

HONG KONG / JUDGMENT

HKSAR v. C.H.P. AND ANOTHER

[2023] HKCA 216

COURT

Court of Appeal

DECIDED

17 February 2023

CASE / FILE NUMBER

CACC97/2021

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CACC 89 & 97/2021

(Heard together)

[2023] HKCA 216

CACC 89/2021

in the high court of the

hong kong special administrative region

court of appeal

criminal appeal no 89 of 2021

(on appeal from HCCC NO 28 of 2020)

BETWEEN

HKSAR

Respondent

and

C.H.P. (D1)

1st Applicant

W.H.T. (D2)

2nd Applicant

G.M. (D3)

3rd Applicant

AND

CACC 97/2021

in the high court of the

hong kong special administrative region

court of appeal

criminal appeal no 97 of 2021

(on appeal from HCCC NO 29 of 2020)

BETWEEN

HKSAR

Respondent

and

C.H.P. (D1)

1st Applicant

W.H.T. (D2)

2nd Applicant

(Heard together)

Before: Hon Macrae Acting CJHC, Zervos and M Poon JJA in Court

Date of Hearing: 10 August 2022

Date of Judgment: 10 August 2022

Date of Reasons for Judgment: 17 February 2023

R E A S O N S F O R J U D G M E N T

Hon Macrae Acting CJHC (giving the Reasons for Judgment of the Court):

A. Introduction

This is a tragic case in which a 7- or 8-year-old boy known as “X”, and a 5-year-old girl, known as “Z”, were subjected to extreme and callous cruelty and neglect by those who were supposed to be caring for them, ultimately resulting in Z’s death. The 1st applicant (“A1”) was the natural father of both X and Z, while the 2nd applicant (“A2”) was their step-mother. The 3rd applicant (“A3”) was A2’s mother and, therefore, the children’s step-grandmother. At the time of the offences, the applicants were living together in a flat in Tuen Mun, New Territories with X and Z, and also with Y, who was a child of A2’s previous marriage.

In HCCC 28/2020, A1 and A2 were jointly charged with the murder of Z. They each entered pleas of guilty to manslaughter (either by way of an unlawful and dangerous act or by reason of gross negligence), which pleas were rejected by the prosecution. At the trial which followed before Wong J and a jury, A1 and A2 were convicted of Z's murder.

In HCCC 29/2020, A1 and A2 were jointly charged with two counts of cruelty to a child by wilful assault, ill-treatment and neglect between 10 August 2017 and 6 January 2018 (both dates being inclusive), in relation to Z and X respectively, to which they pleaded guilty before a magistrate and were duly committed for sentence to the High Court. A1 and A2 were each sentenced to a total of 9½ years' imprisonment on the two cruelty counts, which were ordered to run concurrently with their sentences of life imprisonment for murder. A1 and A2 now seek leave to appeal against their convictions for murder. Although they originally also sought leave to appeal against their sentences on the cruelty counts, they abandoned their applications after their appeals against conviction for murder were dismissed.

A3 pleaded not guilty to cruelty to a child by wilful ill-treatment (Counts 2 and 4); and by wilful neglect (Counts 3 and 5). Having been tried together with A1 and A2 in HCCC 28/2020, she was acquitted of the two counts of cruelty by wilful ill-treatment but convicted of the two counts of cruelty by wilful neglect. A3 was sentenced to a total of 5 years' imprisonment. She now seeks leave to appeal against her sentence only.

After the hearing, we refused leave to appeal on all grounds of appeal by each applicant in respect of both the appeals against conviction and sentence and dismissed all the appeals. We indicated that we would give our reasons for doing so in due course. These are our reasons.

B. The prosecution case

Much of the prosecution case was not disputed and was presented to the jury by way of an extensive set of Admitted Facts. The following facts and circumstances are taken substantially from those Admitted Facts.

A1 and a lady referred to only as "M" were the natural parents of X, who was born in 2009; and Z, who was born in 2012. They originally lived in a flat in the Fu Tai Estate in Tuen Mun ("Fu Tai Flat"), together with A1's mother (the "paternal grandmother") and A1's younger brothers.

In November 2013, A1 and M separated and M moved out of the Fu Tai Flat. However, X and Z continued to live with A1, their paternal grandmother and their uncles. In July 2015, A1 and M formally divorced. A1 had custody of the children and they continued to live in the Fu Tai Flat as before. X and Z grew up uneventfully and were of normal health and development.

In November 2016, A1 married A2, who already had a daughter, Y, born in 2010, by a previous marriage. In September 2016, A2 and Y moved into the Fu Tai Flat and since then lived with A1, X, Z, the paternal grandmother and A1's brothers. Occasionally, A1 and A2 would exercise corporal punishment on X and Z; for example, by hitting them with a rattan stick or a clothes hanger.

On 10 August 2017, A1 and A2 moved out of the Fu Tai Flat with X, Z and Y and into A3's flat in Trend Plaza in Tuen Mun ("the Trend Plaza Flat"). A1 and A2 did not tell the paternal grandmother or the uncles of their new address and M had not seen her children since the move.

Z's attendance at nursery school

Z had been attending a nursery school in Tuen Mun since September 2015, when she was 3 years of age. She was toilet-trained and able to maintain proper hygiene and walk properly. She did not have any special needs or require any special care. When Z was living in the Fu Tai Flat, the paternal grandmother would usually drop Z off at, or pick her up from, the nursery. Shortly after A1 and A2 relocated with the children to the Trend Plaza Flat in August 2017, A1 and A2 instructed the nursery that only the two of them were permitted to drop Z her off at, or pick her up from, the nursery. A2 was thereafter responsible for the task.

In September 2017, teachers at the nursery noticed that Z would frequently request more food at breakfast. On one occasion, in early September 2017, a teacher saw Z arrive at the nursery crying. On another occasion, Z was seen to have a red mark on her calf. On 5 September 2017, a teacher saw various injuries and marks consistent with beatings on Z, including a swollen thumb and palm, a 4-centimetre mark on her forearm, a swollen right elbow, an 8-centimetre mark on the back of her waist, two marks on her right thigh and two 5-centimetre marks on her buttocks. On the following day, Z's teachers made enquiries with A2, who admitted that she and A1 had beaten Z because the child was incontinent when ordered to stand as a punishment. The staff advised A2 not to inflict corporal punishment on Z, and A2 promised not to do so again.

On 13 September 2017, A2 told a teacher that the abrasions and bruises to Z's head were the result of her bumping her head against a cabinet at home and that her tooth had loosened naturally. On 25 September 2017, the principal at the nursery saw Z's face swollen with bruises. When asked why, A2 explained that Z had accidentally bumped into a door. Later the same day, a teacher at the nursery discovered that the sole of Z's foot was red and swollen. A2 said that A1 had used a rattan stick to hit against the floor in order to scare Z: however, she had not responded and the blow had accidentally landed on the sole of Z's foot. A2 also accepted that Z had been asked to stand as a punishment and deprived of sleep. A2 was warned that such corporal punishment was unacceptable and the nursery would closely monitor the condition of Z in future. Following this incident, no further injuries were observed on Z, who seemed relatively happy in class; although one teacher noted that Z became quiet and refused to answer questions about her activities at home or on holidays.

Prior to moving to the Trend Plaza Flat, Z rarely took leave from nursery. However, after the move, Z was often absent; in particular, she did not attend the nursery on 11, 16 to 28 August, as well as 15, 18 and 21 September 2017.

In late October 2017, a teacher noticed an injury on Z but the child could not explain how it had been caused. Z last attended the nursery on 27 October 2017. On 30 October 2017, A2 called the nursery and claimed that the family had to attend a relative's funeral in the Mainland for a week, after which the child would return to the school on 6 November 2017. On 6 November 2017, A2 called again, claiming that Z had had to remain in the Mainland for a further week. In fact, these claims were false: immigration records showed that Z was in Hong Kong throughout this time.

On 11 November 2017, A1 made an application to the nursery to suspend Z from the school for two months. Accordingly, the principal and teachers of the nursery met with A1, who said he wanted Z to be home-schooled because the teachers indulged her too much; he further asserted that Z's writing had improved significantly under his tutelage. When the principal and teachers proposed that Z attend the nursery in the mornings or on some days during the week, A1 rejected the proposal. When A1 was told that absence from the nursery for more than one month would result in the government's fee remission being withdrawn, A1 said he would discuss the matter with A2 and revert to them. However, they did not hear from A1. Repeated contacts were made by telephone but Z was not returned to the nursery. Finally, on 30 November 2017, A1 was told to attend the nursery in order to sign some papers and pay extra fees, Z having been absent for the entire month of November.

On 2 December 2017, A1 called the nursery to apply for Z's withdrawal from the nursery. When A1 came to sign the relevant papers, he claimed that Z was "doing fine".

X's attendance at school

Since September 2017, X had been attending Primary 3 level at a school in Tuen Mun. One day, in the middle of October 2017, a teacher noticed that X looked very tired and sleeping in class. On 6 November 2017, X's class teacher saw that X had a swollen face and was walking very slowly. When asked why, X explained that he had accidentally hurt his face at home. It was also noticed that X had difficulty walking up stairs. When A2 was spoken to about these matters by a teacher, she said that X had been punished by being made to "sit on air" one or two days before, and that he always bumped into things at home. On the same day, the school social worker noticed a large patch of bruising on X's thighs, and when enquiries were again made of A2, she explained that A1 had punished X and had hit him for not doing well during his punishment. A2 was again warned not to inflict corporal punishment on X.

On 7 November 2017, X's class teacher observed numerous injuries and marks on X, such as bruises below his left eye, to both sides of his face, to his left hand and abrasions on his right elbow. However, X refused to discuss his injuries. The following day, the class teacher noticed that bruising under his left eye looked worse and he was also limping. The teacher called A2, who said she not sure if the injuries had been caused by Z. Understandably concerned, the school contacted the paternal grandmother to ask about the child's injuries. The paternal grandmother made several telephone calls to A1, but received no answer.

On 9 and 10 November 2017, X was absent from school. The school social worker spoke to A2, who said A1 had caused X's injuries because the child was unruly. Suspecting that X was being ill-treated, the paternal grandmother and A1's brothers went to the school. They were advised to report the matter to the police. Accordingly, they attended Tuen Mun police station, where a police officer telephoned A1 and left a message. A1 called the police station, stating that X's injuries were taken care of and promising to answer the paternal grandmother's telephone calls in future. Later the same day, A1 went to the school to apply for sick leave for X for 9 and 10 November 2017; and to ask the school not to contact the paternal grandmother again.

On 13 November 2017, a teacher noticed that X's face was pale and drawn. She bought X some food because the child was evidently hungry. A school social worker saw between three and five beating marks on X's right calf. She contacted A1 and A2 separately and warned them that the case would be reported to the police if they applied corporal punishment on X again.

On 15 November 2017, X said he was hungry during class, so he was again provided with some food. However, X would not say why he was not being given food at home. When enquiries were made of A2, she answered that X ignored her at home and did not like to eat. On the following day, A1 and X attended the school picnic. X did not bring any food, notwithstanding that all of the students had been instructed to do so. A1 told X's class teacher that he refused to eat at home because he wanted his teachers to buy him food. He told the staff not to treat X to food and to let him starve and faint.

Since moving to the Trend Plaza Flat, X was often absent from school: 1 day in September; 7 days in October; 4½ days in November; and 2 days in December 2017. X last attended school on 19 December 2017 and never returned.

Leave was applied for X to be absent from school in early January 2018, on the basis that he would be visiting the Mainland. On 5 January 2018, X's class teacher asked A2 when the child would return to school. A2 claimed that X was in the Mainland and would attend school the following week. However, the claim was false: immigration records showed that X was in Hong Kong during this period.

Z's death

Since October 2017, a security guard, at the building where the Trend Plaza Flat was located, noticed that X and Z would always wear facemasks when they went out; however, Y did not. CCTV footage at the building showed that, between 1 and 6 January 2018, X and Z did not leave or enter the building, until the time Z was taken to hospital.

At 1:15 pm on 6 January 2018, A1 made a 999-call, stating that Z had collapsed in the Trend Plaza Flat. At around 1:23 pm, an ambulance officer found Z in the living room with no response and no pulse. Z was observed to be wearing a diaper, her face was swollen, her calves were bruised and the injured parts of her body had not been dressed. The ambulance officer asked A1 and A2 what had happened. While A1 did not reply, A2 said that Z had been conscious and able to talk at 1:00 pm; however, she was unconscious by 1:15 pm. On the way to the hospital, the ambulance

officer asked A2 what had caused the injuries to Z. A2 replied that Z had behavioural problems, she would hurt herself and refused to go to school.

On admission to the Accident and Emergency Department of Tuen Mun Hospital, Z presented with no pulse and had no response. Resuscitation was attempted but Z was certified dead at 2:38 pm on the same day.

Arrests, cautioned statements, house search and medical evidence

On 6 January 2018, A1 and A2 were separately arrested for child abuse. Under caution, A1 said, “I hit her with a rattan cane only”; while A2 responded, “Ah sir, it has nothing to do with me. The injuries were due to the beating inflicted by my husband”. On 7 January 2018, A3 was also arrested for child abuse.

During house searches, police officers seized various items from the Trend Plaza Flat, some of which were submitted for DNA testing. On a left slipper, the DNA of Z and A1 were found. On a right slipper, Z’s blood was discovered, with Z’s and A1’s DNA being found on the bottom surface of the slipper. On a pair of scissors, Z’s and A1’s DNA were detected on the handle and Z’s DNA was detected on the blades. A rattan stick was seized but no DNA could be lifted. Various bottles of antiseptic solution and rubbing alcohol were also seized.

An autopsy was conducted on Z by Dr Kwok Ka-ki, who concluded that the cause of death was Septicaemia. Specimens collected from Z showed that she suffered from infections of Salmonella Enteritidis and Staphylococcus Aureus in multiple parts of her body. The bruising found on Z’s body was compatible with blunt force trauma; for example, the result of being punched, slapped or hit by a slipper, and the head hitting the ceiling when the child was thrown upwards. Based on the ulcers found on Z’s body, some superficial and some deeper, Dr Kwok was of the opinion they were the result of repeated trauma, compatible with being inflicted a few weeks before death. There were confluent deep bruises over Z’s scalp consistent with blunt force trauma, such as bumping against a hard surface, but not caused by a single impact. Dr Kwok found Z’s thymus only weighed 5 grammes, which was far below the 16 to 40 grammes for children up to 10 years of age. Her opinion was that the diminutive size of Z’s thymus could have resulted from conditions such as infection, malnutrition and prolonged physical or emotional stress.

Dr Kwan Yat-wah, an expert in paediatric immunology and infectious diseases, explained that distress caused by repeated abuse, by her injuries not being properly treated and by seeing her own brother being ill-treated, could have contributed to the small size of Z’s thymus; and that such a process would have taken at least 6 months. The abscesses found on Z and the infection in her organs supported a finding of Septicaemia as the cause of death. The individual injuries found on Z were not by themselves fatal. According to Dr Kwan, long-term abuse and neglect of Z had led to an involution of her thymus and a deficiency in her immune system, which predisposed Z to an increased propensity for infection, including the fatally invasive Salmonella infection. He was of the view that, in the few days before Z’s death, the symptoms of such a serious infection would have manifested themselves and Z’s consciousness would have been

impaired. He considered that the Salmonella infection played a major role in the occurrence of Septicaemia, but that with timely medical intervention Z would have survived.

Dr Ho Pak-leung, an expert in infectious diseases and clinical microbiology, testified that the very small size of Z's thymus would have seriously affected her immune system and weakened her resistance to bacteria. The symptoms of the Salmonella infection would have caused Z to vomit, have diarrhoea and experience abdominal pain, tiredness and poor appetite. The large ulcers on Z's shoulder and her right knee would have caused pain in her leg, making it difficult for her to stand. The large abscesses in Z's ulcers would have emitted a strong odour in the two days before her death. Dr Ho was of the view that Z would not have died if she had not been abused and suffered so many injuries; and if timely medical treatment had been given to her. While Dr Ho accepted that the condition of Z's thymus would not have been known, her injuries should have caused any person to realise the risk of infection.

On 6 January 2018, X and Y were taken to hospital for medical examination. Medical reports were produced at trial in respect of X's condition. In addition to injuries on various parts of his body, X had anaemia and low serum electrolytes, which reflected the fact that he had been neglected by not receiving adequate sustenance.

Dr Foo Ka-chung gave evidence that the injuries on X could have been inflicted by punching with fists, slapping with slippers or hitting with clothes hangers. The large ulcer on X's buttocks may have been produced by repeated beatings with a stick or slipper, and could have been inflicted weeks, or possibly months, prior to examination. Dr Foo was of the opinion that the injuries to X should have been inflicted over a prolonged period of time. The injuries to his chest and abdomen were consistent with poking with a pair of scissors, such as those seized from the Trend Plaza Flat.

By contrast, when Y was medically examined, she had no injuries at all.

WeChat messages from A1 and A2's telephones for the period between 1 August 2017 and 6 January 2018 were adduced at trial. WhatsApp messages passing between A2 and her friend, a Madam Tsao, sent between 20 August 2017 and 6 January 2018, were also adduced.

X's and Y's interviews

On 7 January 2018, X attended two interviews, both recorded on video, in which he was asked to describe how he and Z had been treated by A1 and A2.

He recounted that in the evening of 5 January 2018, when A3 was at work, A1 and A2 performed what was termed an exercise called "flying high", with A1 holding Z by her waist, repeatedly throwing her high into the air and then catching her. A2 was present watching this exercise. Z screamed at the time and said she was very frightened. Z's head touched the ceiling lightly each time she was thrown. After throwing Z in this fashion some 18 times, A1 stopped. Then A1 and A2 did an act with Z, which they termed "pretending superman", whereby A1 and A2 each held an arm and a leg and swung Z about. Z was again very frightened and cried. Z was then told to walk

in circles, while X stood by the door. At that time, other family members were having dinner. X and Z were only permitted to eat when everyone had finished their meal.

On other days, when Z misbehaved, A1 and A2 would use a rattan stick to hit her hands, the soles of her feet and her buttocks. A2 would use a slipper to hit Z (sometimes on the head), while A1 would punch Z's feet and thighs with his fists. Sometimes A3 was present when the beatings took place, but she did not intervene to stop them. X said he saw blood, sores and a scab on his sister's hands. He heard A1 and A2 say that Z emitted some pus which smelt. Furthermore, Z was required to sleep on the floor without a blanket. A3 knew about these conditions, but, again, did nothing about it.

A1 beat X with what was described as a "hang stick" on his soles, hands and palms, and also used a slipper to hit his face. Between 30 and 50 strokes were administered on X each time. Marks were left on his body and, sometimes, they bled. On one occasion, A1 had poked X's chest with a pair of scissors. He also punched him in the eye and on the legs. X was not taken to see a doctor; instead, A2 treated his injuries with disinfectant, ointment and gauze. When A1 and A2 learned that X had informed the school about his injuries, they became angry and he was again beaten.

X was deprived of food for several days, but could not say for how long. No food was given to him for 15 days from 21 December 2017, although A2 gave him one cup of milk.

As for A3, X said that she had beaten him too, but only when he did not listen to her. In cross-examination, X said that A3 witnessed the children being beaten by A1 and A2 on a few occasions. By contrast, Y had never been beaten.

On 7 January 2018, Y also attended an interview, which was recorded on video. She said that on 5 January 2018, A1 and A2 had performed an operation called "flying high" on Z, by which Z was thrown into the air some 12 times. It was A2 who suggested this, since hitting her with a hang stick had not worked. During the process, Z touched the ceiling and bumping sounds of moderate volume could be heard 7 or 8 times. Z had shouted "No". When "flying high" was also performed on Y, she did not touch the ceiling. On the same day, A1 and A2 did the "pretending superman" exercise. Although Z said she was scared, A1 and A2 persisted. Z then seemed dizzy and lay down trembling. X and Z watched the rest of the family have dinner and they ate only when the others had finished their meal. That night X and Z slept in sleeping bags. On 6 January 2018, Z woke up feeling a bit dizzy and A2 bathed her and gave her some food.

X and Z were made to sleep in sleeping bags because they were said to be dirty. This happened on some 15 to 20 occasions but nobody, including A3, intervened to prevent it.

Y maintained that when they were living in the Fu Tai Flat, X and Z were rarely beaten. However, when they all moved to the Trend Plaza Flat, they were assaulted many times, perhaps 50 times in total. X and Z were beaten by A1 and A2 with a rattan stick and slippers, while A1 also hit X on his face with his fist. X had many rattan's marks, and had sometimes bled from the mouth, after being hit with a slipper.

A3 had witnessed A1 and A2 hitting X and Z, yet did not intervene to stop the assaults. On occasion, A3 had also hit X and Z with a rattan stick on their buttocks, arms and faces.

Z and X were not given food when they were said to have misbehaved. Sometimes they would not be given breakfast: on some days, they did not have lunch. However, they would have dinner every day. Y said that X and Z had even eaten excrement.

It is noteworthy that the Admitted Facts at trial were to a large extent identical to the Summary of Facts admitted by A1 and A2 for the purpose of their guilty pleas to the cruelty counts in HCCC 29/2020, save for some minor differences. At the trial in HCCC 28/2020, three of X's teachers were called to give evidence. They were in agreement that X did not have serious conduct issues in school and had been a cheerful student; however, he had become quiet when injuries were discovered on him.

C. The defence case

A1 and A2 both elected to give evidence. Their offers of pleas of guilty to manslaughter were disclosed to the jury. While the fact of their assaults on, and their neglect to provide timely medical attention to, Z leading to her death were accepted, both denied that they had the intent to cause Z really serious bodily harm.

A1 admitted inflicting corporal punishment on X and Z by hitting them both with a rattan stick and a slipper. Sometimes the punishment would take the form of not giving them food. In some of the telephone messages between himself and A2, he appeared to agree with A2's suggestion that the children should be beaten but he claimed he was only trying to calm her down by letting her vent her frustration. He said that they punished X and Z (but not Y) because they misbehaved. He accepted he had seen some minor wounds on Z's body, but Z's picking at them had made them worse. He claimed that A2 would clean the wounds every day and explained that he and A2 did not take Z to a doctor because he was worried that he would be charged with an offence. A sticker award scheme had been introduced in order to encourage the children to behave better. In December 2017, X and Z were on occasion not allowed to sleep in the bedroom, but in sleeping bags instead, because they did not wash themselves. He admitted performing the actions of "flying high" and "pretending superman" on Z on 5 January 2018, but he did not know if Z's head had hit the ceiling. He never intended to cause Z really serious bodily harm and had never heard of bacteria in the blood causing death.

A2 admitted causing injuries to X and Z, by using a rattan stick and slipper. She assaulted the children because they did not listen to her, despite her efforts. She accepted that she had pleaded guilty to two charges of cruelty to a child. She did not intend to cause Z really serious bodily harm, but accepted she was responsible for Z's death; hence she had offered to plead guilty to manslaughter. She had applied antiseptic solution and ointment to Z's wounds every day. A2 had only discovered the wounds late because Z had refused to take a shower. She did not take Z to a doctor because she feared she too would be charged with an offence. On 5 January 2018, when "flying high" was performed on Z, she accepted that she did say words to the effect "Let Z's head

touch the ceiling”; however, she had only been joking. On 6 January 2018, when Z felt unwell, A2 tried to warm the child up and gave her some food. She had even performed cardio-resuscitation and artificial respiration. A2 explained that in some of her telephone messages to her friend, she was only venting her anger and did not really mean to kill Z.

A2 called Dr Choi Wing-kit, a psychiatrist, who gave his opinion that A2 was suffering from recurrent depressive disorder, which had seriously impaired her judgment at the time of the offence. The prosecution called a psychiatrist, Dr Liu Ching-yung, Amy in rebuttal.

A3 did not give evidence but relied on the cross-examination of certain witnesses, as well as the admitted facts. In essence, her case was that she did not have the custody, charge or care of X or Z because she was absent from the Trend Plaza Flat most of the time either because she was at work or because she had to take care of her sick mother. Moreover, if she was found to have had custody, charge or care of the children, she was not guilty to wilfully ill-treating them since on some occasions she had prevented A1 and A2 from beating the children, and had never participated in depriving X and Z of food.

Finally, A1, A2 and A3 placed reliance on the fact that they all had clear criminal records.

D. Grounds of appeal against conviction

Mr Edwin Choy SC who, with Ms Mavis Lam, now appears for A1 and A2, has advanced three grounds of appeal against conviction on their behalf.

Ground 1 – causation

It is submitted that the judge erred in misdirecting the jury on the issue of causation by telling them that the prosecution only needed to prove that A1 and A2’s conduct amounted to a “more than a minimal cause” of the death of Z. While Mr Choy accepted that the judge’s direction to the jury did conform with the relevant Specimen Direction, he submitted that the correct test for causation was the one laid down by Lord Parker CJ in *R v Smith*, which employed the key notion of an “operating” and “substantial” cause. The dilution of the operating and substantial test, so it was argued, unjustifiably diminished the importance of establishing a causal link between the acts of a defendant and the death of the victim.

He emphasised, given that there was no concrete evidence as to which one of the applicants had caused any particular injury to Z, that it was incumbent on the judge to direct the jury to consider whether the acts of each individual applicant amounted to a substantial and operative cause of the death of Z.

Mr Choy further submitted that a so-called Nedrick direction was required to be given to the jury on the requisite intent they must find in the applicants before they could convict either one of the applicants.

Ground 2 – “sequence of events”

Mr Choy argued that the judge had also erred in emphasising the need for the jury to decide whether or not, as a matter of fact, the conduct of the applicants “formed a sequence of events”. He had referred to this requirement more than once during the summing-up:

“Now, the conducts were part of a sequence of events. It is a finding of facts of you upon consideration of the evidence. What you need to decide is whether or not, as a matter of fact, the conducts of the defendant formed a sequence of events. The prosecution is not required to prove that the defendant intended that there would be a sequence of events. It is sufficient if you are sure that the conducts were part of a sequence of events. To be a sequence of events, it does not need to be continuous, in the sense that it happened every day. You exercise your common sense and decide whether or not the conducts, which you find proved, were a part of a sequence of events.”

And later:

“...If having considered the evidence in accordance with my directions, you are not sure that the conducts of the defendants did form a sequence of events, you must find the defendant not guilty of murder. If you are sure that the conducts of the defendants were part of a sequence of events, then you go on to consider whether or not you can be sure that at some point when the defendants did the conducts which caused the death of the deceased Z, the defendant at the same time, intended to cause Z grievous bodily harm.”

Mr Choy submitted that the problem with this direction was that the judge failed to explain what amounted to a “sequence of events”, and what causal or forensic relationship each of the “events” must have with Z’s death before being qualified as part of such a sequence of events. Without any explanation as to how the “events” could be identified, it was submitted that this direction was potentially dangerous: since events always formed a chronological sequence, there was a risk that the jury would skip the laborious task of analysing each and every episode related by the witnesses and deciding whether it took place as described and how it contributed to Z’s death.

Where there was more than one potentially causal episode in the present case, Mr Choy suggested that the judge should have adopted a step-by-step approach. This was particularly important since the prosecution did not pursue the case on a joint enterprise basis. Mr Choy relied on *R v Lane* and *R v Strudwick and Merry*, where the carers of a child were charged with wilfully ill-treating and causing the child’s death but the prosecution evidence could not show which defendant struck the fatal blow. As the evidence could only show the offence was committed by either accused, each must be acquitted. Mr Choy further argued that since the facts in this case supported a possibly different actus reus, the judge ought to have given a direction in accordance with *R v Brown (Kevin)*.

Ground 3 – admission of prejudicial evidence

Since A1 and A2 had pleaded guilty to the cruelty charges in relation to X, the trial should have been focused on their conduct against Z. However, because A3 had pleaded not guilty to four counts of cruelty in relation to both Z and X, she had been tried together with A1 and A2 and the evidence of X’s ill-treatment at the hands of A1 and A2 thereby came before the jury. It was

contended that this was highly prejudicial to A1 and A2. Although the judge sought to neutralise the effect of such evidence, it was submitted that it was not sufficient to counter the extremely prejudicial effect of such evidence and, as a consequence, A1 and A2 did not have a fair trial.

E. The respondent's reply (on conviction of A1 and A2)

Ground 1

Mr Derek Lai, with him Ms Jackie Lai, on behalf of the respondent, submitted that the judge's directions to the jury on causation complied with Specimen Direction 20.1, which was in line with the English equivalent in the Judicial College's Crown Court Compendium. This required the jury to consider whether the defendant's conduct contributed to the outcome in a way that was "significant" and "more than trivial". Such direction has been endorsed by a long line of judicial opinion both in England and Wales and in Hong Kong.

Throughout the trial it had never been suggested that there was another remotely possible cause of Z's death, and there was ample evidence of a prolonged course of ill-treatment of Z (including severe beatings, hunger and not being given proper medical care) which in turn created a deficiency in Z's immune system, thus predisposing Z to infection and eventually Septicaemia, which caused her death. In short, causation was never a live issue before the jury: the real issue was whether A1 or A2 had the intent to cause Z grievous bodily harm. The closing speeches on behalf of A1 and A2 argued for a finding of manslaughter on the basis of either an unlawful and dangerous act or gross negligence.

As to the complaint of the absence of a so-called Nedrick direction, Mr Lai submitted that such a direction was only required where the defendant's actions may not have been motivated by a desire to harm anyone. In the present case, A1 and A2's actions amounted to the direct assault, abuse and neglect of Z over the course of 5 months, resulting in numerous injuries to her and her eventual death; as opposed to actions targeting any other individual or an indiscriminate attack. The issue at trial was clear and focused. The present case clearly did not fall within the rare cases where a Nedrick direction was required.

Ground 2 – sequence of events

Mr Lai submitted that the single transaction rule, established in *Thabo Meli v R*, and followed by *Fagan v Metropolitan Police Commissioner*, held that in a case of continuing acts or conduct, it was not necessary for the mens rea to be present at the inception of the actus reus; it could be superimposed upon an existing act. It was sufficient that an accused had the mens rea at some point during the continuance of the actus reus and, where the actus reus was part of a larger transaction, it would be sufficient that D had the requisite mens rea during the transaction, though not at the moment the actus reus was accomplished. This rule was applicable in Hong Kong and had been endorsed by in *Wan Kim Chung v HKSAR* and *HKSAR v Ma Kwok Fai*. Mr Lai further relied on *R v Bottineau* and *R v Radita* (which also concerned long-term neglect and abuse of children) to show that the well-recognised rule applies also to cases where a series of

acts and/or omissions occurred over a protracted period of time.

In answer to the applicant's complaint, Mr Lai submitted that there was no need for the judge to direct the jury on what amounted to a "sequence of events", otherwise it would usurp the function of the jury. The jury could use their common sense in determining whether A1 and A2's conduct formed a sequence of events.

As for the lack of a Kevin Brown direction, Mr Lai submitted that the direction was not applicable in the present case: at no time throughout this trial did the prosecution ever advance any alternative route to establish the actus reus for the murder count, and the jury could not have entertained any misconception about their task in determining what caused Z's death. Mr Lai relied on *R v Giannetto* and *R v Boreman and Others* to illustrate the point that a Kevin Brown direction is only necessary where there is a risk of a disagreement between members of the jury as to whether a particular ingredient of the offence has been proved. Mr Lai reiterated that causation was never a live issue and that the real question for the jury was the intent of the two applicants.

Ground 3 – admission of prejudicial evidence

Mr Lai queried whether Mr Choy was effectively arguing that the trial of A3 should not have been joined to their trial for murder. If so, he pointed out that no application for severance had ever been made by any party. The joinder of trials was entirely proper and necessary given the family context of the case and the common and interlinking evidence (for example, X and Y's testimony, and the telephone messages on the abuse and neglect of Z and X). In fact, A1 and A2's counsel at trial made particular use of the evidence concerning X's ill-treatment in their closing submissions in order to try and persuade the jury that the applicants did not have the requisite intention for murder, and thus were only guilty of manslaughter. Dr Choi, the defence psychiatrist called by A2, relied on evidence of the behaviour of Z and X to support his diagnosis of A2. Mr Lai's answer to this ground of appeal was that the trial of A3 was properly joined to that of A1 and A2 in the circumstances; accordingly, no prejudice flowed from that joinder.

F. Reasons for sentence

In HCCC 29/2020, A1 and A2 had been jointly charged with, and pleaded guilty to, two counts of cruelty to a child by wilfully assaulting, ill-treating and neglecting, respectively, Z (Count 1) and X (Count 2), between 10 August 2017 and 6 January 2018 (both dates being inclusive). In HCCC 28/2020, A3 was found guilty by the jury of two counts of cruelty to Z and X by wilful neglect during the same period (Counts 3 and 5).

The judge noted the applicants' backgrounds. It had been contended on their behalf that A1 and A2, together with the children, had moved from the Fu Tai Flat because they could not get along with other family members and had hoped to start afresh in a new home. It was urged upon the judge that the ill-treatment of the children was not sadistic, but rather a wrong way of teaching and disciplining children. It was also said that A1 and A2 were not aware of Z's abnormal thymus as the child's weight and height were within normal range.

In respect of A3, it was asserted that her time spent at home was limited; accordingly, there were many occasions she did not witness the abuse of the children. It was emphasised that A3 had made an effort to stop the beatings and had urged A2 to take the children to a doctor, but she was placed in the dilemma of taking the children to seek medical attention herself or causing her daughter and son-in-law to be arrested for child abuse.

The judge made reference to HKSAR v Lam Wai Man, Secretary for Justice v Lam Lui Yin and HKSAR v Wong Wing Man. However, the present case was one of extreme cruelty to two children over a 5-month period. Of the three children in the household, only X and Z were targeted and both suffered extensive and very serious injuries. Furthermore, A1 and A2 had made efforts to deliberately conceal the children's injuries by giving untrue accounts to their schools. Both children obviously needed proper medical attention but none was given because the applicants selfishly wanted to avoid the legal consequences of their wrongdoings. Apart from physical abuse, the children were also subjected to indignities such as kneeling, standing for a long time and watching the other family members have dinner, as a result of which there must have been psychological harm to both children. The judge accepted there were moments of happiness in the household, a small consolation in what must have been a miserable time for X and Z.

The judge considered that both A1 and A2 had contributed directly to Z's sufferings and he was sure each of them continued to abuse Z knowing what the other one had been doing over the course of a five months' period. A2 was the primary carer of Z and there was no possibility of her not being aware of the seriousness of Z's injuries. The telephone messages passing between the couple showed that A1 had a good idea what had been done to Z; his responses amounted to encouraging even more severe conduct towards Z. A1's explanation of trying to calm his wife down defied common sense.

The judge found that both A1 and A2 continued to inflict injuries on Z knowing the serious nature and extent of the abuse. Various instruments had been used to assault Z, and with considerable force at times. Y's evidence showed that the "flying high" action caused Z's head to bump heavily against the ceiling. Other forms of punishment such as standing, walking, deprivation of food for days on end, kneeling and tying up of hands were all performed with the couple's full knowledge. The medical treatment by A2 on Z was obviously sub-standard and was motivated by the desire to conceal their abuse of Z.

The judge noted that X had also been subjected to severe and repeated physical abuse during a prolonged period. X had been deprived of food for such a long time that he had become underweight and displayed signs of malnutrition. The judge considered that the psychological

impact on X from such abuse was likely to be long-term. No impact report was called for on X because the child did not wish to be interviewed for that purpose. The judge assessed the psychological impact on X to be at least not insignificant, with which assessment counsel for the applicants agreed.

As for A3, by the findings of the jury, there were occasions where she must have been aware of the ill-treatment of X and Z but did nothing to prevent its continuation. A3 knew the seriousness of the children's condition, yet she failed to ensure that they received any proper medical attention. The judge accepted that A3 was not at home most of the time when the children were severely abused; nevertheless, there were times when she was present but did nothing to stop the abuse. It was inconceivable that A3 would not be aware of the dire conditions the children were enduring, particularly over such a prolonged period. The injuries must have been obvious, and A3 should have taken the initiative to seek medical care for the children. Her failure to take the children to a doctor in such circumstances amounted to acquiescence or connivance in A1 and A2's conduct. Although the judge recognised A3's dilemma, she was the last person who could help the children and her failure to do so was the result of her own selfishness.

In sentencing A1 and A2 in HCCC 29/2020, the judge adopted a starting point of 9 years and 9 months' imprisonment for their ill-treatment of Z (Count 1) since it was in the band of the worst case of its kind. There was no distinction in culpability between A1 and A2; accordingly, they received the same starting point. The judge adopted a starting point of 9 years for their abuse of X (Count 2). A one-third discount produced sentences of 6 years and 6 months' and 6 years' imprisonment respectively on the two counts. There was no other mitigation.

In HCCC 28/2020, A1 and A2 were sentenced to life imprisonment for murder. In HCCC 29/2020, having regard to totality, the judge ordered 3 years of the sentence on Count 1 to run consecutively to that on Count 2: the total sentence for the two counts thus became 9 years and 6 months' imprisonment. The judge ordered this sentence to run concurrently with the life imprisonment sentences in HCCC 28/2020.

In sentencing A3, the judge adopted a starting point of 4 years' imprisonment on Count 3, since Z's death could have been avoided but for A3's wilful neglect. The judge adopted a starting point of 2 years and 6 months' imprisonment in respect of Count 5.

In considering totality, the judge ordered 1 year of the sentence on Count 5 to run consecutively to the sentence on Count 3. A3 was, therefore, ordered to serve a total of 5 years' imprisonment.

G. Grounds of appeal against sentence

A1 and A2, in their leave application in relation to sentence on the cruelty charges, acted in person. However, they did not advance any substantive ground of appeal. Ultimately, after we had dismissed their appeals in relation to their conviction for murder, they abandoned their appeals against sentence in respect of HCCC 29/2020.

A3 was represented by Mr Leung Chun Keung, who advanced two grounds of appeal. In advancing those grounds, he complained that the judge was wrong (i) to give too much weight to the fact that Z died as a result of A1 and A2's acts when there was insufficient evidence that Z's death, or the risk of her death, was within A3's contemplation; (ii) to conclude that A3's neglect in the circumstances amounted to acquiescence of, or connivance in, A1 and A2's conduct; (iii) to give insufficient weight to the fact that A3 was not the carer of X and Z; and (iv) to give insufficient weight to X and Y's evidence that A3 did not know the extent and severity of any ill-treatment. It was further submitted that the difference of 1½ years' imprisonment as between the two counts by virtue of Z's death was excessive. As such, the sentence of 5 years' imprisonment was manifestly excessive. Mr Leung argued that A3's culpability fell short of the prolonged abuse of, and deliberate neglect in providing medical care to, a child, which had warranted 4 years' imprisonment on review by the Court in *Secretary for Justice v Lam Lui Yin*.

H. The respondent's reply on sentence

In relation to A1 and A2's sentences, Mr Lai submitted that, given the horrifying injuries occasioned by X and Z and the significant psychological trauma which will have been caused to X by the applicants' conduct, the judge was correct to assess this case to be one of the worst of its kind.

In response to A3's grounds of appeal, Mr Lai submitted that the jury must have found A3 to have the charge, custody and care of X and Z, in order to have convicted her of the two cruelty counts. Moreover, the judge's finding of A3's acquiescence or connivance was amply supported by the evidence, when A3 was the step-grandmother of the children who had turned a blind eye to their sufferings and failed to intervene even when the injuries to X and Z must have been obvious. He argued that the judge was right to take into account Z's death in assessing the appropriate penalty, since it was a cardinal principle of sentencing that the consequences to a victim should be taken into account. The 4 years' imprisonment imposed in *Lam Lui Yin* only reflected the gravity of the offence in the circumstances of that particular case. In A3's case, 5 years' imprisonment for her wilful neglect of X and Z could not be said to be manifestly excessive.

I. Discussion

Conviction

Ground 1 - causation

The judge's directions on causation were, as Mr Choy accepted, in accordance with Specimen Direction 20 of the Specimen Directions in Jury Trials, promulgated by the Hong Kong Judicial Institute, which itself is consonant with the Crown Court Compendium of the Judicial College in England and Wales, Part 1, ss 7-9. We do not think, reading the judge's summing-up as a whole, that there was any risk of the jury finding the applicants guilty if what either had done merely resulted in no more than a minimal or trivial cause of death. The judge repeatedly directed the jury that they had to be sure that the particular act of an applicant was a "significant" cause of Z's

death:

“So to summarise, as you may see from the document, to be a cause to the death, the prosecution must prove that the conducts of the defendant constitute a significant cause of the death of the deceased. The defendant’s conducts did not have to be the only or even the main cause of the death. But if it is a minimal or trivial cause, it is not sufficient. And even if the deceased was already suffering from the fatal disease or injury, so long as the conducts of the defendant had significantly contributed to the death of the deceased, it is sufficient, as the conducts accelerated the death not in a trivial or minimal way.” (Emphasis added)

Later, he reiterated:

“As a matter of law, as I have directed you, to be a cause of death, it is sufficient if the conduct of the defendant was a significant cause.” (Emphasis added)

In any event, there was no issue about causation at the trial and, even if there had been, the evidence in this regard was overwhelming.

As for a so-called Nedrick direction, which should perhaps more strictly be termed a Woollin direction, this was not one of the rare cases which remotely called for such a direction. Given the nature, scale and length of the abuse suffered by Z, it is inconceivable that the jury could have found that either applicant might not have desired the result of his/her actions, whether or not they intended such a consequence. Not surprisingly, the need for such a direction was never canvassed by any of the trial counsel in the court below.

Ground 2 - sequence of events

Nor do we think it was in any way incumbent on the judge to define or explain what was meant by a “sequence of events” which resulted in the death of the deceased. He correctly told the jury, as the triers of fact, to “exercise your common sense and decide whether or not the conducts, which you find proved, were a part of a sequence of events”. He then expressly directed them:

“If having considered the evidence in accordance with my directions, you are not sure that the conducts of the defendants did form a sequence of events, you must find the defendant not guilty of murder. If you are sure that the conducts of the defendants were part of a sequence of events, then you go on to consider whether or not you can be sure that at some point when the defendant did the conducts which caused the death of the deceased Z, the defendant at the time intended to cause Z grievous bodily harm.”

Mr Lai has helpfully drawn to our attention the decision of the Court of Appeal in *Wan Kim Chung*, where the complaint on appeal was that the trial judge had usurped the function of the jury by suggesting that the “sequence of events”, involving a strangulation in the New Territories and a death by drowning in the sea off Aberdeen several hours later, had not been broken. The Court said:

“However, these directions by the judge must not be considered in isolation but rather in the entire context of the judge’s summing-up. When this is done it is apparent that the suggested offensive part identified by Mr McCoy was clearly prefaced with a direction to the jury that it was for them to determine whether the act of throwing the deceased’s body into the sea was part of the same transaction or sequence of events as the earlier strangling of the deceased.

We did not agree with Mr McCoy’s suggestion that the judge had usurped the function of the jury. The lapse of time between the act which rendered the deceased unconscious and the dispositive act which led to her death was part of the evidence and had to be addressed by the judge. What he said was to correctly direct the jury that no coincidence in time was required by law to make the applicant guilty of murder if they were sure that the acts of strangling and the acts of throwing the deceased into the sea were parts of the same transaction or sequence of events. We were of the view that, contrary to Mr McCoy’s submission, the judge did in fact clearly leave for the jury’s determination the issue of whether the strangling of the deceased and the throwing of her body into the sea were part of the same transaction or sequence of events.

In considering the way that the judge summed up the case to the jury, it has to be borne in mind that the points put forward by Mr McCoy were not directly raised before the judge and that the judge’s proposed direction to the jury was agreed to by the defence at trial.

We were also of the view that common sense would be offended if we were to rule that on the facts of the present case, the applicant should only be guilty of attempted murder or manslaughter, and not of murder.”

We might equally point out that no issue was taken in this regard before the trial judge in the case before us.

We note that the applicant in Wan Kim Chung further sought leave to appeal to the Court of Final Appeal on two questions of law, the second of which was in these terms:

“Is the issue of causation a matter of fact to be left exclusively to the jury to decide in determining whether independent acts causing the death of the deceased ought to be viewed as part of one transaction?”

In answering this question, the Appeal Committee approved the single transaction rule established in such cases as Thabo Meli and said of the trial judge’s direction in the case before it:

“The direction was clear and the Judge left to the jury the question of the connection between the act of strangulation and the dumping of the deceased’s body in the sea. It is not correct to suggest, as was contended on behalf of the applicant, that the Judge removed from the jury the factual issue of whether the first and second act were one sequence of events.”

The application for leave to appeal against conviction was refused.

In any event, we think the matter of which Mr Choy complained was met by the clear and repeated directions of the judge that the jury must be sure the applicants had the requisite intent for murder at the time when he or she carried out the conduct which caused the death:

“As regards the issue of intent, as I have told you, there is no direct evidence on this issue. You have to consider the whole of the evidence and decide whether or not you can draw the inference that the defendant must have the required intent, and this conclusion is the only reasonable inference to be drawn from the whole of the evidence. The prosecution is not required to pinpoint at which point of time the defendant did have the alleged intent. What you have to be sure is that, at some point when the defendants did the conduct which caused the death of said, the defendant at the same time of the doing of the conduct had the required intent. And please remember, the intent must coincide with the conduct.”

A little later, he said:

“The prosecution says that the extent and the seriousness of the injuries found on Z tells a thousand words, and they say, by doing such things on Z and repeatedly, over a duration of about five months, the defendant must, at least at some point of time, during this prolonged mistreatment on a girl 5 years old, must have the intent to cause Z grievous bodily harm when he performed a culpable conduct on the child.”

The question of whether there was a sequence of events which caused the death of Z, and whether at some stage during that sequence of events the applicant under consideration had the requisite intent for murder was properly and clearly left to the jury as the fact-finding tribunal.

Mr Choy then argued that given the plethora of different acts committed in respect of Z, there ought to have been a Kevin Brown direction. With respect, there was nothing to suggest that there was any disagreement by the jury over an ingredient of the offence. They may have differed, although there is no evidence that they did so differ, as to particular acts in the sequence of events. However, if they applied the directions at [92] *supra*, they would have been satisfied as to each ingredient of the offence of murder. We find no merit in Ground 2.

Ground 3 - admission of prejudicial evidence

As for Ground 3, no complaint was ever made, nor application mounted, at the trial or in the run-up to the trial, by any party in respect of the improper joinder of the defendants or the admission of prejudicial evidence. Moreover, the judge gave an elaborate and emphatic direction explaining how the jury may, and may not, use the evidence in respect of X:

“Now, evidence of X against D1 and D2. Now D1 and D2 are charged with one count only in this trial, which is murdering of Z. You have heard evidence relating to some conducts of D1 and D2 on X. No matter what you think about these conducts, you must bear firmly in mind this direction. D1 and D2 have already pleaded guilty to the offences relating to X. In the present trial, neither D1 nor D2 is facing any allegation against him or her in relation to X. Now the only purpose of adducing this area of evidence, that is conducts performed by D1 and D2 on X, is to give you the whole context of what the prosecution alleged against the three defendants. And also, there are some parts of this area of evidence

... relevant to the case of D3, what you must not do is to draw any adverse inference or have any adverse consideration against D1 and D2 because of the evidence which is read (?led) in relation to X, this is a thing you are not entitled to do.

Not only that you must not find ... D1 and D2 guilty of any offence relating to the death of Z because of the area of evidence concerning their conduct of X, you must not think, because D1 and D2 had done something wrong on X, they were more likely to have done similar things to Z or they were more likely to have committed the offence you are considering. This area of the evidence, that is the evidence of their conducts on X, does not have such effect. You must not draw any adverse inference or have any adverse consideration against D1 and D2 because of this part of the evidence.”

This emphatic direction was entirely sufficient in the circumstances. We think it would have been a wholly truncated and misleading prosecution case (Mr  Lai used the word “incomprehensible”) to have excluded from it the evidence in relation to X. Moreover, as Mr  Lai has pointed out, the defence actually wanted this evidence before the jury to support their case that A1 and A2 did not have the requisite intent for murder and were guilty only of manslaughter. There is no merit whatsoever in Ground 3.

Having refused leave to appeal on all three grounds of appeal, the general averment in Ground 4 that the convictions of A1 and A2 are unsafe and unsatisfactory must likewise fall away. Accordingly, the appeals of A1 and A2 against conviction for murder under HCCC 28/2020 were dismissed.

Appeals against sentence

A1 and A2

Although A1 and A2 decided to abandon their applications for leave to appeal against sentence in relation to the cruelty counts following our refusal of leave to appeal against conviction and the dismissal of their appeals on the count of murder, we wish to make the following observations. This was a wicked and disturbing case, which will have shocked everyone in the community. As the judge remarked, in his careful review of the evidence, it was “a case of extreme cruelty to the two children over a period of about five months”, which was, in respect at least of Z, “one of the worst cases of its kind” to come before the courts. Any parent who visits upon his or her own children (or,  indeed, step- children) the sort of physical and emotional cruelty and abuse described in this case, which has led to the death of one child and the severe and probably life-long emotional scarring of the other, when those children were powerless to defend themselves against the torments of those who were supposed to cherish and protect them, deserves no mercy whatsoever.

The scale of abuse was graphic. In his sentencing reasons, the judge noted that when Z’s body was examined, extensive and multiple bruises and wounds were found on her body:

“Some were recent, some were old. There was a total of 58 recent injuries, with 11 bruises and abrasions at the head, seven bruises at the chest, six bruises and abrasions at the trunk and abdomen, and a lot of bruises and abrasions in the four limbs. There were also 75 scabbed wounds, ulcers and scars, all over the body. Two abscesses were found on the left shoulder and right knee. The presence of scabs and scars, together with more recent injuries, indicates that there were repeated trauma on the go at different times.”

As to the medical examination of X in January 2018, the judge recorded that:

“... he was found to have more than 60 old and new injuries in his head, face, chest, trunk, buttocks and four limbs. The injuries included haematoma, swelling, bruises, lacerations, scars, necrosis and desquamations of various sizes. There was slap marks on his face and multiple linear marks by sticks all over his body. There were also laceration scars on hands, feet and chest wall likely caused by sharp objects. There was an infected and necrotic ulcer on his buttocks reflecting that he had received no medical attention or care. Expert opinion is that this ulcer could be produced by repeated beating with rattan stick or slapping with slippers resulting in lacerations over a localized area.”

It has been said before that the maximum sentence for this offence comes nowhere near providing for the punishment of those who would abuse children in this way. This case demonstrates yet again the need for a substantial increase in the maximum sentences for this offence.

In our judgment, the sentences were not a day too long and we suspect it was this realisation which prompted A1 and A2 finally to abandon their applications for leave.

A3

As the judge remarked in the case of A3, “She was the only person who could have offered help to the children, very young in age, and might have been their only hope, but she for selfish reason decided not to do what she should have done”. A3 was not an elderly relative with no effective say in the running of the home or family: she was in her mid-50’s at the time of these offences, a working woman and a mother herself. She could at the very least have acted as a controlling influence or restraint on her own daughter, A2, and intervened when she saw the way the two children were being treated. Yet she effectively did nothing and wilfully neglected her responsibilities as a grandmother, as an adult and as a human being.

Mr Leung took issue with the degree of control A3 had within the family unit. But the jury, by their verdicts, must have been satisfied that she had “the custody, charge and care” of both Z and X; as she did of Y as well. One of the particularly distasteful and disturbing features of this family unit was how X and Z were singled out for such despicable treatment, yet A2’s daughter (and A3’s granddaughter by blood), namely Y, was spared such torment.

In our judgment, having fought the case and lost, the overall sentence visited upon A3 was also not a day too long. Her application for leave to appeal was likewise refused and her appeal dismissed.

J. Conclusion

It was for the above reasons that the appeals of A1 and A2 against conviction in HCCC 28/2020 and their appeals against sentence in HCCC 29/2020 were dismissed; and A3's appeal against sentence in HCCC 28/2020 was also dismissed.

(Andrew Macrae)

Acting Chief Judge of the

High Court

(Kevin Zervos)

Justice of Appeal

(Maggie Poon)

Justice of Appeal

Mr Derek Lai SADPP and Mr Jackie Lai PP, of the Department of Justice, for the Respondent

Mr Edwin Choy SC and Ms Mavis Lam, instructed by David Y Y Fung & Co, assigned by the Director of Legal Aid, for the 1st and 2nd Applicants in CACC 89/2021 (re: Conviction)

Mr Leung Chun Keung, instructed by Cheung, Chan & Chung, for the 3rd Applicant in CACC 89/2021: (re: Sentence)

The 1st and 2nd Applicants in CACC 97/2021 appeared in person (re: Sentence)

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