Privy Council Appeal No. 5 of 1988

Law Shing-Huen *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH JULY 1988

Present at the Hearing:

LORD BRIDGE OF HARWICH
LORD ELWYN-JONES
LORD GRIFFITHS
LORD ACKNER
LORD OLIVER OF AYLMERTON

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

On 18th March 1985 in the High Court of Hong Kong the appellant was convicted by a jury, at a trial presided over by Deputy Judge Hopkinson, of the murder of Ho Fat-wong ("the deceased"). On 4th February 1986 the Court of Appeal of Hong Kong, by a majority (Kempster J.A. and Nazareth J., Li, V.-P. dissenting) dismissed his appeal. The appellant appeals to Her Majesty in Council by special leave, the main question raised in the appeal being whether a record of an interview with the appellant (exhibit P4(B)) should have been admitted in evidence.

The Material Facts. Ho Po-chu was the girlfriend of the appellant. They had lived together between 1982 to mid 1983 when they separated. Subsequently she acquired two further boyfriends, the latter being the deceased. The appellant was angry that Miss Ho had left him and acquired other boyfriends. Through a friend, one Leung Chi-tong, a youth at the material time of some fourteen years and who, subject to an immunity granted to him by the Crown, gave evidence at the trial against the appellant, he asked Miss Ho to have what were described as "settlement talks" with him. The Appellant said that if terms were not agreed he would hit Miss Ho's boyfriend.

On 1st June 1984, which was the date upon which the murder was committed, the appellant met Lee Chuen-tin, who was his co-accused at the trial, and Yip Ting-man who also, subject to an immunity granted by the Crown, gave evidence for the prosecution at the trial. These two men were, at the request of the appellant, to chop the deceased on the face, if he would not agree to these talks. Later on that day the appellant asked Leung to discover where the deceased could be found. Leung subsequently informed the appellant that the deceased was to have dinner at room 1447 on the 14th floor, block 43 of Tsz Wan Shan Estate Kowloon. Leung having unsuccessfully attempted, at the request of the appellant, to obtain knives, the appellant in the evening visited Cheng King-san who lived on the same estate as Miss Ho. He obtained from him two long beef knives. Cheng was also given immunity by the Crown and gave evidence for the prosecution at the trial. Although he was treated by the judge in his summing up as an accomplice, it was never suggested to him that he knew for what purpose the knives were being borrowed but more important still, his evidence was not challenged by the defence. The appellant gave these knives to Lee and Yip and instructed Lee to chop the person answering the description of the deceased. At about 8.45 p.m. Lee and Yip gained entry to room 1447 where Miss Ho, the deceased and a number of other persons were engaged in a game of mah-jong. Lee attacked the deceased with one of the beef knives causing his death. The appellant remained outside the room near the lift lobby on the 14th floor. The three then made their escape.

The Interrogations.

The appellant was arrested on 7th June 1984 at 7.25 p.m. when he was then cautioned. Some twenty minutes later Senior Inspector Lam Yiu-sang commenced questioning him. Having introduced himself, his first comment was "now, I have something to ask you in respect of the case of homicide which occurred in your girlfriend's house I already know you are the mastermind in the case. Now, I want to know who are the two persons who chopped the other person on that day". The Inspector did not caution the appellant either then or at any time until shortly before midnight, when the appellant was further interrogated by this officer. The record of that interview was exhibit P4(B).

When giving evidence-in-chief, the Inspector confirmed that he believed that the appellant was the mastermind adding "I still had doubts due to the complexity of the case". He said that he considered "this interview as a general interrogation" and that was why he did not caution the appellant. That interview lasted until 8.20. During the course of

the interview the appellant gave the Inspector Yip's name. However he initially declined to give the name of the second man and provided, under pressure of further questions, a false name. After asking about the radio paging system which had been used, the Inspector informed the appellant that he knew that the name of the second man was not that given by the appellant and said to him "don't tell lies anymore who was that person actually". The appellant then gave the Inspector Lee's name and after further questioning, the officer proceeded to ask the appellant a number of questions as to why the appellant had hacked Miss Ho's boyfriend, thereby achieving a number of admissions, some of which were inaccurate both as to the identity of the boyfriend and as to the source from which the knives used were obtained.

There was then a break of an hour and a half until just after 10.00 p.m. when the appellant was taken back to the office for a further interview by the Inspector. Before the interview commenced, however, the appellant's elder brother was brought into the room to tell the appellant that he should tell the police the truth. He only stayed a few minutes and after he left the Inspector said to the appellant "some of what you just said are true and some are false. Now, I don't wish to waste anymore time. Ah Ming had told Ah Wah, Ah Ming and Ah Wah had said that Ah Fai [the deceased] wore spectacles. And you had said that all Po-chu's boyfriends had to be hacked. Is that so?". The appellant answered the question in the affirmative. After a few more questions the Inspector asked "In fact, who were the two persons who hacked the person?". The appellant answered in these terms:-

> "I have now thought it over carefully and I have a clear mind. I now tell you everything. I hope you can help me so that the offence I have committed will be lessened. I remember that Wah-ching's name is called Yip Ting-man. His nickname is called But Shue. His telephone no. at home is 276785. Ah Tak-wah has a name called Ah Tin. His telephone no. at home is 875640. Ah Sir, now I want to have a glass of water."

Not only did the Inspector not immediately caution the appellant, he did not even comment on the hope which the appellant had expressed that he, the Inspector, might help him by reducing the seriousness of the offence which he committed. The Inspector's silence was clearly capable of being interpreted by the accused as holding out the possibility that if he continued to give the Inspector details of how the offence came to be committed, the offence with which he would ultimately be charged would be less severe.

Having provided the appellant with a glass of water, the Inspector proceeded to ask the appellant further questions. In cross-examination, the Inspector conceded that a number of these were quite unfair e.g. "how did you instruct Wah Ching and Tak Wah to hack the person?" - "did you take along the knives with you when you left?" - "who actually chopped the person?". They were serious incriminating questions which clearly should have been preceded by a caution. Mr. Ramanathan, appearing for the appellant, put to the Inspector the following questions, to which the Inspector gave the following answers:-

> "It would be fair to say Inspector, that in the entirety of this interview, the first defendant really had no choice but to answer questions, that is the way in which the interview was being conducted, he had no choice but to answer all questions.
>
> He could answer me anything as he wished.
>
> Leaving aside what he did answer - just answer my question - the manner in which the interviews were conducted was such that the defendant had no choice but to answer your questions.
>
> Yes, I agree."

Towards the end of this interrogation, the Inspector asked the appellant a number of questions relating to his membership of the Triad organisation. The record of these interviews was exhibit P.4(A).

That final uncautioned interview ended 11.40 p.m. The Inspector admitted in cross-examination that immediately after its conclusion, he decided to commence another interview, because he recognised that the previous interviews had not been conducted under caution. The Inspector accepted under cross-examination that the purpose of the interview was to get the damning admissions, which the appellant had already made, repeated despite the administration of the caution to the appellant that he was not obliged to answer any questions. The interview began at 11.50 p.m. The Inspector re-introduced himself, explained the nature of the homicide which he was investigating, recounted the appellant's arrest and the cautioning on that arrest and continued as follows:-

> "Later, you were brought to this room where I made general enquiries from you between 7.46 p.m. and 11.20 p.m. What you said at that time was simultaneously recorded by Detective Police Constable 14930 Mak Chi-keung. Now, I have reason(s) to believe that you are connected with this case. Now, I have some questions to ask

> you. But you are not obliged to answer these questions. You have the right not to answer. But what you say in answer of your own free will may be given in evidence in Court. Do you understand?"

There is no need for their Lordships to recount in detail the questions which were administered and the answers that were given, many of which are set out in the dissenting judgment of Li V.-P. As in the uncautioned interviews, they dealt with the identity of the boyfriend, the source of the knives, the identity of those involved, the appellant's knowledge that the deceased would be in room 1447, the paging system which was used and the Triad connection. The questions administered were in a far less objectionable form, but then of course by this time the Inspector knew from the appellant's own mouth by his prior questioning, what were the answers to the questions which he was now putting. The record of this interview was as stated above exhibit P.4(B).

The Trial Judge's Rulings as to the Admissibility of the Statements following the Voir Dire.

Following the voir dire the learned judge gave his ruling. The judge stated that the prosecution had satisfied him beyond reasonable doubt that neither exhibit had been obtained by force, threats or inducements. He then said:-

> "I am also satisfied beyond reasonable doubt that P.4(B) was not obtained by oppression, and that it was voluntarily made. As for whether it was accurately recorded, that is a question of fact for the jury, and I will direct them to bear this aspect in mind when considering what weight to attach to the statement.
>
> As for P.4(A), this was not made under caution, and I am not entirely satisfied that it was not obtained by oppressive questioning, or that the 1st accused did have a choice whether or not to answer the senior inspector. Accordingly, I decline to admit P.4(A) in evidence.
>
> The result of all this is that I decline to admit P.(4) in evidence, but I do admit P.4(B) and I decline to exercise my residual discretion to exclude P.4(B) on the grounds of unfairness."

The order in which the judge referred to these two exhibits in his ruling - P.4(B) before P.4(A) was odd. The validity of the defence attack upon the admissibility of P.4(B) depended upon their first establishing that P.4(A) had been obtained by oppression and was therefore not voluntary and secondly that the same vice attached to P.4(B), which

could not be saved by pronouncing the mere incantation of the caution. When the prosecution was about to put in evidence P.4(B), Mr. Ramanathan, being unhappy with the judge's decision, returned to the charge and invited the judge to reconsider his ruling in the light of *R v. Sparks* [1964] A.C. 964. This was a case in which the issue was whether the oppresssion, which had caused the giving of a confession, still continued to operate, when quite some time later, a statement under caution was obtained.

In his second ruling the judge said, *inter alia*:-

> "Well, Mr. Ramanathan's argument seems to be based on a misunderstanding of my ruling. In my ruling, I never found that there had been oppression or oppressive questioning before or during the first statement, nor did I find that it was obtained as a result of oppression or oppressive questioning. I simply ruled that while I was satisfied beyond reasonable doubt neither statement was obtained by force, threats or inducements, and while I was also satisfied beyond reasonable doubt that the second statement was not obtained by oppression, I was not entirely satisfied that the first statement was not obtained by oppressive questioning ... I have made no positive finding, as I have said, of oppression or oppressive questioning, and I was simply ruling that the prosecution had not discharged the burden on them of proving that that first statement was voluntary by satisfying me beyond reasonable doubt that it had not been obtained by oppression so that I could admit it."

It seems to their Lordships that the judge thought that since he had, to use his own words, "made no positive finding of oppression" in relation to P.4(A), P.4(B) could be considered on its own, without any reference back to the circumstances in which P.4(A) came into existence. He overlooked that he had in fact made a positive finding - indeed an inevitable finding, namely that there may well have been oppression during the uncautioned interviews, and oppression of such a degree as to prevent the admissions being voluntary. His statement in his first ruling that he was not entirely satisfied "that the first accused did have a choice whether or not to answer the senior inspector", shows that he had very much in mind the admission quoted above made by the Inspector in the course of his cross-examination. Indeed, in the majority judgments of the Court of Appeal both Kempster J.A. and Nazareth J. accepted that a number of questions had been put in a most reprehensible way and that the questioning may have continued after sufficient evidence was available to the police for them to charge the appellant (per

Kempster J.A.) and that the failure to caution the appellant before his first statements must be deprecated (per Nazareth J.). Indeed in their Lordships' view, the recognition by the trial judge that there may well have been oppression during the course of the interviews recorded in P.4(A) was a clear understatement of the position. Their Lordships share the view taken by Li V.-P., that it is apparent that the Inspector deliberately conducted the first interviews without caution, so as to enable him to obtain answers before the appellant was made aware of his right of silence.

Given the existence of this oppression, which made P.4(A) inadmissible, the simple question was whether the prosecution could establish beyond reasonable doubt that such oppression, by the time the interrogation under caution recorded in P.4(B) took place, had been dissipated. The trial judge never in terms asked himself this question and his first ruling, by implication, would appear to indicate quite clearly that he did not have such an approach in mind. In his second ruling, he wrongly took refuge in emphasising that he had made "no positive finding" of oppression. This failure by the judge properly to direct himself on this issue has been overlooked by the majority in the Court of Appeal. Again their Lordships fully concur with the view expressed so clearly by Li, V.-P. that not only did the second interview follow so closely upon the first, but that it was the same officer who practically dictated to the appellant the answer to his questions, which questions were largely a repetition of the questions asked in the first interviews conducted without caution. As the learned Vice-President pointed out:-

> "By the time he conducted the second interview when substantially the same questions were asked, the Inspector was assured he would obtain the same incriminating answers. Even though the appellant was aware by then that he need not answer further questions, the appellant was not told that his former answers were inadmissible as evidence ... The caution administered was only a sham to assure admissibility."

Their Lordships are wholly satisfied that if the trial judge had properly directed himself, he would or should have answered the question - has the prosecution convinced me that the oppression which rendered P.4(A) inadmissible, did not continue to operate in relation to P.4(B) - in the negative.

The Triad Connection. As previously stated, in the interviews recorded both P.4(A) and P.4(B), the Inspector had asked questions with a view to establishing and had established that the appellant

was a member of the triad society. Not content with that, the prosecution called Detective Station Sergeant Yeung, who joined the CID in 1966, since when he has spent most of his time in the Triad Society division of the police headquarters. His evidence was led as an expert on the Triad society. He explained the different ranks, the role of "the protector" and the role of "the follower". He dealt with the settlement of disputes and violence which is normally resorted to when settlement talks break down. This evidence however was not introduced because it was part of the prosecution's case that the murder had the particular hallmark of being a Triad murder. It was led to establish why the co-accused and Yip were prepared to act on the appellant's behalf. However it was common ground that the co-accused and Yip had been asked by the appellant to act on their behalf, at least to the extent of seeking to bring about a settlement. That was the limit of the instructions which the second accused said he received from the appellant, a position which was adopted at the trial on behalf of the appellant. His co-accused said that having gained entry, having asked the deceased to come out for talks, he was then attacked. When trying to escape from the room Yip passed him a knife, which he used in legitimate self defence, alternatively by reason of provocation.

In introducing the Triad evidence, what in effect the prosecution was seeking to do was to establish the propensity of the appellant and his co-accused to resort to violence. This, of course, is impermissible and was unanimously condemned by the Court of Appeal. This evidence was in no way necessary to enable the Crown to prove its case; was irrelevant and substantially prejudicial in nature and its admission constituted an error of law (per Kempster J.A.). Li V.-P. categorised the triad questions and answers in exhibit P.4(A) and P.4(B) as being "highly incriminating prejudicial evidence", Triad membership being per se a criminal offence. He commented that if the prosecution's contention that it was relevant and admissible, because it tended to establish the co-accused and Yip's motive for co-operating with the appellant, then the prosecution would be allowed to introduce evidence of Triad membership to prove any crime. Both in the written summary of the argument and before their Lordships, Mr. Duckett Q.C., on behalf of the Crown, sought to justify the Triad evidence "to prove a motive for an otherwise inexplicable crime". He conceded that while it was possible that a person will undertake an armed attack at the request of a friend or associate, the likelihood that he would so attack the deceased was strengthened, if there was evidence that the attacker was a triad follower of the person making the request. That likelihood only exists, of course,

because of the known propensity of members of that illegal organisation readily to resort to violence. Their Lordships agree with the unanimous view of the Court of Appeal that, in the particular circumstances of this case, evidence of the Triad connection should not have been admitted.

The Application of the Proviso to Section 83(1) of the Criminal Procedure Ordinance.

In the Crown's written case, settled by Mr. Duckett, it was stated that if it were to be held that exhibit P.4(B) was not admissible, then it was conceded that there was a material irregularity in the course of the trial within the meaning of section 83(1)(c) of the Criminal Procedure Ordinance [Cap. 221] and that, in the circumstances, the Crown would not seek to apply the proviso to section 83(1). In his written summary of argument Mr. Duckett sought to withdraw that concession. Indeed, he wished to contend, that even if both exhibit P.4(B) and the Triad evidence were wrongly admitted, nevertheless the jury, without such material, would inevitably have convicted the appellant. Their Lordships considered that this proposition was so clearly unarguable, that it would be wrong to permit Mr. Duckett to withdraw his original concession. His first thoughts were so obviously right.

New Trial.

Under section 83(E)(1) of the Criminal Procedure Ordinance it is provided that "where the Court of Appeal allows an appeal against conviction and it appears to the Court of Appeal that the interests of justice so require, it may order the appellant to be retried". In giving the judgment of the Judicial Committee of the Privy Council in the case of *Au Pui-Kuen v. The Attorney General* [1979] H.K.L.R. 16, Lord Diplock stated at page 20 that the discretion, whether or not to exercise the power to order a new trial in any particular case, is confided to the Court of Appeal of Hong Kong and not to their Lordships' Board. To exercise it judicially may involve the Court in considering and balancing a number of factors, some of which may weigh in favour of a new trial and some may weigh against it. The interests of justice are not confined to the interests of the prosecutor and the accused in a particular case. They include the interests of the public in Hong Kong that those persons who are guilty of serious crimes should be brought to justice and should not escape it merely because of a technical blunder by the judge in the conduct of the trial or his summing up to the jury. As observed by Lord Diplock at page 21, the strength or weakness of the evidence is a factor to be taken into account but that it is only one amongst what may be many other

factors. Mr. Newman Q.C. did not contend that the strength of the evidence against his client, without P.4(B) and the Triad evidence, was so tenuous that if a verdict of guilty was returned, it would be set aside as unsafe or unsatisfactory under section 83(1)(a) of the Criminal Procedure Ordinance. In their Lordships' view he was right not to make such a submission. Accordingly, their Lordships will humbly advise Her Majesty not only that the appeal ought to be allowed and the conviction quashed, but also that the question whether or not there should be a retrial of the appellant should be referred to the Court of Appeal of Hong Kong for its decision.