

HONG KONG / JUDGMENT

HKSAR v. ISLAM JAVED IQBAL

[2024] HKCA 528

COURT

Court of Appeal

DECIDED

5 June 2024

CASE / FILE NUMBER

CACC33/2023

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CACC 33/2023

[2024] HKCA 528

in the high court of the

hong kong special administrative region

court of appeal

criminal appeal no 33 of 2023

(on appeal from HCCC NO 51 of 2021)

BETWEEN

HKSAR

Respondent

and

Islam Javed Iqbal

Applicant

Before: Hon Macrae VP in Court

Date of Hearing: 5 June 2024

Date of Judgment: 5 June 2024

J U D G M E N T

The applicant faced one count of murder (in the case of HCCC 51/2021), to which he pleaded not guilty; and another count of theft (in the case of HCCC 52/2021), to which he pleaded guilty. He was convicted unanimously of murder on 2 February 2023, following a trial before Yau J (“the judge”) and a jury of nine. On 6 February 2023, the judge sentenced the applicant to life imprisonment for murder and ordered an absolute discharge for the theft count. He now appeals against his conviction of murder only.

The prosecution case

On 28 December 2019, the applicant went hiking with his girlfriend, after which they had a drink somewhere near Hi Lee Path in Yuen Long, New Territories. At 9 pm, after finishing a bottle of vodka with his girlfriend, the applicant went to a 7-Eleven convenience store, situated in Kik Yeung Road, Yuen Long, where he stole two cans of beer; this incident formed the subject matter of the theft charge. The applicant was chased by members of staff of the store, including Mr Tang (“the deceased”).

There followed an attack by the applicant on the deceased at On Ning Road, which was captured by one of the CCTV cameras of a shop called “Sufi Fashions”, on the ground floor of Man Yip Building in Hi Lee Path. The relevant CCTV footage (Exhibit P62) was admitted into evidence pursuant to section 65C of the Criminal Procedure Ordinance, Cap 221, although the view of the scene was partially obstructed by, amongst other articles, the pavement railings and the quality of the video recording was not perfect. Accordingly, a “brightened and magnified version” of Exhibit P62 was also admitted into evidence, marked as Exhibit P62A.

What can be seen from Exhibit P62 and P62A, and there was no dispute about his movements in this regard, is that, after entering Hi Lee Path, the applicant suddenly turned back and ran in the direction of On Ning Road. The deceased was then observed running away from the applicant along On Ning Road, but somehow the deceased stumbled and fell. He was able to get up himself; but, as he was doing so, the applicant kicked him at his upper body and stomped on his head a number of times before leaving the scene along Hi Lee Path. It was also the evidence of PW2 and PW3, who were civilian witnesses standing on Hi Lee Path at the material time, that the applicant had in fact kicked the deceased five to six times and spoken foul language to him.

On 28 December 2019, at 10:18 pm, the deceased was conveyed to the Accident & Emergency Department of Tuen Mun Hospital; and, on 29 December 2019, transferred to the Anaesthesia & Intensive Care Unit of the same hospital. On 30 December 2019, at 3:31 pm, the deceased was declared dead. The autopsy performed by a forensic pathologist, Dr Chiao Wing-fu, on 7 January 2020 recorded that:

“...the deceased had received a large blunt force impact at right side of head causing a laceration with marked bruising around the scalp and fracture on the underlying right side of skull...”

[There were] fractures over the orbital roofs (front base of skull) and extensive areas of haemorrhage and brain damage at the lateral aspect of left temporal lobe. Considering the nature and pattern of these injuries, they could be ‘contrecoup’ injuries, which were inflicted when opposite side of the head was forcefully landing on a blunt hard unyielding surface.”

It was Dr Chiao’s conclusion that:

“...the cause of death as shown by the autopsy was due to ‘Head Injury’. The head injury could be satisfactorily explained by bumping of right side of head against a blunt hard and unyielding surface in a single fall.”

The applicant participated in four video-recorded interviews (“VRIs”). Initially, in the 1st and 2nd VRIs conducted on 29 and 30 December 2019 respectively, he denied involvement in the incident. In the 3rd VRI conducted on 31 December 2019 (a video re-enactment was conducted on the same day), he admitted stealing two cans of beer from a 7-Eleven convenience store. He said he was then chased by the deceased, who threatened to beat him to death, and did in fact attack him. He therefore pushed the deceased once who fell on the ground, and swore at him. He then kicked (and/or stepped on) the side of the deceased’s face or forehead twice. In the 4th VRI conducted on 31 December 2019, the applicant denied any intention of killing the deceased and said it was a case of manslaughter.

The prosecution position was that the applicant was neither drunk nor provoked at the time of the offence; nor was he acting in self-defence. In order to substantiate the element of the intention to kill or cause grievous bodily harm, the prosecution pointed to “the intensity, the strength, the determination of the defendant’s attack on the deceased”, including his head, to describe the assault on the deceased.

The defence case

The applicant elected to testify at trial. His evidence was generally consistent with his account in the 3rd VRI as summarised above, although he accepted that he had told a lie that the deceased had initially attacked him; rather, the deceased had only tried to, but did not actually, grab him. It was contended that, when he pushed the deceased, he was acting in self-defence.

It was also submitted that the deceased suffered a severe head injury as a result of falling over and hitting the ground, which was therefore an accident only; and that the subsequent kicking by the applicant did not cause his death. In cross-examination of Dr Chiao, the following questions were asked (and answered):

“Q.

In your examination of the deceased, did you see any signs where -- to indicate that he had been the victim of a kick or the kicks?

A.

I don't have any specific medical findings to support that the deceased had been kicked.

Q.

As we've seen on the CCTV, it indicates that he appears to be kicking the victim, but there was no injuries or signs to substantiate that, is that the situation?

A.

Correct. I don't have this kind of medical evidence to support that.

Q.

Was there anything to indicate that the kicks would have in any way contributed to the deceased's death?

A.

I have no medical evidence to support that any kicking had occurred and the kicking that had contributed to the cause of death, I don't have this evidence.

Q.

No evidence whatsoever to indicate that they contributed to the deceased's death.

A.

Correct."

The applicant also relied, as a partial defence to murder, on the fact that he was provoked; however, that is not the focus of this appeal. It is therefore unnecessary to examine this particular defence in any detail.

The summing-up

The principal complaints in this appeal centre on what the judge said to the jury in respect of the attack depicted in the CCTV footage. It is therefore relevant to examine closely the directions in the summing-up on this matter.

On the first day of his summing-up, the judge told the jury that:

"You can see the CCTV clip can in fact be divided into three continuous scenes. In the first scene, Tang was running away from the defendant. He tripped himself and fell on the ground. That is the first scene. The second scene is that Tang got up immediately and sat on the ground. The defendant kicked him and he fell flat on the ground. This is the second scene. In the third scene, Tang was lying on the ground and the defendant kicked or stamped on him for a number of times."

Now, if you come to the conclusion that the fatal injury which killed Tang was caused or might have been caused only by the first scene, you will find that the defendant did not kill Tang. You remember the first scene was -- is Tang tripped himself and fall. You will have to find him not guilty of murder or any one of the offences of manslaughter which we will come to later.

If you are not sure which scene caused the death of Tang, you still have to find him not guilty of murder or any one of the offences of manslaughter. If you are sure that the fatal head injury of Tang was caused by the second scene or the third scene or a combination of the two, you will find that Tang was killed by the defendant.

You will remember that Mr Donald says in his closing submission that the pathologist is of the opinion that kicking in no way caused the death of Tang. Now, with due respect, this is not the evidence of the pathologist. What the pathologist says is that there is no specific finding or evidence that Tang had been kicked or that kicking had contributed to the death of Tang. He adds that kicking could cause depressed fractures of the head, but there is no such specific finding, and that whether the injury of the head was caused by kicking did not depend on the nature of the shoes but the energy delivered.

It is of course a question for you to decide whether the kicking or stamping on Tang caused the fatal injury on the head. If you are sure that the fatal head injury was caused by any combination of the three scenes, Tang was still killed by the defendant. If you are sure that Tang was killed by the defendant, you consider the second element of murder that the killing was not done in lawful self-defence. How you consider this element will depend on your finding of facts."

In light of the applicant's evidence that he pushed the deceased (which was not depicted in the CCTV footage), the judge said to the jury:

"And if the fatal head injury was caused by the pushing scene in combination with the first scene in the CCTV clip, again the defendant would not be liable because in scene 1, well, in the first scene of the CCTV clip, the injury was caused by the defendant tripping himself and fell down. That is the first scenario.

The second scenario: if you are sure that the fatal head injury was caused by the pushing scene only or in combination with scene 2 or scene 3 depicted in the CCTV clip and you are sure that the defendant was not acting in self-defence, the defendant killed Tang under the first element of murder.

So to explain this a bit more, if you find there was or may be -- might be a pushing scene but you are sure that in the pushing scene the defendant was not acting in self-defence, so if the fatal injury had been resulted from the pushing scene, then the defendant obviously will be liable.

Similarly, if the fatal injury was caused as a result of the pushing scene which you find that the defendant was not acting in self-defence, in combination with scene 2 or scene 3 or both scene 2 and scene 3 in the CCTV clip, of course the defendant will be liable because in the pushing scene, you are sure he is not acting in self-defence, and as I have told you, for the first and second scene in the CCTV clip, legally speaking, they do not amount to self-defence and the defendant will have to be liable.”

When the court resumed on the second day of the summing-up, the judge continued as follows:

“Now, regarding the CCTV clip, I watched it again very carefully yesterday. I discovered I made some mistake when I tell you what I have seen on the CCTV footage, but I must, I must emphasise I am doing it only as a review of the evidence. But how to interpret the footage, what you actually see on the footage is a question for you. You must make your own view as to make what you see on the footage. But in my review of the evidence, of course I have to go into the CCTV footage but at the end of the day, you are to decide what you can see in the footage. And the correction concerns the first two scenes in the CCTV clip.

Now, in the first scene, on the CCTV footage, the defendant can be seen walking into Hi Lee Path from On Ning Road. The timeframe is 00:20. At timeframe 00:29, he turned around and walked back towards On Ning Road. He started to run at timeframe 00:32, making a right turn into On Ning Road. And at timeframe 00:34, at the top edge of the screen, you can see through the railings a person was running away from the defendant, in the opposite of the defendant. And then, of course, there is no dispute this person was Tang. And although it is only at the upper edge of the screen, you can see clearly a person running.

And then at timeframe 00:37, Tang tripped himself and fell. Here I made a mistake and I now tell you the version which I see when I watch the CCTV again. Now, Tang tripped himself and he fell forward with the hands landing on the ground, and so as a result, he was on four on the ground. And then he did not fall completely on the ground. So this is the first scene, but I must emphasise again you have to watch the CCTV very carefully during your deliberation to see how you interpret the CCTV footage.

Then Tang -- at timeframe 00:39 -- Tang was trying to get up, and before he could stand upright, he was kicked by the defendant, causing him to fall flat on the ground, and then he did not get up again. That is the second scene.

The third scene will be concerning about the defendant either kicking or stamping on him. So that is the correction I want to make.

Now, but of course, Mr Donald -- I also make a mistake there. Mr Donald in fact in his submission tells you that as he watched the CCTV, what he sees is that when in scene No. 2, the second scene, sorry, in the first scene, when Tang tripped himself, Mr Donald says he fell on the ground and the right side of his body and head hit on the ground. That is the submission of Mr Donald.

So you can see the importance of yourself scrutinising the CCTV footage to decide what actually was depicted in the CCTV footage and what actually happened at that time. So you must - I must emphasise again - you must form your own view as to what you can see. I do it in the review of evidence but you are the ones who are to decide what the facts of the case are.”

In order to direct the jury on the effect of the applicant’s pushing the deceased, the judge provided them with a written handout, the contents of which were read out as part of his summing-up:

“In this summing-up, I describe the encounter of Tang and the defendant by use of four scenes. The pushing scene and the 3 scenes depicted in the CCTV clip. The pushing scene can be further categorised as pushing scene in self-defence and pushing scene not in self-defence. The former is when you find that the defendant was or might have been acting in self-defence in pushing Tang while the latter is when you are sure that the defendant was not acting in self-defence in pushing Tang.”

Perfected grounds of appeal

By Ground 1, Mr Donald, who again acts for the applicant, but now with Ms Mohamed, argues that the judge erred in providing the jury, in his initial directions, with factually inaccurate descriptions of the various “scenes” broken down from the CCTV footage. Mr Donald submits that, although the mistake was subsequently rectified by the judge himself and clarified with the jury, the resulting prejudicial effect was not properly remedied for it was still contrary to the evidence to tell the jury that a combination of events or “scenes” could have caused the death. It is complained that the judge not only wrongly usurped the function of the jury in make his own findings of fact himself drawn from the CCTV footage, but his directions in relation to the “scenes” were wrong and confusing and provided a new interpretation, namely that the deceased fell on all fours and not completely to the ground, which neither party had suggested at trial. Accordingly, the defence were not given a fair opportunity to counter the suggestion or put it to Dr Chiao for his comment.

By Ground 2, Mr Donald contends that the judge should have directed the jury that, if they did not accept his interpretation of the CCTV footage, they should apply their own interpretation of the facts to the law. Absent such a direction, the jury might have convicted the applicant on an erroneous factual basis.

By Ground 3, Mr Donald states that the judge misunderstood the evidence of Dr Chiao and thereby unfairly corrected the defence submission that the kicking in no way caused the death of the deceased. He argues that, since Dr Chiao had testified that there was no medical evidence to support any kicking; even if in fact kicks had been administered, such kicks would not have been the cause of death.

Respondent's submission

Ms Ng, for the respondent, submits that it was the common position of both parties to adopt a breakdown of the CCTV footage. The prosecution aimed to show that each “scene” constituted a calculated attack: the defence aimed to demonstrate that the falling over of the deceased, resulting in his severe head injury, was by itself the cause of his death. In the result, Ms Ng submits that the judge could not be criticised for following the same approach in his summing-up to assist the jury.

It could hardly have escaped the jury's attention from the judge's emphatic and repeated directions on the matter that they were to form their own interpretation of the CCTV footage. Ms Ng argues that there was nothing wrong in telling the jury that the death of the deceased could be caused by any of the “scenes” or a combination of any of them, since it was important to consider how his body landed on, or his head hit, the ground; and whether it resulted in the fatal head injury before he was further attacked by the applicant. Further, the judge could not be criticised for incorporating the pushing scenario, which derived from the applicant's own evidence, and introduced a distinction in law between defensive and offensive pushing, on which the jury had to be properly directed.

Regarding the judge's mistaken descriptions of the various “scenes”, it is the respondent's position that such error did not affect the flow of the jury's consideration of different combinations of those scenes. Moreover, the facts were a matter for them. As for the complaint concerning the judge's new interpretation of the CCTV footage, Ms Ng submits that Mr Donald had, in his closing speech, invited the jury to interpret the CCTV footage in the way he advocated. In any event, how the CCTV footage should be interpreted was a matter for the jury, not for counsel or the judge, or for Dr Chiao.

In response to Ground 3, Ms Ng submits that the absence of medical evidence of kicks to the body of the deceased did not mean that no kicking had in fact taken place. There was clear evidence before the jury, from the CCTV footage, from eyewitnesses and from the applicant himself that he had in fact kicked the deceased. The circumstances in which those kicks took place and their significance in relation to the cause of death were factual issues for the jury to determine.

Consideration

I do not propose to dissect the grounds of appeal advanced and determine whether they can or cannot individually be regarded as reasonably arguable. All three grounds of appeal are nevertheless different aspects of the same complaint, which is essentially that the jury did not receive correct directions on the issue of causation. Thus, in general terms, Grounds 1 and 2 complain about the correctness and propriety of the judge's analysis and interpretation (or re-interpretation) of the CCTV footage in respect of the issue of causation, while Ground 3 suggests that his directions as to the pathologist's evidence on the effect of the kicking were neither correct nor consistent with the cause of death contended for by the prosecution. Ultimately, all

three grounds of appeal bear on the issue of causation.

I am satisfied that the issue of causation, which underlies each of the grounds of appeal, is reasonably arguable. Accordingly, I shall give leave to the applicant to appeal against his conviction.

(Andrew Macrae)

Vice President

Ms Claudia Ng SPP, of the Department of Justice, for the Respondent

Mr Richard D Donald and Ms Nisha Mohamed (complimentary brief), instructed by Chiu, Szeto & Cheng, assigned by the Director of Legal Aid, for the Applicant

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