



Summary of Judicial Decision

HKSAR v SHUM Man-fai (“the Appellant”)

CACC 338/2019, [2021] HKCA 168

Decision : **Appeal against conviction allowed**
Date of Hearing : **12 January 2021**
Date of Judgment : **10 February 2021**

Background

1. This was a so-called one-punch manslaughter case. The deceased saw his girlfriend walking with the Appellant in an evening. Getting agitated, the deceased reacted with slapping and hitting the girlfriend, followed by dashing towards the Appellant. The Appellant fended off the deceased and both started a conversation. During the exchange, the deceased got agitated again and pushed the Appellant, who responded with two punches, the first missing but the second landed on the deceased's head, causing him to fall down with his head hitting the ground forcefully. The deceased died after a week.
2. Following a trial before a judge and a jury, the Appellant was convicted by a majority of 6:1 of one count of manslaughter, contrary to common law and punishable under section 7 of the Offences against the Person Ordinance, Cap. 212, and was sentenced to 3 years' imprisonment. The Appellant appealed against both his conviction and sentence.

Issues in dispute against conviction

3. Whether the judge failed to provide the jury with a full direction, in accordance with Specimen Direction 2 of the Specimen Directions in Jury Trials (issued in September 2013) (“the Specimen Directions”), on the burden of proof when considering the defence evidence (“Ground 1”).
4. Whether the judge failed to give a direction, in accordance with Specimen Direction 48 of the Specimen Directions, relating to what the Appellant did against the background of what he honestly believed the danger to be (“Ground 2”).



Department of Justice's Summary of the Court's rulings

(full text of the Court of Appeal's judgment at

https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=133518&QS=%2B&TP=JU)

5. Regarding Ground 1, as the Court of Appeal held that the substance of the *Liberato* direction was conveyed to the jury when the summing-up was read in its entirety, this ground failed (Paragraph 38).

6. In relation to Ground 2, the Court of Appeal discussed the “two-step” approach governing the issue of self-defence, namely, (1) the **subjective limb** of whether a defendant honestly believed or might have honestly believed that it was necessary to defend himself; and (2) the **objective limb** of whether the amount of force used by the defence was reasonable, taking the circumstances as he honestly believed them to be (Paragraph 34).

7. In allowing the appeal against conviction under Ground 2, the Court of Appeal highlighted the importance of the **subjective element in the second limb of the test for self-defence**, involving assessment of reasonableness of force used by the defendant (Paragraphs 39-44).

8. The Court stressed that the danger in the judge's summing-up direction lies in its absence, in the re-direction, of any reference to the Appellant's **subjective view concerning the issue of reasonableness**, i.e., what the Appellant honestly believed, or may have honestly believed, “in the heat of the moment” it was necessary to do in the circumstances facing him. Where the case was concerned, as it was here, with a defendant's response or reaction to another's aggression, then, whilst the reasonableness of that response or reaction must be a matter for the jury, it is nevertheless highly relevant to consider what the defendant thought, or may have thought, about the necessity of responding or reacting as he did. If the defendant believed or may have honestly believed that he had to defend himself and he did no more than what he honestly and instinctively thought was necessary to do, that would be *very strong*



evidence that the amount of force used by him was reasonable. (Paragraph 39).

9. With reference to the full terms of the direction in Specimen Direction 48, the Court held that when the jury determined whether the Appellant's reaction or response in defending himself was reasonable, which was an **objective question**, it was highly relevant for them to consider what the Appellant thought, or might have thought, about the necessity of responding or reacting as he did, which was a **subjective question**. If the jury find that a defendant could not have honestly and instinctively thought it was necessary to defend himself in this way, perhaps because he could and should have withdrawn, or because he was the much stronger, younger or more agile party, or because he used a proverbial 'sledgehammer to crack a nut', the jury would no doubt find that he was not acting in reasonable self-defence. (Paragraphs 39-40).
10. Without a proper direction given in accordance with Specimen Direction 48, there was a **danger for the jury applying a purely objective approach** to the reasonableness limb of the test for self-defence (Paragraph 43).

Prosecutions Division
Department of Justice

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