

IN THE PRIVY COUNCIL
ON APPEAL FROM THE COURT OF APPEAL OF HONG KONG

BETWEEN:—

AU PUI-KUEN *Appellant*
and
THE ATTORNEY GENERAL OF HONG KONG *Respondent*

CASE FOR THE RESPONDENT

1. This is an appeal from an order of the Court of Appeal of Hong Kong (Briggs C. J. Huggins and Pickering J. A.) ordering a retrial of the Appellant for the offence of Murder consequent upon an appeal by the Appellant against his conviction for the said offence of Murder which appeal had been allowed. Record
2. The indictment charge the appellant with the murder of LAI Hon-shing on the 9th day of January 1976 and also with shooting at the said LAI Hon-shing with intent to do him grievous bodily harm. The trial occupied 10 days between the 20th September 1976 and 25th September 1976 and between 27th September 1976 and 30th September 1976.
3. The relevant Hong Kong statutory provisions relating to the Court of Appeal's power to order a retrial are as follows:—
20 "S.83E(1) Where the Full Court allows an appeal against conviction and it appears to the Full Court that the interests of justice so require, it may order the appellant to be retried."
The foregoing power is now exercisable by the Court of Appeal.
4. Evidence was given for the Crown as follows:—
The deceased was a young man who met two of his friends LEE Wai-tang and WONG Hon-keung at the latter's home at about 9.10 p.m. on the 9th January 1976 and left from there to proceed to the Mayfair Theatre in Tai Kok Tsui. They travelled on foot and at approximately
30 9.20 p.m. arrived at the junction of Argyle Street and Sai Yeung Choi Street. Argyle Street continues to the west where it intersects with Nathan Road.
5. As the three young men were moving across Sai Yeung Choi Street, a yellow B.M.W. motor car driven by Appellant turned into Sai Yeung Choi Street and cut in front of the deceased and his companions bumping into LEE Wai-tang's thigh. This caused an exchange of words. Appellant then drove his car to the west side of Sai Yeung Choi Street parked and then alighted.

Record

6. Appellant a Detective Constable at the time off duty but nevertheless armed with a loaded .38 Police Issue Colt revolver alighted.

7. Appellant went to the back of his car. There followed an angry exchange of abusive language and a fight broke out. Evidence adduced by the Crown conflicts as to who struck the first blow.

8. The deceased and his companions were not armed and blows were struck at Appellant. A Chinese female companion of Appellant (not called to give evidence), remained in the car and according to LEE and WONG called out words to the effect "Don't fight" LEE called out "Go" and the three young men ran off. LEE ran south along Sai Yeung Choi Street and WONG west along Argyle Road turned left and then ran south along Nathan Road. 10

9. Evidence is in conflict as to when shots were fired from Appellant's revolver. However it is not in dispute that three shots were fired in total. WONG was accompanied by the deceased in his flight from the altercation and it seems clear two shots were fired in the vicinity of the Sai Yeung Choi Street, Argyle Street intersection and one in Nathan Road.

10. The deceased collapsed in Nathan Road and in that vicinity a passer-by received a stomach wound from a bullet which had ricocheted. A Pathologist determined that deceased had two pair of bullet wounds in his body i.e. two entry and two exit wounds each entry wound was on deceased's back one minor wound to the back of the right arm near the arm-pit, the other fatal wound on deceased's left upper back. The fatal bullet exited in the left upper chest. The track of each wound was slightly upwards. 20

11. It was the Prosecution's case that appellant unlawfully fired three shots at deceased intending to kill him or cause him grievous bodily harm and that at that time he was neither acting in self defence nor in the "prevention of crime or in effecting or assisting in the lawful arrest of offenders or of persons unlawfully at large."

12. Participants in the struggle and eyewitnesses gave evidence summarised as follows:— 30

p. 142

(a) LEE Wai-tang walked with Deceased and WONG Hon-keung on the night in question and was in front of his two friends at the intersection of Sai Yeung Choi Street with Argyle Street when a BMW car turned into Sai Yeung Choi Street struck him a slight blow to his person about the level of his knee. The car stopped the driver abused him with foul language and then the car moved on to the opposite side of the road. Whereupon the driver alighted and approached witness and his friends, an verbal altercation followed and then the driver (appellant) punched the witness. Witness and his two friends came to his assistance, a general melee followed. The three friends appeared

p. 143

p. 144-6

p. 148

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- to be getting the “better of the fight” Witness heard appellant’s female companion seated in the car shout “Don’t fight”. Then he called “Run” and then he himself ran along Sai Yeung Choi Street. He was frightened and felt it was wrong for three to fight against one. Witness never saw the driver being held from behind by any person. He returned to WONG Hon-keung’s home later watched television and saw a news item after which he WONG and WONG’s father went to Mongkok Police Station voluntarily. Record p. 149
- 10 Witness did not hear any noise resembling a gunshot. p. 151
- Witness conceded that he ran away “very fast” because he was frightened and did not want to become involved “with police and Court proceedings”. p. 153
- Witness testified appellant never identified himself as a Policeman. He agreed the car grazing him annoyed him and denied “banging on” the car. Witness denied making a special sign consistent with membership of an illegal society in Hong Kong when appellant approached him. Witness denied concocting any story with WONG before reporting to Police. p. 165
p. 169-170
p. 175-176
- 20 (b) WONG Hon-keung accompanied the deceased and LEE Wai-tang on the night in question. He was behind LEE Wai-tang when the BMW car grazed LEE. No one struck the car in retaliation but the driver used foul language towards LEE. The car was parked on the opposite side of the roadway from where the incident had occurred. The driver alighted and swore at LEE and then punched him. Appellant (the driver) appeared “ferocious”. Witness went to help LEE and assisted him to fight with the driver. LAI Hon-shing was also involved in the fight which became a “confused scuffle” those fighting with the witness gaining the upper hand. Witness heard the passenger in Appellant’s car shout and also LEE shouting “Run”. He heard appellant threaten that “He would pull out his revolver and shoot us all to death and doom to our whole family”. As the Appellant uttered the threat he saw the appellant use his right hand to reach to the rear of his waist on the right side. p. 186
p. 186
p. 188
- 30 Witness ran down Argyle Street, left into Nathan Road and having run down Argyle Street he looked back and saw LAI Hon-shing running behind him some 3 to 4 feet away. He heard a bang before he reached Nathan Road and heard another shot when he was in Nathan Road. He at first thought that appellant might be a Policeman when he arrived home. After hearing a T.V. announcement he and LEE spoke and later went to Mongkok Police Station. Witness denied changing his story because his evidence given before a coroner’s inquest was an impossible story. He denied that he or his companions had “banged” on appellant’s car. p. 191
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p. 40
- p. 41
- p. 47
- p. 48
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- (c) Tso Siu-tat gave evidence that he was on the upper deck of a bus travelling along Argyle Street in Nathan Road and saw 4 persons fighting at the corner of Argyle Street and Sai Yeung Choi Street. That no weapons were being used and that the participants were sometimes “lumped together” and sometimes “separated”. Witness agreed that a person was “grabbing another’s neck” and two others were assaulting the person held.
- (d) FONG Bun stated that at about 9.30 on the night in question he was walking down Argyle Street towards Nathan Road. That he saw the parked BMW car. He observed one person alight from the car. That person walked to the rear of the car and argued with two youths. At this time he was some forty feet away. He stopped and looked and saw the fight. That all used foul language. That one of the “three” hit the driver of car first. That in the course of the fight the driver was struck and fell backwards, that the driver struck back, that one of the youths grabbed the driver’s neck while the other two hit him. He then saw people running and heard noise like “firecrackers” as they were running. That this noise came from the scene. That the sound of the “firecrackers” occurred after two of the youths had run about five feet from the scene of the struggle. Two persons ran along Argyle Street followed by the appellant. He did not see any of the participants in the fight carrying anything. He agreed that this was not a stationary fight. He said that he could not remember if at the time the shots were fired whether the driver was being held by the neck. Nor did he recollect having said that on any previous occasion. “It seems that I said this although I cannot remember exactly now” and he went on to reply to counsel. “Q. While the driver was so held you heard two noises like firecrackers? A. “Yes it seems that was so.”
- (e) CHEUNG Him watched the fight from behind an iron grill in a bank building outside of which the BMW car was parked. The driver alighted and approached three youths standing at the junction of Argyle Street with Sai Yeung Choi Street. A conversation or argument commenced and fighting broke out. A youth delivered the first blow to the driver of the car. He did not observe any holding of one person by another during the fight. He saw one person fall and rise immediately. After this the youths began to run. He heard a girl shout “Not fight”. One youth ran along Sai Yeung Choi Street. The other two ran along Argyle Street with the driver following the two. He did not hear any shots. The witness was recalled later and demonstrated how one of the

- youths held his hands outstretched with palms facing upwards. He did not notice any folding of the fingers in this gesture. Record
- 10 (f) WONG Moon-lam accompanied his wife on the evening in question was walking along Argyle Street towards Nathan Road. He saw the car turn into Sai Yeung Choi Street, stop and the driver approach three young men using foul language. Witness proceeded on his way looked back and saw the fight. He walked further, heard a bang, turned around to look and that a short while later there was another bang. He saw a blue flash at the time of the second bang and within a short period of time somebody ran past him. He saw two persons being chased by a third who was holding a pistol like object in his hand. A distance of approximately 30 feet separated the pursuer from the pursued. p. 84
p. 87-88
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- 20 He walked on to Nathan Road and turned left. Before this he heard a third bang. After entering Nathan Road he saw a group of people in Nathan Road and went up to them and saw a youth lying on the ground. This person he identified as one who had been involved in the fight. Witness did not get any impression that the fight constituted a robbery. p. 93
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- (g) POON Lai-ying wife of WONG Moon-lam substantially corroborated his account of the incident. She added that she saw one of the persons pursued actually fall down onto the pavement in Argyle Street get up and ran back in the opposite direction and the other one turn left into Nathan Road. She acknowledged that her recollection was not clear. p. 101
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p. 111
- 30 (h) TAM Kin-kwok stated that he was walking along Argyle Street towards Sai Yeung Choi Street. Then he stopped about 10 feet from the intersection and was facing Nathan Road when he heard a sound resembling a firecracker. He turned to look and 3 to 4 seconds later he saw a man running past. He heard a second bang 4 or 5 seconds after the first. He saw a person holding what might be a revolver and heard him uttering foul language. He went to Nathan Road and saw a young man lying on the pavement. Witness acknowledged that he had only a "very vague recollection of what happened." p. 112
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p. 117
- 40 (i) FUNG On-na a Sales girl was in Argyle Street at the junction of Nathan Road when she heard a shot. A short while later she heard a second shot after which two persons ran round the corner from Sai Yeung Choi Street followed by a third person. She walked back along Nathan Road and saw a young man lying on the pavement. p. 125-127
- (j) POON Leung was walking along Nathan Road when a man running towards him bumped into him. Witness stopped then two more men approached him the one in front "twisted his p. 128-9

Record
p. 130

hand or his arm” at the man behind. The man following (Appellant) was holding an object in his left hand which looked like a pistol. Then witness heard a bang and the man in front fell into the pavement. Witness demonstrated how the man in front swung around before the shot was fired.

p. 135-136

13. Police officers who attended the scene gave evidence as follows:—

p. 137-140

(a) Constable LI To-sing stated he observed deceased lying on the ground he spoke to Appellant who stated that “somebody wanted to snatch his revolver.”

(b) Sgt. LI Kin-ping found the deceased on the pavement in Nathan Road and a short distance away a wounded man, witness spoke to appellant who said “Sergeant it was I who opened fire. He snatched my revolver” pointing to the youth lying on the ground. Witness formed the impression that someone had attempted to snatch appellant’s revolver. **10**

p. 230

(c) Sgt. YIP Kai stated that he interviewed Appellant at Nathan Road and that Appellant described an incident in Sai Yeung Choi Street which included “One of the two persons assaulting him put his hand over his waist in order to snatch his revolver. At that time he tried his best to struggle and that he himself pulled out his revolver from this part (witness indicating). The three youths seeing that he had pulled out his revolver started to run. Then he fired two shots at one of the three”. . . . Appellant then described the chase and went on to say . . . he saw the young man outside 656 Nathan Road pavement and turn round then he fired the third shot”. Appellant stated to this witness that the three shots were not aimed, witness observed some signs of injury to Appellant. **20**

p. 261

p. 263

p. 264

p. 265-6

14. Appellant gave evidence on affirmation and stated at the relevant time he was off duty. That he was driving his BMW car with a friend of his wife’s down Argyle Street towards Nathan Road at about 9.30 p.m. That he turned left into Sai Yeung Choi Street travelling slowly. That he felt some people banging on the near side rear part and the near side bonnet of his car and that he observed three young men with a “Teddy Boy” appearance outside his car one of whom made faces at his passenger saying “Wah”. That he moved his car forward to the opposite side of the road, parked it and alighted. Two of the youths were waving him to come out. He walked towards these men and disclosed his identity to all three. That he was abused verbally upon which he said to LEE Wai-tang that he wanted to arrest him. That Lee made a sign known to appellant as an identification sign of the 14K Triad Society upon which appellant said “Fuck you I will arrest you anyway”, that he approached Lee who hit him in the face. Appellant retreated to railings on the side of the road with the three attacking him, he advanced but was grabbed from behind around the neck. That he was concerned during the struggle that his gun **30**

p. 267

p. 268

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might be snatched and that while he was being attacked and held by the neck someone was feeling at the right side of his waist. But that his revolver was on his left side. That a moment arrived in the fight when he drew his revolver with his left hand. He was still held by the neck. He aimed at the person immediately in front of him and opened fire once. He was struck again and fired a second shot. These two shots were almost fired in succession. That his head was tilted backwards and the figures in front of him were shadowy. He was released, his assailants were running. He gave chase along Argyle Street into Nathan Road. He was catching up with one of the young men who then paused, turned and swung his right hand towards Appellant. Appellant then aimed at the ground and fired one shot to frighten deceased who ran off. Appellant caught up with him. Deceased said he was in agony and squatted down Appellant assisted him to lie down then went and dialled 999. He returned to deceased saw a Police Sgt. had arrived then went back to his car spoke to his passenger then took his car key and returned to Nathan Road. He later went to hospital and received treatment for injuries. Appellant stated he gave a short account as to what happened to Sgt. Yip. When at hospital he found that his jacket had been torn. He later handed it to Police as an exhibit.

Appellant was cross-examined and he alleged that when he heard the initial bang on his car he thought it was a friend or that it was teddy boys "out to make trouble". He continually alleged he acted without anger.

He maintained that the grip around his neck was not reduced until after the said shot was fired and that when he fired he could only see the hair of two of his attackers and that he did not think of firing a shot at the ground alleging he was not in control of himself at the time.

He denied both shots had been deliberately aimed after the youths had started to run. Appellant stated that when he fired the third shot in Nathan Road he thought he was going to be attacked and alleged he had no alternative to this.

Appellant acknowledged that on a previous occasion he had referred to his aiming at deceased's leg but asserted that this was a mistake.

Appellant asserted Sgt. Yip might have got "mixed up" and that he "did not make a record immediately".

15. The case for the defence was that Appellant acted in self defence or lawfully in the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders. Appellant asserted he was concerned about an attempt to snatch his revolver.

16. Appellant was convicted of the count alleging the murder of LAI Hon-shing. Appellant faced one further count on the indictment arising out of the third gunshot namely "shooting with intent to do grievous bodily harm" contrary to Section 17 of the Offences Against the Person Ordinance, Cap. 212.

Appellant was acquitted of this Charge by a majority verdict.

Record
p. 269
p. 271-2

p. 273

p. 274

p. 275

p. 276

p. 282

p. 297

p. 300

p. 301

p. 302

p. 318

p. 327

17. An appeal against the conviction of the appellant was heard by the Court of Appeal of Hong Kong (Briggs C. J., Huggins & Pickering J. A.) on the 20th and 21st of January 1977. After hearing argument on Appellant's first three grounds and part of his fourth ground of Appeal appellant's conviction was quashed. Consequent upon this acting under the provisions of Section 83E(1) of the Criminal Procedure Ordinance, Chapter 221 of the Laws of Hong Kong the Court of Appeal made an order for the retrial of Appellant.

18. On the 3rd day of February 1977 Appellant's Counsel moved the Court of Appeal to reconsider the question of a new trial. The Court of Appeal being satisfied it was not functus officio ordered that the matter be set down for further argument. **10**

19. On the 16th and 17th days of February 1977 the Court of Appeal heard argument on the question of retrial and on the 17th of February aforesaid an order for Retrial was made.

20. The Appellant in his Petition to Her Majesty in Council for special leave to appeal raised as a Proposed Ground, inter alia,

“The paramount factor in deciding whether or not a retrial shall be ordered is or ought to be the strength or otherwise of the evidence to be adduced by the prosecution.” **20**

21. This has been reformulated in the case for the Appellant as:—

- “6. (a) In deciding whether the interests of justice so require and/or in deciding how to exercise the discretion to order a re-trial under Section 83E(1) of the Criminal Procedure Ordinance the paramount factor in deciding whether or not a re-trial should be ordered is or ought to be the strength or otherwise of the evidence adduced by the prosecution.
- (b) The test to be applied should be that a re-trial should not be ordered unless the Court of Appeal on an examination of the transcript of the Trial is satisfied that a Jury **30** properly directed would probably convict on the evidence adduced in the Trial but in any event should not be ordered where it is likely to cause an injustice to the accused person.”

22. The Respondent respectfully submits that the correct principles to be applied should be as follows:—

- (a) In deciding whether the interests of justice so require and/or in deciding how to exercise the discretion to order a re-trial under Section 83E(1) of the Criminal Procedure Ordinance one of the factors to be taken into account in deciding whether or not a **40** retrial should be ordered is or ought to be the strength or otherwise of the evidence adduced by the prosecution.

(b) One of the tests to be applied should be:—

Record

(i) a retrial should not be ordered when the Court of Appeal on an examination of the evidence is satisfied that further conviction would be improbable *or* would be unsafe *and* unsatisfactory.

Or alternatively

(ii) A retrial should be ordered when the Court of Appeal on an examination of the evidence is satisfied that a jury *properly directed* could *reasonably convict*.

10 23. The Respondent further respectfully submits that the decision of the Court of Appeal to order a retrial was correct and ought to be affirmed for the following (among other)

REASONS

1. That the question as to whether or not a retrial should have been ordered was clearly a matter for the Court of Appeal to consider in its discretion and that this discretion was properly exercised.
2. That in the interests of Justice the order for retrial was correct both in fact and in law.
- 20 3. That the Prosecution is not (and has never been alleged to be) seeking to fill by retrial a gap in its own case which might have been filled at the trial.
4. That upon an objective analysis of the evidence adduced in the Trial of the Appellant, a conviction would not be improbable nor unsafe and unsatisfactory.
5. That upon an objective analysis of the evidence adduced in the Trial there is every prospect that a jury properly directed could reasonably convict if the same evidence is adduced in a further trial.

B. T. CAIRD

