

HONG KONG / JUDGMENT

HKSAR v. TSUI CHU TIN, JOHN

COURT

Court of Appeal

DECIDED

6 March 2007

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CACC433/2003

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Before: Hon Stuart-Moore Ag CJHC, Stock JA and Lunn J Dates of Hearing: 19 May 2006 and 6 March 2007 Date of Judgment: 6 March 2007 J U D G M E N T Stuart-Moore, Ag CJHC (giving the judgment of the Court): On 9 March 2005, the appellant's conviction for murder was set aside and we substituted a conviction for manslaughter. The matter is now before us, pursuant to section 83A(2) of the Criminal Procedure Ordinance, Cap. 221, for sentence. The judgment given on 9 March 2005 (CACC 433/2003) sets out the details of the case in full. It suffices, for present purposes, to summarise the salient points. The appellant, who at the time of the killing was a serving police constable, had known the deceased for just over a year. In January 1998, the deceased told the appellant that she wanted to bring their relationship to an end. The appellant, however, was unable to accept this and he then began stalking the deceased. In addition, he made numerous telephone calls to her place of work and to her home. Following complaints to the police, the appellant was charged on 28 June 1998 with three offences of causing (the deceased) reasonably to be concerned for her safety or well-being between May and June 1998. Bail, pending trial on 23 July 1998, was granted at San Po Kong Magistrates Court on 29 June 1998 with the condition that the appellant must not approach, or interfere with, the deceased. On 16 July 1998, the appellant purchased a long-bladed knife and went to stay at a hotel close to the deceased's residence in Shatin. Two days later, at about 7.00 am on 18 July 1998, the appellant met the deceased outside her flat. He spoke to the deceased but he was ignored. The appellant then threatened to kill himself in front of her saying that he wanted her to remember him for the rest of her life. He then followed the deceased into the lift and out into the street. The deceased went to a public telephone and told the appellant she was talking to the police and, in effect, told him to go away. It was at that stage that the appellant drew out the knife and repeatedly stabbed her neck and chest. Nine stab/ cut wounds were found to the neck and twelve other stab/ cut wounds were found on other parts of her body including the chest. The main issue at trial, where the appellant did not testify, was concerned with the defence of diminished responsibility. There was little dispute on the facts. The evidence of two psychiatrists, Dr Andrew Johns for the defence and Dr Yuen in rebuttal for the prosecution, was heard by the jury. A summary of their opinions is

provided in paragraphs 23 to 32 in our earlier judgment. On any view (as we stated at paragraph 35), the appellant was suffering from a deteriorating, major depressive disorder which was identified as having set in well before the events on the day of the killing. We went on to state: We have not, as we have already indicated, overlooked Dr Yuen's opinion that this impairment of the appellant's mental responsibility was a secondary consideration to the anger and jealousy the appellant felt towards the deceased. In this sense, it is apparent that this was a borderline case of diminished responsibility and, as such, was a most serious case of its kind. We then, having substituted a manslaughter conviction on the ground of diminished responsibility, ordered further psychiatric reports for the purposes of deciding upon sentence stating: We have in mind particularly the references in Dr Yuen's report dated 24 April 1999 to the appellant being unable to accept two previous break-ups with girlfriends. In the first of these cases, the appellant persisted in going to the address and waiting for his ex-girlfriend there. Even after she had emigrated to Canada, he continued to make long-distance calls to her. After the second relationship ended, the appellant again made a habit of following his ex-girlfriend after waiting for her at her address over a period of two months leading, eventually, to her resignation from her job in the Police Force.

39. This report concluded with an opinion that the appellant belonged to the rejected type of stalker, such stalkers being dangerous because there is a high risk that they would assault their targets in revenge for rejection. We went on to say (at paragraph
- 40) that we were particularly concerned about the danger which this appellant may pose if, in the future, he was to form a relationship with another woman. The appellant is now aged thirty-six. We have been provided with a large number of reports. It is convenient, firstly, to take the report of Dr C H Yuen who, for good and practical reasons, gave Dr S H Lui the task of providing an independent opinion about the risk of the appellant committing an act of violence in the future. In his report, dated 11 March 2005, Dr Yuen, visiting consultant psychiatrist at Siu Lam Psychiatric Centre, stated: In the supplementary report dated 1.7.99 that I had submitted to the prosecution counsel, I had said that if prediction was to be made at that moment, I would say that the risk of recurrence of his stalking behaviour was high and that his next girlfriend would be likely to be the next victim. My opinion was based on the fact that out of all the four girlfriends that he had had, he had stalked and caused some form of harm to the first, second and fourth one. He had not stalked or caused harm to the third one because he was never deeply in love with her. We know that the best predictor of future violence is past violence and violence is usually the interactive result of a specific individual and specific situation. In this case, specific individual refers to his personality which by definition is not easy to change. The specific situation is his relationship with his lovers. So, unless he would not fall in love again, the risk that he would act violently towards his lover (and he himself as well) would be high if he is being rejected again. (Emphasis added) Before we turn to Dr S H Lui's report dated 26 April 2005, Dr Judy S H Hui, a clinical psychologist with the Correctional Services Department, in her report dated 7 April 2005, briefly summarised the appellant's previous relationships with girlfriends. She, like Dr Yuen, also reported with regard to the third of the appellant's relationships that this was of a

different intensity to the others. In the other three instances, the appellant admitted to Dr Hui (as set out in paragraph 9 of her report) having stalking behaviour including repeated following and contacting his ex-girlfriends over the phone after break up in his first, second and fourth relationships and that his behaviour had brought his ex-girlfriend(s) a lot of fears. Dr Hui indicated that the level of uncertainty of risk assessment of stalkers is higher than the prediction of violence in other type(s) of offenders and, taking this into account, she concluded that she was not able to say that the appellant was: definitely having a very high risk of committing a very serious violent offence . However, she went on to state that the presence of several risk factors, namely,

- (1) the previous violent history, (2) the history of relationship instability and (3) high probability of facing relationship problem in the future , suggests the presence of a risk of violence that requires cautious attention . Dr Hui continued by stating: If he returns to the community now, he would likely have a fairly strong need for intimate relationship. Chance for him to encounter problem in maintaining a stable and close relationship is high. When he breaks up with his partner, he is likely [to be] emotionally very disturbed. Risk of violent behaviour under these conditions will increase. Whether it would escalate into extreme violence will depend on how he handles his mood in the future. We also need to note that his motivation for receiving treatment from mental health professionals is found to have fluctuation and is not very strong. Reducing his risk of violence may require some form of personality change, which usually takes a longer period of time and is not very easy. (Emphasis added) Dr S H Lui, consultant psychiatrist at Castle Peak Hospital, in a report dated 26 April 2005, found the appellant to be in full remission of depressive illness . Importantly, however, Dr Lui stated that the depressive illness from which the appellant was suffering at the time of the killing: did not come out of the blue; it emerged in the context of a failed relationship. There was a pattern to his reaction, marked by denial, extreme distress and stalking behaviour in a hopeless attempt to revive a relationship that was [in the past]. The stalking behaviour had its root in his personality, manifest especially at times of his being rejected by a lover. Treating depression helps but will not eliminate the stalking behaviour. Unless and until his problem personality and related psychopathology have been dealt with squarely, [the appellant] likely will find himself in the same intractable situation in future relationship failures. According to Mullen and Colleagues, rejected stalkers have a good chance (54%) of assaulting their targets. (Mullen PE, et al, Study of Stalkers, American Journal of Psychiatry 156:8 August 1999). Tsui s pledge that he will not because he has learned his lesson the hard way, referring to his six years in custody, is not particularly reassuring. In the course of my assessment Tsui impressed me to be still denying and making light of his behavior and its effect on the victims. He claims he had never issued any threats at all as he had never meant any harm. Of the killing he says he did not know he was ill at the time. [Dr Judy S H] Hui also has doubts about Tsui s motivation to tackle his personality problems by way of psychological treatment. (Emphasis added) In conclusion, Dr Lui indicated that the appellant remains at risk of stalking and violence in some future intimate relationship that does not turn out well . The reports to which we have referred, together with other relevant

documents, were considered by Dr Andrew Johns whose services were engaged on behalf of the appellant. Dr Johns is a consultant forensic psychiatrist at a number of hospitals in South London. His report is dated 2 November 2005. Dr Johns disagreed with Dr Lui's opinion that the appellant's personality lay at the root of the trouble, stating that the predominant diagnosis was that of a major depressive disorder which he stated was present at the time of the offence and became increasingly severe over the six months prior to its commission. In the light of the material before him, Dr Johns expressed the opinion that: three to five years treatment in prison should allow sufficient progress for some risk factors to reduce and for supervised community visits to occur, leading to eventual community placement again under supervision. Given the gravity of his index offence, I would require him to be monitored in the community for at least ten years, and longer if necessary. Turning next to the report dated 8 May 2006 from Professor Peter W H Lee, consultant clinical psychologist at Queen Mary Hospital, his opinion was that, given the many factors which may precipitate violent behaviour, any prediction about whether a rejected stalker may resort to violence is likely to be crude and unreliable. Professor Lee was, however, particularly concerned about two aspects relating to the appellant. The first of his concerns was that the appellant's insight into his failings and weaknesses was superficial: His assertion of his lack of problems and that he has changed completely is unsettling. His insistent denial of rage, anger or any intention to harm is unrealistic and shows a blatant lack of awareness of his longstanding difficulties. I would feel more reassured if [the appellant] admits to having problems and expresses the need to seek help. The second area which concerned Professor Lee, as expressed in paragraph 140 of his report, was related to:

2. Superficial remorse and shallow victim empathy: despite claiming that he realized now that the victim would have a very difficult life because of his prolonged stalking, I feel that [the appellant] has managed to rather unhelpfully emotionally distanced away from the sufferings and pains of his victim whom he once considered to be the love of his life. I could not sense in [the appellant] deep emotional regrets or remorse towards the victim or her family members. His keen motivation and fixation in studying legal processes to fight for his trial is worrying. His superficial assurance that he never intended any harm or would never make the same mistake is unconvincing. (Emphasis added) In conclusion, Professor Lee stated that when the appellant is eventually released back into the community he would need close monitoring for as long as possible and continual help to reduce his inherent risk factors and personal vulnerabilities. This is particularly so when he begins another courtship experience. Professor Lee has provided us with a further report, dated 3 March 2007. Amongst other things, he stated as follows:
42. I noted pleasing improvement in Mr. Tsui's insight into his own failings and personality pathology. He has also begun to show some signs of improved victim empathy and motivation for self improvement.

43. However, his self reports and emphatic confidence seem contrive[d] and superficial. I was impressed that the bulk of his self volunteered account of his improvements and insight reflects no more than a regurgitation of the main contents of the psychological reports which had been prepared on him. He himself admitted that of course, I was concerned with the upcoming sentencing . His self proclaimed improvements seem at least partially motivated by such concerns.
44. On a better and more reassuring note, however, was the fact that Mr. Tsui seems to be finally willing to pay more attention to his own personality problems and egocentricity. He indicated spontaneously that eventually I do not need to answer to you or to the judges, but I have to be able to face up to myself
45. While on the right track, I feel that Mr. Tsui still needs a prolonged duration of intensive psychological treatment and self reflection before he could achieve and consolidate enough self understanding, self control and personal growth. Over the past years of his incarceration, he had unfortunately been too eager to fight his case, and thus was left with little interest, time or energy to really reflect and learn from his grave mistakes.
46. While Mr. Tsui was emphatic that he has learnt a deep lesson and has developed an intense dread towards any possibility of re-imprisonment, I am concerned that should he be released prematurely into society, there is always the chance that under a different emotional condition and in face with real life challenges, he would once again succumb to his impulsivity and depressive disorder. Should Mr. Tsui be discharged now, he would be at risk of being overwhelmed by various real life demands and his new found freedom. He would also find his inflated sense of self confidence and pseudo-insights insufficient to equip him in coping with previous emotional challenges he had once succumbed so disastrously to in the past.
47. I am also concerned that outside of the penal settings, there may be insufficient interest, time, and expertise on the part of mental health professionals in helping him to deal specifically with his personality flaws, prevention of any impending violent impulsivity, or to help him foster a more positive and balanced approach to life and its necessary frustrations and hardships.
48. With the above concerns, I am of the considered view that Mr. Tsui should receive at least three more years of further intensive psychological treatment within the penal institution. He needs to develop more genuine remorse, empathy, insight and capabilities in reforming himself. The treatment aims and foci documented in my previous report dated 8th May 2006 (which will not be repeated here) are still considered relevant and highly important. Within the penal institution, should uncertainties be cleared by a definite sentence, he would be much better able to free himself to truly devote his interest and attention to improving his mental and personality health rather than fighting for his case year after year. Further time and demands on Mr. Tsui s patience and coping with frustrations and hardships would also help him develop more lasting resilience, competence, and social responsibility which are

vital resources for successful re-integration as a citizen. F: Long-Term Prognosis

49. I maintain the opinion stated in my earlier report that Mr. Tsui is not by nature a violent man. However, it was tragic that he obviously had the lethal potential to become so severely blinkered by self-centredness and narcissistic urges, so much so that when he found himself afflicted also with a major depressive disorder, all senses and judgment were completely demolished resulting in a lethal outcome.
50. Compared to my previous assessment, Mr. Tsui has shown some improvement both in his insight and willingness in acknowledging and overcoming his psychological and personality flaws. He thus stands a good chance of benefiting from further intensive psychological therapies.
51. Mr. Tsui does not harbour most of the other high risk indicators of propensity for recurrent violence. I feel thus that with completion of the intensive psychological treatments, and with further consolidation of a more balanced range of interests and altruistic values, he stands a good chance of being successfully rehabilitated. (Emphasis added) We note that Professor Lee said (at paragraph 48 of his report) that he was of the considered view that [the appellant] should receive at least three more years of further intensive psychological treatment within the penal institution . Although it is not within our power to give any direction to the relevant authorities responsible for the appellant s care while he is in custody, we have assumed that such therapy as may be available within the prison system will be provided to the appellant and no doubt that is a matter to which the Board of Review will pay attention as it will to the question of what progress has been made as a result. We wish to pay tribute to Professor Lee whose services were engaged by those representing the appellant. His reports are a model of what such reports should be. That is to say, they were objective, realistic, and designed to be of assistance to the court, regardless of the party by whom he had been engaged. When this matter was last before this court on 19 May 2006 we heard submissions from Mr Sarony SC for the appellant. In the result, we decided that further reports were needed in order that we could be informed, amongst other things, whether the appellant had been receiving any medical or therapeutic treatment since admission and, if so, what the effect of this has been. We were particularly concerned to know whether, assuming there has been a positive response to the medication or therapy, this might have a bearing upon the appellant s future conduct. We have now been provided, aside from Professor Lee s latest report to which we have referred, with a psychiatric report from Dr Michael M C Wong and a psychological report from Ms Yvonne Lee. Both reports are dated 20 June 2006. Dr Wong stated that the treatment given to the appellant was mainly pharmacological and that there had been no psychotherapy. Ms Lee, similarly, indicated that no psychological treatment had been undertaken. Mr Sarony described the absence of any psychotherapy for the appellant until very recently as a highly significant omission in the management of the appellant s condition. He urged us to consider making a determinate sentence of 12 years imprisonment which would enable the Post-Release Supervision Board, if it saw fit, to make a supervision order. This, he submitted, would provide a degree of close

monitoring for some years over the appellant's post-release progress which, in turn, would provide a sufficient protection for the public. It has been indicated to us that close family members would be prepared to look after the appellant during the period of supervision including his sister who is a registered nurse. Mr Sarony, in the proceedings today, suggested that the imposition of an indeterminate sentence would militate against a constructive disposition of this case because, he submitted, whereas a finite sentence would offer therapy in a communal setting after the appellant's release, a discretionary life term would not. In other words, the suggestion was that the supervision in the community that is available under the Post-Release Supervision of Prisoners Ordinance, Cap. 475, would not be available in the context of an indeterminate sentence. That is true as far as it relates to those to whom supervision orders may be made under that ordinance (see: section 3(2) of that ordinance) but the suggestion that supervision and therapy is not available to someone who has been the subject of an indeterminate sentence is simply not so (see: sections 15 and 18 of the Long-Term Prison Sentences Review Ordinance, Cap. 524). There is a wide power for the imposition of supervisory conditions, including attendance for medical treatment (see: section 18 and schedule 2 of the Long-Term Prison Sentences Review Regulation, Cap. 524A). Mr Sarony's contention was, therefore, based on a false premise. We must take matters as we find them, and the fact is that the prognosis for this appellant is uncertain and he remains a distinct danger to the community. The case is one of balance. There must be appropriate punishment for the offence giving proper weight to the extent to which the appellant's responsibility for the crime was diminished by reason of his condition but, at the same time, there must be adequate protection for the public. It is common ground amongst all the experts that the appellant is not ready safely to be released. It is not a question of protecting the public merely by locking someone up. It is protecting the public by ensuring that, with appropriate help in prison, he is not released until this can be safely done. We are not in a position to say when that will be. The appropriate body to decide that will be the Long-Term Prison Sentences Review Board after the minimum term has expired. They will no doubt have regard to the appellant's progress and to the help available to him when he is released, no doubt under supervision and with the continuing assistance of therapy. It follows, therefore, in the light of the various reports before us that, we are left in no doubt that the appellant continues to represent a potentially serious danger to the public, albeit to a narrow category of possible victims consisting of women who may in the future form an intimate relationship with him. We accept that it was the breakdown of the appellant's relationship, as Dr Lui indicated, which led to the appellant's depressive state and that the stalking behaviour had its root in his personality disorder; not, as Dr Johns opined (in paragraph 58 of his report dated 2 November 2005) that the predominant diagnosis was that of a major depressive disorder. Having regard to all the reports which we have had the advantage of considering at some length, there is a clear long-term concern that a similar event may happen again with the onset of a state of depression following a breakdown of an intimate relationship. With these considerations in mind, we have looked at the guidelines given by the English Court of Appeal in *R v Hodgson* [1968] 52 Cr App R 113, which have been adopted in Hong Kong, as to the circumstances justifying the imposition of a

discretionary life sentence. It was decided in that case that such a sentence is justified, whether in regard to one offence or more, where:

- (i) the offence is in itself grave enough to require a very long sentence; (ii) it appears from the nature of the offence or from the defendant's history that he is a person of unstable character likely to commit such an offence in the future; and (iii) if the offence is committed, the consequences to others may be specially injurious, as in the case of a sexual offence or a crime of violence. It is plain to us that the appellant falls squarely within each of these brackets. The offence was itself a killing of dreadful brutality as the pathologist's report and the photographs amply illustrate. This followed a long period during which the appellant had stalked the deceased and frequently telephoned her at work and at home. Even the criminal proceedings which were taken against him in the Magistrates Court failed to dissuade him from continuing this course of conduct. In less than three weeks, he had broken his bail conditions and killed the deceased. A similar pattern of stalking had occurred with two of his previous girlfriends. In one incident concerning the second of his girlfriends, he had removed his service revolver and pointed it at his own head threatening to kill himself if she did not resume her relationship with him. The psychiatrists agree that this is not a case for disposal under the Mental Health Ordinance, Cap. 136 and it is plain that they regard the appellant as someone whose problems are likely to be ongoing. In our view, bearing in mind all the circumstances of the case, there is no proper alternative to a life sentence. Section 67B(1) of the Criminal Procedure Ordinance, Cap. 221, provides that: When imposing a discretionary life sentence on a person for an offence, the judge must specify as part of the sentence a minimum term that the person must serve for the offence. As Stock JA stated in *HKSAR v Hui Chi-wai and Ors* (No.2) [2003] 2 HKC 582 at 591 when describing the effect of this section: It is designed to draw from the court a minimum term of years which the convicted person must actually serve before release, remembering however, and this is an important caveat, that it is inherent in the phrase minimum term that the court does not say that that is the stage at which the convicted individual is to be, or even should be, released. Those who are entrusted with the function of monitoring prisoners serving indeterminate sentences, or long term determinate sentences, and with making recommendations, where appropriate, for release or for the conversion of indeterminate terms to determinate ones, may very well in individual cases decide against the prisoner's release at the end of the minimum term and, indeed, may decide that release is not permissible for some considerable time beyond that date, or indeed at all. We have given careful consideration to this aspect of the sentencing exercise. We particularly bear in mind, as we have said before, that this was a borderline case of diminished responsibility and, as such, was a most serious case of its kind. It is our view that the minimum term to be served should be 12 years. Accordingly, the sentence imposed on the appellant is life imprisonment with a minimum term of 12 years to be served. (M. Stuart-Moore) Ag Chief Judge, High Court (Frank Stock) Justice of Appeal (Michael Lunn) Judge of the Court of First Instance Mr Arthur Luk, SC, DDPP and Mr Derek Lai, GC, of the Department of Justice, for the Respondent (on 19 May 2006). Mr Derek Lai, SGC, of the Department of Justice, for the

Respondent (on 6 March 2007). Mr Neville Sarony, SC and Mr Phil Chau, instructed by Messrs Katherine Y.W. Or & Co., for the Appellant (on 19 May 2006). Mr Neville Sarony, SC and Mr Gordon Wong, instructed by Messrs Katherine Y. W. Or & Co., for the Appellant (on 6 March 2007). PAGE - A B C D E F 1udk 1udk ~Xx, Y<2^ H; < F{j< >!6Z Pl?^R n<Re ElFtd9> Pl?^ >!6Z ElFt F{j< n<Re XIva :y~i & 6" ~1802190.dot setup Microsoft Word 9.0 Judiciary Title Source Erica Microsoft Word Document MSWordDoc Word.Document.8

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