Judgment 34 of 1978

IN THE PRIVY COUNCIL No. 21 of 1978

ON APPEAL

FROM THE SUPREME COURT OF HONG KONG

BETWEEN:

WONG KAM MING Appellant

- and -

THE QUEEN Respondent

CASE FOR THE APPELLANT

RECORD

1. This is an appeal from a judgment of the Court of Appeal of the Crown Colony of Hong Kong (Briggs, C.J., Huggins J.A. and McMullin, J.) dated 12th July 1977 which dismissed the Appellant's appeal from his conviction for murder by the Supreme Court of Hong Kong (Commissioner Garcia and a jury) on 1st October 1976 when he was sentenced to death. p.354-391

2. The Appellant was charged with murder and two counts of wounding with intent to do grevious bodily harm, the particulars being that on the 28th December 1975, he, with others, murdered Lam Shing, alias Lam Chung, at 689, Nathan Road, Hong Kong.

3. The evidence called by the Crown was:

(a) Several persons went to premises at 689, Nathan Road which were a massage parlour and attacked Lam Shing, a floor manager, in retaliation for an attack on one of their number on a previous occasion. p. 132-196

(b) The Crown sought to admit a statement by the Appellant in which he admitted being one of the number present at the time of the murder and that he held the murder weapon.

p. 3-116

4. The Appellant put the Crown to proof that the statement was a voluntary statement and himself gave evidence on the voir dire. He claimed that the statement did not originate from him and had been procured by various degrees of inducment including physical force. He was cross-examined by counsel for the Crown not only about his treatment by the police but about the admissions made in his statement which he confirmed were true. The learned Commissioner found that the statement had not been proved to be voluntary and therefore directed that it be excluded. There was no other evidence upon which the Crown could rely to prove a case against the Appellant.

5. The Crown thereupon applied to introduce passages of evidence (below) from the voir dire as evidence in the general issue. After full argument the learned Commissioners ruled as follows :

p. 266-268

"COURT: I must confess that when this question was first broached I was of the same opinion as Mr. Ming Huang, that if the Crown sought to have these passages introduced as part of its case to the jury then the whole of the proceedings on the voir dire regarding the 5th defendant ought to go to the jury as well. My view regarding that has changed since I have been referred to this case R. v. Wright in the 1969 State Reports (South Australia) and after reading the decisions which have been made in that case I have come to the conclusion that the Crown has a right to lead his evidence, which is now sought, which it seeks to lead.

I refer also to Section 59 of the Criminal Procedure Ordinance, CAP.221 where it says: 'If on a trial by jury of a person accused of an offence, a statement alleged to have been made by such accused person is

admitted in evidence, all evidence relating to the circumstances in which the alleged statement was made shall be admissible for the purpose of enabling the jury to decide upon the weight (if any) to be given to the statement; and, if any such evidence has been taken in the absence of the jury before the admission of the statement, the Crown and such accused person shall have the right to have any such evidence retaken in the presence of the jury.' That is a positive statement where a statement has been admitted for introduction as evidence to the jury. There is no prohibition in this Ordinance that a statement made by an accused person on voir dire proceedings shall not be led as evidence before the jury. There is one provision where it says that on the admission of a statement for the jury the Crown and the accused can lead evidence but there is no negative, there is no prohibition against the reception of evidence where a statement has not been admitted in evidence.

As I said, I have come to the conclusion that this case R. v. Wright is good law, and the only point which arises now is whether I should exercise, or whether there is any discretion which I should exercise to exclude this evidence from the jury. The passages which are sought to be produced in evidence do not, in my view, give any indication whatsoever to the jury that the accused had, at some stage, made a confession and that such confession was not admitted in evidence. These are statements which were made by him under oath. These are statements made in cross-examination, and in none of the questions asked was it necessary to give the accused a warning that he was answering a question which would produce an incriminating answer, so that no warning was necessary. I think there is authority to say also that there is no necessity where a person is represented by counsel or a prisoner who is represented by counsel would require a warning from the trial judge that he need not answer a particular question. It is for his own counsel to bring this matter up.

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I can not see any reason why I should exercise the discretion in favour of the accused and, accordingly, these two passages or these two series of questions which are sought to be produced in evidence are now to be admitted in evidence and to be led in evidence before the jury."

When the jury returned to court, counsel for
p. 268-269 the Appellant registered a formal objection to the production of only a small portion of the evidence, but was overruled by the judge. The court reporter, Adrienne Frances Ozorio, was then called to prove the following record of the
p. 271 Appellant's evidence on the voir dire.

"WONG Kam Ming (5th Accused)

BY MR. MARASH:

Q. Is it correct that at the time you were at the Siu Nui Chin Kiu you were at some stage holding a beef knife?

A. No.

Q. You just told us that you were.

A. I said we went up there to ask for compensation. They being the wrongdoer, they made the allegation against us. Then I saw him going to fetch a knife.

Q. What else did you see?

A. I pushed him away and snatched it away from him.

Q. And then you chopped him.

A. Someone punched me from behind. I turned around and chopped and injured him.

Q. Do you know what sort of knife you were holding at the time you chopped him?

A. I did not know. It was something wrapped in a sheet of newspaper. I thought it was an iron bar.

Q. At the time you chopped, you didn't know what you were chopping with. Is that what you are saying?

A. I did not know what it was at that time.

Q. What sort of blade did the knife that you had in the music parlour have?

A. Up to the time when I had chopped that person and ran away I did not notice what the blade looked lime.

Q. Would you agree that the description "beef knife" is not inaccurate?

A. Not correct.

Q. How long was this knife?

A. This long. (Witness indicates)

Q. What sort of knife would you call it?

A. It belonged to the melon knife type.

Q. How do you know that?

A. Because the shape of the knife was straight which looked like, similar to melon knife."

6. Were it not for the Appellant's admissions on the voir dire being admitted there would have been no case for him to answer at the close of the case for the Crown.

7. In his defence on the general issue the Appellant said he knew both the first defendant Cheung Kwan Sang and Li Yak who was a sworn brother. It was agreed that they should meet for dinner at the Man Nin Wah Restaurant together with Kong Sin on the 28th October 1975. p.289-325

In fact that restaurant was full so the meeting took place in the Lung Wai Restaurant. Kong Sin explained how he had been chopped at a massage parlour, and it was agreed that they

should later go up there and request compensation. This was done, no one carried anything there, and Ah Yuk requested compensation on behalf of Kong Sin as he was injured and could not work.

The manager said there would be no compensation and that if he was not satisfied they had weapons. One attendant pushed past the Appellant and made for a drawer in the reception area. The Appellant followed and pushed the man away but he returned. Then the Appellant said "Don't move" and pressed his hand down hard. The Appellant was then hit in the back by another man, the first man turned to face him, and he was again pushed by the man behind. The Appellant thereupon took from the drawer a long square object covered in newspaper and waved it at the man behind who then retired to the rest room.

There was much excitement and confusion and the Appellant, upon seeing the man who had pushed him emerge, decided to leave. He left the premises by taxi taking the object with him which he left in the taxi.

The Appellant agreed with his counsel that he wrote some remarks for the police.

In cross-examination the part of the statement already led to the jury by the Crown was put to the Appellant.

p.351 8. The jury found the Appellant guilty of murder and he was sentenced to death.

p.352-4 9. The Appellant appealed to the Court of Appeal on the grounds:

"A. The learned Commissioner failed to draw or sufficiently to draw to the attention of the jury evidence which was favourable to the Second Appellant, particularly the following:

(a) that the Second Appellant and his friends went to the scene unarmed (p.822Q-V, and p.952A-S);

(b) that some of the floor managers were very arrogant men (p.587);

(c) that on the night of the 27th December 1975, after having assaulted and chopped the First Appellant, the floor managers hold a discussion among themselves and expected a revenge attack (pp.527A-529H); and

(d) that one of the floor managers, Fai Chai, had in fact at the time of the incident run behind the counter and grabbed hold of weapon (p.561K-5627J) as alleged by the First and Second Appellants (p.824A-E, 953-954I).

B. That the learned Commissioner erred in not sufficiently explaining the law relating to self-defence having regard to the particular evidence of the case (p.1066-7).

C. Alternatively, the learned Commissioner erred in not directing the jury to consider the issue of manslaughter as there was evidence of provocation (p.823A-824H, 952-955B).

D. The learned Commissioner was wrong in law in allowing Counsel for the Prosecution to cross-examine the Second Appellant during voir dire with respect to his personal involvement at the scene of crime and in admitting subsequently the same at the trial (p.175A-176M, 774E-777K).

E. That the convictions are unsafe and unsatisfactory."

10. On 12th July 1977 his appeal was dismissed (Briggs, C.J., Huggins, J.A., with McMullin J. dissenting). The reserved judgement concerned only the last ground of appeal:

"D. The learned Commissioner was wrong in law in allowing counsel for the prosecution to cross-examine the second appellant during voir dire with respect to his personal involvement at the scene of crime and in admitting the same subsequently at the trial."

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p.359-374

11. In delivering the majority judgement of the Court, Huggins, J.A. said:

> "This Appellant (who was in fact the 2nd Appellant) was alleged to have made a confession statement to the police. He objected that it had been obtained from him by improper means and in accordance with established practice a trial within the trial was held to determine (a) the admissibility of the statement and also (b) whether there were circumstances requiring the exclusion of the statement even if it was admissible. The learned judge ruled as a matter of law that the statement was inadmissible and therefore did not have to go on to consider the matter of discretion. However, in the course of the proceedings on the issue of admissibility, which were (properly) held in the absence of the jury, this Appellant had elected to give evidence. In his evidence in chief he admitted that he had been present at the scene of the alleged murder. In cross-examination he had been asked whether his confession statement wastrue. His reply was to the effect that it was true in substantial respects, namely that he had been present at the scene of the alleged murder and that he had chopped the Deceased. When the jury had returned, the Crown adduced on the general issue evidence of what this Appellant had said against his interest in their absence, although counsel for the Crown was careful not to reveal the existence of the extra judicial confession statement. Objection was taken by counsel for the defence but the objection was overruled. The question is whether that ruling was correct.
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> Of all the subjects which occupy the courts at all levels perhaps that which takes up (and often wastes) the most time, produces the largest number and most vehement of dissents and has led to the greatest inconsistencies is the use of confessions in proving the guilt of accused persons.

Whatever the decision of this court it is to be hoped that the present case will be taken further and that an authoritative and final ruling may be given for the guidance of judges and magistrates in Hong Kong."

12. McMullin, J., in his dissenting judgement said: p.375

"I find abundant authority in the cases cited to show that the exclusion of involuntary confessional statements is grounded equally in public policy as in the fear that they may not be true. That policy as I see it embraces two things: (a) the need to preserve some check by the courts on improper investigative practices; and (b) the need to preserve the common law right enshrined in the maxim "nemo tenetur seipsum accusare".

Later he said:

"that (the maxim) would oblige the judge to prevent the question being put, no question of discretion being involved for even if it be said that the question has potential probative value its probative value can scarcely exceed the prejudice to the defendant of being, in effect, put, under oath or affirmation, to plead a second time when he has not chosen to do so. Alternatively, if this be wrong then as a question of discretion he should at the later stage, having excluded the statement, exclude any answers given on the voir dire if he was satisfied that the statement had been obtained by means so outrageous that it would bring the administration of justice into disrepute to stand over them."

13. It is submitted that cross-examination in the voir dire on questions relating to the truth of confessions are not relevant to the issue of voluntariness. The leading case of R. v. Hammond (1941) 3 All E.R. 318 approves such questions as going to the accused's credit, but fails to set out the material relevance. A denial of truth does not assist either way; and an affirmation

simply usurps the function of the whole trial and prejudices the determination of the special issue before the court. A confusion seems to have arisen historically that the voir dire should assess the truth of the confession as much as its voluntariness; it may not do this without spreading the enquiry beyond the scope of the voir dire, R. v. Weighill (1945) 2 D.L.R. 474. It was said in R. v. Hnedish (1958) W.W.R. 685 that it was not permissible to have an inquisition into the truth of the confession. In any event unless the truthfulness of the statement were entirely in issue the value of the affirmative answer to the question "Is the statement true?" would be limited to the level of an admission, apparently contrary to interest, but would be equally likely to be a tactical lying admission. Even in the best case e.g., Hammond, where the confession of guilt was confirmed in the voir dire this was still not sufficiently persuasive to render the defendant's other evidence credible on the issue of voluntariness. To pre-empt the issue, is the defendant guilty or not, by attempting to assess the truth of his statement is the inevitable result De Clercq v. R. Vol.70 D.L.R. (1968) 530, dissenting judgements.

14. It is further submitted that to permit the asking of questions regarding the truth of statements in the case of the voir dire may tempt the police into a course of undesirable pressure. They may trump up a confession which is not the defendant's or is his, but is not voluntary. The defendant is virtually compelled to enter the witness box and to be examined albeit ostensibly in support of his rights on the narrow issue, but in fact in contravention of the principle "nemo tenetur seipsum accusare" on the truth of the confession. Such compulsory pre-trial questioning by a coroner was condemend in Batary v. A-G.Sask (1966) 3 C.C.C.152 as abrogating an accused's right of silence. In R. v. Van Dongen 26 C.C.C.22 it was held that as an accused was not a compellable witness he should have the protection on the principle "nemo tenetur seipsum accusare" which right should not be indirectly violated. The infliction of violence to compel a statement would have this effect. It is submitted that this principle applies especially in Hong Kong

where the defendant cannot make a statement from the dock, and must given evidence if he is to challenge voluntariness S 55 Criminal Procedure Ordinance. As in the law of England he "may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged" S 54 (1) (e) Criminal Procedure Ordinance.

15. It is further submitted that where a so-called voluntary statement is ruled inadmissible nothing more ought to be heard of it, and just as it is inadmissible to cross-examine from an inadmissible statement so the whole of the evidence taken on the voir dire should remain separate from the main trial, R. v. Treacy (1954) C.C.A. 229. The proceedings on a voir dire being of a distinct and separate kind directed to a single issue, evidence may be received by a judge which is not taken in accordance with the rules of evidence. It is noticeable that in Ng Chun Kwan v. The Queen (1973) H.K.L.R. 319 the Court of Appeal of Hong Kong ruled that what an accuses says on the voir dire may not be led against him as evidence by the prosecution.

16. It is submitted in the alternative that even if it be found that the truth of the confession is relevant to the issue of voluntariness, where, in the result, the statement is not admitted, the judge should exercise his discretion to exclude the answers given on the voir dire Callis v. Gunn (1964) 1 W.B. 50 and De Clerog (above). In the latter case it was said that the question, though legally admissible, should have been disallowed by the trial judge as being so gravely prejudicial as to be unjust. In another Canadian case, R. v. Wray C.C.C. (1970) it was held that even evidence of substantial weight may be rejected by a trial judge if he considers that its admission would be unfair or was calculated to bring the administration of justice into disrepute.

In the Canadian case of R. v. Hnedish 4 C.C.C. (1970) 1 the extreme case is considered where regardless of how much physical or

mental torture or abuse has been inflicted on an accused to coerce him into telling what is true the confession is admitted because it is in fact true. The court could not approve that course, and where disreputable tactics have been used by police e.g., torture, threats, violence, then the court should exercise control in the interest of human rights and in pursuit of public policy.

17. The Appellant therefore respectfully submits that this appeal should be allowed and his conviction and sentence quashed for the following amongst other

## R E A S O N S

1. BECAUSE the learned trial judge should not have permitted cross-examination in the voir dire of the Appellant with regard to the truth of the confession.

2. BECAUSE the learned trial judge should not thereafter have allowed the prosecution to lead evidence taken on the voir dire to the jury.

3. BECAUSE in the instant case, if the prosecution had not been allowed to adduce as evidence-in-chief the answer given by the accused during the voir dire, the accused could not have been confronted with these answers in the trial of the general issue, since at the close of the prosecution case, there would have been no case to answer.

4. BECAUSE on the grounds of public policy it is unconscionable for an accused to be drawn into making admissions on the voir dire as the result of intimidation or undue influence.

5. BECAUSE evidence taken upon a voir dire enquiry in regard to a special issue is of relevance only to that issue, and is only for the better information of the judge and is not evidence in the case.

6. BECAUSE so to admit evidence taken on the voir dire abrogates one of the fundamental principles of the common law, namely "nemo tenetur seipsum accusare".

7. BECAUSE the learned trial judge refused to allow the whole of the evidence taken on the voir dire to go before the jury, and in the premises the abstract put before them out of context was given the colour of a confession.

8. BECAUSE the judgement of McMullin J. was right.

9. BECAUSE the decision of the Court of Appeal was wrong and ought to be reversed.

CHARLES FLETCHER-COOKE

WILLIAM GLOSSOP

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