

24/1962

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, Appellant

B E T W E E N :

LEE CHUN-CHUEN alias LEE WING-CHEUK

- and -

THE QUEEN

68250

Respondent

CASE for the RESPONDENT

Record

10 1. This is an appeal, by special leave of the
Judicial Committee granted on the 19th February 1962,
from a judgment of the Supreme Court of Hong-Kong,
Appellate Jurisdiction (Hogan C.J., Rigby and Mills
Owens J.J.) dated the 1st December 1961, which
dismissed the Appellant's appeal against his convic-
tion on a charge of murder by the Supreme Court of
Hong-Kong, Criminal Jurisdiction (Blair-Kerr J. and
a jury) dated the 18th September 1961, upon which he
was sentenced to death.

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20 2. The principal question in this appeal is what
should be the proper effect to be given to the
misdirection of the learned trial judge to the jury
upon the subject of provocation.

3. The Appellant was indicted upon the charge of
murdering Tsang Kan-Kong, who was his father-in-law,
on the 15th May 1961 in Hong-Kong. The trial took
place between the 11th and 18th September 1961
before Blair-Kerr J. and a jury.

P.1

30 4. The evidence called on behalf of the Crown
included

(a) Dr. Frederick Ong, a pathologist, carried out
the post-mortem: there were three fractures to the
skull, fractures of the breast bone and three ribs
on the left and an injury over the left loin by the
spleen and kidney: the fracture over the left eye
must have been caused by a blow of some severe

P.7 1.26

P.10 1.5

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P.10 1.39	strength: the injuries, except those to the chest, were consistent with more than three blows with the 5 lb. hammer produced (P.2) which was bloodstained: this could cause severe injury: the chest injuries could have been caused by a fist or a fall; the cause of death was shock and haemorrhage from the head injury and rupture of the spleen and and kidney.	
P.10 1.44		
P.11 1.33		
P.9 1.19		
P.14 1.10	(b) Dr. Gordon Low said that the deceased had been admitted to hospital at 8 p.m. on the 15th May suffering from the injuries described and that he had died about 9.30 p.m. that night.	10
P.15 1.30		
P.18 1.21	(c) Yuen Yan Chung, a police photographer produced photographs of the scene of the crime. In cross examination he agreed that there were piles of big and small stones in the vicinity, and the road appeared to be unfinished.	
P.18 1.30		
P.19 1.17		
Pp.26-27	(d) Detective Inspector Cheng Hoi Hing proved two letters to have been written by the Appellant. The first letter was found among the deceased's belongings by a fellow employee after his death and had been written to one Tsang Ping on the mainland: it accused the deceased of cruel and malicious intentions in saying that the Appellant was dead and contained the phrase "I must kill your father and then give myself up". The second letter was written two days after the killing of the deceased, and said the Appellant was going to jump in a river "so as to indicate I have revenged on this".	20
P.36 1.14		
P.41	(e) Kwok Chan Sing, a fellow employee of the deceased, had found him at 5 p.m. on 15th May lying in a roadway with bloodstains on his head: there was a hammer (produced) lying beside him: the witness identified the spot on the photographs produced: cross-examined, he said that nearby at the time there were stones and stone fragments used in the road construction.	30
P.42 1.5-		
P.43 1.7		
P.45 1.21		
P.49 11.8-25	(f) Tsui Chi, an ambulance driver, had been sent for to take the deceased to hospital: near him and in the heap of stones, he had found the hammer and a paper bag.	40
P.60 11.1-17	(g) Chan Yu-Wing, the uncle of the Appellant, said that the Appellant and the deceased had run a confectionery business outside Kowloon for about a year in 1957: since then he had seen the Appellant from time to time, who was on bad terms with the deceased, because the deceased had written to the Appellants wife saying that he was dead and telling	
P.61 1.6-		
P.63 1.36		

her to re-marry: the Appellant had appeared angry at this: after the death of the deceased, who was aged about 50, he had received a letter from the Appellant.

10 (h) Detective-Inspector Quinn said that at 2 a.m. on 6th June he went to Lamma Island with a party of police and arrested the Appellant in a stone hut: he was taken to Kowloon City Police Station and charged. He made a statement under caution, which was admitted by the trial judge after an objection had been made thereto and evidence called as to the taking of it. The statement was to the effect that he had hit the deceased: the deceased had told his family he was dead: twenty days before the death, he had found a hammer and went to wait for the deceased, finally he had found him and hit him with the hammer: later he had tried to commit suicide but had been rescued by some fishermen.

P.66 1.6 -
P.69 1.44

P.71 1.15 -
P.112 1.4

P.299

20 (i) Dr. Lung Kai Chung said that he had examined the Appellant after his arrest on 6th June, and found that he had an infected laceration 1" long on the right leg: the Appellant said that it was caused by a fall on 16th May: he had had no other complaints or injuries.

P.139 1.30 -
P.141 1.8

30 (j) Detective Sergeant Lui Lok had been present at the arrest of the Appellant: the Appellant had, after caution written a statement at that time in his notebook, to the effect that he had disagreed with the deceased over the false report of his death, that he had "stolen an iron hammer from Tak Wing to strike him to death", and that he had tried to commit suicide.

P.145

P.148-149

40 (k) Lam Yu said that he lived on Lamma Island, and that on the 17th May the Appellant came up and asked for work and that he worked there until his arrest: when the Appellant first came he had a laceration on his shin, which he said had been caused by a fall, but had no other injuries or apparent marks. The Appellant elected to give evidence, but called no other witnesses. He said that he had been in business with the deceased: he had been told that the deceased had told his wife that he was dead, and that she had remarried, which made him very angry: he agreed he had written the two letters adduced in evidence: on the 15th May he went out to buy fruit but found he did not have sufficient money, and so he thought of collecting some debts owing to him by workers on the road: the workers had dispersed and

PP.177-180

PP.181-207

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while looking for them he met the deceased at a cross-roads: he spoke to him and held the deceased's hand, whereupon the deceased said "are you coming hereto assault me?" and struck him so that he fell down: when he got up the deceased rushed at him and tried to strike him again: he kicked the deceased and knocked him down, whereupon the deceased threw a stone, injuring his leg, which knocked him down and his trousers were torn: there were further blows and the two began throwing stones at each other for some time: when the Appellant was about to run away the deceased picked up a big stone and threw it rolling along the road: the Appellant picked up a hammer he saw on the roadside and threw it at the deceased: he fell down and did not get up, so the Appellant ran away; later he returned and was told that the deceased was going to die, and so he ran away again and jumped into the sea, but was picked up by some fishermen: he was put ashore at Lamma Island and worked there until he was arrested: on arrest he was told he would be hanged, and he was told to copy the statement in Sergeant Lui's notebook from a statement put before him: then he was taken to Kowloon Police Station, where he was told what to say in his statement, and was not allowed to correct it. In cross-examination he said that the fight with the deceased lasted half-an-hour during which he had knocked the deceased down and he had hit the back of his head on a stone: he threw the hammer in order to keep the deceased away and stop the fighting.

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6. Blair-Kerr J. began his summing-up to the jury by telling the jury their duty and defining the onus of proof upon the prosecution: they had to show all the elements of the offence, namely that the accused caused the death intentionally by his unlawful unjustified and unprovoked acts: the defences raised of self-defence and provocation had to be disproved by the prosecution. The learned judge went on to define murder and, having dealt with the question of intention, continued :

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P.249 11.10-26

"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

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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".

- 10 The learned judge defined the defence of self-defence, pointing out the limitations of this defence: he then turned to the defence of provocation and explained that it involved a sudden and temporary loss of control making the accused for the moment not master of his mind: it must be such as to deprive a reasonable man of self-control: the learned judge went on :
- 20 "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".
- 30 The jury were told there must not be a cooling period and that the onus was on the prosecution to show that there had been no provocation. The learned judge then considered the statements made to the police and directed the jury that they must be satisfied that they were made voluntarily. He then reviewed the evidence in detail: in particular, Dr. Ong's evidence showed that three blows of considerable force had been inflicted upon the deceased's head: the jury would consider this in conjunction with the Appellant's version of the crime, and they might well think that these three injuries would not have been caused by one blow even if it knocked the deceased down. In directing the jury upon the Appellant's evidence, the learned judge read passages from the Appellant's own evidence as well as giving the gist of the defences raised. He
- P.249 1.27
P.251 1.15
P.252 11.10-22
P.252 1.44 -
P.253 1.44
P.258 1.25
P.259 1.42 -
P.261 1.46
PP.262-275

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also called attention to the Appellant's own account of how he came to throw the hammer: there was no evidence as to where the hammer had come from. The verdicts open to the jury were murder, manslaughter because of provocation, an acquittal on the ground of self-defence. The learned judge then said :

P.275 1.46 "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?" and reminded the jury of the reason given in evidence by the Appellant for throwing the hammer. 10

P.276.1.41 The summing-up ended with a further reminder upon the onus of proof.

P.278 7. The jury found the Appellant guilty of murder but recommended him for mercy on the ground of the tragic circumstances surrounding the case: he was sentenced to death. 20

P.282 8. The Appellant's appeal to the Appellate Court of the Supreme Court (Hogan C.J. Rigby and Mills Owens J.J.) was dismissed in a written judgment signed by the members of the Court and dated the 1st December 1961.

After setting out the facts, the judgment approved the direction given to the jury as to the two statements made to the police: the Court noted that if accepted either of these was a clear admission of murder. Subject to the direction upon the question of provocation, the summing-up of the learned judge was not open to criticism: further there was no substance in the submission that the summing-up was prejudicial to the Appellant and that no reasonable jury, properly directed, could have convicted of murder: the case for the defence had been properly put to the jury. 30

There remained the question of the learned judge's direction to the jury upon the defence of provocation, and the Court referred to the three passages set out in paragraph 6 hereof. This appeared to follow a statement by Lord Simon in his speech in Holmes v. D.P.P. (1946) A.C. 588, which seemed to support the view that an intention to kill was incompatible with a verdict of manslaughter by reason of provocation. 40

However this view was inconsistent with the law as stated in R. v. Hopper (1915) 2 K.B. 431, Mancini v. D.P.P. (1942) A.C.1. and Kwaku Mensah v. R. (1946) A.C. 83 and restated in Attorney-General of Ceylon v. Perera (1953) 2 W.L.R. 238. In view of the clear statement in the latter case, it followed that the learned judge's direction to the jury on this point was incorrect. The judgment of the Court continued :

P.294 1.18

10 "The Full Court has, in the case of Chan
Wai Kung v. Reg., dealt very fully with the
approach to be adopted to the verdict of the
jury when a misdirection on law has occurred.
Adopting the view therein expressed that we
should determine whether, if properly directed,
the jury acting reasonably would certainly have
come to the same conclusion, we are of the
opinion that, having regard to the letter
written by the accused to his brother-in-law
some months prior to the killing, the letter
20 written to his uncle and his conduct after the
killing, together with the nature of the injuries
inflicted on the deceased from which he died, no
jury, acting reasonably, could properly have found
manslaughter rather than murder."

P.294 1.20

Consequently, the Court considered that no miscarriage of justice occurred, and applying section 82(2) of the Criminal Procedure Code, dismissed the appeal.

P.294 1.34

30 9. The Appellant was, on the 19th February 1962,
granted special leave to appeal in forma pauperis
to the Privy Council.

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40 10. The Respondent respectfully submits that the
judgment of the Appellate Division of the Supreme
Court was correct and should not be disturbed. No
criticism can be made of the conduct of the trial or
the contents of the summing-up beyond that made as
to the direction upon whether an intention to kill
was inconsistent with the defence of provocation.
The Respondent accepts the careful analysis of the
Appellate Division, and their conclusion that in this
respect alone the summing-up was inaccurate, and the
Respondent will not seek to argue that the learned
judge's direction upon this point was accurate. The
Respondent however submits that the Appellate Division
was correct in holding that the misdirection had
occasioned no miscarriage of justice, and that upon

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consideration of the whole of the evidence, no reasonable jury could have come to any other verdict than murder. The Respondent will further rely upon the test applicable by the Board when the Judicial Committee is considering a case where a misdirection has occurred in the summing-up of a trial judge in a criminal case, such as is exemplified in Chan Kau v. R. (1955) A.C. 206. It is submitted that there is no probability that the jury would have come to a different verdict if they had been properly directed upon the defence of provocation -

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11. The Respondent respectfully submits that this appeal should be dismissed for the following, among other

R E A S O N S

1. BECAUSE upon the whole of the evidence the defence of provocation was not available to the Appellant.
2. BECAUSE there was no possibility that a reasonable jury, properly directed, could have found that the Appellant was provoked.
3. BECAUSE the Appellant has suffered no miscarriage of justice.
4. BECAUSE of the other reasons given by the Appellate Division of the Supreme Court.

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MERVYN HEALD.

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

B E T W E E N :

LEE CHUN-CHUEN alias
LEE WING-CHEUK Appellant

- and -

THE QUEEN Respondent

CASE FOR THE RESPONDENT

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