HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

THE QUEEN APPELLANT

AND

CHONG MUN CHAI RESPONDENT

The Queen v Chai [2002] HCA 12
14 March 2002
S180/2001

ORDER

1. *Appeal allowed.*

2. *Set aside order of the Court of Criminal Appeal of New South Wales dated 25 August 2000.*

3. *Remit matter to the Court of Criminal Appeal of New South Wales for further hearing and determination of so much of the respondent's appeal to that Court as has not been determined.*

On appeal from the Supreme Court of New South Wales

Representation:

M G Sexton SC, Solicitor-General for the State of New South Wales with R D Ellis and B K Baker for the appellant (instructed by S E O'Connor, Director of Public Prosecutions (New South Wales))

G Nicholson QC with B W Cross for the respondent (instructed by Susan N Goodsell)

CATCHWORDS

The Queen v Chai

Criminal law – Manslaughter – Unlawful and dangerous act – Accessorial liability – Requisite mental element – Procurement of assault – Adequacy of directions on nature of assault procured – Directions framed according to issues at trial.

Appeal – Criminal appeal – Criminal law – Grounds of appeal – Duty of court of criminal appeal to determine all matters raised by grounds of appeal.

Crimes Act 1900 (NSW), s 18(1).

1 GLEESON CJ, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ. The issue in this appeal concerns the adequacy of a trial judge's directions to a jury on accessorial liability for manslaughter by procuring an unlawful and dangerous act which results in the unintended death of the victim.

2 The respondent, and a co-accused Shang Hyun Bae, were tried in the Supreme Court of New South Wales before James J and a jury on charges arising out of the deaths of Duck Hwan Kim and Dok Su Kim ("the victims"). Each accused was charged with two counts of murder and, in the alternative, two counts of maliciously inflicting grievous bodily harm. In addition, in relation to each charge of murder, the statutory alternative charge of manslaughter was left to the jury[1]. The respondent, in respect of each victim, was found not guilty of murder but guilty of manslaughter. He appealed against his convictions.

3 In the Court of Criminal Appeal of New South Wales the respondent relied upon six grounds. Ground 2 was that the trial judge's directions as to the elements of manslaughter, including joint enterprise, were erroneous and misleading. In support of that ground two arguments were advanced, but the Court of Criminal Appeal (Mason P, Sperling and Bergin JJ) found it necessary to decide only one of them, which it resolved in the respondent's favour[2]. The Court did not deal with the other argument or the other grounds. It allowed the appeal, quashed the convictions, and ordered a new trial. If that order were to stand, the trial judge at the new trial would not have the benefit of a decision upon the other issues raised by the respondent before the Court of Appeal. At least some of those issues would be likely to arise at a new trial[3]. The Court of

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1 Section 18(1) of the *Crimes Act* 1900 (NSW) provides:

> "(a) Murder shall be taken to have been committed where the act of the accused, or thing by him or her omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him or her, of a crime punishable by imprisonment for life or for 25 years.
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> (b) Every other punishable homicide shall be taken to be manslaughter."

2 *R v Chai* [2000] NSWCCA 320.

3 *Jones v The Queen* (1989) 166 CLR 409 at 411, 415.

Criminal Appeal should have dealt with all grounds likely to affect a new trial. The prosecution appeals to this Court, accepting that, if the appeal is allowed, it will be necessary to remit the matter to the Court of Criminal Appeal to deal with the rest of the respondent's arguments.

The evidence

4 The deaths of the victims occurred in the following circumstances. The respondent was the owner of the Ehwa Karaoke Bar at Kings Cross. The co-accused Bae was a friend. On the evening of 30 January 1997, the two victims, who were referred to in the evidence as "gangsters", were seated in a car parked outside the Karaoke Bar. Sang Hoon Lee, who was called as a witness for the prosecution, and two other men, Jung Suk Song and Myoung Il Jong, were at a gymnasium. According to his evidence, Lee received a message from the respondent. Following that message, and a telephone call, he and his two companions left the gymnasium and drove to the Karaoke Bar. Upon arrival, Lee, Song and Jong set upon the "gangsters". According to Lee, the respondent and Bae, armed with timber batons, also participated in the attack. The attackers dragged the driver out of the car and into a nearby garage, and did the same with the passenger. The victims were beaten and kicked while being dragged along the ground. They were taken upstairs to a room attached to the Karaoke Bar and subjected to further beating, kicking, and stomping. On the prosecution case, the respondent participated in part of the attack and was present during the remainder. There was evidence that the respondent had blood on his clothing. After about half an hour, Jin Hun Jang, an acquaintance of the respondent, delivered the victims by car to St Vincent's Hospital, where they later died.

5 That Lee and his two companions drove to the Karaoke Bar and attacked the two victims, dragging them from the car in which they were seated, beating and kicking them on the footpath, at the garage, and later upstairs, was established beyond doubt. It is likely that the jury inferred that the extent of the violence displayed towards the two victims was related to the fact that they, in turn, were said to be gangsters. This was not an attempt to induce two innocent people to move an inconveniently parked car. The jury would probably also have reasoned that the behaviour of Lee and the other men, upon their arrival at the scene, was itself compelling evidence of the nature of the request which procured their attendance. In any event, there was evidence, both from Lee, and from another witness, of that request. It is highly improbable that Lee, Song and Jong would have interrupted their visit to the gymnasium, driven to the Karaoke Bar, and violently attacked two men in a parked car, without somebody having asked them to do so. And it was no part of the respondent's account of events

that the attack was an unfortunate over-reaction to a request to exercise peaceful persuasion as a means of encouraging the gangsters to move away.

6 The witness Lee said that, at about 9.30 pm on 30 January 1997, while he was at the gymnasium, he received two urgent messages on his pager telling him to come to the Ehwa Karaoke Bar. He telephoned the respondent, who told him to come quickly because gangsters had arrived at the Ehwa. While driving to the Bar with Song and Jong, he spoke again on the telephone to the respondent, who told him that when he arrived at the Ehwa a man would point out "the guys", and he was to bring them to the garage.

7 Lee's girlfriend, Min Jung Kim, gave evidence that, when Lee returned home on the evening of 30 January 1997, she saw that his clothes were bloodstained, and asked for an explanation. He said he had been told by the respondent "to go to Ehwa quickly since there was some gangsters there and come here and bash them."

8 Jin Hun Jang said that the respondent was present when the victims were put into his car before he drove them to hospital.

9 The respondent gave evidence. He said that he heard a noise of fighting in the vicinity of the Ehwa some time after 9 pm on the evening in question, but he did not see the fighting and did not take part in it. He agreed that he had called Lee's pager number twice, earlier in the evening. He said that the reason for the pager calls was that he was trying to find Song, who had borrowed the company car. He admitted having spoken to Lee on the telephone when Lee returned the pager call. In his evidence in chief, the respondent denied having said anything to Lee about gangsters, and he generally denied Lee's evidence. In re-examination, he admitted he had been told by Jin Hun Jang that there were gangsters outside the Ehwa, but he said Jang told him that Jang had sent them away.

The parties' cases at trial

10 As the case was left to the jury, the prosecution, seeking to prove murder, or alternatively manslaughter, alleged that the respondent summoned Lee and his companions for the purpose of giving a severe beating to the two men described as gangsters. The prosecution alleged that the respondent and Bae not only supervised the beating but participated in it, but that allegation was not an essential part of all aspects of the prosecution case. The respondent, although he ultimately admitted that he was told there had been two gangsters outside the restaurant, denied that he had summoned Lee, or requested him or anybody else

to deal with the gangsters, or that he saw or participated in any violence. They were the versions of the facts that emerged from the evidence.

11 There was an occurrence at trial that should be mentioned. After the prosecutor opened to the jury, and before any evidence was called, counsel for the respondent also made some opening remarks to outline the general nature of the defence case. At that stage, counsel advanced a version of the facts which turned out to be significantly different from the evidence of his client and the defence case as finally put to the jury. He said that the respondent, having been informed that there were gangsters outside the Ehwa, endeavoured to contact Lee on his pager. He left a message. Lee rang him back. He "asked [Lee] to come to the Ehwa to tell the two men to move on. Lee was specifically told no fighting".

12 Four points may be noted. First, that suggested version of the facts was not supported by any evidence, and was contrary to the evidence given by the respondent. In cross-examination of the respondent, an attack was made on his credit on the basis of the difference between his evidence and what counsel had said in opening. He denied having instructed counsel to the effect suggested by counsel. (It should be added that there were language difficulties in the evidence of the respondent and other witnesses.) Secondly, there is a reason why such an account of the facts would be disavowed by the respondent. If embraced, it would involve accepting that the respondent had summoned Lee and his companions to deal with the gangsters. In the light of the evidence as to how Lee and the other men behaved when they arrived on the scene, and the available inference that they acted as they had been requested to act, it was risky for the respondent to acknowledge responsibility for asking them to come; and in his evidence he denied any such responsibility. Thirdly, if the men were gangsters, and as their presence was evidently regarded as some kind of threat, the idea that they could be persuaded peacefully to "move on", or that the people who were summoned to move them on would have been prohibited from using force, was improbable. Fourthly, if that version of the facts had been accepted by the jury, or at least entertained as a reasonable possibility, it would have been exculpatory of the respondent. It is not a version of the facts consistent with accessorial liability for manslaughter. It involves the respondent positively instructing Lee not to become involved in any fighting, but simply to ask the victims to leave. That having been said, it is a version of the facts that disappeared from the case, being unsupported by evidence, and being, in important respects, contrary to the evidence of the respondent.

The directions on manslaughter

13 In *Giorgianni v The Queen*[4], Wilson, Deane and Dawson JJ accepted as an accurate statement of the law the following passage from the judgment of Lord Parker CJ in *R v Creamer*[5]:

> "A man is guilty of involuntary manslaughter when he intends an unlawful act and one likely to do harm to the person and death results which was neither foreseen nor intended. It is the accident of death resulting which makes him guilty of manslaughter as opposed to some lesser offence such as assault … Bearing that in mind, it is quite consistent that a man who has counselled and procured such an illegal and dangerous act from which death, unintended, results should be guilty of being accessory before the fact to manslaughter."

14 The prosecution case against the respondent on manslaughter, which only became relevant if the jury were not prepared to convict of murder, was that the unintended death of the victims resulted from an unlawful and dangerous act in which the respondent participated or which he procured. It was the second alternative that became the focus of attention in the Court of Criminal Appeal.

15 In the course of a brief judgment delivered following argument about the form of the directions to the jury, James J said:

> "The Crown case in the present trial is that an understanding or arrangement amounting to an agreement to which each accused was a party came into existence to give each of the victims a beating to teach the victims a physical lesson, to inflict such physical violence on the victims that they would stay away from the Ehwa. There is no suggestion in the Crown case of any arrangement or understanding to engage in slight or trivial acts of assault.
>
> The only acts of assault, apart from acts of dragging or carrying the bodies of the victims, were acts of serious violence such as punching, kicking, stamping on, or hitting with wooden sticks or a golf club."

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4 (1985) 156 CLR 473 at 503.

5 [1966] 1 QB 72 at 82.

16 These comments were not made to the jury, and they were directed to an argument that was different from, although related to, the central issue in the present appeal. But they reflect what James J was setting out to convey to the jury in the part of his directions which is presently relevant. When he referred to "assault", he did so in the context of the prosecution case, the defence case as it was put to the jury, and the evidence of the witnesses. That part of the prosecution case on manslaughter that did not depend upon proof of actual participation by the respondent in the beating of the victims, but asserted that the respondent procured the beating, and was therefore liable as an accessory before the fact, was a case of the kind described by Lord Parker CJ in the passage quoted above: the procuring of an assault, of such a nature that it was both unlawful and dangerous.

17 As the Court of Criminal Appeal observed, the prosecution case on accessorial liability for manslaughter was not argued, or left to the jury, on the basis that, the respondent and those who actually beat the victims having entered into an understanding or arrangement that one crime would be committed, another crime falling within the scope of the common purpose was committed in carrying out that purpose[6]. The principle relied upon by the prosecution was that, if a person procures another to commit an unlawful act, which is objectively dangerous, and (unintended) death results, then the first person will be guilty of manslaughter. That principle was not in dispute before the Court of Criminal Appeal or in this Court. The question is whether James J put that aspect of the case to the jury in a way that exposed the respondent to the possibility of conviction on a different basis, and upon a view of the facts (or of the reasonable possibilities) that ought to have resulted in an acquittal.

18 In considering that question, two matters need to be kept in mind. First, it is not the function of a trial judge to expound to the jury principles of law going beyond those which the jurors need to understand to resolve the issues that arise for decision in the case. Secondly, the law should be explained to the jury in a manner which relates it to the facts of the particular case and the issues to be decided[7]. The judge's task was not to compose an essay on the topic of accessorial liability for manslaughter. It was to explain to the jurors so much of the law as they needed to know in order to decide the issues that arose from the charges, the evidence, the case for the prosecution and the defence case. It

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6 cf *McAuliffe v The Queen* (1995) 183 CLR 108 at 114.

7 *Alford v Magee* (1952) 85 CLR 437.

would, therefore, be wrong to take the oral or written directions given at this trial as providing a model to be used in another trial. The issues in that other trial will almost certainly differ from those about which the judge had to direct the jury in the respondent's trial. In view of one matter raised in the reasons of the Court of Criminal Appeal it should also be noted that, in accordance with common practice, James J directed the jury that they must decide the case on the evidence, and that what counsel said in their arguments and addresses was not evidence.

19 Towards the end of his summing-up, James J handed the jury written directions on law, which summarised what he had earlier told them. It is convenient to begin a consideration of what he said by reference to the relevant part of the written summary. It was as follows:

"MANSLAUGHTER

Elements

1. An understanding or arrangement amounting to an agreement came into existence between the particular accused and other persons to assault the particular victim.

2. In the course of the carrying out of the agreement to assault the victim and while the accused continued to be a party to the agreement, a party or parties to the agreement did an act or acts which were unlawful and dangerous, and which in fact caused the death of the victim.

3. The accused participated in some way in the joint criminal enterprise to assault the victim. It is sufficient for the Crown to prove that the accused participated in any of the following ways:

   (i) The accused himself did an act or acts of assaulting by way of participating in the assaulting of the victim;

   or

   (ii) At the time when the act or acts which were unlawful and dangerous and which caused death ('the fatal act or acts') were done by some other party or parties to the agreement, the accused was present and knowing that that party or those parties intended to assault the victim, intentionally assisted or encouraged that party or those parties to assault the victim;

or

(iii) In the case of Mr Chai, he procured the party or parties to the agreement who did the fatal act or acts, to assault the victim;

or

(iv) At some time before the fatal act or acts were done, the accused, knowing that other parties to the agreement intended assaulting the victim, had by words or acts assisted or encouraged parties to the agreement, including the party or parties who subsequently did the fatal act or acts, to assault the victim.

If the jury are satisfied beyond reasonable doubt of all of the elements of manslaughter, they should find the accused guilty of manslaughter. If the jury are not satisfied beyond reasonable doubt of all of the elements of manslaughter, they should find the accused not guilty of manslaughter and should proceed to consider maliciously inflicting grievous bodily harm."

20 The decision of the Court of Criminal Appeal turned upon par 3(iii). However, it is necessary to note other aspects of the oral and written directions. In the directions relating to murder, James J explained that, by assault, he meant the application of physical force to the body of the victim. In the directions relating to grievous bodily harm, James J referred to the intentional infliction of grievous bodily harm. In the oral directions relating to manslaughter, he distinguished between an agreement which had as its object "merely to assault the victim" and an agreement which included the intentional infliction of grievous bodily harm. But he did not suggest that assault meant anything other than what he had said earlier: the application of physical force to the body of the victim. In explaining the elements of manslaughter he said:

"The crucial point with manslaughter is that it is not necessary that the act or acts which caused death should have been done with the intent either to kill or to inflict grievous bodily harm. It is sufficient that the act or acts were unlawful and dangerous. I direct you that an intentional application of force to the body of another person without that person's consent and in the absence of any lawful excuse is unlawful …

I repeat that an act is dangerous if a reasonable person in the position of the person doing the act would have realised that doing the act would expose another person to an appreciable risk of serious injury."

21 The cases for the prosecution and the defence, in all respects, including the aspect of manslaughter now in question, were put to the jury on the basis of the evidence. For example, James J told the jury that the prosecution case was that the respondent had decided that the two victims were to be given a beating so as to teach them a lesson. The version of events suggested by counsel for the respondent in his opening, but unsupported by evidence, and contradicted by the respondent, was not left to the jury as being part of either the prosecution case or the defence case.

The reasoning of the Court of Criminal Appeal

22 The essential fault which the Court of Criminal Appeal found with the summing-up and, in particular, with the way the prosecution case on procuring was left to the jury, was that the references to "assault" might have been taken to encompass a technical or trivial assault which, although unlawful, was not objectively dangerous. The Court of Criminal Appeal observed that "the crime of assault does not necessarily include physical force, let alone injury, nor even physical contact". The Court said that the references to assault, and agreement to assault, were too general, and "embraced a situation where [the respondent] summoned Lee and his companions with instructions to move 'the gangsters' away by no more than threat of force as well as a situation where the instructions were to beat the gangsters if necessary."

23 It is true that an assault is not necessarily dangerous as well as unlawful, and that, if the jury had been given to understand that it would have been sufficient to convict the respondent of manslaughter if he had requested Lee to act with "no more than threat of force", and had not agreed to or procured anything more than a technical assault, then such a direction would have been misleading. But it is difficult to understand what could possibly have given the jury the idea that James J had a merely technical assault in contemplation, or that the kind of assault to which he was referring was one that was significantly different from the assault that actually took place. The prosecution's primary case was not merely that the respondent procured the beating that was administered to the victims but that he participated vigorously in its administration. The idea that, when he came to speak of procurement, in sub-par (iii), James J switched to a kind of assault that did not necessarily involve a beating, but included a mere threat of force, bears no relationship to the evidence in the case or the manner in which the trial was conducted. He specifically told the jury that when he was talking about assault he meant the application of physical force to the body, and, in the context of the present case, which concerned dealing physically with men who themselves were regarded as threatening, it was sufficiently clear that he was speaking of an assault involving

acts of a kind that were objectively dangerous, and of the kind that actually took place.

24 The basis on which the Court of Criminal Appeal considered that the jury might have thought that the reference to assault encompassed a mere threat of force without actual violence is to be found in the occurrence at trial earlier mentioned, that is to say, the opening statement made by counsel for the respondent. This, it was said, raised "a scenario which the jury could find – and might have found as [a] fact". The suggested scenario was that the respondent asked Lee to come and tell the men to move on, but that he also told Lee that there was to be no fighting. A slightly different scenario, also regarded by the Court of Criminal Appeal as a reasonable possibility, was that Lee and his companions were summoned to "persuade the [victims] to leave, if necessary by use of some unspecified degree of force but not involving a beating." It was pointed out that Lee, in his evidence, did not specifically say what, if any, force he had been asked to use, although the evidence of Ms Kim referred to "a bashing", and a bashing was what the victims received.

25 What the Court of Criminal Appeal regarded as a possible view of the facts, which, if taken by the jury, might lead them to understand the references to assault as references to a technical assault, or at least one that was not dangerous, was purely hypothetical. It bore no relationship to the evidence in the case, or to the way in which the case was left to the jury. The jury were told not to treat things said by counsel as evidence. Nothing in the evidence suggested the scenarios mentioned above. They are inherently improbable. They were not raised as possibilities in the summing-up. They were not raised as possibilities in the final addresses of counsel. And the jury had seen the respondent's credit challenged in cross-examination on the basis that his counsel had advanced a suggested version of the facts which was inconsistent with the respondent's own evidence. One thing that would have been clear to the jury by the end of the trial was that nobody embraced the version of the facts originally advanced in opening by the respondent's counsel.

26 It should also be noted that, if the jury had accepted as a fact, or a reasonable possibility, that the respondent had merely summoned Lee to engage in a technical or trivial assault, or to remove the victims without any fighting, and the respondent had not participated in the attack on the victims, it is difficult to understand how the element of manslaughter set out in par 2 of the directions could have been found to be satisfied. The jury were told that they had to be satisfied that the unlawful and dangerous acts that occurred were done in the course of carrying out the agreement. If the respondent told Lee there was to be no fighting, then the savage beating that was inflicted on the victims would not

have occurred in the course of carrying out the agreement. This consideration also underlines the hypothetical nature of the matter which concerned the Court of Criminal Appeal.

Conclusion

27 The appeal should be allowed. The orders of the Court of Criminal Appeal should be set aside and the matter should be remitted to that Court for consideration of the remaining arguments of the respondent.