27/84

IN THE PRIVY COUNCIL No.53 of 1983

ON APPEAL

FROM THE COURT OF APPEAL OF HONG KONG

BETWEEN:

1. CHAN WING SIU
2. WONG KIN SHING
3. TSE WAI MING — Appellants

- and -

THE QUEEN — Respondent

RECORD OF PROCEEDINGS

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INDEX OF REFERENCE

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Directions to Registrar relating to appeals by the 3 accused	15th September 1981

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RECORD OF PROCEEDINGS

In the High Court

Criminal Jurisdiction

No.1
Indictment
22nd December 1980

No.1

INDICTMENT

Case No.170 of 1980

IN THE HIGH COURT OF HONG KONG

The Queen

v.

CHAN Wing-siu (1st accused)
WONG Kin-shing (2nd accused)
TSE Wai-ming (3rd accused)

charged as follows :-

First Count
STATEMENT OF OFFENCE

Common Law, Cap.212, Sec.2 — Murder, contrary to Common Law.

PARTICULARS OF OFFENCE

CHAN Wing-siu, WONG Kin-shing and TSE Wai-ming on the 31st day of May, 1980, at Kowloon, in this Colony, murdered CHEUNG Man-kam.

In the
High Court

Criminal Jurisdiction

No.1
Indictment
22nd December 1980

(continued)

Second Count
STATEMENT OF OFFENCE

Cap.212, Sec.17(a)

Wounding with intent, contrary to section 17(a) of the Offences against the Person Ordinance, Cap.212.

PARTICULARS OF OFFENCE

CHAN Wing-siu, WONG Kin-shing and TSE Wai-ming, on the 31st day of May, 1980, at Kowloon, in this Colony, unlawfully and maliciously wounded LAM Pui-uin, with intent to do her grievous bodily harm

(Sd.) J Duffy
(J.M.Duffy)
Deputy Crown Prosecutor
for Attorney General

Date: 22nd December, 1980

To: CHAN Wing-siu (1st accused)
WONG Kin-shing (2nd accused)
TSE Wai-ming (3rd accused)

Take Notice that you will answer to the Indictment whereof this is a true copy at the High Court, Battery Path, Victoria, on the 28th day of May, 1981.

(Sd.) N.J.Barnett
N.J.Barnett
Acting Registrar

IN THE HIGH COURT OF HONG KONG

The Queen

v.

CHAN Wing-siu
(1st accused)

WONG Kin-shing
(2nd accused)

TSE Wai-ming
(3rd accused)

Indictment for

(1) Murder (of CHEUNG Man-kam)

(2) Wounding with intent

WITNESSES

(1) AU Hing
(2) HO Wai-hung
(3) POON Oi-wah
(4) LAM Pui-yin
(5) CHEUNG Chi-shing
(6) Dr. LI Chi-chiu
(7) Dr. William CHOW
(8) Dr. LAU Kwok-wai
(9) Dr. WONG Koon-sang
(10) Dr. YIP Chi-pang
(11) LEUNG Yan-chi
(12) Andrew Edward Strachen
(13) CHAN Yee-ha
(14) LAU Pak-yuk
(15) SZETO Shui-sum
(16) Dr. LEE Hee-ming
(17) LEUNG Fu-keung
(18) LAU Chak-lung
(19) TONG Siu-kai
(20) Christopher D.Prowse
(21) Ian Charles Grant
(22) LIN Hung-cheung
(23) WONG Hau-man
(24) PAK Yu
(25) LAW Wai-hung
(26) John Phillip Cartwright
(27) CHEUNG Kam-sing
(28) LEUNG Kwok-fai
(29) CHAN Kwok-wai

Det. Snr. Inspector I.C. Grant i/c case

(Telephone No. 3-030161 Ext.34)

Attorney General's Chambers,
Hong Kong.

In the High Court

Criminal Jurisdiction

No.2
Particulars of Trial
7th January 1982

No.2

PARTICULARS OF TRIAL

[rule 18]
CRIMINAL PROCEDURE ORDINANCE (CAP.221)

IN THE SUPREME COURT OF HONG KONG
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 540 OF 1981
(High Court Case No.170 of 1980)

The Queen v. CHAN WING SIU 1st Appellant (1st accused)

WONG KIN SHING 2nd Appellant (2nd accused)

TSE WAI MING 3rd Appellant (3rd accused)

Particulars of Trial

1. When tried: 28/5, 29/5, 1-4/6, 8/6 & 9/6 of 1981.

2. Name of Trial Judge: Hon. Mr. Justice Macdougall

3. Verdict of Jury:
1st accused:-
1st Count: Guilty (unanimous)
2nd Count: Guilty (unanimous)
2nd accused:-
1st Count: Guilty (unanimous)
2nd Count: Guilty (unanimous)
3rd accused:-
1st Count: Guilty (unanimous)
2nd Count: Guilty (u)

4. Sentence and any orders made consequent thereon:

All accused:- 1st Count: Death
2nd Count: 5 years' imprisonment

5. Copy of List of Exhibits :-

6. Whether a certificate under section 82(2)(b) was given : -

7. Whether appellants were defended by counsel and solicitors privately, or by counsel and solicitors at request of Court. Give names of counsel and/or solicitors for appellants:

Mr.Christopher Young instructed by D.L.A. assigned for the 1st & 2nd accused.
Mr. K.H.Suen instructed by Peter C. Wong & Co. assigned for the 3rd accused.

8. Whether appellants bailed before trial, if so in what amount, and whether with sureties, if so in what amount:

Nil

9. Previous criminal record: Nil

10. Dialect: Both accused spoke Punti

Dated the 7th day of January, 1982.

(Sd.)
(W.H.CHU)
p. Registrar, Supreme Court.

In the High Court

Criminal Jurisdiction

No.3
Transcript of Summing Up
9th June 1981

No.3

TRANSCRIPT OF SUMMING UP

IN THE HIGH COURT OF JUSTICE
CRIMINAL JURISDICTION

Case No.170 of 1980

Transcript of a tape-recorded summing-up delivered by the Honourable Mr.Justice Macdougall on 9th June, 1981 at the trial of Regina v. CHAN Wing-siu, WONG Kin-shing, TSE Wai-ming charged with Murder etc.

Mr. Foreman, members of the Jury, in coming to your verdicts in this trial you will be required to consider both the law and the facts. The facts are the conclusions that you draw from the evidence that has been presented to you during the course of this trial. This necessarily means that you must exclude from your minds any information that may have come to your knowledge outside of this courtroom concerning this matter. You will confine yourselves exclusively to the evidence which you have heard, to the evidence which has been put before you.

Now this evidence consists not only of the oral testimony of the witnesses but also of the statements of witnesses that were read out to you by counsel for the Crown. These statements were statements which were agreed by counsel as being non-contentious and therefore were read out in order to avoid the necessity of bringing to court a witness whose evidence was not in any way going to be challenged.

Equally, you are entitled to take into consideration the statements that were put in evidence by the Crown, those statements being statements which were made by the accused persons to the police. There were also a number of exhibits that were put in evidence. You may also use these in coming to your verdicts.

You will of course remember the advice that was given to you the other day about handling exhibits that have been bloodstained. I'll repeat that advice because I think it is important; it is not only unhygienic but it may be positively dangerous to handle exhibits that are covered with bloodstains. I don't think it is necessary to extract any of the exhibits from the polythene bags in which they are contained, it is sufficient, if you wish to look at them,

that you can examine them by looking through the polythene. That of course is a matter entirely for you.

What you decide are the facts of this case is entirely a matter for you. You as the jury are the sole judges of the facts, it is not for counsel or for me to tell you what the facts are, it is for you to decide what the facts are, that is your function in being here.

Needless to say you should pay full consideration to all of the submissions that have been urged upon you by counsel in their final addresses. Counsel have indeed suggested to you various constructions that you should place upon the evidence. As I say, you should give full consideration to these suggestions, but if in the final analysis you come to the conclusion that you do not accept any one or more of these suggestions, then you should disregard that suggestion or those suggestions as the case may be.

Indeed, if during the course of my summing-up I express or appear to express any view upon the evidence, then you are equally entitled to disregard what I have to say; you would only agree with what I say if you independently come to the same conclusion as I express or appear to express. You do not accept anything that I say on the evidence simply because I am the judge, that would be entirely wrong because the decision is yours.

I am here as judge to direct you on the law and to assist you on the evidence, but it goes no further than that. In considering the evidence, members of the jury - the evidence of any particular witness - you will have to decide what evidence you accept as being truthful and reliable and what evidence you reject as being either untruthful or unreliable.

It is possible that you may consider that part of the evidence of a witness may be either untruthful or unreliable but this would not prevent you from concluding that the balance of his or her evidence may be truthful and reliable. In other words, you may accept part of a witness' evidence and you may reject another part; you do not have to accept or reject evidence in its totality.

As far as the law is concerned, however, you have no such liberty. For as trial judge I

am the sole judge of the law, you must accept my directions in that regard. You will therefore apply the law as I give it to you, to the facts as you find them.

In a criminal trial, the burden of proving the guilt of an accused person rests on the Crown. It is the Crown that brings the charges against an accused person and therefore in all fairness it is the duty of the Crown to prove those charges. The Crown must prove those charges beyond reasonable doubt.

There is nothing magical about this expression, members of the jury. It does not mean that the Crown has to prove the case against an accused person with mathematical precision, because such certainty is well-nigh impossible in the world of human affairs.

What then is the test? It is simply this: that if at the end of the day you are able to say to yourselves "Well, we are sure that X committed murder" then the case against X will have been proved beyond reasonable doubt, and you will therefore find him guilty of that offence. Nothing short of this, however, will suffice; you must be sure of the guilt of an accused person before you find him guilty of whatever charge it is that you are considering.

By now of course you are well aware of the nature of the charges that have been brought against all 3 accused, they stand very properly charged - jointly - with 2 offences. In determining whether or not an accused person is guilty of either of those offences you must consider the evidence against him separately; separately, that is, from his co-accused, and separately on each charge.

There will undoubtedly - you may think - be a considerable amount of overlap, but in considering the case against each accused you must consider it separately.

For the purpose of this case, murder is the unlawful killing of a person with the intention either of killing him or of causing him really serious bodily injury. Really serious bodily injury does not require any explanation members of the jury. It does not have to be permanent and it does not have to be dangerous.

If you were to think, for example, that someone were to stab another person in the arm or the leg or the abdomen, or to slash him across the arm, or the leg or the abdomen with a knife, then I have no doubt that you would well come to

the conclusion that he intended to inflict really serious bodily injury. That is of course a matter entirely for you. I emphasize that the injury does not have to be permanent or dangerous to constitute really serious bodily injury.

Again, for the purpose of this case, a killing would only be lawful if done in reasonable self-defence. I shall have more to say about self-defence later on.

An accused person cannot be heard to say that he merely intended to inflict serious bodily injury on his victim but did not intend to kill, but that unfortunately he thrust more forcibly with his weapon than he intended, or whilst aiming for a less vulnerable part of his intended victim's anatomy he misaimed and struck a vital organ.

Such an explanation, even if believed, does not constitute a defence to murder. It will not suffice to save him from being convicted of murder. If he intends by his blow to inflict serious bodily injury but instead he actually kills his victim, then, subject to what I have to say subsequently about self-defence, he is guilty of murder.

As to the second count, members of the jury, that is to say the count of wounding with intent to do grievous bodily harm, that is the wounding alleged to have been done to Madam Lam, a person is guilty of this offence if he unlawfully and deliberately wounds someone with intent to do him serious bodily injury.

I have already explained to you what 'serious bodily injury' means and it means the same in this charge. He must deliberately wound - it must not be an accident - and it must be unlawful. For the purposes of this case, 'unlawful' means what I have already told you; that it is done otherwise than in reasonable self-defence.

What is a wound? A wound consists of a breakage of the continuity of the skin. In other words, the whole skin, not merely the surface or the cuticle of the skin. It must go through every layer of the skin.

On the medical evidence in this case, I imagine that you will have no difficulty in coming to the conclusion that Madam Lam sustained a knife wound on her head. Indeed this evidence was not in the least challenged. For the purpose

of this case, as I say, such a wounding would only be lawful if it were done in reasonable self-defence.

Now members of the jury, if you were to come to the conclusion that an accused person wounded or aided and abetted - assisted - in the infliction of this wound, but did not intend to inflict serious bodily injury; if you were to think that it was reasonably possible that he intended to inflict or to assist in the infliction of an injury less than serious bodily injury, then you would not find him guilty on the second count in the indictment but you might find him guilty of simple wounding.

A person is guilty of simple wounding if he deliberately inflicts a wound on someone but intends that the injury to be sustained falls short of serious bodily injury.

It is the contention of the Crown that anyone who intends to use or foresees that one of his companions may use a vicious weapon, such as one of the 3 knives that have been produced in evidence, and that these knives are to be used or he foresees that they may be used to injure someone, he must intend or foresee that really serious bodily injury will be sustained.

You may well think, members of the jury, bearing in mind the nature of these weapons, that in such circumstances it would be fanciful to imagine that such a person would have anything less than serious bodily injury in contemplation. That of course is a matter entirely for you.

If you were to conclude that an accused participated in the killing but neither intended death nor serious bodily injury, that in fact he merely intended some lesser injury to occur, then he would be merely guilty of manslaughter.

You may think, however, in view of the nature of the weapons that had been used, that this is highly unlikely indeed. You may well come to the conclusion that anyone who intended to use one of those weapons, or thought that it was possible that one of his colleagues might use such a weapon, that the inevitable consequence would be to inflict serious bodily injury, and that it is fanciful to imagine that any injury less than that would be occasioned. As I say, it is a matter for you.

The Crown does not have to prove which accused inflicted the fatal blow. You may convict any accused of murder if you come to the conclusion that he either personally inflicted the fatal wound on the deceased with the intention of causing at least serious bodily injury or that one of his companions inflicted that wound and that the accused contemplated that either of his companions might use a knife to cause serious bodily injury on any one or more of the occupants of that flat.

This does not mean that an accused must have intended at the very outset to inflict in any event, come what may, serious bodily harm on one of the occupants of the flat. He may even earnestly hope that he would not encounter any resistance at all from the occupants of the flat and thus be able to attain his ends without the use of violence.

But if, while hoping that this will be the outcome, he nevertheless decides at any time prior to the killing that he will use his weapon to inflict at least serious bodily injury on one of the occupants in order to enforce his demands or to overcome any predictable resistance that his or his co-adventurers' actions might produce, then he is guilty of murder.

Equally if, although hoping that his and his co-adventurers' demands will be met by the occupants of the flat without it being necessary to resort to the use of knives to cause serious bodily injury, an accused contemplates that such violence may be used by one of his co-adventurers if the occupants do not yield to the demands to be made upon them - whatever they may be, or put up a predictable resistance, then he will be guilty of murder in the event that a knife or knives are used and the victim dies as a consequence.

The Crown does not have to prove the motive for the 3 accused in entering the deceased's flat. Regrettably, those of you who have been living in Hong Kong for any length of time well know that intruders burst into flats for any one of a number of reasons, including robbery, rape, kidnapping. These are 3 major reasons that come readily to mind.

Furthermore, the means used to enter flats are many and varied. Sometimes intruders pose as persons employed by utility companies such as the Gas company, the Light company, the

Telephone company and such the like.

They may pose as salesmen, they may lurk in waiting for a child or even an unsuspecting adult to enter or leave the premises and then barge their way in. They may even bail up an innocent unsuspecting neighbour and use him or her - usually the latter - to secure the neighbour to open the door and thereby gain entry

Indeed, members of the jury, you will no doubt be fully aware of the fact that intruders are constantly on the lookout for premises that are vulnerable to easy entry.

Now the Crown has not charged the accused persons with robbery, rape or kidnapping or an attempt to do any of these, or of any crime other than the 2 crimes set out in the indictment. It, therefore, is only required to prove to you the commission of the 2 crimes set out in the indictment.

You will recall however, that in his opening address Mr. Egan, counsel for the Crown, theorised that the motive for the intrusion of the flat was robbery. He observed that the fact that Madam Lam ran continuous advertisements on a daily basis in 2 Chinese newspapers announcing her availability as a prostitute and a masseuse rendered her particularly vulnerable to would-be robbers.

The reason is not hard to find. A person such as Madam Lam, seeking male customers as she did, would no doubt expect - with the exception perhaps of satisfied clients who were returning for further services - that the males who presented themselves at her door would be complete strangers.

It would therefore be a necessary consequence of her occupation that she would be in the habit of opening her door to total strangers. This, to my mind, is the real significance of her evidence that she advertised her occupation in the daily newspapers. It provides a very reasonable explanation as to why she opened her door to a complete stranger.

Mr. Egan's theory that the accused read Madam Lam's advertisement seems to me to be nothing more than a theory, as there is no positive evidence that any of the accused had in fact actually read any such advertisement. There is the evidence of the deceased's finger ring being found lying in the living-room as depicted in photographs P85 'D' and 'K', photographs that

you have already examined.

You will recall the evidence of Madam Lam that she said that the ring was a firm fit on the deceased's finger. You may think, members of the jury, that there seems to be no apparent reason why it should have fallen off during the conflict. The deceased's hand on which he wore the ring -- indeed neither hand was injured.

In the light of Madam Lam's evidence you may think it highly unlikely that the accused might have removed it before the struggle occurred and placed it on the floor, or on some item of furniture from which it might have fallen onto the floor. That of course is a matter entirely for you.

The premises, as you can observe from the photographs, are spartan in the extreme; there is nothing in view in any of those photographs that would commend itself as being an easily transportable object that is worth taking.

Do you think, members of the jury, that the ring was pulled from the deceased's finger after he had been overpowered and brought down, but that in the flurry of his hurried retreat or in his pain and dazed state as a consequence of suffering a wound, such accused as might have taken it, fumbled with it and let it slip from his grasp.

Does this suggest to you that the motivation for entering these premises was robbery, or do you think that that explanation is displaced by the possibility that if one of the accused did in fact remove the finger ring from the deceased's finger, he did so not as an act of robbery but in order to gain some compensation for the debt that the accused all say they came to collect? I mention these matters, members of the jury, simply to put before you possible conclusions on the evidence.

However, there are some matters that the Crown says indicate that the accused did not go to the premises to collect a debt but actually went there to rob.

First, the 2nd accused, who arrived at Queen Elizabeth Hospital before the 1st accused arrived there you'll recall, gave a completely

false account as to how he came by his injuries. He said that he had been attacked by a group of people outside the Rex Theatre in Mong Kok.

Secondly, the 1st accused who arrived at Queen Elizabeth Hospital a little while later, some 10 minutes later I think the evidence was, gave an equally false account of how he came by his injuries. After giving a number of conflicting locations he finally said that he had been attacked and robbed in the vicinity of the Ying Wah Theatre in Wong Tai Sin.

Now the Crown argues that if these 2 accused had gone to the deceased's premises for the legitimate purpose of collecting a debt, and had been savagely attacked by the deceased upon their entering, why would they not have told the police that this was how they sustained their injuries?

No doubt the defence would reply that the reason why the 2 accused did not admit having gone to the deceased's premises was that to do so would involve disclosing that they had carried knives with them, a criminal offence, and that in order to avoid so involving themselves they each concocted a fanciful story of having been attacked by other persons.

In reply to that the Crown would no doubt say that this may well be so, but it graphically illustrates what the Crown has at all times contended; namely that the accused only admit to what they feel they cannot deny and lie about everything that they think cannot be proved against them.

In this connection the Crown says that the 3rd accused only admitted to being at the deceased's premises because not being arrested until some 3 months after the killing, he would undoubtedly know that his 2 colleagues had been arrested by the police and he would be alive to the possibility that they may well have mentioned his name to them, and that his worst fears in this regard would no doubt have been confirmed when he was formally cautioned by the police officer in respect of the killing.

This, says the Crown, puts him in the same position as his 2 colleagues, in that he realised that it was pointless denying that he was present at the premises because the police were well and truly aware of this fact, and that it was best for him to give a story such as to put his conduct at the premises in a light most favourable to himself.

Thirdly, woman police constable CHAN Yee-ha, who was on duty at the Queen Elizabeth Hospital when the 1st and 2nd accused attended at the Casualty Ward, told you in evidence that Madam Lam was present at that ward when CHAN Wing-siu - the 1st Accused - was there, and she pointed at CHAN Wing-siu and said: "That's him, he robbed me".

Constable CHAN says that CHAN Wing-siu could hear this allegation as he was only 4 or 5 feet away from Madam Lam when she uttered these words, and that he made no reply but simply bent down his head. You may interpret this conduct on the part of CHAN Wing-siu as amounting to evidence of a tacit admission by him that he was engaged in a robbery, albeit an abortive robbery, if you were completely satisfied that he heard the charge uttered by Madam Lam, and that in dropping his head that amounted to an acceptance of her allegation.

A person can indicate acceptance of an allegation by words, or conduct, or demeanour. You are all familiar with the action of a child hanging its head when chided for some offence that it knows it has committed - do you think that the accused's action in dropping his head amounted to an act of resignation to having been caught out, and that it was a tacit admission on his part of participation in an event which he knew to be an abortive robbery?

If you were to think however that the dropping of his head may have been due to exhaustion, dizziness, pain or any other reason, then you would not draw any adverse conclusion from this dropping of the head. In deciding this matter, you will bear in mind that the dropping of the 1st accused's head occurred when he heard Madam Lam make the allegation of robbery against him. This has not been challenged in any way.

If you were to conclude that the 1st accused's demeanour did amount to a tacit admission of the truth of Madam Lam's allegation, it would only be evidence against him for he cannot make admissions on behalf of anybody else.

However, the Crown would say that if you accept that the 1st accused tacitly admitted in effect to having been involved in an abortive robbery, it makes a lie of his subsequent account and the accounts given by his 2 co-accused that he went to the premises to collect a debt.

The significance of the Crown's allegation that the 3 accused went to rob is not that it is essential to the proof of the Crown's case that this was indeed so, for it matters not what the motive of the accused was in going to these premises. But the importance, the point of the Crown making this allegation is that if you accept that the purpose of the accused persons in going to that flat was to commit a robbery, then it strips the versions that they gave to the police as to what happened in the flat of all credibility and exposes their defence as being totally untruthful. That is, concisely, the Crown's submission in this case.

I turn now to a consideration of the evidence adduced by the Crown. The principal witness, Madam Lam, testified that she and her husband resided at 2 premises. They resided at one address - the address she was unwilling to disclose for obvious reasons - and the other address at which they resided was the Lok Shan Road premises at which the events with which this trial is concerned actually occurred.

Although she and her husband sometimes stayed overnight at the latter premises, it is clear that the principal purpose for which they used those premises was a place at which Madam Lam could carry out her occupation of prostitute and masseuse.

Madam Lam and her husband went to the Lok Shan Road premises 3 to 4 days a week and stayed there between 11 a.m. and 10 p.m. When a client rang the door bell the deceased would discreetly retire into the kitchen and Madam Lam would admit the client and perform the services for which she made herself available.

She said in her evidence that some time after 2 p.m. on the 31st of May last year she and her husband were waiting as usual for clients when the door bell rang. The deceased,as usual, discreetly withdrew into the kitchen and Madam Lam went to the door, drew aside the curtain and looked through the glass panel to see who was at the door.

She said that she saw the 3rd accused standing there. Thinking that he was a client she opened the door to admit him. Having done so, she saw 2 other Chinese males suddenly rush around the corner, she tried to close the door but the 3rd accused prevented her from doing so. All 3 men then burst into the premises.

She said that they then all produced knives

and ordered her to kneel down and not make a sound. She was further ordered not to move. She obeyed the commands given to her. Madam Lam said that her husband, apparently hearing the voices of the intruders, came to the kitchen door.

At once, 2 of the intruders - the 1st accused and another who was definitely not the 3rd accused - then pressed the deceased into the kitchen. She heard one of the 2 men say: "Stab him down". Her husband then screamed and shortly afterwards one of the 2 men called out: "Run!".

As they were leaving the premises Madam Lam said one of the 3 intruders said: "Stab her down too". She was then slashed on the head and the wound bled profusely. Madam Lam said that she does not know who called out for her to be stabbed down nor can she say who it was that actually slashed her head. She said the blow was on the edge of her head and she theorised that in the haste of these persons to leave the premises, the person who actually slashed her head had somewhat missed his aim because she only felt a slight blow.

You will note that Madam Lam did not attempt in any way to fix blame on any particular person. She was quite frank, she said: "I don't know who it was that slashed me, I don't know who it was that suggested that I be slashed".

If you were to think that she was attempting to embroider her evidence in any way, this might well give the lie to such a suggestion. That of course is a matter for you.

Madam Lam then said that she went and turned on the light to the kitchen and she found her husband - the deceased - lying covered with blood, moaning and apparently in great pain. She summoned the police, and about 10 minutes later an ambulance and some police officers arrived. The rest of it, members of the jury, I don't think I need bother you with because it deals with what happened at the hospital.

Now all 3 accused admitted in the statements that they made to the police that they were present at the premises when this incident happened. Of course they give an entirely different version as to what happened to that given by Madam Lam.

In view of these admissions, coupled with the

evidence given by the Government Forensic Chemist Mr. LEE Hee-ming as to the various blood samples found at the premises, the preponderance of the deceased's blood being in the kitchen and the evidence of facial and other injuries being sustained by the 1st and 2nd accused, with a total absence of any evidence of injury to the 3rd accused, you may well think that Madam Lam's evidence that the 1st and 2nd accused fought with the deceased in the kitchen whilst the 3rd accused stood guard over her at the main door of the premises has been very substantially supported, whatever might have been the condition of the lighting in the flat at that time.

In cross-examination, it was put to Madam Lam what had in fact happened was that as soon as the 3 accused entered the flat the deceased attacked them first. This, Madam Lam emphatically and categorically denied. She stated with complete positiveness that what she saw indeed happened.

If you accept Madam Lam's evidence as being the truth, it necessarily follows that you would reject the versions given by the 3 accused in their statements to the police because they are totally at variance with what she maintained actually occurred.

If you believe Madam Lam, then the action of the deceased in taking up a chopper and using it on the intruders was perfectly justifiable in law. Anyone whose home is invaded by intruders displaying knives is not required by law to stand passively by to see what they intend to do with those knives. It would be an affront to common sense if it were otherwise.

If there is a present hostile demonstration indicating that violence is about to be used, then a man is not required to wait until his assailants come within striking distance; he is entitled to make a pre-emptive strike if needs be. He is entitled to protect himself, his wife, or his family from such an attack and he may take up the initiative to prevent such injury from being inflicted.

Debt or no debt, the accused had no right to be in the deceased's premises displaying knives. If you accept Madam Lam's evidence and are in no doubt that each accused went to those premises with the intention of inflicting serious bodily injury on any occupant who either failed to yield to the demands of the accused - whatever they may be - or who put up predictable

resistance by way of self-defence to being assaulted in this manner, then you will find him guilty of murder.

You must consider the case of each accused in this regard. You consider the case of each accused separately as I have already indicated to you. Such an accused person does not have available to him the defence of self-defence, or the partial defence of provocation. In the circumstances testified to by Madam LAM - if you accept them - then neither of those defences are available to any of the accused.

If you accept the contention for the Crown that the 1st and 2nd accused rushed at the deceased brandishing knives and forced him back into the kitchen where, despite his valiant defence, the two accused succeeded in overpowering him by inflicting a number of wounds including the fatal wound on him, you will have no difficulty in concluding that, whoever it was who struck the fatal blow, that both had at least the necessary intention to inflict serious bodily harm on the deceased and you will find them both guilty of murder.

You will recall that the 2nd accused in one of his statements to the police admitted that he struck the fatal blow. That admission, however, is of no avail to the 1st accused if you accept that he, the 1st accused, played the role that I have just described and assisted the 2nd accused in inflicting the wounds including the fatal wound on the deceased.

In this connection, members of the jury, you will recall that there were blood stains on both knives found in the flat that were of a group that could only have come from the deceased person. The Crown says that this shows without doubt that both persons who attacked the deceased wounded him. This, the Crown says, should leave no doubt in your mind as to what their intentions were.

As to the 3rd accused, the Crown contends that his role was no less culpable in law than that played by the 1st and 2nd accused because although he remained at the front entrance of the flat during the time of the struggle, he did so for the sole purpose of ensuring that Madam LAM did not escape and thereby raise the alarm. The Crown contends that the 3rd accused must have seen and heard what was happening and yet made no attempt to protest or to call off his

co-accused but remained guarding Madam LAM until they emerged from the kitchen after the deceased had been despatched. Whereupon all three left the premises.

Finally, and most damning, says the Crown: how did the blood specks come to be on the third knife if the 3rd accused did not use it? The Crown contends, on the scenario that is put forward by it as supported by the evidence, that the injury that caused the specks of blood on that knife must have been the injury that was sustained by Madam LAM, and that if this is the case, it shows that the third person wielded that knife after the events that occurred in the kitchen, showing clearly that he lent his support to what had happened in the kitchen. Now that, of course, is a matter for you.

Mr. SUEN for the 3rd accused says that those specks of blood might have come onto the knife accidentally, that in the escape from the premises somehow drops of blood or specks of blood might have come from one of the first two defendants and sprayed onto the knife. Do you think that this is reasonably possible? Or do you think that it is far more likely that what happened was that these specks of blood were specks of blood that came onto that knife as a result of it having been used on Madam LAM's head?

It means what then, members of jury? All three knives were found there and the evidence is that each accused was armed with a knife. All three knives were stained with blood. Do you deduce from this that all three accused participated in an act of violence involving the use of those knives?

If you have not any doubt, members of the jury, that the 3rd accused went to those premises contemplating that a knife or knives might be used by one of his co-accused on one of the occupants, if either of the accused's demands, whatever they might be, were not acceded to or if the occupants reacted predictably by resorting to self-defence, then you will find him guilty of murder even though he did not strike a single blow at the deceased.

If, however, on a consideration of all the evidence and the obvious, inherent probabilities that arise in such a situation, you were to think that it is reasonably possible that, despite carrying a knife himself and despite his seeing his co-accused produce knives, the 3rd accused did not intend to inflict serious

bodily injury, nor have in contemplation that serious bodily injury might be inflicted on any occupant of the flat, but only thought that the knives would be used to do no more than frighten the occupants, then he would be guilty not of murder but of manslaughter.

This would, of course, mean that you would have thought it possible that the 3rd accused had not given any thought to the possibility of the occupants refusing to yield to the demands accompanied by knife-waving threats of the accused, or that he had thought that such an eventuality might occur, he expected that he and his co-accused would then put their knives away and quietly retreat in defeat. It would also mean that you would have thought that it is reasonably possible that the 3rd accused never entertained any thought of the possibility of the occupants offering predictable self-defence to which his co-accused might have responded by using their knives to inflict serious bodily injury of those occupants.

I now turn to a consideration of the defence of each accused. The defence of each accused is embraced in the statement that he made to the police. At this juncture, I find it convenient to give you a direction in law as to the use you may make of the statement made by each accused.

A statement made by an accused person to the police such as the statements you have had put before you in this trial, can only be used by you for and against the accused who actually made the statement. You may not use anything that is contained in the statement of one accused either for or against anyone of his co-accused. To do so would be entirely wrong and, I emphasize, you must not do it.

I have already commented upon the first statement that the 1st accused made to the police. That is the one in which he said that he was involved in an incident other than the one with which we are concerned. I do not propose to make any further comment upon that. But, in order to speak about his defence, I now propose to embark upon a consideration of the statements which he made to the police, other than that first one.

The first statement, members of the jury, is Exh.91, that is to say, the statement which

was taken at 1320 hours on the 1st of June last year. If you turn to the second page of that statement. I do not think you need concern yourself very much with the first page as that is merely introductory matter that deals with the antecedents of the 1st accused. But in paragraph 4 of that statement, he says :

> " I slept up to shortly after 1 p.m. and got up. Tai Tau Cha told me to go downstairs for a walk. At that time I had nothing to do. So I agreed with Tai Tau Cha and went down to the street. When the two of us went down to the ground floor, I saw Tai Tau Cha saying hallo to a short man, and introduced me to know him, his nickname was Pat See Ming, but he did not formally introduce me to know his real name. When the three of us became known to one another, we started chatting. During the conversation Pat See Ming and Tai Tau Cha suggested 'Let's go and collect a debt now' and asked me if it was alright for me to go with them. I agreed to go with them because I was free at that time. After discussion three of us agreed that it would be safer to carry Ka Cham (equipment) to protect ourselves in case of need."

That position, of course, is very important in so far as the 1st accused's defence is concerned because what he is saying here is that although he went to the deceased's flat for the purpose of collecting a debt, he did not carry a weapon for any illegal purpose. He did not intend to threaten the deceased. He only intended to use it in the event that he might have to protect himself in case of need.

He then goes on to relate how the other two persons, Pat See Ming and Tai Tau Cha, concealed knives on their persons as well. He was therefore aware that his two companions were carrying knives.

They went to the scene and there Pat See Ming led the two of them - that is to say, the 1st accused and the other companion - as they walked. At the time Pat See Ming was holding a sheet of newspaper and walking around. Members of the jury, you may wonder what this sheet of newspaper was and for what purpose it was being used. Do you think that this gives any support at all to the Crown's contention that the newspaper was being used for the purpose

of tracing down the address of someone and that it was to be used for the purpose of committing a robbery?

I emphasize, members of the jury, that whatever the 1st accused has said in his statement is, of course, not evidence against either of the other two accused. It is only evidence against the 1st accused himself.

Later on, on arrival at the flat he said that Pat See Ming pressed the door bell; a woman answered and the door was opened. At once Pat See Ming dashed into the flat first. The accused said that he dashed into the flat after him and that when he dashed into the flat he was hit on the forehead by a hard object, that he fell to the ground, that he covered his head with his hands and he realized that he was bleeding; that he tried to take out the weapon from his sock but without success; that he heard various noises and sounds; that all that he wanted to do was to open the door and to escape; later the door was opened and he rushed downstairs.

It is perfectly plain from this, members of the jury, that as far as the accused is concerned, he took no part whatsoever in what happened in this flat because as soon as he entered he was struck a blow by someone and that all that he wanted to do, and all that he did do, was to run from the premises.

In the middle of page 5, members of the jury, he said :

> "Ah Sir, at that time I was first chopped and received injury on my forehead by someone with knife. Therefore I had no chance to take out a weapon to counter-attack. At the same time I felt dizzy and thought of running away only, therefore I was not clear whether Tai Tau Cha and Pat See Ming had stabbed that man to collapse, but I in fact had not stabbed that man. The weapon has been left behind there."

He, presumably, means in the flat.

That, in fact, members of the jury, is a mere repetition of what I have already said that he asserts to be the case, namely, that he took no part in the proceedings that occurred inside the flat.

Then in the statement in answer to the charge of murder - which is Exh.81A - he said that that afternoon he left home with his two companions and that he was asked to go to collect some money; that he agreed to go; that he took a vehicle to Tokwawan. On arrival there, they alighted from the vehicle and that one of his companions took some newspapers with him and walked to and fro "with us". Later, they arrived at a house where one of his companions pressed the door bell. Later he followed that companion into the flat. Upon entering the flat his head was suddenly struck by something. He fell to the ground and became unconscious. After a short while, he came to. His head was painful. His whole face was covered with blood. He was very frightened. He immediately opened the door and ran away.

Now in answer to the charge relating to the wounding, he said that he did not harm the woman, but when he entered the house his neck was struck by a hard object. He fell onto the ground and he knew nothing else. He was very frightened and he ran away immediately. All along in these statements, members of the jury, he denies having participated in the events which occurred in that flat; that on entry he was struck, that he was rendered hors de combat or unconscious temporarily, and that on regaining consciousness or regaining his wits he thought of nothing but of escape and fled through the door.

It is his defence that although he took a knife to the premises he went there solely for the legitimate purpose of recovering a debt, that he had no intention of using that knife for any purpose other than self-defence, in the event the deceased might suddenly attack him. He, therefore, neither intended nor foresaw any injury being inflicted on any occupant of that flat, save and except such as had to be inflicted in his own necessary self-defence; nor, in fact, did he inflict any injury, so he has maintained.

If you think that this might reasonably be true, then you must find the 1st accused not guilty of murder.

Likewise, if you think that his denial that he wounded Madam LAM might be true, then you will find him not guilty on the second count on the indictment.

In considering whether or not he is guilty on the second count of the indictment, you will bear in mind what he says about what happened when he entered the flat, that he did not strike a blow, that he did not participate in any way. If you were to think that that might reasonably be true, then of course it would be impossible for him to have inflicted any blow on Madam LAM.

Well the Crown says that what the 1st accused has said in his statement by way of exculpation is nothing but a tissue of lies; that what he has sought to do is to give an explanation which puts his conduct in the most favourable light possible; that he realizes that it is fruitless trying to deny having been in those premises because of the evidence that exists against him; the blood group, the injuries to his face, the evidence of Madam LAM: and therefore it is best to mount a defence that would suggest to you that his participation in these events was not in any way culpable. The Crown says that this is sheer nonsense, that it is merely the desperate attempt of a man to escape the proper consequences of his actions.

The Crown says: look at the statement. Does it give the ring of truth? The Crown says: do you think that if a debt were to be collected, it would be necessary for three men to go along with knives? That, in itself, the Crown says, would suggest the motive for going to the premises was not to collect a debt but to commit a robbery. The Crown says: look at the circumstances in which the first accused describes as having existed at the time of entry. It says that the three of them went to the premises, that one pressed the door bell and that, lo and behold, the door was opened, and that they all barged in. The Crown says, surely this is absurd. No doubt, Madam LAM, in the practice of her avocation as prostitute and masseuse, would be accustomed to opening the door to single men who are total strangers to her, but she would certainly not open the door to three men who were standing outside.

Of course, you may say that the accused does not positively say here that all three were standing outside the entrance, but you may think, on a natural reading of this statement, that that is really what it means. But if it were not to mean that, if it meant that two of them were actually waiting around the

corner and that they took advantage of the opportunity to dash in when the door was opened to admit the first person who rang the door bell, then the Crown says it is absolutely ludicrous to imagine that the deceased would have been standing inside the doorway with a chopper ready to attack anybody who came in because if he were running his business with his wife, he would necessarily expect people, strangers, to come in through the door; he certainly would not expect two or three to come in but he would expect a stranger to come in for the purpose of carrying on the business that his wife pursued.

Now if these two men were hanging around behind the door, behind the wall, obscured from view, and Madam LAM had opened the door to only one person, it is extraordinary that the deceased would have been standing there at that time with a chopper and would have lashed out a blow at the 1st accused as he entered the premises. This, the Crown maintains, defies common sense and reason. In order for the deceased to have armed himself with this chopper, he would have had to go back into the kitchen to the furthermost point of the kitchen to the refrigerator on which the chopper was resting, and then come out. But to imagine that he was standing in the vicinity of the door ready to chop someone as they came in does not accord with the inherent probabilities of the situation. That, of course, is a matter entirely for you, members of the jury.

The Crown also says that if Madam LAM had admitted these three men into the premises not because she had wished to but because they had forced their way into the premises, do you think that it is in any way likely that she would then lock the door and shout, "Robbery!"? What is the natural reaction of a person whose premises are invaded? You may well think that the last thing they are likely to do is to lock the door so as to lock the robbers in the premises with them. The Crown says that this is not in the least likely and invites you therefore to disbelieve this account given by the 1st accused.

I now turn to a consideration of the defence put forward by the 2nd accused. Again, I refer to the statements which he made to the police. The first statement is Exh.90. Ignoring again the introductory part of that statement, members of the jury, I go straight to the account that the 2nd accused gave as to

what happened immediately prior to the incident. He said in paragraph 5 of the statement :

> " Yesterday at about 1 p.m. (I did not know the exact time because I had no watch) at No.140, Tai Po Road, Tung Lo Building, Block A, No.10, 11th floor, when my friend 'Lour Yare' and I were having a talk, my friend Pak Sze Ming came to look for me. He spoke to us and asked us to help him to fix a job. I asked him what job it was. He said that a guy had owed him money and he was going to collect the money now. That guy lived in Tokwawan, and you two give me a helping hand. We both said, 'It is okay, as you say.' He again asked us two whether we had weapons. I said that we had not and we had better go to Mongkok to buy."

The accused then gave a description of going to the Chung Kiu Emporium Company where Pat Sze Ming bought three fruit knives and gave each of them one knife. He says that he then put the knife in the top of his trousers; that they went to Tokwawan and after having arrived there they went up some stairs, where one of them pressed the bell. Later the door was opened and Pat Sze Ming went inside, Lour Yare followed and the 2nd accused was the third one to enter. He said when he went into the house, a woman locked the door and shouted "Robbery!" loudly.

Members of the jury, I think I attributed that statement to the 1st accused - that the woman locked the door. I do not think there is anything in the statement of the 1st accused that the woman locked the door. So I will correct that. The 2nd accused said that the woman locked the door and shouted "Robbery!" loudly.

He said that at the same time a man who was holding a chopper chopped him once on his face. He, the 2nd accused, then turned around and wanted to run but he could not open the door. The second chopping occurred on his left shoulder. It was because he could not open the door that he then turned around and he received a third chopping on the right rear of his waist. The fourth chopping was aimed at his head and he used his left hand to ward off the hand which was holding the chopper and then took out the knife from his waist with his right hand and stabbed the deceased many times. After that he pushed the deceased away, turned around and ran.

"At that time the woman who had shut the door was stopping us at the door and was shouting 'Robbery!' loudly". He says that the woman was pushed away and that he then threw down his knife and ran.

Later, towards the bottom of page 2 - sorry - page 4 of the certified translation of that statement, he said :

> "As I have said just now I did not want to kill him and I also did not know that I would have killed him. It was because that he had chopped me with a chopper for three times and wanted to chop me for the fourth time I therefore took the knife from my waist to stab him for my defence, but I had no intention to stab to kill him. I now make it clear that I have stabbed and killed him for self-defence."

In his statement in answer to the charge of murder, he reiterated that intention, members of the jury.. He said:

> "This time I did it in self-defence. I only struck when he knifed me the fourth time. I have nothing else to say. That is all."

In his answer to the second count on the indictment, he said :

> "I did not harm this woman. That is all."

In essence, the 2nd accused's defence is that although he carried a knife to the premises with him, when he went there to collect the debt, whatever ideas he had about the possible use of the knife in those premises, such intention was relegated to history on his arrival because, immediately after having followed his two companions into the flat, he was suddenly, savagely attacked by the deceased. He said that he did what any person who was attacked should do, if reasonably possible - that is to say, to attempt to break off the attack by trying to escape. He said that he turned, desperately attempted to open the door but failed to do so, that blows were rained down upon him, and that finally, after the third, or perhaps the fourth, blow, in utter terror and frustration, he turned around and used his knife in self-defence.

If you think, members of the jury, that this may reasonably be true, then you will find the 2nd accused not guilty of murder, for he would have been acting in reasonable self-defence.

Whatever views he might have had as to the use of a weapon before he went, he resiled from such use of a weapon. He did what a person should properly do when attacked: that is to say, attempt to escape; and that he only reacted when it was absolutely necessary to do so in reasonable self-defence.

As to the second count, the 3rd accused denied that he harmed Madam LAM. If, bearing in mind what he said about the murder charge, you think that this denial might reasonably be true, then you will find him not guilty on the second count also.

The Crown, of course, has a great deal to say about the statement of the 2nd accused. It again comments: if it were necessary to collect the debt, do you think that it is in any way reasonable or necessary for three men to go along armed with knives? Does this not suggest robbery and not the collection of a debt?

Looking at the circumstances which the 2nd accused said prevailed at the time that he entered the premises, the Crown again says that this is sheer nonsense; this does not bear the light of examination. What is suggested here is that the three persons presented themselves at the premises, that Madam LAM opened the door to the three of them. There is no suggestion here of people barging into the premises. The 1st accused - I think I was wrong in saying that there was no suggestion there that he was barging into the premises - the 1st accused in fact had suggested that there was a barging into the premises, but the 2nd accused does not suggest this at all. He suggests, on a natural reading of the statement, that there was some orderly entry into the premises. That is a matter for you to decide on your reading of the statement, members of the jury. This, the Crown says, is plainly absurd because Madam LAM would never admit three people into the premises in those circumstances and if, indeed, this statement is capable of the construction that two of the accused were waiting around the corner and then entered the premises when the door had been opened to admit one person, it again is quite absurd to suggest that the deceased wouldhave been standing there with a weapon in his hand ready to attack a person whom he expected to enter the premises. In other words, the same observation is made by the Crown in connection with the 2nd accused's statement as is made in

connection with the 1st accused's statement.

The Crown says: do you really think that Madam LAM would have closed the door of those premises to keep these robbers inside or these intruders inside? Do you think that that is in any way likely? Do you think to the contrary that it is far more likely that a person whose premises have been invaded would attempt to keep the door open and attempt to escape?

I now turn to a consideration of the 3rd accused's statements. The first statement, members of the jury, is Exh.93A. In that statement he said :

> "Fai Lo owed me one thousand dollars. I went with a friend of Ah Cha's to Fair Lo's home to collect money. Fai Lo Por shouted robbery. Fai Lo held two knives to chop us. At that time I was running to one side. My two friends were chopped and injured by Fai Lo at once. My friend held a knife to counter-attack. I opened the door to run. I do not know what had happened later."

In his statement in answer to the charge - sorry, in Exh.93B, he made the statement in response to having seen the statements which had been made by his two co-accused. He said that there were contradictions in these statements and he denied that he actually knew that either of his companions had knives with them. He said that he only met his friends in the street and did not discuss what would happen at the deceased's home.

In answer to the charge of murder, the 3rd accused said :

> "Because I did not take part in the fight at that time. I only went up there for collecting money. I also did not know that my friends had brought knives on their person. When the fight was going on I opened the door and left."

In answer to the charge of wounding, he said :

> "Because after I had opened the door and after I had not seen clearly I heard the sound of fighting. I had already opened the door and left. Therefore I did not know the condition inside the premises. Furthermore, I was the first one to leave."

The essence of his defence - that is to say, the 3rd accused's defence - is that although he went to the deceased's premises with two companions to collect a debt, he was not aware that they were carrying knives. It is implicit also from what he said that he was unarmed. On arrival at the deceased's premises, the deceased, armed with two knives, suddenly attacked them. The 3rd accused immediately turned and opened the door which had been closed and ran away, thus taking no part in the ensuing fight. He did not strike a single blow.

If you think that this might reasonably be true, then you will find the 3rd accused not guilty of murder and you will also find him not guilty of wounding Madam LAM with intent to do her grievous bodily harm, or with wounding her at all.

Now members of the jury, if I suggested to you during the course of my dealing with the 1st accused's defence that he had suggested that the three of them just walked calmly into the premises, then of course that would be quite wrong. What he suggested was that they burst into the premises. If I suggested to you that what he said was that the door was locked, or closed behind them after they entered, then of course, there being no suggestion as I can see it in his statements to that effect, if I said anything to the contrary, then I thereby correct it.

Now members of the jury, in dealing with the second count - that is to say the wounding of Madam LAM with intent to do her grievous bodily harm, which means serious bodily injury - or in considering whether or not the accused are guilty of the lesser offence of simple wounding - that is to say intentionally wounding, but intending less than serious bodily injury - I think you should give consideration to the fact that the evidence seems to disclose, at least to my mind, the fact that this particular incident, in the whole series of incidents, occurred suddenly and out of the blue.

You may well think, therefore, whatever may have been the pre-arranged intention, the plan of the accused - either implied or expressed - that this probably did not enter into their minds. You may well think that although they went along to these premises

with the intention of using the knives to inflict serious bodily injury, if the residents of the premises offered resistance or refused to accede to the demands that were being made upon them, you may well think it is unlikely that the thought ever occurred to any of the accused that one of their number would suddenly out of the blue gratuitously suggest that someone should slash down a woman who happened to be kneeling on the floor and who was offering no resistance.

If you were to think that this was within their contemplation, and that this occurred, then of course you would be entitled to conclude that those who had that in contemplation are guilty of either wounding with intent to inflict serious bodily injury or simple wounding, depending upon their particular intent.

The difficulty that arises here, members of the jury, is this: that Madam LAM was totally unable to say who it was that shouted out, "Strike her down too.", and she was totally unable to say who it was who actually struck the blow on her head.

So therefore, members of the jury, you are left in the situation that unless you are sure that all three accused had in contemplation the possibility that this act might occur in the course of their adventure inside these premises, you cannot find any of them guilty of that offence; because although you may be perfectly satisfied of Madam LAM's evidence that indeed one man did call out, "Strike her down too.", and you may equally be satisfied that another person in response to that call did in fact strike a blow on her head, there is no evidence as to what the third party did or thought, and there is no evidence as to who that third party was.

In the face of such ambiguity, I find it very difficult to see how you can convict any of the accused on the second count on the indictment, or of the lesser count of wounding - simple wounding.

That, of course, is a matter entirely for you, members of the jury.

Now in considering the defences of the accused persons, you are, of course, confined to a consideration of their statements to the police, because that is the only evidence that you have before you of their defence. You cannot

speculate and guess as to what might have happened; you must be guided - you must act on only the evidence that is given in this case and such conclusions as might fairly and reasonably arise from the evidence.

You are entitled to give such weight as you think fit to the accused's statements. You are entitled to take cognizance of the fact that these statements were not made in the witness-box and were, therefore, not tested in the white light of cross-examination. You may, therefore, not be inclined to attach as much weight to them as you would have done had they been given in the witness-box.

The accused, of course, are not required to give evidence; they are entitled to remain silent and rely for their defence upon what is contained in their statements. As I say, however, what weight you attach to the statements is entirely a matter for you.

You may well have had personal experience in life that people rarely make voluntary confessions to a crime that they have not committed. Indeed, if your experience does not extend to crimes, no doubt it is your experience, common experience, that your employees, your co-workers, your friends or your family are not in the habit of admitting to having done something wrong which in fact they have not done. In fact it is probably your experience that where persons are in a position where the evidence against them is strong that they have done something wrong, they usually resort to what is called "confession and avoidance", that is to say they admit what they did, but then set about supplying a number of excuses as to what happened, the effect of which virtually strips the offence of much, if not all, of its culpability. This, you may think, is a natural human reaction, an instinctive reaction in a situation such as that.

It is therefore in that context, members of the jury, that you have to consider what weight you have to give to these statements that were not subjected to the white light of cross-examination. It is a matter entirely for you. You are entitled to take them into account in the accused's favour, but how much weight you attach to them is entirely a matter for you.

Before I conclude, members of the jury, you will recall that there was evidence given as to the circumstances of the arrest of the 3rd accused. Now it would be entirely wrong for you to deduce from that evidence that the 3rd accused was guilty of any crime at that particular time. You must not do so. The fact that he happened to have been found by some police officers in the circumstances described does not of itself suggest that he was committing any offence. It would be absolutely wrong of you to come to that conclusion, and it would be even wronger of you to think that, because of that, therefore he is a person all the more likely to have committed the crimes with which he is charged. You must completely dismiss from your minds anything adverse to the 3rd accused arising out of the circumstances of his arrest.

Finally, members of the jury, I would like to remind you that the burden of proof in this trial, as in all criminal trials, rests upon the Crown, and before you can convict an accused of any of the offences with which he has been charged, you must be sure that he committed that offence.

I do not think, members of the jury, that there is anything else that I can usefully add at this stage. I have attempted to reduce the evidence and the law to as simple a state as I possibly can; you may think that I have failed dismally in this regard, I hope that that is not so. But if at any stage during the course of your deliberations you find that you are uncertain, either as to any aspect of the evidence or as to any aspect of the law, then you must feel perfectly free to ask me to redirect you on the point or points in respect of which you are in doubt.

The way in which I would like you to do this is as follows: I would ask you to have your foreman write a brief note explaining what point it is that you seek guidance on, and to hand that note to the jury bailiff who will then give it to me. I will then reconvene the court with the accused and counsel and direct you to the best of my ability on the point in respect of which you seek guidance.

In this case, members of the jury, if you are to find an accused guilty or not guilty of murder, then your verdict must be unanimous. You cannot have a majority verdict for guilty or not guilty of murder. If you were to conclude that an accused is guilty of manslaughter - and

you will recall what I have said about manslaughter - then you may find him guilty of manslaughter by a majority verdict of either 6 to 1 or 5 to 2; but you may not have a majority verdict of 4 to 3 because that is not a proper verdict.

Unfortunately there are no jury rooms in this building. The courtroom will, therefore, be cleared, and I would suggest that you assemble yourselves around counsel's table and make yourselves comfortable so that you can discuss this case at your leisure.

The hour is relatively late, and no doubt you will require some time to consider your verdicts. You will, therefore, be provided with lunch. I particularly ask you not to return any verdict before 2 o'clock. I am not suggesting that you should have a verdict by 2 o'clock, but I am asking you not to return one before 2 o'clock so as to enable court staff, counsel and myself to partake of lunch.

Mr. Egan, is there anything that you think I should add?

MR. EGAN: No, my Lord, except as long as the jury are aware that for the second count they may also bring in a majority verdict.

COURT: Oh yes, indeed, I did omit to mention that, members of the jury, probably in view of the very strong views that I had expressed about the second count. But as far as the second count is concerned, you may convict - rather, I will correct myself - find an accused guilty or not guilty of the count of assault - I am sorry, of wounding with intent to cause grievous bodily harm or of simple wounding, by a majority verdict of 6 to 1 or 5 to 2.

Mr. Young, is there anything that you would like me to add?

MR. YOUNG: My Lord, no, I am grateful.

COURT: Mr. SUEN?

MR. SUEN: No, my Lord.

COURT: Thank you, gentlemen.

(Usher sworn.)

11.42 a.m. Court adjourns

In the High Court

Criminal Jurisdiction

No.3
Transcript of Summing up 9th June 1981

(continued)

3.30 p.m. Court resumes

3 accused present. Appearances as before. Jury present.

COURT: Mr. Foreman, I have received a note from you, rather a lengthy note. I will read it out sentence by sentence and endeavour to answer the points that you have raised.

The first point that you raised is, "We are arguing a point which may be a point of law, we believe murder is intent to kill."

Members of the jury, that is not so; that is only part of the definition of murder, it is one possibility. A person is guilty of murder if he unlawfully kills with the intention either of killing, or with the intention of inflicting serious bodily harm on his victim. Therefore it is not essential for him to be convicted of murder for him to have intended to kill; it is sufficient that he intended to inflict serious bodily harm on the person whom he ultimately kills.

He cannot be heard to say, "Oh, I did not intend to kill, I only intended to inflict serious bodily injury, but unfortunately I went too far.", or, "I struck a vital portion of the victim's body when I did not intend to do so."

Does that answer your first question?

You next say, "We disagree over the intent or not by the accused to use their knives."

I am not quite sure what this means, but I imagine that what you are asking for here is a direction as to what intent is necessary as to the use of knives before you can convict of murder; is that the question that you are asking?

MR. FOREMAN: Yes, your Lordship.

COURT: Well, then I will attempt to explain this again, members of the jury.

An accused person does not have to intend right at the very outset to inflict serious bodily injury on the person concerned. He may even hope that it will not be necessary to inflict any injury of any nature at all. He may earnestly hope that he can enforce his demands without the necessity of having to inflict any injury. But if, while hoping that injury will not be the outcome, he nevertheless decides at any time prior to the fatal killing that he will

use his weapon to inflict at least serious bodily injury on one of the occupants of the premises in order to enforce the demands of himself and his co-accused, or to overcome any predictable resistance that his or his companions' actions might produce, then he would be guilty of murder.

Now that deals with the case where he evinces an intention himself. But he may also be guilty of murder if - again not necessarily hoping that violence should ensue, but hoping that violence would not ensue he still has in contemplation that violence may be used by one of his co-adventurers, and that that violence will amount to the infliction of serious bodily injury.

If he thinks that that violence may be used by one of his co-adventurers if the occupants of the flat do not yield to the demands, whatever they may be, that are made by the accused and his companions, or that that violence will be inflicted if the occupants of the flat put up a predictable defence to the situation in which they find themselves, then he would be equally guilty of murder as if he had intended himself to use the knife to inflict serious bodily injury.

Do I make myself clear there, members of the jury, or would you like me to endeavour to put it another way to you? I see you nodding, so I gather that you have understood what I have said.

You next go on to say, "An important consideration we feel is if the knives were not pulled until the deceased, with the chopper, confronted the accused, the resultant fight and killing would be manslaughter."

I understand from this observation that you wish to ascertain what the situation would be if the accused had entered the premises and had not produced their knives, but were then and there subjected to an attack by the deceased with the chopper.

First of all, members of the jury, the accused had no right to enter into the deceased's premises armed with knives. But if they did not display them, then the most that the deceased person would be able to complain about is that three persons had gained unauthorised entry into his premises. He would be entitled to take some sort of preventive action. It may well be that he

would be entitled to think these persons are in his premises for no good purpose.

But members of the jury, if he were then to pick up a chopper and launch into a violent attack upon them when no weapons were visible in their hands, it is my view that he would be acting in excessive self-defence, and this would entitle the accused persons to draw their knives to protect themselves provided that they first attempted to leave the premises. They must attempt to leave the premises, members of the jury, because their entry in there has been unauthorised, and because in a situation where a person is subjected to a violent attack by another person, that first person must first endeavour to escape. He must not take up the challenge and settle the matter by a fight, he must endeavour to withdraw if such withdrawal is reasonably possible in the circumstances. If, of course, it is not reasonably possible in the circumstances, then he is perfectly entitled to take out such weapons as he may have in order to defend himself.

These are matters, members of the jury, which you have to determine. You have to apply your common sense. You have to analyse the situation, the inherent probabilities of what occurred in a situation such as this. You have to consider the nature of the weapons involved. You have to determine whether or not you think that the action of the deceased person was one of justifiable self-defence when the three intruders entered the premises. To this end it is very important for you to determine whether or not they had produced their knives upon entry into the premises.

It is the clear evidence of Madam LAM that they did so. It is not seriously suggested in cross-examination that it was otherwise. In fact it was suggested rather to the contrary that they had drawn their weapons - perhaps they had drawn their weapons before they entered the premises.

Well, members of the jury, it is a matter for you to decide. It may be that counsel for the defence was generally challenging her evidence on this point; that is a matter which you will have to determine.

Do you believe her evidence that the three accused produced these weapons and displayed them on their entry into the premises? If they did, members of the jury, then the deceased was perfectly entitled to take up that chopper and to defend himself and his wife. He is not to be expected to sit by passively and wait to

see what might happen, to wait and see what use those knives were going to be put to. Prevention is better than cure. He is entitled, as I told you before, to launch a pre-emptive strike in order to protect his life and limb, and that of his wife.

If, on the other hand, you come to the conclusion that you are not satisfied beyond reasonable doubt as to the evidence of Madam LAM, that is that the three accused did produce these knives as soon as they entered the premises, then of course you are left with the situation that I have just told you about, that the accused, without any display of weapons, and merely because of their unauthorised entry into these premises, were subjected to a violent attack by the deceased with a chopper.

Their first responsibility in such a circumstance - having entered the premises illegally - is to disengage, to withdraw, to retire from the premises. They must not engage in physical violence unless there is no option but to do otherwise. They must engage in all reasonable measures; that is to say, the first is to withdraw if that is reasonably possible. If that is not reasonably possible, then they are entitled to engage in such reasonable self-defence as is available to them. If they had knives concealed on their person, and they were confronted by a man wielding a chopper, then you may well think that it is only reasonable that they should pull out a knife and endeavour to protect their life or limb.

Does that assist you in any regard as to the last observation that you made?

Members of the jury, it does not follow that you must presume that because the three accused entered the premises with knives drawn that they must have intended to cause grievous bodily harm. This is an inference which you are perfectly entitled to draw from the evidence. As I say, you have got to use your common sense. If people enter premises illegally with weapons drawn, you are entitled to draw any obvious conclusion that fairly arises on the evidence. You are entitled to take into account all of the evidence that you have heard, particularly the evidence of Madam LAM.

Her evidence was that her husband, attracted by the sound of these human voices, came to the door of the kitchen. On seeing him there, the

1st and the 2nd accused - and it must have been the 2nd because Madam LAM says it positively was not the 3rd - the 1st and the 2nd accused rushed at him, pushed him into the kitchen. She heard one of them call out, "Strike him down." She heard her husband scream, and that shortly afterwards one of the accused who was in the kitchen shouted out, "Let us go" or "Let us run", words to that effect.

You also have the evidence of the forensic specialist who said that the two knives that were found in the premises both contained traces of blood that could only have come from the deceased person. Those traces of blood could not possibly have come from any of the other persons in the premises.

The Crown says that this shows that the two persons who were in the kitchen used their knives; and the fact that they used those knives is evidence that they intended to inflict serious bodily injury on the deceased person. The Crown says it is idle to suggest or suppose that anybody who uses vicious looking weapons like that would have intended anything less than the infliction of serious bodily injury. But this is a matter of common sense, members of the jury, which the Crown enjoins you to consider. Do you think, in view of all that evidence, that there was an intention less than that of inflicting serious bodily injury on the part of the 1st and 2nd accused?

As to the 3rd accused, the Crown says he made no attempt to prevent his two friends from continuing with their attack, he did not attempt to call them off, he remained at guard over Madam LAM at the door, and the obvious purpose for this was to ensure that she did not escape and raise the alarm.

The Crown also says that the third knife that was found downstairs - and you will bear in mind that the clear evidence is that three knives were used or held - the third knife that was found downstairs had blood stains on it, but that the expert could not tell from which person those stains had come.

The Crown says that the fact that this weapon was stained must surely suggest to you that it was used at some time during this fracas. It says that that third knife must have belonged to the 3rd accused; and that if he had not engaged in the tussle in the kitchen but had stood at the doorway, then how did the blood get on that knife? The Crown suggests that the

only way in which this could have happened is if he were the one who struck the victim Madam LAM over the head with the knife.

The defence say that it is possible that this blood might have spattered accidentally from one of the accused when he was running by in his flight from the premises. Do you think this is in any way a likely possibility?

The Crown says that is not in the least likely. It clearly shows that even after what had happened in the kitchen, the 3rd accused was willing to strike a blow on Madam LAM, and this is proof positive of the support that he lent to the acts that the 1st and 2nd accused were perpetrating in the kitchen.

You then ask, "The point is being made by one of us that murder has been committed because the killing took place in the accused's premises. Is this a legal point?"

Members of the jury, the fact that the killing took place in the deceased's premises does not automatically of itself make it murder. It could equally be murder if it occurred in the street. The point about it being the deceased's premises is that firstly, these persons had no legitimate right to be in there with weapons, either concealed or displayed, and that the occupant of premises is entitled to defend his premises against interlopers, particularly those bearing knives. He is entitled to defend himself and his wife. He is not obliged to retreat from those premises; indeed, members of the jury, he could not possibly have retreated from those premises because it is plain that the accused were at the doorway. So there was no way in which he could escape even if he had wished to.

Does that answer that question, members of the jury? If you feel that I have not adequately dealt with any of the matters which you have raised, please ask me to re-explain it to you; but I gather from the nodding of your heads that you now understand the points that I have made.

Finally, you say, "Are we expected to consider a possible verdict of manslaughter? Can we return such a verdict or are we confined only to the first charge of murder?"

As I mentioned to you this morning, members of the jury, if you were to come to the conclusion

that it was reasonably possible that an accused person had an intention less than the infliction of serious bodily injury on any occupant of the flat, or that he did not foresee that one of his colleagues was going to inflict injury of a serious bodily nature, then of course he would not have the necessary intent or the necessary foresight of the consequences to constitute murder.

In those circumstances, if he only intended to inflict an injury less than serious bodily injury, or if he only foresaw that one of his colleagues would inflict any injury less than really serious injury in the circumstances that I have already described to you, then you might find him guilty of manslaughter.

But again, members of the jury, you have to bear in mind the nature of the weapons that had been used. You have to bring your common sense to bear on the subject. You have to look at all of the evidence in the case, particularly that of Madam LAM who spent some time in the witness box. She was subjected to cross-examination, her evidence was tested. You have to consider her evidence and all of the other evidence in the case, and you have to consider also the statements made by the accused persons.

As I have said to you before, it is a matter for you to decide what weight you give to those statements of the accused, untested as they have been by cross-examination. You may think that had they gone into the witness box and given you these stories and had been subjected to cross-examination that you might have been able to attach more weight to them. But you are left in the situation where they have not been tested by cross-examination. You, therefore, must give such weight to them as you think fit in all the circumstances.

It really comes down to this, members of the jury, that you have to analyse the evidence. You have to decide what happened and come to a verdict accordingly.

Now members of the jury, does that answer your question, your last question? I see you are all nodding again.

Mr. Egan, is there anything that you think that I should add?

MR. EGAN: No, my Lord.

COURT: Mr. Young?

MR. YOUNG: My Lord, no.

COURT: Mr. SUEN?

MR. SUEN: No, my Lord.

COURT: Well, members of the jury, as you seem to understand what I have now told you, we will again vacate the court and leave you to your deliberations. Again, if any problems arise, you should not hesitate to ask me to return and clarify any points that you have difficulty with.

We, the undersigned, of THE SUPREME COURT OF HONG KONG do certify that, having been required by the Registrar of the Supreme Court to furnish to him a copy of the above tape-recorded summing-up, we have made a correct and complete transcript thereof to the best of our skill and ability in pursuance of the said requirements:-

Transcribed by:

Lily Wong	Sd: Lily Wong
Susan Kwong	Sd: S. Kwong
Patricia Brown Cheung	Sd: P.B.Cheung

Re-copied by:

Sd: Lily Wong
Lily Wong

Sd: S. Kwong
Susan Kwong

Sd: P.B.Cheung
Patricia Brown Cheung

In the Court of Appeal

No.4
Notice of Application by 1st Accused for Leave to Appeal 11th June 1981

No.4

Notice of Application by 1st Accused for Leave to Appeal 11th June 1981

FORM VII

CRIMINAL PROCEDURE ORDINANCE

(Chapter 221)

第七款表格 Criminal Appeal No. 540 of 1981

To the Registrar Courts of Justice Hong Kong 呈香港最高法院經歷司	Notice of application for leave to appeal and of other applications 申請准予上訴及其他申請通知書

PART I 第一部

Particulars of Appellant 上訴人詳情	Full Name CHAN Wing-siu 姓名	A1	Age of 定罪年齡 conviction 24
	Present Address Stanley Prison 現址		
Court where trial and/or sentenced 審判與判刑之法庭	Name of Court 法庭 High Court		Date of 判罪日期 (i) Conviction 9.6.1981
	Name of Judge 法官 The Hon. Mr. Justice Macdougall		(ii) Sentence 判刑 9.6.1981

Particulars of Offences and sentences appealed against 控罪詳情及呈請減刑之刑期	Offences 罪名	Sentences 刑期
	1st : Murder	1st : Death
	2nd : Wounding with intent	2nd : 5 years
Offences taken into consideration 2 併供請考慮之罪名		Total Sentence 合計刑期 Death

II

PART II 第二部

The Appellant is applying for :-
上訴人刻正聲請

* ~~EXTENSION OF TIME in which to give notice of application for~~ leave to appeal.
延長期限傳呈通知請准予上訴通知書
* ~~EXTENSION OF TIME in~~ which to give notice to appeal.
~~延長期限傳呈上訴通知書~~
* Leave to appeal against CONVICTION.
准許不服原判之上訴
* ~~Leave to appeal against SENTENCE.~~
~~准許對刑期不服之上訴~~
* ~~is/is not~~ seeking LEGAL AID.
上訴人現正/~~未有~~請求法律援助
* ~~BAIL~~
~~保釋~~
* Delete as appropriate.
將不適用各項刪去

PART III 第三部

The grounds are as follows. (Include reasons for delay if extension asked for). (If Grounds of Appeal have been settled and signed by Counsel they should be sent with this form and this Part may be left blank.)

上訴理由如下:(如係聲請延期則列舉耽誤之理由)
(倘若上訴一方之代表大律師經已確列並簽署其上訴理由時,可逕將該理由隨本表格附上而不須在本部內填寫)

In the Court
of Appeal

No.4
Notice of
Application
by 1st Accused
for Leave to
Appeal -
11th June 1981
(Contd.)

III

陳永韶

(CHAN Wing-siu)
Prisoner No. 34066

Signed .....
簽署

Date 11.6.1981
日期

上訴人經於本日呈交此通知書.
This notice was handed in by the Appellant today.

(Francis WONG)

(Signed) A.C.Sr.Supt...Stanley....(Officer)
(簽署) Prison (職員)

Date 11.6.1981.
日期

Received in the Criminal
Appeal Office.
刑事上訴處收訖

16 JUN 1981

Date .....
日期

No.5
Notice of Application by 2nd Accused for Leave to Appeal - 11th June 1981

In the Court of Appeal

No.5
Notice of Application by 2nd Accused for Leave to Appeal - 11th June 1981

附

FORM VII

CRIMINAL PROCEDURE ORDINANCE

(Chapter 221)

第七款表格 Criminal Appeal No. 540 of 1981

To the Registrar Courts of Justice Hong Kong 呈香港最高法院經歷司	Notice of application for leave to appeal and of other applications 申請准予上訴及其他申請通知書

PART I 第一部

Particulars of Appellant 上訴人詳情	Full Name 姓名 WONG Kin-shing	A2	Age of 定罪時年齡 24
	Present Address 現址 Stanley Prison		
Court where trial and/or sentenced 審判與判刑之法庭	Name of Court 法庭 High Court		Date of 判刑日期 (i) Conviction 9.6.1981
	Name of Judge 法官 The Hon. Mr. Justice Macdougall		(ii) Sentence 判刑 9.6.1981

Particulars of Offences and sentences appealed against 控罪詳情及呈請減刑之刑期	Offences 罪名	Sentences 刑期
	1st : Murder	1st : Death
	2nd : Wounding with intent	2nd : 5 years
Offences taken into consideration 經併辦在案之罪名	2	Total Sentence 合計刑期 Death

In the Court
of Appeal

No.5
Notice of
Application
by 2nd Accused
for Leave to
Appeal -
11th June 1981
(Contd.)

PART II 第二部

The Appellant is applying for :-
上訴人謹此申請

* ~~EXTENSION OF TIME in which to give notice of application for leave to appeal.~~
~~延長發給申請准予上訴通知書~~
* EXTENSION OF TIME in which to give notice to appeal.
~~延長發給上訴通知書~~
* Leave to appeal against CONVICTION.
准許不服原判之上訴
* ~~Leave to appeal against SENTENCE.~~
~~准許對刑罰不服提出上訴~~
* is/~~is not~~ seeking LEGAL AID.
上訴人現正/~~未~~申請法律援助
* ~~BAIL~~
~~保釋~~
* Delete as appropriate.
將不適用各項刪去

PART III 第三部

The grounds are as follows. (Include reasons for delay if extension asked for). (If Grounds of Appeal have been settled and signed by Counsel they should be sent with this form and this Part may be left blank.)

上訴理由如下：(如係聲請延期則列舉耽誤之理由)
(倘若上訴一方之代表大律師經已確列並簽署其上訴理由時，可逕將該理由隨本表格附上而不須在本部內填寫)

In the Court of Appeal

No.5
Notice of Application by 2nd Accused for Leave to Appeal - 11th June 1981 (Contd.)

VI

上訴人經於本日呈交此通知書
This notice was handed in by the Appellant today.

(Signed) Ag. Sr. Supt. Stanley (Officer)
(簽署) Prison. (職員)

Date 11.6.1981
日期

黃建成
(WONG Kin-shing)
Signed Prisoner No. 34067
簽署

Date 11.6.1981
日期

Received in the Criminal Appeal Office.
刑事上訴庭收訖

Date 16 JUN 1981
日期

In the Court of Appeal

No.6
Notice of Application by 3rd Accused for Leave to Appeal - 11th June 1981

No.6
Notice of Application by 3rd Accused for Leave to Appeal - 11th June 1981

VII

FORM VII

CRIMINAL PROCEDURE ORDINANCE

(Chapter 221)

第七款表格 Criminal Appeal No. 540 of 1981

To the Registrar Courts of Justice Hong Kong 呈香港最高法院經歷司	Notice of application for leave to appeal and of other applications 申請准予上訴及其他申請通知書

PART I 第一部

Particulars of Appellant 上訴人詳情	Full Name 姓名 TSE Wai-ming A3		Age of 定罪年齡 conviction 26
	Present Address 現址 Stanley Prison		
Court where trial and/or sentenced 審判與判刑之法庭	Name of Court 法庭 High Court		Date of 判罪日期 (i) Conviction 9.6.81
	Name of Judge 法官 The Hon. Mr. Justice Macdougall		(ii) Sentence 判刑日期 9.6.81

Particulars of Offences and sentences appealed against 控罪詳情及呈請減輕之刑期	Offences 罪名	Sentences 刑期
	1st : Murder	1st : Death
	2nd : Wounding with intent	2nd : 5 years
Offences taken into consideration 2 經供歸在案之罪名		Total Sentence 合計刑期 Death

VIII

二

PART II 第二部

The Appellant is applying for :-
上訴人現正聲請

- ~~EXTENSION OF TIME in which to give notice of application for~~ leave to appeal.
延長期限俾呈遞聲請准予上訴通知書
- EXTENSION OF TIME in which to give notice to appeal.
~~延長期限俾呈遞上訴通知書~~
- Leave to appeal against CONVICTION.
准作不服原判之上訴
- ~~Leave to appeal against SENTENCE.~~
~~對所判刑期准予以減輕~~
- is/~~is not~~ seeking LEGAL AID.
上訴人現正/~~否~~申請求法律援助
- ~~BAIL~~
~~保釋~~
- Delete as appropriate.
將不適用各項刪去

PART III 第三部

The grounds are as follows. (Include reasons for delay if extension asked for). (If Grounds of Appeal have been settled and signed by Counsel they should be sent with this form and this Part may be left blank.)

上訴理由如下:(如係聲請延期則列舉耽誤之理由)
(倘若上訴一方之代表大律師經已確列並簽署其上訴理由時,可逕將該理由隨本表格附上而不須在本部內填寫)

In the Court
of Appeal

No.6
Notice of
Application
by 3rd
Accused for
Leave to Appeal -
11th June 1981
(Contd.)

IX

上訴人經於本日呈交此通知書
This notice was handed in by the Appellant today.

(Francis WONG)
(Signed) Ag. Sr. Supt. Stanley ....(Officer)
(簽署) Prison (職員)

Date 11.6.1981
日期

(TSE Wai-ming)
Prisoner No. 32962
Signed .....
簽署

Date 11.6.1981
日期

Received in the Criminal
Appeal Office.
刑事上訴處收訖

Date 16 JUN 1981
日期

No. 7

GROUNDS OF APPEAL

IN THE SUPREME COURT OF HONG KONG
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 540 OF 1981

BETWEEN: (1) CHAN Wing-siu
(2) WONG Kin-shing
(3) TSE Wai-ming Appellants

- and -

The Queen Respondent

Grounds of Appeal Against Conviction of all three Appellants

The verdict of the jury was unsafe and unsatisfactory in that :-

1. IN THE CASE OF ALL THREE APPELLANTS ON THE FIRST COUNT OF MURDER

The Learned Trial Judge misdirected the jury as to the circumstances in which a murder verdict would be appropriate.

2. IN THE CASE OF ALL THREE APPELLANTS ON THE SECOND COUNT OF WOUNDING WITH INTENT

The verdict of the jury was perverse.

Dated the 21st day of August, 1981

(Sd:) A.J.Collins
(A.J.Collins)
Asst.Director of Legal Aid
(Signed on behalf of
Christopher Young, Esq.,
assigned Counsel for all
three Appellants)

In the Court of Appeal

No.8
Notice to file particulars of specific grounds of appeal
2nd September 1981

No. 8

NOTICE TO FILE PARTICULARS OF SPECIFIC GROUNDS OF APPEAL

SUPREME COURT
HONG KONG

2nd September, 1981

Our ref: Criminal Appeal No.540/81
Tel.: 5-231340

To: The Director of Legal Aid,
Legal Aid Department, H.K.

Dear Sir,

Re: Criminal Appeal No.540/81

q Your memo dated 19th August, 1981 (Re: CLA 6/50/81) and the grounds of appeal against conviction of all three appellants filed on the 24th August, 1981 refer.

The Honourable Mr Justice Garcia directed that the so-called specific grounds require particulars and has extended time until 16th September, 1981 to enable you to file Particulars of specific grounds of appeal.

In the event of your failing to file the Particulars of specific grounds on the date mentioned above, you may run the risk of having your application refused.

Yours faithfully,

Sd:

(H.M.Bassan)
p. Registrar, Supreme Court

N.B. "Specific" is meant that substantial reasons must be advanced. It is not sufficient to use the formulas in the old printed notices.

No. 9

PARTICULARS OF SPECIFIC GROUNDS OF APPEAL

IN THE SUPREME COURT OF HONG KONG
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 540 OF 1981

BETWEEN:

(1) CHAN Wing-siu
(2) WONG Kin-shing
(3) TSE Wai-ming — Appellants

- and -

The Queen — Respondent

GROUNDS OF APPEAL AGAINST CONVICTION OF ALL THREE APPELLANTS

The verdict of the jury was unsafe and unsatisfactory in that :-

1. IN THE CASE OF ALL THREE APPELLANTS ON THE FIRST COUNT OF MURDER

The Learned Trial Judge misdirected the jury as to the circumstances in which a murder verdict would be appropriate in that he directed that a defendant should be convicted of murder as an aider and abettor if he thought it possible that a co-adventurer might use a weapon to cause death or serious injury (reference pages 6, 7, 17, 18, 36).

2. IN THE CASE OF ALL THREE APPELLANTS ON THE SECOND COUNT OF WOUNDING WITH INTENT

The verdict of the jury was perverse in that they had been directed that there was insufficient evidence upon which to found a conviction (reference page 30).

Dated the 21st of August, 1981.

Sd: Christopher Young
Christopher Young

CY/al

In the Court of Appeal

No.10
Notice of Order refusing leave to 1st accused to appeal
15th September 1981

No.10

NOTICE OF ORDER REFUSING LEAVE TO 1ST ACCUSED TO APPEAL

[rule 23(2)]

FORM XIII

CRIMINAL PROCEDURE ORDINANCE
(Chapter 221)

Criminal Appeal No.540 of 1981

R. v. CHAN Wing-siu (1st Appellant)

NOTICE OF ORDER by the Hon.Mr Justice Garcia:-

1. APPLICATION CONSIDERED:

#(a) [illegible]

#(b) Leave to appeal against CONVICTION

#(c) [illegible]

#(d) [illegible]

#Delete as appropriate.

2. DECISION: Leave Refused.

DIRECTION under Criminal Procedure Ordinance, Section 83W ---------- days of the time spent in custody as an appellant SHALL NOT COUNT TOWARDS SENTENCE.

3. OBSERVATIONS to the Appellant (if leave refused)

There is no misdirection - the use of the knives in this case indicates that the inflicting of grievous bodily harm at least was in the contemplation of all the accused (page 13). See Johns v. The Queen (1980) 54 ALJR 166 and Miller v. The Queen (1980) 55 ALJR 23.

Having regard to the evidence the verdict on the 2nd count is not perverse.

Signed: N.I.Barnett
Registrar

Date: 15th September, 1981

Note. You may renew your application to the Court within 14 days. You may do this completing FORM XIV herewith.

A renewal to the Court after refusal by the Judge may well result in a direction for the loss of time should the Court come to the conclusion that there was no justification for the renewal. If the Judge has already directed that you lose time, the Court might direct that you lose more time.

To: CHAN Wing-siu (Prisoner No.34066) in Stanley Prison, c/o Commissioner of Prisons, Prisons Department, H.K.
(You are requested to acknowledge receipt)

The Director of Legal Aid,
Legal Aid Department, H.K.

The Hon. Attorney General,
Legal Department, H.K.

No.11

NOTICE OF ORDER REFUSING LEAVE TO 2ND ACCUSED TO APPEAL

[rule 23(2)]

FORM XIII

CRIMINAL PROCEDURE ORDINANCE
(Chapter 221)

Criminal Appeal No.540 of 1981

R. v. WONG Kin-shing (2nd Appellant)

NOTICE OF ORDER by the Hon.Mr. Justice Garcia:-

1. APPLICATION CONSIDERED:

#(a) EXTENSION of time

#(b) Leave to appeal against CONVICTION

#(c) Leave to appeal against SENTENCE

#(d) BAIL

Delete as appropriate.

2. DECISION: Leave Refused.

DIRECTION under Criminal Procedure Ordinance, Section 83W ---------- days of the time spent in custody as an appellant SHALL NOT COUNT TOWARDS SENTENCE.

3. OBSERVATIONS to the Appellant (if leave refused)

There is no misdirection - the use of the knives in this case indicates that the inflicting of grievous bodily harm at least was in the contemplation of all the accused (page 13). See Johns v. The Queen (1980) 54 ALJR 166 and Miller v. The Queen (1980) 55 ALJR 23.

Having regard to the evidence the verdict on the 2nd count is not perverse.

Signed: N.J.Barnett Registrar Date: 15th September, 1981

Note. You may renew your application to the Court within 14 days. You may do this completing FORM XIV herewith.

A renewal to the Court after refusal by the Judge may well result in a direction for the loss of time should the Court come to the conclusion that there was no justification for the renewal. If the Judge has already directed that you lose time, the Court might direct that you lose more time.

To: WONG Kin-shing (Prisoner No.34067)
in Stanley Prison,
c/o Commissioner of Prisons,
Prisons Department, H.K.
(You are requested to acknowledge receipt)

The Director of Legal Aid,
Legal Aid Department, H.K.

The Hon. Attorney General,
Legal Department, H.K.

No. 12

NOTICE OF ORDER REFUSING LEAVE TO 3RD ACCUSED TO APPEAL

[rule 23(2)]

FORM XIII

CRIMINAL PROCEDURE ORDINANCE
(Chapter 221)

Criminal Appeal No. 540 of 1981

R. v. TSE Wai-ming (3rd Appellant)

NOTICE OF ORDER by the Hon. Mr Justice Garcia:-

1. APPLICATION CONSIDERED:

#(a) EXTENSION OF TIME.

#(b) Leave to appeal against CONVICTION

#(c) LEAVE TO APPEAL AGAINST SENTENCE

#(d) XXXX

#Delete as appropriate.

2. DECISION: Leave Refused.

DIRECTION under Criminal Procedure Ordinance, Section 83W---------- days of the time spent in custody as an appellant SHALL NOT COUNT TOWARDS SENTENCE.

3. OBSERVATIONS to the Appellant (if leave refused)

There is no misdirection - the use of the knives in this case indicates that the inflicting of grievous bodily harm at least was in the contemplation of all the accused (page 13). See Johns v. The Queen (1980) 54 ALJR 166 and Miller v. The Queen (1980) 55 ALJR 23.

Having regard to the evidence the verdict on the 2nd Count is not perverse.

Signed: N.J.Barnett Registrar Date: 15th September, 1981

Note. You may renew your application to the Court within 14 days. You may do this completing FORM XIV herewith.

A renewal to the Court after refusal by the Judge may well result in a direction for the loss of time should the Court come to the conclusion that there was no

No.12
Notice of Order refusing leave to 3rd accused to appeal 15th September 1981

(continued)

justification for the renewal. If the Judge has alreay directed that you lose time, the Court might direct that you lose more time.

To: TSE Wai-ming (Prisoner No.32962)
in Stanley Prison,
c/o Commissioner of Prisons,
Prisons Department, H.K.
(You are requested to acknowledge receipt)

The Director of Legal Aid,
Legal Aid Department, H.K.

The Hon. Attorney General,
Legal Department, H.K.

No.13
Notice by 1st accused of renewal of application for leave to appeal against conviction 21st September 1981

No.13

NOTICE BY 1ST ACCUSED OF RENEWAL OF APPLICATION FOR LEAVE TO APPEAL AGAINST CONVICTION

[rule 23(2)]

FORM XIV

CRIMINAL PROCEDURE ORDINANCE
(Chapter 221)

Criminal Appeal No.540 of 1981
R. v. CHAN Wing-siu (1st Appellant)

PART I

The order of the Single Judge was sent to the appellant on 17 SEP 1981 through Commissioner of Prisons

(Signed) A.Ng
(A.NG)

PART II

(Notes: 1. A renewal to the Court after refusal by the Judge may well result in a direction for the loss of time should the Court come to the conclusion that there was no justification for the renewal. If the Judge has already directed that you lose time, the Court might direct that you lose more time.

2. This form must be returned to reach the Court of Appeal Office within 14 days of the date shown in Part I.)

The following applications are renewed :

#(a) ~~EXTENSION of time.~~

#(b) Leave to appeal against CONVICTION

#(c) ~~Leave to appeal against SENTENCE~~

#(d) ~~BAIL~~

Signed (In Chinese)
(Appellant)

Date 21.9.81

Received in the Court of Appeal Office.
Date 23 SEP 1981

If you wish to state any reasons in addition to those set out by you in your original notice, you may do so on the back of this form.

Delete as appropriate.

To the Registrar,
Court of Justice, Hong Kong.

No.14

NOTICE BY 2ND ACCUSED OF RENEWAL OF APPLICATION FOR LEAVE TO APPEAL AGAINST CONVICTION

No.14
Notice by 2nd accused of renewal of application for leave to appeal against conviction 21st September 1981

[rule 23(2)]

FORM XIV

CRIMINAL PROCEDURE ORDINANCE
(Chapter 221)

Criminal Appeal No.540 of 1981
R. v. WONG Kin-shing (2nd Appellant)

PART I

The order of the Single Judge was sent to the appellant on 17 SEP 1981 through Commissioner of Prisons

(Signed) A. Ng
(A. NG)

PART II

(Notes: 1. A renewal to the Court after refusal by the Judge may well result in a direction for the loss of time should the Court come to the conclusion that there was no justification for the renewal. If the Judge has already directed that you lose time, the Court might direct that you lose more time.

2. This form must be returned to reach the Court of Appeal Office within 14 days of the date shown in Part I.)

The following applications are renewed :

#(a) ~~EXTENSION of time~~

#(b) Leave to appeal against CONVICTION

#(c) ~~Leave to appeal against SENTENCE~~

#(d) ~~BAIL~~

Signed: (In Chinese)
(Appellant)

Date: 21.9.81.

Received in the Court of Appeal Office
Date 23 SEP 1981

If you wish to state any reasons in addition to those set out by you in your original notice, you may do so on the back of this form.

Delete as appropriate.

To the Registrar,
Court of Justice, Hong Kong.

No.15

NOTICE BY 3RD ACCUSED OF RENEWAL OF APPLICATION FOR LEAVE TO APPEAL AGAINST CONVICTION

No.15
Notice by 3rd accused of renewal of application for leave to appeal against conviction 21st September 1981

[rule 23(2)]

FORM XIV

CRIMINAL PROCEDURE ORDINANCE
(Chapter 221)

Criminal Appeal No.540 of 1981
R. v. TSE Wai-ming (3rd Appellant)

PART I

The order of the Single Judge was sent to the appellant on 17 SEP 1981 through Commissioner of Prisons

(Signed) A. Ng
(A. NG)

PART II

(Notes: 1. A renewal to the Court after refusal by the Judge may well result in a direction for the loss of time should the Court come to the conclusion that there was no justification for the renewal. If the Judge has already directed that you lose time, the Court might direct that you lose more time.

2. This form must be returned to reach the Court of Appeal Office within 14 days of the date shown in Part I.)

No.15
Notice by 3rd accused of renewal of application for leave to appeal against conviction 21st September 1981

(continued)

The following applications are renewed:

#(a) ~~EXTENSION-of-time~~

#(b) Leave to appeal against CONVICTION

#(c) ~~Leave-to-appeal-against-SENTENCE~~

#(d) ~~BAIL~~

Signed (In Chinese)
(Appellant)

Date: 21.9.81

Received in the Court of Appeal Office.
Date 23 SEP 1981 10

If you wish to state any reasons in addition to those set out by you in your original notice, you may do so on the back of this form.

Delete as appropriate.

To the Registrar,
Court of Justice, Hong Kong.

No. 16

JUDGMENT

Headnote : Murder : contemplation that a knife "might be used" sufficient for guilt : no direct English Authority : Johns v. The Queen [1980] 54 A.L.J.R. 166 adopted

IN THE COURT OF APPEAL 1981 No.540 (Criminal)

BETWEEN:

CHAN Wing-siu
WONG Kin-shing
TSE Wai-ming — Appellants

- and -

THE QUEEN — Respondent

Coram: McMullin, V.-P. Li and Silke, JJ.A.
Dated: 8th April, 1982

J U D G M E N T

McMullin, V.-P.

The deceased, CHEUNG Man-kam, lived with his wife, LAM Pui-yin, in a flat on the 1st floor of No.78, Block A, Lok Shan Road, Tokwawan.

Some time between 1.00 p.m. and 2.00 p.m. on the 31st of May 1980, in answer to a ring upon the doorbell, Madam Lam opened the door. Three men rushed in and almost at once attacked her husband who was in the kitchen of the premises. One of the number inflicted upon him a number of serious wounds from which he died a short time afterwards. Madam Lam herself received a slight head injury inflicted with a knife. The three men then left the flat and ran away leaving behind three knives two of which were heavily blood-stained with blood of the same group as that of the deceased. The third knife showed some spots of blood, too small for grouping. That was the story as told by Madam Lam.

It was never in dispute that the three appellants were the three men who were involved in this affair.

The prosecution case rested upon the testimony of Madam Lam. It appears that with her husband's consent, she was carrying on the trade of a prostitute at those premises and that she regularly placed advertisements, suitably worded, in several Chinese newspapers to indicate the availability of her services.

She told the court that when she heard the doorbell ring on this occasion, she peered through the spyhole and observed a man outside and assumed that he was a prospective customer. She said that as soon as she opened the door, two other men suddenly dashed from around a corner nearby and all three made to enter the flat. She endeavoured to close the door but was thrust aside and one of the men stayed with her near the door, told her to kneel down and kept guard upon her while the other two rushed towards the kitchen to which her husband had discreetly withdrawn assuming, as she had done, that a customer was in the offing.

At thirty-five minutes past two on the same day, the second appellant presented himself at the casualty department of Queen Elizabeth Hospital. He was found to have a number of serious injuries including a 2½ inch wound in the left side of his face involving the left side of the nose and penetrating the oral cavity. There was a compound fracture of his hard palate. He also had a wound on the left shoulder involving a chipped fracture of the scapula. There were two superficial cut wounds on his right flank. These wounds were all treated on the spot. He was given analgesics and antibiotics and he was discharged on the 2nd of June.

Some fifteen minutes after the second appellant had been admitted to casualty, Madam Lam attended the same department and was treated for a 1 inch wound over the left parietal region and bruising over the forehead.

Some five minutes later the first appellant turned up at casualty where upon examination he was found to have a wound over the right parietal region and a linear fracture of the centre table of the skull. These wounds were also treated and he, too, was discharged on the 2nd of June.

While she was being attended to, Madam Lam saw the first appellant when he arrived for treatment and she pointed to him and said

"That's him. He robbed me.". Her evidence was that the first appellant, on hearing this, did not reply but simply bent down his head.

The first and second appellants made statements to the police while still in hospital in which they gave false accounts of how they had come by their wounds. Subsequently, they each made a number of statements admitting to having entered Madam Lam's flat on the 31st of May and to having received their injuries in a confrontation with the deceased.

The third appellant was not arrested until some three months later. By this time the statements of the other appellants were in the hands of the police and he was shown their statements. He, too, made several statements relating to the charges of murder and wounding which are subject matter of the indictment in this case.

None of the three appellants gave evidence in court but the several statements made by them were introduced in evidence by the prosecution and they constituted the only defence put before the court on their behalf.

All three maintained that they had gone to Madam Lam's premises on that day to collect a debt which was allegedly owing from her husband to the third appellant.

The first appellant, Chan, said that Tse, the third appellant, whom he had not known previously, had been introduced to him earlier in the day by his friend Wong, the second appellant. Tse asked him and Wong to help him collect the debt from the deceased. He said that he had supplied each of them with a knife taken from his own premises and that each of them had concealed his knife in his clothing, their purpose being to protect themselves against any violence that might be offered to them.

He went on to say that they went together to Tokwawan in a public light bus and alighted in an area not familiar to him. Tse, he said, was consulting a newspaper. After some time he led them to the flat on the 1st floor of No.78. Tse pressed the doorbell and a woman answered the door. Tse went into the flat first and he, Chan, followed closely after. But as soon as he got inside, he was struck on the forehead by a hard object and he fell down.

He found that he was bleeding from the head and he tried to take his knife from its place of concealment in his sock but was unable to do so because the light was so dim that he could not see who had hit him. He heard a woman cry "No, don't" and there was a sound of violent fighting. He himself was only concerned to get away and as soon as the door was opened, he rushed downstairs and ran for about half an hour until he caught a taxi which took him to the hospital.

Subsequently, when he was charged with the murder of CHEUNG Man-kam and with the wounding of Madam Lam, he made a brief statement in answer to each charge. These were to the same general effect as the earlier statements.

The second appellant, Wong, in his statement, made on the 1st of June, said that his friend, Tse, had come to seek his help to pursue a debt which was owed to him by a man in Tokwawan. At that time he, Wong, was chatting with the first appellant, Chan, near the latter's premises in Tung Lo Building in Tai Po Road. He said that they went together in a public light bus until they got to the Chung Kiu Emporium Company where they stopped and Tse purchased three fruit knives and gave him and Chan one each, retaining one for himself. The knives were concealed within their clothing in various ways.

Thereafter they boarded another bus and were led by Tse to the flat on the 1st floor of No.78. Tse rang the bell and the door was opened. Tse and Chan entered first. He followed. The woman, who opened the door, shouted "Robbery" and locked the door behind him. A man, whom he saw within holding a chopper, then chopped him on his face once. He then turned to run away but could not open the door. He was then chopped again on the shoulder and on the back near the waist. A fourth blow was aimed at his head but he warded it off with his hand. Then he took out his knife and stabbed his assailant many times and then turned around and ran. The woman at the door was shouting "Robbery" but Tse pushed her away, opened the door and ran out, followed closely by Chan. Then he himself threw down his knife and followed them. He took a taxi to get to the hospital.

In answer to the formal charge of murder, he said that he had struck the deceased in self defence. In answer to the charge of unlawful wounding, he denied that he had injured the woman.

The third appellant, Tse, in his statement, made upon the 1st of September 1980, said that he had gone with the other two to collect a debt owed to him by the deceased whom he referred to as Fai Lo. He said that, on entering, Fai Lo was seen holding two knives aiming to chop them. He ran to one side and his two friends were chopped and injured by Fai Lo immediately. He saw Wong produce a knife to retaliate but he himself ran to the door and opened it and ran off. He did not know what occurred thereafter.

In answer to the formal charge of murder, he said that he did not know that his friends were armed with knives. He himself had only gone there to collect a debt. He was not clear what had happened after he had opened the door and run away.

In answer to the formal charge of wounding, he said that he had seen nothing clearly and that he had heard a sound of fighting. Immediately thereafter, he had opened the door and left and did not know the condition inside the premises. He was the first to leave the premises.

Madam Lam was unable to identify the person who had struck her on the head. The judge pointed out to the jury, however, that in view of the absence of any injury upon the third appellant, Tse, and in view of the fact that the knife found near the door had spots of blood upon it, the jury might, if they were prepared to accept Madam Lam's story as substantially true, infer that these facts pointed to the third appellant as the person who had stayed guarding her while the other two went to attack her husband, and also as the person who had endeavoured to strike her on the head, but who, in the haste of the moment, had inflicted a comparatively superficial injury.

In relation to the charge of wounding with intent to cause grievous bodily harm, the learned judge gave a strong direction to the jury, pointing out that since Madam Lam was unable to identify which of the appellants had struck her, they would find it difficult, in view of the fact that the attackers were then in retreat, to be able to say with certainty that whoever it was had struck her must have shared with the others an intention to inflict such an injury. Nevertheless, he left that charge to them for their decision on the evidence as a whole.

The second and less important of the grounds of appeal referred to this matter. Mr. Young submitted that in view of that direction, the jury, in returning a verdict of guilty against all three appellants upon the wounding charge,were, in effect, returning a perverse verdict. We cannot agree. If the jury accept Madam Lam's evidence as substantially true, it was open to them to conclude that anyone had gone to the premises armed with a knife was prepared to be a party to all the violence offered to any of the inhabitants of the flat. No doubt, that is the conclusion to which they came.

The main ground of appeal, however,raises a matter of some interest and considerable difficulty. Mr. Young, who appeared for all three appellants, relies upon a ground which is stated in the following terms :

> "The Learned Trial Judge misdirected the jury as to the circumstances in which a murder verdict would be appropriate in that he directed that a defendant should be convicted of murder as an aider and abettor if he thought it possible that a co-adventurer might use a weapon to cause death or serious injury."

Counsel drew our attention to passages in the summing-up which appear at pages 6, 7, 17, 18 and 36 therein. It is unnecessary to reproduce each of these passages in full. It may be said that a reasonable paraphrase of the summing-up at large, in relation to this matter, is that the learned trial judge did throughout direct the jury on the basis that a conviction for murder could and should follow if they were satisfied as regards each of the defendants that he foresaw death or grievous bodily harm as a possible, not as a probable, consequence of the enterprise to which he had lent his assistance. This is indicated at these points in the summing-up by the use of words such as"possible", "possibility", "might" and "may" in relation to the appellants' foresight of the outcome of their acts. Not all of these directions carry precisely the same degree of implication but as a whole it can be said that they do indicate the test as being one of foresight of possible rather than probable grievous bodily harm or death. There are other passages which suggest that the jury must find a positive intent to kill or cause grievous harm but the general cast of the directions is in the mode of foresight of possible consequences.

Within the last two decades, decisions in the English courts have afforded material for a debate involving some of the most respected voices on the academic side. The debate is, in the main, concerned with clarifying the notion of mens rea as a necessary ingredient in most criminal offences. In the course of it, we find a close and exacting scrutiny of many familiar terms as, for instance, intention, recklessness, gross negligence, foresight of consequences, knowledge, wilfulness and the like.

Mr. Young's argument for the appellants sets out from the standpoint that the law in England is settled in this matter. He argues that it is to the effect that, in order to constitute the mens rea of murder, it must be proved beyond reasonable doubt that the prisoner either did the act which killed or assisted in the doing of it with the foresight of the probability that what he did, or what was being done with his consent, would be likely to cause, at least, grave bodily injury. The test, in other words, is one of probability not of mere possibility. He acknowledges that a different rule seems to prevail in other jurisdictions. In this connection, we were referred to an Australian textbook - Criminal Law by Professor Colin Howard. In the 2nd edition of that work at page 55 under the sub-heading "Recklessness as to the Causing of Death", the learned author says as follows:

> "In Victoria, South Australia, New South Wales and Tasmania it is murder for D to kill V by deliberately and unjustifiably undertaking a course of action which he foresees may cause someone's death, even if he does not want to kill anyone. In New South Wales and Tasmania this rule is enacted by statute."

This will serve as sighting shot from the Antipodes although, as will later be shown, the author's use of "may" is equivocal. It will be necessary later to return to a fuller consideration of the Australian authorities and in particular to Johns v. The Queen (1) which Mr. Young has sought to distinguish.

Those authorities are, of course, not binding upon this court. We are bound, strictly

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(1) (1980) 54 A.L.J.R. 166

speaking, only by Privy Council decisions and there are none exactly relevant to the present purpose.

There has, however, been much discussion amongst academic writers as to the principles to be deduced from certain decisions in the House of Lords. If there could be extracted from these cases, or any of them, a clear statement of principle it would be binding upon this court (see De Lasala v. De Lasala) (2) Unfortunately, it does not appear that any such principle directly upon the point in issue here is to be found in any of the English decisions. In Hyam v. Director of Public Prosecutions (3) the House of Lords examined the nature of mens rea in murder in depth. Although the point we are now concerned with was not directly considered, the authority is of such intrinsic importance and has received so much in the way of comment in relation to this topic generally, that it must be referred to for the light incidentally thrown on the present point. Their Lordships' judgments show how problematic this area of the law remains in the United Kingdom.

It might be thought unlikely, at this date, that the familiar formula whereby juries are instructed on the necessary mens rea in murder viz.: that it is constituted by an intention to kill or cause grievous bodily harm, should be called in question. This is the formula which was approved by the Court of Appeal in 1957 in R. v. Vickers (4). Since the decision in DPP v. Smith (5), it has been the practice of judges both here and in England, following the languate employed by Kilmuir, L.C., in that case at page 291, to explain the term grievous bodily harm as meaning any really serious bodily injury. It may be said that this continues to be the classic direction on the subject.

Nevertheless, in Hyam (3) although the five Law Lords, who deal with the case, appear to agree that the effect of section 1 of the 1957 Homicide Act was to abolish the doctrine of constructive malice, two of their number (Lord Kilbrandon and Lord Diplock) went further and said that the consequence of that was to make the intent to cause grievous bodily harm no longer a sufficient intent to support a

(2) (1979) H.K.L.R. 214
(3) (1974) 59 Cr.App.R.91
(4) (1957) 2 Q.B. 664
(5) (1960) 44 Cr.App.R.261

charge of murder. Lord Hailsham, L.C., and Lord Dilhorne would not agree with that. They were satisfied that the trial judge's directions on grievous bodily harm could be supported on the basis that the intent to cause such harm was a type of malice aforethought. They disagreed with him, however, on the form of his direction which, in their opinion, appeared to equate "intent" with "foresight of probability of consequences". Lord Hailsham drew a distinction between "implied" and "constructive" malice and held that whereas the former had been abolished by the 1957 Act the latter had not.

Lord Cross was not prepared to decide between the opposing views of Lord Dilhorne and Diplock on the question of grievous bodily harm without having had "the fullest possible argument on the point from counsel on both sides.....". However, he joined the majority in dismissing the appeal but did so on the footing that the case of Vickers (4) had been rightly decided.

Clearly this is difficult ground. On that judges and jurists alike are at one.

In DPP v. Lynch (6) Lord Simon of Glaisdale said:

> "A principal difficulty in this branch of the law is the chaotic terminology, whether in judgments, academic writings or statutes."

Lord Simon's comment will serve well as a preface to what must be said concerning the point at issue in the present case.

Although the mens rea in murder was widely and variously canvassed, the judges in Hyam (3) did not consider, and were not asked to consider, whether a result foreseen as possible would suffice to constitute malice aforethought.

Since, however, such eminent judicial authorities can be found in contention over a point of such fundamental concern in the

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(4) (1957) 2 Q.B.664
(6) (1975) 61 Cr.App.R.6 at p.25
(3) (1974) 59 Cr.App.R.91

criminal law as the status of grievous bodily harm in relation to malice aforethought, I will take it that the present point, which has received no direct consideration at the highest level in the English courts, is one upon which we would be wise to receive whatever help we may, not only from judicial dicta but also from the observations of academic writers, in deciding whether or not the view taken of this matter in the Australian courts is the correct one.

With that said, however, I should add that in so far as they considered the matter at all, it would appear that the judges in the House of Lords in Hyam's (3) case accepted probability or likelihood as the proper test.

The direction of the trial judge, Ackner, J., was to the effect that when Mrs. Hyam poured petrol through her neighbour's letter-box and then set the house on fire - the death of two small children resulting from her act - the jury should only convict her of murder if they were satisfied that she had foreseen death or grievous bodily harm to someone within the house as "highly probable". As to this, Archbold (40th Edition) at p.950 says :

> "It seems reasonably clear from the majority of their Lordships opinions that the inclusion of the word 'highly' before 'probable' was unnecessary."

At all events, nobody, neither counsel nor the learned judges, suggested in that case that the test of foresight of possibility might be the correct test.

It may be said that the argument concerning "possible" as against "probable" when it reaches the hands of the academic writers is occasionally carried by them to philosophical depths so profound as to exclude the common daylight by which the courts of law must conduct their business. (In this connection see "The Mathematics of Proof" by Professor Williams a formidable and closely reasoned critique appearing in two parts in the Criminal Law Review for 1979 at pages 297 and 340). No doubt it is to such depths that the roots of meaning must necessarily draw the inquiring mind at its most acute and scholarly and in the

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(3) (1974) 59 Cr.App.R.91

end the discourse of the courts is likely to benefit from the refinement of concepts. Meanwhile, however, there is some immediate help deriving from the academic debate upon the case law which will assist in a common sense approach to these terms.

The difficulty, of course, arises from the fact that the terms "probable" and "possible" when variously used may tend to encroach upon each other's territory. Mathematically regarded there is, no doubt, a degree of probability to every possibility. But it would surely be preferable, at least, when treating of mens rea in homicide, if the usage of the courts were to settle upon "probable" as a term denoting something which is "more likely than not" to occur whereas the term "possible" would be taken to apply to an event less likely than not to occur.

In Fallon's Crown Court Practice at page 250, the learned author is dealing with recklessness and foresight of consequences. He considers the degree of risk which has to be foreseen in crime and he says :

> "For the purposes of malice aforethought, it must be established that the defendant knew or foresaw that there was a probability or a likelihood of the risk eventuating."

For this he is relying upon Article 224, paragraph (b) of Stephen's Digest of the Criminal Law and on DPP v. Smith (5) (cited supra). These were prominent among the authorities being considered by the House of Lords in Hyam (3). Fallon then points out that malice aforethought is an ingredient special to murder and that it is not helpful to consider the meaning of malice in such enactments as the Offences against the Person Act of 1861, section 23 or, generally, in dealing with the mental elements of other crimes. He adds, in relation to murder, (p.251) :

> "In no case does it seem that a jury has been directed that foresight of mere possibility suffices."

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(5) (1960) 44 Cr.App.R.261
(3) (1974) 59 Cr.App.R.91

For him, therefore, recklessness in murder implies foresight of probability.

Archbold (40th Edition) citing Hyam (3) (at p.958) says :

> "'Recklessly' in certain dicta and according to some writers appears to be regarded as almost equivalent to 'intent'.....The better view seems to be that whereas 'intent' requires a desire for consequences or foresight of probable consequences, 'reckless' only requires foresight of possible consequences coupled with an unreasonable willingness to risk them."

Shortly thereafter, he quotes the definition of recklessness proposed by the Law Commission (Law Comm. No.89) which is in the following terms :

> "(1) The standard test of recklessness as to result is -
>
> Did the person whose conduct is in issue foresee that his conduct might produce the result and, if so, was it unreasonable for him to take the risk of producing it?
>
> (2) The standard test of recklessness as to circumstances is -
>
> Did the person whose conduct is in issue realize that the circumstances might exist and, if so, was it unreasonable for him to take the risk of their existence?" (emphasis added)

Archbold also says, however, at page 958, that where a statute provides that an act will be criminal if done recklessly "it will seldom if ever be necessary to direct the jury that 'intent' includes 'foresight of probable consequences', because the latter will be sufficiently covered by 'recklessly'." There seems to be a contradiction here. If "reckless" only requires foresight of "possible" consequences, it is difficult to see how foresight of "probable" consequences can also be covered by the same term if it be conceded

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(3) (1974) 59 Cr.App.R.91

that the latter term is used to denote a more likely-than-not occurrence and therefore one which obliges a greater reach of prosecution labours into the factual field of proof.

It may be, however, that what is intended is that foresight of "possible consequences" is to be equated in blameworthiness with the foresight of "probable consequences" when the result which is envisaged as possible is accompanied by an unreasonable willingness to take the risk. Archbold appears to regard the proposed definition of recklessness by the Law Commission as satisfactory and he adds that it would seem to accord with some of the reported cases. Dealing with this very matter, Professor Glanville Williams in the 2nd edition of his Criminal Law (The General Part) says at page 53 :

> "Recklessness as to consequence occurs when the actor does not desire the consequence, but foresees the possibility and consciously takes the risk.....
> For many, if not most, legal purposes recklessness is classed with intention. It is like intention in that the consequence is foreseen, butthe difference is that whereas in intention the consequence is desired, or is foreseen as a certainty, in recklessness it is foreseen as possible or probable but not desired."

At page 59 he says :

> "Consequences may range in every degree from the remote and unexpected, through the reasonably possible, the likely or probable, to the inevitable. ..... Recklessness occurs where the consequence is foreseen not as morally or substantially certain but only as 'probable' or 'likely', or perhaps merely 'possible'."

He cites the opinion of Criminal Law Commissioners of 1833 regarding the act of a man who selects one pistol from a number of pistols, only one of which is known to be loaded and he says :

> "Superficially one might think that the law ought to declare how many unloaded pistols to the single loaded one make a killing merely 'possible'

"and how many make it 'probable' or'likely'. The authorities furnish no guidance on this, and do not indicate whether foresight of possibility is enough to constitute recklessness."

He then quotes the words of the Commissioners who said that the probability of a fatal result would be diminished accordingly as the number of pistols increased. He did not regard the increase in number as having a significant effect upon the issue of the act because :

"still there would be a wilful risking of life attended with a fatal result....."

Professor Williams notes that "probable" in this passage from the Commissioners report means what is usually called "possible". He continues (p.60) :

"The opinion of the Commissioners may be accepted, for a person is not generally at liberty to bring another causelessly even within slight danger of death. However, this does not mean that foresight of bare possibility is in every case tantamount to recklessness."

He then introduces a distinction which may be of cardinal importance on this issue. He suggests that the case in which such foresight will amount to recklessness may be distinguished from the case in which it does not by reference to the degree of social utility, or the lack thereof, which can be discerned in the act which causes damage. One page 62, he says :

"The conclusion is that knowledge of bare possibility is sufficient to convict of recklessness if the conduct has no social utility, but that the slightest social utility of the conduct will introduce an enquiry into the degree of probability of harm and a balancing of this hazard against its social utility. If this is the law, it would be useless to define probability in mathematical terms, because the degree of probability that is to constitute recklessness must vary in each instance with the magnitude of the harm foreseen and the degree of utility of the conduct."

At page 63, he says :

> "Degrees of possibility or probability, in the circumstances that come before the courts, are almost incommunicable, except in rought terms. .....The finding of recklessness is easiest where the defendant was bent upon wrong-doing, and pursued his aim regardless of an obvious risk; such a defendant can be accounted reckless because he was not entitled, for the sake of his unlawful ends, to inflict any foreseen risk upon others. His plea that he thought the risk a small one will not avail him, because he was not entitled to bring others even into small danger for an unlawful purpose of his own."

It must be said that none of the passages cited from Glanville Williams are related directly to the crime of murder. On the other hand, it is evident that the opinions expressed are not intended to be restricted to any one crime or species of crimes.

At page 246 of Fallon (op.cit.), it is said that "murder based, as it is, on malice aforethought, can be committed recklessly on the basis of foresight of probability....".

In Hyam (3) , Lord Hailsham struck off in a somewhat different direction to that taken by the other judges. He returned a negative answer to the question posed for consideration by the Court of Appeal viz.: whether knowledge of the likelihood of harm is sufficient to show malice aforethought. In his view, intention was the important ingredient and foresight of consequences was not to be equated with intention. He settled upon a different test of intention: did the defendant know that by his act he was exposing the victim to a risk of really serious bodily injury? This is interpreted by Smith & Hogan as a clear statement that deliberate risk taking is equivalent to recklessness (op.cit. page 286). The risk must, of course, be unjustifiable or - in the language of Glanville Williams (page 53) - without any social utility. Smith & Hogan follow Glanville Williams in this and add that the test for recklessness is an objective one and that the opinion of the defendant is irrelevant, presumably both as to

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(3) (1974) 59 Cr.App.R.91

the social utility of the act and the probability of the result; but to this I must return.

Since it is clear enough that we are in the realm of what is arguable, it might be said to be arguable that, since recklessness involves an intentional act in the face of a perceived risk, the more grave are the possible results of that act the wider should stretch the net to catch the conscience of the actor. Is there anything repugnant to the moral judgment in demanding that any person who foresees a substantial possibility of grave harm in his intended act should be fixed with the necessary degree of malice when death results if it was clearly unreasonable for him to take the risk?

A good guide to a safe passage through these reefs and shoals of meaning is provided by the suggested test to be found at page 958, paragraph 1443C in Archbold in the passage already cited where he suggests that the better view seems to be that foresight of possible consequences coupled with an unreasonable willingness to risk them is sufficient to constitute that recklessness which is nowadays regarded as being almost equivalent to positive intent. It will, I think, be clear, adopting that principle, that the test of what is reasonable will not be the subjective test of what the accused believed to be reasonable but what was reasonable by the standard of the reasonable man.

The report of the Royal Commission on Capital Punishment (Cmd.8932) in its fifth proposition as to what constitutes mens rea in murder says :

> "It is murder if one person kills another by an intentional act which he knows to be likely to kill or to cause grievous bodily harm and may be either recklessly indifferent as to the results of his act or may even desire that no harm should be caused by it."

In his chapter on murder and manslaughter, Fallon remarks that the mental element so defined has caused problems, especially as it is no longer proper to say when addressing a jury that a man is presumed to have intended the natural consequences of his act. At

page 308, he says:

> "Foresight of consequences is, therefore, an essential feature of malice aforethought. ..... Malice aforethought is, however, a wider concept than intention. It includes a certain degree of magnitude of foresight accompanying a voluntary (intentional) act whether the defendant was recklessly indifferent to the consequences arising from his act or whether he actually desired the consequences not to eventuate."

He appears to take the view that the result of Hyam (3) is that foresight of likelihood of grave bodily injury coupled with recklessness as to consequences is a sufficient mens rea in murder. It is evident that even putting the matter as high as that, he is, nevertheless, moved to question whether it should not go higher still and is inclined to approve of the criticism of this paragraph in the Royal Commission Report advanced in Kenny's Outlines of Criminal Law (15th Edition) where that learned author suggests that it may be "impolitic" to treat that class of intention as amounting to murderous malice. Fallon goes on in fairness, however, to note that Professor Smith, in a brief commentary in the 1975 Criminal Law Review at page 702, regards the decision in Hyam (3) as establishing that either positive intention or else recklessness as to the particular harm prohibited by the offence is a sufficient mens rea for murder. He notes also that Professor Glanville Williams was of the same opinion in an article in the New Law Journal (126 NLJ 660) where he said :

> ".....Murder can be committed by a certain type of recklessness."

It will be readily seen that there are high opinions in some condition of disarray on this very fundamental question. Admittedly the paragraph in the Royal Commission's Report, cited above, combines probability with recklessness as constituting mens rea and this is also the view taken by Fallon. Archbold and Smith & Hogan regard recklessness as constituted by foresight of possible harm but they also adhere to probability in relation to malice aforethought. It would seem to follow that for both of these authorities recklessness is not a sufficient mens rea in murder. It is not

(3)(1974) 59 Cr.App.R.91

clear why Smith & Hogan take this view. For Archbold the reason appears to be related to the distinction, which next falls to be considered, between crimes of specific or ulterior and those of basic intention.

These are the terms employed by Lord Simon of Glaisdale in Lynch v. DPP for Northern Ireland (6) and in Morgan (7). They have since come in for criticism. In Lynch (6), Lord Simon identified assault as a crime of basic intent and he said (page 33) :

> "The actus reus is the wounding; and the prosecution must prove a corresponding mens rea - namely, that the accused foresaw the wounding as a likely consequence of his act. But this crime "- i.e. wounding with intent to cause grievous bodily harm -" is defined in such a way that the prosecution must in addition prove that the accused foresaw that the victim would, as a result of that act, probably be wounded in such a way as to result in serious injury to him. "

Archbold (page 952) regards this as a lucid definition of a crime of specific intent but goes on to suggest that Lord Simon departed from it in Majewski (8) (infra) in which case, moreover, Lord Simon appears to draw a distinction between "specific" and "ulterior" intent the latter being as he puts it merely "one type of specific intent".

In DPP v. Morgan (7) (supra) at page 152, Lord Simon, some six weeks later, gives assault as an example of a crime of basic intent in that it is an offence in which the "mens rea (did) not extend beyond the act and its consequences, however remote, as defined in the actus reus."

In DPP v. Majewski (8), Lord Elwyn-Jones, L.C., (at page 267) adopted this definition for the purposes of the case before him in which the principal point being considered was the effect of self-intoxication upon the act of a person who

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(6) (1975) 61 Cr.App.R.6
(7) (1975) 61 Cr.App.R.136
(8) (1976) 62 Cr.App.R.262

was charged with assault. The question of intoxication is of no relevance to present concerns. What is of interest is the divergence of views which have subsequently been expressed concerning this definition of a crime of basic intent given by Lord Simon in Morgan (7).

This distinction between crimes of basic intent and crimes of ulterior or specific intent has been much canvassed of recent years in the courts and by the academic writers. The editors of Smith & Hogan point out at page 56 in the 4th Edition that the term specific intent must be taken with some caution because :

> "It is variously used to mean
>
> (i) whatever intention has to be proved to establish guilt of the particular crime before the court;
> (ii) a 'direct' as distinct from an 'oblique' intention; or
> (iii) an intention ulterior to the actus reus; or
> (iv) a crime where D may successfully plead lack of the prescribed mens rea notwithstanding the fact that he relies on evidence that he was intoxicated at the time. "

Shortly thereafter, citing the case of Belfon (9), the editors point out that upon a charge of wounding with intent to cause grievous bodily harm, proof that D was reckless whether he caused grievous bodily harm will not suffice. The learned editors add:

> "Yet, paradoxically, if death resulted from the wound, D's recklessness would probably be enough to found liability for murder. "

And immediately thereafter the following general definition of mens rea is proposed :

> "Intention or recklessness with respect to all the consequences and circumstances of the accused's act (or the state of affairs) which constitute the actus reus, together with any ulterior intent which the definition of the crime requires."

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(7) (1975) 61 Cr.App.R.136
(9) (1976) 3 All E.R.46

This opinion is, to some extent, echoed in the words of Lord Elwyn-Jones, L.C., in Majewski (8) where, at page 270, having concluded that self-induced intoxication itself constituted the recklessness necessary to support a charge of assault, that being a crime of basic intent, went on to say :

> "By allowing himself to get drunk and thereby putting himself in such a condition as to be no longer amenable to the laws commands, a man shows such regardlessness as to amount to mens rea for the purpose of all ordinary crimes."
> (emphasis added)

This I take to be an opinion at large upon the topic of recklessness irrespective of whether the crime be one of basic or of specific intent. The distinction, however, persists and continues to attract controversy.

Smith & Hogan (page 186) having pointed out how important the nature of specific intent may be in relation to a defence of voluntary self-intoxication go on to say (in relation to the distinction between specific and basic intent) :

> "A careful scrutiny of the authorities, particularly Majewski itself, fails to reveal any consistent principle."

The only importance of this distinction to the present case lies in the suggestion (Archbold page 973-4) that it is only in offences of "basic intent" that recklessness is a sufficient mens rea. If that be right and if murder is a crime of specific intent then recklessness would not constitute malice aforethought. Archbold's comment is, however, a gloss on the words of the Lord Chancellor which were directed specifically to the situation of an accused who pleaded that he was too drunk to form the special intent described in the definition of the offence. There does not appear to be any case which says in so many words that "recklessness" as a concept is incompatible with a crime requiring specific intent.

Setting aside for the moment the distinction between what is "possible" and what is

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(8) (1976) 62 Cr.App.R.262

"probable", it must surely be the case that whether an act is seen by the doer as one which may possibly cause grievous bodily harm, or whether it is seen by him as likely or very likely to cause such harm, it is in either case an act which can perfectly well be associated with a cast of mind which is reckless of that result. The doer, to whatever degree of possibility or probability he foresees the result, "recks not" that it should come about. This opinion of Archbold - and the same opinion to be found in Fallon (page 247) - cannot, I think, be supported on any logical ground.

Apart from that, there is still some doubt whether murder is to be regarded as a crime of specific or of basic intent. Smith & Hogan (page 186) say that murder is "conspicuously" one of the latter kind. The authors note that Lord Simon, in Majewski (8), introduced a further refinement into the argument by suggesting that it is the purposive element which distinguishes the two types of offence - i.e. specific and basic - and they argue that although Lord Simon regarded rape as a crime of basic intent, it is one which requires a purposive element whereas, it is said, murder, unlike rape, need not (page 186-7).

Archbold (page 973) notes that the Lord Chancellor in Morgan (7) accepted Lord Simon's definition, in the same case, of a crime of basic intent and went on to list the crimes, in addition to rape, in respect of which it would be no excuse in law that the accused had knowingly and willingly deprived himself of the ability to exercise self-control by the use of drink or drugs. Murder does not appear in that list. Archbold remarks that the definition of crimes of "basic intent" accepted by the Lord Chancellor would seem to include murder and also causing grievous bodily harm with intent to cause grievous bodily harm, although it is apparent that the Lord Chancellor did not intend to include those crimes in his list.

Professor Glanville Williams appears to agree. Writing in the New Law Journal Vol.126 at page 660, he comments on Lord Simon's definition. He argues that on this definition an offence of wounding with intent is a crime of basic intent since, in Lord Simon's words,

(8) (1976) 62 Cr.App.R.262
(7) (1975) 61 Cr.App.R.136

"the mens rea does not extend beyond the act and its consequences, however remote, as defined in the actus reus." Glanville Williams adds that the same would be true of murder.

Fallon, however, (page 243) rejects this criticism pointing out that Lord Simon, who regards murder as a crime of specific intent, had not said: "An actus reus included a consequence, however remote, as defined in the actus reus." That is so; but it does not dispose of the criticism. Since either one of the two different degrees of intent will sustain a murder charge, where the intent is only to cause grievous bodily harm the mens rea stops there but the result of the act exceeds it. Looked at in isolation from the salutary rule whereby the courts will not allow a man to say he only intended grievous harm, death can be said to be a consequence more remote than that intended.

The difficulty arising out of the use of the terms "basic" and "specific" is, with respect, enhanced by the language employed by Lord Simon in a passage which appears on pages 152-153 in the Criminal Appeal Report and which is strongly relied on by Mr. Chandler in the present case. At page 152 dealing with a crime of basic intent (assault), he says :

> "The prosecution must prove that the accused foresaw that his act would probably cause another person to have apprehension of immediate and unlawful violence or would possibly have that consequence, such being the purpose of the act, or that he was reckless as to whether or not his act caused such apprehension."

At page 153 he turns to consider a crime of "ulterior" intent (wounding with intent) and he says that the prosecution "must show that the accused foresaw that serious physical injury would probably be a consequence of his act, or would possibly be so, that being a purpose of his act." (added emphasis)

In both of those passages "possibly" appears as a viable alternative to "probably" and one must ask why, if that is a proper equation in relation to both types of crime, the further alternative of recklessness should not be sufficient mens rea for one of specific

intent also.

Smith & Hogan (4th Edition, page 286) considers the test of intention to cause death or grievous bodily harm proposed by Lord Hailsham in Hyam (3) viz.: whether there is an intention "wilfully to expose a victim to the serious risk of death or really serious injury." and the editors go on to say:

> "But whether a risk is a 'serious' risk depends on how probable the consequence is. It might be thought, however, that there would be 'a serious risk' of a consequence occurring even if it was something less than 'highly probable'."

They go on to consider the case of the man who sets fire to a house thinking the chances are one hundred to one against anyone being inside it. Since such an eventuality cannot be seen as probable, the question is posed: would the risk thus taken, nevertheless, be regarded as a "serious" risk of death? They add:

> "Arguably, because the consequence is so grave and the risk completely unjustifiable, this is 'a serious risk'. "

Although immediately thereafter the learned editors conclude that whereas even the slightest risk of inflicting serious bodily harm where the act has no social utility may make a man guilty of an offence under section 20 of the Offences Against the Person Act (i.e. assault), it will not be enough to sustain a murder charge because the bodily harm was not "probable". In other words the more grave the consequences of an act and therefore the more obvious its lack of social utility the higher must go the level of foresight. The logic of this is by no means obvious in view of what has been said immediately before this conclusion. Possibly it is intended to reflect not the gravity of the consequences to the victim but the gravity of the penalty faced by the accused.

What is notable, however, is that the learned editors in these passages advert to the possible link between the social utility of an act in relation to the seriousness of the risk which it occasions. This is very much

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(3) (1974) 59 Cr.App.R. at 104

the same as the opinion expressed by Professor Williams (page 60 op.cit.) to which I have earlier referred.

Contrasting the illustration of the pistol chosen from among a number of pistols with the situation of a person driving a motor car, Professor Williams points out that everyone who drives a car knows that a possible consequence is that he will kill a pedestrian. Nevertheless, he is not, simply by driving a motor car, to be considered reckless. The difference between the two situations consists in the social utility of the latter and the total lack thereof in respect of the pistol user. He adds:

> "The difference is not in the degree of danger, for it may be statistically less dangerous to select one pistol from a million (one only being loaded) and aim at a man than to drive from London to Edinburgh. "

The difference, that is to say, lies in the want of justification for the act.

The foregoing excursion through some of the authorities leads me to the conclusion that, although the better view would seem to be that, in England, at least, the foresight test is related to probability and not bare possibility, the point has not yet been settled because the question of recklessness in relation to murder is not yet unequivocally decided. This is so because the term "reckless" itself has been variously understood as involving either foresight of probable or else of possible consequences.

Assuming that recklessness is equally available in crimes of specific as well as of basic intent, a final question arises: what is the proper test thereof? Archbold (page 940) says that the test is purely subjective but no reason is given for that conclusion. To the contrary, both Smith & Hogan (page 53) and Fallon (page 250) emphatically state that the test is objective. The former writers put it this way :

> "A person who acts recklessly is, then, taking a deliberate risk; and the word connotes that the risk is an unjustifiable one..... Whether the risk is justifiable depends on the social

"value of the activity involved, as well as on the probability of the occurrence of the foreseen evil. It is an objective question - that is, it is a question to be answered by the jury and D's opinion is irrelevant. ..... It follows that it is impossible to say in general term that recklessness requires foresight of probability, or that foresight of mere possibility is enough. If the act is one with no social utility (for example a game of Russion roulette) the merest possibility is enough. If the act has high social utility, foresight of probability may be required."

In the same vein Fallon (page 250) :

"Neither criminal nor civil liability arises merely because a risk is foreseen. The magnitude of the risk of the result eventuating may vary from a remote possibility to near certainty, and every risk is run in a certain factual setting. The running of the foreseen risk is objectively judged having regard to the magnitude of the risk in the circumstances.

A jury may infer that a defendant knew of or foresaw the risk from the magnitude of the risk in the circumstances, but unless a jury is directed that before a defendant can be found guilty, they must be sure that he did know or did foresee the risk, the test is not subjective."

This latter (and somewhat obscure) sentence is then explained by a distinction: the magnitude of the risk is to be judged objectively; but the question: did he foresee the result? is answered subjectively by reference to the actual state of the accused's mind.

It is some measure of the lingering confusion surrounding the term "reckless" that in the present case it is Mr. Young, who asks us to disapprove the language used by the judge and not Mr. Chandler who seeks to uphold it, who cited to us the Australian textbook entitled Criminal Law by Professor Howard. Mr. Young was prepared to concede

that if the view (cited above) expressed by that learned author at page 56 is correct, his argument must fail.

Mr. Chandler did not resort to Professor Howard and a closer scrutiny of the text reveals, I think, the reason why. Although it is clear that at page 56, Professor Howard equates reckless killing with foresight "that one's actions may cause the death of another with the decision to take that risk", it is evident that throughout this section, which deals with recklessness as to the causing of death, he regards the word "may" and the word "likely" as denoting a similar degree of foresight. He is thus in conflict with those English authorities who regard recklessness as constituted by foresight of the mere possibility of the harmful result and, since he considers recklessness to be in certain circumstances evidence of a guilty mind sufficient to support a charge of murder, it would seem to follow that he agrees with those who hold to probability in the proof of malice aforethought. In common with most of the other writers, he distinguishes between recklessness and positive intent or negligence. But then he says (page 52 3rd Edition) :

> "In Victoria, South Australia, New South Wales and Tasmania, it is murder for D to kill V by deliberately and unjustifiably undertaking a course of action which he foresees may cause someone's death, even if he does not want to kill anyone. In New South Wales and Tasmania this rule is enacted by statute. The Tasmanian version, which is limited to the case where D intends to harm V is set out above."

When, however, we consult section 157(1)(b) of the Tasmanian Code to which he refers, we find it there laid down that it is murder to kill "with an intention to cause to any person, whether the person killed or not, bodily harm which the offender knew to be likely to cause death in the circumstances, although he had no wish to cause death." Later, (page 54) he says :

> "Although a different view has been expressed, the law probably is that, subject to the one exception of wilful blindness which is mentioned in the next section, foresight of the mere

"possibility of causing death cannot amount to recklessness."

The "different view" to which he refers is that of Glanville Williams (p.60 The General Part) to which I have referred above.

Howard cites the Australian case of Hallett and the Queen (10) to show that the rule, as formulated in the Australian Courts, seems to favour foresight of probability or likelihood over foresight of possibility as constituting the type of malice aforethought sometimes known as recklessness.

Reverting to the example of the one loaded pistol among a number of unloaded pistols (the example posed by the English Criminal Law Commissioners of 1833), he demurs to the view expressed by Professor Glanville Williams viz.: that this example accepts that foresight of mere possibility can constitute recklessness. Then, having come down upon the side of likelihood or probability, he says (page 55) :

> "It therefore seems preferable to say that the Commissioner's example discloses recklessness only if the number of pistols was so low that the likelihood of death was so high as to render the taking of the risk reckless. This still leaves open the question how high the likelihood has to be. Except, perhaps, in such cases as the one envisaged by the Criminal Law Commissioners, it is impracticable to make a mathematical approach to this problem. It would be going too far even to say that the causing of death must be foreseen as more probable than not, for a substantial danger to life may be created even though that danger may be demonstrably less than 50% probable. An example would be if the number of guns in the Commissioner's case were three. One can only say that the risk must, in the view of the jury, be substantial."

At this point the tangle in terminology becomes more apparent even as it grows more impenetrable. I cannot think, with due

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(10) (1969) S.A.S.R. 141

respect, that discourse on this topic is much assisted by the use of the motion of probability in this way. The jury is surely best instructed to adhere to the common sense usage which would make "probable" mean "more probable than not".

It is interesting that Professor Howard immediately thereafter, dealing with the question of wilful blindness, allows that proof of the foresight of bare possibility will be enough to sustain a murder charge if it be also shown that the defendant deliberately took no steps to ascertain the magnitude of the risk. He gives the example of somebody setting fire to a house knowing that someone may be within but not troubling to find out if anyone is, in fact, inside. These circumstances he regards as constituting murder by recklessness; a view which seems to support the idea that the gravity of the risk renders possible harm a sufficient content for the necessary foresight.

Finally, in dealing (page 56) with recklessness as the infliction of grievous bodily harm, he says :

> "It is murder for D to kill V by unjustifiably undertaking a course of action which he foresees may cause grievous bodily harm to V or some other persons."

In a footnote he appears to regard the English case of Hyam (3) as supporting this proposition but as we have seen the majority in that case favoured, at the least, the probability rule while the minority would go further and say that there must be an intention to do an act likely to endanger life.

From all the foregoing, although it would be rash to say that any such clear principle is demonstrated, I think it is, nevertheless, arguable that there is authority to support the following principle. Malice aforethought in murder is constituted by (a) a positive and direct intent to kill, or (b) the taking of a deliberate and unjustifiable risk when the one who takes it foresees that death or really serious bodily injury is a substantial possibility. A risk is unjustifiable when objectively judged, it was unreasonable to take it in view of its magnitude and want of social utility. But the

(3) (1974) 59 Cr.App.R.91

final question is still subjective:did the accused foresee the result as a serious, or substantial possibility? As against the somewhat confusing and elastic use of terms which I have been thus far concerned with, there is available recent Australian authority which is unequivocally behind this test of mens rea in murder. It is a very considerable authority. It carries the weight of the fully considered opinions of five judges in the highest Australian Appellate Court with Barwick, C.J., presiding.

In Johns v. The Queen (1) the appellant Johns appealed from the majority decision of the Court of Criminal Appeal of New South Wales dismissing his appeal against a conviction for murder. It was a "common design" case. The appellant had driven W to a rendezvous with the latter's co-accused D. The plan was to waylay and rob M. The applicant was aware that W carried an automatic pistol which he expected to be loaded on this occasion. On the way to the rendezvous which was some distance short of the place where the ambush was to take place, W told the applicant that M was always armed and that he, W, would not stand any nonsense. He added that M was likewise a person who would not stand for any "mucking round" if it came to a showdown. M was waylaid and in the course of a struggle, he was shot and killed by W. The robbery was unsuccessful. W and D left the scene in another car, returned to where the applicant was and told him that things had gone wrong. The applicant learned next morning of M's death when he read about it in a newspaper.

He was convicted as an accessory before the fact upon the murder charge. The trial judge directed the jury that they should find murder in all the accused if they were satisfied that the parties, that is, the applicant, W and D, must have had in mind the contingency that for the purpose of carrying out their joint enterprise, or attempting to carry it out, the firearm carried by W might be discharged and kill somebody. He told them that if a party to the enterprise "must have been aware of such a possibility or contingency then he is responsible for the death" whether or not he was present at the

(1) (1980) 54 A.L.J.R. 166

time of the killing. He also told them that they would be entitled to hold that all who had taken part in the joint enterprise of robbery with a lethal weapon must be taken to have had in mind the "possibility" that it would be put to a lethal use.

The argument upon the appeal centered upon two points. Firstly, it was argued for the applicant that an accessory before the fact could not be convicted merely on the basis of his participation in the joint enterprise. We are not concerned with that submission which was rejected by the High Court.

Barwick, C.J., pointed out that the charge was a charge of murder at common law. He considered, therefore, that the decisions of R. v. Eli Guay and Christina Guay (11) and Brennan v. The King (12) were of no assistance to the applicant because the circumstances in each of those cases - cases of homicide - were governed by the relevant provisions of, respectively, the Canadian Criminal Code and the Criminal Code of Western Australia. Each of those codes provides in terms that culpability for participation in a common purpose requires it to be shown that the criminal result was a probable consequence of the prosecution of such purpose. He was satisfied that the judge's direction had been correct.

Stephen J., dealt with the point in greater detail. He, in common with all the other judges, rejected the argument that a different degree of foresight should be required of an accessory at the fact (i.e. a principal in the second degree) from that required of an accessory before the fact. That by itself could have resulted in the dismissal of the appeal since it appears that counsel for the appellant, while urging this distinction, conceded that an accessory at the fact would be guilty if he foresaw the possibility that the gun might be used by his armed accomplice.

Stephen, J., in relation to the purported distinction between accessories before and at the fact, adopted the words of Glanville Williams (The General Part 2nd Edition, page 404) :

(11) (1957) O.R. 120
(12) (1936) 55 Crim. L.R.253

> "The distinction between principals in the first and in the second degree, and between principals and accessories generally has no legal importance."

Then he went on to consider the major point.

At page 170, he begins by remarking that the endeavour to distinguish between the culpability of accessories and principals in this way on the basis of foresight of probability as distinguished from possibility seems "singularly inappropriate". Then he says :

> "There will usually be a variety of possible responses to the criminal act. With each of these contingencies the criminals will have to reckon, if they are at all to plan their future action. What they conceive of as contingent reactions to each possible response will have, interposed between these reactions and the planned crime, at least one and perhaps a whole sequence of spontaneous and relatively unpredictable events..... in such a speculative area, it would be remarkable were the accessory's liability for the other crime to depend upon the jury assessing in terms of 'more probable than not' the degree of probability or improbability which the accessory attached to the happening of the particular reaction by the principal offender which in fact occurred, itself dependent upon the intervening uncertain responses of victim or third parties."

A little later he says :

> "Another and perhaps more substantial objection to this suggested criterion of probability lies in the standard of blame worthiness and responsibility which it presupposes. If applied, it would mean that an accessory before the fact to, say, armed robbery, who well knows that the robber is armed with a deadly weapon and is ready to use it on his victim if the need arises, will bear no criminal responsibility for the killing which in fact ensues so long as his state of mind was that, on balance, he thought it rather less

"likely than not that the occasion for the killing would arise. Yet his complicity seems clear enough: the killing was within the contemplation of the parties, who contemplated 'a substantial risk' that the killing would occur, Howard, Criminal Law 3rd Edition 1977 page 276."

Later he notes the fact that, as Lord Reid remarked in The Wagon Mound (No.2) (13), "probable" may bear a variety of meanings and that it can be used variously to cover the idea "more probable than not" but may also shade out to the notion of "a bare possibility". He takes the view that Sir James Stephen in following Sir Michael Foster's use of the term "probable" (Crown Cases 3rd Edition 1809) is necessarily relating that term to the illustrations given by Foster to show an accessory's equal culpability with his principal. These illustrations, Stephen J., suggests, show that both Foster and Stephen were using the term "probable" in an extended sense and were not restricting it to the notion "more probable than not".

The decision in Johns (1) was applied shortly afterwards in Miller v. The Queen (14).

Here at last we have clear, compelling and direct authority from Australia favouring the "foresight of possibility" test, and nothing equally compelling or direct from the Privy Council or the House of Lords to set against it. The point was not squarely confronted by the courts in Hyam (3), Morgan (7) or Majewski (8).

It may be that the trial judge's reference to "highly probable" in Hyam (3) (a phrase which Lord Cross thought too favourable to the accused, and which in commentaries since has been said to be an unnecessary addition to the term "probable") was intended to mean "more probable than not" and that, if they had been asked to consider the matter, or if it had been necessary to their decision, their Lordships in the House

(13) (1967) 1 A.C. 617
(14) (1980) 55 A.L.J.R. 23
(1) (1980) 54 A.L.J.R. 166
(3) (1974) 59 Cr.App.R. 91
(7) (1975) 61 Cr.App.R. 136
(8) (1976) 62 Cr.App.R. 262

of Lords might have come to a conclusion similar to that arrived at by the Australian Appellate Court. That is, of course, speculation. However, I do not think that it would be a disservice to justice or that it would, in any way, infringe the legitimate interests of any defendant upon a criminal charge for the alternative to direct intention to be framed in terms of "possible" as distinct from "probable" foresight of consequences.

For the comfort of trial judges, however, I would stress the importance of the decision of the English Court of Appeal in Beer (15). In that case Lawton, J., pointed out that the trial judge had misapplied the decision in Hyam (3) by directing the jury in terms (following the line of Lord Hailsham which was not adopted by any of the other judges in that case) that a murderous intent would be established if it were shown that the accused had intended to expose the victim to the risk of death or really serious bodily harm. He said that Hyam (3) was a very unusual case and that there were few murder cases where the facts bore any resemblance at all to those in that case. He adopted the words of Viscount Dilhorne who, in Hyam (3) had said, in effect, that in the vast majority of murder cases it was sufficient to leave to the jury the question: was it proved that the accused had intended to kill or to do grievous bodily harm? It would greatly simplify the tasks of both judge and jury in Hong Kong if this advice were taken to heart and applied in all but those exceptional cases where a closer analysis of the contents of the accused's mind becomes necessary.

It would have been preferable if in the present case the judge had told the jury that the possibility he was leaving to them had to be a substantial possibility but the circumstances were such that the omission to do so cannot have prejudiced the appellant.

For the reasons given, I do not think there was any material misdirection and I would dismiss this appeal.

(15) (1976) 63 Cr.App.R.222
(3) (1974) 59 Cr.App.R.91

Sd: Illegible

In the Court of Appeal

No.16
Judgment
8th April
1982

(continued)

Li, J.A.:

I have the benefit of reading the judgment of my Lord the Vice-President with whom I respectfully agree. For the purpose of the present appeal, however, I will be content to consider only the facts in evidence in totality.

The defence was the 3 appellants went, armed themselves with knives, to the home of the victim to collect a debt. The rhetorical question is: Who requires a knife to collect a debt? Further, if the appellants brought knives for such a purpose is it not a natural inference they intended to use them should the victim refused to accede to their demand?

Throughout his direction to the jury when the learned trial judge used such words as "may", "might", "possible" or "possibility" - words which are subject matter of counsel's criticism - he qualified them with the words "contemplated" and "expected". The word "contemplated", according to the Concise Oxford dictionary, means "view mentally; expect; intend; and purpose".

In my opinion the judge virtually directed the jury that if they came to the conclusion that each appellant intended, expected, or had the purpose the possibility that the appellant's co-accused would resort to the use of lethal weapons to inflict grievous bodily harm then they would convict the appellant of murder.

Even if I am wrong I am further of the opinion that had the judge directed the jury with the formula "highly probable", "probably" or "likely" the jury would inevitably have come to the same verdict. In short, the proviso should apply.

For these reasons I also dismiss the appeal.

(Simon (sic) F.S.Li)
Justice of Appeal

Silke, J.A.:

In the Court of Appeal

No.16
Judgment
8th April
1982

(continued)

I also have had the opportunity of reading in draft the judgment of McMullin V.-P. which sets out in detail the facts of the case.

It further deals in so admirable and comprehensive a fashion with the interesting and important point of law raised by this appeal that there is little I can usefully add. I am in respectful agreement with his conclusions but in the light of the importance of the point would shortly give my reasons for that agreement.

On the facts if the jury believed the evidence of Madam Lam then they would have been fully entitled to find that the three appellants came to the premises armed with knives; that they burst into those premises following upon the initial decoy knock by the third appellant; that two of them, identified by Madam Lam as the 1st appellant and one other who was not the third appellant, upon that entrance used those knives to inflict such violence upon the deceased as to cause his death.

There was before them the cautioned statements of the three appellants and the evidence of the injuries suffered by the first and second appellants. None of the applicants give evidence. It was open to the jury to reject the untested statements, which it is clear they did, and to find that the injuries occurred in the course of their attack upon the deceased who made a futile attempt to defend himself.

They were clearly and strongly warned as to the dangers, emerging from the evidence, of convicting on the wounding count. They must, as my Lord has said, have come to the conclusion that the appellants coming to the flat, armed as they were, not only contemplating violence but were also prepared to be a party to all forms of violence offered to its inhabitants. They were fully aware that Madam Lam was unable to say which of the appellants it was who struck the actual blow which caused her injury.

The jury were entitled to reach the verdicts they did.

If the use by the trial judge of expressions less positive than "probable" was wrong and

therefore a misdirection, and I do not think this to be so, there was in my judgment no miscarriage of justice resulting from any such misdirection and I would have applied the proviso.

On the complex issue of law, being in agreement with my Lord that there is no decision of the Privy Council or the House of Lords directly in point - though in Hyam (1), a case very much peculiar to its own facts, as was Morgan (2), the majority of the House appear to favour "probable" or the "more likely than not" test while the minority would go further - I am content to adopt the reasoning in Johns v. The Queen (3). The High Court of Australia was dealing with the issue of an "accessory before the fact".

It was there held :-

> "(1) An accessory before the fact can be convicted by reason of his participation in a common design or joint enterprise on the basis of the same degree of responsibility as other participants, notwithstanding that he does not actively participate in the actual on the spot execution of the enterprise, to which he has agreed or encouraged. He is then liable for all that occurs in the course of such execution, if this be of a kind which fairly falls within the ambit or scope of such enterprise or design, while it is enough that the contingencies within the contemplation of the parties should be possible, as distinct from being probable consequences". (emphasis supplied).

Barwick C.J. thought the point as to "possible" "probable" was of sufficient general public importance to merit a final pronouncement by the High Court of Australia.

Stephen J. reviewed the authorities and cited the speech of Lord Reid in The Wagon Mound (4) where he said of "probable" :

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(1) [1975] A.C.55
(2) [1975] 61 Cr.App.R. 152
(3) [1980] 54 A.L.J.R. 166
(4) [1967] A.C.617

"It is used with various shades of meaning. Sometimes it appears to mean more probable than not, sometimes it appears to include events likely but not very likely to occur, sometimes it has a still wider meaning and refers to events the chance of which is anything (sic) more than a bare possibility." (continued)

He agreed with the joint judgment of the three other members of the Court, Mason, Murphy and Wilson JJ., as to the criminal liability of an accessory before the fact.

At page 173 their Lordships had this to say :-

"The problem here is one of expressing the degree of connexion between the common purpose and the act constituting the offence charged which is required to involve the accessory and the principal in the second degree in complicity. The applicant referred to some cases in which reference has been made to the offence charged as a "probable" consequence of the common purpose and sought to gain support from them. Two comments should be made about these cases. One is that none of them lends any countenance to the notion that the doctrine differs in its application to an accessory before the fact as compared with a principal in the second degree."

I would interpolate here that the doctrine does not differ in its application as between those classes of person instanced by their Lordships and the appellants here.

They went on :-

"The second comment is that the observations in the two cases on which the applicant principally relies relate, not to the common law, but to the interpretation of one only of two relevant provisions in statutory criminal codes. It should be noted, as will be mentioned later, that there is support for the view that the relevant code provisions reflect the common law."

We are not here construing statutory codes and I share the views expressed by my Lord that

the authorities on what is or is not the common law are at best uncertain in this realm.

Their Lordships went on to consider a series of cases and having decided that those authorities supported the decision of Street C.J. in the Court of Criminal Appeal (New South Wales), which decision was for consideration by the High Court of Australia, and which is, in effect, set out in the headnote to Johns (3) which I have earlier quoted, concluded at p.175:-

> "The narrow test of criminal liability proposed by the applicant is plainly unacceptable for the reason that it stakes everything on the probability or improbability of an act, admittedly contemplated, occurring. Suppose a plan made by A, the principal offender, and B, the accessory before the fact, to rob premises, according to which A is to carry out the robbery. It is agreed that A will carry a loaded revolver and use it to overcome resistance in the unlikely event that the premises are attended, previous surveillance having established that the premises are invariably unattended at the time when the robbery is to be carried out. As it happens, a security officer is in attendance when A enters the premises and is shot by A. It would make nonsense to say that B is not guilty merely because it was an unlikely or improbable contingency that the premises would be attended at the time of the robbery, when we know that B assented to the shooting in the event that occurred. "

They went on to find that the original jury could have concluded on the evidence that the common purpose involved resorting to violence of the kind that occurred should the occasion to use it arise and that the violence contemplated amounted to grievous bodily harm or homicide.

So too here. The trial judge was entitled to say of the third appellant :-

> "If you have not any doubt, members of the jury, that the 3rd accused went to

"those premises contemplating that a knife or knives might be used by one of his co-accused on one of the occupants, if either of the accused's demands, whatever they might be, were not acceded to or if the occupants reacted, predictably by resorting to self defence, then you will find him guilty of murder even though he did not strike a single blow at the deceased." (emphasis supplied).

Nor was he wrong to use the expressions "the possibility" and "reasonably possible" where he did.

As my Lord has trenchantly stated what the trial court and the jury are concerned with is the question: was there proof that the accused, at the time he did the act, had the intention either to kill or to do grievous bodily harm to the victim and, I would add, ancillary to that in a case such as this: what was the nature of the common design encompassing all the accused.

In the event I too would dismiss the appeal.

Christopher Young, Esq. (D.L.A.) for Appellants
J.P.Chandler, Esq., Crown Counsel, for Crown/Respondent.

In the Privy Council

No.17
Order granting leave to appeal to H.M. in Council

18th November 1983

No.17

ORDER GRANTING LEAVE TO APPEAL TO H.M. IN COUNCIL

AT THE COURT OF SAINT JAMES
The 18th day of November 1983

PRESENT

THE COUNSELLORS OF STATE IN COUNCIL

WHEREAS Her Majesty in pursuance of the Regency Acts 1937 to 1953 was pleased by Letters Patent dated the 3rd day of November 1983 to delegate to the six Counsellors of State therein named or any two or more of them full power and authority during the period of Her Majesty's absence from the United Kingdom to summon and hold on Her Majesty's behalf Her Privy Council and to signify thereat Her Majesty's approval for anything for which Her Majesty's approval in Council is required:

AND WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 27th day of October 1983 in the words following viz:-

" WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of (1) Chan Wing-Siu (2) Wong Kin-Shing and (3) Tse Wai-Ming in the matter of an Appeal from the Court of Appeal of Hong Kong between the Petitioners and Your Majesty Respondent setting forth that the Petitioners pray for special leave to appeal from a Judgment of the Court of Appeal dated 8th April 1982 which dismissed the Appeals of the Petitioners against their convictions in the High Court of murder and wounding with intent: And humbly praying Your Majesty in Council to grant the Petitioners special leave to appeal against the Judgment of the Court of Appeal of Hong Kong dated 8th April 1982 and for other relief:

" THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said

Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that special leave ought to be granted to the Petitioners to enter and prosecute their Appeals against the Judgment of the Court of Appeal of Hong Kong dated 8th April 1982:

" AND THEIR LORDSHIPS do further report to Your Majesty that the proper officer of the said Court of Appeal ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy of the Record proper to be laid before Your Majesty on the hearing of the Appeals."

HER MAJESTY Queen Elizabeth The Queen Mother and His Royal Highness The Prince Charles Prince of Wales being authorised thereto by the said Letters Patent have taken the said Report into consideration and do hereby by and with the advice of Her Majesty's Privy Council on Her Majesty's behalf approve thereof and order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

WHEREOF the Governor or Officer administering the Government of Hong Kong and its Dependencies for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

N.E. LEIGH

IN THE PRIVY COUNCIL No.53 of 1983

ON APPEAL

FROM THE COURT OF APPEAL OF HONG KONG

BETWEEN:

1. CHAN WING SIU
2. WONG KIN SHING
3. TSE WAI MING — Appellants

- and -

THE QUEEN — Respondent

RECORD OF PROCEEDINGS

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