

ON APPEAL FROM

THE FEDERAL COURT OF MALAYSIA

B E T W E E N

LIM YAM TEK alias AH THAW  
and TAN LAU CHUAN alias  
TAN AL LIAK

Appellants

-and-

THE PUBLIC PROSECUTOR

Respondent

UNIVERSITY OF LONDON  
INSTITUTE OF ADVANCED  
LEGAL STUDIES  
10 MAY 1973  
25 RUSSELL SQUARE  
LONDON W.C.1

CASE FOR THE APPELLANTS

Record

1. This is an appeal by Special leave in forma pauperis from the Majority Judgment of the Federal Court of Malaysia (Federal Judges Suffian and Gill, Chief Justice Ong dissenting) dated 1st April 1971 which dismissed the Appellants' appeal from their conviction of murder and sentence of death in the High Court in Malaya at Ipoh on 27th November 1970.

p.63

2. The principal grounds of this appeal are

(a) That the Appellants' defence was not put to the jury.

(b) That the jury were misdirected as to the burden of proof.

(c) That the Federal Court applied

unnecessarily restricted appellate principles to the Appellants' appeal.

3. The Appellants were charged as follows

"That you, jointly together with two others on the 19th day of April 1969 at Seberang Port Weld, Tamping in the State of Perak, in furtherance of the common intention of all, did commit murder by causing the death of Ong Chan Tian alias Ong Ah Peow, and that you have thereby committed an offence punishable under Section 302 read with Section 34 of the Penal Code".

p. 1

4. The case for the prosecution was summarised in the Judgment of Chief Justice Ong in the Federal Court as follows:

"The Prosecution case depended entirely on the evidence of two witnesses who alleged that they saw four men, including these appellants, make a murderous attack with knives on one Ong Ah Peow, whose death, according to the medical evidence, was almost instantaneous from stab wounds in the heart and lung. This attack was said to have occurred at about 8.30 p.m. on April 19, 1969 during a stage performance

p. 50, l. 24

at Seberang Port Weld, which is a small fishing community across the river opposite the town of Port Weld."

5. The evidence presented by the prosecution consisted principally of the evidence of two alleged eye-witnesses, namely Ong Yu Sew - a friend since childhood of the deceased - and Ong Ban Kim - the brother of the deceased. Their evidence as summarised in the Judgment of Chief Justice Ong was as follows:-

p. 4 1.10

p. 8 1.1.

p. 50,1.38

"Ong Yu Sew's evidence was that he had accompanied the deceased to the Show. The stage faced a Chinese temple about 50 yards opposite. Ong Yu Sew said he sat with the deceased some 38 feet in front of the stage, while Ong Ban Kim and another of his brothers, Ong Ah Heng, were some distance behind. Ong Yu Sew went on to say that while he was watching the Show - 'people came from behind and they stabbed Ah Peow and he fell down. On seeing that I started to run away. Before I ran away I had a look at those people who stabbed Ah Peow. There were four people who stabbed Ah Peow'. He was able to identify all four by name, two of them being the appellants.

After he had run a short distance towards the temple the 'same four people' caught up with him and stabbed him. Ong Ban Kim next testified that he was watching the Show with another brother Ong Ah Heng, from about 10 yards behind Ong Yu Sew, when he saw four persons attacking the deceased. He too gave the same four names as did Ong Yu Sew. After the deceased fell down he saw two of the four persons chasing after Ong Yu Sew while the **other two continued to stab the deceased.** He did not know what happened to Ong Yu Sew after his escape, he did not see him stabbed, he did not know how Ong Yu Sew received his injuries but admitted having stated at the preliminary enquiry that Ong Yu Sew ran away after being stabbed. When the assailants had disappeared he and Ah Heng went to render assistance to their injured brother, whom they carried across the river by boat. Ah Heng took the deceased to the Tamping Hospital while Ong Ban Kim himself went to the police station and made his report. Later when A.S.P. de Silva, the Investigating Officer arrived from Tamping Ong Ban Kim accompanied this A.S.P. to the scene, and finally went home. He

did not report to his mother the death of one of her sons nor tell anyone else of the stabbing. He had known all the four assailants since childhood".

6. In addition to the evidence of the two principal witnesses the prosecution called further evidence against the appellants namely

- (a) post mortem evidence that the deceased had received multiple stab wounds and died of a haemorrhage due to two stab wounds (i) of the heart and (ii) of the lung; and that death would have been almost instantaneous after the receipt of these two wounds. p. 2 1.24
  
- (b) The evidence of Hassan Bin Man, a police officer, that he took down in writing a statement from Ong Ban Kim at the Police Station at 9.00 p.m. on the day in question and, that Ong Ban Kim failed to give him the names of the assailants. p. 11. 1.12
  
- (c) the evidence of A.S.P. P.C. De Silva the Deputy O.C.P.D. Crime for Tamping who testified that he had attended the alleged scene of the incident and had made a thorough examination p.13 1.1

of the square. He found a blood stain on a bench 25 yards from the Stage which was about 1" in diameter, a few drops of blood on the ground near the bench, and a small pool of blood on the floor of the temple. He further testified that he recorded a statement from Puah In Tian in the course of his investigation, and that the first appellant was arrested on 17.12.1969 and the second appellant on 5.5.1970.

7. The Defence of the appellants was an alibi and they each called a witness to corroborate their alibi.

8. The first appellant Lim Yam Tek testified that prior to April 1969 he lived in Singapore but that at the beginning of April 1969 he received a letter from his mother asking him to go to Seberang to attend the Festival and worship at the nearby temple. He took one week's leave from his employer and arrived in Seberang on 17th April. On the evening in question 19th April 1969 at about 7.30 p.m. while he was at home Puah In Tian visited him and invited him to go to the Stage Show. While they were at the Show they heard a commotion coming from the spectators at the

p.15 1.1

right hand side of the Stage. They remained there for about five minutes after the commotion commenced. Gradually the people involved in the commotion walked away and at Puah In Tian's suggestion they left the Show. The first appellant returned to his house and Puah In Tian to his. He denies any part in any stabbing. The first appellant further testified that in January 1968 he had met the deceased, Ong Yu Sew and Ong Ban Kim, and they tried to force him to join their gang, the Green Dragon Society. When he told them not to force him as if they did he would report them to the police, the three of them spat at him and warned him to look after himself. Whenever he saw the three men after this incident they pulled faces and spat at him.

9. The first appellant called Puah In Tian to give evidence. He testified that he had met the first appellant on the evening in question at his house at about 7.15 p.m., and invited him to see the Stage Show. They arrived at the Show at about 8.00 p.m. and while they were watching the Show a commotion broke out among the spectators. The spectators

p.17 1.16

subsequently slowly left the place. The two of them continued to watch the Show and then Puah In Tian suggested that they should leave as he had heard children in the crowd saying there was a quarrel. They both then walked out to the road, separated and went home. They separated at about 9.00 p.m. He said that the first appellant was with him all the time until they parted and that he did not see him with any weapon or take part in any stabbing. **Puah In Tian further testified that as he was walking home he saw some blood on the ground in front of the house of Ong Eng Kek. The blood covered the ground in patches over an area of about 3 or 4 feet in diameter. When he saw the blood, a number of other people were also looking at it.**

10. The second appellant testified that on the day in question he had received news in Kuala Lumpur that his grandmother was ill and that he had arrived in Tamping at about 6 p.m. in order to visit her in the District Hospital Tamping, He visited his grandmother and left the hospital at about 7.30 p.m. From the hospital he walked to the taxi stand in

p.19 1.5



Tamping. There he met a Malay taxi driver named Mat Bin Durus at about 8 p.m. They had to wait for some time until an Indian bound for Matang filled another place in the taxi. Thereupon the taxi took the two passengers to Matang and Port Weld departing at about 8.30 p.m. The second appellant reached Port Weld at about 9 p.m. and proceeded to his Uncle's house. He did not go to Seberang Port Weld or to the Show that evening at all. He denied any part in any stabbing. He further testified that in 1968 the deceased Ong Ban Kim and Ong Yu Sew had tried to force him to join their Secret Society, and had threatened him on his refusal to do so.

11. The second appellant called Mat Bin Durus the taxi driver to give evidence. He testified that he had met the second appellant on the night in question at the taxi stand in Tamping at about 8 p.m. and that they and an Indian left Tamping at about 8.30 and proceeded to Matang where the Indian alighted. They then proceeded to Port Weld. The second appellant alighted at Kampong Bharu in Port Weld at about 9.00 p.m.

p.21 1.17

12. The Appellants adduced, in addition to the above evidence, the evidence of Ong Eng Kek who was the village headman and a shopkeeper. He testified that on the night in question he was inside his shop at 8.30 p.m. He heard people quarrelling and left his shop to see what was happening and saw the deceased lying on the road outside in front of his shop. He noticed that he was bleeding and that people were running away. He said that he was frightened, closed up his shop and remained inside and did not report the matter.

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13. In his summing up the learned trial Judge directed the Jury on the following points:

p.25 1.1

- (a) the function of Judge and Jury;
- (b) the onus of proof in criminal cases;
- (c) the law as to murder and common intent;
- (d) the evidence of the witnesses.

14. The Jury after retiring returned a majority verdict of 5-2 that the appellants were guilty of murder, and they were sentenced to death.

15. The appellants appealed to the Federal Court on 16 grounds including the

grounds relied on in this case but by a majority on the 1st April 1971 yhe said Court dismissed the appellants' appeal.

16. The appellants respectfully submit that in the course of his summing up the learned trial Judge:-

- (a) failed to put the specific defence raised by the appellants to the Jury, namely that the deceased had met his death outside the house of Ong Eng Kek and not at the Stage Show as was the prosecution's case. Such failure it is submitted amounted to a fatal defect in the summing up. In support of the submission the appellants respectfully rely on the whole of the Judgment of Chief Justice Ong; and
- (b) misdirected the Jury in that he directed the Jury that it was for them the Jury to consider whether the prosecution (on the prosecution evidence alone) had established a prima facie case and that only thereafter should they consider the Defence evidence to see if it raised any doubt, and not to direct them that the case must be considered on

the totality of the evidence.

17. In addition the Appellants further submit that the provisions of Section 60(1) of the Malaysian Courts of Judicature Act 1964, namely that the Federal Court may "confirm reverse or vary the decision of the trial court or .... make such other order in the matter as it may seem just, entitles the Federal Court to follow the principles enacted by and applied to Section 2(1) of the English Criminal Appeal Act 1968, and consequently it is open to the Federal Court to consider, or it is eminently desirable that the Federal Court should consider, whether under all the circumstances the verdict of the Jury was unsafe or unsatisfactory.

In support of this submission the appellants respectfully rely on the Judgment of Chief Justice Ong and respectfully submit that the majority of the Federal Court, Federal Judge Suffian and Federal Judge Gill were wrong in law in failing so to consider the case, holding instead that if there was evidence to justify the Jury's verdict the only remaining question was whether

there had been a misdirection in the summing up, and that had they so considered the case they would or should have come to the conclusion that the verdict was unsafe or unsatisfactory,

18. The appellants finally respectfully submit that the verdict of the Jury was in all the circumstances unsafe and unsatisfactory.

19. On the 24th December 1971, an Order was made, pursuant to the advice of the Judicial Committee (Lords Hailsham, Hodson and Cross) dated 14th October 1971 granting the appellants special leave to appeal to His Majesty The Yang Di Pertuan Agong in Council.

20. The Appellants respectfully submit that their appeal should be allowed and their conviction and sentence quashed for the following amongst other

R E A S O N S

1. BECAUSE the learned trial Judge failed to put the Defence to the Jury.

2. BECAUSE the learned trial Judge misdirected the Jury in that he directed them to consider whether the prosecution (on the prosecution evidence alone) had established a prima facie case and that only

thereafter should they consider the Defence evidence to see if it raised any doubt, and because he failed to direct them that the case must be considered on the totality of the evidence.

3. BECAUSE the majority of the Federal Court were wrong in not holding that the provision of Section 60(1) of the Malaysian Courts of Judicature Act 1964, namely that the Federal Court may "confirm, reverse or vary the decision of the trial court ... make such other order in the matter as it may seem just entitles the Federal Court to follow the principles enacted by and applied to Section 2(1) of The English Criminal Appeal Act 1968 and to consider, as a matter of duty, or desirability, whether under all the circumstances the verdict of the Jury was unsafe or unsatisfactory.

4. BECAUSE the verdict of the Jury was unsafe or unsatisfactory.

5. BECAUSE the majority judgment of the Court of Appeal is wrong and should be reversed.

(sgd) JOHN HAMILTON

JUDICIAL COMMITTEE OF THE  
IN THE PRIVY COUNCIL

ON APPEAL FROM

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5 OF 1972

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and TAN LAU CHUAN alias  
TAN AL LIAK

-v-

THE PUBLIC PROSECUTOR

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C A S E

-for-

the Appellants

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