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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

V

WONG SIU CHING

Before Morgan LCJ, Higgins LJ and Girvan LJ

MORGAN LCJ (delivering the judgment of the court)

The application

[1] The Applicant was convicted of the murder of Mi Yo Ho (commonly known as Candy Ho) on 8 June 1998 at her home in Isoline Street, Belfast by a majority of 9 to 1 at Belfast Crown Court on 7 May, 2008 and was consequently sentenced to life imprisonment by the learned trial judge, Mr. Justice Hart. On 6th June, 2008 Hart J ordered that the release provisions of the Life Sentences (Northern Ireland) Order 2001 would apply to the applicant once he had served the specified period of 18 years. The applicant obtained leave to appeal the tariff and renewed his application for leave in respect of his conviction.

[2] The Crown case against the applicant was a circumstantial case. The applicant made no complaint in respect of the learned trial judge's summing up to the jury but contended that there was evidence adduced at the trial which so undermined the Crown case that it should not have gone to the jury. In any event the applicant submitted that the conviction was unsafe by reason of those evidential matters. We dismissed the application for leave to appeal at the hearing and these are our reasons.

The Crown Case

[3] Both the applicant and the deceased were natives of Hong Kong. At the time of her death the deceased was living in Isoline Street, Belfast and worked as a waitress. The applicant was well known to the deceased. There was evidence that they had been in phone contact in April 2008 and he had written to her on 16 April 2008. He had been acting as caretaker of her flat in Hong Kong so that she would not forfeit the tenancy after her return to the United Kingdom in 1997. They first met during that year. While in Belfast the deceased had been in a sexual relationship with a Mr Wing Cheun Yeun, a married man. She had fallen pregnant with his child and was eighteen weeks into that pregnancy at the time of her death. She had obtained information in relation to termination but had not proceeded down that route. The prosecution case was that Mr Yeun wished to have the deceased killed and brought the applicant, whom he also knew well, to Northern Ireland for that purpose. Mr Yeun was acquitted of procuring her murder at a trial in 2001.

[4] On 2 June 1998 the applicant booked an open return ticket to London from Hong Kong. He travelled to London on 4 June 1998. When he arrived in London he was interviewed by an immigration officer who noted that he had an open return ticket with a confirmed return booking at 8.30 pm on 10 June 1998. It is agreed that the applicant told the immigration officer that the reason for his visit to the United Kingdom was for shopping and travel and that he intended to obtain hotel accommodation in London. The applicant admits that he gave false information to the immigration officer. He said in evidence that his intention was to travel to Northern Ireland to take up long term employment with Mr Yuen for one or two years. He agreed that he had told neither his mother nor girlfriend that this was his intention and he had made no arrangements in relation to his accommodation in Hong Kong.

[5] After negotiating entry the applicant phoned Mr Yuen twice before taking a flight to Aldergrove Airport, arriving at 12.40 pm on 5 June 1998. He was met at the airport by Mr Yuen. Photographs are available of the applicant's arrival which demonstrated that he was of Chinese appearance, wearing glasses, with a distinctive pony tail and carrying a rucksack on his back and an umbrella.

[6] It was common case that there had been substantial telephone contact between the applicant and Mr Yuen during the period from 2 June until 8 June 1998. Three calls to Mr Yuen were made from phone boxes in the centre of Belfast to Mr Yuen around midday on 6 June. On the afternoon of 6 June 2008 Richard Briers, who lived nearby saw a man walking up and down Isoline Street looking at the houses on the even side. He described the man as 20-30, Asian appearance, 5' 7'' to 5' 9'' with glasses and a moustache. He was wearing a baseball cap and had a small black rucksack. The applicant was 34

at the time and did not have a moustache. He denied that he had visited Isoline Street during his stay in Belfast.

[7] On 7 June a neighbour who also lived nearby noticed a Chinese fellow walking on the even numbered side. It was still light although this was in the evening. He was 5′ 6″, wearing an anorak and baseball cap and had longish hair which came out of the back of the baseball cap in a pony tail. He had a dark rucksack on his back and was carrying an umbrella. The jury had available to them a photograph of a Chinese man with an umbrella in Dorchester Street which the Crown said supported this identification as being the applicant.

[8] Mr Briers saw the same person that he had seen earlier return at approximately 7.45 pm on 7 June looking again at the even numbers in Isoline Street. Mr Saulters who lived nearby said that he saw a Chinese man walking up and down outside the deceased's house before going into it using the key at 10 pm on 7 June. Others in the same house also described that entry to the deceased's house. The learned trial judge carefully reviewed the strengths and weaknesses of those recollections.

[9] Although the applicant made a number of telephone calls to Mr Yuen his case is that he had no contact of any sort with the deceased. She was the only other person he knew in Belfast. They had recently been in contact by telephone and correspondence and if his account of coming to Northern Ireland was correct this had implications for the deceased in terms of finding someone to look after her apartment in Hong Kong. On the applicant's case he changed his mind about staying in Northern Ireland on 5 or 6 June as a result of a telephone call with his girlfriend who had been unaware of his plans.

[10] The deceased returned to her home probably sometime between 12.15 am and 12.25am in the early hours of 8 June. No-one appears to have seen her car return. There is little doubt that she was then murdered in the hallway of her home. The pathologist considered it likely that this occurred sometime around 12.30 am although it could have been later. There was some evidence of witnesses hearing screams at the relevant time. There was evidence of a phone call to Mr Yuen around 1 am that morning and the applicant was identified as the person who obtained a taxi at 1.20 am in the centre of Belfast. His location was consistent with leaving the scene of the murder shortly after it was committed.

[11] A phone call was made from a phone box to Mr Yuen at 12.37 on 8 June and an hour later the applicant purchased a ticket from a travel agent for Heathrow. He left on the 5.30 pm flight that day which would have been the next available flight to Heathrow. He phoned Mr Yuen from Heathrow and

changed his ticket there so that he could fly back to Hong Kong that evening at 8.30 pm.

[12] The deceased's body was discovered on 9 June when Mr Yuen raised the alarm. He was seen at the deceased's house shortly before 2 pm that day and informed police shortly afterwards. The deceased had not been missed at her work on 8 June because she had switched her rest day from 10 June to 8 June. The Crown relied on this because the original booking made by the applicant was to leave the United Kingdom on a flight on the evening of 10 June. The Crown suggested that the original plan had been to murder the deceased on the night of 9/10 June so that the applicant would have returned to Hong Kong before the deceased was discovered. The change of rest day meant that the dates had to be brought forward.

The applicant's case

[13] Apart from the positive case made by the applicant that he had not visited Isoline Street nor had any contact with the deceased during his visit to Northern Ireland the defence also relied on other evidence suggesting the possible connection of other individuals. There was evidence that on his visits to the deceased Mr Yuen was accompanied by another young Chinese male who had been seen in the vicinity of the deceased's house on a number of occasions including the earlier part of the day on 5 June. The defence also pointed to the fact that there was no sighting of anyone leaving the deceased's premises shortly after 12:30 a.m. on 8 June although there were people in the street at that time. The strength of that evidence is undermined by the fact that none of these people saw the deceased returned in her car to her home.

[14] The principal matter upon which the defence relied, however, was the evidence of Mrs Betty Williams. She lived nearby and gave evidence about someone entering the deceased's house at 10 p.m. on 7 June using a key. She said that she woke up sometime between 2 a.m. and 2:30 a.m. on 8 June to feed her young son. She looked into Isoline Street and said that she saw the bedroom light on in the deceased's bedroom on the first floor. She said that she sort of saw someone bent over as if they were looking through the venetian blind.

[15] It is highly unlikely that the applicant was in the deceased's house at this time. The applicant had taken a taxi from the centre of Belfast to his guest house at 1:20 a.m. that morning. Mr Yuen also has an alibi for this period since he was in the company of a business associate and his wife. In light of this the defence contended that no jury properly directed could exclude the reasonable possibility that someone else had murdered the deceased.

Conclusion

[16] The defence made an application for a direction that the case should be withdrawn from the jury at the end of the Crown case. In support of an application the Crown relied upon the second limb in R v Galbraith [1981] 1 WLR 1039.

> "How then should the judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case.(b) Where however the Crown's evidence is such that its strength or weakness depends on the view to betaken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there *is* evidence on which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

It was accepted for the purpose of the direction that there was evidence that the crime alleged had been committed by the applicant but in light of the evidence of Mrs Williams it was contended that her account was inconsistent with his guilt.

[17] The approach to the evaluation of circumstantial evidence is well-established and found in the judgment of Pollock CB in R v Exall [186] 4 F&F 922 at 928.

> "What the jury has to consider in each case is, what is the fair inference to be drawn from all the circumstances before them, and whether they believe the account given by the prisoner is, under the circumstances, reasonable and probable or otherwise .. . Thus it is that all the circumstances must be considered together. It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link broke, the chain would fall. It is more likely the case of a rope composed of several cords. One strand of the cord might be insufficient to sustain the

> weight, but three stranded together may be quite of sufficient strength. Thus it may be in circumstantial evidence – there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion; but the whole, taken together, may create a strong conclusion of guilt, that is, with as much certainty as human affairs can require or admit of."

This issue was also considered by the Privy Council in DPP v Varlack [2008] PC 56. That was a case in which the issue was the extent to which the appellant had in contemplation the plan to murder the victim. It was contended on her behalf that the evidence was equally consistent with her participating in an adventure related to the deceased's drug activities. The trial judge refused an application for no case but this was reversed on appeal. The substance of the reasoning is set out at paragraphs 23 and 24.

> "**[23]** The judge held that the evidence was such that a reasonable jury might convict. The Court of Appeal held, on the other hand, that because it was in their view as likely that the Respondent was a party only to a purpose which did not involve contemplation of the killing of Todman, there was "no basis but speculation on which to ascribe to Varlack's participation in one as opposed to the other" (para 31). They did not apply the test of determining what inferences a reasonable jury properly directed might draw, as distinct from those which they themselves thought could or could not be drawn.
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> **[24]** Their Lordships consider that the Court of Appeal were in error in this respect. The trial judge correctly approached the submission of no case by reference to the test whether a reasonable jury properly directed might on one view of the evidence convict. When one applies this principle, it follows that the fact that another view, consistent with innocence, could possibly be held does not mean that the case should be withdrawn from the jury. The judge was in their Lordships' opinion justified in concluding that a reasonable jury might on one view of the evidence find the case proved beyond reasonable doubt and convict the Respondent. They were clearly entitled to draw the inference that the Respondent telephoned Hamm in order to inform him that Todman had set out along the mountain road. In determining whether this was with knowledge that he might meet with lethal force at the rendezvous, they were entitled to place in the scale the antecedent and subsequent facts."

[18] We have no doubt that the learned trial judge correctly applied this test when dealing with the application in this case. He identified the considerable evidence against the applicant. This included the evidence of his lies to the immigration officers on entry and the fact that he had a close connection to the deceased through his occupation of her flat. There was ample evidence that he was very closely connected to Mr Yuen and that Mr Yuen was the father of the child the deceased was carrying. The applicant was collected by Mr Yuen arrival in Northern Ireland and the jury could infer that he was taken by him to a guesthouse. There was evidence from which the jury could conclude that he was in Isoline Street on 6 and 7 June 1998 and evidence from which they could accept that he entered the deceased's house before she returned in the early hours of 8 June. Even if the jury accepted the evidence of Mrs Williams it was still for them to decide whether they were satisfied beyond reasonable doubt whether the applicant murdered the deceased.

[19] We consider that the learned trial judge was correct to let the case go to the jury and we have no sense of unease about the verdict. One discrete issue was raised about the discharge of a juror in the course of the summing up. The juror had indicated that he was under stress because of difficulty in coming to a conclusion about the guilt of the applicant. We consider that the learned trial judge dealt with this appropriately. Criticism was also advanced in relation to the majority verdict direction given to the jury after they had returned to say they were having difficulty in coming to an agreed verdict. The learned trial judge gave an appropriate adapted direction to the jury on this and we consider that no criticism of that can be sustained. We dismiss the appeal against conviction.

Sentence

[20] The learned trial judge concluded that this was a carefully planned murder carried out by the applicant at the request of his close friend Mr Yuen. He correctly applied the guidance in R v McCandless [2004] NI 269 and was satisfied that this was a higher starting point case because it was effectively a professional or contract killing. We accept the applicant's submissions that in relation to aggravating factors it is necessary for those to be established beyond reasonable doubt but it is clear from the sentencing remarks of the learned trial judge that he was so satisfied. We do not consider that the prior acquittal of Mr Yuen in 2001 of procuring the murder of the deceased affects that conclusion.

[21] The applicant had serious previous convictions. On 28 January 1980 he was sentenced for possession of an offensive weapon to a period of probation. In his favour is the fact that he was only 15 at that time. Of more concern is the fact that on 10 August 1990 he was sentenced to a period of 4 1/2 years imprisonment for robbery. The trial judge was certainly entitled to take that into account as an aggravating factor. He was also entitled to bear in mind

that this attack took place upon this lady as she returned late at night to her home where she lived alone. In our view she was a vulnerable victim in relation to this planned attack.

[22] After the failure of the Yuen trial it was decided on 2 May 2002 to seek the extradition and prosecution of the applicant. Nothing was in fact done about this until 10 November 2005 when a warrant was issued for his arrest. He was subsequently held in Hong Kong on 31 August 2006 and extradited to Northern Ireland on 27 June 2007. It was contended that because of the delay between May 2002 and November 2005 some adjustment should be made to the sentence in order to vindicate the alleged breach of his rights under article 6 of the ECHR. In our view there is no substance in the submission. The applicant was not substantially affected until 31 August 2006 and the reasonable time provisions of article 6 have no part to play in respect of the earlier period.

[23] A submission was advanced to the learned trial Judge that he should give credit for the period of nine months and three weeks spent in custody in Hong Kong. In England and Wales there is a statutory power to give credit for such period by virtue of section 47 of the Criminal Justice Act 1991. In Northern Ireland section 26 of the Treatment of Offenders Act (Northern Ireland) 1968 as the learned trial Judge correctly concluded does not make any provision relating to credit being given in respect of periods spent in custody in other jurisdictions.

[24] When this matter was debated before the learned trial judge he considered whether he should make some allowance by way of alteration of the tariff. While his attention was apparently drawn to section 243 of the Criminal Justice Act 2003 which applies to offences committed after 4 April 2005 his attention was not drawn to the 1991 Act which provides for a similar approach in England and Wales in relation to offences committed before that date. In relation to a mandatory life sentence the tariff period is the period which the Court determines is the appropriate period a defendant convicted of murder should serve by way of deterrence and retribution before he may be considered for release by the Parole Commissioners. If the period of foreign detention relates to the subject crime there is no reason in logic why the period of detention in the foreign prison pending extradition should not properly be considered as part of that period to be served before release can be considered. It is a period of incarceration served and it relates to the murder charge. The aims of deterrence and retribution are not frustrated by taking account of that period of detention in the calculation of the appropriate tariff. Accordingly, a court fixing a tariff, following the approach enunciated in McCandless, should take account of the period already spent in custody in relation to the offence in respect of which tariff is being determined. The court may take account of that period either by way of reducing the tariff making it clear that it takes account of the period spent in the foreign prison or it may

fix the tariff directing that in calculating the earliest date when release may be considered credit should be given for the period of imprisonment in the foreign prison pending extradition.

[25] The last point made in favour of the applicant was the impact upon him of serving his sentence in a foreign jurisdiction. There are cases where an accused has been able to demonstrate particular difficulties as a result of this and in some cases the court has been prepared as a matter of discretion to show leniency. In our view this is not such a case. This man travelled to Northern Ireland for the purpose of carrying out a heinous crime. It would require the most compelling of circumstances to justify any reduction in the period appropriate for retribution and deterrence.

[26] Accordingly we confirm the tariff at 18 years but direct that in determining the earliest date on which he may be considered for release credit must be given for the period of time spent by the applicant in custody in Hong Kong pending his extradition to the United Kingdom on the murder charge.