Privy Council Appeal No. 29 of 1954

Chan Kau *alias* Chan Kai - - - - - - - - *Appellant*

v.

The Queen - - - - - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF HONG KONG

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH NOVEMBER, 1954

Present at the Hearing:

LORD OAKSEY
LORD TUCKER
MR. L. M. D. DE SILVA

[*Delivered by* LORD TUCKER]

On the 23rd December, 1953, the appellant was convicted of the murder of one Chan Fook on the 23rd July, 1953, after a trial before Reece, J. and a mixed jury in the Supreme Court of Hong Kong.

His appeal to the Appellate Division of the Supreme Court was dismissed on 5th March, 1954. He now appeals *in forma pauperis* to Her Majesty in Council by special leave granted on 24th June, 1954.

Among those employed at the Naval Dockyard at Stonecutters Island were two rival groups led respectively by two men called Mak Hei and Ho Kai, and prior to the 23rd July, 1953 there had been trouble between members of these groups with the result that the Mak Hei group decided to attack the Ho Kai group as they left Ho Kai's house at the conclusion of a party which was taking place there that evening. Chan Fook was one of those attending the party and he was killed after leaving the house in the course of incidents arising out of the attack by Mak Hei's group. There is no dispute that his death was due to one or more violent blows with a weapon, sometimes described as a chopper and sometimes called a knife, wielded by the appellant.

The appellant was not normally a member of either of the two rival groups. He was employed by Mak Hei at a Teahouse on Diamond Hill where Mak Hei carried on a business in addition to his employment at Stonecutters Island.

The case for the prosecution was that, although not a regular member of the Mak Hei group, the appellant on the evening in question joined with Mak Hei and other members of his group knowing that they intended to attack the Ho Kai group and that thereafter he actively assisted them in their unlawful enterprise in the course of which he killed Chan Fook.

The case for the defence was that at no time was the appellant taking any part in the unlawful expedition or the attack. Certain creditors of Mak Hei who had been introduced by the appellant were pressing for payment of their accounts for goods supplied to the Teahouse and causing trouble. Accordingly the appellant went to see Mak Hei on the evening of 23rd July and told him that some of the creditors were threatening to remove the frigidaire from the Teahouse if their accounts were not paid. Mak Hei tried to put him off by saying that he was busy and going to a fight. The appellant went with him, not in order to take part in the fight,

but for the purpose of pressing Mak Hei to pay his creditors. When the fight began Chan Fook mistook the appellant for one of his assailants and attacked him. The appellant endeavoured to escape and picked up a knife from a nearby stall with which he struck Chan Fook in self defence or alternatively under such provocation as would reduce the crime to manslaughter.

Such in outline was the defence sworn to by the appellant, but it will be necessary later to set out verbatim that part of his evidence which dealt with the events immediately leading up to the blow which he struck.

This evidence differed materially from a statement which the appellant had made to the police on 28th July which, even allowing for difficulties of language and translation, the jury might well have thought amounted to an admission by the appellant that he had knowingly joined in Mak Hei's party for the purpose of assisting in the attack. On a proper direction they might accordingly have altogether rejected the appellant's sworn testimony, but he was entitled to have his defence as given in evidence fairly put before the jury and it was the Judge's duty to direct the jury on the law applicable to the case on that basis.

The appellant now submits that the defence of provocation was wrongly withdrawn from the jury and that there was misdirection with regard to the defence of self defence.

Before dealing with these two separate aspects of the case their Lordships think it desirable to state—and this was agreed by Counsel for the Crown—that in cases where the evidence discloses a possible defence of self defence the onus remains throughout upon the prosecution to establish that the accused is guilty of the crime of murder and the onus is never upon the accused to establish this defence any more than it is for him to establish provocation or any other defence apart from that of insanity. Since the decisions of the House of Lords in *Woolmington* v. *Director of Public Prosecutions* [1935] A.C. 462 and *Mancini* v. *Director of Public Prosecutions* [1942] A.C. 1, it is clear that the rule with regard to the onus of proof in cases of murder and manslaughter is of general application and permits of no exceptions save only in the case of insanity which is not strictly a defence. It has been expressly so decided in the case of self defence in Scotland and Canada, *cf. H.M. Advocate* v. *Doherty* [1954] Sc. L.T. 169 and *Latour* v. *The King* [1951] D.L.R. 834. It is unfortunate that in Archbold's Criminal Practice (33rd Edition) at page 942 a passage is quoted from the summing up in the case of *Rex* v. *Smith* 8 C. & P. 160 where, dealing with self defence, these words occur:—"Before a person can avail himself of that defence he must satisfy the jury that the defence was necessary". This actual passage was quoted by the trial Judge in the course of his summing up in the present case. It clearly needs some modification in the light of modern decisions.

Turning now to the two matters relied upon on the present appeal. The issue of provocation was expressly withdrawn from the jury who were ultimately directed—in response to a question from their foreman—that the only possible verdicts were guilty of murder or not guilty.

The appellant's defence as given in evidence at the trial has already been outlined. It is now necessary to set out the vital passages verbatim, since withdrawal of the issue of provocation from the jury must be judged on a view of the evidence most favourable to the accused. After describing the circumstances in which he came to be on the scene with Mak Hei and saying that Mak Hei had told him to go and tell a group of people not to start fighting as there was a policeman in sight he said that before he got to them they had already started fighting and he saw three or four persons setting upon another. The questions and answers then proceed as follows:—

(*Q.*) Did you see anybody holding anything?

(*A.*) Yes I did.

(*Q.*) What did you see?

(*A.*) I could not tell what it was but I saw something wrapped in newspaper.

(*Q.*) Then what happened?

(*A.*) Then this man ran and the other people ran after him. This person ran and the other people ran after him.

(*Q.*) Who do you mean by " this person "?

(*A.*) The person from the opposite party.

(*Q.*) Did you know him?

(*A.*) No.

(*Q.*) And what happened?

(*A.*) When this person was about near the Kong Wah Cafe, he turned around and fought with the group of pursuers. I then went up to these people and said, " Policeman, So Wing ". The several people stopped setting upon this person. I wanted to go. This person came up and grabbed me with both of his hands. (In the manner as demonstrated by the witness in the box—gripped by the chest.) Then he held me with his left hand and hit me with his right hand (demonstrates).

(*Q.*) When he hit you, did you notice whether he was injured or not?

(*A.*) Yes, I think he was suffering from minor injuries.

Reece, J.: You think?

(*A.*) No ; he had a little quantity of blood on his person.

(*Q.*) What hapened then?

(*A.*) He kept on beating me and I wanted to give him an explanation. I said, " You hit the wrong man. I have nothing to do with it ". At that time this man was really ferocious and so I had to resist. I had a chance and I freed myself from him. I started to run. He ran after me and hit my back. Well, I was acting on good intention to go up and tell the people not to set upon him but, when he hit me, I felt that I was very angry. I ran up to a stall which I have said to be a candy stall but which I now say is a bread stall and, at that moment, I was haywire. He was taller and bigger than I am and I had to resort to something in my resistance. I did not know that there was a knife in that place. As a matter of fact, I tried to get a pole or a bottle or things like that. I was given no chance for consideration and I picked up a knife blindly. This man squatted and was looking for something. I continued to run and he ran after me into the street. He hit my head at the back.

(*Q.*) With what did he hit you?

(*A.*) I don't know what it was but it was wooden.

(*Q.*) Did you see the object?

(*A.*) I did not.

(*Q.*) And then what happened?

(*A.*) I wanted to run but I was out of breath and, besides, I had flinching pains in both my loins. I was still beaten by him then, so I turned around (in a manner as demonstrated) and did this (demonstrates). I could not remember whether I struck once or twice. Then I ran along Sai Yeng Choi St.

On this evidence, and assuming his presence at the scene of action to have been innocent, their Lordships are of opinion that there was a case with regard to provocation fit to be left to the jury, whose function it was, having regard to all the circumstances of the case, to weigh in the scale the nature of the weapon used as against the degree of provocation received, and that accordingly the verdict of guilty of murder cannot stand.

With regard to self defence, although the learned Judge gave correct and ample directions in general terms at the beginning and end of his summing up as to the onus of proof, when he came to deal with the defence of self defence he quoted the passage referred to above from *Rex* v. *Smith* and added the words " he the accused must satisfy you that the defence was necessary " with the result that the jury were not in fact adequately directed on this issue. It is also true that when dealing with the evidence of the appellant he omitted to mention his having been struck by Chan Fook with a wooden implement and treated it as an attack with fists only.

He also spoke of his as having " gone back " after picking up the knife. The learned Judge did, however, leave the issue of self defence to the jury, and their Lordships think he was wise to do so. By their verdict the jury rejected it.

In his appeal to the Appeliate Division the appellant made no complaint of the summing up with regard to self defence.

The Appeal Court disposed of the matters relied upon in support of his appeal, of which the only one now remaining is that relating to provocation, in a judgment of six lines stating there was no substance in any of the grounds of appeal.

Viewing the case as a whole their Lordships do not consider that the jury's rejection of the defence of self defence amounted to a miscarriage of justice. It is difficult, if not impossible, to infer from the evidence, taking the most favourable view for the defence, that the appellant's life was ever seriously endangered so as to justify—as distinct from excuse—the use of such a weapon.

Applying the test used in the case of *Teper* v. *The Queen* [1952] A.C. in the judgment of the Board delivered by Lord Normand viz.: " The test is whether on a fair consideration of the whole proceedings the Board must hold that there is a probability that the improper admission of hearsay evidence turned the scale against the appellant " and substituting for the words " improper admission of hearsay evidence " the words " these misdirections " their Lordships have no hesitation in answering the question posed in the negative.

In the result their Lordships have for the reasons stated above humbly advised Her Majesty that the appeal should be allowed and the verdict of guilty of murder set aside and the case remitted to the Appellate Division of the Supreme Court of Hong Kong with a direction to record a verdict of guilty of manslaughter and to pass sentence accordingly.

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In the Privy Council

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v.

THE QUEEN

DELIVERED BY LORD TUCKER

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