



Summary of Judicial Decision

HKSAR v Mak Wan Ling (D3) (“the Appellant”)

FACC No.3 of 2019 ; [2019] HKCFA 37

Decision : **Appeal unanimously dismissed**
Date of Hearing : **5 September 2019**
Date of Judgment : **18 October 2019**

Background

1. The Appellant is a registered medical practitioner employed by the DR Group to work in one of the company’s beauty centres located in Causeway Bay. A customer (the Deceased) of the company purchased an autologous blood product known as “CIK/AI” (CIK) and on 3 October 2012, the Appellant administered the CIK intravenously to the Deceased. The Deceased became sick shortly after the infusion and was admitted to the Ruttonjee Hospital on 4 October 2012. Upon blood test, a catastrophic number of Mycobacterium Abscessus was found and the Deceased was diagnosed with septic shock. The same strain of bacteria from the Deceased’s blood was traced back the lab which had cultured and produced the Deceased’s CIK infusate. The owner of the DR group also owned the lab and no sterility test had been performed on the CIK infusate prior to it being sent out. On 10 October 2012, the Deceased died from multi-organ failure.
2. Along with 2 other co-defendants, the Appellant was charged with Gross Negligence Manslaughter (GNM). After trial, the co-defendants were convicted but the jury was unable to reach a verdict on the count against the Appellant and a re-trial was granted with dates to be fixed.

Question of Law

3. The Appellant then applied to the Court of Appeal (CA) under section 81 of the Criminal Procedure Ordinance Cap.221 (CPO) on a point of law, namely for the elements of GNM (i.e. duty of care, breach, causation and gross negligence), whether the prosecution must also prove that the accused was subjectively aware of an obvious and serious risk of death to the deceased in relation to gross negligence. The Appellant’s s.81 CPO application was heard together with another GNM case (HCCC 213/2016 where a taxi with a liquefied petroleum gas tank exploded in a garage killing 3 persons) by the CA on 18 and 19 October 2018.
4. Having considered the law on GNM in Hong Kong, the United Kingdom, Australia and Canada, the CA ruled that the prosecution is not required to prove that the accused was subjectively aware of the obvious and serious risk of death to the deceased (for the full text of the Court of Appeal judgement



from CAQL 1 of 2018 please see https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=118498&QS=%2B&TP=JU). The Appellant then made an application for leave to appeal to the Court of Final Appeal (CFA).

5. In the leave application, an issue arose as to whether the CA s.81 decision could be regarded as a “final decision” in the context of s.31(a) of the Hong Kong Court of Final Appeal Ordinance Cap.484 (HKCFAO). The section provides that an appeal shall, at the discretion of the Court, lie to the CFA in any criminal cause or matter, at the instance of any party to the proceedings, from “*any final decision of the Court of Appeal*”.
6. In granting leave, Fok PJ endorsed the approach that a decision may be final even if it does not finally determine the whole action. A broad commonsense approach should be adopted and that if the issue dealt with and determined by the court is a “*substantive part of the final trial*” or a “*crucial issue*” in the case, or a point “*that goes to the root of the case*” or a “*dominant feature of the case*” then the order or judgment even if it did not finally dispose of the whole action should nevertheless be regarded as a final judgment for the purpose of s.31 of HKCFAO (at paragraph 12 of judgment, https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=120824&QS=%24%28CAQL%2C1%2F2018%29&TP=JU)

Department of Justice’s Summary of the CFA Judgment

7. In the final appeal, the Appellant sought to argue that the offence of manslaughter by gross negligence should include a subjective recklessness as to the risk involved, and that no one should be convicted of GNM unless the accused proceeded with the conduct causing death while aware of an obvious and serious risk of death. In support, the Appellant contended that firstly the definition of the offence is objectionably circular and secondly, it is unacceptable in principle and contrary to authority that liability for an offence as serious as manslaughter should rest on an objective test rather than on proof of the accused’s awareness of the risk of death.
https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=124944&QS=%2B&TP=JU
8. The CFA examined a body of case law in the UK and noted that so far as the fourth element of the offence is concerned, the objective test is embraced by the Supreme Court of Canada and the High Court of Australia where attempts to persuade those tribunals to jettison that test have failed. (paragraph 27)
9. The CFA rejected the Appellant’s arguments that (i) the definition of the offence is objectionably circular; (ii) liability for an offence as serious as manslaughter should rest on proof of the accused’s awareness of the risk of death (as opposed to an objective test only); (iii) the decisions in *Hin Lin Yee*, *Kulemesin* and *Choi Wai Lun* as lending support; (iv) *Sin Kam Wah* where *R v G*



and Anor was adopted as providing further support. The CFA emphasised that the common law offence of GNM operates in a sphere in which the courts have consistently referred to the value placed by the law on human life. (paragraphs 30-55)

10. Accordingly, the CFA unanimously concluded that: "In the offence of manslaughter by gross negligence, the element of gross negligence referred to in the last element of the offence as enunciated in *R v Adomako* [1995] 1 AC 171, is proved by application of the objective standard of reasonableness, there being no additional requirement that the prosecution must also prove that the defendant was subjectively aware of an obvious and serious risk of death to the deceased. Such awareness, if proved, is relevant to liability but not a necessary ingredient of the offence." (paragraph 56)

**Prosecutions Division
Department of Justice**

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