

Public Prosecutor v Ong Pang Siew (No. 2)
[2011] SGHC 177

Case Number : Criminal Case No 25 of 2008
Decision Date : 27 July 2011
Tribunal/Court : High Court
Coram : Tay Yong Kwang J
Counsel Name(s) : Amarjit Singh DPP (Attorney-General's Chambers) for the prosecution; Subhas Anandan and Sunil Sudheesan (Khattar Wong) for the accused
Parties : Public Prosecutor — Ong Pang Siew (No. 2)

Criminal Law

Criminal Procedure and Sentencing

27 July 2011

Tay Yong Kwang J:

Introduction

1 The accused was charged for the murder of his 15 year old step-daughter. He admitted to killing his step-daughter but claimed that he was suffering from a major depressive episode at the material time which entitled him to invoke the defence of diminished responsibility under Exception 7 in section 300 of the Penal Code (Cap 224, 1985 Rev Ed). At the conclusion of the trial, I rejected his defence and convicted him of murder (see the facts set out in detail in *PP v Ong Pang Siew* [2009] 4 SLR(R) 474).

2 The accused appealed to the Court of Appeal against his conviction. The Court of Appeal held that the defence of diminished responsibility was made out, acquitted the accused of murder and substituted his conviction for murder to culpable homicide not amounting to murder, punishable under section 304(a) of the Penal Code. The Court of Appeal then remitted the case to me as trial judge to consider the sentence on the substituted conviction (see the Court of Appeal's judgment in *Ong Pang Siew v PP* [2011] 1 SLR 606).

3 After hearing both parties, I sentenced the accused to 10 years' imprisonment backdated to 20 October 2007, the date of the killing and his arrest. The prosecution has appealed against this sentence.

The substituted charge

4 The applicable law is section 304(a) of the Penal Code as it stood before 1 February 2008, when various major amendments were made thereto. The section provides:

Whoever commits culpable homicide not amounting to murder shall be punished –

(a) with imprisonment for life, or imprisonment for a term which may extend to 10 years, and shall also be liable to fine or to caning, if the act by which death is caused is done with the

intention of causing death, or of causing such injury as is likely to cause death; or ...

Previous convictions

5 The accused was convicted in 1979 for being drunk in a public place and was fined \$20. He was convicted in July 1991 on a charge under section 506 of the Penal Code (criminal intimidation) and was fined \$800. Another charge under section 427 (committing mischief) was taken into consideration. In September 1996, he was fined \$3,000 for illegal punting.

The prosecution's submissions

6 The prosecution submitted that the facts and circumstances of this case were 'so grave and exceptionally inhumane' that, based on conventional sentencing principles, the appropriate sentence ought to be life imprisonment. The alternative sentence of imprisonment of up to 10 years was said to be 'wholly inadequate' in this case.

7 The prosecution referred to the guidelines set out in *R v Rowland Jack Forster Hodgson* (1968) 52 Cr App 113 for the imposition of life imprisonment and conceded that those criteria would not be met here as it was not submitting that the accused's history of depression was such that he would, in all likelihood, commit a similar offence in future. However, it argued that the *Hodgson* guidelines were not the only criteria determining whether life imprisonment should be imposed. Conventional sentencing principles would lead the court to conclude that life imprisonment was the appropriate sentence on the facts of this case.

8 The prosecution relied on the evidence adduced during the trial to submit that the step-daughter was not involved in any dispute with the accused. The accused was angry with his ex-wife for their failed marriage but directed his actions instead at the innocent step-daughter. Based on my findings, it was plain that the accused had the sinister intention of making his ex-wife feel the pain of losing a loved one. It was vengeance that he desired.

9 The prosecution also submitted that while the Court of Appeal found that the accused was suffering from diminished responsibility, this court still had to consider the level of impairment of his mental responsibility, particularly after having heard the evidence at the trial. The accused's mental affliction was at least to some extent caused by his drinking binge that day. The Court of Appeal had noted (at [93] of its judgment) that the effect of the alcohol could have exacerbated the accused's depression at the time of the offence.

10 The prosecution argued that the sentencing principle of retribution required this court to express its complete disapprobation and disapproval of the conduct of the accused as direct harm was inflicted on at least two persons – the step-daughter and her mother. As a result of the traumatic death of the step-daughter in October 2007, the ex-wife is now suffering from depression. To support this, the prosecution relied on a medical report dated 14 April 2011 on the ex-wife by Dr Angelina Chan of the Department of Psychological Medicine, Changi General Hospital, where the doctor opined that the ex-wife would benefit from continued treatment and follow-up for at least a few years. This situation was not incidental or collateral but was the very objective of the accused when he decided to kill the step-daughter. This was shown by the fact that the accused took pains to contact the ex-wife during the incident on 20 October 2007 to inform her that he was extinguishing the life of her child.

11 Further, the step-daughter did not die immediately as she was calling out in a weak voice for someone to call "999" during the attack on her. This, the prosecution argued, was reflective of the

brutal, spiteful and vindictive nature of the accused's actions and he deserved no leniency whatsoever.

12 The prosecution reminded me of what I said in *PP v Barokah* [2009] SGHC 46 at [71] that "[w]hile we are concerned about the future of accused persons and their families, we must never forget the victims and their families". It submitted that "the accused was not only able to appreciate right from wrong, but had, whatever his mental state, plainly *intended* to commit the actions that unfolded on 20 October 2007 in a spiteful attempt to exact revenge against the [ex-wife] by targeting her daughter" (emphasis in original).

13 While our courts are disinclined to impose life imprisonment on youthful offenders, that concern did not arise here. The accused was 45 years old at the time of the offence. Based on the above, the prosecution submitted that only life imprisonment would adequately reflect the gravity of the offence and indicate society's disapprobation of the accused's heinous actions. It agreed with defence counsel that caning would not be appropriate in the circumstances here.

The mitigation plea

14 In his oral submissions, defence counsel urged the court not to put too much weight on the previous convictions of the accused. The accused, the sixth in a family of 12 siblings, is suffering from hypertension and diabetes. His family has a strong history of depression. His mother (who is deceased) suffered from it and so do one of his brothers and one of his sisters, both of whom are still receiving treatment.

15 The accused did not attempt to flee from the scene of crime. He cooperated fully with the police investigators. The Court of Appeal found that there was no premeditation when he went to the ex-wife's flat on the night in question. The intention to kill was probably formed after he had snapped while in the flat. General or specific deterrence would therefore not be relevant in this case.

16 Defence counsel tendered a report dated 24 February 2011 by Dr Tommy Tan of Novena Psychiatry Clinic in respect of the accused. For this report, Dr Tommy Tan examined the accused in prison on 16 February 2011 and spoke to a sister and two brothers of the accused over the telephone. Dr Tommy Tan stated as follows:

Examination of Mr Ong

Mr Ong was very happy to see me as he was expecting me. His counsel, Mr Sunil Sudheesan had earlier informed him that I will be reviewing him.

Mr Ong said that he only started to feel better immediately after the trial, even though he had received death sentence. He said that it was only then that he fully accepted his fate for his deed.

Since then, he said his mood had improved. He does not feel depressed or frustrated. He is able to eat. He sleeps well. He spends his time in prison in Buddhist prayers and chants. He became a vegetarian. He has found friends. The prison officers treat him well. He attends Buddhist sessions once a week, conducted by counsellors. The monk would visit the prisoners during major holidays such as Chinese New Year and Vesak Day.

Mr Ong remains in contact with his family members. His siblings visit him twice a month. His brothers, Pang Chan and Pang In, usually visit him. The other siblings visit him less frequently.

Mental state examination

Mr Ong was appropriate in his behaviour. He was cheerful. He denied that he was depressed in mood. He was relevant and rational. There were no abnormal signs and symptoms. He was oriented.

Information from family members

I spoke to Mdm Sally Ong on 22 February 2011. She last visited Mr Ong last year, before the hearing by the Court of Appeal. She said that Mr Ong did not appear depressed then.

I also spoke to Mr Ong Pang In on 23 February 2011. Pang In agreed that Mr Ong was well when he visited him in prison before and after the hearing by the Court of Appeal. He said that Mr Ong was better after the main trial. However, Pang In said that as he had not been well, he had not visited Mr Ong in the past 4 months.

I spoke to Mr Ong Pang Chan on 23 February 2011. He said that he has been visiting Mr Ong regularly. He last visited Mr Ong on 21 February 2011. Pang Chan said that Mr Ong is still feeling depressed in prison and had lost weight.

Opinion

In my opinion, Mr Ong may not have fully recovered from major depressive disorder, single episode or moderate depressive episode, although his mental state has improved. He is still depressed in mood and had lost weight according to his brother, Mr Ong Pang Chan. He has not been receiving psychiatric treatment in prison.

Mr Ong said that the prison psychiatrist, Dr Tan, saw him only once a few days before my visit. Mr Ong was very perplexed by this, as he had not seen the prison psychiatrist before that.

I am saddened that Mr Ong has not been regularly examined by the doctors in prison, especially when it is well known that he has major depressive disorder or depressive episode. I am grateful that he is receiving religious counselling as he finds solace in Buddhism. If he had not, I believe his mental state would not have improved.

I will be grateful if the Prison Department will instruct the prison psychiatrist to examine Mr Ong regularly and to prescribe antidepressant medication if necessary.

Risk of re-offending

The risk of Mr Ong repeating the same offence is low for the following reasons:

1. He has a normal premorbid personality,
2. He does not have antisocial personality traits,
3. He has very good family support. His family members will ensure that he continues psychiatric follow-up after he is released from prison.
4. The offence was related to his mental disorder. As he will be on psychiatric treatment and follow-up, he will be continually monitored, any relapse can be quickly treated so that his

mental state will not deteriorate. His mental disorder is treatable.

5. His family said that he is not an aggressive person and does not pick fights,
6. He has always been gainfully employed,
7. Unless the same set of circumstances were to repeat, it is very unlikely that he would commit the same offence.

Risk of relapse

I hope that Mr Ong will fully recover fully from his major depressive disorder or depressive episode.

There is a risk that Mr Ong may have a relapse of Major Depressive Disorder or Depressive Episode because he has a family history of major depressive disorder. His prognosis is possibly compromised by the fact that Mr Ong has not been receiving treatment in prison.

Mr Ong requires long-term psychiatric treatment and follow-up. He does not need to have this follow-up in a high security setting because the risk of offending is low.

I sincerely hope that the Court will appreciate that imprisoning Mr Ong for the rest of his natural life because it is not possible to predict when he will have a relapse of his mental disorder or when he can be safely released, could be unjust or disproportionate to his culpability.

Long term psychiatric follow-up outside a secure setting can be equally effective, especially with good family support. Any relapse can be effectively treated before his mental state deteriorates.

17 Defence counsel cited a number of cases involving accused persons suffering from abnormality of mind where the courts did not think life imprisonment was appropriate. These cases were *PP v Chee Cheong Hin Constance* [2006] 2 SLR(R) 707, *PP v Aguilar Guen Garlejo* [2006] 3 SLR(R) 247, *PP v Han John Han* [2007] 1 SLR(R) 1180 and *PP v Aniza bte Essa* [2008] 3 SLR(R) 832. As the psychiatric reports (see [16] above and [19] below) showed that the accused was improving or that there was nothing wrong with him presently, an imprisonment term of less than 10 years would be sufficient punishment.

18 Where the ex-wife was concerned, defence counsel sympathized with her but added that everyone suffers when he/she loses someone and there was nothing exceptional in this case.

The prosecution's response

19 In response to Dr Tommy Tan's report (at [16] above), the prosecution tendered a letter dated 30 March 2011 from Dr Tan Soo Teng, a psychiatrist of Changi prison, which stated as follows:

With regard to information requested, written below are my replies:

A) I do not see every prisoner for psychiatric assessment unless asked to do so eg. if the prisoner should appear mentally unwell to the prison officers in charge of him.

I saw this prisoner only once on 14.2.11 because was informed that Dr Tommy Tan had wanted to discuss with me about prisoner's condition.

Prisoner was surprised to see me as he had no complaint and had not requested to see me. I saw him without prior knowledge of the offence he had committed leading to his trial. When seen on 14.2.11 he appeared relaxed & smiled readily. There was no sign of distress. He had no complaint and denied that he was depressed. Hence he was surprised that I was seeing him.

In my opinion prisoner was not mentally unwell or in depression at the time when I assessed him.

With the above perspective in mind, I do not agree with Dr Tommy Tan's report dated 24.2.11 that prisoner was still depressed in mood.

In the event that prisoner should feel unwell or is noticed by his prison officers to be in need of psychiatric help I will definitely attend to him.

As I have no knowledge of prisoner's background and nature of his offence I am unable to comment on Dr Tommy Tan's opinion about the prisoner eg. his family support, his previous personality traits, his state of mind at the time of the offence.

B) This has been answered above.

C) I am of the opinion that he was not depressed then and was not acutely mentally unwell.

20 The prosecution submitted that the facts in each case were different. It contended that the sentencing principle of retribution should take centre stage here. It reiterated that intention to kill could be formed on the spur of the moment and that the manner of killing here was a cruel one.

The sentence

21 As my conclusions on the evidence adduced at the trial were not accepted by the Court of Appeal, it would not be right for me to sentence the accused based on the facts as found by me during the trial. Instead, I have to abide by the findings of the Court of Appeal as spelt out in its judgment.

22 At [35] of its judgment, the Court of Appeal stated that the prosecution had conceded in the course of arguments that the evidence could not support the finding that the accused had gone to the flat in question with the intention of killing the step-daughter. Even if the prosecution had not made that concession, the Court of Appeal would have found that as a fact. At [36], the Court of Appeal accepted that after the accused "snapped", he intended to seriously harm, if not kill, the step-daughter and that it was established that the accused intentionally committed an act of homicide.

23 At [89], after considering the conflicting psychiatric reports on the accused, the Court of Appeal accepted the report of the defence's psychiatrist instead of the prosecution's psychiatrist. It then proceeded to consider the non-medical evidence.

24 At [91], the Court of Appeal remarked:

His actions were inexplicable; twice, he closed the main gate and wooden door and then went back to sit on the deceased. He must thus have sat on the deceased for about half an hour (from the time before [the ex-wife] made the first information report at 10.15pm to the time that the police arrived at about 10.35pm). There was no rational explanation for the [accused's] behaviour.

25 At [92], commenting on the accused's conduct in calling and apologising to his then employer (for not being able to work the next day) after killing the step-daughter, the Court of Appeal was of the view that, rather than showing clarity of mind, his conduct was abnormal behaviour unless he was a cold-blooded murderer. However, the Court of Appeal did not think the accused was such. At [93], the Court of Appeal noted that the accused had a drinking binge just before the incident and that the evidence "revealed a serious drinking problem associated with a depressive state of mind". At [98], the Court of Appeal referred to another aspect of the evidence (the several superficial incision and puncture wounds found on the step-daughter's body) and said that "this further reinforces our view that the [accused] was behaving abnormally at the time of the offence".

26 All these findings by the Court of Appeal pointed to the *intoxicated* accused having gone to the flat *without any intention of killing* the step-daughter, behaving abnormally *at the time of the offence* and again behaving abnormally *after* the killing. I therefore did not think the prosecution's submissions about the "brutal, spiteful and vindictive nature of the accused's actions" (see [11] above) could stand in the light of these findings by the Court of Appeal.

27 The accused's actions before, during and after the killing were not found by the Court of Appeal to be as reprehensible as submitted by the prosecution but they did result in the violent death of an innocent young girl. While life imprisonment would be too harsh in the light of the Court of Appeal's findings, I am of the view that he should be sentenced to the maximum alternative imprisonment term provided by s 304(a) of the Penal Code. I therefore sentenced the accused to 10 years' imprisonment, backdated to 20 October 2007, the date of the offence and his arrest.

28 Before sentencing the accused, I made some comments about the second last paragraph of Dr Tommy Tan's report (at [16] above). In my opinion, medical experts should not transgress into giving their views on whether a particular sentence would be "unjust or disproportionate" to an accused person's culpability. They may state whether a particular sentence could affect an accused person's treatment or well-being but not whether it would be fair or not because that is in the province of law and such legal arguments ought to be made by the prosecution and the defence counsel. Defence counsel very helpfully informed me that they would convey my comments to Dr Tommy Tan.

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