EXPANDING THE BOUNDARIES OF SUDDEN FIGHT
THE TAN CHUN SENG DECISION

The recent Court of Appeal decision in Tan Chun Seng\(^1\) stretched the boundaries of the sudden fight exception in four different ways. First, it re-defined the definition of sudden quarrel. Second, it lowered the threshold of the requirements needed for a fight. Third, it extinguished the need for strict proportionality. Fourth, it added to the debate on what type of conduct is sufficient to constitute an escape, or an attempted escape, from the fight. At first glance, it seems that these four developments over-liberalised the exception. It is the aim of this article to show that these developments must, in fact, be commended since they not only clarify the requirements for the sudden fight exception but they also augur well for the robust development of the exception in Singapore. As a precursor to the analysis of these four developments, the article will deal briefly with a philosophical point – namely, whether the sudden fight exception is excusatory or justificatory in nature. This brief philosophical exercise will give the reader a more complete understanding of why the sudden fight exception, and its four developments in Tan Chun Seng, have as their focus the accordance of the appropriate level of moral blameworthiness to the killer.

Excuses and justifications

Traditionally, exceptions and defences are divided into two categories – excuses and justifications. This part of the article will conclude that sudden fight, like the defence of provocation, operates as an excuse in criminal law because it does not ‘justify’ the wrongful act but seeks only to decrease the blameworthiness of the wrong-doer in relation to the wrong he committed. There is a difference between an excuse and a justification. A justification neutralises a wrongful act. An example of a justification is necessity – under section 81 of the Penal Code, if an accused person proves the elements of section 81 on a

\(^1\) [2003] SGCA 26.
balance of probabilities, he will secure for himself an acquittal. An excuse, however, goes only to reduce or decrease the blameworthiness of the committing of the wrongful act. For example, provocation under Exception 1 to Section 300 of the Penal Code goes only to reduce murder to culpable homicide.

2 The reason why a justification neutralises rather than reduces moral culpability is because there is a good reason to account for what was otherwise morally objectionable conduct. Usually, if we conclude that there are in fact good reasons for acting, this conclusion is based primarily on (a) our (as arbiters of objective reason) assessment of the particular circumstances which include a survey of all the facts therein, and (b) whether there was in fact good reason to warrant the actor to do as he did. In this sense, justifications are objective in nature – the prima facie wrongful act is warranted, permitted, correct and universally so. If a justification is found to exist, what has really been proved is the existence of a good reason in the factual circumstances surrounding the wrongful act. If pushing someone forcefully out of the way of an oncoming bus to prevent him from being killed is a justified act, surely anyone acting in such circumstances, and for such a reason, will have the justification.

3 Excuses are different. There must be a clear sense that the act from which the actor wishes to be excused must be wrong even from the point of view of the actor. This requirement must exist before the concept of an excuse becomes operative. In seeking to establish an excuse, one takes the act as wrong but attempts to show reasons to suggest that no implications (i.e. blameworthiness) or, at least, only weaker implications should be drawn than otherwise seem appropriate. While the investigation for a justification is an objective one, in excuses the investigation is a subjective one. Unlike the focal point of justifications, the focal point of an excuse is not only the wrongful act. Rather, the

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3 For a study into the excusatory nature of other defences such as Diminished Responsibility and Infanticide, please see Mackay, ‘Mental Condition Defences in the Criminal Law’ (1995), pages 180 to 206; R v Sullivan [1984] AC 156; R v Burgess [1991] 2 WLR 1206; R v Hennessy [1989] 1 WLR 287.

4 This personal nature of the excuse ties in well with what Professor John Gardner describes as the ‘character standard’ of the one claiming the excuse. Please see ‘The Gist of Excuses’ [1998] Buffalo Crim.L.R. 575.
focus is also on what implications or imputations can be drawn from the concededly wrongful act to the actor of the wrong. There is a sense that excuses are subjective and individual.\(^5\) When we find a valid excuse, we find there must be something about the actor, or his character, or his capacity, or his reasons that must be established as sufficient to excuse him. There may of course be some feedback with the external circumstance, but at the core, there is something personal. Many times as a child, we were asked, “And what is your excuse?” Therefore, there is an observable distinction between excuses and justifications in the sense that justifications are in some way objective and universal, while excuses are in some sense subjective and individual.\(^6\)

4 Where does the sudden fight exception find its philosophical home? Is its home in the justification camp or the excuse camp? The article takes the stance that it belongs in the latter camp. An excusatory defence is taken in criminal law doctrine to be a defence that arises because the defendant is deemed less blameworthy. The defendant though deemed less blameworthy (by virtue of his excuse) has

\(^5\) This assertion and the arguments which flowed from it were made by the author and Abraham Chan when presenting a paper to Professor Tony Honorê and Professor John Gardner, at a BCL seminar in Oxford, Spring 2001.

\(^6\) See Gardner’s chapter on ‘Justifications and Reasons’ Simester & Smith, Harm and Culpability, 1996. Professor John Gardner argues that the distinction between justifications and excuses can also be understood by distinguishing between what he calls ‘guiding reasons’ from ‘explanatory reasons’. In Gardner’s mind, guiding reasons tell a person how to act. They bear on what that person ought to do or believe. As Gardner argues, a person may overlook or ignore these guiding reasons. Thus it seems that guiding reasons must be external to the actor’s perception of them. This fact combined with a guiding reason’s normative nature persuades the conclusion that characteristically they are objective. Explanatory reasons, on the other hand, are never ignored as they are precisely the reasons for which one actually acts. Thus, it seems that explanatory reasons are subjective. They are believed by the actor to be operatively guiding reasons. The person who acts for an explanatory reason necessarily takes it as a true and valid reason for acting, and therefore takes it as a guiding reason. The concepts of justification and excuse operate at the deepest level in terms of both guiding and explanatory reasons, together. With justification, it is a requirement that the defendant actually acts for the reason he puts forward to show his act is justified. In addition, that reason must in fact be a good reason for viewing the act as warranted. The reason that allows a justification is therefore explanatory in that the defendant has acted for it, but it is also guiding because it is correct – it is in fact a valid reason for acting and is therefore generally applicable. The actor’s subjective belief is objectively true. With excuses, there is also structurally a combination of subjective and objective elements, of explanatory and guiding reasons. An attempt to excuse presupposes a wrong act. Put in other words, there is no need to claim an excuse unless one fails to establishes full justification.
nonetheless done an act that is wrongful. The wrongfulness of the act, for example, a killing, does not extinguish upon proof of a valid excuse. Thus, defences such as provocation and sudden fight fit here. This is buttressed in the provisions of the Penal Code governing the punishment to be meted out upon the establishment of the provocation and sudden fight defences. These provisions do not go towards acquitting the accused, but merely reducing the sentence from one of death under s 302 to one of up to 10 years’ imprisonment, or life imprisonment under ss 304(a) and 304(b). This was exemplified in the case of Tan Chun Seng. At the High Court, the trial judge found that the accused was guilty of murder under s 300 and sentenced him to death. However, upon appeal to the Court of Appeal, the Court found that the defence of sudden fight was established and accordingly reduced the sentence from one of death under s 302 to one of 10 years’ imprisonment under s 304(b) of the Penal Code. The excuse of sudden fight reduced the moral culpability associated with murder to the moral culpability associated with manslaughter.

5 The article now moves into its second part. It will demonstrate that the decision in Tan Chun Seng expanded the boundaries of the sudden fight exception in Singapore. Nonetheless, it will be argued that the Court legitimately pushed the ambit of the following elements required for a sudden fight defence:

(a) sudden quarrel;

(b) the definition of a sudden fight;

(c) the need for proportionality in a fight and how that relates to the issue of undue advantage; and

(d) what constitutes an attempted escape by the deceased which would disqualify the accused from the defence.

6 Before the article discusses each of these elements in greater detail, a summary of the facts and holdings of the Court of Appeal in Tan Chun Seng will be provided. But prior to looking at the case proper, it would be helpful to refresh one’s mind of the requirements needed for the successful operation of the sudden fight exception. Exception 4 to section 300 of the Penal Code (Cap 224) states that in order for an accused to take benefit of the sudden fight defence, three statutory requirements must be met. It must be proved:
(a) that a sudden fight in the heat of passion upon a sudden quarrel had taken place;

(b) that the killing was not premeditated;

(c) that there was an absence of undue advantage and that the killing was not cruel or unusual.

*Tan Chun Seng v PP* ²

7 The appellant, Tan, was parking his newly purchased Nissan Sunny car along a street. Just as he was parking the car, he saw two Indian males walking towards his car. These two Indian males were Krishnan and Chandrasegaran. Tan had never met these two men before. Just as they approached the car, Chandrasegaran hit the glass window on the front passenger side of the car. Tan was furious that this had happened. Krishnan and Chandrasegaran stopped at the rear of the car. Chandrasegaran was gesturing for the appellant to come down from his car, with Krishnan standing beside him. All this happened when Tan was in the midst of parking his car. He was set on confronting Chandrasegaran. Tan walked a short distance to catch up with the two men but soon realised that Chandrasegaran was no longer in sight.

8 Not being able to confront Chandrasegaran about why he hit his car, Tan decided to approach Krishnan. When catching up with Krishnan, Tan was shouting at him, asking him why his friend had hit his car. The fact that Krishnan continued walking, unperturbed at Tan’s outburst, further enraged Tan. Tan was unaware that Krishnan was a deaf mute. He started to hurl Hokkien vulgarities at Krishnan. When Tan had almost caught up with Krishnan, the latter turned around and faced Tan. Krishnan, now facing Tan, just stood his ground and looked at Tan. Tan kept on hurling Hokkien vulgarities at Krishnan. Tan coupled his verbal outburst with expressive hand gestures. Krishnan, however, being a deaf mute, did not say anything in reply. Tan noticed that Krishnan was of a big physical build. The autopsy report showed that Krishnan weighed 94 kg and that he was 172 cm tall. As Tan continued his verbal onslaught and hand gesturing, he moved forward thereby closing the gap between himself and Krishnan. Krishnan then pushed Tan with great force such that Tan immediately fell to the ground. This push was not an ordinary shove. It was meant to fell Tan to the ground.

² [2003] SGCA 26
After being felled to the ground, Tan spotted a wooden pole on top of a pile of rubbish at the side of the street. Convinced that he was not going to overpower Krishnan in a bare-hand fight, Tan grabbed the pole, got up, and gave chase. Krishnan had advanced a few steps from the place where he had pushed Tan. Thus, Tan had a slight distance to make up for before he hit Krishnan on the head with the pole. Tan stated in his police statements that he hit Krishnan numerous times with the pole. Krishnan then fell to the ground and lay motionless. Tan threw the wooden pole to the side of the road, walked back to his car and drove off. At this time a bystander called an ambulance and the paramedic who arrived pronounced Krishnan dead. The autopsy report confirmed that the death had stemmed from a constellation of injuries over the right side and the right back of the head. It stated that these injuries could be explained by a single blunt blow over the right side of the head.

Decision

The Court of Appeal decided that all three statutory requirements needed for the successful operation of the sudden fight defence were satisfied. The Court was convinced that there had been a fight. To this end, the Court quoted its recent ruling in *Arun Prakash Vaithilingam* in which it was decided that an exchange of pushes could constitute a fight. The Court was certain that the fight between Tan and Krishnan was sudden and conducted in the heat of passion. As regards the first of the three principle requirements – that the sudden fight be borne out of a sudden quarrel – it seems that the Court took the view that the stand-off between Tan and Krishnan just before the latter pushed Tan to the ground amounted to a quarrel. It is interesting to note that the Court did not require there to be an actual verbal exchange between Tan and the deceased. With regard to the second principle requirement – premeditation – the Court made it clear that Tan had no intention of getting into a fight that evening. He had never met the two Indian men before. It was clear from his police statements and his evidence at trial that he wanted to ask Krishnan why Chandrasegaran had hit his car. When he finally caught Krishnan’s attention, Tan continued to shout and gesture vulgarities at him. Krishnan, when face-to-face with Tan, forcefully pushed Tan to the ground. It was clear that the fight was not

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8 The following is a summary of the grounds of decision taken from The Honourable Yong Pung How CJ’s judgment in the Court of Appeal.


10 The author agrees with the Court of Appeal’s stance. This point will be studied in greater detail below.
planned – there was no premeditation on the part of Tan to injure or cause hurt to the deceased. The sequence of events happened in the heat of passion without any planning.

11 With regard to the third principle requirement – undue advantage – the Court made it clear that Tan did not come armed. It was only after he was felled by Krishnan that Tan picked up the wooden pole. In fact, he spotted the wooden pole when he was on the ground after being pushed by Krishnan. Contrary to the evidence of the forensic pathologist, the Court was of the view that the case was one where Tan hit the deceased numerously. Nonetheless, the Court ruled that there was no undue advantage taken by Tan. Their Honours stressed the fact that there was a considerable disparity in size between the accused and the deceased. The autopsy report showed that the deceased weighed 94 kg and was 172 cm in height. Tan, however, weighed in at 61 kg and was 168 cm tall. The Court of Appeal stressed that in terms of weight, this made Krishnan 150% the weight of Tan. Also highlighted by the court was the fact that Tan had stated in his numerous police statements and on the stand that he had picked up the weapon because he was convinced after being pushed to the ground that he would not overpower Krishnan in a bare-hand fight.11 Thus, the appeal was allowed and Tan was convicted of the lesser crime of culpable homicide not amounting to murder and was sentenced to ten years’ imprisonment. This article will now elaborate how the Court of Appeal pushed the boundaries of the sudden fight defence.

(1) Sudden quarrel

12 The Tan Chun Seng decision showed that the Court took a purposive approach to what constituted a quarrel. Of importance in that decision was the fact that the victim was a deaf mute. Therefore, the Court was presented with an opportunity to decide whether a verbal exchange was needed before a quarrel could be deemed to have taken place. The Court answered this question in the negative. It took the view that the stand-off between Tan and Krishnan just before the latter pushed Tan to the ground amounted to a quarrel.

11 The Court did not explicitly state whether it thought Krishnan’s death was the result of a cruel or unusual act on the part of the appellant. By implication, it seems that the Court’s stance was that while the appellant ought to be punished for the heinous act of battering someone to death, the manner in which the act was performed was insufficiently cruel or unusual to secure a murder conviction.
13 It is commendable that the Court of Appeal did not limit the defence by requiring that there must have been a verbal exchange. It was clear that Krishnan was unable to speak. But it was equally clear that he knew that there was a disagreement between himself and Tan. He faced Tan when the latter was gesturing and hurling vulgarities at him. To require the deceased to actually say something in order for the defence of sudden fight to operate would be requiring the impossible on the facts of the case. Take for example when two men stare at each other. No words are exchanged. After one minute of dressing each other down through the art of staring, one pushes the other and the other retaliates. A fight breaks out. Should the exception of sudden fight operate in the case presuming the other two principle requirements are met? Arguably, a hard stare at another who is staring back can sometimes be more aggressive in nature than a verbal banter. To this end, the author agrees with the Court of Appeal’s decision that the showdown between Tan and Krishnan was sufficient to constitute a sudden quarrel for the purposes of the first principle requirement. It can be argued that the approach adopted by the Court is consistent with the argument Gour makes:

“...It is not perhaps possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact... But, as Parke B told the jury: “If a person receives a blow, and immediately avenge it with any instrument that he may happen to have in his hand, then, the offence will be only manslaughter, provided the blow is attributed to the passion of anger arising from that previous provocation; for anger is a passion to which good and bad men are both subject.””

12 Gour, ‘Indian Penal Code’ 11th Ed, page 2546.

14 One sees that the touchstone should not be whether there was a verbal exchange but whether there was some form of confrontation before the fight began. It appears that the Court adopted this touchstone in Tan Chun Seng. Implicit in the judgment was the proposal that what the courts should look for is some form of a showdown between the accused and the victim before the fight took place. At first glance, this approach of merely requiring a non-verbal confrontation may appear to be too inclusive and one may therefore jump to the premature conclusion that the scope of the defence was expanded beyond what was necessary. Such an analysis overlooks the fact that the decision in Tan Chun Seng does not go so far as to say that no showdown whatsoever is needed for
the defence to succeed. The decision is not saying that an accused can ambush his victim\textsuperscript{13} (i.e. where no quarrel or showdown\textsuperscript{14} between the parties has taken place) and still take benefit of the exception. Thus, we see in the \textit{Tan Chun Seng} decision an inclusive approach to what can constitute a quarrel for the purposes of the sudden fight exception. Such an approach is clearly desirable: if a deaf man can fight, why can’t he also quarrel?

\textbf{(2) What constitutes a sudden fight?}

Gour states that if a person deals a blow to another there will be a fight only if the other hits him back or at least attempts to.\textsuperscript{15} Gour uses the word ‘blow’ which connotes a high level of force. Of interest is the fact that the Court of Appeal, in two recent decisions, has shown itself to

\textsuperscript{13} See, for example, \textit{Mohd Yassin v Public Prosecutor} [1994] 3 SLR 491. There, the appellant and the deceased were inmates at a drug rehabilitation centre. They had a disagreement over a table-tennis game. Later in the evening, the appellant approached the deceased from behind in the toilet and punched him. The deceased retaliated and the other inmates stepped in to break the two up. That night, when in his room, the appellant sharpened the handle end of his toothbrush by rubbing it against the rough floor surface of his room. The next day, the appellant concealed the weapon in his shorts and waited for the deceased to pass by the doorway of his room. He trailed the deceased down a spiral staircase. Just then a loud commotion coming from the spiral staircase was heard by the other inmates. Shortly after, the appellant’s shirt was covered in blood and the deceased was clutching his neck. The appellant had stabbed the deceased in the neck using the sharpened toothbrush. In dismissing the defence of sudden fight, the Court emphasised that the appellant had used the whole evening before the attack to plan how he was going to cause injury to the deceased. He actually used this time to sharpen the weapon he planned to use on the deceased the following day. Thus the attack was premeditated and the appellant ambushed his victim. He caught his victim by surprise. The surprise element showed that there was no room for a confrontation or quarrel to have taken place just before the fight.

\textsuperscript{14} See, for example, \textit{Asogan Ramesh s/o Ramachandran & Ors v Public Prosecutor} [1998] 1 SLR 286. There, the first appellant spotted the deceased. Knowing that the first appellant had several previous confrontations with the deceased, the third appellant called out to the deceased to talk to them. The deceased scolded them in vulgarities and ran away. The appellants caught up with the deceased whereupon the latter took out his knife. The first and second appellants won the knife from the deceased and stabbed him. The third appellant then took a discarded chair and swung it at the deceased, fracturing his head. The Court of Appeal in \textit{Asogan Ramesh} held that the elements of sudden fight were not established because, inter alia, the Court found that there was no sudden quarrel. This goes to show that if the accused suddenly pounces on the deceased and a sudden fight does break out thereafter, he will still not be able to take benefit of the defence because there was no confrontation or ‘showdown’ between the two before the fight began.

\textsuperscript{15} \textit{Supra} note 12 at p 2544.
be capable of being more generous when assessing what conduct constitutes a fight.

16 The Court in *Tan Chun Seng* relied on its recent ruling in *Arun Prakash Vaithilingam*. In that earlier decision, it was decided that an exchange of pushes could constitute a fight. There, the deceased was fast asleep in his room. The appellant, still smarting from a remark made about him earlier in the day, entered the room armed with a knife. The deceased woke up and vulgarities were exchanged. There was some pushing of shoulders. The trial judge, with some hesitation, found this pushing constituted a fight. Although the defence of sudden fight failed on other grounds, this finding of the trial judge was upheld by the Court of Appeal. The Court of Appeal in *Tan Chun Seng* referred to *Arun Prakash* and ruled:

“The case of *Arun Prakash Vaithilingam* worked to the advantage of Tan in the current case…the trial judge in *Arun Prakash Vaithilingam* found that ‘pushing’ did constitute a fight and this was not disapproved by the Court of Appeal.”

17 Thus, the case of *Tan Chun Seng* confirmed that the boundary of a fight includes the mere exchange of pushes. Arguably, *Tan Chun Seng* went further because the Court there found that one strong push by the deceased marked the beginning of a fight. The finding that the push did start the fight was of crucial importance in the case because all physical activity in the fight, after the push, came from Tan. Thus, if the push, in the Court’s mind, did not mark the start of a fight then Tan’s subsequent blows on Krishnan would only have amounted to a one-sided attack.

18 At first glance, this apparent relaxation of the requirement of what can constitute the start of a fight might be perceived to have unduly expanded the boundaries of the sudden fight defence. One might think that so long as a push by the deceased is established, the defence of sudden fight will always flow. However, the decision in *Tan Chun Seng* did not go as far as that, since the Court of Appeal emphasised the magnitude of Krishnan’s push in its decision. On the facts, the push that started the fight was not an ordinary shove. The Court of Appeal relied

17 The aggressor was, at all times, the appellant who eventually stabbed the victim in the chest.
19 Gour states that a one-sided attack cannot constitute a fight. See ‘Indian Penal Code’ 11th Ed, p 2545.
on the trial judge’s readiness to ‘assume, without casting blame on Krishnan, that he [Krishnan] did push [Tan] a little harder than he [Krishnan] ought to.’\textsuperscript{20} This is an effective control of the defence. In future cases, if the first push originating from the deceased was a weak one, then arguably, the Court may not find that a fight had started and it may consequently not allow the defence. This is because the threshold would be too low to crystallise the commencement of a fight. In short, if a weak push came from the deceased and the accused responded to it but the deceased did not respond thereafter, then the accused would not be able to take benefit of the defence of sudden fight because the whole episode would likely be construed by the Court to be a one-sided attack. On the contrary, if the accused was the one who cast the first push and the deceased responded with a push, then strictly speaking, there would be an exchange of pushes and one need not rely on Tan Chun Seng since reliance on Arun Prakash would suffice.

\textbf{(3) No role for proportionality in sudden fight?}

19 The need for proportionality exists in the defence of sudden fight only in so far as it is subsumed in the requirement that the assailant must not have taken undue advantage of the victim. This undue advantage, as will be discussed below, hinges largely on; (a) whether the accused came to the fight armed\textsuperscript{21} and (b) whether the victim was of a considerably larger build.\textsuperscript{22} Thus, proportionality plays a part only through the medium of the ‘no undue advantage’ requirement.

\textsuperscript{20} This was further supported by two other pieces of evidence which the Court of Appeal took into account in its judgment. First, the appellant went on the stand and stated in Hokkien: ‘As I walked nearer towards him [Krishnan], this man used his right hand and pushed me on the chest. The force he used was very great and I fell onto the ground.’ Second, the Court relied on the fact that the appellant recounted the force with which Krishnan pushed him in two separate police statements. In his first statement, he stated in Hokkien: ‘When I walked near him [Krishnan], he pushed me with his hand and I fell to the ground … I realised that I could not overpower him with my bare hands.’ In the second statement, he stated in Hokkien: ‘He used his right hand to push at my chest. I fell on the ground due to his pushing.’ See [2003] SGCA 26 at para 5.

\textsuperscript{21} If he came armed, then the Court is likely to find that he did have an undue advantage over his victim; see Mohd Sulaiman v Public Prosecutor [1994] 2 SLR 465, Arun Prakash Vaithilingam v Public Prosecutor [2003] SGCA 12 and Roshdi v Public Prosecutor [1994] 3 SLR 282 which are discussed below in the main text.

\textsuperscript{22} If the victim was much larger than the accused and the accused resorted to using a weapon, which he found after the fight began, to equalise the fighting power between the larger victim and himself, the court is likely to find that no undue advantage existed.
After the Court of Appeal judgments in *Soosay v PP*23 and *Tan Chun Seng*, one could argue that proportionality has a much decreased role in the sudden fight exception. In *Soosay*, the Court of Appeal placed great emphasis on the fact that there was no premeditation on the part of the appellant. The appellant confronted the deceased only to recover a gold chain. As regards the number of injuries and the ferocity of the blows during the fight, the court ruled:

> “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. See *PP v Seow Khoon Kwee* and *PP v Ramasamy a/l Sebastian* where Exception 4 was successfully invoked.”24

Thus, one sees that the Court acknowledges that the sudden fight exception is one which is, by its very nature, steeped in situations where heat of passion25 is brimming. It follows then that there can be little or no rationality in how a person fights – he fights like a kitten in a corner would fight. He fights with all his might, and he is allowed to, because the exception looks at the fighters as being on an equal footing. The proportionality-like safeguard comes only in the form of the need that no undue advantage was taken by the accused.

The Court in *Tan Chun Seng* stressed the importance of not disqualifying an accused from the sudden fight defence where his behaviour to the victim was disproportionate compared to the conduct of the victim. The court stated:

> “There was evidence in the current case that Tan hit Krishnan when the latter was on the ground. We were of the opinion that *Tan’s actions were borne out of a fight and thus were carried out in the heat of passion*. To this end, the fact that Tan continued to hit the deceased when the deceased was on the ground did not prevent him from claiming the defence of sudden fight.”26 (My emphasis).

The decision by the Court not to exact a high threshold of proportionality augurs well for the defence. A killing would always be disproportionate unless it was conducted, for example, in self-defence or

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23 [1993] 3 SLR 272. The judgment was delivered by Karthigesu J as he was then.
25 The phrase ‘heat of passion’ is expressly stated in the wording of Exception 4 to Section 300 of the Penal Code.
26 *Supra* note 1, at para 25.
as an act in a just war. Thus, to require exact proportionality where the inevitable conclusion is that a killing would always be disproportionate would be to nullify the use of the sudden fight exception. In sudden fight, because the fight is a pre-requisite, the defence is always tested in a ‘heat of passion’ situation. Due to the irrationality which comes with heat of passion, to require proportional responses on the part of the accused when he is in the fight is, in the author’s view, defeating the purpose of the sudden fight exception. This is also in line with the watering-down of proportionality in the provocation defence as was seen in the case of *Kwan Cin Cheng*.27 In *Kwan*, the court ruled:

“In our view a proportionality criterion would be more accurately expressed in the following terms: in deciding if an accused had exercised adequate self-control for the objective test, a relevant question may be whether the degree of loss of self-control was commensurate with the severity of the provocation. Nonetheless, it must be recognised that where the provocation defence in exception 1 to section 300 is concerned, the accused’s loss of self-control would *ex hypothesi* always have been of an extreme degree, resulting in the killing of another person. *In practice, an inquiry into proportionality does little to answer the essential question of whether an ordinary person would, upon receiving the provocation in question, have lost his self control to this extent and reacted as the accused did.*”28 (My emphasis).

24 Therefore, it appears that the combination of Yong CJ’s judgment in *Tan Chun Seng* and Karthigesu J’s judgment in *Soosay v PP* has confirmed the Singapore Courts’ approach that disproportionate violence in a sudden fight does not disqualify the accused from the defence if it can be proved that the he did not have an undue advantage.

(4) Undue advantage

25 Following on from the discussion above, it seems appropriate to ask - What then constitutes an undue advantage? This debate on whether there was an undue advantage that was enjoyed by the accused over the deceased usually surfaces in situations where a weapon was used. Lee Kiat Seng dealt with this point when he said, in relation to the case of *Soosay v PP*:

‘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.'

26 Lee Kiat Seng’s observation could not have been better made. The case law has shown that the use of a weapon itself should not automatically disqualify the accused from the defence of sudden fight. The courts have emphasised that where a weapon has been used by the accused, this will not amount to undue advantage if (a) the weapon was used to equalise the fighting capacities between the two parties30, and (b) the accused was not armed with the weapon before the fight broke out. A brief look at the case law will show that the above two factors are of key importance.31

Mohd Sulaiman v Public Prosecutor32

27 In Mohd Sulaiman, the appellant had broken into a coffee-shop for the purpose of committing theft therein. He was surprised by the deceased, who was an elderly man who tried to prevent the appellant from stealing. In the course of their confrontation, the appellant stabbed the deceased’s chest four times with a screwdriver. The court highlighted that the appellant had taken a screwdriver from the drawer of one of the stalls soon after breaking into the coffee-shop. This showed that the appellant was arming himself in the event that he encountered any resistance. The deceased, who was working as a cleaner cum security guard in the coffee-shop, confronted the appellant. By this time, the appellant was already armed.

28 The court placed emphasis on the fact that the deceased was an elderly man. The appellant had stabbed the victim four times. Each of these stab wounds penetrated the deceased’s heart. The fact that the appellant was armed, that he had stabbed the deceased four times and


30 The Courts have placed heavy emphasis on the disparity in height and weight between the accused and the victim. If the accused was of a smaller build than the victim and used the weapon to make up for this disparity, the courts would be unlikely to find an undue advantage.

31 The Tan Chun Seng decision confirmed that these two factors play foremost in the Court’s mind when deciding on the issue whether use of a weapon constituted undue advantage.

that the victim was an elderly man showed that the appellant had an undue advantage even if, as alleged by the appellant, the deceased had thrown hot water on him. The defence of sudden fight was dismissed by the Court of Appeal.

*Arun Prakash Vaithilingam v Public Prosecutor*

29 The Court of Appeal affirmed the trial judge’s reasoning as to why there was undue advantage in this case. In his grounds, the trial judge stated:

‘I hold the view that generally a person who picks a quarrel or fight with an unarmed person, who is not substantially bigger or stronger than he, is deemed to have taken an unfair advantage when he uses a deadly weapon that he had armed himself with prior to the fight. By no account can two such protagonists be considered to be fairly or evenly matched. The post-mortem description of Lenin and my assessment of Arun do not indicate that Lenin was substantially bigger than Arun.’

30 Like the case of *Mohd Sulaiman*, the case of *Arun Prakash Vaithilingam* shows that the court places key importance on two factors when deciding whether the use of a weapon constitutes undue advantage. These two factors are: (a) whether the weapon was used to equalise the fighting capacities between the two parties (here the court places emphasis on the disparity in size and weight between the accused and the victim) and (b) whether the accused came armed before the fight broke out.

*Roshdi v Public Prosecutor*

31 In *Roshdi*, the appellant and the deceased were both Central Narcotics Bureau officers. When in the appellant’s flat, the topic of debts that the appellant owed to the deceased cropped up. The deceased

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33 Criminal Case No. 60 of 2002 (High Court). This case was specifically mentioned by Yong Pung How CJ in the *Tan Chun Seng v PP* decision.

34 See para 18 of Criminal Case No. 60 of 2002 (High Court) which was upheld by the Court of Appeal in [2003] SGCA 12 para 27.

35 This fact also goes to whether there was premeditation on the part of the accused. Nonetheless, the ‘armed beforehand’ point is also used by the court in deciding whether the accused had an undue advantage.

wanted the appellant to pay up there and then. The appellant thought the deceased’s request was unreasonable and refused. On further analysis of the evidence, the Court of Appeal found that the deceased had felled the appellant with a kick to the abdomen and had advanced towards the appellant. The Court found that the appellant’s belief that the deceased was armed with a revolver was a reasonable assumption. When the deceased was using his limbs to attack the appellant, the latter saw a mortar on the kitchen floor. He hit the deceased with the mortar. The deceased went for the appellant again, and this time the appellant hit the deceased several times with the mortar. The Court of Appeal found that the defence of sudden fight operated in this case, thus reversing the trial judge’s finding. The Court of Appeal convicted the appellant of the lesser crime of culpable homicide not amounting to murder.

32 As regards the question of undue advantage, the Court emphasised that the deceased was of a stronger physique than the appellant. According to the Court, the robustness of the deceased’s attack coupled with the fact that the deceased was of a stronger build showed that the appellant did not have an undue advantage when he resorted to using the mortar. The court placed further emphasis on the fact that the appellant resorted to using the mortar only after the deceased had attacked him. He spotted the mortar on the kitchen floor and used it against the deceased when the latter was overpowering him in a physical duel.

33 Tan Chun Seng puts the last nail in the coffin. It confirms that two considerations play foremost in the Court’s mind when deciding whether the use of a weapon constitutes an undue advantage. Extremely insightful for academics and practitioners alike is the following statement by the Court:

‘Of factual importance was the fact that there was a considerable disparity in size between the accused and the deceased. The autopsy report showed that the deceased weighed 94kg and was 172cm in height. At the time of admission to prison, Tan weighed 61kg and was 168cm in height. In terms of weight, this made Krishnan 150% the weight of Tan. Tan stated in his numerous police statements and on the stand that he picked up the weapon because he was convinced after being pushed to the ground that he would not overpower Krishnan in a bare-handed fight. This was an important fact because the past 12 years have shown that the Singapore Courts have placed substantial emphasis on the physical sizes of the deceased and the accused
when assessing whether the use of the weapon by the latter procured an undue advantage.37

34 The decision of the Court of Appeal made it clear beyond any doubt that where (a) the accused was considerably smaller than the deceased, (b) used a weapon he found after the fight began, (c) to equalise the fighting capacities between himself and the bigger–framed deceased, this would not constitute a taking of undue advantage.

35 This stance should be commended because it has, at its foundation, the equality of the fighters. If the fighters are still in an equal position where one of them has a weapon, then there is no undue advantage. The immediate criticism of such an argument is that there was obviously an advantage that came with the weapon since the weapon-less fighter is now dead. I agree – there is an advantage accorded to the fighter with a weapon but it is not an undue advantage, since from the Court’s point of view the fighter was of such a slight build in comparison to the deceased that he needed to use a weapon to equalise somewhat their fighting capacities. Thus, the Court was correct to conclude that there was no undue advantage in the case of Tan Chun Seng even if there was a slight advantage in favour of the armed accused. We see from the wording in Exception 4 to section 300 that only an undue advantage would suffice to disqualify the accused from taking benefit of the exception.

(5) The great escape?

36 An argument could be made that the Court in Tan Chun Seng overlooked the fact that the deceased was in the process of trying to escape from the accused after the fight began. The reader might recall that Krishnan had taken a few steps away from the accused after felling the latter to the ground.38 It is argued that while it looks prima facie an escape, the Court was sound in its finding that Krishnan’s movement away from the accused did not amount to one. For this, Karthigesu J’s judgment in Soosay v PP offers exceptional insight. Karthigesu J addressed the unique case of Nga Nyi v Emperor,39 heard in the Rangoon High Court. In that case, the deceased struck the appellant and the two of them engaged in a fight. The deceased fell and the appellant stabbed him. The deceased got up, ran for some distance and fell again whereupon the

38 See facts of Tan Chun Seng, supra note 7.
The appellant stabbed him a second time. The Court in *Nga Nyi* held that Exception 4 to s 300 of the Penal Code applied because the appellant had not taken an undue advantage over the victim even though the appellant pursued the advantage he had obtained after the victim had disengaged himself from the fight. Karthigesu J did not approve of this decision, since it was inconsistent with the Privy Council’s decision in *Mohamed Kunjo v PP*, where in Karthigesu J’s view, it was held that Exception 4 could not 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 argued, in the language of the case of *Nga Nyi*, that Tan did not have two points of advantage in the fight. Tan was felled by Krishnan. It was for this reason that he picked up the pole. He then hit Krishnan with it. Tan’s hitting was done as an immediate response to Krishnan’s shove. Secondly, in the language of Karthigesu J in *Soosay*, Tan was *not* the clear victor when he picked up the pole and used it to hit Krishnan numerous times. Up to the point when Tan picked up and used the pole, it was Krishnan who enjoyed the advantage in the fight. In no way can it be said that at the time Tan picked up the pole (which incidentally was the time when Krishnan took a few steps back from the confrontation) Krishnan was ‘a loser who was attempting to escape.’ Thus, on the basis of Karthigesu J’s interpretation of *Mohamed Kunjo v PP* in *Soosay v PP*, the author argues that the Court of Appeal in *Tan Chun Seng* was thorough in its finding that the sudden fight exception operated even though Krishnan moved away from the confrontation.

It is an inescapable fact that the existence of an escape hinges on the unique facts of the case. There are some cases, like *Tan Chun Seng*, where there is more room for the debate on whether there was, on the facts, an attempted escape. However, there are some cases where it is fairly clear-cut that there was an attempted escape by the deceased, which then disqualifies the accused from the sudden fight exception. One such case is *Jin Yugang v Public Prosecutor*.

*Jin Yugang v Public Prosecutor*

An argument broke out between the accused and deceased after they had been drinking. The accused’s friend, who was not the deceased,

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40 Thus, the accused had two points of advantage here – the first was when he had the upper hand in the fight and the second was when he re-established his advantage after the deceased attempted to disengage himself from the fight.

41 [1978] 1 MLJ 75.

brought the accused out of the flat where they had been drinking, walked him down three flights of steps to the ground floor and told him to compose himself, and not to over-react towards the deceased. However, the accused upon returning to the flat continued to quarrel with the deceased. The accused, having injured the deceased, then chased him down three flights of steps, pinned him down on the ground floor, and stabbed the victim to death, practically disembowelling him. The trial judge dismissed the defence of sudden fight. The accused did not take issue with this finding of fact on appeal. Instead, the accused focused on the defence of intoxication, which was duly dismissed.

The trial judge placed heavy emphasis on the fact that the accused had already injured the deceased, yet he chased the latter down three flights of steps in order to pin him down and deal the last few fatal blows. There was clearly an escape by the deceased that disqualified the accused from taking benefit of the sudden fight defence.

Vicarious provocation – A red herring

For the sake of completeness, this article will now deal with an issue which was raised by the trial judge in Tan Chun Seng but which, unfortunately, the Court of Appeal did not have an opportunity to fully address its mind to. This relates to the issue of whether the law in Singapore would allow the defence of provocation if the provocation did not originate from the deceased, but from a person associated with the deceased. For the sake of brevity, this issue will be termed ‘vicarious provocation’ for the remainder of this article.43

Justice Choo Han Teck heard the Tan Chun Seng decision at first instance.44 Interestingly, counsel for the accused cited Ho Chun Yuen v R45, a case decided by the Hong Kong Court of Appeal, as an authority which showed that conduct from persons other than the deceased may be included as part of provocation from the deceased (i.e. vicarious provocation). Choo J ruled that he did not disagree with the reasoning of the Hong Kong Court of Appeal. Choo J ruled:

43 Exception 1 to s 300 states that culpable homicide is not murder if the offender whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident.

44 [2003] SGHC 44.

“The principle enunciated was that acts by others closely associated with the deceased and the deceased’s actions that the deceased can be considered, in effect, to have adopted and joined in the said acts. This statement was further explained by the [Hong Kong Court of Appeal] with the following example:

‘…merely to put my hands over the eyes of a man from behind might not in itself appear to be provocation, but if you do that when he is engaged in a fight with another and trying to ward off the latter’s blows then the significance of your action is very different.’ At page 441 of the Hong Kong Court of Appeal judgment.

Hence, the true test when a third person is involved, is whether the provocative act of that third person may be regarded in the circumstances of the case to have been adopted or form part of the provocation of the deceased.”46 (My emphasis).

43 Choo J’s concept of vicarious provocation can be supported. Before such support is given, one must first analyse the challenge to the operation of vicarious provocation. Illustration (a) in Exception 1 to s 300 of the Penal Code states:

A, under the influence of passion excited by a provocation given by Z, intentionally kills Y, Z’s child. This is murder, inasmuch as the provocation was not given by the child, and the death of the child was not caused by accident or misfortune in doing an act caused by the provocation.

44 This illustration therefore supports the counter argument that provocation should only come from the deceased, in order for the accused to take benefit of the defence.47 However, on a strict interpretation of the illustration, there is no way to determine whether the drafters of the Penal Code meant to go so far as to prohibit the accused from arguing that the man he had killed had provoked him by means of the conduct of another man. It is further argued that the use of a child (as opposed to Z’s friend or Z’s fellow gang member) in illustration (a) suggests that the drafters intended to keep the third non-provocative

47 In this sense, it further clarifies the need that the offender must have ‘cause(d) the death of the person who gave the provocation’ which is the wording used in Exception 1 proper.
party in the illustration as independent from the provocation as possible.
If keeping Y as independent from the provocation as possible was the
reason why Y was described as a child in the illustration, then there is
room to argue in favour of Choo J’s idea of vicarious provocation
because Choo J was attempting to destroy the independence between the
main provoker (the third party) and the party who provoked less but who
was eventually killed.

45 It seems that Choo J was trying to paint the following situation.
A, who provokes C, disappears leaving his friend, B, behind. One
assumes that A’s provocation is sufficiently ‘grave and sudden’. B then
also provoked C but B’s provocation is not to the extent as that
originating from A such that it is not sufficiently ‘grave and sudden’. C
was retaliating to A’s provocation when he killed B. For Choo J, it seems
that even though it was A’s provocation to which C was responding, C
should still be able to take benefit of the defence of provocation if he can
prove that A’s (the third party’s) provocation was adopted or formed part
of B’s provocation.

46 This concept of vicarious provocation is not as far-reaching as it
seems at first glance. For vicarious provocation to operate there still
exists the pre-requisite that the provocation must not have been prompted
by the killer. A further pre-requisite evident in Choo J’s judgment is that
the deceased must have himself provoked, in some way, the killer albeit
in a less provocative manner than the third party. If the deceased was
passive while the third party was provoking the killer then there would
be absolutely no way for the killer to argue that he was vicariously
provoked. It was no surprise then that Choo J found that vicarious
provocation would not work in favour of Tan since (a) the third party’s
(Chandrasegaran’s) act of gesturing to Tan when the latter was parking
his car did not amount to ‘grave and sudden’ provocation and (b) the
deceased’s (Krishnan’s) only provocative act (the push) was itself
provoked by Tan. It is argued that although vicarious provocation did not
work in favour of Tan (and rightly so, due to the facts of the case) this
does not mean that vicarious provocation has been given an abrupt end in
our courts since, in the author’s mind, Illustration (a) of Exception 1 to
s 300 of the Penal Code does not offer much resistance to the concept.

Conclusion

47 The four developments in Tan Chun Seng suggest that the
exception of sudden fight has become a very credible defence to murder.
This is due in no small part to the Court’s willingness to put itself in the
boots of the accused to see whether the heat of the fighting ring
genuinely misplaced his judgment. The *Tan Chun Seng* developments were commensurate with the need to accord the appropriate *level* of moral blameworthiness to the accused, which, as explained, is the role of an excuse in Criminal Law. This augurs well for a defendant whose conduct, though grossly wrong, is unmeritorious of a murder conviction.

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