Privy Council Appeal No. 30 of 1991

Lai Chi-Hong *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 27TH JANUARY 1992, DELIVERED THE 13TH FEBRUARY 1992

Present at the hearing:-

LORD BRIDGE OF HARWICH
LORD TEMPLEMAN
LORD ACKNER
LORD GOFF OF CHIEVELEY
LORD BROWNE-WILKINSON

*[Delivered by **Lord Ackner**]*

This is an appeal by special leave granted on 24th July 1990 from a judgment of the Court of Appeal of Hong Kong (Silke J.A., Power and Bewley J.J.) dated 27th February 1987 dismissing an appeal by the appellant against his convictions of murder and wounding with intent to cause grievous bodily harm on 11th September 1986. At the conclusion of the hearing of the appeal on 27th January 1992 their Lordships announced that they would humbly advise Her Majesty that the appeal should be dismissed. The reasons for this advice now follow.

The prosecution arose out of a revenge attack by members of one triad society upon members of a rival triad society. On the evening of 12th April 1986, in a small park in Wanchai, a fight occurred between a number of members of the Luen Lok Tong Triad Society ("Lo Tan") and a rival society, the Lo Hop Triad Society ("Hop To"). A member of Lo Tan, called Ah Kau, was hit on the head by a stone, thereby suffering injuries of sufficient seriousness to require his hospitalisation for some days. After the fighting had ceased, a small group of Lo Tan searched for members of Hop To but failed to find them.

In the early hours of the morning of the following day, this group of Lo Tan went to an old building where they were joined by three or four persons, including the appellant. There was an agitated and angry discussion about the incident and one person was heard to say "unless Ah Kau is alright, we will fight to the death with the Hop To boys". Later that night the appellant went with three members of Lo Tan, the leader being Ah Ping, to look for members of Hop To, but they could not find them. Shortly after 3.00 a.m. the following morning, it occurred to the appellant that there was a party of Hop To who liked to frequent the New Coco Billiard Saloon in Johnston Road. He mentioned that fact to Ah Ping. He drove them to the billiard saloon, but the appellant was unable to identify there any members of Hop To. Later Ah Ping and another of the men went up to the saloon and when they returned they informed the appellant that they had there recognised members of Hop To. Ah Ping then went off to make a telephone call for the purpose, as the appellant appreciated, of summoning reinforcements. Shortly after the phone call, a green car arrived, four men got out and the appellant saw them open the boot of the car in order to take something out of it. Ah Ping told his two companions in his car to join the four men and all six went into the billiard saloon. Ah Ping stayed in his car with the appellant but reparked his car so that it was opposite the entrance to the billiard saloon. Inside the billiard saloon, three members of Hop To were attacked with knives and choppers. Fung was cut on his head, neck, back, arms and hands and later died as a result of those wounds. Wong and Lam also received wounds on their heads, but these did not prove fatal.

The six men rushed out of the billiard saloon and climbed into the green car, which was driven off.

At his trial the appellant pleaded not guilty to all counts, one of which charged him with membership of a triad society, contrary to section 20(2) of the Societies Ordinance, Cap. 151, on which he was also found guilty. He has not appealed against this conviction.

The appellant's case at the trial was a simple one. He was not a member of the triad society, but he knew members of both these two societies. Although present during the discussion that took place following the fight between these two rival societies, he had not heard the observation quoted above about fighting to the death with the Hop To boys. His function was to try and achieve a settlement of the dispute by persuading Hop To to pay compensation to the injured Ah Kau. It was for this purpose and this purpose only that he sought in the billiard saloon to discover whether there were any members of Hop To present. Having learned in due course from Ah Ping that members of that society had been identified in the

billiard saloon, he took no further action, merely complying with Ah Ping's instruction to remain in the car. In the course of his examination-in-chief the appellant admitted that following his arrest he had told the police that if the claim for compensation failed then "probably we will beat them up".

In his summing up, the learned trial judge, Mr. Justice Garcia, instructed the jury *inter alia* as follows:-

> " There can be no doubt in this case that the killing of FUNG Yiu-fai was unlawful. The intention of those who perpetrated this crime may be gathered, firstly, by the type of weapons used in the attack; secondly, the injuries which those weapons would inflict and, thirdly, the part of the bodies of those victims which the weapons were to be used against. I think having regard to the injuries sustained by the deceased and by both WONG Wai-keung and LAM Kin-keung, you can be left in no doubt that whoever caused those injuries and the death of FUNG Yiu-fai had either intended to kill or to cause serious bodily harm to those persons whom they, that is the attackers, had come into contact with that morning in the New Coco Association.
>
> You will note that in respect of these three victims the knife blows were directed towards their heads. There is no evidence to show by whose hand or hands the injuries to the deceased or the two other victims were caused but, in law, all those persons who shared the common intention of killing or causing serious bodily harm to those who were in the New Coco Association that morning by being present and taking part in the attack and were ready and willing either actively or by incitement or encouragement to assist each other in carrying out the common intention, if necessary, are as responsible for whatever is done by any of the parties pursuant to the common intention as if they had themselves delivered the blow or blows which caused the death of the deceased or the injuries to the other two victims.
>
> So a person or persons who is or are proved to be acting as look-outs and sharing the common intention with those who actually carried out the attacks are as guilty as if they had themselves struck the blow or blows which caused the death of the deceased and the injuries to the two other victims."

Mr. Martin Thomas Q.C. on behalf of the appellant accepts that it must follow from his convictions, that the jury were satisfied that the appellant was a member of Lo Tan and that they were also satisfied that his function was not that of a conciliator, seeking to obtain compensation for Ah Kau's injury.

The main ground of appeal before the Court of Appeal, and the only ground urged before their Lordships, was that the trial judge should have, but failed to direct the jury as to the alternative verdict to murder, namely that of manslaughter, and the alternative verdict to wounding with intent, namely that of unlawful wounding.

As to this Silke J.A., giving the judgment of the Court of Appeal said:-

" We would re-emphasize that the jury were not addressed by Mr. Poll on the question of manslaughter and that the trial judge was not requested to so direct them. We accept that there is a duty upon a trial judge to place before the jury any defence which may have properly arisen and that even though it may be a tenuous one.

If the joint enterprise accepted by the jury was one of the seeking of compensation then the verdict would have been one of not guilty.

If the jury accepted, as they clearly did by their verdict, that the common intention to which the Applicant had attached himself was that of, at the very least, causing really serious bodily injury to the Hop To boys, which injury was caused, then the verdicts of guilty of murder and of wounding were correct.

The state of the Applicant's knowledge, therefore, as it must have appeared to the jury, was that of a group, superior in numbers to the opposition, carrying 'something' and going upstairs to 'beat up' the occupants of the billiard room. The question is whether, in these circumstances, a verdict of manslaughter was open to the jury.

The reality of the matter is that this was a revenge attack by members of one Triad Society upon members of a rival gang. It was the sequel to an incident in which a member of the Lo Tan triad group had been struck on the head by a stone during a fight between the two groups the day before and taken to hospital. It took place at 4 a.m., after a prolonged search and after reinforcements had been summoned. This was no spur of the moment brawl between rival groups of schoolboys.

In *Chan Wing Siu v. R.* [1985] A.C 168 (P.C.), Sir Robin Cooke, giving the judgment of the Board, said at p.177:-

'The test of mens rea here is subjective. It is what the individual accused in fact contemplated that matters. As in other cases where the state of a person's mind has to be ascertained, this

> may be inferred from his conduct and any other evidence throwing light on what he foresaw at the material time, including of course any explanation that he gives in evidence or in a statement put in evidence by the prosecution. It is no less elementary that all questions of weight are for the jury. The prosecution must prove the necessary contemplation beyond reasonable doubt, although that may be done by inference as just mentioned. If, at the end of the day and whether as a result of hearing evidence from the accused or for some other reason, the jury conclude that there is a reasonable possibility that the accused did not even contemplate the risk, he is in this type of case not guilty of murder or wounding with intent to cause serious bodily harm.'
>
> Whether or not the Applicant knew that the 'something' carried by the attackers were knives or choppers, we are satisfied, given the Applicant's admission that his party were looking for the party of the Hop To to beat them up, that there was no evidence before the jury from which it might have concluded that there was a reasonable possibility that the Applicant did not even contemplate the risk of really serious harm to the rivals found in the billiard room. We are further satisfied that there was evidence before the jury, upon which it could have been satisfied beyond reasonable doubt, that it was in the contemplation of the Applicant that the attack would result in the causing of grievous bodily harm. Having regard to the evidence and the realities of the situation in Hong Kong, we are satisfied that no reasonable possibility of the kind referred to by Sir Robin Cooke in the passage set out above arose in the present case. The inference drawn by the jury was the only one, other than acquittal, open to them upon the evidence."

Their Lordships entirely agree with the observations of the learned judge. It was not fairly open to the jury on the evidence before them to bring in the alternative verdicts. The appellant must have foreseen that the infliction of serious bodily harm was a possible incident of the common unlawful enterprise and yet he still participated in it.