

40,1954

No. 29 of 1954

IN THE PRIVY COUNCIL

ON APPEAL
FROM THE SUPREME COURT OF HONG KONG (APPELLATE JURISDICTION) (APPELLATE CITY OF LONDON W.C.1.)

23 MAR 1955
INSTITUTE OF ADVANCED
LEGAL STUDIES
Appellant

BETWEEN
CHAN KAU alias CHAN KAI

and

THE QUEEN Respondent

38049

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C A S E F O R T H E R E S P O N D E N T

RECORD

1. This is an appeal from a judgment, dated the 5th March, 1954, of the Supreme Court of Hong Kong in its appellate jurisdiction (Gregg and Reynolds, J.J.), dismissing an appeal from a verdict and judgment, dated the 23rd December, 1953, of the Supreme Court in its criminal jurisdiction (Reece, J. and a jury), whereby the Appellant was convicted of murder and was sentenced to death. p.126 p.122

20 2. The indictment charged the Appellant with the murder on the 23rd July 1953 of one Chan Fook. The trial took place on the 21st, 22nd and 23rd December 1953. p.1

3. Evidence was given for the Crown as follows:-

30 Many of the people involved in the case were employed at the Naval Dockyard at Stonecutter Island. Among the employees at the Dockyard were two groups of men, one led by a man named Mak Hei and the other led by a man called Ho Kai. These were rival groups. On the 23rd July, 1953 Mak Hei and members of his group arranged to fight Ho Kai and members of his group that evening. About 7 p.m. that day the Appellant (who was not a member of either of these groups) came to see Mak Hei about certain debts which Mak Hei owed. Mak Hei told him that he was going out to have a fight. That evening three persons, including Chan Fook, were having dinner at Ho Kai's house. After dinner the

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pp.32-43 three guests left the house, and as they were walking down the street Chan Fook was attacked from behind. An eye-witness account of this attack was given by a shoe-black named Mui Wing Por. He said that between 8 and 9 o'clock in the evening of the 23rd July he got off a bus in Argyle Street. While he was standing there he saw a fight. Among the people fighting was the Appellant, whom he knew. Before the fight began the Appellant went to a bread stall and from it took a knife. He then went back to the fight and chopped a man once on the ear and once on his hand. The man then fell to the ground. The Appellant dropped the knife and ran away through a side lane. The medical evidence was that Chan Fook was brought to hospital at about 9.15 in a very critical condition and died at 9.35. A post mortem examination showed that he had a large cut wound, cutting the jaw bone, over the left side of the head, and other wounds on the right wrist, the left arm and both shoulders. On the 28th July the Appellant was arrested, and that evening he made two statements. In the first he said that Mak Hei had asked him to go to assault a man, and he had gone. Shortly after 8 o'clock they had met Chan Fook and two other persons, and Chan Fook was reeking with liquor. They had quarrelled, so he (the Appellant) took up a knife from a stall nearby. Chan Fook intended to return the blow so the Appellant chopped him twice and cut off one of his ears. He was wounded, and so the Appellant ran away, not thinking that through mistake of the hand he had died. In the second statement the Appellant said that Mak Hei had asked him to go to take part in a fight, and he had gone with him. They had met Chan Fook walking along with two people and had a dispute with him. Chan Fook was large and powerful and, moreover, was drunk. The Appellant intended to go away, but as Chan Fook did not stop he took up a chopper from a shop and chopped him on the shoulder. He chopped him a second time and then ran away, not knowing that he was dead.

pp.77-97 4. The Appellant himself was the only witness for the defence. He said that on the 23rd July he had gone to see Mak Hei late in the afternoon about some debts. Mak Hei asked him to return later. He did so, and Mak Hei then told him that he was going out to have a fight, but he did not ask him to take part in it. They both got a bus together, and when they got off it Mak Hei went up to a group of people. The Appellant went with him, still in order to press him for the debt. After a time Mak Hei and the Appellant walked by themselves to Argyle Street, and the Appellant sat down and drank some soup. He then saw a group of people following three persons down Argyle Street. He and Mak Hei followed the former

group, and as they turned a corner Mak Hei saw a policeman. He told the Appellant to go and tell the people not to start fighting, but as the Appellant approached them they had already started fighting. One man of the three ran away and the people who had been following chased him. The man turned round and fought with his pursuers, and the Appellant came up to them and said "Policeman, so wing!" The pursuers then stopped fighting, and the Appellant wanted to run away, but the man grabbed him with both his hands and kept on beating him. The Appellant said he was hitting the wrong man and managed to free himself and run away. The man went after him and hit him on the back. Thereupon the Appellant run up to a bread stall, thinking he would get hold of a pole or a bottle or something like that. He picked up a knife blindly. The man was then squatting down looking for something. The Appellant continued to run, and the man ran after him and hit him on the back of the head with an object which he could not see but he thought to be wooden. The Appellant, being then out of breath, turned round and struck the man with the knife, which he then threw away. He said that Mui Wing Por had a grudge against him because of an incident when he (the Appellant) was unable to pay for a shoe-shine. When cross-examined, the Appellant said that when first he went up to the group of people fighting, the man held him with one hand and punched him with the other. All that he wanted to do was to run away. He did run away and the man, when he caught him up, hit him on the back with his fists. It was then that the Appellant picked up the knife from the stall.

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5. In his charge to the jury, Reece J. told them that they alone were the judges of fact, and explained to them the onus of proof. He defined the crime of murder and said that while intent was necessary in order to constitute it, that must not be confused with motive. He then dealt with the question of the evidence of accomplices, because Mak Hei and certain other witnesses were accomplices in the crime. The learned Judge suggested that there was ample evidence of the facts without the evidence of the accomplices. He then said that while malice aforethought was necessary to constitute murder, it was possible to imply malice from the use of a lethal instrument which in fact resulted in death. The use of an instrument such as had been used in this case with the force which would have been necessary to cause the neck injury made it possible to imply the necessary malice. If the Appellant was able to satisfy them that he was provoked into inflicting the wound the offence would be reduced from murder to manslaughter. The learned Judge then summarised the evidence. He suggested that on the Crown evidence, apart from the Appellant's statements, there could only have been one possible verdict. However, the statements had also to

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p.116 1.10 be taken into account. The learned Judge suggested that the first statement made by the Appellant was a complete confession of murder, and Counsel for the Appellant had not challenged the genuineness of the statement. Turning to the defence, he said it had been suggested that when the Appellant took up the knife he did not intend to cause grievous bodily harm. However, a man was presumed by law to intend the natural consequences of his action, and if the Appellant had used the knife, he must be considered to have intended to cause the injuries. The defence of excusable homicide had also been suggested but there was no evidence to support it. It was then suggested that the Appellant had killed Chan Fook in self-defence. Before a person could use that defence, he had to show that the defence was necessary to protect him from bodily harm so serious as to cause him reasonable apprehension that his life was in danger. In this case there was no evidence to show that the Appellant was in immediate danger, that he had retreated as far as he could, or that he had no other way of resisting the alleged attempt. It had also been suggested that the death was caused by an accidental slashing. The learned Judge suggested that injuries such as had been inflicted could not be caused by accident. Nevertheless, it was a matter for the jury, and if they found that the Appellant acted in self-defence or inflicted the injuries accidentally, it would be their duty to find him not guilty, though the learned Judge suggested that there was no evidence to support either defence. The last of the defences submitted had been that of provocation. The learned Judge quoted the definition of provocation as "some act, or series of acts, done by the dead man to the accused, which would cause in any reasonable person, and actually caused 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." It was the duty of the Appellant to satisfy the jury that he was so provoked to use the knife. In the learned Judge's opinion there was no evidence which would justify the jury in saying the Appellant was actuated by a sudden provocation in the eyes of the law. In cases of provocation, the instrument had to bear some relation to the provocation, and here an instrument of an extremely dangerous kind had been used very violently. The learned Judge directed the jury as a matter of law that there was no evidence to justify a finding of provocation.

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p.123 1.38 6. After retiring, the jury found the accused guilty of murder but recommended him to mercy on the ground that he had no prior intention of killing. He was then sentenced to death.

7. The Appellant appealed on the following grounds:-

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- (1.) That the verdict amounted to a verdict of Not Guilty of murder,
- (2.) That the verdict was ambiguous because of the finding that the Appellant had no prior intention to kill,
- (3.) That the learned Judge had misdirected the jury that there was no evidence of provocation, that revenge was the motive and that the Appellant's statement amounted to a confession of murder.

8. The appeal was argued before Gregg and Reynolds, J.J. on the 5th March, 1954. At the conclusion of the argument the learned Judges dismissed the appeal without giving reasons.

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9. The Respondent respectfully submits that Reece, J. was right in withdrawing from the jury the defence of manslaughter. The evidence, on the view most favourable for the Appellant, was that Chan Fook first attacked the Appellant with his bare hands. The Appellant, after running away, picked up the knife from the stall and was later, according to his own account, struck on the back by Chan Fook with what he thought to be a piece of wood. There was no evidence that the attack on the Appellant was of a serious nature or such as might reasonably have caused him to fear serious injury. While the attack no doubt justified some retaliation on the part of the Appellant, it could not, in the Respondent's submission, justify the use of a lethal weapon. Furthermore, it appeared from the nature of the wounds inflicted that the Appellant had used the knife with very great violence. The Respondent respectfully submits that the learned Judge was correct in telling the jury that in cases of provocation the use of a weapon must be proportionate to the provocation offered. Such provocation as the Appellant received could not justify such use as the Appellant made of a knife.

10. No complaint was made on the appeal in Hong Kong of the directions given by the learned Judge as to the other defences which were put forward, and the Respondent respectfully submits that those directions were right.

11. The direction given by the learned Judge to the jury about the onus of proof was not, in the Respondent's submission open to any objection. At the outset of his charge, the learned Judge told the jury that the Crown had to prove the case against the

Appellant to their complete satisfaction and it was not for the Appellant to prove his innocence.

In saying to the jury at a later stage that it was the duty of the Appellant to satisfy them that he was provoked to use the knife, the learned Judge was referring, not to the general burden of proof, but solely to the issue of provocation.

The Respondent respectfully submits that in this context the direction was right. If the Crown succeeded in establishing the ingredients of the offence of murder it was the duty of the jury to convict the Appellant, unless he could satisfy them that for some reason his conduct either was excused or amounted only to a lesser offence. In any event, since the learned Judge withdrew from the jury the issue of manslaughter, this passage was of little importance.

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12. The Respondent respectfully submits that there can be no doubt as to the meaning of the jury's verdict. They found the Appellant in terms to be guilty of murder. The Respondent submits that the words "he had no prior intention" meant only that in the jury's view the crime was not premeditated. This would not make it any the less the offence of murder, and indeed the prosecution was conducted on the basis that the crime was not premeditated.

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13. The Appellant's evidence, even on the view most favourable to him, amounted, in the Respondent's respectful submission, to a confession that he was guilty of manslaughter. If, therefore, contrary to the Respondent's contention, the learned Judge was wrong in withdrawing from the jury the issue of provocation, the relief to be granted to the Appellant should be the substitution of a conviction of manslaughter for the conviction of murder.

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14. The Respondent respectfully submits that judgment of the Supreme Court of Hong Kong was right and ought to be affirmed for the following (amongst other)

R E A S O N S

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1. BECAUSE the evidence showed the Appellant to be guilty of murder;
2. BECAUSE there was no evidence upon which the jury could have been justified in finding him guilty of any lesser offence;
3. BECAUSE the learned Judge's charge to the jury

was proper in every respect;

4. BECAUSE the jury returned an unambiguous verdict of guilty of murder.

J.G. LE QUESNE

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O N A P P E A L

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(APPELLATE JURISDICTION)

B E T W E E N

CHAN KAU, alias CHAN KAI Appellant

- v -

THE QUEEN ... Respondent

C A S E FOR THE RESPONDENT

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