

Li Shu-ling

Appellant

v.

The Queen

Respondent

FROM  
THE COURT OF APPEAL OF HONG KONG

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REASONS FOR REPORT OF THE LORDS OF THE  
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE  
6TH JULY 1988, DELIVERED THE 27TH JULY 1988

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*Present at the Hearing:*

LORD BRIDGE OF HARWICH  
LORD ELWYN-JONES  
LORD GRIFFITHS  
LORD ACKNER  
LORD OLIVER OF AYLMEYTON  
*[Delivered by Lord Griffiths]*

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On 1st July 1985 the appellant killed Madam Chow Shuk-king in her apartment in Kowloon. The prosecution case was that he murdered her by strangulation both manually and with a ligature. The defence was that it was an accidental killing that occurred when the appellant was trying to stop Madam Chow from screaming after a quarrel. On 19th February 1986 after a trial before judge and jury the appellant was convicted of murder. The Court of Appeal on 18th July 1986 refused the appellant leave to appeal against his conviction. On 10th June 1987 the appellant was granted special leave to appeal from the decision of the Court of Appeal. On 6th July 1988 at the conclusion of the hearing of the appeal their Lordships announced that they would humbly advise Her Majesty that the appeal should be dismissed for reasons to be given later. They now give their reasons.

The appellant was granted special leave in order that the Board might consider whether a video recording of the re-enactment of the crime by the appellant and a woman police inspector playing the part of the victim should have been admitted in evidence as a confession.

The circumstances leading up to the making of the video recording were as follows. The deceased was found on 1st July 1985 in the bedroom of her apartment with a double ligature made from a skipping rope wound tightly round her neck and knotted at the back. The forensic evidence was that she had died as the result of strangulation applied both manually and by the ligature.

The appellant was first questioned by the police on 13th August 1985 and on that occasion he gave a false alibi. On 15th August he admitted to the police that he had given a false alibi and gave a different but innocent account of his movements on 1st July. On 17th August during the course of further questioning the appellant after a long pause said "Ah Sir, do not ask me any more questions. 'Shuk King' was killed by me. However, I killed her accidentally". The interview was broken off immediately and some short while later he was cautioned and then made a full confession in which he described going to the deceased's flat in an attempt to borrow money, being scolded by her and then quarrelling with her and striking her. He described how she ran into a bedroom and he pursued her and there strangled her, first with his hands and then seeing a piece of rope nearby he took it and strangled her with it. He then described searching for money, taking her purse and various ornaments from the flat before leaving. He ended by saying he now felt deep remorse. On the following day he was questioned about the stolen property and took the police to the goldsmith where he said he had disposed of it.

On 19th August, that is two days after he had made his confession, the police asked the appellant if he would be willing to go back to the scene to re-enact the way in which the killing occurred. He was reminded that he was still under caution and that he was not obliged to go. The appellant replied that he did understand and that he was willing to go with the police. The police then took the appellant to the apartment and told him that they wanted to have the re-enactment shot by a video tape. He was again warned that he was under caution and was not obliged to take part in the re-enactment if he did not wish to do so but he expressed his willingness. He was introduced to a woman detective inspector who was to play the part of the deceased.

A video recording was then made which substantially re-enacted the contents of his earlier oral confession. It was accompanied by a running commentary made by the appellant explaining his movements. As one would expect it was a stilted performance but the essential facts of the killing were illustrated clearly enough. The film showed the accused pursuing the victim from the living room into

the bedroom and there strangling her first with both his hands and then with a piece of rope.

Those members of the jury who could understand Chinese would have heard the running commentary given by the appellant and for those who could not understand Chinese there was available an English translation of the commentary. The re-enactment was a visual confirmation of the earlier oral confession.

At the trial both the oral confession and the video recording were challenged upon the ground that they had been obtained as a result of police oppression and were therefore not voluntary. On the voir dire the judge ruled that both the oral confession and the video recording were voluntary and there has been no appeal against that part of his decision. It was also submitted on behalf of the appellant that the judge should exercise his discretion to exclude the video and in support of this submission the appellant's counsel relied upon the decision of the Court of Appeal in *R. v. Tam Wing-kwai* [1976] H.K.L.R. 401. The judge rejected this submission and admitted the video recording in evidence.

Possibly before the Court of Appeal and certainly before their Lordships the appellant has taken a more fundamental objection to the admissibility of the video recording than either of the objections raised at the trial. The appellant submits that a visual re-enactment of the crime by the accused and another person acting the part of the victim will be so far removed from a true reconstruction of the event that it ought never as a matter of principle to be admitted in evidence. It is submitted that as it is unlikely that either the accused or the police officer playing the part of the victim will have any acting skills, let alone any directing skills, the video recording will be worthless as evidence of what actually happened and probably dangerously misleading as to the true state of affairs at the time the crime was committed. In these circumstances it is urged upon their Lordships that they should as a matter of policy declare that no video recording of the re-enactment of a crime which involves another person playing the part of the part of the victim should be received in evidence.

In support of this submission the appellant relies upon the decision of the Court of Criminal Appeal in *R. v. Quinn* [1962] 2 Q.B. 245. Quinn was charged with keeping a disorderly house and the prosecution was based upon the obscene nature of striptease acts performed at his club. The trial judge refused to admit in evidence a film of the three striptease artists performing what were said to be the same acts taken some three months after the date of the offence. In giving the judgment of the Court of

Appeal upholding the decision of the judge, Ashworth J. said at page 257:-

"The film was intended to portray what three of the performers actually did in the course of their acts, and evidence was apparently available to the effect that the performances shown in the film were identical with the performances on the occasions complained of. The chairman rejected the evidence on the ground that it was inadmissible, and we agree with this. The film was in essence a reconstruction of the alleged crime and, quite apart from the interval of three months, we think that evidence of this type is inadmissible.

It is, of course, true that demonstrations are frequently given by witnesses in the witness box to show what was done at the material time. For example, the way in which a blow was struck is often demonstrated, but such demonstrations usually take place in the witness box, take place in the presence of the jury, and are intended to illustrate one act. In our view, such demonstrations are altogether different in character from a reconstruction of an entire scene, a reconstruction which has been brought into existence in private for the purpose of constituting evidence at a trial. It is obvious that to allow such a reconstruction would be introducing a method of proof which would be most unsatisfactory for the reason that it would be almost impossible to analyse motion by motion those slight differences which may in the totality result in a scene of quite a different character from that performed on the night in question. Indeed, in this case, it was admitted that some of the movements in the film (for instance, that of a snake used in one scene) could not be said with any certainty to be the same movements as were made at the material time. In our judgment, this objection goes not only to weight, as was argued, but to admissibility: it is not the best evidence."

This decision is readily understandable. The film the defence wished to introduce was self-serving evidence and bearing in mind the subject matter would obviously be suspect. There is a fine line between the risque and the obscene and the temptation to move the performance from one side of the line to the other in the film would be great. If the three performers who made the film had described their act in out of court statements those statements would be hearsay and not admissible. A demonstration given on film is open to the same objection. If however the video recording of the accused's re-enactment of his crime is admissible it is admissible as a confession

and as such is an exception to the hearsay rule because provided it is voluntary it is inherently unlikely that the accused will confess to a crime he did not commit.

It is conceded on behalf of the appellant that if a video recording had been made of his oral confession the video film would be admissible in evidence. If in the course of the video recording of the oral confession the accused had been asked to demonstrate how he placed his hands round the deceased's neck either using a dummy or a police officer it is conceded that this too would be admissible. This concession is rightly made for if an accused can say what he did there is no reason why he should not show what he did, indeed many illiterate people might find it easier to demonstrate an action rather than attempt to describe it in words. If it is permissible to allow the accused to re-enact a part of the crime during interrogation there is no reason in principle why, if he is prepared to do so, he should not show how he committed the crime at the scene of the crime. The technique of video recording confessions in the form of a re-enactment of the crime is already established in Hong Kong although, as one would expect, it is confined to relatively few grave crimes. Such evidence has been held to be admissible in principle in *R. v. Tam Wing-kwai* although, for reasons to which their Lordships will return later, it was held that it should have been excluded on the facts of that particular case. Video recordings of re-enactments of the crime by the accused and another participant have also been held to be admissible in Australia, *R. v. Lowery and King* (No.1) [1972] V.R. 554, *Collins and Others v. R.* [1980] 31 A.L.R. 257, in Canada *R. v. Tookey and Stevenson* 58 C.C.C. (2d) 421 and in the United States *People v. Dabb* 32 Cal (2d) 491 cited with approval in *Hendricks v. Swenson* 456 F. (2d) 503 (1972). It should however be noted that some of these authorities warn of the caution that should be exercised when the judge considers whether he should exercise his discretion to exclude the video recording.

It is self-evident that a re-enactment of the crime is likely to fall far short of a complete reconstruction of the actual event. Nevertheless in many crimes there should be little difficulty in re-enacting and demonstrating the essential features of the crime. The facts of the present case provide a good example. The video film shows the accused strangling the deceased first with both his hands round her neck and then continuing with a piece of rope which he picks up from nearby and ties round her neck. When he gave his evidence he presented an entirely different account saying he placed one hand over the deceased's mouth to stop her screaming and

had one hand on the back of her neck and because she was hitting him with a skipping rope he snatched it from her and placed it round her neck to stop her screaming. He said she then collapsed and seemed to be dead so he ransacked the flat and only then did he return to her body and tie the rope round her neck to make it look as if there had been a robbery. Making all allowances for lack of acting ability there could be no possibility of confusion between these two versions of the killing. He accounted for the video film by saying he was only doing what the police told him to do. There was no sign of police direction during the running of the video film which lasted five minutes and the jury clearly disbelieved the accused's explanation which must have related to some time before the recording commenced.

The truth is that if an accused has himself voluntarily agreed to demonstrate how he committed a crime it is very much more difficult for him to escape from the visual record of his confession than it is to challenge an oral confession with the familiar suggestions that he was misunderstood or misrecorded or had words put into his mouth. Provided an accused is given a proper warning that he need not take part in the video recording and agrees to do so voluntarily the video film is in principle admissible in evidence as a confession and will in some cases prove to be most valuable evidence of guilt.

To meet the suggestion that lack of acting skill may result in serious distortion of a fair demonstration by the accused the video recording should be shown to the accused as soon as practicable after it has been completed and he should be given the opportunity to make and have recorded any comments he wishes about the film. If the accused says the film does not show what he meant to demonstrate there will then be a contemporary record of his criticism which the judge and jury can take into account when assessing the value of the film as evidence of his confession.

The appellant further submitted that even if a video recording is admissible in principle the judge should have exercised his discretion to exclude it in the present case and relied upon the decision in *R. v. Tam Wing-kwai*. In that case the accused had made five oral statements between 17th and 25th July. The fourth statement was a full oral confession made under caution on 21st July. On 7th August the accused was taken to the scene of the crime and further questioned about what happened and he illustrated his answers by demonstration. This interview was recorded on video tape. The Court of Appeal held that the judge should have exercised his discretion to exclude the video tape of this final

interview. In giving their reasons Huggins J.A. said:-

"It seems to us that the over-all intention was to bolster up the Crown's case, it being hoped that the Appellant would confirm visually what he had already said in his fourth statement. In our view it was not the recording on video-tape which was open to objection but the fact that a further 'statement' was taken at all. Sound tape recordings of statements are commonly admitted in evidence. A video-tape merely extends the record to the sense of sight and it is a record which is much more difficult to tamper with than is a tape of the sound alone. In our view such evidence may as a general rule properly be admitted. However, we think it was wrong here to try to obtain confirmation of the fourth statement in this way and we think that the sixth statement ought to have been excluded in the exercise of the judge's discretion, but we are satisfied that the support for the Crown's case which was thus wrongly obtained was of minimal value and that no injustice has resulted from the admission of this evidence."

In so far as the opening sentence of this passage may seem to suggest that the prosecution should never make a video recording after an oral confession their Lordships cannot agree with it. There can be no point in making a video film of the demonstration of the crime unless the accused has confessed orally to the crime. Provided the video film is made reasonably soon after the confession and is made voluntarily it should not be excluded on the ground that it may strengthen the prosecution's case by making it more difficult for the accused to resile from his confession. It is in the interests of justice that persons guilty of grave crimes should be convicted. However a sixth statement taken from an accused nearly three weeks after a full oral confession and taken in response to further questioning smacks of oppresssion which would justify the exercise of the judge's discretion to exclude it.

The facts of the present case are very different. The video recording was made voluntarily two days after the accused's oral confession and there was no further questioning by the police. Their Lordships agree with the Court of Appeal that there is no ground for interfering with the exercise of the judge's discretion in this case.

There will of course be crimes when it will be wholly inappropriate to attempt to re-enact them on a video tape. An obvious example would be a killing committed in the course of an affray with many people milling about the victim and the killer. It would be

hopeless to expect to reconstruct such a scene and any attempt to do so might indeed be dangerously misleading. It is to be hoped that the prosecution would not attempt anything so foolish, but if they did their Lordships are confident that it can safely be left to the discretion of the trial judge to exclude any such ill-judged attempt on the ground that its prejudicial effect would far outweigh its probative value. This however is not such a case and the video recording was in their Lordships' opinion rightly admitted in evidence.



