

HONG KONG / JUDGMENT

HKSAR v. HO HOI SHING

COURT

Court of Appeal

DECIDED

24 August 2007

CASE / FILE NUMBER

CACC244/2006

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bjbj n nomacro Applicant

Before: Hon Stuart-Moore VP, Burrell J and Beeson J Date of Hearing: 10 July 2007 Date of Judgment: 24 August 2007 J U D G M E N T Stuart-Moore, macrobutton nomacro VP (giving the judgment of the Court):

Background

The applicant, aged 32, was convicted of murder on 14 June 2006 after a trial before Lunn J and a jury. He now seeks leave to appeal against his conviction. At the outset of his trial, the applicant pleaded guilty to manslaughter. The basis for this plea was provocation but, as we shall indicate later, this was not made known in open court. In any event, there was, it follows, no issue at trial as to the identity of the killer. The facts were relatively straightforward and were largely based upon the applicant's confession to the police as there was no eyewitness to the killing and no forensic evidence linking the applicant to it. On 24 April 2000, at 7.45 am, the almost naked body of Chung Koi-wun (the deceased), who worked as the head cashier at the Hang Fook Lau Seafood Restaurant in Hunghom, was found inside a storeroom at that restaurant. There were no signs of a struggle or of blood at the scene but all her clothes had been removed save for a top which had been pulled up to expose her breasts. Her death had been brought about by manual strangulation. The pathologist found deep bruising between the injuries on the neck caused, in his opinion, by a heavy amount of force. The time of death was estimated to have been 2.00 am on the same day as the deceased's body was discovered. Suspicion immediately fell on the applicant for two reasons in combination. These were that, on 21 April 2000, three days before the deceased's body was found, he had been given the sack from the restaurant where he had worked for many years and where, since December 1999, he had been a deputy manager. Added to this, according to immigration records, the applicant left Hong Kong on 24 April 2000 at 8:00 am and went to the Mainland. On 28 July 2005, just over five years later, the applicant surrendered himself to the Public Security Bureau in Guangdong. He was then handed over to the Hong Kong Police whereupon he immediately said (with reference to the deceased): It was because Wun-che

caused me to be fired. I kill Wun-che in a fit of rage. I am filled with remorse. In the first of his video-recorded interviews, the applicant was asked to explain the answer he had given to the arresting officer. He said that the deceased had complained that he often went to the Jockey Club to bet on horses during his working hours. He said that he was summoned on the third day of his vacation by Mr Yeung to go back to the restaurant and he continued by saying: well, Mr. Yeung told me that Woon Che [the deceased] spoke to Mr. Chan, that is Chan Tai-yuen [transliteration], she said that I often went to jockey club for gambling, betting on horses during (my) working time. I ve been doing the job for so long, starting from junior to manager, even when there s no merit, (my) labour should be appreciated. (Appeal bundle p.73) The interview then continued in the following way: [Police] : What then? [Applicant] : Even when there s no merit, (my) labour should be appreciated, the following day I returned to the company with intent to look for Woon Che, h-hoping that she -- hoping that Woon Che could speak to Chan Tai-yuen, that is her younger brother, - [Police] : What to speak to her younger brother? [Applicant] : Hoping that he could let me stay there for work, she said no, demanding me to speak to him myself. I said, Any word you speak for me is better than all I say. [Police] : What then after having spoken so? [Applicant] : Then she told me to leave, she said, Should you not leave, I ask the watchman to send you away. Then I, acting out of momentary rage (and) fury, pushed her onto the ground, strangled her with bare hands, and then dragged her to the store room with a tablecloth. [Police] : What then after having dragged her to the store room? [Applicant] : N-Not knowing the reasons why (I) r-removed her clothes, seeing that there re two keys on her body, that means on the waistband, I then took the two keys, one was the office key, one was the accounts room key, then I went to the doorway of accounts room where several tablecloths were placed there, Er, then (I) took the tablecloths back there to cover the dead body, after that (I) came out and went into the office, as the matter that ought not to be done was done anyway, I hoped to get some money for escape. So (I) opened (sic) the accounts room key, opened four cash boxes, each of which has \$5,000, all in small denominations and coins, then I took away \$19,000. Having failed to open the safe, er, I went alone to the VIP Room at the lift lobby, sitting there thinking for a long time, thinking of surrendering myself, not surrender myself. (Appeal bundle pp. 74-76) Later in this interview, the applicant described how at first he had gone to the restaurant after 10.00 pm on 23 April 2000 and found the management office unlocked. He went inside and waited in the Po Cho Room where the tablecloths were kept. He came out when he heard the deceased coming into the premises. He said: usually [the deceased] lived there alone apart from the old watchman . He described again how he had tried to reason with her but she told him to speak to her younger brother, Mr Chan, who the applicant described as the boss and general manager. Then, according to the applicant, having been told to leave, the deceased said that if he did not leave she would ask the old watchman to tell him to go away. The applicant went on to say: Then I pushed her onto the ground out of momentary rage, after that I strangled her to death. Strangled her to death with both hands. (Appeal bundle p. 93) The applicant said (page 94) he had forgotten how long he took to strangle the deceased but after she had lost consciousness, he used a tablecloth to drag her into the storeroom. After that, he used a tablecloth to cover the deceased not knowing the reasons why [he] removed all her clothes (pages 95-96). He then described seeing two keys in the deceased s waistband, one for the accounts room and one for the office. He said (page 99): I

intended to get some money for escape. As such, I opened ... four cash boxes, each containing \$5,000 I took some \$19,000 away . Later in the interview (page 121), the applicant explained that he had been waiting in the dark for the deceased to return to her office to have a private talk with her and had not looked for her earlier at the restaurant because he was afraid of losing face, being fired He said (page 124) that he had pushed the deceased to the ground on the spur of the moment . He then (page 126) laid the body on a tablecloth which he dragged into the storeroom. In a later reconstruction of the crime to which the applicant gave his consent, the applicant told the police (pages 150-151) how he had spoken with the deceased for about half an hour well, she told me to go away. Well, she said that if (1) did not go (she) would fetch the watchman. Well, out of impulse, ... I pushed her to her floor . With a doll which was used for demonstration purposes (page 153), the applicant went on to say: Then [I] strangled her with two hands she (tried to) push me away with a hand but in vain strangled her till there s no breathing . The applicant was sitting on the doll as he demonstrated how he had strangled the deceased. He went on to say (page 163) that after dragging the deceased he saw that her trousers were torn. He took off her trousers and noticed the keys which made him think of taking the money. Defence case The applicant chose to testify. In essence, his case was that he had not intended to kill or even to hurt the deceased when he went to see her. However, when she refused to help him and threatened to force him to leave the premises, and taunted and pushed him, he flew into an uncontrollable rage. His mind was, he said, a blank and he was very confused. He strangled the deceased without intending to do so. Much of the account he gave was very similar to the answers he had given to the police but, significantly, he provided many details about the allegedly provocative nature of the conversation he had had with the deceased before he strangled her which he had not previously spoken about in his interviews with the police. Grounds of appeal Mr Ramanathan, who also appeared for the applicant in the court below, advanced three grounds of appeal.

- (1) Whether unlawful act manslaughter was an issue for jury In the 1st ground, it was submitted that the judge erred in withdrawing from the jury the issue of unlawful act manslaughter and / or refusing to direct the jury on that issue despite submissions by the prosecution in support of such a direction . At the conclusion of the evidence and before the commencement of the final speeches, the judge raised with counsel his proposed directions to the jury. The judge was then invited by counsel for the prosecution to give directions as to a verdict of unlawful and dangerous act manslaughter to cater for a possible situation in which the jury might consider that the applicant s intent to harm the deceased fell short of that required for murder. In this, he received support from Mr Ramanathan. Ultimately, the judge decided (page 317) that it was not in the interests of justice to give a direction which would have had the effect of leaving open the possibility of a manslaughter verdict by reason of an unlawful and dangerous act. Seemingly, the judge came to this conclusion on the basis of the decision in *R v Coutts* [2005] 1 Cr App R 517 at 538 because he made specific reference to paragraphs 83 and 84 in that case where Lord Woolf CJ, giving the judgment of the English Court of Appeal, had said: What is important here is that the judge accepted it would be unfair, and therefore unjust, to leave the alternative count for the very good reason that it involved a different and inconsistent case from that put forward by the prosecution. If, in

this case, manslaughter had been included, and the jury convicted the appellant of this offence, an appeal would almost inevitably have followed, and it is doubtful whether the conviction could have been regarded as safe. There may be cases where the approach based upon not withdrawing a defence from the jury should be extended to situations where the alternative verdict would not be a defence, but this case is not that situation. The judge's task is, as far as practical and appropriate to simplify the task of the jury, not to make it more complicated than it would otherwise be. 84 As our detailed consideration earlier in this judgment of the facts is intended to make clear, the case for the prosecution required the jury to consider a formidable body of circumstantial evidence. The critical issue for the jury to determine, however, was whether it was possible for the victim's death to have been an accident. In this situation, to introduce an alternative count, would make the jury's task far more complicated without enhancing the interests of justice. Properly understood, the authorities only require a jury to be directed as to manslaughter, as an alternative to murder, when it is in the interests of justice for this to happen. It is not in the interests of justice for this to happen where it would result in unfairness to a defendant, or where it would make the task of the jury far more difficult without there being any sufficient countervailing benefit which justifies an additional burden being placed upon the jury. The summing up to the jury in the present case was on 14 June 2006, the same day, as it so happens, as the Court of Appeal's decision in *R v Coutts* was the subject of argument on appeal in the House of Lords. The decision of the House of Lords (see: *R v Coutts* [2006] 1 WLR 2154) amounted to a reversal of Woolf LCJ's judgment and a return to the position which had previously been the law. The judgment in its totality is a lengthy one but it suffices to refer to a passage in Lord Rodger of Earlsferry's judgment at 2167: 23 The public interest in the administration of justice is, in my opinion, best served if in any trial on indictment the trial judge leaves to the jury, subject to any appropriate caution or warning, but irrespective of the wishes of trial counsel, any obvious alternative offence which there is evidence to support. I would not extend the rule to summary proceedings since, for all their potential importance to individuals, they do not engage the public interest to the same degree. I would also confine the rule to alternative verdicts obviously raised by the evidence: by that I refer to alternatives which should suggest themselves to the mind of any ordinarily knowledgeable and alert criminal judge, excluding alternatives which ingenious counsel may identify through diligent research after the trial. Application of this rule may in some cases benefit the defendant, protecting him against an excessive conviction. In other cases it may benefit the public, by providing for the conviction of a lawbreaker who deserves punishment. A defendant may, quite reasonably from his point of view, choose to roll the dice. But the interests of society should not depend on such a contingency. 24 It is of course fundamental that the duty to leave lesser verdicts to the jury should not be exercised so as to infringe a defendant's right to a fair trial. This might be so if it were shown that decisions were made at trial which would not have been made had the possibility of such a verdict been envisaged. But no such infringement has ordinarily been found where there is evidence of provocation not relied on by the defence, nor will it ordinarily be unfair to leave an alternative where a defendant who, resisting conviction of a more serious offence, succeeds in throwing doubt

on an ingredient of that offence and is as a result convicted of a lesser offence lacking that ingredient. There may be unfairness if the jury first learn of the alternative from the judge's summing-up, when counsel have not had the opportunity to address it in their closing speeches. But that risk is met if the proposed direction is indicated to counsel at some stage before they make their closing speeches. They can continue to discount the alternative in their closing speeches, but they can address the jury with knowledge of what the judge will direct. Had this course been followed in the present case there would have been no unfairness to the appellant, and while taking a contrary view the Court of Appeal did not identify the unfairness which it held would arise. It is not unfair to deprive a defendant, timely alerted to the possibility, of what may be an adventitious acquittal. This judgment represented a return to the position indicated by the Privy Council in *Von Starck v R* [2000] 1 WLR 1270 at 1275 where, in delivering the judgment, Lord Clyde said: The function and responsibility of the judge is greater and more onerous than the function and the responsibility of the counsel appearing for the prosecution and for the defence in a criminal trial. In particular counsel for a defendant may choose to present his case to the jury in the way which he considers best serves the interest of his client. The judge is required to put to the jury for their consideration in a fair and balanced manner the respective contentions which have been presented. But his responsibility does not end there. It is his responsibility not only to see that the trial is conducted with all due regard to the principle of fairness, but to place before the jury all the possible conclusions which may be open to them on the evidence which has been presented in the trial whether or not they have all been canvassed by either of the parties in their submissions. It is the duty of the judge to secure that the overall interests of justice are served in the resolution of the matter and that the jury is enabled to reach a sound conclusion on the facts in light of a complete understanding of the law applicable to them. If the evidence is wholly incredible, or so tenuous or uncertain that no reasonable jury could reasonably accept it, then of course the judge is entitled to put it aside. Returning to the instant case, there were three passages in the evidence of the applicant which in these proceedings Mr Ramanathan, supported by counsel for the respondent, suggested were sufficient to justify a direction being given to the jury to cater for the possibility of unlawful and dangerous act manslaughter. The first of these occurred in the applicant's evidence-in-chief when Mr Ramanathan asked him to explain the answer he had used in his interview (see: paragraph REF_Ref172003166 \r \h * MERGEFORMAT above): After that I came out and went into the office as the matter that ought not to be done was done anyway . The applicant needed time to find the place where this was recorded in the interview but, once this had been done, he was asked to explain what he meant by the phrase as the matter that ought not to be done was done anyway , he replied: I made a slip of tongue here. I meant that I thought to myself at that time, I had been working for the company for so many years, all I had got was seven days pay. For the Provident Fund, I had to wait, for how long I did not know. So I got the two keys to see whether I could get more money. Perhaps I was really greedy at that moment. That is, I mistakenly killed Wun Che. (Appeal bundle p. 290) However, the reference to having mistakenly killed the deceased cannot be read in isolation. The answers he went on to make in reply to the questions he was

asked immediately afterwards read as follows: [Mr. Ramanathan] : What exactly do you mean at counter 433 when you said, s already in the heat of the moment, unable to cool down, what is it you mean by that? [Applicant] : She was pushing me, making me angry. Her tone provoked me. And she pushed me. I therefore pushed her back. I could not stop my anger. I could not control my emotion. [Mr. Ramanathan] : If I could then direct you to counter 441 on page 391. You were asked about your state of mind at the time and you say you were so scared that you were confused. [Applicant] : That s right. I entirely lost control of myself. My mind went blank. I lost my common sense entirely. (Appeal bundle p. 290) It is plain to us that in overall context the answers the applicant was giving were directed to a defence of provocation. He, at no stage, suggested a lack of intent to cause grievous bodily harm. This exchange led to the second passage which it was suggested justified a direction for unlawful act manslaughter. This is taken from the applicant s evidence-in-chief and reads: [Mr. Ramanathan] : Mr Ho, on that evening when you went to see Madam Chung, did you intend to kill her? [Applicant] : No. [Mr. Ramanathan] : Did you intend to do ... [Applicant] : I intended to beg her to keep me in the company. I did not intend to hurt her. At that period of time, it was really difficult to find a job outside. (Appeal bundle pp. 290-291) As to these answers, it is apparent that the applicant was saying that he had not planned in advance to kill or hurt the deceased when he went to see her. The answers were not related to the applicant s intent at the time of the killing. The third passage, relied upon by Mr Ramanathan for present purposes, occurred in cross-examination of the applicant, as follows: [Mr Sham] Did you apply a great degree of force when you strangled the deceased? [Applicant] Yes. [Mr Sham] Did you ever consider to release the deceased when she struggled? [Applicant] I could not think of it. My mind when blank. I lost my common sense and I could not control myself. But I had not intended to kill her. (Appeal bundle p. 294) Whilst it may be that the applicant had not intended to kill the deceased, no suggestion had ever been made that he had not intended to cause her really serious injury. We are satisfied that there was no proper basis for unlawful act manslaughter to have been put before the jury. There was, however, one further difficulty which Mr Ramanathan was the first to agree he had to face. He had instructions from the applicant that the applicant wished to plead guilty, as in due course he did, to manslaughter. The basis for this plea was provocation and, quite rightly, he had informed the prosecutor in the court below (who now appears for the respondent), Mr Alain Sham, of this. This obviously put Mr Ramanathan in a somewhat curious position when the judge raised with him whether he should leave unlawful act manslaughter to the jury after Mr Sham had tried to persuade the judge to do so. Mr Ramanathan was alert to the fact that if this was left as a possible defence for the jury to consider, this was in conflict with the applicant s own instructions to him. Manslaughter by reason of provocation involved an acceptance on the applicant s part that he had acted with a murderous intent when he killed the deceased, that is, the applicant was either intending to kill her or, at the very least, intending to cause her really serious bodily injury. In these circumstances, Mr Ramanathan appreciated that he would be unable to make any reference to this alternative verdict in his closing speech, although he perceived it as his duty to his client to support Mr Sham s invitation to the judge to deal with unlawful act manslaughter in

the summing up. In reality, the evidence in this case left open only one possible alternative to murder, namely manslaughter by reason of provocation. Mr Sham, whilst he would have been quite entitled at trial to have brought out in cross-examination the basis of the applicant's guilty plea to manslaughter, most unfortunately failed to do so. Had he done so, this ground of appeal would probably never have arisen as doubtless the judge would not have been invited to include this alternative basis of manslaughter in the summing up. Whilst, therefore, the judge ruled out an unlawful act manslaughter direction on a premise which has, since his ruling, been corrected by the House of Lords in *R v Coutts* (above), we are satisfied that there was in any event no proper evidential foundation for a verdict of manslaughter on any footing other than provocation. It follows that, in our opinion, the applicant has not been denied the chance of a verdict of unlawful act manslaughter as there was no evidence to justify such a conclusion. This ground fails.

- (2) and (3) The directions on provocation during the jury's deliberations Mr Ramanathan candidly described the two remaining grounds of appeal, which are closely linked, as not his main points. In the first of these (ground 2), he argued that when the jury sought guidance on the second limb of the trial judge's directions on the issue of provocation (by which time the jury had already deliberated for 5 hours and were, as their note disclosed, divided 4-3), the judge erred in giving further directions dealing with facts on a selective basis which the jury had not sought. The other point (ground 3) related to the same stage of the proceedings and suggested that the judge had failed to present to the jury facts which were capable of supporting the applicant's case. In the judge's original directions, on provocation, which are not criticised, the judge had posed the question: How then do you determine whether the defendant was or may have been provoked to do as he did? There are two questions that you will have to consider before you are entitled to conclude that the defendant was, or may have been, provoked on this occasion. Firstly, may Madam Chung's conduct, that is the things she did or things she said, or both, have provoked, that is, caused the defendant suddenly and temporarily to lose self-control? If you are sure that the answer to that question is, then the prosecution will have disproved provocation and, providing the prosecution has made you sure of the ingredients of the offence of murder to which I have referred, your verdict will be guilty of murder. If, however, your answer to that question is, then you must go on to consider the second question; namely, may that conduct have been such as to cause a reasonable and sober person of the defendant's age and sex to do as he did? (Appeal bundle p. 26) These directions were also provided to the jury in a printed handout. By reference to this, their question which the judge read to counsel was: The vote result is four, three. We would like to clarify a question on provocation 2. May that conduct be such as to cause a reasonable and sober person of the defendant's age and sex to do as he did? The judge, having indicated how he intended to answer the question and having heard submissions from counsel, then called the jury back into the courtroom and, having asked them to look at the second question in the printed handout on provocation, he went on to say: May that conduct have been such as to cause a reasonable

- let me emphasise these words reasonable and sober person of the defendant s age
- let me add, 27 at the relevant time and sex
- that is male to do as he did? reasonable person is simply a person who has that degree of self-control that is to be expected of the ordinary citizen who was sober and is of the defendant s sex and age. Therefore, when considering this question, you must take into account everything that was done and said according to the effect that, in your opinion, it would have on that ordinary - let me emphasise that - person. Now, members of the jury, you are ordinary, reasonable, sober people of Hong Kong. And let me add this direction. When deciding this, bear in mind that the law expects people to exercise control over their emotions. The issue is - returning now to the question - may the conduct of Madam Chung have been such as to cause a reasonable and sober person of the defendant s age and sex to do as he did? Well, what did he do? At midnight, in the course of what he said was an argument with Madam Chung, he pushed a middle-aged lady to the floor, jumped on her, sat on her, strangled her, ignoring her attempts to prise his hands away from her neck to save her life. I hope, members of the jury, that that assists you in your further deliberations. (Appeal bundle pp. 52-53) Mr Ramanathan s complaint was that these directions failed to strike a balance in the presentation of the evidence as they only highlighted what the applicant actually did whereas, in fairness, he submitted, the judge ought also to have drawn attention to what caused the applicant to act as he did and the state of mind he was in at the time. The matters which Mr Ramanathan complained were omitted from this direction were however, covered by the first question in the printed handout, namely, the conduct of the deceased. The jury had specifically not asked about this aspect of provocation and, in any event, the fact that the jury were considering the second question at all makes it clear that they had already answered the first question in the affirmative and had, in other words, satisfied themselves that the deceased s conduct may have provoked the applicant suddenly and temporarily to lose his self-control. The judge s directions reminded the jury what the applicant had actually done to the deceased which had to be considered with everything that was done and said according to the effect that, in [their] opinion, it would have on [the] ordinary person . In our view, the directions which the judge gave to the jury were entirely appropriate and were neither unfair nor unbalanced. These grounds fail.

Conclusion

The application is dismissed. (M. Stuart-Moore) macrobutton nomacro Vice-President (M.P. Burrell) Judge of the Court of First Instance (C-M Beeson) Judge of the Court of First Instance Mr Alain Sham, SADPP, and Mr Isaac Tam, SGC, of the Department of Justice, for the Respondent. Mr Kumar Ramanathan, instructed by Messrs Lo, Chan & Leung, assigned by Director of Legal Aid, for the macrobutton nomacro Applicant PAGE - PAGE - A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H 1udk 1udk 1udk V "0 "0 "0 "0 "0! "0" "0# "0\$ "0% "0& i\$&`G Normal.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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