

BALAMURALI MUTHUSAMY**v.
PP**

Court Of Appeal , Putrajaya
Suriyadi Halim Omar, Hasan Lah, Ahmad Maarop JJCA
[Criminal Appeal No: B-05-109-07]
28 December 2010

JUDGMENT**Suriyadi Halim Omar JCA:**

[1] Two charges were preferred against the appellant under s. 302 of the Penal Code and the prosecution called 14 witnesses whilst the appellant called 4. The first charge reads that on 6 November 2002 at about 10pm at Lot 10352, Jalan Bunga Melur, Kampung Baru Hicom, Seksyen 26, Shah Alam, in the district of Petaling, Negeri Selangor Darul Ehsan, the appellant had caused the death of one Sareswathy a/p Krishnan (KPT No. 780511-10-5374) (Sareswathy) and thus committed an offence under s. 302 of the Penal Code . The second charge reads that on the same date, place and time he also caused the death of one Komathi a/p Muniandy (KPT No. 771023-10-5944) (Komathi) and similarly committed an offence under s. 302 of the Penal Code .

[2] In brief the facts are that on 6 November 2002 at about 8.30pm at Lot 10352, Jalan Bunga Melur, Kampung Baru Hicom, Seksyen 26, Shah Alam, Selangor one Saravanan s/o Murali (SP9) was lounging in his house when the appellant visited him on foot. The appellant said that his motorcycle had run out of petrol and requested him to purchase petrol for his empty tank. SP9 obliged him. He bought the petrol at a Petronas petrol station and handed it over to the appellant.

[3] The petrol, like the murder weapon (a club) legislated in illustration (a) in s. 5 of the Evidence Act 1950 , is a relevant fact. The procurement of the petrol here, which is a preparatory act is a relevant fact (*Wong Foh Hin v. Public Prosecutor* [1964] 1 MLRA 578; [1964] 1 MLJ 149). The relevancy of the request of the appellant to SP9 to buy the petrol is seen in light of s. 8 of the Evidence Act 1950 , which promulgates that any fact is relevant, which shows or constitutes a motive or preparation for any fact in issue or relevant fact. As an added explanation, under illustration (c) of s. 8 of the above Act (an example of preparation of an unlawful act), it is clarified that if A is tried for the murder of B by poison, then the fact that before the death of B, A procured poison similar to that which was administered to B, is relevant. In this case, with the unwitting assistance of SP9, the appellant had managed to purchase/procure petrol, later to be used to murder the deceased persons. This is an incontrovertible preparatory act and relevant (*Thiangiah & Anor*



v. Public Prosecutor [1976] 1 MLRH 276; [1977] 1 MLJ 79). Or to use the words of Jwala Prasad in *Lakshmi Prasad v. Emperor* AIR [1923] Pat 307/307, the preparation here which came in the form of the exploitation of SP9, and leading to the petrol procurement was the 'devising or arranging means necessary for the commission of an offence'.

[4] The saga continued one hour later when one Mariammah a/l Suppiah (SP4), when cooking at about 9.30pm, heard shouts and screams and had rushed to the source of the commotion. There she saw Komathi, wife of the appellant, being drenched with petrol and the appellant attempting to strike a lighter. She saw Komathi and Sareswathy attempting to prevent the appellant from striking the lighter by embracing him. Some of the petrol had splashed also on SP4 and Sareswathy. Both Komathi and Sareswathy failed to stop the appellant and in the course of it were engulfed by fire. The appellant and SP4 were also burnt in the melee. At about that time one Ganesan a/l Muniandy (SP5) ie, husband of Sareswathy, who was outside the house also heard SP4's scream and thereupon rushed into the house. There he saw SP4, Komathi, Sarewathy (the deceased persons respectively), and appellant being engulfed by fire. He saw the appellant running out, with Komathi running towards the kitchen, and SP4 attempting to put out the fire engulfing him. Saraswathy was still burning in the lounge. SP4 after successfully extinguishing the fire proceeded to help extinguish the fire on Saraswathy. SP5 subsequently sent Sarawathy and SP4 to the hospital.

[5] On receipt of information the investigating officer on duty, one Sergeant Teh Nyong Seng (SP7), left for the hospital to investigate the above incident. He saw the effects of the burns on Komathi and Sareswathy. The appellant was arrested the next day. On 10 November 2002, Sareswathy died suffering from a 70% body burn. Her death was caused by traumatic shock together with multiple organ failure. On 11 November 2002, ASP Razali bin Ahmad (SP10) took down Komathi's statement under s. 112 of the Criminal Procedure Code . The next day she died too. She died of pneumonia and complicated multiple organ failure due to the 50% burn.

[6] The appellant was subsequently charged under s. 302 of the Penal Code for the death of the deceased persons.

[7] The learned judge found that the appellant was the cause of the deceaseds being engulfed by the fire, his act was imminently dangerous, the severe burns had resulted in the deaths, and the appellant knew that his acts were dangerous. The learned judge found that the prosecution had successfully established a *prima facie* case against the appellant for both the charges.

[8] Having perused the evidence we found that not much of a defence was canvassed by the appellant at the stage of the prosecution. The only suggestion made eg, to PPP Ahmad Fauzi b. Mohd Zin (SP14) was that the deaths were accidental. Yet in the course of another set of questions the appellant's counsel suggested that the appellant wanted to commit suicide and the deceased persons



were trying to rescue him. Even though the cross-examination by the appellant's counsel was silent as regards the issue of drunkenness at the prosecution's stage, the defence of accidental death was not pursued and instead opted for the defence of being intoxicated. Putting it in a nutshell the defence was in a confused state. Having considered the facts in totality, we found no reason to disagree with the factual finding and legal reasoning of the learned judge that led to the calling of the defence.

[9] At the defence stage the appellant, as stated above, evinced that he was intoxicated with drink and had no intention of injuring the deceased persons let alone kill them. He also admitted that he wanted to commit suicide in front of his wife by drenching himself with the petrol bought by a friend of his. He denied drenching Komathi with the petrol. When he was about to strike the lighter Komathi embraced him in order to prevent him from carrying out his suicidal act. Unfortunately not only was his wife engulfed by fire but also his sister-in law.

[10] From our point of view this specific defence of being intoxicated was an afterthought as not once did the appellant suggest this defence at the prosecution's stage. For purposes of this defence ss. 85 and 86 of the Penal Code are relevant. They read as follows:

Intoxication when a defence

85 (i) Save as provided in this section and in section 86 , intoxication shall not constitute a defence to any criminal charge.

(ii) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and -

(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or

(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission (emphasis added).

86 (i) Where the defence under subsection 85(2) is established, then in a case falling under paragraph (a) thereof the accused person shall be acquitted, and in a case falling under paragraph (b), the provisions of section 84 of this Code , sections 347 and 348 of the Criminal Procedure Code [Act 593] shall apply.

(ii) 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.

(iii) For the purpose of this and the preceding section "intoxication" shall be deemed to include a state produced by narcotics or drugs.



[11] Alluding to the above s. 85(ii) of the Penal Code the learned judge stated that the appellant had failed to explain how he got drunk, or had established whether his intoxication was due to his own folly, or caused by a third party. We were equally satisfied that the appellant had failed to establish the very basis of his intoxicated state particularly as there was no alcohol in his blood or urine. That being so, by his failure to establish his intoxicated state at the time of the incident, we were satisfied that the appellant had failed to establish his legal burden as required by s. 105 of the Evidence Act 1950 (see *Jayasena v. R* [1970] 1 All ER 219). For easy reference we reproduce s. 105 of the Evidence Act 1950, which reads:

Burden of proving that case of accused comes within exceptions

105. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or provision contained in any other part of the same Code, or in any law defining the offence, is upon him, and the court shall presume the absence of those circumstances.

ILLUSTRATIONS

(a) A accused of murder alleges that by reason of unsoundness of mind he did not know the nature of the act.

The burden of proof is on A.

(b) A accused of murder alleges that by grave and sudden provocation he was deprived of the power of self control.

The burden of proof is on A.

[12] Even though the defence of being intoxicated is not under any of the legislated illustrations, it obviously falls under one of the exceptions, whereby the burden is on the appellant to establish. It is not the legal or evidential burden of the prosecution to establish that he was not drunk.

[13] So, did his act fall within the ambit of murder? Section 299 of the Penal Code defines the offence of culpable homicide, with it being murder, if it falls under s. 300(a), (b), (c) or (d) of the Penal Code, which demands a certain special degree of requirements. The learned judge here had adverted to s. 300(d) of the Penal Code when convicting the appellant for murder, being convinced that the appellant had knowledge that his act was so imminently dangerous, and that it must in all probability cause death, or such bodily injury as is likely to cause death. The relevant limb of s. 300 reads:

Murder



300. Except in the cases hereinafter excepted, culpable homicide is murder:

(a) ...

(b) ...

(c) ...

(d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

[14] In his grounds of judgement the learned judge when applying the above provision of s. 300(d) to the facts wrote:

Secara keseluruhannya saya mendapati adalah jelas OYDT dalam keadaan sedar akan perbuatannya dan tahu perbuatan beliau menyalakan pemetik api ketika itu sangat berbahaya kepada beliau dan juga Komathi. Saya juga berpendapat OYDT juga sudah tentu mengetahui perbuatan beliau itu membahayakan kepada Sareswathy yang berada begitu hampir dengan OYDT.

[15] With the defence of being intoxicated rejected, the learned judge had gone ahead to clarify that the appellant knew what he was doing at the time of the incident, and knew that his act of striking the lighter was imminently dangerous. Without any merit in his defence he thus had failed to rebut the prosecution's case on reasonable doubt. The learned judge then found the appellant guilty of murder, had him convicted and accordingly sentenced to death.

[16] Come the appeal before us learned counsel began by ventilating that the grounds of judgment of the learned judge was not a talking judgment and had fallen short of the requirement of s. 300(d) of the Penal Code . Learned counsel conceded that even though the learned judge had made a factual finding that the appellant's acts were imminently dangerous he failed to conclude whether the act in all probability would cause death.

[17] To resolve this allegation a need arises for us to scrutinise the grounds of judgment thoroughly first. Having perused the grounds, with respect we must disagree with counsel's submission. At p. 202 of the record of appeal in no uncertain terms the learned judge, when considering whether a *prima facie* case had been established, had written that:

i. the fire was caused by the appellant;

ii. the act of the appellant of drenching the deceased persons with petrol followed by the striking of the lighter was imminently dangerous;



- iii. his acts caused the serious injury which led to the death; and
- iv. he had no reason for doing what he did.

[18] At p. 208 of the record of appeal, to confirm that he was not unmindful of the legal requirement that the injury in all probability would cause death or such bodily injury as is likely to cause death, the learned judge wrote:

Seksyen 300(d) Kanun Keseksaan ini boleh digunakan apabila seseorang yang dituduh itu tidak mempunyai niat tertentu untuk menyebabkan kematian atau kecederaan ke atas seseorang yang khusus, tetapi ia merangkumi perbuatan seseorang yang dituduh yang beliau mengetahui amat berbahaya dan perbuatan itu beliau mengetahui boleh menyebabkan kematian atau kecederaan yang mungkin menyebabkan kematian.

...

Berdasarkan kepada alasan-alasan di atas saya berpuashati bahawa pihak pendakwaan telah berjaya membuktikan kesemua unsur di bawah seksyen 300(d) Kanun Keseksaan di tahap melampaui keraguan munasabah terhadap kedua-dua pertuduhan.

[19] Based on our perusal of the grounds of judgment and finding we had no hesitation in dismissing the supplementary argument of learned counsel that the learned judge had failed to consider the ingredient of "act in all probability, cause death, or such bodily injury as likely to cause death."

[20] Whether by design or not, learned counsel before us left the defence of being intoxicated untouched. In substitute he canvassed that since limb s. 300(d) was alluded to by the learned judge, by no account could the learned judge have found that the appellant knew his acts were imminently dangerous, and would cause the deaths (*Kalegura Padma Rao & Anor v. The State of A.P.* [AIR [2007]1299). We accept that this limb requires knowledge on the part of the appellant ie, a subjective requirement, that he knows that his acts were so imminently dangerous that they must in all probability cause death or such bodily injury as is likely to cause death.

[21] In no uncertain terms learned counsel submitted that the appellant had merely wanted to commit suicide and had no idea that his acts were imminently dangerous and would in all probability cause death. Further to that, the two deceased persons had come onto the scene when he was in the midst of setting himself on fire, and they had attempted to stop him from so doing. As starters, we found the suggestion of learned counsel that the appellant would not know the effect of his actions as dangerous, absurd and unacceptable. It was his very own case that the appellant wanted to commit suicide, let alone his mode of suicide was by engulfing himself with fire. In a word it was a self-defeating argument. If the appellant knew that drenching himself with petrol and igniting the lighter would



lead to a successful suicide, surely the same principle and argument would apply to the deceased persons.

[22] After a maximum evaluation of the evidence we found no fault with the eventual decision of the learned judge (*Balachandran v. PP* [2004] 2 MLRA 123; [2005] 2 MLJ 301; [2005] 1 CLJ 85; [2005] 1 AMR 321). We saw the flow of evidence in the following manner. The appellant started his quest by procuring petrol, had a lighter ready and then deliberately entering the house to carry out his dark deeds. He then sought out the deceased persons in that house. A reliable view of what actually happened in the house could be gauged from P14 ie, the s. 112 statement of the Criminal Procedure Code statement, recorded from Komathi by SP10. The latter when recording this statement testified that Komathi was fully conscious and had comprehended what was asked of her though in a dire strait. She was unable to leave her thumbprint or signature as her hands were badly burnt and bandaged. The next day she died. We view her statement, which tantamount to a dying declaration, as highly relevant and must be accorded a high degree of value (*State of Uttar Pradesh v. Chet Ram & Ors* [1989] 1 MLRA 372; [1990] 3 CLJ (Rep) 468). Komathi in her statement said that she was in the lounge area watching the television when the appellant quietly entered the house through the rear door of the house holding a tin. He went immediately towards Sareswathy and drenched her with petrol. The appellant then drenched Komathi with petrol when she was in the process of pacifying him. Having done that the appellant took out a lighter and lit it causing fire to engulf them. As said above the two of them subsequently succumbed to the burns.

[23] By entering the house the appellant had shown absolute callousness to life especially with so many people around in the house at that time. To use learned counsel's words, "there was a Deepavali party at the house"; it was a miracle that more people had not died. If committing suicide was his bizarre way of showing his undying love for his wife surely he could have done it more successfully and without interference outside the house?

[24] At p. 148 of the appeal records the appellant testified that when Komathi embraced him he was totally drenched with petrol (Masa Komathi peluk saya badan saya telah dipenuhi petrol). We found no truth in this admission. It was his evidence that in the course of this dramatic incident that Sareswathy was also drenched with the petrol. If the appellant had actually drenched himself with petrol as alleged, and the deceased persons merely wanted to prevent him from committing suicide, there was no reason for him to be alive whilst the good samaritans were dead. In fact PPP Razali b. Ahmad (SP10) who visited the deceased persons in Hospital, together with the Shah Alam Magistrate who came along to remand the appellant, saw the latter in good health ("OYDT adalah okey ie, tidak cedera").

[25] The next phase was the final step of striking the lighter. Any person of average intelligence knows that petrol burns easily. Anyone drenched with petrol will



definitely be engulfed by fire if the lighter is lit. The admission of wanting to kill himself by using petrol confirms that he knew the combined effect of fire on petrol. Despite that knowledge, and despite the frantic attempts of SP4 and Komathi trying to grab the lighter from him, the appellant still lit it. We were therefore satisfied that the appellant knew that his acts were so imminently dangerous and that those acts must in all probability cause death to the deceased persons, or such bodily injury as was likely to cause death, and had committed such acts without any excuse for incurring the risk of causing death or such injury.

[26] At the end of the defence case we were satisfied that the appellant had failed to rebut the case of the prosecution on a reasonable doubt. His defence of being intoxicated was never established as the presence of alcohol in his blood or urine was never proved. Even had he established his intoxication he would have failed in convincing the court that he was forced to consume the alcohol. The evidence clearly showed that he consumed the alcohol without any coercion. At p. 139 of the appeal records he said:

Sebelum membeli petrol saya telah bertemu dengan seorang perempuan bernama Susila. Susila ini ada kedai runcit. Saya beritahu Susila saya lapar dan minta makan. Susila telah menghidang nasi untuk saya. **Di situlah saya telah beli whisky 99. Saya minum arak itu di situ juga .**

[27] As the prosecution had established a *prima facie* case of murder at the end of the prosecution stage, and at best have it reduced to a charge of culpable homicide not amounting to murder, it was then up to the appellant to show at the defence stage that his acts were removed from the category of murder by one of the exceptions to s. 300 of the Penal Code (*Piare* [1919] 17 A LJ R 866). Here the appellant failed to establish that knowledge was wanting under the exception of s. 300(d) of the Penal Code . Lastly there was no excuse for him to act in the way he did incurring the risk of causing the deaths or bodily injury that led to the deaths.

[28] From the totality of the evidence we were satisfied that the prosecution had established a beyond reasonable doubt case of murder against the appellant for both charges. We thereupon dismissed the appeal and affirmed the decision of the High Court.

