Tan Chor Jin v Public Prosecutor
[2008] SGCA 32

Case Number : Cr App 9/2007

Decision Date : 18 July 2008

Tribunal/Court : Court of Appeal

Coram : Andrew Phang Boon Leong JA; V K Rajah JA; Tan Lee Meng J

Counsel Name(s) : Subhas Anandan and Sunil Sudheesan (KhattarWong) for the appellant; Lee Sing Lit and Edwin San (Attorney-General's Chambers) for the respondent

Parties : Tan Chor Jin — Public Prosecutor

Constitutional Law – Accused person – Right to counsel – Accused consistently declined to be represented by counsel – Whether right to counsel could be waived or taken away – Article 9(3) Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint)

Criminal Law – General exceptions – Accident – Whether accused fulfilled all four conditions for defence of accident to succeed – Section 80 Penal Code (Cap 224, 1985 Rev Ed)

Criminal Law – General exceptions – Intoxication – Whether accused suffering from insanity to such degree that it rendered him incapable of knowing either nature of the act or that it was wrong or contrary to law – Whether accused had intention to commit offence – Whether unsoundness of mind synonymous with insanity – Sections 84, 85, 86 Penal Code (Cap 224, 1985 Rev Ed)

Criminal Law – General exceptions – Private defence – Preconditions and requirements – Whether aggressor had right of private defence – Sections 96 to 106 Penal Code (Cap 224, 1985 Rev Ed)

Criminal Law – Statutory offences – Arms Offences Act (Cap 14, 1998 Rev Ed) – Whether presumption of using or attempting to use firearm with intention to cause injury to person was rebutted

Criminal Procedure and Sentencing – Appeal – Allegation of prosecution witness lying – Whether trial judge obliged to visit crime scene – Power of appellate court to reverse findings of fact

18 July 2008

V K Rajah JA (delivering the grounds of decision of the court):

Introduction

1 The appellant ("Tan") was convicted by the High Court for an arms offence pursuant to s 4 of the Arms Offences Act (Cap 14, 1998 Rev Ed) (see *PP v Tan Chor Jin* [2007] SGHC 77 ("the Judgment")). Briefly, Tan was found guilty of discharging six rounds from a 0.22 calibre Beretta ("the Beretta") with intent to cause physical injury to the deceased ("Lim"), who had immediately succumbed to the wounds inflicted. Tan acknowledged having fired the Beretta, but maintained that he had not intended to cause any physical injury to Lim. The evidential burden therefore rested on Tan to rebut the statutory presumption raised pursuant to s 4(2) of the Arms Offences Act, which states:

> In any proceedings for an offence under this section, any person who uses or attempts to use any arm shall, until the contrary is proved, be presumed to have used or attempted to use the arm with the intention to cause physical injury to any person or property.

2 Tan – who chose to appear in person at the trial – did not succeed in establishing his

defences of intoxication and accident; neither did he manage to establish the right of private defence. These defences are found in ch IV (headed "General Exceptions") of the Penal Code (Cap 224, 1985 Rev Ed). On appeal, Tan (who had by then decided to have counsel represent him) challenged the decision of the trial judge ("the Judge") on these three defences. In addition, three new issues concerning procedural fairness – *viz*, Tan's right to counsel, the conditions of remand in which Tan was placed while preparing for his trial and whether the Judge was obliged to visit the crime scene so as to ascertain if a witness was lying – were raised. It was contended that the cumulative effect of these breaches of procedural fairness warranted a retrial.

3 We dismissed the appeal, and now give the reasons for our decision. In these grounds of decision, we will address, first, the defences relied on by Tan and, second, the issues relating to procedural fairness. We have placed particular emphasis on three points, *viz*, the nature of the defence of intoxication, the extent of the right of private defence and the scope of the right to counsel in the context of a criminal trial.

Overview of the facts and the issues

4 As the Judge has admirably summarised the facts in the Judgment, only the salient facts need now be reiterated.

5 Until some seven or eight years ago, Tan had been the head of a secret society known as "Ang Soon Tong". About three years prior to the shooting, Tan and Lim were involved in illegal betting activities. According to Tan, as at April 2004, Lim owed him some RM500,000, but refused to pay up. Instead, in July 2005, he told Tan that he would send someone to "settle with him" (see [58] of the Judgment). As time passed, Tan grew increasingly distressed about Lim's callous disregard for him and the purported threat. Some time later, he purchased the Beretta in Thailand, purportedly for self-defence, in the light of the alleged threat made earlier by Lim.

6 On 15 February 2006, Tan went out for drinks with friends late at night. After several rounds of drinks, Tan was driven to Lim's flat ("the Flat") by a friend, Ah Chwee. Tan claimed that the purpose of this visit was to persuade Lim to resolve their differences. Lim was so taken aback that Tan knew where he lived that he refused to see Tan. A few hours later, Tan returned to the Flat in the same car and, this time around, he managed to gain entrance.

7 Armed with a knife and the Beretta, Tan tied up Lim as well as Lim's wife, his daughter and his maid ("Risa"). They were later confined in different rooms. Tan also had a bag with him which was used to hold valuables that he ransacked from the Flat. Later, he confronted Lim alone in the study. Risa testified that even though her hands and legs were tied, she was still able to approach the study and peek inside. She saw Tan hold the Beretta very close to the right side of Lim's face. Tan initially fired a single shot, whereupon Lim fell backwards against the chair behind him. Terrified and panic-stricken, Risa immediately retreated into another room. Five more gunshots followed before Tan left the Flat hurriedly. On his way out, he warned the family not to summon the police. Back in the car, Tan instructed Ah Chwee to let him alight near a canal, where he disposed of the Beretta. Just prior to leaving for Malaysia in another car, Tan told Ah Chwee to read that evening's newspapers.

8 Tan was eventually arrested and extradited to Singapore on 1 March 2006. On 15 March 2006, he was remanded at Complex Medical Centre of Changi Prison ("CMC") for psychiatric assessment. The assessment was completed on 14 May 2006. Tan, nevertheless, continued to be held in remand at CMC until he was transferred to Queenstown Remand Prison ("QRP") on 27 October 2006, where he remained until the first day of his trial (*ie*, 22 January 2007).

9 During the trial, Tan testified that he had brought the Beretta to the Flat for the sole purpose of "negotiating"[note: 1] with Lim. It was only after Lim became abusive that Tan decided to rob him. Unexpectedly, while they were alone in the study, Lim suddenly grabbed a chair and attacked Tan. A scuffle ensued. Tan claimed that he panicked and his mind then went blank; he "misfired"[note: 2] the first shot, but could not remember what happened thereafter. To justify the homicide, Tan invoked the general exceptions of intoxication, accident and the right of private defence. Tan also contended that Risa could not possibly have witnessed the shooting of Lim. To substantiate this allegation, he invited the Judge to visit the Flat. The Judge, however, declined to do so, expressing his view that the photographs and the sketch plans of the Flat were clear.

10 As mentioned earlier (at [2] above), Tan chose to appear in person during the trial. He discharged his counsel before the preliminary inquiry and refused to be represented by assigned counsel. This was despite his allegations that while he was held in remand at CMC, he was kept in solitary confinement, deprived of sunlight and suffered from depression. Given that Tan's psychiatric assessment was completed approximately two months after he was first remanded at CMC, counsel for Tan in the present appeal, Mr Subhas Anandan ("Mr Anandan"), argued before this court that Tan's continued remand at CMC for another five months after the completion of the psychiatric assessment was oppressive and hampered Tan's preparations for the trial.

11 Mr Anandan further contended on appeal that the Judge had summarily dismissed Tan's request for a lawyer towards the end of the trial. To put matters into perspective, however, it bears mention that Tan had earlier confirmed on several occasions throughout the proceedings (including on the first day of the trial) that he did not wish to have legal representation. Yet, after all the witnesses had been called and just prior to closing submissions being made, Tan inquired of the Judge, "If I say I need a lawyer how [*sic*]?"[note: 3] (see further [50] below). This request was not directly addressed by the Judge in the Judgment as it was raised only on appeal. In the circumstances, the question arose as to whether Tan's right to counsel, which is entrenched under Art 9(3) of the Constitution of the Republic of Singapore (1999 Rev Ed) ("the Constitution"), had been contravened.

12 As we agreed with the reasoning of the Judge on the factual controversies, we shall, in these grounds of decision, address only the legal issues that merit elucidation (*ie*, the issues outlined at [3] above).

The defences raised by Tan

The defence of intoxication

The relevant statutory provisions

13 The defence of intoxication is spelt out in ss 85–86 of the Penal Code, as follows:

> **Intoxication when a defence**
>
> **85.**—(1) Except as provided in this section and in section 86, intoxication shall not constitute a defence to any criminal charge.
>
> (2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and —
>
> (*a*) the state of intoxication was caused without his consent by the malicious or

negligent act of another person; or

(*b*) the person charged was, by reason of intoxication, insane, temporarily or otherwise, at the time of such act or omission.

Effect of intoxication when established

86.—(1) Where the defence under section 85 is established, then in a case falling under section 85(2)(*a*) the accused person shall be acquitted, and in a case falling under section 85(2)(*b*), section 84 of this Code and sections 314 and 315 of the Criminal Procedure Code [(Cap 68, 1985 Rev Ed)] shall apply.

(2) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

(3) For the purposes of this section and section 85 "intoxication" shall be deemed to include a state produced by narcotics or drugs.

14 It has been rightly observed (in K L Koh, C M V Clarkson & N A Morgan, *Criminal Law in Singapore and Malaysia: Text and Materials* (Malayan Law Journal Pte Ltd, 1989) ("Koh, Clarkson & Morgan")) that from the perspective of criminal responsibility (at p 232):

> [A] person who commits a crime when involuntarily intoxicated should not be blameworthy while one who voluntarily gets into a state of intoxication should be responsible for his acts.

By way of historical background, it is pertinent to note that the current provisions on intoxication were introduced only after amendments were made to the Penal Code (SS Ord No 4 of 1871) in 1935 (via the Penal Code (Amendment No 2) Ordinance 1935 (SS Ord No 16 of 1935)). As pointed out in Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* (LexisNexis, 2007) ("Yeo, Morgan & Chan") at para 25.5, these amendments represented an attempt to codify the English common law on intoxication, *viz*, the House of Lords decision of *Director of Public Prosecutions v Beard* [1920] AC 479 ("*Beard*"). In *Beard*, Lord Birkenhead LC, who delivered the leading judgment, observed at 500–502:

> 1. [I]nsanity, whether produced by drunkenness or otherwise, is a defence to the crime charged. …
>
> …
>
> 2. [E]vidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent.
>
> 3. [E]vidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.

15 It is very clear, even from a literal comparison, that there are several material differences between the principles laid down in *Beard* on the one hand and ss 85–86 of the Penal Code on the

other (see also Koh, Clarkson & Morgan at pp 233–240). This is significant in so far as judicial reliance on the English position on intoxication is concerned, all the more so because the principles set out in *Beard*, although having undergone further refinement, remain good law in England (see, *eg*, *Director of Public Prosecutions v Majewski* [1977] AC 443). In the same vein, ss 85–86 of the Penal Code are a substantial departure from ss 85–86 of the Indian Penal Code 1860 (Act 65 of 1860) ("the Indian Penal Code"), which is the statute upon which much of Singapore's Penal Code was modelled (see Stanley Yeo, "A Penal Code Reviser's Checklist" (2003) 23 Sing LR 115 at 117–118). The Indian provisions on intoxication are as follows:

> **85.** Nothing is an offence which is done by a person who, at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law: provided that the thing which intoxicated him was administered to him without his knowledge or against his will.
>
> **86.** In cases where an act done is not an offence, unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will.

16 What all this means is that considerable care must be taken before any reliance is placed on English and Indian authorities in this area of the law. The English position, for instance, places greater weight on the moral turpitude of the accused in becoming intoxicated (see Yeo, Morgan & Chan at para 25.6). The Indian position, on the other hand, focuses on whether "intoxication produce[d] such a condition [that] the accused los[t] the requisite intention for the offence" (see *Ratanlal & Dhirajlal's Law of Crimes: A Commentary on the Indian Penal Code 1860* (C K Thakker & M C Thakker eds) (Bharat Law House, 26th Ed, 2007) vol 1 ("*Law of Crimes*") at p 333). Therefore, before we can even contemplate the relevance (if any) of English and Indian jurisprudence, our focus must begin with *our* Penal Code provisions.

The ways in which the defence of intoxication may be invoked

17 There are essentially three avenues through which the defence of intoxication (as set out in our Penal Code) can be raised (see Yeo, Morgan & Chan ([14] *supra*) at para 25.3; see also Chan Wing Cheong, Michael Hor Yew Meng & Victor V Ramraj, *Fundamental Principles of Criminal Law: Cases and Materials* (LexisNexis, 2005) at pp 351–360), namely:

(a) where a third party maliciously or negligently caused the accused to become so intoxicated that the accused did not know his act to be wrong or did not know what he was doing (see s 85(2)(*a*) of the Penal Code);

(b) where the accused was so severely intoxicated as to have been insane at the time of the alleged crime (see s 85(2)(*b*) of the Penal Code); and

(c) where intoxication prevented the accused from forming the requisite *mens rea* of the offence in question (see s 86(2) of the Penal Code).

(1) Section 85(2)(a) of the Penal Code

18 Section 85(2)(*a*) of the Penal Code was *prima facie* inapplicable on the facts of this case as it was clear that any imbibing of alcohol by Tan leading up to the shooting was completely of his own volition. Hence, the sole question was whether Tan, as a result of his intoxication, was insane at the

time of the shooting (see s 85(2)(*b*)) or lacked the intention to cause physical injury to Lim when he fired the Beretta (see s 86(2)).

(2) Section 85(2)(b) of the Penal Code

19 Section 85(2)(*b*) of the Penal Code raises an interesting and perhaps hitherto judicially-unresolved point as to its relationship with s 84 of the Penal Code, *viz*, the defence of unsoundness of mind. For convenience, we reproduce s 84, which reads as follows:

> Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

20 Indeed, s 85(2)(*b*) has been identified as problematic because it is also not immediately clear if the alcohol-induced insanity alluded to in the provision must be long-standing (*eg*, *delirium tremens*) or whether it can be merely transient (which the words in s 85(2)(*b*), "temporarily or otherwise", would ostensibly permit (see Yeo, Morgan & Chan ([14] *supra*) at paras 25.32–25.35)). As an important aside, it should be noted that the question of whether unsoundness of mind has been established for the purposes of s 84 is ultimately a question of fact to be decided by the court in the light of any relevant medical evidence (see *PP v Chia Moh Heng* [2003] SGHC 108 at [6] and *PP v Han John Han* [2007] 1 SLR 1180 at [6]).

21 Regarding the first point (*ie*, the relationship between s 84 and s 85(2)(*b*) of the Penal Code), there are cases which imply that the concept of insanity under s 85(2)(*b*) is synonymous with unsoundness of mind under s 84 (see, *eg*, *PP v Tan Ho Teck* [1987] SLR 226 ("*Tan Ho Teck*") at 238, [34] and *PP v Jin Yugang* [2003] SGHC 37 at [86]). It is noteworthy too that, in the court below, the Judge, having considered the evidence of the expert witnesses, concluded (at [86] of the Judgment):

> [Tan] ... had not gone over the precipice of sanity. There was therefore no *unsoundness of mind* at the time of the shooting incident and s 85(2)(b) is also not available to [Tan]. [emphasis added]

22 Are the concepts of "unsoundness of mind" under s 84 and insanity by reason of intoxication under s 85(2)(*b*) precisely the same? There is perhaps some element of persuasiveness in the following observations made in Yeo, Morgan & Chan (at paras 25.26–25.27) that the two concepts are the same:

> It is very likely that the choice of the word 'insanity' for s 85(2)(b) was the result of sloppy drafting since it is difficult to identify any material difference between 'insanity' under the *M'Naghten* Rules [see *M'Naghten's Case* (1843) 10 Cl & Fin 200; 8 ER 718] and 'unsoundness of mind' under s 84 of our Penal Code. The view of some commentators that [s 84], particularly in relation to the concept of 'disease of the mind', is narrower than [s 85(2)(*b*)] is speculative and lacks the support of judicial authority. ...
>
> … [T]he function served by [s 85(2)(*b*)] is not to increase the scope of the defences of intoxication and unsoundness of mind, but to bring clarity to the law. It does so by describing the circumstances when alcohol or drugs can result in unsoundness of mind. Such a provision differentiates this type of case from ones where the accused regains normalcy as soon as the intoxication wears off. ...

23 On the other hand, it has been forcefully contended in Lee Kiat Seng, "Case Notes: Public

Prosecutor v. Tan Ho Teck" [1990] 2 SAcLJ 332 at 335 that:

> Under s 84 the accused has to prove that this state of mind [*ie*, the state of not knowing the nature of his act or not knowing that what he was doing was wrong] was due to unsoundness of mind, whereas under s 85 the accused has to prove instead that his state of mind was due to intoxication. This intoxication has, in addition, to have caused insanity. Thus, it can be seen that although the two provisions are very similar in that there is no perceivable difference between the prerequisite state of mind of the accused, the cause of this state of mind to be proved is different. Here the line must be drawn between unsoundness of mind and the notion of insanity under s 85.

24 We are of the view that the two concepts – *viz*, unsoundness of mind in s 84 on the one hand and insanity by reason of intoxication in s 85(2)(*b*) on the other – are indeed different. One should not be too astute to attribute statutory superfluousness to Parliament where the use of the word "insane" in s 85(2)(*b*) is concerned. Section 85(2)(*b*) refers to a different basis for exoneration from that afforded by s 84 as the former is grounded on intoxication-induced insanity. In contrast, the unsoundness of mind embraced by s 84 refers to an abnormal state of mind that covers diseases and deficiencies of the mind, both of which are invariably permanent conditions. The reference to "temporarily or otherwise" in s 85(2)(*b*) is neither accidental nor superfluous. These words do not refer merely to the temporary symptoms or effects of intoxication. Rather, they refer to an abnormal state of mind that can, *inter alia*, be transient. In short, s 85(2)(*b*) reinforces the point that an otherwise normal person can, under the influence of drink or drugs, become so intoxicated that he becomes legally "insane". This condition of insanity can be transient, as opposed to the unsoundness of mind envisaged in s 84, which *must* be permanent.

25 Our view, as just stated in the preceding paragraph, also addresses the question posed at [20] above, *viz*, whether the intoxication-induced insanity referred to in s 85(2)(*b*) must be permanent or whether it can be transient. In deciding on this particular point, we found it useful to return to the underlying philosophy underpinning the defence of intoxication. It is undoubtedly true that an accused person who commits a crime while suffering from unsoundness of mind or without the requisite *mens rea* should not be viewed as meriting the same sanction as a person who commits a crime while of sound mind and/or while having the requisite *mens rea*. The phrase "temporarily or otherwise" in s 85(2)(*b*) cannot but mean that even transient episodes of intoxication-induced insanity are to be considered as being embraced by s 85(2)(*b*). The provision could apply to an accused even if he does not have a prior mental illness or pre-existing mental deficiency. It should not be restricted in its application, as has been suggested (see, *eg*, the quotation at [22] above), to an accused suffering from a mental disorder who experiences normalcy between his bouts of illnesses. Why should s 85(2)(*b*) be thus restricted given that an accused who lacks the requisite *mens rea* by reason of s 86(2) is entitled to an acquittal? To be clear, this does not necessarily mean that an accused who succeeds in proving intoxication-induced insanity under s 85(2)(*b*) will be completely exonerated and therefore remain at liberty to commit more mischief or crime. An accused who can become *insane* (whether temporarily or otherwise) under the influence of drink or drugs is a danger to society, and consideration needs to be given to how future recurrent instances of "insane" homicide by such an accused can be prevented. Indeed, s 86(1) of the Penal Code prescribes that if an accused successfully invokes s 85(2)(*b*), "section 84 of this Code [*ie*, the Penal Code] and sections 314 and 315 of the Criminal Procedure Code shall apply". In particular, s 315(1) of the Criminal Procedure Code requires the trial court, where it has found that the accused did commit the act in question, to "order [the accused] to be kept in safe custody in such place and manner as the court thinks fit" after the trial; this provision gives the trial court the option of ordering the accused to be, *inter alia*, confined in a mental hospital. Given the penal consequences that flow from a successful invocation of s 85(2)(*b*), it is not surprising that this provision will seldom be invoked by

defence counsel if s 86(2) can be successfully relied on. Nevertheless, s 85(2)(*b*) does have its uses, as illustrated by cases such as *Tan Ho Teck* ([21] *supra*), which concerned an accused with a prior history of mental problems (the defence provided by s 85(2)(*b*) was successfully invoked in that case). As such, notwithstanding the rather limited utility of s 85(2)(*b*) and the practical reasons militating against its invocation, this provision should not be narrowly interpreted. We prefer to afford statutory defences greater interpretative latitude provided the interpretation adopted dovetails, in the final analysis, with both the letter and the intent of the provisions concerned.

26 On the facts of this appeal, Tan could not prove, clinically or otherwise, that he was suffering from intoxication-induced insanity to such a degree that he did not know that his actions were wrong or did not know what he was doing. We thus agreed with the Judge that the essential ingredients of s 85(2)(*b*) of the Penal Code were not satisfied.

(3) Section 86(2) of the Penal Code

27 We turn now to s 86(2) of the Penal Code, which is the last of the three avenues through which intoxication may be raised as a defence (see [17] above). Two requirements must be met before this subsection can be successfully invoked. First, the accused must show evidence of his intoxication. In this regard, objective evidence of the accused's level of intoxication is crucial (see *Jin Yugang v PP* [2003] SGCA 22 at [32]). Second, even if the accused can prove that he had consumed a considerable amount of alcohol, the surrounding facts must show that he was so intoxicated that he could not form the intention which is a necessary element of the alleged offence (see *Mohd Sulaiman v PP* [1994] 2 SLR 465 ("*Mohd Sulaiman*") at 474, [31]).

28 Unfortunately for Tan, the expert evidence did not take his defence under s 86(2) very far. Dr Munidasa Winslow ("Dr Winslow"), a senior consultant psychiatrist from the Institute of Mental Health who testified for Tan, concluded in his report dated 6 March 2007 that "despite the possibility of intoxication, [Tan's] ability to form intent was not impaired, and there was no evidence of any alcohol related psychotic process".[note: 4] Dr Winslow affirmed this conclusion while testifying in court, noting that "to be really intoxicated [such] that you cannot form an intent, usually [the] blood alcohol [level] will be about 200 milligrams per decilitre [of] blood or thereabout[s] and I did not find evidence of that in [Tan]".[note: 5]

Whether Tan could avail himself of the defence of intoxication

29 Indeed, there was nothing at all about Tan's conduct on that fateful day that attested to his having been so intoxicated at the material time that he could not form the requisite *mens rea*. On the contrary, Tan knew exactly what he wanted from the outset, and had Lim and Lim's family firmly under his control; after Lim was shot, Tan even had the presence of mind to dispose of the Beretta and escape to Malaysia. In our view, it was plain that this defence was entirely without merit.

The defence of accident

30 Section 80 of the Penal Code states:

> Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge, in the doing of a lawful act in a lawful manner, by lawful means, and with proper care and caution.

This provision operates as an exception to criminal liability in that, as explained in *Law of Crimes* ([16] *supra*) at p 287, it:

> ... exempts the doer of an innocent or [a] lawful act in an innocent or [a] lawful manner from any unforeseen evil result that may ensue from accident or misfortune. … The primordial requirement … is that the act should have been done with 'proper care and caution'.

Indeed, "the accused's conduct and its effect remain wrongful but the criminal law is prepared to exculpate him or her for that wrong on account of the extenuating circumstances comprising the accident" (see Yeo, Morgan & Chan ([14] *supra*) at para 18.3). For this defence to succeed, four rigorous conditions have to be fulfilled, namely:

(a) the act done by the accused must be the result of "accident or misfortune" (see s 80 of the Penal Code);

(b) the said act must be done "without any criminal intention or knowledge" (*ibid*);

(c) the said act must be lawful, and must be performed "in a lawful manner, by lawful means" (*ibid*); and

(d) the said act must be done "with proper care and caution" (*ibid*).

31 In the present case, it was glaringly obvious that, *inter alia*, the third and fourth of the above conditions had not been satisfied. To begin with, Tan had no lawful reason to carry the Beretta with him and force his way into the Flat on that fateful morning. As the Judge rightly observed (at [93] of the Judgment), everything that Tan did in the Flat that morning was unlawful, regardless of whether he had intended to ask Lim for a loan or to collect a debt from the latter or to merely force Lim to negotiate – in fact, according to Tan himself, he had intended to rob Lim (see [9] above). It is true that "lawful act" for the purposes of s 80 is not defined in the Penal Code. In this regard, some Indian courts have adopted the English common law view that unlawful conduct may take the form of either conduct which is unlawful in itself (*ie*, crimes *malum in se*) or conduct which would not be a crime except for legislation stipulating it to be such (*ie*, crimes *malum prohibitum*) (see Yeo, Morgan & Chan at para 18.14). We think that there is merit in this approach as it offers a useful touchstone to assess the legality or otherwise of the act in question. In the instant case, Tan's actions fell within both categories and clearly could not amount to "lawful act[s]" within the meaning of s 80 of the Penal Code. Furthermore, they could not by any stretch of (even) wild imagination be said to have been done with "proper care and caution" (*ibid*). For these reasons alone, the defence of accident would fail.

32 In any event, the Judge's determination that there was no chance at all that the six shots from the Beretta had been misfired was, simply put, irrefutable. According to David Loo Chee Long, an arms specialist from the Police Logistics Department, a force of 12*lb* was required to pull the trigger of the Beretta if the hammer was not cocked; if the hammer was cocked, the force required was 4*lb*. Since the Beretta did not have an automatic discharge function which allowed it to discharge more than one round at a time, the firing of six shots required, in the words of the Judge, "determined deliberateness" (see the Judgment at [94]). As the Judge went on to incisively remark (*ibid*):

> Even if the first shot was fired with the hammer cocked … the subsequent five shots must have been fired when the hammer was not cocked … If the subsequent shots were fired when the hammer was cocked each time, it begs the question [of] why the act of cocking the hammer was done five times continuously and accidentally during a fight. It was even more remarkable that five out of six accidental shots could hit [Lim] in various parts of his body from both front and back and from various angles.

33 Such a conclusion must be correct. Even though there was only one eyewitness to the shooting (*ie*, Risa), it is imperative to remember that, based on the evidence of Ms Lim Chin Chin ("Ms Lim"), Senior Forensic Scientist, at least two of the shots from the Beretta had been fired at a muzzle-to-target distance of more than 1m. This dispelled the notion that the shots had been fired inadvertently during a desperate struggle between Tan and Lim. While Tan also attempted to argue that there were inconsistencies between the experts' opinions, we were not convinced that any material inconsistencies existed. Specifically, Tan pointed out that Dr Teo Eng Swee ("Dr Teo"), the forensic pathologist who performed the autopsy on Lim, had stated that Lim's head might have been pressed against a hard surface when the final shot was fired, whereas Ms Lim had stated that Lim was probably standing near the piano in the study at that time. On a plain reading of these two opinions, it was difficult to accept the contention that there was a material contradiction between these two expert witnesses' evidence. It would have been quite different if the two experts had differed on where Lim actually was when the final shot was fired. However, this was not the case.

34 It is trite law that a scenario which favours the accused should be preferred in cases where multiple inferences may be drawn from the same set of facts (see *Tai Chai Keh v PP* (1948–49) MLJ Supp 105 at 108 and *PP v Chee Cheong Hin Constance* [2006] 2 SLR 24 ("*Constance Chee*") at [85]). In the present case, however, there was, in the final analysis, *no other inference* to be drawn as to how the Beretta could have discharged six rounds, with five bullets hitting Lim in his left thigh, his left arm, his back, his right cheek and his right temple respectively, other than the sole inference that Tan had fired the shots with the intention of hurting or killing Lim. It was inconceivable that Lim could have been merely incapacitated after five bullet wounds when Dr Teo had opined that either the shot to the back or the shot to the right temple would have killed Lim almost instantly. We inferred that some of these rounds had been discharged when Lim was no longer capable of defending himself, *ie*, such shots could only have been fired with the intention to hurt or kill Lim. Even if we excluded Risa's evidence (which we did not), the cumulative effect of all the circumstantial evidence led us to the irresistible conclusion that Tan had shot Lim with the intent to cause physical injury. In reaching this conclusion, we agreed with the measured approach adopted in *Sunny Ang v PP* [1966] 2 MLJ 195 (at 195) on the utility of circumstantial evidence. We also endorse the High Court's summary of principles expressed in *Constance Chee* (at [85]):

> The various links in the interlocking chain of evidence must establish a complete chain that rules out any reasonable likelihood of an accused's innocence. Guilt must be the only rational inference and conclusion to be drawn from the complete chain of evidence. In assessing the circumstances, the court should discount fanciful or speculative possibilities.

The right of private defence

35 With regard to the third and final defence pleaded by Tan, *viz*, the right of private defence, the basic premise is set out in s 96 of the Penal Code as follows:

> Nothing is an offence which is done in the exercise of the right of private defence.

The relevant provisions of the Penal Code which delineate the limits of this defence actually span 11 sections (namely, ss 96–106), and cover both defence of the body as well as defence of property. These provisions have been colourfully (and quite correctly) described as complex, disorganised and illogical in sequence (see Yeo, Morgan & Chan ([14] *supra*) at para 20.1 and Lee Kiat Seng, "Two Aspects of Private Defence" (1996) 8 SAcLJ 343 at 346).

36 It is useful to establish from the outset the principle that underlies this defence. An Indian perspective – which is instructive because the provisions in the Indian Penal Code on the right of

private defence employ the same language as that of the corresponding provisions in our Penal Code – is provided in *Law of Crimes* ([16] *supra*) at pp 371–372, as follows:

> [When] an individual or his property is faced with a danger and immediate aid from the State machinery is not readily available, that individual is entitled to protect himself and his property. The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger not of self creation. That being so, the necessary corollary is that the violence which the citizen defending himself or his property is entitled to use must not be unduly disproportionate to the injury which is sought to be averted or which is reasonably apprehended and should not exceed its legitimate purpose. The means and the force a threatened person adopts at the spur of the moment to ward off the danger and to save himself or his property cannot be weighed in golden scales. It is neither possible nor prudent to lay down abstract parameters to determine whether the means and force adapted by the threatened person was proper or not.
>
> …
>
> ... The right of private defence is purely preventive and not punitive or retributive. The right of self-defence is not a right to take revenge nor is it a right of reprisal. It does not permit retaliation. It is a right which in fact is meant to ward off the danger of being attacked but the danger must be so imminent, potent and real that it cannot be averted otherwise than by a counter attack. … [A]s soon as the cause for reasonable apprehension has disappeared and the threat has been destroyed or has been put to rout, there can be no occasion to exercise the right of private defence.

37 A similar view is provided in *Ratanlal & Dhirajlal's The Indian Penal Code* (Y V Chandrachud *et al* eds) (Wadhwa & Company, 31st Ed, 2006) ("*The Indian Penal Code*") at p 406:

> The need of self preservation is rooted in the doctrine of necessity and it is the law of necessity to which a party may have recourse under certain situations to prevent greater personal injury which he may apprehend. Instantaneous defensive action means a degree of necessity. Therefore, the right of self defence is based on necessity and without such necessity the right to resort thereto does not exist.

38 It is also well known that when the Indian provisions on the right of private defence were drafted, the drafters consciously provided greater latitude for the exercise of this right than that provided under English law. As stated in Koh, Clarkson & Morgan ([14] *supra*) at pp 120–121 (quoting from Macaulay, *The Works of Lord Macaulay* (1898) vol 2 ("Macaulay") at pp 55–56):

> It may be thought that we [*ie*, the drafters of the Indian Penal Code] have allowed too great a latitude to the exercise of this right; and we are ourselves of opinion that if we had been framing laws for a bold and high-spirited people, accustomed to take the law into their own hand, and to go beyond the line of moderation in repelling the injury, it would have been fit to provide additional restrictions. In this country the danger is on the other side; the people are too little disposed to help themselves; the patience with which they submit to the cruel depredations of gang-robbers and to trespass and mischief committed in the most outrageous manner by bands of ruffians, is one of the most remarkable, and at the same time one of the most discouraging symptoms which the state of society in India presents to us. Under these circumstances we are desirous rather to rouse and encourage a manly spirit among the people than to multiply restrictions on the exercise of the right of self-defence.

39 While the reasonable limits prescribed for the right of private defence will inevitably vary in a myriad of differing factual circumstances, it is imperative to first identify correctly the legal requirements which govern the existence or accrual of this right. It has been suggested (in Yeo, Morgan & Chan ([14] *supra*) at para 20.7) – and we agree – that there are two preconditions which must be satisfied before the right of private defence arises, namely:

(a) the person purporting to exercise the right of private defence (the "defender") must have been the subject of an offence (see s 97 of the Penal Code); and

(b) the defender must have attempted to seek help from the relevant public authorities if there was *a reasonable opportunity* for him to do so (see s 99(3) of the Penal Code).

In the present case, it was plain that both of these preconditions had not been met. Tan had not been the subject of any offence committed by Lim; on the contrary, it was Tan who was committing an offence against Lim. There was nothing to suggest that Tan made any attempt to seek help from the public authorities although he could easily have done so if he had been genuinely alarmed by Lim's alleged threat to send someone to kill him (see [5] above). As such, we agreed with the Judge's ruling that Tan could not avail himself of the right of private defence. That said, there are nevertheless two aspects of the Judge's decision that require further clarification.

40 First, at [96] of the Judgment, the Judge cited *Soosay v PP* [1993] 3 SLR 272 ("*Soosay*") as embodying a judicial distillation of the elements of the right of private defence. In *Soosay*, the defender ("S") was charged with murder for stabbing a person ("L") to death. Together with a friend ("K"), S had confronted L after suspecting the latter of stealing a watch and money belonging to another friend. On being confronted, L became abusive and drew out a knife. K ran away, but S kicked L and fought with him. In the course of the fight, S killed L by stabbing him several times with his (*ie*, L's) knife. The Court of Criminal Appeal dismissed S's appeal against his conviction for murder. The court held (at 281, [29]) that, in order to establish the right of private defence, the defender had to prove on a balance of probabilities that:

(a) the right of private defence had arisen;

(b) the right was exercised in good faith;

(c) the death of the person against whom the right was exercised (the "victim") was caused without premeditation; and

(d) the victim's death was caused without any intention of doing more harm than was necessary for the purposes of private defence.

On the facts, it was held that, although S had acted in good faith in defending himself, his right of private defence had ceased the moment the knife was dislodged from L's hold. When S took possession of the knife, there was no longer any apprehension of danger to his life, and, even if the right of private defence had not ceased at that point, it had been far exceeded by S's subsequent conduct.

41 One must bear in mind, however, that the court in *Soosay*, when it laid down the four requirements mentioned in the preceding paragraph, was ultimately dealing with Exception 2 to the offence of murder under s 300 of the Penal Code ("Exception 2"). This exception reads as follows:

Culpable homicide is not murder if the offender, in the exercise *in good faith* of the right of private

> defence of person or property, exceeds the power given to him by law, and causes the death of the person against whom he is exercising such right of defence, *without premeditation* and without any intention of doing more harm than is necessary for the purpose of such defence. [emphasis added]

This observation is important because whereas s 96 of the Penal Code operates as a general defence that will acquit an accused (*ie*, the defender) entirely of any offence, Exception 2 operates only as a defence to the specific offence of murder and does not exonerate the accused from liability for culpable homicide not amounting to murder, which is punishable under s 304 of the Penal Code. As a matter of logic, this must mean that it is more difficult to plead the general exception of the right to private defence as compared to Exception 2, even though the relationship between the two defences is, without question, a very close one (see Yeo, Morgan & Chan ([14] *supra*) at para 21.1 and *The Indian Penal Code* ([37] *supra*) at p 1299; see also [42] below). Furthermore, the elements of the defence under s 96 and those of the defence under Exception 2 are different. The lack of premeditation does not feature in the scheme of ss 96–106 of the Penal Code. The same can be said of good faith, which is a requirement under Exception 2 but not under s 96 (except for the purposes of Illustration (*b*) to s 98 and ss 99(1)–99(2)) (see, however, Koh, Clarkson & Morgan ([14] *supra*) at p 120, where it is stated (quoting from Macaulay ([38] *supra*) at pp 55–56) that the drafters of ss 96–106 of the Indian Penal Code "propose[d] ... to except from the operation of the penal clauses of the code large classes of acts done in *good faith* for the purpose of repelling unlawful aggressions" [emphasis added]). As such, the Judge's reliance on *Soosay* – which is, strictly speaking, better suited as an authority on Exception 2 – as authority for the right of private defence is not altogether appropriate.

42 We acknowledge, however, that the relationship between the defences provided by s 96 and by Exception 2, respectively, is a very close one (see also [41] above). The learned authors of Yeo, Morgan & Chan have helpfully provided (at para 21.12) a theoretical framework, which we agree with, as to how the two defences could apply in a situation where the defender has killed a person (*ie*, the victim) while purporting to exercise the right of private defence:

> (1) Were there circumstances giving rise to the right of private defence? If 'yes' both the general plea of private defence and Exception 2 may be available. If 'no' both pleas are unavailable and the inquiry is at an end.
>
> (2) Was the [defender] confronted with one of the specific types of threats mentioned in ss 100 or 103 [of the Penal Code], and did his or her act of killing constitute no more harm than was necessary to inflict for the purpose of private defence? If 'yes' the general plea of general defence is likely to be available. If 'no' the general plea is unavailable but Exception 2 may be available.
>
> (3) Was the [defender]'s act of killing done without premeditation and without an intention of doing more harm than was necessary for the purpose of private defence? If 'yes' Exception 2 is likely to be available. If 'no' the defence is unavailable.

The second of the scenarios postulated above presupposes, of course, that ss 97and 99(3) of the Penal Code are fulfilled where the defender seeks to rely on s 96 of the Penal Code, as opposed to Exception 2 (*id* at para 20.48). It should also be noted that the "specific types of threats mentioned in ss 100 or 103 [of the Penal Code]" (*id* at para 21.12) are predicated on the concept of whether the defender had reasonable cause to apprehend death or grievous hurt at the material time.

43 The second aspect of the Judge's decision on the right of private defence which we wish to

address is the Judge's reliance on *Mohd Sulaiman* ([27] *supra*) (which also cited by the Court of Appeal in *Mohd Iskandar bin Mohd Ali v PP* [1995] SGCA 86) as authority for the legal proposition that "it is inconceivable for an assailant to have a right of private defence against someone legitimately exercising his right of private defence against the assailant" (see [99] of the Judgment). The Judge held that since Tan had plainly been the aggressor at the material time, the right of private defence was inapplicable to the latter. His reasons for this conclusion, as set out in the Judgment, were as follows:

> 93 ... [Tan] was already in the process of robbing [Lim] and his family when [Lim] allegedly retaliated by attacking him [*ie*, Tan] when he returned to the study room. Even if so, [Lim] was doing no more than exercising his right of private defence of his body, of the body of his wife, daughter and domestic help [*ie*, Risa], and of his property against an armed robber who had trespassed into his home and who appeared ready and able to inflict death or grievous hurt … [Tan] was still strutting about the [F]lat in a most menacing manner, with knife and pistol [*ie*, the Beretta] in his hands …
>
> ...
>
> 97 ... Plainly, [Tan] was the agitated aggressor …
>
> …
>
> 99 On the law, it is inconceivable for an assailant to have a right of private defence against someone legitimately exercising his right of private defence against the assailant. … If it were otherwise, the right of private defence would swing back and forth infinitely between victim and assailant like a perplexed pendulum. ...

44 In other words, the Judge held that, while Lim would have been justified in causing harm or even death to Tan in the exercise of Lim's right of private defence (although Lim was found not to have used a chair to attack Tan (see [9] above and [99] of the Judgment)), the same defence (*ie*, the right of private defence) could not have been of avail to Tan. The Indian cases seem to echo the same point, *viz*, the defender generally has no right of private defence where he is the aggressor (see *Halsbury's Laws of India* vol 5(1) (LexisNexis Butterworths, 2006) at para 105.172). Hence, if the victim is attempting to defend himself (pursuant to his right of private defence), the defender/aggressor cannot invoke the right of private defence even if he is injured by the victim (*ibid*). Further, if deadly weapons are used by the defender/aggressor, "the intention of the [defender/aggressor] is clearly discernible and the right to private defence will not be sustained" (*ibid*).

45 As stated earlier (at [39] above), on the facts of the present case, we agreed with the Judge that Tan could not avail himself of the right of private defence. However, we would not go so far as to say that this right will *never* be available to a defender where he is also the initial aggressor; much will depend on the facts of the particular case at hand (see further [46] below).

46 We would also add that, on a more faithful rendition of ss 96–106 of the Penal Code, a modified sequence of the *conjunctive* requirements which must be satisfied in order to establish the *general exception* of the right to private defence of *the body* (as adapted from Yeo, Morgan & Chan ([14] *supra*) at para 20.48) is as follows:

> (a) Save for the situation where the defender is defending himself against an act of a person of unsound mind (see s 98 of the Penal Code), the defender must show that an offence

affecting the human body has been committed or is reasonably apprehended. This is to conform to the first of the preconditions mentioned at [39] above, *viz*, s 97 of the Penal Code.

(b) The defender must show that there was no time to seek the protection of public authorities. This is to conform to the second precondition stated at [39] above, *viz*, s 99(3) of the Penal Code. The test for whether the defender had time to have recourse to the protection of the public authorities is an objective one. In this regard, it should be noted that the Indian cases appear, quite correctly, to equate the words "time to have recourse to the protection of the public authorities" (see s 99(3) of the Penal Code) with "reasonable opportunity of redress by recourse to the public authorities" (see *Law of Crimes* ([16] *supra*) at p 406). Further, the defender should not be expected to seek the protection of the public authorities if the time needed to do so would result in the mischief being completed (see *The Indian Penal Code* ([37] *supra*) at p 459).

(c) If the defender was the aggressor at the material time, it is *prima facie* less likely that he had a right of private defence (*cf* the Indian position, which seemingly makes no room at all for a defender/aggressor to invoke this right (see [44] above; see also *The Indian Penal Code* at p 411)). Much would depend on the factual matrix of the case: if, for instance the defender was armed with a deadly weapon from the outset, it is very unlikely that the right of private defence would ever arise.

(d) The defender must prove that, at the time of acting in private defence, he reasonably apprehended danger due to an attempt or a threat by the victim to commit an offence affecting the body. This is a subjective test (the Indian position is the same in this regard (see *The Indian Penal Code* at p 406)).

(e) Where the defender has killed the victim, he has to prove that the offence which occasioned the exercise of the right of private defence was one of the offences listed in s 100, namely:

(i) an assault "as may reasonably cause the apprehension that death will otherwise be the consequence of such assault" (see s 100(*a*))

(ii) an assault "as may reasonably cause the apprehension that grievous harm will otherwise be the consequence of such assault" (see s 100(*b*))

(iii) an assault with the intention of committing rape (see s 100(*c*));

(iv) an assault with the intention of gratifying unnatural lust (see s 100(*d*));

(v) an assault with the intention of kidnapping or abducting (see s 100(*e*)); and

(vi) an assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release (see s 100(*f*)).

If the defender is unable to show that he exercised his right of private defence owing to one or more of the offences listed in s 100, his right of private defence will not extend to the causing of the victim's death, although s 101 would still permit him to cause "any harm other than death" to the victim.

(f) The defender must prove that the harm caused to the victim was reasonably necessary in private defence. Due allowance should be given to the dire circumstances under which the defender was acting.

This approach seeks to strike an appropriate balance between *criminally* harmful conduct and *justifiably* harmful conduct arising out of the defence of the person. We would like to stress that, notwithstanding the foregoing guidelines, whether the right of private defence has arisen and, if so, whether it has been exceeded in a particular case ultimately depends on all the relevant circumstances of the case.

Our findings on the defences raised by Tan

47 Having explicated the relevant principles, we now summarise our views on the substantive defences raised by Tan. In brief, we affirmed the Judge's decision to reject all three defences (*ie*, the defence of intoxication, the defence of accident and the right of private defence), and, consequently, the decision that Tan had failed to rebut the statutory presumption set out in s 4(2) of the Arms Offences Act. Tan had simply failed to adduce sufficient – or, more accurately, any – evidence to rebut that presumption, and his bare denials of any intention to cause Lim physical injury carried no weight (see *Tay Chin Wah v PP* [2001] 3 SLR 27 at [10]). We now turn to address the issues relating to procedural fairness which were raised on Tan's behalf before this court.

The issues relating to procedural fairness

The right to counsel

48 Dealing, first, with Tan's right to counsel, the argument made by Mr Anandan was that the Judge should have suggested to Tan that he use state-assigned counsel to assist him with his closing submissions. The failure of the Judge to do this, *combined* with the other two aspects of alleged procedural unfairness (*viz*, the conditions of remand which Tan faced and the Judge's decision not to visit the crime scene despite Tan's request that he do so (see [2] above)), meant that a retrial was necessary.

The context in which Tan's right to counsel arose

49 It is important to make clear from the outset the context in which Tan made his request for a lawyer. Several points need to be borne in mind, namely:

(a) Tan made this request only after both the Prosecution and the Defence (*ie*, Tan himself) had completed the examination of witnesses, *ie*, only closing submissions were due by the time the request was made;

(b) Tan had confirmed at least twice before the trial that he did not want a lawyer, and he confirmed this again twice on the first day of the trial; and

(c) Tan had chosen to discharge his counsel before the preliminary inquiry as he claimed that counsel would be unable to assist him.

50 It is equally important to examine the exchange which took place between the Judge and Tan when the latter made his request for a lawyer. For ease of reference, we reproduce below the relevant portions of the certified transcript of the notes of evidence of the trial ("the Notes of Evidence"):[note: 6]

Court: So next week, on ... Thursday, the 3rd of May, we will resume again, this time it's for submissions. Okay? I think I have explained to you already what you need to do and I have already asked the DPP [*ie*, Deputy Public Prosecutor Edwin San ("DPP San")] to prepare the submissions the last time. I think you have had a copy for more than 3 weeks already, right?

[Tan]: Yes.

Court: Okay. So you –

[Tan]: But Your Honour, I got [*sic*] one problem.

Court: Yes.

[Tan]: I cannot write my submission, I think one page only, have [*sic*] so many page[s].

Court: What do you mean you can't write?

[Tan]: My knowledge not enough to use [*sic*].

Court: Well, I asked you from day 1 whether you want[ed] a lawyer, but you said you [didn't] want. So I can't – I can't do anything else now. Okay, so you just have to do your best.

[Tan]: Cannot push.

Court: Yes?

[Tan]: Cannot lah, because I see the submission already, that is out of my knowledge already.

Court: *Well, it was a choice you made. I kept asking you are you sure you want to defend yourself in person, you said yes.*

[Tan]: *Defend, but I don't know that want [sic] to write, have to write so many things, I don't know. I think only just defend by asking, answer[ing] these questions okay already [sic].*

Court: No, I don't need you to write everything.

[Tan]: Oh, you don't need?

Court: What I mean is for you to – I give you pen and pencil, so that you can put all your thoughts down. Make it easier for you when you come back to Court. I am not asking you to make a written reply, if that's what you mean.

[Tan]: But only that the submission not [*sic*] like the DPP write so many page[s] like that, no need lah?

Court: No need, no need. You can – you can just come to Court and tell me what is it you want to submit on. Right. I [will] ask the prison authorities to give you pen and paper so that you can write down your thoughts, that's all.

[Tan]: Uh.

…

Court: Okay?

[Tan]: Yah, okay.

Court: Okay. So you have to be prepared for next Thursday's submissions.

[Tan]: Next Thursday.

Court: Okay.

[Tan]: Okay.

Court: Will you be making any additional points, Mr San?

[DPP] San: No, your Honour, I think we stick by our submissions which we have tendered.

Court: Okay. So you will not be – sorry, so the DPP will not be adding anything else to what he has already submitted and given to you.

[Tan]: Okay.

Court: Okay? So you can make your notes on the DPP's submissions or you can make your own notes, whatever.

…

[Tan]: *If I say I need a lawyer how [sic]?*

Court: I sug – just explained to you [that] from day one I kept asking you, "Do you want a lawyer" and you kept saying, "No".

[Tan]: No, you know, you must understand what – what –

Court: Yes.

[Tan]: – why is [*sic*] I facing the problem. Do you know ... why I don't want a lawyer? Before I come to this Court, in the Sub Court there I was remand[ed] in CMC. If I take a lawyer they all never transfer me to QRP, so I don't want [to] take [a] lawyer. Because all the remandee[s] would remand [*sic*] in QRP. Why I [*sic*] so special put [*sic*] in CMC? Then the Sub Court ... order put me to C – QRP don't know which one is [*sic*] obey court order, "Put you to CMC". Can you help me to check out this person, who is that?

Court: Sorry, what – what is CMC?

[Tan]: CMC means Changi Prison.

Court: Okay.

[Tan]: Uh. Who is the one to disobey court order, put me to CMC, please?

Court: … I don't quite follow what [this has] got to do with your request now for a lawyer?

[Tan]: No, no, you see, that time before all the remandee[s] lock [*sic*] up in Q – er, remand QRP, er, but I different [*sic*]. They brought me to CM – C – CMC.

[DPP] San: Your Honour, Mr Tan is deliberately being devious, your Honour. I remember during the [preliminary inquiry] and during the – during this – before this trial, your Honour, your Honour, he had ample opportunities to get a lawyer. So whether he [was] in the CMC or the QRP, it makes no difference. I – I – I think he's just trying to mislead the Court, your Honour.

[Tan]: No misuse. This one I [*sic*] facing the special treatment. So that I confused [*sic*]. Where got [*sic*] law in this country?

…

Court: Well, the registry offered you [a] defence lawyer, right? But you told the prison authorities you [didn't] want a lawyer. Right?

[Tan]: Yes, because [at] that time he put me in CMC. If I took a lawyer he never transfer [*sic*] me to QRP. You know, the CMC there under – I got locked up [for] 200 over day[s] never see sun [*sic*]. Not – never see the – see the sun before, 200 over day[s].

Court: You see, you never ma[d]e any other request from the time you were charged in Court until now?

[Tan]: Have.

Court: Huh?

[Tan]: I have already mentioned in the Sub Court but they all don't bother. They all say what? Ask my doc – lawyer to say. So I cannot speak. So I discharged my lawyer. From the beginning I ... engaged a lawyer. But the judge Sub – Sub Court I want to explain my problem he said, "No, you ask your lawyer to come". Then my lawyer said, "This one is the regulation". I [said], "Different". I [said], "I got lock[ed] up [in] isolation what [*sic*] – not keep under the sun. This one is not suitable for human being [*sic*]". But he said he [couldn't] do anything. I [said] then – then means what [*sic*], I discharged my lawyer. I want to talk to the judge. But he don't bother me. Until now [*sic*] I got the chance to say.

…

[Tan]: No prisoner – I think you can check I think the remandee[s] all can mix together, but I only [*sic*] different.

Court: Well, I –

[Tan]: Why?

Court: I believe the prison authorities must have its reasons.

[Tan]: If – I got ask [*sic*] the superintendent.

Court: Yes.

[Tan]: He give me the reason very [*sic*], very funny, you know. He said afraid [*sic*] that I mix with other inmate[s] they all will kill me or chop off – chop off my hand, my leg. Why like that [*sic*]? Singapore prison got parang *toh*, ah [*sic*].

Court: Okay. So –

[Tan]: So, okay, mm.

Court: – any further matters?

[Tan]: *No. Uh, any further, ah. Want to make complain [sic] only …*

[emphasis added]

51 We were not persuaded that Tan was serious – or, for that matter, clear – when he made his alleged request for a lawyer. He had merely mentioned tentatively the possibility of appointing a lawyer to represent him (as evinced by his question to the Judge, "If I say I need a lawyer how [*sic*]?"), and had not been evidently keen on pursuing that option. By the same token, the Judge did not expressly reject Tan's request for a lawyer either. That said, we think it will be helpful to the legal community if greater clarity is brought to the issue of whether the right to counsel can ever be considered to have been waived by an accused, or to be in some way subordinated to competing interests. It is, after all, not entirely fanciful to suggest that there will be accused persons who persistently refuse legal representation in good faith, only to discover, after all is said and done, that trials are complex proceedings in respect of which legal assistance is required. Can there ever be a situation where it would not be unfair to refuse an accused who is voluntarily unrepresented access to counsel, knowing full well that the absence of counsel in relation to an accused charged with a capital crime will very often be a severe handicap?

Whether there are circumstances in which the right to counsel can be validly denied to or waived by an accused

(1) The constitutional right to counsel

52 Any argument relating to the right to counsel leads invariably to Art 9(3) of the Constitution, which states:

> Where a person is arrested, he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

53 The jurisprudence engendered by Art 9(3) has revolved around a variety of interrelated issues, such as when an accused should be allowed access to counsel after he has been arrested (*eg*, *PP v Leong Siew Chor* [2006] 3 SLR 290 at [87]–[88]), whether an accused should be informed of his rights under Art 9(3) (*eg*, *Rajeevan Edakalavan v PP* [1998] 1 SLR 815 at [19]), whether an accused has a further right to contact third parties to discover and inquire into his right to counsel or the legal consequences of his arrest (*eg*, *Sun Hongyu v PP* [2005] 2 SLR 750 at [34]) and whether the right to counsel is available only if there are lawyers who are willing to represent the accused (*eg*, *Balasundaram v PP* [1996] 2 SLR 331 at 333–337, [6]–[18]). In other words, these cases involve the question of when the right to counsel *becomes available*. In contrast, the question in the present appeal leans more towards whether and/or when this right can be validly *denied to or waived by* an

accused. Additionally, the contours of Art 9(3) have hardly been explored in the context of an accused who voluntarily appears in person, although there is the case of *Soong Hee Sin v PP* [2001] 2 SLR 253 ("*Soong Hee Sin*"). There, Yong Pung How CJ, commenting on the duties of a judge in such a situation, pertinently observed at [8]:

> If an accused person voluntarily chooses not to avail himself of his constitutional right to an advocate, it cannot be that the judge's duty towards him then suddenly becomes more arduous than it would have been had counsel been appointed, for an unfair advantage would then accrue to accused persons who do not consult their own lawyers. Indeed, to accept counsel's submissions in this case would create an incentive for accused persons not to instruct their own lawyers, knowing that they can depend on the judge for legal advice, with the latter's failure to do so then amounting to easy grounds for an appeal.

54 In the light of the above cases, it can be stated with certitude that the right to counsel cannot be said to be an untrammelled or enduring and/or unwaivable right. In this regard, we disagree with the view that although the time at which the right to counsel is exercisable is qualified, the right itself is absolute (see Tan Yock Lin, *Criminal Procedure* (LexisNexis, 1996, December 2007 release) vol 1 at ch 2, paras 254–300).

5 5 *Prima facie*, it can usually be said that the denial or deprivation of an accused's right to counsel would almost invariably be considered to be unduly prejudicial to the accused and, quite plainly, unconstitutional. In the present case, however, we had a unique factual matrix whereby the accused (*ie*, Tan) had persistently indicated his desire not to have legal representation, only to "attempt" to invoke and/or inquire about his right to counsel at the eleventh hour. In these circumstances, the question of whether it would be unduly prejudicial and/or unconstitutional to deny the accused his right to counsel should be considered not merely from the viewpoint of prejudice to the accused, but also from the viewpoint of prejudice to the other interested parties (*eg*, the witnesses involved, the Prosecution and the court itself) as well. In short, it is necessary to balance the rights of and prejudice to the accused, on the one hand, and to the other parties involved in the proceedings, on the other. In relation to this issue, we also found it instructive to consider a range of decisions from Commonwealth countries as well as the US.

(2) Case law on the right to counsel

(A) MALAYSIAN CASES

56 It would be appropriate to start with a review of the Malaysian cases, since Art 5(3) of the Federal Constitution uses the very same language as that in our Art 9(3). In *Mohamed bin Abdullah v Public Prosecutor* [1980] 2 MLJ 201 ("*Mohamed bin Abdullah*"), although counsel for the accused had been away on urgent business, the trial of the accused in the absence of his counsel was held to be proper and was not vitiated. This holding was based on the principle that the right to counsel did not in any way restrict the power of the court to fix any date for the hearing of a case. Harun J stated (at 203):

> The general principle of course is that trial dates should be fixed at the convenience of the court. This is the only way some order can be maintained … In practice, trial dates are fixed well in advance giving ample notice to all concerned and there is no reason why most cases should not be heard on schedule except in the rare case where death or sudden illness has intervened … Unless courts are in full command of their proceedings, the administration of justice will be chaotic and respect for the law that much diminished.

57 An earlier Malaysian decision, *Mohamed Ekram v Public Prosecutor* [1962] MLJ 129, although not involving constitutional arguments, established the proposition that whether an accused was entitled to an adjournment to obtain legal representation depended on the merits of each application. The Malaysian cases also unequivocally suggest that the grant of an adjournment of a trial to enable an accused to seek legal representation is a matter entirely within the discretion of the trial judge, and the appellate court will be slow to interfere with the exercise of such discretion unless it appears that the refusal of an adjournment has caused an injustice to the accused (see, *eg*, *Tan Eng Hoe v Liang Hooi Kiang* [1961] MLJ 119).

58 The Malaysian position has in fact been approved and adopted by our High Court. In *Balasundaram v PP* [1996] 2 SLR 331 ("*Balasundaram*"), the accused, who had been unable to secure the lawyer of his choice in time for his trial, was convicted. He appealed against his conviction on the basis that a miscarriage of justice had been occasioned by the trial judge's refusal to grant him an adjournment so as to enable him to be represented by counsel of his choice. The court dismissed the appeal, holding (at 333–334, [9] and [11]):

> Although the appellant's right to counsel is clearly spelt out in the Constitution as well as in the Criminal Procedure Code, *this right is not an unqualified right.* …
>
> ...
>
> … [I]t is clear from the authorities that, if counsel fails to turn up or is not willing or able to act for the accused person, the latter cannot by virtue of this fact alone claim that his constitutional right has been violated and as such any proceedings against him are rendered null and void. *The question then is whether there [was] a miscarriage of justice* when the trial judge refused the appellant's application for an adjournment thus depriving him of ... representation [by the lawyer of his choice].
>
> [emphasis added]

Further, the court noted that the accused had had ample opportunity to be represented by other counsel who were willing and able to take on his case, but had instead chosen not to avail himself of the opportunity. It stated (at 336, [15]) that the reasonableness of the behaviour of the accused was a relevant factor in considering whether any miscarriage of justice had arisen on the facts of the case:

> As observed by the trial judge, the appellant apparently did not want nor considered any other solicitor to represent him. His attitude was plainly unreasonable. … This was not a situation in which the appellant had been deprived of any representation. In fact, it would seem that the appellant had displayed scant respect for the court and its judicial process by subjecting it to his ever-changing whims and fancies.

59 The Malaysian cases cited above (at [56]–[57]) are admittedly of some antiquity. While that does not necessarily translate to outdated or outmoded legal thinking, the apparent pragmatic focus on the difficulties of adjourning and rescheduling court hearings (as pointed out in, *inter alia*, *Mohamed bin Abdullah* ([56] *supra*)) may not be as compelling today. What does remain compelling, we believe, is the overarching issue of whether any real prejudice and unfairness has been caused by denying the accused the right to counsel (which includes the right to be represented by a particular lawyer of his choice), something which has not been addressed fully by the Malaysian cases. In this regard, we found a trio of Privy Council decisions on appeals from Jamaica helpful.

(B) PRIVY COUNCIL DECISIONS ON APPEALS FROM JAMAICA

60 Section 20(6) of the Constitution of Jamaica 1962 ("the Jamaican Constitution") provides that:

> Every person who is charged with a criminal offence —
>
> …
>
> c. shall be permitted to defend himself in person or by a legal representative of his own choice ...

It should also be noted that s 20(6)(b) of the Jamaican Constitution states that every person who is charged with a criminal offence shall be given "adequate time and facilities for the preparation of his defence".

61 In *Frank Robinson v The Queen* [1985] 1 AC 956, the majority stated that while an accused must not be prevented by the State from exercising his right to have legal representation, an accused who failed to take reasonable steps to ensure that he was legally represented at his trial could not reasonably claim that the lack of legal representation amounted to a deprivation of his constitutional rights. Lord Roskill, who delivered the judgment of the majority, stated (at 966):

> In their Lordships' view the important word used in section 20(6)(*c*) [of the Jamaican Constitution] is "permitted." [The accused] must not be prevented by the state in any of its manifestations, whether judicial or executive, from exercising the right accorded by the subsection. He must be *permitted* to exercise those rights. It is apparent that no one could have done more than the judge to secure the defendant's representation by counsel of his choice. ... [T]wo counsel were on the record [as the defendant's lawyers] and the judge refused them leave to withdraw. It was those two counsel who in defiance of the judge's refusal of leave to withdraw absented themselves and thus left the defendant unrepresented. The judge even invited Mr. Soutar [one of the two lawyers on record as acting for the defendant] to appear on legal aid. Mr. Soutar refused. Faced with this position the judge exercised his discretion not to grant a further adjournment. It is clear that it was the repeated adjournments in the past coupled with the facts of Irving's [the key prosecution witness's] previous absences, his current presence and the risk of his future disappearance, which weighed with the judge in refusing a further adjournment. It is also clear [that] the judge was influenced by the fact that when Mr. Soutar refused to appear on legal aid, a grant of a legal aid certificate to other counsel must necessarily have entailed yet another adjournment.
>
> In their Lordships' view the judge's exercise of his discretion ... can only be faulted if the constitutional provisions make it necessary for the judge, whatever the circumstances, always to grant an adjournment so as to ensure that no one who wishes [to have] legal representation is without such representation. ***Their Lordships do not for one moment underrate the crucial importance of legal representation for those who require it. But their Lordships cannot construe the relevant provisions of the [Jamaican] Constitution in such a way as to give rise to an absolute right to legal representation which if exercised to the full could all too easily lead to manipulation and abuse*.**
>
> [emphasis added in bold italics]

Notwithstanding the above views, the Privy Council was mindful of whether the absence of legal

representation had resulted in any risk of injustice to the accused. To that end, they considered (*id* at 968–969) whether the accused would have had greater success in cross-examination had he been legally represented, whether the calling of more alibi witnesses for the accused would have made a difference and whether the trial judge had directed the jury fairly. The majority concluded (*id* at 969) that no miscarriage of justice had occurred (*cf* the dissenting judgment of Lord Scarman and Lord Edmund-Davies (*id* at 969–974)).

62 In *Errol Dunkley v The Queen* [1995] 1 AC 419, Lord Jauncey of Tullichettle, delivering the judgment of the Privy Council, held (at 427) that "there [was] no absolute right to legal representation throughout the course of a murder trial although it [was] obviously highly desirable that defendants in such trials should be continuously represented where possible". In *Delroy Ricketts v The Queen* [1998] 1 WLR 1016, the counsel assigned to defend the accused withdrew on the ground that he could not get any instructions from the accused. It was held that since "[the accused] had counsel and there was no suggestion that he objected to this particular counsel ... [but] ... chose not to instruct counsel to put forward his defence and to challenge the prosecution case" (at 1020), the accused's constitutional right to counsel had not been contravened.

63 Based on the above Privy Council cases and *Balasundaram* ([58] *supra*), it would appear that whether an accused who has not been able to obtain legal representation or who has not been able to appoint the lawyer of his choice to act for him has had his constitutional right to counsel violated depends on whether his invocation of such right was reasonable, and whether the absence of legal representation was prejudicial to him in all the circumstances of the case. Does this then mean that an accused can potentially have his right to counsel extinguished by his own conduct, for example, through a waiver of this right? The Canadian and the American positions offer some interesting insights into this point.

(C) CANADIAN AND AMERICAN CASES

64 Under s 10 of the Canadian Charter of Rights and Freedoms (which forms Pt I of Canada's Constitution Act 1982), it is provided that:

> Everyone has the right to on arrest or detention
>
> …
>
> (*b*) to retain and instruct counsel without delay and to be informed of that right …

65 In the Alberta Court of Appeal decision of *R v Smith* (1986) 46 MVR 47; 32 CRR 215; 74 AR 64 ("*Smith*"), the accused was stopped while he was driving and was asked to provide a breath sample. He refused and was convicted of the offence of unlawfully failing to provide a breath sample for roadside analysis. He appealed against his conviction on the ground that the police had failed to advise him on his right to counsel after the demand for a breath sample was made. The Alberta Court of Appeal dismissed the appeal, holding at [10] that (*inter alia*) the accused's right to counsel had simply been deferred, but had not been extinguished.

66 The decision in *Smith* appears to indicate that an accused's constitutional right to counsel cannot be extinguished. The oft-cited Supreme Court of Canada case of *R v Prosper* [1994] 3 SCR 236 ("*Prosper*"), however, does suggest that this right can be extinguished if the accused *chooses* to waive it. *Prosper* similarly involved a driver who had to provide a breath sample. He was asked by the police if he wanted to speak to a lawyer first. He replied in the affirmative, but was unsuccessful in contacting any of the lawyers in a list (provided by the police) of legal aid

lawyers. The accused then said that he could not afford to engage a lawyer in private practice and proceeded to take the breathalyser tests, which he failed. The accused was subsequently charged with the offence of having care and control of a motor vehicle while his blood alcohol level was above the legal limit. One of the questions before the Supreme Court of Canada was whether the accused had waived his right to counsel. The court, after considering a number of its previous decisions, held at 274–275 (*per* Lamer CJ) that while an accused could waive his right to counsel, rigid conditions had to be met before the court could make a finding that the accused had waived this right:

> Given the importance of the right to counsel, I would ... say with respect to waiver that once a detainee asserts the right there must be a clear indication that he or she has changed his or her mind, and the burden of establishing an unequivocal waiver will be on the Crown … Further, the waiver must be free and voluntary and it must not be the product of either direct or indirect compulsion. This Court has indicated on numerous occasions that the standard required for an effective waiver of the right to counsel is very high: *Clarkson v. The Queen*, [1986] 1 S.C.R. 383 … [A] person who waives a right must know what he or she is giving up if the waiver is to be valid.

6 7 *Clarkson v The Queen* [1986] 1 SCR 383 ("*Clarkson*"), which was referred to in *Prosper*, held that for a voluntary waiver to be valid and effective, the accused must have a "true appreciation of the consequences of giving up the right [to counsel]" (see *Clarkson* at 396 *per* Wilson J). This is a more general proposition than the American position (which was discussed in *Clarkson*), under which there must be "an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter" (see the US Supreme Court decision of *Von Moltke v Gillies* 332 US 708 (1948) at 724) before an accused's waiver of his right to counsel will be deemed to be valid and effective.

(D) ANALYSIS OF THE CASES

68 It is apparent that, for the purposes of determining whether the denial of counsel to an accused amounts to a violation of the latter's constitutional right, a common foundation upon which the foreign cases surveyed above rests is the universal concept of fairness to the accused. The Canadian and the American cases have even come up with specific parameters to define what a valid waiver of the right to counsel entails (see [66]–[67] above). For now, we do not think it is necessary to propound a specific test, in our local context, on how and when the right to counsel may be validly waived by or denied to an accused because we think that a more broad-based, fact-centric approach to this question is preferable. Such an approach should also factor in the competing interests (if any) of other concerned parties, while maintaining at the same time the focus on whether any *undue unfairness or prejudice* has been caused to the accused as a result of his lack of legal representation – in short, a holistic approach should be adopted. (The preceding remarks presuppose, of course, that the accused has already been given an opportunity to avail himself of his right to counsel.)

Whether Tan's constitutional right to counsel had been violated

69 If one approaches the issue of denial of access to counsel from the angle of prejudice, one will no doubt identify several flaws in Mr Anandan's argument that Tan's constitutional right to counsel had been violated in the present case. First, Tan had persistently refused legal representation throughout the proceedings, even going to the extent of discharging his lawyer before the preliminary inquiry for reasons that can only be described as bemusing. It is ironic, to say the least, that the Judge, whom Tan accused in this appeal of falling short in his duty to ensure that Tan had access to counsel, is the very same judge who had:

(a) confirmed twice with Tan on the first day of trial that Tan did not need a lawyer; and

(b) knowing that Tan would have difficulties in navigating the labyrinths of criminal law and procedure, taken considerable pains to explain to Tan what had to be done at each point of the trial.

It was plain to us from the record that the Judge went beyond the norm in trying to ensure that Tan could follow the proceedings.

70 Second, to bring on board a lawyer at the stage in the proceedings when Tan made his (apparent) request for counsel – *ie*, after all the witnesses had been examined and just before closing submissions were due – would have, to put things mildly, engendered confusion without any real accompanying benefits to Tan (see further [71] below). If Tan's would-be counsel were allowed by the court to cross-examine the witnesses all over again and devise new submissions, that would surely be unfair to the Prosecution, which had already presented its case, and, indeed, to all the other relevant parties, such as the witnesses if they had to be recalled. On the latter point, we would draw attention to this court's ruling in *Sim Cheng Hui v PP* [1998] 2 SLR 302 that the court's power to recall witnesses in criminal proceedings should be exercised "sparingly and judiciously to the just decision of the case" (at [30]). Put another way, fairness is a multi-faceted concept even in criminal proceedings, and a concession to an accused's right to counsel cannot be allowed to progress to an abuse of the judicial process.

71 On the other hand, if Tan's would-be counsel were not permitted to cross-examine the witnesses all over again and were restricted to making new submissions, then – notwithstanding the importance of closing submissions in a trial – the apparent benefits of permitting Tan to engage counsel at that stage of the proceedings would have been quite considerably diminished on the facts of this case. Mr Anandan, when queried by this court as to whether he would have done anything other than prepare closing submissions had he taken over the case in the High Court pursuant to Tan's (apparent) request for a lawyer, gave a forthright reply in the negative. He also said that, having had some three months to peruse the Notes of Evidence, he would not have sought leave to adduce any further evidence or to call in any other experts to refute the Prosecution's experts. All said and done, Tan's opportunity to have counsel argue the present appeal was, in this particular case, *not very different* in *practical* terms from the opportunity to have counsel make closing submissions on his behalf at the trial. On the evidence that was presented before this court, it was difficult to maintain the position that it would have made a critical difference for Tan had he been represented by counsel for the purposes of making closing submissions at the trial. In the circumstances, we were not at all persuaded that fairness to Tan had been compromised due to his lack of legal representation in the court below. It should be stressed, however, that we are by no means saying that the availability of legal representation at the stage of closing submissions (where such representation has been lacking in preceding stages of the trial) will invariably never make a difference; each case will have to be assessed on its own facts.

72 This brings us to the third difficulty which we have with Mr Anandan's contention *vis-à-vis* Tan's right to counsel – which is that there was no resulting unfairness or prejudice to Tan despite his lack of legal representation at the trial. The preponderance of the decisions cited above (at [58] and [61]–[62]) support the view that the conduct of the accused is a relevant factor when assessing whether the denial of counsel to the accused has occasioned any unfairness or prejudice. At the risk of putting this too bluntly, if Tan had indeed been denied his constitutional right to legal representation at the trial, it would have been his fault alone. The facts of the present case were far removed from those in *Dietrich v The Queen* (1992) 177 CLR 292 ("*Dietrich*"), a decision of the High Court of Australia. In *Dietrich*, the accused, who was unrepresented at his trial, was convicted of the

offence of trafficking in heroin. The Australian High Court allowed the accused's appeal against his conviction because the accused had applied on numerous occasions to be represented by state counsel but had had his applications rejected. In contrast, in the present case, Tan was informed of his right to counsel from the outset, and was given a number of opportunities to either engage or be assigned a lawyer. As stated at 343 of *Dietrich* (*per* Dawson J):

> ... *[N]ot every refusal of an adjournment for the purpose of obtaining counsel will amount to a refusal to allow an accused to exercise his right [to counsel].*The accused may previously have had adequate opportunity to pursue his entitlement and [may] have failed to do so. An adjournment may be sought for merely tactical reasons and not for the genuine purpose of obtaining representation. And no counsel may be available because the accused lacks the means to secure representation and all avenues to obtain legal aid have been explored unsuccessfully.
>
> ... [T]here cannot be a miscarriage of justice merely because an accused is unrepresented when he has no entitlement to representation.*Obviously, in some trials a defect may be more likely to occur in the course of the trial because of an accused's lack of representation, but it is the defect which must be relied upon on appeal, not the lack of representation.*
>
> [emphasis added]

73 Finally – and this was conceded by Mr Anandan – it was clear to us, from our perusal of the Notes of Evidence, that the Judge had tried to guide Tan along as much as possible to facilitate the presentation of the latter's submissions. On the totality of all the facts of the case, it could not even begin to be said that Tan's constitutional right to counsel had been violated; neither was it tenable to argue that the Judge was obligated to repeatedly remind Tan of the possibility of availing himself of state-assigned counsel or to insist that Tan engage such counsel. As far as Tan's lack of legal representation at the trial was concerned, it did not, in these circumstances, give rise to any irregularity or unfairness that would void the trial.

Whether Tan's remand at CMC was oppressive

74 Tan was first remanded at CMC on 15 March 2006 for his psychiatric assessment; that was some two months after he was apprehended. Mr Anandan submitted that there was no apparent reason for Tan to continue to be held at CMC after the psychiatric assessment was completed on 14 May 2006, especially when the latter was preparing for his trial without the assistance of counsel. Although the prison authorities had stated that Tan had been kept at CMC until 27 October 2006 in view of security considerations, Mr Anandan claimed that this was not a consistent position on the part of the prison authorities as Tan was later transferred to QRP on 27 October 2006 and was remanded there for the remaining three months leading up to his trial in January 2007. Mr Anandan did clarify, however, that he was not arguing that there had been *mala fides* on the part of the prison authorities; rather, his point was simply that CMC was not the most conducive of environments to be remanded in, and Tan, as a result of being held in remand there, had been hampered in his preparations for his trial.

75 CMC is first and foremost a legitimate place for remand. Pursuant to s 44(1) of the Prisons Act (Cap 247, 2000 Rev Ed), the Director of Prisons has the discretion to determine where prisoners shall be confined. As Mr Anandan was not relying on the argument of bad faith on the part of the prison authorities *vis-à-vis* Tan's remand, the only way in which he could show procedural unfairness in this regard would be by persuading this court that Tan's remand at CMC had been oppressive. In the absence of evidence of *mala fides* and/or oppression, there was no basis for us to find that it had been procedurally unfair to continue to hold Tan in remand at CMC after his psychiatric assessment

was completed.

76 The only evidence before us on this issue, far from supporting Tan's complaint that it was unfair to continue to remand him at CMC after his psychiatric assessment was completed, served only to reinforce the unmeritorious nature of this particular complaint. At all material times while he was at CMC, Tan had access to the materials necessary for preparing for his trial. In a handwritten letter to the Supreme Court Registry dated 7 September 2006 (about a month after he discharged the lawyer who had originally represented him), he confirmed again that he did not require counsel for his defence. Six weeks later, he again affirmed his decision not to be legally represented during the preliminary inquiry. It bears mentioning that all this took place during the period when Tan was still remanded at CMC. If it were indeed the case that he had been subjected to oppressive conditions of remand at CMC such that his preparations for the trial were hampered, why did he still insist on rejecting legal representation while he remained at CMC? Furthermore, why did Tan raise his grievances about the alleged oppressive conditions of remand at CMC only during the trial, and not prior to that? Tan had no credible response to these questions. In our view, the argument that Tan had been remanded in oppressive conditions was most likely an *ex post facto* one whimsically predicated on unsubstantiated allegations.

Whether the Judge was obliged to visit the crime scene

77 In the court below, Tan questioned the credibility of Risa's account of the first gun shot on the fateful day, stating that it was impossible for her to have witnessed that shot (see [9] above). To substantiate this contention, Tan invited the Judge to visit the Flat, which the latter declined to do. Before this court, Tan contended that the Judge's acceptance of Risa's testimony (that Tan had fired the first shot at Lim's face) and his refusal to visit the Flat had denied Tan "an important tool to properly assist the ... Judge."[note: 7] Tan's request that the Judge visit the Flat, counsel submitted, was not unreasonable as other judges had inspected the relevant incident sites in some earlier cases so as "to get a better feel of the scene".[note: 8]

7 8 It was apparent from the Judgment that the Judge, after carefully assessing the evidence, accepted Risa's testimony of the material events and ruled that Tan had intentionally fired the first shot at Lim's face. In challenging the Judge's decision not to visit the scene of the shooting, Tan was in reality seeking to overturn one of the Judge's findings of fact (although this point was not explicitly argued in that manner by Mr Anandan).

79 We saw no reason to interfere with any of the Judge's findings of fact. The principles governing appellate interference with a trial judge's factual findings are well established in the local case law. First, if the trial judge has heard all the evidence of the witnesses in full, his findings should be taken as *prima facie* correct and should not be disturbed in the absence of sound reasons. Indeed, an appellate court will be slow to overturn the trial judge's findings of fact unless it can be shown that those findings were plainly wrong or were against the weight of the evidence before the court (see *Lim Ah Poh v PP* [1992] 1 SLR 713 at 719, [32]). In the same vein, if the trial judge's findings of fact are based on his assessment of the witnesses' veracity and credibility, the appellate court would be even more reluctant to overturn such findings (see *Yap Giau Beng Terence v PP* [1998] 3 SLR 656 at [24]). However, where the trial judge, in convicting an accused, has relied solely on a witness whose testimony was riddled with material contradictions and improbabilities, the conviction of the accused may be unsafe (see *Yeo Eng Siang v PP* [2005] 2 SLR 409 at [50]). (In this regard, if only minor inconsistencies exist in a witness's testimony, such inconsistencies should not be held against the witness's credibility (see *Jagatheesan s/o Krishnasamy v PP* [2006] 4 SLR 45 at [82])). Similarly, where the trial judge has failed to give due weight to material evidence, the accused's conviction may be unsafe (see *Neo Hong Huat v PP* [1992] 1 SLR 312 at 316, [17]).

80 In the present case, no particularly legitimate reason was put forth by Mr Anandan as to why the Judge erred in accepting Risa's evidence (apart, presumably, from the consideration that Tan needed to have a platform for discrediting Risa's testimony). The decision of a trial judge as to whether to visit the scene of a crime is, at the end of the day, entirely a matter of discretion An appellate court would be extremely slow to intervene in or criticise the exercise of such discretion. There is certainly no rule of law or practice which mandates that a judge has to visit the crime scene whenever there is a conflict of testimony. In any event, we were of the view that the Judge had provided in the Judgment a satisfactory explanation as to why he accepted Risa's evidence and why a visit to the Flat was unnecessary. His reasoning was as follows (*id* at [97]):

> On the evidence, I accept Risa's account relating to the first shot that was fired in the study room. … I am convinced that Risa was fulfilling her promise to help her former employer [*ie*, Lim] not by telling malicious falsehood against [Tan] but by voicing verity. The statement about hiding behind the door of S's [Lim's daughter's] room was nothing more than an inaccurate rendition of her evidence that she was squatting and hiding behind the door frame to peek into the study room. Risa's version of the events is supported by the objective forensic evidence that this particular shot was fired at a very short [muzzle-to-target] distance.

By all accounts, there was simply no merit in the argument that the Judge erred in declining the request that he visit the crime scene.

Our findings on the issues relating to procedural fairness

81 In the result, we were not persuaded that Tan had been treated unfairly either in the course of his preparations for the trial or during the trial itself. There was simply no basis to order a retrial.

Conclusion

82 As Tan failed in rebutting the statutory presumption set out in s 4(2) of the Arms Offences Act, we dismissed this appeal. We were satisfied beyond any reasonable doubt that Tan had fired the Beretta with the intention of causing physical injury to Lim, thereby committing the offence under s 4(1) of the Arms Offences Act. All said and done, it was plain to us that Lim was killed in cold blood by Tan.

[note: 1]See the certified transcript of the notes of evidence ("the Notes of Evidence") for the hearing on 29 January 2007 (at vol 2, p 249 of the record of proceedings ("Record of Proceedings")).

[note: 2]*Id* (see Record of Proceedings at vol 2, p 244).

[note: 3]See the Notes of Evidence for the hearing on 27 April 2007 (Record of Proceedings, vol 2 at p 340).

[note: 4]See para 5 of Dr Winslow's report dated 6 March 2007 (Record of Proceedings, vol 3 at p 402).

[note: 5]See the Notes of Evidence for the hearing on 2 April 2007 (Record of Proceedings, vol 2 at p 304).

[note: 6]See the Notes of Evidence for the hearing on 27 April 3007 (Record of Proceedings, vol 2 at pp 338–342).

[note: 7]See para 27 of Mr Anandan's written submissions dated 18 January 2008 for the appeal ("the Appellant's Skeletal Submissions").

[note: 8]See para 28 of the Appellant's Skeletal Submissions.