

53/84

No 36 of 1983

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL OF HONG KONG

B E T W E E N :

LEUNG KAM KWOK

Appellant

and

THE QUEEN

Respondent

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CASE FOR THE APPELLANT

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1. This is an appeal, pursuant to leave granted by the Board (Lords Diplock, Templeman and Bridge) on 20th June 1983 from the judgment dated 8th January 1982 of the Court of Appeal of Hong Kong (McMullin, V.-P., Silke, J.A., and Macdougall, J.) dismissing the Appellant's appeal against conviction by the High Court of Hong Kong (Mr. Commissioner Barnes and a jury) for murder, contrary to common law. The said

offence being a capital offence, the Appellant was sentenced to the mandatory penalty of death on 23rd June 1981.

2. The main issues on this appeal are:

- (a) Whether the following direction viz. that if it were proved that the Appellant knew of the presence of the victim and other persons in the immediate vicinity and that he fired a gun, he would have to be guilty of murder, was a proper direction in law.
- (b) Whether, by virtue of the above directions, the learned trial judge was (in effect) withdrawing the Appellant's defence of unintentional homicide, and thereby also withdrawing the possibility of a verdict of guilty of manslaughter and directing the jury to convict of murder.
- (c) Whether the learned trial judge erred in law in failing to direct the jury on the effect of statements made by one accused in the absence of a co-accused, which implicated the latter in the offence of murder.
- (d) Whether the Appellant's defence was properly put to the jury with adequate and proper directions on the law.

- (e) Whether, where a direction on the burden of proof is absent from a summing-up in a capital case, such a conviction can be upheld.
- (f) The effect of section 65(A)(1) of the Hong Kong Criminal Procedure Ordinance (1982) Chap. 221 on the facts of the present case.
3. On 10th July 1980 the Appellant and his co-defendant went to a loan company's offices in Kwun Tong, Hong Kong, with the intention of carrying out an armed robbery on the staff at the said offices. The Appellant was armed with a revolver. Having entered the said premises with his co-defendant, the Appellant and his co-defendant went to a counter (which had a grille separating the staff from members of the public). The word "robbery" was shouted and the staff all fell to the ground. There was, at the side of the counter grille, a door. The prosecution case was that the door was open and the persons on the other side, including the victim, were visible to the Appellant. The Appellant fired a shot which struck the victim who was in an office, separated from the Appellant and his co-defendant by the said door. The said shot led to the death of the victim. A second shot that was fired, came to rest in a waste-paper bin and caused no injury.

The Appellant and his co-defendant made good their escape.

4. On 4th August 1980 the Appellant was arrested. He was interviewed on various occasions by the police. When initially informed of the reasons for his arrest (homicide and robbery) the Appellant admitted killing the deceased.

The Appellant later described (in a statement under caution) how he had come into possession of the revolver, how he recruited his co-defendant, planned the robbery and attempted to carry it out. As to the homicide, the Appellant <sup>said</sup> said: "I fired one shot upward as warning. But I saw a woman at the doorway of Manager's Office fall down on the floor suddenly. And then I shouted at those inside to open door. But he did not do as what I said. I fired one more shot. However they still did not open (the door)."

5. On 6th August 1980 the Appellant was charged with murder (contrary to common law and section 2 of the Offences Against the Person Ordinance, Chapter 212). The Appellant's reply to the charge was: "I understand. It was I who shot her dead, I (deletion) was without any intention".

6. The co-defendant was also arrested and interviewed by the police. In a statement under caution dated 15th December 1980 (and made in the absence of the Appellant) he said: "I saw (the Appellant) draw his pistol and fire one shot at the interior part beyond

the counter. We saw the door of the manager's office was opened and a woman came out. (The Appellant) fired the second shot and the woman fell on the floor".

7. On 15th June 1981 the Appellant and his co-defendant appeared for trial before Mr Commissioner Barnes and a jury on one charge of murder and one charge of attempted robbery. The Appellant and his co-defendant pleaded not guilty to murder but pleaded guilty to the charge of attempted robbery.
8. During the said trial the statement under caution of the co-defendant was adduced in evidence and exhibited. The co-defendant gave evidence and was cross-examined by the Crown on the statement under caution. The Appellant did not give or call any evidence. The Appellant's defence was that he did not have the requisite mens rea for murder. The co-defendant's defence was that the killing was outside the joint agreement to commit the robbery.
9. The learned trial judge summed up the case on 22nd and 23rd June 1981. The Appellant was convicted of murder on 23rd June 1981 (the co-defendant being acquitted of murder but convicted of manslaughter). The Appellant was sentenced to death on the count of murder and to 15 years imprisonment on the robbery count.

10. In the course of his summing-up the learned trial judge directed the jury as follows: "If you are satisfied that he fired that gun in the way that was demonstrated by the witness Lai Kim-bor and in the way that the second accused demonstrated - they were very similar demonstrations you may think - if he fired that gun in a horizontal or near horizontal position and at the time he fired it that door of the manager's office was open and he saw people in there, then there could only be one verdict and that would be murder because you would have the inference available to you there that it was almost a deliberate aiming at whoever was in there.

But even if you did <sup>not</sup> accept that, if you accepted that the door was open at the time he fired that gun, and that since there were four people in there, in that room, and that since the second accused had seen people in that room, therefore the first accused must also have seen people in that room and fired the gun, again you would be satisfied that the necessary intention to constitute murder had been established and you would have to find him guilty of murder."

11. The learned judge failed sufficiently or at all to direct the jury on, inter alia, the following matters:-

(a) The distinction between murder and manslaughter;

(b) The effect of a statement made by an accused in the absence of a co-accused, which implicates the latter;

(c) The law and facts relating to the Appellant's defence;

(d) The effect of the Appellant not giving evidence;

(e) The burden of proof.

12. The Appellant appealed to the Court of Appeal of Hong Kong and, on 8th January 1982, his appeal against the conviction for murder was dismissed.

In their judgment the Court of Appeal referred to the passage from the summing-up set out at Paragraph 10 above. It was the Appellant's contention that the word 'that' in the sentence - "But even if you did not accept that ..." - referred to the contents of the passage which immediately preceded the said sentence i.e. the word 'that' referred to the fact that the gun was in a horizontal or near horizontal position, the door of the manager's door was open and the Appellant saw that there were people in that office.

The Court of Appeal stated in their judgment that:  
"That passage read in that way would appear to have

the judge say that the simple firing of the gun into the room would be sufficient, knowing that there were people there, to constitute the offence of murder.

If that were the meaning of the passage it might, taken on its own, constitute a serious misdirection since the jury might have been prepared to consider the possibility that the accused had genuinely intended to fire well above the heads of the persons in the room without foreseeing that the execution of that intention was likely to miscarry."

13. It was the Crown's contention (and accepted by the Court of Appeal) that the word 'that' was a reference to the words in the preceding passage "an almost deliberate aiming at whoever was in there".
  
14. The Court of Appeal also relied upon further directions given to the jury (according to the Crown at a time when it appeared that the jury had reached a verdict in relation to the Appellant and were apparently dealing with verdicts in relation to the co-defendant) where the learned judge said: "Finding the first accused guilty of an offence does not necessarily mean that there must be equally a verdict of guilty against the second accused for that offence because if you found the first accused guilty of the offence of murder, for instance, that would mean that you were satisfied beyond a reasonable doubt that he



fired that gun aware that there were people in that small room or likely to be in that room and to be seriously injured by the firing of the gun."

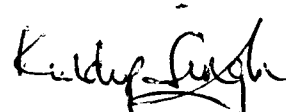
15. The Court of Appeal stated in their judgment that while the phrase "would have to find him guilty of murder" (which appears at the conclusion of the passage quoted at Paragraph 11 above) is "over-emphatic, manslaughter was very clearly left to the jury. We accept that it would have been preferable had more specific reference been made to the question of the "firing upward" and that which was said in the Answer to Charge and, consequent upon that, the possibility of the lack of intention to kill. But having said that we do not think the jury were left in any doubt as to what the Appellant's defence was and the possibilities arising from it".
16. The Appellant respectfully submits that the High Court and the Court of Appeal erred in law as a result of the matters set out in Paragraphs 2, 10, 11-15.
17. The Appellant respectfully submits that the judgment of the Court of Appeal was wrong and ought to be reversed, varied or altered for the following (amongst other)

#### REASONS

1. Because of the misdirections in the summing-up

as to the law on murder.

2. Because of the misdirections in the summing-up as to the law on manslaughter.
3. Because of the matters set out in Paragraph 11 above.
4. Because of the Court of Appeal's construction of the passage from the summing-up (see Paragraphs 10 and 12-14) and the reasons given for such an interpretation.



KULDIP SINGH

18.5.84

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