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IN THE PRIVY COUNCIL No. 53 of 1983

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	First Appellant
WONG KIN-SHING	Second Appellant
TSE WAI-MING	Third Appellant

- and -

THE QUEEN	Respondent

CASE FOR THE RESPONDENT

Record

1. This is an appeal by special leave of the Judicial Committee granted on the 18th day of November 1983 from a judgement of the Court of Appeal of Hong Kong (McMullin V.P., Li and Silke JJ.A.) dated the 8th day of April 1982 which dismissed the appeals of the Appellants against their convictions for murder and wounding with intent in the High Court of Hong Kong (Macdougall J. and a jury) on the 9th day of June 1981. pp.97,98 & 103 p.4

2. The Appellants were jointly charged upon indictment containing two counts as follows:

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(a) the murder of CHENG Man-Kam (first Count)

(b) unlawfully and maliciously wounding LAM Pui-uin with intent to do her grievous bodily harm (second count) pp.1-2

These counts averred that the offences were committed on the 31st day of May 1980 at Kowloon in the Colony of Hong Kong.

3. At the trial of the Appellants the case for the Crown was as follows:

(a) LAM Pui-uin was a prostitute who advertised her availability at the Lok Shan Road premises in the newspapers. p.12 lines 25-28

(b) At about 2 p.m. on the 31st day of May 1980, she and her husband, CHENG Man-Kam, hereinafter referred to as the deceased, were waiting for clients when the door bell rang. The deceased, as usual, discreetly withdrew into the kitchen while LAM answered the door. p.16 lines 38-45

(c) Thinking that the third appellant who appeared at the door was a client, LAM opened the door. All three appellants then burst into the premises. p.16 Lines 46-52

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(d) All three appellants produced knives and ordered LAM to kneel down. The deceased appeared at the kitchen door, at once the first and, it seems, the second appellant pressed the deceased into the kitchen. She heard one of them say "stab him down". The deceased screamed and shortly afterwards on of them called out "run". p.16 line 53 p.17 lines 1-13

Meanwhile the third appellant remained at the front entrance to ensure that LAM did not escape and raise the alarm. p.19 lines 45-52

As the three appellants were fleeing the premises, one of them said "stab her down too". LAM was then slashed on the head. p.17 lines 14-17

4. Three knives were found, all were stained with blood. The deceased sustained a number of serious wounds from which he died a short time afterwards. p.20 lines 33-36 p.65 lines 29-31

5. The defence of each appellant is contained in the statement he made to the police wich basically claimed that as soon as the three appellants entered the premises, the deceased attacked them first. p.23 lines 35-46 p.27 lines 42-55 p.28 lines 9-29

6. The trial judge directed the jury, inter alia, in the following terms: p.30 lines 15-52

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(a) as to the first count - murder

(i) that an accused may be convicted of murder if one of his companions inflicted the fatal wound and he contemplated that either of is companions might use a knife to cause serious bodily injury. p.11 lines 3-12

(ii) that, similarly, if an accused contemplates that such violence may be used by one of his co-adventurers if the occupants do not yield to the demands to by made upon them - whatever they may be, or put up a predictable resistance, then he will be guilty of murder in the event that a knife or knives are used and the victims dies as a consequence. p.11 lines 31-42

(iii) that if it is reasonably possible that despite carrying a knife himself and despite seeing his co-adventurers produce knives, the third appellant did not intend to inflict serious bodily injury, nor have in contemplation that serious injury might be inflicted on anyone, but only thought that the knives would be used to do no more that frighten the occupants, then p.20 lines 39-55 p.21

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	he would be guilty not of murder but of manslaughter.	lines 1-25
(iv)	that an appellant would be guilty of murder if, while hoping that injury will not be the outcome, he nevertheless decides that he will use his weapon to inflict at least serious bodily injury to overcome any predictable resistance that his or his companions' actions might produce; or he has in contemplation that violence <u>may</u> be used by one of his co-adventurers and that that violence will amount to the infliction of serious bodily injury.	p.36 lines 47-49 p.37 lines 1-7 p.37 lines 10-17
(v)	that if an accused thinks that violence <u>may</u> be used by one of his co-adventurers if the occupants of the flat do not yield to the demands or put up a predictable defence, then he would be equally guilty of murder.	p.37 lines 18-29
(vi)	that it it was reasonably possible that an accused had an intention less than the infliction of serious bodily injury or that he did not foresee that one of his co-adventurers was going to inflict serious bodily injury,	

then he would not be guilty of murder. p.42 lines 1-10

(vii) that if an accused only intended to inflict an injury less than serious bodily injury, or if he only foresaw that one of his co-adventurers would inflict any such injury, he may be guilty of manslaughter. p.42 lines 11-18

(b) as to the second count - wounding with intent

(i) that if it is unlikely that the thought ever occurred to any of the appellants that one of their number would suddenly out of the blue gratuitously suggest that someone should slash down a woman who happened to be kneeling on the floor and who was offering no resistence, the jury should not return a verdict of guilty for wounding with intent nor simple wounding. However if this was within their contemplation, then they may be guilty of wounding with intent or simple wounding, depending upon their particular intent. p.31 lines 44-55 p.32 lines 1-20

(ii) that unless the jury are sure that all three appellants had in contemplation the

possibility that this act might occur in the course of their adventure, they cannot find any of them guilty of this offence as LAM was totally unable to say who shouted out "strike her down too" or who actually slashed her and there is not evidence as to what the third person did or thought. p.32 lines 21-40

7. The jury at the conclusion of the trial unanimously convicted the three Appellants of all counts. p.4

8. The Appellants were sentenced to death on the murder count and to five years' imprisonment on the wounding count. p.4

9. An appeal against conviction by the Appellants to the Court of Appeal of Hong Kong (McMullin V.P., Li and Silke JJ.A.) was heard and the court dismissed the Appellants' appeal in relation to all counts.

10. The following submissions were made on behalf of the Appellants:

(a) as to the first count - murder

that the 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.

(b) as to the second count - wounding with intent

that the verdict of the jury was perverse in that they had been directed that there was insufficient evidence upon which to found a conviction. p.55

11. The Court of Appeal after setting out briefly the facts relating to the incident and reviewing authorities on the subject of the requisite intent for murder made the following observations:

(a) as to the first count - murder

(i) that the 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 grevious bodily harm as a possible, not as a probable, consequence of the enterprise to which he had lent his assistance. p.70 lines 35-42

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(ii) That although is seems that in England the foresight test is related to probability and not bare possibility, the point has not yet been settled because the question of recklessness in relation to murder is not yet unequivocally decided. This is so because the term "recklessness" itself has been variously understood as involving either foresight of probable or else of possible consequence — p.88 lines 26-37

(iii) that there is arguably authority to support the proposition that malice aforethought in murder may be constituted by the taking of a deliberate and unjustifiable risk when the one who takes it foresees that death or really serious bodily injury is a substantial possibility. A risk is unjustifiable when objectively judged, it was unreasonable to take it in view of its magnitude and want of social utility. — p.92 lines 39-52

(iv) that there is clear, compelling and direct authority from Australia (Johns v. The Queen (1980) 54 A.L.J.R. 166 and Miller v. The Queen (1981) 55 A.L.J.R. 23)

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	favouring the "foresight of possibility" test, and nothing equally compelling or direct from the Privy Council or the House of Lords to set against it.	p.96 lines 31-36
(v)	that it would not be a disservice to justice nor infringement to the legitimate interests of any defendant upon a criminal charge for the alternative to direct intention to be framed in terms of 'possible' as distinct from 'probable' foresight of consequences.	p.97 lines 4-11

12. The Court of Appeal held as follows:

(a) <u>as to the first count - murder</u>

(i)	that it would have been preferable if the trial judge had told the jury that the possibility he was leaving to them had to be a substantial possibility but the circumstances were such that the omission to do so cannot have prejudice the appellant.	p.97 lines 41-46
(ii)	that even if the use by the trial judge of expressions less positive than 'probable' was wrong and therefore a misdirection, there was no miscarriage of justice and the proviso should apply.	p.98 lines 35-40 p.99 lines 50-51 p.100 lines 1-5

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(b) as to the second count - wounding with intent

that the verdict was not perverse as it was open to the jury to conclude that anyone going to the premises armed with a knife was prepared to be a party to all the violence offered to any of the inhabitants of the premises. p.70 lines 1-14

13. The Appellants petitioned Her Majesty in Council for special leave to appeal against the decision of the Hong Kong Court of Appeal. Special leave to appeal was granted on the 18th day of November, 1983. pp.104-105

14. The respondent respectfully submits that the decision reached by the Hong Kong Court of Appeal is correct, and that this appeal should be dismissed with costs for the following among other

R E A S O N S

(1) That is a "joint enterprise/common design" factual situation, where all 3 perpetrators are physically in attendance and where the original purpose of their presence is to perform a dangerous and illegal act with no social utility (if not robbery then at least the enforced entry of private premises by means of a ruse without prior notice and armed with knives) and a further illegal act (the fatal stabbing of one of the

residing occupants) occurs during the carrying out of the original purpose which further act was an act which was within the contemplation of the 3 perpetrators as an act which might be done in the carrying out of the original illegal purpose then such further act is by its very nature one which falls within the parties' own purpose and design precisely because it is within their contemplation and is foreseen as a possible incident of the execution of their original planned purpose.

(2) That provided the trial judge made it clear in his directions to the jury that (on the facts of this case) they had in effect to be satisfied of the existence of implied malice aforethought in all 3 Accused and that the test to apply when asking this quesiton in respect of each Accused was a subjective one, that the use of a precise or particular verbal formula (either "possible, probable" or some other variation) was neither necessary nor fatal.

(3) For the reasons set out in the judgement of the Court of Appeal of Hong Kong adopting the reasoning of the High Court of Australia.

(4) Relying upon the authority of KWAN Ping-bong and Another v The Queen [1979] A.C. 609 (Privy Council) that even if it is decided that the Court

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of Appeal of Hong Kong was in error, that the clear indication of the majority of the Court (Li, Silke JJ.A.) that they would nevertheless apply "the proviso" in any case ought to reflect the disposal of this case.

(5) It is submitted that the Appellants' criticisms of the Summing Up of the reasons set out in paragraphs 21, 22, and 23 of the Petition are misconceived. The passages therein (or in answer to one of the Jurys subsequent questions) to which the Appellants are understood to refer are directed to the question of joint venture in murder, and not to the question of the mens rea necessary in proof of that offence. Record p. 37 : l. 18 - 29.

The Respondents will submit that, in substance, the Judge's direction dealt accurately with the necessary intent in murder, and that the purport of his direction on joint venture was also accurate.

For the avoidance of doubt, the Respondents submit that the directions as to intent are to be found at:

A Record p. 8 : l.41 - 44
Record p.10 : l.36 - 40
Record p.36 : l.40 - 49
Record p.37 : l.1 - 7

Record p.40 : l.18 - 32
Record p.42 : l.1 - 18

B The directions as to <u>joint venture</u> are to be found at:

Record p.10 : l.41 - 51
Record p.11 : l.1 - 12 and
31 - 42
Record p.20 : l.39 - 55
Record p.21 : l.1 - 25
Record p.37 : l.9 - 29

(6) The use of the words "may" "might" or "possible" in the references given under "B" herein are directed not to the question of the <u>intent</u> with which an accomplices act were done, but to the issue vis-a-vis any other defendant that <u>given</u> that the wounding <u>was</u> accompanied by the necessary mens rea in the principal actor, was his murderous conduct within the scope of the joint enterprise.

Put another way, the directions of which complaints are made go to this question: Given that 3 men go armed with knives pursuant to a common design to rob, have the Crown proved in respect of any one of the defendants that he contemplated that in the pursuit of that common design one or more of his companions might, upon an exigency, use his knife with the intent necessary to establish murder?

(7) The Respondents therefore submit that the Appellants' arguments confuse contemplation of the prospect of an actus reus with contemplation of its consequences.

The cases cited by the Appellants go to the foresight in a single actor of the consequences of his act. The decisions in the High Court of Australia in Johns -v- R and Miller -v- R referred to in paragraph 20 of the Petition, and followed by the Court of Appeal in Hong Kong go to the question of joint venture. See also R -v- Smith (1963) 1WLR p.1200. R -v- Reid (1975) 62 Cr. App. R. 109.

Harry Ognall, Q.C.
Kevin Egan

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CHARLES RUSSELL & CO.
Hale Court
Lincoln's Inn
London WC2A 3UL

Solicitors for the Respondent