Public Prosecutor *v* Kho Jabing
[2013] SGHC 251

Case Number : Criminal Case No 31 of 2009

Decision Date : 18 November 2013

Tribunal/Court : High Court

Coram : Tay Yong Kwang J

Counsel Name(s) : Seraphina Fong, Lee Lit Cheng and Teo Lu Jia DPPs (Attorney-General's Chambers) for the prosecution; Anand Nalachandran (Braddell Brothers LLP), Josephus Tan and Keith Lim (Patrick Tan LLC) for the convicted person.

Parties : Public Prosecutor — Kho Jabing

Criminal Law – Statutory offences – Murder re-sentencing

[LawNet Editorial Note: The appeal to this decision in Criminal Appeal No 6 of 2013 was allowed by the Court of Appeal on 14 January 2015. See [2015] SGCA 1.]

18 November 2013

Tay Yong Kwang J:

1 Jabing Kho ("the convicted person") and Galing Anak Kujat ("Galing") were convicted of murder under s 300(*c*) read with s 34 of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code") and punishable under s 302 of the same by Kan Ting Chiu J and the then mandatory death sentence was passed on them accordingly. The present proceedings concern the re-sentencing of the convicted person pursuant to s 4(5)(*f*) of the Penal Code (Amendment) Act 2012 (Act No. 32 of 2012) ("the PCAA"). After hearing the submissions made by both parties, I re-sentenced the convicted person to life imprisonment with effect from the date of his arrest (26 February 2008) and to receive 24 strokes of the cane.

2 The prosecution, which urged me to re-sentence the convicted person to death, has appealed against my decision.

The background

3 The convicted person was born on 4 January 1984. The charge against him at the trial read as follows:

> That you, Jabing Kho, on or about the 17th day of February 2008, at about 8.19pm, at the open space near Geylang Drive, Singapore, together with one Galing Anak Kujat, in furtherance of the common intention of both of you, committed murder by causing the death of one Cao Ruyin, male 40 years old, and you have thereby committed an offence punishable under section 302 read with section 34 of the Penal Code, Chapter 224.

4 The co-accused, Galing, faced a similar charge and both the convicted person and Galing were tried together. On 30 July 2010, Kan J convicted both of them of them of murder committed in furtherance of their common intention and sentenced them to receive the then mandatory death penalty. Kan J accepted that the convicted person's offence fell within s 300(*c*) of the Penal Code.

His judgment appears at *Public Prosecutor v Galing Anak Kujat and another* [2010] SGHC 212 ("Kan J's judgment").

5 Both Galing and the convicted person appealed against Kan J's decision. On 24 May 2011, the Court of Appeal affirmed the decision against the convicted person. Galing's appeal was allowed by the Court of Appeal which substituted his conviction for murder with an offence of robbery with hurt committed in furtherance of a common intention under s 394 read with s 34 of the Penal Code (see *Kho Jabing and another v Public Prosecutor* [2011] 3 SLR 634 at [38] – "the Court of Appeal's judgment"). Galing's case was remitted to Kan J for sentencing in respect of the substituted offence and he was subsequently sentenced to imprisonment for 18 years and 6 months and to receive 19 strokes of the cane.

6 On 30 April 2013, the Court of Appeal confirmed that the convicted person was convicted under s 300(*c*) of the Penal Code. It allowed his application for his case to be remitted to the High Court for re-sentencing under s 4(5)(*f*) of the PCAA. The relevant sections of the PCAA are as follow:

> 2 Section 302 of the Penal Code is repealed and the following section substituted therefor:
>
> Punishment for murder
>
> 302 -(1) Whoever commits murder within the meaning of section 300(a) shall be punished with death.
>
> (2) Whoever commits murder within the meaning of section 300(b), (c) or (d) shall be punished with death or imprisonment for life and shall, if he is not punished with death, also be liable to caning.
>
> …
>
> 4 -(5) Where on the appointed day, the Court of Appeal has dismissed an appeal brought by a person for an offence of murder under section 302 of the Penal Code, the following provisions shall apply:
>
> …
>
> (*f*) if the Court of Appeal clarifies under paragraph (c)(ii) or (d) that the person is guilty of murder within the meaning of section 300(b), (c) or (d) of the Penal Code, it shall remit the case back to the High Court for the person to be re-sentenced;
>
> (*g*) when the case is remitted back to the High Court under paragraph (f), the High Court shall re-sentence the person to death or imprisonment for life and the person shall, if he is not re-sentenced to death, also be liable to be re-sentenced to caning;
>
> …
>
> (6) If –
>
> (*a*) any Judge of the High Court, having heard the trial relating to an offence of murder, is unable for any reason to sentence, affirm the sentence or re-sentence a person under this section; or
>
> (*b*) …

any other Judge of the High Court or any Judge of Appeal, respectively, may do so.

7 Kan J has retired as a Judge of the High Court. The case was therefore placed before me for re-sentencing pursuant to s 4(6) set out above.

8 Briefly, the facts of the case are as follow. The convicted person and Galing are from Sarawak, Malaysia. At the time of the offence, they were both working in Singapore on work permits. On 17 February 2008, both of them had agreed with three of their fellow countrymen, Vencent, Anthony and Alan, to rob two of Vencent's co-workers at a worksite in Tiong Bahru. However, as the two co-workers had fortuitously left the worksite, the robbery plan was aborted. The five men remained at Tiong Bahru to consume liquor. Subsequently, they left for Geylang intending to find some victims to rob.

9 At Geylang, the convicted person and Galing walked some distance away from their fellow countrymen and spotted two possible male prey, Cao Ruyin who is the deceased person named in the charge ("the deceased") and Wu Jun, walking along a path in an open space near Geylang Drive. Galing assaulted Wu Jun with a belt wrapped around his fist with the metal buckle exposed. The convicted person attacked the deceased with a piece of wood that he had picked up while approaching the deceased. Galing also assaulted the deceased with the metal buckle.

10 The deceased suffered severe head injuries from the attack and passed away in a hospital on 23 February 2008. The cause of death was certified by a pathologist to be severe head injury. Wu Jun escaped with minor injuries and called the police. When they went to the scene of crime, the deceased was lying on the ground unconscious, with his face covered in blood.

11 The deceased's mobile phone was taken away by Galing. The five Sarawakians regrouped at a coffee shop in Geylang where Galing sold the said mobile phone to Vencent for $300. The five of them took $50 each from the sale proceeds and spent the remaining $50 on food and drinks.

The prosecution's submissions

12 When the law provides a maximum sentence for an offence, that maximum sentence is reserved for the worst type of cases. This expression should be understood to be marking out a range and an offence may be within it notwithstanding the fact that it could have been worse than it was (see *Sim Gek Yong v Public Prosecutor* [1995] 1 SLR(R) 185 at [12]).

13 Where the law provides for a limited choice of the death penalty or of life imprisonment, neither of the options should be considered the default position. Instead, all the facts and circumstances must be taken into consideration in order to determine if the accused person ought to suffer the death penalty (*Sia Ah Kew and others v Public Prosecutor* [1974 – 1976] SLR(R) 54). In that case, which involved kidnapping for ransom, the Court of Appeal opined that the maximum sentence would be appropriate where the manner of the kidnapping or the acts or conduct of the kidnappers were such as to outrage the feelings of the community. The Court of Appeal also held that it would be wrong to take the view that the alternative sentence of life imprisonment should be imposed only when there were some very exceptional circumstances which did not justify the imposition of the death penalty.

14 The views in *Sia Ah Kew and others v Public Prosecutor* were endorsed by the Court of Appeal in *Panya Martmontree and others v Public Prosecutor* [1995] 2 SLR(R) 806. This was a case of gang-robbery with murder under s 396 of the Penal Code (Cap 224, 1985 Rev Ed) which provided that:

> If any one of 5 or more persons who are conjointly committing gang-robbery, commits murder in so committing gang-robbery, every one of those persons shall be punished with death or imprisonment for life, and if he is not sentenced to death, shall also be punished with caning with not less than 12 strokes.

The Court of Appeal held (at [66]) that the appellants' "acts of violence were mercilessly executed and gravely abhorrent in their execution" and "were amply sufficient to outrage the feelings of the community". The death sentences were therefore upheld.

15 During the introduction of the amendments to the law on the mandatory death penalty in homicide cases, the Minister for Law made a statement in Parliament (see Changes to the Application of the Mandatory Death Penalty to Homicide Offences (Statement by Minister for Law), *Singapore Parliamentary Debates, Official Report* (9 July 2012) vol 89):

> In deciding whether and how to apply the death penalty to a particular offence, several factors have to be considered. In particular I will mention, in broad terms, three interconnected factors:
>
> (1) the seriousness of the offence, both in terms of the harm that the commission of the offence is likely to cause to the victim and to society, and the personal culpability of the accused;
>
> (2) how frequent or widespread an offence is;
>
> (3) deterrence.
>
> These three factors must be considered in their totality. For example, the fact that an offence is not widespread or that its incidence is low may not, by itself, be a decisive factor. The overarching aim of the Government is to ensure the safety and security of Singapore, while maintaining a fair and just criminal system.
>
> …
>
> In respect of other categories of murder, under section 300(b) to (d), there could be different degrees of intention, and these offences are committed in a variety of situations. Today, that is something considered by the Public Prosecutor when he decides the appropriate charge in each case. The factors he considers include the precise intention of the accused, the manner in which the homicide occurred and the deterrent effect a charge may have on others. We want to move towards a framework where the court also has the discretion, to take the same factors into account during sentencing.
>
> This change will ensure that our sentencing framework properly balances the various objectives: justice to the victim, justice to society, justice to the accused, and mercy in appropriate cases. … We now have a relatively low incidence of homicides – last year we had 16 recorded homicides, or about 0.3 per 100,000 population. As our society becomes safer, less violent, and more mature, we believe that today's changes are a right step to take.

16 Relying on the three factors spelt out in [15] above, the prosecution submitted that the convicted person had acted in a vicious and pernicious manner. The Court of Appeal described his act of raining heavy blows on the deceased's head, a vulnerable part of the body, as a "violent assault". The forensic pathologist had testified that the injuries suffered required "very severe" or "huge" blunt force from multiple blows. Galing had described the deceased's head as "cracked open". Wu Jun had

testified that the convicted person and Galing attacked him and the deceased stealthily from behind.

17 The prosecution highlighted that the attack occurred in an open public place. The "sheer brazenness of the convicted person and Galing, and their gratuitous use of violence would bring disquiet to society. Also, the fact that the brutal attack was prompted only by greed leaves the public in fear that such ill-fortune may befall on them some day".

18 The personal culpability of the convicted person was also high. He targeted vulnerable or "easy" victims – those walking alone or with only one other person. He armed himself with a piece of wood that he had picked up. Excessive force was used to immobilize the deceased. Even after the deceased fell to the ground facing up and there was blood coming out from his head, the convicted person did not stop his attack but swung the piece of wood at him a second time. There was no provocation by the deceased whatsoever.

19 The only motivation for this cold-blooded and wanton use of violence was greed. There was scant regard for human life. As the Court of Appeal opined at [37] of the Court of Appeal's judgment, such violent crimes cannot be condoned in any civilised society and severe condemnation is required.

20 The defence of intoxication was raised at the trial and on appeal and was rejected by both courts. Indeed, the law is that self-induced intoxication is an aggravating, rather than mitigating, factor. The convicted person was able to recount the events with details and that showed his mind was clear at the time of the offence despite his evidence that he was drunk. His personal circumstances, absence of previous conviction and remorse do not warrant "exceptional leniency".

21 The prosecution also produced statistics that showed that in the ten years since 2003, there were 25 cases of fatal assault committed in the course of robbery. Out of these 25 cases, 15 involved groups of at least two or more assailants. In 2008, the year in which the present offence took place, there were four cases of fatal assault during robbery by young foreign workers below the age of 30, like the convicted person here. The prosecution argued that "the confidence which society has in the safety and security of Singapore can only be upheld by ensuring that those who contemplate such atrocious actions know that those who show no mercy to their victims will receive no mercy from the law".

22 A deterrent sentence would be appropriate where the offence was committed with premeditation and planning. Examples of particular circumstances of an offence which may attract general deterrence include offences committed by two or more persons and those which, in addition to harming their immediate victims, also have the wider-felt impact of triggering unease and offending the sensibilities of the general public (see *Public Prosecutor v Law Aik Meng* [2007] 2 SLR(R) 814 at [25]).

23 The deceased was 40 years old at the time of his demise. He was from a rural village in China and had come to Singapore to earn a living as a construction worker. His untimely death would doubtlessly bring indescribable grief to his family in China.

24 For all these reasons, the prosecution urged the court to re-impose the death penalty on the convicted person.

The convicted person's submissions

25 Counsel for the convicted person relied upon the Ministerial statement set out at [15] above to submit that Parliament's intention was for the death penalty to be applied restrictively and to a

narrower category of homicides and that for cases under s 300(*b*) to (*d*) of the Penal Code, the death penalty would not be the appropriate starting or default position. Citing *Sia Ah Kew and others v Public Prosecutor*, they argued that the starting or default position in the three categories of homicide cases should be life imprisonment, with the death penalty being the exception rather than the rule.

26 Counsel for the convicted person also cited cases from India, the United States and South Africa to bolster their arguments at [25] and to conclude that the restrictive approach to the exercise of judicial discretion whereby "the death penalty is only imposed in situations where the offender's conduct and/or the offence's facts are exceptionally heinous is consistent with the international trend".

27 It was proposed that the answers to the following two questions would aid in the exercise of judicial discretion:

(1) Is there something uncommon about the crime that outrages the feelings of the community and that renders life imprisonment inadequate and calls for a death sentence?

(2) Are the circumstances such that there is no alternative but to impose the death sentence even after according maximum weight to the mitigating circumstances of the offender?

Each case has to be considered on its own facts to allow for "individualised justice" in sentencing.

28 In the present case, the injuries were intended but the fatal outcome was not. The convicted person only intended to incapacitate or temporarily subdue the deceased in order to carry out the robbery. There was no subjective knowledge of the outcome. The use of weapons by both attackers was purely "opportunistic and improvisional" (see the Court of Appeal's judgment at [35(b)]) and was not premeditated. Further, the piece of wood used was not "a patently deadly weapon such as a knife". The injuries were inflicted during "a frantic and frenetic fracas". The deceased was still alive when the convicted person left the scene of the attack and only tragically succumbed to his injuries six days later in the hospital. The conduct of the convicted person and the manner of the deceased's death were "not exceptionally brutal, heinous, cruel and/or depraved" and the deceased was not vulnerable due to age or infirmity.

29 There was no clear and undisputed sequence of events and circumstances surrounding the offence (see the Court of Appeal's judgment at [8] to [10]), including but not limited to the number of times the convicted person hit the deceased. While this was not material for the purpose of a conviction, it was relevant for sentencing. The extent of intoxication, while insufficient to constitute a defence, was not fully and thoroughly explored. There was also no credible objective evidence of the convicted person's level of intoxication. The death penalty should only be imposed where there was clear and convincing evidence leaving no room for an alternative explanation of the facts. It would be appropriate only in the most aggravated circumstances, for instance, where the manner of the fatality and/or the conduct of the offender are particularly aggravated. The present case did not fit into these criteria.

30 The personal circumstances of the convicted person were also highlighted. At the time of the offence, the convicted person was at the relatively young age of 24. He has been in custody for about five years without incident. He had no criminal antecedents and had cooperated fully during the investigations. He is single and is the only son in his family. His father passed away while the convicted person was awaiting his trial. His mother lives alone and works as a chambermaid in a hotel in Sarawak. She misses the convicted person terribly but does not have the financial means to visit him during his long incarceration. She has mentioned in her clemency plea to the President of

Singapore that the death penalty for her son would also be the death sentence for her. While the deceased's family could be in a similar position, the loss of another life would only add to the tragedy and sorrow from this unfortunate and ill-fated robbery and would not serve the ends of justice.

31 On 26 August 2009, the Agri-Food and Veterinary Authority of Singapore ("AVA") issued a media release stating that excessive levels of methanol had been detected in one of the alcoholic products consumed by the convicted person prior to the offence. Methanol poisoning was not contemplated nor assessed during the investigations and the recall of the product was not highlighted during the trial or the appeal. The possibility that the convicted person was suffering from a mental and behavioural disturbance from alcohol could not be discounted and should be considered in sentencing because he would not have known about the excessive amounts of methanol present in the drink that he consumed that night.

32 The convicted person is deeply remorseful about the tragic consequences of his actions. During his incarceration, he "has developed a mark on his forehead as a result of his relentless and continuous Islamic prayers (through the act of bowing his head onto the floor) asking Allah for forgiveness". If given the opportunity, he intends to locate the deceased's family to seek forgiveness and to do whatever is possible and within his power to aid the deceased's family in coping with their lives.

33 Statistics from the Singapore Police Force's website show that the number of homicide cases registered a 20-year low in 2012, dropping from 16 cases in 2011 to 11 cases in 2012. Fatal assaults in the course of robbery have also been on a steady decline in the past ten years.

34 Galing was convicted on a lesser charge. Considering the respective roles and culpability, parity in sentencing would suggest that life imprisonment is appropriate for the convicted person. Further, in another re-sentencing case (Criminal Case No. 40 of 2009), where the facts were largely similar to the present case, Chan Seng Onn J imposed life imprisonment and 24 strokes of the cane on 16 July 2013. The convicted person in that case was 18 years old at the time of the offence in question. No written grounds of decision were given and there was no appeal.

The decision of the Court

35 As I was not the trial Judge in this case, I relied entirely on Kan J's judgment and the Court of Appeal's judgment where the findings of fact were concerned. I do not think I should look further into the evidence adduced at the trial and make further conclusions on the facts.

36 The issue of intoxication was raised and rejected at both levels and it is not open to the convicted person at this stage to revisit this issue. The AVA's media release was in 2009 and if it was relevant to the defence of the convicted person, then such evidence should have been adduced during the trial or, in any case, at the appeal after leave has been obtained to adduce fresh evidence. It is certainly improper to attempt to introduce the fresh evidence before me during the re-sentencing submissions.

37 I agree with the prosecution that there should not be a default position preferring the death penalty or life imprisonment in considering the appropriate sentence under s 300(*c*) of the Penal Code. In other legislation providing for punishment for offences, the courts have consistently accepted that there is no presumptive preference that the least severe punishment should be the starting or default position. So if a law allows the court to impose imprisonment with or without caning or a fine or both, the court does not begin its inquiry by asking why the offender should not be fined. Instead, it looks at all the circumstances of the case before deciding to impose one or the other or both of the

punishments. The Minister's statement at [15] above also does not show a presumptive preference for life imprisonment as the starting point. Similarly, it would be wrong to regard the death penalty as the starting point and then see if there are factors which would justify the less severe alternative (see *Sia Ah Kew and others v Public Prosecutor)*. All the facts of the case should be looked at before deciding which is the appropriate punishment for offences under s 300(b) to (d) of the Penal Code although there are only two stark choices of literally life or death.

38 I do not find it necessary or fruitful to look at decisions in other jurisdictions as to when the death penalty would be appropriate. Each society must decide for itself what type and degree of punishment it wants and needs in the unique context of its values and the level of development on all fronts, including social, cultural and economic ones.

39 I do not accept the submission (at [30] above) that the loss of another life (that of the convicted person if the death penalty is imposed) would only add to the tragedy and sorrow and not serve the ends of justice. Such reasoning amplifies the potential grief and sense of loss of an offender's family while diminishing the already existing grief and loss of a deceased victim's family. An offender's life is precious beyond measure to him and his family. A victim's life is equally precious to him and his family. When a right to life is claimed, it must be remembered that it was the offender who took away the victim's right to life. While the offender is alive and able to plead his case in court, his victim's voice can no longer be heard.

40 After considering all the factors put forward by the parties, I am of the view that the death penalty is not the appropriate sentence for the convicted person for the following reasons:

(a) He was relatively young at 24 at the time of the offence in 2008 although he was not as young as the convicted person in Criminal Case No. 40 of 2009 (see [34] above);

(b) The convicted person's choice and use of the piece of wood during the attack were, in the words of the Court of Appeal (see the Court of Appeal's judgment at [35(b)]), "opportunistic and improvisational" and not part of a pre-arranged plan. Equally so was Galing's use of his belt as a weapon;

(c) There was no clear sequence of events concerning the attack. There was no clear evidence that the convicted person went after the deceased from behind without warning and started hitting him on the head with the piece of wood. There was evidence that a struggle could have taken place first between Galing and the deceased before the convicted person stopped chasing Wu Jun and returned to assault the deceased.

41 I therefore re-sentenced the convicted person to life imprisonment with effect from the date of his arrest on 26 February 2008. In addition, his acts of violence and the resulting dire consequences warrant that the maximum number of strokes of the cane be imposed. Accordingly, I also ordered him to receive 24 strokes of the cane.