Public Prosecutor v Fazely bin Rahmat and Another
[2002] SGHC 141

Case Number : CC 12/2002

Decision Date : 08 July 2002

Tribunal/Court : High Court

Coram : Choo Han Teck JC

Counsel Name(s) : Ng Cheng Thiam and Imran Abdul Hamid (Deputy Public Prosecutors) for the Public Prosecutor; BJ Lean (Syed Yahya & Partners) and Amarick Gill Singh (Tan, Gill & Paul) (assigned) for the first accused; Subhas Anandan and Anand Nalachandran (Harry Elias Partnership) (briefed) for the second accused

Parties : Public Prosecutor — Fazely bin Rahmat; Another

Criminal Law – Offences – Murder – Accused charged with being members of unlawful assembly with common object to cause hurt with dangerous weapons – Whether common object can be formed at any point in time – Original common object of unlawful assembly – Whether accused aware that fellow gang members carrying knives – Whether knowledge of knives being used by fellow gang members necessarily leads to inference of new common intention by all members – Whether charge against accused proven beyond reasonable doubt

Evidence – Documentary evidence – Statements – Voluntariness of statement – Admissibility – Statement admitted into evidence – Whether such evidence necessarily incontrovertible – Whether maker can explain admitted statement's contents

Judgment

GROUNDS OF DECISION

The Gang

1. The first accused Fazely Bin Rahmat (also known as "Pendek") and the second accused Khairul Famy Bin Mohd Samsudin (also known as "Fami") are 20 and 19 years old respectively. They belonged to a secret society known by the numerical name of "369". They were both charged for the murder of one Sulaiman Bin Hashim, a 17-year old boy whom the two accused and their fellow gang members mistook to be a member of a rival gang. The two accused were initially charged together with a third member of their gang, Hasik Bin Sahar, but on the first day of the trial the prosecution reduced the charge against the latter to culpable homicide not amounting to murder. Hasik decided to plead guilty to the amended charge and was taken to another court to be dealt with. He was subsequently sentenced to life imprisonment. The trial of the first and second accused then continued before me. Two other members of the gang, Mohamad Fahmi Bin Abdul Shukor (known as "Fahmi") and Mohammad Ridzwan Bin Samad (known as "Chemong"), were sentenced in the subordinate courts to three years' imprisonment and six strokes of the cane each for their involvement in the attack on Sulaiman. Three other members Muhammad Syamsul Ariffin (known as "Aki"), Norisham Bin Mohammad Dahlan (known as "Baby"), and Sharlhawazi Bin Ramy (known as Boy Sharul") were still at large when this trial commenced. Two other members of the gang were not involved in the assault as they had gone home after the party. They were Mohamad Khairsofian (known as "Pian") and Sophian (known as "Yan").

The Assault On Sulaiman

2. On 31 May 2001 Sulaiman and two of his friends, Muhamad Sharif and Mohamed Imran, were walking along the footpath outside *Bernie Goes To Town*, a public house (commonly referred to as a 'pub'), at South Bridge Road about 4 o'clock in the morning. The two accused together with four of

their friends were walking on the opposite side of the road and in the opposite direction. The accused and their friends had just celebrated Aki's birthday at *Club 7* at Mohamad Sultan Road, and arrived at South Bridge Road. The members of the accused persons' gang spotted Sulaiman and his friends on the opposite side of the road (South Bridge Road), so they crossed the road just behind Sulaiman's party. This gang (without Chemong and Fahmi) caught up with Sulaiman and his friends just outside *Bernie Goes To Town* and attacked them. Muhamad Sharif and Mohamed Imran fled for their lives but not before Muhamad Sharif was assaulted and stabbed. When these two (Sharif and Imran) returned to the scene in a taxi a short time later, they saw Sulaiman lying in a pool of blood at the spot where they were attacked. Sulaiman was later pronounced dead at the scene. The pathologist Dr. Paul Chui testified that Sulaiman's death was caused by stab wounds to the neck and chest. He also testified that the wounds were consistent with those inflicted by a knife with a single sharp blade, possibly similar to the knife recovered by the police (P44) from a rented flat occupied by Aki, Baby, Chemong, and Hasik.

The Prosecution Case

3. The prosecution case against the two accused was founded on the premise that they were part of a gang who had a common object to attack Sulaiman with dangerous weapons and cause him grievous hurt. Neither accused disputed the evidence that they were part of the gang that attacked Sulaiman and his two friends. However, they denied stabbing Sulaiman and only admitted to punching and kicking him. Their defence was that others in the gang stabbed Sulaiman, but the two accused claimed that they did not know that knives were carried by the others nor had they formed any intention to use them.

4. Several statements of the two accused were admitted in evidence. One of which, namely the statement of the first accused recorded on 28 June 2001 was admitted only after a *voir dire*. The first accused challenged the admissibility of the statement on the ground that it was not made voluntarily. His reasons were not sufficiently strong to convince me that it was unsafe to admit it in evidence. He claimed that as he was dressed in T-shirt and shorts he was feeling unbearably cold. He also testified that the recording officer (ASP Goh Boon Tat) told him not to lie and that he (ASP Goh Boon Tat) had sent many people to the gallows and that he could send the first accused to the gallows within a week. He was also told by ASP Goh that the judge would not believe him if he said that he did not kick Sulaiman. The first accused then said that ASP Goh provided most of the information and "seemed to be copying from a piece of paper". All this evidence seemed very disjointed and, in my view, little in what was said created any impression of duress or oppression operating on the mind of the first accused. The thrust of his case, however, was that the first accused was feeling very cold during the recording of the statement. I accept that the room in which the statement was recorded was cold. The interpreter Iskander Goh admitted as much, but he did not think that it was so cold that the first accused would be feeling any discomfort. Iskander Goh, was, on his own evidence, warmly dressed with his sweater on, and may not be best placed to assess how the accused felt. However, the first accused did not protest that he was so cold that he could not carry on with the interview. I accept that the accused was probably cold and may not be as sharp or alert as he might otherwise be in order to check or clarify his statement, but I do not think that the statement was not made voluntarily. I am satisfied that the statement was given without any threat, inducement or promise and admitted it in evidence. The statements of the two accused contain admissions that they, together with four others (including Hasik and Aki), took part in the assault on Sulaiman. On all the evidence above, I called upon the defence and both accused elected to testify.

The Defence Case

5. They testified that they did not know that Baby, the leader of their gang, and Aki were armed

and they did not know or expected weapons to be used. In short, they asserted that the common object of the gang was to beat up members of rival gangs should they encounter them in the course of the morning. They denied that they had any common object with the others to kill or use any dangerous weapon. There was no evidence to contradict this evidence that neither of them was armed with either knife or dagger, or any similar weapon. The evidence from both accused had consistently been that the fatal wounds were caused by either Baby, Aki, and Boy Sharul or any one of the three. The first accused, however, admitted that he had used a wallet chain (made for the purpose of hooking one's wallet at one end and the belt loop of his trousers at the other) in an attempt to hit Sulaiman, but the attempt failed because the chain hit Baby on the arm and broke when it fell to the ground. I had examined the broken pieces and am satisfied that the wallet chain did not seem to be sufficiently lethal to be ascribed as a dangerous weapon. There is no evidence that this wallet chain was brought along specifically as a weapon. That the first accused had used it and not just his fists and feet (like the second accused) is a factor to be taken into account. It is also not disputed that the fatal wounds were caused by daggers or knives, and not by this chain.

The Common Object

6. The charge against the two accused indicts them as "members of an unlawful assembly *whose common object was to cause hurt with dangerous weapons* to members of the '303' Secret Society…". I have emphasized the relevant portion because that is the critical mental element that constitutes the backbone of the charge of murder in this case. I have to begin with the observation that the prosecution was unsure as to how to make the connection between this important element and the evidence. I will explain, but it is necessary first, to refer to the learned DPP's written submission where he asked (at page 7), "Was there a pre-arranged plan to beat up rival gang members? And were the First [and Second] Accused aware of this plan?". Then he asked (at page 11), "Were the First [and Second] Accused aware of the use of knives? And at what stage did they come to know of the knives?" The third major question posed by the learned DPP (at page 15) was, "Upon realising that knives were being used, what role did the First [and Second] Accused play in the attack?". The DPP then proceeded to answer these questions. In regard to the first question, the DPP was very meticulous in trawling the evidence to establish the 'purpose' of the gang, which he summarised in these words, "to beat up the rival gang members". He submitted that "at no time was there a change of plan". Referring to Khairul's statement marked as P107, the DPP pointed out that the second accused admitted "that the purpose was to go there and fight". However, he also submitted that s 149 "does not require proof of a pre-arranged plan. An unlawful object could develop suddenly, on the spot after the offenders gather at the scene of the occurrence."

7. I shall pause at this juncture to consider this aspect more fully before continuing with the other questions posed by the learned DPP. The DPP is absolutely right in so far as the evidence, including the admissions of both accused in their statements and oral evidence in court, are concerned. The common object of the gang as verbally articulated by their leader "Baby" was to go to *Rootz Discotheque* (which is near *Bernie Goes To Town*) to look for rival gang members. This was understood by the gang to mean beating them up. There has been no evidence from that moment, up to the time the gang accosted Sulaiman, that weapons of any kind were discussed or contemplated. Up to that point, as the DPP pointed out, there was no change in their plan. The difference between the object of picking a fight and attacking the intended quarry with dangerous weapons is too stark and serious to disregard or to give it scant attention. From the evidence, I am satisfied that the common object of the entire gang, other than the two who went home, but including the two who went to scout for get-away taxis, was to find rival gang members to beat up. Up to this juncture, there is no basis to add in the words *with dangerous weapons*. The evidence does not support it.

One Or Two Common Objects?

8. The next step in the analysis of the evidence, in view of the fact that knives were used in the actual assault, is to enquire when, if at all, a new and separate common object was formed by those at the scene to attack Sulaiman and his friends with knives; and if so, did the two accused share this new common object. It is at this stage of the analysis that the question as to when, if at all, the two accused were aware that knives were being used by other members of the gang (it is not disputed that the two accused themselves did not use any knife) becomes relevant. This factual issue is relevant because a new or different common object can be formed at any point in time. Short of an express declaration, as was the case in the original common object, the evidence of the events from the time the gang spotted Sulaiman must be scrutinized to ascertain whether they sufficiently support the formation of a new common object (to use dangerous weapons). In this regard, as I have mentioned, it is not clear what the prosecution case is. Is it based on the premise that the common object was formed when the gang was still at Mohamad Sultan Road where they were celebrating Aki's birthday, or a new common object was formed by the gang? If it was the latter, it is also not clear as to when and how this new object was formed. The DPP's submission seems to waver between one and the other. For instance, Mr. Ng submitted emphatically that "at no time was there a change of plan by Baby". Was he suggesting that the common object to use knives was formed at the outset - before the gang arrived at *Bernie Goes To Town*? Expanding on his written submission, Mr. Ng maintained that the prosecution was not relying on the 'second limb" of s 149 of the Penal Code, that is, that the accused knew that the offence of murder was likely to be committed. In other words, his case rests on the premise that the accused are culpable because they shared the same common object to cause hurt with dangerous weapons. This meant, of course, that the two accused must have shared the knowledge and intention of the gang's common object. Pausing here, it is plain that on this premise, it would not matter whether the two accused actually saw the knives being used or that the knives were used only after the two accused had done their part of beating the victim. However, the bulk of Mr. Ng's submission focussed on the argument that knives were drawn by one or more members of the gang after they accosted Sulaiman, and that the two accused knew that knives were aware that the knives were drawn when they (the two accused) were assaulting Sulaiman. This argument is relevant only if it is in support of a submission that a new common object was formed after the gang arrived at *Bernie Goes To Town*, but Ng stopped short of saying that a new common object superseded the old.

Original Common Object

9. The evidence from the prosecution and the defence indicates that the original common object was to pick a fight with such rival gang members as they may find. It is a question of semantics whether "picking a fight" is a more accurate description than "beating them up". The evidence suggests that the more accurate description is the former. The latter is merely a more optimistic version of the latter. (I am using the more neutral version of "picking a fight"). Fazely was told by Baby in the taxi on the way to South Bridge Road, that they were going to "hit" and "attack" their rival gang. In their statements to the police Khairul and Hasik say that Baby merely commanded them to proceed to *Rootz*, and although no other words were used they understood him to mean that they were going there to look for a fight with their rival gang, or to beat them up. But certainly no reference was made with regard to any weapon. It is axiomatic that an unlawful assembly may form a common object at any point in time. Both accused also testified that they had been involved in previous fights with rival gangs but no weapons were used. There is no evidence that the common object as formed when the gang left *Club 7* was to pick a fight *with dangerous weapons*. I do not think that just because one or more of the relatively large gang had drawn daggers or knives at the scene of crime that the natural inference must be that the common object, right from the beginning, was to use the knives. The evidence must be considered and weighed in totality. I shall revert to the evaluation of the evidence shortly, but for the moment, I should state my finding that the original common object was merely to pick a fight without the use of dangerous weapons. The question that

follows, is whether a new common object was formed at the time of the assault?

New Common Object

10. In the situation as the facts have presented, two equally contentious possibilities emerge. First, even if one or more members had knives, there may not be a new common object in that the others may not have seen them so armed, or, if they had, may nonetheless, not have shared the same object of using it on the victim. Secondly, it may be possible that the other members became aware that some of them had drawn, and support the use of those knives - in that case a common object to, among other things, use the knives, may be formed. This is, of course, just a concise description of the possible situations, each of which are constituted under its own facts. Knowledge that a knife had been taken out and used in the assault is, naturally, strong evidence of a concurring mind, although it does not necessarily lead to an irresistible inference that that is so. To draw such an inference without more is a mere exercise in logic; narrowly applied, disregarding reasons and explanations. That is neither a careful nor thoughtful approach, and the fact finding exercise will thus be reduced to the adoption of the formulaic expression: "Knife drawn + knowledge = common object to use knife". The inference of that common object should only be made after all relevant evidence are considered and weighed. The detail is as important as the broad picture. Fact finding in a trial is a complex, but not a complicated exercise. What then, is the evidence in this case, and how should it be evaluated?

Some Salient Evidence

11. I begin with an indubitable piece of evidence pertaining to the actual assault. That is that one of Sulaiman's companions (Muhamad Sharif) was stabbed very early on in the encounter between the two groups, suggesting that a knife was used very early on. However, Muhamad Sharif was unable to say who used the knife, how it was used, and neither did he see the knife. If Muhamad Sharif who was a victim of the knife attack did not see the knife, did anyone else see it? It is possible that someone might have. In his testimony the first accused denied seeing any knife (this would put him in the same category as Muhamad Sharif, that is, present at scene but did not see a knife). However, in his statement to the police (P100) his version gave a different account. He explained in court how that discrepancy came about. He testified that when he gave his statement while in remand he was told (by the investigating officer) how the incident took place, and was asked to confirm that story. He testified that in court, he felt that "he was allowed to give the whole narration freely".

12. The second accused testified that he saw Aki stab Sulaiman, but that he (the second accused) had already stopped his assault on Sulaiman and had backed off. In his statement to the police (P106) he stated in 8 that he saw Aki, and Baby stabbing Sulaiman, but after the second accused had ceased his own assault on Sulaiman. It should be noted, for completeness, that in his statement to the police, Hasik described the crucial sequence in the following passage (19), relied on by the DPP:

> "On reaching the spot where Baby was, I saw the male Malay, who was in a black shirt lying on his back at the step of the stairs leading to a pub. Baby was stabbing the male Malay at his head. Boy Sharul was slashing the male Malay on his neck. As for Pendek [the first accused], I saw him took out his chain-belt from his jeans and swung (sic) it at the male Malay. Khairul Fami was the first to reach them and he shouted "Tepi!-Tepi!" which means to 'move aside'.

> Thereafter Khairul Fami [corrected from 'Pendek'] moved aside and Aki kicked the person on his face and also punches the face of the person. Following this I saw Khairul Fami [corrected from 'Pendek'] moved aside and Aki together with Baby were stabbing the person on his head and neck. Boy Sharul then shouted to leave. We then moved away from the said place…." (sic)

13. The two accused were charged with a capital offence because on the facts, it appears that whoever plunged the knife into Sulaiman had committed murder. The two accused will share the burden of that guilt if they had shared a common object with the wielder of the knife - but not, if they did not. The facts in this case are significantly different from that in *PP v Thongthot Yorsad-Art* case (CC 3 of 2002, unreported). In the *Thongthot* case, six men all armed, with an assortment of deadly weapons, went searching for a specific target with the intention of assaulting him using the weapons they carried. The common object was easily proved in that case. In the present case, not every one was armed, and there is no evidence that the two accused knew who in the gang was armed, let alone the knowledge that weapons would be used. The evidence was that in all the previous fights that they had engaged in, no weapons were used. It is true that we only have the words of the two accused for this, but their evidence on this score was not contradicted by evidence of any previous antecedents and I am prepared to accept their evidence on this score.

14. Another significant piece of evidence is that the assault took place in the early hours of the morning where there was no natural light, and the assault was over very quickly. To these it may reasonably be added that as may be expected of an ambush by six men on three, that the occasion was not orderly, and the mayhem was a question of degree. The evidence of what took place exactly at the assault must, therefore, be considered in this context.

Evaluation Of Evidence And Submissions

15. The learned DPP submitted (at 67 of his submission) that "the first accused condoned the action of the rest of his gang members. They started the fight together and they finished the fight together and went away from the scene together. The common object to beat up the victim did not change or diminished by the fact of the first accused walking away. It merely meant that the first accused left it to the others to finish the job. If the others were to kill the victim, the first accused should therefore also shoulder the legal consequences of the dastardly act." This line omits the all-important bridge between premise and conclusion namely, *the common object*. A common object to pick a fight without weapons may not have the same consequences, factual or legal, as one in which the use of dangerous weapons was contemplated. The DPP further concluded (in 75) that "the common object of causing hurt to the victim with dangerous weapons is clearly made out. The consequence of the attack was the death of the deceased". In my view, this is a completely erroneous conclusion. What was clearly made out was a common object to pick a fight or beat up some rival gang members. At the fight (or more accurately, the assault), dangerous weapons were used by *some* of the gang. The victim died from wounds inflicted by those weapons. But we return to the question that will not go away - *did a new common object supplant the original one?*

16. The only evidence that the prosecution relied upon to support its case (that there was a common object to use dangerous weapons) are the statements of the accused persons to the police that indicated that they had kicked Sulaiman after he had already been stabbed. The inference that the DPP draws from this, and which he wishes me to find as a fact, is that this evidence establishes the common object. It is important to remind ourselves that even if the written statements are accepted as stating the truth of what happened, specifically, namely that the two accused persons

carried out their parts in the assault even after the armed members had drawn their knives, the prosecution has still to prove that a common object to do so had been formed. The one does not follow the other as a matter of course. The question as to whether the two accused or either of them had formed a new common object with their knife-wielding friends is one that must be answered by the evaluation of all the evidence, each in detail, and all in connection with one another, without losing sight of the context and circumstances of the events. The statements of the accused persons, and their oral evidence are, therefore, parts of the essential material for consideration. In this case, there is a manifest discrepancy - the oral testimonies in court contradict the written statements to the police in so far as to the moment when knives were drawn. Mr. Ng argues that the statements contain the truth, and that the oral testimonies are lies because they are inconsistent with the written statements. This is, of course, too simplistic an approach. Written statements to the police was once inadmissible because of the thinking that a man ought not to incriminate himself. That line was modified when it became accepted view that the evil we wish to avoid is the coercion of the accused and not his statement. Hence, the rules were changed so that statements of the accused are admissible if the court is satisfied that they were made voluntarily. But it does not follow that once the court admits the statement into evidence it stands as incontrovertible evidence - just because the court is of the view that it was not made under a threat, inducement or promise (as the courts have defined them to be). The statement becomes another piece of the evidence before the court. What is stated may or may not be true. That is what the court has to consider, like any other evidence before it. There are two more points to be made in this regard. First, even when a statement has been admitted in evidence, the maker is entitled to explain what he said and why he said what he said. Secondly, the court's finding of guilt or otherwise does not depend solely on whether the statements carry the truth although it must be recognised that, generally, a written statement forms a forceful piece of evidence unless the persuasiveness of the explanation matches that force, but there is little point in listening to the oral explanation if the written statement is to be preferred as a matter of course.

17. The 'incriminating' (from the prosecution's point of view) statements in this case are sparse; no more than a paragraph or two, and the oral evidence, including that under cross-examination is not much more; but there is nothing exceptional about this. The point in issue, crucial as it may be, is a very narrow one. Taking all the evidence into account, I find little difficulty in finding that the attack took place swiftly and was over very quickly. Although the DPP takes the view that there was adequate light for the knives to be seen clearly, I think that it is not unreasonable to accept the accused person's contention that the lighting was poor. It may be sufficient for the knives to be seen clearly, but it may not be sufficient for the knives to be clearly seen. This is not intended as a play on words. I shall explain. Taking a step back to consider from a broader perspective, the circumstances in which the attack took place, one must recall that there was a fairly large group of people involved (although a few began to run away and others gave chase) in an incident occurring under a street lamp as opposed to natural light, the action was swift as it was furious. It was not the sort of occasion where those involved (on either side) had the luxury of time nor the comfort of safety to observe in detail what the others were doing. I had considered the evidence of the accused persons against this background, and am of the view that there was nothing in the way or manner of their testimony that disinclines me from granting them the benefit of doubt. This is a case which, but for the inconsistency in their written statements, I would have said that I believe their testimonies. Nonetheless, even after taking their written statements into account, there is still a reasonable doubt in my mind as to whether the two accused actually saw the knives being drawn *before* they carried out their part of the assault. More importantly, even if they had carried on hitting Sulaiman after their friends had stabbed him, there is insufficient evidence to convince me beyond reasonable doubt that the two accused had, there and then, formed a new common object of *causing hurt with dangerous weapons* as charged.

18. The evaluation of the evidence must necessarily include a consideration of the written statements of Hasik (P98 and D2), as well as his evidence in court and also the evidence of Chemong and Fahmi. I should also mention that the convictions of these three in respect of their part in the assault on Sulaiman are independent matters left to the prosecutor's discretion and the defence. They cannot safely be used to bolster the case for either prosecution or defence in the case before me. However, it was relevant for the court to know what charges had been proffered against them if they relate to the same incident, if only to be satisfied that nothing materially relevant may be gleaned from those cases and nothing more. So far as Hasik's evidence in court is concerned, I am unable to place any weight on it as he was a figure of dejection and had no interest whatsoever in giving any evidence in the spirit that was required of a material witness. He was thus unable to provide any further information or explain any part of his written statements. So, having taken all the written statements into account, and apportioning the weight to them as I think appropriate, I come to the following conclusion.

Conclusion

19. In cases such as this where a young and innocent life is senselessly slain, the retribution of the law must be inflicted swiftly and firmly but, appropriately, as against the diverse offenders and the diverse nature of their crime. In this case, I am of the view that the defence had raised a reasonable doubt as to whether the two accused are guilty of murder in having a common object with others to cause hurt with dangerous weapons to Sulaiman Bin Hashim. However, on the facts as I have found, both accused are guilty of an offence of Rioting under s 147 of the Penal Code, Ch 224. I therefore find them guilty of that offence and convicted them accordingly.

20. I am of the view that it is inappropriate and wrong to amend the murder charge to one under s 299 Penal Code for culpable homicide not amounting to murder because the mental element that s 299 requires to be present had not been proved on the facts as I have found in this case. Why it was that Hasik pleaded guilty to a s 299 is not a matter before me. However, it will be remembered that he was, together with the two accused before me, faced with a capital charge. Whether he accepted the reduced charge as a life-line is a decision personal to him, and if that proves to be an error of judgment on his part he has to seek correction elsewhere.

21. After hearing submissions in mitigation, and the reply by the DPP, I am of the view that there is insufficient distinction between the two accused to be reflected in the sentences against them. The offence was sufficiently serious to merit a stiff punishment and I therefore sentenced them to five years imprisonment and 12 strokes of the cane each. The sentence of imprisonment shall commence from the date of their arrest.

Sgd:

Choo Han Teck
Judicial Commissioner