Ng Chee Tiong Tony v Public Prosecutor
[2007] SGHC 217

Case Number : MA 35/2007

Decision Date : 12 December 2007

Tribunal/Court : High Court

Coram : Lee Seiu Kin J

Counsel Name(s) : Peter Keith Fernando (Leo Fernando) for the appellant; April Phang (Attorney-General's Chambers) for the respondent

Parties : Ng Chee Tiong Tony — Public Prosecutor

Administrative Law – Natural justice – Trial judge descending into arena and questioning accused using cross-examination-like questions – Trial judge relying on evidence from own line of questioning in justifying finding of fact in grounds of decision – Prohibition against assuming inquisitorial role – Whether trial judge's judgment and ability to properly evaluate and weigh evidence impaired – Whether trial rendered unfair and conviction ought to be quashed

Criminal Procedure and Sentencing – Appeal – Acquittal – Applicable principles in deciding whether to acquit or to order retrial

12 December 2007

Lee Seiu Kin J:

1 On 28 February 2007, the appellant, Ng Chee Tiong Tony ("Ng"), was convicted of the charge of voluntarily causing hurt to one Serene Neo ("Neo") by punching her on her left eye, and sentenced to six weeks' imprisonment by the learned trial judge. Being dissatisfied with the learned trial judge's decision, he appealed against both his conviction and sentence. He had two grounds of appeal:

(a) the learned trial judge had unreasonably and unfairly entered the arena of conflict by excessively questioning Ng, through a series of about 70 continuous questions, thereby rendering the conviction unsafe; and

(b) the evidence of the two key prosecution witnesses was unreliable because the undisputed relative end-positions of the parties' vehicles were inconsistent with Neo's and her husband's account of the incident, and instead, supported Ng's assertion that Neo's husband was indeed the dominant aggressor throughout the incident.

2 At the end of the hearing on 12 October 2007, I allowed the appeal by setting aside the conviction and acquitting Ng of the charge. I now give the reasons for my decision.

Background facts

3 On 22 December 2005 at about 10pm, Neo was on the passenger seat of a van driven by her husband Yanto Budiman Nur ("Yanto") along Penang Road. At the same time,Ng was driving his car on the lane to the left of Yanto's van. Both drivers were intending to turn right into Buyong Road when the unfortunate events began. According to Yanto, Ng had suddenly cut into his lane causing him to swerve to the right to avoid a collision with Ng's car. On the other hand, Ng asserted that he had signalled his intention to filter to the next lane to his right before changing lane. Ng said that as he was doing so, he heard a slight honk but ignored it. Ng further stated that Yanto then headed directly

towards the right side of his car, almost hitting it. Ng then swerved to his left to avoid colliding with Yanto's car, and by the time he stopped his car at the junction of Buyong Road with Orchard Road, he had ended up on the leftmost lane of Buyong Road. Yanto's van was on the next lane to the right of Ng's car.

4 What happened subsequently is set out in the grounds of decision ("GD") of the learned trial judge: see *Public Prosecutor v Ng Chee Tiong Tony* [2007] SGMC 13. I will therefore not repeat them, except when required in the course of this decision. Ng on the one hand, and Yanto and Neo on the other, gave differing versions of what transpired. The learned trial judge found Ng to be the dominant aggressor throughout the incident, although Ng claimed that Yanto was drunk at the material time and had acted aggressively by purposely trying to crash into Ng's car when the latter filtered into his lane. Suffice it to say that vulgarities were exchanged and there was a heated argument between the parties. Neo claimed that this culminated in Ng punching her in her left eye. Ng claimed that all he did was to make a gesture at her as if to punch her, but he did not touch her at all. What is undisputed is that both Ng and Yanto ended up being charged for voluntarily causing hurt; Ng for punching Neo in her left eye and Yanto for throwing six to eight punches on Ng's head thereafter.

The conduct of the trial

5 Ng was the sole defence witness. On the first day of his testimony, the morning was spent on evidence-in-chief. His cross-examination started after the lunch break and lasted the entire afternoon. The following day, the learned trial judge asked Ng three questions concerning his failure to subpoena his travelling companion to support his defence. Immediately after that the learned trial judge embarked on a series of questions pertaining to Ng's version of the facts. This questioning by the learned trial judge forms the subject of Ng's first ground of appeal. The judge asked a total of 76 questions which covered 12 pages of the Notes of Evidence ("NE") (from pages 171 to 182). Even in cold print, it is evident that many of these questions, when considered in the context of the questions and answers preceding and following them, were in the nature of cross-examination. To fully appreciate the extent and nature of such questioning by the learned trial judge, it is necessary to reproduce the relevant pages of the NE in full (with cross-examination-like questions underlined):

Court: I want to go back to the incident. Yesterday you testified that you moved from Position 1 to Position 2 to Position 3, then lane F, then D and then E.

A: Yes.

Court: How long did this process take?

A: 3–5 minutes.

Court: You were unable to remember where you were immediately before Position 1, right?

A: Yes.

Court: <u>You described in detail your positions on Penang Road and Buyong Road. Why is it you cannot remember where you were just before Position 1?</u>

A: I know that I am on the right side of the junction but I cannot recall whether I am on rightmost lane or second lane from right.

Court: <u>Can you explain why you are unable to remember but you can remember precisely which</u>

lanes you are on at Penang Road and Buyong Road?

A: Normal for any driver travelling along Penang Road heading into CTE to keep right because of the big sign showing you that right turn on Penang Road will be heading to CTE. At this junction because Position 2 you are able to see the road direction signboard that shows turning right is CTE.

Court: That's not my question. You were precise about what happened on Penang Road and Buyong Road. Why can you not remember exactly where you were before Position 1?

Ng: I remember Position 1 onwards because on that day the IO has informed me that I will be charged in Court for voluntarily causing hurt. That's the time I feel that I have to recall that incident pertaining to the charge against me.

Court: When did he inform you that you will be charged?

A: Cannot remember.

Court: Can you estimate?

A: About a month or less after the incident. I feel that the position before Position 1 is not related to the incident. Therefore I only take note Position 1 onwards and try to recall as much as possible such that I can explain in Court if necessary.

Court: The Kangoo van moved to "K1" to "K2" to "K3" to "K4" and then "K5"?

A: Yes.

Court: Do you regard this change of positions to be dangerous driving?

A: Yes, very dangerous driving.

Court: How did you feel as you observed the van moving positions in that manner?

A: I am a bit scared and I feel that he did it intentionally.

Court: Intentionally?

A: Intentionally to drive in this manner.

Court: Elaborate on why you felt scared?

A: Because initially when I moved to Position A and when I heard a slight horn and somebody coming behind me driving in this manner, I got a feeling that he is only going after me.

Court: What do you mean by that?

A: When he cut lane in this manner…after the horn he cut into the right side of the lane where I feel it is not necessary because the traffic was very clear and upon making the turn he was driving towards me.

Court: Why did you feel scared?

A: I only felt scared during the turn when he drive his van directly towards the driver's side of my car. He was driving towards me.

Court: You did not feel scared before that?

A: No because he want to drive in this manner got nothing to do with me. It's against the law…but…

Court: Explain why you felt scared as he came towards you.

A: Naturally when somebody driving, whether a Japanese car or a European make car driving directly towards you, you would definitely have a shock as he goes closer, especially Kangoo van is a European make vehicle which is known to have very solid body. And Japanese make cars has got very thin and light bodies. So if accident does occur Japanese make car drivers will definitely suffer serious injuries.

Court: He followed you across the lanes, aiming at you?

A: At position B, he was aiming at me. At lane F, position K4, it's side by side.

When I was in lane F, his van is half of lane F and half of lane B.

Court: When he was half in lane F and half in lane B, did you still think he was going to collide into you?

A: Yes, Your Honour. That's the time where I was even forced out of lane F and ended in lane E.

Court: What was your emotion like when he was in lane F and half in lane B and he thought he was going to collide into you?

A: I was very frightened and I have to swerve all the way towards the left.

Court: Can you elaborate on why you felt very frightened?

A: Because if he continued in this manner accidents would definitely occur.

Court: Earlier you said "he was aiming at you". Elaborate?

A: His van was driving directly towards me and the distance between the side of my vehicle and the front of this van was approximately 2 m away.

Court: You testified that you swerved to position D, saw the Kangoo van at F, hesitated and then moved to position E. Can you explain why you hesitated at "D"?

A: I hesitated for a while because firstly I cannot stop in the middle of the road and secondly I do not want to stop next to him in order to avoid further commotion.

Court: Why did you move to "E"?

A: I felt that stopping in the middle of the road, especially immediately after a turn is incorrect and dangerous.

Court: Based on what you have testified, would you regard the driver of the Kangoo van as a dangerous driver or person?

A: I regard him as a dangerous person and inconsiderate driver.

Court: Why a dangerous person?

A: Based on my 30 years experience on the road I have not encountered or seen people reacting in this manner just because other drivers filter into his lane.

Court: Before you continue, what I mean is that based on the change of positions from "K1" to "K5", and the times he collided into you, did you regard his [*sic*] as a dangerous person or driver on the night in question?

A: I regard him as a dangerous person and driver because of the way he react…driving in this manner.

Court: Were you afraid for your life or sustaining injuries?

A: Afraid of sustaining injuries.

Court: I now come to position E and F. You saw him alight, approach your car and mumble?

A: Yes. I alighted from my car and stood behind my car door.

Court: Can you explain why you chose to alight?

A: I am not used to winding down the side window. I usually open the door.

Court: Why don't you stay in your car as you saw him approach?

A: At that moment I did not think of sitting inside the car will be safe because he seemed to be quite fierce so by standing I may be able to run away from him in case he put his hand on me.

Court: Would it not be safer to stay in your car and drive off quickly if necessary?

A: At that moment the traffic light was red. So I won't be able to drive off immediately because Orchard Road traffic is heavy.

Court: Would it not be safer to just stay in your car then he cannot touch you?

A: During that time I have not thought of sitting in the car will be safer for me.

Court: Why?

A: Because at that moment I am very frightened when he approached me.

Court: Why very frightened?

A: When he approached me in this manner, I knew something is going to happen and at that moment my thought was standing outside behind my car door will be better. I also do not want him to

damage my car.

Court: What did you mean something is going to happen?

A: The way he came to as if he is a fighter.

Court: So were you more afraid for yourself or your car?

A: I am more afraid of [*sic*] myself and second my car also.

Court: Were you also afraid for your travelling companion?

A: Frankly speaking, that did not come to my mind.

Court: Before you reached position E, you had regarded Yanto as a dangerous person.

A: Yes.

Court: You were afraid of sustaining serious injury before reaching position E?

A: Yes.

Court: When he emerged to [*sic*] his car you were also afraid for yourself because he looked like "a fighter"?

A: Yes.

Court: Despite that you decided the safer route is to emerge from your car, and expose yourself to him?

A: Not expose myself to him but standing behind using my car door as protection and also able to run away from him at any moment.

Court: You regard this to be a safe course of action than remaining in your car where he cannot touch you at all?

A: I regard this to be safer because if he forced open the door with me sitting inside there's nothing I can do but to allow him a free hand to do anything he wants.

Court: At that point in time when he emerged mumbling, what was the traffic condition on Buyong Road?

A: It was very light. Vehicle just turning from Penang Road just coming into Buyong junction.

Court: At the time he come out mumbling and you alighted to stand behind car door?

A: Only a few vehicles.

Court: At this point in time any car behind you?

A: I think so.

Court: When he came out mumbling, was your car door locked or unlocked?

A: Unlocked.

Court: Why didn't you just lock it?

A: It didn't come to mind at that moment.

Court: Before you got out of the car after you saw the wife gesturing you and mouthing vulgarities?

A: Yes.

Court: Did you get a good look at her at this time?

A: Yes.

Court: You also testified that you saw her again gesturing and mouthing vulgarities as you got back in your car after arguing with Mr Yanto?

A: Yes.

Court: Did you get a good look at her at time [*sic*] point in time?

A: Yes.

Court: You decided to frighten her by swinging your arm at her?

A: Yes.

Court: You were about 60cm away from her?

A: Yes.

Court: You had a good look at her at this time?

A: No. I just simply wanted to frighten her and go off.

Court: During your observation at her, did you notice any injuries on her face?

A: No.

Court: When Yanto come out to confront you, you smelt alcohol on his breath?

A: Yes.

Court: At that time you decided you did not want to further engage with a drunkard man?

A: Yes

Court: Can you describe why it was better not to engage him?

A: Because he's already drunk so there's no point arguing with a drunkard.

Court: Did the fact that he was drunk increase your fear of him?

A: Yes because he's already drunk. He may not know what he's talking. There's no point in further conversation or arguing with him. It would make him more aggressive.

Court: What would come of that?

A: Definitely a fight would occur and I and Yanto would be injured.

When I told him that I did not wish to talk to a drunkard, he gets angry, shouted vulgarities, pushed my door against my chest and walked back to his vehicle.

Court: At that point in time you were already minded to leave?

A: Yes.

Court: And then you saw Ms Neo gesturing at you?

A: Yes.

Court: Can you explain why you decided to frighten her?

A: At that moment I felt very annoyed seeing a girl in this manner and she is doing it continuously. So I intend to give her a fright before stepping into the car.

Court: You did this despite knowing her husband was drunk?

Ng: Yes.

Court: You did this despite knowing that if you continued to engage him, he might turn aggressive.

A: Yes. But when I do it at that time it did [sic] come to my mind because I have no intention at all of punching her.

Court: Do you agree that Mr Yanto would not know what your actual intention is?

A: Do agree but did not come to my mind.

Court: When he slammed the door into your chest, you thought there's no point in arguing with him because it would make him more aggressive?

A: Yes.

Court: When you were all seated in your cars at E and F, you saw husband and wife gesturing and mouthing vulgarities at you?

A: Yes.

Court: You pointed the middle finger at them?

A: Yes, I pointed back.

Court: You pointed back despite the fact that Yanto's driving had put you in fear for yourself?

A: Yes.

Court: You pointed back despite thinking or regarding Yanto as a dangerous driver or person?

A: Yes.

Court: You said Mr Yanto's car was moving slowly. Yet you say the car nearly collided into you. Can you explain this?

A: This is at the turn. So all car speed will be reduced and I believe he do it intentionally.

Court: If so, would it not make more sense to drive fast?

A: I don't think so. My opinion is that if you have no intention you would not reduce your car speed and simply ram on it.

Court: So you are saying that since he had the intention, he would reduce his car speed to collide into you slowly?

A: Yes.

Court: This was 15km/hour?

A: Yes.

6 Quite apart from the number and nature of the questions that the learned trial judge had subjected Ng to, she had also relied on evidence obtained from this series of questions in justifying her disbelief of Ng's version of events in her GD. At [67] and [68], she had cited evidence from her own line of questioning in a total of ten footnotes in those paragraphs, in coming to her belief that Ng was the aggressor in the whole incident:

> 67 In court, Ng said that he was "very frightened" (footnote 30) by the repeated near-collisions with Yanto. He thought Yanto had it in for him. In his estimation, Yanto was a dangerous man who could cause him to sustain "serious injuries" (footnote 31). So concerned was he to avoid "further commotion" (footnote 32) that he actually hesitated in the middle of Buyong Road before moving up to join Yanto's vehicle at Position E. Seen in this context, I find it incongruous that Ng would have been so bold as to point his middle finger back at the couple at Position E, much less emerge from the safety of his car to listen to Yanto mumbling. When asked to explain why he chose to alight from the car rather than wind down his window, Ng said twice that he was not in the habit of winding down his window (footnote 33). It was only on the third time that Ng raised, for the very first time, the justification that it was not safe to remain in his car (footnote 34). As Yanto seemed to be "quite fierce" (footnote 35), he said, it was more prudent to alight from his car so that he would be able to "run away" (footnote 36) if Yanto were to lay a hand on him. For that matter, I could not accept Ng's story of near-collisions with Yanto's vehicle. To my mind, if Yanto had the intention to hit Ng's vehicle, it was implausible that he would have driven at a stately pace of 15km/h.

68 More importantly, I could not accept that Ng had only swung his hand at Neo to frighten her. I found Ng's story in this respect to be completely implausible. According to Ng's own version of events, he decided not to continue with the confrontation after realising that Yanto was drunk as further confrontation would only make Yanto "more aggressive" (footnote 37). This would "definitely" (footnote 38) result in a fight in which both men would suffer injuries. If Ng's version of events is to be believed, this belief was not unfounded. Indeed, when Ng said that he did not wish to speak to a drunkard, Yanto's response was to hurl vulgarities at him and smash the car door against his chest. Yet, Ng would have this court believe that he was thereafter so overcome with self-righteous indignation at Neo's unladylike behaviour that he decided to swing his hand at her to give her a fright. When asked why he did so at the risk of provoking a man he already knew to be aggressive, Ng could only say that that the risk did not cross his mind (footnote 39). I was not able to square this with his assertion that he was in fear just the moment before of what Yanto might do.

7 The learned trial judge's questions are found in pages 171 to 182 of the NE (see supra at [5]); footnotes 30 to 39 in [67] and [68] of her GD refer to pages 174 to 181 (footnote 33 refers to both pages 157 and 176). An examination of the questions would show that the conclusions formed by the learned trial judge in [67] and [68] arose out of the line of questioning that she herself had adopted. The prosecutor had not raised any of those points aside from the reference in footnote 33 to page 157 of the NE.

8 The respondent submitted that the learned trial judge was not biased against Ng and was simply intent on getting down to the truth of the matter. The respondent first argued that the questions asked by the learned trial judge were mainly for the purposes of clarification and to follow-up on the questions previously asked by the respondent or the defence. However it is clear from the questions reproduced above (see supra at [5]) that a substantial number of them do not pertain to mere clarification but were sustained questioning by the learned trial judge. There were many leading questions and a number of points were raised that had not been surfaced by the prosecutor in his cross-examination. More importantly, the learned trial judge had relied upon some of these points to make findings of fact adverse to Ng.

9 The respondent also argued that the learned trial judge had similarly questioned the prosecution witnesses at length, especially Neo and the medical expert, Dr Chin. On this point, it would conduce to clarity for the learned trial judge's questioning of Neo to be set out:

(a) from NE at p 50:

Court: Can you describe the injuries on your left eye?

A: I cannot recall. I just started crying. It wasn't my reaction to check what injuries I had.

Court: What injuries did you sustain after you had time to observe?

A: Visibly my eye was swollen and it felt tender, a bit sore.

Court: Any other injuries?

A: No.

Court: At TTSH, how many doctors did you see?

A: Three.

Court: Which ones are those?

A: Two in the A&E section and then I was told to wait for the eye doctor to come down. The first was a female and then a male Indian doctor and then a Chinese doctor. Saw the third doctor when I went to hospital again.

(b) from NE at p 76:

Court: When did you first look at your injured eye?

A: I can't really remember but it [*sic*] when I took off my contact lenses.

Court: When was that?

A: I don't remember if after I saw the first doctor or second doctor.

(c) from NE at p 79:

Court: Why did your husband's comment not prompt you to take a look yourself?

A: I could not get over the fact that I was hit, punched. I was traumatised, I was crying. It just did not cross my mind to see how I looked.

Court: You testified earlier that you noted the Defendant's car licence number. What motivated you to note this down? You remembered or noted it down?

A: I remembered. When my husband got back to the car I just kept repeating he punched me, he punched me and I was seated upright so I could see the other car drive away and I just kept repeating the car plate number to myself. Although the light had turned green my husband did not drive off immediately as I called 999 first to report that I was punched and I was asked if I wanted an ambulance like I mentioned this morning.

…

Court: You testified that you were crying and traumatised. What motivated you to take special note of the number?

Neo: I could not believe I was punched. What crossed my mind was that he could not be allowed to this.

10 It can be seen that both in terms of the quantity of questions and, more importantly, the nature of the questions, the learned trial judge's questioning of Neo was quite different from that of Ng. The questions asked of Neo were clearly by way of clarification. Certainly there was no prolonged series of questions, with many of them pushing a point, as was done in the case of Ng. As for the learned trial judge's questioning of Dr Chin, she had asked ten questions in relation to the doctor's examination of Neo's eye on the night of the incident: see NE, at pp 99-100. It should be remembered that Dr Chin was not a witness to the incident and had no interest in the matter. The learned trial judge's questions to him were in the nature of clarification of evidence by a neutral medical witness. I do not find it necessary to reproduce this part of the NE.

11 Counsel for Ng submitted that the learned trial judge's excessive questioning of Ng impaired her judgment and her ability to properly evaluate and weigh the evidence and that a fair trial had therefore been compromised. In support of his proposition, counsel cited the recent case of *Re Shankar Alan s/o Anant Kulkarni* [2007] 1 SLR 85 ("*Shankar Alan*"), wherein Sundaresh Menon JC quashed the findings of the Disciplinary Committee on the basis that it "failed to discharge its judicial function because it assumed an inquisitorial role at a certain point by descending into the arena in such a manner that impaired its judgment and its ability to fairly evaluate and weigh the evidence and the case as a whole" (see *Shankar Alan* at [124]), alongside his finding of bias.

The law

12 A trial judge has a wide power under s 167 of the Evidence Act (Cap 97, 1997 Rev Ed) ("the Act") to ask questions of any witness before him. Section 167 provides as follows:

> (1) The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form at any time, of any witness or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the court, to cross-examine any witness upon any answer given in reply to any such question.

13 However this power is not without limit. A trial judge must bear in mind that ours is an adversarial system in which the role of the judge is that of a detached adjudicator and it is for the prosecution to prove its case. That said, the judge should always bear in mind that he must exercise such power in the context of an adversarial system; this was set out by L P Thean JA in *Yap Chwee Kim v American Home Assurance Co* [2001] 2 SLR 421 ("*Yap Chwee Kim*") at [25] in the following manner:

> …such wide power must be exercised with caution and within well-recognised limits with judicial calm and detachment and without usurping or assuming the functions of counsel. Case law has shown that, while a trial judge has the power to ask questions of witnesses at any stage of the hearing, an excessive exercise of such power may, and indeed would, operate unfairly against the witnesses and litigants. A general statement on the role a judge should play in this regard is to be found in the judgment of Denning LJ in the case of *Jones v National Coal Board* [1957] 2 QB 55 at 63 ...

14 In *Shankar Alan*, Menon JC considered the law regarding the appropriate test to apply in relation to a complaint such as the present one. He analysed the authorities dealing with the two most common tests, which he described as a "reasonable suspicion of bias" and a "real likelihood of bias". Menon JC concluded that there was a material difference between them; in the former, the inquiry is from the viewpoint of a reasonable member of the public and in the latter, it is from that of the court. He said at [74]:

> … there are … some important differences between [the two tests] the most important of which are the reference point of the inquiry or the perspective or view point from which it is undertaken, namely whether it is from the view point of the court or that of a reasonable member of the public; and the substance of the inquiry, namely, whether it is concerned with the degree of possibility that there was bias even if it was unconscious, or whether it is concerned with how it appears to the relevant observer and whether that observer could reasonably entertain a suspicion or apprehension of bias even if the court was satisfied that there was no possibility of bias in fact. These two aspects are closely related and go towards addressing different concerns.

> The "real danger" or "real likelihood" test is met as long as a court is satisfied that there is a sufficient degree of possibility of bias. As noted by Deane J in [Webb v The Queen (1993-1994) 181 CLR 41] this is plainly a lower standard of proof than that on a balance of probabilities. But that lower test is in truth directed at mitigating the sheer difficulty of proving actual bias especially given its insidious and often subconscious nature.

15 Menon JC analysed the Court of Appeal decisions in *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1992] 2 SLR 310 and *Tang Liang Hong v Lee Kuan Yew* [1998] 1 SLR 97 and concluded at [76] that the "reasonable suspicion" test was the appropriate test under the law in Singapore. He formulated the test in the following manner at [75]:

> The "reasonable suspicion" test … is met if the court is satisfied that a reasonable number of the public could harbour a reasonable suspicion of bias even though the court itself thought there was no real danger of this on the facts. The driver behind this test is the strong public interest in ensuring public confidence in the administration of justice.

16 Menon JC then went on to expound on an additional ground raised by the applicant, which he described as a "separate and distinct principle" and which he termed the "prohibition against assuming an inquisitorial role". This is separate from the test of "reasonable suspicion of bias" as it does not concern the issue of apparent bias but deals with the question of whether the tribunal has so descended into the arena as to impair its judgment and ability to properly evaluate and weigh the evidence as to render the trial unfair. This arises from the fact that our system of justice is founded on an adversarial rather than inquisitorial model. He considered the English Court of Appeal decision in *Jones v National Coal Board* [1957] 2 QB 55 and noted as follows at [108]:

> This [separate and distinct principle] has been expressed in a number of authorities the starting point of which is one containing perhaps the most eloquent articulation of the principle. That is found in the judgment of Denning LJ … in *Jones v National Coal Board* … Developing a point articulated by Lord Green MR in *Yuill v Yuill* … , Denning LJ noted as follows at 63:
>
> > Nevertheless, we are quite clear that the interventions, taken together, were far more than they should have been. In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries. Even in England, however, a judge is not a mere umpire to answer the question "How's that?" His object, above all, is to find out the truth, and to do justice according to law; and in the daily pursuit of it the advocate plays an honourable and necessary role. Was it not … Lord Greene M.R. who explained that justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations? If a judge, said Lord Greene, should himself conduct the examination of witnesses, "he, so to speak, *descends into the arena and is liable to have his vision clouded by the dust of conflict*": see *Yuill v. Yuill*.
> >
> > Yes, he must keep his vision unclouded. It is all very well to paint justice blind, but she does better without a bandage round her eyes. She should be blind indeed to favour or prejudice, but clear to see which way lies the truth: and the less dust there is about the better. Let the advocates one after the other put the weights into the scales – the "nicely calculated less or more" – but the judge at the end decides which way the balance tilts, be it ever so slightly … *The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure*; to see that advocates behave themselves seemly and keep to the rules laid

> down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. *If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well*.
>
> (emphasis added)

17 Menon JC considered (at [110]) that this principle differed from the ground that a judge had not kept an open mind and had prejudged the guilt of the accused as in *Roseli bin Amat v PP* [1989] SLR 55 ("*Roseli*"), or the ground that the manner in which a subject had been questioned had been so humiliating and unfair such that the right to be heard was realised more in form than in substance, as in *Singapore Amateur Athletics Association v Haron bin Mundir* [1994] 1 SLR 47. He considered that it was a distinct principle having to do with "the risk of a fair trial being compromised because of the failure of the tribunal to observe its proper role and its duty not to descend into the arena". This was recognised by the Court of Appeal in *Yap Chwee Khim*, the High Court in *Wong Kok Chin v Singapore Society of Accountants* [1989] SLR 1129 and the Court of Appeal of the Supreme Court of New South Wales in *Galea v Galea* (1990) 19 NSWLR 263. Although he recognised that in the modern era of complex and often document-intensive litigation, it is not uncommon for judges to take an active part in case management or to intervene as often as they felt they needed to in order to understand the issues and the evidence, and that counsel are often assisted by the court revealing its concerns so that counsel have the opportunity to correct any misperceptions, the situation was different if the judge enters the arena. Menon JC considered that this renders the judge ill-suited to the dispensation of dispassionate justice as he would, in the process, slip into the perils of self-persuasion (see *Shankar Alan* (supra at [11]) at [114] and [115]).

18 Referring to the decision of the English Court of Appeal in *Mayor and Burgesses of the London Borough of Southwark v Kofi-Adu* [2006] EWCA (Civ) 281 ("*Kofi-Adu*"), Menon JC cited the following extract from the judgment of Parker LJ at [116]:

> It is, we think, important to appreciate that the risk identified by Lord Greene MR in *Yuill v Yuill* does not depend on appearances, or on what an objective observer of the process might think of it. Rather, the risk is that the judge's descent into the arena (to adopt Lord Greene MR's description) may so hamper his ability properly to evaluate and weigh the evidence before him as to impair his judgment, and may for that reason render the trial unfair.
>
> In the instant case we are left in no doubt that the judge's constant (and frequently contentious) interventions during the oral evidence, examples of which we have given earlier in this judgment, served to cloud his vision and his judgment to the point where he was unable to subject the oral evidence to proper scrutiny and evaluation. This conclusion is confirmed by his irrational findings in relation to housing benefit and by his complete failure to address the credibility of Ms Kofi-Adu's evidence in his judgment or to explain why he rejected the evidence of Mrs Aitcheson's diary sheets.
>
> …
>
> In our judgment, therefore, the manner in which the judge conducted the trial led to a failure on his part to discharge his judicial function. That is not to say, of course, that the decisions which he reached on the issues of nuisance and annoyance (including the issue of reasonableness in that context) might not have been reached following a proper evaluation and scrutiny of the evidence. Plainly, they might. The flaw in the instant case lies not so much in the decisions

themselves as in the way in which the judge reached them, in that he allowed himself not merely to descend into the arena but, once there, to play a substantial part in the interrogation of the witnesses. In effect, he arrogated to himself a quasi-inquistorial role which (as Lord Denning MR explained in *Jones*) … is entirely at odds with the adversarial system.

19 From *Kofi-Adu*, Menon JC extracted three points which are of application in the present case: see *Shankar Alan* at [117] (supra at [11]). First, a tribunal that assumes a quasi-inquisitorial role is acting at odds with one of the essential underpinnings of the adversarial system of justice and that is objectionable. Second, a complaint of apparent bias depends on whether the reviewing court was satisfied that the manner in which the challenged tribunal acted was such as to impair its ability to evaluate and weigh the case presented by each side. And third, the flaw lies in the manner in which the decision was reached rather than whether the decision was wrong. He said at [118]:

In my judgment, these principles are wholly consistent with our own jurisprudence as articulated in cases such as *Yap Chwee Khim* and *Wong Kok Chin*. At the same time, there are extremely good reasons not to limit or chill unduly the wide latitude given to judicial tribunals in the conduct of hearings. For this reason, it will be necessary to show that the tribunal *has acted* in a manner that does constitute a failure of the judicial function. This will exceptionally be so as it was in the case in *Yap Chwee Khim*. It was also the case in *Haron bin Mundir* and *Roseli bin Amat* where a different aspect of the same overarching principle of ensuring a proper discharge of the judicial function was involved.

20 Menon JC concluded his analysis of the law in the following manner at [121]:

I would accept that the question in every case of this nature is what is the impression the court is left with after considering all the evidence and the circumstances. There can be no inflexible rules and every case will depend on its facts. A tribunal that questions an expert at some length in an effort to come to grips with a difficult technical issue might leave a quite different impression than one that questions a witness of fact on a vital but simple point in an effort to secure a concession.

21 With respect, I agree entirely with the exposition of the law by Menon JC in *Shankar Alan*.

Applying the law on the facts of this case

22 I find that the learned trial judge's chain of inquiry, as reproduced at [5] above, had gone way beyond what would qualify as clarifications. The respondent had submitted that the trial judge probably asked the questions because there was insufficient evidence for her to make an assessment of Ng's version of events, and that that was crucial because of the inconsistencies between the two versions of events. In my view, while it is entirely proper for a trial judge to ask questions to clarify an unclear answer, or even to establish a crucial point (which I should add must be done with circumspection and in a neutral manner), what was done in the present case went past that. It is the duty of the prosecution to bring out the evidence to prove its case; it is not the judge's duty to do so, and certainly not to take over the cross-examination to make up for any shortfall in the conduct of the case by the prosecutor. And it is certainly not for a trial judge to test the credibility of a witness by sustained questioning. Quite apart from the problem of giving a perception of bias to a reasonable observer, it is well known that witnesses often respond differently to a judge as compared with cross-examining counsel. As Lord Green MR pointed out in *Yuill v. Yuill* [1945] 1 P. 15 at [20]:

"… as everyone who has had experience of these matters knows, that the demeanour of a witness is apt to be very different when he is being questioned by the judge from what it is when

he is being questioned by counsel …"

23 From the list of questions at [5] above alone, the learned trial judge seemed to have taken a position and pursued it in her questioning of Ng. More than that, she had made crucial adverse findings of fact in her GD, particularly in relation to the credibility of Ng as a witness, based on Ng's answers to such questioning. I am satisfied that any reasonable observer to the process, who was present at the court proceedings and who has read the GD, would entertain a reasonable suspicion of bias on the part of the trial judge.

24 In relation to the prohibition against assuming an inquisitorial role, although the learned trial judge had embarked on a sustained series of questions in only one part of the trial, it must be seen in the context of Ng being the sole witness and his cross-examination having taken only one afternoon, and after the learned trial judge had questioned him the following morning, his evidence ended. The cross-examination was recorded in 26 pages of the NE (142 to 167), compared to the trial judge's 12 pages of questions. However, a considerable part of the cross-examination had been devoted to clarifications and questions directed at Ng to sketch details of his evidence whereas the entire 12 pages recorded only the judge's questions to Ng. Seen in that context, the learned trial judge had asked almost as many questions as the prosecutor.

25 Much more disconcerting is the degree of reliance by the learned trial judge on evidence adduced from such questioning on crucial issues such as Ng's credibility. It is apparent from the questions that the learned trial judge had framed her questions from the position that Ng was not telling the truth, in order to elicit the truth. The danger here, and one which this prohibition seeks to avoid, is that having formed a position, a judge's ability dispassionately to consider the evidence is compromised. In *Shankar Alan* (supra at [11]), Menon JC said at [115]:

> The real problem arises when the judge takes up a position and then pursues it with the passion of the advocate and in the process slips "into the perils of self-persuasion" (*per* Sir Robert Meggary "*Temptations of the Bench*" (1978) 16 Alta L Rev 406 at 409 cited in *Galea* at 281). When that happens, he has entered the arena and it is a position ill-suited to the dispensation of dispassionate justice.

26 It was on these bases that I quashed the conviction by the learned trial judge of Ng. The manner in which the learned trial judge had questioned Ng and her reliance on the evidence derived from such questioning in her decision to convict him had failed the requirement so eloquently expressed by Lord Hewart CJ in *R v Sussex Justices, ex parte McCarthy* [1924] 1 K.B. 256 at 259 that *"justice should not only be done, but should manifestly and undoubtedly be seen to be done"* (emphasis added).

Decision to acquit

27 Consequent upon my decision to quash the conviction of the court below, this court has the power pursuant to s 256(b)(i) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed)("CPC") either to acquit Ng or order a retrial. In *Beh Chai Hock v Public Prosecutor* [1996] 3 SLR 495 (at [38]), Yong Pung How CJ said that in deciding which course of action to take:

> … the court must have regard to all the circumstances of the case. The court must also have regard to two competing principles. One is that persons who are guilty of crimes should be brought to justice and should not be allowed to escape scot-free merely because of some technical blunder by the trial judge in the course of the trial. The countervailing principle is one of fairness to the accused person. The prosecution has the burden of proving the case against the

accused person; if the prosecution has failed to do so once, it should not ordinarily get a second chance to make good the deficiencies of its case. These principles are summarised in *Chee Chiew Heong v PP* [1981] 2 MLJ 287.

28 *Chee Chiew Heong v PP* was a decision of the Ipoh High Court on an appeal from the Sessions Court. With regard to the decision on whether to order a retrial, the court referred to the following passage from the speech of Lord Diplock sitting in the Privy Council in *Reid v The Queen* [1980] AC 343 at 348:

> The interest of justice that is served by the power to order a new trial is the interest of the public in Jamaica that those persons who are guilty of serious crimes should be brought to justice and should not escape it merely because of some technical blunder by the judge in the conduct of the trial or his summing up to the jury. There are, of course, countervailing interests of justice which must also be taken into consideration. The nature and strength of these will vary from case to case. One of these is the observance of a basic principle that underlines the adversary system under which criminal cases are conducted in jurisdictions which follow the procedure of the common law: it is for the prosecution to prove the case against the defendant. It is the prosecution's function, and not part of the functions of the court, to decide what evidence to adduce and what facts to elicit from the witness it decides to call. In contrast the judge's function is to control the trial, to see that the proper procedure is followed, and to hold the balance evenly between prosecution and defence during the course of the hearing and in his summing up to the jury. He is entitled, if he considers it appropriate, himself to put questions to the witness to clarify answers that they have given to counsel for the parties; but he is not under any duty to do so, and where, as in the instant case, the parties are represented by competent and experienced counsel it is generally prudent to leave them to conduct their respective cases in their own way.

29 Applying these principles to the present case, I consider that the main factors are as follows:

(a) the gravity of the charge and the facts;

(b) the likelihood of a successful prosecution in a retrial; and

(c) the prejudice suffered by the accused if a retrial is ordered.

I now deal with each factor in turn.

30 With regard to the first factor, it is obvious that - all things being equal - there is a greater public interest in ensuring that a person who has committed a serious offence is brought to justice as opposed to a less serious one. A court would be more inclined to order a retrial for a person charged, for example, for murder than one charged for littering. In the present case, although it is characterised as a "road rage" offence, one must not lose sight of the fact that the charge is under s 323 of the Penal Code (Cap 224, 1985 Rev Ed), carrying a maximum punishment of imprisonment for up to one year, or a fine of up to $1,000 or both imprisonment and fine. Crucially, the offence is a non-seizable one and may be compounded by the victim pursuant to s 199 of the CPC. As for the facts of the case, the allegation is that Ng had punched the victim, Neo, in the eye after he had a scuffle with her husband, Yanto, and after she had shouted at him to shut up. As for the extent of the injury, the area around her eye had appeared red to Yanto and there was soft tissue swelling in the lower eye lid with some mild corneal abrasions.

31 As concerns the second factor, it is also self evident that there is a greater public interest in

remitting a strong case for retrial than a weak one. A case in which the evidence is likely to result in a conviction upon retrial would be considered differently from one where the likelihood of a conviction is less certain. Turning to the present case, it essentially turns on the evidence of Neo and Ng. Although Neo has injuries to corroborate her version of events, Ng's counsel had submitted that the medical evidence is not entirely conclusive as the doctor had agreed that the injury could have been caused by vigorous rubbing, although he considered that it was most likely due to a punch. The learned trial judge in her GD (at [63]) had said that she found no evidence that the punch necessarily landed over the entire left eye. Further, the emergency doctor who attended to Neo about three hours after the incident had stated in her report to the police that "no external injuries were noted".

32 Another aspect of the evidence was in regard to the relative positions of the vehicles when they came to a stop. Ng's counsel submitted that his client's version was more consistent with the final position of the vehicles than that of Yanto's. The two vehicles had ended up side-by-side at the leftmost lanes of Buyong Road. If, as Yanto had claimed, he had swerved to the right to avoid Ng's car, in all likelihood they would not have ended up on the leftmost lanes. Therefore the more logical conclusion is that Yanto had swerved his car to the left, causing Ng to veer to the left to avoid a collision. This would indicate that Yanto had been the aggressor, contrary to his testimony. These are the doubts that linger and it is far from a case in which the evidence is so clearly against Ng that a retrial would likely result in a conviction.

33 I turn to the third factor, that of prejudice to the accused. In *Roseli*, the Court of Appeal quashed the rape convictions on the ground that the trial judge had failed to keep an open mind and had adversely determined issues against the accused prior to the presentation of the case. The Court of Appeal decided against ordering a retrial having regard to the long lapse of time since the alleged offences and the fact that the appellants had served a term of imprisonment of over three years. In the present case, the trial had taken six days (five days on evidence and on the sixth day Ng was convicted and sentenced) spread over a five-month period, from September 2006 to February 2007. Ng had been made to incur the expense of defending the charge for this period and has had this conviction hanging over his head for another eight months or so leading up to the appeal before me. Furthermore, the learned trial judge had relied on evidence brought out by her questions to make findings of fact adverse to Ng that were material to her decision to convict him. Had the learned trial judge not interfered in the proceedings, she would not have had the evidence to make those adverse findings. To order a retrial in these circumstances would mean that the prosecution would have a second bite of the cherry.

34 In summary therefore, the charge faced by Ng was not a serious one, the evidence cannot be said to be certain and he would suffer prejudice if he were made to go through a retrial. I was of the view therefore that in the circumstances of this case, it would not conduce to justice to order a retrial. Accordingly I allowed the appeal and acquitted Ng of the charge.