Wan Kamil Bin Md Shafian & Ors v Public Prosecutor
[2002] SGCA 15

Case Number : Criminal Appeal No 20 of 2001
Decision Date : 07 March 2002
Tribunal/Court : Court of Appeal
Coram : Chao Hick Tin JA; Tan Lee Meng J; Yong Pung How CJ
Counsel Name(s) : —
Parties : —

Between

1. WAN KAMIL BIN MD SHAFIAN
2. IBRAHIM BIN MOHD
3. ROSLI BIN AHMAT ... Appellants

And

PUBLIC PROSECUTOR ... Respondent

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Jurisdiction: Singapore
Date: 2002:03:07
2002:02:18
Court: Court of Appeal
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Chao Hick Tin, JA
Tan Lee Meng, J
Counsel:
Ahmad Khalis (*Wong Khalis & Partners*) and Shah Bhavini (*Bhavini & Co*) (assigned) for the first appellant
Luke Lee (*Luke Lee & Co*) and Johan Ismail (*Johan Ismail & Partners*) (both assigned) for the first appellant
David Rasif (*David Rasif & Partners*) and Sadari Musari (*Sadari Musari & Partners*) (both assigned) for the third appellant

Lawrence Ang, Cheng Howe Ming and Alvin Chen (*Deputy Public Prosecutor*) for the respondent

HEADNOTES

Criminal Law – Common intention – Murder – Whether murder was in furtherance of common intention to rob – Penal Code (Cap 224) s 34

Criminal Law

– Common intention – Murder – Physical presence at the actual commission of the offence - Penal Code (Cap 224) s 34

Facts

The deceased, Koh Ngiap Yong, a taxi driver, was found in some bushes along Chestnut Avenue with

a number of stab wounds in his chest and neck. A handcuff key with a metal ring was recovered by police officers at the scene. Following police investigations, the three appellants were arrested on 15 October 2000. A bayonet was recovered from the first appellant's locker at Cathay Bowl at Choa Chu Kang. The police also found a Smith & Weston revolver, a Colt semi-automatic pistol, three pairs of handcuffs and a bunch of handcuff keys in his flat. Tests confirmed that the first appellant's bayonet had bloodstains and that the blood was that of the deceased. The handcuff key recovered from the scene of the crime was found to be similar in composition, make-up, design and dimension to the handcuff keys seized from the first appellant's flat.

It was determined that on 8 August 2000, the three appellants had met at a coffee shop at West Mall to plan a robbery. During the meeting, the second and third appellants were each given a bag containing weapons by the first appellant. The appellants required a vehicle to ferry them away from the scene of the robbery. After failing to find an unattended vehicle, they flagged down a taxi plying along Bukit Batok. The second appellant sat on the front seat beside the taxi driver while the other two appellants sat on the back seats of the taxi, with the third appellant seated directly behind the taxi driver. The taxi driver was asked to proceed to Chestnut Avenue. At the destination, the taxi driver was asked to stop the taxi some 200 metres away from the PUB Waterworks main gate and ordered to get out. The third appellant tapped a bayonet on the taxi driver's left side but the latter remained in his seat, saying "I pay, I pay". The first appellant then pointed his pistol at the taxi driver, who alighted from the taxi and started to run. However, the third appellant caught hold of him, handcuffed him and dragged him to the bushes. The third appellant stabbed the taxi driver in the chest and the neck, after which he removed the handcuffs and stole the taxi driver's wallet. The second appellant then ferried his accomplices in the taxi to Woodlands. Later at Jurong East, they aborted their plan to rob the targeted shop when they realised that it was fitted with a closed circuit television camera. The second and third appellants had a haircut to prevent recognition. The taxi was parked in a multi-storey car park at West Mall. The three appellants then watched a movie, after which they shared the money in the taxi driver's wallet and coin box. All the weapons were returned to the first appellant and the appellants parted ways at the Bukit Batok MRT station. The trial judge found all the appellants guilty of murder in furtherance of a common intention, punishable under s 302 read with s 34 of the Penal Code and accordingly sentenced them to death. The first appellant withdrew his appeal while the second and third appellants proceeded with their appeal against conviction and sentence. The third appellant claimed that he was not guilty of murder because he would not have killed the taxi driver if the first appellant had not pointed a pistol at him and asked him to "finish off" the victim. The second appellant claimed that his role was solely to act as the driver of the getaway car to be used during the planned robbery. He did not know of the presence of the bayonet before the killing nor that the taxi driver would be killed.

Held,

dismissing the second and third appellants' appeal :

1. The trial judge had rightly noted that the question of duress had not been raised in any of the third appellant's statements to the police. He had also aptly pointed out that duress is not a defence in the case of murder. The stabbing of the taxi driver with the bayonet is certainly within the ambit of s 300 of the Penal Code. Each of the stab wounds inflicted on the taxi driver was, by itself, sufficient in the ordinary course of nature to cause the taxi driver's death. As the third appellant intended to inflict the fatal injuries on the taxi driver, he was rightly held to be guilty of murder (see ¶ 14-15).
2. The common intention of the three appellants was to seize a taxi in order to use it as a getaway vehicle in their planned robbery. It was also their common intention to rob the driver of the taxi of his money. The third appellant's act of stabbing the victim several times was consistent with the three appellant's common intention of robbing the victim of his taxi and his monies. It was in furtherance of their common intention as it enabled them to make off with the taxi and the monies without fear of being identified by the victim later on (see ¶ 19-20).

3. Section 34 is applicable even if the second appellant did not witness the commission of the crime. Physical presence for the purposes of s 34 includes a situation whereby the person stands guard by a gate outside ready to warn his companions about any approach of danger or waits in a car on a nearby road to facilitate their escape (see ¶ 21); PP v Gerardine Andrew [1998] 3 SLR 736 followed.

Case(s) referred to

Mimi Wong & Anor v Public Prosecutor [1972-1974] SLR 73 (folld)
Public Prosecutor v Gerardine Andrew [1998] 3 SLR 736 (folld)

Legislation referred to

Penal Code (Cap 224) ss 34, 94, 300, 302

Judgment

GROUNDS OF DECISION

1. The first appellant, Wan Kamil bin Md Shafian, the second appellant, Ibrahim bin Mohd, and the third appellant, Rosli bin Ahmat, were jointly tried for the offence of murder. The charge against them was as follows:

> That you, Wan Kamil bin Md Shafian, Ibrahim Bin Mohd and Rosli bin Ahmat, are charged that you, on or about the 8th day of August 2000, at or about 11.45 am, along Chestnut Avenue leaving to Bukit Timah Nature Reserve, Singapore, in furtherance of the common intention of you all, did commit murder by causing the death of one Koh Ngiap Yong (male/42 years old), and you have thereby committed an offence punishable under section 302 read with section 34 of the Penal Code, Chapter 224.

2. The three appellants were found guilty and were given the mandatory sentence for murder. During the hearing of their appeals, the first appellant withdrew his appeal. After considering all the circumstances and the evidence before us, we dismissed the appeals of the second and third appellants and now set out the reasons for our decision.

Background

3. On 8 August 2000, a dead body was found in some bushes along Chestnut Avenue. The deceased, Koh Ngiap Yong, a taxi driver, had a number of stab wounds in his chest and neck. A handcuff key with a metal ring was recovered by police officers at the scene. It was estimated that the deceased died some 12 to 24 hours before his body was discovered.

4. Following police investigations, the three appellants were arrested on 15 October 2000. The police recovered a bayonet from the first appellant's locker at Cathay Bowl, which is at a shopping centre at Choa Chu Kang. They also recovered from his flat a long-barrelled Smith & Weston revolver, a Colt semi-automatic pistol, three pairs of handcuffs and a bunch of handcuff keys attached to a small metal ring. A pair of handcuffs was also found in the second appellant's flat.

5. Tests confirmed that the first appellant's bayonet had bloodstains and that the blood was that of the deceased. Evidence was tendered that the handcuff key recovered from the scene of the

crime was similar in composition, make-up, design and dimension to the handcuff keys seized from the first appellant.

6. It was determined that on 8 August 2000, the three appellants met at a coffee shop at West Mall to plan a robbery. The first and second appellants testified that they had intended to rob Boon Lay Gem Pte Ltd, a jewellery shop at Jurong East. The third appellant added that he and his accomplices had also talked about robbing CISCO officers who were carrying cash to ATM machines. During the meeting, the second and third appellants were each given a bag containing weapons by the first appellant. The bag for the third appellant contained a bayonet, a pair of handcuffs, a ski mask and a pair of gloves. The bag for the second appellant contained a long-barrelled Smith & Wesson revolver, a pair of handcuffs and a ski mask. As for the first appellant, he was armed with a Colt 45 pistol, which was placed in a pouch around his waist. He also had a pair of handcuffs, a ski mask, a pair of gloves and a hammer in another bag.

7. The appellants required a vehicle to ferry them away from the scene of the robbery. They decided to steal an unattended vehicle or to take over a taxi from a taxi driver. After failing to find an unattended vehicle, they stopped and boarded a taxi, which was plying along Bukit Batok. The second appellant sat on the front seat beside the taxi driver while the other two appellants sat on the back seats of the taxi, with the third appellant seated directly behind the taxi driver.

8. The taxi driver was asked to proceed to Chestnut Avenue. At the destination, the taxi driver was asked to stop the taxi some 200 metres away from the PUB Waterworks main gate. He was then ordered to get out of the taxi. The third appellant tapped a bayonet on the taxi driver's left side but the latter remained in his seat, saying "I pay, I pay". At this juncture, the first appellant pointed his pistol at the taxi driver, who alighted from the taxi and started to run. However, the third appellant caught hold of him, handcuffed him and dragged him towards the bushes. The taxi driver, who begged for mercy, pointed out that he had a family. The three appellants gave conflicting versions as to what happened thereafter. What is undisputed is that the third appellant stabbed the taxi driver in the chest and the neck, after which he removed the handcuffs and stole the taxi driver's wallet. The second appellant then ferried his accomplices in the taxi to Woodlands.

9. At Woodlands, the appellants discussed their plans to rob the jewellery shop. After proceeding to Jurong East, they aborted their plan to rob the shop in question when they realised that it was fitted with a closed circuit television camera. Concerned that they might be recognised by the drivers of two vehicles which had passed by them when the taxi stopped at Chestnut Avenue, the second and third appellants had a haircut. After that, the three appellants proceeded to West Mall. The taxi was parked in a multi-storey car park and the appellants watched a movie, after which they shared the money in the taxi driver's wallet and coin box. All the weapons were returned to the first appellant and the appellants went their separate ways when they reached the Bukit Batok MRT station.

The trial judge's decision

10. Although it was the third appellant who stabbed the taxi driver to death, the prosecution sought to have all three appellants convicted of murder on the basis of section 34 of the Penal Code, which provides as follows:

> When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

11. The trial judge held that all three appellants were guilty. In para 150 of his judgment, he said as follows:

> The common intention of the three accused persons to rob the taxi driver of his taxi was not disputed by the defence. Reviewing all the evidence, in my determination, the compelling inference was that there was clearly a common intention by all three of them not only to rob the taxi driver of his taxi but all his monies and in that process to put the taxi driver away for good so that he would not be around to tell the police what happened and eventually identify them.

The third appellant's appeal

12. The third appellant's appeal will first be considered. He admitted that he plunged the bayonet into the taxi-driver's chest and neck a number of times. Each of the four wounds in the deceased's chest would have been sufficient in the ordinary cause of nature to result in his death. All the same, the third appellant claimed that he was not guilty of murder because he would not have killed the taxi driver if the first appellant had not pointed a pistol at him and asked him to "finish off" the victim.

13. The third appellant testified that before they boarded the taxi, the first appellant told him: 'Li, you have to finish the taxi driver.' (p 1090 of the Notes of Evidence). He said that the first appellant, who instructed him to take the taxi driver to the bushes, stood at the rear of the taxi, holding a pistol in his hands. The third appellant added that while he was leading the taxi driver towards the bushes, the latter tripped and fell into a ditch. The first appellant came over and helped to pull the taxi driver out of the ditch. Whilst in the bushes, the taxi driver, who tripped and fell again, could not get up. As the third appellant could not raise the fallen victim by himself, he thought of asking the first appellant to help him. He said that instead of coming to his assistance, the first appellant pointed the pistol at him and told him to finish off the taxi driver. The third appellant claimed that he was afraid that the first appellant would shoot him if he did not act as instructed.

14. The trial judge took the view that the third appellant's claim that he acted under duress was a "belated fabrication concocted to evade the consequences of his mindless and cruel deed". He rightly noted that the question of duress was not raised in the third appellant's statements to the police. He also aptly pointed out that duress is not a defence in the case of murder because section 94 of the Penal Code provides as follows:

> *Except murder and offences against the State punishable with death,* nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence:
>
> > *Provided that the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation he became subject to constraint.*

15. The stabbing of the taxi driver in the chest with the bayonet is certainly within the ambit of section 300 of the Penal Code. The forensic pathologist testified that each of the stab wounds inflicted on the taxi driver was, by itself, sufficient in the ordinary course of nature to cause the taxi driver's death. As the third appellant intended to inflict the fatal injuries on the taxi driver, the trial judge rightly concluded that he was guilty of murder. In the circumstances, his appeal was dismissed.

The second appellant's appeal

16. As for the second appellant, the main plank of his defence was that his role was solely to act as the driver of the getaway car to be used during the planned robbery. He claimed that he did not know that the taxi driver would be killed or that the third appellant had a bayonet until the latter re-entered the taxi after killing the taxi driver. As such, he contended that he played no role in the murder of the taxi driver.

17. The second appellant testified that as soon as the taxi driver got out of the car, he swiftly got out of the car in order to occupy the driver's seat. As he was about to adjust the rear view mirror of the vehicle, he happened to turn back and observed that the third appellant was holding the victim close to the bushes. The first appellant was somewhere behind the taxi holding his pistol in his right hand. The second appellant claimed that he saw nothing else.

18. As it was the third appellant who stabbed the taxi driver, the second appellant will only be guilty of murder if section 34 of the Penal Code, which concerns common intention, is applicable. This section has been discussed in innumerable cases. In *Mimi Wong & Anor v Public Prosecutor* [1972-1974] SLR 73, 79, Wee Chong Jin CJ, who delivered the judgment of the Court of Criminal Appeal, said as follows:

> The Privy Council in *Mahbub Shah* (sic) v *Emperor* AIR 1945 PC 118 said this of s 34 :
>
> > Section 34 lays down a principle of joint liability in the doing of a criminal act. The section does not say 'the common intentions of all' nor does it say 'an intention common to all'. Under the section, the essence of that liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. To invoke the aid of s 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in furtherance of the common intention of all. If this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone.
>
> In an earlier case, *Barendra Kumar Ghosh v Emperor* AIR 1925 PC 1, the Privy Council said :
>
> > Section 34 deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself, for 'that act' and 'the act' in the latter part of the section must include the whole action covered by 'a criminal act' in the first part because they refer to it….
>
> It is clear from the Privy Council's interpretation of the words 'criminal act' that it is the result of a criminal act which is a criminal offence. It then remains, in any particular case, to find out the actual offence constituted by the 'criminal act'. If

> the nature of the offence depends on a particular intention the intention of the actual doer of the criminal act has to be considered. What this intention is will decide the offence committed by him and then s 34 applies to make the others vicariously or collectively liable for the same offence. The intention that is an ingredient of the offence constituted by the criminal act is the intention of the actual doer and must be distinguished from the common intention of the doer and his confederates. It may be identical with the common intention or it may not. Where it is not identical with the common intention, it must nevertheless be consistent with the carrying out of the common intention, otherwise the criminal act done by the actual doer would not be in furtherance of the common intention.

19. From the evidence given by the three appellants, their common intention was to seize a taxi in order to use it as a getaway vehicle after robbing a jewellery shop at Jurong East. It was also their common intention to rob the driver of the taxi of his money. In his statement to the police, the third appellant stated as follows:

> "At this juncture all of us agreed that we rob a taxi driver and at least we can get a couple of hundred dollars. We then flagged a taxi, a cream coloured taxi, at Bt Batok."

20. The third appellant's act of stabbing the victim several times was consistent with the three appellants' common intention of robbing the victim of his taxi and his monies. It was in furtherance of their common intention as it enabled them to make off with the taxi and the monies and proceed to Jurong East to carry out their planned robbery at the designated jewellery shop without fear of being identified by the victim later on. There was ample evidence that the appellants were afraid of being recognised and identified by anyone. The bags given by the first appellant to the other appellants contained, inter alia, ski masks and gloves. On the fateful day, the appellants were armed to their teeth and were prepared to use their weapons to achieve their goal. They had intended to rob in broad daylight and had even contemplated robbing armed CISCO guards carrying cash to ATM machines. In these circumstances, it is unbelievable that they intended the taxi driver no serious harm. Their claim that they had only intended to tie him up behind the bushes cannot be believed. In any case, if they had merely intended to tie up the taxi driver, they brought no rope with them.

21. The fact that the second appellant claimed that he was in the taxi when the taxi driver was stabbed some distance away has not been overlooked. Section 34 is applicable even if the second appellant did not witness the commission of the crime. In *Public Prosecutor v Gerardine Andrew* [1998] 3 SLR 736, 752, this Court stated the position as follows:

> The question whether an accused person must be physically present at the actual commission of the offence is … answered in the affirmative. The next question which arises for this appeal is whether [the person charged] was physically present for the purposes of s 34 when the stabbing took place. The requirement here is physical presence at the actual commission of the offence, not physical presence at the immediate site when the commission of the offence occurred. In *Barendra Kumar Ghosh v Emperor* AIR 1925 PC 1, a post-master was shot and killed inside a post office. The accused said that he was outside the post-office at the time of the shooting. Lord Sumner in delivering the judgment of the court observed at p 6, 'Even if the appellant did nothing as he stood outside the door, it is to be remembered that in crimes as in other things "they also serve who only stand and wait'. It was noted by Bose J in

> *Shreekantiah* that an accused need not be present in the actual room. *He can, for instance, stand guard by a gate outside ready to warn his companions about any approach of danger or wait in a car on a nearby road ready to facilitate their escape*. What is crucial is that he must be physically present at the scene of the occurrence and must actually participate in the commission of the offence in some way or other at the time the crime is actually committed.
>
> (emphasis added)

22. As for the second appellant's claim that he did not know that the taxi driver would be killed or that there was a bayonet in their midst before the third appellant re-entered the taxi after killing the taxi driver, the trial judge found this claim unbelievable. He pointed out that although the second appellant said that he did not know the contents of the third appellant's bag, he admitted that he knew that it contained some weapons. In any case, the trial judge pointed out that the second appellant must have noticed the bayonet when it was used to tap the left side of the taxi driver before the latter got out of the taxi. Whether it had been the left waist or the left shoulder of the victim that had been tapped, the bayonet was a rather large object and the second appellant's assertion that he did not notice it because he was looking at the victim's face could not be accepted. Within the close confines of the taxi, the second appellant must have noticed the bayonet. Finally, the second appellant admitted that he saw the third appellant and the taxi driver when they were close to the bushes. At that time, the third appellant was holding the bayonet and the second appellant must have noticed this.

23. It was not established that the trial judge erred when he found the second appellant guilty of the charge faced by him. As such, the second appellant's appeal was also dismissed.

Sgd:

YONG PUNG HOW
Chief Justice

Sgd:

CHAO HICK TIN
Judge of Appeal

Sgd:

TAN LEE MENG
Judge