Public Prosecutor *v* Micheal Anak Garing and another [2015] SGHC 107

Case Number : Criminal Case No 19 of 2013

Decision Date : 20 April 2015

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Anandan Bala, Seraphina Fong and Marcus Foo (Attorney-General's Chambers) for the Public Prosecutor; Ramesh Tiwary (Ramesh Tiwary), Josephus Tan (Fortis Law Corporation) and Keith Lim (Quahe Woo & Palmer LLC) for the first accused; Amarick Gill Singh (Amarick Gill LLC) and Justin Tan (Trident Law Corporation) for the second accused.

Parties : Public Prosecutor — Micheal Anak Garing — Tony Anak Imba

Criminal Law – Sentencing

[LawNet Editorial Note: The appeals to this decision in Criminal Appeals Nos 9 and 11 of 2015 were dismissed by the Court of Appeal on 27 February 2017. See [2017] SGCA 7.]

20 April 2015 Judgment reserved.

Choo Han Teck J:

1 The facts of this case are set out in my written judgment handed down on 20 January 2014 and I need not repeat them here. On the facts, counsel for the prosecution and defence made submissions on the sentence. DPP Anandan Bala, assisted by Ms Seraphina Fong and Mr Marcus Foo, submitted that both accused should be sentenced to death. Mr Ramesh Tiwary ("Mr Tiwary"), assisted by Mr Josephus Tan and Mr Keith Lim submitted on behalf of Micheal Anak Garing ("Micheal Garing"), and Mr Amarick Gill ("Mr Gill") assisted by Mr Justin Tan submitted on behalf of Tony Anak Imba ("Tony Imba"). Counsel for both defendants argued that the death penalty should not be imposed in this case.

2 Until the law was changed, anyone convicted of murder punishable under s 302 of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code") shall be punished with death. But murder is defined in the Penal Code to include not only killing with an intention to kill (s 300(a)) but also killing with the intention of causing such bodily injury as the offender knows to be likely to cause death (s 300(b)), killing by inflicting a wound that was sufficient in the ordinary course of nature to cause death (s 300(c)) and killing with the knowledge that it is so imminently dangerous that it must in all probability cause death (s 300(d)).

3 Section 302 was amended in 2012 so that the death penalty is retained for murder with the intention to kill (s 300(a)), but murder under ss 300(b) to (d), namely, without an explicit intention to kill, is now punishable with either imprisonment for life and caning, or with death.

4 When a court refers to sentencing principles, it would be referring explicitly or implicitly to principles such as utilitarian principles or retributive principles. When it is determining how harsh or lenient it would be, those principles remain relevant but the actual sentence meted out is always a matter of the court's discretion. That has to be so because the facts of each case will always be

different even if the more outstanding facts may appear similar. Hence, one accused who punches another may be jailed for a week whereas another might be jailed for a month. The circumstances of the two cases may be sufficiently different to justify the different terms of imprisonment.

5 Consistency in sentencing is also regarded as a principle and thus, courts set broad precedents so that the discretion of the courts is not applied so diversely that lawyers and the public have no indication what the accused may face. That will lead to far too many contested prosecutions. Clarity and consistency in sentencing has the greater utility of warning the public of the punishment in store, and thus, in that sense, has a deterrent value.

6 When Parliament removed the mandatory death penalty for cases in which the accused has no explicit intention to kill, it conferred a discretion to impose a term of life imprisonment (with caning) as an alternative to the death penalty to the court. Judicial discretion is exercised by taking all relevant factors into account. In the case of sentencing in ss 300(b) to (d) cases, the discretion is not one in which the judge can impose life imprisonment just because he is personally not in favour of the death penalty. I do not think that Parliament amended this section to give the courts a discretion that is so broad and absolute. Whether the death penalty should be removed entirely is a question for the legislature and not the courts. The question before me is whether on the facts should the death penalty be imposed, and if so, whether on one or both of the convicted accused. It is a question that must be answered by a consideration of the facts.

7 Courts that have discretionary powers to impose the death penalty have used various descriptions when they justify their decisions. The Court of Appeal in *Public Prosecutor v Kho Jabing* [2015] 2 SLR 112 (*"Kho Jabing")* did not find the description "rarest of the rare" that has been used by the Indian Court in *Bachan Singh v The State of Punjab* (1980) 2 SCC 684 appropriate, because it is of the view that reserving the death penalty only for the "rarest of the rare" or the "worst of the worst" cases "would mean that it is only in the most extreme of circumstances and the narrowest of cases that the death penalty would be imposed" (at [38]). The Court of Appeal in *Kho Jabing* preferred to use "outrage the feelings of the community" to determine whether the death penalty should be imposed.

8 Phrases like "rarest of the rare" and "worst of the worst" are general terms intended to convey the sort of cases that would place the crime at such a high level of opprobrium that would justify the penalty of death since no one can tell which is the worst of the worst until the worst has occurred.

9 What conduct is likely to "outrage the feelings of the community" requires some elaboration because not everyone who outrages the feelings of the community should be sentenced to death. Thus, the Court of Appeal in *Kho Jabing* further held at [45] that:

> In determining whether the actions of the offender would outrage the feelings of the community, we find that the death penalty would be the appropriate sentence when the offender has acted in a way which exhibits viciousness or a blatant disregard for human life. Viewed in this light, it is the *manner* in which the offender acted which takes centre stage. For example, in the case of a violent act leading to death, the *savagery of the attack* would be indicative of the offender's regard for human life. The number of stabs or blows, the area of the injury, the duration of the attack and the force used would all be pertinent factors to be considered. [emphasis in original]

10 The Court of Appeal was clearly of the view that the phrase "rarest of the rare" might lead judges at first instance to shove discretionary death penalty into a remote corner of legal material where it may rarely be heard of again. It therefore prefers a description that will admit more than the rare case. But when we take into account the viciousness or savagery of the attack we are not far

from the "worst of the worst" and "rarest of the rare". How vicious or savage must the act be? Ultimately, the sentencing court must not take such a lenient view that one would need to strain the imagination to find what facts deserve the imposition of the death penalty. There is no scientific or mathematical formula that determines what conduct deserves the imposition of the death penalty. Linguistic descriptions can be helpful but can sometimes confuse and mislead. The court has to find the facts, and then decide whether on those facts the conduct of the accused and the circumstances of the case merit the punishment of death. If the answer is "yes", then one can garnish the judgment with descriptive adjectives such as "heinous", "savage", or "outrageous"; but when the facts speak for themselves, these descriptions are unnecessary.

11 In this case, Mr Tiwary, realising that the deceased victim was only one of four and the other three were close to death themselves, submitted that I should ignore the three other victims because those three were the subject of offences that were not part of the charge in the present case. That may be true, but they were relevant to the prosecution's narrative as to what the gang had planned to do that evening and how it carried out that plan. The facts concerning the three other victims cannot be ignored. The assault on each of them was as violent as the one that killed the last victim. The plan was to rob and the method was through violence with a deadly weapon. All victims suffered severely and one lost his life. I am of the view that the conduct of Micheal Garing justified the death penalty and I so sentence him to suffer death.

12 The prosecution similarly argued that Tony Imba too ought to be punished with death. Counsel for Tony Imba, Mr Gill submitted that his client did not wield the weapon that caused the injuries of the four victims and death. In that sense, Tony Imba was no different from the other members of the gang. There was an attempt by Micheal Garing at trial to show that it was Tony Imba who carried out the physical assault, but I found that that was against the evidence. The weapon was wielded by only one man – Micheal Garing. Tony Imba was guilty of murder under s 300(c) only by the application of s 34 of the Penal Code, namely, that he and the other members of the gang shared the common intention to rob their victims by violent means. In reply, Mr Anandan Bala submitted that "it is certainly not unprecedented for co-accused persons convicted of a common intention to cause death to receive similar sentences". That may be true before the law was amended. But now, that is not necessarily so because the court has the discretion to impose a different sentence other than death for co-accused persons charged with a common intention to murder under ss 300(b) to (d).

13 In the circumstances, can the same degree of blameworthiness be ascribed to Tony Imba? The fact that he did not use the weapon is important. Tony Imba knocked the deceased victim off his bicycle and held him whilst Micheal Garing began his assault. But the fatal wounds were not inflicted by Tony Imba and there is no evidence to show that he ever wielded the weapon to cause deadly injuries. Is this a sufficient distinction? I do not think that in common intention cases only the principal actor would suffer the death penalty. Each case must be considered on its own facts. The sentencing court must be satisfied, after considering the facts and the circumstances, that the convicted offender deserves to be punished with death, and I am not satisfied that the facts sufficiently warrant it so far as Tony Imba is concerned. If none of the victims were killed, Tony Imba's sentence would probably be lower than that of Micheal Garing. The question now is whether that difference is sufficiently great for him to escape the gallows? If none of the victims had died, even Micheal Garing would have escaped the gallows. Tony Imba's culpability in this case is still significantly less than Micheal Garing's, and in my view, sufficiently different to be sentenced to life imprisonment rather than to suffer death. I therefore sentence him to imprisonment for life with effect from 20 January 2014, the date of his conviction, and also to 24 strokes of the cane.