Public Prosecutor *v* AOB
[2010] SGHC 376

Case Number	: Magistrate's Appeal No 166 of 2010
Decision Date	: 31 December 2010
Tribunal/Court	: High Court
Coram	: Chan Sek Keong CJ
Counsel Name(s)	: Gillian Koh-Tan (Attorney-General's Chambers) for the appellant; Tay San Lee (Tay & Wong) for the respondent.
Parties	: Public Prosecutor — AOB

Criminal Procedure and Sentencing

31 December 2010

Chan Sek Keong CJ:

Introduction

1 This is an appeal by the Prosecution against sentence. The District Judge ("the District Judge") had imposed a fine of $3,500 (with a default sentence of three weeks' imprisonment) on the respondent ("the respondent") after convicting him of one charge of voluntarily causing hurt under s 323 of the Penal Code (Cap 224, 2008 Rev Ed) ("the Penal Code") in DAC No 12681 of 2010.

2 The maximum sentence for a s 323 offence is two years' imprisonment and/or a $5,000 fine. Two other charges against the respondent were also taken into consideration by the District Judge, namely:

(a) a second s 323 charge of causing hurt to the respondent's nine-year-old daughter ("the Daughter"); and

(b) a s 298A(*b*) charge of hurling racial insults at the victim, one Abdul Hamid bin Hassan ("the Victim").

3 I dismissed the appeal and recorded an undertaking by the respondent to pay a sum of $1,000 as compensation to the Victim. I now set out the reasons for my decision.

Facts

4 The facts of this case are relatively straightforward and have been admitted by the respondent. On 5 July 2009, at about 5.55pm, the respondent was with the Daughter at Serangoon Bus Interchange. He was slapping her face and neck, and pinching her forearm. The Victim and his friend (the complainant) stepped in to intervene and asked the respondent to stop the beating. The respondent told the complainant to mind his own business, and insulted the Victim by saying "Malays are bastards, Chinese are good". The Victim told the respondent not to say such things, whereupon the respondent punched the Victim on the nose. The Victim then pushed the respondent to the ground in self-defence. After this, both parties stopped and waited for the police to arrive.

5 The respondent's act of punching the Victim caused the latter to suffer an undisplaced fracture of a nasal bone. The respondent himself also suffered a displaced fracture to his nasal bone due to the impact of being pushed to the ground by the Victim.

The District Judge's decision

6 The District Judge held that there was no need to impose a custodial sentence on the respondent, and that a fine of $3,500 would suffice because:

(a) the respondent had no history of violence, and his only criminal antecedents related to gaming;

(b) the respondent had struck only a single blow, and the altercation had lasted for only a short period;

(c) the Victim had suffered only minor injuries, namely, an undisplaced fracture of a nasal bone;

(d) there was clearly no premeditation behind the respondent's actions, and the respondent had acted on the spur of the moment; and

(e) there were no other aggravating factors relating to the respondent's actions.

The Prosecution's appeal

7 The Prosecution appealed against the sentence imposed by the District Judge, contending that the fine of $3,500 was manifestly inadequate because of two main factors, namely:

(a) the sentence given by the District Judge was out of line with sentencing precedents; and

(b) the respondent had hurled a racial insult at the Victim.

Sentencing precedents

8 A survey of the sentencing precedents reveals a lack of consistency in the sentences imposed in s 323 cases. Unsurprisingly, the cases cited by the Prosecution, such as *Agmir Singh v PP* Magistrate's Appeal No 342 of 1992, *PP v Gopal Maganathan* Magistrate's Appeal No 253 of 2001 and *Quek Kheok Seng v PP* [2003] SGDC 198, were all cases where the District Courts chose to impose custodial sentences on the offenders. Based on those cases, the Prosecution submitted that a custodial sentence of between six weeks and three months ought to be imposed on the respondent. On the other hand, there are also a number of s 323 cases, such as *Lim Hung Khiang v PP* Magistrate's Appeal No 142 of 1997 and *PP v Chua Tian Bok Timothy* [2005] SGMC 4, where only a fine was imposed on the offender.

9 *Sim Yew Thong v Ng Loy Nam Thomas and other appeals* [2000] 3 SLR(R) 155 ("*Sim Yew Thong*") is one of the few High Court decisions dealing with sentencing guidelines for the s 323 offence. There, the first accused, who was annoyed by the noise made by the victims at the temple, punched the first victim and knocked him to the ground. The second victim, who was the first victim's 67-year-old mother, went to help the first victim up. At this point, the second accused charged towards them and knocked them to the ground. He further kicked the first victim in the stomach. The first victim suffered bruises and tenderness, while the second victim fractured a vertebra in her lower

back.

10 The second accused was convicted of two charges under s 323 and was sentenced to three months' imprisonment for each charge, with the sentences to run concurrently. Chief Justice Yong Pung How observed that the key factors which weighed against the second accused were that the second victim had suffered severe injuries, and the second accused had kicked the first victim even after the latter had fallen to the ground. On the other hand, Yong CJ reduced the sentence of the first accused from two weeks' imprisonment to a fine of $1,000 because of the relatively minor injuries inflicted by him.

1 1 *Sim Yew Thong* suggests that a custodial sentence is generally not imposed for a s 323 offence when: (a) the offender's actions were not premeditated; (b) the victim's injuries were minor; and (c) the altercation lasted for only a short time. Given these factors, as well as the wide range of punishments meted out by the court to s 323 offenders, I was of the view that it was difficult to say that the sentence meted out to the respondent in the present case was out of line with the sentencing precedents.

The hurling of a racial insult at the Victim

12 The Prosecution submitted that the fact that the respondent had hurled a racial insult at the Victim before attacking him was an aggravating factor that justified the imposition of a custodial sentence. I did not accept this submission as the Prosecution rightly did not submit that the respondent's attack on the Victim was a racially-motivated one. On the evidence, the respondent did not go around looking for someone of a particular race to pick a fight with. Instead, he was simply "minding his own business" in disciplining the Daughter. When the Victim intervened, the respondent warned him to back off. It was only when the Victim persisted with his intervention that the respondent, who was by then extremely annoyed by the Victim's actions, uttered a racial insult and assaulted him.

13 In other words, the respondent "lost his cool" when he was repeatedly told by the Victim to stop beating the Daughter. The race of the Victim was not a significant factor in the physical attack, which had its roots in the respondent's belief that the Victim was persisting unreasonably in interfering with his (the respondent's) responsibilities as a father. Although the respondent's act of uttering racially insulting words at the Victim was an offence under s 298A(*b*) of the Penal Code, I did not give it too much weight as an aggravating factor because, as just mentioned, the Victim's race was not a factor which triggered the respondent's attack on the Victim.

14 Neither did I regard the second s 323 charge of causing hurt to the Daughter as an aggravating factor which warranted an increase in the sentence meted out to the respondent. I was of the view that a more appropriate form of "additional punishment" would be to impose a monetary penalty on the respondent by means of an order to pay compensation to the Victim under the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("the CPC").

Conclusion on sentence

15 Taking into account all the aforesaid considerations, I was of the view that it was well within the District Judge's sentencing discretion not to impose a custodial sentence, but to impose only a fine on the respondent.

Compensation for the Victim

16 As I stated earlier, I considered that the circumstances of this case justified the making of a compensation order to compensate the Victim. When this court suggested to the respondent that he should agree to such an order, he replied that he was remorseful and would be willing to pay compensation of an appropriate amount (which I indicated would be $1,000) if the Victim was willing to accept such compensation. The Victim did not object to my suggestion. The Prosecution informed the court that it had not applied for a compensation order during the proceedings before the District Judge, and that it was unlikely that the District Judge had considered the question.

17 A technical problem then arose as to whether the High Court, in its capacity as an *appellate* court, had the power to order compensation in view of the wording of s 401(1)(*b*) of the CPC, which provides as follows:

> **401**.—(1) *The court before which a person is convicted of any crime or offence* may, in its discretion, make either or both of the following orders against him:
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> (*a*) an order for the payment by him of the costs of his prosecution or such part thereof as the court directs;
>
> (*b*) an order for the payment by him of a sum to be fixed by the court by way of compensation to any person or to the representatives of any person injured in respect of his person, character or property by the crime or offence for which the sentence is passed.
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> [emphasis added]

18 Under s 401(1)(*b*), it is the *trial* court convicting an offender of an offence which has the power to impose a compensation order on him. This discretion is a judicial discretion, and, like all other kinds of judicial discretion, "must be exercised not only in accordance with the rules of reason and justice but also in accordance with the provisions of the law" (see *Public Prosecutor v Norzian bin Bintat* [1995] 3 SLR(R) 105 at [52]).

19 In this case, the District Judge did not consider whether it was appropriate for him to impose a compensation order on the respondent under s 401(1)(*b*) of the CPC. Neither did the Prosecution seek such an order. The question is whether, in a case where the trial court has not imposed a compensation order, the High Court has the power to impose such an order when it is hearing an appeal against the sentence imposed by the trial court. The answer would appear to be "No". The powers of the High Court when hearing a criminal appeal from the Subordinate Courts are set out in s 256 of the CPC. Section 256 reads as follows:

> **256**. At the hearing of the appeal the court may, if it considers there is no sufficient ground for interfering, dismiss the appeal or may —
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> (*a*) in an appeal from an order of acquittal, reverse the order and direct that further inquiry shall be made or that the accused shall be retried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;
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> (*b*) in an appeal from a conviction —
>
> (i) reverse the finding and sentence and acquit or discharge the accused or order him to be retried by a court of competent jurisdiction or committed for trial;
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> (ii) alter the finding, maintaining the sentence, or, with or without altering the finding,

reduce or enhance the sentence; or

(iii) with or without the reduction or enhancement and with or without altering the finding, alter the nature of the sentence;

(*c*) in an appeal as to sentence, reduce or enhance the sentence, or alter the nature of the sentence; or

(*d*) in an appeal from any other order, alter or reverse the order.

20 In *Public Prosecutor v Lee Meow Sim Jenny* [1993] 3 SLR(R) 369 ("*Lee Meow Sim*"), the Court of Appeal held that in an appeal against sentence, the powers of the High Court under s 256(*c*) of the CPC were restricted to reducing, enhancing or changing the nature of the sentence; the High Court had no power to impose a compensation order on the accused when such an order was not part of the sentence imposed by the trial court.

21 In *Public Prosecutor v Donohue Enilia* [2005] 1 SLR(R) 220 ("*Donohue Enilia*"), Yong CJ distinguished *Lee Meow Sim* and made a compensation order on the Prosecution's appeal after the district judge refused to order compensation to be paid by the accused to the victim. Yong CJ held that the Prosecution's appeal fell within s 256(*d*) of the CPC, *ie*, it was "an appeal from any other order" and, thus, the High Court, in its capacity as an appellate court, could "alter or reverse" the district judge's refusal to make a compensation order. Yong CJ said at [14]–[15]:

> 14 ... I made the observation in *Lim Poh Eng v PP* that a compensation order could conceivably be varied under s 256(d) "in an appeal from any other order". I only stopped short of varying the compensation order because the appeal in *Lim Poh Eng v PP* had only been with regards to conviction and sentence and s 256(d) therefore did not apply. Therefore, it is clear that where an appeal lies against a compensation order made by the lower court, such an appeal can be heard by the High Court and the order accordingly maintained or varied.
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> 15 The only problem in this appeal was that the trial judge had made no compensation order at all. Strictly speaking, there was no existing compensation order from which the Prosecution could appeal. In other words, it was technically not "an appeal from any other order" under s 256(d) of the CPC. Nevertheless, I was of the view that there could be an appeal against the court's refusal to grant a compensation order. The opposite conclusion would be absurd, for it would mean that an appeal would be possible if the court awarded a manifestly inadequate amount of compensation, but no appeal would be possible if the court refused to grant any compensation. It cannot be Parliament's intention for the High Court's appellate powers to be so circumscribed.

22 The facts of the present case are different from those in *Donohue Enilia* since, here, the District Judge did not make a compensation order and hence there was no order against which the Prosecution could appeal. Having regard to *Lee Meow Sim*, it was not within my power to order the respondent to compensate the Victim. Notwithstanding this, since the respondent himself was willing to pay compensation of $1,000 to the Victim as an expression of his remorse, I decided to record his willingness to pay compensation in the amount stated, but without prejudice to any civil claim that the Victim is entitled to bring under the law.

Postscript on the making of compensation orders

23 In concluding these grounds of decision, I would like to make some observations on the purpose of compensation orders under the CPC. The power to make compensation orders under s 401(1)(*b*) of

the CPC is a benign and useful power which trial judges should consider exercising in appropriate cases. Such cases would include those where the offender has caused the victim physical injury in respect of which the victim would be entitled to claim damages in a civil action. Compensation orders are particularly suitable and appropriate for victims who may have no financial means or have other difficulties in commencing civil proceedings for damages against the offender. Although a custodial sentence or a heavy fine may be appropriate as punishment for the offender, such punishments are cold comfort to a victim who has experienced pain and suffering as a result of the offender's actions and who, as a result, has to bear the burden of medical bills, lost wages and other expenses. In theory, the victim can always bring a civil claim against the offender to recover damages for any loss suffered. However, as just mentioned, this may not be practical for disadvantaged or poor victims. In this regard, the following comment in *R v Inwood (Roland Joseph)* (1974) 60 Cr App R 70 at 73 (cited by the Court of Appeal in *Lee Meow Sim* at [28]) is pertinent:

> Compensation orders were not introduced into our law to enable the convicted to buy themselves out of the penalties for crime. Compensation orders were introduced into our law as a convenient and rapid means of avoiding the expense of resort to civil litigation when the criminal clearly has means which would enable the compensation to be paid.

24 In a similar vein, the High Court in *Donohue Enilia* stated at [19] that "[a] compensation order allows compensation to be recovered where a civil suit is an inadequate remedy due to the impecuniosity of the person injured". A compensation order is therefore an efficient process to compel offenders to pay damages to the victims without having to waste the economic and judicial resources involved in the prosecution of a civil claim.

The quantum of compensation

25 As mentioned earlier, the power of the court to order compensation under s 401(1)(*b*) of the CPC is a discretionary power. The amount of compensation which the court can order the offender to pay is at large. In *Donohue Enilia*, Yong CJ, drawing upon English authorities, summarised the principles relating to compensation orders as follows:

> 20 There are several principles relevant for the purposes of deciding whether a compensation order should be granted.
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> 21 Firstly, a compensation order does not form part of the sentence (*PP v Lee Meow Sim Jenny*; *Lim Poh Eng v PP*), nor is it an alternative to a sentence (*R v Miller* [1976] Crim LR 694). Therefore, it should not be used as further punishment of a convicted person, and the amount of compensation ordered should not exceed the amount of damage caused: *Emperor v Maung Thin* (1909) 10 Cr LJ 78.
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> 22 Secondly, there must be a causal connection between the offence of which the accused is convicted and the personal injury, loss or damage in respect of which the compensation order is made: *R v Deary* (1993) 14 Cr App R (S) 648. In other words, the court may make a compensation order only in respect of the injury or loss which results from the offence for which the accused is convicted. The court should adopt a broad commonsense approach in assessing whether compensation should be awarded. It should not allow itself to be enmeshed in refined questions of causation which may arise in claims for damages under contract law or tort law: *per* McCullough J *in Bond v Chief Constable of Kent* [1983] 1 All ER 456 ...
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> 23 Thirdly, compensation will be ordered only in clear cases where the damage is either proved or agreed: *R v Vivian* [1979] 1 All ER 48. The assessment of loss or damage must be based on

evidence and not simply on representations by the Prosecution: *R v Horsham Justices, ex parte Richards* [1985] 2 All ER 1114.

24 Fourthly, it was established in *R v Daly* (1973) 58 Cr App R 333 that the power to make compensation orders should only be used for dealing with claims in straightforward cases. Compensation orders are designed for cases where the amount of compensation can be readily and easily ascertained, and are not for cases where the amount of damages or loss is notoriously disputed: *R v Donovan* (1981) 3 Cr App R (S) 192. Although the court can hear evidence in order to determine questions as to the fact or quantum of loss, the court should not embark on any complicated investigation: *R v Briscoe* (1994) 15 Cr App R (S) 699. Indeed, an order should only be made where the legal position is quite clear: *R v Miller*. The court should decline to make a compensation order unless it is based on very simply stated propositions which have been agreed on or which are simple to resolve: *Hyde v Emery* (1984) 6 Cr App R (S) 206.

...

26 Fifthly, the order must not be oppressive, but must be realistic in that the court must be satisfied that the accused either has the means available, or will have the means, to pay the compensation within a reasonable time (*R v Parker* (1981) 3 Cr App R (S) 278). ...

The amendments to the CPC

26 In the past, the Subordinate Courts were reluctant to exercise the power to order compensation on their own motion. Similarly, the previous practice of the Prosecution was to refrain from seeking compensation orders. However, in recent years, the courts have begun to make such orders, although they have yet to develop an established practice of doing so. The law has now been changed to require a court convicting an offender of any offence to consider whether or not the making of a compensation order is appropriate in the circumstances of the case. Section 401 of the CPC will shortly be repealed and replaced by s 359 of the Criminal Procedure Code 2010 (Act 15 of 2010) ("the CPC 2010") which, the Ministry of Law has announced, will come into force on 2 January 2011. Section 359 provides as follows:

359.—(1) The court before which a person is convicted of any offence *shall*, after the conviction, consider whether or not to make an order for the payment by that person of a sum to be fixed by the court by way of compensation to the person injured, or his representative, in respect of his person, character or property by —

(*a*) the offence or offences for which the sentence is passed; and

(*b*) any offence that has been taken into consideration for the purposes of sentencing only.

(2) If the court is of the view that it is appropriate to make such an order referred to in subsection (1), it must do so.

(3) If an accused is acquitted of any charge for any offence, and if it is proved to the satisfaction of the court that the prosecution was frivolous or vexatious, the court may order the prosecution or the complainant or the person on whose information the prosecution was instituted to pay as compensation to the accused a sum not exceeding $10,000.

(4) Any order for compensation made under subsection (1) shall not affect any right to a civil remedy for the recovery of any property or for the recovery of damages beyond the amount of

compensation paid under the order, but any claim by a person or his representative for civil damages in respect of the same injury arising from the offence, shall be deemed to have been satisfied to the extent of the amount paid to him under an order for compensation.

(5) The order for compensation made under subsection (3) shall not affect any right to a claim for civil damages for malicious prosecution or false imprisonment beyond the amount of compensation paid under the order, but any claim by the accused for civil damages in respect of the malicious prosecution or false imprisonment shall be deemed to have been satisfied to the extent of the amount paid to him under an order for compensation

[emphasis added]

27 The use of the word "shall" in s 359(1) of the CPC 2010 makes it mandatory for judges hearing criminal trials to consider whether a compensation order is appropriate, and, if so, to make such an order. This amendment has effectively abrogated the decision in *Lee Meow Sim*. As I stated earlier, the power to order compensation is a benign and useful power, and the courts should make compensation orders in suitable cases whenever it is appropriate to do so.