

~~SC~~
~~GMU-6-2~~

Judgment
23, 1966

No. 38 of 1965

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L
FROM THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

B E T W E E N:

CHUNG KUM MOEY @ AH NGAR Appellant

- and -

PUBLIC PROSECUTOR FOR SINGAPORE Respondent

C A S E FOR THE APPELLANT

RECORD

- 10 1. This is an appeal in forma pauperis, by Special Leave of the Privy Council dated 15th July 1965, p.103 from the judgment of the Federal Court of Malaysia (Barakbah C.J., Malsya, Campbell Wylie, C.J., Borneo, and Tan Ah Tah, J.) dated the 22nd day of February p.100 1965, dismissing the appeal of the appellant from his p.102 conviction for murder on a majority verdict of 5 to 2 under Section 300 of the Penal Code of Singapore (Chapter 119 of the Revised Edition) p.87, 1.40- p.88, 1.13 and sentence of death under section 302 of the p.88, 11.27- Penal Code, passed the 11th day of November 1964 33 after a trial lasting 6 days before the Honourable Mr. Justice Ambrose and a jury.
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2. The questions in this appeal are:-
- (a) Whether the learned trial judge was right to direct the jury, in almost the final words of the summing-up, that once the jury was fully satisfied that it was the appellant who fired the bullets which penetrated the deceased's chest and abdomen the only verdict that the jury could return was that the appellant was guilty of murder. p.87, 11.13- 21
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- (b) Whether the learned trial judge was right to direct the jury in the earlier part of the summing-up that the only alternative verdict p.73, 1.36- p.74, 1.22

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to one of murder under section 300 of the Penal Code was an acquittal.

- (c) Whether the requirement of section 300 (d) of the Penal Code (relating to murder) that the appellant must have known that his act was "so imminently dangerous that it must in all probability cause death" implied a higher degree of knowledge and/or probability than the requirement of section 299 (c) of the Penal Code (relating to culpable homicide not amounting to murder), i.e., that the appellant must have known that his act was "likely to cause death"; and whether the learned trial judge in this case was right in withdrawing from the jury the possibility of rendering an alternative verdict of culpable homicide not amounting to murder under section 299 (c) of the Penal Code; and whether the learned trial judge correctly interpreted the said sections in accordance with the decision in Public Prosecutor v. Somasundaram (1959) A.I.R. Madras 323. 10

- p.86, 11.32-40 (d) Whether the learned trial judge misdirected the jury in saying that it was an irresistible inference to be drawn from the facts that the appellant knew that his act was "so imminently dangerous that it must in all probability cause death" despite his own view that it was a reasonable possibility that neither of the bullets which caused death were fired with an intent to cause death and none of the fatal injuries were intentionally inflicted. 30

- p.64, 1.23- p.73, 1.8 (e) Whether the conduct of the cross-examination of the appellant by Crown Counsel was so unfair as to constitute a substantial miscarriage of justice such as to vitiate the whole trial.

- p.1, 11.24-29 3. The appellant was tried in the High Court of Singapore on the 2nd, 4th, 5th, 6th, 9th, 10th and 11th November 1964 before the Honourable Mr. Justice Ambrose and a jury of seven, on a charge that the appellant "on or about 7.15 p.m. at 374 Tanjong Katong Road, Singapore, committed murder by causing the death of one Chia Mui Song, and hereby 40

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committed an offence punishable under section 302 of the Penal Code (chapter 119 of the Revised Edition).

4. (a) On the 9th November 1963 at or about 6.15 p.m. three men entered the premises of a shop at 374 Tanjong Katong Road, Singapore, with the apparent intention of committing a robbery.

p.19, 1.1
p.20, 1.30
p.34, 1.24-
p.35, 1.25
p.42, 1.20-
p.43, 1.21
p.47, 11.5-

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*(b) One of the three men was armed with a revolver, and the respondent-public prosecutor alleged that that man was the appellant.

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*p.20, 1.30
p.35, 1.26
p.48, 11.1-12
p.23, 11.1-
17
p.48, 11.34-
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(c) The deceased who was the proprietor of the shop attempted to reach for the telephone which was near at hand, whereupon the man with the revolver fired a shot which grazed the proprietor's arm.

(d) Two subsequent shots were fired in quick succession, both of which caused fatal injuries to the deceased.

p.24, 11.21-
32
p.36, 11.1-
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p.48, 1.36-
p.49, 1.3
p.24, 11.31-
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p.36, 11.12-
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p.49, 1.8

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(e) Three men made their getaway, but one was arrested shortly afterwards and was subsequently charged with attempted robbery, on which charge he was convicted and sentenced to seven years' imprisonment.

(f) The appellant was not arrested and charged with murder until the 8th June 1964.

p.60, 1.21
p.61, 11.7-8

(g) The main evidence against the appellant was the identification of him by three witnesses at identity parades; of these three witnesses, one was found to be unreliable by the learned trial judge.

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p.20, 11.31-
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p.35, 11.27-
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p.48, 11.4-
6
p.81, 11.34-
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(h) The appellant's defence was that he had never been at the scene of the crime at any material time or at all.

p.61, 11.30-
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5. On the 11th day of November 1964 the appellant was put in the charge of the jury which returned a verdict of guilty of murder by a majority of 5 to 2 (which by the law of Singapore is the smallest

p.87, 1.40-
p.88, 1.13

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p.88, 11.27-33 majority-vote having the effect of a valid finding of guilty), and was thereupon sentenced to the only penalty prescribed by law in respect of that offence - namely, the death penalty.

p.92, 1.10- p.101, 1.38 6. On the 22nd February 1965 the appellant's appeal to the Federal Court of Malaysia was heard before Mr. Justice Barakbah, Chief Justice of Malaya, Mr. Justice Campbell Wylie, Chief Justice of Borneo, and Mr. Justice Tan Ah Tah, Judge of the Malaysia Federal Court.

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7. The grounds of the appeal were:-

p.90, 11.13-16 (a) The learned trial judge failed to direct the jury adequately on the evidence given by the witnesses, Tan Peng Puan and Goh Ah Hong.

p.90, 11.17-19 p.92, 1.29 (b) The learned trial judge failed to direct the jury to consider whether the third man might have fired the fatal shots. (This ground of appeal was abandoned at the hearing of the appeal).

p.90, 11.20-22 (c) The verdict of the jury was unreasonable and could not be supported having regard to the evidence as a whole.

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p.91, 11.20-21 (d) The learned trial judge's direction as to reasonable doubt was confusing.

p.91, 11.22-25 (e) The learned trial judge misdirected the jury as to the requirements of section 300 of the Penal Code and as to the appellant's knowledge as required by the fourth heading thereof.

8. The relevant provisions in the Penal Code are as follows:-

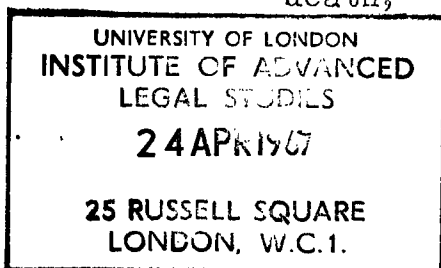
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Section 299 (Culpable homicide) Section 300 (Murder)

Whoever causes death -
(a) by doing an act with the intention of causing death;

... culpable homicide is murder
(a) if the act by which the death is caused is done with the intention of causing death;

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Section 299 (Culpable homicide)
(Contd.)

Section 300 (Murder)
(Contd.)

or (b) with the intention
of causing such bodily
injury as is likely to
cause death;

or (b) if it is done
with the intention
of causing such
bodily injury as
the offender
knows to be likely
to cause the death
of the person to
whom the harm is
caused;

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or (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;

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or (c) with the knowledge
that he is likely
by such act to
cause death; ---

or (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 aforesaid.

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commits the offence of
Culpable Homicide.

9. The learned trial judge directed the jury in the
following manner:-

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(a) In almost the final words to the jury the learned trial judge said:-

p.87, 11.13-
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"Your main task is, therefore, to decide whether you fully accept the evidence of Tan Peng Puan and Goh Ah Hong, that it was the accused who fired the bullets which penetrated the deceased's chest and abdomen. If you are fully satisfied on this point, that is, satisfied beyond reasonable doubt, you will find the accused guilty of murder. If you are left in any reasonable doubt as to this point you will find the accused not guilty".

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(b) At an earlier stage in the summing-up the learned trial judge defined murder in terms of section 300 (a) - (c) inclusive as follows:-

p.73, 1.37-
p.74, 1.12

"A person commits murder if he causes the death of another person by doing an act with the intention of causing death. But that is not the only way of committing murder. For murder may be committed without any intention of causing death. If a person intends only to cause bodily injury and commits an act which causes death, he commits murder if the injury intended to be inflicted by him is sufficient in the ordinary course of nature to cause death. In other words, he commits murder if the intended injury will most probably result in death. It does not matter if he does not know that the intended injury will most probably result in death".

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(c) The learned trial judge then defined murder in the terms of section 300 (d) as follows:-

p.74, 11.12-
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"If the intended injury is not sufficient to cause death what is the position? In such a case the person committing the act which causes death commits murder if two conditions are fulfilled. First, he must know that the act is so imminently dangerous that it must in all probability cause death or bodily injury likely to cause death. Secondly, he must commit the act without any excuse for incurring the risk of causing death or bodily injury likely to cause death".

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(d) The learned trial judge in the following words

then left the issue with the jury whether the requisite intention in section 300 (a) - (c) had been proved by the prosecution:-

p.85, 1.4]-
p.86, 1.8

10 (i) "Now the first question you have to decide in connection with the state of mind of the accused is this: Did he intend to cause the death of the accused? It seems to me a reasonable possibility that when he fired the first shot he was merely trying to intimidate the deceased and make him hand over the keys.

It also seems to me a reasonable possibility that when he fired the second and third shots he was aiming at the deceased's right forearm which had altogether four injuries and that his intention was only to prevent the deceased from telephoning the police.

20 If you take the same views as myself, you will decide that there was no intention to cause death"; and the learned trial judge went on to add:-

(ii) Secondly, you have to consider the question whether the accused intentionally inflicted the bullet wound which penetrated the chest and also the bullet wound which penetrated the abdomen.

p.86, 11.15-
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30 Here again it seems to me a reasonable possibility that the accused was aiming at the forearm of the deceased to prevent the deceased from telephoning the police and that the bullets penetrated the chest and abdomen of the deceased either after passing through or without passing through his forearm.

If you take the same view as myself, you will decide that the injuries to the chest and abdomen were not intentionally inflicted by the accused.....

40 (d) The learned trial judge, after having indicated to the jury that the prosecution might not have satisfactorily discharged the burden of proving the requisite intention under section 300 (a) - (c) inclusive, turned to the requisite proof under section 300 (d) in the following words:-

p.86, 11.27-
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- p.86, 11.32-40 (i) "Thirdly, you have to consider the question whether the accused had the knowledge that his act in aiming at the forearm was so imminently dangerous that it must in all probability cause death or bodily injury likely to cause death.
- p.86, 1.49- p.87, 1.6 To my mind it seems impossible to believe that the accused did not have such knowledge. It seems that one cannot possibly entertain any doubt as to the existence of such knowledge in the mind of the accused It seems to me, as far as the state of mind of the accused is concerned, the irresistible inference is that he had the knowledge that the act of shooting at the deceased's forearm was so imminently dangerous that it must in all probability cause death or bodily injury likely to cause death". 10
- p.86 11.40-49 (ii) "You have also to consider the question of whether the accused committed the act of shooting at the deceased's forearm without any excuse for incurring the risk of causing death or bodily injury likely to cause death. 20
- p.87, 11.6-9 It seems to me that if the accused's excuse for incurring the risk was that he only wished to prevent the deceased from telephoning the police, then I must tell you that there is no excuse for incurring the risk, as far as the law is concerned ... It is clear to me beyond doubt that he had no excuse in law for incurring the risk of causing death or bodily injury likely to cause death. 30
- p.87 11.9-12 It seems to me, therefore, that the prosecution has established beyond reasonable doubt one of the states of mind required for the offence of murder".
- p.87, 11.17-19 "If you are fully satisfied on this point, that is, satisfied beyond reasonable doubt, you will find the accused guilty of murder." 40
- pp.100-101 10. The Federal Court of Malaysia dismissed the appeal. The judgment of the court, delivered

by Barakbah, C.J., Malaysia, dealt with the requirements of section 300 of the Penal Code.

The learned Chief Justice said:

10 "We find that the learned trial judge has already dealt with the question of knowledge and that his last direction to the jury was whether the accused did commit the act having regard to the evidence of the two witnesses, namely Tan and Goh, and he had earlier on already directed the jury to disregard any expression by him on facts, and in our opinion there was no misdirection on the part of the learned trial judge on that point."

p.100, 11.22-31

11. The appellant respectfully submits the following comments on the summing-up of the learned trial judge:-

20 (a) The learned trial judge, by the use of the final words in his summing-up referred to in paragraph 9(a) above, in effect withdrew from the jury any issue other than the acceptance or rejection of the evidence of the two witnesses as to identification of the appellant as the person who fired the fatal shots. The learned trial judge told the jury unambiguously that if the jury was satisfied "on this point" the appellant was guilty of murder.

30 The judgment of the Federal Court of Malaysia failed to appreciate that these concluding words in the learned trial judge's summing-up would have been calculated to appear to the jury to negative the earlier directions about the essential ingredients for the crimes of murder and culpable homicide not amounting to murder; and the Federal Court was wrong in concluding that this did not constitute a misdirection. The jury must, it is respectfully submitted, have concluded that it did not need to
40 consider either the question of the appellant's intention within section 300 (a) - (c) inclusive or the appellant's knowledge within section 300 (d).

(b) If, which it is submitted is not the case, the jury was still left to decide the issue of

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the appellant's mental state in relation to the offence, the following comments are respectfully submitted:-

(i) While the learned trial judge rightly indicated that the jury might find that the appellant's action did not satisfy the requisite mental element within section 300 (a) - (c) inclusive, it was a misdirection for the learned trial judge then not to have indicated to the jury the difference between culpable homicide not amounting to murder within section 299 (c) and murder within section 300 (d) 10

(ii) Under both section 299 (c) and 300 (d) knowledge alone may be sufficient to constitute either offence, but that (a) under section 300 (d) a higher degree of knowledge is required in that the prosecution must establish that the accused knew his act would in all probability cause death, whereas under section 299 (c) knowledge that his act was likely to cause death is sufficient to establish culpable homicide; and (b) that, whereas under section 300 (d) the act must be so imminently dangerous that it must in all probability cause death, under section 299 (c) the act does not have to be so imminently dangerous, and has only to be causing such bodily injury as is likely to cause death. 20

(iii) The learned trial judge wholly omitted to leave with the jury the issue whether the appellant knew that his act was likely to cause death, and thereby failed to give the jury the opportunity of bringing in a verdict of culpable homicide not amounting to murder instead of murder. Such a verdict was a reasonable alternative finding having regard to the learned trial judge's previous indication, when dealing with the requisite intention for the crime of murder, that there was a reasonable possibility that the appellant intended only to prevent the deceased from telephoning the police; by parity of reasoning the learned trial judge should have left it to the jury to decide whether that same reasonable possibility might not equally have indicated that the appellant's knowledge of the act he committed was only likely to cause death and not that he knew that it was so imminently dangerous that it must in all probability cause death. The learned trial judge 30 40

ought to have directed the jury that if death was the most probable result of the appellant's act it would be a case of murder within section 300 (d), but that, if it was only a likely result, the offence committed by the appellant was the lesser offence of culpable homicide not amounting to murder within section 299 (c).

10 12. On the grounds that Crown Counsel's conduct of the cross-examination of the accused was so unfair as to constitute a miscarriage of justice, the appellant respectfully submits the following comments:-

(a) A fair trial demands that every accused, should be fairly treated by the prosecutor; and that the prosecutor's role is akin to that of a representative of a Ministry of Justice.

20 (b) An accused fails to obtain a fair trial if the jury, which instinctively places trust in the fair-mindedness of the prosecutor, is not given the opportunity of having the case against him fairly presented. The more reliance placed by a jury on the fairness of the prosecutor, the more weight it will give to the words and acts of the prosecutor. If unfairness by the prosecutor goes unchecked by the learned trial judge, prejudice will inevitably reflect on the accused, particularly if similar checks were earlier made on the conduct of cross-examination by defence counsel.

30 (c) The Crown Counsel in the instant case was repeatedly guilty of infringing the provisions of section 144 (1) (b) of the Evidence Ordinance (Edition of 1955), Chapter 4, which provides:-

"(1) Leading questions may be asked in cross-examination, subject to the following qualifications:-

(a) the question must not be put into the mouth of the witness the very words which he is to echo back again; and

40 (b) the question must not assume that facts have been proved which have not been proved, or that particular answers have been given contrary to the fact."

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p.26 11.10- 14 (d) While on no occasion throughout the cross-examination of the appellant did the learned trial judge remind Crown Counsel of breaches of section 144 (1) (b) of the Evidence Ordinance, on two occasions during cross-examination of the prosecution witnesses by the appellant's counsel the learned trial judge intervened to prevent breaches by appellant's counsel of Section 144 (1) (b) of the Evidence Ordinance. It is respectfully submitted that the conduct of the learned trial judge in not checking the course of the appellant's cross-examination by prosecuting counsel, failed to provide that element of protection against conduct which tended to minimise or remove the right to a fair trial. 10

(e) The appellant respectfully submits that the manner of his cross-examination by Crown Counsel was so unfair as to vitiate the trial.

13. The appellant respectfully submits that in the light of the misdirections by the learned trial judge, referred to in paragraphs 9 and 11 above, a substantial miscarriage of justice occurred. Even if, contrary to the appellant's submissions, the jury might reasonably, despite the learned trial judge's misdirections, have brought in the same majority verdict of guilty of murder, it would be undesirable for the Court to consider that no substantial miscarriage of justice had occurred, having regard to the fact that the result of this appeal makes a difference between a capital sentence and a sentence only of imprisonment. 20 30

14. The appellant respectfully submits that this appeal should be allowed for the following (among other)

R E A S O N S

- (1) BECAUSE the learned trial judge withdrew from the jury any issue other than the rejection or acceptance of the testimony of the identification witnesses of the fatal shooting of the deceased victim.
- (2) BECAUSE the learned trial judge should have left to the jury the alternative verdict of culpable homicide not amounting to murder within section 299 of the Penal Code. 40

- (3) BECAUSE the conduct of the cross-examination of the appellant by Crown Counsel was so unfair as to vitiate the trial.
- (4) BECAUSE the learned trial judge misdirected the jury about the different crimes of murder and culpable homicide not amounting to murder.
- (5) BECAUSE the judgment of Chief Justice Barakbah was wrong, for the reasons given in paragraph 10 above.
- 10 (6) BECAUSE the Federal Court of Malaysia was wrong, and its judgment ought to be reversed.

MARK LITTMAN

L. J. BLOM-COOPER

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