18 of 1977

No. 35 of 1976

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF CRIMINAL APPEAL IN THE REPUBLIC OF SINGAPORE

BETWEEN:

MOHAMED KUNJO S/O RAMALAN — Appellant

- and -

THE PUBLIC PROSECUTOR — Respondent

CASE FOR THE APPELLANT

Record

1. This Appeal is against conviction by special leave in forma pauperis dated the 9th December, 1976. p.443

2. The substantial questions raised by this Appeal can be summarised as follows:

(i) whether the evidence at the trial as to the cause of death of the deceased was sufficient to sustain a conviction for murder under Section 302 of the Penal Code (cap. 103).

(ii) whether the learned trial Judges erred in rejecting the Appellant's defence that he was so drunk as to be incapable of forming the specific intent required by Section 300(c) of the Penal Code.

(iii) whether it was the duty of the learned trial Judges to consider the defence of sudden fight (Section 300 of the Penal Code: Exception 4), notwithstanding that the defence was not relied upon.

3. The Appellant was charged with murder punishable under Section 302 of the Penal Code of Singapore (CAP 103). He was tried in the Supreme Court of Singapore (Chua. J., and D'Cotta. J.,) and was convicted and sentenced to death. p.2 p.411

4. The Appellant appealed to the Court of Criminal Appeal in the Republic of Singapore against his conviction. By his Petition of Appeal he claimed, inter alia, that the medical evidence at the trial had disclosed a number of possible events which could have caused the death of the deceased and that the learned trial Judges had not properly addressed p.423

themselves to that evidence. In terms, the Appellant's case on the uncontradicted evidence as to the possible causes of death was, that no proof beyond reasonable doubt was available to the trial Judges, and that no conviction could be sustained on such evidence. The Appellant also claimed that the learned trial Judges erred in rejecting his defence that he was so intoxicated as to be incapable of forming the specific intent to murder the
P.429 deceased. On the 12th August, 1976 the Court of Criminal Appeal (Wee, C.J., Choor Singh, J., Kulasekaram, J.) dismissed the Appeal.

5. The Appellant and the deceased were best friends. They lived at the same address and they worked together. On the day the deceased died (25th May, 1975) they had spent substantially the whole day together; eating, talking and drinking substantial quantities of alcohol. At about 7.30 p.m. they were outside their home drinking and talking. They were drunk. At about 7.40 p.m.
p.208 Tan Chwee Siong, their employer's manager came to speak to them. He considered they were very intoxicated and told them to go to
p.208 sleep, because they were not in a fit condition to work that
l.20-30 evening. There were 2 eye witnesses as to what happened next:
p.209 Phasaram Misa, aged 16 and Saeroen bin Rekinan (Saeroen), aged 76.
l.24 Phasaram Misa's evidence was to the effect that the Appellant and
p.223-268 the deceased were sitting on a stack of poles about 54 feet away
p.227 from him, talking loudly and laughing. That a little later they
l.20 talked more loudly and roughly, they then began to wrestle and
p.228 grapple with each other and fall to the ground. Suddenly the
p.229 Appellant ran towards a nearby store and rushed back holding an
l.30 iron pipe in his hand, with which he struck the deceased on the head. The deceased tried to defend himself and fell to the
p.232 ground. The Appellant struck the deceased again some 3 or 4
l.10 times on the side of the head and then threw the pipe on one side.

p.268 6. Saeroen's evidence accorded with Misa's in that he saw the
p.280 Appellant and the deceased wrestling and grappling with each other, but Saeroen stated that the deceased fell to the ground before the
p.280 Appellant fetched the iron pipe from the store, and that at the
l.30 time the Appellant struck the deceased, he considered the deceased
p.281 was already dead because he was lying on his back and was
l.5 motionless.

7. Dr. Seah Han Cheow, a pathologist performed an autopsy, made
p.447 a report (Exhibit P.28) and gave extensive evidence as to his
p.4-172 findings and opinions. He listed 6 external injuries and four separate fractures. In examination-in-chief he suggested there
p.13 had been 3 blows altogether; to the left side of the forehead, to the right ear and to the left ear. Later under cross-examination he accepted that one fall and one blow could have caused all the
p.128 fractures. The four fractures listed were as follows:

(i) comminuted fractures involving the left half of the frontal bone;

(ii) comminuted fracture involving left temporal bone;

(iii) communited fracture involving the right temporal bone;

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(iv) a fracture line across the base of the skull obliquely from the right petrous temporal bone extending through the pituitary fossa into the left eye socket (frontal bone).

In addition, there were subarachnoid haemorrhages at the temporal lobes. In examination-in-chief he stated that in his opinion these haemorrhages were caused when the temporal bones were fractured. In cross examination he accepted that the haemorrhages could have been caused by a fall, and could have been unconnected with any blows. In his opinion it was most likely that the blow to the ears (the temporal bones) came from behind the deceased at a time when the deceased was standing. Each of the fractures would in the ordinary course of nature be sufficient to cause death within 15 minutes. In cross examination he stated that if only the fracture to the frontal bone had been inflicted the deceased could have lived for some 3 to 4 hours.

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The effect of Dr. Seah's evidence was, that in his opinion the cause of death was a fractured skull, but that the fracture at (i) above could not have caused death, for the deceased was already dead at the time it was inflicted. The fact that it was a post mortem injury was neither stated in his autopsy report nor in his examination-in-chief.

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In addition he accepted that all the other fractures could have been inflicted after the deceased had died, and that death could have been due to subarachnoid haemorrhages, which could have been caused by a fall.

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8. At the time he wrote his autopsy report Dr. Seah had not seen a Chemist Report (Exhibit P.29) disclosing that the deceased's blood alcohol level, determined from a sample of blood, was 400 milligrammes per 100 millilitres of blood. He accepted that such a level could itself have caused death and that as a result a fall to the ground could cause a serious haemorrhage. Further that a person with such a high degree of alcoholic intoxication is liable to sudden death particularly if he sustains a knock to his head. At one stage in cross examination he accepted alcoholic intoxication as a probable cause of death. At another he accepted it as a possible cause of death. Nonetheless when questioned by the court he maintained that the deceased most probably died of fractured skull.

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p.168

9. Evidence was given as to the condition of the Appellant at the time of his arrest. A sample of blood taken by Dr. Gandhimuthu disclosed a blood alcohol content of 100 milligrammes. of alcohol to 100 millilitres of blood. By calculating back to the time of the fight it was estimated that the Appellant could have had about 190 milligrammes of alcohol in every 100 millilitres of blood.

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10. A cautioned statement of the Appellant was admitted in

evidence. The statement read: "The fight started because I told Arunmugam not to drink when he drove lorries. He got angry and punched me in the eye. He also used a wood to hit me on my left hand. I got angry and hit him back. I do not remember with what I hit him. I had no intention to kill him. I did not know he will die. That's all."

p.306 l.10 11. The Appellant elected to make an unsworn statement from the dock. With regard to striking the deceased he stated:

> "I don't remember having hit the deceased and even if I did, I don't know with what I hit him. He was my best friend, My Lords, and I had helped him to get the job for him. I had no intention of killing him and I don't remember anything else, My Lord."

12. Dr Paul Ngui gave evidence for the Appellant in the terms p.457 of a Medical Report. (Exhibit D.10). He expressed the opinion that the Appellant was a chronic alcoholic and that at the time of the offence the Appellant was in a confused state of mind due to alcoholic intoxication so as to be incapable of forming the p.317 necessary intent to commit murder.

p.411 13. The learned trial Judges made Findings and found the Appellant guilty of murder. They stated that they accepted the evidence of Misa as to what took place and found specifically that the Appellant "delivered the first blow with the exhaust pipe in the region of the deceased's head and that when it was p.411 l.12 delivered the deceased was standing."

They continued:

"After being hit the deceased fell to the ground and the accused delivered some more blows in the region of the deceased's head. We reject the defence contention that the deceased was already dead when those blows were delivered. We find that the cause of death was a fractured skull."

Further they rejected the defence of alcoholic intoxication, stating that the evidence clearly showed that the Appellant "had the intention of causing bodily injuries to the deceased which resulted in his death and that the bodily injuries inflicted were sufficient in the ordinary course of nature to cause death."

14. The learned trial Judges delivered Grounds of Decision. p.413 As to a submission that the deceased was dead at the time he p.417 received a blow to the head, they recorded their rejection of the submission and stated: "We found that the deceased was alive when the accused delivered the blows." At no time either in their Findings or in their Grounds of Decision did the learned trial Judges deal with Dr. Seah's evidence that the blow to the front of the deceased's head was a post mortem injury. Nor was any explanation given as to why the evidence of Dr. Seah on this issue was rejected (if that was the case). The learned trial Judges explained their rejection of the defence of alcoholic intoxication.

They stated that it was clear that the Appellant could remember clearly the events of 25th May 1975. Further that if the Appellant had been in fear of his life he could have picked up a piece of wood or a bottle to protect himself. Further that by choosing to run 50 feet to fetch an exhaust pipe and to run back and strike 4 to 5 "deliberate blows" the Appellant was clearly not acting as a severely intoxicated person would. p.420 l.5

The learned trial Judges returned to this line of reasoning when they rejected the evidence of Dr. Ngui. They stated: p.420 l.30

"It is apparent that the doctor had disregarded the evidence of Phasaram Misa that the accused ran fifty feet and ran back with the exhaust pipe and deliberately struck the deceased....." p.421 l.43

15. The Court of Criminal Appeal dealt in their Judgment with the evidence of Dr. Seah in some detail. Save that the Court of Appeal did not state that Dr. Seah had accepted that all the fractures could have been post mortem fractures (paragraph 7 above), they correctly summarised the general effect of Dr. Seah's evidence. They did deal with Dr. Seah's evidence that the fracture to the left half of the frontal bone was a post mortem injury. They rejected it; stating: "In our opinion Dr. Seah was here clearly in error". They rejected the submission of the Appellant that it had not been proved beyond reasonable doubt that death had been caused by any act on his part by the following reasoning: "Where there are a number of possibilities, it is eminently a matter for the trial judges to decide which is the most likely possibility". They upheld the learned trial Judges rejection of the defence of intoxication for they were of the opinion that it was an irresistible inference from all the evidence that the Appellant was not so drunk as not to know what he was doing, and not so affected by alcohol as to be incapable of forming the requisite intent to murder. p.430 p.434 p.437 l.32 p.428 l.38 p.441 l.5

Neither the learned trial Judges nor the Court of Appeal considered the defence of sudden fight, nor were either of them invited to do so.

16. Culpable homicide is only murder if it is shown that the act falls within one of the 4 definitions outlined in Section 300 of the Penal Code. In particular S.300(c) states as follows:-

"..... culpable homicide is murder -

(a) .....

(b) .....

(c) if it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death."

Section 86 (2) of the Penal Code provides as follows:

> "Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention specific or otherwise, in the absence of which he would not be guilty of the offence."

Exception 4 to Section 300 of the Penal Code provides:

> "Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner."

17. It is submitted that the learned trial Judges did not adequately consider the implications and effect of the medical evidence and or applied a burden of proof less stringent than inquiring as to whether the totality of the evidence satisfied them beyond reasonable doubt. In this respect it is significant that in the course of the trial one of the trial Judges (Chua, J), observed to the Appellant's Counsel: "It is for you to satisfy the
p.134 Court that the person was dead already." It is submitted that the
1.8 best the evidence could prove was, what was the most likely possibility, and such proof is insufficient to sustain a criminal conviction. It follows that it is submitted that the Court of Criminal Appeal erred in applying such a test and in holding such an approach to be sufficient to warrant conviction. Further it
p.437 is submitted that the Court of Appeal erred in substituting their
1.32 own medical opinion for that of the expert who gave evidence in the case, for there was no evidence available to them to make such a finding, and it was no part of the prosecution's case that the injury to the frontal bone was an ante-mortem injury. In failing to consider (in the case of the learned trial Judges) and to accept (in the case of the Court of Criminal Appeal) that the blow to the front of the deceased was a post mortem injury it is submitted they fell into grave error, which resulted in a failure to consider the weight of all the evidence, and a literal and total acceptance of the evidence of Phasaram Misa which was in fact inconsistent with the medical evidence. Save by the total rejection of that part of Dr. Seah's evidence relating to the post mortem nature of the frontal injury it is submitted the inconsistencies cannot be reconciled.

18. It is submitted that the prosecution had to prove that the Appellant had the specific intention to cause the bodily injury actually inflicted, and to prove by evidence that such injury was sufficient in the ordinary course of nature to cause death. (Mohd. Yasim bin Hussin alias Rosli v Public Prosecutor Privy Council Appeal No. 17 of 1975). It is submitted that both the trial Judges and the Court of Criminal Appeal considered the defence of intoxication upon the basis that the proper test to be applied was whether the Appellant was incapable of forming the necessary intent. It is submitted that the trial Judges should have asked themselves whether the material before them suggesting intoxication was weighty enough to leave them with a reasonable doubt about the Appellant's guilty intent. Broadhurst v Queen

1964 A.C. 441, at 463. At no stage in the Findings or in their Grounds of Decision did the trial Judges indicate that they had assessed (1) the evidence that the Appellant was seen to be too drunk to work on the night in question (2) the result of the blood sample showing 100 mgs. of alcohol some 6 hours after the relevant time. It is submitted that the evidence was sufficient to show that the Appellant had been drinking heavily and that he could have been incapable of forming the necessary intent. Further since the Appellant's intention to inflict the bodily injury actually inflicted could only be inferred from the use of an exhaust pipe to strike the deceased it was essential for the learned trial Judges to consider whether the Appellant was so affected by alcohol or could have been so affected by alcohol as not to be aware of precisely what the consequences of his acts would be, alternatively not to be aware of the nature of the weapon he was using. Both the learned trial Judges and the Court of Appeal relied heavily upon the fact that the Appellant had run some 50 feet to fetch the exhaust pipe. At two points in their Grounds of Decision the learned Judges refer to the Appellant running back and striking deliberate blows to the deceased (p.420 l.27. p.421 l.43). It is submitted that by the assumption that the blows were deliberate the learned Judges were begging the very question they had to decide. Further it is respectfully submitted that the mere fact that the Appellant ran 50 feet and back when he could have used a bottle or a stick to protect himself, is of itself neutral in its relevance to the point in issue and from the manner of its consideration by trial Judges indicates a confusion as to the nature of the defence relied upon. It is submitted that a more relevant consideration on this issue was the fact that the Appellant and the deceased were best friends and had shortly before the death been laughing and talking together.

19. It is submitted that at the very least the defence of sudden fight arose upon the facts of the case and that the omission by the learned trial Judges not to consider the defence, although not raised by the Appellant, cannot be cured on appeal. (Haji Talib v Public Prosecutor 1969 MLJ. 94). The defence can be involked when death is caused:

(1) without pre-meditation;

(2) in a sudden fight;

(3) without the offender having taken undue advantage or acted in a cruel or unusual manner.

It is submitted that there is no evidence or sufficient evidence to indicate that the Appellant reflected as to whether he should kill or not. The weight of the evidence was that he fetched the exhaust pipe on a sudden impulse, in the heat of passion engendered and provoked by the fight. Such passion need not involve loss of control (see Chamru Budhwa v State of Madhya Pradesh A.I.R. 1954 S.C. 652), and an enquiry as to who provoked the fight is irrelevant. There was no evidence that the Appellant entered upon the fight with the intention of using a weapon (e.g. by concealment), and the weight of evidence was

to the effect that the snatching up of the exhaust pipe was engendered in the heat of the fight. (Kirpal Singh v The State A.I.R. 1951 Punj 140, Public Prosecutor v Somasundaram A.I.R. 1958 Mad. 323). It is submitted that the advantage so taken was neither undue nor unusual or cruel in the context of the fight and where it had occurred. The pipe was one of many similar weapons which were readily available at the time.

20. By reason of the foregoing it is humbly submitted that this Appeal should be allowed and the Judgment and Order of the Court of Criminal Appeal should be reversed, and the conviction and sentence of the Appellant be set aside for the following among other

REASONS

(1) BECAUSE there was no sufficient evidence as to how the death of the deceased had been caused;

(2) BECAUSE the learned trial Judges and the Court of Criminal Appeal failed to consider all the evidence;

(3) BECAUSE the learned trial Judges and the Court of Criminal Appeal erred in their consideration of the defence of intoxication;

(4) BECAUSE the learned trial Judges omitted to consider the defence of sudden fight.

GEORGE NEWMAN

No. 35 of 1976

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF CRIMINAL APPEAL IN THE REPUBLIC OF SINGAPORE

B E T W E E N

MOHAMED KUNJO S/O RAMALAN — Appellant

- and -

THE PUBLIC PROSECUTOR — Respondent

CASE FOR THE APPELLANT

COWARD CHANCE,
Royex House,
Aldermanbury Square,
London EC2V 7LD

Solicitors for the Appellant