Privy Council Appeal No. 23 of 1983

Lau Sik-Chun *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF HONG KONG

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE 27TH FEBRUARY 1984, DELIVERED THE 26TH MARCH 1984

Present at the Hearing:

LORD FRASER OF TULLYBELTON
LORD WILBERFORCE
LORD EDMUND-DAVIES
LORD SCARMAN
LORD BRIDGE OF HARWICH

*[Delivered by **Lord Bridge of Harwich**]*

At the conclusion of the arguments in this appeal their Lordships announced that they would humbly advise Her Majesty that the appeal should be allowed. They now indicate their reasons for reaching that conclusion.

The appellant was jointly indicted with a man named Yeung on one count of murder and four counts of wounding with intent. They were tried by Mr. Commissioner Barnes and a jury. Yeung was acquitted on all counts. The appellant was convicted of murder and sentenced to death. He was also convicted of two offences of wounding with intent. On appeal to the Court of Appeal (Sir Alan Huggins V-P., Yang and Barker JJ.A.) both convictions for wounding were quashed, but the murder conviction was affirmed. The appellant appealed to the Board by special leave.

The prosecution arose out of an encounter between two rival factions of Chinese young men in a billiards saloon. Initially it appears that some minor blows were exchanged as the result of a trivial argument as to whose turn it was to take the next
[12] free billiards table. The members of one faction

then withdrew and reassembled at some nearby tea rooms. According to the prosecution, the leading figure in this faction, a man named Yip Kam-ping, but nicknamed Tai Ngan Chai, shortly afterwards received a telephone call from the appellant inviting him and his companions to return to the billiards saloon. The purpose of this invitation was, on the evidence, obscure but presumably the prosecution attached some sinister significance to it. In the event Yip and his friends did return to the billiards saloon. Very soon after their return a general fight broke out between the two factions. Those who had remained at the billiards saloon, who included Yeung and the appellant, outnumbered Yip and his friends who had returned from the tea rooms. Though the evidence was understandably imprecise, it would appear that some 40 young men were involved in the fighting. There was some evidence of a hammer being used as a weapon, but none of any injury consistent with a hammer blow. The main weapons which were clearly used on both sides were billiard cues. In the course of the fight unfortunately one member of the Yip faction named Ng Fuk Nam received a number of blows to the head, almost certainly with the thick end of a billiard cue, described by the pathologist of more than moderate force, which, although they caused no fracture of the skull, set up intra-cranial bleeding which resulted in his death.

The somewhat remarkable basis on which the case for the prosecution was primarily advanced was that <u>all</u> the members of the billiards saloon faction shared a common intent to cause serious bodily harm to <u>any</u> member of the Yip faction on whom they could lay hands and that consequently all were guilty of the murder of Ng Fuk-Nam. It was indeed only on this basis that any case at all of murder could be suggested against the appellant's co-accused Yeung, there being no evidence that Yeung was in any way involved in any assault on Ng Fuk-Nam. As already stated, Yeung was acquitted. The appellant, however, was undoubtedly involved in an assault on Ng Fuk-Nam, to the details of which their Lordships must later return.

Regrettably it has to be said that the learned Commissioner's summing up was flawed in many respects. From start to finish there was no clear statement to the jury that the onus of proof rested on the prosecution and that it was not for the accused to prove his innocence. But it is fair to say that this omission was to a substantial extent mitigated by repeated references, in relation to particular issues, to the need for the jury to be satisfied beyond a reasonable doubt. Even this, however, was far from satisfactory when it took the form, in discussing the evidence of the appellant himself, of saying, as the Commissioner did:-

> "You have to be satisfied beyond a reasonable doubt that he's lying when he denies that he took part in that attack. If the evidence doesn't persuade you as to that, you must give him the benefit of the doubt and you must find him not guilty."

The two undoubted misdirections, which consisted of simple misquotations of the evidence, which led to the quashing of the appellant's two convictions for wounding with intent, although not directly connected with murder, could certainly be regarded as prejudicial to the appellant.

More serious prejudice, however, may well have arisen from the Commissioner's reference to evidence given by two prosecution witnesses that on the return of Yip and his friends to the billiards saloon, the appellant was heard to say "kill Tai Ngan Chai first". One of the witnesses giving this evidence claimed to recognise the appellant's voice but did not see him. The evidence of the second witness on this point was so obscure and ambiguous that it may well have amounted to no more than hearsay. The Commissioner not only gave no warning to the jury of the possible weaknesses of this evidence, but he did not even remind the jury that it was denied by the appellant.

The conclusion of the Court of Appeal was expressed in these words:-

> "Having considered such weaknesses as there are in the summing-up, we nevertheless are of opinion that no miscarriage of justice has resulted and this is therefore a proper case for the application of the proviso to Section 83(1) of the Criminal Procedure Ordinance. The appeal against the conviction on Count 1 is dismissed."

Their Lordships bear in mind the oft repeated statements in judgments of the Board that they are not a Court of Criminal Appeal and that it is only when the trial below has been so misconducted as to result in injustice of a serious, substantial character that a case for the exercise of the prerogative to reverse a decision of a Commonwealth Court of Criminal Appeal can be justified. If the matter rested on the shortcomings of the summing-up so far considered their Lordships would not feel that this was such a case.

They turn now to the central issue in the case, bearing in mind that where a charge of murder, or indeed any other serious crime of violence, arises out of a fight in which a number of people have been involved, a careful and accurate summing up is essential to a fair trial for two reasons, first

because of the inherently confusing character of the evidence which is likely to be given in such cases, but secondly, and more significantly, because it is of vital importance that the jury should clearly understand the principles on which one person can be held criminally liable for the consequences of violence inflicted by the hand of another.

Three witnesses gave direct evidence of the immediate incident which preceded the death of the deceased. He and his friend Tam Man were seeking to escape from the billiards saloon via the lift and, meanwhile, holding the door against their would be attackers. It is, in their Lordships' view, improbable, but cannot be ruled out as impossible, that the deceased had already been struck on the head before this incident. Tam Man said that he and the deceased were dragged back into the billiards saloon and attacked by others including the appellant but could give no details of the attack before he lost consciousness. Another witness, Lee Kit-hung, identified the appellant as taking part in this attack and said that he struck the deceased after he had been knocked to the floor four or five times on the back with the thick end of a billiard cue. Photographs and the pathologist's report both indicated that the back of the deceased had sustained bruising but no more serious injury. A third witness, Pang Pui-yuen, described this attack. He said that several men struck Tam Man and the deceased on their heads and bodies with billiard cues and further kicked the deceased in the head and chest after he fell to the ground. Pang knew the appellant, and indeed had before the trial picked him out at an identity parade as one of those involved in the billiards saloon fight. Counsel for the prosecution told the jury, in opening, that Pang would identify the appellant as one of those engaged in the final attack on the deceased. But despite persistent questioning this identification was not forthcoming so that Pang's evidence in relation to the appellant was at worst neutral, at best favourable.

The learned Commissioner dealt with this evidence in a very remarkable way in his summing up in that he fairly summarised the evidence of Tam Man and Lee Kit-hung, but made no reference whatever to the evidence of Pang.

However, much the most serious defect in this summing up was that, in the absence of any evidence that the appellant struck any blow to the head of the deceased, the Commissioner wholly failed to make clear to the jury that they could only convict the appellant of murder if it was proved that he took part with others in a concerted attack on the deceased which in fact caused his death and in which the attackers jointly intended to cause death or

grievous bodily harm. It was essentially this defect which convinced their Lordships that the proper advice they should tender to Her Majesty was that the appeal should be allowed.

The Commissioner did indeed tell the jury that before they could convict either accused they must find that the accused had the intent at least to do serious bodily injury, but because this direction was given alike in relation to both accused, when, as already indicated, the accused Yeung took no part in the attack on the deceased, this positively obscured the vital necessity that the jury, before they could convict, must find the necessary intent manifested by concerted action which was the cause of the death.

There was one particularly unfortunate paragraph in the summing up, which immediately followed a reminder of the evidence of the appellant striking the deceased on the back with the thick end of a billiard cue. The Commissioner said:-

> "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 drew 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 some time 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."

It is far from clear from this passage whether the learned Commissioner was here inviting the jury to impute to the appellant the necessary participation in a joint attack intended to cause serious bodily injury from the fact that he struck the deceased on the back, from the fact that at approximately the same time the deceased received the blows from which he died from some other hand, or from a combination of these factors. But however the passage is read it contains a serious misdirection.

It is fair to quote the following paragraph of the summing up:-

> "If you were satisfied of those things beyond a reasonable doubt, that he had the common intent with whoever struck the fatal blows to do serious bodily injury, and therefore, he had the necessary intent in doing what he did to make him guilty of murder, and that would be your proper verdict."

If there were to be found elsewhere in the summing up a proper explanation of the basis of joint criminal liability to which the phrase here used

"common intent with whoever struck the fatal blows to do serious bodily injury" could be understood to refer, this might have gone some way to correct the misdirection in the preceding paragraph, but in the absence of any such explanation, it was valueless.

Sir Alan Huggins V-P., giving the judgment of the Court of Appeal, referred to the broad basis on which the prosecution was presented relying on a general intent on the part of the members of the billiards saloon faction to cause grievous bodily harm to any member of the Yip faction. He went on:-

> "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 a 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, 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."

It will be observed that this passage, in contrast with the summing up, refers by necessary implication to the evidence of Pang, who alone spoke of the deceased being hit on the head.

This passage from the judgment of the Court of Appeal provides the essential foundation which enabled the court to reach the conclusion that the conviction was not vitiated by any misdirection or nondirection on the vital issue of joint criminal liability.

Their Lordships entirely accept that, given a proper direction, from the whole of the evidence, including that of Pang, a reasonable inference which the jury might have drawn was that the appellant was engaged in a joint attack on the deceased in which all the participants intended to cause him grievous bodily harm. They cannot, however, accept for a moment that it was a necessary inference which the jury must have drawn. Having regard to the way the case was summed up, the question whether this inference should or should not be drawn was never fairly left to the jury to decide. This amounted, in their Lordships' judgment, to a grave injustice calling for the exercise of the prerogative in the appellant's favour. So regarded, this could not be

considered a fit case for the application of the proviso to section 83(1) of the Criminal Procedure Ordinance. Indeed, their Lordships understood the reliance on the proviso by the Court of Appeal to relate to the less serious defects in the summing-up identified earlier in this judgment and cannot suppose that the Court of Appeal would have applied the proviso if they had shared their Lordships' disquiet in relation to the summing-up on the central issue in the case.

At the conclusion of the hearing before their Lordships the successful appellant applied for his costs against the prosecution. Their Lordships were told that the costs had been provided by the appellant and his father, who were both of limited means. As Viscount Radcliffe pointed out in *Lim Chin Aik v. The Queen* (No. 2) [1963] A.C. 498:-

> "It is not, and never has been, an absolute rule that in no case can a successful appellant in a criminal matter before the Board receive costs from the respondent."

But such an award of costs is not made save in exceptional circumstances and none could be, nor were, suggested in the instant case. No fault in bringing the case could be attributed to the prosecution. To quote again from Viscount Radcliffe *(loc cit.)* this was "....merely a question of a conviction which has gone wrong in the sense that the law has been wrongly applied". Accordingly, no award of costs would be appropriate.