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IN THE PRIVY COUNCIL No. 23 of 1983

ON APPEAL
FROM THE COURT OF APPEAL OF HONG KONG

BETWEEN:

LAU SIK-CHUN Appellant

and -

THE QUEEN Respondent

CASE FOR THE APPELLANT

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1. This is an appeal from the Judgment of the Court of Appeal of Hong Kong (Sir Alan Huggins, VP., Yang J.A. and Barker J.A.) dated the 10th of February, 1982, whereby they dismissed the Appellant's appeal against his conviction on the 18th of August, 1981, for the murder of one Ng Fuk-Nam in the High Court of Hong Kong (Mr. Commissioner Barnes sitting with a Jury) as a result of which the Appellant was sentenced to death.

p.246 l.30 - p.254 l.15

p.237 l.14 - p.243

2. The Appellant was charged, together with one Yeung Kwong-hung, upon an indictment containing five counts. The first count was one of murder and charged: "Yeung Kwong-hung and Lau Sik-Chun on the 26th day of June, 1980, at the Good World Billiard Room, 8th Floor, 80 Sai Yeung Choi Street, Mongkok, Kowloon, in this Colony, together with Lau Sik-hung, Lau Hing-Sang and other persons unknown, murdered Ng Fuk-Nam." The 2nd to 5th counts all charged Yeung and the Appellant, together with the others mentioned in the first count, of wounding with intent, namely, unlawfully and maliciously wounding with intent to do grievous bodily harm to :

p.1 l.10 - p.3

YIP Kam-Ping (Count 2)
TAM-Man (Count 3)
KWOK Shing-Yip (Count 4)
PANG Pui-Yuen (Count 5)

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p.237 l.14 - p.243

3. The first Accused, Yeung Kwong-hung, was found not guilty on all charges and was discharged. The Appellant was found guilty of murder (Count 1) and wounding with intent YIP Kam-Ping (Count 2) and TAM-Man (Count 3). He was acquitted of wounding KWOK Shing-Yip (Count 4) and PANG Pui-Yeun (Count 5). The Appellant was sentenced to death on Count 1 and to three years imprisonment concurrently on each of the wounding counts.

p.246 l.30 - p.254 l.15

4. On appeal against all three counts, the Court of Appeal quashed the convictions on the wounding charges (Counts 2 and 3) but affirmed, it is submitted wrongly, the conviction on the murder charge (Count 1). 10

5. The case for the Prosecution was that YIP (the victim named in the second count) went to the billiards room at about 10 pm on the 26th of June, 1980. An argument ensued between him and one LAU Sik-hung (also known LEUN MO) mentioned in the charges but not before the Court as having committed the offences with the two accused. YIP then left the billiards 20 room and went to a nearby restaurant where he told his friends about the dispute with LEUN MO, and the matter was discussed. During that discussion the Appellant contacted YIP by means of a paging device and invited him to return to the billiards room to resolve the dispute. At about 11 pm YIP returned to the billiards room accompanied by some eight to ten companions who included the deceased and the three men mentioned in Counts 3, 4 and 5. Another confrontation resulted between YIP and LEUN MO. This developed into a 30 fight between YIP and his companions on the one side and LEUN MO and his companions on the other side. Most witnesses testified that billiard cues were used in the fight, but some three Prosecution witnesses spoke of the use of a hammer by someone on LEUN MO's side. There was general confusion, and a general fight involving some thirty to forty people. YIP and three of his companions then escaped down a rear staircase. The deceased and TAM MAN (the man named in the third count), however, were caught at the door of a lift, dragged back to the 40 billiards room and, according to the Prosecution, assaulted by LEUN MO and his group. The eventual result of the fight was that the deceased died and YIP and his companions mentioned in Counts 3, 4 and 5 were injured.

6. As regards the case against the Appellant there was evidence (1) that when the fight between the two groups began, he was heard to say: "Kill Ngai Tam Chai" (YIP's nickname), (2) that he was one of the men who dragged back

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the deceased from the lift, and (3) that he was seen hitting the deceased on the back with the thick end of a billiard cue after the deceased had fallen unconscious to the floor.

7. It was common ground that the deceased did not die of any back injury, but from intercranial haemorrhage and bruising of the brain caused by injury to his head. Consequently the case for the Crown was based on the doctrine of common intent or common design.

10 8. The Appellant gave evidence on oath. He admitted having gone to the billiard room that evening at about 10 pm. He played billiards for about half an hour. He then saw YIP (Tai Ngan Chai) quarrelling with LEUN MO (LAU SIK-hung) who was his elder brother. He persuaded them to stop quarrelling and they did. He then returned to his table and continued playing billiards "for several tens of minutes". He then heard a commotion and saw YIP and his brother quarrelling again with a number of persons surrounding them. He proceeded to go towards 20 them again but before getting there, he was attacked by several persons and struck with billiard cues. He ran away to the nearest rear exit on the left side of the lift. He pushed open the door but there was a metal grille. He returned to the hall, then went to the rear entrance, but people were still fighting. He tried to open the door but it was closed. He then tried to escape through the other rear exit on the right hand side of the lift. That was closed also. Eventually he ended up in the front lobby and escaped through a door there.

p.151 - p.164 l.7

30 9. (a) In summing up to the Jury, the learned Trial Judge made some preliminary remarks in the course of which he said :

> "The crux of this case is the other element of the charge if I may describe it that way, that is the intention with which the blows were struck, if you are satisfied that they were struck. And the case here for the Prosecution is not that either one of the accused actually struck the blow - it is rather that the Prosecution says, "Look, we're unable to 40 say who struck the fatal blows, but what we do say to you, is that both these accused had the intent, at least, to do serious bodily injury to the deceased, an intent which they shared with others, an intent which they shared with whoever it was who struck the fatal blows to cause NG FUK-NAM serious bodily injury."

p.219 ls.1-41

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It was mentioned to you by Counsel that intention is not something which can be directly proved. It is not possible to give direct proof of the mental state of a person which accompanies the doing of an act by a person and so, whether or not a particular intent accompanies a particular act, is a matter that can only be determined by inference - a matter that can only be determined by saying : What inference do I draw from certain observed acts; 10

In this particular case, if you were satisfied beyond reasonable doubt on the evidence that NG FUK-NAM did receive repeated blows to his head that caused that jarring of the brain which caused the bleeding which killed him, then it's a matter of commonsense that you draw the inference that whoever inflicted those blows must have had the intention to do him, at least serious bodily injury, and if you came to that conclusion, if you draw that inference, then you would draw the inference that the necessary 20 intent sufficient to establish the crime of murder was present.

And so then, the really crucial question is, does the evidence establish to your satisfaction, beyond a reasonable doubt that either or both these accused had that particular intent in this case."

It is submitted that these directions given to the Jury were wrong.

(b) The learned Judge then dealt with the case in relation to each of the accused separately. He first dealt 30 with the case in relation to the first accused in the course of which he made certain comments in relation to common design or intent which the Appellant will submit were not correct.

p.219 l.7 - p.223 l.24

(c) He then turned to the case against the Appellant saying :

p.223 l.25

"Now the case against the second Defendant is a lot stronger."

Immediately thereafter he dealt with the evidence of identification by voice and misdirected the Jury (as was found by 40 the Court of Appeal) in relation to the evidence of the witness CHAN CHUN-KI.

The learned Judge then turned to the evidence of the

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witnesses TAM-MAN and LI KIT-HUNG and again misdirected the Jury in relation to the evidence of TAM-MAN. These misdirections were particularly important in the light of the Prosecution's reliance and the nature of the learned Judge's summing up in relation to the doctrine of common intent or common design. p.224 - p.225 l.21

(d) After dealing with the evidence of the witnesses TAM-MAN and LI KIT-HUNG the learned Judge continued :

"Now, if you accepted that evidence, you have this situation taken with the evidence of TAM-MAN that NG FUK-NAM is alive outside the doors of the billiards room; he's brought back into the billiard room by a group of men amongst whom was the second accused; somehow or other, he's - that is the deceased man - is knocked to the ground - and while he is on the ground, if you accept this evidence, the second accused is seen to deliver four or five blows to his back, wielding a billiard cue, holding the thin end and hitting with the thick end. p.225 ls.22-44

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Members of the Jury, what intention would a person have who strikes a body lying on the floor with a billiard cue in that manner; could it be any intention other than to cause that body, serious bodily injury; if you draw that conclusion, then you would conclude that he had the intent to cause the deceased serious bodily injury, since the evidence establishes that somehow or other, the deceased at sometime in that particular episode, received blows which caused his death, then you would arrive at the decision that the second accused was guilty of murder."

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(e) Later the learned Judge said :

"But, if you accept the evidence of TAM and LI, you could conclude beyond reasonable doubt that he had the necessary intent and find him guilty of murder. p.226 ls.28-38

If, however, your view was well although, he did strike that prone body with a billiard cue, I don't think that necessarily means an intent to do serious bodily harm. I'm not sure whether it would or not but I am sure that it would cause some harm - then your verdict would be guilty of manslaughter."

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(f) It is submitted that the above passages in the summing up contain clear misdirections to the Jury. In particular, the learned Judge failed to direct the Jury on the question as to whether any intent on the part of the

accused or anything done by him was causative of the death of the deceased.

(g) The learned Judge should have directed the Jury that the Prosecution must prove that the Appellant intended to cause the death of the deceased or cause serious bodily harm to the deceased. Alternatively, he should have directed the Jury that the Prosecution must prove that the Appellant was a party to a joint enterprise with a common intention to kill or cause serious bodily harm to the deceased and that the Appellant himself took part in an assault upon the deceased which was causative of the death of the deceased. He should have directed the Jury in relation to any evidence which was capable of supporting such a finding. 10

(h) The learned Judge failed to give the Jury a proper or adequate direction in relation to the burden of proof, in particular in that he failed to direct the Jury that the count charging the Appellant with murder must be proved on the whole of the evidence so that the Jury were sure of guilt and he failed to direct the Jury that it was for the Prosecution to prove that the guilt of the Appellant had been so proved upon the whole of the evidence. 20

(i) The learned Judge should have directed the Jury that if it was proved that the Appellant was engaged on a joint enterprise with the person or persons who inflicted the fatal blow or blows on the deceased but that the person or persons who inflicted the fatal blow or blows departed completely from the common design in so doing the Appellant was entitled to be acquitted of the offences of murder and manslaughter. R. v. Anderson and Morris [1966] 2 Q.B. 110. 30

(j) The learned Judge failed to give the Jury a proper direction in relation to identification. R. v. Turnbull [1977] 1 Q.B. 224.

(k) The learned Judge failed to give the Jury any adequate direction on the ingredients of the offence of manslaughter and the distinction between the offence of murder and the offence of manslaughter.

p.245 l.16 - p.246 l.28

10. The Appellant appealed to the Court of Appeal, but in a Judgment dated the 10th February, 1982, the Court dismissed the appeal against his conviction of murder on Count 1 in the Indictment. 40

11. The Appellant respectfully submits in relation to

the Judgment of the Court of Appeal that the said Court erred in relation to each of the matters set out in paragraph 9 above and in particular in relation to the doctrine of common design. It is submitted that the Court erred when it held :

p.249 ls.1-31

(a) "Since there was no evidence that the second Defendant hit the deceased otherwise than on the back, the case for the Crown was that the death resulted from an injury inflicted by someone in
10 pursuance of a common design to him and to the second Defendant. The first argument on behalf of the Appellant is that there was no evidence of a common design, and, in particular, that there was no evidence that those who hit the deceased were all members of a gang. It must be said that the common design suggested by Counsel appearing for the Crown at the trial was one to deliver serious bodily harm "to anyone of TAI NGAN CHI's men and that they would get their hands on."
20 The Judge took a narrower view and invited the Jury to consider whether there was a common design to do grievous bodily harm to the deceased. We think he was entitled to do that. The evidence of that common design was that the second Defendant hit the deceased with the billiard cue while others were similarly attacking him, one or more of those others hitting him on the head. It is inconceivable that the second Defendant was unaware of the fact that others were involved in the attack and that they,
30 too, were using billiard cues. It was a reasonable inference that all the attackers intended to do grievous bodily harm to the deceased. This was not a case where two or more assailants made independent assaults upon a victim when ignorant of the acts and intents of the others."

The evidence was not to the effect that the Appellant hit the deceased with a billiard cue "while others were similarly attacking him one or more of those others hitting him on the head." It was to the effect that the
40 Appellant was seen hitting the deceased on the back with a billiard cue after the deceased had fallen unconscious to the floor. It is therefore submitted that the possibility could not be eliminated that blows on the deceased's back were not with a common intent of whoever hit the deceased on the head, which injuries caused his death, especially as upon the Prosecution evidence, a hammer was being used.

(b) Having recited certain passages from the summing up

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the Court of Appeal held :

p.250 ls.6-12

"Where the possibility exists that contemporaneous assaults by two persons might have been entirely independent, some explanation of the meaning of common design would no doubt be necessary, but in the present case we do not think that it was incumbent on the Judge to say more than he did."

Where there was a spontaneous general fight - with as many as some thirty to forty people possibly involved - as in this case, it is submitted that it was vital that the learned Judge give a careful direction in relation to common design. Further, one of the assailants may have gone beyond the common design. Furthermore, the assaults on the deceased in this case may well have been "entirely independent". 10

p.250 ls.21-23

(c) "If those witnesses (TAM-MAN and LI KIT-HUNG) were believed, the Jury could not have been in any doubt as to the existence of a common design."

It is submitted that in this passage the Court of Appeal failed to direct their minds to the issues as to the actual intent of the Appellant in relation to any common design and whether anything which may have been proved to have been done by the Appellant was causative of the death of the deceased. 20

p.251 ls.3-5

(d) "The Jury could have been in no doubt about the necessity to find common intent"

(In relation to the second passage of the summing up cited by the Court of Appeal on common design).

p.251 l.3

It is submitted that the passage in the summing up referred to by the Court of Appeal is not only "somewhat obscure" as the Court of Appeal found but is misleading and wrong and the learned Judge failed to direct the Jury as he should have done as submitted in paragraph 9 above. 30

p.253 ls.1-4

p.252 ls.43-44

12. On the question of voice identification, it is respectfully submitted that the Court of Appeal was right in saying that: "It would have been better if the Judge had warned the Jury of the need for caution" in relation to this matter, especially as on one view of the evidence PANG's identification was hearsay. It is, however, submitted that the Court erred in saying that the voice of identification "was not vital to the case". A vital difference between the 40

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case as against the first accused YEUNG (who was acquitted) and the case against the Appellant was the alleged use by the Appellant of the words : "Kill Tai Ngan Chai", and that is why the Trial Judge directed the Jury that "the case against the second Defendant is a lot stronger." Great emphasis was placed on this evidence by the Prosecution and by the learned Judge. It is respectfully submitted that this was evidence in the case relied upon by the Prosecution in support of their contention that the Appellant had the necessary common intent with the person who struck the blow or blows which caused the death of the deceased. Accordingly the misdirection, or the failure to give a proper direction on this vital issue was, it is submitted, fatal and could not be cured by the application of the proviso to S. 83(a) of the Criminal Procedure Ordnance.

13. In any event it is submitted that the Court of Appeal wrongly applied the proviso in this case as it cannot be said that despite the misdirections and flaws the Jury would inevitably and without doubt have come to the same conclusion. In this connection it is submitted that the misdirections on the wounding counts - accepted by the Court of Appeal - must inevitably have coloured the Jury's view on the murder count and on the case as a whole.

p. 254 ls. 7-13

14. The Appellant was granted Special Leave to Appeal to Her Majesty in Council by Order dated the 22nd December, 1982.

p. 254 l. 16 - p. 255

15. The Appellant respectfully submits that this Appeal should be allowed, the Appellant's conviction on Count 1 of Murder should be quashed and that the sentence of death passed on him should be set aside for the following among other,

REASONS

1. BECAUSE there was no or no adequate evidence of a common intention or common design.

2. BECAUSE the learned Trial Judge misdirected the Jury or failed to give a proper or adequate direction to the Jury in relation to :

(a) The evidence in relation to common intention or common design;

(b) The meaning of common intention or common design;

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(c) The application of the said doctrine to the facts of this case;

(d) The issue of causation;

(e) The burden of proof;

(f) The departure from a common intention or design;

(g) Identification;

(h) The distinction between the offences of murder and manslaughter and the ingredients of the two offences. 10

3. BECAUSE the Court of Appeal similarly erred in not allowing the Appeal in respect of each of the matters set out in paragraph 2 above and in its treatment of the doctrine of common design in relation to the facts of this case, and in particular,

(a) Erred in saying that the Appellant hit the deceased with a billiard cue "while others were attacking him";

(b) Erred in holding that in the present case it was not incumbent on the Trial Judge to say more than he did in relation to the meaning of common design; and 20

(c) In holding that the Jury could have been in no doubt about the necessity to find common intent.

4. BECAUSE the learned Trial Judge failed to warn the Jury about the need for caution in relation to the question of voice identification.

5. BECAUSE the Court of Appeal wrongly held that though the question of identification by voice was clearly an important matter it was not vital to the case. 30

6. BECAUSE the Court of Appeal wrongly applied the proviso to S. 83(1) of the Criminal Procedure Ordinance in this case.

SWINTON THOMAS

EUGENE COTRAN

No. 23 of 1983

IN THE PRIVY COUNCIL

O N   A P P E A L

FROM THE COURT OF APPEAL
OF HONG KONG

B E T W E E N :

LAU SIK-CHUN   Appellant

- and -

THE QUEEN   Respondent

CASE FOR THE APPELLANT

Philip Conway Thomas & Co.,
61 Catherine Place,
London,
SW1E 6HB.

Solicitors for the Appellant