

Leung Kam-kwok

Appellant

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 17TH DECEMBER 1984

Present at the Hearing:

LORD SCARMAN

LORD DIPLOCK

LORD ROSKILL

LORD BRIGHTMAN

[Delivered by Lord Roskill]

On 23rd June 1981 after a trial in the High Court of Hong Kong before Mr. Commissioner Barnes Q.C. and a jury, the appellant was convicted of murder and sentenced to death. The trial had begun on 15th June 1981 when the appellant and another man named Fong Yui-wah ("Fong") had been jointly charged both with murder and attempted robbery. Each had pleaded guilty to the latter offence but not guilty of murder. Fong was acquitted of murder but convicted of manslaughter. The appellant appealed to the Court of Appeal of Hong Kong (McMullen V-P., Silke J.A., and MacDougall J.). That Court on 8th January 1982 dismissed the appeal. Special leave to appeal to the Board was granted on 27th July 1983 for reasons to which their Lordships will advert in due course.

The charge of murder against the appellant and Fong arose from the shooting by the appellant on 10th July 1980 of a lady named Lai who was the wife of the general manager of the Maybo Finance Loan Investment and Trading Company. It was the Crown's case, which the jury must be taken to have accepted, that at about 1.00 p.m. on that day the appellant and Fong entered that company's premises at 147 Hip Wo Street, Kowloon. The appellant had a 0.38 calibre revolver tucked into the waistband of his trousers and hidden by his shirt. Fong was unarmed.

Those premises consisted of a reception room, a general office and the general manager's office. The general manager's office was behind the other two rooms. Access from the reception room to the general office was barred by a grille counter and a 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 at the far end of the office from the grille, at a distance of some 14 feet. When that door was open, the inside of that office was visible, as was anyone then in that office, from around the grille in the reception room.

On entering the reception room, the appellant and Fong were seen by a lady member of the staff. Fong asked her about personal loans. The two men were told that the company did not do business of that kind. Further discussion followed in which the company's assistant manager joined regarding possible commercial and industrial loans and the two men were told that no such loans could be negotiated until certain documentation was forthcoming.

The assistant manager then asked the two men to leave but they did not do so. His suspicions were aroused and he turned to go into the general office in order to raise the alarm. But while he was doing this, the appellant called him back. At that moment it was claimed by the Crown that the door between the general office and the general manager's office was fully open. The appellant pulled out the revolver and pointed it through the grille into the general office holding it with both his hands. The assistant manager shouted a warning as he and those in the general office dived for cover.

At that moment Madam Lai was in the general manager's office near to the door, visible through an open door to anyone looking from the area of the grille near where the appellant was standing. The appellant fired one shot which hit her. It was this shot which caused her death almost immediately. She fell mortally wounded with her legs in the doorway and her head into the inside of the general manager's office. Someone dashed forward to move her body from the doorway and kicked the door in order to close it. At that time the appellant fired a second shot which struck the door before it closed, 28 inches from the floor and directly below the door handle. It pierced the door but was deflected to the left. The appellant and Fong then fled.

On 4th August 1980 the appellant, accompanied by a priest, surrendered to the police. Shortly after his surrender he made an oral statement to the police. He said he did not intend to shoot the woman. He had meant to fire a warning shot to frighten the

staff of the company and he accidentally hit the woman in the body. Later on the same day after caution and before making a long written statement the appellant said "I did it. I am a Christian. I am willing to speak it out". In the evening in the course of the written statement he said "I fired one shot upward as a 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"

Some months later on 3rd November 1980 the appellant, in answer to a charge of murder, made a further written statement:- " I understand. It was I who shot her dead. I was without any intention".

It is convenient at this juncture to mention that later on 15th December 1980 Fong made a written statement which undoubtedly to a considerable extent incriminated the appellant but to which their Lordships do not find it necessary to refer in detail.

It will be apparent from what their Lordships have already said that a verdict of not guilty was not open to the jury in the case of the appellant and the learned Commissioner rightly so directed them. The appellant's only hope, at best an exceedingly thin hope, was that a benevolent jury, if minded to accept the possibility of his story, which he had not been prepared to support by evidence on oath, being true, might feel able to return a verdict of guilty only of manslaughter. But in truth in their Lordships' view this was a very plain case of murder by the appellant and of murder of a particularly cruel and cold-blooded kind. Unhappily this seemingly simple case has become complex because of the manner in which the learned Commissioner summed up to the jury. The Court of Appeal though critical of the summing up, describing one passage as "over emphatic" and saying that "more specific reference" should have been made to the possibility of "firing upwards", felt able to dismiss the appeal on the ground that the jury had not been left in any doubt as to the nature of the appellant's defence.

With both regret and respect, their Lordships are unable to take the same view of this summing up which they feel bound to say was not only in the critical passage but also elsewhere extremely confused. Moreover the critical and confused passage was followed by a serious misdirection, albeit only in relation to Fong who, the learned Commissioner told the jury at that stage, could "only be found guilty of whatever the first accused" [i.e. the appellant]

"is found guilty of". It is true that this serious misdirection was later corrected but only after a discussion partly in the presence of the jury and partly in their absence extending over some eight printed pages of the record which, though doubtless intended to correct and clarify, in the event seems more likely to have increased the jury's confusion in the case of Fong. This last matter is not directly relevant to the appellant's appeal but their Lordships think it right to refer to it as illustrating how what was and should have been presented to the jury as a simple case of a brutal murder was allowed by reason of the summing up to become both confused and complex.

It will be convenient now to quote the whole of the relevant part of the summing up in order to set the parts, of which complaint is particularly made, in their context. For ease of reference their Lordships have numbered the successive paragraphs 1 to 8 inclusive.

- "1. You will remember, of course, that he says that he fired it upward and the suggestion being that it was fired upward as a sort of warning shot. However, you have to consider what the evidence establishes as regards the 1st accused's intention in the way that I have defined 'intention' to you.
2. 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 2nd 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.
3. But even if you did not 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 2nd accused had seen people in that room, that therefore the 1st 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.
4. The evidence that the door was open comes from the members of the staff, from the 2nd

accused himself and it is somewhat supported by the evidence of what actually happened. All the evidence seems to coincide that there was firing of the first shot and it was that shot which killed Lai Kim-ying and the second shot was fired which hit the door.

5. So that if you came to that conclusion that the door was open, then you would probably conclude that he had the necessary intention.
6. If you concluded that the door was not open or if you found you were not able to come to a conclusion at all about it, that is, that you are in doubt about it, then it's a question of whether you think it was likely that he was aware that people were likely to be in there with that door closed. That is a matter of inference for you and I don't think that I can assist you any further on that. I'll leave the matter with you.
7. If you are satisfied that the door was open, then you would consider this: do I draw the inference that he was aware that there were people in there? If you answer that yes, then you would find him guilty of murder. If your answer is no or if you cannot resolve that question, then you must find him not guilty of murder.
8. If you find him not guilty of murder, you must then consider whether he is guilty of manslaughter. In this particular case I don't need to tell you any more than this, that if you found the other facts that I have mentioned, namely, that he fired the gun which killed that lady, then since this was done in the course of a robbery, he's certainly guilty of manslaughter."

It is of paragraph 3 of which complaint is most made. Indeed it was this paragraph which led their Lordships to grant special leave to appeal since a first reading of it without knowledge of the evidence given at the trial and of the background to the summing up suggested that the learned Commissioner was in substance, though not in actual words, telling the jury that the appellant was guilty of murder if when firing the fatal shot he had acted not with intent to kill or to do grievous bodily harm but only recklessly.

On reading the full record, their Lordships have indeed been disturbed to find that in his final speech to the jury learned counsel for the Crown said:-

"It is also my submission to you that if knowing that there was somebody, generally speaking, in the line of which he made this deliberately aimed shot, and that he was reckless as to the possibility of hitting that person and because of the way he aimed the shot, he knew he probably would hit that person and perhaps didn't care, though he might have preferred that it didn't happen, then if he probably knew he would hit her, he probably knew he would cause her grievous bodily harm, and if you are satisfied in fact beyond reasonable doubt, then in my submission, what you have here is murder."

At the outset of his speech for the appellant and Fong - they were not separately represented - learned counsel for the defence said:-

"Now members of the jury, may I say immediately that I agree entirely and adopt the propositions of law put forward by Mr. Cagney on behalf of the Crown this morning. I agree totally with what he said to you as to what is the law."

Later learned counsel went on to say this:-

"Members of the jury, of course, if you found, as my learned friend for the Crown said this morning, if you found, of course, that he was shooting intentionally or recklessly having seen the deceased lady possibly there, then of course he would probably be guilty of murder ..."

Their Lordships cannot be too emphatic that there is no offence known to the common law as murder by recklessness. They cannot but regard it as unfortunate that both learned counsel appear to have stated the contrary to the jury and that the learned Commissioner should have left that major error uncorrected, at least explicitly. Nonetheless their Lordships have, after the most careful consideration, reached the conclusion that paragraph 3 was not intended to compound counsels' error but, when read against the earlier and later parts of the summing up, was intended to be what in this branch of the law has become known as a *Hyam* direction; see *Hyam v. Director of Public Prosecutions* [1975] A.C. 55.

At the beginning of the summing up on the afternoon of the day before the trial finished, the learned Commissioner gave the jury in faultless terms the classic direction - was the act which killed the victim "done with the intention either to kill or to do really serious injury"? He repeated that direction the following morning but then added:-

"Now when we speak of the intention, we usually mean something such as this, that a consequence is said to be intended when it is the desired result of something somebody does but in law, in the

circumstances of a case such as this, it is given an extended meaning and we say in law that a consequence is intended when the doer of an act is aware that that consequence was a likely result of his act."

He repeated the adverb "likely" twice more on the same page of the transcript and later repeated it twice in paragraph 6 of the passage already quoted.

The giving of a *Hyam* direction in murder trials is comparatively new in this century. Previously it was the practice to give only what their Lordships have already described as the classic direction. In their Lordships' view, as in the view of Viscount Dilhorne [1975] A.C. at page 85, the classic direction should still suffice "in the vast majority of cases".

Their Lordships echo what was said in this connection by the Court of Appeal (Criminal Division) in England in *R.v. Beer* [1976] 63 Cr. App. R. 222 at page 225 in a judgment delivered by Lawton LJ.

Whether a *Hyam* direction is desirable in a particular case is necessarily a matter for the trial judge. Their Lordships do not criticise the decision of the learned Commissioner to give such a direction in the present case if he thought the nature of the evidence required it though many judges might well in so simple a case have thought otherwise. But if a trial judge decides to give a *Hyam* direction it beholds him to make clear that the onus of proof remains, as always, high. The adverb "likely", like so many words in the English language, depends for its precise meaning upon the context in which it is used. In one context it may mean "extremely probable", in another only "a possibility". When in *Hyam*, at page 86, Lord Diplock used that adverb, he plainly used it in the context of doing an evil act "knowing full well that it is likely to produce that consequence", a very different context from that of which the learned Commissioner reiterated the word in his summing up.

Viscount Dilhorne in the same case twice used the phrase "highly probable" - see page 82 of the Report. That or the related phrase "a high degree of probability" are, in their Lordships' view, the appropriate phrases to use in this context. Neither should be susceptible of such misunderstanding as the use of the adverb "likely" may all too easily involve.

Their Lordships return to paragraph 3. It was common ground that paragraph 2 was not open to criticism for it stated that if the revolver were held on a horizontal or near horizontal position when the fatal shot was fired and it was clear to the

appellant that there were people in the general manager's office, the jury were entitled to draw the inference that the appellant had deliberately aimed the revolver at someone in that office. It was also accepted that paragraph 1 reminded the jury of the appellant's statement and indeed of the nature of his defence that he had fired the gun upwards in a warning shot and without intent to kill or do serious bodily injury.

But paragraph 3 opens with the words "But even if you did not accept that" (emphasis added). Their Lordships are uncertain to what the learned Commissioner was referring as "that". One suggestion was that it referred to "deliberate aiming", another to the "horizontal or near horizontal position of the revolver" and yet another to whether or not the appellant "saw people in there". Since their Lordships are uncertain what was intended by the use of that word it is at least possible that some if not all of the jury shared that uncertainty. If it be assumed that "that" was intended only to refer to deliberate aiming, as was submitted, even so the learned Commissioner appears to have equated firing through the open door, even without deliberate aiming, as establishing without more an intention to kill or to do grievous bodily harm, though in fairness to him it must be said that the question whether or not the door was open was left to the jury to consider.

Learned Counsel for the appellant claimed that this misdirection "usurped" the function of the jury by in effect telling them that if that were their view of the facts they should still find the appellant guilty of murder and not manslaughter and thus virtually withdrew the possibility of a verdict of manslaughter from their consideration.

Their Lordships have already stated that, read in conjunction with paragraph 6 and the earlier reference to "extended meaning", they regard paragraph 3 not as a direction that reckless killing was murder but as intended, albeit in an unhappily confused manner, as a *Hyam* direction. But even so their Lordships cannot do otherwise than regard paragraph 3 as a misdirection. The Court of Appeal though critical of paragraph 3, as already stated, felt able to uphold the conviction without recourse to the proviso on the ground that later when answering a question from the jury in relation to Fong, the learned Commissioner gave a substantially correct *Hyam* direction though once again he used the word "likely", albeit in a different context from before. It is to be noted that in taking this view the Court of Appeal did not accept a concession frankly and properly made by learned counsel for the Crown that in this further passage the learned

Commissioner was dealing only with Fong and that it was not right that it should be regarded as a correction of any previous misdirection as regards the appellant in paragraph 3.

With all respect to the Court of Appeal, their Lordships think that learned counsel for the Crown was right in his concession and that the Court of Appeal ought not to have rejected it. By the time this correction was made, there had been the misdirection in paragraph 3 and another misdirection in relation to Fong which plainly, as the transcript of the discussion shows, had left the jury in a state of confusion regarding Fong.

It follows that, in their Lordships' view, the appellant's conviction can only be upheld if resort can properly be had to the proviso as permitted by section 83(1) of the Criminal Procedure Ordinance which is identical with the corresponding provision in the English statute.

But before considering this question there are other matters discussed in argument to which reference must be made.

First, it was submitted that the summing up was further defective because it nowhere stated that the onus of proof was on the Crown. It was said that the passages which dealt with the onus of proof were directed only to the standard of proof and not to the question on whom the onus lay. In their Lordships' view this submission is untenable. In the context it is obvious that the jury was sufficiently told, as doubtless they had been told many times during the trial, that the onus lay on the Crown.

Second, complaint was made that the learned Commissioner did not warn the jury in his summing up that the statements made by the appellant and Fong were only evidence against their respective makers and not against the co-accused and further that, Fong having given evidence, the learned Commissioner did not caution the jury regarding the danger of accepting the uncorroborated evidence of an accomplice. As to the former the learned Commissioner gave a strong warning early in the trial though he did not repeat it later. As to the latter there was no relevant warning. Their Lordships think that a reminder of the former warning and of Fong's position would have been timely but they are not disposed seriously to criticise the omission since the earlier warning could hardly have been clearer and when Fong went into the witness box his evidence was in the crucial respect by no means hostile to the appellant. To the extent that it did incriminate the appellant, there was a massive amount of corroboration.

Third, when considering whether the appellant's defence had been properly placed before the jury, the Court of Appeal made certain observations upon the evidential status of the appellant's several statements. The appellant, as already stated, did not go into the witness box. He had admitted responsibility for the killing in those statements but claimed that he had had no intent to kill and that he had fired upwards as a warning. The learned Commissioner made no comment upon the appellant's failure to give evidence though, in their Lordships' view, he might well have done so. But the Court of Appeal, following an earlier decision of that Court in *Cheng Chiu v. The Queen* [1980] H.K.L.R. 50, appear to have treated the part of his statements concerned with his lack of intention as evidence of their truth even though they were not made on oath before the jury and were to this extent what have been called in this context "self-serving" statements. In their judgment in *Cheng Chiu* the Court of Appeal considered a number of relevant English decisions some of which the Court suggested ought not to followed in Hong Kong.

Their Lordships respectfully suggest that the position resulting from those English decisions is not as complicated as the Court of Appeal there appeared to have thought. If an accused person in a statement not made on oath in Court denies his guilt, saying for example "I am not guilty: I was not there" and no more, that statement is not evidence of the truth of his absence from the scene of the crime and thus of the truth of his alibi. But if such a statement consists partly of an admission and partly of an explanation for example "I shot him: it was an accident" or "I shot him: I was provoked" the admission is plainly admissible and common fairness requires that the entirety of the statement should be admitted so as to show the precise context in which the admission was made, even though what is said by way of explanation or excuse is not evidence of its truth. Where the accused goes into the witness box and repeats the explanation or excuse on oath there is no problem. Where he does not go into the witness box it behoves the trial judge, when dealing in his summing up with the admission, in common fairness to the accused, also to refer to the accompanying explanation or excuse, adding if he thinks fit to do so that that explanation or excuse has not been supported by evidence on oath before the jury. It is then for the jury to evaluate the admission and the unsworn explanation or excuse as they think fit.

So to state is little more than to repeat and adopt the statements succinctly and correctly made by James LJ. when giving the judgment of the Court of Appeal (Criminal Division) in *R.v. Donaldson & Others* [1977] 64 Cr. App. R. 59 at page 65:

" In our view there is a clear distinction to be made between statements of admission adduced by the Crown as part of the case against the defendant and statements entirely of a self serving nature made and sought to be relied upon by a defendant. When the Crown adduce a statement relied upon as an admission it is for the jury to consider the whole statement including any passages that contain qualifications or explanations favourable to the defendant, that bear upon the passages relied upon by the prosecution as an admission, and it is for the jury to decide whether the statement viewed as a whole constitutes an admission. To this extent the statement may be said to be evidence of the facts stated therein. If the jury find that it is an admission they may rely upon it as proof of the facts admitted. If the defendant elects not to give evidence then in so far as the statement contains explanations or qualifications favourable to the defendant the jury, in deciding what, if any, weight to give to that part of the statement, should take into account that it was not made on oath and has not been tested by cross-examination.

When the Crown adduce evidence in the form of a statement by the defendant which is not relied on as an admission of the offence charged such a statement is evidence in the trial in that it is evidence that the defendant made the statement and of his reaction which is part of the general picture which the jury have to consider but it is not evidence of the facts stated."

Their Lordships therefore regret that they are unable to agree with what was said in *Cheng Chiu* in the passage quoted by the Court of Appeal in the instant case.

Their Lordships now return to the question whether in the light of their conclusions thus far it is proper to invoke the proviso and uphold the conviction on the ground that "no miscarriage of justice has actually occurred" notwithstanding that there was the misdirection already mentioned. Mr. Duffy Q.C., the Director of Public Prosecutions in Hong Kong, who appeared on the appeal for the Crown, informed their Lordships that, though capital sentences were still passed in Hong Kong, there had been no execution since 1966 and capital punishment had fallen into disuse. It was now the invariable practice to commute death sentences. Their Lordships therefore see no reason why today in a proper case the proviso should not be applied even though death sentences are still passed. Indeed their Lordships note that in *Lau Sik-Chun v. The Queen* - unreported - (Privy Council Appeal No. 23 of 1983, in which the opinion of the Board was delivered by Lord Bridge of Harwich on 26th March 1984) where the appellant had

also been convicted of murder and sentenced to death in Hong Kong, the Court of Appeal, in an appeal after a trial before the same learned Commissioner, had felt able to uphold that appellant's conviction by the application of the proviso.

The conduct of the appellant's trial was manifestly fair and in their Lordships' view the evidence justifying his conviction for murder was overwhelming. They are of the view that the misdirection in paragraph 3 in no way deprived the appellant of his right to have his defence fairly put to the jury and that any jury properly directed must inevitably have reached the same verdict as did this jury. It cannot be said that the appellant's conviction was in any way unsafe or unsatisfactory. Their Lordships are therefore of the opinion that the case is one which demands the application of the proviso.

For the sake of completeness their Lordships mention that their attention was drawn to a recent opinion of the Board (delivered by Sir Robin Cooke on 21st June 1984) in *Chan Wing-Sui and Others v. The Queen* [1984] 3 W.L.R. page 677. The relevant part of the opinion in that appeal was not concerned with the state of mind of a principal in the first degree but with that of an alleged joint offender.

In the result their Lordships will humbly advise Her Majesty that this appeal should be dismissed.

