

53/84

IN THE PRIVY COUNCIL

No. 36 of 1983

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O N A P P E A L  
FROM THE COURT OF APPEAL OF HONG KONG

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B E T W E E N :

LEUNG KAM KWOK Appellant

- and -

THE QUEEN Respondent

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CASE FOR THE RESPONDENT

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1. This is an Appeal by Special Leave of the Judicial Committee granted on the 27th day of July 1983 from a judgment of the Court of Appeal of Hong Kong (McMullin, V P, Silke, J A and MacDougall, J) dated 8th January 1982, which dismissed an appeal by the Appellant from a judgment of the High Court of Hong Kong, (Commissioner Barnes - as he then was - and a jury) given on the 23rd day of June 1981 whereby the Appellant was convicted of murder.

2. The Appellant was charged with murder following the death of a woman from a gun-shot wound sustained during the course of an attempted robbery. It was alleged by the

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Crown that the Appellant while attempting, with a Co-accused, to commit a robbery in the premises of a finance company, drew a gun and fired two shots, the first of which killed the deceased woman.

3. The questions of law which are raised on this Appeal are:-

- (1) Whether, having regard to the facts of this case, the Trial Judge properly directed the Jury as to the intention of the Appellant, (when he fired the fatal shot) that had to be proved before a verdict of murder could be returned.
- (2) Whether the Trial Judge adequately directed the Jury as to the possibility of a manslaughter verdict or whether he effectively withdrew the possibility of a verdict of not guilty of murder but guilty of manslaughter.
- (3) Whether the manner in which the trial judge dealt with the Co-accused's statements, in so far as they affected the Appellant, was adequate in the circumstances of the case.

- (4) Whether the manner in which the Trial Judge dealt with the Appellant's defence was adequate in the circumstances of this case.
- (5) Whether the manner in which the Trial Judge dealt with the Appellant not giving evidence was adequate in the circumstances of this case.
- (6) Whether the Trial Judge's directions on the burden of proof were adequate.
- (7) Whether the Appellant was denied a fair trial, because he was represented throughout by the same counsel as his Co-accused, and there was a conflict between the proper presentation of his case and that of his Co-accused.

4. The Appellant was jointly charged with FONG Yiu-wah upon an indictment containing two counts as follows:-

- (a) the murder of LAI Kim-ying; and
- (b) attempted robbery of Fung Kee.

Both of the counts in the indictment averred that the offences were committed on the 10th day of July 1980 at Kowloon in the Colony of Hong Kong. The Appellant and his Co-accused both pleaded not guilty to the count of murder, but guilty to the

count of attempted robbery.

5. At the trial of the Appellant and his Co-accused the case for the Crown was as follows:-

- (a) Shortly before 1 pm on the 10th July 1980, the Appellant and his Co-accused entered the premises of the Maybo Finance, Loan, Investment and Trading Company situated on the mezzanine floor of 147 Hip Wo Street, Kwun Tong, Kowloon, Hong Kong. The Appellant was armed with a 0.38 calibre revolver which was tucked into the front waistband of his trousers and was concealed by his shirt. His Co-accused was unarmed.

The premises consisted of a reception room, a general office and a general manager's office. The general office lay directly between the reception room and the general manager's office. Free access from the reception room to the general office was prevented by a grille-counter and door combination. The general manager's office was entered from the general office by a door opening inwards from left to right. This door was situated at the far end of the general office from the grille at a

distance of 4.25 metres (13.94 feet).

When the door to the general manager's office was as fully open as possible, the interior of that office and persons in it were visible from the area of the grille in the reception room.

When the Appellant and his Co-accused entered the reception room, the general office was occupied by five persons. The general manager's office was also occupied by five persons, including the deceased who was the wife of the general manager. The door between these two offices was fully open.

- (b) On entering the reception room the Appellant and his Co-accused were attended to by a female member of the company's staff who was one of those who occupied the general office. Initial enquiries were made by the Appellant's Co-accused about the availability of personal loans. A discussion followed during which the appellant and his Co-accused were advised that the company did not deal in personal loans. Thereafter, commercial and industrial loans were discussed. The assistant manager of the company intervened and he told the Appellant (who had joined the discussion) and his Co-accused that certain documentation was required, and no loan could

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be negotiated until such was forthcoming. He asked the two men to leave which they showed no sign of doing. His suspicions aroused, the assistant manager turned from the grille to walk to the general manager's office to issue a warning. Before he got to that office, he was summoned back to the grille area by the Appellant who apparently was challenging him for his refusal to approve a loan. The door between the general office and the general manager's office was at that moment still fully open. The Appellant was then seen to produce a gun from the waistband of his trousers and to point it through the iron grille into the general office, using both hands to hold it in the horizontal position, and resting the barrel on the metal of the grille. The assistant manager shouted out a warning and he and the other occupants of the general office dived for cover.

- (c) At that moment, the deceased was in the general manager's office at a position near the door where she and another occupant of that office were visible to someone looking in from the grille area in the vicinity of where the Appellant was standing. The Appellant fired one shot which struck the deceased and

caused her to fall to the floor of the general manager's office with her legs in the doorway and her head further into the office interior. Another occupant of the general manager's office dashed forward to move the deceased's body from the doorway, and kicked the door forcibly to a close. At the same time the Appellant fired a second shot which struck the door, before it was completely closed, at a height of 28 inches from the floor and at a spot directly below the door handle. The shot pierced the door, was deflected slightly to the left and ricocheted off a desk in the office into a plastic rubbish basket.

- (d) The Appellant and his Co-accused then fled from the premises. The Police were summoned by an emergency 999 call and eventually an ambulance was called to carry the deceased to hospital. She was there certified dead at 1.18 pm. A post-mortem was conducted on 11th July which revealed that the cause of death was a bullet wound of the chest with injury to the lungs and to the blood vessels supplying the lower lobe of the left lung.
- (e) The Appellant, accompanied by a priest, surrendered himself to the Police on 4th August 1980. At that time he claimed that in the course of an intended robbery he had fired a warning shot which had accidentally hit the deceased. He claimed that he had never used a gun before and that he had not intended to shoot the deceased. He maintained that position throughout subsequent recorded interviews he had with the Police.

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9(40) to  
10(16)

6. At the trial, after the Crown's opening and before any evidence was adduced, the Court and Jury were taken for a view of the scene. There, each member of the Jury looked through a part of the metal grille from the right-hand side of the reception room towards the interior of the general office. In particular, each Jury person looked from that position into the general manager's office, the door to which was held for a few moments in several positions, namely a closed position, a fully open position and two positions in between.

7. At the trial of the Appellant and his Co-accused, eye-witnesses to the fatal shooting gave evidence summarised as follows:-

Xm 34(7) to 40(42)  
XXm40(45) to 53(12)  
RXm53(14) to 54(25)

(a) CHONG Kan-kwong - Assistant Manager and Shareholder.

He gave evidence that he was in the general office when the Appellant and his Co-accused arrived in the reception room at about 12.45 pm.

35(47) to 36(19)

He overheard the initial discussion between the two and female members of staff, who also occupied the general office, about personal loans and commercial and industrial loans.

36(20) to 37(7)

He joined the discussion (which took place with the Appellant and his Co-accused standing in the reception room at the grille) and eventually



|   | <u>Record</u>   |
|---|---|
| told them to go away which they showed no sign of doing. He then turned to go to the general manager's office to issue a warning because he was suspicious of the two.                            | 46(8-29)  |
| He saw that the door to the general manager's office was fully open at that moment.   | 38(1-9)<br>49(32) to 50(27)   |
| He testified that, at that moment, the deceased and TSANG Wah were visible inside the general manager's office.   | 47(37) to 49(31)  |
| The Appellant called him back and he then saw the Appellant step back from the grille and take out a gun from the waistband of his trousers.  | 37(9) to 38(31)<br>45(43) to 46(6)  |
| He saw the Appellant resting the barrel of the gun on the grille with the gun pointing through it into the general office. The Appellant was at that moment on the right-hand side of the grille. | 36(35-50)<br>37(24-41)<br>43(48-57)   |
| He shouted "Robbery, squat down" and dived for cover out of sight of the Appellant.   | 38(32-38)<br>47(4-11)   |
| He heard two shots fired.   | 37(28)<br>39(21-40)<br>Xm 56(12) to 61(47)<br>XXm61(49) to 71(14)<br>RXm None |
| (b) <u>KWONG Lai-ngor</u> - Clerk   |   |
| She confirmed CHONG Kan-kwong's evidence about  | 56(12) to 58(45)  |

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the arrival of the Appellant and his Co-accused, their position in the reception room behind the grille, her position in the general office, the conversation about loans, Mr. Chong's intervention and movement towards the general manager's office, the Appellant calling Mr. Chong back.

58(55) to 59(4) She saw the door to the general manager's office was fully open at the moment Mr. Chong was walking towards it.

58(47-50) She saw the Appellant pulling out a gun from  
67(27-43) the waistband of his trousers.

59(14-17) She heard two shots being fired with several  
67(50) to 68(14) seconds between the shots.

65(1-21) She saw the deceased lying on the floor of the general manager's office and TSANG Wah trying to close the door to that office.

Xm 71(25) to 76(23) (c) CHUNG Lai-sheung - Clerk  
XXm 76(25) to 89(48)  
RXm 89(50) to 92(29)

71(25) to 73(41) She confirmed the evidence of the arrival of the Appellant and his Co-accused, her position at the counter on which was erected the metal grille, the conversation about loans and the intervention of Mr. Chong. She heard the

81(14) to 83(10)

She heard the Appellant asking Mr. Chong in an impolite way 'Are you refusing a loan?' as Mr. Chong walked to the general manager's office. She heard the Appellant call Mr. Chong back.

She saw the Appellant draw out what looked like a gun and she then dived for cover. Thereafter, she heard Mr. Chong shout "Robbery". The Appellant was on the right-hand side of the grille when this occurred. When the first shot was fired she was looking towards the general manager's office and saw the deceased standing almost in the doorway to that office and she saw her fall down, being dragged inside by Mr. Tsang and the door being closed. The door was open before the shooting.

(d) TSANG Wah - Manager and Shareholder Xm 93(10) to 99(23)  
XXm 99(40) to 105  
RXm None (37)

He gave evidence that he was in the general manager's office at the time of the shooting with four others, including the deceased, and was sitting on the sofa at the right-hand corner of the office.

The deceased was standing in the general manager's office at the corner of the desk which was nearest to the door.

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95(30) to 96(36)

He heard someone in the general office shout "Squat down - robbery", heard a shot fired and saw the deceased fall to the floor. He moved her and kicked the door closed. Her body, where it fell, prevented him from closing the door until he moved her.

102(30) to 105(a)

95(46) to 96(5)

A second shot was fired while he was closing the door and when it was almost closed.

97(6)

At the time of the shooting the door was almost fully open (i.e. as far open as it could be with a filing cabinet placed behind it).

101(20) to 102(29)

Xm 105(47) to 113(12)

XXm 113(14) to 119(48)

RXm None

(e) LUK Kwun-shek - Accountant

105(47) to 108(18)

He gave evidence that at the time of the shooting he was in the general manager's office with four others including the deceased. He was sitting in his usual seat at the desk opposite to Fung Kee, the general manager.

108(19) to 109(41)

The deceased was about to leave and was standing at a position in the middle of the room near the desk.

114(38) to 116(10)

109(42) to 110(10)

He heard the assistant manager Mr. Chong shout "Robbery, squat down" and he saw the deceased move in an apparent effort to close the door. She never

111(20-37)

|   | <u>Record</u>                           |
|---|---|
| reached the door before he heard a shot fired           | 116(12) to 117(15)                      |
| and saw the deceased fall down in the general           | 117(26) to 119(48)                      |
| manager's office in a position where her legs           |   |
| prevented the door being closed.                        |   |
| <br>  |   |
| He saw TSANG Wah forcibly close the door.               | 111(42) to 112(6)<br>116(50) to 117(10) |
| <br>  |   |
| He gave evidence about the second shot and the          | 112(9-46)                               |
| bullet mark on the desk at the position where he        |   |
| sat.  |   |
| <br>  |   |
| (f) <u>FUNG Kee</u> - Managing Director and Shareholder | Xm 120(3) to 124(14)                    |
| Husband of the deceased                                 | XXm 124(16) to 125(57)<br>RXm None      |
| <br>  |   |
| He gave evidence that prior to the shooting he          |   |
| was in the general manager's office and sitting         | 120(3) to 121(34)                       |
| at the desk directly opposite LUK Kwun-shek. He         | 122(55) to 123(13)                      |
| confirmed the positions of the other four in that       | 124(52) to 125(17)                      |
| office and said that his wife was sitting on a          |   |
| chair next to the desk as shown in the plan             |   |
| Exhibit P5 (page 362). She was facing the direction     |   |
| of the grille.  |   |
| <br>  |   |
| Prior to the shooting the door to the general           | 121 (39-47)                             |
| manager's office was fully open.                        | 124(30-51)                              |
| <br>  |   |
| He heard a shout of "Robbery" followed by a             | 121(48) to 123(36)                      |
| gunshot and ducked down under the desk. He then         | 125(30-57)                              |
| saw his wife lying on the floor. He saw TSANG           |   |
| Wah close the door to the office and heard the          |   |

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second shot.

Xm 156(25) to 161(2)  
XXm 161(4) to 163(40)  
RXm 163(42) to 164(18)

(g) LAI Kim-bor - Business Supervisor

156(25) to 157(49)  
161(4-40)

He gave evidence that he was in his usual place in the general office when the Appellant and his Co-accused entered the premises and made enquiries about loans. He observed Mr. Chong's intervention and Mr. Chong walking away towards the general manager's office which he could not see from where he was sitting.

157(50) to 158(11)

He heard the Appellant call for Mr. Chong to return and also saw him pulling out a gun from his waist. He heard Mr. Chong call out "Robbery - bend down".

158(12) to 159(5)  
161(41) to 162(10)

He saw the accused pull out the gun with one hand but then he saw him use two hands when he fired the gun in the direction of "the front" - he demonstrated the aiming position.

159(6-24)  
162(11) to 163(34)  
163(35-39)

He ducked for cover and then he heard the second shot. He estimated the time between the two shots to be ten seconds.

Xm 164(32) to 166(30)  
XXm 166(32) to 167(35)  
RXm None

(h) FUNG Siu-ling - Daughter of deceased.

164(32) to 165(30)

She gave evidence that she was in the general office in a position near to the door of the

general manager's office. She heard the discussion about loans.

She heard the shout of "Robbery - bend down". 165(31 - 49)  
She ducked for cover and heard two shots.

She was aware of the door to the general manager's office being closed thereafter. 165(50-54)

She testified that before the shots the door to the general manager's office was open. 166(51) to 167(35)

8. The prosecution adduced further evidence which can be summarised as follows:-

(a) Photographs and a plan of the premises were produced and were respectively Exhibits P1 and P5. 343-361  
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(b) A Forensic Pathologist, Dr YIP Chi-pang, gave evidence of a post-mortem examination he carried out on the deceased on 11th July 1980. He gave evidence that the deceased was 163 cm (5.34 feet) in height and that she died from the effects of a bullet wound of the chest with injury to the lungs and to the blood vessels supplying the lower lobe of the left lung. 15(25)  
17(52)  
The bullet had entered the upper part of her left arm about 129 cm (4.23 feet) above the

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heel level and exited on the right upper side of her chest nearer the back about 128 cm above the heel level. The bullet must have hit the skin surface at about right angles, and the trajectory of the bullet through the body was practically a straight line.

Xm 24(32) to 28(58)  
XXm 29(3) to 33(21)  
RXm None

(c) Robert Cathmore Nicoll - Assistant Ballistics Officer with the Royal Hong Kong Police.

He gave evidence that on examining the premises of the Maybo Finance Loan Investment and Trading Company about 2.20 pm on 10th July 1980 he found a bullet hole about 28 inches above the ground in the door of the general manager's office and directly below the door handle. The bullet had entered the door, which in his opinion was completely or almost completely closed at the time, from a position outside that office or from the direction of the general office. It had been deflected by the hardness of the door and exited into the general manager's office, struck a desk situated to the left of the doorway and was further deflected into a plastic rubbish basket which was on the floor to the left of the desk. He made an inspection of the whole premises but found no other marks on walls, ceiling or furniture that had been made by a bullet.



He compared the bullet found in the office with another that was found resting between the clothing and the skin of the deceased and concluded they were fired from the same gun, a 0.38 calibre revolver of the type on issue to the Royal Hong Kong Police. He gave evidence that such a gun could really only be fired by a squeezing of the trigger, exerting five pounds of pressure if cocked and twelve or thirteen pounds of pressure if uncocked.

27(45) to 28(34)

31(5-27)

He explained why it was most unlikely that such a gun would go off accidentally.

30(16-53)

(d) Charles Michael G Mayger - Inspector of Police.

Xm 168(43) to 170(31)  
XXm 170(33) to 171(7)  
RXm None

He gave evidence that the Appellant and the Reverend John Paul Chan came to the Sai Kung Police Station at 6.05 pm on 4th August 1980. He initially spoke to the Reverend Chan, leaving the Appellant in the charge of Police Constable 860 CHAN Keng-hung. Thereafter, on being given certain information by that constable, he spoke directly to the Appellant. The Appellant confirmed that he wished to confess to the shooting of a woman concerned with a finance company in Kwun Tong. He went

169(50-53)

170(1-31)

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on to tell Inspector Mayger that he did not intend to shoot the woman, that he had meant to fire a warning shot to frighten the staff of the company and he accidentally hit the woman. He further claimed that he had never used a gun before.

Xm 171 (16) to 172(36)  
XXm 172(38) to 173(44)  
RXm None

(e) CHAN Keng-hung - Police Constable

He gave evidence that he was at Sai Kung Police Station around 6 pm on 4th August 1980 when he was approached by the Appellant and the Reverend Chan. They asked to see an Inspector and he arranged for them to see Inspector Mayger. He was told to guard the Appellant while Inspector Mayger spoke to the Reverend Chan. While guarding him, the Appellant told him that he had shot and killed a woman while robbing a finance company in the Kwun Tong area. He said he fired and accidentally hit the woman. He claimed that he had no intention to shoot her.

172(3-6)

173(4-35)

Xm 173(51) to 197(5)  
XXm 197(10) to 199(42)  
RXm None

(f) CHAU Foo-cheong - Detective Senior Inspector

He gave evidence that he had interviewed the Appellant on a number of occasions and that these interviews were recorded in writing and signed by the Appellant.

Among those interviews was one which took place between 8.35 pm and 10.50 pm on 4th August 1980 at Sai Kung Police Station.

Inspector Chau produced the record of that interview and its translation as Exhibits P6 and P6A, and read the English translation to the Court. No objection was taken as to the admissibility of Exhibit P6. In the course of that recorded interview the Appellant gave an account of the shooting:

177(31-46)

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"At that time I found the male staff saw the butt of my gun. I therefore told CHAN Wah to do as planned. In the same time, I drew out my gun at once. On seeing the gun, the male employee immediately shouted all the persons to lie down. At the same time I shouted "Robbery". I fired one shot upward as warning. But I saw a woman at the doorway of the 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. I and CHAN Wah therefore fled together and after going downstairs we separated and fled."

180(27-43)

365(43) to 366(3)

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Xm 132(7) to 142(23)  
XXm 142(25) to 145(7)  
RXm None

(g) CHOI Wai-ye - Detective Senior Inspector

139(22) to 140(18)

He gave evidence that at 5.30 pm on 6th August 1980 at Police Headquarters he formally charged the Appellant with murder. The Appellant chose to respond to the charge and wrote a short statement in his own handwriting. The Senior Inspector produced the record of this procedure as Exhibit P14 with its translation Exhibit P14A.

140(10)

379-381

He gave evidence that in answer to the charge of murdering LAI Kim-ying on 10th day of July 1980 at the Maybo Finance Loan Investment and Trading Company, the Appellant wrote:

140(17-18)

381(6-8)

"I understand, it was I who shot her dead. I was without any intention."

250(28) to  
251(12)

9. At the conclusion of the Crown case, no submissions were made on behalf of either the Appellant or his co-accused. The trial judge advised both accused as to their rights in relation to the giving and calling of evidence.

10. The Appellant elected not to give evidence. His co-accused elected to give evidence. His evidence can be summarised as follows:-

Record

FONG Yiu-wah

Xm 252(10)to 262(10)  
XXm 262(12)to 271(32)  
RXm 271(34)to 272(56)

He gave evidence that he went with the Appellant Court 273(1)to 274(18)  
to the Maybo Finance Company premises in Kwun 255(9-33)  
Tong on 10th July 1980. He told about the  
discussion regarding a loan and of the Appellant 255(35)to 256(13)  
pulling out a gun, of his holding the gun in two  
hands and pointing it into "the inner part of the  
premises". (He demonstrated for the Jury). He  
heard the first shot which he said he thought was  
a warning shot.

He said that at the time the door to the general  
manager's office was half ajar and from where he  
was standing i.e. to the left of the Appellant, he  
could see that there were several people inside  
that office. He did not remember seeing the deceased  
at any time. He suggested that the Appellant may not  
have seen people inside that office because "that time 264(34-43)  
he was talking with the staff about a loan."

He agreed that he did see someone in the middle of the  
general manager's office throughout the time he was 265(26-41)  
in the premises, but could not give any reason why the  
Appellant should not also see that person.

11. The jury returned a unanimous verdict of guilty of murder  
against the Appellant and on that count he was sentenced to  
death. (They unanimously found the other accused not

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guilty of murder, but guilty of manslaughter).

12. An appeal against conviction of the Appellant was heard and dismissed by the Supreme Court of Hong Kong in its Appellate Jurisdiction on the 28th of August 1981 (McMullin V P, Silke J A and MacDougall, J). A written judgment giving reasons for the dismissal of the Appeal was delivered for the Court by Silke J A on the 8th January 1982.

323(14)

13. The first ground of appeal argued for the Appellant was:-

335(30-36)

"The conviction on the count of murder is unsafe and unsatisfactory in that the learned trial judge erred in failing to explain adequately to the jury the Appellant's defence and the possibilities which the Defence projected that could reduce murder to manslaughter."

323(20)

14. The second ground of appeal was:-

338(29)

"The defence being one of inadvertent killing during the course of an unlawful act, thus projecting the possibility that the death was caused by a reckless act on the part of the Appellant, the jury should have been directed as to the law governing recklessness in cases of murder."

335(37-48)

15. As to the first, the learned Judge, in delivering the Courts judgment on the Appeal, pointed out that the question of the Appellant's intentions at the time of the shooting

336 to 338

were clearly left to the Jury early in the learned Trial Judge's summing up and later in more detail when dealing with the meaning in law of "intention". Though there was room for some criticism of the learned Trial Judge's use of words, "you would have to find him guilty of murder" and the absence of a more specific reference in the summing up to the Appellant's claim of lack of intention to kill, the learned Judge of Appeal held for the Court, that the Jury were not left in any doubt as to what the Appellant's defence was.

299(16-24)

302(16-26)

304(20-25)

338(13-28)

16. As to the second ground of Appeal, Silke J A was of the view that the Jury had not yet reached a final conclusion as to the guilt or otherwise of the Appellant, at the time when they asked questions, going to the matter of whether the Appellant and his co-accused could be convicted of different offences. In the view of the Appeal Court, the directions, particularly when read in the light of the further direction resulting from a question by the Jury, were not too broadly expressed in the light of the facts of this case and the "settled" law applicable to it and discussed in HYAM v DPP (1974) 59 Cr.App.R.91 (1975) A.C. 55.

338(30)

338-339(10)

17. The Appellant petitioned Her Majesty in Council for Special Leave to Appeal against the decision of the Supreme Court of Hong Kong (the Court of Appeal of Hong Kong). Special leave to Appeal was granted on the 27th day of July 1983.

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18. The Respondent respectfully submits that the decision reached by the Court of Appeal of Hong Kong dismissing the Appellant's Appeal against conviction was a correct decision and is one which should be affirmed.

19. The Respondent respectfully submits that the Appellant's Appeal against conviction should be dismissed for the following

R E A S O N S

- (1) BECAUSE, having regard to the overwhelming and consistent nature of the evidence that went to the Appellant's knowledge and state of mind, the Trial Judge properly and adequately directed the Jury:-
  - (a) as to the intention of the Appellant (when he fired the fatal shot) that had to be proved before a verdict of murder could be returned and
  - (b) as to the possibility of a manslaughter verdict.
- (2) BECAUSE the Trial Judge did not fail to direct the Jury that the statements of the Co-accused to the Police could not be evidence against the Appellant. In any event, should such directions as he gave be held to be inadequate, that would



not in the circumstances of this case have led to any miscarriage of justice because:-

- (a) the statements of the Co-accused where they referred to the circumstances of the fatal shooting were so inconsistent with the facts as described by the witnesses, including the expert witnesses, that no reasonable Jury could have relied upon them;
  - (b) they were never referred to or relied upon by either Counsel or by the Trial Judge; and
  - (c) they were specifically rejected by the Co-accused in the course of his evidence, and it was only to that evidence that the Trial Judge drew the Jury's attention.
- (3) BECAUSE the Trial Judge's directions on fact and law, taken as a whole, could have left the Jury in no doubt as to what the Appellant's defence was and the possibilities arising from it.
- (4) BECAUSE the Trial Judge in the presence of the Jury advised the Appellant and his Co-accused of their rights in relation to the giving and calling

of evidence, and that no adverse inference could be drawn from their declining to do so. In the circumstances of this case, the Trial Judge did not err in law by failing to make further reference to the fact that the Appellant did not give evidence.

(5) BECAUSE the learned Trial Judge did not fail to direct the Jury on the burden of proof as his directions taken as a whole could have left the Jury in no doubt as to where the burden of proof lay.

(6) WHILE a situation of potential conflict existed between the Appellant and his Co-accused any irregularity in the conduct of the proceedings which may have resulted from the same Counsel acting on behalf of both did not lead to a miscarriage of justice.

J.M. DUFFY

JOHN CAGNEY

No. 36 of 1983

IN THE PRIVY COUNCIL

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O N A P P E A L  
FROM THE COURT OF APPEAL OF HONG KONG

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B E T W E E N :

LEUNG KAM KWOK

Appellant

and

THE QUEEN

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CASE FOR THE RESPONDENT

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