IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 199

Magistrate's Appeal No 9331 of 2018

Between

Arumugam Selvaraj

… *Appellant*

And

Public Prosecutor

… *Respondent*

BRIEF GROUNDS

[Criminal Law] — [Complicity] — [Common intention]
[Criminal Procedure And Sentencing] — [Sentencing] — [Appeals]

Arumugam Selvaraj
v
Public Prosecutor

[2019] SGHC 199

High Court — Magistrate's Appeal No 9331 of 2018
Aedit Abdullah J
10 May, 22 July, 5 August 2019

28 August 2019

Aedit Abdullah J:

1 These are brief grounds, capturing oral remarks made in dismissing the Appellant's appeal against conviction, but allowing his appeal against sentence.

Introduction

2 In the present case, the Appellant appealed against his conviction after trial on a charge of voluntarily causing grievous hurt in furtherance of a common intention with another person, Arumugan Manikandan ("the co-accused"), to the victim, Muthu Palani Sugumaran ("the victim"), under s 325 read with s 34 of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code"). The Appellant also appealed against the sentence of ten months' imprisonment that was imposed on him.

3 The Appellant argued that the decision below should be reversed as the offence was not made out. The Appellant was not proven to have had the

common intention to cause the specific injury which was the subject of the charge against him (*ie*, an undisplaced fracture of his right middle finger).[1] Despite the best arguments made by counsel, I was of the view that the proper interpretation was that there only need be common intention to cause the criminal act (*ie*, some form of grievous hurt), and not the specific injury inflicted. However, I concluded that the sentence imposed was manifestly excessive as inappropriate weight was placed on certain factors, and accordingly reduced the sentence imposed to seven months' imprisonment.

Background

4 The Appellant and the co-accused were involved in an altercation with the victim, after the victim had sounded his lorry's horn when the Appellant and co-accused had dashed across a road. Subsequently, the Appellant and co-accused went after the lorry, which was being driven slowly. The co-accused caused damage to the lorry by kicking its right side mirror.[2] The victim alighted and confronted the Appellant and co-accused. Thereafter, a fight ensued, with the Appellant and co-accused hitting the victim on his face and body. After he had fallen to the ground, they stepped on and kicked his chest, and also kicked his back. In the midst of this, the victim's right middle finger was fractured. A passing CISCO officer intervened. The fight lasted for a total of about two minutes. Aside from the fracture, the victim was found to have bruising over his face and shoulder and suffered pain.[3]

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1 Appellant's further submissions at para 5.

2 Record of Proceedings ("ROP") at p 253.

3 ROP at p 255.

5 The co-accused pleaded guilty to and was convicted of a charge of voluntarily causing hurt in furtherance of a common intention with the Appellant under s 323 read with s 34 of the Penal Code. A charge of mischief with common intention under s 426 read with s 34 of the Penal Code was taken into consideration for the purposes of sentencing.[4] The co-accused was sentenced to three months' imprisonment.[5]

6 The Appellant faced a total of two charges. The first, which formed the subject of this appeal, was for voluntarily causing grievous hurt in furtherance of a common intention under s 325 read with s 34 of the Penal Code. The second was for committing mischief in furtherance of a common intention under s 426 read with s 34 of the Penal Code. After trial, he was convicted of the first charge and acquitted of the second charge, and was sentenced to ten months' imprisonment. He appealed against both his conviction and sentence. The Prosecution did not appeal against his acquittal on the mischief charge.

Summary of arguments

7 The Appellant argued that the common intention element would only be made out if it was shown that he had the common intention to inflict the very injury which was the subject of the charge.[6] The Appellant would have to be shown to know that it was almost certain the primary offender would commit the criminal act in furtherance of the common intention of all the parties.[7] The Appellant argued that the Court of Appeal ("CA") decision in *Daniel Vijay s/o*

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4 ROP at p 401.

5 ROP at p 408.

6 Appellant's further submissions at para 5.

7 Appellant's further submissions at para 2.

Katherasan and others v Public Prosecutor [2010] 4 SLR 1119 ("*Daniel Vijay*") was authority for these propositions. He also relied on the decision of the Supreme Court of the United Kingdom in *R v Jogee* [2016] 2 WLR 681 ("*Jogee*").

8 The Prosecution argued that *Daniel Vijay* did not support the arguments made by the Appellant: the common intention need only be to cause the injury type contemplated by primary offence (*ie,* grievous hurt in this case) and not a specific injury.[8]

The decision on conviction

9 Taking first the application of common intention, the CA in *Daniel Vijay* did not go so far as argued by the Appellant's Counsel. While the CA specified in *Daniel Vijay* that what must be in the intention of the secondary offender is the very criminal act committed by the principal, nothing in that case stipulated that the criminal act must encompass the specific injury inflicted by the principal offender.

10 It is important to bear in mind, as submitted by the Prosecution, that the degree of specificity required will be dictated by the primary offence, and the *actus reus* specified for the primary offender. Where the primary offence, such as s 300(c) of the Penal Code, requires the infliction of a particular type or nature of injury, it would follow that a secondary offender must also have the common intention to cause such injury. But where, as is the case here, the offence is to cause one of a class of injuries, it is not necessary for there to be a common intention to cause the specific injury that is covered by the charge; it is sufficient

[8] Prosecution's reply submissions at para 2.

for the Prosecution to show that there was a common intention to cause an injury falling within the class of injuries covered by the penal provision (*eg*, grievous hurt).

11 I noted the various authorities cited by the Appellant. The United Kingdom approach in *Jogee* has not been followed in Australia. More significantly, it has also not been followed in Hong Kong, which shares largely the same body of criminal law as the United Kingdom. The Appellant's reading of the United Kingdom case, that it abolished joint criminal enterprise in English law, would effectively render s 34 of the Penal Code otiose. That interpretation was therefore not open to me at all given the contrary approach taken in our local cases, including the CA's decision in *Daniel Vijay*, which was binding on me. In any event, it would be more accurate to note that the United Kingdom approach in *Jogee* really abolished what is termed "parasitic accessory liability", under which a secondary offender would be liable for acts of the primary offender in the course of a joint criminal enterprise if they were foreseeable. The decision in *Jogee* did not assist the Appellant; if anything, it brought the position under English law closer to the approach adopted in Singapore in interpreting s 34 of the Penal Code.

12 Returning to the present case, I was satisfied that the learned District Judge correctly found that the case was proven against the Appellant beyond a reasonable doubt. The evidence against him showed that he and the co-accused attacked the victim, aggressively inflicted blows on him, and continued to attack him after he had been pushed to the ground. There were sufficient grounds for an inference that there was a common intention to cause grievous hurt as defined in s 320 of the Penal Code. The other findings of evidence made by the District Judge were warranted by the evidence before her, and the conviction was safe.

The sentence imposed

13 Turning to the sentence imposed, I was of the view that, in applying the sentencing framework in *Public Prosecutor v BDB* [2018] 1 SLR 127*,* the District Judge misdirected herself. The degree of harm was correctly identified to be moderate and at the lower end of the range, but in considering the injuries caused, I did not consider that the starting point should be as high as eight months' imprisonment. Six months' imprisonment was an appropriate starting point bearing in mind the fracture suffered here, accompanied by extensive bruising.

14 The next consideration would then be the interplay of aggravating factors on that baseline. The Prosecution here and below seems to have set some store by the existence of an aggravating factor in the attack being a "group attack", as well as the length of the attack. While the District Judge stated that she was careful to bear in mind that there were only two persons involved, she accepted the labelling of the assault by the Prosecution as a "group assault".[9] On appeal, the Prosecution maintained that characterisation.[10] An assault by a group as against that by an individual merits a heavier sentence, all other things being equal, as such an assault entails a greater degree of culpability: the victim is outnumbered, and generally overwhelmed. It may also entail greater harm, through the sheer scale of the injuries caused. An assault by a group of persons also potentially endangers public order: mob assaults have a tendency to go out of hand, and lead to other dangers. But there must be consideration of whether the assault is indeed a group assault. An attack by five would be by a group, but will also probably constitute other, more serious, offences. An assault by four

9 ROP at p 273.

10 Prosecution's submissions at paras 41-44.

would be as well. That by three, as well, though that may be on the boundaries of the meaning of the word 'group'. An assault by two though is on the very edges of such meaning. It is important then to unbundle the meaning and objective of the term "group assault", and to ensure that consideration is given to the fact that the situation is perhaps different from an assault by a larger number, as it would be as regards a solo assault. It is in between, and I was of the view that the sentencing should be undertaken with that in mind.

15 I note that similar problems exist in respect of other labels commonly used in submissions, such as "premeditation" and "abuse of position". Care must be taken not to be carried away with loose labelling.

16 As for the duration of the assault, a two-minute assault is not brief, and I had no doubt that it was a long two minutes for the victim. But this was not the sort of attack that attracts the label of viciousness. There are, unfortunately, many common instances of actual viciousness. The duration and degree of attack was not such as to push the sentence further along the scale to the extent identified by the District Judge. On the other side of the coin, I did take into account that the accused was intoxicated.

17 Taking all of these in mind, I was of the view that a sentence of seven months' imprisonment was appropriate, and accordingly so ordered.

Aedit Abdullah
Judge

Tang Jin Sheng and Aw Jansen (LVM Law Chambers LLC) for the appellant;
Chew Xin Ying and Tan Yen Seow (Attorney General's Chambers) for the respondent.
