

27/84

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL OF HONG KONG

B E T W E E N :

CHAN WING-SIU
WONG KIN-SHING
TSE WAI-MING

Appellants

and

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THE QUEEN

Respondent

CASE FOR THE APPELLANTS

RECORD

1. This is an appeal from a Judgment of the Court of Appeal of Hong Kong (McMullin V-P, Li and Silke J.J.A.) dated 8th April 1982 which dismissed the Appellants' appeals from their convictions for murder and wounding with intent and sentences of death and imprisonment in the High Court (McDougall J and a Jury) dated 9th June 1981.

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2. The Appellants were each charged on an indictment containing two counts.

p.1

1. Murder, contrary to Common Law.

PARTICULARS OF OFFENCE

Chan Wing-Siu, Wong Kin-Shing and Tse Wai-Ming, on the 31st day of May 1980 at Kowloon in this colony, murdered Cheung Man-Kam.

2. Wounding with intent, contrary to Section 17(a) of the Offences Against the Person Ordinance, Cap. 212.

p.2

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PARTICULARS OF OFFENCE

Chan Wing-Siu, Wong Kin-Shing and Tse Wai-Ming, on 31st day of May 1980 at Kowloon in this colony, unlawfully and maliciously wounded Lam Pui-Yin, with intent to do her grievous bodily harm.

3. So far as is relevant section 17 of the Offences Against the Person Ordinance, Chapter 212 of the Laws of Hong Kong, provides:-

"Any person who -

(a) Unlawfully and maliciously, by any means whatsoever, wounds or causes any grievous bodily harm to any person with intent to maim, disfigure, or disable any person, or to do some other grievous bodily harm to any person shall be guilty of felony, and shall be liable to imprisonment for life."

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4. The principal ground upon which this Appeal is based can be shortly stated. The learned Judge in the High Court directed the jury, and the Court of Appeal approved his direction, that they (the jury) could and should convict the Appellants if they were satisfied in each case that they foresaw death or grievous bodily harm as a possible, not as a probable, consequence of their joint enterprise. It is respectfully submitted that that direction was wrong in law; that it has caused substantial and grave injustice; and that if the decision of the Court of Appeal in Hong Kong is followed, such injustice will be repeated.

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p.16

5. The prosecution case against the Appellants depended on the evidence of Madam Lam, the victim described in the second count of the indictment, who was the wife of the victim described in the first count, hereafter referred to as the deceased. She was a prostitute, and her account was as follows. She practised her profession, with the deceased's consent, at her address in Lok Shan Road, Kowloon; as a rule, when a client presented himself there, she would receive him and the deceased would discreetly withdraw into another room. On 31st May 1980, her door bell rang and she went to answer it: as usual the deceased withdrew to the kitchen. She then saw through the door the Appellant third above-named, who will hereafter be referred to as "Tse". When she opened the door to admit him, he pushed past her, with two other male Chinese, the Appellants first and second above-named, "Chan" and "Wong". All three drew knives and ordered her to kneel down, keep still and be silent. The deceased then came to the kitchen door. At once Chan and Wong went across and forced the deceased into the kitchen. Madam Lam heard one of them say "stab him down". She then heard the deceased scream, and shortly afterwards either Chan or Wong shout "run". As the man left, one of the three said "stab her down too" and Madam Lam was slashed across the head. She

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could not say which of the men was responsible. When they had gone she went to the kitchen where she found the deceased. He had been stabbed several times and was dying.

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6. There was scientific evidence (of blood stains) which supported Madam Lam's account that Chan and Wong fought with the deceased while Tse stood guard over her. In addition Chan and Wong received substantial wounds themselves: Tse did not. Chan and Wong were arrested after they reported to the casualty department of a nearby hospital, where Madam Lam was also being treated, and where she saw and identified Chan as one of the intruders. Wong was arrested at about the same time - Tse not until some three months later.

p.17/18

p.66

7. None of the three Appellants chose to give evidence at their trial. However it was not disputed that they were the three men involved. Madam Lam was cross-examined on the basis that the deceased had attacked them as soon as they entered the premises. More particularly each of the Appellants made statements to the Police in which they set out their versions of what had taken place.

p.67

8. Chan's version was that he had been introduced to Tse by his friend Wong. Tse had asked them to help in collecting a debt. They agreed, and after some discussion they decided to carry "ka Cham", (equipment) for self protection. Chan stressed that he had only ever intended to use his knife to protect himself if this was necessary. When they got to Madam Lam's (Chan told the Police) and had gone inside, he had immediately been "chopped" on the forehead; he had fallen down, realised he was bleeding and immediately run away. He had not taken part in any fight with the deceased, nor in any stabbing of Madam Lam.

p.67

9. Wong's version was that he and Chan had been approached by Tse and that they had agreed to go with him to collect a debt. On the way they had bought the knives. When they got to Madam Lam's Wong said, he was the last to go in. He at once saw the deceased, who had a chopper, and who attacked him, chopping him once on his face. He could not get away and was chopped on his left shoulder and again to the right rear of his waist. The next chop was aimed at his head; he used his left hand to ward off the blow and managed to get out his knife. He stabbed the deceased but only in self defence. Wong denied any knowledge of Madam Lam's wounding.

p.68

10. Chan's and Wong's own wounds accorded with

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their respective versions of what had taken place.

p.69

11. Tse, in his version, said that the deceased had owed him \$1,000, and he had gone with the others to collect it. The deceased, however, had had two knives and had attacked and injured Chan and Wong. Tse ran off - he was the first to leave and could not say what happened afterwards. He denied any knowledge that Chan and Wong had knives with them when they went to Madam Lam's. He took no part in any fight with the deceased nor in any stabbing of Madam Lam.

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p.6

12. The learned Judge in the High Court, in summing up the Case to the jury, included a number of directions relating to each of the Appellants' states of mind at the material time. The effect of these is conveniently summarised, it is submitted correctly, by McMullin V-P, giving judgment in the Court of Appeal:

p.70

"It may be said that a reasonable paraphrase of the summing up at large, in relation to this matter is that the learned trial Judge did throughout direct the jury on the basis that a conviction for murder could and should follow if they were satisfied as regards each of the Defendants that he foresaw death or grievous bodily harm as a possible, not as a probable, consequence of the enterprise to which he had lent his assistance. This is indicated at those parts in the summing up by the use of the words such as "possible", "possibility", "might" and "may" in relation to the Appellants' foresight of the outcome of their acts. Not all of these directions carry precisely the same degree of implication but as a whole it can be said that they do indicate the test as being one of foresight of possible rather than of probable grievous bodily harm or death. There are other passages which suggest that the jury must find a positive intent to kill or cause grievous bodily harm but the general cast of the directions is in the mode of foresight of possible consequences."

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pp.10,11
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32 and 37

p.36

13. It is clear that the jury were concerned by their consideration of the Appellants' states of mind, because after their retirement they returned to Court with a number of requests for assistance from the learned Judge, the first two of which were transmitted as follows:

p.36

(i) "We are arguing a point which may be a point of law, we believe murder is intent to kill".

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(ii) "We disagree over the intent or not by the accused to use their knives". p.36

The learned Judge dealt with the jury's requests by a similar direction as to foresight of possible consequences. p.36-42

14. In respect of the second count the learned trial Judge directed the jury in strong terms, that are again conveniently summarised in the judgment of the Court of Appeal. p.69

10 "In relation to the charge of wounding with intent to cause grievous bodily harm the learned Judge gave a strong direction to the jury, pointing out that since Madam Lam was unable to identify which of the Appellants had struck her, they would find it difficult, in view of the fact that the attackers were then in retreat, to be able to say with certainty that whoever it was had struck her must have shared with the others an intention to inflict such an injury." p.32

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15. The jury convicted each of the three Appellants on both counts of the indictment. For the offence of murder each was sentenced to death; for the offence of wounding with intent each was sentenced to five years' imprisonment.

16. The Appellants appealed to the Court of Appeal by a notice dated 21st August 1981 alleging that the verdicts of the jury were unsafe and unsatisfactory in that:- p.55

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"1. In the case of all three Appellants on the first count of murder. p.55

The learned trial Judge misdirected the jury as to the circumstances in which a murder verdict would be appropriate in that he directed that a Defendant should be convicted of murder as an aider and abettor if he thought it possible that a co-adventurer might use a weapon to cause death or serious injury. p.55

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2. In the case of all three Appellants on the second count of wounding with intent.

The verdict of the jury was perverse in that they had been directed that there was insufficient evidence upon which to found a conviction."

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17. It is submitted that the said notice of appeal correctly stated the issues which now arise for decision save and except that the criticism of the learned Judge's directions made in respect of the first count of murder applies equally to the second count of wounding with intent, the learned trial Judge having directed the jury in the following terms:

p.32

"So therefore, members of the jury, you are left in the situation that unless you are sure that all three accused had in contemplation the possibility that this act (the wounding of Madam Lam) might occur in the course of their adventure inside these premises, you cannot find them guilty of that offence."

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p.65

18. On 8th April 1982 the Court of Appeal (McMullin V-P, Li and Silke J.J.A.) gave written judgments dismissing the appeals.

19. It is respectfully submitted that the question raised by the Appellants in the Court of Appeal in Hong Kong and herein can conveniently be restated as follows: Was the learned trial Judge right or wrong to direct that a conviction for murder or wounding with intent could and should follow if the jury were satisfied as regards each of the Defendants that he foresaw death or grievous bodily harm as a possible, not as a probable, consequence of the enterprise to which he had lent his assistance?

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pp.93-96
pp.100-103

20. It is submitted that the Court of Appeal in Hong Kong in dismissing the appeals was wrong to favour the "possibility" test, and to base its decision on two Australian cases, namely Johns v. R 1980 54 A.L.J.R. 166 and Miller v. R 1980 55 A.L.J.R. 23. As a result it is submitted that the convictions of the Appellants cannot stand.

21. It is further submitted that the degree of Mens Rea required to constitute Malice Aforethought in the crime of murder is an intent to kill or cause grievous bodily harm; that is serious injury although not necessarily dangerous to life (R v. Vickers 1957 2 QB 664). Intention is to be further defined as a desire to bring about one or other of the above consequences, or foresight that one or other of those consequences will probably result from the Defendants' voluntary act. (Hyam v. DPP 1975 AC 55, Whitehouse v Gay News Limited and Lemon, 1979 AC 617, Lang v. Lang 1955 AC 402).

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22. It is further submitted that the need for foresight of probable, rather than possible,

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consequences as a necessary ingredient of intention is supported by the decisions of the House of Lords in Lynch v. DPP 1975 AC 653 and Morgan v. DPP 1976 AC 182.

RECORD

23. It is further submitted that the foresight of possible consequences is properly to be considered as the hallmark of ordinary "recklessness" as that state of mind has been explained by the recent decisions of the House of Lords in R v. Caldwell (1982) AC 341 and R. v. Lawrence (1982) AC 519. It does not appear that these decisions were referred to the Court of Appeal in Hong Kong in the instant case. In each of these decisions, it is respectfully submitted, foresight of possible consequences coupled with the willingness to risk such consequences, was categorised as "reckless". Recklessness can never constitute the necessary state of mind for the crime of murder, nor for any crime of specific intent such as wounding with intent (R v. Belfon 1976 1 WLR 741). It is respectfully submitted on behalf of the Appellants that in view of these authorities the effect of the learned trial Judge's directions in the instant case was to direct the jury that if the Appellants were reckless as to the consequences of their voluntary acts they could and should be convicted. It is humbly submitted that is not the law.

24. It is therefore respectfully submitted on behalf of the Appellants that this appeal should be allowed, and that the Appellants' convictions and sentences dated 9th June 1981 should be set aside, for the following among other

R E A S O N S

1. BECAUSE the learned trial Judge was wrong and misdirected the Jury that they could convict the Appellants of Murder if they (the Jury) were satisfied in each case that the Appellants foresaw death or grievous bodily harm as a possible consequence of their joint enterprise.
2. BECAUSE the learned trial Judge in the same way misdirected the Jury as to the Second Count of Indictment, namely that they could convict if they were satisfied that the Appellants had in contemplation that wounding might occur.
3. BECAUSE the Court of Appeal in Hong Kong was wrong to endorse the learned trial Judge's said misdirections and to uphold the Appellants' convictions.

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4. BECAUSE the foresight of possible consequences is insufficient as the mental element required to ground convictions for crimes of specific intent.
5. BECAUSE such foresight of possible consequences amounts to recklessness only.
6. BECAUSE substantial and grave injustice has been done.

MICHAEL CORKERY

JAMES GUTHRIE

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