

HONG KONG / JUDGMENT

HKSAR v. BUI VAN-CUONG

[2023] HKCA 367

COURT

Court of Appeal

DECIDED

17 March 2023

CASE / FILE NUMBER

CACC180/2020

Source: [legalref.judiciary.hk](https://www.legalref.judiciary.hk) · Research copy typeset by Esheria. Not court-issued or certified.

CACC 180/2020

[2023] HKCA 367

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CRIMINAL APPEAL NO. 180 OF 2020

(ON APPEAL FROM HCCC NO. 350 OF 2016)

BETWEEN

HKSAR

Respondent

and

BUI Van-cuong

Applicant

Before: Hon Macrae VP, Zervos and Anthea Pang JJA in Court

Dates of Hearing: 29 July 2022 and 2 March 2023

Date of Judgment: 2 March 2023

Date of Reasons for Judgment: 17 March 2023

REASONS FOR JUDGMENT

Hon Anthea Pang JA (giving the Reasons for Judgment of the Court):

Introduction

The applicant stood trial for a single count of murder before M Poon J (as she then was) sitting with a jury in the Court of First Instance. On 12 July 2017, he was unanimously convicted and sentenced to a mandatory term of life imprisonment.

On 16 October 2020, the applicant filed a Form XI Notice, applying for leave to appeal against conviction and sentence out-of-time. On 19 February 2021, the Court informed the applicant that his intended application for leave to appeal against sentence would not be proceeded with as it was a sentence fixed by law.

Thereafter, a hearing was originally fixed for 15 December 2021 to deal with his out-of-time application for leave to appeal against conviction. However, that hearing was vacated when the applicant indicated that he would need time to obtain a psychiatric report and adduce the same as fresh evidence on appeal.

On 28 January 2022, the intended fresh evidence, including a psychiatric report prepared by Dr Li Cheuk Wing (“Dr Li”) dated 7 December 2021, was filed by way of a (1st) Notice of Motion, together with a supporting affirmation of Tam Tak Wing (“Tam’s affirmation”). When the case came on for hearing on 29 July 2022, we considered it helpful to call for updated psychiatric reports on the applicant from the Visiting Psychiatrists at Siu Lam Psychiatric Centre (“SLPC”). Accordingly, the hearing was adjourned to a date to be fixed.

Between 27 and 29 September 2022, the Court received updated psychiatric reports from Dr Dorothy Tang (“Dr Tang”) and Dr Lui Sing-heung (“Dr Lui”), who is the treating psychiatrist of the applicant. On 19 January 2023, by way of a (2nd) Notice of Motion, the applicant further sought leave to adduce the affirmation of Thi Hoa Vu, the mother of the applicant, as fresh evidence.

At the conclusion of the hearing on 2 March 2023, we refused the applicant’s out of time leave application and dismissed his appeal against conviction. These are our reasons.

Prosecution case

The applicant, a Canadian Vietnamese, was a visitor and had no fixed place of abode in Hong Kong. It was not disputed that, on 8 March 2016, between 6:35 pm and 6:55 pm, he entered three times into a 7-Eleven Convenience Store in Yau Ma Tei (“the Store”), of which the deceased was the storekeeper. The first entry was uneventful: the applicant stayed there for a short while and left. Some four minutes later, he returned to the Store and, having taken a packet of tissues from the rack, followed by a can of potato chips, he left without paying. The applicant was confronted

by the deceased at the doorway and he then responded by raising his middle finger as well as eating the potato chips in front of the deceased. The deceased returned to the cashier counter to work (and perhaps unbeknownst to the applicant, the deceased called the police). The applicant eventually threw the potato chips into the Store and left.

The relevant CCTV footage then depicted the applicant going to a nearby supermarket and, having taken two knives from the display rack for comparison, finally taking an 8-inch knife without making payment. Next, the applicant returned to the Store, went into the cashier counter, slammed the knife on the counter and confronted the deceased. He also shouted at the deceased, "You're gonna die" six times. Following a scuffle, the applicant stabbed on the chest of the deceased, who died six days later due to multiple organ failure.

The stab wound had a depth of 8.5 centimeters and was said to be caused by a frantic attack using excessive force, making the blade detach from the handle.

The applicant was arrested on 9 March 2016 and subsequently took part in two video-recorded interviews. He claimed in the second interview that he stabbed the deceased with the knife as he was possessed by demons. However, the applicant retracted this account when he testified in court, saying that it was a story fabricated by him since he had been beaten up by the police. No voir dire was, however, sought by the defence.

Defence case

The applicant chose to give evidence and testified that, prior to coming to Hong Kong on 14 December 2015 (with permission to stay until 14 March 2016), he had failed to find a temple in China to enrol as a monk. While in Hong Kong, he ran out of money and resorted to sleeping at McDonald's. The applicant said that he was frustrated with life and hoped to return to Canada.

In respect of the killing, the applicant said he had no complete recollection of what happened on that evening but that his primary motive was to threaten the deceased to call the police so that he would be arrested and deported to Canada. The applicant said he had demanded the deceased to call the police (defence counsel relied on the inaudible parts of the CCTV recording to support this claim). Regarding the utterances of "You're gonna die" and the slamming of the knife on the counter, the applicant told the jury that such was out of his "gangster personality" and he had no intention to stab the deceased. The applicant also said it was the deceased who punched him many times, which caused him to fight back, resulting in the killing.

In total, four partial/complete defences, namely (1) accidental killing, (2) unintentional killing, (3) self-defence, and (4) provocation were run at trial which Mr Donald for the applicant, summarised to the jury in this way:

"... And it just happens that [the applicant] had the knife in his hand as a threat when the altercation took place and that's when [the deceased] was stabbed, [the applicant] says unintentionally, accidentally, as a result of provocation ... because ... the deceased had punched him first and started pushing him first and that the [applicant] was just reacting to the initial attack."

Concerning his mental state, the applicant firmly stated that he had never had any mental problems when testifying before the jury. Yet, Mr Donald prayed in aid the applicant's conduct in the video-recorded interviews and his evidence in court to suggest to the jury that the applicant was not a normal person (although he was not insane):

"You may think that the defendant during this time in Hong Kong was, put it this way, not in the best headspace, he was not -- you may think that he hasn't been acting properly or sensibly or as a normal person would act while in Hong Kong. And I think he illustrated that quite clearly to you through the VIR when he was interviewed by the police. And you may think he's also illustrated that quite clearly to you when he gave evidence and you may find some of his murmurings and mutterings and his comment were rather strange, to say the least. But that's the sort of -- that's the person that the defendant is and that's how you have to judge him in relation to what you observed in the VIR and when he gave evidence before you."

Mr Donald also placed emphasis on the applicant's dire circumstances, emotions and suicidal tendencies during his stay in Hong Kong, telling the jury that:

"...That was his reasoning, that was his understanding of the situation leading up to 8 March on the day of this incident."

The judge's summing-up

To enable the jury to have a better understanding of the relevant legal directions, the judge, after consulting counsel, provided them with a total of four handouts: "Ingredients of the offence [of murder]", "Self-defence", "Manslaughter – by a dangerous and unlawful act" and "Provocation".

Since Mr Donald's present complaint centres on the judge's directions on provocation, whether given orally or in writing, it is necessary to repeat below, in some detail, that part of the summing-up (the italicised part did not appear in the handout and was added by the judge verbally):

"[Giving the general direction on provocation in the terms set out in section 4 of the Homicide Ordinance, Cap 339, and the 2013 Specimen Directions]

So the first question, you as members of the jury will have to consider is whether the deceased used some provoking words or conduct. The prosecution says it did not happen. Now, pausing there, I elaborate. The prosecution says it did not happen because transcripts from the CCTV contain nothing of the sort. Only the defendant was swearing, roaring, saying to Mr Cheng, 'You're gonna die', six times. Throughout Mr Cheng was calm, never raised his voice, never swear at the defendant. In response to the defendant's threat what Mr Cheng said was merely, 'I don't want to die. Why? Can you just go outside? Don't play here.' Hence, prosecution said there was simply no provoking words or conduct coming from Mr Cheng at all. The only provoking words in the circumstances came from the defendant himself, the defendant himself was the aggressor.

Furthermore, the prosecution says that the CCTV footage does not support the defendant's allegation that he was punched by the deceased which provoked him into losing his self-control. What the deceased did was only trying to push the defendant out of the cashier counter.

Now, let us return to the second paragraph on page 2. On the other hand, if you find that there existed such provoking conduct, then you will have to consider whether such provoking conduct caused the defendant to lose his self-control. If the answer is no, then that is the end of the issue and the defendant is guilty of murder. So if you are sure that the defendant was not provoked in that sense, the defence of provocation does not arise and the defendant is guilty of murder. But if you conclude that the defendant was or might have been provoked in the sense which I have explained, then you must firstly form a view as to the gravity of the provocation for the defendant in all the circumstances, taking into account everything said and/or done to the defendant, including any peculiarity of the defendant which affects that gravity, and you should then decide whether, in your opinion, having regard to the actual provocation and your view as to the gravity, a person having ordinary powers of self-control would have done what the defendant did.

Turning over the page, a person having ordinary powers of self-control is simply a person who has the powers of self-control to be expected of an ordinary sober person who is of the defendant's age and sex and with other special characteristics. The law expects people to exercise control over their emotions. If, for example, a person has an unusually volatile, excitable or violent nature he cannot rely on that as an excuse. So a person having ordinary power of self-control is one who is not exceptionally excitable or given to violence but possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is today.

[Continue giving the "do as he did" direction as that suggested in Liang Yaoqiang]" (underlining added)

It should be noted that after the above directions were given, the following exchange took place between the judge and defence counsel in the absence of the jury:

"MR DONALD: My Lady, just one thing I need to mention in relation to your -- in respect of provocation. You haven't mentioned anything in relation to the special characteristics of the defendant.

COURT: Do we know of any special characteristics of the defendant?

MR DONALD: Well, we would -- I mean, you've obviously mentioned age and sex, etc. But I would suggest his suicidal tendencies...

COURT: No.

MR DONALD: ... his delusional conduct, the fact that he's talking with demons.

COURT: His special -- the special characteristics they can discern from his evidence what they are.

MR DONALD: Again, I mention the strange murmurings and speaking to himself, always on edge. These I would suggest were specific characteristics that should be referred to the jury.

COURT: Noted. I'm not going to do it." (emphasis added)

Although the judge declined to elaborate on the applicant's "special characteristics", when summarising the applicant's evidence, she began by telling the jury of his dire situation in Hong Kong in the following terms:

"He told you that he is 32, he does not and he never had any mental problems. He came to Hong Kong to go to China to find a temple to become a monk, failing which he returned to Hong Kong and he was permitted to stay until 14 March 2016. He ran out of money, he could not afford to stay in hostels and resorted to what he called borrowing and sleeping in McDonald's..."

Appeal out-of-time

By way of an affirmation dated 14 April 2021, the applicant explained that he was late in lodging the appeal by some 3 years and 2 months because he was not aware of his right to appeal until an inmate at SLPC gave him some advice. That said, attached to the applicant's affirmation was a letter from the Legal Aid Department dated 3 March 2021 in which the following was revealed:

2 August 2017

A letter was sent to the applicant with initial grounds enclosed and he was advised of his right to appeal and to apply for legal aid.

4 August 2017

Arrangement was made to meet with the applicant at Stanley Prison so as to advise him of his right to appeal. The applicant, however, refused to meet with the staff of the Legal Aid Department but it was confirmed that he had received the letter dated 2 August 2017.

The sole ground of appeal & the applicant's submissions

In his Perfected Ground of Appeal filed on 10 February 2021, Mr Donald only put forward one ground of appeal, that is, the judge "failed to direct the jury to the peculiarities and/or characteristics of the defendant relevant to the provocation so as to be considered when assessing the gravity of the provocation, and in respect of the second, objective limb of the defence of provocation, whether the provocation was enough to make a reasonable man do as he did."

It would appear from this ground that the sole complaint was in relation to the objective limb of provocation, and not in respect of the first subjective question of whether, as a matter of fact, the applicant was, or might have been, provoked to lose his self-control at the time of the killing.

In his written submissions and insofar as the subjective limb was concerned, Mr Donald said:

“23.

The Appellant submits that in the present case, the loss of self-control was caused by first, the Appellant’s own conduct towards the deceased, and thereafter the conduct of the deceased, namely his inaction or refusal to call the Police despite the Appellant’s persistent and animated requests, rather than any overt provoking words.

...

27.

The actions of the Appellant, which caused the inaction and perpetual calmness shown by the deceased, especially when faced with the Appellant’s prolonged requests for him to call the Police, led him to lose his own self-control and was more than sufficient to render it provocative conduct.”

When dealing with the second objective limb, Mr Donald said:

“31.

The Court of Final Appeal emphasised that the standard of a reasonable man who is expected to exercise ordinary powers of self-control is ‘a person having the history, experiences, background, features and attributes of the defendant relevant to the provocation’. It is an objective test, but one which fairly incorporates the features of the defendant that might affect the gravity of the provocation.

...

34.

The term ‘characteristics’ should be used interchangeably with ‘features’ and peculiarities’ to not only include the colour race and creed of a defendant, but also physical qualities and mental conditions as may be established by, in the latter case, expert evidence, which can fairly be said to distinguish the defendant from the hypothetical reasonable man.” (emphasis added)

Pausing here, and with respect, although Mr Donald cited the Court of Appeal’s decision in *Luc Thiet Thuan & Ors* and included “mental conditions” as one of the relevant characteristics on the issue of the gravity of the provocation, that was not what was decided in the case. Instead, the Court specifically stated that:

“... We are satisfied that, as the law stands in England and in Hong Kong, the provocative words or acts can only be relied on if they are directed to the characteristic or, to put it another way, that provocation cannot be relied upon where, even though the accused may have a mental condition which lessens self-control, what was said or done was not directed thereto. ...”

The Privy Council, when giving the judgment in *Luc Thiet Thuan’s* appeal to which we shall turn in due course, affirmed that the above was the correct legal position.

Finally, when dealing with his complaint concerning the issue of “special characteristics”, Mr Donald said:

“43.

The Appellant had returned to the Store on several occasions, and with each visit, it was evident that his behaviour became increasingly confrontational. Despite his continued elevated aggression, the deceased remained calm and said nothing to him when he walked in. It was during the Appellant’s second visit that the deceased made a phone call to the Police, but this was not observed by the Appellant. Thereafter, the Appellant went to Wellcome Supermarket to take the Knife that ultimately killed the deceased.

44.

It is submitted that despite the trivial nature of the above scenario, the evidence needed to be considered in light of the following features of the Applicant when considering the gravity of the provocation portion of the second issue, namely: -

(i)

he had failed in his quest to be a monk;

(ii)

he had no money;

(iii)

he was sleeping at McDonald’s;

(iv)

he believed this was the only way for him to return to Canada; and

(v)

he was at his [wits’] end.

45.

Taking a ‘warts and all’ approach, one must therefore ask whether the Appellant, compounded by the above factors and peculiarities, had more of a propensity to react strongly to the deceased’s inaction, when considering whether in fact he lost self-control? We would answer this in the affirmative.

46.

It was therefore critical for the learned Judge to specifically draw to the jury’s attention the various features that could have a bearing on whether the Appellant lost control.

47.

It is only when those features of the Appellant are properly considered when the jury was to assess the gravity of the provocation, that the objective limb of the provocation defence is properly applied. The fact that learned Judge's failure to do so meant that there was a very real risk that the jury did not properly understand how to apply the defence of provocation to the Appellant's case." (emphasis added)

The above italicised parts are clear references to whether, as a matter of fact, the applicant might have lost control - the first subjective question, rather than the second objective limb. In the circumstances, it is ambiguous from the written submissions whether, apart from the directions on the objective limb, Mr Donald was also suggesting that the judge's directions on the subjective limb were inadequate. In any event, for the sake of clarity and completeness, we will address this subjective question below.

Application to adduce fresh evidence

Mr Donald submitted that the report of Dr Li would help to demonstrate that the applicant was actually suffering from a mental disorder at the time of the offence. He further argued that the report was admissible because the peculiarities and characteristics of the applicant were relevant when assessing the gravity of the provocation. In respect of the delay in adducing the evidence, Mr Donald suggested that it was excusable as the applicant would not, at the time, realise that he had a chronic disabling mental illness.

The applicant's psychiatric history

The following is a summary of the history of the applicant's psychiatric consultations:

Pre-trial

On 26 May 2016, the applicant was first examined by Dr Lui for "banging his head". On 19 January 2017, at the court's request for a psychiatric report, he was also seen by Dr Tang. No psychiatric problems were diagnosed on all those occasions.

On 3 April 2017, the applicant was examined by Dr Wong Yee Him John ("Dr Wong"), instructed by his solicitors at trial. Dr Wong opined that there was no evidence to show that the applicant had suffered from a mental illness, specifically stating that, "I do not think the Defendant's presentation at the interview is typical of chronic schizophrenia". However, Dr Wong added that, "it is worthwhile to explore his new revelation of having psychiatric admissions in Canada". (It is now clear from the affirmation of Thi Hoa Vu that, to the best of her knowledge, the applicant had refused to see any psychologist and did not receive any psychiatric treatment while he was in Canada.)

Post-trial

After his conviction on 12 July 2017, the applicant was referred from Stanley Prison to SLPC for mental assessment on a number of occasions but he was diagnosed as having adjustment problems only.

From late 2018 to mid-2020, it appeared that the applicant did not see any psychiatrist.

In August 2020, the applicant was again referred to SLPC for hallucinations, odd beliefs and bizarre behavior; he particularly claimed to have heard voices, experienced being controlled and harbouring certain grandiose ideas. For the first time, Dr Lui opined that the applicant suffered from schizophrenia but he was then unable to conclude whether it was the onset or a relapse of mental illness not previously diagnosed. The applicant was placed on medication, which was terminated on 17 August 2021 on the applicant's request and when his mental condition became stable. However, in January 2022, the applicant was again referred to SLPC for "jumpy speech with delusion" and Dr Lui found that he was clearly in psychotic relapse of schizophrenia and medication was resumed with the symptoms soon receding. On 22 February 2022, the applicant was released back to Stanley Prison.

The appeal stage

In September 2021, the applicant's solicitors retained Dr Li to conduct a medical examination on the applicant. The assessment took place on 5 November 2021 and lasted 1 hour and 45 minutes. In short, Dr Li opined that the applicant suffered from chronic schizophrenia and "had been mentally ill for some years before he came to Hong Kong".

On 26 September 2022, Dr Lui examined the applicant again and stated that, "From the information available and my repeated assessments, onset of the illness was in the summer of 2020, the symptoms presented then and the effect these had on him were completely different from before." Further, Dr Lui was of the opinion that:

"Schizophrenia is a chronic illness marked by remissions and relapses, the frequency of relapses and length of remissions vary with individuals. Of note is how quickly Bui had suffered a relapse of the illness in January this year just a few months after medication was taken off. If Bui had been suffering from schizophrenia prior to the offence in 2016 it was very unusual that he should have survived in custody free of psychosis without treatment until 2020."

Similarly, in her report dated 27 September 2022, Dr Tang stated:

"The relapse of psychotic symptoms documented in January 2022 precipitated by discontinuation of medications for few months concurs with the natural course of schizophrenia; and highlighted that BUI was unlikely to be free from psychotic symptoms without any treatment during the remand period from 2017 to 2020 if the onset of schizophrenia was prior to index offence."

and her conclusion was that, "he was not opined to be actively psychotic at the time of the index offence."

Discussion

(1)

The psychiatric evidence

As set out in detail above, during the applicant's repeated remands at SLPC (being seen by Dr Lui over 40 times in the 6 years between May 2016 and September 2022), he was only found to be suffering from schizophrenia for the first time in August 2020, some 4½ years after the date of the offence. The applicant responded to medication, which rid him of psychotic symptoms in about two months. It was only after he stopped the medication in August 2021 that in January 2022, he was again found to be in relapse of schizophrenia but after medication was resumed, the symptoms soon subsided and he was considered fit for discharge to Stanley Prison in February 2022.

The importance of this history, according to Dr Lui and Dr Tang, is that if the applicant had been suffering from schizophrenia prior to the offence, then "it was very unusual that he should have survived in custody free of psychosis without treatment until 2020." Further, it should be noted that, on this history, Dr Li's interview with the applicant fell exactly within the period when the psychotic medication was stopped, and was very close to the relapse diagnosed in January 2022. Accordingly, the assessment made by Dr Li on the single occasion, seeking to reconstruct the applicant's mental condition some years prior to and at the time of the offence, has to be examined in this light and also in light of the applicant's psychiatric consultations documented over some 6 years.

We would also point out that while Dr Wong, the first defence psychiatrist, conducted the examination on the applicant much closer to the time of the offence, he had not been asked to review his opinion following the diagnosis of schizophrenia made by Dr Lui in August 2020. Instead, Dr Li was asked to comment on Dr Wong's earlier report wherein Dr Li said, *inter alia*, that, "... in light of the latest report from Dr Lui confirming definite psychotic symptoms, Dr Wong's opinion in his report may no longer stand." One would have thought, whether a psychiatrist would still hold the same opinion given a subsequent event, might best be answered by the psychiatrist himself rather than by a third party.

In short, although we have read Dr Li's report on a *de bene esse* basis, it does not appear to us that "the evidence is likely to be credible". Further, for the reasons given below, we also do not consider that Dr Li's report would afford a ground for allowing the appeal. We therefore refused to accept the fresh evidence, both from Dr Li and the applicant's mother.

(2)

The applicant's evidence at trial

It will be recalled that the applicant, when he testified, denied that he had any mental problems and admitted lying to the police about being possessed by demons. In respect of the repeated utterances, "You're gonna die", the applicant explained that he did not want to stab the deceased and only wanted to threaten the deceased into calling the police. The applicant further told the jury that he attacked the deceased because the latter punched him first.

It would therefore appear from the applicant's own evidence that what caused (provoked) him to attack was not any failure on the part of the deceased to call the police but because the deceased had attacked him first.

While evidence on provocation may either come from the prosecution or the defence or both, this evidence of the applicant is of significance because, as accepted by Mr Donald, the prosecution evidence did not disclose any specific provocative conduct or provocative words attributable to the deceased. That being the case, the evidence on provocation, if any, would have, in the present case, come from the defence. Yet, on the applicant's own account, he was not provoked to attack because of the deceased's failure to call the police. This is contrary to Mr Donald's submission that the deceased's failure to call the police was a provocative act. In short, the applicant's evidence, that it was only when the deceased allegedly punched him did he then use the knife to stab, would form the basis for the jury to consider the issue of provocation and would be relevant when they assessed whether, as a matter of fact, he might have actually lost his self-control. The subjective question aside, this evidence of the applicant would also provide the context to consider what characteristic, if any, would go to the assessment of the gravity of the provocation, a question which we shall address later.

(3)

Provocation: the subjective limb

On the specific defence of provocation, Mr Donald said towards the end of his closing speech to the jury that:

"As I say, the third defence is provocation as a result -- that the stabbing came about as a result of provocation on the part of the deceased. Now, her Ladyship has got a -- will address you on the law and she has prepared a printout for you in relation to what provocation means and she'll explain that better to you in due course. And you may think that the defendant was acting in self-defence. You may, of course, accept what the defendant said that the deceased did punch him a number of times and he was threatening to him and the defendant -- all he wanted the deceased to do was call the police, but during the altercation he was punched several times by the deceased. And you may recall one of the live witnesses saying that the deceased had been picking up things in his hand, pushing them against the defendant. And you may even accept that the defendant himself was trying to withdraw, trying to get out of the fight, trying to move away when the -- during the course of the altercation, but the defendant -- the deceased continued to hit the deceased -- the deceased continued to hit the defendant and that the defendant, when he did do -- he did stab the deceased but it was accidental -- that it wasn't -- that there was no intent and it was by means of a self-defence."

While the above might seem more like a catch-all submission on the various defences instead of one focusing on provocation as Mr Donald's opening remark suggested, his speech has to be understood in context, taking into account the other parts because Mr Donald had, earlier on, addressed the jury in detail (covering 9 pages of transcript) as to the applicant's background and the circumstances he was in which led to the killing, including what the applicant intended or did not intend to do. In particular, Mr Donald told the jury that:

"So you may think, members of the jury, that having observed the defendant give evidence and in the VIR and having heard his story, that we're dealing here with a man who's at wits end, who was extremely lost in many ways, a man who was very confused and, you may even think, delusional. That's the sort of man you're judging in this case today. I'm not suggesting he's insane. That's certainly not put forward as a defence by the defendant -- the defence, that he's insane, but just a little bit abnormal, you may think."

Now, we know the defendant was broke, he had no money. He'd been sleeping in McDonald's and he had been attempting to find a temple in Hong Kong was proving very unsuccessful. He's coming towards the end of his three-month period and he told us how he was feeling very frustrated, very emotionally upset because of his lack of food, that he was becoming tired of life. You may think that's -- if he did, as he say, try to commit suicide three times, clearly he was getting tired of life. He was tired of sleeping in the streets or sleeping in McDonald's. And he thought that the only way out was perhaps the Hong Kong -- under these circumstances he believed that the only way out for him, the only thing he could do was to get arrested by the Hong Kong police and sent back to Canada, that the police would arrest him, that his visa would -- three-month visa would be up, that he would have no -- because he had no money, that the Hong Kong police or the Hong Kong authorities would send him back to Canada. That was his reasoning, that was his understanding of the situation leading up to 8 March on the day of this incident."

Thus, the jury was fully apprised of the relevant matters sought to be relied on by Mr Donald as to whether, as a matter of fact, the applicant might have lost his control at the time.

In our assessment, given the prosecution's evidence, particularly the CCTV footage which was not contested, and given the applicant's account as well as how provocation was (so narrowly) run at trial, it would not be surprising if the jury had rejected provocation on the subjective limb. After all, the deceased was captured by the CCTV as having acted calmly and remained so even after the applicant had slammed the knife on the counter and repeatedly said, "You're gonna die" to which the deceased, without raising his voice, simply replied that he did not want to die and asked the applicant to go outside.

The prosecution accepted that the deceased did push the applicant out of the cashier counter and did try to ward the applicant off but according to the prosecution, it was never a case of punches being delivered by the deceased. Since the CCTV footage was produced before the jury, it would not be difficult for them to decide whether the deceased was simply pushing the applicant or punching him.

(4)

Provocation: the objective limb and mental infirmity

In order to consider whether Mr Donald's complaint concerning the applicant's mental condition has any merit, we should first repeat the following observations made by the Privy Council in *Luc Thiet Thuan v R*:

"It is of course consistent with Lord Diplock's analysis in Camplin, and indeed with the decision of the House of Lords in Morhall, that mental infirmity of the defendant, if itself the subject of taunts by the deceased, may be taken into account as going to the gravity of the provocation as applied to the defendant. Such a conclusion was also consistent with the opinion expressed obiter by North J in McGregor. But this is a far cry from the appellant's submission that the mental infirmity of the defendant impairing his power of self-control should as such be attributed to the reasonable man for the purposes of the objective test.

Their Lordships have reached the foregoing conclusion as a matter of construction of the English Act (and therefore of the Hong Kong Ordinance). But they are, like the Hong Kong Court of Appeal, fortified in that view by reference to the defence of diminished responsibility introduced into English law by section 2 of the same Act, and into Hong Kong law by section 3 of the same Ordinance. To accept the appellant's submission would, in their Lordships' opinion, be to incorporate the concept of diminished responsibility indirectly into the law of provocation. Such a conclusion is most unlikely to have been intended by the legislature which, in a neighbouring section in the same statute, introduced diminished responsibility as a defence of general application in the law of murder, and moreover did so subject to the imposition of a special rule relating to the burden of proof, viz that the burden of establishing diminished responsibility should rest upon the defendant, though it should be the civil burden. If diminished responsibility was held to form part of the law of provocation, the extraordinary result would follow that a defendant who failed to establish diminished responsibility on the burden of proof placed upon him by section 2 of the English Act might nevertheless be able to succeed on the defence of provocation (as recognised in section 3) on the basis that, on precisely the same evidence, the prosecution had failed to negative, on the criminal burden, that he was suffering from a mental infirmity affecting his self-control which must be attributed to the reasonable man for the purposes of the objective test. This was precisely the result for which the appellant was contending before their Lordships. They do not consider that this could have been the intention of the legislature. ..." (emphasis added)

Luc Thiet Thuan v R was referred to with approval in *Ho Hoi Shing v HKSAR*, which in turn was more recently cited in *HKSAR v Liang Yaoqiang*, to which we shall return when revisiting the Court of Final Appeal's discussion on the question of the gravity of provocation.

For present purposes, we only need to say that the contention of Mr Donald that the fresh evidence would be admissible because it "goes directly to the second limb of provocation the jury had to answer" is untenable.

It was never suggested at trial that the taunts, if any, were directed at the applicant's mental disease and therefore, whether the applicant might have been suffering from schizophrenia would not be a relevant factor when making the assessment of the gravity of the provocation.

(5)

Provocation: the objective limb and "special characteristics"

Once the above is clear, what remains of Mr Donald's complaint would simply be that the judge did not identify what those "peculiarities" and "characteristics" were when making references to them.

In HKSAR v Liang Yaoqiang, one of the questions of law before the Court of Final Appeal was:

"21.

...

'Whether, in respect of the second limb of the defence of provocation (namely as to "whether the provocation was enough to make a reasonable man do as he did", Homicide Ordinance (Cap. 339) s. 4), it is a misdirection of law not to direct the jury to form a discrete view as to the gravity of the provocation on the defendant, having the particular attributes he has, separately from and before determining whether, objectively, having regard to the actual provocation and their view as to its gravity, a person with ordinary powers of self-control would have done what the defendant did?'

After examining section 4 of the Homicide Ordinance and the authorities from other common law jurisdictions on the issue of provocation, the Court concluded that the two elements of the objective question, namely, an assessment of the gravity of the provocation; and an assessment of how a person with ordinary power of self-control would or might react to provocation of that gravity, should both be assessed objectively.

Nevertheless, the Court observed that:

"46.

It is for this reason that, for the purposes of assessing the gravity of the provocation, one must take the reasonable man, who is affected by that provocation, to be 'a person similarly placed' to the defendant. As Lord Millett put it in R v Smith:

'... the jury must take the accused as they find him, warts and all. When considering whether a person of ordinary self-control would have been provoked to react as the accused did, the jury must have regard to what Lord Simon in Camplin called "the entire factual situation". The question for the jury is whether a person of ordinary self-control would have reacted as the accused reacted if he were similarly placed, that is to say, having the history, experiences, background, features and attributes of the accused. This is a question of opinion on which the jury may bring their collective experience and good sense to bear without further evidence: see Camplin [1978] AC 706, 716D, 720F-G, and 727G-H. Accordingly, I respectfully agree with Lord Hoffmann that the question is whether the defendant's behaviour fell below the standard which

could reasonably be expected of him, but only if that is taken to mean of him exercising normal self-control.’

(Italics in original.)

47.

Thus, the reasonable man who is expected to exercise the ordinary powers of self-control is a person having the history, experiences, background, features and attributes of the defendant relevant to the provocation. This remains an objective test but one which fairly incorporates the features of the defendant that might affect the gravity of the provocation. ...

48.

By attributing to the reasonable man the relevant history, experiences, background, features and attributes of the defendant and by applying contemporary societal standards, the provocation is properly contextualised, so that the jury ask themselves the question of whether the provocation was enough to make a reasonable man do as he did in the context of the provocation which caused the loss of self-control that in fact occurred. ...”

In the present case, while it is correct that the judge did not specifically point out the applicant’s circumstances or his characteristics when directing the jury on the gravity of the provocation, she did, however, emphasise to them that:

“... you must firstly form a view as to the gravity of the provocation for the defendant in all the circumstances, taking into account everything said and/or done to the defendant, including any peculiarity of the defendant which affects that gravity, and you should then decide whether, in your opinion, having regard to the actual provocation and your view as to the gravity, a person having ordinary powers of self-control would have done what the defendant did.

Turning over the page, a person having ordinary powers of self-control is simply a person who has the powers of self-control to be expected of an ordinary sober person who is of the defendant’s age and sex and with other special characteristics. ...” (emphasis added)

Moreover, when reviewing the defence evidence with the jury, the judge not only highlighted what happened on the day of the killing but also referred to the applicant’s background and how he came to be in Hong Kong, having failed to become a monk in China. The fact that the applicant was homeless and ran out of money at the time was also repeated before the jury.

Therefore, the matters now relied upon by Mr Donald as relevant to the gravity of the provocation, in terms of “a person similarly placed” as explained in Liang Yaoqiang, had been fairly summarised for the jury. As set out above, Mr Donald had also addressed the jury in detail as to these matters and the jury would, no doubt, apply their common sense and understanding of human nature when assessing the gravity of the provocation.

We should reiterate that, on the applicant's account, what caused (provoked) him to stab was the deceased's punches and not the annoyance caused to him because of the alleged failure of the deceased to call the police, as submitted by Mr Donald. If the evidence was that the applicant had been annoyed in that way and found the deceased's inaction provocative, then perhaps, the applicant's personal circumstances and his characteristics might have played a more significant role when one seeks to contextualise such provocation. However, given that the provocative conduct, according to the applicant, only related to the punches, then in our assessment, it would not appear to matter much how contextualising such punches (that is, the punches were delivered to a person placed in the applicant's situation) would have materially affected the jury's assessment of the gravity of the provocation (the 1st element of the objective question).

In any event, as explained, we did not consider the judge to have committed any error on the issue of provocation. Nor did we find the summing-up inadequate or unfair.

Conclusion

For the reasons given, we refused the application for leave to appeal against conviction out of time.

(Andrew Macrae)

(Kevin Zervos)

(Anthea Pang)

Vice President

Justice of Appeal

Justice of Appeal

Mr Andrew Li, SPP, of the Department of Justice, for the Respondent

Mr Richard Donald and Mr Kim Joseph McCoy, instructed by Sammy Ip & Co., Solicitors, assigned by the Director of Legal Aid, for the Applicant

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=151283

CASE PAGE <https://chat.esheria.ai/case-law/hong-kong/hksar-v-bui-van-cuong-2023>

Prepared on 29 October 2026 · Esheria