Privy Council Appeal No. 39 of 1977

Au Pui-kuen — — — — — — — *Appellant*

v.

The Attorney General of Hong Kong — — — *Respondent*

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE THE PRIVY COUNCIL, DELIVERED THE 4TH DECEMBER 1978

Present at the Hearing:

LORD DIPLOCK

LORD SIMON OF GLAISDALE

LORD SALMON

LORD EDMUND-DAVIES

LORD KEITH OF KINKEL

[*Delivered by* LORD DIPLOCK]

This is an appeal from an order of the Court of Appeal of Hong Kong dated 17 February 1977 whereby it allowed the appeal of the appellant Au Pui-kuen against his conviction of murder and (by a majority) exercised its discretion under s.83E(1) of the Criminal Procedure Ordinance to order that the appellant be re-tried.

The respondent, the Attorney General of Hong Kong, does not contest that part of the Court of Appeal's order which quashed the appellant's conviction. He is concerned only to uphold the order for a new trial. As their Lordships have reached the conclusion that they would not be justified in advising Her Majesty that the order of the Court of Appeal ought to be interfered with, their Lordships will refrain from saying any more about the evidence adduced in the previous trial of the appellant than is necessary for a proper understanding of the circumstances in which his conviction came to be quashed.

The appellant was a detective constable in the Royal Hong Kong Police Force. On 9 January 1976 at a time when he was not on duty he got into a dispute with three young men in a public street. This developed into a fight between the appellant and the three young men. It took place in the presence of a number of eye-witnesses, and in the

course of it the appellant drew his revolver and fired three shots. One shot killed Lai Hon-shing, one of the three young men with whom he had been struggling; another shot injured a bystander.

A Coroner's Inquiry into the death of Lai Hon-shing was held between 2 February and 20 May 1976 at which the appellant gave evidence. The Coroner's jury of three brought in a verdict of " excusable homicide ". Nevertheless, pursuant to leave granted by the Chief Justice, an indictment against the appellant was filed in the High Court based upon the evidence called at the inquest. It charged the appellant on two counts: one of the murder of Lai Hon-shing, and one (in respect of the second shot) of shooting with intent to do grievous bodily harm.

The trial, before Mr. Justice Li and a jury of seven, took place between 20 and 30 September 1976. The jury returned a verdict of guilty on the murder count and not guilty on the other count.

The appellant applied to the Court of Appeal for leave to appeal against his conviction. Numerous grounds of appeal were filed. The first four of these alleged misdirections of the learned judge on the law relating to such matters as self-defence and the defence available to a police officer who kills in the legal exercise of his duty. At the hearing of the application on 21 January 1977 these objections to the summing up in point of law were argued first; the Court of Appeal held that the judge's direction as to self-defence was erroneous in law. The president (Briggs C.J.) stated that the application for leave to appeal would be granted, the appeal allowed and the conviction quashed. The president then invited submissions on the question of re-trial. After hearing brief arguments by counsel the president announced that (by a majority) the court would order a new trial.

Counsel for the appellant on reflection considered that he had not sufficiently developed his arguments against a new trial. On 3 February 1977 he applied for a further hearing on this question. At the hearing of the application two points were argued. The first was whether the Court of Appeal had become *functus officio*. This was decided in favour of the appellant because, although the order for a new trial had been pronounced orally at the conclusion of the hearing on 21 January 1977, it had not yet been drawn up and served upon the trial judge. The second point argued was whether counsel for the appellant should be granted an opportunity of addressing the court further on what he submitted was the weak and unsatisfactory nature of the evidence adduced by the prosecution at the trial. Submissions were made as to the importance which an appellate court in exercising its discretion to order a new trial ought to attach to the strength of the evidence that had been adduced by the prosecution at the previous trial.

In the course of the argument the Chief Justice indicated that, having already read the transcript of the whole of the evidence given at the trial, he was of opinion that it was not sufficient to justify a conviction. At the conclusion of the argument and a short retirement he announced that a further hearing would be granted. Neither he nor the other members of the court (Huggins and Pickering JJ.A.) gave oral reasons at the hearing for the court's decision to allow a further hearing; but at some time later, following what appears to be a long-established practice in Hong Kong, a document bearing the date 3 February 1977, described as a " Judgment " and purporting to be delivered by Huggins J.A., was placed in the Court File and a copy of it was supplied to the librarian of the Supreme Court Library for filing there. It gives reasons for the Court of Appeal's decision on 3 February 1977 to allow a further hearing

on the question whether a new trial should be ordered; but the contents of the document were never read out in open court, nor were the parties supplied with copies or even informed of its existence—which in fact they only discovered by chance.

Their Lordships appreciate that, particularly in criminal cases, it may be desirable, in order to avoid delay, that a court should announce its decision orally at the conclusion of the hearing and state that reasons for the decision will be rendered in writing later. This is a common practice in criminal appeals and an analogous procedure is often adopted by this Board. It is, however, in their Lordships' view, important if the court proposes to provide written reasons for its decision later (1) that it should announce in open court that such is its intention; (2) that the written reasons when prepared should be " handed down " to the parties or otherwise formally communicated to them; and, if they relate to proceedings that have taken place in open court, (3) that the written reasons should be available for public inspection. In so far as the current practice in Hong Kong departs from any of these three requirements it ought, in their Lordships' view, to be changed.

The further hearing ordered on 3 February 1977 took place on 16 and 17 February 1977, when counsel addressed the court upon discrepancies in the accounts given by various eye-witnesses of and participants in the fracas in the course of which Lai Hon-shing was shot dead by the appellant. At the conclusion of this hearing the President announced that by a majority (Huggins and Pickering JJ.A.) the court had decided to order a new trial. It is against this order that appeal is brought by special leave to Her Majesty in Council.

Their Lordships have already indicated that the power of the Court of Appeal of Hong Kong to order an appellant in a criminal appeal to be re-tried is a discretionary power. It is conferred in the broadest terms by s.83E(1) of the Criminal Procedure Ordinance:

> " Where the Court of Appeal allows an appeal against conviction and it appears to the Court of Appeal that the interests of justice so require, it may order the appellant to be retried."

The power to order a re-trial when a conviction is quashed owes its origin not to the common law of England but to the Indian Code of Criminal Procedure more than a hundred years ago. A similar power, not always conferred by identical words, has subsequently been incorporated in the criminal procedure codes of many other Commonwealth jurisdictions. In some, as was the case in Hong Kong before 1972, the power to order a new trial is unqualified by any explicit reference to the requirements of justice; in some " *shall* order " is substituted for " *may* order " which appears in the Hong Kong Ordinance. In their Lordships' view these minor verbal differences are of no significance. The power to order a new trial must always be exercised judicially. Any criminal trial is to some degree an ordeal for the accused; it goes without saying that no judge exercising his discretion judicially would require a person who has undergone this ordeal once to endure it for a second time unless the interests of justice required it. So the amendment to the Hong Kong Criminal Procedure Ordinance which inserted the express reference to the interests of justice did no more than state what had always been implicit in the judicial character of the unqualified power to order a new trial conferred by the Indian Criminal Procedure Code and the pre-amendment terms of the Hong Kong Criminal Procedure Ordinance. The pre-amendment terms of the Hong Kong Ordinance were, in their Lordships' view, rightly construed in *Ng Yuk Kin* v. *Regina* (1955) 39

H.K.L.R. 49 as authorising the ordering of a new trial only in cases where the interests of justice so required.

The discretion whether or not to exercise the power to order a new trial in any particular case is confided to the Court of Appeal of Hong Kong and not to their Lordships' Board. To exercise it judicially may involve the court in considering and balancing a number of factors some of which may weigh in favour of a new trial and some may weigh against it. The interests of justice are not confined to the interests of the prosecutor and the accused in the particular case. They include the interests of the public in Hong Kong that those persons who are guilty of serious crimes should be brought to justice and should not escape it merely because of a technical blunder by the judge in the conduct of the trial or his summing-up to the jury.

It would not, in their Lordships' view, be helpful to attempt a catalogue of the various factors which the Court of Appeal should take into consideration in determining how to exercise their discretion, still less to make any suggestion as to the relative weight to be given to them. The factors that are relevant and their relative importance may vary greatly as between one case and another. These are matters which call for the exercise of the collective sense of justice and common sense of the members of the Court of Appeal of Hong Kong, who are familiar, as their Lordships are not, with local conditions. Their Lordships would not interfere with that court's exercise of its discretion in such a matter unless they were satisfied that it must have reached its decision as to whether or not to order a new trial by taking into consideration matters to which it ought not to have had regard or by failing to take into consideration matters to which it should have had regard, and that in consequence a substantial injustice had been done.

In the instant case, their Lordships do not know all the factors that the majority of the Court of Appeal took into account in reaching their decision of 17 February 1977 that there should be a new trial; for neither at that time nor thereafter have they given their reasons for it. If a new trial is to be ordered it is often the case that in the interests of justice at the fresh trial, the less said by the Court of Appeal, the better. In the absence of disclosed reasons their Lordships can infer that the Court of Appeal took into account the matters urged upon them by counsel for the appellant and repeated at the hearing before their Lordships.

Two of these matters can be disposed of briefly. The first was that the first trial was both preceded and accompanied by virulent publicity prejudicial to the appellant and that the second trial might attract a similar publicity campaign against him. In their Lordships' view the weight to be attached to this factor was pre-eminently a matter for a Hong Kong court. So was the weight to be attached to the second matter relied upon, viz., that a new trial would, in effect, inflict a third ordeal on the appellant since before the first trial he had appeared as a witness at the Coroner's Inquiry.

A third matter, which could not be relied upon before the Court of Appeal, was the lapse of time between the date of the killing in January 1976 and any new trial which could now take place. Their Lordships are informed that if the Court of Appeal's order of 17 February 1977 had not been appealed against the re-trial could have been heard within a couple of months, viz., by April 1977. Any delay beyond that date is of the appellant's own making and no specific ground has been advanced to show that it will operate to his disadvantage upon a re-trial.

The principal ground upon which it was argued before their Lordships that a new trial was not required in the interests of justice, was that the Court of Appeal had erred in law in holding that it was not a condition precedent to any exercise of their discretion in favour of ordering a new trial that they should be satisfied that it was *probable* that a fresh jury properly directed by the judge would convict the accused upon the evidence adduced at the previous trial. This argument had been addressed to and considered by the Court of Appeal at the hearing on 3 February 1977. It is referred to in the so-called judgment of Huggins J.A. bearing that date and subsequently placed in the Court File; so the view of the Court of Appeal upon it is a matter of knowledge and not merely a matter of inference.

The strength of the evidence adduced against the accused in the previous trial is clearly one of the factors to be taken into consideration in determining whether or not to order a new trial. At the one extreme it may be so tenuous that a verdict of guilty upon that evidence would be set aside as unsafe or unsatisfactory under s.83(1) (*a*) of the Criminal Procedure Ordinance. In such a case the Court of Appeal would be exercising its discretion unjudicially if it ordered a new trial; for under the adversary system of criminal procedure which is followed in common law jurisdictions it would be contrary to the interests of justice to allow a new trial so as to give the prosecution a second chance to get its tackle in order by adducing additional evidence. In the U.S.A. where new trials in criminal cases are a commonplace a similar principle has recently been held by the Supreme Court of the United States to be applicable in both Federal and State courts. (See *Burks* v. *U.S.* 437 U.S.; *Greene* v. *Massey* 437 U.S.)

At the other extreme the evidence at the previous trial may have been so strong that any reasonable jury if properly directed would have convicted the accused and that no miscarriage of justice had actually occurred. In such a case instead of quashing the conviction and ordering a new trial the appropriate course would be to dismiss the appeal under the proviso to s.83 (1).

Between these two extremes, however, there lies a whole gradation in the apparent credibility and cogency of the evidence that has been adduced at the trial rendered abortive by some technical blunder of the judge. The strength or weakness of the evidence is a factor to be taken into account but it is only one among what may be many other factors; and if the Court of Appeal are of opinion that upon a proper consideration of the evidence by the jury a conviction might result it is not a necessary condition precedent to the exercise of their discretion in favour of ordering a new trial that they should have gone further and reached the conclusion that a conviction on the re-trial was probable.

In the so-called judgment of Huggins J.A. this question was dealt with thus:

> "The true principle is that the court will *not* order a new trial where a conviction is improbable or where a conviction will, assuming the same evidence is given, be unsafe or unsatisfactory. In any other case the court will consider the strength of the evidence as just one of the factors relevant to the determination of what are the interests of justice. It is a factor which in some cases may assume greater importance than in others."

In their Lordships' view this states the matter correctly, although in one respect it may be too favourable to the accused. If by the reference to a conviction being "improbable" is meant no more than that the court

believes that an acquittal is more likely than a conviction, there may be cases where this belief does not in itself provide a conclusive reason for not ordering a new trial. As was pointed out by Gould Acting C.J. in *Ng Yuk Kin* v. *Regina* (1955) 39 H.K.L.R. 49 at p. 60, which was a case of rape, there may be cases where it

> " is in the interest of the public, the complainant, and the appellant himself that the question of guilt or otherwise be determined finally by the verdict of a jury, and not left as something which must remain undecided by reason of a defect in legal machinery ".

Their Lordships refer to this because there had been dicta in previous cases in the Court of Appeal of Hong Kong some of which lent colour to the view that the court ought to be satisfied that there is a strong probability of conviction on the re-trial. The latest of these was in ***Aplin and Ors.*** v. *Reg.* (1976) H.K.L.R. 1028 where it was said (at p. 1039):

> " in considering the issue of retrial a question of paramount importance is the prospect of a further successful prosecution ".

The " paramountcy " here claimed for the factor of the likelihood of a conviction upon the re-trial was rightly rejected in the so-called " judgment " in the instant case.

In their Lordships' view there is nothing in the material before them that could justify the inference that in exercising their discretion the majority of the Court of Appeal took into consideration any matters to which they should not have had regard or failed to take into consideration any matters to which they should have had regard. Their Lordships accordingly can see no ground upon which they would be justified in interfering with the court's order that the appellant be re-tried.

Their Lordships will humbly advise Her Majesty that the appeal be dismissed.

310964-3 Dd 119941 70 1/79

In the Privy Council

AU PUI-KUEN

v.

THE ATTORNEY GENERAL OF HONG KONG

DELIVERED BY
LORD DIPLOCK

Printed by HER MAJESTY'S STATIONERY OFFICE
1978