

**IN THE COURT OF APPEAL, MALAYSIA  
THE PALACE OF JUSTICE  
PUTRAJAYA**

**CRIMINAL APPEAL NO. C-05-27-06**

Appellant

AZHAR BIN CHE WIL

v.

Respondent

PUBLIC PROSECUTOR

*and*

**CRIMINAL APPEAL NO. C-05-94-05**

Appellant

PUBLIC PROSECUTOR

v.

Respondents

TEYUN THIAN EIM & 3 ORS

[In the matter of the High Court of Malaya at Kuantan,

Criminal Trial No. 45-(46)-3-2004]

[In the matter of

**Public Prosecutor**

v.

**Azhar bin Che Wil & 6 Ors]**

Coram: Suriyadi Halim Omar, JCA

Wan Adnan Muhamad, JCA

Mohd Hishamudin Yunus, JCA

## **JUDGMENT OF THE COURT**

**(A separate judgment written with the permission of the Rt. Hon. President of the Court of Appeal pursuant to the proviso to subsection (2) of section 62 of the Courts of Judicature Act 1964)**

These two appeals, Court of Appeal Criminal Appeal No. C-05-27-06 and Court of Appeal Criminal Appeal No. C-05-94-05, are related and were heard together. They originated from the High Court of Kuantan Criminal Trial No. 45(46)-3-2004. At the Kuantan High Court, seven persons were charged for the offence of murder under section 302 of the Penal Code read together with section 35 of the same Code.

Section 35 of the Penal Code states –

**When such an act is criminal by reason of its being done with a criminal knowledge or intention.**

**35. Whenever an act, which is criminal only by reason of its being done with criminal knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or intention, is liable for**

**the act in the same manner as if the act were done by him alone with that knowledge or intention.**

All the accused in the above case are prison officers and personnel from Penor Prison, Kuantan.

At the trial, before the commencement of submissions at the close of the case for the prosecution, the learned Deputy Public Prosecutor (DPP) conceded that no prima facie case had been made out in respect of the sixth accused (Shamsul Darniza bin Ismail). Hence, he was acquitted and discharged.

At the close of the case for the prosecution, after hearing submissions, the trial Court called only the first accused to enter his defence. The remaining six accused were acquitted and discharged.

The first accused elected to give evidence under oath. Only the appellant gave evidence (as DW1). He did not call any witnesses.

At close of the case for the defence, the learned trial Judge found that the first accused had failed to raise a reasonable doubt against the prosecution's case and therefore found him guilty of the crime of murder. He was accordingly convicted of the charge of murder and sentenced to death.

The first accused now appeals to the Court of Appeal. He is the appellant in Criminal Appeal No. C-05-27-2006. For the sake of clarity and convenience, I shall be referring to him in this judgment as 'the appellant' or 'the first accused'.

The Public Prosecutor has cross-appealed against the acquittal of the second, third, fourth and fifth accused. These four accused are the respondents in Criminal Appeal No. C-05-94-05. In this judgment, I shall be referring to them as 'the respondents'.

At the High Court, the charge against the appellant and respondents reads as follows:

*Bahawa kamu bersama-sama pada tarikh 1.3.2004, di antara jam 4.00 petang hingga 7.00 petang, bertempat di Penjara Penor, Kuantan, dalam Negeri*

*Pahang, telah melakukan pembunuhan ke atas MOHD SHUKRI B. MOHD YUSOF KP No. 850404-06-5179, dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 dibaca bersama seksyen 35 Kanun Keseksaan.”*

Briefly, the following are the facts of the case.

On 1 March 2004, at about 4.10 p.m., the deceased, a 19 year old youth by the name of Mohd Shukri Bin Mohd Yusof, tried to escape from Penor Prison in Kuantan. He was a remand prisoner at the prison. His attempt to escape failed. The attempt was discovered and the alarm was raised. At about 4.45 p.m. the same day the prison officers managed to apprehend him in an area known as *Zone Nenas*, and he was brought, through a football field, to the main gate of the prison. A few prison officers assaulted him while he was at *Zone Nenas*, at the football field and at the main gate. From the main gate he was taken to the lock-up. At about 5.20 p.m. the appellant, Prison Inspector Azhar bin Che Wil, who was the Head of the Security Unit of the prison, directed his subordinate, prison officer Razali bin Fauzi (PW7), to bring the deceased to a room known as *Bilik Unit Kawalan Keselamatan Penjara* (Prison Security Control Unit Room – hereinafter

shall be referred to as 'the room' or 'the *UKK* room'). PW7 brought the deceased to the room. Upon arrival at the room, four prison wardens were already there. The appellant ordered these wardens to leave the room, with the exception of PW7. They did as told leaving only three persons in that room, namely, the appellant, PW7 and the deceased. In the room the deceased was made to sit on the floor. His hands were handcuffed at the back. PW7 testified that he saw the appellant putting on a pair of rubber gloves. Then, for no apparent reason, the appellant began kicking and stomping the head of the deceased several times, causing his head to hit the concrete wall and the concrete floor of the room. He also kicked the deceased at the chest. PW7 heard the appellant uttering the words, '*Kamu ni menyusahkan orang*' several times while assaulting the deceased. PW7 then saw blood coming out from the mouth of the deceased. The deceased went into a seizure and lapsed into a coma.

Seeing the condition of the deceased, the appellant instructed PW7 to call the prison medical assistant. The latter, Mohd Paddli (PW8), arrived and on seeing the condition of the deceased advised the appellant to have the deceased taken to the hospital as soon as possible. PW8 in his evidence said—

*Apabila tiba di bilik UKP, didapati mangsa terbaring. Ada kesan basuhan di hujung penjuru lantai bilik UKP. Mangsa telah tidak sedar diri, tekanan darah rendah dan pernafasan tersekat-sekat. Masa itu Razali [PW7] dan tuan Azhar ada di situ.*

In cross-examination, PW8 said –

*Pada 5.30 petang saya telah dipanggil ke bilik UKP. Saya lihat mangsa, pada ketika itu, tidak sedar. Selepas saya jalankan pemeriksaan, saya meminta mangsa mengucap. Ini ialah selepas pemeriksaan ke atas mangsa. Mangsa tidak dapat mengucap. Selepas itu dia dibawa ke hospital.*

At about 6.30 p. m. the deceased was taken by a prison van to the hospital, accompanied by the appellant, PW7, PW8 and three other prison officers, arriving at the hospital around 7.00 p. m.. Throughout, the deceased remained in coma without regaining consciousness. He was in that state until he died on 10 March 2004.

The only witness who saw what had happened to the deceased in the UKK room was PW7. The learned trial Judge, having observed the demeanor of

PW7, found that he was a truthful witness. On the evidence, I see no reason to disagree with this finding of the learned trial Judge.

According to the pathologist and forensic expert, Dr. Zahari bin Noor (PW6), the death of the deceased was caused by serious internal injury in the head, and that injury was caused by multiple blunt trauma to the head. The multiple blunt trauma had caused sub-arachnoid haemorrhage in the brain area.

In his evidence, PW6 said –

*Saya telah membuat pembedahan pada bahagian otak. Didapati lapisan otak banyak pendarahan yang nyata adalah pendarahan 'sub-arachnoid' yang menyeluruh pada bahagian otak. Ada juga tumpok-tumpok pendarahan 'sub-dural' pada bahagian otak. Dan juga terdapat pada kiri otak kesan extra-dural pendarahan.*

...

*Kesimpulan dari kecederaan yang ditemui, sebab kematian adalah kecederaan dalam kepala yang disebabkan oleh trauma tumpul yang berganda. Trauma*

*tumpul berganda ini disebabkan oleh perbuatan ataupun tindakan pukulan atau hentakan atau tendangan atau hentaman pada permukaan yang tumpul, seperti dinding atau lantai atau tanah.*

In the present case, upon an evaluation of the evidence and the facts, in particular, the evidence of PW6 and PW7, I am satisfied that the appellant had committed an act that falls squarely within section 299 and limb (c) of section 300 of the Penal Code. Section 299 states—

**Culpable homicide**

**299. Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.**

Section 300 limb, (c) provides –

**Murder**

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

**(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.**

In my judgment, it is very clear from the evidence that the act done by the appellant towards the deceased was an act that was done with the intention of causing bodily injury to the deceased; and the bodily injury intended to be inflicted was sufficient in the ordinary course of nature to cause death.

On the evidence, I am satisfied that the learned trial Judge had made a correct finding when he said:

Every Tom, Dick and Harry, as human beings, is fully aware that the head is a vulnerable and vital part of a human being. One need not be in the medical field to know such basic fact. It therefore flows that any hard kicking and stomping of the head and especially repeatedly against a hard surface like a concrete wall or a concrete floor, can cause injuries that are sufficient to cause death in the ordinary course of nature.

The appellant in his defence alleged that the deceased was already in a very weak condition even before he (the deceased) entered the *UKK* room such

that the appellant together with PW7 had to assist the deceased to walk to the room. As to this allegation, there is, however, no evidence to suggest that the deceased was already seriously injured prior to him being brought to the room. On the contrary – and significantly – there is evidence of several witnesses, namely, PW7, Supian Yadi (PW10) and Khatijah bt Adam (PW9) that the deceased was able to walk on his own, in a normal manner and unaided, to the *UKK* room. In my judgment, I see no reason to disturb the finding of the learned trial Judge as to the condition of the deceased prior to the incident in the *UKK* room.

Now, as to the Public Prosecutor's appeal against the respondents, on the evidence the learned trial Judge was correct when he acquitted and discharged them at the close of the case for the prosecution. There was, clearly, no *prima facie* case established against them.

In the first place, the respondents were not present in the *UKK* room when the appellant assaulted the deceased. This means the act of assault by the appellant cannot be said to be an act '*done by several persons*' (the phrase used in section 35 of the Penal Code). The appellant did the act alone. Hence the respondents could not be associated with what the appellant did and

could not be held criminally liable for what happened in the *UKK* room. The only evidence against the respondents was that they had assaulted the deceased before the deceased was brought to the *UKK* room. There is evidence that the deceased was assaulted by the second respondent (Prison Inspector Suhaimi bin Nordin) while the deceased was at *Zone Nenas*; and there is evidence that the deceased was assaulted by the third and fourth respondents (prison officers Mohamad Hamdan bin Mohd Yaakob and Ahmad Rizal bin Ab. Halim) while he was at the football field. There is evidence that the first respondent (prison officer, Deputy Superintendent Teyun Thian Eim) and the third respondent participated in the assault on the deceased at the main gate of the prison. But when these assaults took place, the appellant was not present: he was not present either at *Zone Nenas* or at the football field or at the main gate when the assaults by the respondents took place. Whatever the respondents did to the deceased, those acts were done independently of the appellant. In other words, the appellant and the respondents were not acting in concert in relation to the deceased. It is, however, true that all the incidents happened in the prison compound and on the same day. But the incidents happened at different locations or areas and at different times and involved different individuals (except that

Mohammad Hamdan (the third respondent) was involved in the football field incident as well as in the main gate incident).

Now, reverting to the appellant's case, Encik Karpal Singh, the learned counsel for the appellant, submitted that as the appellant was jointly charged together with the other accused by the prosecution invoking section 35 of the Penal Code, the learned trial Judge should have amended the charge when he called upon the appellant to enter his defence and acquitted and discharged the other co-accused. It is counsel's contention that any reference in the charge to the other accused and section 35 should have been deleted from the charge at the close of the prosecution's case after acquitting and discharging the other co-accused. Encik Karpal referred to section 158 of the Criminal Procedure Code. This section reads –

**158. Court may alter or add charge.**

**(1) Any Court may alter or add to any charge at any time before judgment is pronounced.**

**(2) Every such alteration or addition shall be read and explained to the accused.**

The learned counsel further submitted that, by reason of the failure on the part of the trial Judge to amend the charge, the appellant was deprived of his right to recall witnesses as accorded to him by section 162 of the Criminal Procedure Code. Hence there was a miscarriage of justice and there ought to be a retrial.

Encik Karpal, in support of his argument, referred to the following cases:

(1) *Quek Ching Kim v. Regina* [1956] 22 MLJ 54;

(2) *Lee Swee Tee v. Public Prosecutor* [1960] 26 MLJ 161; and

(3) *C. Mohamed v. Public Prosecutor* [1974] 1 MLJ 25.

With respect to counsel, I do not find these cases as being of any assistance or relevance to the position that he adopted.

Section 162 provides –

**162. Recall of witnesses when charge altered.**

**Whenever a charge is altered or added by the Court after the commencement of the trial the prosecutor and the accused shall be allowed to recall or re-summon and examine, with reference to the alteration or addition, any witness who may have been examined, and may also call any further evidence which may be material.**

In my judgment, in the context of the present case, the failure on the part of the learned trial Judge to amend the charge either at the close of the prosecution's case or at the close of the defence's case, so as to delete any reference in the charge to the other accused and to section 35 of the Penal Code, is only a minor error; and judging from the evidence, in particular the evidence of the appellant himself, and bearing in mind that he was defended by counsel at the trial, I am satisfied that he was not at all misled or prejudiced in making his defence by the trivial omission. In *Msimanga Lesaly v Public Prosecutor* [2005] 4 MLJ 314, a case that I decided at first instance at the High Court of Alor Setar, that went on appeal to the Court of Appeal and finally to the Federal Court, Gopal Sri Ram JCA (as he then was), in delivering the judgment of the Federal Court, said (at p. 318-319):

Taking the first ground, it is important to recall that the appellant was initially charged with another person. Accordingly, the charge carried in it the allegation that the two accused had acted in furtherance of a common intention under s 34 of the Penal Code. Once the co-accused was acquitted at the close of the prosecution's case, the allegation of common intention fell to the ground. The charge had to be amended to reflect the fact that the appellant had solely trafficked in the drug in question. It was. But the wording in the charge was not so perfectly amended as to rid itself of all references to the element of the appellant having acted with another person. That in our view does not render the charge bad. For, it is well settled law that s 34 of the Penal Code does not create a substantive offence but is merely a rule of evidence to infer joint responsibility for a criminal act performed by a plurality of persons: *Chota bin Abdul Razak v Public Prosecutor* [1991] 3 MLJ 77. In *The Thiam Huat v Public Prosecutor* [1996] 3 SLR 631, the same complaint was raised on appeal. Karthigesu JA dealt with it as follows:

We should, however, mention that an issue was raised that as the capital charge of trafficking was a common intention charged and the learned judge having acquitted the other conspirator, Tay Bee Hoon, the conviction of the appellant without amending the charge was irregular. True, the learned judge did not amend the charge; he found that the appellant alone was in possession of the 40 sachets of heroin and that he failed to make good that he was in possession of the 40 sachets for his and Tay Bee Hoon's consumption. Suffice it to say that section 34 of the Penal Code does not create a substantive offence; it lays down only a rule of evidence to infer joint responsibility (per Thean J (as he then was) in *Chota bin Abdul Razak v PP* [1991] 3 MLJ; [1991] SLR

675). Accordingly there was nothing irregular about the appellant's conviction on the capital charge of trafficking.

Likewise here, the failure to amend the charge by the trial Judge after acquitting the respondents at the close of the prosecution's case does not render the charge bad in law. It is to be noted, however, that in *Msimanga Lesaly* the charge involves section 34 of the Penal Code whereas in the present case the charge involves section 35 of the same Code. But to my mind, the principle in *Msimanga Lesaly* should equally apply here.

As the failure by the learned trial Judge to amend the charge is only a minor error, then, by reason of section s.422 of the Criminal Procedure Code, the proceeding and judgment of the learned trial Judge ought not to be disturbed or vitiated, as no miscarriage of justice had been occasioned by the error. Section 422 reads:

**Irregularities not to vitiate proceedings.**

**422. Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of –**

- (a) **any error, omission or irregularity in the complaint, sanction, consent, summons, warrant, charge, judgment or other proceedings before or during trial, or in any inquiry or other proceedings under this Code;**
- (b) **the want of any sanction; or**
- (c) **the improper admission or rejection of any evidence,**

**unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice.”**

In conclusion, both appeals (by the appellant and by the Public Prosecutor) are dismissed.

*[Appeals dismissed]*

t.t.

(MOHD HISHAMUDIN MOHD YUNUS)

Judge, Court of Appeal, Malaysia

The Palace of Justice

Putrajaya

Date of decision: 5 May 2009

Date of separate written grounds of judgment: 29 June 2009

Encik Karpal Singh and Cik Sangeet Kaur Deo (*Messrs. Karpal Singh & Co.*) for the appellant

Encik Saiful Edris bin Zainuddin, DPP, and Encik Awang Armadajaya bin Awang Mahmud, DPP, (*Attorney-General's Chambers*) for the Public Prosecutor

Datuk Bastian Vendargon (*Messrs Vendargon & Partners*) for the first respondent

Dato' Mohd Sukri Mohamed (*Messrs Wan Haron Sukri & Nordin*) for the second respondent

Encik Bob Arumugam (*Messrs Bob S. Arumugam & Co.*) for the third respondent

Encik Richard Bong and Cik Aida Rahayu Abdul Rahman (*Messrs Bong & Co.*) for the fourth respondent