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40,1954

Appeal No. 29 of 1954.

IN THE PRIVY COUNCIL

ON APPEAL FROM THE SUPREME COURT OF HONG KONG

APPELLATE JURISDICTION

B E T W E E N:

CHAN KAU alias CHAN KAI Appellant

- and -

THE QUEEN Respondent

UNIVERSITY OF LONDON
W.C.1
20 MAR 1955
INSTITUTE OF ADVANCED
LEGAL STUDIES

38048

CASE FOR THE APPELLANT

RECORD

1. This is an appeal by special leave in forma pauperis against a judgment of the Supreme Court of Hong Kong (Appellate Jurisdiction) dated the 5th day of March, 1954, dismissing the Appellant's appeal against his conviction of murder in the Supreme Court of Hong Kong on the 23rd day of December, 1953. P.126 P.123

2. The Appellant was charged with having on the 23rd day of July, 1953, in the Colony of Hong Kong murdered one Chan Fook. The case for the Crown was that in the course of a street fight begun by members of a gang the Appellant, acting with those members, seized a knife from a nearby breadstall and therewith inflicted injuries upon the said Chan Fook from which he died. The case for the defence was that Chan Fook grabbed the Appellant, held him with his left hand and struck him with his right and thereafter pursued him and struck him on the back of the head with a wooden implement and that during the course of such pursuit the Appellant seized the knife from the breadstall and struck at Chan Fook. P.1

3. The principal grounds of appeal are as follows: -

(a) The learned judge wrongly directed the jury that there was no evidence upon which they could find provocation and in terms withdrew the defence of provocation from the jury. P.121(1)

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P.120(27) (b) The learned judge wrongly directed the jury that it was the duty of the Appellant to satisfy them as to the existence of provocation.

P.119(5) (c) The learned judge wrongly directed the jury that on the evidence there was "no warranty for the defence of self-defence".

P.118(25) (d) The learned judge wrongly directed the jury that, in order to avail himself of the defence of self-defence, the Appellant must satisfy them that the defence was necessary.

(e) The learned judge failed to direct the jury that if they found that the killing had taken place with a weapon snatched up in the course of a quarrel it was open to them to return a verdict of manslaughter.

4. The case for the Crown was that a feud had arisen between two groups of workers at Stonecutters Island, one group being led by a man named Mak Hei and the other group by a man named Ho Kai. After a quarrel between these groups had led to the dismissal of a man named Li Hing, the members of the Mak Hei group decided to attack and beat the members of the other group and that they would go to the house of Ho Kai, who was holding a party for his friends and attack him and his guests as they emerged. It was alleged that the Appellant had visited Mak Hei's house earlier in the evening and learned what was intended and that, although not a member of either group, he made his way to the street where Ho Kai lived. Shortly afterwards 3 persons, including Chan Fook, emerged from Ho Kai's house. They were set upon by members of the Mak Hei group and the Appellant, having seized a knife from a nearby breadstall, killed Chan Fook by chopping therewith.

P.34 5. The Crown called 2 alleged eye-witnesses of the assault, although only one of them, a shoeblack of 16 years of age named Mui Wing Por, positively identified the Appellant. 3 witnesses spoke as to a conversation which took place at the house of a man named Tai Yan Fat later on the same day in the course of which one of those present had stated in the Appellant's hearing that the Appellant had chopped the victim with a knife. The evidence was to the effect that the Appellant first remained silent and later said "There are so many people around here we'd better not talk at random, let's go".

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6. The Crown put in evidence the two statements made by the Appellant, the first to a police officer on the 28th day of July, 1953, the second in answer to the charge at the preliminary enquiry in which he stated that on the night in question he had accompanied Mak Hai who had asked him to go to a fight. These statements were as follows:-

"Originally the deceased and I did not know each other. However, I had been maintained by Mak Hai, manager of the He Sheung Hi eating House for a long time. On that night he asked us to go to take part in a fight, I then went with him. At that time deceased was walking along with two persons. We had a dispute with him. Deceased was conditionally large and powerful, moreover, was drunk with strong smell of wine. I intended to go away but he still did not stop, so (I) in convenience, took up a chopper from a confectioners shop in the vicinity and chopped him on the shoulder. He dodged and the aim was missed. I did not know that he ear had received a stroke. Upon the second stroke he was bleeding. I was greatly frightened and ran away, but I did not know he was dead."

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PP.129,
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(Statement in answer to charge)

"Previously the deceased and I did not know each other. But I had been treated with favour by Mak Hai, manager of the Hi Sheung Hi eating house, for a long time. On that night he asked us to go to fight, so I went with him. At that time the deceased was walking along with two (other) persons. We quarrelled with him. The deceased relied upon (his) stoutness, braveness and strength and also (he) was drunk and reeking with liquor. I intended to go away but he still would not stop, so (I) took up a knife readily from a candy shop nearby and facing him (I) chopped (him) on the shoulder. He dodged, so (the blow) missed (him). I still did not know that his ear had already been hit once by the knife. (I) hit with the knife again and he was bleeding. I was greatly frightened and in a flurry and ran away. But I did not know he had already died."

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7. The Crown called a medical officer named Tamkai who had examined the Appellant at 7.30 p.m. on the 28th day of July, 1953. This witness deposed that he had found minor superficial abrasions over the right ear lobe, the lobe itself, the front of the right side of the chest, the front of the left side of the chest, the front of the left armpit, over the back of the left side just below the left shoulder blade, over the instep of the left foot and over the left leg or shin. He was of opinion that those abrasions were about 3 to 4 days' old and that they were most probably due to "a struggle or fight or rubbing against any rough surface".

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PP.13,
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P.14

8: The Crown also called a police surgeon named Pang Teng Cheung who had conducted the post-mortem examination of Chan Fook. He found that the deceased had sustained 6 wounds consisting of a gaping cut wound over the left side of the neck, a cut wound over the right side of the head, split wounds on the right wrist, the left arm and the back of the right shoulder, and a slightly curved wound across the left shoulder. In this witness' opinion the assailant would have been in front and slightly to the left of the deceased when the first wound was inflicted. It was this wound which was the cause of death.

PP.78-
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9. The Appellant in evidence deposed that he did not belong to any group and did not know Ho Kai or the deceased Chan Fook. On the evening of the 23rd day of July he went to see Mak Hai about the settlement of certain outstanding accounts. Mak Hai said, "In fact I am very busy. I am going to have a fight" but did not mention who he expected to fight or ask the Appellant to go to the fight. The Appellant in fact accompanied Mak Hai in order to press for a debt. They went with a number of others to Argyle Street where Mak Hai observed a policeman. He said to the Appellant "Ah Kau there is a policeman over there. Hurry, hurry, tell them not to start fighting". The Appellant approached the group of people but on the way they started fighting and he saw 3 or 4 persons setting upon each other. He observed in particular a person from the "opposite party". His evidence continued as follows:-

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"Q. And what happened?

A. When this person was about near the Kwong Wah Cafe, he turned around and fought with the group of pursuers. I then went up to these people and said 'Policeman, So Wing'. The several people stopped setting upon this person. I wanted to go. This person came up and grabbed me with both of his hands. (In the manner as demonstrated by the witness in the box - gripped by the chest). Then he held me with his left hand and hit me with his right hand (demonstrates).

Q. When he hit you, did you notice whether he was injured or not?

A. Yes, I think he was suffering from minor injuries.

REECE, J: You think?

Q. No; he had a little quantity of blood on his person.

A. He kept on beating me and I wanted to give him

"an explanation. I said 'You hit the wrong man. I have nothing to do with it'. At that time this man was really ferocious and so I had to resist. I had a chance and I freed myself from him. I started to run. He ran after me and he hit my back. Well, I was acting on good intention to go up and tell the people not to set upon him but, when he hit me, I felt that I was very angry. I ran up to a stall which I have said to be a candy stall but which I now say is a breadstall and, at that moment, I was haywire. He was taller and bigger than I am and I had to resort to something in my resistance. I did not know that there was a knife in that place. As a matter of fact, I tried to get a pole or a bottle or things like that. I was given no chance for consideration and I picked up a knife blindly. This man squatted and was looking for something. I continued to run and he ran after me into the street. He hit my head at the back.

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P.84

Q. With what did he hit you?

A. I don't know what it was but it was wooden.

.....

MR. LOO: After the fighting, where did you go? P.85

A. I went to Diamond Hill.

Q. Did you go to Fa Hui Village?

A. No.

Q. Now, when you picked up the knife, at that moment did you intend to cause grievous bodily harm to the deceased?

A. No.

Q. Thank you."

The cross-examination of the Appellant included the following questions and answers:-

"Q. This man held you with one hand and punched you with the other. Is that correct? P.91

A. Yes.

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"Q. What were you doing at this time with your hands when he held you with one hand and punched you with the other?

A. Trying to ward them off.

Q. Were you successful in warding him off?

A. Yes, I could not on some occasions.

Q. On some occasions you could manage to ward him off?

A. Yes.

.....

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Q. Now, which direction did you run? Why didn't you run into Argyle Street when you warded this man off?

A. When I ran away, I could not run fast enough.

Q. He caught you up?

A. Well, he hit my back.

Q. What with?

A. Fists.

Q. And then, what did you do?

A. I ran.

Q. Was it then you made up your mind to go to the breadstall and arm yourself with a bottle or something?

A. Yes, at that time I wanted to get a piece of firewood or a bottle.

Q. How long did you look for a bottle at the breadstall?

A. No, I did not look for it, I took immediately.

Q. Did the breadstall look like that, P.10?

A. I did not see it looked like that, but at that time I cannot say whether that one was the one in the photo.

Q. But it looked like that?

A. Yes.

"Q. It is one on the corner of Sai Yeung Choi Street and Argyle Street we are talking about?

A. Yes.

Q. So you could not find a bottle, and you found the knife?

COURT: He has already said he picked up the knife off the breadstall.

Q. Did the knife look like this?

A. Like this

Q. How far behind you was the vicious man at this stage? P.93

A. About from here to there (indicates)

Q. And he was stooping down to pick something up?

A. Yes, he squatted, but I do not know what he was doing.

Q. You did not know what he was doing?

A. No.

Q. Why didn't you run to Argyle Street then?

A. Well, when he was squatting he had a new intention. I could not run because there were plenty of people over there and you could not run through.

Q. You have just told us you did nothing else but run so far.

Q. Now "from here to there" about five or six ft. Now, you had a chopper in your hands, what did you do next?

A. I ran.

Q. Where did you run, you said you could not run for the..

COURT: He said that he picked up this knife, turned back and saw the man. Nothing about running.

Q. After you picked up the knife, where did you run, in which direction?

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"A. Ran into the street.

Q. What caused you to swing your arm round like this?

A. He hit me.

Q. Where?

A. On the head.

Q. Hard?

A. I received several blows. I don't know whether I felt painful or not.

Q. Was your head injured in any way?

A. No.

Q. How many times did you swing this knife round to the side like this?

A. I cannot remember whether I have swung the knife once or twice in the manner just demonstrated.

Q. And you were running all the time when this was going on?

A. At one time I was fighting.

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Q. What do you mean by 'fighting', did you turn round and face him?

A. That is before I took up the knife and he assaulted me."

10. The summing-up included the following passages:-

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"I just want to read a short passage here from the same text book that Mr. Loo was so frequently directing to your attention yesterday on this question of self-defence, so that you will have it in as clear a picture as it could possibly be brought and in as simple language as possible. Listen to it: 'But there is another question, did he use the weapon in defence of his own life? Before a person can avail himself of that defence he must satisfy you that the defence was necessary, (he the accused must satisfy you that the defence was necessary), that he did all he could to avoid it, and that it was necessary to protect his own life, or to protect himself from such serious bodily harm as would give a reasonable apprehension that his life was in immediate danger. If he

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"used the weapon having no other means of resistance and no means of escape, in such case, if he retreated as far as he could, he would be justified'. You may take it from me that that is the law on self-defence. Apply that to the facts in this case and what have you got? You haven't got the beginning of a defence of self-defence here on these facts. There is not a bit of evidence to show that that man was in immediate danger, that that man retreated as far as he could, that that man had no other way of resisting any alleged attack, and I used the word 'alleged' advisedly on the evidence. All of the evidence points to the fact - and the accused man himself tells you that he ran away to the stall, picked up the knife and went back. Up to this minute, the accused person himself has not said that he was attacked by this man with anything else but his fist. He has said that he was attacked by the man who struck him in his back with his fist, but the law is, even if you believe him that he was attacked with his fist, it is no self-defence to use an instrument such as that - this is no self-defence, and I tell you that on the evidence there is no warranty for the defence of self-defence here. P.119

.....

"Now the last of the legal defences which Mr. Loo brought to your notice was provocation. Now what is provocation? Provocation however violent it may be can never reduce a crime of homicide to justifiable or excusable homicide. I am going to read what is now considered by the Lord Chief Justice of England to be almost a classical definition of provocation to you; It is very simple and it gives you a complete picture of the legal requirements of provocation, as clearly as anyone could put it, so much so, that this is what the Lord Chief Justice said about it. He said: P.120
'This is as good a definition of the doctrine of provocation as it has ever been my lot to read and I think it might well stand as a classic direction to the jury in a case in which the sympathy of everyone would be with the accused person and against the dead man, and it was essential that the Judge should see that the jury had an opportunity of indicating the law.' This is the definition.

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"Provocation is some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind'. And there is one other short passage to which I would direct your attention:- 'Similarly, as counsel for the prosecution had told you, circumstances which induce a desire for revenge, or a sudden passion of anger, are not enough. Indeed, circumstances which induce a desire for revenge are inconsistent with provocation, since the conscious formulation of a desire for revenge means that a person has had time to think, to reflect, and that would negative a sudden temporary loss of self-control which is of the essence of provocation'.

"Members of the Jury, it is the duty of the accused person to satisfy you either from his own evidence or from circumstances of the evidence of the prosecution that he was so provoked as to use the instrument which he did use and which caused the death of the deceased. What is the evidence before you either from the Crown or from the accused person which would justify you in saying that this man was actuated by a sudden provocation in the eyes of the law? In my opinion there is none. Moreover, in dealing with provocation the instrument used must have some relation to the measure of provocation. In this case you have admittedly an instrument of an extremely dangerous kind being used in an almost herculean manner upon what provocation. What is the provocation which, if there is any, the accused tells you that he had? The evidence for the Crown is that these people were attacked as they were walking along the street without any provocation, unsuspecting, after having been to a friend's house for a small dinner party and on their way to go to a cafe to have a cup of coffee. That is the evidence. What evidence is there of provocation? Members of the Jury, I tell you there is no evidence whatever, and I will give this to you as a direction in law, that it is my duty, where the evidence does not warrant a finding of manslaughter on the ground of provocation, it is the duty of a Judge to tell the Jury to ignore the defence of provocation and I tell you that in this case there is no evidence to justify a finding on your part of provocation in law and you are to ignore it. If I make a mistake in giving you that direction then there is a remedy, but on this evidence I tell you that there is in law no justification

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"for a finding on your part of provocation on the evidence which has come before you." RECORD

11. After the learned judge had summed up he answered certain specific questions put to him by the foreman of the jury. These included the following question and answer:-

"FOREMAN: As regards possible verdicts, may we have it quite clear as to what the possible alternatives are? P.123

REECE, J: In this case, I have told you that there is no room for provocation. Therefore, there is no room for a verdict of manslaughter. I give you that as a direction in law and you have got to take that from me. I have told you that on the evidence there is in my opinion - you may think otherwise - no question of a verdict of acting self-defence, no question of excusable homicide. So, you have got two alternatives, a verdict of murder or not guilty. If you agree that this man acted in self-defence, or, if you think the evidence warrants it that he acted in justifiable homicide, then the verdict is not guilty. If you don't, and if on the evidence you are satisfied that the verdict should be one of murder, then your verdict is murder. I have taken away from you the possible verdict of manslaughter because, in my opinion, there is no evidence to justify a finding of provocation in law."

12. The jury brought in the following verdict:-

"We find the accused guilty of murder but with a recommendation to mercy on the ground that he had no prior intention of killing." P.123

The learned judge sentenced the Appellant to death.

13. The Appellant appealed from his said conviction to the Supreme Court of Hong Kong (Appellate Jurisdiction). The grounds of appeal included the following:-

"3(a) That the learned judge wrongly P.126

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"directed the jury that there was no evidence of provocation and therefore ruled out manslaughter in his summing-up"

14. At the conclusion of the argument in the Supreme Court the learned President gave judgment as follows:-

P.126(26) "In our view, having carefully considered the record of proceedings in this case and the submissions of Counsel, there is no substance in any of the grounds of appeal which have been argued before us. The appeal is therefore dismissed."

P.127 15. Special leave to appeal in forma pauperis to Her Majesty in Council was granted by Order in Council dated the 24th day of June 1954.

16. The Appellant respectfully submits that this appeal should be allowed and the judgment of the Supreme Court of Hong Kong (Appellate Jurisdiction) set aside and his conviction and sentence quashed for the following amongst other

R E A S O N S

1. Because the learned judge wrongly withdrew the defence of provocation from the jury.
2. Because the learned judge misdirected the jury as to the burden of proof in relation to the defence of provocation.
3. Because the learned judge wrongly directed the jury as to the nature of the evidence in relation to self-defence.
4. Because the learned judge wrongly directed the jury that there was no evidence to support the defence of self-defence.
5. Because the learned judge misdirected the jury on the onus of proof in relation to the defence of self-defence
6. Because the learned judge failed to direct the jury that if they found that the Appellant had killed the deceased with a weapon snatched up in the course of a quarrel it was open to them

to bring in a verdict of manslaughter
instead of murder.

RECORD

DINGLE FOOT

INGRAM POOLE

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