Privy Council Appeal No. 16 of 1989

(1) Chan Kwok Keung and
(2) Chan Kar Shing *Appellants*

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 2ND NOVEMBER 1989, DELIVERED THE 27TH NOVEMBER 1989

Present at the hearing:-

LORD BRIDGE OF HARWICH
LORD ACKNER
LORD OLIVER OF AYLMERTON
LORD JAUNCEY OF TULLICHETTLE
MR. JUSTICE TELFORD GEORGES

*[Delivered by **Lord Ackner**]*

This is an appeal by special leave from a judgment of the Court of Appeal of Hong Kong (Yang C.J., Kempster J.A. and Macdougall J.) given on 4th May 1988, dismissing the appellants' appeals against their convictions of murder on 13th November 1987, after a trial by jury presided over by Addison J. At the conclusion of the hearing on 2nd November their Lordships agreed humbly to advise Her Majesty that the appeals ought to be allowed, the convictions quashed and that there be no order for retrial, for reasons to be given later. They now give their reasons.

The Facts.

The facts out of which the prosecution arose can be shortly stated. At about 2.30 p.m. on 29th August 1986 a twelve year old boy called Kwan Ho-lun saw four men chasing the victim Peng Shao-chiang on the Yuen Chau Kok Temporary Housing Estate Shatin. At least three of the men had knives and were chopping at him as they ran. As a result he suffered severe injuries and later died on the same afternoon in hospital.

[39] When the attack took place there were several police officers in the vicinity who gave chase. One of the

men Leung Chi-fai, surrendered, but the others escaped. On 12th December 1986 Leung was indicted with murder, as was Keung Siu-ming, who had been subsequently arrested. On 20th March 1987 Leung pleaded not guilty, was convicted of murder and sentenced to death. Keung pleaded guilty to manslaughter, which plea was accepted by the prosecution.

At the appellants' trial the prosecution called Leung who, as the learned trial judge said at an early stage in his summing-up, was "at present hoping for a reprieve of his sentence". It was essentially upon his evidence that the Crown relied. Accordingly the learned judge, in his very careful summing up to the jury, said that if they did not believe his evidence or thought he might be lying when he said that both the appellants were present and participated in the knife attack, they must acquit. Leung was an accomplice. Accordingly the judge warned the jury of the danger which existed in acting on his evidence in the absence of corroboration. This warning was particularly important in this case, since Leung in giving evidence had been obliged to concede that on certain important matters he had lied. His testimony which is hereafter referred to in some detail was thus highly suspect.

The judge informed the jury that there was material which was capable of corroborating Leung's evidence. It was therefore for them to decide whether they accepted such evidence as corroboration, that is, evidence which implicated the appellants, confirming in some material particular not only that the crime had been committed, but also that it had been committed by them.

The short issue in this appeal is whether the trial judge correctly directed the jury that there was material capable of corroborating Leung's evidence. If the learned judge was in error then it was accepted by the Crown that the convictions must be quashed. The only remaining issue would then be - would it be appropriate to remit the matter to the Court of Appeal of Hong Kong for consideration as to whether or not there should be a new trial?

<u>The evidence said to be capable of corroborating Leung's testimony.</u>

At the trial the following, *inter alia* were agreed facts and were so recorded in a written statement:-

> "1. On the 30th August 1986 the names of CHAN Kwok-keung, identity card No.E456847(1) and CHAN Kar-shing, identity card No.C259256(6) were placed on the Hong Kong Immigration Department Black list (the stop and detain list). All immigration counters throughout Hong Kong were informed to stop and detain

either or both of the aforesaid persons. The names of both accused were on this list as at 5th June 1987.

2. At about 9.00 p.m. on the 5th June 1987 the accused CHAN Kwok-keung and CHAN Kar-shing were located as stowaways on board a ship named Wai Hong No. 1 which was at the time on route from Hong Kong to Macau.

   Both accused were placed in custody and at about 11.30 p.m. on 5th June 1987 were handed over to the Macau Marine Police by the Coxswain of the ship Wai Hong No. 1. At the same time the Hong Kong Identity Cards of the 2 accused were handed to the Macau Marine Police.

3. On the 8th June 1987 members of the Macau Judiciary Police placed both accused on the 12.30 p.m. jetfoil bound for Hong Kong for the purpose of their deportation.

4. At 1.30 p.m on the 8th June 1987 both accused were arrested as the aforesaid jetfoil was about to dock at the Macau Terminal, Hong Kong.

5. The Hong Kong Identity Cards of both accused bear 3 asterisks which would enable each accused to travel from Hong Kong to Macau through legitimate immigration check points. This was the situation in June 1987."

The agreed facts in paragraph 1 above were highly prejudicial since they clearly indicated that the appellants, from the day after the murder, were suspected by the police of being involved in the crime. Apart from being highly prejudicial, such evidence would not be admissible, since it was not an agreed fact that the appellants or either of them knew that they had been placed on the stop list, either on 30th August 1986 or at all. It may be that it was for this reason that the judge in his summing-up did not remind the jury of the precise terms of the agreed facts but contented himself with saying:-

> "It is agreed that these defendants stowed away on a ship from Hong Kong to Macau. They could legitimately have gone to Macau using their identity cards and have passed through the Immigration Control Officers in the normal way. They chose not to do so."

On the basis of that statement of the agreed facts, the judge then gave this direction which is critical to this appeal:-

> "If you are satisfied so as to be sure they ventured to Macau as stowaways, illegally by-passing the Immigration Control because they were on the run, then that evidence is capable of corroborating the evidence of Leung Chi-fai. Why should they have deliberately by-passed or avoided the Immigration Officers? - Only they could have given their reasons for doing so. If you are sure in your own minds that they adopted that course because they knew they would be arrested for this offence, then it would be evidence from a source other than from Leung himself capable of tending to confirm his story that they participated in the attack on the deceased."

Neither of the appellants chose to give evidence, hence the judge's indirect reference to the absence of any explanation from the appellants as to why they had stowed away on this journey to Macau.

It is common ground that conduct, and in particular the flight of an accused after an offence has been committed, may be tantamount to an admission by him of his guilt of that offence and as such admissible evidence. Their Lordships' attention was invited by Mr. Duckett Q.C. on behalf of the Crown to a number of Australian authorities which illustrate this proposition. But each case must depend on its own particular facts. In those cases to which their Lordships were referred, the flight of the accused had occurred within a short space of time of the offence being committed and in circumstances which clearly connected the accused with the offence.

In this case the appellants were found stowed away nearly ten months after the commission of the crime. The prosecution led no evidence to suggest that they had been in hiding for all or any part of this period. Indeed there was no evidence as to whether any and if so what efforts had been made by the police to find them and with what result. Leung, in his statements to the police after his arrest, gave them some information as to where the appellants were living or working, but no evidence was given as to whether these leads were followed up and if so with what result. It would in their Lordships' opinion be quite wrong for the jury to have taken it for granted that the appellants, during all or any part of this relatively lengthy period, had been evading capture for this offence. That was not the case as presented by the prosecution, and very appropriately the judge in his summing-up never suggested to the jury that they were entitled to make such an assumption.

In order for flight to be capable of amounting to an admission of guilt there must be some evidence which establishes a nexus between the conduct of the accused, his flight or concealment and the offence in question.

In this case the prosecution produced no evidence to establish that either of the appellants had been hiding away or otherwise behaving in an unusual manner in this period of nearly ten months. There was therefore no material which could have justified the jury inferring that the only reasonable explanation for the appellants stowing away on the ship from Hong Kong to Macau was that they were on the run, because they knew they might be arrested and charged with this murder. There could have been a variety of other reasons for their having stowed away nearly ten months after the murder.

Their Lordships are therefore satisfied that the judge and the Court of Appeal were in error in holding that this evidence was potentially corroborative of Leung's evidence. Indeed, in the circumstances, the jury should have been directed, not only that it was not potentially corroborative evidence, but of the dangers of paying any regard to it.

New trial.

The trial judge properly and fairly drew the attention of the jury to the many respects in which Leung's credibility had been attacked. He was a convicted murderer who hoped to obtain a reprieve. He had told the jury that he was prepared to sacrifice the appellants as a means of protecting his long-standing friend "Ah Sai" who he said was the fifth man involved - the police and the boy witness had only spoken of four men. In his statement to the police he said he was some eight to ten yards away when the chopping took place and was so frightened that he did not dare move his hands. He maintained that he did not chop the deceased. The evidence given by the police on the trial of the appellants put Leung amongst those leading the pursuit and the evidence of the boy was that he saw him chop the deceased.

Leung was able to identify the appellants on an identification parade, notwithstanding that their ages and their heights, as previously stated by him to the police, did not fit. Indeed the police evidence as to the heights and ages of the attackers, exluding Leung, also did not fit the appellants. Significantly the boy who was able to identify Leung's co-accused, Keung, did not identify either of the appellants on the same identification parade.

As the trial judge pointed out, Leung admitted in his evidence that his first statement contained a number of lies, as indeed did the other statements he made. He told the jury that in his interview with the police he had decided to protect his friend Ah Sai at the expense of the two appellants, but at the same time he concealed certain facts about them from the police. To take one example he said they were not related to each other, although he knew that they were brothers. When

asked by the police how he came to know the two appellants and the other two persons he alleged were involved, he said:-

> "About ten months ago when I and Ah Ming were walking in the street at Shamshuipo, we met Tai Kau and Sai Kau [the alleged nicknames of the two appellants]. Ah Ming then introduced them to me. Now Ah Ming has gone to Canada. I only have come to know the other two today."

Before the jury Leung admitted that Ah Ming was an entirely fictitious person. Indeed he told the jury that he and Ah Sai had been friends for many years and it was Ah Sai who asked him to go to Tsuen Wan where he met the first appellant and the second appellant and Chiu Yan through Ah Sai and that he first met them a few days before 29th August.

During the trial Leung was shown two knives which the police recovered in the vicinity of the housing estate. He said that the first and the second appellant each had a knife similar to those. Yet in his third statement dated 30th August he was only able to identify the one that had been given to him. In his second statement to the police Leung said he first became aware of the motive for the attack when he was inside the car on the journey to the scene with all the others. At the trial of the appellants he said the plan was hatched in room 1105 and finalised in the restaurant the following morning.

In his statement to the police, he said all five men travelled in the same vehicle to the scene of the crime. At his trial he told quite a different story. He said the first appellant travelled to Shatin in a lorry and later on "Ah Sai" joined the first appellant in that lorry to go to the housing area. He and the remaining men went in the private car.

In view of the obvious motivation which Leung undoubtedly had for giving false evidence, and the respects in which he had been so clearly discredited, the dangers of relying exclusively on his evidence, particularly in a capital case, are in their Lordships' judgment, such as to make it inappropriate for consideration to be given to a retrial.