

Public Prosecutor v Tan Peng Liat, Mark
[2018] SGDC 43

Case Number : DAC 937116/2015 and others, Magistrate's Appeal Nos. 9196/2017/01-02 and 9268/2017/01

Decision Date : 26 February 2018

Tribunal/Court : District Court

Coram : Eddy Tham Tong Kong

Counsel Name(s) : Deputy Public Prosecutor Mr Kumaresan Gohulabalan and Mr Jotham Tay for the Public Prosecutor;
Defence Counsel Mr Derek Kang and Mr Ammar Lulla (M/s Ho & Wee LLP) for the Accused

Parties : Public Prosecutor — Tan Peng Liat, Mark

[LawNet Editorial Note: The appeal to this decision in MA 9196/2017/01-02 and MA 9268/2017/01 was withdrawn on 15 March 2018.]

26 February 2018

District Judge Eddy Tham Tong Kong:

INTRODUCTION

In my oral grounds of decision, I had stated that this was a tragic case where what started off as a verbal altercation between a father and son, had led to a physical struggle and ended in the death of the father. The son, the Accused Tan Peng Liat, Mark, was arrested and consequently charged for the murder of his father, Tan Kok Keng (“the Deceased”). Subsequently, the charge was reduced from a murder charge under section 302 of the Penal Code to one of culpable homicide not amounting to murder under section 304(b) of the Penal Code.

2 The charge states that the Accused –

“on the 10th day of February, 2015, at or about 5:26 pm, at 58 West Coast Rise, Singapore 127500, did commit culpable homicide not amounting to murder by causing the death of one Tan Kok Keng, Male / 67 years old, to wit, by applying a headlock and a chokehold over the said Tan Kok Keng’s neck region, which acts were done with the knowledge that they were likely to cause such bodily injury as is likely to cause death.”

3 The Accused claimed trial to this charge. At the end of the trial, I had acquitted the Accused in relation to the charge under section 304(b) of the Penal Code but convicted him on a reduced charge under section 304A (a) of the Penal Code of causing death by a rash act and sentenced the Accused to 12 months’ imprisonment. The amended charge reads –

“did cause the death of one Tan Kok Keng, Male / 67 years old by doing a rash act not amounting to culpable homicide, by applying a neck-lock /chokehold over the said Tan Kok Keng’s neck region, and you have thereby committed an offence punishable under section 304A(a) of the Penal Code, Chapter 224.”

4 The Accused thereafter pleaded guilty to a stood down charge of possessing of 13 air pistols without authorisation, an offence under section 13(1)(a) of the Arms and Explosives Act (2003 Rev. Ed.), Chapter 13 and was sentenced to a fine of \$5,000 which fine has been paid.

5 The Prosecution being dissatisfied with the acquittal of the charge under section 304(b) of the Penal Code had appealed against it. They have also appealed against the sentence of 12 months' imprisonment imposed in respect of the reduced charge.

6 The Accused being dissatisfied with the conviction under section 304A(a) of the Penal Code as well as the sentence of 12 months' imprisonment has also appealed against both decisions.

7 I will now set out both my grounds of decision for the acquittal of the section 304(b) charge and conviction on the reduced charge under section 304A(a) of the Penal Code and the sentence.

THE APPEAL AGAINST THE ACQUITTAL OF ORIGINAL CHARGE AND CONVICTION ON REDUCED CHARGE

8 The trial focused on 2 main points of contention:

- i. Firstly, did the Accused cause the death of the Deceased by applying a neck-lock/ chokehold over the neck region of the Deceased?
- ii. Secondly, if the answer is yes, was this act done with the knowledge that it was likely to cause death?

THE PROSECUTION'S CASE

THE STATEMENT OF AGREED FACTS

9 A statement of agreed facts was tendered in evidence. The Accused was 29 years old at the material time and was residing with the Deceased who was 67 years old. They lived together at their home at No. 58, West Coast Rise ("the West Coast Rise home"), the place where the Deceased passed away at.

10 On 10 February 2015, the police received a '999' phone call from a Ms Sumardi at 5.26pm with the message:

"My boss with the son fighting. I scared I run out. No weapon".

11 The incident location was the West Coast Rise home. The police responded and arrived at the scene to conduct preliminary investigations. They were informed that the Deceased had been pronounced dead. They subsequently went to National University Hospital to place the Accused under arrest. The Accused was thereafter brought to Alexandra Hospital for a medical examination. He was observed to have small superficial abrasions over the forehead, right hand dorsum, left foot dorsum and left tendinoachilles, each measuring 0.5cm or less with no underlying tenderness or swelling.

The Statements of the Accused

12 A total of 5 of Accused's statements made to the police were admitted as part of the Statement of Agreed Facts attached as Tabs D to H. It is agreed that all the statements had been voluntarily made by the Accused without any threat, inducement or promise before or during the recording of the statements.

13 In the Accused's statements, the events that led to the death of the Deceased was recounted. The statements covered 3 broad areas:

- i. the events leading to and surrounding the death of the Deceased;
- ii. the reason for the altercation between him and the Deceased; and
- iii. the intention and knowledge of the Accused.

The events leading to and surrounding the death of the Deceased

14 The Accused had gone to a car workshop at Tagore Lane in the afternoon of 10 February 2015 and was driving away from the workshop when he received a call at about 4.00pm from the Deceased. The Deceased sounded angry and had asked him to return home. The Accused asked him what had happened but the Deceased merely responded to ask him to return home immediately. The conversation ended. The Accused reached home after 20 minutes and went to the master bedroom to look for the Deceased.

15 The Deceased asked the Accused if he taken any of his money. The Accused was confused by that question and probed him further to get more details from him. The Deceased became angry and asked him if he had stolen his money. The Deceased started calling the Accused a thief and making accusations against him. The Accused moved forward to him and tried to calm him down.

16 The Deceased then used his right index finger to push against the Accused's chest causing him to shift backwards. The Accused moved forward again and this time the Deceased threw a punch at the Accused's right cheek but the Accused managed to partially block it. The Accused lost his temper and tried to grab the Deceased using both his hands to stop the Deceased from hitting him and ended up in a physical struggle with the Deceased. The Accused was pushing the Deceased into the master bedroom toilet. During the struggle, the Deceased had tried hit the Accused using his hands and the Accused was trying to restrain him. At one point, they both fell onto the floor. The Accused then tried to pin him down on the toilet floor and they continued to struggle with each other. In the process, the Accused's spectacles came off and he could not see clearly. After a while, he managed to "arm-lock" the Deceased's head while the Deceased continued to struggle. The Deceased's head was in between his right arm and body but he kept slipping off because the Deceased was bald and his head was slippery.

17 At this juncture, their Indonesian domestic helper, Sumarti, entered the toilet. She yelled at the Accused to stop and tried to break them up. As they were still struggling, the Accused had kicked out and in the process might have kicked Sumarti accidentally. He had also remembered hearing glass shattering and believed that his kicks might have caused the glass screen below the sink to shatter. He wanted Sumarti to help but as he was out of breath, he could not say anything. He tried to reach out to her but she left before he could do that. Thereafter he continued to struggle with the Deceased.

18 By this time, the Accused was tired and weak and so was the Deceased. Eventually the Accused released the grip and walked out of the toilet with the intention of leaving the bedroom. He then noticed that the Deceased had gotten up and was following him from behind. The Deceased then tried to arm-lock him from his back. They were still inside the bedroom near to the door of the bedroom.

19 The Accused managed to wriggle away from his attempts and they had ended up in a struggle again on the floor of the bedroom. This time the Accused using his left hand, managed to arm-lock the Deceased's neck with the back of the latter's head facing him. The Accused used his right hand to grab his throat and told the Deceased to "just fucking stop it".

20 The Accused elaborated on this neck-lock and chokehold. He described it as "position my arm on his neck with one free hand holding onto his neck to prevent him from slipping out. His head was between my arm and my body".^[note: 1] He further described how his hand was positioned on the neck during the chokehold:

"I opened up my hand [Recorder's note: accused person gestured using his left hand with the thumb and the remaining 4 fingers together stretched out forming a 'V' shape between the thumb and the index finger and he placed the 'V' shape portion onto his neck] and placed it on his neck."^[note: 2]

21 The Accused, to the question of which part of his arms was he applying his strength on, replied that it was his arms using whatever strength he has left.^[note: 3] He had learned this technique of "head-lock" and "choke-hold" from the Deceased who practiced Taekwondo as well as "from movies, TVs or whatsoever".^[note: 4]

22 The Accused held onto the Deceased's neck in a choke-hold until the Deceased stopped struggling, after which, the Accused released his grip. The Accused then left him on the floor and returned to the toilet to retrieve his spectacles. After wearing his spectacles he returned to the room and saw that the Deceased was not moving. He then left the room for his bedroom. As he saw that there was blood on his shirt he took it off and put on another t-shirt whilst walking down the stairs.

23 He left the house and met his aunt Helen and Sumarti just outside the driveway walking towards him. ("Aunt Helen" is PW1, one Tan Hoon Choo, the Deceased's sister, who was residing nearby at 28, West Coast Rise). The Accused and Helen hugged and the Accused at this point realised that he may have killed his father and so he told his aunt that "I think Dad is dead".

24 They then returned to the house and to the Deceased's bedroom. The Deceased was lying motionless on the floor with his eyes opened. Helen then knelt and started praying in front of the Deceased. At this point, the Accused regained some senses and made a '995' call on his handphone for an ambulance. He then began performing 'CPR' on the Deceased by blowing into his mouth three times and performing 5 compressions on his chest. He also massaged his neck as he thought the airway passage could have been blocked. He continued a few more times until the paramedics arrived and took over.

25 The Accused followed the Deceased to the hospital with the ambulance. At the hospital, the Accused had called his sister. Subsequently all the family members came to the hospital including his mother who had already been divorced from the Deceased.

26 The Accused was subsequently brought to Alexandra Hospital by the police for a medical examination. Thereafter he was brought to the Police Cantonment Complex where he was placed in lock-up.

The reason for the altercation between the Accused and the Deceased

27 In his statements, the Accused provided a possible reason for the accusation made by the Deceased against him. The Accused disclosed that there were 2 joint bank accounts in the names of the Deceased, the Accused and his sister. One account is a POSB Savings account where the income from the property rentals of 2 properties owned by the Deceased go into. The rental amount was about \$30,000 every month. Another account is a POSB My Savings account.

28 The Accused admitted that he had been withdrawing regularly amounts of \$1,000 to \$3,000 from the joint account for the few years. He was given access to this account about 5 years earlier. He stated that he lost control and gave in to temptations. He had withdrawn about \$200,000 altogether over the last 5 years. He claimed that the Deceased would allow him minor transactions when he asked him. However over time, he stopped asking and he continued making withdrawals and slowly, the withdrawals became more frequent. He believed that the Deceased would be angry if he knew that he had withdrawn this amount of money from the joint account, but he believed that the Deceased would forgive him because "he is a good man and I am a lousy son".^[note: 5] Nonetheless, he believed that the Deceased did not know about his frequent withdrawals as he did not monitor the accounts and had been having memory issues as well.

The intention and knowledge of the Accused

29 The Accused had stated strenuously that he had no intention to hurt his father, much less, cause his death. His intention was only to calm him down and to prevent the Deceased from further attacking him. He stressed that he loved his father and that the death was an unintentional accident.

30 He also highlighted that the Deceased was a Taekwondo black belt holder and exercised regularly and so was in good physical condition. The Accused did not throw a single punch at him but had only attempted to restrain him.

31 The Accused also pointed out that when the Deceased lost consciousness, he was the one who had called '995' and performed CPR on the Deceased.

32 I set out the following questions and answers in his statement at Tab G in relation to his knowledge and intention when applying the neck-lock and chokehold on the Deceased:

"Q34: Can you tell me to your knowledge, what are "head-lock" and "choke-hold" meant to do?

Answer 57. Restraining techniques.

Q35: Why did you decide to use choke-hold on your dad?

Answer 58. Because I believe that it would allow me to restrain him without hurting him.

Q40: In paragraph 13 of your statement, you have mentioned that you held on to his neck with the choke hold until he stopped moving. Could you elaborate more on this?

Answer 63. The only thing going through my head was to get him to stop fighting. That was all I could think of. I believed that he was giving up fighting or calming down because he had stopped struggling.

Q51: Do you know the consequences of holding onto your dad's neck in a choke-hold position over a period of time?

Answer 74. Now I do. Then I believed that if I applied appropriate strength, it would not be dangerous. I understood that there may be some danger but I believe that I was applying the correct amount of strength to avoid danger.

Q52: What sort of danger are you talking about in your answer in paragraph 74?

Answer 75. Injuries like sprains and twisted muscles."

THE EVIDENCE OF PW1 "AUNT HELEN"

33 The Prosecution had called the Accused's aunt, whom the Accused had referred to as "Aunt Helen", one Tan Hoon Choo (PW1) to give evidence. She essentially confirmed the account given by the Accused in his statements that she had met the Accused outside the driveway of his home. She had walked there from her home at 28 West Coast Rise, which was just a minute's walk away, after Sumarti had come to her house, crying hysterically for help as "Mark and Sir are fighting".

34 She saw that the Accused had a lost and bewildered look. She gave him a hug and thereafter went into the Deceased's house to check on the Deceased. She found the Deceased lying on the master bedroom floor just by the door. She prayed for him and touched him. She and Sumarti also rubbed the Deceased's body and started crying. She suddenly realised the ambulance has to be called and asked the Accused to do so. As she was concerned that the ambulance might not arrive soon enough, she went downstairs to make a call to speed up the arrival of the ambulance. When the paramedics arrived, she waited downstairs for them to do their job. Later, she saw them stretcher the Deceased off. They informed her that the Deceased did not have any pulse.

35 She testified that the relationship between the Deceased and the Accused was good and that the Deceased had told her that he was very proud of his son, the Accused. She described the Deceased as very fit physically. He held a Taekwondo black belt and would exercise by kicking and punching a sandbag. He also trained with weights and would run at Pandan Reservoir.

36 During cross-examination, PW1 explained that as she was in a state of shock, she did not remember seeing the Accused performing CPR on the Deceased nor did she remember the Accused telling her that he would do so.

37 She also claimed that the Deceased had ever told her a few years earlier that he could kill a person with a single punch. She also confirmed that the Deceased was very sensitive about money matters.

THE EVIDENCE OF PW4 DR LEE CHIN THYE, THE FORENSIC PATHOLOGIST

38 Dr Lee Chin Thye is the forensic pathologist employed by Health Sciences Authority who performed the autopsy on the Deceased. An autopsy report dated 12 February 2015 (exhibit P199) was prepared by him. The cause of death is stated to be "Manual Compression of Neck" ("MCN") with a contributory cause of "Hypertensive Heart Disease" ("HDD").

39 In Court, Dr Lee highlighted the following findings of the report:

- i. the presence of bilateral conjunctival petechial haemorrhages – these may be evidence of manual compression of neck but they may also be non-specific findings^[note: 6] (meaning there are many causes including result of resuscitation and cannot be said to be caused only by manual compression of the neck ^[note: 7]); and
- ii. a total of 31 external injuries from the head, neck, trunk, upper and lower limbs comprising bruises, lacerations and abrasions.

40 Dr Lee went on to focus in particular on 2 external injuries that are related to the cause of death by MCN. He identified external injuries no. 10 and 11 which are 2 bruises on the neck, namely:

"10. A purple bruise 3.5 cm up-down by 2 cm across over the right side of the front of the neck, just touching the jawline and 4 cm from the midline.

11. A reddish bruise 0.6 cm across by 0.3 cm up-down over the right side of the front of the neck, just below the jawline and 1.5 cm from the midline."

41 Dr Lee opined that there are internal injuries related to these injuries which would constitute the pathological evidence for compression of the neck. He pointed to the internal injuries that corresponded with the external injuries to show that considerable force must have been applied to the neck area.

42 Dr Lee referred to page 5 of the autopsy report under the heading of "Neck Dissection" to highlight the following internal injuries:

"1. Subcutaneous haemorrhage 3 x 2 cm just below the right jaw, corresponding to external injury no. 10;

2. Right submandibular gland haemorrhage 3 x 2 cm;

3. Left submandibular haemorrhage 3 x 2.5 cm;

4. Thin-film haemorrhage 2 x 0.5 cm over the right anterior para-vertebral region of C3 to C4 vertebrae;

5. Fracture of the base of the left superior horn of the thyroid cartilage, obliquely backwards and downwards to involve the upper part of the left posterior border of the thyroid cartilage. There was associated haemorrhage in and around the fracture site."

43 Dr Lee further said that the haemorrhage around the fracture site demonstrated that the fracture is fresh as it showed that the heart was still beating at that time and hence the haemorrhage or bleeding. He also stated that a significant amount of force need to be applied in order for the fracture of the thyroid cartilage as it is a relatively deep structure.

44 Based on the injuries on the neck, both internal and external, Dr Lee concluded that there was manual compression of the neck. He went on to explain that manual compression of the neck can lead to death through three mechanisms:

i. *Blockage of air passages to the lungs* – The neck contains the main air passage from the mouth and the nose to the lungs. Compression of the structures of the air passages would effectively block off the air supply resulting in loss of consciousness and death;

ii. *Compression of the blood vessels* – Compression of the blood vessels in the neck which carry blood and oxygen to the brain. Once the supply is reduced or cut off, the brain will be starved of blood and oxygen which will lead to loss of consciousness and death; and

iii. *Stimulation of the carotid arteries receptors* – On both sides of the neck, there are receptors near where the carotid arteries bifurcate into 2 branches. Compression of these areas and hence stimulation of the receptors can lead to a cardiac arrest by sending a wrong nervous signal to the heart causing the heart to stop beating.

45 Dr Lee was of the view that death by the mechanism of blockage of the air passages can be ruled out. This was because he did not see any damage to the structures supporting the air passage that would cause the airway to collapse or be obstructed.

46 Instead, Dr Lee opined that both nervous stimulation of the receptors and blood vessels compression were the likely mechanisms.

47 Finally, Dr Lee concluded that based on the evidence of the injuries noted, significant amount of force had been applied to both sides of the neck, which findings are sufficient to cause death.

48 In addition, Dr Lee found signs of thickening of the heart muscles evidenced by an enlarged heart indicative of a heart illness called HHD. His belief is further supported by the surfaces of both the Deceased's kidneys showing fine granularity and focal scarred areas which can be seen in cases of hypertension. Further, the histological findings of the kidney are in keeping with hypertensive renal disease or benign hypertensive nephrosclerosis. Hence he concluded that the Deceased was also suffering from HHD. However he is of the view that it is not possible to predict the severity of the HHD based on the appearances of the heart at the time of autopsy but it would require a clinical diagnosis when the patient is exercising. As HHD may have hastened the death of the Deceased, Dr Lee has listed it as a contributory cause with MCN still as the primary cause of death. He explained that there could be several ways that HHD could have hastened the death such as making the heart weaker and making it decrease the reserves it has in reaction to the MCN. He also gave an example that a person with HHD would tire more easily and rapidly thus making it easier to be overpowered by the assailant. He also believed an HHD heart, would make it more susceptible to nervous stimulation from the compression of the carotid sinuses.^[note: 8]

49 During cross-examination, Dr Lee agreed that death due to HHD can happen at any time, even during rest period, and that someone with HHD can suffer from sudden cardiac arrest irrespective of the severity of the HHD condition, whether it was mild, moderate or severe.^[note: 9]

50 Dr Lee also agreed that a pathologist would not be able to find pathological evidence of blood vessel compression. He also explained that even in intermittent blockage of the blood vessels through compression of the neck during a struggle, there may be at play the stimulation of the carotid sinus receptors. He also opined that when the compression of the blood vessels had stopped after unconsciousness has slipped in, there may be sufficient damage done that may still lead to death.^[note: 10]

51 Similarly, he also agreed that a pathologist would not be able to find pathological evidence of death caused by stimulation of the carotid sinus receptors.

52 Dr Lee, when confronted with the opinion of Dr Gregory Davis "that the historical case and information and anatomic finding in this case are not enough to state to a reasonable degree of certainty that pressure on the neck was the definitive cause of death given the dissident's underlying co-morbidities. In fact the narrative of the rapidity of the dissident's death is also consistent with certain cardiac death during an altercation", disagreed with Dr Davis. His view remained that due to the evidence of forceful manual compression of the neck, the manual compression of the neck would still be the primary cause of death contributed by HHD.^[note: 11] He also disagreed that in older people, the cartilage is more calcified and hence more brittle and breaks more easily. He was of the view that calcification sometimes makes the cartilage stronger.^[note: 12]

53 Dr Lee agreed with Dr Duflou's opinion that relatively minor initiating event can result in vagal stimulation with potentially profound effects on the heart.^[note: 13]

54 Finally, Dr Lee disagreed with Dr Duflou's observation that there were arteriosclerosis within the heart of the Deceased. He had also commented that the photomicrographs relied on by Dr Duflou were of poor resolution and hence he was unable to agree that the lung sections showed secondary pulmonary lung hypertensive changes due to emphysema. Emphysema has been described as pathologic enlargement of air spaces in the lung with the destruction of their walls. He also stated he would be unable to predict if a person would develop emphysema even if he is given the person's smoking history as some groups of people are more susceptible to emphysema than others. After being shown clearer images of the lung section, Dr Lee agreed that there were increased air spaces but opined that they were due to "autolytic changes" which is decomposition setting in after death.

55 At the end of the cross-examination, Dr Lee maintained his view that while HHD alone can lead to sudden cardiac death, given the findings of the heart, kidneys and the injuries on the neck and on other parts of the body, the cause of death would be primarily due to the MCN, contributed by HHD.^[note: 14]

THE EVIDENCE OF SUMARTI

56 The Prosecution had adduced evidence through PW3, Investigation Officer Tan Boon Kok ("the IO"), that Sumarti had left Singapore on 28 February 2016 and had not returned since. The IO had earlier informed Sumarti's new employer that the police should be kept informed if Sumarti wishes to leave the country. Unfortunately, Sumarti's employer did not notify the police. The IO also informed that the police have sought the help of Interpol Jakarta but to date they have not been able to trace the whereabouts of Sumarti.

57 The Prosecution applied under section 32(1)(j)(iii) of the Evidence Act (Cap. 97) for Sumarti's statements to be admitted on the ground that she is outside Singapore and it was not practicable to secure her attendance. Alternatively, the Prosecution also relied on the ground provided under section 32(1)(j)(ii) of the Evidence Act, that despite reasonable efforts to locate her, she could not be found whether within or outside Singapore.

58 The Defence did not object to the application subject to their right to submit on the weight to be given to the contents of the statements.

59 As I found that the criteria under both limbs of section 32 (1)(j) of the Evidence Act had been satisfied, I allowed Sumarti's statements to be admitted.

Sumarti's account of the events preceding the physical struggle

60 In P205, Sumarti's statement to the police dated 11 February 2015, she noted that the Accused had said "Hi Dad" and "Bye" to his father before leaving the house on 10 February 2015 at about 2.00pm. In her 13 years of working for them she had not seen them quarrelling or having any problems with each other and that their relationship had been cordial. She shed some light as to what might have been the trigger to the altercation between the Deceased and the Accused. She said that at about 3.00pm on the same day, she had followed the Deceased to Clementi Central. After buying some groceries, the Deceased had gone alone to a POSB Branch there. In P206, a further statement of Sumarti dated 16 February 2016, she elaborated that after coming out of the branch, the Deceased was unhappy. On the journey home, the Deceased told her that his money has been withdrawn from his account without his knowledge.

61 After reaching home, she had heard the Deceased calling the Accused on the phone to return home to talk.

Sumarti's account of the physical struggle

62 The Accused reached home a while later and went upstairs to the Deceased's bedroom. She heard them talking in normal tone about money issues. Subsequently, she heard noises coming from the master bedroom and the Deceased calling out her name "Marti" twice.

63 She ran upstairs and opened the master bedroom. She went in and saw the Deceased and the Accused lying on the master bedroom toilet with the Accused lying on top of the Deceased, with both of them facing each other. She saw that the Accused's right hand was grappling the Deceased by the neck in an "arm-lock" fashion. She went to pull the Accused's left hand and asked him to let go of the Deceased. The Accused said "OK, OK" but did not do so. Instead he kicked her on her right thigh. He then tried to kick her a second time but missed. The Deceased told her to call for the police. She ran down and took her handphone to call for the police.

Sumarti's account of the post-struggle events

64 After making the police call, she went to "Aunty Helen"'s house to get her help. Together they quickly returned to the house where they were met by the Accused outside the gate, standing by the car. "Aunty Helen" had hugged the Accused. Thereafter they went up to the master bedroom where she saw the Deceased lying behind the master bedroom door, facing upwards. "Aunty Helen" shouted twice at the Accused to call for the ambulance. The Accused did so and asked her to wait downstairs for the ambulance to arrive. Upon arrival of the ambulance she had gone upstairs to inform the Accused. Subsequently the Deceased was carried away by the ambulance staff. The Accused then left with the ambulance for the hospital.

65 She did not notice the Accused performing any CPR on the Deceased. Subsequently the Defence admitted without objections from Prosecution two further statutory declarations from Sumarti. The contents do not add much to her police statements other than providing a further detail that the Deceased would punch and kick a punching bag daily.

THE DEFENCE CASE

THE EVIDENCE OF THE ACCUSED

Background Information

66 The Accused informed that the Deceased had been incarcerated for a period of 6-8 months in an Indonesian prison and was released some time in 2009. After his release he set up a joint account in the joint names of the Accused, the Accused's sister and the Deceased. The reason was to provide for the Accused and his sister.

67 He testified that the Deceased was very fit and would train almost daily with weights as well as hitting a punching bag and "sparring mitts". The Deceased would drink occasionally whenever he plays with his band. He used to smoke but quit in 2009.

68 He confirmed that his father had a black belt in taekwondo and had trained regularly. The Accused had seen old photographs of the Deceased in his full black belt taekwondo gear. The Deceased had boasted to him that he could kill a man with a punch.

69 One hobby they shared was collecting air guns. The Accused himself also kept a collection of swords. He had about 6 to 9 swords, of which some were kept in the study and others in the upper level hallway.

Accused's account of the incident

70 The Accused testified that after he came home as requested by the Deceased, he had gone upstairs to the Deceased's bedroom. The Deceased was extremely angry and agitated. He made accusations against the Accused of stealing his money. The Accused tried to get the Deceased to explain what he meant and asked for details but did not manage to get any from the Deceased. The verbal dispute then became physical when the Deceased poked and pushed the Accused in the chest with his index finger. When the Accused moved forward to ask him what was causing him to be so angry, the Deceased threw a punch towards the Accused's face. The Accused managed to block this punch partially and at this point the Accused proceeded to close the distance between them and tried to hug the Deceased to calm him down.

71 He did this to close the distance so that the Deceased would not be able to get a full swing for another punch. The Accused grabbed the Deceased and pushed the Deceased towards the master bedroom toilet. The Accused tried to hold onto the Deceased whilst the Deceased continued to throw punches, elbows, kicks at him.

72 The Accused's spectacles came off due to being hit or swiped by the Deceased. The Accused kept trying to hold onto the Deceased to stop him from hitting him but the Deceased kept freeing himself or slipping out of the Accused's grip. At one point, the Accused found himself holding onto the Deceased's head and they both fell to the ground.

73 He called this a "head-lock". He held onto the Deceased's head to restrict his movement. The Deceased's head was being held in the region of the Accused's armpit by the Accused's right arm^[note: 15]. The Accused would use his left hand to either support himself or to fend any attacks. After some struggling, he then noticed that Sumarti was present with them in the master bedroom toilet. By this time, he was quite tired and could not remember any exchange Sumarti had with them. He tried reaching out to her but could not say anything as he was out of breath. He could only remember the Deceased making some shouts and grunts.

74 The Accused believed that he could have kicked Sumarti by accident as the floor was slippery and he did not have a proper grip during the struggling with the Deceased.

75 After Sumarti left the bedroom, he could feel the Deceased tiring as his attacks had decreased. He himself was also extremely fatigued. Once the attacks had subsided and things appeared to have calmed down, the Accused took the opportunity to leave the bathroom.

76 After he left the bathroom, he noticed that the Deceased had followed him out of the bathroom. He saw the Deceased coming at him with his hands outstretched as if to tackle or grab him. The Accused managed to evade him and thereafter held the Deceased from his behind. In the process of evading and holding onto the Deceased they both fell to the floor. The Accused then held the Deceased with his right arm in a V-shape initially across his chest and then his right arm slipped onto the Deceased's neck when the Deceased struggled. The Accused then used his left hand to place it on the Deceased chest around the collar bone with the index finger and thumb forming a V-shape over the base of the Deceased's neck. He was pressing his left hand on the Deceased neck towards him to keep the Deceased down as the Deceased was "thrashing around"^[note: 16].

77 The Accused held this position over the Deceased until the Deceased stopped struggling. The Accused immediately released his hold and slipped out from under the Deceased. As he could not see anything he went to retrieve his spectacles from the bathroom area. After he had put them on, he saw the Deceased still lying on the floor facing upwards. He then left the bedroom immediately.

78 After he left the master bedroom, he noticed that there was blood on his shirt. Hence he went to change out of the bloodied shirt and put on a new shirt from his wardrobe before going downstairs. As he noticed the front door was wide open, he stepped out of the house onto the street and there he saw his aunt Helen and Sumarti. He left the house as he wanted to get as far away as possible from the Deceased.

79 He said that after he had called for the ambulance, he told his aunt to wait for the ambulance and to direct the paramedics when they arrived. Thereafter he performed CPR on the Deceased applying the basic formula of 3 breaths and 5 compressions. As he could not feel the air going into the Deceased's lungs, the Accused also massaged the Deceased's neck to clear any blockages in the airways of the Deceased. He also remembered hearing cracks when he was doing the chest compressions.

80 Upon arrival of the paramedics, he followed them with the Deceased to the hospital in the ambulance.

81 The Accused had not heard of how stimulating carotid sinus receptors on the sides of the neck could lead to signals being sent that might affect the heart before this trial. He was not aware that the Deceased was suffering from HHD.

82 He explained that he was taught this form of restraint of using the arm over the neck to hold someone down by the Deceased. This was further reinforced by what he had watched on television and movies growing up. He had also used the same form of restraint over a friend, Glenn Lim, at his birthday in 2003. He had held him down using the same method while other friends were trying to remove Glenn's pants as a prank. Photographs of the Accused holding Glenn were tendered as evidence. The Accused testified that if he had known that using such a method of restraint over the neck would be dangerous he would not have used it on Glenn. He confirmed that he did not know by restraining the Deceased in the manner that he did, it would likely cause his death.

83 Under cross-examination, he confirmed that the source of the monies in the joint bank accounts he had with the Deceased came solely from the Deceased. He further added that there was no explicit requirement by the Deceased to obtain his express consent for withdrawals. He explained his words of remorse and calling his withdrawals a "sin" in his "G" statement the result of him feeling guilty over what had happened and trying to come up with a reason as why the Deceased was so angry with him. However, at the time of the incident, he did not know that the Deceased was referring to the withdrawals from the joint bank accounts given that the Deceased had also accused him earlier of stealing his money but it later turned out to be a mere misunderstanding.

84 The Prosecution also put to the Accused that in executing the neck-lock and chokehold, the Accused was intending to subdue the Deceased by rendering him unconscious, to which the Accused flatly denied. The Accused reiterated that his intention was to get the Deceased to stop struggling to attack him. He was not intending to cut off the Deceased's air supply or blood circulation from reaching his brain.

THE DEFENCE MEDICAL EXPERT WITNESSES

Dr Gregory James Davis' Evidence

85 Dr Gregory James Davis works at the Department of Pathology and Laboratory Medicine at the University of Kentucky in the United States as well as at the Office of the Associate Chief Medical Examiner for the Commonwealth of Kentucky. He explained that the term "medical examiner" is synonymous with "forensic pathologist". He has been qualified as a forensic pathologist since 1991.

86 He was provided with the autopsy report of Dr Lee as well as histological slides of cells from the Deceased's body. He came to the conclusion that there were competing causes of death. While he agreed with Dr Lee that manual compression of the neck is a possible cause, the historical case information and the anatomic findings are not enough to state to a reasonable degree of certainty that pressure on the neck was the definitive cause of death. Instead he found that the death is also consistent with sudden cardiac death due to his underlying heart disease during a struggle. As such, he found there was a "legitimate uncertainty" and the cause of death could not be determined in the present case.^[note: 17]

87 Dr Davis found evidence of not just HHD but also lung disease called pulmonary emphysema in some of the lung sections of the Deceased. He had noted thickened blood vessels as well as destroyed air spaces. The thickened blood vessels meant that the heart would have to work harder to pump the blood through and destruction of air spaces would compromise the exchange of gas in the lungs. This would present an added co-morbidity. Dr Davis described it in this way:

"[pulmonary emphysema is an] additional co-morbidity, it's an additional disease that the Deceased had that could make it more difficult to (a) bring in adequate oxygen when the heart is under increased demand, such as during an altercation; and (b) more difficult to blow off carbon dioxide, the laced product out of the lungs."^[note: 18]

88 He also expressed his view that the likelihood of thyroid cartilage fractures increases due to increased calcification of the cartilage and increased brittleness of the structure. He found support in a generally accepted textbook in the field of forensic medicine and pathology called "Forensic Pathology – Principles and Practice". I also noted that an extract from another textbook tendered (exhibit D12), the Fourth Edition of Knight's Forensic Pathology at page 378 also lend support to the view that the thyroid horns in later life can calcify and become more brittle. I found the first paragraph under the heading of "Injury to the Larynx" particularly relevant to the present case and I set it out in full here:

“During manual strangulation, the larynx may become damaged in various ways. The pressure is mainly bilateral, so that the sides of the larynx are squeezed. Particularly, vulnerable structures are the four ‘cornuae’ or horns, which protect backwards to maintain the patency of the airway around the glottis. Lateral pressure of the fingers can displace any of the four horns inwards, either by direct pressure or by pressure on the membrane, which then drags the horns medially. In young persons, the horns are so pliable that they return to their normal position on release of the pressure but, variably beyond the third decade, they may be sufficiently calcified to fracture”.

Dr Duflou’s Evidence

89 Dr Johan Anton Duflou is a forensic pathologist who first qualified in South Africa and later emigrated to Australia in 1988 as a specialist forensic pathologist. He is presently working as a consultant forensic pathologist.

90 When asked to comment on the three possible causes of death, he was of the view that blood vessel constriction of the neck causing death in manual strangulation is an uncommon mechanism. This was because it would take about 10-15 seconds of blood vessel constriction to result in unconsciousness and thereafter another 4 minutes of sustained compression to cause damage to the brain. It would then take another 10 minutes for the brain to be damaged to the extent of causing the heart to stop. He reasoned that it would be strange for an assailant to carry on compressing for such a long period after the victim had already lost consciousness.

91 He was of the view that vagus nerve stimulation is possible during compression of the neck resulting in the production of an abnormal heart rhythm leading to heart stoppage. In the present case, he would say that it was reasonably possible that the Deceased had died from this mechanism resulting from the neck compression in the form of a chokehold.

92 Dr Duflou also noted that the Deceased had two significant abnormalities of the heart: scarring of heart tissue and enlargement of the heart, which are signs of HHD. Both these conditions are known to be triggers for causing sudden cardiac deaths brought on by the stress of an altercation. As both vagus nerve stimulation and HHD could be at play in causing the death of the Deceased, Dr Duflou was of the view that the cause of death is best described as undetermined or unascertained. [note: 19] However, in his report dated 18 June 2015, Dr Duflou expressed the view at paragraph 25 that given the adverse effect of neural stimulation of the heart, the presence of the pre-existing heart disease could reasonably be anticipated to result in adverse outcomes more commonly than if the Deceased’s heart was normal in all aspects. Hence, he had stated in paragraph 25 that there was “a reasonable likelihood that the Deceased’s HHD was a contributory cause to the death” and that his view “appears to be in accord with that of Dr Lee”.

93 In court, he also opined that the neck injuries, namely some bruising and the fracture of the left superior horn of the thyroid cartilage by themselves were of minor significance in terms of danger to a person’s health.

94 However, during cross-examination, Dr Duflou agreed that chokeholds are potentially dangerous as when inexpertly applied, they can result in extensive injuries to the soft tissues of the neck and potentially fracture the structures of the larynx as outlined in his report dated 18 June 2015 at paragraph 15.

95 Dr Duflou was also cross-examined on his paragraph 24 of his report dated 18 June 2015 where he had stated that there “was no evidence of death directly due to hypertension or natural disease of another type in this case.” Dr Duflou disagreed that by that statement he meant that the underlying HHD could not have been the main cause of death. Instead he explained that the Deceased did not die directly from HHD as for that to happen, the Deceased would have to have severe hypertension or severe uncontrolled hypertension. He elaborated to say that if the Deceased was sitting still and minding his own business, he would in all probability not have died just based on the condition of his HHD. [note: 20]

96 Dr Duflou when pressed by Prosecution whether Dr Lee was correct in coming to the conclusion that the primary cause of death was manual neck compression, replied that it was an opinion open to Dr Lee, an opinion “which can be considered as a reasonable opinion”. [note: 21]

THE COURT’S ANALYSES

97 The circumstances leading to the altercation between the Deceased and the Accused which then escalated into a physical struggle are largely undisputed.

98 The Accused was summoned back by the Deceased after the Deceased had gone to the bank and realised that the Accused had made frequent and regular withdrawals over a period of time. It is not disputed that such withdrawals were carried out by the Accused without informing the Deceased. Whilst the Accused might claim that he has implied consent to do so and that the monies were for his benefit, it is clear from the angry reaction of the Deceased that the Deceased had thought differently. After all, it was not a small amount of monies withdrawn. The Accused had admitted that the total withdrawals came up to about \$200,000 over the last 5 years.

99 The account given by the Accused after he reached home is corroborated by the statements given by Sumarti. There was a confrontation between the Deceased and the Accused in the Deceased's master bedroom.

100 Thereafter, the verbal confrontation turned physical. Although we only have the account given by the Accused on this aspect, the Accused had been able to give a very consistent account in all his statements as well as in his evidence in court. The Prosecution was not able to cast any doubt on the version given by the Accused as to how the confrontation became physical, which is that the Deceased had used his finger to push against the chest of the Accused and had thereafter tried to punch the Accused.

101 I found that the Accused's accounts were internally consistent in all his statements as well as in his evidence in court. The account was also credible and cogent in that the Deceased being the "wronged" party could plausibly have lost control of his anger and became physical towards the Accused, particularly when the Accused did not immediately acknowledge his wrongdoing and kept asking him to explain himself. The Deceased's sister also confirmed that the Deceased was particularly sensitive about money matters. As for his physical ability to carry out an attack, all accounts given were consistent that the Deceased was not only a Taekwondo black belt holder in the past but he has been keeping himself physically fit by running as well as hitting the punching bag as part of his daily routine.

102 Accordingly I accept the version given by the Accused that it was the Deceased who had initiated the violence by firstly jabbing the Accused with his finger and thereafter tried to punch and hit the Accused. I also accept that the Accused had closed the space between them and tried to grab the Deceased with the intent of restraining the Deceased from further attacking the Accused. The Accused did not inflict any blows on the Deceased with the intention of causing hurt to him.

103 During this struggling where the Accused was trying to restrain the Deceased and the Deceased was trying to break free and attack him, both of them ended up falling to the ground in the master bedroom toilet. This was corroborated by the statement of Sumarti who stated she saw both of them physically entangled on the master bedroom toilet floor. The only slight difference is that Sumarti said that the Accused had his arm around the neck of the Deceased whilst the Accused said the Deceased's head was at his armpit. This slight discrepancy is not material given that the head and neck area are quite close to each other and Sumarti's observation may be less than accurate in her brief moment of observation. In any case her account ought not to be granted the same quality given that it had not been subjected to cross-examination.

104 I did not think the fact that Sumarti had tried to get the Accused to stop and release the Deceased would make the Accused out to be the aggressor. The Accused was physically bigger and is also the Deceased's son. It would be most natural for anyone in the position of Sumarti to try to get the Accused to release his grip over the Deceased who is a much older person. The pertinent point is that her observation corroborated the Accused's version that he was trying to restrain the Deceased from further attacking him by placing him in a headlock.

105 The action of the Accused in kicking out at Sumarti as well as at the screen door also did not show that the Accused was trying to hurt Sumarti or prevent her from getting help. These actions would be more in line with the Accused struggling to restrain the Deceased and in the process had kicked out wildly and not purposefully.

106 In the absence of any evidence to the contrary, I further accepted that this episode ended with the Accused releasing his restraint on the Deceased and had gotten back to his feet to walk out of the toilet door. However, the Deceased had also gotten back to his feet and followed the Accused before moving forward to attack the Accused again. I accept this account of the Accused as this also explains why the Deceased's body was found lying at the master bedroom door area instead of in the master bedroom toilet area as witnessed earlier by Sumarti. It was during this second episode where the Accused had placed the Deceased in a neck-lock with one arm over the neck with the arm and forearm in a V-shape over the neck and his other hand using his thumb and index finger placed at the collar bone area to keep the Deceased's head from slipping out. At this juncture, I would point out that the Accused had contradicted himself stating that he was using his right arm to perform the neck-lock whilst in his statement he has stated he was using his left arm. I found this discrepancy immaterial as essentially he was describing the same technique of neck-lock. I found it more probable that he was using his right arm as even in his statement he had stated using his right arm to perform the head-lock in the first episode at the master bedroom toilet area.

107 I accept the intention of the Accused was at this time still to restrain the Deceased from further attacking him. By him stating that he was using whatever strength he has left, in my view, is consistent with him saying that he was tired and was struggling to restrain the Deceased. It should not be interpreted to mean that he was trying to restrain the Deceased by causing him to lose consciousness.

108 The accounts given by the Accused in his multiple statements as well as in court were materially consistent and carried with it much candour. He did not shy away from stating that he had lost his temper when he was attacked. He also was candid in stating that he had used angry words like "Stop fucking around" and "just fucking stop it" during the struggling with the Deceased. He also expressed his feeling of guilt upon realising that his withdrawals of money had resulted in him "killing" his own father stating that he wished to come clean by giving a detailed account of his withdrawals.

109 I therefore found that the incident leading to the death of the Deceased had transpired in the way as described by the Accused.

THE MEDICAL EXPERT EVIDENCE AND FINDING OF CAUSE OF DEATH

110 I now move on to the medical evidence in relation to the cause of death.

111 On the issue of the qualifications of the expert witnesses, I bore in mind the caution given in *Sakthivel Punithavathi v Public Prosecutor* [2007] 2 SLR(R) 983 at [75] that –

"[w]here there is conflicting evidence between experts, it will not be the sheer number of experts articulating a particular opinion or view that matters, but rather the **consistency and logic** of the preferred evidence that is paramount" (emphases are mine)

and that –

"[e]xperts may sometimes be abundantly eminent while lacking credibility in a particular matter."

112 The qualifications of Dr Davis and Dr Duflou are without doubt impressive in terms of the years of qualification as well as the prominent positions held by them. On the other hand, I found that Dr Lee at the material time of his performing the autopsy on the Deceased was a sufficiently qualified forensic pathologist. He had extensive experience having performed over 1,000 post-mortems from 2007-2014 and had been certified to be qualified in May 2014 by the Royal College of Pathologists in the UK. Both Dr Davis and Dr Duflou had affirmed that Dr Lee had performed a detailed autopsy. Dr Davis described the autopsy to be an "excellent description" and Dr Duflou stated that Dr Lee had described all injuries, and the injuries and abnormalities had been photographed or otherwise documented.

113 What stood out for me is that both Dr Davis and Dr Duflou agreed that manual compression of the neck is a reasonable cause of death of the Deceased. Both had also found that the Deceased did suffer from HHD and would agree that this could have contributed to death. However, where they differed from Dr Lee is that they were unable to state with precise certainty that MCN is the primary cause of death. This was because there is a possibility that the Deceased could have died from the

HHD as a result of the altercation. They also found that there were the presence of other diseased conditions such as lung disease called pulmonary emphysema and arteriosclerosis within the heart which could also have contributed to the death of the Deceased.

114 I had pored through the evidence of all the expert witnesses carefully. Dr Lee on certain points was not very convincing particularly on stating that a calcified thyroid structure could be stronger. Both the other experts opined that calcification will cause the structure to be more brittle and this is typically seen in older adults. Dr Davis was also able to produce literature to support that opinion. However, aside from this, I found that the evidence leading to the death of the Deceased was more in support of Dr Lee's conclusion.

115 The medical opinion cannot be viewed in isolation from the factual matrix of the events leading to the death of the Deceased. The Deceased did not collapse whilst having a verbal altercation with the Accused. Neither did he suddenly collapse whilst grappling with the Accused. Instead, he had been held in a necklock and chokehold by the Accused until he became motionless. That was the final act being committed on the Deceased just before he became motionless. The bruising around the neck structures as well as the fracture of the thyroid cartilage even though more easily broken in older people would still require a significant amount of force as it is a relatively deep structure within the neck.

116 The account as narrated by the Accused would coincide with the logic provided by Dr Lee. The compression of the neck resulted in either the compression of the blood vessels resulting in weakening of the Deceased until complete occlusion took place or a stimulation of the carotid sinus receptors resulting in a wrong signal being sent to the heart or an interplay of the two mechanisms. The underlying heart disease would have hastened the process as the heart being diseased would be weaker and more susceptible to both the lack of oxygenated blood to the brain and vagus nerve stimulated signals. This would fit perfectly the situation as described by the Accused: that the Deceased eventually stopped struggling after a while of being placed in a neck-lock and chokehold.

117 The possibility that the Deceased had passed away purely from an increased demand on his heart due to the stress he was undergoing which is apart from the mechanisms triggered by the manual neck compression is clearly speculative and not borne out by the facts leading to the death of the Deceased as I had found them.

118 The other additional co-morbidities even if I found in favour with the opinions of Dr Davis and Dr Duflou would also be merely contributory to the cause of death which was primarily caused by the manual neck compression of the Deceased by the Accused.

119 Accordingly, I found that Dr Lee's opinion is the most persuasive on the primary cause of death which is MCN and I made this finding. The first element of the charge has therefore been proven beyond a reasonable doubt which is that the act of MCN was the proximate cause the death of the Deceased.

120 However, under section 304(b) of the Penal Code, the offence is only made out if the act committed by the Accused ie. MCN is one committed by the Accused with the knowledge that it is likely to cause such bodily injury as is likely to cause death; which is the second issue set out in paragraph 8 above.

121 This question can be answered more easily. The Accused was able to produce convincing evidence in support of his contention that he had thought such a manoeuvre is relatively safe. He had been taught this practice by the Deceased and more importantly he had used it on his friend some 11 years earlier without any harm being caused to him. He was aware that some harm may be caused such as sprains and twisted muscles if the inappropriate strength is applied.

122 The Accused was not strangling the Deceased which is an act that he should know would likely cause death. Instead he had placed his arm around the neck of the Deceased to hold him down but not to choke him or to make him unconscious through depriving him of oxygen. While there is some contact between the arm and the neck, the Accused was clearly trying to pull the Deceased toward him while the Accused was lying below him. It was to prevent the Deceased from getting up and attacking him further. I accept the Accused's assertion, that he had used all his remaining strength to pull the Deceased towards him and had intended to hold that position until the Deceased stop struggling, as true.

123 In summary, the Accused had been taught by the Deceased, who was a taekwondo black belt holder, such a method of restraint. He himself had applied such a method on his friend during a prank when he was a youth; he had applied a necklock to restrain his friend without any life-threatening consequences.

124 I have no doubt that the Accused's intention was clearly one of restraint. Throughout the two episodes, his evidence has been consistent and unchallenged that he was trying to restrain the Deceased from further assaulting him. His evidence that his arm was initially over the chest area was not objected to. However, the Accused admitted that there was no grip and very quickly his right arm had slipped onto the neck area of the Deceased. Given the volatility of the situation, where the Accused had applied a form of restraint which he had been taught and exercised before, I found it has not been proven beyond a reasonable doubt that the Accused knew that his act was likely to cause such bodily injury as is likely to cause death.

125 Accordingly, I found that the Prosecution had failed to prove beyond a reasonable doubt the charge under section 304(b) of the Penal Code and I accordingly acquitted the Accused on this charge.

126 However, I was mindful that a lesser offence might have been committed by the Accused given the possibility of my finding that the act of manual compression of the neck is the primary cause of death. I note that the Defence in their closing submissions had also considered this possibility and had put forward alternative charges for conviction. As such, I had invited the Prosecution to submit on alternative charges which Accused could be convicted of based on the same evidence adduced before the Court on 20 April 2017. Time was given for their consideration.

127 However, the Prosecution wrote on 21 July 2017 to state they do not wish to do so and instead sought leave to make further arguments for conviction on the charge as framed. They also asked for leave to make further submissions in the event that the Court indicate that it was not with them on the proceeded charge before verdict is delivered. Defence objected to the position taken by the Prosecution.

128 I then called for a conference in chambers to meet with both parties. I gave leave for Prosecution to make further submissions on the proceeded charge but directed the Prosecution to include the submissions on alternative charges which Accused could be convicted if they wish to, failing which I would give my verdict on the adjourned date without their submissions.

129 Unfortunately, Prosecution in their further submissions, only elected to address the Court on the proceeded charge and continued to request to make further submissions on possible alternative charges that the Accused could be convicted of in the event that the Court is of the view that the charge in its current form is not proven.

130 Accordingly, on the adjourned date, I delivered my verdict that the Accused be acquitted on the proceeded charge and instead convicted him on a reduced charge under section 304A(a) of the Penal Code for causing death by a rash act, without the benefit of the Prosecution's submission on the appropriate charge.

CONVICTION ON THE REDUCED CHARGE OF SECTION 304A(A) OF THE PENAL CODE

131 Section 139 of the Criminal Procedure Code states –

“If in the case mentioned in section 138, the accused is charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged under that section, he may be convicted of the offence that his is shown to have committed although he was not charged with it.”

By virtue of this provision, the Court can convict an accused of a different offence even though he has not been charged with it.

132 In the case of *Public Prosecutor v Tan Khee Wan Iris* [1994] 3 SLR(R) 168, it was held at [7] that the judge “possessed the discretion to effect such amendment once she noted the strong possibility of another offence arising on the facts”.

133 Given my finding that the Accused did commit an act which has caused the death of the Deceased, the issue that I had to address is whether there was anything criminal in his act. The Defence submitted on the alternative charges, namely, voluntarily causing hurt under section 323 of the Penal Code and one under section 304A(b) of the Penal Code for causing death by a negligent act.

134 As I have found that the Accused's intention was not to cause harm but to restrain the Deceased when performing the act of neck-lock and choke-hold, I found that the most appropriate charge to be considered would be one under section 304A of the Penal Code of causing death by a rash or negligent act not amounting to culpable homicide.

135 In the case of *Public Prosecutor v Hue An Li* [2014] 4 SLR 661 at [45], the High Court, when considering the issue of the distinction between rashness and negligence in the context of section 304A of the Penal Code, held that:

"In our judgment, awareness of the potential risks that might arise from one's conduct ought, in general, to be the dividing line between negligence and rashness. For both negligence and rashness, the offender would have fallen below the requisite objective standard of the reasonable person. The harsher sentencing regime for rashness is justified on the basis that the offender was actually advertent to the potential risks which might arise from his conduct, but proceed anyway despite such advertence. This is essentially a restatement of the definitions of "rashness" and "negligence" enunciated in *Poh Teck Huat*, which, in our judgment, remain good law. In short, advertence to risk will generally be an essential element of rashness".

136 The issue is thus whether the Accused was advertent to the potential risks which might arise from his conduct.

137 The Defence had submitted that the Accused had been taught this technique by his father and had applied it safely on his friend, Benjamin, without any harm caused and hence would be inadvertent to the risks from applying such a necklock.

138 However, this struggle was clearly different from what he had experienced many years ago in a fun and playful manner. This was a real fight where the Deceased had lashed out in anger and the Accused had struggled with all his might to make the Deceased yield to him. In any case, the necklock and chokehold he applied this time was different from that used on his friend previously. He had used his other hand to grip the neck on top of the necklock. The level of force and extent of the pressure on the neck region would definitely be greater with the use of both hands. He ought to know that there is inherent danger using such a method of restraint over a vulnerable area of the body for too long.

139 Whilst I am mindful that the Accused was performing a defensive action which is that of a restraining act, the manner in which he committed it, by applying both hands to the neck area, a vulnerable part of the body, would in my view, have crossed the threshold of rashness.

140 Accordingly, I found him guilty and convicted of the charge of causing death by a rash act not amounting to culpably homicide under section 304A(a) of the Penal Code.

THE APPEAL AGAINST SENTENCE

THE PUNISHMENT PRESCRIBED BY LAW

141 Section 304A(a) of the Penal Code provides that the offender shall be punished with imprisonment for a term which may extend to 5 years, or with fine, or with both.

THE CULPABILITY OF THE ACCUSED

142 The Prosecution's description of the act of the Accused in their closing submissions at paragraph 2, as having "**viciously attacked** the Deceased by gripping his neck within a neck-lock with his right arm" is clearly inconsistent with my findings and the Prosecution had proceeded on the wrong footing in their submission on the culpability of the Accused.

143 I reiterate my findings that it was the Deceased who first used violence on the Accused. The Accused moved forward to restrain the Deceased in order to prevent him from further assaulting the Accused. His purpose was to stop the Deceased from being able to throw further punches at him. His action was clearly defensive in nature and not a vicious or brutal attack. The second error in the Prosecution's submission was to conflate the two episodes of the restraint into one when at paragraph 3 of their submissions they stated that the "Accused temporarily released his hold on the Deceased, before constricting the latter's neck again" giving the impression that the Accused had relentlessly attacked the Deceased.

144 This was not clearly not borne out by the facts as I found them. The Accused had released his grip on the Deceased at the end of the first episode and had walked away. This shows that the Accused's intention was to stop the fight and was prepared to walk away once the Deceased had stopped struggling. It was because the Deceased had then followed him to attack him, that the Accused felt the need to restrain the Deceased again. It was not one continuous act of arm locking the Deceased on the neck with a brief moment of loosening of grip. There was a brief period of disengagement by the Accused before the Deceased started the second episode.

145 I will now examine the culpability of the Accused in terms of the rashness of his act. It is not disputed that the degree of culpability of the rashness offence can be assessed based on

- i. the degree of risk taken by the Accused; and
- ii. the extent to which the Accused appreciated the risk and disregarded it.

146 The Accused ought to have known that any constriction around the neck is objectively a dangerous act. The greater the force used, the longer the time of such constriction, the graver the risk that serious injuries will result.

147 Here, the Accused did not just arm lock the Deceased around the neck but he also used his other hand to press his fingers forming a "V" shape at the neck area to get a better grip. The combined effect of both locking mechanisms had exerted a significant amount of force on the Deceased, resulting in visible bruises around the neck as well as a fracture of the thyroid cartilage.

148 However, I had to weigh the situation that the Accused had found himself in when assessing the degree of his rashness. I felt that his culpability is mitigated by the fact that he did not have the luxury of time and space to fully contemplate the seriousness of his action. He had been attacked once already and his restraint on the Deceased by way of a head-lock had worked. He was then attacked again. Unfortunately, this time round he had deployed a more dangerous form of restraint, one which would involve some form of constriction around the neck area. As the Deceased continued to struggle, the Accused inevitably exerted more force to contain and subdue the Deceased until he stopped struggling.

149 I am mindful that the Accused was in a volatile and dynamic situation of trying to fend off an enraged father who was much older than him in age but who was said to be very fit and a holder of a black belt in taekwondo. His level of consciousness of the risks involved in deploying such a restraining act would be of a lesser degree than someone who was not in that situation.

150 It should also be borne in mind that the Prosecution's own expert witness, Dr Lee Chin Thye, had held that the previously unknown underlying hypertension heart disease was a contributory cause which could have hastened death by manual compression of the neck in 2 ways:

- i. the diseased heart is weaker and more susceptible to death in any situation and would have decreased its reserves in reaction to the manual compression of the neck; and
- ii. it makes it more susceptible to the nervous stimulation of the carotid sinuses thereby causing the heart to stop.

151 Therefore the culpability of the Accused in causing the death of the Deceased is also reduced by the presence of this inherent condition, in contrast to other cases where the act of the offender is the sole cause of death.

152 Sentencing precedents for section 304A of the Penal Code under the rash limb for non-road traffic accident cases, present a very wide spectrum of facts such that it is not easy to try to meaningfully compare the different culpability with exact precision.

153 The other point to note is that precedents that are before the Penal Code amendments which came into force on 1 February 2008 ("the pre-2008 cases"), which led to an increase in the maximum imprisonment which can be imposed to 5 years from 2 years, are still relevant. It is not Parliament's intention that once the maximum punishment is raised that the sentence to be passed would automatically go up. An example would be where in a particularly egregious case, a court under the pre-2008 era would be constrained to limit the highest sentence it wished to impose to 2 years even if it wanted to impose a longer sentence. However, it did not mean that with the increase of the maximum punishment to 5 years, the right sentence would then be pegged at the maximum of 5 years' imprisonment. The same court might still have elected to impose at most slightly higher than 2 years but nowhere near the new maximum of 5 years, taking into account all the relevant factors.

154 I now turn to the more relevant case precedents submitted by the Prosecution and Defence and my analysis of them.

155 On the extreme end of culpability of rashness would be the case of *Public Prosecutor v Ikaeshi Dulkolid* DAC 41395/2000 (unreported) where the offender had shown a high degree of rashness. The offender, who was working as a domestic helper, had held a 14-month-old infant outside the window of a high rise flat, with the intent of letting the deceased see the birds outside the window. While holding the deceased with one palm under the buttock of the deceased and another hand under the deceased's armpit, she lost her grip and the deceased fell to his death. She was given the maximum sentence of 2 years. The rashness displayed was stated to be of the "highest degree" in *Ikaeshi* by the High Court in the case of *Public Prosecutor v Tiyatun and another* [2002] SGHC 76. The probability of death was very high and the offender had displayed total disregard for the safety of the infant deceased.

156 In *Tiyatun*, a nanny and the domestic maid had force-fed a 21-month old child by pressing the child's nostrils while holding his hands down to force the food down his mouth. The cause of death was certified to be "bronchopneumonia due to inhalation of foreign material". The child had been fed this way for the past 8 months. Both offenders were sentenced to 9 months' imprisonment. It was noted by CJ Yong in the case of *Balakrishnan S & Anor v Public Prosecutor* [2005] SGHC 146 that the child had been fed in the same manner over the past 8 months without adverse consequences.

157 In *Public Prosecutor v Shagar* DAC 913177/2015 (unreported), the deceased had first swung a trowel at the offender and 2 others who had approached him. The offender, in response, had picked up a 1.2m wooden rod and advanced towards the deceased. The deceased had then begun to retreat. Despite that, the offender had swung the wooden rod hitting the deceased on the head, resulting in multiple fractures to the head and brain stem cell bleeding. The offender was sentenced to 2 years' imprisonment.

158 I found the facts of *Shagar* more aggravated in one aspect. When the offender swung the wooden pole which hit the head of the deceased, the offender was not in danger since the deceased was retreating. This is in contrast to the present case when the Accused was trying to restrain the Deceased from further attacking him.

159 In *Tan Choon Ming v Public Prosecutor* Magistrate's Appeal no. 153 of 1997, the offender was a national serviceman who had loaded a machine gun with live rounds without the permission of the safety officer. He had briefly applied pressure on the trigger without checking to ensure that the gun was in a safe mode. A live round was discharged killing another serviceman. He was sentenced to 6 months' imprisonment.

160 Finally, in *Balakrishnan*, in a combat survival course, as a result of having their heads dunked in a water tub, one trainee died and another seriously injured. The commander and the course supervisor were charged for abetting the rash acts committed against the trainees. They were sentenced to 6 months' imprisonment and 12 months' imprisonment respectively. The course supervisor, Captain Pandiaraj, as the safety supervisor, was given the more severe punishment as he was tasked with ensuring the safe conduct of the exercise. He gave instructions for the dunking, witnessed the manhandling of the trainees and did nothing to stop it.

THE SENTENCING CONSIDERATION

161 Looking at all the above facts and sentences, as the Accused's culpability is clearly not at the extreme end or even near it, I found that the submission of 4 years' imprisonment by the Prosecution was way off the mark.

162 The Accused's culpability lies in the fact that he had employed a dangerous manoeuvre of using two hands to restrain the Deceased over the neck region. However this has to be moderated in the light that he was being attacked. He had deployed the necklock and chokehold in the heat of the moment. I also took into account that the Accused has a clean record and by all accounts shared a cordial and warm relationship with the Deceased. Even on the day itself, prior to leaving the house, Sumarti had heard him deliver the usual courtesies to his father saying "Hi, dad" and "Bye". It was clearly not a malicious and brutal attack on his part due to any earlier hostilities or grievance against the Deceased.

163 The Accused struck me especially in the immediate aftermath of the offence as someone who was genuinely regretful over what he had done. The death of his father by his own hands was clearly an unintended outcome. He gave a very honest and detailed account of his role to the police and did not downplay his part.

164 I note that the Accused had spent a period of more than 8 months in remand after he was first charged for murder under section 302(1) of the Penal Code on 12 February 2015 where no bail was granted. He was only released on bail on 22 October 2015 after the charge was reduced to one under section 304(b) of the Penal Code. He had spent a total of 8 months and 11 days in remand.

165 The Defence in their closing submissions at paragraph 116, asked for a sentence of 1 day's imprisonment after giving credit for the period spent in remand. I agree that the Accused had been sufficiently punished for his crime. I had in mind a sentence of one year's imprisonment to reflect the gravity of the offence and the level of his culpability. A sentence of one year's imprisonment would also sufficiently satisfy the principles of deterrence and retribution in this case.

166 Taking into account the one third remission, he would need to serve at least 8 months in prison. Hence he would have effectively served out his this imprisonment term of one year. I accordingly sentenced the Accused to one year's imprisonment with a direction that the sentence be backdated to 18 February 2015, the date he was placed on remand after psychiatric evaluation, a period which would still be more than 8 months. The fact that he is now out on bail constituting a "break" in the custody of the Accused is not a bar to backdating of sentence – see *Public Prosecutor v Sivanantha a/l Danabala* [2015] 4 SLR 585 at [35]. The Prison authorities would be able to compute the period of imprisonment taking into account the period spent in remand by the Accused. Both the Defence and Prosecution agreed on this approach so that the sentence passed can properly reflect the culpability of the Accused which a one day's imprisonment may not.

167 As for the charge under section 13(1)(a) of the Arms and Explosive Act punishable under section 13(4) of the Act, both parties are agreeable that a fine would be sufficient. I note that the case of *Sim Wen Yi, Ernest v Public Prosecutor* [2016] 5 SLR 207, which had held that the punishment provision should be interpreted to mean that an offender should be sentenced to both a custodial sentence and a fine, should be applied prospectively. As the Accused had already indicated that he wished to plead guilty to this charge before the judgment of *Sim Wen Yi Ernest* was delivered and the charge had been stood down pending the outcome of the charge to which he had claimed trial, I am agreeable to impose only a fine on the Accused. In view of the high number of the air pistols involved, I agree with the Prosecution's submission that the maximum fine should be imposed. I accordingly sentenced the Accused to a fine of \$5000, in default 2 weeks' imprisonment. The fine has been paid.

168 The Accused is currently on bail pending the hearing of this appeal.

[note: 1] Tab G statement p.9 para 54.

[note: 2] Tab G statement p.10 para 59.

[note: 3] Tab G statement p.9 para 55.

[note: 4] Tab G statement p.9 para 56.

[note: 5]Tab G statement p.3 para 33.

[note: 6]Record of Proceedings ("RP") Day 3 p.29 lines 20-25.

[note: 7]RP Day 3, p.37 lines 6-16.

[note: 8]RP Day 3 p.53 line 12 to p.54 line 22.

[note: 9]RP Day 4 p. 6 line 19 to p.7 line13.

[note: 10]RP Day 4 p.38lines 4-32.

[note: 11]RP Day 4 p.45 line 13 to p.47 line 26.

[note: 12]RP Day 4 p.30 lines 11-24.

[note: 13]RP Day 4 p.61 lines 22 to 27.

[note: 14]RP Day 5, p.26 line 26 to p.27 line 4.

[note: 15]RP Day 5 p.68 lines 14-17.

[note: 16]RP Day 5 p.72 lines 18-23.

[note: 17]RP Day 6, p.97 lines 7-14.

[note: 18]RP Day 6, p.78 lines 19-26.

[note: 19]RP Day 9 p.16 lines 1-24.

[note: 20]RP day 9, p.39 line 30 to p.40 line 4.

[note: 21]RP Day 9, p.49 lines 3-13.

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