Privy Council Appeal No. 22 of 1988

Lui Mei Lin *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF HONG KONG

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE 25TH JULY 1988, DELIVERED THE 24TH OCTOBER 1988

Present at the Hearing:

LORD KEITH OF KINKEL
LORD ROSKILL
LORD TEMPLEMAN
LORD ACKNER
LORD JAUNCEY OF TULLICHETTLE

*[Delivered by **Lord Roskill**]*

At the conclusion of the hearing of this appeal on 25th July 1988 their Lordships stated that they would humbly advise Her Majesty that the appellant's appeal should be allowed and her conviction on 23rd January 1987 in the High Court of Hong Kong on two counts of forgery quashed and that their Lordships' reasons for that advice would be given in due course. Their Lordships now give those reasons.

The appellant was one of three defendants jointly charged on two counts (the first and second counts in the indictment), one of having forged dies with intent to defraud, the other of having forged valuable securities. The first defendant was named Liu Kan Por. The appellant was the third defendant. Yick Hak-Kan was the second defendant. Yick Mai Ming was the fourth defendant. The third and fourth counts in the indictment were against the second defendant alone while a fifth count was against the first defendant alone. The first defendant, the appellant and the fourth defendant were all convicted on counts one and two. The second defendant was acquitted on counts three and four. The first defendant was also convicted on the fifth count.

Substantial prison sentences were imposed upon all three defendants so convicted. Subsequent appeals to the Court of Appeal by the first and fourth defendants against their convictions on counts one and two succeeded on the ground of misdirection by the trial judge. Retrials were ordered. The appellant's application for leave to appeal against her conviction was dismissed.

The issue involved in the appellant's application for leave to appeal to the Court of Appeal and now to this Board is entirely different from the issues involved in the appeals by the other defendants. On 11th June 1986 the first defendant was interviewed by and made a statement to the police. That statement, which their Lordships have read, beyond doubt incriminated the appellant. The prosecution sought to adduce that statement in evidence against its maker, the first defendant. The admissibility of the statement was challenged. At the outset of the trial a voir dire was held to determine whether or not the statement had been made voluntarily. The trial judge held that the statement was made as a result of inducements by a police officer. He accordingly excluded the statement on the ground that it was not made voluntarily. The first defendant in due course gave evidence in his own defence. He admitted that he had taken part in the arrangements for printing stamps, but had done so innocently, having been misled by the appellant. He was cross-examined on behalf of the second and fourth defendants. There is no doubt that his oral evidence differed in a number of material respects - the details do not now matter - from what he had said in the excluded statement. The appellant's counsel naturally cross-examined the first defendant on the basis that the oral evidence was false. He sought the leave of the trial judge further to cross-examine the first defendant upon the excluded statement as being an inconsistent statement previously made by the first defendant. Counsel for the Crown opposed the application relying on a previous decision of the Court of Appeal in Yu Tit-hoi v. The Queen [1983] H.K.L.R. 7. The trial judge was of course bound by that decision and refused the application for leave to cross-examine the first defendant upon his statement. A further application on behalf of the appellant for a separate trial was also refused.

When the appellant appealed to the Court of Appeal that Court also held that the appeal must fail because it too was bound by the decision in Yu Tit-hoi v. The Queen and indeed by later decisions following that decision. Power J.A. in a separate judgment, while accepting that the Court was so bound, expressed the view that it was "unfortunate that the Court was not free to consider the appellant's arguments ...". On 18th December 1987 special leave to appeal to the Board was given.

Since the Hong Kong decisions, to which their Lordships have just referred, were given the same issue arose for decision in England in R. v. Rowson [1986] Q.B. 174. In that case the trial judge had ruled that a statement made by one co-accused was inadmissible in that the relevant rule of the Judges' Rules had been broken. Counsel for other co-accused in due course sought to cross-examine the maker of that statement upon its content when he gave evidence. The trial judge allowed the facts alleged in the statement to be put to the maker of the statement but declined to allow the jury to be told that the facts emanated from the statement which he had already excluded. All the accused were convicted but the two co-accused appealed on the ground that their counsel had an unfettered right to cross-examine upon the statement and had been prevented from exercising that right. The Court of Appeal Criminal Division in a judgment delivered by Robert Goff L.J. (as he then was) at page 180 held that the submission was well founded though the Court applied the proviso and dismissed the appeals. The attention of the Court was not, it seems, drawn to the relevant Hong Kong decisions. It is therefore clear that there has been a divergence of view between the Court of Appeal in Hong Kong on the one hand and in England on the other which their Lordships must now resolve.

The decision in Yu Tit-hoi v. The Queen was founded upon the decisions of the Court of Criminal Appeal in R. v. Treacy (1944) 30 Cr. App. R. 93 and R. v. Rice (1963) 47 Cr. App. R. 79. In the former case the Crown had not sought to put in evidence, as part of the prosecution case, a statement made by a defendant charged with murder - there was no co-accused in that case - but when the defendant gave evidence in his own defence he was allowed to be cross-examined upon that statement. This, as the Court of Criminal Appeal held, was plainly wrong and the conviction for murder was quashed. Much reliance was placed by the Court of Appeal in Yu Tit-hoi v. The Queen upon the statement in the judgment of the Court of Criminal Appeal in Treacy, delivered by Humphreys J. at page 96, that a statement made by a person under arrest was either admissible or not admissible. The learned judge went on:-

> "If it is admissible, the proper course for the prosecution is to prove it, and if the statement is in writing to make it an exhibit, so that everybody knows what it is and everybody can inquire into it and act accordingly. If it is not admissible, nothing more ought to be heard of it. It is a complete mistake to think that a document which is otherwise inadmissible can be made admissible in evidence simply because it is put to an accused person in cross-examination."

In R. v. Rice the same principle was applied to the use by the prosecution of a statement made by one co-accused against another co-accused. But their Lordships emphasise that neither case was concerned, as the present case is concerned and as Yu Tit-hoi v. The Queen and R. v. Rowson were concerned, with the attempted use by a co-accused of an excluded statement made by another co-accused.

Counsel for the appellant placed great reliance upon the decision of the House of Lords in Murdoch v. Taylor [1965] A.C. 574. The question there arose under section 1(f)(iii) of the Criminal Evidence Act 1898. The House decided that once a co-accused had "given evidence against" another co-accused, the latter was under the statute entitled without restriction to cross-examine the former as to character and to put his previous convictions to him. In a passage at page 593 of the report Lord Donovan emphasised the difference between the position of the prosecution and the position of a co-accused in this respect:-

> "But when it is the co-accused who seeks to exercise the right conferred by proviso (f)(iii) different considerations come into play. He seeks to defend himself; to say to the jury that the man who is giving evidence against him is unworthy of belief; and to support that assertion by proof of bad character. The right to do this cannot, in my opinion, be fettered in any way."

A similar view had earlier been expressed by Devlin J. (as he then was) in an interlocutory ruling given in R. v. Miller and Others (1952) 36 Cr. App. R. 169 at page 171. Their Lordships think it right to quote the relevant passage in full.

> "The fundamental principle, equally applicable to any question that is asked by the defence as to any question that is asked by the prosecution, is that it is not normally relevant to inquire into a prisoner's previous character, and, particularly, to ask questions which tend to show that he has previously committed some criminal offence. It is not relevant because the fact that he has committed an offence on one occasion does not in any way show that he is likely to commit an offence on any subsequent occasion. Accordingly, such questions are, in general, inadmissible, not primarily for the reason that they are prejudicial, but because they are irrelevant. There is, however, this difference in the application of the principle. In the case of the prosecution, a question of this sort may be relevant and at the same time be prejudicial, and, if the court is of the opinion that the prejudicial effect outweighs its relevance, then it has the power, and indeed, the duty, to

> exclude the question. Therefore, counsel for the prosecution rarely asks such a question. No such limitation applies to a question asked by counsel for the defence. His duty is to adduce any evidence which is relevant to his own case and assists his client, whether or not it prejudices anyone else."

Counsel for the Crown invited their Lordships to distinguish Murdoch v. Taylor on the ground that the rights there in question arose under a statute and that what was there allowed to be put in cross-examination were the previous convictions of the co-accused. Their Lordships agree that this is so but find no sufficient ground of distinction in that fact. Ever since section 5 of the Criminal Procedure Act 1865 (Lord Denman's Act) was enacted - this section is exactly reproduced in section 14 of the Evidence Ordinance [Cap. 8] of the Laws of Hong Kong - it has been permissible in every criminal and indeed in every civil trial to cross-examine a witness as to any previous inconsistent statement made by him in writing or reduced into writing subject, where the inconsistent statement is said to be in writing, to his attention first being called to those parts of any writing which were to be used in order to contradict him. The only limit on the right of a co-accused to cross-examine another co-accused in these circumstances is, in their Lordships' opinion, relevancy. If one co-accused has given evidence incriminating another it must be relevant for the latter to show, if he can, that the former has on some other occasion given inconsistent evidence and thus is unworthy of belief.

Counsel for the Crown also argued before their Lordships that R. v. Rowson was wrongly decided and should not be followed. With respect their Lordships disagree. That decision is entirely in line with the principles which their Lordships have endeavoured to enunciate and is clearly consistent with the decisions in R. v. Miller and Murdoch v. Taylor. Their Lordships respectfully agree with the distinction which the Court of Appeal Criminal Division drew in R. v. Rowson between R. v. Treacy and R. v. Rice on the one hand and the case then before that court where it was, as already stated, counsel for one co-accused who sought to cross-examine another co-accused on his excluded statement. When Humphreys J. said in R. v. Treacy that "nothing more ought to be heard of it" he clearly meant that nothing more ought to be heard of the excluded statement as between the prosecution and the defendant. The learned judge plainly did not have in mind the possibility of a co-accused subsequently seeking to make use of the excluded statement for in that case there was no co-accused. It follows that their Lordships have also reached the conclusion,

with great respect to the Court of Appeal, that Yu Tit-hoi v. The Queen and the later Hong Kong cases following it were wrongly decided and should not be followed. As already pointed out, their Lordships have noted that in the present case Power J.A. clearly had reservations as to the correctness of those decisions.

Counsel for the Crown pressed upon their Lordships the submission that to allow a co-accused complete freedom to cross-examine upon an excluded statement could give rise to difficult questions how far, if at all, a trial judge should explain to a jury why it was that they were suddenly hearing of this statement and perhaps even seeing it for the first time at a comparatively late stage of the trial. This question was touched upon by the Court of Appeal Criminal Division in R. v. Rowson at page 182 of the report. Their Lordships doubt if it is possible to state general principles which should be uniformly applied in every case where the question arises. But in agreement with the judgment of Robert Goff L.J., in the passage just referred to, they are clearly of the view that the trial judge should warn the jury that they must not use the statement in any way as evidence in support of the prosecution's case and that its only relevance is to test the credibility of the evidence which the maker of the statement has given against his co-accused. Their Lordships consider that as a general rule the trial judge should briefly tell the jury why the statement had previously been excluded and cannot therefore be relied upon by the prosecution to prove its case, as for example that it was or may well have been procured by inducement. It should be remembered that in cross-examination as to credit the cross-examiner is bound by the answers which he receives and that it is not legitimate to re-open all the circumstances in which the excluded statement was taken. In many cases, as in the present, the trial judge may well think it right to remind the jury that the maker of the statement may well have a motive for incriminating a co-accused and that his or her evidence should be approached with extreme caution.

It was also suggested on behalf of the Crown that, if cross-examination upon the excluded statement were to be permitted, the trial judge might have to carry out what was described as a balancing exercise, balancing the interests of the maker of the statement against the interests of the co-accused on whose behalf it was sought to cross-examine before deciding whether or not to permit the proposed cross-examination. Their Lordships disagree. In their view the right to cross-examine is, as Lord Donovan stated, unfettered, the only limit being relevancy. If the statement contains irrelevant matter the trial judge would no doubt insist that that irrelevant

matter should not be referred to and, if necessary, excised from any copies of the statement which the jury might be allowed to see.

Their Lordships were told that the practice in Hong Kong is to hold the voir dire at the beginning of the trial, as was done in the present case. If at the conclusion of the voir dire the trial judge decides to exclude the statement, their Lordships see no reason why he should not at that time ask counsel for any co-accused whether they will thereafter seek to make any use of the excluded statement. In the present case, after leave to cross-examine on the statement in the appeal had been refused, there was an application for a separate trial of the appellant which the trial judge also rejected. For the reasons given by Devlin J. in R. v. Miller at page 174, cases of this type, where it is right to grant separate trials, are indeed rare but if that possibility is to be envisaged at all, that will normally be the right moment to consider that issue and not at a much later stage when, for the first time, the statement is referred to and perhaps produced before the jury.

Counsel for the prosecution informed their Lordships that the prosecution would neither seek the application of the proviso nor, in the event of their Lordships humbly advising Her Majesty that the appellant's appeal should be allowed and her conviction quashed, as their Lordships have now done, an order for the appellant to be retried. Unlike her co-accused, whose convictions were quashed but who were ordered to be retried - their Lordships were told that the first defendant was convicted but the fourth defendant acquitted on the retrial - the appellant in common with the fourth defendant stands acquitted.