended to tie the Deceased's mouth and not the neck.

76 The Defence, on the other hand, proffered some explanations for the Accused's reason for lying and giving inconsistent statements:

Examination–in-chief of accused

Q: (In relation to the accused's first investigation statement [D3]) Could you explain why is it that you have given this untrue version of events?

A: When I was arrested in Hotel 12, and [*sic*] Mr Zainal introduced himself as a police officer. My handphone was seized. He asked me where did I keep [*sic*] the items. And I told him that once we get back I will tell him the story. When we reached the police station, before he took my statement[,] he told me that Khalid had passed away and I asked "who"[.] Then he said it is the person I took the jewellery [from]. I was in shock. I thought it was impossible cos [*sic*] at the time I left[,] he was alive. Mr Zainal asked me to narrate the story. So I was afraid and made up this story.

Q: I can understand that you were afraid, but you have given a lot of details for something that didn't really happen. How come?

A: With regards to Zul, I just told Zul then Mr Zainal asked me 'just Zul?' then I told him more details

Court: What about the other details?

Witness: I made it up. It is my imagination. From the things I took from Kak Mie, I just continued

the story. I didn't know that she had died.

Court: You were under pressure, were you afraid?

Witness: I was shocked.

77 Although SSI Zainal Abidin was under the impression that the Accused knew that the Deceased had died when he was being interviewed and D3 was being recorded, the Defence, however, maintained its stance that upon arrest, the Accused thought that it was in relation to the theft of the Deceased's jewellery. Therefore when he was informed of the death, it was natural that he was very shocked.

78 Furthermore, the Defence also submitted that the Accused was not someone who had plotted the whole story over a period of time in order to lie to the police as there was only a 3 day interval between the Deceased's death and the Accused's arrest. His emotions on hearing the news of the death led to his imagination taking control over him.

79 As to why the Accused lied twice in a day, his explanation was that he was very frightened when the first statement (D3) and cautioned statement (P144) were taken. The Accused later decided to come clean and relate the true story to Inspector Kwok after SSI Zainal Abidin told him that he did not believe in his story about Zulkarnian and Khairul.

80 The Defence submitted that the Accused was forthcoming during his examination-in-chief in which he admitted to his own lies. Moreover, the Accused furnished a plausible explanation as to why he had lied: he had never had any run in with the law prior to this case and therefore, it must have been alarming and shocking for him to be apprehended for such a serious and grave offence. The Accused had lied under those circumstances as he was in a state of shock, despair and confusion, causing him to be 'not in a proper state of mind'.

81 The Court of Criminal Appeal in *Chan Kin Choi v PP* [1991] 1 SLR(R) 111 ("*Chan Kin Choi*") held that once the Defence was called (as it was in this case), the trial judges who were performing the role of deciders of fact must consider the whole statement, *both the incriminating parts and excuses or explanations*, in deciding where the truth lay. Thus, this court should consider the incriminating portion of the Accused's statements and the lies, having regard to the exculpatory or explanatory parts of his statements, his evidence in court and all the surrounding circumstances in its endeavour to determine what the true facts are.

82 In the case of *Tan Chee Hwee and another v PP* [1993] 2 SLR(R) 493 ("*Tan Chee Hwee*"), there were inconsistencies between the appellants' police statements and their evidence in court. Tan, the first appellant, had in his police statement stated that he and Soon (the second appellant) had strangled the maid with the cord of an electric iron as opposed to using his bare hands. His explanation for the discrepancy was that at the time he gave the confession statement, his grandfather had passed away and he was confused. In his oral evidence, Tan also admitted that some parts of his statements to the police were lies.

83 As for the second appellant, he admitted during cross-examination that his statements to the police made no mention of Tan rendering the maid unconscious with his bare hands because he was scared, confused and disorientated at the time of interrogation. Soon maintained throughout his evidence that his intention that day was to "take the money" and that he had no intention whatsoever of killing the maid. He also admitted to lying to the police when he had said that he only learnt of the maid's death from the newspapers the next morning.

84 Karthigesu J at [46] noted that far from being overwhelming, it would be totally unsafe (as the judicial commissioner below had done) to disregard the section 122(6) statement of Tan as well as the explanation given in his long statement and conclude that, when Tan with the help of Soon placed the cord of the electric iron around the body of the violently struggling maid, it was not to tie her up around the waist but to strangle her with it around the neck.

85 Karthigesu J opined that taken as a whole and *giving such weight to the exculpatory portions of the statements, short of disregarding them altogether*, the evidence was equally consistent with an intention to tie the maid up without any intention of causing her bodily injury. The fact that the first appellant did not hit the maid with the iron and instead used it to tie her up strongly suggested that even at the critical moment the first appellant could not have formed an intention to strangle the maid with the cord of the electric iron as a means of silencing her forever. In those circumstances, the court in *Tan Chee Hwee* was driven to conclude that the injury which was in fact caused to the maid around her neck, in all probability, was not intentionally but accidentally or unintentionally caused. See [46].

86 I note that in the application of the *Virsa Singh* test to the factual matrix of the present case, there are no difficulties in meeting the requirements of the first, second and fourth limb of the said test. The third test, being as contentious and vexing as it is, forms the critical dividing point between the Prosecution and the Defence. In order to determine whether the Accused had intended to tie the ligature around the Deceased's neck, it would be prudent to assess all the Accused's statements, both incriminating and exculpatory, and his oral evidence in court together with the objective evidence.

Objective evidence of the case

87 The forensic evidence, especially those provided by A/P Gilbert Lau, can offer only so much assistance as to establish the degree of force used in applying the ligature, the internal injuries caused and whether they were sufficient in the ordinary course of nature to cause death. Although A/P Gilbert Lau was not in a position to assist on the question of the intention of the Accused at the time the ligature was applied, he nevertheless said that he would not rule out that the Accused might have mistakenly applied the ligature around the Deceased's neck when he had only intended to tie up the Deceased's mouth. At this point, it must be emphasised that it was very clear from the evidence (in particular from the position of the knot being at the back of the Deceased's neck) that when the Accused applied the ligature, the Accused was positioned at the *back* of the Deceased, who was *lying face down* on the floor. It was not as if the Accused was lying with his face upwards when the Accused was tying the knot and the Accused could obviously see that he was not applying the ligature to the mouth but to the neck.

88 The Accused had, at several junctures, repeated that he had no intention to kill the Deceased and that when he left the flat, the Deceased was still alive (or so he thought). He also later admitted in his statement and in court that he had invented two fictional characters when he was interrogated because he was in a state of shock, fear and confusion. As contemplated by MPH Rubin J in *PP v Sundarti Supriyanto* [2004] 4 SLR(R) 622 at [144], to hold the falsified statements or lies out of court against the accused to corroborate his guilt or to discredit him as a witness would mean disregarding perfectly acceptable portions of his testimony in court. This would be a disproportionate reaction, especially in a trial where capital punishment was involved.

89 It is also poignant to note that there are evidential gaps in the Prosecution's case. The Prosecution is faced with the daunting task of proving that the Accused in fact had the intention to apply the ligature *around the Deceased's neck*. That the ligature eventually ended up around the

Deceased's neck was supported by forensic evidence and that the Accused was the only person present at the scene was never disputed. However, the specific intent of the Accused in so applying and tying the ligature around the Deceased's neck and not the mouth must still be proved by the Prosecution beyond a reasonable doubt.

90 I find it compelling to note that the Deceased, when he exited the Deceased's flat on the night of 19 June 2008, had left his blue canvas bag behind. If the Prosecution was correct in describing the Accused as a careful and meticulous murderer, his act of forgetting his blue bag would have been a devastating miscalculation on his part. If the Accused had intentionally tied the ligature around the Deceased's neck thereby causing his death, it would be odd to find that having taken the Deceased's jewellery to ensure that he would be financially secured for at least the next few days (if not weeks) thus giving him sufficient time to make his escape possibly out of Singapore, the Accused would be so perplexingly careless as to leave his belongings as a voluntary lead for police investigations to track him down. Leaving the bag behind also showed to some extent that he intended to return to the flat, which lends some weight to his evidence that he did not know at the time he left the flat that the Deceased had died. If he knew the Deceased had died, he probably would not have left his blue canvas bag behind.

91 Moreover, the act of pawning the Deceased's gold bracelet (P154) at Tekka Enterprises on 20 June 2008 at around 10.30 am using the Deceased's identity card further lends credence to the Accused's evidence that he did not know that the Deceased had passed away until he was informed by SSI Zainal Abidin. If the prosecution was right that the Accused had intended to tie the ligature around the Deceased's neck and had thereby caused his death, it would be an act which baffles and defies common sense to use the Deceased's identity card for transactional or even any purpose at all. The prosecution emphasised that the Accused was no simpleton and was wary not to use his passport to register for a room in Hotel 12, possibly for the avoidance of police detection. If this were the logic that had occupied the Accused's mind after he left the Deceased's flat, would it not be contradictory and futile to his efforts of self-preservation to use the Deceased's identity card which would expose himself, sooner or later, to the authorities?

92 The Accused also had in his possession his Malaysian passport throughout the period when he left the Deceased's flat up until his arrest. After he had pawned the Deceased's gold bracelet (P154) raising a sum of $1,900, would it not have been the most prudent decision to leave Singapore immediately and escape the accompanying death penalty once and for all? His actions of lingering around the streets of Singapore, from pawning a gold chain with a key-shaped pendant (P167) for $150 at Tekka Enterprises, to later engaging the services of a prostitute on the 21 June 2008, showed no intention to flee the country or even cover up his trail and are therefore at odds with the Prosecution's case.

93 I now consider whether the Accused had intended to tie the ligature around the Deceased's neck to strangle him in order to rob the Deceased of the jewelleries that the he was wearing at that time. Although motive is not to be equated with *mens rea per se*, motive can be a helpful instrument in pointing us to the right direction as to whether the requisite *mens rea* for the offence was in fact present. In my view, a motive of robbery on the Accused's part would be highly unlikely. Given that the Deceased had always been obliging in respect of the Accused's needs and requests for money, a fact substantiated by the evidence given by Taher and the Accused himself, the Accused could have just asked for more money from the Deceased rather than murder the Deceased in order to steal his gold bracelet, gold chain and hand phone.

94 It was held in *Jagatheesan s/o Krishnasamy v PP* [2006] 4 SLR(R) 45 at [61] that while the prosecution does not have to dispel all conceivable doubts, the doctrine that the prosecution bears

the burden of proving its case beyond reasonable doubt mandates that, at the very least, those doubts for which there is a reason that is relatable to and supported by the evidence presented must be excluded so that no reasonable doubt remains. I am of view that the doubts raised above are not merely fanciful doubts but those which are reasonable. The lack of an 'unbreakable and credible chain of evidence' (in the words of *XP v PP* [2008] 4 SLR(R) 686 at [98]) seem to indicate that there are decidedly reasonable doubts concerning the Accused's intention in inflicting the ligature around the Deceased's neck in order to strangle the Deceased to death.

95 Thus, following the approach in *Chan Kin Choi* and *Tan Chee Hwee*, it would be prudent to take into account both incriminating and exculpating statements of the Accused, assigning them with appropriate weights as such, short of disregarding the exculpating/explanatory portions altogether. The Accused's explanation that he did not intend to tie the ligature around the Deceased's neck and that he was of the belief that the Deceased was still alive seem to be, on balance of probabilities, truthful as it is corroborated by objective circumstantial evidence in the aforementioned [90] to [93]. In any case, at the very least I am of the view that there is a reasonable doubt as to whether the Accused had in fact intended to apply the ligature around the Deceased's neck. I therefore find that the Prosecution has failed to prove beyond a reasonable doubt that the act of tying the ligature around the Deceased's neck was one that was intentional and not accidental. Accordingly, the Accused is not guilty of murder under section 300(c) of the Penal Code.

96 The Accused, however, at the point of application of the ligature, must have known that his act of tying the knot at the back of the Deceased's head and tightening the ligature was likely to cause death given the proximity between the mouth and neck region. This inherent risk was elevated by the fact that the Deceased was lying face down. As the Deceased was in a prone position and was struggling when the ligature was applied, the Accused was not given a clear view of the exact position of the ligature beneath, *ie*, whether it was at the mouth, chin or neck area, at the time he tightened the ligature with a considerable amount of force whilst he was positioned at the back of the Deceased. As this was the case, the Accused is therefore guilty of culpable homicide not amounting to murder under section 299 and is therefore punishable under section 304(b) of the Penal Code:

> **Punishment for culpable homicide not amounting to murder *304.Whoever commits culpable homicide not amounting to murder shall be punished —**
>
> **...**
>
> (b) with imprisonment for a term which may extend to 10 years, or with fine, or with caning, or with any combination of such punishments, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death

Defence of Provocation

97 Even if murder under section 300(c) were to be successfully proven by the Prosecution beyond a reasonable doubt, this court finds that the defence of provocation is made out on the evidence and the offence of murder must in any event be reduced to one of culpable homicide not amounting to murder under section 299 of the Penal Code.

98 The relationship between the Deceased and the Accused becomes critical in determining whether the defence of provocation would operate in this present case. If they were in fact lovers to the extent that the Accused had been regularly penetrating the anus of the Deceased, then perhaps I may not regard the alleged provocation, *ie*, the proposition for anal intercourse, as grave and

sudden under the circumstances. It may not even amount to a provocation at all.

99 The prosecution maintained that the Accused and Deceased were in fact lovers. This was based on the oral testimonies of the Prosecution's witnesses Taher, Aini and one Mr Seet Seng Hai ("Mr. Seet") (PW20). However, the extent of their sexual relationship prior to the incident, in particular whether it included anal sex, was not clear from the evidence relied on by the Prosecution.

100 Taher had known the Deceased since 1978 and lived together since 1986. Their relationship was platonic and they were like siblings. It was Taher's evidence that the Deceased and the Accused were lovers. In fact, he himself was against their relationship as he suspected that the Accused was financially draining the Deceased. His conclusion that the two were lovers was based on the following observations:

(a) The Deceased had expressed to Taher that he loved ("sayang") the Accused;

(b) He had seen the Deceased and Accused both leaning against the railing at an MRT station with their hands clasped together; and

(c) The Deceased told Taher that he had pawned his jewellery and given the money to the Accused as he needed money to make a passport.

101 Mr. Seet, on the other hand, was the Deceased's supervisor/employer at Sengent Company. During cross-examination, Mr. Seet was asked whether the 'lover' mentioned by the Deceased was in fact the Accused or possibly someone else. Mr Seet's reply was the Deceased had told him that the lover was his 'East Malaysian former employee'. In addition to that, the name 'Astro' was also mentioned.

102 The Defence, on the other hand, denied any romantic relationship between the Deceased and the Accused. Instead, their relationship was akin to mother and son. The Accused had always felt beholden to the Deceased and described the Deceased as his 'adopted family' in Singapore.

103 With regard to the evidence of the Prosecution witnesses that the Deceased and Accused were lovers, the Defence submitted that some Prosecution witnesses, especially Taher, lacked credibility. The Defence disputed Taher's observations as mere personal assumptions. His dislike towards the Accused stemmed from his belief that the latter was taking advantage of the Deceased from the very moment the Deceased met the Accused.

104 Most significantly, Taher's evidence on the physical intimacy between the Deceased and Accused was inconsistent. In his evidence, Taher first said that he had never seen them kissing or holding hands and admitted that it was his assumption that they were lovers. However, in the latter part of his evidence, he then testified that he had witnessed them holding hands and leaning against the railing near the MRT station.

105 The Defence relied on the close-circuit television ("CCTV") footage taken outside the SMRT Clubhouse (P156) which showed the Deceased and Accused leaving the premises of the clubhouse together. Notably, they were not walking next to each other. There was, in fact, quite a clear distance between them. The interaction between the two as captured by the CCTV suggested that

the Deceased and the Accused were just friends and not lovers. This was also corroborated by the evidence of Sarah Binte Aman who had seen the two walking near the car park of their HDB flat and that their interaction seemed 'normal' without any exchange of romantic gestures.

106 Aini's evidence in relation to the Accused being the Deceased's lover was speculative in the sense that she knew about the relationship from her aunt and Taher. This is hearsay. She herself was not able to confirm that the Deceased and the Accused shared a romantic relationship as a matter of fact. Although her adopted father admitted to being in a relationship with a man and had promised that he would break off the relationship, the identity of the man remained a mystery to her.

107 Witnesses who were told directly that the Deceased and the Accused were lovers were Taher and Mr. Seet. Mr. Seet had only heard from the Deceased that his lover was Astro but had never seen them in any intimate or romantic embrace. It was his evidence that before he was told about the romantic relationship, he once saw the Accused visit the Deceased at the SMRT Clubhouse and thought they were just friends. As for Taher, his evidence of the intimacy between the Deceased and Accused had been flickering and bordered on prejudice.

108 The Accused's sexual history as established in court revealed that since the age of 16, he had been involved in several romantic relationships with girls of his age. He only engaged in vaginal sex but never had anal sex with any of these girls. He also expressed his dislike and discomfort from unwanted attention that was showered upon him by homosexual men. I believe this evidence of the Accused. Thus, this court is inclined to find that, at the highest, this was a case of unrequited love on the part of the Deceased. This will not be too surprising if one were to look at the photographs of the Deceased and take into account the huge age difference between the Accused and the Deceased. From the totality of the evidence, I do not believe that the Accused and the Deceased had engaged in anal sex prior to the incident.

109 The defence of provocation is encapsulated in Exception 1 to section 300 of the Penal Code:

> **When culpable homicide is not murder Exception 1.—Culpable homicide is not murder if the offender whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident.**
>
> …
>
> *Explanation*. —Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

110 Chao Hick Tin JA in the case of *Seah Kok Meng v PP* [2001] 2 SLR(R) 24 at [21] ("*Seah Kok Meng*") (in turn citing *PP v Kwan Cin Cheng* [1998] 1 SLR(R) 434 and *Lau Lee Peng v PP* [2000] 1 SLR(R) 448) held that there are two distinct requirements which must be satisfied before the defence of provocation can be successfully raised. First, is the subjective requirement that the accused was deprived of his self-control by provocation. Second, is the objective requirement that the provocation must have been "grave and sudden" which involved the application of the "reasonable man" test. The question involves considering whether an ordinary person of the same sex and age as the Accused, sharing such characteristics as would affect the gravity of the provocation and placed in the same situation, would have been so provoked as to lose his self-control.

Actual Loss of Self-Control

111 It was held in *Seah Kok Meng* that the accused did not, in fact, lose his self-control due to provocation. The Court of Appeal was minded that after being informed by his girlfriend that she was molested by the victim, the accused had the presence of mind to do the only proper thing: to go there to "rescue" her. On arrival, there was no altercation although the victim was standing close by. After the accused asked his girlfriend to hang up the phone and leave, there was some staring between the accused and the victim whereupon the appellant went to the back lane and came back armed with a wooden stick. It opined that every move of the accused was very deliberate and that he knew what he wanted to do, *ie*, he found his implement and took the offensive against the victim, literally to teach the latter a lesson.

112 The Prosecution also relied heavily on the case of *Lim Chin Chong v PP* [1998] 2 SLR(R) 278 ("*Lim Chin Chong"*) owing to the factual similarities with the present case. In *Lim Chin Chong*, the appellant was a 19 year old Malaysian who worked as a free lance male prostitute whereas the victim was his employer. After being propositioned for anal intercourse and forcefully kissed, the appellant killed the victim. The Court of Appeal found that on evidence, the subjective element had not been satisfied as the evidence showed beyond doubt that the appellant went about killing the deceased in a cool, calm and methodical way: after the accused had subdued the deceased with a punch on his nose, he went out of the room, found some electrical wire and tied the deceased's arms and legs. The appellant also gagged the deceased who was lying in bed calling for help. He then left the room again and found a long wooden pestle in the kitchen which he decided to use to bludgeon the deceased. At this juncture, he was interrupted by the return of another male prostitute and his customer. The appellant calmly went to the bedroom door and told them that he and the deceased were having sexual intercourse and were not to be disturbed. These acts, in the court's view, were not acts of a man who had lost control of himself and was in a frenzy. They were calculated and premeditated acts.

113 It was the Defence's case that the court should take into account the level of intoxication of the Accused on the night of 19 June 2008. Although the Accused had admitted to Dr. Kenneth Koh ("Dr. Koh") (PW 27) that he usually drinks 6 bottles of alcohol over a day, the Accused's evidence was he had consumed 2 ⅓ bottles of alcohol within a span of 3 hours on the night of the incident. During cross-examination, the Accused testified that the maximum amount of bottles of alcohol that he could take 'in one go' was 2 to 3 bottles and that after 2 bottles, he would be half-drunk and would not be able to perform his normal functions.

114 Thus, the defence submitted that as a result of this, the Accused was not able to retain his self-control when the Deceased repeatedly blackmailed him and insisted on having anal sex:

> Q: Now, why did you punch him, Mr. Astro? Why did you have to punch him? As his Honour said earlier, when you pushed him, he fell into the cupboard, you had the chance, just leave. Why did you have to punch him? Understand the question?
>
> …
>
> A: At that time, I was very angry and he kept on…If I were normal then --- then I wouldn't do all these.
>
> Court: If what, sorry? If?
>
> Witness: If I were normal then, then I would not have done all these, your Honour.
>
> Q: What --- What do you mean by if you were normal? Were you not normal then?

A: Okay, if I were --- if I hadn't consumed alcohol or if I were normal --- if I were in a normal situation then I'll --- I'll --- the approach that I would take would be to talk to him. Talk to this --- the deceased…because I had drunk alcohol, so I was not able to control my anger --- and I was --- as well as myself. And I found that I became angry pretty fast because of the alcohol consumption as well. Now that when I think about what happened, your Honour, I'm also puzzled why I was not able to control my anger because prior to the 19th, he had in fact also touched me but I was able to control myself and not get angry with him, to be patient. But I don't know what made me lose my control on the 19th, that resulted in all this tragedy, your Honour.

115 The Prosecution, on the other hand, submitted that the Accused's acts suggested that he was not half-conscious or drunk as he had claimed, *ie*, his evidence which downplayed his sobriety was contradicted by his actions which demonstrated that his mental faculties were functional and were not affected by alcohol:

(a) After rejecting the Accused's proposition for anal sex, the Accused could stand up, pull up his boxers, push the Deceased's hand away and take his jeans from the bedroom door and put it on;

(b) When the Deceased was groaning on the floor, the Accused still had the presence of mind to think of a way to silence the Deceased in order to prevent the Deceased from calling the police; and

(c) The following evidence revealed that immediately after the scuffle and tying up of the Deceased, the Accused was still capable of acting in a methodical manner:

(i) Ishak and Aini had given evidence that the Deceased's bed was well-tucked when they entered the room. If a scuffle had taken place as the Accused had alleged, the bed would, in all probability, be in a mess. This showed that the Accused had tidied up the room before leaving the flat;

(ii) Ishak and Aini testified that the body was well hidden under a stack of pillows, cushions and blanket. This evidence was corroborated by the paramedic's evidence, Sgt Nasir, who was unable to see the Deceased's body when he entered the room and had to ask twice for directions before he could locate the body. The prosecution submitted that if the Accused had the presence of mind to tidy the bed and put all clothes in place, it is unlikely that he had covered the body accidentally;

(iii) According to the Accused, he finished drinking at about 9.30 pm and by 10 pm, he had already left the flat. Hence, the time span for which the scuffle happened up to the point the Deceased was left tied up in the room was approximately 30 minutes. The fact that everything had happened so rapidly indicated that the Accused had reacted swiftly and acted speedily. This would not have been possible if the Accused was half-conscious or half-drunk; and

(iv) After arriving in Geylang, the Accused who had his passport with him was mindful not to use his own passport to register for a hotel room. Instead, he managed to talk one Lawrence Anak Nyuak, into registering the room under the other's name.

In light of the above evidence, the Prosecution submitted that the Accused was not drunk, or even half-drunk as he had claimed, but was fully conscious of all his actions at the time of incident.

Effect of intoxication on the subjective assessment of loss of self-control

116 In the case of *Seah Kok Meng*, the court did not take into account the level of intoxication of the accused in its consideration of whether the accused had lost his self-control. However, I find that the facts in *Seah Kok Meng* are different from the present case. The accused in *Seah Kok Meng* had committed murder some seven hours after drinking. The Accused in the instant case was, on the other hand, inebriated in the sense that prior to the scuffle, he had just finished a bottle of Guinness Stout. The Prosecution further tendered its argument that even if the Accused had lost his self-control, in between the scuffle to his fleeing from the flat, he in fact regained self-control.

117 I note that counsel has not cited any authorities that dealt directly with the issue of whether the effects (if any) of intoxication may be taken into account as a factor in determining the Accused's loss of self-control when a Defence of provocation is raised to a murder charge. In *PP v Tharema Vejayan s/o Govindasamy* [2009] SGHC 144, the two expert witnesses engaged by the prosecution and defence respectively were in agreement that the accused was intoxicated. Their disagreement was over whether the accused was so intoxicated that he was unable to form the requisite intention for the commission of the offence. However, when it came to the assessment of whether the accused actually lost self-control, the court was silent on the point of intoxication or the effects thereof.

118 There are significant authorities which have been and still are being raised by various courts across the Commonwealth in relation to the effect of intoxication on the defence of provocation. Lord Goff in the case of *R v Morhall [1995] 3 WLR 330* (House of Lords) at page 337 held that a diminished capacity for self-control arising from drunkenness (as an altered mental state affecting capacity for control) is an attribute that is not properly imputable to the reasonable person based on the general policy not to allow such an accused person to benefit from voluntary intoxication by drink or drug.

119 This court takes the view that the *subjective assessment* of whether the accused lost his self-control is essentially a finding of fact. Such a finding of fact would only adhere to and reflect reality if the accused's state of intoxication (or lack thereof) is taken into account. Any concern that an intoxicated man would be able to exonerate himself from an offence *solely* because he was intoxicated could be alleviated as intoxication, at this stage, is taken as *one of the factors* in determining whether he was in fact deprived of his self-control. A finding of intoxication does not automatically in itself warrant the operation of the defence of provocation, bearing in mind the need for the semi-objective test that has to be satisfied for this defence as a whole. See *Seah Kok Meng*.

120 Moreover, taking into account the state of intoxication of an accused in the *subjective determination* of loss of self-control would not detract from public policy in ensuring that no one, by his own volition of taking intoxicating substances (*ie*, drink or drug) could be excused of his lack of self-restraint, short of being completely incapable of controlling himself. It is important to note that the accused's state of intoxication is not attributed to the reasonable man. Hence, the reasonable man is one who is of the same age and sex of the accused, who shares the peculiar characteristics (which form the subject of provocation) as the accused but is one who is sober. The effect of intoxication on the defence of provocation relates only to the subjective element and the assessment

of its effect should be determined on a case-by case basis, depending on the factual matrix of each case.

121 Notably, the Canadian courts have been applying the aforementioned approach. In the case of *Wright v The Queen* [1969] S.C.R 335, Fauteux J held that in determining whether the accused acted actually upon the provocation (applying a subjective test), the character, background, temperament, idiosyncrasies or the drunkenness of the accused are matters to be considered. However, they are excluded from the objective test as to hold otherwise would denude of any sense the objective test. I agree with this approach.

122 Social consumption of alcohol is almost universal in many societies. The physiological and psychological effects of alcohol vary from one individual to another. It is regrettable that this court is not assisted by any expert opinion on this matter pertaining to the effect of alcohol on a person's level of self-control and more particularly, whether the Accused had indeed lost his self-control on that day, having regard to his physical condition and ability to hold alcohol. This is especially so given that he had actually consumed a fairly large quantity of alcohol, which was not long before the scuffle and the subsequent application of the ligature. Even in the absence of expert opinion, this court, however, finds it proper to take into account and consider with some weight the effect of alcohol as another factor in the *subjective determination* of whether or not the Accused had in fact lost his self-control. I cannot disregard the oral testimony of the Accused that he had drunk alcohol and so he was not able to control his anger as well as himself, and that he had become angry pretty fast because of his alcohol consumption. I find that this part of the Accused's oral testimony on the effect of alcohol on his ability to control himself (viewed subjectively) is not something fanciful but evidence that I do give some weight to. The Prosecution wisely did not challenge this evidence on the basis that alcohol has absolutely no effect on a person's ability to control himself as it is common knowledge that it does have some effect, a fact which I can take judicial notice of even in the absence of expert evidence.

123 As MPH Rubin J in *Sundarti Supriyanto* at [154] observed:

> It cannot be said that a particular trait or pattern of behaviour *must* be observed on the part of the accused post-killing, in order to determine whether she had lost her self-control during the time of killing. Different people react differently in different situations. This is why the test pertaining to whether an accused had lost his/her self-control was made subjective. For instance, the actions of the killer post-killing in *PP v Kwan Cin Cheng* differed from the actions of the killer in *Lau Lee Peng v PP*. Everything depended on the facts of the individual case. ***A general submission that the calmness of an accused post-killing meant that she must have been calm throughout the time of killing was not convincing*** .
>
> [emphasis in italics in original, emphasis in bold and italics added]

Although the prosecution highlighted the fact that the Accused was likely to have tidied up the bed prior to leaving the room, this does not in itself warrant an inference that the Accused had, throughout the alleged crime, acted under a clear state of mind. The Accused's acts (by his own admission and supported by Aini and Ishak's evidence) of hastily throwing some clothing back into the wardrobe and some in the direction where the Accused was tied up before he left the flat were in contradiction with those of a person who was sober enough to clean up the aftermath of his crime.

124 This court is therefore inclined to find, on a balance of probabilities, that on the facts of the case the Accused had lost his self-control. In contrast with the accused persons in *Seah Kok Meng* and *Lim Chin Chong*, the time lapse between the scuffle and the Accused's fleeing the flat was

relatively short, *ie*, an approximate 30 minutes. Thus it could be inferred that the Accused's acts were committed in a state of frenzy without pre-meditation or any cooling-off period. The appellant in *Lim Chin Chong* was found not to have his lost self-control as he had ample time to search for a deadly weapon and even present himself in a cool and calm manner in the face of queries by the suspecting male prostitute who 'interrupted' his slaying of the victim. Thus the factual circumstances between *Lim Chin* Chong and the present case are quite different.

Sudden and Grave Provocation

125 The Court of Appeal in *Lim Chin Chong* also did not find that the provocation was grave and sudden. The alleged provocation was the deceased propositioning the appellant to engage in anal intercourse and pulling the appellant onto the bed and kissing him. There was also the threat of setting secret society members onto the appellant. The court at [31] found that the propositioning and the kissing taken together could hardly be said to be provocative or was so disgusting and abhorrent as to have aroused revulsion in a person who, on his own admission, made a living by prostituting himself to other men even if he was to be believed that his service did not include kissing or anal intercourse.

126 If it did, then the immediate and spontaneous reaction was the punch on the nose which immobilised the deceased to such an extent that appellant was able to leave the room, find the electrical wire and return to tie the deceased and gag him. The court in *Lim Chin Chong* opined that on any objective test the provocation of being sodomised had simply *evaporated* and the threat of being got at by secret members was just a hollow threat. Thus, the Court of Appeal was of view that there was no grave and sudden provocation which posed an immediate threat to the appellant.

127 The Defence submitted that the Deceased's proposition for anal sex and taunt about how the Accused was being 'cultivated' by the Deceased all the while amounted to grave and sudden provocation.

128 In determining whether there was 'sudden' provocation, the Defence submitted that an analogy should be drawn with the case of *Sundarti Supriyanto* whereby a series of abuse with no break in time that provided the accused with a cooling off period was found to satisfy the requirement of suddenness. See [155] to [165].

129 The Accused had allegedly been suffering from a 'series of abuse', as coined by the Defence. The 'series of abuse' took the form of caressing and touching by the Deceased. It was the Accused's evidence that from the first time he stayed at the Deceased flat (sometime around November 2007), the Deceased had started caressing him when they were in bed. The series of touching became more serious when the Deceased started to grope the Accused's buttocks on the 18 June 2008. The Accused, although growing increasingly uncomfortable with these touching, protested in silence as he did not want to offend the Deceased, his sole source of dependence in Singapore.

130 The Accused testified that on the night of 19 June 2008, he had 'given up his dignity' and allowed the Deceased to perform fellatio on him. Thus, the account of events, from the touching and caressing up to the point of fellatio should be viewed as part of an ongoing process in the context of provocation. When the Deceased further requested for anal sex and taunted the Accused for being 'cultivated' by him, the Accused having earlier succumbed to the Deceased's harassment, had had enough and I accept that the Accused suddenly erupted in rage and lost control of himself.

131 The Prosecution further submitted that during the scuffle, there were moments when the Accused had time to leave the flat. When the Deceased was lying on the floor groaning in pain, the

'provocation' (if any) had evaporated. The Defence, on the other hand, submitted that the scuffle and incidents between the Deceased and Accused were part and parcel of an ongoing process.

132 Although there was an estimated time lapse of 30 seconds when the Accused just stared at the Deceased who was lying on the floor, it would be artificial in my view to carve up the time frame into intervals of seconds and analyse them rationally. One should be mindful not to expect a man who had acted in the heat of passion to be able to weigh the golden scales of reaction as one can in a calm court room. The relatively short interval between the act of fellatio to the scuffle indicates to me a lack of cooling-off period. Moreover, there was no evidence of any premeditation on the part of the Accused. Hence, objectively assessed, the requirement of suddenness is satisfied.

133 As to whether a proposition of anal sex was 'grave', it was found in *DPP v Camplin* [1978] A.C. 705 that the deceased's acts of committing buggery and later taunting at the accused, a 15 year old boy, was sufficiently grave provocation.

134 In the Australian case of *Green v R* [1997] 148 ALR 659 the accused had been drinking one night with the deceased who was some twenty years older than him, but whom he viewed as a long-standing and trusted friend. The deceased made a sexual advance which the accused brushed off, saying that he was not interested. The accused then went to bed but was followed by the deceased who came into his room naked, got into bed with him, grabbed hold of the accused and touched his groin. The accused responded by repeatedly punching the deceased approximately fifteen times, stabbing him ten times with scissors and banging the deceased's head into the bedroom wall.

135 On appeal, Brennan CJ, sitting in the Australian High Court (in a 3:2 decision) held that the 'real sting' of the provocation lay in the deceased's attempts to 'violate the sexual integrity of a man who had trusted him as a friend and a father figure' and also in 'his persistent homosexual advances'.

136 The classic justification for the existence of the provocation defence is that it provides a concession to human frailty. The extension of this defence to 'non-violent homosexual advances' as per the instant case would rest in the recognition of the fact that most heterosexual men would view such homosexual advances as sufficiently provocative. The more intrusive the advances, the more grave and provocative they would be.

137 The Accused in the instant case was outraged, disappointed and sickened by the Deceased's proposition for anal intercourse as it was disgusting to him. The Accused found it inconceivable to engage in anal intercourse, even with women, and described the act as 'a dirty channel' due to its unhygienic nature. Objectively viewed, an unwanted proposition for anal intercourse in the circumstances of this case does amount to a grave provocation.

138 In his examination-in-chief, the Accused expressed his despair when the Deceased reminded him of all the good deeds he had done for the Accused and that he had secured a roof over the Accused's head. The case of *DPP v Camplin* [1978] A.C. 705 at 726 noted that:

> The effect of an insult will often depend entirely on a characteristic of the person to whom the insult is directed. 'Dirty nigger' would probably mean little if said to a white man or even if said by one coloured man to another; but it is obviously more insulting when said by a white man to a coloured man.

As Jeremy Horder in *Provocation and Responsibility* (Clarendon Press, Oxford, 1992) at page 138 pointed out:

> [A]t the root of *provoked* anger, which is different from exasperation or frustration, lies moral evaluation and judgment. The judgment is one of moral wrongdoing by another that is experienced as demeaning or potentially demeaning to oneself, as involving a lowering or potential lowering of one's self-respect or self-esteem. In the wake of this judgment of wrongdoing may flow the familiar sensation of the heating of the blood and the desire (not necessarily acted on) to retaliate.

Thus, the Deceased's emotional blackmail translated the Accused's subservience into anger and outrage. Such a taunt on the Accused's financial and even livelihood dependence on the Deceased was arguably the sting of the provocation which had added to the gravity of it.

139 This court therefore finds, on balance of probabilities, that the Accused had lost his self-control in the face of a sudden and grave provocation and that he had applied the ligature while still being deprived of his power of self-control.

Defence of Sudden Fight

140 The Defence also sought to rely on Exception 4 to section 300 of the Penal Code:

> *Exception 4*.—Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner.

141 The three requirements to be met for the defence to operate are:

(a) There was a sudden fight in the heat of passion upon a sudden quarrel;

(b) There was an absence of pre-meditation by the accused; and

(c) The accused did not take undue advantage or act in a cruel or unusual manner.

142 The case of *Tan Chee Wee* at [60] held that the word "fight" implies mutual provocation and blows on each side. It is not sufficient merely for there to be "an offer of violence on both sides" in the words of the court in *Jusab Usman v State* [1983] XXIV Guj LR 1148. Worth noting is that the wording of Exception 4 states "a sudden fight in the heat of passion upon a sudden quarrel". As such, this clearly indicates that it must have been the intention of Legislature that "fight" must mean something more than just a mere quarrel.

143 There cannot be a fight if the victim keeps quiet and does nothing as that is simply a one-sided attack. See *Tan Chee Wee* at [61]. In *Tan Chee Wee*, the appellant had struck the deceased on the head with a hammer. It was doubtful that this attack could be regarded as a fight as there was no evidence that there was an exchange of blows even though the attack had supposedly arisen after the victim had grabbed a knife.

144 The forensic evidence before this court suggests that there is a lack of fight between the Deceased and Accused. It was A/P Gilbert Lau's observation that there were no typical defensive injuries found on the Deceased's body.

145 The Defence suggested that the congealed blood found on the floor beneath the Deceased's head had resulted from an injury caused by the scuffle, in the form of abrasion, to the lips or face. A/P Gilbert Lau's reply was that although he was unable to exclude that possibility entirely, he was of view that it was very unlikely for the following reasons:

(a) An abrasion would not have caused much bleeding. The amount of bleeding (as seen in photograph P44) would have been caused by a laceration. However, no laceration was found on the Deceased's face; and

(b) The congealed blood, in all probability, would have resulted from bleeding caused by the bursting of capillaries in the nose due to congestion which was in turn caused by the tightly applied ligature to the neck.

146 Even if I were to characterise the brief struggle as a fight, there is nothing to show that the ligature was applied during the sudden fight in the heat of passion *upon a sudden quarrel*. The Deceased's act of cajoling the Accused and the Accused's brushing his advances off cannot in any way be seen as quarrel. This is crucial because the operation of the exception requires that there must be a killing whilst both parties are gripped by the inflammation of passions caused by a sudden quarrel. See *Tan Chee Wee* at [63].

147 Given that there is a lack of quarrel and/or fight from the objective evidence, the first limb of the defence is not made out and this court therefore takes the view that the defence of sudden fight does not apply to the present case.

Conclusion

148 In light of the foregoing, I find the Accused not guilty of the charge of murder under section 300 of the Penal Code. However, I made a finding in [96] above that Accused is guilty of the offence of culpable homicide under section 299 of the Penal Code. As it was done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death, it is punishable under section 304(b) of the Penal Code. Accordingly I convict him of the offence of culpable homicide under section 299 and punish him under section 304(b) of the Penal Code. I shall adjourn for the Prosecution and the Defence to prepare their submissions on sentence.