Chen Jian Wei v Public Prosecutor
[2002] SGHC 66

Case Number : MA 162/2001

Decision Date : 03 April 2002

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Irving Choh (CTLC Law Corp) for the appellant; Peter Koy (Deputy Public Prosecutor) for the respondent

Parties : Chen Jian Wei — Public Prosecutor

Criminal Law – Public tranquillity – Rioting – Whether offence proven beyond reasonable doubt – s 147 Penal Code (Cap 224)

Evidence – Witnesses – Corroboration – Child witness – Whether corroboration required

Evidence – Witnesses – Impeaching witnesses' credibility – Inconsistencies between appellant's evidence in court and his previous statements – Whether material inconsistencies – Effect of impeachment or rejection of evidence – Need to evaluate whole evidence – Whether appellant's testimony consistent with prosecution witnesses' evidence

Judgment

GROUNDS OF DECISION

The appellant was convicted by the district court of one charge of rioting under s 147 of the Penal Code (Cap 224). The charge sheet stated that at about 1.10 am on 9 December 2000, the appellant was part of an unlawful assembly whose common object was to cause hurt to Ong Jun Kiat ("Ong") and in the pursuit of such a common object, one or more of the assembly had fisted and kicked Ong.

2 Section 147 of the Penal Code is punishable with imprisonment for a term which may extend up to five years and with caning. The appellant was sentenced to two years imprisonment and four strokes of the cane.

3 The appellant appealed against his conviction and sentence. At the end of the hearing, I allowed the appeal against conviction and quashed the sentence. I now give my reasons.

The facts

4 On 8 December 2000, Ong and his friend, Ang Kee Leng ("Ang") were with four other friends at the karaoke lounge located at the Civil Defence Association for National Servicemen ("CDANS") Country Club at Bukit Batok West Avenue 7 for drinks and a karaoke session.

5 The appellant was present at the same karaoke lounge with a group of about 20 of his friends. Around midnight, the appellant left the company of his friends and played pool at the pub outside the karaoke lounge.

6 At about 1 am on 9 December 2000, Ong and Ang left the CDANS premises on Ong's motorcycle to buy cigarettes from a nearby petrol kiosk. A party of the appellant's friends left the karaoke lounge at around the same time. This group included various witnesses who testified for the prosecution:

Thulasidas s/o Sahadevan ("Thulasidas"), Yeo Kwan Loong ("Yeo"), Kenny Cheong Wei Long ("Kenny") and three other prosecution witnesses who are minors and shall be referred to as PW6, PW7 and PW8.

7 Members of the group claimed that Ong deliberately revved his motorcycle engine loudly as he passed them. Ong proceeded to execute a U-turn and as he rode pass them a second time, he revved his engine loudly again. As such, the group felt provoked.

8 Yeo, Thulasidas, PW6 and PW8 then confronted Ong and Ang. In the midst of the confrontation, Thulasidas shouted at Ong and punched his face. Various members of the group then attacked Ong, kicking and punching him with their arms and legs.

9 Upon witnessing the attack, Ang tried to help Ong but was stopped and punched on his neck. He managed to escape and went to seek help from his friends who were still in the karaoke lounge. When they returned, the group had fled.

10 Ong was treated at the National University Hospital as an outpatient. In the medical report, the examining medical officer noted that Ong suffered a fracture on the tip of his nose and had various bruises on his head.

The court below

11 The appellant's main defence was that he was not an active participant in the assault. The prosecution called a total of nine witnesses, while the defence only put the appellant on the stand.

The victims

12 The two victims, Ong and Ang, did not identify the appellant in police identification parades. They were only able to identify Thulasidas and Yeo and their evidence did not shed light on whether the appellant was involved. Hence, the trial judge found that their testimonies were unhelpful in determining if the appellant had been present at the commencement of the assault or whether he had a role in the assault.

Thulasidas and Yeo

13 The prosecution also called the various participants in the assault to the stand. Thulasidas testified that he had only seen Yeo and PW8 on his side when the assault took place. When asked whether he remembered seeing the appellant after he left CDANS, he replied that he had only seen the appellant at the karaoke lounge and had not noticed him after that. Yeo then took the stand but his evidence was largely unhelpful as well. To begin with, he had consumed some beer at the karaoke lounge and he admitted to being inebriated by the time he left the CDANS premises. Furthermore, Yeo said that he was so preoccupied with the assault that he did not notice whether the appellant was present or whether he had taken part in the assault at all.

14 On the whole, the judge found the testimonies of Thulasidas and Yeo to be unhelpful as they were uncertain as to whether the appellant was part of the group that confronted Ong. They were also unable to say for sure whether the appellant was actually involved in the assault. As such, she held that their evidence was neutral in determining the appellant's involvement.

Kenny

15 18-year old Kenny was the fifth witness who testified for the prosecution. He testified that, at about the time when Ong passed the group on his motorcycle for the first time, he was experiencing cigarette withdrawal symptoms. Remembering that the appellant owed him a packet of cigarettes, he looked in all directions for the appellant for at least one to two minutes. When he was unable to find the appellant, he took a stick of cigarettes from another person in the group. When asked whether the appellant was one of those who had gone over to talk to Ong, his answer was a definitive 'no'. He explained that he was positive that the appellant was not involved because of the appellant's height and this characteristic was so distinctive that he was able to recognise him even from his back.

16 The prosecution then applied to cross-examine Kenny as a hostile witness. It was pointed out to him that he had failed to mention this piece of exculpatory evidence in all three of his previous statements to the police. In reply, Kenny said that this was because the police had not questioned him specifically as to whether the appellant was involved in the assault.

17 Even though the prosecution did not apply to impeach his credit, the judge however found that Kenny had fabricated his evidence so as to assist the appellant. In coming to this finding, it was noted that Kenny had failed to mention the exculpatory evidence in favour of the appellant in all three statements which he had given to the police. She also rejected Kenny's explanation that since the police did not question him specifically about the appellant's role, there was no need to mention the exculpatory evidence.

PW6

18 The testimony of 15-year old PW6 was controversial. He recounted that in the midst of the fight, Ong's helmet had fallen to the ground. Thinking of using it to hit Ong, he picked up the helmet, but Thulasidas snatched it from him and proceeded to use it to hit the motorcycle. He testified that it was at this juncture that he witnessed the appellant approaching Ong who had by this time fallen to the ground. The appellant was then alleged to have used his fists to punch Ong twice in his back.

19 However, when it was made known to him that the appellant was being charged with rioting and not the less serious unlawful assembly charge that he had pleaded guilty to, PW6 changed his testimony and said that it was possible that he was mistaken about the appellant's role in the assault. His *volte-face* threw his earlier unequivocal statements into doubt. At this point, the prosecution applied to impeach PW6's credit by introducing his previous statements.

20 The prosecution first referred to PW6's statement to the police dated 14 December 2000, ("P2"). The prosecution pointed out that in the course of his oral testimony, PW6 had said that he did not notice the appellant's presence when Yeo, Thulasidas, PW8 and himself first confronted Ong. In P2 however, PW6 had said that the appellant was part of the first group that had approached Ong; therein lay the material inconsistency. In reply, PW6 maintained that the appellant was not present when the confrontation occurred.

21 Next, the prosecution pointed out that in P2, PW6 had alleged that the appellant had used his hands to punch Ong's body. PW6 disagreed and claimed that he was nervous and confused after having been locked up in the Jurong Police Station lock-up for two days. He maintained his new position that he had probably been mistaken when he gave the statement. When it was pointed out to him that his allegation in P2 was consistent with his evidence given during examination-in-chief,

PW6 claimed that during examination-in-chief, he was also feeling '*nervous and confused*' since it was his first time in court. He claimed that, in the course of the hearing, he had a rethink about the events of the night of the assault and felt that he had been mistaken about the appellant's participation in the assault.

22 In her judgment, the judge held that the prosecution had successfully impeached PW6's credit. She rejected his explanations for his change in testimony and said that it was apparent from his 2 May 2001 statement (which she noted was less than two weeks before the commencement of the appellant's trial) that he continued to hold the view that the appellant was an assailant and had even provided details on the manner he carried out the assault. This latest statement from PW6, she noted, was consistent with his evidence given before his *volte-face*. The judge found that, on the whole, before he changed his testimony, PW6's evidence was generally consistent and he was a coherent and clear witness. As such, she preferred his evidence given in his police statements and in his examination-in-chief.

The remaining prosecution witnesses

23 15-year old PW7 testified that, when the first group confronted Ong, he saw the appellant walking/running towards them. After the assault began, he saw the appellant standing close to the pavement where the assault was taking place. He testified that halfway through it, he did not notice the appellant there anymore. However, he conceded that this was probably because his attention was centred on the assault.

24 15 year old PW8 was an active participant in the assault. He testified that during the assault, things were very chaotic and, as he was not looking out for the appellant, he was unable to say with certainty whether he was present or involved in any way.

25 With respect to both their testimonies, the judge noted that, like Thulasidas and Yeo, they were unable to say with certainty whether the appellant was an assailant. As such, she held that their evidence was neutral in determining the appellant's involvement.

The defence case

26 The appellant was the only witness produced by the defence. He testified that he was playing pool with some strangers at the pub outside the karaoke lounge for most of the evening and was unaware that his friends had already left when the lounge started closing. After a phone call to a friend who informed him that the group was headed for a coffeeshop, he left the CDANS premises alone to catch up with them. At this point, the appellant said that he saw Thulasidas kicking a motorcycle and it was then that he realised that a fight was unfolding. He went closer and watched at a distance of one to two metres for about 20 to 30 seconds. He stressed that he did not join in. Later, feeling increasing unease about being at the scene, he ran away.

27 In the course of his cross-examination, the prosecution applied to impeach the appellant's credit on three inconsistencies. First, it was contended that in his long statement dated 9 January 2001 ("P9"), he had mentioned a staring incident which was said to have occurred whilst he was at the lounge. In his oral testimony however, the appellant had stated that there was no staring incident at the CDANS premises. In reply, the appellant explained that since the person involved in the staring incident was not Ong, he did not think that there was a need to mention it as it was an unrelated incident.

28 Secondly, the prosecution pointed out that in P9 the appellant had stated that he had personally heard someone saying that Ong's act of revving the motorcycle was the cause of the assault. As such, the appellant was well-aware that Ong's act of revving the motorcycle engine repeatedly was the direct cause of the assault and that the appellant's claim during trial that he did not know why his group of friends had attacked Ong was a fabrication. In reply, the appellant explained that Ong's revving of his motorcycle as stated in P9 was a matter that was disclosed to him in the aftermath of the assault by his friends. He explained that when the statement was recorded, he had included his friends' version of events. The appellant insisted that at the time of the assault, he did not have personal knowledge of what the cause of it was.

29 Thirdly, the prosecution pointed out that the phrase "*before reaching the coffeeshop*" which appeared in P9 indicated that the appellant did not actually arrive at the coffeeshop. However, during his oral testimony, the appellant stated that he had spoken to three of his friends at the coffeeshop for less than one minute. When queried on the alleged inconsistency, the appellant explained that his actual meaning during oral testimony was that he was never inside the coffeeshop but only stood "*beside*" and "*near*" to the coffeeshop.

30 In her judgment, the judge accepted the appellant's explanation that he had omitted to mention the staring incident at the karaoke lounge because it had seemed to him to be an unrelated matter. However, the judge felt that the appellant was not truthful when he claimed that he had not personally heard the exchange of words between the group and Ong. She also rejected the appellant's use of the phrase "*before reaching the coffeeshop*" to mean "*outside*" or "*near*" the coffeeshop. She held that, if the appellant really meant to say that he did not enter the coffeeshop but only spoke to his friends "*near*" or "*beside*" it, he was capable of enunciating his stated position. The judge found that the appellant's credit was not impeached in toto, and that he was part of the group that had assaulted Ong. Accordingly, she convicted the appellant.

The appeal

31 The main question that arose in the appeal was: did the judge err in coming to the conclusion that the appellant was actively involved in the assault?

32 In the petition of appeal, the appellant argued that the judge was wrong to have found that PW6's and the appellant's credit were impeached. It was also contended that the judge erred in finding that Kenny had fabricated his evidence in court.

Corroboration

33 The crucial witness for the prosecution was PW6 who was 15 years old at the time he testified. As he is regarded as a young witness, the traditional concerns of whether he had attained sufficient maturity not to be swayed by personal interests and fantasy, and understood the importance of stating the truth on oath applied. In certain cases, the law requires corroboration for evidence given by such young witnesses because it is considered unsafe to convict solely on that witness's testimony alone. This was set out in the recent case of *Lee Kwang Peng v PP* [1997] 3 SLR 278. In *Lee*, the witnesses were between 12-14 years of age and it was stated at para 64:

> …Where, therefore, evidence is given by older children whose intellectual faculties are more developed, the danger in convicting without corroboration is diminished. The rationale of the rule makes it very difficult to lay down a

> guideline as to the point at which a maturing individual, in his progress towards adulthood, crosses the line past which the judicial process considers his testimony credible without independent evidence in support of it and this must therefore be a matter for the judge's assessment in each case.

34 Whether corroboration is required for evidence given by a child witness is a matter for the judge to weigh in coming to a determination on the issues. Obviously, a judge who has had the benefit of observing the demeanour and conduct of the child witness would be in a far better position to judge if corroboration is required in the circumstances of the case. An appellate court would not readily interfere with such a finding.

35 However, in the current case, there were overwhelming reasons to regard the evidence given by PW6 with suspicion.

36 It was clear from the evidence that PW6 was predisposed to easy influence from his peers. By his own admission, he had gone over to kick Ong because he had observed his friends assaulting him. The whimsical changes in his testimony indicated that he was unaware of the implications and consequences of lying under oath. His testimony in court also contained several discrepancies from his earlier statements. As such, I held that he did not fall into the category of persons with more mature intellectual faculties and that it would be unsafe to convict solely on his testimony without any corroboration. The prosecution did not adduce any evidence which corroborated PW6's evidence.

Material inconsistencies

37 Quite apart from the general caution required, I noted that there were several other material inconsistencies in PW6's evidence.

38 In court, PW6 stated that he had met the appellant for the first time on the night of the assault. He testified that he did know of any way to contact the appellant nor did he exchange phone numbers with him. However, during cross-examination, it was revealed that from as early as one month before the assault, that is, in November 2000, PW6 was already well-acquainted with the appellant. In fact, they were both called up by the police for playing with a fire extinguisher in school. When faced with this revelation, PW6 changed his story and said that he first got to know the appellant when the mischief involving the fire-extinguisher was committed. Further, I noted that in P2, PW6 had provided rough details of the appellant's home address and in particular, was able to recite the appellant's handphone number from memory. PW6 was clearly lying when he testified that he had met the appellant for the first time on 8 December 1999 and was not acquainted with him.

39 I also noted that PW6 testified that Thulasidas was the first one to punch Ong on his face. In P2, PW6 stated that "Kwan Long" i.e. Yeo, had used his right hand to punch Ong on the face twice and this led to the others joining in the fracas. This was plainly wrong and the testimonies of all the other witnesses stated conclusively that it was Thulasidas, not Yeo, who had thrown the first punch. In the context that P2 was recorded on 14 December 2000, less than a week after the assaults, I found that this was a patent error for someone who was present at the initial confrontation. It showed that the evidence given by PW6 ought not be believed.

40 None of the above inconsistencies were highlighted to the court by counsel. The combined effect of these discrepancies, together with the whimsical changes in his testimony indicated that PW6 was totally devoid of any credit. In fact, I found that his evidence was suspiciously detailed and systematic. For a person who was actively involved with assaulting Ong, it was hard to believe that

he could give such a methodical, step-by-step account of the assault. None of the other participants was able to come close to such a feat.

Kenny

41 The appellant argued that the judge had erred in finding that Kenny had fabricated his evidence because of his failure to mention the exculpatory evidence in earlier statements to the police. In her judgment, the judge stated that she preferred PW6's evidence given in his police statements and in his examination-in-chief over Kenny's testimony.

42 In his long statement recorded at 8.35 pm on 10 January 2001 ("D1"), Kenny provided a narrative account of how the assault took place. In his cautioned statement recorded at 8.20 pm on 10 January 2001 ("D2"), the sole contents were a record of his denial of having been involved in the assault. Notably, no specific questions were directed at him then with regard to the degree of the appellant's participation in the assault.

43 In my opinion, Kenny's failure to list out all the names of persons who were not active assailants cannot be regarded as a failure to mention the exculpatory evidence. While section 121(2) of the *Criminal Procedure Code* (Cap 68) binds a person to state truly the facts and circumstances concerning the case with which he is acquainted, except that which may incriminate him, the question put to him by the investigating officer was about the identities of the persons who had assaulted Ong. Kenny's reply was to list Yeo, Thulasidas, PW6 and PW8 as the assailants. It could not have been expected of him to list out the names of all the persons who did not take part in the assault.

44 Further, I noted that the prosecution had not impeached Kenny's credit. He was also the only witness who testified to being able to recognise the appellant even from his back, due to his distinctive height. The fact that Kenny was not an active participant but remained a bystander throughout the assault was important since he was in a position to fully observe the events. On the whole, Kenny's story was not incredible and he had merely testified to what he had seen. As such, I found that Kenny's testimony should be given great weight.

The appellant

45 The judge had impeached the appellant's credit on the basis of two material inconsistencies in his previous statements. The first was in P9 where he had stated "*I remember hearing someone ask why they rammed their motorcycled engine, but he* [Ong] *denied it*." On the basis of this statement, the judge held that the appellant was at the scene of the assault when it first started and in the light of the appellant's own testimony that he had stood one to two metres from the scene of the assault, he was well-placed to hear the altercation between the group and Ong. As such, it was held that he did not arrive in the midst of the assault as he claimed in his testimony, but was lying when he denied that he did not know what the cause of the assault was.

46 Evaluating the evidence, it appeared that the appellant only arrived after Yeo, Thulasidas, PW6 and PW8 confronted Ong, at the point when Thulasidas was kicking Ong's motorcycle. This was corroborated by the testimonies given by the other prosecution witnesses. In fact, none of them testified that the appellant was present at the scene when the initial confrontation took place. This was simply because he was not there.

47 Since the appellant could not have personally heard the exchange of words that transpired between the group and Ong in the first instance, I was of the view that the appellant had included in P9 what he believed to be the provocation leading to the assault after discussing the assault with his friends in its aftermath. As such, I disagreed with the judge that this was a material inconsistency which ought to be taken into account to impeach the appellant's credit.

48 As for the second inconsistency, in his evidence in court, the appellant stated that he was at the coffeeshop for less than one minute and, whilst there, he told three of his friends about the assault. He claimed that he did not have any drinks at the coffeeshop. However, the prosecution claimed that the appellant's use of the phrase "*Before reaching the coffeeshop…*" in P9 indicated that the appellant never reached the coffeeshop. Therein lay the discrepancy. In reply, the appellant explained that by "*Before reaching the coffeeshop…*" he really meant that he did not actually step into the premises of the coffeeshop and he had talked to his friends who were standing just outside the coffeeshop. The judge, however, found that this was a material inconsistency and took this into consideration in impeaching the appellant's credit.

49 In my opinion, the dispute as to whether the appellant actually reached the premises of the coffeeshop was decided on the basis of semantics. As I stated recently in *Mohammed Zairi bin Mohamad Mohtar v PP* [2002] 1 SLR 344, at para 33:

> It is settled law that the credibility of a witness cannot be impeached unless there are serious discrepancies or material contradictions between his oral testimony and his previous police statements: ***Muthusamy v PP*** [1948] MLJ 57 . 'Material' inconsistencies are those inconsistencies that go to the crux of the charges against the appellants: ***Kwang Boon Keong Peter v PP*** [1998] 2 SLR 592 . In determining whether the credit of the accused or a witness has been impeached, the court will compare the oral evidence with the previous statement to assess the overall impression which has been created as a whole: ***PP v Heah Lian Khin*** [2000] 3 SLR 609 .

50 Whether the appellant actually stepped into the coffeeshop or had merely stood "*beside*" or "*near*" it was inconsequential and certainly not material enough to go towards impeaching his credit. As such, I disagreed with the judge that this should be a material consideration to justify a finding that the appellant was without credit.

51 At this juncture, I found it helpful to refer to the Court of Appeal's judgment in *Loganatha Venkatesan v PP* [2000] 3 SLR 677, 695 :

> … it is important to bear in mind that an impeachment of the witness's credit does not automatically lead to a total rejection of his evidence. The court must carefully scrutinise the whole of the evidence to determine which aspect might be true and which aspect should be disregarded: see ***PP v Somwang Phatthanasaeng*** [1992] 1 SLR 138 (HC) and ***Kwang Boon Keong Peter*** (supra). Thus, regardless of whether his credit is impeached, the duty of the court remains, that is, to evaluate the evidence in its entirety to determine which aspect to believe.

52 Applying this to the current case, I found that various aspects of the appellant's testimony were consistent with the evidence given by the prosecution witnesses. The appellant's version of events was that when he emerged from the CDANS premises, Thulasidas was kicking Ong's motorcycle and he had stood at a distance of one to two metres away and watched the assault for 20-30 seconds. This

was generally consistent with PW7's version of events :

> Q Was Accused one of these 10? [referring to the alleged 10 persons who first confronted Ong]
>
> A When we approached the victim, then I saw Accused either walking or running towards us. When the fight started, I saw Accused standing either on or near the pavement.
>
> Q Is this next to where the fight was?
>
> A Yes.
>
> Q Then?
>
> A In the middle of the fight, I didn't notice him there anymore.

53 PW7 conceded that he probably did not notice the appellant because he "*didn't really focus my sight on him*". I noted that PW7 was not an assailant but a bystander who was engrossed with the assault. Had the appellant actually joined his friends in attacking Ong, PW7 would surely have witnessed it. Similarly, Kenny, who was also watching the assault from the sidelines did not testify to have observed the appellant assaulting Ong. Even more telling, perhaps, was the fact that the assailants, namely Thulasidas, Yeo, PW6 and PW8 were able to name with certainty and accuracy all the other assailants, but they were all similarly uncertain when asked whether the appellant was involved.

Conclusion

54 Chaos is the hallmark of any riot. Neither statute nor case law has provided a qualification to the standard of proof required for conviction, and it must be reiterated that the burden of proving beyond reasonable doubt in an offence of rioting continues to apply strictly. While t**he prosecution called a** total of nine witnesses to the stand, PW6 was the only witness who insisted that the appellant was an active assailant. Quite apart from the quality of his evidence, by the time he stepped down from the stand, PW6 had already retracted much of his initial testimony and was no longer certain if the appellant was an active assailant.

55 As for the defence, the appellant as well as Kenny provided firm exculpatory evidence that the appellant was not involved in assaulting Ong at all.

56 While I was keenly conscious that the issues before me were mainly factual in nature and that an appellate court should be slow to overturn a trial judge's findings of fact unless they were clearly reached against the weight of evidence or were plainly wrong (***Tan Hung Yeoh v PP*** [1999] 3 SLR 93 and ***PP v Azman bin Abdullah*** [1998] 2 SLR 704), I was not satisfied on the totality of the evidence that the burden of proof was satisfied.

57 For the reasons given above, I allowed the appeal and set aside the conviction as well as the sentence imposed by the court below.

Appeal allowed.

Sgd:

YONG PUNG HOW
Chief Justice