

Chan Wing-Siu
Wong Kin-Shing
Tse Wai-Ming

Appellants

v.

The Queen

Respondent

FROM
THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 21ST JUNE 1984

Present at the Hearing:

LORD KEITH OF KINKEL
LORD BRIDGE OF HARWICH
LORD BRANDON OF OAKBROOK
LORD TEMPLEMAN
SIR ROBIN COOKE

[Delivered by Sir Robin Cooke]

Chan Wing-Siu, Wong Kin-Shing and Tse Wai-Ming were tried jointly in the High Court of Hong Kong before Macdougall J. and a jury on an indictment containing two counts, namely (1) murder contrary to common law, in that on 31st May 1980 at Kowloon they murdered Cheung Man-Kam; (2) wounding with intent, contrary to section 17(a) of the Offences against the Person Ordinance, Cap.212, in that on the same occasion they unlawfully and maliciously wounded Lam Pui-Yin with intent to do her grievous bodily harm. She was the wife of the deceased. The jury unanimously found all three accused guilty on both counts. They were sentenced to death for the murder and to five years' imprisonment for the wounding with intent. Appeals against their convictions were dismissed by the Court of Appeal of Hong Kong (McMullin V.-P., Li and Silke JJ.A.) in unanimous judgments delivered on 8th April 1982. The three appellants now appeal to Her Majesty in Council, special leave having been granted because the case raises questions of general principle as to the directions to be given to a jury explaining the tests of guilt in crimes alleged to arise from a joint enterprise.

The case for the prosecution depended on the evidence of Madam Lam. She was a prostitute carrying on her trade with her husband's consent in a flat in which he was also habitually present. Advertisements were placed regularly in Chinese newspapers indicating that her services were available there. She testified that during the afternoon of 31st May 1980 her doorbell rang and she went to answer it, her husband as usual discreetly withdrawing to the kitchen. At first she saw only the accused Tse. Assuming that he was a client, she opened the door to let him in, but the other two accused then rushed round a corner and the three forced their way into the flat. They all drew knives. She was ordered to kneel down, keep still and not make a sound. Her husband appeared at the kitchen door and Chan and Wong then forced him back into the kitchen, while Tse remained on guard over her. She heard one of the other two say "Stab him down" and then a scream from her husband. Shortly afterwards one of the other two shouted "Run". All three left, but as they did so she heard one say "Stab her down too". She was slashed across the head, receiving a wound which bled profusely but in the event proved to be comparatively superficial. She found her husband dying in the kitchen. He had been stabbed several times.

At different times later on the same day, Madam Lam and Chan and Wong each went separately to the casualty department of the same hospital, where she happened to see and recognised Chan. The two men both had wounds and injuries sufficiently serious for them to be kept in hospital for two days. In particular, Wong had a 2½ inch wound on his face involving the nose and penetrating the nasal cavity; there was a compound fracture of his hard palate. Tse had not been hurt and was not arrested until some three months later.

The men left behind them in the flat three knives, two of which were heavily stained with blood of the same group as that of the deceased. The third knife had only some spots of blood, too small for grouping. A ring worn by the deceased, and said by his wife to fit firmly round his finger, was found lying in the living room. The possibility that it had been wrenched from the deceased's finger and then dropped by one of the accused in flight was relevant to the Crown's theory at the trial that the motive for the attack on the deceased was robbery.

Each accused made several statements to the police. These were put in evidence by the prosecution. None of the accused, however, gave evidence at the trial, nor was any evidence called for them. In their respective statements all the accused admitted, at least ultimately, having gone to the flat that day. (Chan and Wong had initially given quite different

accounts of how they came by their wounds.) They claimed that their purpose had been to collect a debt owing by the deceased to Tse. Chan and Wong each admitted taking a knife, allegedly for self-protection, and knowing that the others also had knives. Tse made no admission of having himself taken a knife, and he denied knowing that his friends were armed with knives. The general tenor of the statements of all three was that, as soon as they entered, the deceased attacked them savagely with a chopper or knives - this despite the fact that, as the judge underlined in his summing up, a client was expected, rather than a party of invaders. Only Wong admitted to using violence himself. He maintained that, immediately they entered, the woman called out "Robbery" and proceeded to lock the door; whereupon the man attacked him with a chopper. He said that after having been chopped three times and warding off a fourth blow, he stabbed his assailant many times and ran. He claimed to have acted in self-defence. It should be mentioned that the judge gave the necessary direction that the statements of each accused were admissible only against the maker.

In the common law of England, which for all purposes material to this case applies in Hong Kong, it is now settled by the decision of the House of Lords in *R. v. Cunningham* [1982] A.C.566 that killing with the intention of inflicting on the victim grievous bodily harm - that is to say, really serious bodily harm - is murder. The evidence of the wife of the deceased, if accepted by the jury, was clearly sufficient when coupled with the circumstantial evidence (in particular the blood-stained knives) to show that Chan and Wong had joined in an attack on the deceased with at least the intention of inflicting grievous bodily harm. Moreover, the evidence gave room for the possible inference that Tse stood guard over her with the intention of facilitating that attack - an inference which would itself be enough to make him a party to the murder. However, the evidence was perhaps equivocal on that point. And while, taken as a whole, the evidence already summarised suggests the likelihood that it was Tse who slashed her, there were uncertainties arising from her inability to specify either her assailant or the man who called out "Stab her down too".

In these circumstances one way in which the Crown case at the trial was put against all three accused, and on both counts, was that crimes of the type charged must have been contemplated by the accused as possible occurrences in the course of their joint venture. Both in the summing up and later in answer to questions from the jury regarding the necessary intent, Macdougall J. directed them to the effect that an accused was guilty on both counts if proved to have had in contemplation that a knife might be

used on the occasion by one of his co-adventurers with the intention of inflicting serious bodily injury. The judge's words varied slightly, but the following is a sufficient example of what he said:-

"The Crown does not have to prove which accused inflicted the fatal blow. You may convict any accused of murder if you come to the conclusion that he either personally inflicted the fatal wound on the deceased with the intention of causing at least serious bodily injury or that one of his companions inflicted that wound and that the accused contemplated that either of his companions might use a knife to cause serious bodily injury on any one or more of the occupants of that flat."

In the Court of Appeal a relatively minor ground of appeal was that the guilty verdicts against all three accused on the second count were perverse. That ground is no longer pursued. The present appeal involves solely an attack on the summing up, albeit in relation to both counts. As in the Court of Appeal, it is submitted for the appellants that it was not enough if an appellant foresaw death or grievous bodily harm as a possible consequence of the joint enterprise: that the jury ought to have been directed that it must be proved that he foresaw that one of those consequences would probably result. Refining the argument somewhat, counsel for the appellants conceded before their Lordships that a person who is charged with murder on the basis of having been a party to an unlawful enterprise, and who was aware that weapons were being carried, need not have foreseen as more probable than not a contingency in which a weapon might be used by one of his companions (for example, resistance by the victim of an intended robbery). The main proposition submitted for the appellants remained, however, that such an accused does at least have to be proved to have foreseen that, if such a contingency eventuated, it was more probable than not that one of his companions would use a weapon with intent to kill or cause grievous bodily harm.

In considering that argument it should first be recalled that a person acting in concert with the primary offender may become a party to the crime, whether or not present at the time of its commission, by activities variously described as aiding, abetting, counselling, inciting or procuring it. In the typical case in that class, the same or the same type of offence is actually intended by all the parties acting in concert. In view of the terms of the directions to the jury here, the Crown does not seek to support the present convictions on that ground. The case must depend rather on the wider principle whereby a secondary party is criminally liable for

acts by the primary offender of a type which the former foresees but does not necessarily intend.

That there is such a principle is not in doubt. It turns on contemplation or, putting the same idea in other words, authorisation, which may be express but is more usually implied. It meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. The criminal culpability lies in participating in the venture with that foresight.

A line of relevant English authorities from 1830 onwards was considered by the Court of Criminal Appeal in *R. v. Anderson and Morris* [1966] 2 Q.B.110. Delivering the judgment of a court of five, Lord Parker C.J. accepted a submission by Mr. Geoffrey Lane Q.C. (as he then was), and (at pp. 118-119) stated the law as follows, in terms very close to those reported (at p.114) to have been formulated by counsel:-

"...where two persons embark on a joint enterprise, each is liable for the acts done in pursuance of that joint enterprise, and that includes liability for unusual consequences if they arise from the execution of the agreed joint enterprise but (and this is the crux of the matter)...if one of the adventurers goes beyond what has been tacitly agreed as part of the common enterprise his co-adventurer is not liable for the consequences of that unauthorised act. Finally,it is for the jury in every case to decide whether what was done was part of the joint enterprise, or went beyond it and was in fact an act unauthorised by that joint enterprise."

In England it appears not to have been found necessary hitherto to analyse more elaborately the test which the jury have to apply. But, in association with the modern emphasis on subjective tests of criminal guilt, the matter has been examined by appellate courts in Australia and New Zealand. In *Johns v. R.* (1980) 143 C.L.R.108 the High Court of Australia rejected an argument that at common law an accessory before the fact is not liable for the crime, although contemplated by him as an act which might be done in the course of the venture, unless it was more probable than not that the criminal act charged would take place. Stephen J. in his judgment and Mason, Murphy and Wilson JJ. in a joint judgment approved the following statement by Street C.J. in the Supreme Court of New South Wales:-

"...an accessory before the fact bears, as does a principal in the second degree, a criminal liability for an act which was within the contemplation of both himself and the principal in the first degree as an act which might be done in the

course of carrying out the primary criminal intention - an act contemplated as a possible incident of the originally planned particular venture."

The joint judgment added that such an act is 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 planned enterprise. Stephen J., taking a phrase from Professor Howard's book on Criminal Law, spoke of contemplation by the parties of a "substantial risk" that the killing would occur. The same phrase was used by the High Court in a case of extraordinary facts, *Miller v. R.* (1981) 55 A.L.J.R.23. There approval was given to a direction to the effect that the accused was guilty of murder if the common plan included the possible murder of girls, so that the parties to the plan contemplated as a substantial risk the murder of any girl who was picked up, even though it was not contemplated that murder would occur in the course of every drive.

Those two Australian authorities were cited to, and strongly influenced, the Hong Kong Court of Appeal in the present case. In *R. v. Gush* [1980] 2 NZLR 92, delivering a judgment of the New Zealand Court of Appeal, Richmond P. applied the approach in *Johns* when interpreting a provision in a statutory code making a person liable as a party "...if the commission of that offence was known to be a probable consequence of the prosecution of the common purpose". After discussing the range of meanings which "probable" may bear, he said that the statutory objects would be largely frustrated if in this provision the word was treated as meaning more probable than not. Instead the court in *Gush* preferred the interpretation that, in the particular context, "probable" denoted an event that could well happen.

In agreement with the courts in Hong Kong, Australia and New Zealand, their Lordships regard as wholly unacceptable any argument that would propose, as any part of the criteria of the guilt of an accomplice, whether on considering in advance the possibility of a crime of the kind in the event actually committed by his co-adventurers he thought that it was more than an even risk. The concession that the contingency in which the crime is committed need not itself be foreseen as more probable than not, while virtually inevitable in the light of the reasoning in *Johns* and the other cases, complicates the argument without improving it. What public policy requires was rightly identified in the submissions for the Crown. Where a man lends himself to a criminal enterprise knowing that potentially murderous weapons are to be carried, and in the event

they are in fact used by his partner with an intent sufficient for murder, he should not escape the consequences by reliance upon a nuance of prior assessment, only too likely to have been optimistic.

On the other hand, if it was not even contemplated by the particular accused that serious bodily harm would be intentionally inflicted, he is not a party to murder. This is reflected in a passage in the speech of Viscount Simonds L.C. in *Davies v. Director of Public Prosecutions* [1954] A.C.378, 401:-

"....I can see no reason why, if half a dozen boys fight another crowd, and one of them produces a knife and stabs one of the opponents to death, all the rest of his group should be treated as accomplices in the use of a knife and the infliction of mortal injury by that means, unless there is evidence that the rest intended or concerted or at least contemplated an attack with a knife by one of their number, as opposed to a common assault. If all that was designed or envisaged was in fact a common assault, and there was no evidence that Lawson, a party to that common assault, knew that any of his companions had a knife, then Lawson was not an accomplice in the crime consisting in its felonious use."

The test of mens rea here is subjective. It is what the individual accused in fact contemplated that matters. As in other cases where the state of a person's mind has to be ascertained, this may be inferred from his conduct and any other evidence throwing light on what he foresaw at the material time, including of course any explanation that he gives in evidence or in a statement put in evidence by the prosecution. It is no less elementary that all questions of weight are for the jury. The prosecution must prove the necessary contemplation beyond reasonable doubt, although that may be done by inference as just mentioned. If, at the end of the day and whether as a result of hearing evidence from the accused or for some other reason, the jury conclude that there is a reasonable possibility that the accused did not even contemplate the risk, he is in this type of case not guilty of murder or wounding with intent to cause serious bodily harm.

In some cases in this field it is enough to direct the jury by adapting to the circumstances the simple formula common in a number of jurisdictions. For instance, did the particular accused contemplate that in carrying out a common unlawful purpose one of his partners in the enterprise might use a knife or a loaded gun with the intention of causing really serious bodily harm?

The present was such a case. It was not necessary for the trial judge to say more on the subject than

he did. He drew the jury's attention fully to the unsworn statements of each accused. He emphasised that if the jury were to conclude that it was reasonably possible that an accused had an intention less than the infliction of serious bodily injury on any occupant of the flat, or that he did not foresee that one of his colleagues was going to inflict injury of a serious bodily nature, then that accused did not have the necessary intent or foresight of consequences for murder. He told them that if Tse thought that the knives would be used to do no more than frighten the occupants, then he would be guilty not of murder but of manslaughter.

On the second count the judge went as far as to give as his opinion on the facts that it was very difficult to convict any of the accused, saying:-

"....you may well think it is unlikely that the thought ever occurred to any of the accused 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 resistance."

The jury were entitled to and did take a different view of the facts. They were entitled to remember that disastrous violent action on the impulse of a moment of emergency is very apt to occur when intruders have weapons.

Further, the judge made it plain that it was for the jury to decide whether they accepted Madam Lam's evidence. And, as he said, if they did so then "debt or no debt, the accused had no right to be in the deceased's premises displaying knives". Evidently Tse did not claim in anything that he said to the police that he knew that knives were being taken but never thought that they would be used except to threaten. On the contrary, he denied all advance knowledge of the knives and being a party to any plan to take them. Once the jury accepted Madam Lam's evidence that all three accused drew knives as soon as they forced their way in, there was no evidential foundation for an argument that, if Tse foresaw the use of knives by the other two, it was only as a risk so remote that he disregarded it. No more elaborate direction was called for on the evidence in this case.

Where there is an evidential foundation for a remoteness issue, it may be necessary for the judge to give the jury more help. Although a risk of a killing or serious bodily harm has crossed the mind of a party to an unlawful enterprise, it is right to allow for a class of case in which the risk was so remote as not to make that party guilty of a murder or intentional causing of grievous bodily harm

committed by a co-adventurer in the circumstances that in the event confronted the latter. But if the party accused knew that lethal weapons, such as a knife or a loaded gun, were to be carried on a criminal expedition, the defence should succeed only very rarely.

In cases where an issue of remoteness does arise it is for the jury (or other tribunal of fact) to decide whether the risk as recognised by the accused was sufficient to make him a party to the crime committed by the principal. Various formulae have been suggested - including a substantial risk, a real risk, a risk that something might well happen. No one formula is exclusively preferable; indeed it may be advantageous in a summing up to use more than one. For the question is not one of semantics. What has to be brought home to the jury is that occasionally a risk may have occurred to an accused's mind - fleetingly or even causing him some deliberation - but may genuinely have been dismissed by him as altogether negligible. If they think there is a reasonable possibility that the case is in that class, taking the risk should not make that accused a party to such a crime of intention as murder or wounding with intent to cause grievous bodily harm. The judge is entitled to warn the jury to be cautious before reaching that conclusion; but the law can do no more by way of definition; it can only be for the jury to determine any issue of that kind on the facts of the particular case.

The present case not being in that class, their Lordships agree with the Court of Appeal that the attack on the summing up fails and will humbly advise Her Majesty that the appeals should be dismissed.

The first part of the document discusses the importance of maintaining accurate records of all transactions. It emphasizes that every entry, no matter how small, should be recorded to ensure the integrity of the financial statements. This includes not only sales and purchases but also expenses and income. The document provides a detailed explanation of how to categorize these transactions correctly, ensuring they are recorded in the appropriate accounts. It also highlights the need for regular reconciliation of bank statements and the company's records to identify any discrepancies early on.

The second part of the document focuses on the preparation of the income statement. It outlines the steps involved in calculating net income, starting from the total sales and subtracting the cost of goods sold and operating expenses. The document provides a clear breakdown of the various components that make up the income statement, such as depreciation, amortization, and interest expense. It also discusses the importance of providing a clear and concise explanation of any significant changes or adjustments made during the period.

The final part of the document addresses the preparation of the balance sheet. It explains how the balance sheet reflects the company's financial position at a specific point in time, showing the assets, liabilities, and equity. The document provides a detailed guide on how to calculate the ending balances for each account and how to ensure that the balance sheet is balanced. It also discusses the importance of providing a clear and concise explanation of any significant changes or adjustments made during the period.