Privy Council Appeal No. 6 of 1987

Chan Hak-So *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF HONG KONG

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE 7TH OCTOBER 1987, DELIVERED THE 2ND NOVEMBER 1987

Present at the Hearing:

LORD BRIDGE OF HARWICH
LORD HAILSHAM OF ST. MARYLEBONE
LORD MACKAY OF CLASHFERN
LORD OLIVER OF AYLMERTON
LORD GOFF OF CHIEVELEY

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

The appellant was convicted in the High Court of Hong Kong before Bewley J. and a jury of one offence of murder and six offences of wounding with intent to cause grievous bodily harm. The Court of Appeal of Hong Kong (Li V-P., Yang and Barker JJA.) allowed his appeal against these convictions, but ordered that he be retried. The appellant appealed to Her Majesty in Council by special leave against the order for retrial. On 7th October 1987 their Lordships, having heard the appeal, humbly advised Her Majesty that the appeal should be allowed and the order for retrial set aside. They indicated that they would give their reasons later, which they now do.

The appellant was tried together with seven others all accused of the same offences. The prosecution arose out of an attack on 22nd November 1983 by a gang of ten to twenty masked men, clearly acting in concert, on the staff and customers of an establishment called the Luen Fat Mahjong School ("the school"). Seven victims of the attack sustained stab wounds, from which one died. The case for the prosecution was that the organiser of the attack was a man named Lam Moon and that his motive

was to be avenged for some injury which he had earlier sustained at the school.

On 9th December 1983 the police arrested a number of men including the appellant. The only evidence that the appellant participated in the offences was contained in two statements which he made to police officers on 9th and 10th December 1983. It will suffice for the purposes of this judgment to summarise the effect of these statements so far as relevant to the issue on which the appeal turned. On 22nd November 1983, according to his own account, the appellant, at the invitation of Lam Moon, went to a barbecue in a car which he had borrowed accompanied by a man named Sai Wah. At the barbecue Lam Moon said to the appellant: "We'll go to have a fight at Luen Fat a little later. Will you go?" The appellant replied: "I will not go, because I am a familiar face there. I can't help you." Lam Moon then said: "No matter what, you drive a person to Lai King Estate for me. You wait for me there." Sai Wah was present during this conversation but said nothing. Afterwards the appellant said to Sai Wah: "What about you?" Sai Wah did not answer. The appellant then drove Sai Wah in the borrowed car to a car park at Lai King Estate. At the car park Lam Moon was present with a group of friends and two seven-seater vehicles. One of the men in the group went away and came back carrying a bag from which the appellant saw a number of knife handles projecting and Lam Moon then said in a loud voice: "You people go to do the work. I am not going." According to the appellant, throughout the incident at the car park he and Sai Wah remained seated in the appellant's borrowed car at a distance of some four car-lengths from the group of men who were talking beside the two seven-seater vehicles. The men in the group, including the man with the bag of knives, boarded the two seven-seater vehicles and drove off. The appellant followed. The appellant stopped his car at the Good View Theatre. Other evidence showed that this was about five minutes walk from the school. The appellant saw the seven-seater vehicles turn into a street leading in the direction of the school. He told Sai Wah to get out of the car, but Sai Wah refused and asked the appellant to drive him to the school. The appellant complied. At or near the school, where the other two vehicles were parked in the middle of the road, Sai Wah got out of the car and the appellant drove away.

The prosecution case was opened to the jury on the basis that the man referred to as Sai Wah in the appellant's statements was one of the co-accused indicted in the name of Sit Kin-wah, who was in due course convicted. But no admissible evidence to establish this identity was ever led. Unfortunately, another co-accused in the course of his evidence said

that a police officer had told him that the nickname of Sit Kin-wah was Sai Wah. The appellant had also said in his statement that Sai Wah spoke to him on the day following the commission of the offences and told him that he (Sai Wah) had gone into the school and had seen the offences committed. As was very properly conceded by the Crown in the Court of Appeal neither of these pieces of hearsay was admissible against the appellant as evidence that Sai Wah had participated in the offences, but no warning to this effect had been given to the jury by the judge.

Li V-P., giving the judgment of the Court of Appeal, expressed the view that:-

> "If such inadmissible statements were taken away from the jury, there would be no evidence that Sai Wah took part in the attack at all."

Counsel for the appellant contended that, on this basis, the evidence was so tenuous that the Court of Appeal should not order a new trial as it had been invited by the Crown to do. But the judgment of the Court concluded:-

> "In view of the course that we have decided to take, the less we say on the evidence in detail the better. Suffice it to say that having considered the matter we feel that in the interest of justice, there should be a new trial in the case of [this appellant]."

Counsel for the Crown conceded that a retrial could not properly be ordered to give the prosecution an opportunity to adduce fresh evidence and, indeed, proffered an undertaking that, in the event of a new trial, no fresh evidence would be led.

The issue, therefore, on the appeal to the Board was a very narrow one. After setting aside the inadmissible evidence, did the remainder of the evidence relied on by the Crown establish a case against the appellant which was sufficient to be left to a jury or was it so tenuous that a judge should withdraw it? If the former, there would be no ground for the Board to interfere with the discretionary decision of the Court of Appeal; if the latter, the order for a retrial could not stand.

Their Lordships were urged by counsel for the Crown to take the view that the Court of Appeal of Hong Kong, being familiar with local conditions, was best qualified to evaluate the cogency and effect of evidence about events in Hong Kong society. This Board is always willing and anxious to give full weight to the advantages of local knowledge enjoyed by courts exercising jurisdiction in other parts of the Commonwealth when it is appropriate to do so. But their Lordships think that the criteria by which

the sufficiency of evidence in a criminal case should be judged must be purely objective and must be the same in any common law jurisdiction from which appeal lies to Her Majesty in Council.

A somewhat unusual feature of this case is that there would be no difficulty in imputing to the appellant a guilty mind once it could be shown that he acted in such a way as to give assistance or encouragement to those who participated in the offences. There was ample material from which the inference could be drawn that the appellant drove to the school with full knowledge that the gang organised by Lam Moon intended to carry out a murderous attack there. Their Lordships can only presume that the Court of Appeal, having expressed the view that there was no admissible evidence of participation in the offences by Sai Wah, nevertheless thought a jury might properly conclude that the appellant, by the mere fact of driving to the school, gave encouragement to those who did participate in the offences. But on this hypothesis their Lordships could see no sufficient nexus between the appellant's action and the actions of the men who travelled in the two seven-seater vehicles to justify the conclusion that the appellant aided and abetted them in the commission of the offences.

The main argument for the Crown on the appeal was that, even in the absence of any direct evidence of Sai Wah's participation, it was a legitimate inference which a jury might draw from all the circumstances that Sai Wah was present at the school at least as an aider and abettor and hence that the appellant by driving him to the scene of the crime, knowing what was intended, was also aiding and abetting. Their Lordships appreciate the force of this argument, but, particularly in the absence of any indication that it represented the approach of the Court of Appeal, they were not able to accept it. Without any admissible evidence of what Sai Wah did after he left the appellant's car, the inference that he participated in the offences was not, in their Lordships' opinion, one which a jury could safely be invited to draw.