

Chan Wai-keung

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
13TH DECEMBER 1994

Present at the hearing:-

LORD KEITH OF KINKEL
LORD MUSTILL
LORD WOOLF
LORD LLOYD OF BERWICK
LORD NICHOLLS OF BIRKENHEAD

[Delivered by Lord Mustill]

This appeal concerns the relationship between two concurrent sets of criminal proceedings in the courts of Hong Kong. At the conclusion of the first Chan Wai-keung was convicted of the murder of Leung Ka-po and was sentenced to death. After unsuccessful recourse to the Court of Appeal of Hong Kong (Yang C.J., Power J.A. and Barnett J.) he now appeals by special leave to Her Majesty in Council. The second set of proceedings culminated in the conviction of Yip Wai-sheung and two co-defendants on charges of conspiring to traffic in a dangerous drug and his sentence to a term of imprisonment for 18 years. These otherwise separate criminal processes were linked by the fact that Yip Wai-sheung was a witness for the prosecution at the trial of the present appellant on the charge of murder.

It is convenient to begin by describing separately the major events in relation to the two trials. Taking the offence of murder first, Leung Ka-po was stabbed to death in the early hours of 21st February 1990. There were two eye-witnesses, but no identification was possible. Of the fact of murder there could be no doubt. The only issue at the trial was whether the appellant was the person responsible. Soon after the murder the appellant left Hong

that the course which it is now suggested the judge should have taken was never proposed to him at the time. At an earlier stage of the trial counsel had vigorously and successfully opposed the admission of the appellant's own supposed confession to the police, and yet made no objection to the evidence of Yip or to the continuation of the trial once his evidence had been admitted. The case for the appellant throughout was simply that the circumstances gave Yip so much of an incentive for making up a false story that the jury could not safely rely on what he said. Even on appeal, the point taken was not that the admission of the evidence made the whole trial objectionable, but rather that in the circumstances the Court of Appeal ought to treat the conviction as unsafe. This is not of course to say that an ultimate court of appeal is powerless to interfere in the face of a real injustice even if no objection has been made at the proper time, but it is hard to overlook that the event now said to have made the proceedings so imbued with unfairness that they should be struck down as an abuse escaped the notice of counsel and of the four judges in Hong Kong who were seized of the case.

Nevertheless the issue has been raised and must be addressed. When doing so it is important to bear in mind that the contest is limited to the propriety of the trial in which the appellant was convicted. The decision of Gall J. not to proceed immediately with the sentencing of Yip is not, and could not be, the subject of any direct complaint before the Board in the present appeal, which concerns the murder trial alone. What is under attack is the adduction of evidence from Yip in the situation where he was still awaiting sentence, and the two cases are linked only by the special feature that the postponement was prompted by the direct intervention of counsel who was prosecuting in the murder trial. Leaving this special feature aside for the moment, the question of principle is simply this - given that Yip was awaiting sentence in circumstances where he knew that at the very least he stood a chance of having his sentence reduced if he gave evidence at the trial of the appellant, was it ipso facto a denial of justice to allow him to give evidence at all?

When considering what should happen in a situation which, so far as counsel have been able to ascertain, is not discussed in any reported case, various lines of authority must be considered. These are in origin wholly unrelated, although recently they have converged.

The first concerns the sentencing of co-accused and accomplices. Formerly, in the days of Assize, there were good practical reasons for setting some standards by imposing sentences at an early stage on those who pleaded guilty, whilst co-accused were maintaining pleas of not guilty. More recently however although the decision on whether to sentence before or after the trial of a co-accused remains, as it has always been, within the discretion of the judge, it is usually thought better for the same judge to sentence all the accused at the end of the trial, when he can

best form an impression of the relative culpability of all those implicated, and avoid the discrepancies which can arise when one of the sentences is passed before the facts have been thoroughly explored: see *R. v. Payne* (1950) 34 Cr.App.R. 43 and many subsequent cases.

The second line of authority was originally quite distinct. It has been recognised for centuries that the practice of allowing one co-accused to "turn Queen's evidence" and obtain an immunity from further process by giving evidence against another was a powerful weapon for bringing criminals to justice, and although this practice "has been distasteful for at least 300 years to judges, lawyers and members of the public", and although it brings with it an obvious risk that the accused will give false evidence under this "most powerful inducement", the same very experienced Court which so stigmatised this practice was willing to accept that it was in accordance with the law: *R. v. Turner (Bryan)* (1975) 61 Cr.App.R. 67, 79.

The logic of this practice, which places the interests of the public in the detection and punishment of crime above the risk which must always exist where a witness gives evidence for the prosecution in the hope that he will obtain a benefit thereby, must also apply to situations where the "powerful inducement" takes the shape not of a promised immunity from prosecution, but of the expectation that he will be granted the "discount" from sentence which the courts accord to those who, not infrequently at physical risk, give evidence against their co-accused. This logic is carried into effect. No authority is needed to illustrate the widespread practice of calling as a witness for the prosecution a co-accused who has pleaded guilty.

The next step in this line of authority concerns the case where the witness is under threat of prosecution or sentence for offences different from that said to have been committed by the defendant against whom he gives evidence. The benefit to the public interest of having criminals detected and punished, and the risk of perjured evidence being given under an inducement is just the same as where one co-accused gives evidence against another, and one would expect the balance to be struck in the same way. This is what has happened. Some of the most conspicuous criminal informers have given information and evidence regarding crimes in which they were not personally concerned. The practice of conferring "discounts", often very large, in such circumstances, was firmly endorsed in *R. v. Davies (Leroy)* (1978) 68 Cr.App.R. 319, and is as much a part of life in the criminal courts of England and Wales as it is in Hong Kong. What was referred to in *Sivan* (1988) 10 Cr.App.R. (S) 282 as the regrettable but unavoidable lack of openness which this may involve is a price to be paid for the benefits to the public obtained by using informers.

There is one more step. What should happen where the assistance to the authorities, whether taking the shape of information or evidence, is given after the accused has received an appropriate sentence for the crimes which he himself has committed? Previously, it was thought best to leave the recognition of this to the executive authorities, but the practice has now changed. The value of the assistance does not depend on when it is given, and it is desirable that its value should be publicly acknowledged, and publicly acted upon by a reduction in sentence on appeal, so that those who wish to reflect after sentence on how their predicament may be eased by belated co-operation can have confidence that it will be appropriately rewarded. Just such a development was discussed and approved by the Court of Appeal of Hong Kong in *R. v. Sze Tak-hung* [1991] 1 H.K.L.R. 109.

How should these two lines of authority be drawn together? The problem will most frequently arise where a co-accused pleads guilty and is willing to give evidence. The discretion still remains whether to sentence at the beginning or the end of the trial. Formerly, the view was taken that sentence should not be postponed, in order to minimise the risk that the inducement would lead to perjury: see, for example, *R. v. Pipe* (1966) 61 Cr.App.R. 67. Latterly, the balance of risk has been differently assessed. It is now clear that there is no such rule of law as had for a time been thought to emanate from *R. v. Pipe*, and that the better practice will often be to leave the sentencing of a co-accused or accomplice until all those pleading guilty or convicted are available to be sentenced together: *R. v. Weekes* (1980) 74 Cr.App.R. 161; *R. v. Palmer*, 20th August 1993 (1993) T.L.R. 481. It is however clear from the explanations given by the Court of Appeal in the latter case that this practice is dependent on the risk of disparity, and not on any other reason. The problem in the present case is rather different, and has not arisen, or at least not so starkly, in any reported case to which attention has been drawn. As Mr. Martin Thomas Q.C. rightly points out the reasoning of even the most modern cases on the sentencing of co-accused cannot be applied to this situation, for no question of disparity could arise between the sentence of death on the appellant for one offence and a long sentence of imprisonment on Yip for one which was wholly unconnected. Put quite bluntly, the only reason why those prosecuting the appellant encouraged those defending Yip to ask for a postponement was to make sure that Yip came forward to give evidence. This being so, it was contended on behalf of the appellant that since the consideration of possible disparity, which prompted the change of practice from that which had been advocated in *R. v. Pipe*, did not apply in the present case, the risk of perjury under inducement should at least be reduced by putting the witness in a position where whatever he stood to gain had already been gained by the time he gave evidence. The response of the Crown was that credit could be given on appeal for assistance rendered after sentence, just as it

would be at the time of sentence for assistance rendered beforehand: see *The Queen v. Sze Tak-hung* [1991] 1 H.K.L.R. 109. Assuming that the prosecution honoured its promise to put the facts before the relevant court, as it did, the credit for giving evidence would have been accorded to Yip whether he was sentenced before the murder trial, in which case the relevant court would have been the Court of Appeal, or after, when it was the court which had conducted his own trial. It may well be that the inducement would have been less cogent in the former case, but the principle is the same. Once the courts have taken the large step, as they undoubtedly have, of recognising that circumstances may justify the calling of a witness who stands to gain by giving false evidence, it becomes impossible to say that what happened in the present case was necessarily contrary to the proper conduct of the murder trial. What was required was that the potential fallibility of Yip's evidence should be put squarely before the jury, and this is what was done.

Their Lordships pause to mention a question not fully discussed in argument. Not long after *Sze Tak-hung* was decided, the case of *Debbag and Izzet* (1991) 12 Cr.App.R.(S). 733 came before the Court of Appeal in England. After conviction for drug offences the appellants had discussions with the police in the course of which they indicated willingness to supply information, but the assistance was not actually given until after they had been sentenced, some two months later. In the event it proved to be of no practical value and this was one factor in the decision of the Court of Appeal that no discount should be awarded. There was, however, another: namely that an offender should not, as the court put it, be allowed to fight his corner until the last and only then, when faced with the sentence imposed upon him, seek a reduction from the Court of Appeal by offering help to the authorities. "The Court of Appeal could not readily countenance a system of what would amount to a negotiation after conviction and sentence for a reduction of sentence on the strength of lately volunteered information". This principle has recently been adopted and applied by the Court of Appeal (Lord Taylor C.J., Waterhouse and Mitchell JJ.) in *re X* [1994] Crim.L.R. 469 (Court of Appeal 93/3316/Y4), a more extreme case where the applicant had not offered any assistance until 15 months after conviction and sentence. Although in this instance the information had been of great value, the court decided that any recognition of what he had done should be left to executive action. Although the facts of *re X* are distant from those which would have existed if Yip had been sentenced before rather than after giving evidence, and *Debbag and Izzet* is not on all fours, it does appear that there may be some divergence between the practice of the two jurisdictions. The Board is not in a position to explore this, since the English cases were not cited in argument; and it is unnecessary to do so, since it was to the Hong Kong regime that Yip was subject. Their Lordships mention

the point only to avoid any implication that by adopting an argument founded on *Sze Tak-hung* they are deciding that the position in England necessarily is or should be the same. For present purposes it need only be said that, taking the position in Hong Kong as it was when Yip was convicted, their Lordships regard the argument for the Crown as convincing.

Their Lordships turn to the grounds of appeal founded on the conduct of this particular trial. The first relates to the initiative taken by prosecuting counsel in the murder to have the sentencing of Yip postponed. In their Lordships' opinion this intervention behind the scenes of the murder trial was ill-judged and should not be repeated, for by taking an active role in the disposition of criminal proceedings with which he was not concerned, and by doing so in the absence of his opponents, counsel stepped outside his proper role as advocate in the adversarial conduct of the murder trial. Nevertheless if the prosecuting authority, rather than counsel, had made it known in a more conventional manner that if Yip were to give evidence his assistance would be officially acknowledged, the decision of Yip's advisers to seek an adjournment, and of the judge to grant one, so as to see what transpired, would almost certainly have been the same.

The next ground of objection concerns the sentencing of Yip, with all the inevitable publicity, before the trial of the appellant was complete. Although Gall J. himself was in no way at fault, this is another unsatisfactory feature of the murder trial, for the failure by the authorities to prompt a further adjournment made the task of the jury and the judge unnecessarily difficult, in two respects. Up to that point, attention had been focused on what if any were the promises made to Yip, and the expectations of Yip, in relation to the possible granting and possible extent of a discount when he came up for sentence; and this was right, for it was Yip's state of mind which the jury had to take into account when deciding whether his evidence was to be relied on. Knowledge that a substantial discount had actually been made might tend to point the jury in the wrong direction. Furthermore, the acknowledgement by Gall J. that Yip had given help might lead an incautious jury to suppose that the authorities, and perhaps even Gall J., himself had accepted that the evidence was, in the words of the written immunity, full and true.

Nevertheless, although the sentencing of Yip at this crucial moment should not have been allowed to happen, the more particularly on the basis of a letter which emphasised the value which the prosecution placed on his evidence, the misunderstandings which might have ensued were capable of remedy by a clear and firm summing-up. Their Lordships are satisfied that this is what the trial judge did furnish, and that no substantial injustice has been suffered.

Finally, exception has been taken to the absence of any communication to the appellant's representatives of the information furnished by the Director of Public Prosecutions in his letter to Gall J. that Yip had been a reluctant witness. Whilst there is force in this complaint their Lordships cannot find that the omission made any practical difference. The jury cannot have overlooked, any more than Yip himself overlooked, that giving evidence for the prosecution in the circumstances which existed was a perilous business, and that a substantial inducement would be needed to overcome any apprehension which might understandably be felt. Such an apprehension was plainly revealed by the conversation to which Moa testified, in which Yip asked Moa to convey to the appellant the explanation that Yip was giving evidence against him only in the hope of improving his own desperate situation; and in the same conversation Yip had told Moa that he was undecided whether to give evidence, which is inconsistent with any thought that he was completely content with the prospect. Even if a way had been found to put in evidence at the trial the prosecuting authority's assessment of Yip as a reluctant witness this would have added little if anything to the general picture of a temptation to commit perjury which was already quite clear.

The imperfections rightly emphasised by Mr. Thomas Q.C. have led their Lordships to examine the record of the trial with particular care, but they can find no such unfairness, under whatever legal formula it might be described, as would justify their intervention. The considerations which put Yip's veracity in doubt were fully exposed throughout his evidence, the closing addresses of counsel, and the direction to the jury. At the same time the learned judge reminded the jury of a cardinal feature of Yip's evidence, without which this might be an altogether more anxious case, that the story of the appellant's confession was told to the police many months before the trial, at a time when Yip had not even committed the drug offences for which he was later to be sentenced. It is true, as the judge was careful to point out, that this statement did not mention fresh blood on the appellant's bandage, or the explanation by the appellant that he had been in a fight, which Yip was to relate at the trial; but the existence of the earlier statement was enough to rule out the possibility that Yip had made up the entire story under the inducement of a lighter sentence. What if any reliance was to be placed on the evidence of Yip in all these circumstances was a matter for the jury to decide. In the opinion of this Board the appellant has suffered in no way from the absence of an application to the judge to stop the trial, since the right course would have been to reject the application and leave the case to the jury, as he did.

Their Lordships will therefore humbly advise Her Majesty that this appeal ought to be dismissed.

