

HONG KONG / JUDGMENT

HKSAR v. NGAN LAK KWONG

COURT

Court of Appeal

DECIDED

26 October 2012

CASE / FILE NUMBER

CACC14/2010

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bjbj RIQ) imWS) Court Date of Hearing: 26 October 2012 Date of Judgment: 26 October 2012 J U D G M E N T Hon Stock VP (giving the judgment of the Court): On 15 August 2012 and 20 September 2012 respectively this Court albeit differently constituted to each case dismissed the applications for leave to appeal against conviction for murder in Ngan Lak kwong and Tam Ho Nam. One common issue in both cases was whether the judge was wrong to have put to the jury the direction you must take into account everything which was done according to the effect which, in your opinion, it would have on that ordinary person . The Court held that placed in proper context the direction was not a misdirection. Each applicant through Mr McCoy SC now asks this Court to certify the following as a question of law of great and general importance: Under the law of provocation, is it a misdirection in law to direct the jury that when considering the usual question Was or may that conduct have been such as to cause an ordinary and sober person of the accused s age, sex and personal circumstances to do as he did? that ...you must take into account everything which was done according to the effect which, in your opinion, it would have on that ordinary person (emphasis added)? McCoy suggests that the two limbs are inconsistent one with the other and that the second limb is a misdirection in that it asks the jury to consider what impact provocative conduct in a case would have on an ordinary person rather than what impact it would or may have. The question posed for certification is, we suggest, somewhat non-contextual for it does not address the overall impact of the directions and the ultimate question which the jury is asked to consider. The standard direction poses to the jury the key question: Was or may that conduct have been such as to cause an ordinary and sober person of the defendant s age and sex to do as he did ? And concludes by telling the jury that your answer is that what was done and/or said would or might have caused an ordinary, sober person of the defendant s age and sex to do as he did, your verdict will be Not guilty of murder but guilty of manslaughter by reason of provocation. (Emphasis added) Further, we do not, with respect, agree that, if read in full, there is the suggested inconsistency or that the directions give rise to the danger that Mr McCoy suggests. We explained the intended effect of the full directions and the place within them of the impugned direction at para 138 of our judgment in Ngan Lak-kwong:

138. [Section 4 of the Homicide Ordinance {from which the impugned direction is drawn}] requires the jury to consider how a reasonable person would respond to the provocation offered. The answer may be one of the following three, namely (1) a reasonable person would not respond as the accused did; (2) a reasonable person would respond as the accused did; or (3) a reasonable person may respond as the accused did. If it is the 2nd or 3rd answer, then the prosecution has not negated provocation. Although the jury must ask themselves how a reasonable person would respond, the ultimate question for determination is whether on the facts found in the case, the act or series of acts done and/or words spoken which caused in the accused a sudden and temporary loss of self-control would or may cause a reasonable person to lose his or her self-control and to behave as the accused did Looked at out of context, the impugned direction (take into account according to the effect it would have on that ordinary person) may be said to be problematic but not in its true context. This reasoning, wherefor we decline the certificate requested, does not address whether the point has already been decided by the Court of Final Appeal in Ho Hoi Shing HKSAR (2008) 11 HKCFAR 354 at 367 or whether that Court s comments were, as Mr McCoy suggests, obiter because the question was not, he informed us, then in argument. For the reasons we have given, we decline to grant the certificate requested. (Frank Stock) Vice-President (W Yeung) Vice-President (Michael Lunn) Justice of Appeal Mr Kevin P. Zervos & Ms Sabra SY Lo of Department of Justice for the Respondent Mr Gerard McCoy, SC, instructed by Lam & Lai, assigned by DLA, for the Applicant (in CACC 14/2010) Mr Gerard McCoy, SC, instructed by C. Yu & Co., assigned by DLA, for the Applicant (in CACC 405/2011) PAGE - A B C D E F G H I J K L M N O P Q R S T U V hx{, hx{, hx{, hx{, hx{, hx{, hx{, hx{, gdx{, ytx{, gdx{, ytx{, gdx{, ytx{, gdx{, ytx{, gdx{, gd` . h;[] h;[] h;[] h;[] h;[] h;[] h;[] hx{, hx{, hx{, hx{, hx{, misimimi h;[] h;[] hH1` h;[] h;[] h;[] h;[] hH1` h;[] h;[] h;[] h;[] h;[] h;[] h;[] hH1` h;[] hH1` h;[] h;[] gd` . h,S h,S hH1` hH1` hx{, h,S h,S hx{, hx{, h,S h;[] hOJg hOJg hOJg hOJg h,S h,S h,S h,S h,S hx{, hx{, hx{, yrkyrkyrkyrkyrkyrkyr hx{, hx{, hx{, hx{, hx{, hx{, h;[] hx{, hx{, hx{, hx{, h,S hx{, hx{, hx{, hx{, 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 A B C D E F G H I J K L M N O P Q R S T U V hx{, hx{, hx{, hx{, hx{, hx{, hx{, hx{, hx{, hx{, hx{, ytx{, ytx{, ytx{, ytx{, ytx{, [Content_Types].xml Iw}, \$yi} _rels/rels theme/theme/themeManager.xml K Y, sQ}# theme/theme/theme1.xml w toc'v`I`n 3Vq%`#q x}r :`TZaG I u3 L+M2 e\O* \$*c?)6-r IqBJ#x ,AGm T[XF64 E)`# R>QD =(K& =al- 4vfa 0%M0 theme/theme/_rels/themeManager.xml.rels 5 6?\$Q K(M&\$R(.1 [Content_Types].xmlPK _rels/.relsPK theme/theme/themeManager.xmlPK theme/theme/theme1.xmlPK theme/ theme/_rels/themeManager.xml.relsPK <?xml version="1.0" encoding="UTF-8" standalone="yes"?> <a:clrMap xmlns:a="http://schemas.openxmlformats.org/ drawingml/2006/main" bg1="lt1" tx1="dk1" bg2="lt2" tx2="dk2" accent1="accent1" accent2="accent2" accent3="accent3" accent4="accent4" accent5="accent5" accent6="accent6" hlink="hlink" folHlink="folHlink"/> H; < jFen & 6" ABC Final setup Flora-template-ABC-Final (fair)1.dot setup Microsoft Office Word Judiciary ABC Final ABC Final Title Source Erica Microsoft Office Word 97-2003 Document MSWordDoc Word.Document.8

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