~~P.C.~~
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Judgment
25, 1966

IN THE PRIVY COUNCIL No. 5 of 1966

ON APPEAL FROM THE SUPREME COURT OF HONG KONG

(APPELLATE JURISDICTION)

B E T W E E N

CHAN WAI KEUNG Appellant

- and -

THE QUEEN Respondent

In forma pauperis

C A S E FOR THE APPELLANT Record

1. This is an Appeal in forma pauperis by Special Leave from the Judgment and Order of the Supreme Court of Hong Kong (Appellate Jurisdiction) dated the 8th October, 1965, whereby the Appellant's appeal against the conviction for murder and sentence of death in the Supreme Court of Hong Kong on the 11th August, 1965, was dismissed. pp.256-271

2. That the Appellant was charged with murder contrary to the common law in that he on the 12th May, 1965, in the Colony of Hong Kong, murdered Leung Piu Chuen. The Appellant was found guilty on the verdict of the jury and convicted of murder and sentenced to death by the Supreme Court in its Original Jurisdiction on the 11th August, 1965. pp.234,235

3. That the principal question arising in this appeal is whether the learned trial Judge correctly or, alternatively, adequately, directed the jury on the burden of proof of the voluntary nature of the statements allegedly made by the Appellant to the police.

4. That the case for the prosecution was that the deceased was a watchman employed by the Bonnie Hair Products Factory which had its

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premises on the 9th floor of a building and that the deceased, a night watchman, slept in this building. The deceased was last seen alive on the night of the 11th May, when the factory operatives left the premises at the end of the day. On the morning of the 12th May at about 8 o'clock the factory operatives were unable to gain admission into the building as the front doors were locked. The doors having been forced open the factory operatives came upon the dead body of the deceased lying on a camp bed with wounds all over the body and blood all over the floor.

5. That the medical evidence was that there were nine split wounds on the head of the deceased. There were three on the forehead; one on the left side of the head; two above the left eye; one on the left cheek; one on the left jaw. There was also a cut wound on the right jaw. Both eyes were bruised and the front teeth were broken - six teeth - and so were the cheek bones: there were wounds on the arm and palm of one hand and during the post mortem it was discovered that a bone in the neck, the hyoid bone, was fractured inwards. The cause of death was due to haemorrhage and shock due to these wounds, which the medical evidence ascribed to a blunt instrument. The time of death was put at sometime between 1.30 a.m. and 4.30 a.m. on the 12th May.

6. That one Chan Pui giving evidence for the Prosecution testified that the Appellant was

p.24 employed on premises above those of Bonnie Hair Products, on which premises a business connected with bulbs and bulb manufacture was carried on and that on the 11th May the Appellant was

p.37 sacked from his employment and that he entrusted to this witness a suitcase for safe keeping. This witness then testified that he did not see the Appellant after that date until the 21st

pp.37, 38 May when he came to this witness and made a request for money, at which meeting this witness told the Appellant of the murder of the watchman, at which this witness then testified that the Appellant looked very frightened. This

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witness then gave evidence that he reported his conversation with the Appellant to the police whom he understood were looking for the Appellant, and that on the 25th May he met the Appellant at the house of one of the Appellant's friends on which occasion he told the Appellant that the police were looking for him at which information the Appellant asked this witness for money in order to go to Macau or China and that this witness then testified that a meeting was arranged between the Appellant and another from whom this witness thought money might be borrowed and that at about 9 p.m. that night, shortly after this witness met the Appellant at a prescribed place a number of police officers arrived and took the Appellant away.

pp.39,40

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7. That evidence was given for the prosecution that the Appellant was interrogated at the police station and that he made two statements; confessing to the murder of the deceased. Both statements were taken down by Detective Constable Leung Shui Wing and were produced by the prosecution at the trial marked Exhibit No.P26A and Exhibit No.P30 respectively.

pp.59,60, 61,84, - 100
Ex.P26A. pp.273-277
Ex.P30. p.278 LL.10-22

8. That the case for the prosecution rested entirely on these two statements.

9. That the Appellant giving evidence in his own defence testified that the confessions were extracted from him by violence, threats and inducements.

pp.161-164, 178-187

10. That in his summing up the learned trial Judge dealt with the burden of proof on the voluntary nature of the confessions as follows:-

> "Now, that is the Crown's case. It depends upon, gentlemen, on the two confessions or one or each of the two confessions. If you have any doubts about those confessions you must acquit. Now the weight and value of those confessions and evidence is in your hands. It is for you to put such weight and to give such value to those confessions as you think proper. If you reach the conclusion that the confessions were obtained

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by threats or inducements, you will give them no weight at all. There are two confessions; each must be separately considered. If you think that both were obtained by duress or inducements then you must acquit, because there is insufficient evidence without those confessions or one of them, if you do not consider that they are voluntary. If you consider that one of the confessions, either one of them was obtained by duress or inducement then you must put it totally from your mind when considering this case. This is not a case where the defendant, the accused, is saying: "I did not mean to do it". The defence of the accused in this case is that: "It was not me; I did not do this at all". It's a complete denial."

p.234 11. That the jury retired for 4 hours and 20 minutes and then returned a verdict of Guilty.

12. That the Appellant appealed against his
p.237 conviction and sentence on the following grounds:-

"(a) That Your Petitioner was prejudiced in his trial by evidence given by a prosecution witness that Your Petitioner had embezzled some money, and that the learned trial Judge refused in the light of this to order a new trial.

(b) That the learned trial Judge misdirected the jury, alternatively, did not adequately direct the jury on the burden of proof of the voluntary nature of the statements allegedly made by Your Petitioner to the police."

13. That the appeal was heard by Rigby J., Macfee A.J., and Huggins A.J. and their Lordships delivered an oral decision dismissing the Appellant's appeal and reserving their written judgments.

p.238-271 14. That the Supreme Court on appeal in delivering its written Judgment on the 8th October, 1965, declared that the degree of proof required to satisfy a jury that statements made by an accused person were free and voluntary was proof

beyond reasonable doubt and that the learned trial Judge failed specifically to warn the jury that this burden was upon the prosecution and that if the jury were left in doubt they must attach no weight to the statements. Record

15. That the relevant passages from the written Judgment of Rigby J. and Macfee A.J. are as follows:-

"It was, and is, manifest that the case for the prosecution depended entirely upon the admissibility of the Appellant's own statements. The Appellant denied that they were free and voluntary and alleged that they had been obtained from him by inducement, duress and actual ill-treatment." p.242

.....

"That would have been the end of the matter were it not for the fact that this Court, of its own motion, drew attention to certain passages in the summing-up of the learned Judge and invited Counsel to address the Court as to whether those passages contained a sufficient and proper direction to the jury on the vital issue as to whether they were satisfied that the self-implacatory statements made by the Appellant were not only true but were also made freely and voluntarily." p.245

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"Now it is beyond dispute that the learned Judge directed the jury that if they reached the conclusion that the confessions were obtained by threats or inducements they should give them no weight at all. But there is a vital distinction between directing the jury that "if they are not satisfied" that the confessions were voluntarily made they should disregard them, and telling them that if they reached the conclusion they were not voluntarily made they should disregard them. The very essence of the complaint made against the p.249

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various passages in the summing-up to which we have referred is that the jury may very well have been left with the overall impression that unless they were satisfied that the confessions were improperly obtained they were entitled to consider them

p.250 or, in other words, that the burden was on the defence to prove that the confessions were obtained by improper or unfair means."

. . . . . .

p.251 "We would again reiterate that in the present appeal now before this Court there can be no doubt that the trial Judge did direct the jury that if they reached the conclusion that the confessions were not voluntary they should disregard them. But for the purposes of this appeal the vital part of the decision in Parkinson's case (The Times, 21st February 1964) is in the ruling of the Appellate Court: that it is for the jury to decide on the evidence before it whether a statement is voluntary, bearing in mind that the burden of proof is on the prosecution throughout. In accordance with the established principles of criminal law we can only interpret those words to be "burden of proof beyond reasonable doubt" and that it is not sufficient simply to direct the jury in the terms used by the learned Judge in the present case that if they had reached the conclusion that the confessions were obtained by threats or inducements they must disregard them, but that the Judge should have directed them in terms similar to those indicated in Bass's case (1953 1 Q.B.D. 680 at 684), namely that if they were not satisfied that they were voluntarily made they should give them no weight at all and disregard them. The distinction between the expressions used lies, of course, in clearly indicating to the jury that the burden of proof lies upon the prosecution to establish that the statements bwere freely and voluntarily made.

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The decision in Parkinson's case as to the burden of proof upon the prosecution to satisfy the jury, as distinct from the Judge, beyond reasonable doubt that a confession tendered in evidence was free and voluntary, is further fortified by the case of R. v. Fudge (The Times, 3rd November 1964). That, again, was a case largely dependent upon the admissibility in evidence of a written confession the voluntariness of which was disputed by the accused. In quashing the conviction the Court of Criminal Appeal stated, in terms, that it was binding on the prosecution to satisfy them so that they felt sure that there was no such inducement. The jury were not given a clear direction on this point, nor was it conveyed to them that, even if satisfied that the statement was true, it was inadmissible if obtained by inducement.

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The appeal was accordingly allowed and the conviction quashed.

Assuming that that case is correctly reported the decision must surely put beyond doubt that it is the view of the Court of Criminal Appeal in England that the degree of proof required to satisfy a jury that a statement made by an accused person was free and voluntary is proof beyond reasonable doubt."

. . . . . .

"In the same way, in our view, the ultimate decision must still rest with the jury, as judges of fact, as to whether the confession was free and voluntary and if they are not so satisfied - and satisfied within the meaning normally attributed to that word in the context of the criminal law - they should give it no weight at all and disregard it. Some support for this analogy may be drawn from Cleary's case (1963 48 C.A.R.116).

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"Turning now to the case before this Court, with great reluctance the Court has come to the conclusion that the learned Judge, in the course of a careful, lengthy and otherwise unexceptionable summing-up, has failed adequately to direct the jury that the burden was on the prosecution to satisfy them beyond reasonable doubt that the confessions were freely and voluntarily made, and if they had any doubt on that matter they should disregard the contents of the statements and attach no weight to them. In this case the jury retired for 4 hours and 20 minutes before they returned to give their verdict. It is clear that the only real evidence against the Appellant consisted of the statements. In the absence of those statements there was really no evidence upon which he could have been charged with this offence, let alone convicted. It is impossible to conjecture what was in the minds of the jury which caused them to take such a length of time in arriving at their verdict. But it may well be that if they had been sufficiently directed as to the position if they were left in any reasonable doubt as to the voluntariness of the statements made by the Appellant, they might have come to a different conclusion.

If it had been open to us now to do so the Court would have thought it right to allow this Appeal. The Court is, however, placed in a position of grave embarrassment and difficulty. When the point was first taken by the Court as to whether or not the directions of the learned Judge to the jury were adequate this Court, after having heard the arguments of Counsel, dismissed the Appeal, stating that we would give our reasons for so doing at a later stage. During the course of our subsequent deliberations members of the Court came to consider a number of authorities which, in the view of the Court, put a different aspect on the matter and which, most

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unfortunately, had not been cited to us by counsel appearing before us. In these circumstances we thought it proper to inform counsel that we would be glad to hear further argument. Upon the resumed hearing Crown Counsel, whilst most ably addressing us upon the further issue raised, reserved the right to take the point that this Court had in fact delivered judgment dismissing this appeal and was, accordingly, functus officio."

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"Whilst it may at one time have been open to argument that a conviction was not effective as a final and decisive order until it had been formally drawn up (see Jones v. Williams (9) and Warne v. Martin (10) the cases of R. v. Essex Justives ex parte Final (11) and R. v. Campbell ex parte Hoy (12) would appear to leave no doubt that an order of conviction (or acquittal) is final once it has been pronounced from the Bench and can thereafter only be altered by a superior court." p.255

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(9) 1877 41 J.P. 614 (10) C.L.R. 936
(11) The Times, 8th November 1962
(12) 1953 1 All E.R. 684 (13) 1933 A.I.R. (All.) 40 (14) 1946 A.C. 347.

"We are, therefore, firmly and unanimously of the opinion, however unfortunate and regrettable the position may be, that this Court is functus officio, that this appeal stands already dismissed, and that this Court has no jurisdiction to alter that decision. We can only hope and trust that the propriety of the decision of the Court dismissing this appeal may be tested elsewhere." p.256

16. That the Appellant submits that this appeal should be allowed for the following (among other)

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R E A S O N S

(1) Because the learned trial Judge failed adequately to direct the jury on the burden of proof regarding the voluntary nature of confessions whereby the Appellant has suffered a grave and substantial injustice.

(2) Because of the reasons given in the Judgment of the majority of learned Judges of Appeal. 10

DESMOND de SILVA.

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In forma pauperis

C A S E

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