10. CRIMINAL LAW

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Elements of the offence: *Actus reus*

Causation

10.1 The case of *Ng Keng Yong v PP* [2004] 4 SLR 89 involved a collision on the night of 3 January 2003 between a Republic of Singapore Navy ("RSN") ship, *RSS Courageous* ("*Courageous*"), which was at the time on a regular patrol of Singapore waters, and a merchant vessel, *ANL Indonesia* ("*ANL*"), off Pedra Branca. The tragic sequence of events showed that when the *Courageous* reached the end of her patrol area, she made a U-turn which led her to be in close proximity to the *ANL* which was travelling in the opposite direction. The *Courageous* bridge team mistakenly reported that the *ANL* was on her starboard side when it was to her port side. Subsequent alterations to the course of the *Courageous* to port brought the two vessels even closer together. This led the *ANL* to respond by altering her course to starboard and sounding a whistle blast to alert the *Courageous*. Unfortunately, the *Courageous* continued to make further alterations to port which resulted in the collision of the two vessels and the death of four RSN servicewomen.

10.2 The first appellant was the Officer-of-the-Watch ("OOW") of the *Courageous* who was responsible for the safe navigation of the ship. The second appellant was a trainee OOW who had control of the steering of the vessel at the time. Both appellants were convicted by the lower court for causing the deaths by a negligent act not amounting to culpable homicide under s 304A of the Penal Code (Cap 224, 1985 Rev Ed). One of the issues raised at the appeal was whether the appellants were indeed to blame for the collision that occurred. It was argued that the *ANL* had been negligent as well in breaching r 8(*b*) of the Merchant Shipping (Prevention of Collisions at Sea) Regulations (Cap 179, Rg 10, 1990 Rev Ed) ("the Collision Regulations") (made under s 100(2)(*h*) of the Merchant Shipping Act (Cap 179, 1996 Rev Ed)) by making two small alterations by autopilot instead of a bold alteration by manual steering. Hence, this rendered the negligent alteration to port of the *Courageous* in breach of r 14(*a*) of the Collision Regulations no longer

the "proximate and efficient" cause of the collision. In support of this argument, the appellants cited the case of *Lee Kim Leng v R* [1964] MLJ 285 where FA Chua J said (at 286):

> [In order to impose criminal liability under s 304A of the Penal Code,] it is necessary that the death should have been the direct result of a rash [or] negligent act of the accused and that the act must have been the proximate and efficient cause without the intervention of another's negligence.

10.3 The learned Chief Justice rejected the appellants' interpretation of *Lee Kim Leng v R* that "the chain of causation is necessarily broken whenever another party's negligence in fact intervenes, irrespective of the parties' relative blameworthiness. … [S]uch an approach [is] so repugnant to common sense that it had to be rejected" (at [65]). The case of *Lee Kim Leng v R* was to be interpreted such that (at [66]):

> [C]riminal liability under s 304A should attach to the person(s) whose negligence contributed substantially, and not merely peripherally, to the result. … The particulars of the factual matrix, and the event to which the third party's negligence contributed to the deaths, have to be assessed as well. The court must ultimately direct its mind to whether the negligence of the accused contributed significantly or substantially to the result.

10.4 Thus, although the vessels would not have collided if the ANL had not been negligent (at [71]), the question was "whether the *ANL*'s contributory negligence had such causative potency that the appellant's initial negligence could not be said to have contributed significantly to the collision" (at [67]).

10.5 On the facts of this case, it was held that once the *Courageous* had made the U-turn such that it was travelling against the flow of traffic, it was incumbent on the appellants to take the necessary extra precautions to avoid any potential risk of collision with other vessels. Unfortunately, the appellants made a series of alterations to their course in breach of the Collision Regulations which led to the *ANL* to respond with her own manoeuvres. The appellants' negligence was held to be a substantial cause of the collision (at [71]).

10.6 There has therefore been a shift towards a more sophisticated analysis of who should bear ultimate responsibility for the harm inflicted. Neither the appellants' argument that it is the person who committed the last act of negligence nor a simplistic approach that it is the original wrongdoer who should be liable for all the harm that results is satisfactory. The use of relative blameworthiness in ascertaining the causation issue puts the focus

rightly on moral considerations (see also Stanley Yeo, "Blamable Causation" (2000) 24 Crim LJ 144).

10.7 However, care must be taken in applying the approach of relative blameworthiness. There should be a distinction drawn for purposes of causation between crimes of intention as compared to crimes of negligence. It should, on principle, be easier to impose liability where the result is intended. Reference may be made to the Australian case of *Royall v The Queen* (1991) 172 CLR 378 at 400 where Brennan J said:

> [In cases where the accused intends his conduct to cause the death of his victim] foresight is subsumed in the intent and, as the ultimate result of the accused's conduct – the death of the person who took that step – is intended, it is immaterial that the victim's attempt at self-preservation is objectively unreasonable … having regard to the nature of the accused's conduct and the fear it is likely to induce. As McGarvie and O'Bryan JJ said in *Reg v Demirian* [1989] VR 97 at 113: "If a person creates a situation intended to kill and it does kill it is no answer to a charge of murder that it caused death at a time or in a way that was to some extent unexpected."

10.8 Two issues could potentially arise in future cases. The first issue is: How can a case be decided if the parties involved were equally blameworthy? Can one dispute liability on the basis that the other had made an equally "significant or substantial" contribution to the result? Such cases will be rare but they are not unknown. The second issue is whether there is a difference between the terms "significant" and "substantial". It can be argued that the term "substantial cause" sets a higher threshold than "significant cause" and if so, it may be preferable to opt for the former (see Stanley Yeo, *supra* para 10.6).

Defences

Unsoundness of mind

10.9 The case of *PP v Boon Yu Kai John* [2004] 3 SLR 226 was one in which the psychiatric condition of the accused was relevant to the case. The case involved the acquittal of the respondent by the trial court of an offence under s 45(*b*) of the Telecommunications Act (Cap 323, 2000 Rev Ed) for transmitting a message that he knew to be false. The facts showed that the respondent had called the police and said that there was a man who wanted to murder one Mdm Tan, the respondent's mother.

10.10 In order to be convicted of the offence, three elements had to be proved by the Prosecution:

(a) that the respondent did transmit or cause the message to be transmitted;

(b) that the message was false; and

(c) that the respondent knew the message to be false (at [12]).

Based on the evidence presented by the psychiatrist called by the Prosecution that the respondent was suffering from a delusional disorder at the time of the offence that he was being persecuted and harmed, the trial judge found that the third element was not proven since he did not know that the information was false. Consequently, the trial judge granted the respondent a discharge amounting to an acquittal.

10.11 The appellant conceded that the respondent lacked the requisite mental element for the offence but one of the issues contended at the appeal was that the absence of the requisite mental element was due to the respondent's unsoundness of mind and not because he genuinely believed the truth of the message. Hence, the procedure stipulated in ss 314 and 315 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("CPC") should apply and the respondent subject to involuntary confinement. Yong Pung How CJ agreed with this argument: "He knew the nature of his act and it was his unsoundness of mind that eradicated the presence of the requisite *mens rea* on his part" (at [42]).

10.12 Two comments are made about this case. First, the concession by the Prosecution that the respondent was of unsound mind was based on the evidence of the prosecution psychiatrist that (at [8]):

> Although he knew the nature of his act, he did not believe that it was wrong *or* against the law to notify the police as he firmly believe[d] that serious harm may befall his mother. [emphasis added]

Yong CJ also said (at [42]):

> [T]he respondent should be acquitted on the ground of his mental disorder as he did transmit a false message to the police, which would have constituted an offence but for the fact that he was found to be by reason of unsoundness of mind, incapable of knowing that his act was wrong *or* contrary to law. [emphasis added]

10.13 It may therefore be argued on the basis of these statements that the troublesome phrase "either wrong or contrary to law" in s 84 of the Penal Code should be interpreted disjunctively. This is contrary to the suggestion made in the case of *PP v Rozman bin Jusoh* [1995] 3 SLR 317 that the phrase should be read conjunctively, that is, an accused will not succeed on the unsoundness of mind defence if he knows the act is against the law even if he is unable to discern right from wrong. However, since neither of these two cases have thoroughly considered the arguments for and against either approach, it cannot be said that the law is by any means settled in this area.

10.14 Second, it should be noted that the respondent in *PP v Boon Yu Kai John* did not seek to raise the defence of unsoundness of mind at trial. As such, is it proper for an acquittal to be granted on the basis of a defence that was not raised – and for the procedures laid down in ss 314 and 315 of the CPC to apply? This will in effect allow the Prosecution to argue the defence of unsoundness of mind in future cases.

10.15 The argument that the Prosecution should be allowed to do so comes from the need to protect the public. What is important is that once the court is convinced that the elements of unsoundness of mind are proved, the procedures in ss 314 and 315 of the CPC should apply such that the accused person can be detained in a mental institution – for his own protection and the protection of the general public. Cases which have followed this approach can be found in Malaysia, see *Pendakwa Raya v Zainal Abidin Bin Mohd Zaid* [1993] 1 CLJ 147; *PP v Nageswari* [1994] 3 MLJ 463 and *PP v Ismail bin Ibrahim* [1998] 3 MLJ 243.

10.16 On the other hand, since our legal system is based on an adversarial approach, it is fundamentally at odds to allow the Prosecution to argue a defence in favour of the defendant. Furthermore, what standard of proof will be required to be shown by the Prosecution? The customary "beyond a reasonable doubt" – which is far higher than what is expected if the defence was alleged by the defendant – or on a "balance of probabilities" – which is not the standard normally required of the Prosecution?

10.17 Another argument against allowing the Prosecution to argue unsoundness of mind is that this should be part of the autonomy accorded to the defendant in how he wishes to defend himself (see *R v Dickie* [1984] 3 All ER 173 at 179). It is doubted if there would be any reason to interfere with the case if the respondent had – despite his unsoundness of mind – chosen to plead guilty and suffer the normal penalties imposed for the offence (see eg *R v Sullivan* [1983] 2 All ER 673 where the defendant who was suffering from

an epileptic seizure at the time of the offence changed his plea to guilty when the trial judge ruled that the defence amounted to one of insanity instead of automatism. No criticism of the plea was expressed by the House of Lords. But for a contrary view, see the Malaysian case of *PP v Ismail bin Ibrahim* (*supra* para 10.15) at 258: "To accept a plea of guilty by a person who could have succeeded on a plea of insanity is wrong in law as the plea will not amount to an offence due to absence of mens rea"). The possible reasons for not wishing to plead unsoundness of mind include the obvious wish not be confined to a mental hospital for an indefinite period of time and not to be stigmatised by society as being insane.

10.18 In the Malaysian case of *PP v Misbah bin Saat* [1997] 3 MLJ 495, it was held (at 511 and 514) that:

> Section 347 [of the Malaysian Criminal Procedure Code (which is the same as s 314 of the Singapore Criminal Procedure Code)] only applies if the defence of insanity is raised by the accused, and the court finds that the accused was insane at the time of the commission of the offence. In such cases, the accused may then be acquitted on the grounds of insanity. The wording of s 347 bears close resemblance to the wording employed in s 84 of the [Penal] Code. Clearly, therefore, s 347 was meant to apply only in cases when the defence of insanity had successfully been raised by the accused.
>
> … Section 347 does not impose an obligation on the court to conduct a full trial whenever the court is aware of the previous mental condition of the accused. The question of insanity or unsoundness of mind of a person fit to stand trial can only arise if the defence of insanity is raised by the accused person himself.

Furthermore (at 513):

> The mere fact that the court has cognizance of a medical report to indicate that at the time of the commission of the offence the accused was of unsound mind is irrelevant at the stage when the accused is certified fit to stand trial and he chooses to plead guilty. In any case, for purposes of establishing insanity as a defence, the medical report by itself is insufficient. It should be emphasized that for purposes of s 84 of the [Penal] Code, what needs to be established is legal insanity and not mere medical insanity.

10.19 In the case of *R v Dickie* (*supra* para 10.17), the English Court of Appeal also found no precedent for allowing the Prosecution to raise the issue of insanity if the Defence did not do so. It was only in "exceptional and very rare" circumstances that a judge may of his own volition raise the issue

of insanity. If he were to do so, sufficient opportunity must be given to the Defence and the Prosecution to call such evidence as they think necessary.

Diminished responsibility

10.20 Three interesting developments can be found in the cases decided in 2004 relating to the scope of special exceptions to murder. *Zailani bin Ahmad v PP* [2005] 1 SLR 356, which deals with diminished responsibility, is dealt with in this section, while *PP v Sundarti Supriyanto* [2004] 4 SLR 622 and *Tan Chee Wee v PP* [2004] 1 SLR 479, which concern provocation and sudden fight respectively, are discussed below.

10.21 In *Zailani bin Ahmad v PP*, the appellant was convicted of committing murder in furtherance of the common intention of himself and one Rachel. The appellant's main defence was that he was suffering from diminished responsibility at the time of the offence. It was argued at the appeal that the trial judge was wrong not to have accepted the evidence of the defence psychiatrist that he was suffering from acute intoxication with hypnotics to such an extent that his mental responsibility was substantially impaired.

10.22 The Court of Appeal noted that there were three limbs that the appellant had to establish in order to show that he was suffering from diminished responsibility at the time of the offence (at [48]):

> (a) The appellant must have been suffering from an abnormality of mind;
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> (b) Such abnormality of mind must have:
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> (i) arisen from a condition of arrested or retarded development of mind; or
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> (ii) arisen from any inherent causes; or
>
> (iii) been induced by disease or injury; and
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> (c) Such abnormality of mind as in (b)(i) to (b)(iii) must have substantially impaired the appellant's mental responsibility for his acts and omissions in causing the death or being a party to causing the death.

10.23 In this particular case, although there was agreement between the prosecution and defence psychiatrists that the appellant had acute intoxication with hypnotics at the time of the offence, the prosecution psychiatrist opined that there was no abnormal behaviour by the appellant

and no signs of psychiatric illnesses, disorder or disease. The defence psychiatrist on the other hand opined that the appellant was labouring under a paradoxical stimulant effect at the time of the offence, making him ultra-susceptible to aggressive behaviour (at [57]). On the basis of the actions by the appellant during the time of the murder (he was able to decide to rob the deceased, to choose which drawers to steal from, to use keys he found to try to unlock them, and return to the task of trying to open the drawers after disarming the deceased), the trial judge held that there was no evidence that the appellant was suffering from a paradoxical stimulant effect at the time of the offence. This finding was upheld by the Court of Appeal.

10.24 The Court of Appeal remarked that there was "hardly any explanation or submission as to the possible cause of the appellant's purported abnormality of mind" (at [59]) as required under limb (b) of the defence of diminished responsibility. This was said to be understandable "because the acute intoxication the appellant was labouring under was *self-induced*" [emphasis in original] (*ibid*). It was further explained that (at [61]):

> [S]ince the appellant's acute intoxication was a direct result of his *own* overdose of Dima tablets and his drug and alcohol consumption, such an abnormality of mind could not have been a result of one of the specified causes in the defence of diminished responsibility. [emphasis in original]

10.25 As for limb (c) of the defence of diminished responsibility, the Court of Appeal upheld the trial judge's finding that there was no substantial impairment of the appellant's mental responsibility at the time of the offence. His actions showed that he was in full control of his faculties at the time.

10.26 What is interesting for our purposes is something which was not clearly explained by the Court of Appeal in this case: Why is it that self-induced intoxication cannot produce an abnormality of mind which comes within one of the specified causes in the defence of diminished responsibility? The most likely cause is that of "induced by disease or injury", so the question can be better phrased as: Why is it that self-induced intoxication cannot produce an abnormality of mind which is induced by disease or injury?

10.27 The Court of Appeal in this case referred to its own previous decision in *Tengku Jonaris Badlishah v PP* [1999] 2 SLR 260 but no decision on the point was in fact made in the latter. It was held in the latter case (at [62]) that:

> Dr Tsoi's [the defence psychiatrist's] evidence was that cannabis intoxication could not be regarded as a disease in the appellant's case. It was thus clear to us … that even if the appellant was suffering from an abnormality of mind due to cannabis intoxication, such a state of mind was not induced by disease. … [T]here was also evidence which indicated that even long-term heavy cannabis consumption would not cause any intellectual or neurological damage … Thus, we were of the view that it had not been proved on the balance of probabilities that the appellant's cannabis consumption resulted in any harm or detrimental effects to his brain to start with. There was therefore no question of the appellant suffering from any injury due to his consumption of cannabis which gave rise to an abnormality of mind. As such, it was unnecessary for us to decide whether injury resulting from self-induced cannabis intoxication and the transient effects of drugs on the human brain would constitute 'injury' for the purposes of Exception 7 [to s 300 of the Penal Code].

10.28 For an explanation as to why abnormality of mind arising from self-induced intoxication does not come within the meaning of "induced by disease or injury", one will have to turn to the High Court decision of *PP v Tengku Jonaris Badlishah* [1998] SGHC 401. It was accepted there in that case that cannabis intoxication could be considered a "disease" when the sustained intoxication had damaged the brain due to long-standing abuse or where the consumption of the alcohol or drugs had become involuntary (at [20.1] and [20.7]). This part of the reasoning follows the English decision of *R v Tandy* (1938) 87 Cr App R 45.

10.29 It is the analysis whether self-induced intoxication can amount to "injury" for the purposes of the diminished responsibility defence that is interesting. The High Court in *PP v Tengku Jonaris Badlishah* held that it did not on the basis that s 44 of the Penal Code defined the word "injury" as harm "illegally caused" and (at [20.4]):

> Where therefore the injury is voluntarily inflicted on oneself, s 44 had no application to *Exception 7* [to s 300 of the Penal Code] – *Volenti non fit injuria* (that to which a man consents cannot be considered an injury).

10.30 A fundamental flaw in this reasoning is the assumption that the word "injury" in Exception 7 to s 300 of the Penal Code (the defence of diminished responsibility) is intended to have the same meaning as s 44 of the Penal Code. This cannot be so considering that the defence of diminished responsibility is a relatively new addition to the Penal Code, having been enacted in 1961 following the words of the English Homicide Act 1957 (c 11). As such, the meaning of the word "injury" for the purposes of diminished responsibility must be separately construed and the mere fact

that the abnormality of mind was brought about through self-induced intoxication should not automatically disqualify the defence from operating.

10.31 The word "injury" should be interpreted in the light of its context. The accepted causes of abnormality of mind – arrested or retarded development of the mind, inherent cause, and disease – all concern conditions which are more than a temporary malfunction of the body. The proper interpretation of the word "injury" thus requires a condition which is more than transitory in nature (*R v Di Duca* (1959) 43 Cr App R 167; *R v De Souza* (1997) 41 NSWLR 656). This was a point that the learned High Court judge in *PP v Tengku Jonaris Badlishah* (*supra* para 10.28) agreed with (at [20.5]):

> [I]t is very doubtful whether the transient effect of drink even if it does produce a toxic or chemical effect on the brain can amount to an 'injury' within s 2(1) of the Homicide Act 1957 after which *Exception 7* [of the Penal Code] is modelled and similarly under *Exception 7* [of the Penal Code].

Provocation

10.32 The case of *PP v Sundarti Supriyanto* (*supra* para 10.20) involved a 23-year-old Indonesian maid who was charged with the murder of her employer. The accused gave evidence of a history of humiliation, and verbal and physical abuse inflicted on her by the employer for about one to two months prior to the incident. According to her, the final straw was the employer scolding her and using her fingers to scratch the accused's face. This erupted into a fight between the two of them which eventually led to the employer being killed. The accused then bought petrol and set the premises on fire.

10.33 Two main difficulties with the provocation defence raised were that the acts of provocation (such as being verbally abused and being given inadequate food) were disputed, and that there was arguably a cooling-off period between the alleged instances of abuse and the killing. It was thus argued by the Prosecution (at [103]) that:

> No matter how grave the provocation is, if it did not take place contemporaneously or shortly before the killing, the exception would not apply.

It was also argued that the requirement of "sudden provocation" in Exception 1 to s 300 of the Penal Code related to the suddenness of the provocation rather than to the loss of self-control (at [109]).

10.34 The learned judge appeared to agree with these submissions to some extent (at [155]):

> I agreed [with the Prosecution], in so far as the Defence sought to adduce the entire period of abuse prior to [the date of the killing] as going towards the acts of provocation, that these acts of abuse were too remote in time from the killing to constitute a "sudden" provocation. However, I found that these acts of abuse were still relevant to the question of whether the provocation that was offered was "grave" enough.

10.35 This requirement of "grave" provocation was found to be proved by looking at the totality of the acts of abuse rather than individually (at [156]–[157]):

> [T]hese many separate events [of abuse] were actually closely linked to each other, as they presented an overall picture of an abusive and poor employer-employee relationship. This was extremely relevant to establishing the accused's "mental background" at the time of the killing. …
>
> … A mild scolding or a nagging from the deceased on one day would not be considered a grave provocation. However, a series of nagging, scolding, insults, humiliation, physical abuse and lack of food over a period of time, culminating in a quick succession of abuse on [the date of the killing], would be sufficiently grave to provoke a reasonable person in the accused's position.

The learned judge further explained (at [161]):

> The question to be asked then was whether a reasonable maid in the position of the accused, that is a maid with this sort of "mental background", would have been so provoked by the acts of the deceased at the material time. … I found that the element of a "grave" provocation was met.

10.36 As for the requirement of "suddenness", the learned judge found that there was no cooling-off period between the abuse of the accused and the killing. There was no sufficient break in the fight between the two that put an end to the provocation (at [162]–[165]).

10.37 The learned judge accordingly found the exception of provocation proved and reduced the charge of murder to culpable homicide not amounting to murder.

10.38 Three comments may be made. First, to the extent that this decision clearly accepts the concept of "cumulative provocation", it is to be welcomed.

This concept had been accepted by cases decided under the Indian and Malayan Penal Codes long before the English courts were able to (*Khogayi v Emperor* (1879) ILR 2 Mad 122; *Boya Mujigadu v R* (1881) ILR 3 Mad 33; *Mat Sawi bin Bahodin v PP* [1958] MLJ 189; *PP v Lasakke* [1964] MLJ 56; *Ikau Anak Mail v PP* [1973] 2 MLJ 153). This approach recognises that different persons respond differently to provocation, including some who may let it fester and play in their minds until a later – perhaps trivial – act of provocation serves as a triggering point.

10.39 Second, the requirement of showing "sudden" as well as "grave" provocation as distinct elements for the defence in Exception 1 to s 300 of the Penal Code, while correct in terms of a literal interpretation, is perhaps too limiting. The requirement that the provocation must be something unexpected on the part of the accused which sparks a fatal response is already embodied in the phrase "whilst deprived of the power of self-control" and the first proviso to the defence:

> *Exception* 1.—Culpable homicide is not murder if the offender whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation …
>
> The above exception is subject to the following provisos:
>
> > (*a*) that the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person …

10.40 It is therefore submitted that a better interpretation of the phrase "grave and sudden provocation" is a holistic one in which the court has to determine if an ordinary person in the position of the accused would have been so provoked by the acts of the deceased. The analysis should be of the response to be expected and not whether the provocation was in fact "sudden". As made clear by the learned judge, an analysis of the "suddenness" of provocation is of little importance since previous acts of provocation can be considered as setting the "mental background" of the accused as to how these acts of provocation are viewed by the accused.

10.41 The third comment relates to the objective test of whether a hypothetical person in the accused's position would be so provoked. The use of the phrase "ordinary person" should be used instead of "reasonable person". The former is the one that is preferred in modern usage, in recognition that the word "reasonable" may set the standard required of the defence of provocation too high in that a reasonable person would not react

so unreasonably as to kill in the face of provocation. In *PP v Kwan Cin Cheng* [1998] 2 SLR 345 at [65] it was said:

> [T]he expression 'reasonable man', though convenient, is somewhat misleading. … The objective test demands only that the accused should have exercised the same degree of self-control as an ordinary person. It does not require that his act of killing must be somehow capable of being viewed as 'reasonable'. In applying the test, care must be taken not to peg the standard of self-control and the degree of provocation required at an unrealistically high level.

10.42 It is clear from previous local case law that attributes of the accused may be used to temper the application of the "ordinary person" test when it comes to assessing the gravity of the provocation, but only age, sex and (arguably) ethnicity of the accused can be imputed to the "ordinary person" in assessing the level of self-control to be expected in the situation (*PP v Kwan Cin Cheng* at [62]; *Lim Chin Chong v PP* [1998] 2 SLR 794 at [29]; *Lau Lee Peng v PP* [2000] 2 SLR 628 at [29]; and Chan Wing Cheong, "The Present and Future of Provocation as a Defence to Murder in Singapore" [2001] SJLS 453 at 461–463).

10.43 The emphasis on there being a "grave" provocation may mislead readers into missing the important distinction between the purposes for which the attributes of the accused may be imputed to the "ordinary person". Even if the history of abuse and humiliation is sufficiently "grave" provocation to an ordinary person in the position of the accused, such provocation must in addition be shown to be sufficient to cause an ordinary person to lose his self-control. The occupation of the accused as a domestic maid in the employ of the deceased who had suffered abuse by her is not relevant to this part of the objective test.

10.44 The approach of the court in *PP v Sundarti Supriyanto* (*supra* para 10.20) would therefore have been clearer if it had posed the following questions separately in determining if the objective test had been satisfied:

> (a) How serious would the accused, with her "mental background" of past incidents of abuse, have viewed the final act of provocation by the deceased?
>
> (b) Has the accused displayed the level of self-control to be expected of an ordinary person in the face of such severe provocation?

As there was no evidence presented as to why the level of self-control to be expected should be raised or lowered owing to the age, sex or ethnicity of the accused, the second part of the inquiry can be stated in purely objective terms.

Sudden fight

10.45 The Court of Appeal in *Tan Chee Wee v PP* (*supra* para 10.20) gave a lengthy analysis of the defence of sudden fight. In terms of rationale, it is considered "a partial excuse in that the accused is regarded as being less blameworthy because his judgment was clouded by the dust of conflict or inflamed by the heat of passion" (at [53]).

10.46 This explains why it does not matter who was the aggressor who initiated the fight (Explanation to Exception 4 of s 300 of the Penal Code) and that some advantage – albeit not "undue" advantage – was taken by the offender. To the extent that an earlier paragraph in the judgement suggests that the rationale of the defence is on the basis of a partial "justification" to the aggression displayed by the victim, that suggestion should be rejected (at [52]):

> [T]he subsequent conduct of both parties implies mutual provocation and aggression which renders the task of apportioning blame between the parties impossible and they must thus be placed on equal footing with respect to blameworthiness.

10.47 The Court of Appeal ruled that in order for there to be a "fight", there must be "blows on each side" (at [61]). Noting that the Exception requires a "sudden fight … upon a sudden quarrel", it was held that the intention of the Legislature must have been to require "something more than just a mere quarrel" (at [61]). Hence, the victim must hit back, or at the very least, attempt to do so in order to separate this from the situation of a one-sided attack. It is not sufficient if there was a verbal, as opposed to a physical, altercation or an "offer of violence" only.

10.48 However, as pointed out by Chan, Hor & Ramraj, *Fundamental Principles of Criminal Law* (LexisNexis, 2005) at 399, one push by the victim – albeit with great force – was held to be sufficient to start a "fight" in *Tan Chun Seng v PP* [2003] 2 SLR 506; and in *Chan Kin Choi v PP* [1991] SLR 34, one punch by the victim was also similarly sufficient for a "fight". It is somewhat inconsistent to require proof of a "fight" and yet allow it to be so easily satisfied. A better approach is to require a series of exchange of blows before one can be said to be in a "fight" and therefore be "inflamed by the

heat of passion". It can also be noted that there is no requirement of a verbal exchange in order to satisfy the element of a "quarrel" (see *Tan Chun Seng v PP*, which involved a deaf-mute). Hence, the element of a "fight" is an important one in explaining the law's indulgence in such cases.

10.49 It was also found in *Tan Chee Wee v PP* that there was no "sudden" quarrel in that the appellant had gone to the deceased's flat to rob her and the deceased had tried to escape twice from the flat before the fatal injuries took place (at [64]). This reasoning could of course also support a finding that there was no "sudden" fight but what is troubling is the implicit assumption that the requirement of "sudden quarrel" be separately proved from "sudden fight", and that the two must occur at the same point in time.

10.50 Such an approach, it is submitted, is far too restrictive. For example, is the defence ruled out if there were a sudden fight as well as a sudden quarrel but the two did not occur contemporaneously? Prof Stanley Yeo posits the following situation in his book, *Criminal Defences in Malaysia and Singapore* (LexisNexis/Malayan Law Journal, 2005) at para 15.13:

> D and V may have quarrelled the day before and, on meeting each other unexpectedly, commenced fighting immediately. Provided all the other elements of Exception 4 [to s 300 of the Penal Code] are satisfied, it would seem unjust to deny D the defence merely because the fight had not been preceded immediately by a quarrel.

Adherence to the concept of the Exception as a partial *excuse* will also indicate that it is wrong to demand so much if the accused were in fact rendered less blameworthy because of the sequence of events.

10.51 Finally, whether the accused had taken undue advantage or acted in a cruel or unusual manner was held by the Court of Appeal to depend on the individual facts of the case (at [66] and [71]). However, it was said that the fact that the appellant had "struck the deceased many times on her head using a fairly hefty hammer so as to cause 18 lacerations and several underlying fractures" was "*prima facie* an indication that the appellant had acted in a cruel or unusual manner" (at [67]). Based on the forensic evidence, the learned judges also concluded that the injuries were inflicted after the deceased had collapsed to the ground when she was of no threat or danger to the appellant.

10.52 As for "undue advantage" in terms of using a hammer to hit the deceased, the "facts of the case must be taken into consideration especially those attributes unique to the other party in the fight, *ie* his physique, age,

ability, aggression, *etc*" (at [71]). However, it does not automatically mean that the accused is only able to use a weapon against the deceased if the latter was larger and stronger than the accused. In this particular case, even though the deceased was a woman who was smaller and weaker than the appellant, both of them were armed with weapons (the appellant with a hammer and the deceased with a knife). The Court of Appeal rightly pointed out that "where both parties are armed, the weightage to be placed on considerations of physical strength and size must be lessened" (at [75]). In this present case, even though the appellant had used a hammer to assault the deceased, it did not mean that he had taken undue advantage (at [76]). However, as he did not satisfy the other elements of the defence of sudden fight, it was not available to him.

10.53 It is somewhat curious that the Court of Appeal found that the appellant had acted in a cruel or unusual manner but had not taken undue advantage of the deceased. As explained by Prof Stanley Yeo in *Criminal Defences in Malaysia and Singapore* (*supra* para 10.50) at para 15.37, while it is possible for a person to take undue advantage without at the same time act in a cruel or unusual manner, it is hard to imagine the converse. Prof Yeo opines that in the case of *Tan Chee Wee v PP*, the court could have found the appellant to have taken undue advantage if the factual inquiry was widened to include his conduct of striking the deceased repeatedly after she had fallen, as opposed to merely his use of the hammer as a weapon.

Specific offences

Murder

10.54 In *PP v Sundarti Supriyanto* (*supra* para 10.20), the learned judge agreed with Prof Stanley Yeo's analysis of the current state of law ("Academic Contributions and Judicial Interpretations of Section 300(c) Murder" in *The Singapore Law Gazette*, April 2004, p 21) in that there has been a fundamental shift in the interpretation of murder under s 300(*c*) of the Penal Code. Prof Yeo's argument comes from the Court of Appeal's decision in *Tan Chee Wee v PP* (*supra* para 10.20), where it was held (at [42]–[43]) that:

> Section 300(c) … envisions that the accused subjectively intends to cause a bodily injury that is objectively likely to cause death in the ordinary course of nature. There is no necessity for the accused to have considered whether or not the injury to be inflicted would have such a result. It is in fact irrelevant whether or not the accused did intend to cause death, so long as death ensues from *the bodily injury or injuries intentionally caused*. …

> As such, in examining whether s 300(c) has been made out, the court's approach to *mens rea* is only to determine whether the accused had intended to cause *the* injury that resulted in the victim's death.
>
> [emphasis added]

10.55 This was analysed by Prof Yeo as indicating a shift towards a more subjective interpretation of s 300(*c*) in that the accused must have intended to cause that very injury that led to the death of the deceased and not any other injury. The learned judge in *PP v Sundarti Supriyanto* agreed. In comparison, some previous decisions had proceeded on a totally objective basis: provided that the accused is proved to have intended to cause some form of bodily injury – no matter how slight – the remaining inquiry is whether the bodily injury actually inflicted was sufficient to cause death (see *Tan Joo Cheng v PP* [1992] 1 SLR 620 at 625, [18]; *Ong Chee Hoe v PP* [1999] 4 SLR 688 at [26]). Prof Yeo (*supra* para 10.54) described it as a "complete sea change" and "heralding a new era for s 300(c)" (at p 24). It remains to be seen if this interpretation of s 300(*c*) of the Penal Code will be consistently applied and whether a more subjective application will be used.

Causing death by a negligent act

10.56 Returning to the case of *Ng Keng Yong v PP* (*supra* para 10.1) above, the second appellant sought to argue that as she was a trainee OOW, she should not be held to the same standard of care as a qualified OOW. Although the learned Chief Justice recognised that it might seem harsh to hold her to the same standard as a reasonably competent and qualified OOW, this was necessary as she had taken on the task of navigating the *Courageous* in busy waters where she was responsible for the lives and safety of not just the crew on her vessel but of other vessels in the vicinity as well (at [79] and [89]). In any case, any other standard was "too ambiguous and uncertain" (at [77]).

10.57 While this is also the approach taken in tort law, it is wondered if it is apposite in cases of criminal negligence. The stakes involved are much higher than the payment of monetary damages (which is usually covered by insurance anyway). Can it really be justified in a criminal case to expect a person to reach a standard that he or she has in fact not attained? Reference may be made to the English case of *R v Prentice* [1993] 4 All ER 935 at 949 where the court was prepared to recognise the appellant's inexperience when applying the objective standard of a reasonable medical practitioner.

Criminal intimidation

10.58 The appellant in the case of *Chua Siew Lin v PP* [2004] 4 SLR 497 was *inter alia* charged with criminal intimidation under s 506 of the Penal Code. It was found that the appellant was unhappy with the victim, a domestic maid employed by the appellant, for neglecting to cook dinner. The appellant placed a kitchen knife against the victim's chin, chest and stomach, each time asking her, "Can you wake up?" It was argued by the Defence that the words "wake up" could not amount to a threat of criminal intimidation. The appellant was nevertheless convicted of the offence.

10.59 On appeal, the learned Chief Justice, in upholding the conviction, reminded that all the circumstances of the case had to be considered in ascertaining the meaning of the words (at [46]):

> [J]ust as intimidating phrases when used in a light-hearted context cannot amount to a threat, purportedly light-hearted words may amount to a threat when used under intimidating circumstances. There was nothing in s 503 of the [Penal Code] that required a threat to be ascertained solely from the words used and not from the surrounding circumstances. A sensible interpretation must be ascribed to the words of s 503 of the [Penal Code] if we are to prevent persons such as the appellant from eluding justice by using sugar-coated threats.

Theft

10.60 *Mustaza bin Abdul Majid v PP* [2004] SGHC 18 involved the offence of theft from a supermarket under s 380 of the Penal Code. The appellant did not dispute that he had taken a carton of canned drinks from the supermarket, but argued that he was still the in the premises of the supermarket at the time when he was apprehended. Hence, it was argued that the elements of theft that the taking was without consent and that the taking was done with a dishonest intention was not proved. However, the trial judge found as a fact that the appellant was apprehended after he left the supermarket premises and this finding was upheld on appeal.

10.61 The Chief Justice further explained that the consent to the taking of property could be given expressly or impliedly. In the context of this case (at [13]):

> [A] shopkeeper consents, at least impliedly, to his customers taking and holding on to any of the items in full view within the store while shopping. This is so, even if the customer is holding on to the items with the intention of stealing it, for the simple reason that theft is not an inchoate offence.

> *Mens rea* alone will not be sufficient, and the would-be shoplifter who desists after reconsideration will not be considered a thief.

10.62 As for the element of dishonest intent, it was held that (at [15]):

> The appellant's attempt to prove that he did have enough money on him to pay for the carton would not have assisted him much even if it had been accepted. The ability to pay does not, by itself, negative an intention to steal. Contrariwise, the finding made by the district judge that … he therefore never had enough money to pay for the carton quite clearly strengthens the inference that the appellant possessed the requisite dishonest intention.

Much would therefore depend on the circumstances of the case in ascertaining whether the elements of the offence of theft had been satisfied.

Arms offences

10.63 In *Ismail bin Abdul Rahman v PP* [2004] 2 SLR 74, the appellant was charged under s 4(1) of the Arms Offences Act (Cap 14, 1998 Rev Ed) for discharging three bullets from a revolver with the intent to cause physical injury to the deceased. The appellant did not dispute that he had caused the three bullets to be discharged from the revolver but claimed that he had no intention to cause physical injury to the deceased. He claimed that he did not know that the revolver was loaded when he discharged the first two bullets, and the third shot was a misfire.

10.64 Section 4 of the Arms Offences Act provides:

> (1) Subject to any exception referred to in Chapter IV of the Penal Code (Cap 224) which may be applicable (other than section 95), any person who uses or attempts to use any arm shall be guilty of an offence and shall on conviction be punished with death.
>
> (2) In any proceedings for an offence under this section, any person who uses or attempts to use any arm shall, until the contrary is proved, be presumed to have used or attempted to use the arm with the intention to cause physical injury to any person or property.

10.65 The Court of Appeal in its judgment commented on the following passage by the trial judge in his decision (*PP v Ismail bin Abdul Rahman* [2003] SGHC 285 at [104]):

> The facts of this case did not even require the application of the presumption in section 4(2) of the Arms Offences Act. The facts showed clearly that the accused fired the first two shorts at [the deceased] with

> intent to cause physical injury to him at the very least. The third shot was undoubtedly fired not only to cause physical injury but death as well.

The Court of Appeal was of the opinion that this was an incorrect approach to s 4(2) of the Arms Offences Act. The word "require" in the above passage might indicate that the trial judge could choose whether to apply s 4(2) of the Arms Offences Act or not. This was not the case as the presumption was meant to be "*automatic* and comes into operation the moment a person uses or attempts to use any arm" [emphasis in original] (at [49]). In the circumstances of this case, the appellant could not rebut this presumption.

10.66 The other interesting point that arose in this case concerned the application of the defence of accident in s 80 of the Penal Code which required, *inter alia*, the doing of a "lawful act". It was held that (at [51]):

> This defence was however not available to the appellant since he did not possess a valid licence for the revolver at the material time and instantly failed the "lawful act" requirement.

It is not clear from this short passage if the requirement that the act be "lawful" means that the defence will automatically fail if the act is one against the general law. A distinction has been accepted by some Indian courts between acts which are *malum in se* and acts which are *malum prohibitum*. The defence of accident under s 80 of the Penal Code under this approach would still be available in the latter case provided that the harm resulting from the accident was not the sort of harm the statute intended to prevent (Mayne, *The Criminal Law of India* (Higginbotham, 2nd Ed, 1901)). However, even on this approach, it has been opined that the defence would not be available to the appellant in this case as the purpose of requiring a licence is to curtail the use of firearms for criminal purposes (Stanley Yeo, *Criminal Defences in Malaysia and Singapore* (*supra* para 10.50) at para 3.14).

Kidnapping

10.67 Several interesting issues arose in two cases concerning kidnapping in *PP v Selvaraju s/o Satippan* [2004] 3 SLR 615 (HC); [2005] 1 SLR 238 (CA) and *PP v Tan Ping Koon* [2004] SGHC 205. In both cases, the accused were charged under s 3 of the Kidnapping Act (Cap 151, 1999 Rev Ed) which provides that:

> Whoever, with intent to hold any person for ransom, abducts or wrongfully restrains or wrongfully confines that person shall be guilty of an offence ….

10.68 In *PP v Selvaraju s/o Satippan*, the accused argued that the act of confining the victim in her own house without concealing his own identity could not be said to constitute the act of kidnapping; and that demanding money which he believed was owed to him by the victim's father could not constitute "ransom".

10.69 The Court of Appeal in *Selvaraju s/o Satippan v PP* [2005] 1 SLR 238 agreed with the trial judge's finding that although the facts of the case were "somewhat atypical of a kidnapping case", once the elements of s 3 of the Kidnapping Act were satisfied, the accused could be held liable for the offence.

10.70 Furthermore, while the word "ransom" was not defined in the Kidnapping Act or the Penal Code, it would include a legitimate claim of a debt as it was unconscionable for the accused to resort to violence to recover a debt in this way when there were legal avenues available. A loophole would otherwise be created that would be easily exploited in the future. In any case, the accused's story of a debt owed to him by the victim's father was disbelieved.

10.71 In *PP v Tan Ping Koon* (*supra* para 10.67), the Statement of Agreed Facts showed that both the accused persons abducted a seven-year-old child from her house with the aim of getting her father to pay a ransom for her release, but they panicked and decided to let the child go when they found their car being trailed by a van. The accused persons nevertheless called the child's father the next day and demanded $1m in return for the safety of his family. After some negotiation, the sum was lowered to $70,000. The accused persons were arrested by the police shortly after the money was collected by them.

10.72 Counsel for the accused persons initially requested for an adjournment to prepare submissions on no case to answer as no demand for ransom had been made before the victim was released. They, however, subsequently decided that a case of kidnapping had indeed been made out and that their clients would plead guilty.

10.73 In his decision, the learned judge was in no doubt that the concession by the defence counsel was correct. To satisfy s 3 of the Kidnapping Act, the abduction must be with the intention of holding that person for ransom and not that there must be an actual ransom demanded (at [55]):

> A demand for ransom made after abduction would offer the best proof of the purpose of the abduction but no demand made does not mean no intention to make a demand. What has to be proved is the intent, not the demand nor the payment of ransom. … The only purpose of abducting [the victim] was to force her father to pay their price for her release. The offence is complete even if the perpetrators did not succeed in their purpose.

10.74 These two cases show that while the basic offence may be one of "abduction", "wrongful restraint" or "wrongful confinement", it is the added motive of holding the victim for ransom that makes the offence more heinous and therefore deserving of greater condemnation. It would be too restrictive if the offence were construed to exclude demands for legitimate debts or to require an actual demand for ransom to be paid. Similar graduated offences can be found with respect to the kidnapping offences in the Penal Code such that it is a more serious offence when committed with certain specified ulterior intents (ss 364–369).

Misuse of drugs

10.75 In *Ong Chin Keat Jeffrey v PP* [2004] 4 SLR 483, the appellant was convicted on one charge of trafficking a Class A controlled drug under the Misuse of Drugs Act (Cap 185, 2001 Rev Ed) by selling one tablet of Ecstasy to an undercover Central Narcotics Bureau officer. At his trial, the appellant gave evidence that he was not a drug dealer and that he had come by the Ecstasy tablet when it was given to him partially in exchange for four pills of Viagra which he sold to a customer. It was argued at the appeal *inter alia* that the Misuse of Drugs Act was aimed at punishing and deterring those who were extensively trafficking in controlled drugs (at [17]).

10.76 Yong Pung How CJ noted that the appellant had admitted to selling the drug, and that he knew he was selling Ecstasy. Hence, unlike the cases of *Ong Ah Chuan v PP* [1980• 1981] SLR 48 and *Ng Yang Sek v PP* [1997] 3 SLR 661, there was no ambiguity as to the appellant's guilt (at [24]). As such, his conduct fell within the plain meaning of ss 2 and 5 of the Misuse of Drugs Act and the intended class of offenders targeted by that Act (at [26]). In any case, a purposive interpretation of the Misuse of Drugs Act would also show that Parliament was equally concerned about "would-be traffickers" and "first-time traffickers" (at [34]). Such considerations were only relevant to sentencing and not for purposes of conviction.

10.77 In *Teo Yeow Chuah v PP* [2004] 2 SLR 563, the Court of Appeal once again made it clear (at [34]) that the presumption in s 17 of the Misuse of

Drugs Act could only be triggered if the accused was proved to have had in his possession the requisite amount of the prohibited drug and not just presumed to have that drug in his possession via s 18 of the Misuse of Drugs Act.

10.78 As for what amounts to "possession" for the purposes of s 17 of the Misuse of Drugs Act, *Shahary bin Sulaiman v PP* [2004] 4 SLR 457 explains that while "physical possession" is required, this does not mean that the drugs must be found on the accused physically. A bag that is placed next to the accused would still be in his physical possession. It is a question of fact depending on the circumstances of the case if the bag is still in the accused's physical possession (see also Chan Wing Cheong, "Criminal Law" (2002) 3 SAL Ann Rev 164 at paras 10.73–10.80). The Court of Appeal further cautioned (at [10]) that:

> If the court finds that the man had left a considerable gap in terms of space and time between him and the bag, it may only mean that the stated timing of the moment of possession would have to be amended to reflect when it was that the man could still be regarded as being in possession of the bag.

It will therefore be an uphill task for defence counsel to argue that the accused did not have the drug in his "possession" save in the most unusual circumstances.