

HONG KONG / JUDGMENT

HKSAR v. YAN PANYUE

COURT

Court of Appeal

DECIDED

2 August 2005

CASE / FILE NUMBER

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Before: Hon Ma CJHC, Stuart-Moore VP, Stock JA Date of Hearing: 27 July 2005 Date of Judgment: 27 July 2005 Date of Reasons for Judgment: 2 August 2005 R E A S O N S F O R J U D G M E N T
Stuart-Moore, VP (giving the reasons for judgment of the Court):

Background

This was an appeal made on behalf of the Secretary for Justice (the appellant), pursuant to section 81E of the Criminal Procedure Ordinance, Cap. 221 (the Ordinance), against the discharge of the respondent under section 16 of the Ordinance after a successful application had been made before Gall J that there was insufficient evidence disclosed in the documents relating to a charge of murder to establish a prima facie case against him. On 14 May 2004, the respondent was committed for trial on a charge which alleged that he had murdered Tse Yiu-yuen (the deceased) on 6 October 2003. On 12 January 2005, he was granted bail and, on 1 March 2005, the respondent was discharged under section 16 and awarded his costs. Section 16 of the Ordinance provides, so far as it is relevant to these proceedings:

16. Discharge of accused after committal without a hearing
 - (1) Where the accused was committed for trial under section 80C(4) of the Magistrates Ordinance (Cap. 227) , the accused may at any time -
 - (b) after the filing of the indictment and prior to his arraignment thereon. apply to a judge for his discharge on the grounds that the evidence disclosed in the documents handed to the court under section 80C(1) of the Magistrates Ordinance (Cap. 227) as read with any further evidence the Secretary for Justice has notified the accused he will seek to have admitted at the trial, is insufficient to establish a prima facie case against him for the offence with which he is charged or for any other offence for which he might be convicted upon that charge.

- (3) The judge may after perusal of the documents and after hearing any representations which the accused and the Secretary for Justice may wish to make, direct that the accused shall not be arraigned on the charge, and direct that he be discharged.
- (4) Subject to section 81E(3), a discharge under this section shall be deemed to be an acquittal. The relevant provisions for an appeal against an order of discharge are set out in section 81E of the Ordinance as follows: 81E. Appeal to Court of Appeal following discharge
 - (1) Where any person has been discharged under section 16 , the Secretary for Justice may appeal to the Court of Appeal against that person s discharge.
 - (2) The appeal may be on any ground which involves a question of law; on the ground that the documents and evidence before the court were sufficient to establish a prima facie case against the accused for the offence set out in the charge or for any other offence for which he might be convicted upon that charge.
 - (3) The Court of Appeal may, if it allows an appeal under this section, quash the acquittal of the accused and order him to be tried.
 - (4) The Court of Appeal may, in ordering a trial, make such orders as appear to it to be necessary for the custody, or admission to bail, of the person ordered to be tried. At the conclusion of the hearing on 27 July 2005, we allowed the appeal, quashed the acquittal and ordered that the respondent should be tried on the indictment (HCCC 137/2004) for murder. We also granted him bail subject to a number of conditions. The facts The facts were not complicated. The deceased was shot in the back of the head as he left a public toilet at about 6:40 a.m. in Sheung Shui. Amongst the five witnesses who saw a man leaving the scene, one noticed that he was holding a pistol and two others purported to be able to identify him. The two identifying witnesses were Madam Yip Sau-hung and Madam Leung Wai-han. The judge s approach to the identifying witnesses The judge indicated in his ruling that while he accepted that Madam Yip had seen the man who had done the shooting, he disregarded her later identification of that person as it was so weak as to leave little value to the jury . Madam Yip worked in the Circle K convenience store overlooking the open space where the gunman had walked to a bicycle and cycled away. She attended an identification parade on 26 November 2003. She failed to pick out the respondent or anyone else on the parade and, although she remained at the police station for about an hour afterwards, she said nothing at that stage about her failure to identify. Later, she was driven home by DPC 47251 who asked her if she had identified anyone. She answered: Failed to identify any . When the police officer asked why she failed to identify anyone, she said that the atmosphere was not very good and she was nervous and added: I dared not tell it even if I had identified any . The judge s ruling sets out the remainder of the conversation as follows: The officer then asked her if she had identified anyone but dared not tell it. She replied: No. 1 and 2 did not look like (the man). No. 3, 4, 5, 6, 7 and 9 were not. The most like the one is No. 8 . The officer asked why she did not say it at the parade and Madam Yip said that she was very frightened. He asked her if she now identified No. 8. She answered by saying: No. 8 is the one who

looked mostly like the male riding the bicycle. In his analysis of this development, the judge accepted that Madam Yip was a frightened witness but rightly concluded that a claim that No. 8 (where the respondent had been standing on the parade) was the person who most resembled the suspect amongst the members of the parade amounted to no identification at all. However, on 9 December 2003 Madam Yip had made a further statement to the police in which she said that No. 8 was the man who left the scene of the crime on a bicycle. She explained that she had been very nervous and was unable to say it out despite the fact that she could have done so. The judge's conclusion in regard to Madam Yip was in these terms:

13. The issue is not whether an identification is made after a parade, where no identification was made, is capable of being a credible identification *R. v. Creamer* (1984) 80 Cr. App. R. 248. The issue is whether the positive identification claimed by Madam Yip on 9 December is so weakened by her statement to DPC 47251 so as to be of negligible value. Even without the test of cross-examination, I hold that evidence of identification on its face to be so weak as to leave little value to the jury and I disregard it. The position in regard to Madam Leung was more straightforward. The judge summarised this as follows:
14. Madam Leung made an identification of the accused at an identification parade on 19 November 2003. Her statement is that on the morning of 6 October 2003, she rose to make breakfast. It was about 6:40 a.m. She heard a loud noise and thought it was a car crash. She looked down from a bedroom window and saw a man looking up and walking from between two trees outside Circle K convenience store. He was dragging a bicycle. He looked up and she could see his face. It seemed he was hurrying away. He dragged the bicycle for a while and then mounted it and rode away. What is the value of this identification?
15. The accused was not known to the witness. It was a clear sunny morning and for what must have been a short period of time she had a clear and unobstructed view of the man. She says she could see him for 10 seconds but I take that estimate with some reservation.
16. From the survey plan, it is clear her observation was from a point some 40 metres or more away at a downward angle of 45 or thereabouts from the horizontal and, from her statements, through a closed window.
17. I have no hesitation in categorizing this as a fleeting glance as contemplated by *R. v. Turnbull* [1977] 1 QB 224, and I am mindful of the direction necessary to be given to the jury consequent upon that categorization. Nonetheless, notwithstanding all the defects so well pointed out by Mr Marash for the accused, a properly directed jury could find, taking the evidence at its highest, that the evidence of Madam Leung constituted an effective identification albeit not as strong an identification as one where identification was closer and the witness had a longer view.
18. What then would the jury have to consider? On the one hand they have an identification which was not strong in nature but is one which they could hold to be true. Before reaching a conclusion about Madam Leung, the judge then reverted to an important piece of evidence in the respondent's favour having earlier in his ruling set out the fact that immigration

records showed the respondent to have gone from Hong Kong to the Mainland with his wife at 10:40 p.m. on 5 October 2003 and to have returned to Hong Kong some days later. In this regard, the prosecution's standpoint had been that it was possible for the respondent to have returned by unlawful means during that night, on either 5 or 6 October 2003, to circumvent the usual immigration controls. This immigration evidence led the judge to observe that, in order to convict, the jury would have to be satisfied that the only reasonable inference to be drawn was that the (respondent) was in Hong Kong and Madam Leung's identification was true. As to this last observation, it seems plain that when the judge spoke of the identification being true he was intending this to mean accurate as there was no suggestion that Madam Leung's veracity was in doubt. The judge then went on to say:

20. Given the nature of the necessary direction to be given the jury that they might only draw an inference adverse to the accused if it is the only reasonable inference to be drawn, I am of the view that the jury could not convict on the evidence disclosed by those depositions. The appeal Mr Zervos SC, on behalf of the appellant, submitted that the judge erred in a number of ways when seeking to apply the appropriate test for the determination of an application under section 16. In particular, the judge's approach to the identification evidence provided by Madam Yip and Madam Leung was criticised as, contrary to the judge's ruling, it was submitted that both witnesses provided evidence of identification sufficient to form a *prima facie* case against the respondent. Mr Zervos placed particular emphasis on the observations of Kempster JA in *Attorney General v Li Fook-shiu Ronald* [1990] 1 HKC 1 to support his contention that the judge had departed from the approach recommended by the Court of Appeal when dealing with a section 16 application. There, at pages 12-13, it was said that: In relation equally to primary facts and to inferences to be drawn from such facts [the judge's] concern is not with present proof to his satisfaction but with potential future proof to that of a jury. Both primary facts and the inferences therefrom are matters generally speaking within the province of the jury in the language of Galbraith ([1981] 1 WLR 1039). Both can critically be affected by later evidence or lack of evidence from the defence. Assuming all proper directions, the test is not what the judge thinks the jury, and still less he, must conclude at that moment, but what a jury could, may or might properly conclude in the future. If elaboration of the approach explained in Galbraith is called for we are of the opinion that a judge faced with a submission of no case or an application for discharge in circumstances where the Crown's case depends, as it usually does, upon an inference or inferences from primary facts, may ask himself :-
- (1) Is there some evidence that the crime has been committed? If not, the judge will rule no case or discharge the count in question. If there is;
 - (2) Is the evidence of primary facts of a quality permitting a jury to accept it? If not, the judge will stop the case or discharge the count. But, if such evidence is of appropriate quality;
 - (3) Could, may or might a jury properly directed be satisfied beyond reasonable doubt of such inferences as have to be drawn if all the elements of the prosecution case are to be established? If he concludes that a jury could, may or might so be satisfied he will rule

against the submission or application. We do not know whether the judge in the present case was referred to Kempster JA's judgment but he made reference to passages taken from two other cases which echo similar sentiments. The judge, cited a passage taken from Attorney General v. Phung Van Toan [1992] 1 HKCLR 56 at 63, referred to in R v Tin Sau-kwong [1996] 1 HKCLR 9 at 12 which reads: At the time of this type of application no word of oral evidence has yet been heard. A court faced with such an application is not enjoined to consider the quality of the evidence. To do so would be to usurp the function of the jury. In R v Tin Sau-kwong, where Leonard J was considering the differences between an application for discharge and a submission of no case to answer, it was rightly pointed out (at page 12) that: In the latter situation the judge has seen and heard the Crown witnesses, some of whom may have been thoroughly discredited by cross-examination, and he is aware of the true quality of the evidence. In the former highly artificial situation, the judge can only assume that the paper evidence before him will be taken at its highest by the jury. Later (at page 13), Leonard J continued by saying: Whereas I disregard for the purpose of this application all statements which are plainly hearsay and inadmissible, I assume that simple statements of fact will be accepted as true. cannot speculate as to what the state of the evidence might be when tested by cross-examination. If a defendant gives up his opportunity to test the evidence at a preliminary enquiry, he must accept the consequences. Mr Huggins says that a defendant is not under any duty so to test the evidence and in that he is correct. But a defendant has a right to test the evidence and cannot, having waived that right, ask the court to speculate as to what the result of testing it might have been. The main thrust of Mr Zervos argument was that a prima facie case had in any event been established against the respondent having regard to Madam Leung's identification of him and the fact that the judge himself seemed to have recognised this when stating that a properly directed jury could find, taking the evidence at its highest, that [this] constituted an effective identification and, later, when adding that the identification was not strong in nature but is one which [the jury] could hold to be true. Whether or not the evidence provided by Madam Leung had been rightly categorised by the judge as a fleeting glance identification is, with respect, difficult to determine without any of her evidence being tested. If it was, then the passage in R v Turnbull & Ors [1977] 1 QB 224 at 229-230 which has applicability to the present situation reads as follows: When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification. This may be corroboration in the sense lawyers use that word; but it need not be so if its effect is to make the jury sure that there has been no mistaken identification: for example, X sees the accused snatch a woman's handbag; he gets only a fleeting glance of the thief's face as he runs off but he does see him entering a nearby house. Later he picks out the accused on an identity parade. If there was no more evidence than this, the poor quality of the identification would require the judge to withdraw the case from the jury; but this would not be so if there was evidence that the house into which the accused was alleged by X to have run was his father

- s. Another example of supporting evidence not amounting to corroboration in a technical sense is to be found in *Reg. v Long* (1973) 57 Cr. App. R. 871. The accused, who was charged with robbery, had been identified by three witnesses in different places on different occasions but each had only a momentary opportunity for observation. Immediately after the robbery the accused had left his home and could not be found by the police. When later he was seen by them he claimed to know who had done the robbery and offered to help to find the robbers. At his trial he put forward an alibi which the jury rejected. It was an odd coincidence that the witnesses should have identified a man who had behaved in this way. In our judgment odd coincidences can, if unexplained, be supporting evidence. In the present case, there was some evidence which provided a link of sorts between the respondent and the deceased albeit, as Mr Marash SC on the respondent's behalf forcefully demonstrated, if this was said to provide a possible motive on the respondent's part for the murder not only was it a seemingly weak one but it related to the respondent's uncle and not to the respondent himself. In short, it was the prosecution's case that the murder arose from a grudge which had arisen between the deceased and Ngan Hung, the respondent's uncle. Ngan Hung ran a shop known as the Luen Hing Roasted Meat Shop at the Shek Wu Hui Complex. The deceased had worked for Ngan Hung for about 6 years before their relationship turned sour in July 2003 and the deceased lost his job. This was followed by a dispute over compensation which was taken to the Labour Tribunal but, in the meantime, during September 2003, the deceased and others opened the Ying Fat Roasted Meat Shop immediately next door to Ngan Hung's shop. There were a number of occasions when Ngan Hung and others were seen to cause trouble at the deceased's new shop. This evidence was not referred to by the judge in the course of his ruling. However, it may well have been the factor which led him to give some credence to Madam Leung's identification because, if her fleeting glance evidence, as he had found it to be, was wholly unsupported then her identification of the respondent at trial would have had to be withdrawn under the guidelines in *Turnbull*. If there had been no support for Madam Leung's identification of the respondent it could not, as the judge found, be one which [the jury] could hold to be true. We are satisfied that Madam Leung's evidence provided a *prima facie* case against the respondent despite the numerous shortcomings to which Mr Marash drew our attention as potentially diminishing the weight of her identification. Even if it is right to treat this as a fleeting glance case, there was some support to indicate that the identification had been correctly made in that the respondent is the nephew of Ngan Hung who ran the shop immediately next door to the deceased's shop. There was, of course, also the evidence provided by Madam Yip which the judge disregarded because he thought it was of little value. It has not been suggested that she had a fleeting glance of the respondent but rather that her statement that No. 8 is the one who looked mostly like the male riding the bicycle, which she made after the identification parade, destroyed any value that might otherwise have been attached to her purported identification of the respondent in a later statement. However, whilst it is perfectly possible that in the end the evidence of this witness may turn out to be of little weight, its quality cannot truly be assessed until it has been given. At its highest, Madam Yip can be regarded as saying that she recognised the respondent at No. 8

on the identification parade but she was too nervous to say so. We are again satisfied, taking all the circumstances of the case into account, that this established a prima facie case. One such circumstance, which will almost certainly be the central plank in the case for the respondent, is the inference which would usually be expected to be drawn from immigration records showing the suspect for a murder in Hong Kong to have been in the Mainland at the material time. It is obvious that this cannot be regarded as conclusive evidence of the respondent s absence from Hong Kong. Ultimately, however strong the immigration point may seem on a superficial level, this may lose its significance depending upon the quality of the evidence given by the identifying witnesses.

Conclusion

For the reasons we have given, we allowed the appeal, quashed the acquittal and ordered the respondent to be tried for murder. (Geoffrey Ma) Chief Judge, High Court (M. Stuart-Moore) Vice-President (Frank Stock) Justice of Appeal Mr Kevin P Zervos, SC, SADPP and Mr Michael Wong, GC , of the Department of Justice, for the Appellant. Mr Daniel Marash, SC, instructed by Messrs Lau Pau & Co., for the Respondent. 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 i\$&`G setup HCAP.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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