**CASELAW NO. 17/2018/AL**

*This case law was adopted by the Judicial Council of the Supreme People’s Court on 17 October 2018 and promulgated under Decision No. 269/QD-CA on 06 November 2018 by the Chief Justice of the Supreme People’s Court.*

## Source of the case law:

Cassation Decision No. 07/2018/HS-GDT on 20 March 2018 by the Judicial Council of the Supreme People’s Court on the *“Murder”* case as to the defendant Nguyen Van H, born in 1977; residing at A Street, C Town, P District, Thua Thien Hue Province.

- Victim: Mr. Duong Quang Q.

## Location of contents of the case law:

Paragraph 1 of the *“Findings of the Court”.*

## Overview of the case law:

### - Background of the case law:

For the case with accomplices, only due to minor conflicts, the accomplices organized to attack the victim in order to scare him.

When committing the crime, the perpetrator used a machete to slash repeatedly the victim’s head, face, legs and arms; the fact that the victim did not die is beyond the perpetrator’s subjective intent.

The instigator is not present when the perpetrator commits such crime, does not know that the perpetrator uses the machete to slash the important parts of the victim’s body but he intentionally lets the consequences happen.

### - Legal resolution:

In this case, the perpetrator must be prosecuted for the crime of *“Murder”* with the *“characteristic of thuggery”*. The instigator is prosecuted for the crime of *“Murder”* but not applied the *“characteristic of thuggery”*.

## Applicable provisions of laws relating to the case law:

* Article 93.1(n) of the Criminal Code 1999 (corresponding to Article 123.1(n) of the Criminal Code 2015);
* Article 93.2 of the Criminal Code 1999 (corresponding to Article 123.2 of the Criminal Code 2015).

## Key words of the case law:

*“Accomplice”; “Thuggery”; “Vital part of body”, “Perpetrator”, “Inciter”, “crime of Murder”.*

**CONTENTS OF THE CASE**

At around 08:00 on 13 January 2015, due to conflicts, there were a scuffle between Mr. Duong Quang Q's sons, i.e. Duong Quang T, Duong Quang R and Duong Quang K against Duong Quang H, Duong Quang L, and Nguyen Van H. Mr. Q’s sons used their hands and feets to punch and kick Mr. Duong Quang H, thereby Mr. H was lightly bruised. Witnessing that his father-in-law, i.e Mr. Duong Quang H, was attacked by Mr. Q’s sons, Nguyen Van H called via phone to inform Tran Quang V (the son-in-law of Mr. H) of such problem. Being informed that his father-in-law was attacked, V left Ha Tinh [Province] to Thua Thien Hue [Province] and invited Pham Nhat T to attack Mr. Q together. V and T left their house(s) with 02 machetes put into a badminton racket bag. At around 16:00 on 19 January 2015, V drove T to Lang Co Town and invited H to drink together. At the pub, H said to V that *“My father was attacked, which is painful. He has been hurt*”. V asked H about Mr. Q's address and identity characteristics of Mr. Q. After being informed by H, V said to T *that “drinking first and then we both will go and fight him,”* H said that “If you attack, only attack to scare”. Thereafter, H left first and V and T continued to drink.

At around 17:45, while paying money, Tran Quang V said to Pham Nhat T *“I am going inside to attack him. If other people come out, you must stop them”*. T agreed and got on the motorbike driven by V to go to Mr. Q’s house. After driving around Mr. Q's house, he realized that Mr. Q was not at home, V stopped in a vacant place, took a piece of nylon fabric to cover his license plate number and drove T to Lang Co Bridge to wait. At around 18:00, V drove T back to the front of Mr. Q's house and saw that Mr. Q was bending down to open the gate. V stopped the motorbike, opened the badminton racket bag to take out one machete with a serrated blade, and ran to slash repeatedly Mr. Q’s head, face, back, legs and arms causing Mr. Q to collapse on the ground. As many people around saw, screamed, and ran toward them, T took the machete to threaten and stop the crowd so that V could be able to run to where the motorbike was and start the ignition to escape. When approaching Phu Gia Pass, V called H via phone to ask about the status of Mr. Q’s injuries. H asked V *“Did you slash Mr. Q? Mr. Q was taken to a hospital*”. After calling H, V called Duong Quang L to tell him that *“I have just slashed Mr. Q! Where are you? Go home and hide 2 machetes for me!”* After that, L waited for V and T near the street. T gave L the badminton racket bag containing 02 machetes to hide and V continued to drive T to V's house and sat with T to have a beer. After L took the badminton racket bag to his house and gave it to Duong Quang H to hide, H took this bag to the kitchen of Mr. Ho T (Mr. H’s father-in-law) to hide. Mr. Duong Quang Q was taken to emergency room for treatment at the Hospital of Da Nang until 03 February 2015, when he was discharged.

In Report on Forensic Medical Examination No. 26-15/TgT dated 28 January 2015, the Forensic Medical Examination Center of Thua Thien Hue Province concluded: Mr. Duong Quang Q suffers from many flesh wounds at the head, left shoulder, left elbow, and left thigh, which leave scars but do not impact on function 3%; the flesh wound of the face has limited impact on function 8%; the fractures of 04 incisors No. R 1.1,1.2, 1.3, and No. 3.3; two premolars No. 1.4and 1.5; molars No. 1.6 and 1.7 are currently being treated, losing

20% of function of his opposing tooth; reconstruction surgery was conducted for the nearly cut-off left hand, currently being treated, so the impact on function cannot yet be evaluated8%; cut-off fingers No. 2 and 3 on the left hand 25%; the overall injury level is 51%; the objects causing such injuries are determined as a sharp and heavy objects.

In First-instance Criminal Judgment No. 20/2016/HSST dated 23 May 2016, the People's Court of Thua Thien Hue Province applied Article 93.1(n); Article 46.1(b) and Article 46.1(p); Article 47; Article 18; Article 52.3 of the Criminal Code 1999 to sentence Nguyen Van H 07 years of imprisonment for the crime of *“Murder”.*

In addition, the first-instance court ruled on the crimes and the sentences as to the other defendants, their civil liabilities, how to deal with the material evidence, court fees and the right to appeal under laws.

After the first-instance hearing, Nguyen Van H submitted an appeal for requesting a review of the crime and mitigation of the sentence.

In Appellate Criminal Judgment No. 217/2016/HSPT dated 2 August 2016, the Superior People's Court in Da Nang ruled: To accept the appeal of the defendant Nguyen Van H; To apply Article 104.2; Article 46.1(b) and Article 46.1(p); Article 20; Article 53 of the Criminal Code 1999 to sentence Nguyen Van H 03 years of imprisonment for the crime of *“intentional infliction of injury”*.

In Cassation Protest No. 13/2017/KN-HS dated 03 July 2017, the Chief Justice of the Supreme People's Court appealed against Appellate Criminal Judgment No. 217/2016/HSPT dated 2 August 2016 by the Superior People’s Court in Da Nang relating to the crime and the sentence of Nguyen Van H; proposed the Judicial Council of the Supreme People’s Court to handle in accordance with the cassation procedures to set aside the appellate criminal judgment aforementioned on the crime and sentence as to Nguyen Van H for appellate re-hearing in accordance with laws.

At the cassation hearing, the representative of the Supreme People's Procuracy agreed with the Cassation Protest of the Chief Justice of the Supreme People's Court.

## FINDINGS OF THE COURT

1. According to the documents and evidence in the case file: After witnessing his father-in- law, namely Mr. Duong Quang H was attacked by Mr. Duong Quang Q's sons, Nguyen Van H was the one who directly called Tran Quang V to inform that H was attacked. While eating and drinking with V and Pham Nhat T during the evening of 19 January 2015, being informed that V and T intended to attack Mr. Q for revenge, H said *“My father was brutally attacked, he is still in pain”.* to reinforce V’s will and determination to attack Mr. Q. H is also the person who pointed out home and identifying characteristics of Mr. Q to V and T so that V and T could attack Mr. Q. While listening to V and T discuss their plan to attack Mr. Q, H did not intervene but even said that *“If you attack, only attack to scare”*, demonstrating his agreement to attack Mr. Q. Thereafter, H left first. In fact, Tran Quang V used the machete to slash repeatedly Mr. Q’s head, face, legs and arms, causing Mr. Q to collapse on the ground. Since everyone intervened and Mr. Q was promptly taken to emergency room, the fact that Mr. Q did not die is beyond V's subjective intent. After slashing Mr. Q, V made 03

consecutive phone calls to ask H about Mr. Q’s injuries. Although H did not know in advance that V used the machete to slash repeatedly the vitals parts of Mr. Q's body, which may deprive Mr. Q’s life, H agreed with V and T to attack Mr. Q and accept the consequences. Therefore, there is basis for the first-instance court to convict Nguyen Van H for being the accomplice who helped Tran Quang V and Pham Nhat T to commit the crime of *“Murder”*. However, the first-instance court convicted Nguyen Van H under Article 93.1(n) of the Criminal Code 1999 with the *“characteristic of thuggery”*, which is incorrect for the following reasons: In the case, Tran Quang V and Pham Nhat T are the persons who directly attacked Mr. Q; due to the minor conflicts with Mr. Q’s sons, V and T used the machete to slash repeatedly the vital parts of Mr. Q’s body, only the crimes committed by V and T can be determined with *“characteristic of thuggery”*, Nguyen Van H did not directly take part in attacking Mr. Q but helped V and T to do so therefore the crime committed by H should not be determined with *“characteristic of thuggery”* but falls in the category specified by Article

93.2 of the Criminal Code 1999.

1. Where the appellate court found that the fact that Tran Quang V used the machete to slash Mr. Duong Quang Q’s head and face is an act that goes beyond the intention of Nguyen Van H so H is not criminally liable for the crime of *“Murder”* but is criminal liable for the actual consequences to Mr. Q, as such the appellate court amended the first-instance criminal judgment and transferred H’s crime from the crime of *“Murder”* to the crime of *“intentional infliction of injury”,* which is a serious violation in the application of laws. At the same time, due to the fact that the appellate court overstated the mitigating factors for criminal liability that the first-instance Court had already considered when it sentenced Nguyen Van H with 03 years of imprisonment, which is an incorrect assessment on the nature and extent of danger to the society of the crime committed by the defendant and thus there was no deterrent effect and general prevention.

For the reasons aforementioned,

## RULES

Pursuant to Article 388.3 and Article 391 of the Criminal Procedure Code;

To set aside Appellate Criminal Judgment No. 2107/2016/HSPT dated 2 August 2016 of the Superior People’s Court of Da Nang on the crime and sentence as to Nguyen Van H, to transfer the case file to the Superior People’s Court of Da Nang for re-conduct appellate procedures in accordance with laws.

**CONTENTS OF THE CASE LAW**

*“[1] According to the documents and evidence in the case file: After witnessing his father-in- law, namely Mr. Duong Quang H was attacked by Mr. Duong Quang Q's sons, Nguyen Van H was the one who directly called Tran Quang V to inform that H was attacked. While eating and drinking with V and Pham Nhat T during the evening of 19 January 2015, being informed that V and T intended to attack Mr. Q for revenge, H said “My father was brutally attacked, he is still in pain” to reinforce V’s will and determination to attack Mr. Q. H is also the person who pointed out home and identifying characteristics of Mr. Q to V and T so that V and T could attack Mr. Q. While listening to V and T discuss their plan to attack Mr. Q, H did not intervene but even said that “If you attack, only attack to scare”, demonstrating his agreement to attack*

*Mr. Q. Thereafter, H left first. In fact, Tran Quang V used the machete to slash repeatedly Mr. Q’s head, face, legs and arms, causing Mr. Q to collapse on the ground. Since everyone intervened and Mr. Q was promptly taken to emergency room, the fact that Mr. Q did not die is beyond V's subjective intent. After slashing Mr. Q, V made 03 consecutive phone calls to ask H about Mr. Q’s injuries. Although H did not know in advance that V used the machete to slash repeatedly the vitals parts of Mr. Q's body, which may deprive Mr. Q’s life, H agreed with V and T to attack Mr. Q and accept the consequences. Therefore, there is basis for the first-instance court to convict Nguyen Van H for being the accomplice who helped Tran Quang V and Pham Nhat T to commit the crime of “Murder”. However, the first-instance court convicted Nguyen Van H under Article 93.1(n) of the Criminal Code 1999 with the “characteristic of thuggery”, which is incorrect for the following reasons: In the case, Tran Quang V and Pham Nhat T are the persons who directly attacked Mr. Q; due to the minor conflicts with Mr. Q’s sons, V and T used the machete to slash repeatedly the vital parts of Mr. Q’s body, only the crimes committed by V and T can be determined with “characteristic of thuggery”, Nguyen Van H did not directly take part in attacking Mr. Q but helped V and T to do so therefore the crime committed by H should not be determined with “characteristic of thuggery” but falls in the category specified by Article 93.2 of the Criminal Code 1999”.*