Judgment 34 of 1978

IN THE PRIVY COUNCIL No. 21 of 1978

ON APPEAL

FROM THE COURT OF APPEAL OF HONG KONG

BETWEEN

WONG KAM MING Appellant

AND

THE QUEEN Respondent

CASE FOR THE RESPONDENT

RECORD

1. This is an appeal in forma pauperis by special leave of the Judicial Committee granted on 1st March 1978 from a Judgement of the Court of Appeal of Hong Kong (Briggs C.J. and Huggins J.A., McMullin J. dissenting), dated 12th July, 1977, which dismissed (by a majority) an appeal by the Appellant from a Judgement of the High Court of Hong Kong (Mr. Commissioner Garcia and a Jury) given on 1st October 1976 whereby the Appellant was convicted of murder and two counts of wounding with intent to do grievous bodily harm and sentenced to death.

2. The questions of law raised on this appeal are:

(a) whether at the Appellant's trial, in a voir dire held in the absence of the jury at the request of the Appellant to contest the voluntariness of a written statement alleged by the Crown to have

been freely given by the Appellant to the police before trial and sought to be led in evidence by the Crown, the learned Commissioner was correct in admitting in evidence the Appellant's answers to questioning by counsel for the Crown in cross-examination as to the truth of the Appellant's written statement.

(b) whether the learned Commissioner was correct in allowing counsel for the Crown to lead in evidence before the jury, as part of the Crown case, the verbal admissions of the Appellant made on affirmation during the aforesaid voir dire, the learned Commissioner having ruled that the Appellant's written statement contested in the said voir dire was inadmissible.

3. The indictment charged the Appellant together with six other Chinese males (one of whom was not before the Court) with three counts as follows :-

(a) the murder of a Chinese male LAM Shing;

(b) unlawfully and maliciously wounding LI Kwong-yi with intent to do grievous bodily harm to persons;

(c) unlawfully and maliciously wounding CHAN Heung-choi with intent to do grievous bodily harm to persons.

All three counts in the indictment averred the offences were committed on the 28th day of December 1975 at 689 Nathan Road, Kowloon in the Colony.

4. At the trial of the Appellant, which occupied 29 sitting days on the 16th, 19th, 20th, 23rd to 27th and 31st August, the 1st, 2nd, 3rd, 6th, 8th, 10th, 13th, 15th, 16th, 17th, 20th, 21st to 24th and 27th to 30th September and 1st October, evidence was given for the Crown as follows:-

(a) Situate in a building at 689 Nathan

Road, Kowloon in Hong Kong are two establishments known as the "Sun Si Suk Nui Massage Parlour" (1st floor) and the "Siu Nui Chin Kiu Music Parlour" (mezzanine floor below). Both parlours were owned by a Chinese male, LAM Siu-hin and his employees varied their work on his instructions between the two premises in accordance with the number of patrons in each from time to time.

(b) On the evening of 27th December, 1975, Chinese male, CHEUNG Kwan-sang (the first defendant at the trial of the Appellant) visited the "Sun Si Suk Nui Massage Parlour" and assaulted a girl employed therein as a masseuse after an argument over her services. He was ultimately forcibly ejected from the premises by a number of the male employees after being assaulted by them.

(c) CHEUNG then walked through the surrounding streets for about a mile where he met three male friends. Together they went to a cooked food stall nearby where they ate some food. Immediately after getting up to leave, three or four unknown Chinese males armed with knives attacked CHEUNG and his friends and he suffered cut wounds to the arm and back, as a result of which he was forced to seek out patient treatment at a local hospital. Whilst at the hospital, CHEUNG was interviewed by a woman detective constable and signed a written statement to the effect that he could not identify his attackers.

(d) On the morning of 28th December, 1975, CHEUNG arranged to meet, inter alia, a male friend known as LI Yuk at a Kowloon restaurant at about 10 p.m. that night to discuss what was to be done about the incident in the "Sun Si Suk Nui Massage Parlour" on the previous night. This meeting was subsequently attended by CHEUNG, LI Yuk, the second accused and at least four other Chinese males. It was decided between the men present that they would go to the two premises at 689 Nathan Road, Kowloon, to seek out and attack with knives those involved in the massage parlour assault on CHEUNG,

(e) Weapons were obtained and the group proceeded to the "Siu Nui Ching Kiu Music Parlour" on the mezzanine floor. At approximately 11.40 p.m., they entered the premises and one of the group identified themselves as policemen calling on the employees to come out into the reception area. As soon as the employees had appeared, the weapons were drawn out, CHEUNG attempted to identify those persons he thought had assaulted him, and CHEUNG's group then attacked them with knives and triangular files. In the melee that followed, the deceased, LAM Shing (who was not an employee but a private chauffer to the owner of the parlour and was in the premises to collect debts due to his boss for clothing purchased by the messeuses) and CHAN Heung-Choi and LI Kwong-yi, two employees, were wounded. LAM Shing died shortly thereafter from his injuries, which included a stab wound in the abdomen, two cut wounds on the back and a cut wound on the right buttock.

(f) CHEUNG and the second and third accused were arrested in the early hours of 29th December, 1975 at a Kowloon flat. The Appellant was arrested in the New Territories on 31st December, 1975 by Detective Constable CHEUK Wah-ngok.

5. Eye-witnesses to the attack gave evidence summarised as follows :

p. 132 (a) Miss TANG Yuk-kuen, alias Siu-ling, a masseuse employed in the "Siu Nui Chin Kiu Music Parlour" stated that between 11.30 p.m. and 11.40 p.m. on 28th December, 1975 she was standing behind the counter in the reception room of the parlour talking to the cashier, Mr. LI Kai. Also present in the room were Mr. LI Kwong-yi, an add-jobs employee, who was sitting on a sofa on the opposite side of the room and Mr. YIP Tin-sung, alias YIP Bun, alias Hak Chai, a floor manager. Suddenly seven Chinese males, aged under thirty years, entered the reception room through the front door, one of them announced that they were policemen from "C.I.D.", instructed the employees not to move and called on everyone to come into the reception room. The deceased and Chinese male employees AU King-hang alias Fai Chai, CHIU

Lun, alias Ah Lun and CHAN Heung-choi, alias Ah Hung, alias Ah Choi came out of an adjoining room. When all the employees were in the middle of the reception room, the seven men produced beef knives and a triangular file and commenced an attack on the employees. One of the attackers dragged her to one side from where she viewed the following events during which she saw LI Kwong-yi attacked and escape into the passageway of an adjoining toilet, CHAN Heung-choi chopped on the arm and escape into an adjoining rest room and the deceased stabbed in the waist and collapse onto the floor near the main entrance. The attackers, having unsuccessfully chased after some of the other employees, then chopped the deceased several times whilst he lay on the floor and then they fled from the premises leaving behind a triangular file. The witness was not certain if every one of the seven Chinese males actually successfully struck a blow but stated all of them were armed. She further stated that the lighting in the parlour at the time of the attack was so dim that at a distance of ten feet one could recognise only the outline of a person's face. (She was unable to identify the Appellant as one of the attackers at an identification parade on 2nd January 1976). In cross-examination, Miss TANG denied that the seven Chinese males came unarmed and requested only compensation for CHEUNG's injuries, whereupon the employees produced weapons and attacked them.

p. 146

p.195

(b) Mr. LI Kwong-yi alias "Dai Chek Kwong", an "odd-jobs" worker at the "Siu Nui Chin Kiu Music Parlour" said that on the night of 27th December, 1975 he followed several of his fellow employees upstairs to the Sun Si Suk Nui Massage Parlour after hearing there was a fight going on there. On arrival, he saw an injured girl being treated by some other girls there. He stayed there for less than two minutes and then returned downstairs.

p.205

On the following night, sometime after 11 p.m., he was in the reception room of the music parlour together with Mr. YIP Tin-sung and Miss TANG Yuk-kuen

p.207

when three Chinese males entered through the front entrance. At this time he was sitting on a sofa and he got up to greet them. YIP also approached them. Another two to four men entered. One of the men said they were policemen and another grabbed LI and warned him not to move or make any noise. One of these men then put a melon knife to his neck and forced him to sit on the sofa. He saw someone run into the resting room and then the man with the knife chopped him on the head. He ran to a toilet adjoining the reception room and locked the door where he stayed until he saw another employee through a ventilator and realised it was safe to emerge. On returning to the scene of the attack, he found the police had arrived. He was escorted to hospital where his head wound was sutured.

The witness recalled attending two identification parades at a later date at which he identified one and three persons respectively as being involved in the attack but stated he was unable to identify any of them in court. He also stated he was "not very sure" when he made these identifications as they were based only on these persons "demeanour" and the features of their faces" which "looked a little similar". He further stated that he was able to identify one of these persons (CHEUNG) at the committal proceedings but he could not do so at the trial. He did not know any of the accused prior to 28th December 1975.

In cross-examination, he denied that he personally had taken part in the assault on CHEUNG
p. 234 on the night of 27th December, 1975 and had prepared weapons in case there was a revenge attack. However, he admitted that he did see at that time CHAN Heung-choi, YIP Tin-sung and AU King-hang assault CHEUNG. He further denied that there was a conversation between one of the five to seven men and CHAN Heung-choi in the reception room on 28th December in which CHAN Heung-choi admitted that music parlour people were involved in the Yaumati knife attack on CHEUNG on 27th December, 1975, whereafter CHEUNG's group then requested monetary compensation and, at this stage, the employees attempted to obtain weapons, which had been hidden behind a bar and under the sofa, and a general melee then ensued. He stated that knives were produced from a carrier bag carried

by the attackers after the knife was put across his throat.

(c) Woman Superintendent CHU Ying-nee said that she was the officer in charge of an identification parade held on 2nd January, 1975 in which the Appellant took part and was identified from a line-up of fourteen men by LI Kwong-yi as having been involved in the music parlour attack. On being told that he had been identified and asked if he had an objection to the way the parade was conducted, the Appellant said to her, "It is very difficult to say. It was very possible I was the only one wearing the slippers and all the other people that took part were young people." Superintendent CHU testified that there was nothing about the Appellant which would have made him stand out in the line-up and, prior to LI viewing the parade and in the presence of all the others in the line-up, the Appellant had no objection to participating. p. 273 p. 277

At the same parade, Miss TANG Yuk-kuen failed to pick out the Appellant. p.p. 275 - 276

6. Prior to Counsel for the Crown's opening address, a voir dire was held in the absence of the jury, at the request of the Appellant's counsel, to contest the voluntariness of a written statement, alleged by the Crown to have been freely given by the Appellant to Detective Constable CHEUK Wah-ngok before trial and which the Crown sought to introduce in evidence.

7. The Appellant's Counsel objected to the admission of the statement on the following grounds:- p. 3

(a) The Appellant was not cautioned;

(b) He was questioned at length but remained silent;

(c) He was grabbed by the shirt and shaken;

(d) An inducement was offered to him, namely, that if he confessed, his friend LI Yuk would not be arrested;

(e) His statement was prepared by the police and he was forced to copy it into D.C. CHEUK's notebook and sign.

8. Evidence for the Crown in this voir dire was given as follows:-

(a) D.C. CHEUK Wah-ngok stated that after he and D.C. LIU Yat-ming arrested the Appellant at a stone hut in the New Territories at 3.50p.m. on 31st December, 1975 and cautioned him in connexion with the music parlour case, he escorted him back to the Mongkok police station by car where he reported the arrest to the duty officer and then took the Appellant to a small C.I.D. room to interview him. On arrival there, the Appellant admitted to CHEUK that he had become involved in the incident because of his friends so CHEUK stopped him
p. 9 from saying anything further, told him not to worry and, at 6.50 p.m., wrote in his notebook details of the attack and the caution he had given the Appellant earlier that day. He read this over to the Appellant, who wrote "I understand" under the caution and signed. The Appellant then wrote his own statement into the notebook after which CHEUK read it over to him and asked him to initial any characters he had altered. The accused did so and signed the statement without any inducements having been offered to him, promises or threats made to him, or assaults upon him.

p.p. 21-22 In cross-examination, CHEUK admitted that he could not remember whether he questioned the Appellant after delivering the second caution and also that he could not remember everything that the Appellant said during the interview - in fact he could remember very little of the interview other than by refreshing his memory from notes made at the time. He denied failing to caution and inform the Appellant at the stone hut of the reason for his arrest and also denied the following :

that he and a Sergeant NG together questioned the Appellant for approximately half an hour at Mongkok C.I.D., during which time the

Appellant remained silent and only then the Appellant finally admitted knowing a person called LI Yuk; that on being shown a picture of the sixth accused, LI Keung, the Appellant said that LI Keung did not take part in the incident but he, CHEUNG, LI Yuk and a few others that he did not know were there and he provided descriptions of the latter persons; that the Appellant said that this group went to the "Siu Nui Chin Kiu" to ask for compensation, whereupon Sergeant NG grabbed his chest and swore at him; that Sgt. NG then ordered D.C. CHEUK to bring in two knives and Sergeant NG hit the Appellant on the head with the handle of one of them; that the Appellant insisted he had never seen these knives before; that D.C. CHEUK then wrote out a statement on a piece of paper, which Sergeant NG told the Appellant to copy into CHEUK's notebook and, when he refused, Sergeant NG threatened to have LI Yuk arrested; that the accused then copied as requested.

(b) Sergeant NG Sai-kit was made available for cross-examination and denied that he was present in the Mongkok Police Station at the time the Appellant was being interviewed. He further denied allegations similar to those put to D.C. CHEUK and, in particular, that the Appellant said to him, "I went up only to ask for compensation, but I never had any knife." p. 47

9. The Appellant elected to give evidence in the voir dire as follows: p. 55

He was arrested in the New Territories shortly after 2 p.m. on 31st December, 1975 by D.C. CHEUK but was not told the reason for his arrest or cautioned. He was taken to Mongkok Police Station arriving between 5.30 and 6 p.m., taken before an Inspector Robson and then interviewed in his room by Sergeant NG. On being asked where he was on the night of 28th December he claimed he could not remember. He was later taken to a large office and finger-

printed and then interviewed by Sergeant NG, D.C. CHEUK and D.C. LIU in a small office. He continued to say he could not remember where he was on 28th December and was told by Sergeant NG that "it would be easier for him if he told them." Despite continuous verbal pressure for about twenty-five minutes he refused to talk. Then Sergeant NG grabbed him by the chest, "jerked" him and produced a photo of the sixth accused. He admitted that he knew this man but said that the sixth accused had not gone up to the "Siu Nui Chin Kiu" - he knew this because he himself had been there at the time. He then told Sergeant NG a number of things including the fact that his close friend LI Yuk had telephoned him on the morning of 28th December, informed him that CHEUNG had been chopped and asked him to meet them at a Kowloon restaurant that night, which he did and that a plan was decided on amongst them there to go up to the parlour to ask for compensation. Sergeant NG then asked him what type of knives they took with them and, when he denied carrying knives, the sergeant had the knives brought in and hit him on the head with the handle of one of them. He also told Sergeant NG that, apart from LI Yuk and CHEUNG, he did not know the other four persons who went to the parlour.

Fifteen to twenty minutes elapsed and D.C. CHEUK came back into the room holding a notebook and a piece of paper. He was shown the latter and, when he saw that the writing on it purported to be a statement by him saying that he went to the parlour with a knife and chopped some people, he refused to copy it into the notebook as requested by D.C. CHEUK. He observed that the notebook already contained some writing but he was prevented from reading it. Sergeant NG told him that, as he had committed a blunder, it did not matter whether he had a knife or not and he might as well copy to save LI Yuk. CHEUK told him the worst that would follow for him would be a manslaughter conviction. On confirming that LI Yuk would not be be arrested if he copied into the notebook, he did so. He admitted the few sentences at the beginning were his own idea and that he did tell Sergeant NG the following:

(i) "It is true LI Yuk had done me favours".

(ii) that CHEUNG was assaulted by others.

(iii) "That day, Kong Shin, CHEUNG Kwan-sang, LI Yuk were together with four persons I did not know. One wore a blue cotton jacket. One wore a car-coat."

(iv) That these men together went up to the "Siu Nui Chin Kiu Music Parlour".

The Appellant denied being cautioned. The only fact which the Appellant affirmed to be true was that "we did go up there to have tea." (This is a colloquial way of saying to obtain compensation in Cantonese).

10. In cross-examination, the Appellant, when asked about his relationship with LI Yuk, said that he was his "elder brother" (protector) in a triad society. He stated that the factor which resulted in him signing the statement admitting that he went to the parlour armed with a beef knife and chopped persons pointed out by CHEUNG was Sergeant NG's offer not to arrest LI Yuk. He further stated that at the time he was asked to copy he knew someone injured in the music parlour attack had died and, on being asked,

Q. "At the time you copied it (the statement) you thought you were confessing to manslaughter?" p. 80

he answered,

A. "Yes, I admit. It is more or less the same. We went up there to ask for compensation. They being the wrongdoer caused trouble. When I saw him I managed to snatch away his knife and I chopped him and ran away."

11. Counsel for the Crown's cross-examination then continued as follows : p. 81

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

12. Counsel for the Crown then continued to attack the Appellant's credibility as to the reason he copied the statement and signed the same and probed the Appellant's relationship with LI Yuk.

p.p. 84-85

13. Counsel for the Crown then asked the Appellant exactly which parts of the statement were not true. The Appellant said that it was not true that they went to the "Siu Nui Chin Kiu" holding knives and that the passage, "At that time I held the beef knife of 'Ma Yan' brand. On arrival, Kong Shin said that those were all (the people). We then started chopping them." was also untrue.

p.p. 86-87

14. The Appellant was further cross-examined about the type of knife he held in the music parlour as follows:

p. 87

"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 like.

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."

15. The Appellant further stated that it was untrue that Kong Shin (CHEUNG) pointed out the people to chop whereafter his group started to chop them. p. 87

16. The Appellant said he did not make any complaint about what the police had done to him at the interview either to the forensic pathologist, who examined him the day after his arrest, or to the Magistrate at committal. p. 88

17. The Appellant denied making statement voluntarily due to his thinking that, as he and his co-accused had been arrested, there was no hope of escaping the consequences of his actions. p. 98

18. Mr. Commissioner Garcia considered the evidence led in the voir dire and, not being satisfied that D.C. CHEUK had revealed that whole truth concerning the interview or that the statement accurately represented everything the Appellant had said, he ruled the statement was inadmissible.

19. In view of the evidence given at the trial by LI Kwong-yi that he was then unable to identify any of the assailants and that he was "not very sure" when he picked out the Appellant at the

identification parade on 2nd January, 1976, a "no case to answer" submission at the close of the Crown's case would inevitably have succeeded. Counsel for the Crown therefore applied to the

p.p. 241-252 and p.p. 262-266

learned Commissioner for leave to lead in evidence the Appellant's verbal admissions in the voir dire, reproduced in the two quoted passages above, for the purpose of establishing his presence and participation in the alleged offences at the "Siu Nui Chin Kiu Music Parlour." 10

p.p. 266-268

20. The Appellant's counsel objected to the introduction of such evidence and Mr. Commissioner Garcia, having heard argument from both sides on the admissibility of the same, ruled the two passages admissible, stated that he had a discretion to exclude the evidence but declined to exercise such discretion.

p.p. 268-273

21. Counsel for the Crown then called Miss Adrienne Frances Ozorio and Miss Mary Mui Mei-lei, the court reporters who recorded in shorthand the two aforesaid passages and, with the consent of the Appellant's counsel, they produced typed extracts of the questions and answers for the jury. 20

p.p. 280-283

22. A submission of "no case to answer" was made on behalf of the Appellant. It was unsuccessful.

p.p. 284-325

23. The Appellant elected to give evidence and, in the course of doing so, affirmed again that he was present in the "Siu Nui Chin Kiu Music Parlour" at the time of the alleged offences but had acted only in self-defence. CHEUNG also gave evidence and stated that the Appellant was present in the music parlour. 30

24. Mr. Commissioner Garcia made only passing reference to the passages of voir dire evidence led by the Crown in his charge to the jury stating that it was relevant in considering the events of 28th December, 1975, because it showed the Appellant was present in the premises of the music parlour on the night of that date.

25. The jury returned unanimous verdicts of guilty on all three counts against the Appellant and he was sentenced to death on the murder count. 40

26. An appeal against the conviction of the Appellant

to the Court of Appeal of Hong Kong (Briggs C.J. and Huggins J., McMullin J. Dissenting) was dismissed in a written judgement dated 12th July, 1977.

27. Huggins J. (with whom Briggs C.J., who did not deliver a separate judgement, concurred), after setting out the facts, found it necessary to consider only the Appellant's fourth ground of appeal that the learned Commissioner was wrong in allowing counsel for the Crown to cross-examine the Appellant during the voir dire concerning his personal involvement at the scene of the crime and in admitting subsequently a portion of this evidence before the jury.

Huggins J., after setting out the facts concerning the voir dire evidence and its subsequent admission before the jury as part of the Crown case, reviewed the history of the law relating to extra-judicial confessions and concluded that they are in a different category to other evidence (which is admissible if relevant no matter how it is obtained) such confessions only being admissible if first proven to have been voluntary. Various bases for the confession rule had been advanced including that it would be unsafe to receive a statement made under "influence or fear" because it may be untrue and the maxim "nemo tenetur seipsum accusare". He concluded that the rule was affected by both the above and a defendant was entitled to object to the admission of a confession, even though he knows it to be true, if it was obtained by improper means.

Accordingly, the practice grew of contesting the voluntariness of confessions in a voir dire to prevent the jury being prejudiced by seeing the incriminating statement, which may later be excluded from evidence, and also because the accused may give evidence in the voir dire and, if the jury form a poor opinion of his character as a result thereof, that may materially diminish his right to remain silent on the general issue.

Huggins J. then went on to consider whether an accused may be questioned as to the truth of his extra-judicial confession in a voir dire. The learned judge stated that Hammond (1941) 28 Cr. App. R. 84, R. v. Plante 1958 O.W.N. 80, DeClercq v. R. (1969) 70 D.L.R. (2d) 530 and R. v. Van Dongen (1975)

26 Can. C.C. (2d) 22 were good authority for the proposition that such questioning was relevant to the credibility of the accused and therefore permissible. He was unable to find authority for any rule which renders self-incriminating evidence inadmissible outside the special rules relating to extra-judicial confessions identified in the leading case of R. v. Thompson (1893) 2 Q.B. 12; indeed s. 54(1)(e) of the Criminal Procedure Ordinance (see Appendix A) appeared to negative the existence of any such rule. The learned judge then considered the cases of Noor Mohamed v. R. 1949 A.C. 182 and Kuruma v. Reg. 1955 A.C. 197, which were binding on him, established that a trial judge has a discretion only to exclude evidence, the probative value of which is outweighed by its prejudice to an accused, as distinct from any wider rule extending to the exclusion of any evidence which he thinks is unfair and that this rule applied at all stages of a trial. As the question of the truth of an accused's statement was relevant to his credibility on the reasoning enunciated in Hammond, he felt that the answer was probative in the voir dire and further, as the trial judge had a discretion to prevent the Crown from leading any resultant answer in evidence before the jury (which he could exercise when that specific problem arose) any prejudice to the accused was so slight as not to outweigh the probative value of the answer. Alternatively, it was not always oppressive or unfair to so cross-examine in a voir dire. Appellate courts having repeatedly declined to substitute their own opinion as to how a trial judge ought to have exercised his discretion, he could see no reason to do so in the instant case.

The learned judge then commenced considering whether a voir dire confession made in the absence of the jury is admissible against an accused as part of the Crown case by examining the various uses which have been made of voir dire evidence. He found authority supporting the use of voir dire evidence to discredit a witness by showing he gave evidence in the voir dire inconsistent with his testimony on the general issue - R. v. Darwin (1973) 13 Can. C.C. (2d) 432; and this principle extended to any witness including the defendant - R. v. Gray 1965 Q.R. 373. He distinguished cases involving trial by judge alone and noted that all the judges

in De Clercq (q.v. supra) thought the Crown could lead evidence before the jury of a voir dire admission by an accused that his written confession was true. He relied on the judgement of Robertson J. in R. v. Gauthier (1975) 27 Can. C.C. (2d) 14 for the proposition that the relevance of an answer to a question cannot be limited by the purpose of counsel who called the witness or the purpose of counsel who asked the question or the purpose of the witness in answering the question. He observed that Neasey, writing in the 1960 Australian Law Journal at page 111, thought that such voir dire evidence could be led by the Crown before the jury and three judges of the Full Court of South Australia so held in R. v. Wright 1969 S.A.S.R. 256, subject to the trial judge's overriding discretion to prevent the Crown following such a course. He relied on Stewart v. R. (1922) 29 C.L.R. 234 and R. v. McGregor (1967) 3 W.L.R. 274 as authority that there was no fundamental objection, nor was it unfair for the Crown to lead evidence of admissions made by a defendant in the course of defending himself against the charge before the court - in these cases the defendant's evidence before the jury at a trial was led against him at his retrial. He then distinguished the case of NG Chun-kwan v. R. 1974 H.K.L.R. 319, which held that voir dire admissions by an accused could not be led by the Crown against an accused other than by way of rebuttal to discredit the accused if he chooses to give evidence on the general issue, on the ground that it was a case involving trial by judge alone and, alternatively, this statement of law was obiter dicta and not binding. He concluded the evidence led in the instant case was admissible and, being highly probative, could see no reason for the learned Commissioner to have excluded the same. He therefore dismissed the appeal.

28. McMullin J. also found it necessary to consider only the Appellant's fourth ground of appeal. He stated that it was conceded (it was not) that the only evidence against the Appellant at the trial was the admissions made by him in cross-examination on the voir dire and that these were merely repetitions of 'parts of' the written statement made by him to the police. In

examining the principles involved, for simplicity, he considered the case on the basis that the excluded statement amounted to a full confession of the crime charged and the subsequent admission on the voir dire amount to a simple affirmation of the truth of the confession.

He felt the crux of the matter lay in whether it was permissible to ask a defendant in cross-examination during a voir dire whether his disputed statement is true and was of the opinion that the answer to this question had no material relevance to the defendant's credibility because, if the defendant answers in the negative, demeanour aside, his credibility cannot be enhanced or impaired by an answer which favours his own interests in opposing the admission of the statement. Alternatively, if the answer is affirmative, it is only relevant if it enhances his credibility on the question of voluntariness on the basis of a presumption in favour of the truthfulness of statements made against a party's own interest but a trial judge is not entitled to form an opinion on the truth of the defendant's statement at that stage of the trial. If the written statement is then admitted, the probative effect of the answer has been negligible on the issue of credibility. However, if it is excluded, the reason may not necessarily be because of the high probative value of the affirmative answer regarding credibility but more likely because the prosecution evidence on the issue was unsatisfactory and because the external circumstances generally tended to support the defendant. He felt only a plea of guilty or a determination of the issue of guilt could establish the truth of the defendant's statement.

McMullin J. then relied on the three dissenting judgements in De Clercq (q.v. supra) to substantiate his view that it was unfair to question a defendant in a voir dire as to the truth of his statement because this, in practice, defeated the long established principle summed up in the maxim "nemo tenetur seipsum accusare" applicable to the criminal law.

The learned judge's opinion was that the reason for excluding involuntary statements was not simply that they may be untrue but also on

the ground of unfairness to the accused or impropriety in the way the statement was obtained and that, as the accused's evidence is usually the only available evidence of police impropriety, he must, in practice, necessarily give evidence in the voir dire and run the risk of being his own accuser if he is compelled to answer questions about the truth of his statement. He was also of the opinion that an affirmative answer from the accused must always be more prejudicial than probative and therefore there was no question of discretion to be entertained on this issue and, alternatively, if the trial judge rules the written statement inadmissible, he ought to exercise his discretion to exclude the accused's answer on the voir dire if he is satisfied that the statement has been obtained by means so outrageous that it would bring the administration of justice into disrepute relying on Callis v. Gunn (1964) 1 Q.B. 50 and the dissenting judgements in De Clercq and R. v. Wray 1970 4 Can. C.C. 1.

The learned judge approved of the decision in NG Chun-kwan (q.v. supra) but felt Hammond (q.v. supra) was wrong. He stated further that he could see little distinction between leading the accused's voir dire answers and putting the written inadmissible statement before the jury and such a course, in spirit, breached the rule in R. v. Treacy 30 Crim. App. R.93, which was intended to preserve the case of the accused from the damage which might be done to it by revealing to the jury the existence of a confession or admission wrongfully obtained. If this rule is so breached, the accused has not had a fair trial. Similarly, it was unfair to put the accused, in effect, to a plea upon oath in the voir dire.

In conclusion, the learned judge's view was that, in the instant case, where the answer on the voir dire did not amount to a plea of guilty but was merely an admission by way of "confession and avoidance" that some of the facts upon which the Crown's case was based were true, the probative value of the question as to the truth of the Appellant's statement was virtually nil. Thus, to adduce evidence of the verbal

answers in the voir dire before the jury was a contrivance to defeat the "nemo tenetur seipsum accusare" rule which should not have been allowed. McMullin J. would therefore have allowed the appeal.

29. The Appellant petitioned Her Majesty in Council for special leave to appeal in forma pauperis against the decision of the Hong Kong Court of Appeal. The Crown did not oppose such application due to the view expressed in the judgements of Huggins and McMullin J.J. that they sought a higher decision on the issues raised in this appeal. Special leave to appeal was granted on 1st March, 1978.

30. The Respondent respectfully submits that the decision reached by the majority of the Hong Kong Court of Appeal was correct and should be affirmed as Appellant's verbal admissions on affirmation in the voir dire was evidence admissible as part of the Crown case before the jury and, the learned Commissioner, having considered he had a discretion to exclude the same, declined to exercise such discretion. His decision should not be disturbed on appeal.

31. The Respondent respectfully submits that this appeal should be dismissed for the following (among other)

REASONS:

1. Because counsel for the Crown was entitled to question the Appellant in the voir dire as to the truth of his written statement.

2. Because the learned Commissioner was correct in admitting in evidence in the voir dire the Appellant's answers to such questions.

3. Because the learned Commissioner had no discretion to prevent such questioning or to exclude the Appellant's answers thereto in the voir dire.

4. Because, alternatively, if the learned Commissioner had any such discretion, there

was no ground for him exercising the same.

5. Because the verbal admissions of the Appellant on affirmation in the voir dire were admissible before the jury as part of the Crown case against the Appellant.

6. Because the learned Commissioner had no discretion to exclude the said verbal admissions from being led before the jury as part of the Crown case against the Appellant.

7. Because, alternatively, if the learned Commissioner had any such discretion to exclude the said verbal admissions from being led before the jury as part of the Crown case against the Appellant, he properly declined to exercise such discretion.

APPENDIX A

1. S. 54(1) of the Criminal Procedure Ordinance of Hong Kong reads as follows :

> "54. (1) Every person charged with an offence, and the wife or husband as the case may be of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person :
>
> Provided as follows -
>
> (a) a person so charged shall not be called as a witness in pursuance of this section except upon his own application;
>
> (b) the failure of any person charged with an offence, or of the wife or husband as the case may be of the person so charged, to give evidence shall not be made the subject of any comment by the prosecution;

(c) the wife or husband of the person charged shall not, save as in this section mentioned, be called as a witness in pursuance of this section except upon the application of the person so charged;

(d) nothing in this section shall make a husband compellable to disclose any communication made to him by his wife during the marriage, or a wife compellable to disclose any communication made to her by her husband during the marriage;

(e) a person charged and being a witness in pursuance of this section may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged;

(f) a person charged and called as a witness in pursuance of this section shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless -

(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or

(ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve

imputations on the character of the prosecutor or the witnesses for the prosecution; or

(iii) he has given evidence against any other person charged with the same offence;

(g) every person called as a witness in pursuance of this section shall, unless otherwise ordered by the court give his evidence from the witness box or other place from which the other witnesses give their evidence.

(2) Notwithstanding any rule of law, the right of a person charged to make a statement without being sworn is hereby abolished."

2. Section 58 of the Criminal Procedure Ordinance of Hong Kong reads as follows :

"58. Sections 54 to 57 shall apply to all criminal proceedings, notwithstanding any other provision in force at the time of their enactment."

3. Section 59 of the Criminal Procedure Ordinance of Hong Kong reads as follows :

"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."

4. S. 83 of the Magistrates Ordinance of Hong Kong, which deals with the procedure to be followed at

committal hearings, contains sections 83(4) and (5), which read as follows :

> "(4) All statements by the accused and all evidence given by him or any such witness as aforesaid shall be taken down in writing."
>
> "(5) Nothing contained in this section shall prevent the prosecutor in any case from putting in evidence at the trial any admission or confession or other statement of the accused made at any time which is by law admissible as evidence against the accused."

MARRIAGE Q.C.

D. Y. MARASH.

No. 21 of 1978

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL OF HONG KONG

B E T W E E N :

WONG KAM MING

Appellant

AND

THE QUEEN

Respondent

CASE FOR THE RESPONDENT

CHARLES RUSSELL & Co.,
HALE COURT,
21, OLD BUILDINGS,
LINCOLN'S INN,
LONDON, W.C.2.