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SUDDEN FIGHT: LIFE AFTER SEOW KHOON KWEE

Exception 4 to Section 300 of the Penal Code has had an interesting history. For many years, it remained shrouded in mystery, at least in the local context, in that there were not many illustrations as to how the Singapore courts would apply the Exception to a given fact situation. Even after the pronouncements of the Privy Council in *Mohamed Kunjo* v *PP* [1978] 1 MLJ 51, there were not many cases where the Singapore courts had the opportunity to follow up on the lead of the Privy Council. However, after the case of *PP* v *Seow Khoon Kwee* [1989] 2 MLJ 100, there has been a deluge of cases in which the courts have had the opportunity to apply sudden fight. This article attempts to scrutinise the local cases in order to determine the *corpus juris* with regard to sudden fight in Singapore.

I. INTRODUCTION

UNTIL the decision of *PP* v *Seow Khoon Kwee*[1] in 1989, there had been a lull of ten years or more before the special exception of sudden fight[2] began to be canvassed before the local courts in situations which merited any serious consideration. Prior to this case, there had not been many decisions in Singapore which had to deal, in any degree of detail, with the principles underlying the defence of sudden fight nor did the facts merit any discussion of the defence. Up until the decision of *PP* v *Seow Khoon Kwee,*[3] the only noteworthy decision had been the Privy Council decision of *Mohamed Kunjo* v *PP*[4] in which their Lordships made certain observations on various aspects of the defence. The law was, perhaps,

1 [1989] 2 MLJ 100.

2 Exception 4 of S 300 of the Penal Code, Cap 224, 1985 Rev Ed, hereafter referred to as 'the Penal Code':

> Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner.
>
> Explanation – It is immaterial in such cases which party offers the provocation or commits the first assault.

The provisions mentioned below refer to the Penal Code unless otherwise stated.

3 *Supra,* note 1.

4 [1978] 1 MLJ 51.

still in an unsatisfactory state in that there remained lingering questions about the ambit of the defence; neither was there any real guidance as to how the Singapore courts would deal with a given fact situation. Another thing which has not helped the cause of trying to clarify the scope of the special exception was that the local courts, when they had occasion to deal with this defence, tended to fight shy of enunciating guiding principles and normally summarily dismissed the case without really providing an insight into the reasons the defence had failed.[5]

The decision of *PP* v *Seow Khoon Kwee*[6] marked the end of the paucity of cases in which the defence of sudden fight merited detailed consideration by the courts. After that case, more than ten cases have arisen in which Exception 4 to Section 300 was relied on, a fair number of cases successfully. This paper will seek to trace the development of the defence of sudden fight in the local context by examining the decisions, from *Mohamed Kunjo* v *PP*[7] to *PP* v *Seow Khoon Kwee*[8] and then move on to the cases which have since followed.

Exception 4 to section 300 was envisaged by the drafters of the Indian Penal Code[9] to apply to cases where, irrespective of the cause of the fight, the subsequent conduct of both parties put them on a equal footing with respect to blameworthiness. This is because there will be blows on each side. Each subsequent blow becomes a fresh provocation, however slight

5 Take for example two cases that were reported at around the same time as the decision of *PP* v *Seow Khoon Kwee*, *supra,* note 1, those of *PP* v *Chan Kin Choi* [1989] 1 MLJ 404 and *Teo Boon Ann* v *PP* [1989] 2 MLJ 321, where the judgments of the courts in both cases dismissed the defence in words that were similar – the fight was not a sudden fight in the accepted legal sense, and even if there was, the accused had taken advantage of his victim and had acted in a cruel and unusual manner. It will be immediately noticed by any reader of the two judgments that there is, interestingly, no explanation of what is meant by 'sudden fight' in the accepted legal sense or of when an accused is deemed to have taken advantage of his victim or had acted cruelly or unusually.

6 *Supra,* note 1.

7 *Supra,* note 4.

8 *Supra,* note 1.

9 As with all matters relating to the Penal Code, much guidance can be sought from the wealth of decisions of the Indian Courts. Although the Indian decisions and commentators are making observations on the Indian Penal Code, they are nonetheless of great significance and of highly persuasive authority not least because the local Penal Code is derived from the Indian Penal Code. As such, it is pertinent to observe how the Indian Courts have dealt with the issues relating to sudden fight.

The precursor of the Singapore Penal Code is the Penal Code of the Straits Settlements which was derived from the Indian Penal Code. The Straits Settlements Penal Code was passed by the Legislative Council of the Straits Settlements in 1871 as Ordinance No 4 of 1871 and came into force on 16 September 1872. Although the Singapore Penal Code has been amended from time to time, it still retains its main original provisions.

the initial insult or blow may have been. With each blow, the blood boils over and the voice of reason is heard by neither. As such, it is impossible to discriminate between the respective degrees of guilt with reference to the initial state of affairs.[10] As such, the whole idea behind the Exception means that it does not matter what the cause of the quarrel is, or who strikes the first blow, as long as it should all arise suddenly in the heat of the moment, and it is not used as a cloak for pre-existing malice or ill-will.[11]

That is why the Indian courts have always held that where a mutual fight occurs and there is no reliable evidence who started it or how it began, the case is more appropriately dealt with under this Exception and not under private defence.[12] However, this does not mean that the Exception is a means of resolving doubt or avoiding a definite decision where it is possible.[13]

To bring a case within the exception of sudden fight, three facts have to be proved:

(1) sudden fight in the heat of passion upon a sudden quarrel;

(2) absence of premeditation; and

(3) no undue advantage or cruelty.[14]

It is immediately noticed that the requirements of the Exception reflect the intention of the drafters and the nature of the defence. All of them point to a situation where it is impossible to say that one party is more guilty

[10] M & M 261, as quoted in *Ratanlal & Dhirajlal's Law of Crimes*, 23rd Ed, Vol 2, at 1110: The Exception directs the attention to the distinction between the present and some of the preceding Exceptions. In many cases of mutual consent, homicide caused by the person who received the first blow or the provocation, would, under those Exceptions, have been extenuated. But if that person's death had been caused by his opponent, the offence would not have been within the reach of any mitigation provision. The present Exception is meant to apply to cases in which notwithstanding that a blow may have struck or some provocation given in the origin of the dispute – or in whatsoever way the quarrel may have originated, – yet the subsequent conduct of both parties puts them, in respect of guilt, upon an equal footing. For, there is a mutual combat, and blows on each side. And however slight the first blow, or provocation, every fresh blow becomes a fresh provocation. The blood already heated warms at every subsequent stroke, and the voice of reason is heard by neither side in the heat of passion. Under such circumstances there cannot be much room for discriminating between the respective degrees of blame with reference to the state of things at the commencement of the fray.

[11] Ratanlal, *ibid*, at 1111.

[12] *Jumman* v *The State of Punjab*, AIR 1957 SC 469; *Ram Karan* v *The State of Uttar Pradesh*, AIR 1982 SC 1185.

[13] *Mangat* v *State*, AIR 1967 All 204.

[14] See *supra,* note 2.

than the other. If any of the facts are not proved, the defence should fail because the accused cannot then say that he was on an equal footing with the deceased, in terms of blameworthiness.

A. *Sudden Fight*

The word 'sudden' connotes a fight that is not prearranged. This would necessarily mean that there should not be a lapse between the quarrel and the fight. The intervention of such a period would mean that reason would have overcome passion and the fight is not sudden.[15]

The word 'fight' is not defined in the Penal Code. The Indian courts have defined it to mean 'a bilateral transaction in which blows are exchanged'.[16] It is not necessary for weapons to be used and it may still be a fight if only one party succeeds in landing a blow. What is important is that blows must be exchanged even if they do not find their target.[17]

The case of *Jusab Usman* v *State*[18] is authority for a more lax definition of 'sudden fight'.[19] This arises because the court described a fight as being where there is 'at least an offer of violence on both sides'.[20] It is submitted that the case does not stand for such a proposition, *ie*, a wider definition.

[15] See Gour, HS, *Penal Law of India* (10th Ed, Vol III, 1983), at 2368, where the editors observe:

> Heat of passion requires that there must be no time for the passion to cool down...

[16] *Bhagwan Munjaji Pawade* v *State of Maharashtra*, AIR 1979 SC 144, *per* Sarkaria J at 134. See also the observations of Teja Singh J in *Hans Raj Singh* v *Emperor* AIR 1946 Lah 41:

> If a person gives a blow to another, there will be a fight only if the other hits him back or at least he gets ready and attempts to assault but none if he keeps quiet and does nothing. In that case, it will only be a one-sided attack but not a fight. If blows are exchanged, the fact that the person assaulted hits back in self-defence would not make any difference. If, the course of a sudden quarrel, one of the parties gives a blow to his adversary and that blow results in death, he cannot take advantage of Exception 4 notwithstanding the fact that after he has given the blow, he is belaboured by the deceased, before he dies, or by his companions, for the simple reason that at the time when he gave the fatal blow, there was no fight.

[17] *Sis* v *State of Punjab*, (1973) 75 Punj LR 25; see also *Atma Singh* v *The State*, AIR 1955 Punj 191, at 192:

> The term 'fight' occurring in Exception 4 to S 300 is not defined in the Code. It takes two to make a fight. It is not necessary that weapons should be used in a fight. An affray can be a fight even if only one party in the fight is successful in landing a blow on his opponent. In order to constitute a fight, it is necessary that blows should be exchanged even if they do not all find their target.

[18] 1983 vol XXIV(2) Gujarat Law Reporter 1148.

[19] Koh, Clarkson and Morgan, *Criminal Law in Singapore and Malaysia, Text and Materials*, 1989, at 458.

[20] See *supra,* note 18, at 1151.

This statement has to be read in its context. What the court was pointing out is that both parties should be willing to fight when the affray broke out, and not just one party taking the blows of the other without attempting to reply. This would then be a one-sided attack and not a fight.[21]

B. *Premeditation*

Exception 4 comes into play only if there was no premeditation in causing death. To constitute a premeditated killing, it is necessary that the accused should have reflected with a view to determine whether he would kill or not.[22] This means that there ought not be an element of design or prior planning.[23] The killing should be sudden, *ie*, under the momentary excitement and impulse of passion upon provocation given at the time or so recently as not to allow time for reflection.[24]

Premeditation is proved by direct or by circumstantial evidence. Premeditation is proved not just from the fact of the use of a deadly weapon but also from the manner of the killing and circumstances under which it was done or from other evidence.[25]

[21] *Gour*, *supra,* note 15, at 2370.

[22] *Kirpal Singh* v *The State* AIR 1951 Punj 137, at 140 *per* Bhandari J; approved and adopted by the Privy Council in *Mohamed Kunjo*, *supra,* note 4, and the High Court in *PP* v *Seow Khoon Kwee*, *supra,* note 1.

[23] See *supra,* note 4, at 54, *per* Lord Scarman.

[24] *Kirpal Singh* v *The State*, *supra,* note 22, at 140, adopted by the court in *PP* v *Seow Khoon Kwee*, *supra,* note 1, where the court made the following observation:

> Exception 4 comes into play only if death is caused without premeditation. To constitute a premeditated killing, it is necessary that the accused should have reflected with a view to determine whether he would kill or not; and that he should have determined to kill as the result of that reflection; that is to say, the killing should be a premeditated killing upon consideration and not a sudden killing under the momentary excitement and impulse of passion upon provocation given at the time or so recently before as not to allow time for reflection.

See also *Nga Chit Tin* v *King* AIR 1939 Rang 225, at 233 where it was observed that:

> Whether or not the killing was premeditated is not the first test to be applied when considering, whether the exception of 'a sudden fight in the heat of passion' is applicable to any given set of facts. The first test is whether the act of the accused which caused the deceased's death was done without premeditation. The distinction is not to be ignored.

Based on this statement, *Gour*, *supra,* note 15, at 2368, observed that even if the killing is not premeditated, but if the act which causes the killing is premeditated, the exception would not apply and the offence is murder.

[25] *Ibid*; in fact Bhandari J gave some illustrations, at 140:

> Evidence of premeditation can be furnished by former grudges or previous threats and expressions of ill-feelings; by acts of preparation to kill, such as procuring a deadly weapon or selecting a dangerous weapon in preference to one less dangerous, and by the manner in which the killing was committed. For example, repeated shots, blows and other acts of violence are sufficient evidence of premeditation.

C. *Undue Advantage or Acting in a Cruel or Unusual Manner*

Even if the fight is unpremeditated and sudden, if the weapon used or the manner of retaliation is greatly out of proportion with the offence given, and cruel in its nature, the accused will not be able to rely on the Exception.[26] 'Undue advantage' has been judicially defined as an unfair advantage.[27] Of course, it may be observed that it is not always the case that the use of a weapon would constitute taking an unfair advantage.[28]

II. Fit the First

(*Mohamed Kunjo* v *PP*)[29]

One of the first cases in the local context which merited serious consideration on the facts, and which had dealt with and had laid down guidelines with regard to Exception 4 is the Privy Council decision of *Mohamed Kunjo* v *PP*.[30] The case involved rather tragic circumstances.

[26] See *supra,* note 4; see also Ratanlal, *supra,* note 10, at 1112.

[27] *Ibid*, at 54; see also *Sarjug Prasad* v *The State* AIR 1959 Patna 66, at 69 where K Sahai J observed that:

> The expression 'undue advantage' means 'unfair advantage' and cannot be limited to a case where the victim is made physically incapable to defend himself. An assailant cannot but be said to have taken undue advantage of his victim if the latter is taken completely unawares and is struck when he does not even suspect he is about to be struck. Furthermore, no reasonable person can expect that a man would whip out a knife and strike another on a vital part of the body with it on account of a petty quarrel. If the weapon or manner of attack by the assailant is out of all proportion to the offence given, that circumstance must be taken into consideration for deciding whether undue advantage has been taken. In such a case, the assailant must also be held to have acted in an unusual manner.

This statement was approved and adopted by the Supreme Court of India in *Chamru Budhwa* v *State of Madhya Pradesh* AIR 1954 SC 652.

[28] As was observed by the court in *PP* v *Somasundaram* AIR 1959 Mad 323, at 327:

> Where from words the parties come to blows and if after the exchange of blows on equal terms, one of the parties without any such intention at the commencement of the affray snatches a deadly weapon and kills the other party with it, such a killing will only be manslaughter. But if a party under colour of fighting upon equal terms, uses from the beginning of the contest a deadly weapon without the knowledge of the other party and kills the other party with such a weapon, the killing will be murder. As long as the fight is unpremeditated and sudden, the accused irrespective of his conduct before the fight, earns the mitigation provided for in Exception 4 to S 300 subject to the condition that he did not in the course of the fight take undue advantage or act in a cruel or unusual manner.

[29] *Supra,* note 4.

[30] *Ibid.* Of course, prior to the instant case, sudden fight had been canvassed before the Singapore courts. However, most of them did not disclose facts which merited further consideration by the courts. Even when the fact situation arose where the court might have

Two colleagues in a transport firm and hitherto good friends were drinking one day when a quarrel broke out. A fight ensued. The two parties grappled with each other, fell to the ground where they continued to wrestle with each other, exchanging punches. They were both so intoxicated that they both fell down and got up again several times. The accused suddenly disengaged from the fight and ran towards the store where a lorry was parked and returned wielding the exhaust pipe of a motor vehicle. The accused charged at the deceased who was merely standing up, and delivered a blow on the head of the deceased. The deceased tried to ward off any further blows by raising his hands but fell to the ground. The accused then proceeded to hit the deceased on the head three or four more times with the exhaust pipe. The deceased had died by the time the ambulance arrived. The autopsy revealed that the deceased had died of a fractured skull. In fact, one of the fractures was found to be caused after the demise of the deceased.

The Privy Council, in a judgment delivered by Lord Scarman, found that on the evidence, it was clear that the blows were struck 'in a sudden fight in the heat of passion upon a sudden quarrel'.[31] Furthermore, the act that caused the death was done without premeditation. Lord Scarman quoted with approval the definition of 'premeditation' as expounded by Bhandari *J in Kirpal Singh* v *The State*[32] and came to the conclusion that in order to consitute a premeditated killing, there must be 'an element of design or prior planning'.[33]

Lord Scarman, however, felt that the accused faced insurmountable problems showing that the act which caused the death was done 'without the offender having taken undue advantage or acted in a cruel and unusual manner'.[34] Lord Scarman defined 'undue advantage' as 'unfair advantage'.[35]

had the opportunity to apply the law to the facts, the main issue was whether the jury had been misdirected. As such, the court did not take the opportunity to explore the factual application of sudden fight: see *Soh Cheow Hor* v *R* [1960] 26 MLJ 254. See also the decisions of the Federal Court of Malaysia in *Vaeyapuri* v *PP* [1966] 1 MLJ 84 and *Berahim* v *PP* [1968] 1 MLJ 298. It may also be that sudden fight was not always relied on by the accused, *eg, Chan Tong* v *R* (1960) 26 MLJ 250, where Exception 4 was not raised before the Singapore Court of Criminal Appeal in circumstances where sudden fight may well have been applicable: see comments of Brown, "'Chance Medley' and the Malaysian Penal Codes" (1961) Mal LR 73, at 81.

31 *Supra,* note 4, at 54.

32 *Supra,* note 22:

> to constitute a premeditated killing it is necessary that the accused should have reflected with a view to determine whether he should kill or not.

33 *Supra,* note 4, at 54.

34 *Ibid.*

35 *Ibid*, where his Lordship accepted and adopted the definition suggested by K Sahai J in *Sarjug Prasad* v *The State*, *supra,* note 27.

The Privy Council placed great emphasis on the fact that the accused had disengaged from the fight to get a weapon, which the court characterised as 'truly murderous',[36] and used to attack the defenceless deceased. Lord Scarman also emphasised the fact that the deceased was taken totally by surprise and was attacked by a very unusual and unexpected weapon, with which a heavy blow on the head could reasonably be expected to be lethal. In light of this, Lord Scarman felt himself constrained to hold that the accused could not be said not to have taken undue advantage or acted in a cruel and unusual manner. The plea of sudden fight therefore failed.[37]

What is clear from the Privy Council's decision is that when a person disengages from a fight and comes back armed with a weapon, it would constitute taking an undue advantage. The other point which the court emphasised was that the deceased was taken by surprise. This would seem to be consistent with the approach of the Indian decisions. Moreover, the nature of the weapon is also relevant in considering if the accused had taken undue advantage. Another notable point which arises from the decision in the instant case is that the Privy Council, in holding that the accused had taken unfair advantage or had acted cruelly or unusually in disengaging to get a weapon and using it, is perhaps suggesting that the mere fact that the parties to the fight were on an equal footing at the beginning of the fight does not preclude the court from scrutinising their subsequent conduct. This means that the question of whether the accused had taken undue advantage is one which is relevant throughout the entire transaction, and not just at the outset.

III. Fit the Second

(*PP* v *Seow Khoon Kwee*)[38]

For ten years, there were no decisions in which the opportunity arose for the Singapore courts to follow up on some of the clarification of the ambit of Exception 4 expounded by the Privy Council in *Mohamed Kunjo* v *PP*.[39] Then came the decision of the High Court in the case of *PP* v *Seow Khoon Kwee*.[40] The court in this case took great pains in dealing with the issues

[36] *Ibid.*

[37] The Privy Council, in its judgment, however made the recommendation that the accused, in light of the mitigating circumstances, be granted the Presidential pardon. As a historical note, the pardon was granted.

[38] *Supra,* note 1.

[39] *Supra,* note 4.

[40] *Supra,* note 1.

which arose with regard to Exception 4. Thus, the decision of the court is particularly instructive in beginning to understand how the local courts would deal with the plea of sudden fight.

Both the accused and the deceased were detainees at the Medium Security Prison in Changi, under the Criminal Law (Temporary Provisions) Act, 1955.[41]

The tragic chain of events which ultimately culminated in the deceased's demise began one day while the detainees of the prison were gathered in the enclosure of the prison. A disagreement arose out of a bout of name calling between the accused and the deceased. The accused challenged the deceased to a fight. The two were restrained from so doing by the other detainees. When the prison warden looked into the enclosure to investigate the commotion, he found the deceased standing and appearing angry. The deceased refused to answer the warder's enquiry as to what had happened.

The warder informed the rehabilitation officer of his suspicion that the deceased had been involved in a fight. The deceased was put in an isolation ward and was subjected to consecutive interviews by the assistant superintendant and the rehabilitation officer. He was released later in the day, on the condition that he would cooperate in ascertaining the parties involved in the fight. The rest of that day was uneventful.

The next day, the accused was seen talking to the deceased, while he was holding a piece of glass wrapped in a towel. The deceased suddenly struck out at the accused who was thrown back by the force of the punch. The deceased then charged at the accused and they fought. After a short altercation, the deceased stepped back, clutching his chest which was bleeding heavily, and collapsed. The deceased was rushed to hospital where he later died. The accused was charged with the murder of the deceased under section 300 of the Penal Code.

At the trial, a few defences were put forward by the accused. Firstly, it was denied that the accused had inflicted the fatal injury, as well as it was contended that the prosecution had failed to establish beyond a reasonable doubt that the the accused had the requisite *mens rea* under section 300. Secondly, the accused was entitled to be acquitted because he had inflicted the fatal injury in the exercise of the right of private defence. Lastly, failing all of the above defences, it was submitted by the defence that the case fell within Exceptions 1, 2 and 4 of section 300 of the Code, *ie*, that the injuries were inflicted after the accused was provoked, or whilst he was exercising his right of private defence or were inflicted in the course of a sudden fight, and therefore the accused should not be convicted for the

[41] Cap 67, 1985 Rev Ed.

offence of murder but rather should be convicted for the offence of culpable homicide not amounting to murder.

The court accepted only the last defence, *ie*, the accused could rely on Exception 4 of section 300.[42] The court found that the circumstances of the case pointed to the conclusion that the fight in question was a sudden fight. The court was also satisfied that the accused did not take undue advantage in using the weapon nor did he act in a cruel or unusual manner having regard to the fact that the accused did not follow up and attack the deceased after the latter had disengaged from the fight.

The court was satisfied that there was no premeditation on the part of the accused. The court ruled that the inference of premeditation, from the fact the accused had prepared the piece of glass, was displaced by his explanation that he had prepared the weapon for his own protection against the deceased. The court accepted the testimony of the accused that he was afraid that the deceased would assault him for being the cause of his detention and questioning and that this fear was compounded by the fact that the deceased was of a bigger size than he was and that the deceased had a propensity for assaulting fellow prisoners.

The court therefore found that the defence had made out a case under Exception 4 of Section 300 on a balance of probabilities and the court accordingly found the accused guilty of culpable homicide not amounting to murder.

The approach of the High Court in the instant case warrants a closer examination as it reveals guidelines which later courts would do well to follow.

A. *Sudden Fight*

The evidence tendered in court in the instant case clearly showed that the fight broke out when the deceased punched the accused. There was also evidence that the two were grappling at each other in the course of which the fatal wound was inflicted. The court accepted that there was a sudden fight.

It has to be correct to say that there was a fight as blows were exchanged between the two protagonists. It was not a case of a one-sided attack. Had the deceased been attacked without replying and was killed, then it would not have been open to the accused to say that there was a fight.

The court did not seem too concerned with the fact that the initial quarrel had occurred the day before. However, this is acceptable in light of the

[42] For the purposes of this note, it is not necessary to lay out the reasons why the other defences failed.

evidence that there was a fresh quarrel just before the fight in which the fatal blow was struck. This is a sound approach for the court to take. Although it may be that the passions aroused by the previous quarrel had cooled, the fight in question was the result of a fresh inflammation of passions on a new quarrel. As long as the fight can be traced to a sudden quarrel occurring just before that, there is no danger of the fight being pre-arranged. Moreover, even if the words exchanged in the fresh quarrel were short, one could take the view that these words could be coloured and given added gravity by what may have transpired in the previous quarrel.

B. *Premeditation*

The court admitted that the conduct of the accused prior to the killing[43] did give rise to a *prima facie* inference that there was premeditation on his part. However, the court was able to hold that this inference was displaced in the light of the other evidence in the case, *viz,* the accused was afraid that the deceased would assault him for his part in causing the deceased to suffer solitary confinement; the deceased was bigger and stronger than the accused; the deceased had previously shown a propensity for violence on fellow prisoners; the accused was thus afraid for his own safety and had thus armed himself accordingly. The court accepted the accused's explanation of why he had armed himself and was thus satisfied that the accused had done so purely for self-protection.

It would appear that from the approach taken by the court that local courts dealing with this defence would consider the evidence in its entirety. It is noteworthy that some sort of preparation would give rise to an inference of premeditation unless this inference can be displaced by the other evidence or the circumstances of the case. The accused would have an opportunity to explain the reason for his conduct prior to the fight.

This approach of the court is to be applauded, not just because it is consistent with what has laid down by the Indian courts, but also because it accords with common sense as in such cases there is often more than meets the eye. This way the court does not fall into the trap of taking the direct evidence at face value. It allows the court some measure of flexibility to take into account all the circumstances of the case.

C. *Undue Advantage or Cruel and Unusual Manner*

In this case, the court found that the accused had not acted in a cruel or unusual manner. The court seemed particularly impressed by the fact that

[43] The accused had obtained a piece of glass and fashioned it into a knife. He armed himself with this weapon before the fight.

on the withdrawal of the deceased the accused did not follow up and attack the deceased who was defenceless. This has to be contrasted with the conduct of the accused in *Mohamed Kunjo* v *PP,*[44] where upon the victim disengaging from the fight, the accused ran off and returned with an exhaust pipe and surprised the victim with a savage attack. It is also worth pointing out that the accused in that case had also failed to stop hitting his adversary even after the latter had collapsed to the ground defenceless.

The court did not seem disturbed by the fact that the accused had entered the fight armed with a deadly weapon.[45] It is possible that the court felt that it had adequately dealt with this when considering the element of premeditation. Since the reason why the accused armed himself was because the deceased was bigger and stronger than he was, there would be no objection that the accused had acted unfairly by being so armed. Here, it may be a case where the accused is already on a weaker footing, all other things being equal. Thus, even though he has armed himself, it may still not be a case of the accused taking undue advantage.

IV. Fit of Fits

It is interesting to note that while ten years passed without any cases arising where the facts demanded serious consideration of Exception 4 between the decision of *Mohamed Kunjo* v *PP*[46] and that of *PP* v *Seow Khoon Kwee,*[47] it took very little time after the latter case for sudden fight to gain popularity in the local context. Since 1989, when *PP* v *Seow Khoon Kwee*[48] was reported, there has been more than ten reported cases in which Exception 4 was raised.[49] Amongst these cases, quite a few have seen the local courts deal with the issue with a fair degree of detail. These decisions are important in that they offer a valuable insight into how the local courts view and apply the various requirements pertaining to a successful plea of sudden fight.

[44] *Supra,* note 4.

[45] See *Umar Khushal* v *Emperor*, AIR 1940 Pesh 1, where it was held that when a man attacks an unarmed man with a dagger, he takes undue advantage and acts in a cruel manner.

[46] *Supra,* note 4.

[47] *Supra,* note 1.

[48] *Ibid.*

[49] Of course, not all of them disclosed facts on which Exception 4 was sustainable: *eg*, *Wong Kim Poh* v *PP* [1992] 1 SLR 289; *Tan Joo Cheng* v *PP* [1992] 1 SLR 620; *Chandran* v *PP* [1992] 2 SLR 263; *Mohd Bachu Miah & Anor* v *PP* [1993] 1 SLR 249; *Sivakumar* v *PP* [1994] 1 SLR 671; *Mohd Sulaiman* v *PP* [1994] 2 SLR 465; *Mohamad Yassin* v *PP* [1994] 3 SLR 491; *Phua Soy Boon* v *PP* [1995] 1 SLR 285 and *Asokan* v *PP* [1995] 2 SLR 456.

A. *PP* v *Ramasamy a/l Sebastian*[50]

This case was the first successful plea of sudden fight to be reported after the case of *PP* v *Seow Khoon Kwee*.[51] In the judgment of the High Court delivered by Chao Hick Tin JC, as he then was, several further observations were made regarding the ambit of Exception 4.

The accused and the victim were colleagues at a construction site. They shared the same cubicle at the temporary on-site quarters with two others. On the night of the fatal stabbing, all four were drinking and playing cards. A quarrel broke out between the accused and the deceased. The accused was seen to pick a knife, which was lying around and close at hand, catch hold of the deceased and stab him three times. When the ambulance arrived at the scene, the victim was pronounced dead by the ambulance officer. The accused was charged with murder. One of the grounds on which the accused based his defence was Exception 4.

One of the first tasks of the High Court was to ascertain the sequence of events which led to the fatal killing. The court came to the conclusion that just prior to the fatal stabbing, the accused had threatened to stab the victim and the latter had challenged him to do so. The court also bore in mind the fact that the victim was much bigger than the accused and accepted the opinion of the other two persons who were present at the scene that in a fight, the accused stood no chance against the deceased. Chao Hick Tin JC was satisfied that in all probability, the deceased rushed forward and grabbed hold of the accused, who then turned round and used the knife which he had picked up, from where it was lying around,[52] and stabbed the deceased. The court found as a fact that the two were involved in a fight. The court was also satisfied that there was no question of there being premeditation on the part of either party.

Turning to the question of whether the accused had taken any undue advantage or acted in a cruel or unusual manner, the court took into account the fact that the deceased was challenging him to stab him and the fact that the accused was no match for the deceased if he were to use only his bare hands. The result was that it was held that it was no obstacle, to the successful plea of Exception 4, that the accused had used a knife against the deceased who was unarmed.

[50] [1991] 1 MLJ 75.

[51] *Supra,* note 1.

[52] The court admitted that the testimony of the accused and that of one of the prosecution witnesses were at variance in that the accused said that he took the knife from a plate while the prosecution witness testified that the accused had taken the knife from the knife rack. However, the court felt that it was not critical for determining whether Exception 4 applies.

This is interesting because it appears that the High Court was taking into account the aggressive attitude of the deceased and the relative physiques of the two protagonists in deciding whether the accused had taken unfair advantage in using the knife. It may well be that the relative size of the deceased and his temperament tipped the balance of power such that these two factors would negate any advantage that the accused might have had by virtue of his possession of the knife. In a sense, the facts are similar to those in *PP* v *Seow Khoon Kwee*[53] where the deceased was also of a much larger build and had shown a propensity for violence and the accused had also used a weapon. Similarly, the court in that case had held that there was nonetheless no undue advantage taken by the accused. In any event, the Indian cases have consistently held that where the accused grabs hold of a weapon which is close at hand, or is on his body for an innocent reason, in the midst of a fight, it would not constitute an unfair advantage.[54]

In the instant case, Chao Hick Tin JC also observed that

> To invoke this exception it is immaterial which party offers the provocation or commits the first assault.[55]

The court was probably concerned because the accused was the one who had hurled the first threat at the deceased. As such, perhaps the court felt it necessary to point out that, as a matter of law, there is nothing to preclude the person who starts the fight from relying on Exception 4. This point is made amply clear by the Explanation to Exception 4.[56] This is consistent with the whole idea behind the Exception: even if one party is more blameworthy than the other at the outset, once the blows start being exchanged, it becomes difficult to say who is more to blame and both parties are very much on an equal footing insofar as blameworthiness is concerned.[57]

[53] *Supra,* note 1.

[54] See *Abbas Khan* v *Emperor* AIR 1932 Lah 3, where the quarrel which led to the fight was sudden, and the parties had in all probability run to take part in the fight with the winnowing instruments which they were using in their respective threshing floors and used them in the fight, it was held that it was nonetheless covered by Exception 4. See also *Mahanarain* v *Emperor* AIR 1946 All 19, where the accused, in the course of a sudden fight, took out a knife which happened to be with him and stabbed the deceased. Here again, it was held that there was no question of the accused acting in a cruel or unusual manner or had taken undue advantage. Of course, these cases may well be explicable on the basis that the courts took a lenient view of the use of the weapon because the circumstances which led to their use did not suggest any deliberate or considered action in taking advantage.

[55] *Supra,* note 50, at 82.

[56] *Supra,* note 2.

[57] *Ratanlal*, *supra,* note 10, at 1110.

B. *Chan Kin Choi* v *PP*[58]

The accused owed the deceased a sum of money. When he went to meet with the deceased to discuss the settlement of the debt, he was armed with two knifes as he was concerned that he might be turned on by the deceased and his gang at the meeting. At the meeting, the deceased asked if the accused had brought the sum of money with him, to which the accused answered that he did not have the money even if he had agreed to repay the loan. The deceased thereupon became angry and tried to give the accused a punch in the face. However, due to the quick reaction of the accused, the blow only landed as a slight punch to the accused's left cheek. Further, the deceased and his gang stood up and advanced menacingly towards the accused. The accused then whipped out a knife and stabbed the deceased once. The stab in the neck turned out to be fatal. The accused was charged with murder. At the trial court, the plea of sudden fight was summarily dismissed.[59]

The Court of Criminal Appeal (comprising Yong Pung How CJ, Lai Kew Chai and Chao Hick Tin JJ) took a more sympathetic view of the whole situation. The court came to the conclusion that there was a sudden fight upon a sudden quarrel and the accused had stabbed the deceased without premeditation.

The first interesting point about this case is that the Court of Criminal Appeal was prepared to accept that although the accused had brought along two knives to the meeting with the deceased, there was nonetheless no premeditation in that he had not planned to stab the deceased, *ie*, there was no premeditation to do the act which caused death. Lai Kew Chai J, who delivered the judgment, came to the conclusion that

> [i]t was probable that the accused had armed himself with two knives for his own protection because he was, as he had anticipated, greatly outnumbered.[60]

This approach of allowing the initial inference that a person who brings along a weapon plans to use it, and as such the stabbing which follows would probably be premeditated, to be displaced by some other fact or circumstance which might well offer a plausible alternative explanation why it was done makes good sense. In this case, the court accepted that the

[58] [1991] 1 MLJ 260.

[59] The decision of the High Court (P Coomaraswamy and Chan Sek Keong JJ) is reported in [1989] 1 MLJ 404.

[60] *Supra,* note 58, at 266.

accused had probably brought the knives along, not so much because he intended to use them, but rather because he felt he needed them for protection. This approach has been used before, as can be seen by how the High Court in *PP* v *Seow Khoon Kwee*[61] allowed the explanation of the accused to displace this initial inference of premeditation. Thus, it is consistent with the approach of the local courts.

As to whether there was a sudden fight, the Court of Criminal Appeal came to the conclusion that there was one:

> A sudden fight broke out immediately after the deceased was joined by his gang. Tables and chairs were overturned. Glasses were broken. There was no reason to disbelieve the appellant when he said that it was the deceased who had started the fight. The absence of any evidence of injury on the appellant was an innocuous fact as the appellant had stated in his statement that the deceased had only slightly injured him. Faced with the danger posed by the gang he stabbed the deceased only once in the neck.[62]

The reasons why the Court of Criminal Appeal held that there was a sudden fight are not without difficulty.[63] The first question which must arise is whether there was indeed a quarrel which then led to the fight. The reason why it might be thought that it is crucial to find that there was a quarrel is because the fight should have arisen in circumstances which would suggest that what is subsequently done was done in the heat

[61] *Supra,* note 1.

[62] *Supra,* note 58, at 266.

[63] See Professor Koh Kheng Lian, 'Trends in Singapore Criminal Law' in *Review of Judicial and Legal Reforms in Singapore Between 1990 and 1995* (Singapore Academy of Law, 1996), at 381-2:

> ...The Court of Criminal Appeal simply concluded that there was a sudden quarrel. ... There must, therefore, be an altercation (sic) between the parties. In *Chan Kin Choi*, would a question from the deceased to the appellant whether he had brought the $2,000, followed by a reply that he did not have the money even if he had agreed to return him constitute a quarrel? No. There could have been a quarrel after the reply by the appellant but the facts as reported do not support this.
>
> On the element of 'fight', there does not appear to be an exchange of blows. The single punch by the deceased was immediately followed by the fatal wound on the neck given by the appellant. The fact that tables and chairs were overturned, and glasses were broken are not relevant, unless there is evidence that these were used as objects of the fight to target at each other. If so, then, of course, it is irrelevant that the targets were missed. ... On the facts, there does not appear to be a sudden quarrel and sudden fight in the legal sense. Rather, it was in anticipation of a fight with the deceased and his gang that the appellant struck the fatal blow on the neck.

of passion. After all, that is what is the rationale behind the Exception – that two persons get carried away by the inflammation of their passions and the heat of the moment. Here, there was a rather short exchange before the blows were struck. It presents some measure of difficulty which may be overcome. Be it as it may, the verbal exchange was short, but taken in juxtaposition with the demeanour of the two parties, and the menacing presence of the deceased's gang, one could perhaps still be able to characterise it as a quarrel. This situation is similar to that in *PP* v *Seow Khoon Kwee*[64] where the quarrel just comprised the accused asking the deceased if they could settle the matter peaceably and the deceased retorting if that was really what the accused wanted, before the first blow was struck. In a sense, one could see the parallel between the facts of the two cases. In both cases, it could perhaps be said that although the exchange of words just prior to the blows being struck was short, it can be seen as a continuation of the previous quarrels. In the instant case, it was stated by the accused in his cautioned statement to the police that he had been assaulted by the deceased and his friends prior to the ill-fated meeting.[65] As such, it may well be that the Court of Criminal Appeal took that into account as the setting in which the words spoken at the restaurant took their meaning or perhaps even their gravity.[66]

As to the question of whether there was indeed a fight as required by Exception 4, it may well be that although only two blows were exchanged, it might still constitute a fight. As long as there is a mutual exchange of blows, or at least a mutual offer of violence, a fight could be said to have taken place. The courts appear only prepared to say that there is no fight when it is purely one-sided, where one party rains blows on the other without the other party even offering or attempting to reply in kind. It may well be that this shows that the local courts are taking an exclusionary approach to the issue what constitutes a fight: if there is no offer of violence by one party and it is a one-sided affair insofar as blows are concerned, then it is not a fight for the purposes of Exception 4. Otherwise, it will be characterised as a fight.

64 *Supra,* note 1.

65 *Supra,* note 58, at 262. However, it is not clear from the statement when these prior assaults had taken place, nor is it clear if they related to this particular money problem.

66 If, however, the previous assaults of the deceased and his gang on the accused had taken place some time before the incident or were totally unrelated to the present debt, then one can only conclude that the Court of Criminal Appeal were accepting that there was in fact a quarrel without much analysis, or it might be that the court was of the view that even a short exchange, such a question and an answer here, could amount to a 'quarrel'. Of course, this is a matter of conjecture as the court did not verbalise its reasons why it came to the conclusion that there was a fight in the instant case: see *supra,* note 58, at 267.

An alternative explanation may be that the courts are taking an expanded view of what constitutes a fight. As long as there is an offer of violence, that is taken into account as part of the fight or it may colour the blows that follow as a fight regardless of the number of blows which might be struck. As a consequence, the posturing of the parties prior to the blows being exchanged, in smashing glasses and overturning tables, are taken as part and parcel of the fight.[67] It may well be capricious to characterise the exchange of blows as a 'fight' only after a certain number has been exchanged. It is purely fortuitous how many blows may be exchanged before the blow which proves to be fatal occurs. To insist that there must be more than two blows being exchanged to constitute a fight may well be to expect more than the rationale behind the Exception would require.[68] The crucial thing is that it must be a killing whilst both parties are gripped by the inflammation of passions caused by a sudden quarrel.

Although it was not directly considered by the Court of Criminal Appeal, it must be said that the accused in the instant case did not take undue advantage in the situation. It may well be that the fact that the accused procured two knives before the meeting with the deceased and kept them out of sight may, without more, have given rise to the finding that he had taken undue advantage. However, consideration must also be given to the fact that the accused had brought the knives along in anticipation of the deceased being accompanied by his gang, and as such, the purpose of the knives was purely for defensive reasons. Moreover, account must be taken of the fact that the accused was outnumbered.[69] Taken in that context, it may be possible to say that the accused did not take unfair advantage by bringing along the knives. As to the question of whether he had acted in

[67] See Teja Singh J's definition of what constitutes a fight in *Hans Raj Singh* v *Emperor*, *supra,* note 16:

> If a person gives a blow to another, there will be a fight only if the other hits him back or at least he gets ready and attempts to assault but none if he keeps quiet and does nothing.

[68] Admittedly, there may still be a problem even if the fight occurred while the two protagonists are caught up in the heat of passion. Sudden fight was contemplated by the drafters of the Indian Penal Code to cover a situation where, regardless of the original conduct of either party in starting the fight, the subsequent conduct of the parties put them on an equal footing in terms of blameworthiness: see *supra,* note 10. However, the drafters, in their explanation of the point, appear to contemplate an extended fight where many blows are exchanged.

[69] In *Tan Joo Cheng* v *PP*, *supra,* note 49, at 627, Rajendran J, when considering the question of whether having a weapon would constitute an undue advantage characterised the instant case as one

> ... where the accused had used a knife to stab the deceased in a situation where there was a sudden fight and the accused was desperately outnumbered.

a cruel or unusual manner, the court took great pains in emphasising that he only stabbed the deceased once. They also pointed out that the accused had done the stabbing while he was trying to get out of the restaurant.

C. *Soosay* v *PP*[70]

The decision of the Singapore Court of Criminal Appeal in *Soosay* v *PP*[71] offers an interesting contrast to the approach taken by the lower court. In the High Court, in an unreported decision,[72] Rubin JC ruled that the accused had failed to make out a case under Exception 4. The High Court took the view that the accused did not have to resort to the use of the knife or at least he could have stopped after the first stab.

The accused was charged with killing a transvestite with a knife. On 25 October 1990, the accused went with two of his friends, Leo and Kuppiah, to Johore Road for drinks. Leo decided to avail himself of the sexual services of the transvestite deceased. The next morning when Leo woke up, he discovered that the deceased had left without bidding him farewell, as well as having helped himself to Leo's gold chain and money. Coming to the conclusion that the missing items were probably taken away by the deceased, the accused, Leo and Kuppiah decided to go and search out the deceased. The deceased was spotted whereupon the accused and Kuppiah persuaded Leo that he should leave matters to them and return home, which he did. They lured the deceased into having drinks with them. However, when the accused brought up the subject of Leo's gold chain and wanted it to be returned, the deceased feigned ignorance and started to get abusive. Kuppiah warned him not to be abusive lest he be beaten up for being disrespectful. Upon hearing this, the deceased stepped back, opened his handbag, took out a knife and brandished it at Kuppiah and made threatening motions as if to go at Kuppiah.

On seeing this unexpected turn in events, the accused quickly gave the deceased a kick in the stomach, whereupon the deceased fell and lost hold of the knife as well as of the handbag. Kuppiah quickly picked up the handbag, on seeing the accused and the deceased engaged in a fight, ran down Queen Street. Later, the accused caught up with Kuppiah and they left in a taxi.

The testimony of the accused was accepted by the court. The summary of the trial judge on the accused's tesimony was also taken by the Court

[70] [1993] 3 SLR 272.
[71] *Ibid.*
[72] Criminal Case No 54 of 1991, 3 March 1993, noted as case no 595 in [1993] Mallal's Digest 286.

of Appeal as an accurate summary of the accused's testimony and was accepted as reflecting the events:

> The transvestite [Lim] recovered and got up. He was trying to reach for the fallen knife but before he could do so the accused [Soosay] grabbed it. According to the accused, the deceased then rushed at him. The accused was then holding the knife in his right hand. When the deceased rushed at him, the accused pushed him by his shoulder with his left hand. As the deceased turned to his left the accused stabbed him on his right buttock. The deceased then turned and grabbed the accused's upper arms. In order to free himself from the deceased, the accused stabbed the deceased at his left back. When the deceased momentarily released his grip on the accused, the accused pushed him away. But the deceased who was on his feet was unrelenting and came charging at the accused again. This time the accused was holding the knife in his right hand at about his waist level. When the deceased charged at him, the accused moved to the side and it was at that point of time that the deceased came into contact with the knife resulting in injuries to the right abdominal region.
>
> The accused said he did not intend to stab the deceased. Further, according to the accused, the deceased kept coming back at him and when the accused swung the knife, it made contact with the chin of the deceased. The continued charges by the deceased resulted in further injuries to the deceased and the accused again stabbed the deceased at the breast. But when the deceased took a few steps back, the accused turned and started running down Queen Street. The deceased was chasing him. The accused saw Kuppiah in front of him and shouted to him to hail a taxi. The taxi Kuppiah managed to hail took both of them to the Paya Lebar MRT station from where they made their way to the accused's room in Geylang.[73]

The deceased's body was later found at the junction of Queen Street and Rochor Road. The accused was charged for the murder.

The High Court had held that the accused had commited murder under section 300(c). The Court of Appeal, however, granted the appeal on the grounds of sudden fight under Exception 4 to section 300 and reduced the conviction to one of culpable homicide not amounting to murder and the accused was accordingly sentenced to nine years' imprisonment under section 304(b) of the Penal Code.

[73] *Supra,* note 70, at 277.

The Court of Criminal Appeal allowed the plea of sudden fight as it was of the view that there was a sudden quarrel which immediately turned into a sudden fight and that the blows were struck in the heat of a fight. Neither could there be said to be any premeditation on the part of the accused to engage the deceased in a fight to recover from him Leo's gold chain. The court held that the deceased was the aggressor despite the fact that it was the accused who was armed with the knife, having wrested it out of the possession of the deceased.

Finally, the court held that the accused could not be said to have taken undue advantage or acted in a cruel or unusual manner. In this respect, the court was particularly influenced by the fact that the deceased kept coming back at the accused each time a charge was repulsed and the accused was unable to disengage himself from the fight which had in fact been started by the deceased pulling out the knife from his handbag. The Court of Criminal Appeal felt that it could not be said that the appellant had taken 'undue advantage' or acted in a 'cruel or unusual manner' as the injuries were inflicted in a fight during which the deceased could well have taken hold of the fallen knife before the accused did or even wrested it from him in which case, judging from the deceased's earlier conduct, the deceased would have used it on the accused and Kuppiah with deadly consequences. As had been noted by the trial judge, the deceased was, despite all the repulsions and injuries, 'unrelenting'.[74] It is perhaps helpful to refer to the court's analysis of the crucial moments in the incident:

> ... Presumably what the learned trial judge meant was that the use of a knife by Soosay when Lim was unarmed was an 'unfair advantage' and the fact that there were four other stab wounds inflicted on Lim after the first was 'cruel'. In our judgment the learned trial judge has overlooked a vital aspect of the evidence which was uncontroverted at the trial and that is that Lim kept coming at Soosay each time he was repulsed and Soosay was unable to disengage himself from the fight which in fact was started by Lim drawing the knife from his handbag and threateningly pointing it at Kuppiah. Further in our judgment it cannot be said that Soosay had taken 'undue advantage' or acted in a 'cruel or unusual manner' as the injuries he inflicted on Lim were inflicted while he was involved in a fight with Lim during which Lim could well have taken hold of the fallen knife before Soosay did or even wrested it from him in which case judging from Lim's temperament shown earlier he would have used it on both Soosay and Kuppiah with devastating effect; furthermore the tenacity with which

[74] *Ibid,* at 279.

> Lim kept charging at Soosay gave Soosay little chance to disengage himself from the fight, which he ultimately achieved in a momentary lull in the fight. The disengagement could not be achieved by the fact Soosay was armed and Lim was not. Considerations of doing more harm than is necessary as in the case of exception 2 (right of private defence) do not arise in sudden fight (exception 4)....[75]

The court was thus of the view that the accused had not taken undue advantage or had acted in a cruel or unusual manner since the injuries were inflicted during the course of the fight. The court also pointed out that any consideration of doing more harm than necessary does not arise in the context of the plea of sudden fight, as contrasted with the situation when private defence is raised.[76]

The approach of the Court of Criminal Appeal with regard to the crucial issue of whether the accused had taken unfair advantage or had acted in a cruel or unusual manner is illuminating. Karthigesu J, as he then was, seemed to be pointing out that the fact that the accused was in possession of a weapon and had used it against the deceased is not sufficient in itself to suggest that the accused had taken advantage. Moreover, the fact that the accused had not stopped after the first stab was also not sufficient in itself for the court to come to the conclusion that the accused had acted in a cruel and unusual manner.[77] In the view of the Court of Criminal Appeal, the trial court had failed to take into account, what was in their eyes, a vital aspect of the evidence that the deceased kept charging back at the accused each time he was turned away, and that the accused was unable, because of the persistence of the deceased, to disengage from the fight which had been started by the deceased. The Court of Criminal Appeal was also particularly impressed by the fact that the injuries were inflicted in the course of a fight where the deceased was trying to get the knife back, and in light of his aggressive behaviour, if he had been successful in doing so, he might have used it to inflict very serious injuries on the accused. Moreover, it was not a case where the accused was seeking to continue the fight. It was rather a situation where he was not given an opportunity of disengaging from the fight because of the fact that the deceased would not be turned away despite the fact that the accused was

[75] *Ibid,* at 280.

[76] The court cited *PP* v *Seow Khoon Kwee*, *supra,* note 1, and *PP* v *Ramasamy a/l Sebastian*, *supra,* note 50, to support the proposition.

[77] This was pertinent in the appeal because the trial court had emphasised these two facts in denying the accused the right to rely on Exception 4.

armed. The court seemed to be particularly impressed by the fact that the accused disengaged at the first opportunity he was given.

The approach taken by Karthigesu J is very sensible and accords with the general approach by the courts, which consists of taking into account all the surrounding circumstances and not to take certain facts in isolation. If both parties had been on an even keel, then it may well have been that the use of a weapon by one or the other might have constituted an unfair advantage. However, where the party who is holding on to the weapon is doing so in order to ensure that the other party does not get hold of it to use it, it cannot be said that he is taking unfair advantage, particularly where the unarmed party is particularly aggressive. Furthermore, looking at the facts on the whole, it is clear that from the outset the aggressor was the deceased and all the actions of the accused could be traced to getting the weapon and keeping it out of the hands of the deceased. It was just that the deceased refused to accept repeated repulsion which prevented the accused from disengaging when he had inflicted the first stab. It may have been that the trial court was influenced by the conduct of the accused in *PP* v *Seow Khoon Kwee*[78] where the court was very much impressed by the conduct of the accused in stopping immediately after administering the first stab. However, the facts of that case were such that the deceased had stopped fighting as soon as he was stabbed. Of course, one could understand that if the accused had nonetheless gone ahead and inflicted more injuries on the helpless deceased, that would have constituted an unfair advantage or acting in a cruel or unusual manner. Here, on the other hand, the accused was given no chance to disengage from the fight. The deceased was not in any way slowed down or discouraged from further attacks by the first stab wound, nor was he by the subsequent ones. As such, the tenacious temperament of the deceased was central to the court's finding that there was no unfair advantage taken nor did the accused act in a cruel or unusual manner.

Karthigesu J also made observations on a point which was referred to the Court of Appeal during the course of argument. Relying on the case of *Nga Nyi* v *Emperor,*[79] the proposition was canvassed before the court that once Exception 4 is found to be applicable at the commencement of

[78] *Supra,* note 1.

[79] (1936) 38 Cr LJ 321, where Dunkley J, in delivering the judgment of the court, said:

> (The appellant's) submission is that because the appellant stabbed the deceased after the deceased has been rendered helpless and was lying on the ground, it must be held that the appellant took undue advantage ... But, in my opinion when the exception is applicable at the beginning of a fight, it cannot be held that one of the participants has taken an undue advantage over the other because the latter has acknowledged defeat and has turned tail, and thereupon the former combatant pursues the advantage he has obtained.

the fight, it cannot be said that the accused has taken undue advantage over the victim or had acted in a cruel or unusual manner if the victim has disengaged himself from the fight, and yet the accused pursues the advantage he has obtained. On the facts of the case before the Rangoon High Court, the deceased started the fight by striking the first blow. In the course of the fight, the deceased fell and the accused stabbed him. The deceased got up, ran for a distance, and fell down again, whereupon the accused stabbed him a second time. The decision of the court was that the question of undue advantage was one which had to be considered on the facts as they stood at the beginning of the fight only. As such, the fact that one of the parties to a fight has disengaged and is making his getaway does not preclude the party in the ascendancy from pursuing his advantage.

The Court of Criminal Appeal of Singapore expressly disapproved of the decision because it was too wide a statement to make and further, it would be inconsistent with the Privy Council decision of *Mohamed Kunjo* v *PP*.[80] As far as Karthigesu J was concerned, he was of the view that the Privy Council's decision stood for the clear proposition that Exception 4 cannot apply where one party who has emerged the clear victor in the fight inflicts a fatal injury on the loser who is attempting to escape. It would be a clear situation where there is undue advantage or cruel or unusual conduct.[81]

This observation is interesting because in the first place, it is not clear that the Privy Council in *Mohamed Kunjo* v *PP*[82] based its decision on that ground. The facts of the case did not relate to a situation where the accused had secured victory and the victim was attempting to escape. However, it must be pointed out that the rule that where the accused inflicts injuries on the deceased when the deceased has admitted defeat and is trying to escape, that would constitute undue advantage, if not acting in a cruel or unusual manner. Moreover, if one were to peruse the judgment delivered by Lord Scarman, one would be able to discern that one of the

[80] *Supra,* note 4.

[81] *Supra,* note 70, at 281, where Karthigesu J observed:

> The proposition advanced in that case is that if exception 4 is applicable at the beginning of a fight it cannot be held that the offender has taken an undue advantage over the victim or has acted in a cruel or unusual manner because the latter has disengaged himself from the fight, and yet the offender pursues the advantage he has obtained....
>
> We do not approve of this decision. In our view it is far too wide and it is inconsistent with the Privy Council's decision of the appeal from Singapore in *Mohamed Kunjo* v *PP* where it was held that exception 4 cannot apply where one party who has emerged the clear victor in the fight inflicts a fatal injury on the loser who is attempting to escape. It is a clear situation where there is undue advantage or cruel or unusual conduct.

[82] *Supra,* note 4.

crucial facts which the Privy Council was very much influenced by was the element of surprise and the fact that the fight appeared to be over, at least in the eyes of the deceased, when the accused attacked the unsuspecting deceased.[83] In that sense, one could extrapolate from the decision that generally when the fight is over in that one or both parties have disengaged from the fight, to return and surprise the other party with a weapon would be either taking undue advantage or would constitute acting in a cruel or unusual manner.[84] It may also be a pertinent point that in a situation like that where the fight has ended, the court may very well hold the view that any subsequent attack is no longer launched under the influence of the inflammation of passion caused by the sudden quarrel, but would rather be one which is actuated by malice and would constitute a killing in cold blood. This would surely take the killing outside of the scope of Exception 4.

As to the part of the decision in *Nga Nyi* v *Emperor*[85] which suggested that the question of whether the accused had taken undue advantage was one which was to be determined at the beginning of the fight only, *ie*, any subsequent conduct cannot be taken into account for considering this question, this is by no means the unanimous position of the Indian courts. In fact, in *Ratan Singh* v *State of UP*,[86] the Allahabad High Court pointed out there is nothing in Exception 4 to Section 300 to suggest that this is the case. As the wording in the exception is general in nature, account can surely be taken of the conduct of the accused at a later stage of the fight.[87] Moreover, the decision of the Calcutta High Court in *Adil Mohamed* v

[83] *Supra,* note 4, at 54, where Lord Scarman observed:

> ... But formidable difficulties face the [accused] when he attempts to show that the act causing death was committed 'without the offender having taken undue advantage or acted in a cruel or unusual manner'. The [accused], who had been engaged in a fight with the deceased, ran to get a weapon and returned to attack the deceased with a truly murderous weapon, the exhaust pipe, a photograph of which we have seen. *The evidence of the assault shows that the deceased was taken by surprise and attacked with a very unusual and unexpected weapon*, a heavy blow on the head from which could reasonably be expected to be lethal. ... In the face of the evidence, we do not see how the appellant could prove that he had not taken undue advantage or acted in a cruel or unusual manner. (emphasis my own)

[84] Of course, it could also be argued that once the fight is over, there is no need to consider whether the accused had taken undue advantage or had acted in a cruel or unusual manner because any subsequent actions of the accused is no longer attributable to or related to the fight, and, thus, he cannot rely on sudden fight.

[85] *Supra,* note 79.

[86] (1973) Cr LJ 1101.

[87] *Ibid*, at 1103, where Mathur J observed:

> Exception 4 to S 300, IPC, ... nowhere lays down that it is the original conduct of the offender which has to be seen while determining whether he had taken undue advantage or had acted in a cruel or unusual manner. When the wording of Exception 4 is general,

Emperor[88] suggests that if the accused who has emerged victorious from the affray and the other party has taken flight, for the accused to take up pursuit and inflict further injuries would take the case outside the scope of Exception 4.[89]

In the ultimate analysis, it may be pertinent to note that the approach of the Privy Council in *Mohamed Kunjo* v *PP,*[90] in scrutinising and evaluating the conduct of the accused subsequent to the commencement of the fight, suggests that when deciding if the accused had taken undue advantage or had acted in a cruel or unusual manner, the court is not concerned merely with the relative positions and conduct of the parties only at the outset. The approach of the Privy Council would indicate that the courts will be vigilant in judging the conduct of the parties throughout the entire fight. This would mean that the proposition of the court in *Nga Nyi* v *Emperor*[91] is not sustainable in light of the Privy Council's decision.

D. *Roshdi* v *PP*[92]

In the instant case, the accused was charged with murder. The crucial facts of the case were that the accused and the deceased were friends and regularly

it must be given effect to even in those cases where the offender had acted in a cruel or unusual manner or had taken undue advantage at a later stage of the quarrel.

88 (1908) 9 Cr LJ 32.

89 In the instant case, the accused's party pursued the other party in three boats for a long distance, and then, when they had the other party overcome by force, landed and attacked them with spears and killed three of them. It was held that their action fell outside the scope of Exception 4 to section 300. Of course, it should be noted that there are decisions which appear to take the same view as the court did in *Nga Nyi* v *Emperor*, *supra,* note 79. See the decision of the Supreme Court of India in *Amrithalinga Nadar* v *State of Tamil Nadu* AIR 1976 SC 1133, where the accused had chased after the deceased and killed him. The Supreme Court held that the accused had not acted in a cruel or unusual manner in chasing after the deceased armed with a knife. However, this case may be explicable because of two salient facts which was relied by the Supreme Court in their decision. Firstly, it was found that the deceased had, at all material times, been armed with what the court characterised as a 'formidable weapon'. Secondly and more importantly, the court was of the view that the second scuffle during which the accused fatally stabbed the deceased was really part of the same fight as the first, in view that the second quickly succeeded the first where the deceased had used his weapon with devastating effect and there was 'no time for reason to interpose and passions to cool down'. The view that the two scuffles were part of the same fight may have helped the court take a lenient view of the whole event since it might have arrested any fears that the stabbing was actuated by malice, rather than one done under the giddy influence of boiling blood.

90 *Supra,* note 4.

91 *Supra,* note 79.

92 [1994] 3 SLR 282.

betted on horses together. On the evening in question, the deceased had come to the accused's flat demanding an immediate settlement of gambling debts which the accused had chalked up during the immediately preceding weekend. The accused insisted he needed more time to get hold of the money and he refused to borrow from an illegal moneylender to enable him to make immmediate payment. The deceased lost his temper and began to punch and kick the accused in a fit of anger. The accused was felled by a kick to the stomach. The kick was so strong that the accused was thrown back from the living room, where he and the deceased were, such that his upper body was in the kitchen while his legs were still in the living room. While he was lying there stunned, he saw a mortar on the floor which he then picked up to defend himself. He stood up. The deceased then approached him, while trying to unzip his waist pouch to get at his service revolver. The accused swung the mortar at the deceased's body in a vain attempt to disarm him. However, this did not deflect the deceased from his menacing advance. He even managed to push the accused back, pinned him against the wall with one hand around the accused's neck, while still trying to unzip his waist pouch and get to his service revolver with the other hand. It was then that the accused, in a fit of desperation, struck the deceased on the head with the mortar. He struck the deceased three times in quick succession, and stopped immediately when the deceased crouched down in pain. After regaining his breath, the accused realised that the deceased was lying motionless on the floor, whereupon, he disposed of the body.

There was some confusion as to the true facts, but the Court of Criminal Appeal came to the following conclusion as to the material facts based on the accused's cautioned statement:

> (1) that he did not intend to kill the deceased;
>
> (2) that he hit the deceased on the body with the mortar when the deceased tried to pull out his revolver from his waist pouch;
>
> (3) that the deceased used his hand to press against the appellant's neck;
>
> (4) that the appellant hit the deceased again on the head with the mortar;
>
> (5) that the appellant stopped hitting the deceased when he became motionless.[93]

[93] *Ibid*, at 289.

Although there was a bit of confusion as to whether the revolver was really in the waist pouch as the accused thought it was or whether it was tucked in the waistband of the deceased's pants, Karthigesu JA (delivering the judgment of the court) observed that it was a reasonable deduction from the evidence that the deceased had his revolver on his person and that the accused interpreted the deceased's hand movements as going for his revolver. The Court of Criminal Appeal also observed that since it was a reasonable assumption that the deceased was armed with his revolver, it followed that it was also a reasonable assumption, on the part of the accused, that the deceased was going for his revolver at the crucial moments, when the accused had noticed the deceased's hand going to his waist.

Karthigesu JA took great pains to point out that in the crucial moments just before the fatal blows were struck by the accused, the accused had found that his initial attack with the mortar had no effect in repulsing the deceased and instead the deceased continued to advance menacingly such that the accused retreated till his back was literally against the wall. The deceased then used his hand to choke the accused, the accused noticed that the deceased's free hand was still going for his waist. It was at this moment that the accused, in fear that the deceased was reaching for his revolver, struck the blows on the accused's head. Karthigesu JA pointed out that the assault on the accused was relentless and that he was in fear for his life, from being strangled and being shot by the deceased. The court further emphasised the fact that the deceased was of a stronger physique than the accused and at the moment just before the fatal blows were struck, he had overpowered the accused and pretty much had him at his mercy.[94]

On those findings of facts, it is understandable that the court held that not only was there a sudden fight upon a sudden quarrel and that there was no premeditation, it also found that the accused did not take undue advantage or acted in a cruel or unusual manner.

Perhaps the most involved question which arose in this case was on the question of the use of the mortar on the head of the deceased and whether that would have constituted the accused taking unfair advantage or acting cruelly. What is interesting is the great pains that Karthigesu JA took to point out the relative disadvantage that the accused found himself at. The deceased was of a large size than he was; the deceased was the aggressor throughout the fatal incident; there was no opportunity for the accused to disengage from the fight; the deceased could not be deflected with a blow to the body; the deceased had the accused cornered in that the accused could retreat no more; the accused had struck the fatal blows when he was being throttled to death as well as being in danger of being shot at from

[94] *Ibid*, at 293-4.

close range. All these point, quite incontrovertibly, to the fact that the accused was the one who stood at a great disadvantage throughout the exchange. It may be that the court was concerned that they should point out that although the mortar was 'a solid and weighty object',[95] it nonetheless did not mean that accused had taken unfair advantage by using it. This must be right insofar as the circumstances would show that the accused could not be said to have taken unfair advantage in using the mortar because of the great disadvantage he was already at.

It is also important that the accused stopped his attack as soon as the deceased disengaged in pain. Moreover, another important fact to note is that the accused had picked up the mortar which happened to be in the kitchen, where he found himself after being kicked by the deceased. All these would go further to showing that the accused did not take unfair advantage nor did he act cruelly.

The interesting question relates to the question of whether indeed the deceased was reaching for his revolver when he appeared to be reaching, not once but twice, to unzip his waist pouch. The Court of Criminal Appeal, as alluded to earlier, was willing to accept that it was a reasonable assumption, on the part of the accused, that the deceased was indeed doing so. Of course, this observation was made while Karthigesu JA was considering the question of whether the accused had the right of private defence in the circumstances, and it would have been relevant as it would determine whether the right of private defence had arisen.[96] However, when the court came to consider Exception 4, Karthigesu JA simply said that

> Whatever we have said in relation to the defence of the right of private defence to person equally applies to the defence of sudden fight.[97]

It may well be the case that Karthigesu JA did not specifically have this particular observation in mind when he made that statement. However, the question does nonetheless arise as to the the relevance of this reasonable assumption, on the part of the accused, that the deceased was reaching for a deadly weapon, in the context of sudden fight. It is, of course, merely a matter of conjecture, but it may be surmised that in considering whether

[95] *Ibid*, at 294.

[96] S 102 reads:

> The right of private defence of the body commences as soon as *a reasonable apprehension of danger to the body* arises from an attempt or threat to commit the offence, though the offence may not have been committed; and it continues as long as such apprehension of danger to the body continues. (emphasis my own)

[97] *Supra,* note 92, at 294.

the accused had taken undue advantage or had acted in a cruel or unusual manner, what matters is not just what in fact was going to happen, but also perhaps what he reasonably assumed was about to transpire. Taken in that light, it might well be said that in considering whether the use of a weapon by the accused amounts to taking an unfair advantage or acting in a cruel or unusual manner, the state of mind of the accused is very relevant. This is, perhaps, not as startling or radical as might first appear.

Cognisance could be taken of the fact that the decisions in *PP* v *Seow Khoon Kwee,*[98] *Soosay* v *PP,*[99] *PP* v *Ramasamy a/l Sebastian,*[100] as well as in the instant case, already do take into account the aggressive conduct of the deceased in considering the issue of whether the accused did in fact take undue advantage. In fact, in the cases, the courts do in fact take into account the logical consequence of the tenacity of the deceased in judging the injuries inflicted by the accused, *eg*, in *Soosay* v *PP,*[101] where the Court of Criminal Appeal seemed to be more kindly disposed to the accused, even though he had a knife in his possession and had used it several times, because of the devastating injuries the deceased might have inflicted on him, given his aggressive attitude.[102] So, in a sense, the Court of Criminal Appeal, when considering if Soosay had taken undue advantage or had acted in a cruel or unusual manner, was in fact taking into account the state of mind of the accused, in what he would have reasonably assumed to be the necessary consequences if he did not use the knife to keep the deceased at bay. Thus, it may well be that the observations of Karthigesu JA with regard to the reasonable assumption that the deceased was reaching for this revolver is not confined to the issue of private defence, but could also be material to the issue of whether the accused had taken undue advantage.[103]

[98] *Supra,* note 1.
[99] *Supra,* note 70.
[100] *Supra,* note 50.
[101] *Supra,* note 70.
[102] See *supra,* note 70, at 280.
[103] It is, however, interesting that the Court of Criminal Appeal proceeded on sudden fight as well as private defence. Exception 4 contemplates the situation where the two parties to the fight are on an equal footing insofar as blameworthiness is concerned. The fact situation in the instant case may be more easily characterised as one in which the accused was exercising his right of private defence against an attack by the deceased where he was under a reasonable apprehension of death or grievous hurt. The whole incident points to the fact that the accused was simply trying to ward off the attack. All his actions, really indicate, not so much a mutual fight as, desperate measures taken in self defence.

E. *Mohamad Yassin* v *PP*[104]

The facts of this case are particularly instructive as it shows the sort of facts that the court will take into account in holding that Exception 4 does not apply to a given situation. The accused and the deceased were both inmates at a drug rehabilitation centre. The accused and the deceased had an argument which arose from a table tennis game. Later the same evening, the accused ambushed the deceased from behind in the toilet, and punched him. The deceased returned the favour by pushing the accused, who then fell onto his back on the toilet floor. The other inmates quickly intervened to prevent a free fight from taking place. The same night, while everyone was asleep, the accused prepared a makeshift weapon by sharpening the handle of his toothbrush by rubbing it constantly against the rough floor of his room. The next morning, the accused tucked the sharpened toothbrush into the waistband of his shorts, with his tee-shirt tucked over it. He then lay in wait for the deceased. As the deceased passed the doorway of his room, the accused followed him up a spiral staircase. A loud commotion was heard coming from the spiral staircase shortly after. The accused was then seen emerging at the bottom of the staircase with blood stains on his tee-shirt. The deceased stumbled back to his room, trying to stem the flow of blood from his neck with one hand. His last words, before he collapsed, to his room mates as they came forward to help him, were 'not gentlemanly, came from behind' and 'two persons stabbed me, Yassin'.[105] He died from the neck wound. The accused was charged with, and convicted of, murder of the deceased. Before the Court of Criminal Appeal, the accused contended, *inter alia*, that the trial judge was wrong to reject the plea of sudden fight as well as the defence of provocation.

The Court of Criminal Appeal found that the evidence adduced established the following:

(1) that the incidents on the day before the fatal stabbing had embarrassed the accused and that he had a motive to inflict injury on the deceased;

(2) that the accused had planned and made preparation for the attack;

(3) that the accused had attacked the deceased from behind and took the latter by surprise; and

[104] *Supra,* note 49.
[105] *Ie*, the accused.

(4) that the accused plunged the sharpened toothbrush at the deceased's neck.[106]

Based on these findings of facts, the Court of Criminal Appeal dismissed the appeal. LP Thean JA (delivering the judgment of the court) took the view that neither defences were available to the accused on basically the same facts. Two main reasons were given: firstly, regardless of the status of the incidents from the previous day, the accused had the entire evening and night to ponder over the incident and decide how to react, *ie*, there was more than sufficient cooling-off period before the fatal stabbing; and secondly, the deceased had not done anything to provoke the accused on the morning of the fatal incident. It was in fact the accused who had attacked the deceased from behind. The court found that he had planned to attack the deceased, and he had in fact done so.[107] As such, it could not be said to be a case of sudden fight.

A few observations may be made about the decision. It must be said that the Court of Criminal Appeal must be right in holding as it did. For a start, there was not even a fight. Regardless of whether one takes a broad or narrow view of what constitutes a fight, ambushing someone from behind cannot, by any stretch of anyone's imagination, be called a fight. It is nothing less than an act of cowardice, a dastardly one-sided attack on the person taken by surprise. It might have been otherwise if the deceased had managed to retaliate. However, in light of the fact that the deceased only managed to stagger away, this could not be characterised as a fight.

Even if the brief struggle could be characterised as a fight, there is nothing to show that the fight resulted from the 'heat of passion upon a sudden quarrel'.[108] There was no evidence of a fresh quarrel before the fight, if it could indeed be called one, in light of the fact that the stabbing was cloaked in stealth. Moreover, the only quarrel that one would be able to trace, in the whole series of events leading up to the stabbing, had taken place the previous day. As was rightly pointed out by LP Thean JA, the accused had the whole evening and night to ruminate over the matter, and, at the very least, there would be a cooling-off period, such that the accused could not point to the quarrel on the previous day providing the heat of passion in which he stabbed the deceased. It is crucial, as is consistent with the approach of the Indian courts, that there should be no cooling-off period as it would be otherwise be difficult to see how the fight could be said to have taken place in the heat of passion, which is the crux of

[106] *Supra,* note 49, at 497-8.
[107] *Ibid*, at 498.
[108] See *supra,* note 2.

the whole defence of sudden fight. The situation in the instant case is very different from that in *PP* v *Seow Khoon Kwee*[109] where the time lapse between the first quarrel and the fight was not fatal to the plea of sudden fight because of a fresh quarrel just prior to the sudden fight which resulted in a fresh inflammation of passion.

The fact that there was a cooling-off period as well as the fact that the accused prepared the makeshift weapon and lay in wait for the deceased all irrevocably pointed to the existence of premeditation. Even if it is accepted that he did not intend to kill, all that is required is that he should have had premeditation to do the act which caused death, *ie*, stab the deceased. It could be noted that the facts in this case here are very different from those in *PP* v *Seow Khoon Kwee,*[110] where the preparation of the weapon could be explained away, as well as the fact that the accused in that case had approached the deceased just prior to the fatal stabbing were explained away by other reasons. Here, the initial inference that there was premeditation on the part of the accused could not be explained away.

The actions of the accused in attacking an unarmed person, as well as the fact that it was totally without any warning, would constitute an unfair advantage.[111] This again can be held in contrast with the factual matrix in *PP* v *Seow Khoon Kwee*[112] and *Chan Kin Choi* v *PP,*[113] where the court accepted that the accused had procured a weapon only for self-protection. There is also nothing in the facts to suggest that the accused was at a disadvantage due to the deceased's relative size or tenacity, unlike the facts in *Soosay* v *PP*,[114] *Roshdi* v *PP*[115] or *PP* v *Ramasamy a/l Sebastian.*[116] Besides, the courts have consistently held that to surprise a person who does not expect to be struck or attacked would be an undue advantage.

V. The Threads That Bind

At long last there is a corpus of local decisions on the interpretation and the ambit of sudden fight under Exception 4 to section 300. It is perhaps time that one should have cognisance of the body of authorities that the local cases provide in this context.

[109] *Supra,* note 1.
[110] *Ibid.*
[111] See *supra,* note 45.
[112] *Supra,* note 1.
[113] *Supra,* note 58.
[114] *Supra,* note 70.
[115] *Supra,* note 92.
[116] *Supra,* note 50.

As a preliminary point, it is perhaps clear that the local courts appreciate the emphasis behind Exception 4. It has been pointed out by the local courts that when the plea of sudden fight is before the court, it is really irrelevant which party is to blame for starting the resulting affray.[117] However, this does not mean that the court does not take this fact into account to decide who is the aggressor in the whole incident. It may well be in the accused person's favour where he has used a weapon, and as such had taken undue advantage which would otherwise been fatal to his plea, if it was the deceased person who was the aggressor and the accused who was constantly on the backfoot.[118]

A. *Sudden Fight*

Insofar as the statutory wording of Exception 4, 'a sudden fight in the heat of passion upon a sudden quarrel', suggests that there is a need for immediacy of the fight after the quarrel has taken place, the courts have been quite vigilant in requiring that this is proved. If there is a cooling-off period, the courts will hold that this requirement of immediacy is not satisfied.[119] This is sensible because it would be difficult to believe, where there has been a cooling-off period, that the fight and subsequent killing had occurred in the heat of passion, and gives rise to the suspicion that the fight was just used by the accused as a cloak for malice. In a similar vein, the local courts have also come to the conclusion that there can be no sudden fight under Exception 4 where the accused goes to the victim looking for a fight.[120]

However, the courts have given due appreciation to the fact that although the bulk of the quarrel may have occurred some time before the fight, there might have been a brief exchange prior to the fight

[117] *PP* v *Ramasamy a/l Sebastian*, *supra,* note 50, at 82: see the text corresponding to note 55. see the Explanation to Exception 4, *supra,* note 2.

[118] See *Soosay* v *PP*, *supra,* note 70, at 280, and *Roshdi* v *PP*, *supra,* note 92, at 290 and 293, where the court in both these cases made special note of the fact that the fight was started by the deceased and also emphasised the tenacity and aggression of the deceased. In both cases, the court seemed to be prepared, as a consequence, to take a more lenient view of the conduct of the accused on account of the fact that the deceased was the aggressor throughout the whole of the respective incidents.

[119] See *Sivakumar* v *PP*, *supra,* note 49, where the accused had sufficient time to round up his gang for the purpose of avenging his humiliation at the hands of another person and *Mohamad Yassin* v *PP*, *supra,* note 49, where the court pointed out that the accused had the whole evening and night to ruminate over the state of affairs which had arisen.

[120] *Chandran* v *PP*, *supra,* note 49, at 272, where the Court of Criminal Appeal observed that where it is found as a fact that the accused and his gang went to look up the deceased looking for a fight, there could be nothing sudden about the events which follow.

which could be characterised as a fresh quarrel which would only serve to re-ignite the flames of passion, which might otherwise have gone cold.[121] This is a sound approach as the history of the acrimony between the two parties may well colour as well as give added weight to the fresh insults.

While there can be no doubt that a one-sided attack on the victim[122] or a surprise attack[123] on the hapless victim cannot be considered a fight under Exception 4, some problems may arise as a result of the decision in *Chan Kin Choi* v *PP*.[124] At the very least, one could say that as long as there was an exchange of blows, no matter how few, the court will hold that there has been a fight for the purposes of Exception 4, even if each party only struck one blow each. Or could one say that, on a broader scale, the decision of the Court of Criminal Appeal, because of its emphasis on the fact that tables and chairs were overturned and glasses were broken even though it did not appear on the reported facts that they were being used to assault the other side, stands for the proposition that the local courts will accept a slightly expanded notion of a fight and take such posturing as being sufficient to give rise to the inference that there was a fight, especially since these actions would mean the parties involved were at least offering violence to the other side.

B. *Premeditation*

On the question of premeditation, the local courts have shown themselves prepared to look at all the surrounding facts and circumstances in order to enable them to come to the conclusion as to whether there was any premeditation on the part of the accused person.[125] The local courts acknowledge that where there is a previous altercation or a history of bad blood between the two parties, and there is a cooling-off period between the last quarrel and the fight, this may give rise to the necessary inference of premeditation if the accused brings along a weapon when he goes to

[121] See *PP* v *Seow Khoon Kwee*, *supra,* note 1, and *Chan Kin Choi* v *PP*, *supra,* note 58.

[122] See *Sivakumar* v *PP*, *supra,* note 49, at 674, where the court noted that Exception 4 could not apply in a situation where a group of persons set themselves on one person who is kicked and assaulted without reply.

[123] See *Mohamad Yassin* v *PP*, *supra,* note 49, where the accused lay in wait for the deceased and stabbed the latter from behind.

[124] *Supra,* note 58, at 266, where the court, when stating its opinion that there was a fight, *inter alia*, pointed out that tables and chairs were overturned and glasses smashed.

[125] See *Mohamed Kunjo* v *PP*, *supra,* note 4, at 54, where Lord Scarman quoted with approval the definition of 'premeditation' as expounded by Bhandari J in *Kirpal Singh* v *The State, supra,* note 32, and came to the conclusion that in order to constitute a premeditated killing, there must be 'an element of design or prior planning'.

meet the victim just before the fight breaks out. This, however, is only an initial inference which may be displaced by some other evidence or some plausible explanation for the weapon being procured. If the accused fails to explain away the weapon the inference is not displaced and the plea fails.[126] If, however, he succeeds in convincing the court that there is a good explanation for him to bring the weapon along, *eg*, for self-protection, then this inference of premeditation is displaced.[127] Of course, all these inferences of premeditation only arise where the accused has taken the trouble to take the weapon along to what later turns out to be the fight. Where, however, the weapon comes to be in the hands of the accused because it is close at hand,[128] or if it was actually wrested out of the control of the victim,[129] then it would be difficult for the court to draw any inference of premeditation.

C. *Undue Advantage*

It would appear that the issue which has detained the local courts most often is the question of whether the accused had taken undue advantage or had acted in a cruel or unusual manner. The local courts have accepted that 'undue advantage' is to be equated with taking 'unfair advantage'.[130] As in other areas, the local courts are inclined towards taking a global view of the circumstances of the case in assessing the conduct of the accused. It is clear that where the accused has superiority of numbers on his side, the court will hold that he has taken undue advantage.[131]

[126] See *Mohamad Yassin* v *PP*, *supra,* note 49.

[127] *PP* v *Seow Khoon Kwee*, *supra,* note 1, and *Chan Kin Choi* v *PP*, *supra,* note 58, where in both cases the court accepted the accused's testimony that he had procured the weapon and had brought it along to the meeting with the deceased for the purpose of self-protection.

[128] See *Roshdi* v *PP*, *supra,* note 92, where the accused had been beaten and had fallen onto the kitchen floor where the mortar was coincidentally lying; and *PP* v *Ramasamy a/l Sebastian*, *supra,* note 50, where the knife which was used to stab the deceased was lying on a plate near him.

[129] See *Soosay* v *PP*, *supra,* note 70, where it was the deceased who had first produced the knife out of his handbag and had used it to threaten the accused and his companion.

[130] *Mohamed Kunjo* v *PP*, *supra,* note 4, at 54.

[131] See *Chandran* v *PP*, *supra,* note 49, at 272, where Lai Kew Chai J pointed out that it had to be a case of taking undue advantage when a fight arose in a situation where it was a case of many persons against one, and *Sivakumar* v *PP*, *supra,* note 49, at 674, where the court also noted that the deceased was grossly outnumbered when considering the issue of whether the accused had acted in a cruel or unusual manner. It is also pertinent to note that *Sivakumar* v *PP*, *supra,* note 49, was cited by the court in *Mohd Sulaiman* v *PP*, *supra,* note 49, at 475, as authority, on which it duly relied, for the proposition that even if the court were to find that there was a sudden fight, and no premeditation on the part of the accused, the plea of sudden fight would fail nonetheless if it was found that he had acted in a cruel or unusual manner.

The most common situation which the court has had to consider this question of whether the accused had taken undue advantage is where the accused had used a knife or other weapon. At the end of the day, it appears that this may not, in itself, constitute taking undue advantage. All the facts of the case are taken into consideration. The default position seems to be that, in the absence of other extenuating circumstances, the use of a weapon against an unarmed person would amount to taking undue advantage.[132] However, it seems legitimate to use a weapon if the accused was dangerously outnumbered.[133] The court also seems to be prepared to take into account factors peculiar to the other party in the fight. If the other party is of a bigger physique, then the courts seem to suggest that it would not really be taking undue advantage to use a weapon.[134] On the other hand, if the victim is much smaller or older, then it may well be that the court will be more prepared to hold that the accused had taken undue advantage or had acted in a cruel or unusual manner.[135] The courts are also more prepared to overlook the use of a weapon if the other party to the fight is very aggressive and dangerous in the circumstances.[136] Of course, if the accused ran off and came back with a weapon, he would be hard put to suggest to the court that he was still acting in the heat of passion when he subsequently used it with deadly consequences. For one thing, the court may well take the view that he was using the fight as a cloak for malicious intent. For another, it may well be that this would constitute taking undue advantage or at least acting in a cruel or unusual manner.[137] If, however, the weapon which is picked up and used by the accused is lying around and is close at hand, the courts seem more prepared to gloss over the fact.[138]

[132] See *Mohamed Kunjo* v *PP*, *supra,* note 4, and *Mohd Sulaiman* v *PP*, *ibid*.

[133] See *Chan Kin Choi* v *PP*, *supra,* note 58, and *Tan Joo Cheng* v *PP*, *supra,* note 69, where the court accepted that the former was a case where the use of a weapon could not be said to be an undue advantage by the accused because he was dangerously outnumbered.

[134] See *PP* v *Seow Khoon Kwee*, *supra,* note 1; *Roshdi* v *PP*, *supra,* note 92; and *PP* v *Ramasamy a/l Sebastian*, *supra,* note 50.

[135] See *Mohd Sulaiman* v *PP*, *supra,* note 49, at 475, where Karthigesu JA pointed out that the deceased was an unarmed old man, when the court was considering if the accused had acted in a cruel or unusual manner.

[136] See *PP* v *Seow Khoon Kwee*, *supra,* note 1; *Roshdi* v *PP*, *supra,* note 92; and *Soosay* v *PP*, *supra,* note 70. See also *Mohamed Kunjo* v *PP*, *supra,* note 4, at 54, where Lord Scarman, in coming to his conclusion that the accused had acted in a cruel or unusual manner in using a weapon, pointed out that the deceased had been struck when he was neither aggressive nor on his guard.

[137] See *Mohamed Kunjo* v *PP*, *supra,* note 4, at 54.

[138] See *Roshdi* v *PP*, *supra,* note 92, where the accused had been beaten and had fallen onto the kitchen floor where the mortar was coincidentally lying; and *PP* v *Ramasamy a/l Sebastian*, *supra,* note 50, where the knife which was used to stab the deceased was lying on a plate (or in the knife rack) near him.

There are a few other miscellaneous observations which may be made about the approach which the local courts adopt with respect to this aspect of Exception 4. It is now clear that the issue of whether the accused had taken undue advantage or had acted in a cruel or unusual manner is not one which is judged merely at the commencement of the fight. It appears that the courts are willing to say that at any one time during the course of the fight, the accused has breached this 'rule of chivalry'. Thus, it would really be difficult for the accused to contend that he did not take undue advantage if he should hunt down his adversary once the latter disengages and tries to make his getaway.[139]

It is also clear that once both parties disengage from the fight, the accused cannot then return with a deadly weapon to strike at his opponent.[140] Along the same lines, the local courts would view a plea under Exception 4 with favour if the accused was shown to disengage from the fight as soon as it appears that his adversary is disabled or is rendered defenceless.[141] The same favour seems to be shown to an accused who has used a weapon or has continued to use it because he is unable to disengage, despite being in possession of the weapon, but disengages at the first opportunity he gets.[142] On the other hand, if the accused should continue to strike at his opponent even when he appears to be defenceless and simply staggering around, this will be held to constitute the accused taking undue advantage.[143] The courts also appear to take a dim view of any accused who launches a surprise attack on his opponent where the surprise element comprises either that the other party does not know or suspect he is about to be

[139] See *Soosay* v *PP*, *supra,* note 70, where the court cast doubt on the proposition that the question of whether the accused had taken undue advantage or had acted in a cruel or unusual manner was only relevant at the beginning of the fight, and any subsequent action, including chasing down and killing the opponent who has taken flight, cannot deprive him of the benefit of Exception 4.

[140] See *Mohamed Kunjo* v *PP*, *supra,* note 4, at 54.

[141] See *PP* v *Seow Khoon Kwee*, *supra,* note 1, and *Roshdi* v *PP*, *supra,* note 92, where in both cases the accused stopped landing blows as soon as the opponent stepped back in pain.

[142] See *Soosay* v *PP*, *supra*, note 70, where the accused took flight down Queen Street as soon as there was a lull in the fighting.

[143] See *Chandran* v *PP*, *supra,* note 49, at 272, where the court took note of the fact that the accused had stabbed the deceased even after he was staggering after the initial blows, in coming to its conclusion that the accused had taken undue advantage or had acted in a cruel or unusual manner. See also *Mohamed Kunjo* v *PP*, *supra,* note 4, where the accused still struck the deceased three or four more times on the head with the exhaust pipe even though the deceased had fallen to the ground after the first blow.

struck,[144] or where he is lulled into thinking that the fight is over since both parties have disengaged from an ongoing fight.[145]

In the ultimate analysis, the courts in Singapore, when considering the issue of undue advantage, appear to be prepared to view the situation from the perspective of the accused. The decisions seem to suggest that it is legitimate to go as far as taking into account, not just the situation as it in fact is, but also the situation as it reasonably appears to the accused. Thus, the state of mind or the reasonable apprehension of the accused is a legitimate consideration for the courts in considering not just whether he had taken undue advantage[146] but also whether his conduct prior to the fight could be construed as suggesting the presence of premeditation.[147]

VI. Conclusion

It will be noted from the cases which we have surveyed that the Singapore courts have largely taken a pragmatic approach to pleas under Exception 4 to section 300. They have shown a consistent and constant willingness to look beyond the immediate or isolated facts and take into account all the facts and circumstances of each case, while always keeping a watchful eye to ensure that the fight and the consequent killing should have arisen while the accused was intoxicated by the heat of passion. It can perhaps be said that the local courts have taken a sympathetic view when considering if the accused had acted in a cruel and unusual manner or had taken undue advantage. They are prepared to put themselves in the shoes of the accused and descend into the heat and dust of the arena of combat to see what may have clouded the accused's judgment. All this augurs well for the future

[144] *Mohamad Yassin* v *PP*, *supra,* note 49, where the deceased was ambushed from behind by the accused.

[145] *Mohamed Kunjo* v *PP*, *supra,* note 4, at 54, where Lord Scarman emphasised the fact that the deceased was not on his guard and was taken totally by surprise by the vicious attack.

[146] *Soosay* v *PP*, *supra,* note 70, where the court took into account the fact that, in view, of the tenacity of the deceased, it must have been in the mind of the accused that the deceased would have used the knife with deadly effect on himself once he managed to wrest it out of the control of the accused; and *Roshdi* v *PP*, *supra,* note 92, where the court took into account the fact that the accused was constantly on the backfoot in the whole incident, and he had a reasonable apprehension that the deceased was persistently trying to unzip his waistpouch in order to get at his revolver.

[147] *PP* v *Seow Khoon Kwee*, *supra,* note 1, and *Chan Kin Choi* v *PP*, *supra,* note 58, where the court took into account the testimony that the accused would have otherwise been at a great disadvantage, either because of the relative sizes of the two parties or because of the numerical superiority that the deceased's party had, and so, had procured and had brought along the weapon purely for defensive purposes.

of Exception 4. It has to be remembered that sudden fight involves a situation where the blameworthiness of both adversaries, with respect to the whole fracas, are on par. Moreover, an overly stringent approach to sudden fight would have lost sight of the basic truth that Exception 4 to section 300 is what it is – it does not offer to the accused a complete exculpation of guilt; it only reduces murder to culpable homicide not amounting to murder. The rationale behind sudden fight, as envisaged by the drafters of the Code, would be well served if local courts in future cases were to trod down the same path that past cases have laid.

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