POOVANESWARAN SELLAN & ANOR v. PP

HIGH COURT MALAYA, SHAH ALAM
WONG TECK MENG JC
[CASE NO: 42S-53-10-2014]
22 MARCH 2016

CRIMINAL LAW: *Voluntarily causing grievous hurt – Penal Code, ss. 149 & 326 – Unlawful assembly – Common object to inflict injuries on victim – Whether established – Whether every member of same assembly guilty of offence committed – Whether conduct of each member before and during attack relevant consideration – Whether identification parade defective – Whether victim able to identify accused directly from the dock – Whether sufficient – Whether omission to state accused name in police report created doubts in prosecution's case – Failure to tender weapons used to attack victim – Whether adverse inference raised against prosecution's case – Injuries sustained by victim – Whether supported by testimony of medical experts to show severity of injuries sustained by victim – Whether defence a bare denial*

EVIDENCE: *Identification parade – Conduct of identification parade – Accused persons identified in one single parade – Whether identification parade for each accused should be done separately – Whether victim able to identify accused directly from the dock – Whether sufficient – Penal Code, ss. 149 & 326 – Arumugam Muthusamy v. PP*

EVIDENCE: *Defence – Alibi – Interested witness to support defence of accused – Whether reliable – Whether witnesses gave evidence to help accused – Whether defence a bare denial*

CRIMINAL PROCEDURE: *Sentence – Voluntarily causing grievous hurt – Severe injuries sustained by victim – Whether considered – First time offender – Public interest – Sentenced to 15 years' imprisonment with 12 strokes of rattan – Whether sentence manifestly excessive – Whether substituted by appellate court*

The appellants were convicted under s. 326 of the Penal Code read together with s. 149 of the same Code for voluntarily causing grievous hurt to PW4 by using dangerous weapons and sentenced to 15 years' imprisonment and 12 strokes of the rattan each by the Sessions Court Judge ('SCJ'). The facts revealed that at around 7.30 in the evening on the fateful day, six men attacked PW4 and as a result, PW4 fell down on the road from his motorcycle. According to PW4, the first appellant attacked him with a knife on his leg, hand and head and the second appellant attacked him with a hockey stick. PW4's brother ('PW1') rushed to the scene and found PW4 sitting on the road with injuries on his body. PW4 informed PW1 that Siva, who was not arrested and the appellants had attacked him. As a result of the attack, PW4 sustained partial amputation to his wrist caused by sharp objects such as a knife (parang) and it was highly impossible that these injuries were

A sustained from a motor accident. There were also injuries to his head and nose. PW1 lodged a police report about this incident and the appellants were later arrested. Dissatisfied with the decision of the SCJ, the appellants appealed to this court. It was argued, *inter alia,* that (i) the prosecution failed to prove the ingredient of common object under s. 149 of the Penal Code; B (ii) the identification parade report was not tendered as evidence in court; (iii) both appellants were identified together in one single parade; (iv) adverse inference under s. 114(g) of the Evidence Act 1950 may be invoked against the prosecution for failure to produce the knife and hockey stick used, as alleged, to attack PW4; (v) both the names of the appellants were not stated C in the police report; and (vi) the appellants entered their notice of alibi stating that they were not at the scene when the event took place. In light of this, the appellants' alibi witnesses, *ie,* the first appellant's uncle ('DW3') and the second appellant's sister ('DW4') testified in court to support the appellants' contention that they were not at the scene when the crime took place.

D **Held (affirming conviction; setting aside sentence passed by SCJ and substituting it with a sentence of 12 years' imprisonment with eight strokes of rattan for each appellant):**

(1) The prosecution must first prove an unlawful assembly under s. 141 of the Penal Code which states, among others, that an unlawful assembly E is an assembly of five or more persons if the common object of the persons composing that assembly was to commit any mischief or criminal trespass or any other offence. On the facts, PW4 testified that the appellants were among the six persons who attacked him with a knife and a hockey stick on his hands, legs and head. In the circumstances, the F prosecution proved that the appellants were members of the unlawful assembly. (paras 11 & 12)

(2) If any member of that unlawful assembly commits such offence in the prosecution of the common object of that assembly, every member of the same assembly is guilty of that offence under s. 149 of the Penal Code. G It is not necessary to prove the commission of an overt act by all members of that unlawful assembly under this section. Even if no overt act was attributed to a particular person, the presence of the accused as part of that unlawful assembly is sufficient for conviction. The precise overt act of the accused need not be established when membership of an H unlawful assembly was already established. Section 149 creates a constructive or vicarious liability of the members of the unlawful assembly for the unlawful acts committed pursuant to the common object by any other member of that assembly. (para 13)

(3) Proof of common object is normally inferred from the facts and I circumstances of the case, the conduct of the parties and the manner in which the occurrence took place. The conduct of each member of the unlawful assembly before and at the attack was a relevant consideration.

On the facts, the attack could be attributed from a small quarrel between the appellants and PW4 on the day before the attack. The common object here was to attack PW4 and to inflict injuries on him. Accordingly, the element of common object has arisen and as such, being a member to that group of persons, all of them were liable under s. 149 of the Penal Code and guilty of the final offence committed under s. 326 of the Penal Code. (paras 15 & 16)

(4) The identification parade held was conducted only to strengthen the prosecution's case. It is trite that where there is more than one accused, the identification parade for all the accused should be done separately. In this case, the victim identified both the appellants in one single identification parade and this rendered the identification parade defective. However, the absence of such identification parade would not render the prosecution's failure to prove its case as there was strong direct evidence of identification by the victim himself. The victim was able to identify both the appellants directly from the dock as the persons who attacked him at the crime scene which was still bright. Further, the victim knew the appellants for quite some time now as they were all staying in the same neighbourhood since they were young. (paras 21-23)

(5) The omission of not stating the appellants' names in the police report was not a ground to conclude that both appellants were not at the scene of the attack. The police report was lodged by PW1 and he was never a party to the attack. PW1 did not know who really attacked the victim. Thus, the police report could not be used against PW4 to dispute the presence of the appellants at the scene of the attack. It could also not be used to contradict his testimony given in court. A police report could only be used to contradict or corroborate the evidence of the maker of the report. (paras 24-26)

(6) Notwithstanding the fact that the offending weapons were not found and tendered as evidence in court, this court was satisfied on the evidence given by the medical experts in confirming the injuries sustained by PW4 and it was not possible to be caused by a fall from the motorcycle. Therefore, the prosecution does not need to produce the weapons physically to prove the injuries caused to the victim. It would be against the interest of justice if the non-production of weapons were considered detrimental for the prosecution's case as the culprits were certainly capable of demolishing or hiding away the offending weapons. The SCJ was therefore right to decide that the recovery of weapons was not necessary as there was enough evidence to prove that PW4 was attacked by a sharp object and that the injuries sustained were consistent to that caused by a knife. (paras 30, 32 & 33)

(7) A notice of alibi that was left unproved does not carry any evidentiary value. The alibi evidence given by both the appellants could not be believed since they were weak and did not raise any doubt on the prosecution's case. It is trite that the evidence of an interested witness is not automatically unreliable and should be treated like any other witnesses. It is always the duty of the court to assess and decide on the credibility of each witness who gives evidence in court, irrespective of whether he is an interested witness. On the facts, however, the evidence of DW3 and DW4 was unreliable since they were not neutral witnesses and had expressly stated that they gave evidence to help the appellants. In the circumstances, the defence was a bare denial. (paras 37-40)

(8) The offence committed involved violence resulting in very severe injury caused to PW4 and thus, it was in the public interest that an appropriate sentence should be imposed to punish the offender and to deter potential wrongdoers from committing the same. The appellants deserves to be sentenced to imprisonment and whipping. However, for a first time offender to be sentenced to 15 years' imprisonment with 12 strokes was manifestly excessive. Therefore, the sentence passed by the SCJ was set aside and substituted with a sentence of 12 years' imprisonment with eight strokes of rattan for each appellant (*PP v. Md Rashid Harun;* refd). (paras 42 & 43)

Case(s) referred to:
Arumugam Muthusamy v. PP [1998] 3 CLJ 597 FC ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Balasingham v. PP [1959] 1 LNS 8 HC ***(refd)***
PP v. Azilah Hadri & Anor [2015] 1 CLJ 579 FC ***(refd)***
PP v. Fong Yee Chun [2009] 1 LNS 981 HC ***(refd)***
PP v. Jamal Sahmad & Anor [2006] 8 CLJ 428 HC ***(refd)***
PP v. Md Rashid Harun [2000] 3 CLJ 832 HC ***(refd)***
PP v. Ng Nai Lim [2011] 1 LNS 487 HC ***(refd)***
Rachemreddi Chenna Reddy [1999] 3 SCC 97 ***(refd)***
Shahyirol Wahab & Anor v. PP [2009] 1 LNS 737 HC ***(refd)***
Sunny Ang v. PP [1965] 1 LNS 171 FC ***(refd)***
Tan Cheng Kooi & Anor v. PP [1972] 1 LNS 146 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 402A
Evidence Act 1950, s. 114(g)
Penal Code, ss. 149, 302, 320, 326

Other source(s) referred to:
Ratanlal & Dhirajlal Law of Crimes, 27th edn, Bharat Law House New Delhi, 2002, p 704

For the appellants - Geethan Ram Vincent & J Jayarubbiny; M/s Geethan Ram
For the respondent - Ahmad Zakhi Mohd Daud & Masriwani Mahmud; DPP

Reported by Kumitha Abd Majid

JUDGMENT

Wong Teck Meng JC:

Introduction

[1] The appellants were found guilty and were convicted for voluntarily causing grievous hurt by dangerous weapons under s. 326 of the Penal Code ('PC') read together with s. 149 PC and were sentenced to 15 years' imprisonment and 12 strokes of rattan each by the Sessions Court Judge ('SCJ') of Kuala Kubu Bharu on 3 September 2014. The charge reads as follows:

> Bahawa kamu bersama-sama dengan empat lagi yang masih bebas, pada 1hb Jun 2009, jam lebih kurang 7.30 malam, di tepi jalan bersebelahan kilang Tan Chong Motors, kawasan Serendah, di dalam daerah Hulu Selangor, di dalam negeri Selangor Darul Ehsan, adalah ahli kumpulan yang menyalahi undang-undang dimana tujuan bersama kamu telah dengan sengaja menyebabkan kecederaan cedera parah ke atas MUHUNTHEN A/L RAMASAMY (NO. K/P: 890221-14-5963), dengan memukulnya dengan menggunakan kayu hoki, parang dan kayu, yang mana boleh menyebabkan kematian jika digunakan sebagai senjata dan semasa kamu semua ahli perhimpunan tersebut serta satu atau lebih dari kamu dalam melaksanakan tujuan bersama iaitu suatu kesalahan dimana ahli-ahli perhimpunan mengetahui dilakukan di dalam melaksanakan tujuan bersama perhimpunan tersebut, dan dengan itu kamu telah melakukan satu kesalahan dibawah seksyen 149 Kanun Keseksaan dan boleh dihukum di bawah seksyen 326 Kanun Keseksaan.

[2] The appellants appealed against the decision of the SCJ on conviction and sentence.

Facts Of The Case

[3] On 1 June 2009, at around 7.30 evening, when the victim, Muhunthen a/l Ramasamy (PW4), was looking around for his cows along the road beside Tan Chong Motor's Factory, the motorcycle he was riding on was hit by a white van from behind and some six men came out of the van and started to attack PW4 who had fallen down on the road from his motorcycle. According to PW4, the first appellant ('DW1') attacked PW4 with a knife on his leg, left hand and head. The second appellant ('DW2') attacked PW4 with a hockey stick on his hands and legs.

[4] The victim's brother, Baskar a/l Ramasamy ('PW1'), rushed to the scene after his friend, Parthiban, told him that PW4 was attacked by a gang of people. When PW1 arrived at the scene, PW4 was seen sitting on the road with injuries and he was told by PW4 that it was Siva (not arrested), Poovaneswaran and Haridass (both appellants) who attacked him. PW4 was sent to Kuala Kubu Bharu Hospital and thereafter for further treatment at Kuantan Hospital as the injuries sustained by him needed specialised treatment ie, hand micro surgery. PW4 was also hospitalised at Kuantan Hospital for some 26 days before he was discharged.

[5] As a result of the attack, the victim sustained partial amputation at the left hand wrist caused by sharp objects. There were also injuries at his head and nose. PW4's injuries were confirmed by Dr Kamil bin Mohd Kasim (PW10) and also Dr Saliana Binti Sadi (PW5) who gave evidence in the court to be injuries caused by sharp objects such as a knife (parang) and it was highly impossible that these injuries sustained by the victim were from motor accident.

[6] PW1 lodged a police report of the incident some eight days later and the investigating officer, Inspector Yusnita binti Samsudin ('PW9'), after enquiring from PW4 at the Kuantan Hospital managed to locate and arrest the appellants on 24 January 2012.

[7] The appellants raised several issues in their petition of appeal which I narrowed down to six issues.

Whether The Prosecution Had Proven The Ingredients Of s. 149 Penal Code

[8] As far as s. 326 PC is concerned, the appellants were not disputing on the ingredients of the section as there was ample proof to establish that grievous hurt as described under s. 320 of the PC had been proven, ie: PW4 suffered from partial amputation at his left wrist, and he was hospitalised for 26 days in the Kuantan Hospital.

[9] The appellants argued that the prosecution had failed to prove the ingredient of common object under s. 149 of the PC and that the SCJ in his judgment did not state the facts that were inferred in coming to his finding of common object. In opposition to this, the respondent submitted that the fact that the appellants were among those who came out of the van and attacked PW4 after PW4 was hit by the van form the back of his motorcycle was already a sufficient proof of the existence of common object under s. 149 of the PC. I have perused the SCJ's written judgment and found that he had made a finding that common object was clearly inferred from the facts that the appellants were from among those that attacked PW4 and inflicted injuries on PW4 without the need to prove who inflicted the injuries in particular.

[10] To tackle this issue, it is crucial for this court to consider whether the ingredients of common object under s. 149 of the PC were proven by the prosecution. As such, the following have to be proven:

(a) the appellants were a member of the unlawful assembly;

(b) in the prosecution of the common object of that unlawful assembly.

[11] The prosecution must first prove an unlawful assembly under s. 141 of the PC which states among others that an unlawful assembly is an assembly of five or more persons if the common object of the persons composing that assembly is to commit any mischief on criminal trespass or any other offence. It is also provided in s. 142 of the PC stating that:

whoever being aware of the facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of the unlawful assembly.

[12] From the evidence available, PW4 testified that six persons came out of the van and started to attack him. According to PW4 DW1 and DW2 were among the six persons who attacked him with a knife and a hockey stick on his hands, legs and head. Hence from the above stated facts, the prosecution had proven that the appellants were member of the unlawful assembly.

[13] Secondly, the prosecution has to prove in the prosecution of the common object in that unlawful assembly. The prosecution of the common object relates back to the provision under s. 141 of the PC as mentioned above where the persons in that assembly so composed with the common object to commit other offence. If any member of that unlawful assembly commits such offence in the prosecution of the common object of that assembly, every member of the same assembly is guilty of that offence under s. 149 of the PC. It is not necessary to prove the commission of an overt act by all members of that unlawful assembly under this section. Even if no overt act is attributed to a particular person, the presence of the accused as part of that unlawful assembly is sufficient for conviction. The precise overt act of the accused need not be established when membership of an unlawful assembly was already established. Section 149 creates a constructive or vicarious liability of the members of the unlawful assembly for the unlawful acts committed pursuant to the common object by any other member of that assembly.

[14] According to *Ratanlal & Dhirajlal Law of Crimes*, 27th edn, Bharat Law House New Delhi, 2002, p. 704:

> The test whether an offence is committed in prosecution of the common object is whether the common object is prosecuted in fact as well as in the intention of the doer. When that is the case, every person who was engaged in prosecuting the same object may well be held guilty of an offence which fulfils or tends to fulfil the object which he is himself engaged in prosecuting.
>
> The expression "common object" is not used in the same sense as the common intention under section 34 PC, which means the intention of all whatever it may have been. The emphasis under this section is on common object. The act must be done which upon the evidence appears to have been done with a view to accomplishing the common object attributed to the members of the unlawful assembly. Thus, every person who is engaged in prosecuting the same object, although he had no intention to commit the offence, will be guilty of an offence which fulfils or tends to fulfil the object which he himself is engaged in prosecuting in the circumstances mentioned in the section. It is in this sense that the common object is to be understood. The expression refers to one of the five objects mentioned in section 141.

[15] Proof of common object is normally inferred from the facts and circumstances of the case, the conduct of the parties and the manner in which the occurrence had taken place. The conduct of each member of the unlawful assembly before and at the attack is a relevant consideration. In the case of *Rachemreddi Chenna Reddy* [1999] 3 SCC 97 it was stated that;

> whether the members of an unlawful assembly really had the common object to cause the murder of the deceased has to be decided on the basis of the nature of the weapons used by such members, the manner and sequence of the attack made by those members on the deceased and the settings and surroundings under which the occurrence took place. Where the accused person appeared at the scene with lethal weapons in their hands, mercilessly assaulted the deceased after surrounding him, it clearly exhibits that their common object was nothing but to kill the deceased.

[16] According to the evidence from the present case, the attack could be attributed from a small quarrel between the appellants and PW4 on the day before the attack. PW1 had gone to look for Siva (not arrested) at 4.30pm and slapped Siva's face as a lesson to him for bullying PW4. After PW1 slapped Siva, Siva warned PW1 that he would seek revenge. Hence, at the moment the appellants together with others came out from the van with a knife and a hockey stick and attacked PW4, the common object here was to attack PW4 and to inflict injuries on PW4. Accordingly, the element of common object has arisen and as such, being a member to that group of persons, all of them are liable under s. 149 of the PC and guilty of the final offence committed under s. 326 of the PC.

[17] Looking at the judgment of the SCJ, although he did not refer to the facts when he made inferences that the ingredient of common object has been proven, he was correct in making that finding as shown by the facts and circumstances of the case.

Whether The Identification Parade Conducted To Identify The Appellants Was Defective

[18] The appellants claimed that the identification parade was defective based on the following reasons:

(i) The identification parade report was not tendered as evidence in court;

(ii) Both appellants were identified in only one identification parade.

[19] From the evidence available, it was not disputed that the identification parade report was not tendered and the police in charge of conducting the identification parade was not called to give evidence pertaining the procedures of the identification parade conducted. Thus, the appellants argued that an adverse inference under s. 114(g) of the EA could be raised against the prosecution as there was no proof that the procedures in relation to the identification parade were followed correctly.

[20] On the issue of the non-production of identification parade report, it is my considered view that evidence of identification of accused by a witness should not be discounted based on the reason of the non-production of the report during the trial. This court relied on the principle laid down in the case of *Shahyirol Wahab & Anor v. PP* [2009] 1 LNS 737; [2009] MLJU 741 which states that the identification of the victim should not be ignored due to the reason that the identification parade report was not tendered as evidence in court. The statement in the case is reproduced as below:

> The fact that the prosecution did not produce the identification parade report and did not explain how the identification parade was conducted does not in my view disentitle the learned trial judge from accepting PW1's evidence. It would be wrong for the learned trial judge to ignore her evidence just because the identification parade report was not produced as evidence.

[21] It was also not disputed that only one identification parade was carried out in which both appellants were put in the same parade and were identified together in that one single parade. It is trite that where there is more than one accused, the identification parade for all the accused should be done separately as mentioned in the case of *PP v. Jamal Sahmad & Anor* [2006] 8 CLJ 428; [2006] MLJU 167 which held that where there is more than one accused, there should be separate identification parade for each accused. In the present case, the victim identified both the appellants in one single identification parade and this rendered the identification parade defective.

[22] Despite the above defects, this court finds that the identification parade held was conducted only to strengthen the prosecution's case. However, the absence of such identification parade would not render the prosecution's failure to prove its case as there was strong direct evidence of identification by the victim himself. I direct myself to the judgment in the case of *Arumugam Muthusamy v. PP* [1998] 3 CLJ 597; [1998] 3 MLJ 73 which states that:

> … it would be a good practice to hold an identification parade, which if it turns out to be positive, would tend to strengthen the case for the prosecution. But to hold an identification parade must, in all circumstances, conducted in order to sustain a conviction would be too stringent … an identification by one witness can constitute support for the identification by another provided that the trial judge warns himself that even a number of honest witness can all be mistake … the evidence of the identification was good ...

[23] Thus, the appellants were correct in contending that the identification parade conducted was defective. Nevertheless, it was shown from the evidence that the victim was able to identify both the appellants directly from the dock as the persons who attacked him at the crime scene which was still bright. Furthermore, the victim had known the appellants for quite some time now as they were all staying in the same neighbourhood since they were young. Hence, there is no issue that the victim was unable to identify the appellants or mistake made in the identification.

Omission To Mention The Names Of The Appellants In The Police Report

[24] Counsel for the appellants submitted since the names of both the appellants were not mentioned in the police report dated 9 June 2009 ('P1') they were therefore never present during the attack. This court is of the view that the omission of not putting in the appellants' names is not a ground to conclude that both appellants were not at the scene of the attack.

[25] According to the evidence, P1 was lodged by PW1 and not PW4 the victim himself. Thus, it could not be used against PW4 to dispute the presence of the appellants at the scene of the attack. PW1 was never a party to the attack and he did not know who really attacked the victim. It is true that he was able to identify few persons whose names were mentioned in P1, but was for the quarrel that happened before the attack somewhere else.

[26] P1 was not a police report lodged by PW4 and as such could not be used to contradict his testimony given in the court. A police report can only be used to contradict or corroborate the evidence of the maker of the report. See the case of *Balachandran v. PP* [2005] 1 CLJ 85 at p. 94; [2005] 2 MLJ 301 at p. 310 which states that:

> the evidentiary value of a first information report is only to contradict the testimony of a witness under section 145 EA or to corroborate his testimony under section 157 EA.

[27] It was also stated by Chang Min Tat J (as he then was) in the case of *Tan Cheng Kooi & Anor v. PP* [1972] 1 LNS 146; [1972] 2 MLJ 11 at p. 118 that a first information report is inadmissible as evidence to prove the truthfulness of a certain fact of the case:

> now, the importance of a first information report has been stressed in a number of decisions. It is not a substantive piece of evidence and it is inadmissible for the purpose of proving that the facts stated in it are correct. But it can be used by way of corroboration or contradiction per Carnduff J in 17 CWN 1213;
>
> The first information report is a document of great importance and in practice it is always and very rightly produced and proved in criminal trials. But it is not a piece of substantive evidence and it can be used only as a previous statement admissible to corroborate and contradict the author of it.

[28] It is therefore clear that P1 can only be used to corroborate or contradict the maker of it and not PW4 as he was not the maker to P1.

Whether The Offending Weapon Needs To Be Produced

[29] According to the evidence by the investigating officer PW9, Inspector G/18687 Yusnita binti Samsudin, the weapons used were not found at the scene nor recovered during the course of investigation. It was then contended by the appellants that adverse inference under s. 114(g) of the EA may be drawn against the prosecution case as the knife and Hockey stick mentioned

by PW4 were never produced in court as evidence. They submitted that if those weapons were produced in court, DNA test could be made and as such the real culprit to the attack might be found.

[30] Notwithstanding the fact that the offending weapons were not found and tendered as evidence given in court, this court is satisfied on the evidence given by the medical experts PW5 and PW10 in confirming that the injuries sustained by PW4, ie: the partial amputation at the left wrist, were caused by sharp objects such a knife (parang) and was not possible that it was caused by a fall from motorcycle. Therefore, the prosecution does not need to produce the weapon physically to prove the injuries caused to the victim.

[31] In the case of *PP v. Fong Yee Chun* [2009] 1 LNS 981 at p. 999, the court opined that:

> it was stated that it is not every case that the offending weapon will be traced or found as there is always the possibility for them being destroyed or hidden by the culprits. Imagine the absurdity and travesty of justice by insisting on finding the offending weapon before the court is prepared to connect the use of the offending weapon to the crime committed. If the law imposed was that the offending weapon shall be produced for the prosecution to prove their case, it would surely be stringent and nearly impossible for the prosecution to prove their case because who would ever leave evidence uncovered? Though the weapons in our instant case, the hockey stick, Parang knives and woods claimed by the victim, were not found, evidence adduced by the prosecution successfully established a *prima facie* case against the Appellants, as such the non-production of such weapon did not raise doubts as to the prosecution case.

[32] In my view, it would be against the interest of justice if the non-production of weapons were to be considered detrimental for the prosecution's case as the culprits are certainly capable of demolishing or hiding away the offending weapons. The prosecution's duty is to produce credible evidence on the injury sustained and what could have caused it without having to produce the offending weapons to prove their case. In support, the case of *Sunny Ang v. PP* [1965] 1 LNS 171, where the body of the victim was not found yet the court was satisfied that the prosecution had proved their case under s. 302 of the PC relying on circumstantial evidence.

[33] The SCJ was therefore right in his decision that the recovery of weapons was not necessary as there was enough evidence to prove that PW4 was attacked by a sharp object and that the injuries sustained were consistent to that caused by a knife.

[34] On my determination on the issues as was discussed above, the SCJ was correct in deciding that the prosecution had successfully establish a *prima facie* case against both the appellants.

A **Defence**

Whether The Defence Was Successful In Proving Notice Of Alibi

[35] In the defence case, both appellants entered their notice of alibi in accordance to s. 402A of the Criminal Procedure Code ('CPC') stating that they were not at the scene when the event took place but were somewhere else. The first appellant, Poovaneswaran, ('DW1') testified that he was still working at the material time as a school bus driver working under his uncle, ('DW3'), Velan a/l Batumalai's company and at the material time was sending students home at Taman Sri Serendah, Serendah from afternoon school. DW3 stated that at the material time DW1 was working as a school bus driver under his bus company which he sends students back from school at Taman Sri Serendah, Serendah. However, there were no records available as DW1 did not possess a driving license and there was no record system for trips done by the driver. The second appellant, Haridass, ('DW2') testified that he was also not at the scene when the incident took place as he was with his sister Bavani ('DW4') at his sister's friend's (Prema) party somewhere at Estate 6 ½ around Sungai Buloh. DW4 claimed that at the material time, DW2 went with her to her friend, Prema's, birthday party at Estate 6 ½ around Sungai Buloh but Prema was not called as witness on the reason that they had lost contact after the party and that they could not recognise the road to Prema's house.

[36] The SCJ did not believe in the alibi evidence given by both appellants mainly due to the reason that the evidence given by both the witnesses was weak and it did not raise any doubt on the prosecution's case. The SCJ mentioned in his grounds of judgment that DW3 did not give any documentary evidence that he was the owner of the bus driver's company that DW1 was working under. DW3 also did not prove that, at the material time, he owned a school bus for the bus driver's company. The evidence on alibi for DW2 was also disbelieved as the SCJ stated that it was very suspicious when DW2, in his evidence, admitted that both him and DW4 did not know the road to Prema's house where the birthday party was held. They both gave evidence that they found Prema's house at Estate 6 1/2 around Sungai Buloh only by asking 'others'. Furthermore, the SCJ stated that DW2 contradicted himself when at first he said that he had conversation with people that attended the birthday party but later denied having interaction with anyone in the party. The SCJ observed the demeanour of DW4 as beating around the bush while giving her answers that were also self-contradicting. Other than those weak evidence stated, the SCJ also opined that the witnesses were interested witnesses and their evidence were not reliable. This court has perused the notes of evidence and found that the finding of the SCJ was consistent with the notes of evidence.

[37] It is trite that the evidence of an interested witness is not automatically unreliable, and should be treated like any other witnesses. See the case *Balasingham v. PP* [1959] 1 LNS 8 which states:

there is no legal presumption that an interested witness should not be believed. He is entitled to credence until cogent reason for disbelief can be advanced in the light of evidence to the contrary and the surrounding circumstances ...

[38] It is always the duty of the court to assess and decide on the credibility of each witness who gives evidence in court, irrespective of whether he is an interested witness or not. In the case of *PP v. Ng Nai Lim* [2011] 1 LNS 487, the trial judge opined that there was an element of bias from the evidence of the witness who testified that he gave evidence in court to help his father, the accused person and as such, the evidence given by the witness should be taken with caution. Applying that caution to the current situation, it was clear that the evidence given by the alibi witnesses DW3 and DW4 was unreliable as they were not neutral witnesses and had expressly stated that they gave evidence in court to help the appellants. I reproduce the evidence from the cross-examination:

SD3 (for 2nd Appellant): setuju saya nak bantu dia hari ini. Setuju dia anak saudara saya, jadi saya sanggup buat apa sahaja untuk tolong kes dia.

And

SD4 (for 1st Appellant): saya sayang abang saya. Setuju saya akan usaha untuk tolong dia.

[39] Counsel for the appellants also raised the issue that in cases where notice of alibi is given, the burden lies on the prosecution to raise reasonable doubt on the defence of alibi and it is not the burden of the person tendering the notice to prove its truthfulness. It is trite law that the burden of proving that one was somewhere else lies on the person who claimed as such, and he should be the one to adduce credible evidence to show the fact he was not at the scene but was somewhere else in order to raise a reasonable doubt on the prosecution case. According to the case of *PP v. Azilah Hadri & Anor* [2015] 1 CLJ 579; [2015] 1 MLJ 617 it was held that a notice of alibi that was left unproved does not carry any evidentiary value:

The burden of proving the commission of an offence by an accused person never shifts away from the prosecution whilst the burden of establishing that defence of alibi lies on the accused person.

Mere service of a notice of alibi on the prosecution is not sufficient to substantiate the truth of such notice even though an accused person does not assume the burden of proving its truth. The burden is still on the prosecution to prove its falsity by evidentially establishing the presence of the accused person of having been at the scene of the crime at the material time. The falsity of that notice will crystallise once the prosecution establishes a *prima facie* case.

… once the prosecution discharges his prosecution burden of proof that led to the establishment of the *prima facie* case, it then becomes incumbent upon the accused person to cast a reasonable doubt that he was elsewhere ...

[40] Thus, I agree with the SCJ's findings that he disbelieved the alibi evidence of the appellants and that the defence was bare denial. As an appellate court hearing this appeal, there are no reasons for this court to interfere to the finding of facts by the SCJ. Based on his findings, there were basis for the SCJ to disbelieve the alibi evidence given by the appellants and their witnesses.

[41] Thus, the SCJ had correctly concluded that the appellants did not raised a reasonable doubt on the prosecution's case and the appellants were correctly convicted for the offence as per the charge.

Whether The Sentenced Passed Was Manifestly Excessive

[42] The offence committed involves violence resulting in very severe injury caused to PW4 and thus, it is in public interest that an appropriate sentence should be imposed to punish the offender and to deter potential wrongdoers from committing the same. Other than the deterrence purpose, the sentence should also be appropriate to reflect the gravity of the crime itself; in our current situation the attack on PW4 was due to the small quarrel that happened a day before the attack but it ended up with PW4 being mercilessly chopped up. The court in *PP v. Md Rashid Harun* [2000] 3 CLJ 832; [2000] 3 MLJ 503 had suggested a heavy penalty for the offence of causing grievous hurt. It held that:

> the respondent's act of throwing acid onto the face of his wife causing grievous hurt under section 326 PC met with the same sense of outrage. Echoing the words of the court in Ng Ah Tak, the High court expressed the view that the sentence passed by the sessions court of three years' imprisonment showed a complete lack of understanding, on the part of the trial court, of the gravity of crime. The learned judge stressed that all of acid-throwing call for the severest penalties and enhanced the sentence to ten years' imprisonment. As a guideline the High court also declared that the minimum sentence in such cases must be half the minimum of the penalty.

[43] From the facts and circumstances of the case, the appellants deserved to be sentenced to imprisonment and whipping which was correctly ordered by the SCJ. However, for a first offender (both appellants were first offenders) to be sentenced to 15 years' imprisonment with 12 strokes for each appellants it is indeed, to my view, manifestly excessive. I therefore set aside the sentence passed by the SCJ and substituted it with a sentence of 12 years' imprisonment with eight strokes of rattan for each appellant which is appropriate and deserving in the circumstances.

Conclusion

[44] Based on the above reasons, I therefore dismissed the appeal on conviction but allowed the appeal on sentence by substituting it with the appropriate sentence.