

9

**DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANGKUASA RAYUAN)
RAYUAN JENAYAH NO. B – 05 – 72 – 2006;
B – 05 – 73 – 2006 & B – 05 – 74 – 2006**

ANTARA

PUBLIC PROSECUTOR

... PERAYU

DAN

1. LOW KIAN BOON
2. TAN PEI YAN

... RESPONDEN-
RESPONDEN

(Dalam Perkara kes Mahkamah Tinggi Malaya di Shah Alam
Perbicaraan Jenayah No. 45-3 Tahun 2004)

Coram: Gopal Sri Ram, J.C.A.
Hasan bin Lah, J.C.A.
Jeffrey Tan Kok Wha, J.

ORAL JUDGMENT

Gopal Sri Ram, J.C.A. delivering judgment:

1. This is the judgment of the Court.
2. Hans Herzog died in tragic circumstances. He was done unto death. At the time, he was married to Ulan Joe Yok (PW20). She had been previously married. She had two daughters by that marriage, SK and SY. This is how Herzog came to meet its end.
3. On 11 November 2003 at about midnight, after they had retired for the night, PW20 heard a knock on the bedroom door. She opened the door but found no one there. PW20 then went to SY's room. As she opened the door someone came at her. In fear she returned to her bedroom and told her husband about it. Herzog, whom we will hereafter refer to as the deceased, then went to SY's

room himself. A little later, PW20 heard the deceased cry out in pain. The deceased then returned to his bedroom. PW20 noticed that his face had been slashed. Covering his wound with a T-shirt and ignoring PW20 pleas, the deceased went downstairs in search of his assailant. At about that time PW20 saw another figure, a male, proceed after the deceased. Later, the body of the deceased was found at the bottom of the staircase leading to the ground floor of the house. He was quite dead. There were 23 slash wounds on his body including one at the base of his neck. That the deceased succumbed to these injuries is beyond doubt. A parang (Exh. P22) was recovered from SY's room. It is said to be the murder weapon. Following police investigations, four persons were arrested and produced before the court. They were all charged under s. 302 of Penal Code read with s. 34 of that Code for murdering the deceased. Of the four, SK and SY were the 2nd and 3rd child respectively. Both were acquitted at the close of prosecution's case. There is no appeal against that order and we therefore find it unnecessary to say anything further about this part of the case. The 1st accused and the 4th child were directed to enter upon their defence. Both gave evidence on oath. At the conclusion of the whole case, the learned trial judge found both guilty of an offence under s. 304 of the Penal Code and sentenced each of them to 10 years imprisonment from the date of their arrest. The public prosecutor being dissatisfied with the conviction on the lesser charge has now appealed to us. The 1st accused and 4th child have also appealed to us to set aside the conviction under s. 304 on the ground that they are guilty of no offence whatsoever. We heard arguments on all three appeals

yesterday and adjourned them to this morning to pronounce our decision and give our reasons for it.

4. The evidence upon which the public prosecutor relies in support of his appeal is as follows. First, the nature of the injuries suffered by the deceased. These are such as to point to an intention to kill on the part of those who inflicted them. Second, the other evidence which the public prosecutor says irresistibly points to the 1st accused and the 4th child as being the assailants who inflicted the wounds on the deceased. In the first place, there is evidence that the 1st accused and the 4th child purchased two parangs from PW5 and PW6. One of the parangs is Exh. P22. In the second place, there is the evidence of PW17 and PW18. In a gist, this is what the two witnesses said. At a little past midnight, PW18 received a telephone call on his mobile from the 4th child asking to be picked up from a Shell petrol station at USJ. PW17 and PW18 went along. On arrival, the 1st accused and the 4th child emerged from the petrol station and entered the car. PW19 was driving it. Both PW17 and PW18 noticed that the clothing of the 1st accused and the 4th child was blood stained. Also, the 4th child appeared to be in a state of shock. While in the car, the 4th child informed PW17 and PW18 that he and the 1st accused had hit someone's father. All those in the car then proceeded to PW17's home where the 4th child had a shower and changed his clothes. PW17 then asked him what had happened. In response, the 4th child said that he and the 1st accused had killed someone but with no intention to cause death. These statements, submits the learned deputy who argued the appeal before us are admissible as admissions under s. 21 of the Evidence

Act 1950. In the third place, there is the blood stained clothing later recovered by the police during investigation which carried the blood of the deceased as established by DNA testing. A similar test was conducted on the blood stain found on Exh. P22 which established that that weapon carried the deceased's blood. In the fourth place, there is evidence showing that the police party who arrived at the scene of the crime had used a tracker dog which had led them from the deceased's house to the very Shell station where PW17 and PW18 had picked up the 1st accused and the 4th child. Lastly, there is evidence to show that the 1st accused was seen in the compound of the deceased's house at about the time the crime was committed.

5. The case for the 1st accused is that he never committed the crime. He was at the deceased's house to help SK and SY escaped from the clutches of their stepfather. Both the 1st accused and the 4th child put the blame for the crime on someone called Ivan. The learned judge after a thorough discussion of the facts and evidence made the following finding:

"Based on the testimony of SP20, it is clear that there were only 2 persons inside the room of SY. In view of my finding that the 1st accused and 4th child [described in this judgment as the 4th accused] were inside the house of the deceased, and in the absence of evidence of any other intruders, I find that it was the 1st accused and 4th child who were inside SY's room. Based on SP20's evidence, it is clear that one of them had

attempted to attack her when she opened the door of SY's room. It is also my finding, that upon deceased going to investigate who the intruders were, he was attacked inside the room (of SY) by one of them with a parang."

We accept that finding as entirely correct based on the proved facts before the learned judge. It follows that the defence of innocent presence failed.

6. However, the learned judge then went on to say something about which the public prosecutor now made complaint. And this is what the learned judge said:

"However, I am unable to determine, on the evidence, whether it was the 1st accused or the 4th child who attacked him. Nevertheless, it is obvious that at that stage there was no intention at all to kill the deceased, otherwise they would have pursuit him to his bedroom, after the attack on him in SY's room. Again, based on SP20's testimony it is safe to infer, that because the deceased had not return to SY's room, but, instead, had run downstairs, he must have been aware that the 1st accused and 4th child were attempting to flee from the house, after the initial attack on him in SY's room, without intending to cause him any further injury. Nevertheless, it would appear that the deceased was determined, either to apprehend

them or put up a fight with them, in the belief, in all probability, that his superior physical build (117 kg) in contrast to the puny size of the 1st accused and 4th child would enable him to overpower them. Unfortunately, this must have triggered a further attack on the deceased downstairs, either by the 1st accused or 4th child, when he attempted to overpower them on their way out of the house. In all probability, the fatal injury must have been inflicted, unintentionally in this 'fight' downstairs."

7. It is the submission of the learned deputy who appeared before us that the finding encapsulated in the above quoted paragraph is pure speculation on the part of the learned judge. It was submitted that this is a case in which the learned judge was attributing a defence to the accused which had not been advanced by either of them or warranted by the evidence that had been placed before the court. After very careful and anxious consideration, we have arrived at the conclusion that there is merit in this argument. First, there is not an iota of evidence to suggest that the deceased had pursued his attackers in the manner described by the learned judge. On the other hand, there is evidence to show that one of the attackers had gone after the deceased. That is indeed what PW20 said. Second, there are the injuries suffered by the deceased. Third, there is the weapon Exh. P22 that was used to inflict the injuries in question.

8. In answer to these points, learned counsel for both the 1st accused as well as the 4th child have argued that there is material

within the prosecution's case which negates an intention to kill. They relied principally on the statement made by the 4th child to PW17. In that statement the 4th child had said that there was no intention to kill. It is submitted that since this forms part of the prosecution's case, the defence is entitled to rely on it to show that one of the vital ingredients of the offence of murder had not been made out. With respect, we do not agree. What PW17 was narrating was the 4th child's version given to him. The prosecution however led cogent evidence to show that the suggestion that there was no intention to kill was untrue. Next, it was submitted for the 1st accused and the 4th child that the learned trial judge was entitled to make a finding that both accused were attempting to flee the deceased's house by means of the staircase. However, as pointed out by the learned deputy who has argued this appeal, if the accused really wished to make an escape they could have done so through SY's room. For, there is evidence to show that SY herself had left the house by exiting through her room.

9. Now it is settled law that whether there is intention to kill in a given case is a question that should be approached along broad based, simple and common sense lines. See Virsa Singh v State AIR 1958 SC 465. In Jai Prakash v State (Delhi Administration) 1991 AIR SCW 654, the Supreme Court of India made the following observation with which we find ourselves in agreement:

"As noted already, when a person commits an act, he is presumed to expect the natural consequences. But the mere fact that the injury

caused is sufficient in the ordinary course of nature to cause death it does not necessarily follow that the offender intended to cause the injury of that nature. However, the presumption arises that he intended to cause that particular injury. In such a situation the Court has ascertain whether the facts and circumstances in the case are such as to rebut the presumption and such facts and circumstances cannot be laid down in an abstract rule and they will vary from case to case. However, as pointed out in *Virsa Singh's case*, AIR 1958 SC 465, the weapon used, the degree of force released in wielding it, the antecedent relations of the parties, the manner in which the attack was made that is to say sudden or premeditated, whether the injury was inflicted during a struggle or grappling, the number injuries inflicted and their nature and the part of their body where the injury was inflicted are some of the relevant factors. These and other factors which may arise in and case have to be considered and if on a totality of these circumstances a doubt arises as to the nature of the offence, the benefit has to go to the accused. In some cases, an explanation may be there by the accused like exercise of right of private defence or the circumstances also may indicate the same. Likewise there may be circumstances in some

cases which attract the first exception. In such cases different considerations arise and the Court has to decide whether the accused is entitled to the benefit of the exception, though the prosecution established that one or the other clauses of Section 300 I.P.C is attracted. In the present enquiry we need not advert to that aspect since we are concerned only with scope of Clause Thirdly of Section 300, I.P.C."

9. In Jagrup Singh v The State of Haryana AIR 1981 SC 1552, Sen, J when delivering judgment said this:

"these observations of Vivian Bose, J have become locus classicus. The test laid down in Virsa Singh's case for the applicability of Clause Thirdly is now ingrained in our legal system and has become part of rule of law. Under Clause Thirdly of S. 300 of the Code, culpable homicide is murder if both the following conditions are satisfied: (a) that the act which causes death is done with the intention of causing a bodily injury; and (b) that the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. It must proved that there was an intention to inflict that particular bodily injury which in the ordinary course of nature, was sufficient to cause

death, viz, that the injury found to be present was the injury that was intended to be inflicted.”

10. Applying the foregoing principles to the facts of this case, the following conclusions may be safely arrived at. Firstly, it was the 1st accused and the 4th child or either or both of them who must have inflicted the fatal injuries on the deceased. Secondly, applying the third limb of s. 300 of the Penal Code they must be taken to have intended to cause the injuries found on the deceased. Thirdly, they must have intended thereby to cause the death of the deceased. Fourthly, the attack on the deceased was pre-planned. This is supported by the purchase of the two parangs including Exh. P22 and the stealthy manner in which the 1st accused and the 4th child entered the deceased's house. It is equally supported by the fact that one of them – either the 1st accused or the fourth child – pursued the deceased down the staircase of the deceased's home. Thus, taking into account the element of premeditation, the nature of the weapon used, the nature of the injuries inflicted on the deceased which indicate a savage attack and all the other surrounding circumstances to which reference has already been made, the irresistible conclusion that a reasonable tribunal properly directing itself upon the law and the totality of the evidence would arrive at is that both accused intended to kill the deceased.

11. That brings us to the application of s. 34 of the Penal Code upon which argument was addressed to us. There is surfeit of authority on the way of which s. 34 is to be applied and we find it sufficient to refer to two authorities on that subject. In Tan Hung

Thiam & Anor v Public Prosecutor [1991] 2 MLJ 137, Chua J when delivering the judgment of the Court of Criminal Appeal of Singapore said:

“On the question of common intention under s. 34 of the Penal Code, the trial judges relied on a long line of cases. It is clear from the decision of the Privy Council in *Barendra Kumar Ghosh v Emperor AIR 1925 PC 1* and *Mahboob Shah v Emperor AIR 1945 PC 118* and from the decision of the Court of Criminal Appeal of Singapore in *Mimi Wong & Anor v PP 1972 2 MLJ 75* that, in a criminal prosecution where s. 34 is invoked, it is not incumbent on the prosecution to prove that there existed between the participants a common intention to commit the crime actually committed. For s. 34 to apply it is sufficient if the prosecution prove that there was in existence a common intention between all the persons who committed the criminal act and that the act which constituted the offence charged was done in furtherance of that common intention.”

12. On the facts and circumstances of the present case, we are satisfied as indeed the learned trial judge was that the 1st and 4th accused committed the offence of murder with common intention. Their joint presence at the scene and their participation to be inferred from the injuries inflicted on the deceased coupled with their flight

from the scene reasonably support the existence of a common intention. We are conscious that there are authorities which state that mere flight or absconding from the scene of the crime is insufficient to infer guilty intention. But if you look all those cases you will find that in each of them flight was the only circumstance relied upon. That is not so in the present case. There are other facts and circumstances which must be taken together with the flight of both accused from the scene of the crime.

13. The other case we would refer to is a more recent one. It is **Anjaiah and others v State of Andhra Pradesh 2008 (1) ALD (Cri) 844** where the court held as follows:

"Section 34 IPC lays down a principle of joint liability in doing a criminal act. The essence of liability is to be found in the existence of common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. The distinct of s. 34 is element of participation in action. The common intention implies acting in concert, existence of prearranged plan which is to be proved either from conduct or from circumstances or from any incriminating facts. It requires a prearranged plan and it presupposes prior concert. Therefore, there must be prior meeting of minds. The prior concert or meeting of minds may be determined from the conduct of the offenders unfolding itself during the course of

action and declaration made by them just before mounting the attack. It can also be developed at the spur of the moment but there must be pre-arranged or premeditated concert. Common intention is to be inferred from the circumstances particularly the part played by the accused and surrounding circumstances namely nature of the weapon used and injury inflicted as well as the meeting of the minds among the accused who are being held constructively liable. There is no uniform inflexible rule for applying the principle of common intention. The inference there for must be drawn from the totality of the facts and circumstances of each case *vide* the decision of the Supreme Court in *Rotash v State of Rajasthan, 2007 (1) ALD (Crl.) 217 (SC)=2007 AIR SCW 44*. Each case, however, has to be decided on its own merit. Facts of each case may have to be dealt with differently. Totality of circumstances could hardly be ever similar in all cases."

14. Drawing the threads together, we would sum up in this way. The prosecution had at the close of the whole case before the High Court established all the ingredients of an offence under s. 302. The learned judge therefore misdirected himself on the facts and evidence and upon the law in holding that the lesser offence under s. 304 had been committed. For the reasons already given, we would therefore allow the appeal of the public prosecutor and set aside the conviction

of the 1st accused and the 4th child under s. 304 of the Penal Code and substitute in its place a conviction under s. 302.

15. In relation to sentence, we must deal with the 4th child first. He was a child within the Child Act 2001 at the date of the commission of the offence. In accordance of s. 97 of the said Act, no sentence of death shall be passed against him. We would therefore, in his respect make an order under s. 97 (2) of the same Act and direct that he be detained at a place of lawful imprisonment at the pleasure of His Royal Highness the Sultan of Selangor. The 1st accused is found guilty of murder and sentence of death is hereby passed upon him.

16. The appeals of the 1st accused and the 4th child are hereby dismissed.

Arguments heard on 7 April 2009 and judgment delivered in Open Court on 8 April 2009.

<u>Counsel for the appellant:</u>	Ahmad Bache
<u>Solicitors for the appellant:</u>	Peguam Negara Malaysia
<u>Counsel for the 1st respondent:</u>	Edmund Bon
<u>Solicitors for the 1st respondent:</u>	Tetuan David Kok & Partners
<u>Counsel for the 2nd respondent:</u>	Karpal Singh (Sangeet Kaur Deo with him)
<u>Solicitors for the 2nd respondent:</u>	Tetuan Karpal Singh & Co.

Verified with Y.A. Gopal Sri Ram, J.C.A. and certified by me to be correct.


Raja Hamidatul Saadiah
Setiausaha kepada Y.A. Dato' Gopal Sri Ram
Hakim Mahkamah Rayuan, Malaysia
Putrajaya