Public Prosecutor *v* Daniel Vijay s/o Katherasan and another [2010] SGHC 334

Case Number	: Criminal Case No 16 of 2007
Decision Date	: 11 November 2010
Tribunal/Court	: High Court
Coram	: Tay Yong Kwang J
Counsel Name(s)	: Amarjit Singh and Sharmila Sripathy-Shanaz DPPs (Attorney-General's Chambers) for the prosecution; James Bahadur Masih (James Masih & Co) for Daniel Vijay s/o Katherasan; Subhas Anandan and Sunil Sudheesan (Khattar Wong) for Christopher Samson s/o Anpalagan
Parties	: Public Prosecutor — Daniel Vijay s/o Katherasan and another

Criminal Law

11 November 2010

Tay Yong Kwang J:

Introduction

1 The two accused persons ("Daniel" and "Christopher") were originally charged with a third person, Nakamuthu Balakrishnan ("Bala") with a joint charge of murder. All three men were convicted by me after a trial (see *PP v Daniel Vijay s/o Katherasan and others* [2008] SGHC 120).

2 On appeal to the Court of Appeal, Daniel's and Christopher's convictions for murder were set aside after the Court of Appeal revisited and restated the law relating to section 34 of the Penal Code (Cap 224, 1985 Rev Ed). Both of them were convicted instead for the offence of robbery with hurt under section 394 read with section 34 of the Penal Code. The Court of Appeal also remitted their case to me as trial judge for me to consider their sentence on the substituted joint charge. Bala decided not to proceed with his appeal against conviction for murder. Nevertheless, his conviction for murder was reviewed and upheld by the Court of Appeal (see the Court of Appeal's judgment dated 3 September 2010 in *Daniel Vijay s/o Katherasan and others v PP* [2010] SGCA 33 at [185] and [186]).

The substituted charge

3 Section 394 of the Penal Code provides:

> If any person, in committing or in attempting to commit robbery, voluntarily causes hurt, such person, and any other person, jointly concerned in committing or attempting to commit such robbery, shall be punished with imprisonment for a term of not less than 5 years and not more than 20 years and shall also be punished with caning with not less than 12 strokes.

4 Section 34 of the Penal Code states:

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

alone.

Previous convictions

5 Daniel had a conviction under the Road Traffic Act (Cap 276) in February 2003 for taking or driving a motor vehicle without lawful authority. Another charge for the same type of offence was taken into consideration. He was fined $1,000 by a district court. He paid the fine. In March 2005, he was convicted again for such an offence, with one other charge for the same type of offence taken into consideration. He was again fined $1,000 by a district court. This time, he served 10 days' imprisonment in default as he did not pay the fine.

6 Christopher has no criminal record.

The prosecution's submissions

7 The prosecution argued that "the imposition of a sufficiently lengthy custodial sentence and caning which falls at the upper end of the tariff provided under Section 394 of the Penal Code" was warranted in the light of the seriousness of the offence perpetrated as well as the grave consequences of the robbery. The prosecution submitted that the principle of retribution must take centre-stage as the victim died as a result of the robbery committed by the three men.

8 The prosecution relied on the findings of fact made at the trial (see *PP v Daniel Vijay s/o Katherasan & Ors* [2008] SGHC 120) as these findings were left practically intact by the Court of Appeal. From these findings, it was clear that Daniel and Christopher had contemplated the use of violence in the robbery. The attack on the victim by Bala was ruthless and vicious – at least 15 blows were delivered to the head and limbs. Neither Daniel nor Christopher attempted or even contemplated stopping Bala from battering the victim with the baseball bat. Both of them had agreed to and actively participated in the robbery which they knew would entail the use of unprovoked, unwarranted and disproportionate force to assault the victim to such an extent that he would not be able to hinder or to identify them.

9 The prosecution also submitted that general and specific deterrence would be relevant in the sentencing of Daniel and Christopher. They had no qualms about resorting to extreme and gratuitous violence in the robbery. They were also in full control of their actions and neither acted on the spur of the moment. The robbery was planned meticulously and the victim was chosen for his vulnerability as he was not accompanied by a cargo hand in his lorry. They played active roles in the robbery. There was completely no remorse as they did not even consider calling for some assistance for the victim after the severe assault.

10 The prosecution further submitted that the principle of prevention of crime would be a relevant sentencing consideration. The primary purpose of the criminal justice system is to prevent crime and to ensure that justice for the guilty is swift, sure and severe.

11 Where the principle of rehabilitation was concerned, the prosecution argued that it could not be a dominant consideration here despite the fact that Daniel was about 23 years old and Christopher about 24 years old at the time of the offence in May 2006. This was because the factual matrix of the case coupled with the weight of the other sentencing principles far overrode the role of rehabilitation here. The offence was so serious, the actions of the robbers were so contemptible and the consequences were so grave.

12 There was no need to resort to violence as the robbers outnumbered the victim by three to

one. Inspite of this clear numerical advantage, vicious violence was resorted to from the start. The fact that Daniel and Christopher did not inflict the fatal injuries was immaterial as they, like the offenders in *PP v Hirris Anak Martin & Anor* [2010] 2 SLR 976 (see [17]) ("*Hirris*"), had clearly intended that the weapon be used in the robbery. The prosecution further relied on *Hirris* (at [15]), decided by the Court of Appeal in January this year, that the established sentencing range for robbery cases involving death was 12 to 20 years' imprisonment. In that case, upon appeal by the prosecution, the Court of Appeal enhanced the sentence for the charge under section 394 read with section 397 of the Penal Code from 10 years' imprisonment and 24 strokes of the cane to 15 years' imprisonment and 24 strokes of the cane although the fatal head injuries were not inflicted by the respondents. Section 397 provides for mandatory additional punishment of not less than 12 strokes of the cane in cases where the offender is armed with or uses any deadly weapon or causes grievous hurt or attempts to cause death or grievous hurt to any person.

13 The 2,700 mobile phones taken in the robbery were valued at US$823,500. 542 of them, valued at US$165,310, have not been recovered. The rest were recovered by the police without the assistance of the robbers. The financial loss to the owners of the cargo was significant and should be taken into consideration.

14 The prosecution also highlighted the sentences imposed on the accomplices in this robbery by other courts. Arsan s/o Krishnasamy Govindarajoo ("Arsan"), the mastermind behind the robbery, pleaded guilty to a charge of abetting, by engaging in a conspiracy with the three accused persons in this case, an offence under section 394 read with sections 397 and 109 of the Penal Code. He also pleaded guilty to two other charges under section 414 read with section 109 of the Penal Code. For the robbery charge, he was sentenced to 15 years' imprisonment and 24 strokes of the cane.

15 Ragu A/L Ramajayam ("Ragu"), the insider in the transport company who provided information about the cargo, pleaded guilty to a charge of abetting Arsan to commit robbery, an offence under section 392 read with section 109 of the Penal Code. He was sentenced to 6 years' imprisonment and 12 strokes of the cane. On appeal, his sentence was reduced to 4 ½ years and 6 strokes.

16 The prosecution contended that Arsan's sentence should serve as a very strong guide as to the minimum appropriate sentence for Daniel and Christopher here. Although Arsan was the one who hatched the plan to rob, he was not at the scene of crime. Daniel and Christopher were not only at the scene, they played direct and critical roles in the events which eventually robbed the victim of both property and life. They were the ones who lured the victim to where Bala was waiting with the baseball bat. Ragu's role was significantly less than the roles of Arsan, Daniel or Christopher. His charge was also a less serious one.

17 Accordingly, the prosecution submitted that offenders who did not inflict fatal injuries in previous cases have generally been sentenced to 15 years in prison. Bearing in mind the degree of planning and deliberation, the seriousness of the offence, the callous, wanton and gratuitous violence inflicted and the value of the cargo taken, a higher level of deterrence would be needed in this case. The prosecution therefore asked that Daniel and Christopher be sentenced to more than 15 years' imprisonment and more than 12 strokes of the cane.

Mitigation plea and submissions for Daniel

18 Daniel is married and has three children aged 10, 9 and 6. His wife was not working. He was absent without official leave from his national service duties at the time of the offence and was doing odd jobs to support his family. He agreed to take part in the robbery for the same reason.

19 The initial plan was simply that Daniel would drive away the lorry carrying the cargo of mobile phones. The plan went awry when the victim's lorry did not stop long enough at the cargo complex's exit point for the robbers to hijack it. It was Bala who instructed Daniel to follow the victim's lorry.

20 Daniel is extremely sorry for the events that happened and is very remorseful that the victim died. He regrets all his actions, starting from his desire to make quick money by agreeing to the robbery. He is grateful that he has not been found guilty of murder and that he will be able to be with his family again in the near future. He also apologises to the victim's family.

21 He pleaded for mercy. He has been in remand since 5 June 2006 and requested that his imprisonment term be backdated accordingly.

22 It was argued that the acts which resulted in the victim's death were done by Bala and that Daniel did not participate in any of them. He "did not know that force would be used by [Bala] which would be so severe as to result in the death of the victim". He was aware that the intention was to rob and that was to drive away the lorry with the cargo on board. The acts which caused the victim's death were never planned.

23 Given the relatively minor role played by Daniel, who "merely went along and did whatever [Bala] planned to do" and that the masterminds were Bala and Arsan, it was suggested that a sentence of between 10 and 12 years' imprisonment and 12 strokes of the cane would be sufficient punishment for Daniel. *Ang Ser Kuang v PP* [1998] 3 SLR(R) 316, where a sentence of 6 years and 12 strokes was upheld, was cited for comparison.

Mitigation plea and submissions for Christopher

24 Counsel for Christopher urged the court "to consider the imposition of a custodial sentence of up to 10 years' imprisonment coupled with the necessary strokes of the cane to leave Christopher with the message that even peripheral participants will be punished significantly to guard against the proliferation of such offences".

25 While it was accepted that the Court of Appeal did not make findings of fact regarding Christopher's specific role in the robbery, Christopher's role was that of a driver who was privy to the robbery plan. He asked for mercy and submitted that the level of his culpability ought to be pegged at the lowest end of the sentencing spectrum for robbery with hurt cases where death has occurred.

26 Christopher, now 28, was almost 24 years old at the time of the robbery in May 2006. He was educated up to N-level and was supposed to be serving national service at the material time. However, he was absent without official leave since 2004 so that he could work as a daily-rated driver for Bala in order to supplement his family's meagre income. He is the only son in his family and was living with his parents. His father was a pastor who unfortunately suffered a serious stroke. His mother was a production operator in a factory.

27 Christopher was engaged to be married but his participation in the robbery brought the engagement to an end. He was a very heavy drinker. On the night before the robbery, he was drinking beer from about 8.30pm to about 1am.

28 He surrendered to the authorities when he learnt that they were looking for him and cooperated with them to the best of his abilities. He admitted that he was a driver in the robbery. However, the violent actions of Bala were not within his contemplation.

29 In a handwritten letter handed by Christopher to his counsel during the trial (for use in case the murder charge was reduced to a non-capital one), he stated as follows:

> I am deeply remorseful and unable to be consoled for the fact that the victim had lost his life. I know that no sufficient words can replace the loss to his loved ones.
>
> Further, I am fervently asking God to give the family the divine consolation they need at this hour. My heart goes out to the loved ones that are going through this agony.
>
> I feel that if I could in any way be of help to the family, I would be more than willing to help them by all means.
>
> My poor mother did not fail to visit me even for a single day despite having to work at night. It has broken my heart to see my mother cheering me up. I hope and pray that God will answer her prayers that I will be able to go back to the workforce to support my family. I realise only now the true love of a mother for her son.
>
> I would like to earnestly appeal to your Honour in all sincerity and humility to ask for mercy and grace based on my current situation. I solemnly plead guilty to my presence at the time of the incident of the robbery. I plead to your Honour to grant me one last opportunity to be able to go back to the workforce and repay my mother for all the months of pain she has undergone trying to support my family.
>
> I would like to take a pledge before God and this Court that I will never again be involved in any situation that could entail me to be sentenced by this Court.

30 Christopher has no criminal antecedent save for his absence from national service. He demonstrates no proclivity for re-offending. The entire legal process has taken more than 4 years and he has learnt a very bitter lesson. This will serve to deter him specifically from ever breaking the law again. His role as a driver was a peripheral one and he received only $500 from Bala for his role. It was also clear that he was controlled by Bala throughout. The last instruction from Bala was for Christopher to drive away with the two pallets of mobile phones to Ang Mo Kio so as to deceive Arsan.

3 1 *Hirris* is a useful guide for sentencing offenders who participate significantly in robberies involving death but is of limited assistance when determining the level of culpability of peripheral participants such as Christopher. In that case, both respondents participated in the "callous and wanton" assault of the victim who eventually died. Although the Court of Appeal stated the established sentencing range for offences under section 394 of the Penal Code where death occurred, the court also noted at [14] that lower courts are not required to adhere slavishly to sentencing precedents and that each case ultimately turns on its own facts. Christopher did not participate in the assault on the victim unlike the offenders in the precedents cited by the Court of Appeal. He was also not intimately involved in the planning of the robbery. In fact, he was just a follower of instructions. "Arsan was clearly the mastermind behind the scenes instructing Bala the lieutenant who in turn directed the periphery characters of Christopher and Daniel". Christopher received only $500 out of $10,600 worth of sales. His role was therefore a very limited one and his culpability was significantly lower than that of all the accused persons in the precedent cases.

32 Counsel for Christopher placed reliance on *PP v Somrak Senkham and Another* [2004] SGHC 172 ("*Somrak*") where the accused persons were sentenced to 5 years' imprisonment coupled with the mandatory 24 strokes of the cane although "it is immediately accepted that the [Court of Appeal] in

Hirris stated that *Somrak* should not be used as a precedent for robbery cases involving death". "However, the unfortunate predicament is that *Somrak* bears some similarity to the instant case" and was decided by the same trial judge in *Hirris* and some of the precedent cases cited therein. The prosecution did not appeal against sentence in *Somrak* which was also not an appropriate precedent in the *Hirris* context where the respondents actively participated in the assault.

33 The distillable variable in sentencing participants in robberies involving death was therefore the level of significant participation of each offender with special regard to the assault on the victims who died. Here, Christopher's participation was peripheral.

34 Arsan played a major role in the planning of the robbery. He was "the main character who brought all the puppets together and masterfully choreographed the robbery". His sentence represented the upper limit as there were aggravating factors. He was the one who hatched the initial robbery plan with Ragu. He recruited Bala who in turn recruited Daniel and Christopher. He admitted that he was the originator of the idea to hit the victim till he became unconscious and unable to recognise the robbers. He was careful not to dirty his hands in the actual robbery. He was largely responsible for the disposal of the loot. This case was also not Arsan's first brush with the law. By contrast, Christopher's role was significantly smaller that Arsan's and his sentence should be correspondingly lower than the upper limit represented by Arsan's sentence.

The sentences

35 It appears to me that it may not be necessary to invoke section 34 for a charge falling within section 394 of the Penal Code. Section 394 already imposes liability on those "*jointly concerned* in committing or attempting to commit such robbery" even though they did not cause the hurt (see [3] above).

36 Under section 394, the imprisonment term has to be between 5 and 20 years and the number of strokes of the cane has to be between 12 and 24 (24 being the maximum allowed under section 229(1) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed)). The Court of Appeal in *Hirris* made it clear that the established sentencing range for robbery cases involving death was 12 to 20 years' imprisonment. Understandably, the Court of Appeal did not deal with the issue of the number of strokes as the minimum and the maximum in that case were both 24. The Court of Appeal also stated specifically at [15] of *Hirris* that "*Somrak Senkham* should not be used as a precedent for robbery cases involving death".

37 In the light of these pronouncements by the Court of Appeal, the persistent attempts by counsel for Christopher to resurrect *Somrak* can only be futile. If counsel was suggesting that the Court of Appeal was in error in rejecting *Somrak*, it is certainly not within the province of the High Court to so decide and depart from the clear ruling in [36] above.

38 In my view, the statement by the Court of Appeal about *Somrak* was a carefully considered one arrived at after a detailed analysis of the relevant cases. Since one of the reasons for relying on *Somrak* is that it "bears some similarity to the instant case" (see [32] above), that makes the argument for rejecting any suggestion that the sentence here should be similar to that in *Somrak* even stronger.

39 I note that the respondents in *Hirris* did inflict some non-fatal punches and kicks to the body of the victim there while Daniel and Christopher here left the vicious assault entirely to Bala. It would be naïve to think that they had no idea whatsoever that violence would be used by Bala. After all, part of the robbery plan was to ensure that the victim would be unable to hinder or to identify them. It

was not as if the robbers had planned to blindfold or to drug the victim to achieve their common objective. They knew that one of them had a baseball bat and that the purpose of bringing it along was not for hitting a ball in Changi coastal park that fateful morning.

40 In *Hirris*, it was essentially a case of three thirsty men planning on the spur of the moment to rob someone in order to purchase some liquor. In stark contrast, in the present case, there was advance planning, entailing even a prior visit to and survey of the scene for familiarisation (or a "recce" mission, in military terms). On the day of the robbery, the whole operation was carried out with almost military precision in the early morning. Steps were taken to ensure that the confrontation with the victim would not be seen by passing drivers. The place and the vehicles for the transfer of the cargo were all planned. The targeted loot was a very valuable cargo worth more than S$1 million (see [13] above). Christopher may have received only $500 at the material time but it must be remembered that the bulk of the cargo had not been disposed of yet by the robbers and their identities were already exposed by the swift actions of the police. They therefore did not have the opportunity to sell the entire loot and distribute all the money. The trio in *Hirris* merely took a brown wallet containing $50, an EZ-Link card, a POSB ATM card and some personal papers from the hapless deceased there (see [5] in *Hirris*). The robbery in this case was therefore a much more serious one compared to that in *Hirris*.

41 I accept that the Court of Appeal in this case did not invoke section 397 of the Penal Code when substituting the charge for Daniel and Christopher. As mentioned in [12] above, section 397 provides for mandatory additional punishment of not less than 12 strokes of the cane in cases where the offender is armed with or uses any deadly weapon or causes grievous hurt or attempts to cause death or grievous hurt to any person. Section 397 only adds mandatory caning without affecting any imprisonment term. I therefore do not think the Court of Appeal's pronouncement in *Hirris* concerning the established sentencing range was confined to cases involving section 397. In any case, the result of the assault here is still a painful and cruel death for the victim.

42 I agree with the prosecution's submissions set out above. In my opinion, 15 years' imprisonment and 15 strokes of the cane would be appropriate punishment for the charge substituted by the Court of Appeal. I sentenced both Daniel and Christopher to this punishment accordingly, without trying to look for minute differences in their roles in the robbery with a legal microscope. I sympathise with their financial difficulties but committing robbery with hurt cannot be the solution and anyone contemplating such easy and extreme ways out of hardship must be effectively discouraged from acting on such thoughts. I disregarded Daniel's previous criminal record as it has no real bearing on this case. The imprisonment term was backdated to 5 June 2006, the date of their arrest. If they are granted a one-third remission in the imprisonment term, they should be released in about 5 years 8 months from the date they were sentenced.

43 Both Daniel and Christopher have appealed against their sentences.