

24/1962

1.

IN THE PRIVY COUNCIL

No. 8 of 1962

ON APPEAL
FROM THE SUPREME COURT OF HONG KONG
(APPELLATE JURISDICTION)

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
30 MAR 1963
25 RUSSELL SQUARE
LONDON, W.C.1.

B E T W E E N

LEE CHUN-CHUEN alias
LEE WING-CHEUK ... Appellant

- and -

THE QUEEN ... Respondent

68249

CASE FOR THE APPELLANT

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- 10 1. This is an appeal in forma pauperis by special leave of the Judicial Committee granted the 26th February, 1962, from a Judgment of the Supreme Court of Hong Kong, Appellate Jurisdiction, (Hogan C.J. and Rigby and Mills-Owens JJ.), dated 1st December 1961, which dismissed an appeal from a Judgment of the Supreme Court of Hong Kong (Blair-Kerr J. and a Jury) dated 18th September, 1961, whereby the Appellant was convicted of murder and sentenced to death. pp.295-6
- 20 2. The questions raised on this Appeal are :-
- (a) whether the directions given by the trial judge on the matter of provocation were correct in law.
- (b) whether the Appellate Court was correct in deciding to apply the proviso in Section 82(2) of the Criminal Procedure Ordinance. pp.282-294
- (c) whether the Appellate Court failed to take into account relevant matters in determining whether any miscarriage of justice had occurred.
- 30 3. The Appellant and the Respondent are hereinafter referred to respectively as "the Accused" and "the Prosecution".
4. The indictment charged the accused with the pp.1-2

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murder of Tsang Kan-Kong on 15th May, 1961.

5. The trial took place between the 11th and 18th September, 1961, and the evidence called by the Crown included the following :-

pp.7-13

(a) Dr. Frederick Ong deposed that he had performed the post mortem on the 16th May, 1961. The deceased was a moderately built Chinese, height 5 feet 5 inches and about 50 years old. The following were the external injuries:-

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"He had bled from his nose and mouth. The upper and lower eye-lids of the left eye were bruised. An abrasion, $1\frac{1}{2}$ " x $1\frac{1}{4}$ ", was seen over the right temporal region. A laceration, $1\frac{3}{4}$ " long, was seen over the left eye-brow, stitched with 8 stitches. Another laceration, $2\frac{1}{2}$ " long, was seen over the left back of the head, stitched with 6 stitches. A swelling, 2" in diameter, with a curved abrasion 1" x $\frac{1}{2}$ " on it, was seen over the right back of the head. An abrasion, $1\frac{1}{2}$ " x $\frac{1}{2}$ ", was seen on the right shoulder tip. An abrasion, $\frac{1}{2}$ " in diameter, was seen on the outer aspect of the right elbow. Abrasions were also seen over the back of both hands and the outer aspect of the right knee joint. A bruise, $1\frac{1}{2}$ " x 1", was seen over the left loin, with an abrasion over it.

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Internally, the tissues above and below the breast bone were bruised. There was a horizontal fracture of the breast bone just below the junction of the third rib. The left fourth, fifth and sixth ribs were fractured in front. The windpipe and gullet contained bloody froth. The lungs were pale and showed no disease. The muscles of the heart were bruised. The heart was empty and showed no disease, except for some thickening of the valves, coronary and aorta.

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COURT: Coronary arteries? A. Yes, my Lord.

A. Blood and blood clots were seen in the abdominal cavity. The liver was pale and showed no disease. The spleen showed a

horizontal laceration $2\frac{1}{2}$ " long; it was pale and showed no disease. The tissues around the left kidney were bruised. The left kidney showed an irregular horizontal laceration $1\frac{1}{2}$ " long. Both kidneys were pale and showed no disease. There was extensive retroperitoneal hemorrhage.

COURT: What is retroperitoneal hemorrhage?

10 A. That, my Lord, is hemorrhage behind the membranes covering the organs and is very characteristic of injury to kidneys, being the only retroperitoneal organ.

20 A. The stomach contained some brownish material. The deeper tissues of the scalp were generally bruised. Blood was seen underneath the covering of the brain. There was a comminuted fracture of the eyebrow. An oval depression of the skull measuring $1\frac{1}{4}$ " by 1" was seen over the left back of the head. The floor and the front wall of the left anterior cranial fossa showed comminuted fractures. The tip of the left frontal lobe of the brain showed irregular lacerations. The brain was pale and showed no disease."

30 The deceased belonged to blood group "o" and the cause of death was shock and haemorrhage from fracture of skull, injury to brain, and rupture of the spleen and kidney. The fracture above the left eye was a very serious one. He had examined a hammer weighing 5 lbs. 1 oz. on which group "o" human bloodstains on the head and handle had been found. At least three of the injuries on the head of the deceased were consistent with being struck by this hammer.

40 (b) Dr. Gordon Low deposed that he saw the deceased at 8 p.m. on 15th May, 1961. He was in a poor general condition but fully conscious. Two of the external wounds had been stitched by the Casualty Department. He died at 9.37 p.m.

pp.14-17

(c) Choi Kung deposed that he was a fellow employee of the deceased at the Tin Heung Yin Bakery whose belongings were kept in

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- the same room. On learning of the death on 15th May, 1961, he searched those belongings and found a letter written some 9 months before by the accused to the deceased's son in which the accused stated he must kill the deceased and give himself up.
- pp.41-45 (d) Kwok Chan Sing deposed that he was also a fellow employee of the deceased and he found him about 5 p.m. on the 15th May, 1961, lying by the side of a nearby road. Beside him was a hammer. An ambulance arrived a short while after. 10
- pp.45-48 (e) Hin Wai-Cheung deposed that he was an accountant with the bakery and saw the deceased leave the bakery at 3.30 p.m. on the 15th May, 1961. He was not carrying anything.
- pp.59-65 (f) Chan Yu-Wing deposed that he was related to the accused who called him Uncle. The deceased was the father-in-law of the accused and they both came to Hong Kong in 1956 or 1957. They started a confectionery business which failed after a year. The last time the witness had seen the accused was on 19th November, 1960 when he said that "his father-in-law had written to his wife in China telling her he was dead and his wife had re-married." The accused was angry and wanted to talk to his father-in-law about it. On 17th May, 1961, the witness received a letter from the accused through the post stating he wanted to down himself. He thought the accused was an easy going and friendly person. His wife had already re-married and as a result his mother had attempted suicide. 20 30
- pp.65-81, 122-139 (g) Detective Inspector Quinn deposed that on 6th June, 1961, he went with a Police party and an informer to a hut on Lamma Island. They arrived at 2.20 a.m. He forced open the door and found the accused sleeping. The party carried torches and roused the accused. The Detective Sergeant spoke to the accused and then began writing in his notebook. The witness left the room for 2½ minutes. The whole proceedings took 15 minutes whereupon the party left with the accused for Kowloon City Police Station where they arrived about 40

4.30 a.m. The accused was charged and made a statement. At no time were any threats, promises or inducements made.

- 10 (h) Detective Sergeant Lui Lok deposed that he was with the police party on 6th June, 1961. He spoke to the accused and then wrote in his notebook what he had said. The accused then wrote in the book. The witness read over what the accused had written who said "Correct" and signed his name. While he was writing the accused was sitting on his bed with the notebook resting on a small table. No threats or inducements were made. This took half an hour to 50 minutes and Inspector Quinn was out of the room half an hour. The accused was not frightened and was not told what to write. The witness denied saying to the accused "It would be better for you to write otherwise it would be the worse for you".
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- (i) Corporal Lam Chiu deposed that he was also with the police party on 6th June, 1961. The Sergeant had asked the accused whether he preferred to write himself or let the Sergeant write for him but apart from that and administering the caution, he had said nothing to the accused. The party stayed in the home for more than half an hour. The witness denied that he said to the accused in the hut:- "You better tell the truth, if you don't tell you will be beaten down before you will be hanged." Also, that he said to the accused in the Police Station: "You have already written down something in the notebook, it is no use for you to deny".
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- (j) Liu Hsuan Kai deposed that he was an Interpreter, was present at the Kowloon City Police Station on 6th June, 1961, and denied that Corporal Lam Chiu said to the accused either:- "You had better say something now or otherwise I will beat you before you are hanged" or "Look you have already talked at the stone hut, you better copy that."
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- (k) Dr. Lung Kai Cheung deposed that he was a medical officer attached to Kowloon Hospital and examined the accused about 7 a.m. on 6th June, 1961. He found an infected laceration of

pp.82-92
145-155

pp.92-105
155-174

pp.105-109
174-177

pp.139-142

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the right leg about 1" long which the accused ascribed to a fall on 16th May. He stated he had no other complaints and the witness found nothing else abnormal about him. He did not know that according to the prison report the accused had contracted rather serious tuberculosis. Corporal Lam Chiu was present as an interpreter.

pp.177-181

- (1) Lam Yu deposed that he lived alone in an unnumbered stone house on Lamma Island. On 17th May 1961 the accused came up to him and asked for work. The witness agreed to employ him without pay, but gave him food, board and lodging. The accused had a wound on his shin and said he had fallen down whilst walking on a hill.

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pp.300-1

6. The entry in the notebook of Sergeant Lui Lok was translated as follows :-

"At 02:30 hrs. on 6.6.61. in an un-numbered stone house on the big mountain on Lamma Island, inside the home of LAM Yu, I said to LI Chun-Chuen, a male, in the Hoi Fung dialect, 'I am D/S. Sgt. LUI Lok attached to Kowloon City Police Station. I now arrest you, LI Chun-Chuen, because at about four o'clock in the afternoon of the 15th of May, 1961, you struck and wounded a man TSANG Kang-Kwong, alias TSANG Koi-Ho, with an iron hammer on Sun Ma Road, Kau Sut Long, Wong Tai Sin, Kowloon City, (He) was admitted into Kowloon Hospital and later died of the injuries. I now caution you, LI Chun-Chuen. You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence. Do you understand?' 'I understand' (Sd.) LI Chun-Chuen. (Sd.) D/S. Sgt. LUI Lok 02:45 hrs. 6. 6. 61.

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"In 1956, I came to Hong Kong with my father-in-law. Later, (we) disagreed (with each other). TSANG Koi-ho falsely used my name in writing a letter to (my) home, saying that I was dead, and asking my wife to marry another. Later, I stole an iron hammer from Tak Wing to strike him to death. Later, (I) went to Tsing Yi and there jumped into the sea. (I) was rescued by a boatman. (I) therefore went

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to Lamma Island to work for LAM Yu."
 (Sd.) LI Chun-chuen. (Sd.) D/S. Sgt. LUI Lok
 03:00 hrs. on 6.6.61. Witness (Sd.) D/Cpl.
 1016 LAM Chiu.

7. The statement made by the accused in answer to the charge was translated as follows :-

"I did hit him. I came to Hong Kong together with my father-in-law in 1956 and (we) carried on business together in Cha Ko Lang. He did not put up any capital, and the capital was put up by myself alone. Later because of failure in business, he frequently asked me for money. As I had no money to give him, (I) therefore went away to avoid (him). I worked for some one. Later I fell ill and therefore (I) had no money to remit to my brother-in-law. My father-in-law then wrote to my wife in China Mainland. They all believed I was dead. This caused the worries of my mother. I do not know whether she is living or dead. My father-in-law wrote to my wife and she thought I was really dead. She therefore married another person. I did not know this and continued to send money to (my) native country. Twenty days before I hit him this time, I picked up an iron hammer on the roadway at the Tak Wing Construction Company's building site at Kun Tong. I brought this iron hammer and went to wait for him. Finally I met him. (I) hit him with the iron hammer. Later I went to Ching Yi Island to (attempt to) commit suicide by jumping into the water. (I) was later rescued by a boatman, who gave me five dollars, and also gave me some clothes to wear. He told me to go to Lama Island to work for some one. This some one was surnamed LAM; he employed me to work.

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(Sd.) LEE Chun-chuen.

(Sd.) D/Cpl.1016 LAM Chin.

(Sd.) LIU Hsuan Kai.

(Sd.) D.I. M.F. QUINN.

(Sd.) Henry A. GIBLETT, ADCI/K."

8. Counsel for the defence challenged the admissibility of the documents set out in paragraphs 6 and 7 above and on this issue evidence

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pp.112-116

was given in the absence of the jury by the police officers and by the accused. The latter stated he was very frightened when he was roused by the police. He was told to write and asked "how?" The Sergeant then said "If you don't know how to write I will write down for you to copy". A piece of scrap paper was found, the Sergeant wrote on it and the accused copied out what the Sergeant had written in the Sergeant's notebook. The Sergeant said "You are now arrested and will be taken to Police Station and later tried by the Judge and sentenced to death by means of hanging." According to the accused when formally charged he said:- "It was not quite like you said as murder". I said I had a fight with someone". Lam Chiu had said to him:- "However you will die and will be hanged. Even though you refuse to sign you have to die" and also "You have written something and signed on the notebook no matter however you will die".

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pp.117-122

9. After a submission by counsel for the defence the learned trial judge ruled that the statements were admissible. The jury were then recalled and the police officers repeated their evidence on this aspect of the case.

p.181

10. The accused elected to give evidence on his own behalf and after confirming what his Uncle Chan Yu-Wing had stated about his background and his relationship with the deceased, gave an account of his meeting with the deceased on the 15th May, 1961 as follows :-

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pp.268-9

"Then I thought of what he had done previously to me and I wanted to ask him. I addressed him as 'KUNG', Grandfather, and I held his hand as I addressed him. When I was holding his hand he said to me: 'Are you coming here to assault me?' and he gave me a blow on the chest. The moment he said so he struck me. I fell down after I received the blow., then I got up on my feet, he rushed at me and tried to strike me again, I was pushing him away from me. I received several blows from him and after I re-received the blow I felt pain, and then I kicked once. When I kicked him he fell down. He got up on his feet, I was looking at him. In view of his age

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10 I dare not strike him. He then took a
 piece of stone and threw it at me, the
 stone landed on my leg, causing injury
 on my leg. I fell down, my trousers
 were torn. He got up on his feet, so
 did I but I was younger and I got up
 quicker than him; he kicked me, I ward-
 ed off the kicks with my hand, I then
 pushed him by the chin and he fell down
 and he knocked against a piece of stone,
 and I also fell down. There were
 stones there and both of us got up and
 threw stones at each other. We fought
 for a long time. I cannot remember ex-
 actly what happened during the fight.
 Finally when I was about to run away he
 picked up a piece of stone and chased
 after me. It was a big piece of stone
 and he threw it at me. The stone he
 20 threw rolled along the road. Then I
 saw a hammer; I could not say whether
 it is the one in court; he was chas-
 ing after me. I picked up the hammer
 and I threw the hammer at him. He fell
 down and I saw him rolling along the
 road, I was standing there looking at
 him. He did not get up on his feet; I
 was scared and I ran away, I was fright-
 ened. The fight lasted more than half
 30 an hour."

11. The accused gave further evidence that after
 the fight he ran away but later the same day he
 came back to the scene. On returning he saw
 people and on being told that a man might die he
 again took fright; he walked and ran aimlessly
 about; wrote a letter to his uncle, then ran
 further to a place from where he jumped into the
 sea. He was rescued by some junk men who gave
 him some money and a pair of shoes and put him
 40 ashore at Lamma Island where he found a job which
 continued until his arrest. He repeated in
 substance what he had told the Court in the absence
 of the jury about the manner in which the two
 statements were taken from him by the Police.

12. In cross-examination the accused admitted that
 he wrote the letter found among the deceased's
 belongings. It was addressed to his brother-in-
 law, the son of the deceased. The letter was
 written when he was angry and he did not have any

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p.222

intention of killing his father-in-law. The accused denied stealing the hammer and stated he intended the hammer to hit his father-in-law so that he would stop throwing stones.

13. In the course of his summing-up to the jury the learned trial judge dealt with the subject of provocation and in his directions upon the law he included the following three passages :-

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"To recapitulate on this point then, you must be satisfied that it was the hand of the accused which caused the injuries which resulted in the death of the deceased. Assuming you find that to be the case, ask yourselves: 'What was the accused's intention at the time, or immediately prior to, the moment when he caused those injuries?' If he intended to cause either death or grievous bodily harm, your verdict should be guilty of Murder. Subject to what I will have to say presently on the question of self-defence and provocation, if you feel that the accused did not intend to cause death or grievous bodily harm but intended to cause some harm less than grievous bodily harm, then your verdict should be not guilty of Murder but guilty of Manslaughter."

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p.252

"The whole doctrine of provocation depends on the fact that it causes, or may cause, a sudden and temporary loss of self-control so that it can be said that there was no formation by the accused of an actual intention to kill or cause grievous bodily harm. If the provocation, - if there was provocation, - if the provocation caused in the mind of the accused an actual intention to kill TSANG Kan Kong or cause him grievous bodily harm, then the killing would be Murder, because there would not be such a provocation as the law requires to reduce the charge from Murder to Manslaughter."

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p.275

"The whole idea, you see, of provocation is that the lethal wound or wounds are inflicted by a man whose mind is for the moment unbalanced by anger - for the moment he is not master of his own mind, so that it cannot be said that he intended to kill or cause grievous bodily harm. Was that the

accused's state of mind? Or might that have been his state of mind?"

14. The summing-up of the learned trial judge commenced at 10 a.m. on 18th September 1961 and the jury retired at 11.45 a.m. The jury returned at 2.30 p.m. and pronounced a verdict in the following terms :-

"Mr. FOREMAN: We find the Defendent guilty of Murder, but we recommend mercy, my Lord".

pp.278-9

10 Asked to amplify the grounds for the recommendation the reply was :-

"Mr. FOREMAN: My Lord, in view of the tragic circumstances surrounding this case, we ask Your Lordship for mercy".

The accused was sentenced to death and told that the recommendation would be forwarded to the proper quarter.

20 15. On 19th September, 1961 a notice of application for leave to appeal against conviction was filed by the accused. The grounds for the application were stated to be :-

p.280

"That I was falsely accused and wrongly convicted."

16. On 1st November, 1961, Solicitors for the accused filed further Grounds of Appeal as follows:-

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"GROUNDS OF APPEAL

30 1. That the Learned Judge misdirected the Jury in Law in that he failed to direct properly and/or sufficiently as to the law and evidence of provocation in favour of the Appellant.

2. That the whole of the Summing-Up of the Learned Judge to the Jury was such that it was prejudicial to the Appellant and if the Jury was to be properly directed no reasonable Jury would convict the Appellant of the offence of murder.

Dated the 1st day of November, 1961."

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p.282

pp.290-1

17. The decision of the Supreme Court (Appellate Jurisdiction) was given on 1st December, 1961. On the matter of provocation the Court referred to the three passages set out in paragraph 13 above. The Court referred to uncertainty in the Law of England and relied upon a passage from the opinion of Lord Goddard in the case of Attorney-General of Ceylon v. Kumarasinghe Don John Perera [1953] A.C. 200. In this case the Judicial Committee of the Privy Council allowed an appeal from the Court of Criminal Appeal in Ceylon which had stated that in England an intention to kill is incompatible with manslaughter. This view was in accordance with the speech of Viscount Simon in Holmes v. D.P.P. [1946] A.C. 588 at p.598. Lord Goddard, however, stated as follows :-

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p.293

"With all respect to the court, that is not the law of England ... The defence of provocation may arise where a person does intend to kill or inflict grievous bodily harm but his intention to do so arises from sudden passion involving loss of self-control by reason of provocation."

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p.294

18. The Supreme Court (Appellate Jurisdiction) therefore considered that on this point, the directions of the learned trial judge were incorrect. The appellant submits that the Appellate Court were right in their view of the authorities and this was conceded by the Respondent upon the hearing of the Petition for Special Leave to Appeal in forma pauperis.

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p.294

19. The Appellate Court then considered what course it ought to take and referred to the case of Chan Wai Kung v. R. (1959) H.K.L.R. 221 in which the cases dealing with the test to be used when applying the proviso in s.4(1) Criminal Appeal Act, 1907, were reviewed. In that case the Court concluded that the correct test was that laid down in R. v. Cohen and Bateman 2 C.A.R. 197 at 207 namely :-

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"... the Crown have to show that on a right direction, the jury must have come to the same conclusion."

The Appellant submits that this test which was

endorsed in R. v. Haddy 29 C.A.R. 189 where it was pointed out that it had stood for 35 years, is correct and that the Court in Hong Kong in Chan Wai Kung v. R. (supra) was also correct in distinguishing Chan Kau v. The Queen [1955] A.C. 206 at p.214 and Teper v. R. [1952] A.C. 480 at p.492.

10 20. In applying the test in R. v. Cohen and Bateman the Appellant submits that the Appellate Court failed to take into account the evidence relating to the most essential part of the case, namely the events which occurred upon the 15th May, 1961 when the deceased and the accused met. The only direct testimony able to be given was that of the accused whose evidence as to his relationship with his father-in-law was corroborated by his Uncle Chan Yu-Wing who was a witness for the prosecution. The Appellate Court did not examine the account of the accused as set out in paragraph 10 above and had this been done in the light of the opinion of Lord Goddard set out in paragraph 17 above, the Appellant submits that the Crown would not be able to show that the jury must have come to the same conclusion. The Appellant would refer also to the length of retirement of the jury and the recommendation of mercy which was added.

30 21. Alternatively, if the test to be applied is that set out in Teper v. The Queen [1952] A.C. 480 at p.492 the Appellant would submit that there was a probability that the misdirections by the learned trial judge on the subject of provocation turned the scale against the Appellant.

22. The Appellant respectfully submits that this Appeal should be allowed and that the conviction of the Appellant should be quashed or, alternatively, that a verdict of manslaughter should be substituted, for the following (amongst other)

R E A S O N S

- (1) BECAUSE the learned trial judge misdirected the jury on the issue of provocation.
- 40 (2) BECAUSE the Supreme Court (Appellate Jurisdiction) ought not to have applied the proviso in Section 82(2) of the Criminal Procedure Ordinance.
- (3) BECAUSE the Supreme Court (Appellate Jurisdiction) failed to take into account relevant

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matters in applying the proviso in Section
82(2) of the Criminal Procedure Ordinance.

DINGLE FOOT.

JOHN A. BAKER.

No. 8 of 1962

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LEE CHUN-CHUEN alias
LEE WING-CHEUK Appellant

v.

THE QUEEN Respondent

CASE FOR THE APPELLANT

T.L. WILSON & CO.,
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London, S.W.1.