Pannirselvam s/o Anthonisamy v Public Prosecutor
[2005] SGHC 26

Case Number : MA 93/2004

Decision Date : 02 February 2005

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Rakesh Vasu and Winnifred Gomez (Gomez and Vasu) for the appellant; Low Cheong Yeow (Deputy Public Prosecutor) for the respondent

Parties : Pannirselvam s/o Anthonisamy — Public Prosecutor

Criminal Law – Offences – Public tranquillity – Rioting – Consideration of combination of direct and circumstantial evidence to establish accused sharing in common object of assembly – Section 146 Penal Code (Cap 224, 1985 Rev Ed)

Criminal Procedure and Sentencing – Sentencing – Principles – Whether specific conduct of rioter relevant to his sentencing – Whether accused entitled to discount in sentence if not active participant in physical assault – Section 147 Penal Code (Cap 224, 1985 Rev Ed)

2 February 2005

Yong Pung How CJ:

1 The appellant was convicted on a charge of rioting and sentenced to 36 months' imprisonment and six strokes of the cane: see [2004] SGDC 210. Having dismissed his appeal against conviction and sentence, I now set out my reasons.

The undisputed facts

2 Some time after 3.00am on 30 January 2004, a fight broke out at the Club VIP located in Clarke Quay. The brawl involved more than ten persons, and resulted in injuries to five of the club's patrons. The initial target of the fight was one Silvakumar Kumar ("Silva"). Silva was badly hurt. In addition to injuries to his left eye, he sustained lacerations on his face, scalp and neck which have resulted in permanent scarring.

3 The appellant was working as a bouncer at Club VIP on the night of the fight. He entered a plea of not guilty in response to the charge brought against him, which was framed as follows:

> DAC 16948/2004
>
> You, Pannirselvam s/o Anthonisamy, M/36 years old, are charged that you on the 30th day of January 2004 at about 3.10am, at Club VIP, Clarke Quay, Singapore, together with Visvaganesan s/o Subramaniam, Sangarapandian s/o Mandasamy and 10 other unknown male persons, were members of an unlawful assembly whose common object was to voluntarily cause hurt to one Silvakumar Kumar, Jasuwah s/o Thevapragasam, Suman s/o Sudhagar, Danieswaran s/o Parumal, Vijayan s/o Muthan, and in the prosecution of this common object of the said assembly, violence was used by one or more of you, and you have thereby committed an offence punishable under Section 147 of the Penal Code, Chapter 224.

4 His co-accused in the court below, Sangarapandian s/o Mandasamy ("Sangarapandian"), was similarly charged under s 147 of the Penal Code (Cap 224, 1985 Rev Ed) and sentenced to a term of 14 years' preventive detention and five strokes of the cane. Sangarapandian did not appeal against

his sentence.

Disputed facts

5 This was a factually complicated case, with the prosecution and defence presenting contradictory versions of the events which took place in Club VIP on the night of the riot. It therefore behoves me to go through both accounts of the events in some detail before dealing with the appeal proper.

Case for the Prosecution

6 Ten witnesses testified for the Prosecution. They consisted of Silva, five police officers who were at Club VIP either during or after the incident, and four of Silva's friends who had accompanied him to the club on the night of the incident.

7 Silva's four friends who were present on the night of the riot were Jasuwah,[1] Vijayan,[2] Danieswaran[3] and Suman.[4] Prior to arriving at Club VIP, Silva and his friends had gathered at a 7-Eleven outlet near Clarke Quay, where some of them imbibed beer. At about midnight, they proceeded to Club VIP and seated themselves in the VIP section of the club, where they ordered and consumed one and a half bottles of Jack Daniels whisky. They testified that no one joined them at their table during this time and nothing untoward occurred.

8 Around 3.00am when the club was closing, Silva and his friends went to the men's toilet. Jasuwah and Suman returned to their seats first. When he came out from the toilet, Silva was accosted by a male Indian who asked Silva who he was and whether he belonged to any gang. The male Indian further asked if Silva recognised him, but Silva said that he did not.

9 Silva then tried to return to his seat. When he reached the dance floor, the appellant's co-accused, Sangarapandian, who was also a bouncer in the club**,** accosted him. Sangarapandian again demanded to know if Silva belonged to a gang. When Silva denied this, Sangarapandian shouted "shoot". Danieswaran, who was walking in front of Silva, testified that he had also heard somebody behind him say "shoot".

10 A scrimmage ensued. Sangarapandian punched Silva in the face. Someone else smashed a bottle on the back of Silva's head. When Silva turned, another bouncer, Prem Ananth ("Prem"), smashed a jug onto Silva's face. The attack on Silva continued as some 30 people (by Silva's estimation) surrounded Silva. He was hit with another glass jug and some chairs. Upon realising that their friend was being assaulted, Silva's four friends moved in to help him. All of them were attacked as well.

11 Three police officers, Cpl Chua,[5] Cpl Khairur[6] and Cpl Chew,[7] were on patrol duty at Clarke Quay that night. At about 3.20am, they heard the sound of glass breaking inside the club and ran inside to investigate. Although the lighting in the pub was dim, the policemen saw a group of 15 to 20 male Indians surrounding a smaller group of about three male Indians on the dance floor. The sound of breaking glasses and shouting emanated from the group. Men were pushing each other around.

12 Suspecting that the smaller group of Indians was being assaulted, Cpl Khairur shouted "Police! Police!" and moved onto the dance floor to push some members of the larger group of assailants aside. When the group of men saw the police approaching, the fight stopped. Cpl Chua and Cpl Khairur saw the smaller group of Indians holding onto Silva, whose face was covered with blood.

They asked this group of friends to lead Silva away from the dance floor. Cpl Chua testified that he saw Vijayan holding Silva by the shoulders and leading him out of the room.

13 Silva was brought to the pool room near the club's exit where more pandemonium broke out. He was attacked despite the attempts of his friend, Vijayan, to protect him from the blows, and fell face down on the ground at the doorway to the pool room. As he got up, he saw the appellant kick him. He fell forward again and could not see who kicked him thereafter. He denied that he had at any time grabbed the appellant's hair or pulled him to the ground.

14 Cpl Khairur testified that he saw three male Indians kicking and punching Silva in the pool room. Cpl Chua said that when he rushed to the pool room, Silva was already crouching down in pain whilst his friends were shouting and gesturing at one of the bouncers, Prem, who was yelling and gesticulating at Silva's friends in return. Cpl Chua then noticed a group of seven to eight male Indians moving forward to hit Silva. Although he tried to stop them, one of them, Visvaganesan ("Visva"),[8] who was a part-time bouncer at the club and a patron on the night of the riot, got past him and punched Silva twice on the back. Cpl Chua managed to pull Visva away and escorted Silva out of the club.

15 Significantly, Cpl Chua testified that none of the six bouncers in Club VIP had tried to stop the fight or assist Silva at any point in time. Instead, he saw Prem shouting at Silva. He did not see the appellant push Visva away when Visva punched Silva.

16 Silva and Vijayan were taken to the hospital by ambulance. Whilst standing outside the pub, Cpl Chua noticed Visva loitering outside the pub and identified him as one of the Indians who had punched Silva. Visva was arrested for rioting after the appellant urged him to co-operate with the police. Visva later pleaded guilty to reduced charges under ss 143 and 323 of the Penal Code and was sentenced to six months' imprisonment.

17 Sani Supaat[9] was a Station Inspector with the Singapore Police Force. He was not present at Club VIP until the riot was over. He checked with the management of Club VIP, only to be informed that the closed-circuit television ("CCTV") in the club was not working.

18 M Somasundaram[10] was the investigating officer ("IO") of the case. He testified that after the incident, he had faced difficulties in apprehending the appellant and the co-accused. The management of Club VIP had told him that the two accused persons, as well as Prem, had failed to show up for work after the incident. He further told the court that Prem was still on the run from the police at the time of trial.

19 In essence, the case made out by the Prosecution was that the appellant, Sangarapandian and Prem had planned and carried out the attack upon Silva. As bouncers of the Club, they were aware that the CCTV on the Club's premises was not functioning. Taking advantage of this, they had deliberately waited until closing time when most of the Club's patrons would have dispersed and the monetary takings of the Club for that day would have been collected. By then, the main entrance of the Club would have been closed, leaving only the narrow side exit for escape. Sangarapandian initiated the fight by uttering the word "shoot", following which the rest of the assailants, including the appellant, fell on Silva. When the police arrived at the dance floor, the appellant pushed Silva to the pool room where Silva was set upon once more. The guilt of the appellant and Sangarapandian was further evinced by their behaviour after the incident, as they stopped coming to work at Club VIP and the appellant did not surrender himself to the police until two months after the riot.

Case for the Defence

20 Both the appellant and Sangarapandian flatly denied the charges brought against them. They alleged that they had first encountered Silva in December 2003. The appellant and Sangarapandian were already working as bouncers for the club then. Silva came to Club VIP with two other friends. They were carrying liquor with them and were intoxicated. The club's management instructed the appellant and Sangarapandian to bar Silva and his friends from entering the club. Silva became agitated and started to spew profanities. He said that he was from "Dynamite Ang Soon Tong" secret society, and cursed the bouncers' mothers in Tamil. Silva's friends managed to drag him away. One of those two friends, Pramkumar,[11] confirmed this version of events in court. I will refer to this as the "December 2003 incident".

21 On the night of the riot, both the appellant and Sangarapandian were on duty at Club VIP from 9.00pm onwards. Two defence witnesses, Sivaprakash ("Pack")[12] and Jason Jesudasan ("Jason"),[13] were also present. Both Pack and Jason had gone to Club VIP together. They were acquainted with both Silva and the appellant, and had sat just opposite Silva and his group of friends in the club. The appellant, Pack and Jason all testified that in the course of the night, they heard Silva shouting "Dynamite Ang Soon Tong". Another bouncer, Prem, approached Silva's table and told the people seated there to behave.

22 At 3.00am, the appellant and Sangarapandian heard a commotion inside the club and found Silva being attacked in the middle of the dance floor. Silva was shouting "Dynamite Ang Soon Tong" and hurling vulgarities. Sangarapandian tried to help Silva, but was cursed for his pains. He saw the appellant pulling Silva away from the group, leading Silva toward the pool room en route to the exit. Sangarapandian could not see very clearly from where he was standing, but thought that he saw Silva pulling the appellant's hair or punching him. Likewise, Pack and Jason testified that they saw the appellant bringing Silva to the pool room, and Pack said that from his position on the dance floor, it appeared that the appellant was protecting Silva.

23 In turn, the appellant testified that he saw Silva squatting down in the middle of the dance floor and holding his bleeding face. Placing his right hand over Silva's right shoulder and his left hand over Silva's left hip, he steered Silva towards the rear exit of the club through the pool room, since the front door had already been locked by this time. As he did so, Silva was still shouting vulgarities and struggling to get back at his assailants.

24 When they reached the pool room, the appellant had to force Silva through the door into the room. Halfway through the room, the appellant saw Vijayan, one of Silva's friends, coming to Silva's assistance. He released his grip on Silva and asked him to leave the club immediately, pointing him in the direction of the exit. Instead, Silva grabbed the appellant's shoulder-length hair with his right hand, placing his left hand on the appellant's right shoulder. Too drunk to heed the appellant's instructions to let go, Silva fell to the ground, pulling the appellant down with him.

25 As Visva had been trying to separate the appellant from Silva at this time, the appellant fell to the ground on top of Silva, with Visva on the ground beside him. The appellant helped Silva up and told him to leave, but Silva instead hurled vulgarities at the appellant and Visva. When Silva did not heed Visva's warning to stop, Visva punched Silva on the face. The appellant pulled Visva aside, and the police arrived and separated them. The appellant claimed that, contrary to the testimony of the police officers, no one apart from Visva had attacked Silva in the pool room.

26 Pack testified that he visited Silva in hospital later that night. Silva told Pack that the appellant and Sangarapandian had assaulted him. In reply, Pack asked how Silva could be so sure of this when so many people were involved in the riot. Silva retorted, "I don't care whoever it is".

27 The appellant asked the police if they required his personal particulars. When they indicated that they did not, he left. He claimed that he did return to work at the club after the incident but that he resigned four days later because he no longer felt like working there.

28 Upon further questioning, the appellant admitted that he only found out that the police were looking for him four days after the incident. When he called the IO the next day, he was asked to come down to see him that very night. The appellant did not do so as he thought that the IO was about to charge him in court, and wanted to consult a lawyer and prepare money for bail before this occurred. The appellant only surrendered himself to the police two months later.

29 In summary, the appellant's defence was one of bare denial. He did not deny that he was with Silva in the pool room, but claimed that he had been removing Silva from harm's way. He suggested that Silva had framed him and Sangarapandian for the assault because they had refused him entry into the club in December 2003, and Silva consequently harboured a grudge against them.

The decision below

30 The trial judge chose to believe the testimony given by the prosecution witnesses. He found Silva to be a truthful witness who gave cogent testimony consistent with the objective evidence before the court. The corollary of these findings was that the judge disbelieved the defence, deeming both the appellant and Sangarapandian untruthful witnesses. In addition, he viewed the remaining defence witnesses as interested witnesses who had tailored their evidence to protect the appellant and Sangarapandian.

31 The judge concluded that the attack on Silva was both pre-meditated and co-ordinated, since it had conveniently commenced at closing time upon Sangarapandian's instigation. The evidence clearly showed that the appellant, Sangarapandian and Visva were active members of the unlawful assembly which had set out to assault Silva. Even if the appellant had pushed Silva from the dance floor to the pool room, this was not done to protect Silva from further harm since the assault on Silva continued in the pool room. Moreover, if the appellant had truly been innocent, he would not have hidden from the police for two months. As such, the judge was satisfied that the Prosecution had proven its case against the appellant and Sangarapandian beyond reasonable doubt and convicted them accordingly.

Appeal against conviction

32 Before me, counsel for the appellant contended that the trial judge had made certain findings of fact without basis and failed to make other findings of fact when in all reasonableness he should have. In light of all the circumstances, and taking into account the more limited function which an appellate court may play in the fact-finding process, I was of the view that counsel had not provided me with sufficient reason to overturn the decision below.

The law

33 Section 146 of the Penal Code provides that:

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

34 An "unlawful assembly" is defined by s 141 of the Penal Code as being an assembly of five or

more persons with the common object, *inter alia*, of committing "any mischief or criminal trespass, or other offence". The punishment for rioting prescribed by s 147 is imprisonment for a term of up to five years as well as caning.

35 I elaborated upon these statutory requirements in *Lim Thian Hor v PP* [1996] 2 SLR 258. The existence of a "common object" is a question of fact which must be deduced from the facts and circumstances of each case. The inference may be arrived at by considering the nature of the assembly, the weapons used by the offenders and the behaviour of the assembly at or before the scene of occurrence. Moreover, whilst the mere presence in an assembly of persons does not render the accused a member of the unlawful assembly, there is no need to prove an overt act against the accused so long as there is direct or circumstantial evidence to show that the accused shared the common object of the assembly. In every case, the issue of whether the accused was innocently present at the place of occurrence or whether he was actually a member of the unlawful assembly is a question of fact.

36 As in other appeals before me, I reminded myself that since a trial judge has had the benefit of hearing the evidence of witnesses in full and observing their demeanour, an appellate judge will generally defer to the findings of fact made by the trial judge which hinge on the assessment of the credibility and veracity of the witnesses, unless they are clearly wrong or wholly against the weight of the evidence. Should the appellate judge wish to reverse the trial judge's decision, he must not merely entertain doubts as to whether the decision is right, but must be convinced that it is wrong: *PP v Poh Oh Sim* [1990] SLR 1047 at 1050, [8], *PP v Azman bin Abdullah* [1998] 2 SLR 704 at [21]. However, when it comes to inferences of facts to be drawn from the actual findings, the appellate judge is as competent as any trial judge to draw any necessary inferences of fact from the circumstances in the case: *Yap Giau Beng Terence v PP* [1998] 3 SLR 656 at [24].

37 Having apprised myself of the relevant legal principles, I turned my mind to the facts of the case. In this regard, I found it helpful to categorise the appellant's main grounds of contention under four headings, which were:

(a) Silva's credibility;

(b) The appellant's credibility;

(c) The credibility of other witnesses; and

(d) The appellant's conduct after the riot.

38 I now deal with each ground in turn.

Whether Silva was a credible witness

39 The judge was impressed by Silva's candid admission that he was unable to identify Visva as one of his assailants even though Visva had admitted to assaulting Silva. He noted that Silva's version of material events was corroborated by the other evidence before the court. For instance, Silva's medical report confirmed that he had been the victim of an assault. Silva's testimony that he was only assaulted after Sangarapandian shouted "shoot" was corroborated by Danieswaran. Silva's claim that he had been assaulted by the appellant, Sangarapandian and Prem was consistent with the testimony of the police officers who had affirmed that none of the bouncers had attempted to stop the fight or assist Silva during the riot.

40 A linchpin of the appellant's case against Silva was that Silva had reason to falsely implicate the appellant because he bore a grudge against him for the December 2003 incident, and because the appellant and Sangarapandian had replaced Silva's friends as bouncers at the club. The judge believed Silva's testimony that the December 2003 incident never occurred, and concluded that the appellant's claims against Silva were afterthoughts conceived to meet Silva's evidence against him.

41 On appeal, counsel for the appellant averred that Silva was lying when he denied that the December 2003 incident took place. In support of this, he pointed to Pramkumar's testimony that the December 2003 incident had occurred. Counsel contended that Pramkumar had no reason to lie since he was Silva's friend, and that the judge was wrong to find that Pramkumar was a biased and unreliable witness. In my opinion, a careful reading of the notes of evidence rendered this argument unsustainable since Pramkumar actually testified that he "knew" Silva Kumar, and that Sangarapandian and the appellant were his "friends".

42 Moreover, I noted that the judge had substantiated his findings by reasoning that even if the December 2003 incident had taken place, this alone was not enough to make Silva perjure himself. As a former bouncer of Club VIP, Silva would have known that the decision to deny him entry had not been made by the appellant and Sangarapandian, but by the club's management. Likewise, even if the appellant's friends had replaced Silva's friends as bouncers at the club (a claim which Sangarapandian made but was unable to substantiate), Silva would have known that this decision was taken by the club's management, and would not have been upset with the appellant or Sangarapandian. As such, I found that the judge was not clearly wrong in doubting the credibility of Pramkumar's testimony or in finding that Silva's purported grudge was just a fiction invented by the appellant.

43 The issue of whether Silva had been courting trouble by shouting secret society slogans prior to the assault provided another instance where the judge had to decide between conflicting testimony by Silva and the appellant. Silva denied doing this, and Danieswaran corroborated his evidence. The judge disbelieved claims to the contrary by the appellant, Pack and Jason. Sangarapandian testified that he had patrolled the club through the night and had not noticed anything irregular as the entire crowd present was behaving itself. Another defence witness, Visva, was sitting beside the bar counter throughout the night, and likewise testified that nothing untoward happened in the club before the fight. Again, this finding was made after observing the witnesses in court and was corroborated by two defence witnesses.

44 Once again, I saw no reason to overturn the judge's finding regarding Silva's credibility. Apart from the fact that any inconsistencies in Silva's evidence were minor, case law establishes that even if Silva's testimony contained *major* inconsistencies, the trial judge need not have rejected Silva's testimony in its entirety, but was entitled to accept his evidence on the key facts in issue: *Ramli bin Daud v PP* [1996] 3 SLR 225 at 230, [24].

The appellant's credibility

45 To my mind, the issue of the appellant's guilt or innocence largely hinged on one issue. It was quite clear from eyewitness testimony that when the police broke up the fight on the dance floor, the appellant led Silva to the pool room where a second fight broke out. The question before the court was whether the appellant was actually trying to assist Silva by taking him from the dance floor to the pool room so that Silva would be able to leave the club by the side exit, or whether he brought Silva there so that the attack on him could continue away from police interference.

46 Although the appellant claimed that he was trying to assist Silva, the judge disbelieved this claim. Counsel for the appellant sought to challenge this finding by accusing the judge of neglecting

the fact that three prosecution witnesses and two defence witnesses had testified that an Indian male subject had helped Silva to the pool room.

47 I considered this point carefully before arriving at the conclusion that there was really no profit in attempting to dissect witness testimony relating to this issue. Contrary to counsel's claims, my perusal of the notes of evidence showed that both prosecution and defence witnesses were *not* able to give any conclusive testimony in this regard. The most some of them could say was that the appellant *might* have been helping Silva to the pool room. However, I would point out that by Silva's own account, he was very badly injured by this time and would not have been able to walk on his own. As such, whether the appellant had benign or malign intentions in bringing Silva to the pool room, he would have had to support Silva bodily in order to get him there, an act which some witnesses might have interpreted as assistance. Crucially, however, the appellant's story unravelled from this juncture onwards.

48 The appellant claimed that once he brought Silva to the pool room, he released his grip on Silva and pointed him in the direction of the exit, but that Silva pulled him to the floor. The appellant asserted that apart from Visva, no one attacked Silva in the pool room. This rather sanitised version of events was glaringly inconsistent with eyewitness accounts of what happened in the pool room. Notably, two of these eyewitnesses were police officers who had no reason to fabricate their testimony before the court. Cpl Chua saw Silva crouching down in pain, and witnessed a group of seven or eight male Indians moving forward to hit him. Cpl Khairur observed three Indians kicking and punching Silva in the pool room. Vijayan, who was holding onto Silva to protect him in the pool room, also testified that there were several people kicking Silva and him in the pool room. Suman saw Vijayan trying to cover Silva in the pool room, and confirmed that there were a few people beating Silva. The only witnesses who corroborated the appellant's story to some extent were Pack, one Rajaletchumi and Visva. For reasons I will detail later, I agreed with the trial judge's assessment of their evidence as unreliable.

49 Significantly, Silva himself disagreed with the appellant's version of events. He said that he was attacked violently at the doorway to the pool room, and that when he tried to stand up, he saw the appellant kick him. He declared that the appellant could not have pointed him towards the exit and asked him to walk out of the club, given his weakened condition at the time. In addition, Silva refuted the appellant's version of events, saying that he never grabbed the appellant by the hair, that they did not fall to the ground, and that the appellant did not then help him up. In addition, Silva's insistence that he received "more blows" in the pool room does not gel with the appellant's claim that Silva was only punched twice by Visva.

50 Upon scrutinising the evidence, it seemed quite clear to me that while the appellant did bring Silva to the pool room, he lied blatantly about what happened in the room. Significantly, the appellant did not claim that he left the pool room after pointing Silva to the exit. Instead, he concocted a story of what had happened in the pool room, presumably to bolster his claim that he was trying to "help" Silva, and possibly to provide himself with a cover story if anyone had seen him wrestling on the floor with Silva. However, his version of events did not tally with the testimony of Silva and other eyewitnesses, which was that Silva was attacked by at least three men when he was in the room. Since the appellant was still in the room with him, he should surely have tried to stop the attack on Silva if his intention had really been to help Silva. To the contrary, Cpl Chua testified that none of the bouncers had intervened when Silva was being assaulted in the pool room.

51 Given subsequent events and the appellant's failure to do anything to stop the fight even though he was a bouncer tasked with maintaining order and safety in the club, I had no grounds to find that the trial judge was obviously wrong when he concluded that the appellant did not intend to

shield and protect Silva when he brought him to the pool room. Rather, after considering that the appellant's testimony was diametrically opposed to the testimony of so many eyewitnesses, including that of two police officers, I was of the opinion that there was ample evidence for the judge to find that the appellant was not a credible witness.

Credibility of the other witnesses

52 After observing their demeanour and weighing their testimonies, the judge concluded that all the defence witnesses were interested witnesses. The appellant questioned this finding. In order for me to interfere with the trial judge's findings, the appellant had the onerous task of persuading me that the trial judge had clearly reached the wrong conclusion. After listening to counsel for the appellant, I concluded that he had failed dismally in his attempt to surmount such a high threshold of proof.

53 The common thread running through the judge's explanations of why he found the various witnesses unreliable was that they were all friends of the appellant and Sangarapandian. In this regard, the following extract from my judgment in *Khua Kian Keong v PP* [2003] 4 SLR 526 at [29] was apposite:

> I did not discount the possibility that there might have been reason for the appellants' friends, Shang and Chang to assist the appellants, but that possibility alone could not form the basis for rejecting their evidence. As I held in *Soh Yang Tick v PP* [1998] 2 SLR 42, the mere fact that the appellant's witnesses were in some way related or connected to [the] appellant did not render their testimonies suspect. "*There must be additional grounds for rejecting the evidence of such witnesses, or alternatively the testimonies of these witnesses were so littered with inconsistencies that they could not be believed.*" [emphasis added]

54 As I further observed in *Kwan Peng Hong v PP* [2000] 4 SLR 96 at [58]:

> Therefore, where there are keenly contested versions of events, the trial judge has the basic duty to lay down in a detailed and clear way how, why, the factors, evidence and considerations that he has taken or refused to take into account, the weight he has attached to them, in arriving at his findings of fact. On this, I would also refer to my judgment in *Syed Yasser Arafat bin Shaik Mohamed v PP* [2000] 4 SLR 27. If the reasoning has been unreasonable or shows signs of bias or prejudice, then the [appellate] court will not hesitate to intervene.

55 I scrutinised the judge's grounds of decision, which attested to the fact that the judge did not rely solely on their friendship with the appellant and Sangarapandian to reject the evidence proffered by the defence witnesses. He stated that he had also observed their demeanour on the witness stand and weighed their testimonies alongside the other evidence tendered before the court. For example, apart from noting that Rajaletchumi was Sangarapandian's fiancée and the appellant's friend, the judge found further reason to doubt her credibility because she testified that she had seen Silva pulling the appellant's hair and Visva trying to stop them. As explained earlier, this evidence was in direct contradiction with the evidence of various other witnesses who testified that they saw at least three people punching and kicking Silva in the pool room. There were plainly grounds for the judge to question her testimony.

56 Counsel for the appellant also cast aspersions on the judge's treatment of Pack's evidence. Pack testified that Prem had told Pack to tell Silva to stop shouting secret society slogans on the night of the riot. In addition, Pack said that he was at the pool area when Silva was being assaulted. He essentially corroborated the appellant's version of events, saying that there had only been one

assailant attacking Silva. The appellant had not kicked Silva, but both of them had fallen onto the floor together. Pack had gone to the hospital to visit Silva after the riot, and Silva had told him that the appellant and Sangarapandian had assaulted him. When Pack asked how Silva could be so sure of their identities, Silva replied, "I don't care whoever it is."

57 The judge noted that Pack was well acquainted with the bouncers of Club VIP, as he was able to provide the nicknames of both the old team of bouncers as well as the present team. The judge further found that Pack's evidence evinced a clear bias towards the appellant, Sangarapandian and the bouncers on duty at Club VIP on the night of the riot. As such, his evidence could not be relied on.

58 Despite this finding, the judge noted at [53] of his decision that Silva's evidence that he was assaulted by the club's bouncers was corroborated by Pack, since Pack had testified that Silva had positively named the appellant and Sangarapandian as his assailants.

59 Counsel for the appellant raised two issues before me. First, he questioned how the judge could justify his conviction of the appellant by relying on Pack's evidence, and then go on to find that Pack's evidence was biased towards the appellant. As I discussed earlier, even if a trial judge notices some major inconsistencies in a witness's evidence, he is entitled to accept the witness's evidence on the key facts in issue. Pack's evidence about what happened in the pool room was clearly incongruous with the testimony given by the other witnesses, including the police. Nevertheless, the judge was entitled to rely on Pack's testimony regarding Silva's identification of the appellant so long as he carefully scrutinised Pack's evidence. In any case, the judge did not base his conviction of the appellant solely on Pack's testimony. Pack's testimony was merely one of many pieces of evidence which came together to paint a picture of the appellant's guilt.

60 In addition, the appellant maintained that the judge should have considered Silva's reply of "I don't care whoever it is" before treating Pack's testimony as corroborative evidence, since this reply showed that Silva was unclear or careless about his identification of the appellant as one of his assailants. It was not clear to me what Silva meant by this sentence, and it was arguably remiss of counsel for the appellant not to question Silva about it during the trial below. The judge did not deal with it in his judgment. Nevertheless, when considered against the totality of the evidence, I found that this one sentence, which may have been just a throwaway phrase uttered in a moment of frustration, did not vindicate the appellant and justify overturning his conviction.

61 Counsel for the appellant went to great pains to explain why the credibility of the remaining defence witnesses was unassailable. I considered his arguments carefully but do not deem it necessary to detail them in my grounds of decision. Suffice it to say that I found that the judge below had sufficient reason to doubt the credibility of these witnesses. In any event, when considered against the totality of the evidence, most of the testimony given by these witnesses was not particularly material to the outcome of the case. As such, I ruled that this ground of appeal should fail.

The appellant's conduct after the riot

62 Counsel for the appellant made much of the fact that the appellant had persuaded Visva to surrender to the police. This, he said, was indication that the appellant was not guilty. I disagreed. Since Visva had been caught red-handed, there was ample reason for the appellant to persuade him to co-operate with the police. This act alone certainly did not demonstrate the appellant's innocence.

63 The appellant tried to excuse his failure to surrender to the police for two months by

explaining that it took him this length of time to consult a lawyer and raise monies for bail. I agreed with the trial judge that this explanation was far from convincing. The courts have traditionally taken a fairly cautious approach to the conduct of an accused subsequent to an offence, holding that such conduct, without more, is not conclusive of prior guilt: *Chandrasekaran v PP* [1971] 1 MLJ 153, cited in *Lewis Christine v PP* [2001] 3 SLR 173 at [29]. Nevertheless, as I pointed out in *Lewis Christine v PP*, certain types of subsequent conduct do not afford easy explanation, and in that case, the appellant's attempts to abscond from detention when there was no apparent reason to do so attracted a "strong inference of guilt".

64 On the present facts, the appellant's very lengthy delay before going to the police attracted a similarly strong inference of guilt. His protestation that he did go back to work for four days after the night of the riot, and that he would hardly have done so had he really been avoiding arrest, did not hold water. The appellant admitted that he only knew that the police were looking for him four days after the riot. The fact that he resigned from his job the very same day spoke volumes about the veracity of his claim.

Conclusion

65 Counsel for the appellant averred that the appellant's conviction was unsafe as it relied solely on Silva's testimony that the appellant kicked Silva. This argument was patently unsound. It bears repeating that for a conviction under s 147 of the Penal Code, it is sufficient to establish direct or circumstantial evidence which shows that the accused shared the common object of the assembly. A person present at the unlawful assembly is deemed to be a member of that assembly even if no overt act is proved against him: *Lim Thian Hor v PP* ([35] *supra*).

66 Considered in totality, the circumstantial evidence before me was stacked against the appellant. He was on the dance floor with Silva when the riot started. He was then seen bringing Silva to the pool room, which was just before the side exit of the club. Although the appellant claimed that he was trying to help Silva to get out of the club, at least three men attacked Silva in the pool room. Even if the appellant did not participate in the attack, he certainly did nothing to prevent it. Moreover, his account of what occurred in the pool room was inconsistent with the accounts given by other eyewitnesses. The appellant returned to work for the next few days. On the very day that he found out that the police were looking for him, he stopped going to work and did not surrender himself to the police for another two months.

67 In my estimation, the circumstantial evidence pointed quite distinctly to the fact that the appellant was a member of an unlawful assembly of five or more persons, which had the common object of causing hurt to Silva. Violence was used in the prosecution of this common object. Whether or not the appellant lifted a finger against Silva was a moot point. Even if he did not physically assault Silva, a strong case could be made out that he was in agreement with the common object of the aggressors. In any case, the charge against the appellant did not accuse him of personally using violence against Silva.

68 A meticulous examination of the evidence led me to the conclusion that the appellant's conviction should be sustained. The only question remaining before me was whether the sentence imposed by the trial judge was manifestly excessive: *Tan Koon Swan v PP* [1986] SLR 126.

Appeal against sentence

69 The punishment prescribed under s 147 of the Penal Code is imprisonment for a maximum period of five years and caning. The trial judge considered that an appropriate sentence on the facts

of this case would be 36 months' imprisonment and six strokes of the cane.

70 In arriving at his decision, the judge accepted that the appellant's financial support of his aged and sickly parents was a valid mitigating factor. However, as the prosecution rightly pointed out, I held in *Lai Oei Mui Jenny v PP* [1993] 3 SLR 305 at 308, [13], that financial hardship is not generally a mitigating factor unless there are exceptional circumstances at hand. The appellant did not draw the court's attention to any such exceptional circumstances.

71 The trial judge took cognisance of the appellant's antecedents dating back to 1988 for offences involving disorderly behaviour, fraudulent possession of property, consumption of controlled drugs and mischief. Furthermore, the offence had taken place in the wee hours of the morning in an enclosed venue patronised by members of the public. Because of the potential dangers associated with this environment, the appellant had been employed to maintain peace in the club. Instead, he had created chaos in the club, and had even continued the attack on Silva in the presence of uniformed police officers who had identified themselves.

72 Counsel for the appellant pleaded that the appellant was only accused of having aimed one kick at Silva, and that the role played by each rioter should be relevant to their respective sentences. This position was not strictly accurate. The basic approach taken by the courts is that the accused is not sentenced for his individual acts considered in isolation, since it is the very fact that his acts were not committed in isolation that constitutes the gravity of the offence. Rather, he is sentenced for "having by deed or encouragement been one of the number engaged in a crime against the peace": *PP v Diki Zulkarnaini bin Saini* (District Arrest Case Nos 57026 of 2000, 289 of 2001 and 5608 of 2001, unreported, digested in *Sentencing Practice in the Subordinate Courts* (LexisNexis, 2nd Ed, 2003) at p 252), following the English Court of Appeal in *R v Roderick Alexander Ferguson Caird* (1970) 54 Cr App R 499. In any event, the courts have not hesitated to mete out heavy sentences even to rioters who have refrained from joining in the physical assault on the victim, so long as they have shared in the common object of the unlawful assembly: *Rajasekaran s/o Armuthelingam v PP* [2001] SGDC 175.

73 As I recently observed in *Phua Song Hua v PP* [2004] SGHC 33 at [42], the courts have consistently imposed sentences of 18 to 36 months' imprisonment, as well as caning ranging from three to 12 strokes, for non-secret society-related offences. There are only two reported cases in which sentences of more than 36 months were meted out. In the first, *PP v Diki Zulkarnaini bin Saini*, the riot took place in the Accident and Emergency Department of a hospital. This "brazen disdain for the protective place" was rewarded with a sentence of 42 months' imprisonment and nine strokes of the cane for the s 147 offence. In the second case, *Rajasekaran s/o Armuthelingam v PP*, the offender and his friends assaulted an off-duty policeman, and then subjected him to terror and intimidation for an hour in a deserted location. The offender was sentenced to 54 months' imprisonment and 12 strokes of the cane. I dismissed his appeal.

74 Although the sentence meted out to the appellant might have been on the high end of the scale, I determined that this was justified in light of the various aggravating factors. Apart from those mentioned by the trial judge, other factors which I took into consideration included the scale of the riot, the level of violence involved, the extent of Silva's injuries, the use of metal stools and glass implements, the fact that the attack was quite possibly premeditated, and, most significantly, the appellant's abuse of his position of authority in the club. Hence, I thought that the sentence could hardly be characterised as manifestly excessive so as to warrant my interference with the trial judge's discretion.

Conclusion

75 It bears repeating that this was a factually complex case. The conflicting evidence presented by the many witnesses, some of whom must have been lying quite unabashedly, made it very difficult for the trial judge to reach any clear conclusion unless he picked carefully through the evidence. In my capacity as appellate judge, I had to give credence to the strong advantage the trial judge had of observing the witnesses as they testified before him. Counsel for the appellant canvassed a string of isolated arguments before me. Even if they had succeeded, they did not present me with enough justification to overturn the decision below. In any case, my evaluation of the evidence led me to the same conclusions reached by the trial judge. As such, I dismissed both appeals against conviction and sentence.

Appeal dismissed.

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[1] PW3.

[2] PW4.

[3] PW5.

[4] PW6.

[5] PW1.

[6] PW7.

[7] PW8.

[8] DW7.

[9] PW9.

[10] PW10.

[11] DW3.

[12] DW4.

[13] DW5.