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WONG CHEE TZE & ANOR v. PP

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
RAVINTHRAN PARAMAGURU J
[CRIMINAL CASE NO: BKI-41S-4-1-2014]
16 JUNE 2015

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CRIMINAL LAW: *Voluntarily causing grievous hurt – Penal Code, s. 325 – Injuries sustained by complainant – Whether seriousness of injuries considered – Whether complainant's injuries fell under s. 320 – Failure to call doctor who first examined complainant – Whether adverse inference invoked – Whether doubt raised in prosecution's case – Whether common intention established – Whether sentence imposed excessive – Abdul Karim Kula v. PP*

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CRIMINAL PROCEDURE: *Appeal – Appeal against decision of Magistrate's Court – Voluntarily causing grievous hurt – Penal Code, s. 325 – Injuries sustained by complainant – Whether fell under s. 320 – Whether prosecution relied on inadmissible evidence to prove ingredients of offence – Whether notes of proceedings incomplete – Whether Magistrate failed to state affirmatively that prosecution's case proved beyond reasonable doubt – Whether Magistrate failed to record a finding of guilt – Whether sentence imposed excessive – Whether decision set aside – Goh Kheng Seong v. PP*

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CRIMINAL PROCEDURE: *Sentencing – Causing grievous hurt – Penal Code, s. 325 – Injuries sustained by complainant – Whether seriousness of injuries considered – First offenders – Appellants and complainant were related – Whether appellants knew that complainant used prosthetic legs – Whether sentence imposed excessive*

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EVIDENCE: *Witness – Interested witness – Whether proved – Whether witness bore enmity with appellants – Whether evidence of witness accepted*

The appellants were found guilty in the Magistrate's Court and convicted under s. 325 of the Penal Code for causing grievous hurt to their 50 year old uncle ('the complainant') in the Keningau General Market. As a result, the appellants were sentenced to three years' imprisonment and a fine of RM2,000. The facts revealed that a commotion took place where the appellants blamed the complainant for selling pork at a reduced price which affected their sales. Thereafter, the appellants attacked the complainant by repeatedly punching him on his face. It was asserted that the first appellant grabbed the complainant from behind and chin locked him while the second appellant punched the complainant's head and also twisted his hand. The other stall holders did not intervene to stop the brothers from attacking the complainant. Shortly thereafter, the police arrived and the parties were brought to the police station. *Vide* the complainant's medical report, it was learnt that he suffered, *inter alia,* from profound hearing loss, imbalance due to injury to the inner ear and fracture of the cheek bones. The case was

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initially investigated under s. 323 of the Penal Code. However, since it was found that the complainant suffered imbalance in his ears which affected his ordinary course of life for more than 21 days, the case was later reclassified under s. 325 of the Penal Code. Aggrieved, the appellants filed an appeal to this court. It was submitted that (i) the Magistrate relied on injuries which were not the basis for the reclassification of the case from s. 323 to s. 325 of the Penal Code; (ii) the grievous hurt relied on by the prosecution did not fall under s. 320(c) of the Penal Code; (iii) the Magistrate did not consider the fact that the prosecution was relying on inadmissible evidence to prove the ingredient of grievous hurt; (iv) the Magistrate failed to invoke adverse inference against the prosecution for its failure to call the doctor from the Keningau Hospital who treated the complainant on the day of the incident; (v) the police did not render immediate first aid treatment to the complainant and did not arrest the appellants (vi) common intention was not proved; (vii) the notes of proceedings was incomplete since the Magistrate failed to state affirmatively that the prosecution's case was proved beyond reasonable doubt and had also failed to record a finding of guilt; and (viii) the conviction was bad in law. In light of the argument that the notes of proceedings was incomplete, a transcript based on the audio recording of the proceedings revealed that the Magistrate mentioned '… kedua-dua tertuduh disabitkan bersalah …'. The appellants argued that the words 'disabitkan bersalah' was not equivalent to a finding of guilt.

Held (dismissing appeal; affirming decision of the Magistrate's Court):

(1) The charge against the appellants was that they had caused grievous hurt to the victim. This was an offence under s. 325 of the Penal Code. The charge did not describe the type of grievous hurt that the complainant suffered. As long as the prosecution proves that the injuries suffered by the victim fell under one or more of the limbs of s. 320, the crucial element of grievous hurt under s. 325 has been satisfied. The actual reason for the classification of the case at the investigation phase from s. 323 to s. 325 should have no bearing on the decision of the Magistrate to call for the defence. It was purely an administrative matter pertaining to police investigation. (paras 12 & 13)

(2) Fracture or dislocation of bone was a category of grievous hurt under s. 320 of the Penal Code. The complainant also suffered from fracture of the cheek bones. In the circumstances, the fact that the doctor who first examined the complainant was not called by the prosecution was not relevant. His absence did not leave any gap in the prosecution's case. Further, there was no merit in the suggestion that the Magistrate did not consider the defence. The Magistrate believed the evidence of the prosecution witnesses and there was nothing wrong with her finding. Apart from the complainant, the other prosecution eye witnesses were independent witnesses who operated stalls at the Keningau Market. Minor discrepancies in their evidence were also considered. However,

A the Magistrate correctly focused on the common thread in their testimonies, *ie,* that the appellants attacked the complainant. Therefore, the minor discrepancies could not detract from the fact that the Magistrate had made a valid finding that the grievous hurt occasioned to the complainant was caused by the appellants. (paras 16, 18 & 19)

B **(3)** There was no statutory duty on the part of the Magistrate to give grounds of decision when calling for defence. The defence could not have been misled as to the type of injuries suffered by the complainant as three medical specialists gave evidence for the prosecution and gave details of various injuries which included fracture of the cheek bone. The C appellants were represented by counsel and therefore, they should have known that fracture of the cheek bones was a type of grievous hurt. Further, the Magistrate had considered the evidence of the prosecution eye-witnesses and the appellants. The trial was about the assault on the complainant. Three independent eye-witnesses at the Keningau Market, D apart from the complainant, stated that the appellants had attacked the complainant. There was no suggestion that the said eye witnesses were interested witnesses or bore enmity with the appellants. (paras 16 & 21)

(4) The police witnesses who arrived at the scene noted that the fight had ceased. However, it was not a material error on the part of the E Magistrate to have stated that the fighting stopped only after the arrival of the police. There was no requirement for the Magistrate to re-evaluate the case for the prosecution as she had already called for the defence. The Magistrate was only required to consider whether the evidence of the appellants and their witnesses raised a doubt on the whole of the case F for the prosecution (*Abdul Karim Kula v. PP;* refd). (paras 22, 24 & 25)

(5) Common intention can be inferred and could be developed on the spot. The fact that the Magistrate did not discuss whether the appellants acted in concert pursuant to the pre-arranged plan or arrangement was not fatal. Therefore, the submission that there was no common intention G was without merit. The material question was whether the prosecution had tendered credible evidence to support the elements of the offence in question and not whether every single circumstance surrounding the arrest had been explained by the prosecution. (paras 26 & 27)

(6) The original notes of proceedings in the record of appeal were incomplete. H The Magistrate had delivered the brief grounds in Malay that was not captured in the transcript of the original notes of proceedings. The words 'disabitkan bersalah' used by the Magistrate meant that she found the appellants guilty and convicted them. Ideally, a finding of guilt should be followed by recording of the conviction. However, the I omission to state the finding of guilt before recording a conviction was a mere irregularity as the Magistrate found both the appellants guilty.

The appellants could not have been possibly prejudiced in their defence by this irregularity. The omission could be cured by s. 422 of the Criminal Procedure Code (*Goh Kheng Seong v. PP;* refd). (paras 29 & 30)

(7) In respect of the sentence imposed, there was no reason to interfere with the exercise of discretion by the Magistrate. The relevant sentencing principles before imposing the sentence had been correctly considered. Although the appellants were first offenders, the Magistrate considered the serious injuries that were inflicted on the complainant in this case over a matter which involved business rivalry. Further, the appellants were much younger and stronger built compared to the 50 year old complainant who used prosthetic legs. The complainant was their uncle and therefore, the appellants ought to have known his disability. (para 31)

Case(s) referred to:
Abdul Karim Kula v. PP [2009] 10 CLJ 1 HC ***(refd)***
Goh Kheng Seong v. PP [1992] 4 CLJ 2133; [1992] 2 CLJ (Rep) 408 HC ***(refd)***
PP v. Ronny Abdullah & Anor [2006] 8 CLJ 512 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 422
Penal Code, ss. 34, 320(c), (g), (h), 323, 324, 325

For the appellants - Hamid Ismail; M/s Hamid & Co
For the prosecution - Chow Siang Kong; DPP
Watching Brief - PJ Perira; M/s PJ Perira & Co

Reported by Kumitha Abd Majid

JUDGMENT

Ravinthran Paramaguru J:

Introduction

[1] This is an appeal against conviction and sentence. The two appellants were convicted of causing grievous hurt to the complainant under s. 325 of the Penal Code. They were sentenced to three years' imprisonment and a fine of RM2,000 in default five months' imprisonment.

Brief Facts

[2] The charge against the appellants reads as follows:

> Bahawa kamu dengan niat bersama pada 10 Februari 2012, jam sekitar 03.45 petang hingga 04.30 petang, bertempat di Gerai Daging Pasar Umum Pekan Keningau, di dalam daerah Keningau, di Negeri Sabah telah dengan sengaja mendatangkan kecederaan parah ke atas penama Lee Kian Min @ Lee Chen Min, (L), 48 tahun. Oleh yang demikian, kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 325 Kanun Keseksaan dan dibaca bersama Seksyen 34 Kanun yang sama.

[3] The appellants and the complainant are pork sellers at the Keningau General Market. The appellants are brothers. The complainant is their uncle. The complainant testified that the appellants blamed him for under selling at the Keningau General Market before launching a brutal attack on him by repeatedly punching him on the face. The prosecution also called three eye witnesses to corroborate the testimony of the complainant. I shall briefly discuss their evidence as follows.

[4] The complainant (Lee Kian Ming @ Lee Chen Ming) is 50 years old. On 10 February 2012, he received a phone call from the second appellant, Kabie Wong Chee Peew (the said Kabie) who requested a meeting at Keningau General Market. The complainant arrived at the market at about 4pm the same day. He went to his stall at booth 10E. The first appellant, Kevin Wong Chee Tze (the said Kevin) was seated at the table of the complainant. Kabie was nowhere to be seen. After waiting for five minutes, the complainant stood up and proceeded to leave the stall. However, Kevin suddenly grabbed him from behind and chin locked him. Kevin punched him a few times. When the complainant tried to remove Kevin's arm from his neck, Kabie suddenly came and twisted the complainant's hand. Kabie also pushed the complainant against the wall and repeatedly rained blows to his face. The other stall holders did not intervene to stop the brothers from attacking the complainant. The police arrived a short time later. The complainant was sent to the Keningau Hospital for treatment. He was treated by Dr Tan Heng Jack. The complainant was also advised to see specialist doctors. The complainant said that as a result of the injuries sustained, he is unable to resume normal work. Three fellow stall operators at the Keningau General Market took the witness stand to corroborate the testimony of the complainant. Asun bin Jiun (PW2) is also a pork seller. He said that at the material time, he saw Kevin talking to someone with a telephone. After the complainant arrived at the stall, Kevin grabbed him and pressed his face on the table. Kabie then punched him repeatedly on the face. The complainant's face was covered with blood as a result. PW2 was not sure if the complainant had meddled in the business of Kevin and Kabie by scaring away their customers or by indulging in the practice of under selling (buang harga). He was also not sure if the complainant started a fight as they were conversing in Chinese. The second eye-witness was Yong Seng Yun (PW3). He is also a pork seller at the same market. He said that he witnessed Kevin and Kabie assaulting the complainant. PW3's table was about four metres away. He said after the complainant arrived at the market around 3.45pm and went to his own booth, Kevin attacked him by chin locking him and pressing his face against the table. Kabie then punched his head repeatedly.

[5] PW3 also heard Kabie accusing the complainant of indulging in 'buang harga'. The third eye-witness was Chin Kim Phin (PW4). He is a fish monger. He heard a loud commotion on the afternoon of the day in question at the pork stall area. He went there to see what was happening. He was shocked to see Kabie punching him repeatedly. He said none of the onlookers

dared to stop the appellants from continuing the assault on the complainant. He said even the enforcement officers of the Majlis Daerah Keningau did not stop the attack.

[6] The evidence of the other witnesses are as follows. Betrrysia Chin Moi Charng (PW5) is the sister in law of the complainant. She said that on the afternoon of 10 February 2012, Kabie met her by chance at the Kelab Rekreasi Keningau and requested the telephone number of the brother of the complainant. Later he came back and told her that he had broken the complainant's hand. She lodged a police report the next day. D/KPL Francis Ak Bandeng was the first policeman to arrive at the market. The 'fight' had ceased by that time. He said that the complainant was injured on the face. SJN Marjumin Bin Rasam was on crime prevention patrol duty at around 3.30pm on the day in question. When he arrived at the market upon hearing of a fight taking place there, he found two other policemen had already arrived there. He said that Kevin and Kabie were yelling at the complainant whose face was bloodied. He also smelt alcohol on Kevin and Kabie. He ordered Kevin, Kabie and the complainant to go to the police station. The investigating officer told the court that the case was initially investigated under s. 323 of the Penal Code, ie, causing hurt. That was the reason he did not initially arrest the appellants. Only after the case was reclassified as a s. 325 case on 17 February 2012, the appellants were arrested. He managed to find witnesses at the market. He said the appellants were unhappy with the complainant because he had reduced the price of the meat and it affected their sales. He said that one of the reasons that the case was reclassified was because the complainant suffered imbalance in his ears and it affected his ordinary course of life for more than 21 days.

[7] The crucial medical evidence in respect of the injuries suffered by the complainant was as follows. The ENT specialist, Dr Go Say Wee (PW12) who examined the complainant told the court that after the attack, the complainant suffered profound hearing loss in his ear. The complainant also suffered from imbalance due to injury to the inner ear. Dr Kolathu Ravi Mandalam (PW15) who is a radiologist at the Sabah Medical Centre testified that based on the X-ray done on the complainant, he found that the cheek bones had fractured. Dr Hoari Krishnan a/l Radhakrishnan (PW16), a bone specialist at the Sabah Medical Centre examined the complainant five days after the incident. Apart from soft tissue injuries, he confirmed that the complainant suffered cheek bone fracture. He also said that the complainant lost a tooth.

[8] The appellants testified on oath and called four witnesses. Kevin said that his brother Kabie had complained to him that the complainant was under selling pork to the extent it affected their business. Kevin said that the complainant asked them to wait at the market for them. While waiting at the market for the arrival of the complainant, Kevin, Kabie and a friend (Wong Shin Kong) drank beer. However, Kevin said that the complainant was drunk

when he arrived at the market. Kevin said the complainant cursed and pushed him. Kevin then chin locked the complainant. Kabie then tried to break them up. Kevin denied hitting the complainant. However, Kevin could not answer why the complainant was bleeding. Kabie also said that the complainant was drunk and cursed them. When he tried to release the complainant from Kevin's grip, the complainant cried out to the onlookers to record what was happening. He said that the complainant had intentionally challenged Kevin to fight to get them into trouble. Both Kevin and Kabie denied hitting the complainant. Their friend (Wong Shin Kong DW3), said it was the complainant who challenged Kevin to a fight. However, he did not witness the fight as he rushed to the washroom soon after that. The fourth witness for the defence was Jason Sin Vui Jie. He said the complainant was drunk and rowdy early that morning. He did not witness the incident in question.

Findings Of Magistrate

[9] The learned Magistrate accepted the evidence of the complainant and the prosecution witnesses that Kevin had chin locked the victim and that Kabie had punched him repeatedly. She considered some minor discrepancies in the evidence of the eye-witnesses such as the manner in which the fight started. However, she noted that all the witnesses said that while Kevin held the complainant in a chin lock, Kabie repeatedly punched the complainant's head. For this reason, she found that the appellants had attacked the complainant. She did not accept the evidence of the appellants that they did not cause hurt to the complainant. She said that their denial cannot explain the injuries suffered by the complainant. As for the injuries, suffered by the complainant, she was satisfied that it came within the definition of grievous hurt under s. 320. Counsel for the appellants submitted before the Magistrate that the court should only consider limb (c) of the definition of grievous hurt, ie, permanent privation of hearing. Counsel for the appellants submitted that the prosecution failed to proof limb (c). However, the Magistrate considered the evidence of medical doctors (Dr Kolathu Ravi Mandalam and Dr Hoari Krishnan) that the complainant suffered fracture of the cheek bone as well. She held that fracture of bone comes under limb (g) of s. 320. As for the element of common intention, she held that evidence of pre-meditation is not an element of s. 34. She said there was common intention because the complainant was punched by Kabie while he was chin locked by Kevin.

Grounds Of Appeal

[10] The first group of grounds relate to the injury suffered by the complainant. They are as follows:

(i) that the Magistrate had relied on injuries which were not the basis for the re-classification of the case from ss. 323 to 325 of the Penal Code;

(ii) that the grievous hurt relied on by the prosecution did not fall under s. 320(c) of the Penal Code;

(iii) the Magistrate did not consider the fact that the prosecution was relying on inadmissible evidence to prove the ingredient of grievous hurt;

(iv) that the Magistrate relied on the evidence of Dr Kolathu Ravi Mandalam, Dr Hoari and Dr Go Say Wee to hold that the prosecution had proved grievous hurt under s. 320(c) and s. 320(h) of the Penal code; and

(v) that the Magistrate failed to invoke adverse inference against the prosecution for its failure to call the doctor from the Keningau hospital who treated the complainant on 10 February 2012.

[11] The investigating officer said that he reclassified the investigation from ss. 323 to 325. He implied that it was because of the hearing impairment suffered by the complainant which resulted in him having difficulty continuing normal work for more than 20 days. In her grounds of decision, the Magistrate found that the prosecution failed to prove permanent hearing impairment. Counsel for appellants submitted that at the end of the case for the prosecution, the Magistrate did not state the type of grievous hurt that was proved. However, at the end of the case for the defence, she held that grievous hurt had been proved under s. 320(g) and s. 320(h).

[12] In my view there is no merit in the above grounds. The charge against the appellants was that they caused grievous hurt to the victim in question which is an offence under s. 325 of the Penal Code. The charge does not describe the type of grievous hurt that the complainant suffered. Section 320 designates the following injuries as 'grievous hurt':

(a) emasculation;

(b) permanent privation of the sight of either eye;

(c) permanent privation of the hearing of either ear;

(d) privation of any member or joint;

(e) destruction or permanent impairing of the powers of any member or joint;

(f) permanent disfiguration of the head or face;

(g) fracture or dislocation of a bone;

(h) any hurt which endangers life, or which causes the sufferer to be, during the space of ten days, in severe bodily pain, or unable to follow his ordinary pursuits.

[13] In the premises, as long as the prosecution proves that the injuries suffered by the victim falls under one or more of the limbs of s. 320, the crucial element of 'grievous hurt' under s. 325 has been satisfied. The actual reason for the classification of the case at the investigation phase from s. 323 to s. 325 should have no bearing on the decision of the Magistrate to call for defence. It is purely an administrative matter pertaining to police investigation.

A What is relevant is whether the prosecution can tender credible evidence to support the elements of the offence at the *prima facie* case stage. In the instant case, the prosecution tendered evidence of the following types of injury suffered by the complainant. The complainant testified that after the attack, he could not hear properly. He still suffers from headaches and did not manage
B to resume work. The ENT specialist (Dr Go Say Wee) who examined the complainant said that he detected hearing loss but could not say whether it is a permanent hearing loss. He said that the complainant has to be assessed yearly. Dr Hoari Krishnan (PW16) who is the bone specialist examined the complainant. He testified that the complainant suffered various injuries
C included loss of a tooth, contusion, concussion, soft tissue injuries and zygomatic arches fracture which is cheek bone fracture. He said as follows in respect of the fracture on the cheek bone:

Q: Bagaimana pula dengan laporan radiology yang mengatakan ada fracture zygomatic arches?

D A: Sebab tulangnya tidak lari dan kami biarkan begitu jadi dia akan secara natural sendiri sembuh.

[14] Dr Kolathu Ravi Mandalum who is radiologist did not directly examine the complainant. However, the X-rays of the complainant were given to him. He explained that zygomatic arches are part of the skull. He
E said as follows:

Q: Dalam laporan ini ada menyebut fracture of both zygomatic arches, boleh kamu terangkan and which part of the body?

A: It is part of a skull but not directly contact with the brain.

F Q: Adakah zygomatic arches in merupakan tulang pipi?

A: Yes

[15] Dr Kolathu Ravi Mandalam said that from the X-ray given to him, he concluded that both zygomatic arches or the cheek bones had fractured. He
G wrote the report although he did not see the complainant because he is the radiologist:

Court: Did you conduct the examination?

A: It has been conducted by the Radiographer I am the one who read the X-Ray and wrote the report because I am the Radiologist.

H **[16]** In the premises, the ground that the prosecution failed to prove the ingredient of grievous hurt at the close of the case for the prosecution is without merit. 'Fracture or dislocation of bone' is a category of grievous hurt under s. 320 of the Penal Code. Although, Dr Kolathu Ravi Mandalam did not examine the patient, he studied the x-rays of the complainant. He
I confirmed the fact of fracture of the cheek bones. Dr Hoari Krishnan, the bone specialist who actually examined the complainant also confirmed the said fracture of cheek bone. In the premises, the fact that the doctor (Dr Tan

Heng Jack) from the Keningau Hospital who first examined the complainant was not called by the prosecution is not relevant. His absence does not leave any gap in the case of the prosecution as all that the prosecution is required to prove is that the injuries suffered by the complainant as result of the attack by the appellants fell within the description of grievous hurt in s. 320. Furthermore, there is no evidence that the prosecution had deliberately suppressed the evidence of the doctor from Keningau Hospital. For that reason as well, the submission to invoke adverse inference is without merit. There are also no grounds to support the submission that the learned Magistrate relied on inadmissible evidence to make a finding that the complainant suffered grievous hurt. The medical report of Dr. Tan Heng Jack was not tendered as an exhibit as the prosecution was unable to call him. The medical report was only marked as 'ID'. Even so, Dr Hoari Krishnan and Dr Kolathu Ravi Mandalam took the witness stand and gave oral evidence in respect of the type of grievous hurt inflicted on the complainant. The complainant also testified that he was unable to resume work or in other words unable to continue with the ordinary pursuits. Finally, in respect of the above group of grounds of appeal, counsel for appellants submitted that at the close of the case for the prosecution, the Magistrate did not give reasons stating what type of grievous hurt had been proved. I find this ground to be without merit as well. In the first place, there is no statutory duty on the part of the Magistrate to give grounds of decision when calling for defence. Secondly, the defence could not have been misled as to the type of injuries suffered by the complainant as three medical specialists gave evidence for the prosecution and gave details of various injuries which included fracture of the cheek bone. The appellants were represented by counsel and therefore should have known that fracture of the cheek bones is a type of grievous hurt.

[17] The second group of grounds pertained to the alleged failure of the Magistrate to consider the case for defence. It is as follows:

> 2(a) The learned Magistrate failed to consider the unchallenged material evidence of DW1, DW2, DW3 and DW4 which proved the Appellants' innocence and would cast reasonable doubts against the charge.
>
> 2(b) The learned Magistrate didn't test the defence's evidence against the prosecution's evidence at the end of the trial.

[18] I find no merit in the suggestion that the Magistrate did not consider the defence. She neatly summarised the evidence of both appellants and their witnesses. She also referred to the submission of counsel for appellants that both accused persons did not hit the complainant and did not start the fight. The relevant portion of the submission of counsel for appellants that was quoted in the judgment of the Magistrate is as follows:

A That both the accused did not hit the victim. Kevin was only holding down the victim because the victim assaulted him. If the victim was injured during this time, it was not done intentionally. It was the victim himself who started the fight. Kevin was only responding to it by chinlocking the victim to stop him.

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The prosecution had failed to prove common intention. Based on the testimonies of the witnesses, the victim had been doing 'buang harga' long before the fight ensued. There was never any indication that they were planning to pounce on the victim any day. The relationship between the victim and the brothers were as usual until the moment when the C victim arrived that afternoon and challenged Kevin to a fight.

[19] However, she believed the evidence of the prosecution witnesses. I see nothing wrong with her finding. Apart from the complainant, the other prosecution eyewitnesses are independent witnesses who operated stalls at D the Keningau Market. She also considered the minor discrepancies in their evidence. However, the Magistrate correctly focused on the common thread in their testimonies, ie, that the two appellants attacked the complainant. Therefore, the minor discrepancies cannot detract from the fact that the Magistrate had made a valid finding that the grievous hurt occasioned to the complainant was caused by the appellants.

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[20] The third group of grounds relate to the alleged misdirection by the Magistrate as follows:

3(a) The Magistrate held that 'The testimonies of PW1, PW2, PW3 and PW4 that the brothers injured the victim were undisputed' when in F fact the defence had challenged their testimonies.

3(b) The Magistrate wrote that "Kevin went back to Keningau and arrived at the market at 1pm. He found his brother at their table with one of their friend, Wong Shin Kong. They discussed the victim's actions" when there was no evidence adduced that such discussion happened. G

3(c) The learned Magistrate was of the opinion that the fighting stopped after the police arrived at the crime scene when, in evidence, the fighting didn't stop for that reason.

[21] I find that the alleged misdirection as stated in para. 3(a) could not H have occasioned any miscarriage of justice. This is because the Magistrate had considered the evidence of prosecution eye-witnesses and the evidence of the appellants. As I said earlier, apart from the complainant, the prosecution called other stall owners who are independent witnesses. Obviously, the Magistrate had chosen to believe their evidence. In respect of the finding of I the Magistrate in her judgment that the appellants 'discussed' the complainant's actions when there is no evidence to support the said finding, I find that the error is not significant or material. The trial is about the assault on the complainant. Three independent eye-witnesses at the Keningau Market

apart from the complainant stated that the appellants had attacked the complainant. There was no suggestion that the said eye-witnesses were interested witnesses or bore enmity towards the appellants. For the same reason, it is not relevant either that the Magistrate stated that the 'fighting' stopped after the police arrived at the scene. The Magistrate stated so because PW3 said as follows during cross-examination:

Q: Waktu kejadian orang Majlis ada di sana kan?

A: Ada.

Q: Diorang nampak kan?

A: Ya.

Q: Tapi diorang tidak buat apa-apa kan?

A: Ya.

Q: Polis datang baru berhenti kan? Polis pun tidak sabar kan?

A: Polis ada sabar juga diorang.

[22] The police witnesses who arrived at the scene noted that the 'fight' had ceased. However, it is not a material error on the part of the Magistrate to have stated that the 'fighting' stopped only after the arrival of the police.

[23] In para. 4 of the petition of appeal, the appellants stated as follows:

4(a) In determining the ingredients of the charge at the end of trial, the Magistrate didn't consider the unchallenged evidence of DW1, DW2, DW3 and DW4 which directly rebutted the prosecution's evidence allegedly proving those ingredients.

4(b) The Magistrate also didn't re-evaluate the prosecution's evidence at the end of the trial in the light of the defence's under oath evidence.

[24] Ground (4)(a) is without merit because the Magistrate considered the evidence of the appellants and their witnesses but preferred to accept the evidence of the prosecution's witnesses. In respect of ground (4)(b), there is no requirement for the Magistrate to 're-evaluate' the case for the prosecution as she had already called for the defence. In *Abdul Karim Kula v. PP* [2009] 10 CLJ 1, the argument that the trial court did not 're-evaluate' the prosecution's evidence at the close of the case for the defence was rejected. Abdul Rahman Sebli JC said as follows:

> The appellant's complaint is that in rejecting the defence case the learned trial judge failed to comply with s. 182A(1) of the Code in that she did not 're-evaluate' the prosecution evidence in deciding whether the prosecution had proved its case beyond reasonable doubt. It was contended that there is a possibility the appellant signed blank LPOs as claimed by him in his defence. With due respect I do not think the duty imposed by s. 182A(1) of the Code is for the court to re-evaluate the prosecution's evidence.

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> What the section requires is for the court to consider the entire evidence and determine whether the evidence presented by the defence has cast a reasonable doubt in the court's mind as to the truth of the prosecution case. This is actually a codification of the procedure laid down by Suffian J (as he then was) in *Mat v. PP* [1963] 1 LNS 82.

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> [34] The need to re-evaluate the prosecution's evidence does not arise because at the end of the prosecution's case the prosecution's evidence had been subjected to a maximum evaluation and the witnesses found to be credible witnesses: *PP v. Ong Cheng Heong* [1998] 4 CLJ 209; *PP v. Dato' Seri Anwar Ibrahim (No 3)* [1999] 2 CLJ 215; *Balachandran v. PP* [2005] 1 CLJ 85; *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457.

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[25] The Magistrate is only required to consider whether the evidence of the appellants and their witnesses raised a doubt on the whole of the case for the prosecution. She had clearly performed this exercise as she said as follows in the penultimate paragraph of her judgment:

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> On the aforesaid reasons, this court rules that the defence had failed to raise any reasonable doubt on the prosecution's case.

Other Grounds

[26] Counsel for the appellants submitted that the prosecution failed to prove common intention. He submitted that the complainant was drunk and had used filthy words against the appellants. Counsel for the appellants also submitted that the appellants did not attack the complainant when they arrived at the market. It is trite law that common intention can be inferred. In the instant case, the prosecution's witnesses said that Kevin held the complainant in a chin lock while Kabie pounded his head and face with his fist. In the premises, the fact the Magistrate did not discuss whether the appellants acted in concert pursuant to the pre-arranged plan or arrangement is not fatal. As stated in the case of *PP v. Ronny Abdullah & Anor* [2006] 8 CLJ 512, common intention can develop on the spot. Therefore, the submission that there was no common intention is without merit.

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[27] Counsel for the appellants also submitted that the police did not do proper investigation in this case. This submission mainly centred on the circumstances of the arrest and the fact that Dr Tan Heng Jack was not called as a witness. Counsel for the appellants also said that the police did not render immediate first aid treatment to the complainant and did not arrest the appellants. The complainant was not admitted to the Keningau Hospital. In my view, all these grounds are without merit. The material question is whether the prosecution had tendered credible evidence to support the elements of the offence in question and not whether every single circumstance surrounding the arrest had been explained by the prosecution.

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Incomplete Notes Of Proceedings

[28] The final ground raised by counsel for appellants is because of the incomplete notes of proceedings. The final part of the notes of proceedings prior to sentencing reads as follows:

Court: Keputusan akan diberi esok pagi (10.1.2014) jam 9.00 pagi. Bail extended. (page 232 Appeal Record)

10.1.2013 Court: Before the Court passes the sentence on both the accused persons, the defence counsel is invited to plea in mitigation of sentence? (page 233 Appeal Record)

Court: Based on the following reasons: ... ... Both the accused are hereby sentenced to an imprisonment of 3 years with effect from today and a fine of RM2,000 each i/d 5 months imprisonment. Bail is refunded. (page 234 Appeal Record)

[29] Based on the above, counsel for the appellants submitted that the Magistrate had failed to state affirmatively that the case of the prosecution was proved beyond reasonable doubt and had also failed to record a finding of guilt. For the above reason, he submitted that the conviction was bad in law. I find no merit in the above ground for the following reasons. When this ground was first raised in the submission of counsel for the appellants, I ordered the Keningau Magistrate's Court Registrar to produce the audio recording of the proceedings on 10 January 2013 and prepare the transcript. Accordingly, the audio compact disc and the full transcript were supplied to the parties. It is apparent from the transcript that the original notes of proceedings in the record of appeal were incomplete. The Magistrate had apparently had delivered brief grounds in Malay that was not captured in the transcript of the original notes of proceedings. At the conclusion of the brief grounds, the Magistrate said that the defence did not raise any reasonable doubt on the case for the prosecution and convicted them. I reproduce the relevant portion below:

Atas sebab-sebab yang telah disebutkan oleh pihak Mahkamah, Mahkamah mendapati bahawa pihak pembelaan gagal untuk raise any reasonable doubt on the prosecution's case. Kedua-dua tertuduh disabitkan bersalah dibawa seksyen 325 dibaca bersama Seksyen 34 Kanun Keseksaan.

[30] Both the DPP and counsel for the appellants acknowledged receiving the above transcript. I also replayed the relevant portion audio recording in court. However, counsel for appellants submitted that 'disabitkan bersalah' is not equivalent to a finding of guilt. Thus, he submitted that there is only a 'conviction' in this case and that there is no 'finding of guilt'. The DPP, on the other hand submitted that the judgment of the Magistrate must be read as a whole as she found that the case of the defence did not raise a reasonable doubt and that she had convicted the appellants. He also submitted the words 'disabitkan bersalah' means that the appellants were found guilty and were convicted. I agree with the DPP that the words used by the Magistrate obviously mean that she found the appellants guilty and had convicted them. Of course, ideally, a finding of guilt should be followed by recording a conviction. However, in my view the omission to state the finding of guilt before recording a conviction is a mere irregularity as it is plain as pikestaff that the Magistrate found both appellants guilty. The appellants could not

have been possibly prejudiced in their defence by this irregularity. In the case of *Goh Kheng Seong v. PP* [1992] 4 CLJ 2133; [1992] 2 CLJ (Rep) 408; [1993] 1 MLJ 103, the Magistrate had failed to formally enter a record of conviction of the appellant. However, Vincent Ng J held that it was a mere error of omission that can be cured by s. 422 of the Criminal Procedure Code as no failure of justice was occasioned. Similarly, in the instant case, even if the argument of counsel for the appellants that there is no finding of guilt is accepted, I hold that the omission can be cured by s. 422. I therefore see no merit in the above ground.

[31] In respect of the sentence, the Magistrate imposed three years imprisonment and a fine of RM2,000 in default five months imprisonment on both the appellants. The maximum punishment for an offence under s. 325 is seven years imprisonment. Learned counsel for the appellants submitted that the sentence is excessive. In my opinion, there is no reason to interfere with the exercise of discretion by the Magistrate. She had correctly considered relevant sentencing principles before imposing the above sentence. Although the appellants were first offenders, she considered the serious injuries that they inflicted on the complainant in this case over a matter involving business rivalry. Furthermore, the appellants were much younger and strongly built compared to the 50 year old complainant who used prosthetic legs because of an earlier motor accident. She also noted that the complainant was their uncle and therefore the appellants ought to have known of his disability. For the above reasons the appeals against both conviction and sentence by both appellants are dismissed.