Judgment 14 of 1972

IN THE PRIVY COUNCIL No. 6 of 1972

ON APPEAL

FROM THE SUPREME COURT OF HONG KONG

APPELLATE JURISDICTION

B E T W E E N

GRAHAM EDWARDS alias
DAVID CHRISTOPHER MURRAY Appellant

- and -

T H E Q U E E N Respondent

C A S E FOR THE A P P E L L A N T

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1. This is an appeal by special leave of Her Majesty in Council dated the 21st day of December 1972 from the Judgment and Order of the Supreme Court of Hong Kong, Appellate Jurisdiction dated the 1st day of June 1971 after trial before the learned Chief Justice of Hong Kong and a jury. The Appellant was charged with Murder contrary to Common Law namely that on the 1st day of December 1970 in Room 1223, Hongkong Hotel, Kowloon in the Colony of Hong Kong he did murder Ronald Alan Coombe (hereinafter called "the deceased"). On arraignment the Appellant pleaded Not Guilty but he was found guilty by the jury and was sentenced to death.

2. The questions which arise for determination in this appeal are :-

(a) whether the learned trial Judge wrongly withdrew the defence of provocation from the consideration of the jury.

(b) whether in finding that the learned

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trial Judge had wrongly withdrawn the defence of provocation from the consideration of the jury the Supreme Court of Hong Kong, Appellate Jurisdiction, were themselves in error in holding that thereby no substantial miscarriage of justice had occurred and that accordingly Section 81 (2) of the Criminal Procedure Ordinance could be applied.

(c) whether in exercising their discretion to apply Section 81(2) of the Criminal Procedure Ordinance the Appellate Court erred in holding that a misdirection in law on the defence of self-defence could and did cure a non-direction in law on the defence of provocation.

(d) whether the learned trial Judge failed properly to direct the jury upon the defence of self-defence and upon the evidence in support thereof.

(e) whether there was any admissible evidence of the motive of the Appellant; whether the learned trial Judge ought to have excluded such evidence as there was of motive or ought to have directed the jury that the same was inadmissible and should be disregarded whether the learned trial Judge misdirected the jury upon the evidence as to motive; whether the learned trial Judge ought to have directed the jury that there was no admissible evidence of motive.

(f) whether the learned trial Judge failed properly to direct the jury upon the burden of proof.

(g) whether the learned trial Judge insufficiently directed the attention of the Jury to the material point of time at which the intention to murder should be formed.

(h) whether in finding that the learned trial Judge's direction to the Jury may have given the impression that an intention to murder once formed could

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not be changed the Appellate Court were themselves in error if and to the extent that they held that thereby no substantial miscarriage of justice had occurred and that accordingly Section 81(2) of the Criminal Procedure Ordinance could be applied.

3. The facts were as follows :-

At about 2.30 a.m. on the 1st December 1970 a Mr. Simpson who was then resident in the Hongkong Hotel and asleep in Room 1427 was awakened by loud screaming and cries of "help me, help me". On looking out of the window a few minutes later he saw a person walking along a cement ledge outside a bedroom window of the hotel below the 14th floor. He told a member of the hotel staff what he had seen and heard.

On entering Room 1223 at 8.50 a.m. the assistant manager found the dead body of Dr.Ronald Alan Coombe lying on the floor. It was clothed in pyjamas and these garments were heavily blood-stained. Room 1223 was in a state of disorder as if a struggle had taken place. The blankets near the foot of the bed were heavily stained with blood and there was also blood on the carpet near the foot of the bed and on some of the furniture. The deceased had been stabbed 27 times. The majority of the wounds had been inflicted on the chest and on the front of the right arm. The police Pathologist indicated that the wounds had been caused by a knife or some similar weapon. The fatal wounds were inflicted on the chest and below the right arm-pit. There were no wounds on the back. No major blood vessels had been severed. Death was due to loss of blood and consequent shock.

From the police examination it was clear that the assailant had left the room by the window and that he had climbed from ledge to ledge from the 12th to the 17th floor, across the roof of the hotel and down some scaffolding on the side of the hotel to the Ocean Terminal.

By far the greater part of the blood in Room

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1223 was Group "O". This was the deceased's own blood. There was also some Group "A" blood on one of the bed sheets and on the window ledge. There was also a trail of blood all the way up to the roof, across the roof and down the scaffolding. It was clear that the assailant had been injured to some extent in Room 1223.

The Appellant was seen about 3.00 a.m. on the 1st December near the Ocean Terminal and at 3.30 a.m. he boarded a taxi near the Star Ferry. At this time his left hand and left leg were bleeding. His blood group is "A". He was taken to hospital where it was found that he had lacerations on the outside surface of the fourth and fifth fingers of the left hand and two sharp clean cut lacerations above the left knee, one on the outer aspect and the other on the inner aspect of the leg. The Appellant gave a number of explanations, which he later admitted were untrue, as to how he had sustained his injuries. In a written statement made on 1st December he said that while he had been visiting the deceased the latter had made a homosexual advance to him; that he had seen a knife on a table in the deceased's room, he grabbed the knife and struck the deceased and in panic kept on hitting him.

4. On the 16th day of December 1970 the Appellant made another written statement in which he said:-

"On or about midnight of the 1st of December 1970, I visited the room of R.A.Coombe to collect some money ($3,000) when I was stabbed by R.A.Coombe who apparently objected to paying blackmail. And whom I believe died after I gained possession of the knife from stab wounds inflicted in the ensuing struggle".

5. The case for the Crown was that the Appellant had been living in Australia with Mrs.Coombe - the deceased's wife - on intimate terms since about June 1970; that the deceased (who had been living with another woman) and his wife were about to be divorced; that the Appellant and Mrs.Coombe were planning a sea trip to England in February where they intended to marry; that in the event of the

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deceased's death Mrs.Coombe would receive approximately A $100,000; that in conspiracy with Mrs.Coombe the Appellant resolved to follow Dr. Coombe to Hong Kong and kill him there so that he and Mrs.Coombe would receive the benefit of the A $100,000 and that the Appellant took various precautions to avoid being followed to or identified in Hong Kong.

6. The case for the Appellant was that he felt that Mrs. Coombe, for whom he had considerable affection, had been tricked by the deceased in respect of a financial settlement consequent upon divorce proceedings then pending between the deceased and Mrs.Coombe; that accordingly he proposed to blackmail the deceased with an obscene photograph of the deceased for the sum of A $3,000; that being unable to see Dr. Coombe before he left Australia the Appellant purchased an air ticket and followed the deceased to Hong Kong where he contacted Dr. Coombe; that he showed the obscene photograph to the deceased and threatened then to publish it if Dr.Coombe failed to pay him A $3,000 within twenty four hours, that Dr.Coombe agreed to pay that sum; that on the night of the death he had 'phoned Dr. Coombe and arranged to pick up the A $3,000 in his hotel bedroom and that the Appellant had gone up to Dr. Coombe's room in order to collect the money; that Dr. Coombe cursed and swore at him; that he (the Appellant) said: "cut the crap - let's have the money"; that Dr. Coombe turned off the light and came towards him with a knife, still cursing and swearing at the Appellant; that the Appellant instinctively went into a defensive position against an underarm thrust.

At this point the Appellant's evidence reads :-

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"What happened after that I can only say was I felt an extremely searing pain in my left hand. I.....resorted to brawling tactics. I have a very quick temper. What happened after this is very confusing. All I can say is I remember seizing Dr.Coombe's arm with the knife in it with both my hands and attempting to wrest the knife from him. From the evidence at hand it can be seen that I succeeded, and in fact did use this knife on Dr. Coombe."

Q. By that time what was the state of your temper?

A. White hot."

The Appellant went on to say that he was not at any time conscious that he had the knife in his hand nor did he realise that he had injured Dr. Coombe until informed of his death at the hospital, and that it was not until he reached the Ocean Terminal that he realised he was bleeding or had a knife in his hand.

7. The Appellant's evidence was supported in a number of respects.

(i) The Crown called Mak Tsan, the room boy on duty that night on Dr.Coombe's floor, who said that at the material time he heard sounds of struggle

(ii) Dr. Lee Fook Key, the Senior Forensic Pathologist gave evidence that the Appellant had knife wounds on the left forearm, left hand and left knee which injuries were consistent with the probability of a knife

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having been first of all in one person's hand and then in another person's hand.

(iii) Dr. Chan Sin Hung described the Appellant's injuries on admission to hospital as lacerations to the fourth and fifth fingers, which were deep enough to cut over or open the tendons and that the injuries to the knee appeared to be stab wounds which had cut part of the muscle; and that there were abrasions on the left arm.

(iv) On admission to hospital the Appellant told Dr.Lo that he had been stabbed by a friend.

(v) The Appellant made the written statement referred to in Paragraph 4 above, and the medical report described the injuries and then said "All wounds healed and consistent with statement".

8. The Learned trial Judge expressly withdrew the defence of provocation from the consideration of the jury in saying :-

> Members of the jury, in my view the defence of provocation cannot be of any avail to the accused in this case.....In my view the defence of provocation is not one which you need consider in this case."

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9. It is respectfully submitted that the evidence referred to in Paragraph 6 above is evidence upon which a jury acting reasonably could have come to the conclusion that the accused, provoked by a murderous attack launched upon him by the deceased, lost his self-control and retaliated with fatal results. It is respectfully submitted that the Learned trial Judge wrongly withdrew the defence of provocation from the consideration of the Jury.

10. By their judgment of the 1st day of June 1971 the Full Court of the Supreme Court of Hong Kong decided that the defence of provocation was a defence which ought to have been left to the jury; that it was not a question of law for the judge, and that accordingly the Learned trial Judge had wrongly withdrawn the defence of provocation from the consideration of the jury, but the Appellate Court considered that it was nonetheless open to them to apply the proviso to Section 81(2) of the Criminal Procedure Ordinance which provides :-

> "On an appeal against conviction the Full Court shall allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision on any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:
> Provided that the Full Court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred".

11. It is submitted that to deprive the Appellant of the right to have the issue of manslaughter by reason of provocation left to the jury must of necessity constitute a substantial miscarriage of justice; R. -v- Bullard. [1957] A.C.635.

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12. In the course of his summing-up to the jury the learned trial judge directed the jury that if the deceased attacked the Appellant and the Appellant used more force than was necessary to defend himself, that the proper verdict was not guilty of murder but guilty of manslaughter:

> "But if he uses more force than is necessary for the purposes of self-defence then that excessive force used is unlawful, and if in that exercise of that excessive and unlawful force he kills his attacker then he is guilty of manslaughter."

The Appellate Court took the view that this was a misdirection in law, holding that :-

> .... what that misdirection did in effect (though, of course, not in theory because provocation was expressly withdrawn) was to tell the jury that conduct which might constitute an act of provocation was sufficient to reduce the crime to manslaughter even though the Appellant did not as a result thereof become no longer master of his mind.
>
> ..... By their verdict the jury necessarily rejected the possibility that the deceased attacked the Appellant in this way .... In our view the verdict of murder which was returned shows that the jury was satisfied that the deceased did not attack the Appellant first. It follows that even upon a proper direction as to the law of provocation they must have rejected that defence."

13. It is respectfully submitted that on an appeal from conviction of capital murder in which it was accepted that one of the two defences open to the accused was not put at all to the jury and the other defence was in part put erroneously, the Appellate Court erred in holding that the misdirection in law on the defence of self-defence could and did cure a non-direction in law on the defence of provocation and that it was therefore open to the Court to invoke the said proviso.

14. It is further submitted that on the facts of

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the case the conclusion of the Full Court that the jury must necessarily have rejected the defence of provocation was erroneous. It is submitted that the misdirection referred to by the Full Court is in terms limited to force used for the purposes of self-defence (albeit excessive force for that purpose).

> "But if he uses more force than is necessary for purposes of self-defence then that excessive force used is unlawful, and if in the exercise of that excessive and unlawful force he kills his attacker then he is guilty of manslaughter".

and

> "If you think that he exercised more force than was necessary in his own self-defence then you would find him guilty of manslaughter ....."

It is submitted that it was the duty of the Full Court to assume a view of the facts most favourable to the Appellant: Lee Chun - Chuen -v- The Queen /1963/ AC 229 at p.230. It is submitted that upon the evidence it was open to the jury to find the following facts :-

(i) that the deceased attacked the Appellant with a knife.

(ii) that after a brief struggle, during which the Appellant was injured, the Appellant wrested the knife from Dr.Coombe.

(iii) that the Appellant then attacked the now defenceless Coombe with the knife - not by reason of self-defence but because of loss of control due to provocation.

It is submitted that the jury might have concluded that because the evidence was that there was only one knife involved in the struggle, the person who had the knife had no reason to defend himself against the other who ex hypothesi had no weapon to attack with. That being so, the jury may have concluded that

the injuries sustained by Coombe were inflicted when the knife was in the Appellant's possession and were inflicted not for the purposes of self-defence but by reason of provocation.

By limiting the misdirection to excessive force used for the purposes of self-defence, the learned trial Judge did not encompass a finding of fact that excessive force was used but by reason of loss of control due to provocation and not in the Appellant's own self-defence.

15. It is further submitted that since the learned trial Judge directed the jury in terms that the defence of provocation was of no avail to the Appellant, it is and was dangerous and unsafe to assume that the jury must necessarily have rejected that defence. It is submitted that insufficient regard was had by the Full Court to the force of such a non-direction in plain and simple English to the different nature of the defences of provocation and self-defence; moreover that non-direction substantially undermined the whole of the Appellant's defence as put forward by his Counsel in his closing speech to the jury.

16. In the premises it is respectfully submitted that the Full Court of the Supreme Court of Hong Kong erred in holding that no substantial miscarriage of justice had occurred and that accordingly Section 81 (2) of the Criminal Procedure Ordinance could be applied.

17. During the course of his summing-up to the jury the learned trial Judge said :-

> "Now, members of the jury, you may think that he used the knife on Dr.Coombe to no mean purpose. There were 27 stab wounds on him, and you will have to consider whether those stab wounds went beyond, and far beyond, the self-defence which he was entitled to use on being attacked by Dr.Coombe with a knife. It is, of course, for the prosecution to

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negative this defence of self-defence; it isn't for the accused to prove it as true. It is for the prosecution to prove that it is not true there is no onus upon the accused; it is for the prosecution. But, looking at the facts as they are, you may well think that those facts establish to your satisfaction that the accused exercised more force than was necessary in his own self-defence."

18. Bearing in mind that the case for the defence was that Dr.Coombe had launched a murderous attack with a knife upon the Appellant it is submitted that 27 stab wounds (of which five were fatal) cannot of themselves be said to evidence excessive force by the attacked person; furthermore, the trial Judge's said direction, it is submitted, was likely to mislead the jury into thinking that there was no evidence to support the defence of self-defence and that accordingly a verdict of not guilty of murder was not open to them.

19. The case for the Crown was that the Appellant went to Hong Kong not to blackmail Dr.Coombe but in order to kill him so that Dr.Coombe's estate would benefit by approximately A$100,000 and that Mrs.Coombe would accordingly gain financially by her husband's death.

The evidence adduced in support of that proposition was as follows :-

(i) In a letter addressed to Superintendent Harris dated the 14th December 1970 (Exhibit P.31 at trial) the Appellant wrote that there were five reasons why the death of Dr.Coombe was not as a result of a pre-meditated murder plot by himself and Mrs.Coombe. The Appellant said :

"I am aware that the facts brought forward by yourself and other officers of the Hong Kong Police Force do indicate the existence of such a possibility .....From the

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information detailed herein no possible advantage or gain to anybody could be reaped from the death of Mr.Coombe".....

In detailing those reasons the Appellant said, inter alia,

"1. Mrs.Coombe's divorce settlement with her husband was to be, if my memory serves me correctly.

A. A cash settlement of $ A.3,500

... C. Transfer of certain Insurance Policies (Details unknown).

... E. A weekly maintenance of $ A.95 in the ratio of 24 : 7: 7 plus automatic proportional increases for every increase in her husband's salary ...."

and later

"5. I myself stood to gain nothing from the death of Mr.Coombe.

1.(E) At this rate of maintenance Mrs. Coombe would make approximately $A5,000 per year with high probability of an increase. Assuming that this rate was to remain standard, in thirty years Mrs.Coombe stood to make in the vicinity of $A150,000 Tax Free. By her husband's death she would receive, if my information is correct, $A.100,000 less probate, currently at 25% of the estate and other taxes her total gain would be in the vicinity of $A60,000."

(ii) The Appellant's evidence was as follows:-

In cross-examination:-

"Q. I suggest that it was the $90,000 Australian dollars that you and Mrs. Coombe had in your mind when you

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planned this expedition to Hong Kong.

A. That is quite incorrect, sir.

Q. You did know that on the death of Dr. Coombe, his estate would benefit by about 100,000 Australian dollars, didn't you?

A. I did not, sir, not until I was informed by Mr.Harris.

Q. That was the first time you knew anything about it?

A. That is correct, sir.

.....

Q. But no mention had been made of this sum of 100,000 Australian Dollars, is that so?

A. I had no knowledge of it whatsoever, sir.

.....

COURT: And who was the first person who mentioned it to you?

A. Senior Superintendent Harris....."

(iii) Superintendent Harris was questioned about this aspect of the case. In re-examination, he was asked:-

"Q. It was put to you that you suggested that there was a motive to this killing of collecting insurance money.

A. Yes.

Q. Now, how did you first learn anything about insurance on the deceased's life?

A. Several days later, in a letter from the police in Perth in Western Australia."

and on further cross-examination:-

"Q. You say that you saw the accused again and said that you had yourself information from the Perth or Australian authorities.

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A. Yes.

Q. In that interview, did you suggest the motive of insurance?

A. Yes.

Q. I see. So you did suggest the motive but it wasn't in the first interview; it was in the second?

.....

A. No, this would be the third interview. It would be I think on the 9th.

Q. On the 9th?

A. Yes.

(iv) Superintendent Harris gave evidence that at the time he interviewed the Appellant on the 9th December, Senior Inspector Gravener was also present. That officer was also questioned about the interview in these terms:-

"Q. Well Harris, for instance, admits that he suggested the motive was the insurance money .....

A. That is correct, sir. He didn't actually suggest, he just put these points to the accused.

.....

A. These points were from a report we received from Australia and Mr.Harris just put them to the accused.

.....

Q. One point was the insurance money.

A. That is correct".

(v) The only evidence given as to whether or not the deceased's estate or Mrs. Coombe would benefit by Dr.Coombe's death was elicited by way of re-examination of Inspector Gravener by the Crown as follows:-

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"Q. Would you look at P.31? That is the five reasons concerning possible premeditated murder, the letter.

....Q.... Now would you look at Paragraph 5 of that letter.... That refers to a sum of A $100,000. Paragraphs 5 and then 1E.

A. Oh yes, I am with you.

Q. In your investigations, did you find out whether there was any such sum?

A. Yes. There was a sum, approximately A$95,000, which was part of a superannuation scheme of the West Australian Institute of Technology. This scheme was part of the conditions of service of the deceased and on his death the sum, as I say, in the region of A $95,000 would be due to his estate."

20. It is respectfully submitted that the state of the evidence or lack of it was as follows:-

(a) there was no evidence at all (admissible or inadmissible) that Mrs.Coombe stood to gain financially from her husband's death. The deceased's Will, if he died testate, was not proved, and there was no evidence that Mrs.Coombe stood to inherit all or part of his estate. Nor it is submitted, were the jury entitled to draw such a conclusion

(b) that the evidence given by Inspector Gravener to the effect that his enquiries, had revealed that the deceased's estate would benefit by A $ 95,000 on his death was hearsay evidence and inadmissible.

(c) that there was no admissible evidence that the deceased's estate would benefit by the alleged or any sum at his death.

(d) that the details of Mrs.Coombe's benefit or the deceased's estates benefit set out in the Appellant's

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letter to Superintendent Harris (P.31) were provided by Superintendent Harris on the 9th December 1970 from information sent to the police officer from Australia.

(e) that the Appellant did not know or believe either before or at the time of the killing that Mrs.Coombe stood to gain financially from her husband's death

(f) as a matter of probability it would seem unlikely that the deceased, who had consulted a solicitor and instituted divorce proceedings, would leave a will in favour of his estranged wife. It would seem equally unlikely, in view of the relations between the deceased and his wife that the deceased would not make a will, on the assumption that under Australian law the wife would benefit substantially from the estate intestacy, a matter which was never proved in evidence. It would be in the highest degree unlikely that the Appellant would know at any material time whether the deceased had made a will, still less that he would know its contents. None of these difficulties in the way of the Crown's case on the vital question of motive were put to the jury by the learned trial judge.

21. The learned trial Judge dealt with the question of motive as follows in summing-up to the jury:-

"The prosecution say this: not only does that document (P.31) show a remarkable insight into Mrs.Coombe's financial position, but that that passage which I have read out to you, the prosecution suggest, is the very motive for killing, namely, that by Dr.Coombe's death, within the knowledge of the accused, Mrs. Coombe would profit from what I will call life insurance to the extent of some sixty thousand Australian dollars. It is said fairly and squarely by the prosecution that that is the motive behind the killing... You will remember... that in dealing with that particular passage which I have read out to you, the accused said

that he knew nothing whatsoever about the extent to which Mrs.Coombe would benefit from her husband's death until Mr.Harris had said to him "How much of the hundred grand did she pay you for bumping off her husband?" He said that it was Mr.Harris who told him that Mrs.Coombe would benefit to this sum of money by her husband's death. If, of course, Mr.Harris did say such a thing, then it was a grossly improper thing for him to say to an accused person who was already in custody on a charge of murder. It is for you to decide whether the accused is telling the truth when he said he knew nothing about Mrs.Coombe's likely benefit from her husband's death until Mr. Harris told him about it.... Members of the jury, that is the circumstantial evidence on which the prosecution invite you to find the accused guilty of murder on the basis that he had come up here for the express purpose of killing Dr.Coombe in order that, by arrangement with Mrs.Coombe - in order that the pair of them should benefit by the life insurance that Mrs. Coombe would get on her husband's death."

and at the end of the summing-up :-

.....it is said by....Counsel for the Defence that....it may well be true.... - the accused did not know of this insurance money amounting to some sixty thousand dollars that would come to Mrs.Coombe on her husband's death until Mr.Harris himself mentioned it. It may be that this is true, but speaking for myself - .... - it doesn't seem to me to matter very much one way or the other whether he knew of the insurance money that Mrs.Coombe would get on her husband's death...it doesn't seem to me to matter whether he knew before he came up here, or even after he came up here, as to whether Mrs.Coombe was going to benefit financially by her husband's death."

22. It is respectfully submitted that the summing-up contained the assumption, repeated on a number of occasions, that there was admissible evidence to establish that Mrs.Coombe would gain financially by reason of her husband's death. It is submitted that not only was such an assumption unfounded

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but that it was the duty of the learned trial Judge to direct the jury that there was no admissible evidence as to motive, and that they should disregard entirely the hearsay evidence referred to which had been adduced by the Crown in the re-examination of Inspector Gravener.

23. It is further submitted that in failing to direct the jury adequately as to the evidence of Harris and Gravener referred to in Paragraph 19 above as to the fact that they had informed the Appellant on the 9th December of information from Australia in respect of the deceased's life insurance, the learned trial Judge in effect misdirected the jury as to the evidence by saying that if Harris did say such a thing, then it was a grossly improper thing for him to say.

24. It is further submitted that the learned trial Judge failed properly to direct the jury upon the burden of proof and in particular failed adequately to direct the jury that the onus of proof was on the prosecution throughout, including the onus to disprove the Appellant's version and defences; further that the learned trial Judge failed to give a general direction upon the burden of proof in the summing-up but referred to it only when considering subsidiary issues; further, it is submitted that the overall impression left with the jury was that it was for the Appellant to raise a doubt rather than for the Crown to dispel all reasonable doubts.

25. The learned trial Judge further directed the jury to the effect that if they were satisfied that the Appellant went to Hong Kong with an intent to murder, it was not open to the jury to return any verdict other than guilty of murder. It is submitted that the learned trial Judge accordingly failed to direct the jury that the real issue was what was the state of the Appellant's mind at the time when he struck the deceased.

26. Moreover, the said Full Court in their

judgment dealt with the submissions contained in Paragraph 25 and concluded:-

> "The real issue for the jury was, of course, what was the state of the Appellant's mind at the time he struck the deceased... it might well be that the jury would be slow to believe the Appellant's allegation of an attack by the deceased if they were satisfied that the Appellant came to Hong Kong to murder the deceased, but it was essential that this issue be clearly put to them Insofar as the passage cited may have given the impression that an intention to murder once formed could not be changed, we think it was open to criticism."

It is submitted that in finding that the learned trial Judge's direction to the jury may have given them the impression that an intention to murder once formed could not be changed and that in further finding that it was essential that the issue be clearly put to the jury and by inference finding that the issue was not clearly put to the jury, the Full Court were themselves in error if and to the extent that they held that thereby no substantial miscarriage of justice had occurred and that the said proviso could properly be invoked.

27. The Appellant respectfully submits that the said Verdict and judgment should be reversed and that he should be unconditionally discharged or in the alternative that a judgment of manslaughter be substituted for the said verdict and judgment of murder and that such sentence be awarded as to Her Majesty in Council may seem just, for the following among other

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(1) THAT the learned trial Judge wrongly withdrew the defence of provocation from the consideration of the jury.

(2) THAT in finding that the learned trial judge had wrongly withdrawn the defence of provocation from the consideration of the jury the Supreme Court of Hong Kong, Appellate Jurisdiction, were themselves in error in holding that

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thereby no substantial miscarriage of justice had occurred and that accordingly Section 81(2) of the Criminal Procedure Ordinance could be applied.

(3) THAT in exercising their discretion to apply Section 81(2) of the Criminal Procedure Ordinance the Appellate Court erred in holding that a misdirection in law on the defence of self-defence could and did cure a non-direction in law on the defence of provocation.

(4) THAT the learned trial Judge failed properly to direct the jury upon the defence of self-defence and upon the evidence in support thereof.

(5) THAT the learned trial Judge failed to direct the jury that there was no admissible evidence as to motive; that the learned trial Judge failed to exclude inadmissible evidence as to motive or to direct the jury that the same was inadmissible and should be disregarded.

(6) THAT the learned trial Judge failed properly to direct the jury upon the burden of proof.

(7) THAT in the premises there has been a substantial miscarriage of justice.

M. STUART SMITH Q.C.

PATRICK TWIGG

No.6 of 1972

IN THE PRIVY COUNCIL

ON APPEAL

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APPELLATE JURISDICTION

B E T W E E N:

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- and -

T H E Q U E E N Respondent

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