CYRILE NAVARRO TAGAPAN

AND

PUBLIC PROSECUTOR

(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 14 of 2015)

Before: Mortimer P, Burrell and Seagroatt JJ A.
23rd May 2016

Headnote: appeal against conviction for murder. Application to withdraw the admissions in facts agreed at trial refused. Admissibility of statements made to pathologist when conducting medical examination considered. Properly admitted in particular circumstances of this case when such statements were made part of the defence case. Appeal refused.

Mr. Hj Mohamad Rozaiman bin Dato Haji Abdul Rahman (Messrs. Rozaiman Abdul Rahman Advocates and Solicitor) for appellant
DPP Aldila Hj Mohd Salleh and DPP Hjh Rozaiman Haji Abd Rahman for Respondent

Cases cited:

Public Prosecutor v Samer Klom Klom [1996] JCBD 24
Public Prosecutor v Wong Boon Hing [2001] BLR 95
Public Prosecutor v Yahya bin Mansor [1991] JCBD 171

Mortimer P.

On the 31 March 2015 the appellant pleaded not guilty to an offence of murder contrary to section 302 of the Penal Code but guilty to charges 2, 3 and 4. The 2nd charge was causing mischief by fire with intent to destroy a house contrary to section 436 of the Penal Code for which he was sentenced to life imprisonment; the 3rd charge was theft of property in a house contrary to section 380 of the code for which he was sentenced to 12 months imprisonment; and the 4th charge theft of a car contrary to section 379 of the code for which he was sentenced to 8 months imprisonment. All the sentences were to run concurrently.

On the 2 July 2015 after a trial before Steven Chong, Ag. C.J. and Hairol Arni Majid J the appellant was convicted of murder and was sentenced to death. He now appeals against that conviction.

The facts

The deceased was a Bruneian who lived alone. The appellant is a foreign worker from the Philippines. There was a homosexual relationship between the deceased and the appellant in which the appellant was paid for sexual services.

On the 1 August 2012 the appellant visited the deceased house by invitation and was offered money. During the appellant's visit the deceased received knife injuries from which he died. The appellant admitted that the injuries were caused by him but contended that they were caused in self defence, accidentally or during a sudden fight and struggle for a knife with which the deceased had come for him.

The appellant gave evidence that he told the deceased that he was married and that the homosexual relationship had to end whereupon the deceased became angry, shouted "no, no, no", threw some hard object which hit him in the face and then came for him with a knife. The appellant admits that in the course of the struggle for the knife he stabbed the deceased 3 times in the right shoulder near the neck and this subdued him. These injuries were inflicted either in self defence, accidentally or in the course of a sudden fight. The deceased fell down and was trying to stand up so the appellant removed his shoelaces and tied his right wrist to his right ankle and his left wrist to his left ankle. He later felt pity for him so untied him.

The appellant then went up to the master bedroom found $50, a laptop and a mobile phone which he stole. He washed himself and wearing the deceased's slippers started to mop the floor. He removed his bloodied T-shirt wrapped the knife in the T-shirt and a newspaper and put them in a bag. He heard the deceased say, *"Cyrile we will not break the relationship"* but ignored him. Fearing that he heard someone coming he did not complete the cleaning up so he drove away in the deceased's car. He put the shirt and a knife into a large garbage bin and later he threw the deceased's wallet and bag together with his own shoes into a huge drainage canal before returning home. These items were never recovered.

On the following day 2 August 2012 the appellant bought 4 or 5 gallons of kerosene. On the 3 August 2012 having thought about the evidence against him in the deceased's house he returned there. He went inside again wearing the deceased's slippers and saw that the deceased was dead. He poured the kerosene about in the house and set it alight then left the house but returned shortly afterwards to check that it was burning. Later on the same day he took the deceased's slippers, a bag and the key of the car and threw them all into a river.

The appellant insisted throughout that he accidentally stabbed the deceased on his right shoulder near his neck before he managed to get the knife away from the deceased, that after the deceased had been injured he was trying to stand up and that is why the appellant tied him so that he was disabled from attacking him. When he left the house the deceased was still alive.

It was not until 9 August 2012 that the body of the deceased was discovered by his family.

The Pathologist's Evidence

The scene and the body were examined by the pathologist, Dr Colombage. The body was on its back, bleeding had been profuse, there were blood stains on a nearby pillar, a nearby refrigerator door and a fallen screen.

The body had 17 injuries. 15 of these were caused by a knife or similar object. Death had been caused by 3 deep horizontal injuries to the right side of the deceased's neck. These injuries severed the underlying muscles, veins and arteries including the right carotid artery, the trachea and the oesophagus. Death would have ensued within a few minutes of these injuries. The victim would not have been able to either stand or speak. These 3 injuries were horizontal and unlikely to have been caused accidentally in a struggle. These injuries and other 12 cutting injuries to the right shoulder and neck appeared to be systematic.

Additionally there was a deep cut to the palm of the left hand – a typical defensive injury and also a deep cut on the lower lip.

Also the jaw had been fractured by a heavy blow with a blunt instrument and a fracture of the skull caused by a blow to the back of the head which could have been a fall.

When found the left ankle of the body was tied to the left wrist with a shoelace. The right wrist also was tied with a shoelace but the ends were free.

There were no abrasions found and the pathologist said these injuries were unlikely to have been caused a struggle. He also expressed the view that the deceased would not have been tied up after the injuries as he would have died by the time the restraint was applied.

As for the appellant he had an injury to his forehead or face. This was supported by independent evidence. He said this had been caused by an object thrown at him by the deceased before any physical conflict. He also had a number of healed minor injuries to his face which the pathologist thought were possibly self-inflicted. These came to light when the pathologist examined the appellant. As part of his examination he took an account from the appellant of the events leading to the death which was consistent with his statements to the police. The pathologist's findings on examining the appellant together with the appellant's account of these events was put in evidence by the prosecution. To this we will return.

Summary of evidence

The evidence central to the judges' findings was the pathologist's examination of the scene and the body followed by his expert conclusions; his medical examination of the appellant; the statements given by the appellant to the police and to the pathologist; and the appellant's evidence.

Much of this we have already summarised but importantly after the injuries had been caused the appellant did not seek medical or other help. He made considerable efforts to conceal or destroy possible evidence by cleaning up the scene, by throwing away the knife, bloodstained clothing and shoes, purchasing kerosene and then making serious attempts to burn the house and everything in it.

The appellant admitted causing the injuries but in the circumstances he described. He had no defensive injuries. There was a stark contrast between the deceased's injuries and those of the appellant.

Significant parts of the appellant's account could not be accepted as either accurate or true in the face of the pathologist's evidence. In particular because from the 3 deep injuries to the right side of the neck which severed muscles, arteries, veins, the trachea and the oesophagus, the deceased would have died within a few minutes and would be unable to talk once the windpipe was severed. Also, the injuries appeared to be caused in a systematic pattern with each of the 3 deep injuries being horizontal and unlikely to be caused accidentally or in a struggle for the knife. Examples are:

1. That he tied the deceased wrists to his ankles after the injuries had been caused to protect himself because the deceased was trying to stand up.

2. That the deceased was alive and speaking when he left the house.

3. That the 3 deep injuries were caused either accidentally or in a struggle for the knife.

Under section 105 of the Evidence Act Cap.108 if one of the exceptions under section 302 of the Penal Code is raised as a defence to murder under section 300 by an accused person the evidential burden to establish that defence is upon the accused. See *Public Prosecutor v Samer Klom Klom [1996] JCBD 24.*

As we have indicated the appellant's defences to murder were those provided for in the exceptions to section 300 of the Penal Code of provocation, self defence and sudden fight. As can be seen from their judgment the judges considered all the evidence before them with great care. This evidence included the 6 statements the appellant had made to the police, the account of the events leading to the death made to the pathologist by the appellant and the appellant's evidence at trial.

On this evidence it was clearly open to the judges to find as they did that none of these defences were made out and that murder was proved. On this basis they convicted the appellant and it is not contended that on the evidence they had before them that they were in error.

The Appeal

In this appeal Mr Rozaiman, who appears for the appellant but did not represent him at trial, contends that the conviction for murder should be overturned on 2 grounds;

1. That the appellant should be given leave to withdraw the agreed facts relating to the statements made to the police and therefore the 6 statements ought not to have been considered by the judges as agreed.

2. That the pathologist's evidence of his medical examination of the appellant and the account given to him by the appellant of events leading to the death was inadmissible and ought not to have been given in evidence for the judges' consideration.

The conviction would be undermined if either of these grounds is made out.

The First Ground

It is open to a court at any stage of proceedings to allow admissions in agreed facts to be withdrawn, see section 117 (C) (4) of the Criminal Procedure Code which provides:

> *An admission under this section may with the leave of the Court be withdrawn in the proceedings for the purpose of which it is made or any subsequent criminal proceedings relating to the same matter.*

Mr Rosaiman contends that the procedural requirements of admitting the statements in evidence were not complied with.

First, this was because the statements to the police were not made and recorded in a language of the appellant's choice. See *Public Prosecutor v Wong Boon Hing [2001] BLR 95.*

Secondly, because the last 4 statements were made after the 16 August 2012 when the appellant had already been charged with the offences and brought before the court. *See Public Prosecutor v Yahya bin Mansor [1991] JCBD 171*.

Thirdly because counsel representing the appellant at trial is said to have been unsure whether to admit that the statements were made voluntarily or not. To support this last contention he notes that on page 27 of the Notes of Proceedings counsel addressed the court as follows '*I seek clarification. I take it the prosecution has agreed that the defendant made 6 police statements and the statements have been tendered.'* Clarification was given and accepted by counsel. Later counsel for the appellant put to a police officer that he had punched and slapped the appellant. The purpose of this cross examination is unclear but no suggestion was made that the statements were other than accurate and voluntary.

These submissions can be dealt with briefly. There can be no doubt that if a written statement signed by an accused person is made in other than a language which he understands and which is not his choice must be excluded as unreliable, not voluntary and inadmissible.

However, an accused person will be the first to know whether a statement is in a language he does not understand and is not of his choice. The statement would be challenged at trial and if any agreement had been made in error applications would be made to withdraw.

If this court is to give leave to withdraw admissions on this basis there must be some indication or evidence of the problem. There is none. Indeed on the contrary the appellant was anxious to endorse and affirm what he had said in the statements no question of misunderstanding or misinterpretation was raised at any stage.

Relevantly the appellant gave the following evidence in chief when being examined by his counsel:

Q. You were examined by Dr. Colombage. You told him what had happened?
A. Yes.
Q. You gave him the history?

A. Yes.
Q. In your other statements, for example on 14.8.12 and 27. 8.12., 28.8.12, 1.9.12. and 3.9.12, you gave your evidence of sudden fight and you were trying to defend yourself, the same consistent story?
A. Yes.
Q. You gave the same version of the sudden fight and self defence to Dr Colombage?
A. Yes.
Actually what happened on the night of 1.8.12.?
A. Yes
Q. It is the truth of what happened?
A. Yes.

Mr Rozaiman's 2nd point is sound. Further interviewing an accused person who has been charged and brought before the court on the same subject matter ought not to be undertaken. If voluntary and relevant such statements are admissible but once charged and in custody, or simply charged with an offence, an accused person is under pressures. If such statements are challenged care should be taken before they are admitted. After all, a person should not be charged until there is evidence and once there is evidence he should be charged. Although further investigations will follow this ought not to include further questioning of the accused on the same subject matter unless some genuine clarification is necessary. Of course, an accused person may always be interviewed about other matters.

This said, when further interviewing has been undertaken and an accused wishes to adopt and rely upon the contents of a statement as in this case to demonstrate consistency he may do so. In the circumstances this 2nd point does not support the application to withdraw admissions when the statements were relied upon as part of the appellant's case at trial

As to the 3rd point that counsel below was unsure as to whether to admit whether the statements made to the police were voluntary or not, it is difficult to understand the purpose of the cross examination suggesting that the police witness had punched or slapped the appellant but counsel never went further and suggested that any statement was other than voluntarily made in consequence. The answers came to nothing.

There is no basis upon which we could properly give leave for the admissions made in the agreed facts to be withdrawn and the application is refused.

The Second Ground – The pathologist's examination of the appellant

There is considerably more substance in this ground of appeal although for different reasons from those advanced. It is suggested that the pathologist's evidence of his examination of the appellant ought not have been admitted as it was outside the Ministry of Health guidelines. Whether or not this is so may be of some relevance but it is not indicative of the admissibility of this evidence.

In isolation the pathologist's evidence of the medical condition of this appellant is on the face of it both relevant and admissible. After all he is an independent expert. However, the statements made by the accused to the pathologist about the events leading to the deceased's death are normally inadmissible. There was no question of the appellant being given any warning that he was not obliged to say anything or answer and the

pathologist must be regarded in the circumstances as being a person in authority. A person being examined in the circumstances may have felt under an obligation to reply.

In normal circumstances the evidence by the pathologist of what the appellant said to him ought not to have been given and ought to have been excluded. However, such statements may always be introduced as relevant and admissible by an accused person who wishes to rely upon the statement for example for consistency as in this case. The evidence therefore can be put before the court either by agreement with the prosecution or through cross examination.

As we have indicated not only the statements to the police but also the account given to the pathologist were integral parts of the appellant's defence. Through counsel he wished to demonstrate that not only his accounts to the police had been consistent but also his account of events to the pathologist. At least in this endeavour he was successful because the judges accepted that all these accounts were consistent and took that into account in their consideration of the evidence.

Whether the pathologist's evidence was introduced in the prosecution case by agreement or not in the particular circumstances of this case it cannot be said that the evidence ought to have been excluded and not considered by the judges. There was no objection to it by the appellant's counsel for the obvious reason that he wanted it in as part of his case.

Conclusion

For these reasons no grounds have been established under Section 427 of the Criminal Procedure Code on which we could allow this appeal. The appeal therefore must be dismissed.

Order

This appeal against the conviction of murder is dismissed.

Mortimer, P.

Burrell, J.A. **Seagroatt, J.A**