

HONG KONG / JUDGMENT

HKSAR v. LIM KHI CHONG

COURT

Court of Appeal

DECIDED

9 November 2007

CASE / FILE NUMBER

CACC159/2007

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bjbj on nomacro Applicant

Before: Hon Stuart-Moore VP and Tong J Date of Hearing: 7 November 2007 Date of Judgment: 9 November 2007 J U D G M E N T Stuart-Moore, macrobutton nomacro VP (giving the judgment of the Court):

Background

This was an application for leave to appeal against a 10-year sentence imposed on 27 April 2007 by Beeson J for manslaughter. The applicant was tried for murder and acquitted after his offer to plead guilty to manslaughter had been rejected by the prosecution at the outset of the trial. At trial, there were effectively only two issues for the jury to determine. These related to the intent of the applicant at the time he killed the deceased and, if that was established, whether he had acted in provocation. The jury convicted of manslaughter by reason of provocation. The facts were straightforward, much of the background coming from the applicant's replies in his interviews with the police. He did not give evidence at trial. The deceased was a 30-year old woman who worked as a prostitute from her home address. She had met the applicant in the street on 21 June 2006 and an arrangement was made between them to meet later at her flat. The meeting duly took place and lasted about thirty minutes. The applicant paid \$200 for a sexual service. Later in the day, a further meeting took place between the deceased and the applicant. On this occasion, the applicant paid \$500 and said that he wanted to stay the night. When the applicant indicated that he was either unable or unwilling to take part in a further sexual encounter, the deceased went to her computer, apparently to continue dealing with her shares portfolio. She told the applicant that he could profit from her knowledge and continued to speak to him until well into the early hours of the morning. It seems that he largely ignored her. He was feeling tired and wanted to go to sleep but, according to him, she kept directing his attention to the screen. She had also suggested that the applicant should marry her as he had divorced his wife. He eventually complained about her talking and, at some stage between about 3.00 am and 6.00 am, the deceased put her computer away. At about that time, or soon afterwards, the

applicant killed her. The forensic pathologist's estimate of the time of death was between 3.25 am and 6.25 am. However, the applicant's account to the police was that he had killed the deceased at 8.00 am shortly after he had indicated to her that he would be leaving the flat. The applicant said that even so the deceased had gone on reminding him that he should invest his money in the stock market and she again referred to his divorce and suggested that he should marry her. On this occasion, the applicant said that he became angry and lost his temper with her. He grabbed the deceased with his arms. She cried out and struggled and the more she struggled the more tightly he grabbed her. He only let go of his grip on her after 2 to 3 minutes by which time she was motionless. The cause of death was later established as having been pressure on the neck and the pathologist, Dr Lam, stated that manual strangulation was the likely cause of this. The deceased's body was left face down on the bed. The applicant made no attempt to resuscitate her or to call for medical assistance. On the contrary, he looked around for things to steal. He took a number of small items of value and then placed flammable materials on top of the deceased's body and set fire to them. This was done, as he admitted, with a view to escaping detection. He also used a fire hose to put out the fire in the belief, as he told the police, that this would erase any fingerprints he may have left behind. In fact, he had not entirely extinguished the fire as it was still burning when the fire brigade arrived some considerable time after smoke had first been noticed coming from the flat. The fire was not, however, a contributory cause of death because, although the body was badly burnt down the left side, the pathologist was able to establish that the deceased would already have died by that stage. The CCTV cameras at the deceased's address recorded someone leaving the deceased's flat at just after 8.00 am. In the light of his admissions, this was plainly the applicant. Later, he sold all the items he had stolen except one. He managed to avoid detection for almost a month. It would be unwise to reveal the way that the applicant was eventually traced as the killer because future enquires may use the same method of detection again. It suffices to say that the police were, by painstaking research and careful investigation, eventually able to establish the probable identity of the killer having had no direct leads about his identity beforehand. The applicant was then made the subject of a surveillance exercise by the police until he was arrested on 17 July 2006. Thereafter, the applicant made a full confession to the offence. Grounds of appeal Two grounds of appeal were advanced on the applicant's behalf by Mr Hoosen. He submitted, firstly, that the applicant had not been given a sufficient discount for his offer to plead guilty to manslaughter and, secondly, that in all the circumstances a 10-year sentence was manifestly excessive.

- (1) Discount for offer to plead guilty Mr Hoosen emphasised, in the context of what was described as the remorse felt by the applicant in the aftermath of this killing, that there had not only been an offer made to the prosecution of a plea guilty to manslaughter at a pre-trial review but, from the time of his arrest, the applicant had made a full confession of his guilt to the police. We note also that the applicant had not resiled from this position at trial by seeking to put forward a defence which, if believed, might have resulted in his complete acquittal. The judge, however, had the applicant's offer to plead guilty well in mind at the time of sentencing because Mr Hoosen, who also represented the applicant at trial, was reminded by the judge of this feature of the case during his speech in mitigation. When

passing sentence, the judge said: Taking all factors into account, I consider that a sentence of 10 years is appropriate (Emphasis added) (Appeal bundle p. 63) The judge did not need to say more. The offer of a guilty plea was obviously a circumstance which was taken into account and it is well known, since the decision in *R v Lee Sau-ping* CACC 189/1995, that a judge is under no obligation in a case of manslaughter to fix a starting point for sentence. As P Chan J (as he then was) put the matter: This is one class of offence where a judge may well not be able conscientiously to fix a starting point. There is a wide range of sentence, from probation to life imprisonment. A sentencing judge may well feel, having taken an overall view of the matter, that all he can finally do is to decide on the appropriate sentence.

- (2) Whether sentence manifestly excessive We turn, therefore, to the 2nd ground of appeal which makes the complaint, in effect, that the sentence was inappropriate in that it was manifestly excessive. Mr Hoosen described the case as a rather unusual one as the provocation was not of the kind normally encountered where someone, following a heated argument, had lost their self-control. Here, he suggested, it was the cumulative effect of the deceased talking until late into the night and the references to marriage and divorce which had caused the applicant to lose his self-control. In this regard, Mr Hoosen invited our attention to a psychiatric report made on 26 March 2007 by Dr Dominic Lee Tak-shing. Amongst other things, Dr Lee reported: 2.4 During my interview with the accused, he explained that he felt upset and angry whenever the issue of marital divorce was raised. On one occasion, during a vacation trip, when his friends talked incessantly about his divorce, he was so angry that he lost his temper. He scolded his friends and slapped on a nearby object. He felt an outpour of emotions, and lost his self-control. He was so agitated that his mind was empty. This happened only once, as he usually stayed away from the topic, kept himself quiet, or would walk away if the issue of divorce was brought up. 3.3 The accused called the victim again around 9 pm as he felt bored and did not want to meet his nagging father at home. He went to victim's flat again. The victim asked about his divorce, asked him to marry her, and asked him to bring money for share trading. Instead of telling the victim squarely that he would not, he said s leave it [to] tomorrow . The victim continued to dwell on the same topics the whole night and because of that, he could not fall off to sleep. 3.4 The accused was angry but he could not leave. He knew that his father regularly locked the door from inside at night. 3.5 When it was near dawn, the victim intensified her efforts. She told him that she loved him and would like to marry him. She also asked for money again. The accused felt very angry and depressed . 3.6 When dawn came, he wanted to rise and the victim started to caress his genital. He had no erection as he was already angry. He quickly gestured that he would not like the service (even though he had already paid). He felt emotion boiling inside. The victim reminded him to divorce and to come the next day with the money. He was angry and agitated. So he embraced the victim from her back to release his anger. The victim screamed and he was so scared that he tightened his grip and told her not to shout. The victim screamed even louder and he tightened his grip further. Later, when he loosened his grip, he found the victim dead. Dr Lee made reference also to what was said to have been a suicide attempt on the part of the applicant while he was in custody when the

applicant had knocked his head against a concrete seat. In conclusion, Dr Lee's report suggested that the applicant was someone who by bottling up his emotions, ran the risk of an anger attack when his emotions spill over. In his opinion, the deceased had: unknowingly provoked the [applicant] by repeatedly ask[ing] about the failed marriage and suggested divorce. The [applicant] was trapped in a whole night of harassment. He lost his control eventually when the nagging was intensified. It was not suggested at any stage of the proceedings in this case, either before or during the trial, that the applicant was in a position to advance a defence of diminished responsibility. Mr Hoosen confirmed that this was so in the present proceedings. Having read Dr Lee's report, we have been left with strong impression that the provocation was minimal. We considered that if what the applicant had said in his interviews, reinforced by what he had told Dr Lee, was enough to have provoked the applicant to kill, it might well be that the applicant is to be regarded, potentially at least, as an extremely dangerous man. There was nothing to stop the applicant walking away from the deceased's flat if he could feel his irritation with the deceased rising to a serious level of anger. Instead, he chose to strangle the deceased with his bare hands, to steal her belongings and to mutilate her body by fire. The applicant had not even informed the deceased that the subject of his divorce was a sensitive topic. In fact, as Mr Robert Lee for the respondent pointed out, it was the applicant who had first brought up family matters. Then, when the deceased mentioned that he might think about marrying her he had replied: Let me think about it. It is not without significance also that the applicant informed the police that his divorce had been eleven years beforehand. Mr Lee drew our attention to a number of decisions of this court where we have previously considered sentences for manslaughter. Some of these, where male defendants, having lost their temper with female victims, had gone on to kill in a variety of circumstances giving rise to provocation, had similarities with the present case including: *R v Yu Wing-sze* CACC 372/1995, *R v Szeto Ken* alias *Szeto Shin* CACC 687/1996, *HKSAR v Sin Kwai-ching* CACC 176/2004, *HKSAR v Tam Shu-kin* CACC 444/2004, and *HKSAR v Lam Chun-fai* CACC 486/2005. We do not propose to review these cases because, for present purposes, it suffices to say that the applicant's sentence was well within the appropriate bracket for this offence. In our view, the applicant can consider himself fortunate that his sentence was not longer because, as we have already indicated, the minimal nature of the provocation makes this a particularly serious case.

Conclusion

The application is dismissed. Commendation A superficial reading of this case might give the impression that this was a relatively straightforward investigation of no particular complexity. If so, it has to be said that this was anything but a simple enquiry. Until the applicant was arrested and had confessed his involvement nothing, including the CCTV recordings from the deceased's address, was found at the scene of the crime to connect the applicant to the killing. There was, of course, no eyewitness to the killing and no relevant fingerprints were found. Only after the applicant had been arrested, and a sample was taken from him for comparison purposes, were the police able to match a sample taken from a fingernail of the deceased to the applicant's DNA

profile. The investigations by the team of officers who conducted this enquiry were remarkable for their thoroughness, vision and dedicated professionalism. It is not in the public interest that there should be disclosure of the means by which the applicant was eventually tracked down, after long hours and extensive enquiries in numerous different directions, as the same methods of detection might well assist in future cases. However, we do not think it would be right to leave this case without commending the officers who were at the forefront of the enquiry for their skill and resolute determination to find the killer. This was, by any standards, an unusually difficult investigation, requiring the highest degree of expertise as well as patient dedication to duty. The precise roles played by the officers in this investigation are documented in a detailed report by WSIP Chung Wing-man, Eve, together with covering memoranda from Mr Robert S K Lee for the respondent. We have been able to study this and Mr Hoosen has been offered access to these documents. The officers we commend are: CIP Chan Lok-wing; WSIP Chung Wing-man, Eve; SGT 52558 Lo Chi-sing; SGT 50877 Wong Hon-man; SGT 46967 Sze Kin-mo; WPC 55809 Chow Mo-yin; PC 54691 Cheung Tan-ling; PC 51486 Chu Ka-hung; PC 11309 Chan Yiu-tong; and PC 53551 Sin Chi-shing. We shall invite Mr Lee to ensure that a copy of this judgment is provided to the Commissioner of the Hong Kong Police Force. We express our gratitude on behalf of the general public in Hong Kong to those officers we have commended. (M. Stuart-Moore) macrobutton nomacro Vice-President (Louis Tong) Judge of the Court of First Instance Mr Robert S K Lee, SADPP, and Ms Kathie Cheung, SGC, of the Department of Justice, for the Respondent. Mr A A Hoosen, instructed by Messrs Haldanes, 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 I J K L M N O P Q R S T U V 1udk 1udk 1udk G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V "0 "0 "0 i\$&`G Normal.dot setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

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