IN THE COURT OF APPEAL OF MALAYSIA

Coram: Mohtarudin Baki, JCA; Abdul Karim Abdul Jalil, JCA; Rhodzariah Bujang, JCA

Muhammad Faizal Bin Salim v Public Prosecutor

Citation: [2018] MYCA 264 **Suit Number:** Criminal Appeal No. J-05(M)-113-03/2017

Date of Judgment: 10 July 2018

Criminal law – Murder – Conviction – Death sentence – Appeal – Whether conviction safe

Criminal law – Intention to cause death or to cause injuries which lead to death – Whether the appellant had the intention of causing death or injuries

JUDGMENT

Introduction

[1] The appellant, a married policeman was charged with murdering his lover, Nik Norzielawati binti Afandi at a recreational park following a quarrel at his residence, which was an apartment at a housing complex for police personnels called Kompleks Perumahan Polis Mersing. His apartment was at a block called Tulip. He was convicted and sentenced to death by the learned High Court Judge and this is our judgment in respect of his unsuccessful appeal against that conviction and sentence. The charge against the appellant in Bahasa Malaysia reads as follows:

> 'Bahawa kamu pada 12.4.2015, di antara jam lebih kurang 11.00 malam sehingga 13.4.2015 jam lebih kurang 12.30 pagi bertempat di Taman Rekreasi Hutan Bandar Bukit Cantik, Jalan Bukit, Mersing Kechil, di dalam daerah Mersing di dalam Negeri Johor Darul Ta'zim telah membunuh Nik Norzielawati Akmar binti Afandi (KPT No: 800703-03-5230) dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan'.

[2] The marital status of the appellant, his love relationship with the victim and the quarrel that night of the 12/4/2015 between them were all admitted by the appellant in his sworn evidence after being called to give his defence to the charge. Therefore, the collective testimonies of two of his neighbours at the said Kompleks, Zaleka binti Hamuron (PW5) and Sergeant Zainudin bin Bakar (PW12) that they heard the voices of the appellant and a woman quarrelling that night was more than credible.

Both actually testified that they heard the voice of a woman groaning in pain and saying “jangan pukul saya macam ini saya mengandung".

[3] The appellant in his evidence admitted hitting the victim. He was angry because she went against his order not to go to his apartment and hit her, he said, with his hand. She fell and hit her head against a table in the sitting room and was injured and bleeding. He said he helped to wipe her blood with cotton wool and a piece of cloth. When he went out to throw the cotton wool and cloth outside the apartment, he saw the victim walking out of the apartment block. So he followed her on his motorcycle and offered her a lift when she told him that she wanted to go home. His evidence about picking her up was corroborated by one Muhamad Syazwa bin Abdul Rashid (PW7) who was with a friend at the same road and witnessed the victim getting on the appellant’s motorcycle. That was around 11 pm that night.

[4] The appellant continued his narrative by saying that they both stopped at the recreational park (as stated in the charge) and there they quarrelled again. Then he said he called ASP Mohd Nasir bin Jappiry (PW14) to inform him about the quarrel but according to PW14 it was more than that. The appellant told him that he assaulted the victim and that she was injured and PW14’s advice was, and this was also stated by the appellant in his evidence, that she be sent to the hospital. This he did after he went back to get his car, a Myvi with plate number WB2614C. They arrived at 12.30 am on 13/4/2015 and was seen by Dr. Tang Wei Chern (PW10) at the red zone of Mersing Hospital. According to PW10 the victim was without any vital signs when he examined her and at 1 am he confirmed her death.

[5] It was about that time too that Sergeant Saiful Izwan bin Sahar (PW13) received a call from the appellant who then met up with him at Restoren Al Hamid. He said the appellant wanted his company to go back to his apartment and told him he had assaulted a woman. At the apartment, PW13 waited outside whilst the appellant went in and then came back with a bundle which the appellant then threw into a rubbish bin. Afterwards they went back together to Hospital Mersing and they met PW10 who told him about the victim’s death. Thereafter, the appellant was arrested at the said Hospital.

[6] The post mortem on the victim was done by Dr. Rohayu binti Shahar Adnan (PW9) who testified, inter alia, that she was 6.2 months pregnant and there were altogether 47 injuries on the victim. The multiple blunt injuries were on her head, torso and limbs and there were also injuries on her neck consistent with neck compression. The cause of death according to PW9 was blunt force trauma to the head. The appellant, however, in his evidence denied hitting the victim on the head-that ‘he only’ hit and punched her on her back and slapped her once but never strangled her.

[7] However in cross-examination, he admitted hitting her many times but never with the intention to cause her any serious injuries. When she fell and fainted after hitting the side of the table, he revived her by wiping her face with water.

[8] At the recreational park, he said after he hit her and when he left to get the car, the victim was lying on her side and he admitted the victim was weak because he hit her (“Simah dalam keadaan lemah sebab dipukul oleh saya”) although right after that he said “Saya tidak setuju yang saya ada

pukul mangsa sehingga lemah di Taman Rekreasi". However, his final words in cross-examination was that he agreed that if he had not hit the victim, the victim would not have died. For the record, the appellant's evidence in re-examination consisted of two sentences as follows:

> *Saya tidak suka si mati datang ke rumah sebab rumah saya adalah tempat yang diwartakan sebagai Perumahan Polis. Ya saya tidak hendak orang nampak simati datang ke rumah saya.*

The appellant was the sole witness for his defence.

The High Court Judgment

[9] The learned High Court Judge identified the three ingredients to establish the charge against the appellant and they are:

> (i) that the deceased by the name of Nik Norzielawati Akmar binti Afandi (KPT No. 800703-03-5230) died on the 12.4.2015 between 11.00 pm till 12.30 am at Taman Rekreasi Hutan Bandar Bukit Cantik, Jalan Bukit Mersing Kechil in the district of Mersing, Johor Darul Takzim;
>
> (ii) that the deceased died from injuries caused; and
>
> (iii) that the accused had the intention of causing such bodily injury to the deceased and the bodily injury intended to be inflicted was sufficient in the ordinary course of nature to cause death.

[10] There was of course no issue that the first ingredient has been satisfactorily proven or that she died from the head injuries, that is the blunt force trauma, which according to PW9 resulted in an acute subdural haemorrhage.

[11] In respect of the 3rd ingredient, the learned High Court Judge found that the appellant had the motive to kill the victim. He was having an illicit affair with her for 2 years, she was pregnant and although no DNA profiling was done on the foetus, it could not be discounted that he was its father. Additionally the victim's mother, Nik Kamariah binti Mat Ali (PW6) testified that the appellant was 'highly jealous' of the victim and often beat her up. The learned High Court Judge also said the appellant had to find a way to get rid of the victim because their relationship had put his marriage in jeopardy. His Lordship added that the 47 injuries on the head and face of the victim were severe and were sufficient in the ordinary course of nature to cause death.

[12] The severity of the injuries, held the learned High Judge Court further does not support the contention that it was an ordinary spat between lovers. He therefore concluded that a prima facie case has been made out against the appellant and for the same reason was not persuaded by the defence that it was a mere lovers' quarrel. His Lordship also found that the conduct of the appellant in bringing the victim to the hospital for treatment as well as not evading arrest were not, as submitted by his counsel, evidence of no intention to inflict such serious injuries which in the ordinary course of nature to cause death. Therefore held His Lordship, the prosecution has proven its case against the appellant beyond reasonable doubt.

The appeal

[13] Before us, learned counsel for the appellant again reiterated the absence of intention to commit murder and submitted that the fact that no weapon was used shows the absence of such intention. He referred to the Singapore case of **Public Prosecutor v Visuvanathan** (1978) 1 MLJ 159 where the use of a knife coupled with the medical evidence on the fatal gaping stab wound led the Court to find that there was such an intention "... to cause some bodily injury to the victim of a kind which is sufficient in the ordinary cause of nature to cause death". The underlined words are from limb (c) of section 300 of the **Penal Code of Singapore** which is in pari materia with section 300(c) of our own **Penal Code**. The full section 300 reads:

> Section 300
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> **Except in the cases hereinafter excepted, culpable homicide is murder:-**
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> (a) if the act by which the death is caused is done with the intention of causing death;
>
> (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;
>
> (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**; 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 as aforesaid.

[14] He also submitted that the facts in this appeal are similar with that in **Public Prosecutor v Chia Teck Onn** (2015) 1 MLJ 519 where there too was a quarrel and the victim was stabbed in the process. The High Court Judge in this cited case found there was no evidence of mens rea as required under section 300 of the **Penal Code** and amended the charge to culpable homicide not amounting to murder, an offence punishable under section 304(a) of the **Penal Code**. With respect to learned counsel, the facts in these two cases are different. In the cited case the quarrel was between the respondent, PW5 and her sibling. The deceased was at the scene but was not involved in the quarrel. When the respondent came charging with the knife towards PW5, she ran towards the deceased and it was when the deceased pushed her aside that he was stabbed by the respondent. Obviously there was no intention to commit murder, for the stabbing was accidental. It is equally obvious that the facts in the cited case are as different as night and day from those in this appeal.

[15] As was rightly submitted by the learned Deputy Public Prosecutor based on this court's decisions in **Sainal Abidin bin Mading v Public Prosecutor** (1999) 4 MLJ 497, and **Nor Hasnizam bin Ab Latif v Public Prosecutor** (2002) 1 MLJ 154 intention is a matter of inference and that can be deduced from the nature of the wounds as held by Thomson CJ in **Tan Buck Tee** v **Public**

Prosecutor (1961) MLJ 176 at page 179 which was quoted in **Nor**'s case (supra).

[16] Now in the facts of this case there were 47 injuries inflicted by the appellant on the victim and he assaulted her not just at the apartment but at the recreational park as well. Although he did not use any weapon, just his bare hands, that does not absolve him of the guilt given the extensive wounds inflicted on a defenceless woman. His denial of strangling her was obviously a lie because of the strangulation marks on her neck. The fall in the apartment where the appellant alleged that the victim hit her head against the side of the table could not be the fatal injury because as his own evidence shows she was able to get up and walk out of the apartment on her own after that. The mere fact that he brought her to the hospital from the park is not proof of that he had no intention to cause her the injuries which led to her demise. That one charitable act does not in any way exonerate the appellant given the clear intention to murder the victim by the senseless beatings and raining blows upon blows on the vulnerable part of her body which was her head-all because he said he was angry and incensed by her refusal to follow his order not to go to his apartment. That reason, by the way, given the extensiveness and severity of the beatings not just on one part of her body, appears totally illogical. We must also mention that since there was clear admission by the appellant that he had beaten up the victim, although he said without intention to cause her death, the forensic evidence adduced at the trial is not crucial evidence for considerations in this appeal, for the said evidence merely confirmed, inter alia, the DNA of both appellant and victim on her panty which was recovered at the park and on the towel which was retrieved from the apartment.

[17] On the above considerations we were convinced that the charge against the appellant had been proven beyond reasonable doubt and therefore, the appellant's appeal lacked merit. Accordingly, the same was dismissed and the conviction and sentence imposed by the learned High Court Judge affirmed.

Date: 10 July 2018

RHODZARIAH BINTI BUJANG
Judge
Court of Appeal Malaysia
Putrajaya

Note: This copy of the Court's Grounds of Judgement is subject to editorial revision.

COUNSEL

For the Appellant: Messrs Chand, Jag & Associates

For the Respondent: Public Prosecutor

LEGISLATION REFERRED TO:

Penal Code, Sections 300, 300(c), 304(a)

JUDGMENTS REFERRED TO:

Nor Hasnizam bin Ab Latif v Public Prosecutor (2002) 1 MLJ 154

Public Prosecutor v Chia Teck Onn (2015) 1 MLJ 519

Public Prosecutor v Visuvanathan (1978) 1 MLJ 159

Sainal Abidin bin Mading v Public Prosecutor (1999) 4 MLJ 497

Tan Buck Tee v Public Prosecutor (1961) MLJ 176