CACC 338/2019

[2021] HKCA 168

**in the high court of the**

**hong kong special administrative region**

**court of appeal**

criminal appeal no 338 of 2019

(on appeal from HCCC NO 87 of 2019)

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###### BETWEEN

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| HKSAR | | | Respondent |
| and | | |  |
| Shum Man Fai (岑文輝) | | | Appellant |
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Before: Hon Macrae VP, McWalters JA and Zervos JA in Court

Date of Hearing: 12 January 2021

Date of Judgment: 10 February 2021

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| J U D G M E N T |

Hon Macrae VP (giving the Judgment of the Court):

1. Following a trial before M Poon J (“the judge”) and a jury, the appellant was convicted by a majority (6:1) of the manslaughter of Mr **‍**Wong **‍**Yat-ming (“the deceased”), contrary to Common Law and punishable under section 7 of the Offences against the Person Ordinance, Cap 212. On 6 November 2019, he was sentenced to 3 years’ imprisonment.
2. On 26 November 2019, the appellant filed a Notice of Application for Leave to Appeal (Form XI) in respect of both his conviction and sentence. On 9 April 2020, he was granted bail pending appeal by the Single Judge[[1]](#footnote-1) on the basis of the merits of his appeal and on the time basis. At the same time, leave to appeal against both conviction and sentence was also granted, for reasons which were later reduced into writing[[2]](#footnote-2).
3. On 12 January 2021, having heard argument from the parties, we reserved our decision in this matter. This is our judgment and the reasons therefor.

The prosecution case

1. The appellant was the ex-boyfriend of Ms Wong Chuk-kwan (“PW1”): the deceased was PW1’s current boyfriend. Despite the fact that they were no longer in a relationship, the appellant and PW1 seemed to have remained on friendly terms. In the early evening of 16 **‍**July **‍**2018, pursuant to an earlier arrangement, the appellant met with PW1 for dinner **‍**in Kowloon City[[3]](#footnote-3). As they parted company after dinner in Hau **‍**Wong **‍**Road and were walking to where their respective cars were parked, the deceased, who was driving in the area, happened to see the appellant and PW1 walking together. The deceased became very agitated by what he saw, stopped his car and ran across the road, tripping over in the process. He immediately went up to PW1, punched her in the face, squeezed her neck and threw her against a car. PW1 immediately cried out for help.
2. By the time of the assault on PW1, the appellant had already got into his car, which was some three or four spaces away from PW1’s car. Hearing PW1’s cries for help and seeing a commotion, he alighted from his car and walked to a position outside a wine shop on the ground floor of No’s 6-10, Hau **‍**Wong **‍**Road. The wine shop had three CCTV cameras, one inside, the other two outside the wine shop, all of which were in operation at the relevant time[[4]](#footnote-4). The quality of all of the CCTV material was very good and two of the videos in particular enabled the jury and this Court to see with unusual clarity, and also to hear, much of what took place at the time outside on the pavement. The CCTV videos and a transcript of the conversation between the appellant, the deceased and PW1, and later, the ambulance men and police, which was recorded by one of the cameras, were produced as Exhibits P1 and P5 respectively.
3. The CCTV evidence showed that the deceased “dashed towards” the appellant (to use the language of the Admitted Facts[[5]](#footnote-5)) in a highly agitated state. There was brief bodily contact in which the appellant used his left hand to fend off the deceased and his right elbow to make a defensive strike at the deceased as the latter charged into him. The two men quickly separated and there was a verbal exchange for about one minute, with both men pointing at each other and the appellant initially assuming a defensive stance. During the exchange, the appellant is heard telling the deceased that he did not want to fight or touch him[[6]](#footnote-6). PW1 then appeared holding the left side of her face, which had earlier been struck by the deceased, and both men appeared to relax their positions. All three then had certain verbal exchanges, with the deceased repeatedly questioning why the appellant should have been together with PW1. This part of the incident was referred to by the parties and the judge at trial as “Episode 1”.
4. In the course of the deceased persistently querying why the appellant should have been together with PW1, during which he pointed out that it was not the first time he had “bumped into” the two of them together[[7]](#footnote-7), he suddenly gave the appellant a forceful push, at which the appellant punched the deceased back, initially missing his target. It is what happened thereafter that was the subject of dispute, and which is critical to an analysis of whether the offence of manslaughter was committed. This part of the incident was referred to at trial as “Episode **‍**2”.
5. It was the prosecution case that the appellant had over-reacted to the deceased’s initial aggression by aiming three blows at him during Episode 2: a first punch which missed its target; a second punch which landed on the deceased’s head, causing him to lose his balance and fall into, or onto, a wine-rack placed on the pavement; and a third punch when the deceased was either falling or about to fall onto the ground[[8]](#footnote-8). The prosecution contended that self-defence was not made out, since the force used by the appellant was neither necessary, nor was it reasonable or proportionate in the circumstances.
6. It was not disputed that the deceased suffered a bad head injury[[9]](#footnote-9) as a result of the fall, from which he died a week later[[10]](#footnote-10). An autopsy was carried out by a forensic pathologist, Dr Chiao Wing-fu, who concluded that the cause of death of the deceased was a head injury, which “could have satisfactorily been explained by a single fall with his right back of head bumping against the ground”[[11]](#footnote-11). Dr Chiao detected three fractures at the right back of the deceased’s head, which could have been be caused by one impact when the head landed forcefully on a blunt, unyielding object, such as the ground[[12]](#footnote-12).
7. The CCTV evidence, in addition to capturing Episode 1 and the initial part of Episode 2, also recorded the ensuing conversation between the appellant and two ambulance men and three police officers, who subsequently arrived at the scene. In essence, the appellant repeatedly claimed at the scene that he had acted in self-defence[[13]](#footnote-13); and that after the initial bumping episode (Episode 1)[[14]](#footnote-14), he had punched the deceased only once (Episode 2)[[15]](#footnote-15).

The defence case

1. The appellant elected to give evidence. He was a 44‑year‑old married man, who had previously been in a relationship with PW1. That relationship had ended in September ‍2017; however, the two remained friends. He said that he did not cause the death of the deceased; rather, it was an accident in which the deceased had tripped and fallen; in any event, he had been acting in self-defence and the force used by him was reasonable in all the circumstances.
2. The appellant claimed that the deceased had initiated both **‍**episodes of violence. Accordingly, he had acted throughout in self‑defence[[16]](#footnote-16). During Episode 2, his first blow had missed the deceased, who then tried to grab his collar. He therefore threw a second punch at the deceased’s shoulder to free himself, whereupon the deceased tried to kick him but lost his balance and fell. The appellant was adamant that there was never a third blow as contended for by the prosecution[[17]](#footnote-17). He maintained that only one of his punches landed on the deceased, and the deceased’s kick, or attempt to kick, was an intervening act which caused him to lose his balance and eventually led to his death.
3. When cross-examined as to why he had made no mention to either the ambulance men or the police at the scene about any attempted kick by the deceased, or that the deceased had thereby lost his balance and fallen, the appellant said he was only asked to give a rough account of the incident and was not, at that stage, concerned with matters of detail[[18]](#footnote-18). He did not agree that he had used excessive force or retaliated against the deceased[[19]](#footnote-19); moreover, he believed that there was no way to get out of the situation other than by throwing the second punch[[20]](#footnote-20).

The summing-up

1. Plainly, the case was one which depended on an assessment of the credibility of witnesses, in particular the appellant. The judge said, in a tailored version of Specimen Direction 2 on the burden and standard of proof[[21]](#footnote-21):

“Members of the jury, the defence put forward in this case is the defendant did not cause the death of the deceased. It was an unfortunate accident and that he was acting in self-defence. And as I say, members of the jury, it is not for the defendant to prove his innocence, it is for the prosecution to prove his guilt. You must bear in mind these two fundamental principles in considering the present case.”

However, it is clear that the judge did not in this part of the summing-up, add the statement which appears immediately after the direction she was purporting to give from Specimen Direction 2, and which is often referred to as the *Liberato* direction from the eponymously named High Court of **‍**Australia decision in *Liberato v R*[[22]](#footnote-22), subsequently applied in *Sze* ***‍****Kwan* ***‍****Lung & Others v HKSAR*[[23]](#footnote-23), namely:

“Of course, if the account given by the defendant is true, then he must be acquitted, but he must also be acquitted if that account may be true”.

As to whether the judge conveyed this message elsewhere in her summing‑up, we shall examine in due course.

1. Further, when addressing the jury as to their approach to the **‍**reasonableness of the force used by the appellant, the judge said, *inter* ***‍****alia*[[24]](#footnote-24):

“So it is for you to decide whether the force used by the defendant was reasonable in the circumstances of the present case.

You should remember, members of the jury, a person cannot weigh to some fine degree his exact measure of his defensive reaction. So if you think in a moment of unexpected anguish or chaos he only did what he honestly and instinctively thought was necessary, that would be strong evidence that the act he took was in fact reasonably.”

Again, the relevant part of Specimen Direction 48, which the judge was purporting to give, in fact reads as follows:

“In deciding this (namely the reasonableness of the force used by the defendant), judge what the defendant did against the background of what he honestly believed the danger to be. You should also bear in mind that a person who is defending himself cannot be expected in the heat of the moment to weigh precisely the exact amount of defensive action which is necessary. The more serious the attack [or threatened attack] upon him the more difficult his situation will be. If, in your judgment, 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 so, that would be *very* strong evidence that the amount of force used by him was reasonable.

And so, bearing in mind what I have said, are you sure that the force used by the defendant was unreasonable? If it was unreasonable he cannot have been acting in lawful self-defence [and he is ‘Guilty’], but if the force was *or may have been reasonable*, then he is ‘Not Guilty’.” (Emphasis supplied)

The judge did not recite the words we have italicised from Specimen **‍**Direction 48 when addressing what the appellant may have thought as to the reasonableness of his response to the deceased’s attack. Again, as to whether she effectively conveyed these matters elsewhere in her summing-up, we shall examine in due course.

The appellant’s submissions

1. It is the omissions from Specimen Directions 2 and 48 which essentially form Grounds 1 and 2 respectively of the appellant’s perfected grounds of appeal against conviction. Although Mr Duncan Percy, on behalf of the appellant, accepted that the substance of the *Liberato* direction may have been subsequently given in the summing-up when looked at as a whole, his complaint was that it was not given at the outset of the judge’s directions as it should have been when setting out the burden and standard of proof; and, since it was misplaced, it was liable to have confused the jury when it was later given. By this omission, it is said that the judge did not make clear to the jury that, even if they did not accept the appellant’s account, they still had to be sure of the prosecution version of events, especially where the only real issue at trial was the reasonableness or unreasonableness of the appellant’s actions in defending himself (Ground 1).
2. Mr Percy further contended that the failure to bring home the **‍***Liberato* principle to the jury at an early stage of the summing-up spilled over into the alleged omissions from Specimen **‍**Direction 48, as to what the appellant *may* *have* honestly believed the situation to be when acting as he did; particularly where the deceased was clearly shown to be the aggressor at the inception of both episodes of violence caught on CCTV (Ground 2).

The respondent’s submissions

1. Mr Derek Lai, with him Mr Kelvin Tang, on behalf of the respondent submitted that, even if the sentence in question was omitted from the initial direction on the burden and standard of proof, the substance of the *Liberato* direction was later given by the judge in her summing-up; and it is the summing-up as a whole which must be looked at to see if the *Liberato* message has been conveyed to the jury, in the words of Bokhary **‍**PJ in *Sze Kwan Lung & Others*, “[w]hether by one form of words or another and whether in one way or another”[[25]](#footnote-25). For example, later in the summing-up the jury were directed in respect of the alleged intervening act of the kick by the deceased[[26]](#footnote-26):

“The defence says that this was an intervening act independent of any act of the defendant. If you should find that to be trueor *may be true* and if you should conclude that it wasor *might be an intervening act* which is independent of any act of **‍**the **‍**defendant, you should acquit the defendant.” (Emphasis **‍**supplied)

1. In respect of the issue of self-defence, the judge did identify the questions the jury should ask themselves, namely[[27]](#footnote-27):

“first, was the defendant attacked by the deceased or did the defendant honestly believe or *may (he) have honestly believed* that he was being attacked by the deceased and that force was necessary to protect himself?” (Emphasis supplied)

Later, the judge said[[28]](#footnote-28):

“If, however, you think that the defendant *may honestly believe* that he was attacked by the deceased, then consider the second question. Were the acts or was the act which caused the death of the deceased carried out by the defendant in response to the actual attack on the defendant?” (Emphasis supplied)

1. Again, in response to the jury’s question, posed some two hours after retiring to consider their verdict, the judge repeated that it was for the jury to decide whether the appellant honestly believed or “*may he have honestly believed* that he was being attacked by the deceased and that force was necessary to protect himself[[29]](#footnote-29)”. (Emphasis supplied)
2. Mr Lai placed particular stress on the appellant’s version of events in evidence, which was not borne out by the CCTV evidence. Nevertheless, the jury were appropriately directed[[30]](#footnote-30):

“Please remember that even if you do not accept the defendant’s evidence, you still have to be satisfied beyond reasonable doubt on the prosecution’s evidence…”

Accordingly, it was submitted that when the summing-up was looked at as a whole, the jury were properly directed on their approach to the appellant’s evidence on the issue of self-defence.

Discussion

1. We are acutely conscious of the dangers of substituting our own interpretation of the facts for that of the jury who saw and heard the evidence, including the evidence of eye-witnesses. Nevertheless, the CCTV evidence provides a surprisingly clear picture of events and the interaction between the appellant and the deceased up to the moment when the deceased fell against the wine-rack outside the wine shop and subsequently disappeared from view. To that extent, we are in exactly the same position as the jury in interpreting the actions of the appellant and the deceased in Episode 1, and much of Episode 2.
2. Although it may still be difficult to see some of the precise detail of the engagement, there are, in our view, certain facts which can be derived from the CCTV evidence, and which are incontrovertible. Firstly, the appellant had already got into his car and turned on the ignition in order to leave the scene, when there was a cry from PW1 for help. That cry, which we would more aptly describe as a scream, can be clearly heard on the CCTV recording; and it can readily be inferred from the expression on the face of a passer-by captured on the CCTV footage at the time that the assault on PW1 by the deceased must have presented a shocking scene. Hardly surprisingly, the appellant alighted from his car to see what was happening and walked slowly towards where PW1 and the deceased were, although only the appellant can be seen at this stage in the CCTV footage. The point to be made from this sequence of events is that the appellant cannot have been expecting or looking for a fight when he got into his car to leave the scene: indeed, had he and PW1 parted company a minute earlier, the deceased may not have seen them together and the tragedy would never have happened. It was entirely understandable, given his relationship with PW1, that he should have got out of his car on hearing PW1 cry out; and it cannot sensibly be suggested that he was deliberately asking for trouble by responding to her pleas for help.
3. Secondly, as the appellant walked along the pavement, we can see the deceased in a highly agitated state charging at the appellant from the opposite direction with the clear intention of striking him. It is obvious that the deceased was the initial aggressor in Episode 1, and the respondent does not argue otherwise. Rather than standing still waiting to be assaulted, the appellant advanced a couple of steps towards the approaching deceased, used his left hand to fend him off, while at the same time raising his right fist and striking the upper left body of the deceased with his right elbow. It is not clear precisely where the appellant’s elbow made contact with the deceased but we would characterise the appellant’s action as a hard defensive blow, which successfully stopped the deceased in his tracks and seems to have somewhat stunned him; for he is then observed clutching his left upper chest area and, at one point, spitting into the gutter.
4. Pausing here, we asked Mr Lai during argument whether, if this had been the extent of the physical interaction between the deceased and the appellant, he would accept that the appellant was defending himself as he was entitled to do. Rightly, we think, so far as Episode 1 was concerned, Mr **‍**Lai accepted not only that the deceased was the initial aggressor, but that the appellant, by responding as he did, had properly acted to defend himself.
5. Thirdly, the appellant and the deceased are then seen to face off against each other on the pavement, with each gesturing or pointing at the other. The admitted CCTV transcript, Exhibit P5, tells us that the deceased repeatedly asked the appellant why he was together with PW1, and why they were earlier seen to be arm in arm; while the appellant said that he did not want to fight with, or touch, him. The appellant initially assumed an aggressive but defensive stance, which relaxed upon the arrival of PW1, who is observed holding her left cheek.
6. Fourthly, when PW1 appeared, the conversation turned to PW1 and the deceased, with the deceased questioning PW1 as to why she was meeting up with the appellant yet again. When he pointed out that this was the second time he had seen them together, the deceased suddenly lunged at the appellant again. There was an issue at trial as to whether he gave the appellant a punch or a push. It seems to us that it was a push, but whatever it was, it was done with enough force to propel the appellant backwards, and the deceased was plainly the initiator of the aggression which precipitated Episode 2.
7. Fifthly, the appellant returned a punch with his right fist at the head of the deceased, but the deceased ducked and the punch did not connect with him.
8. Sixthly, there was then what may be described as a grappling action between the two men, followed by a hard punch by the appellant with his right fist to the head of the deceased as he was falling against the wine-rack on the pavement outside the wine shop. At this stage, it is clear that the appellant had the upper hand and, as both men moved out of sight of the CCTV cameras, the appellant can be seen to raise his right arm again. We should say we are not prepared to agree with Mr Lai’s interpretation that the deceased’s head can be seen coming to rest on the pavement.
9. Finally, it is also important to note that from the moment of the deceased’s punch or push, which precipitated Episode 2, to the time the deceased was lying on the ground, the incident took about five seconds. We have, of course, had the luxury of repeatedly examining the CCTV **‍**evidence, in real time or frame by frame in slow motion, on an enlarged screen in the clinical setting of a courtroom. Yet, there is a certain artificiality in trying to attribute any specific intention to any particular action in the heat of a fast-moving, unexpected and interactive event, which lasted only a few seconds.
10. While some of the actions we have described may be open to nuance and interpretation, nevertheless two clear features emerge from the CCTV evidence, which would have been as obvious to the jury, as they are to us: first, the deceased was the initial aggressor at the inception of both Episode 1 and Episode 2; secondly, the appellant got the better of the deceased on each occasion.
11. Looked at in this way, it seems to us that the real issue in this case, if one accepts, as we think we must, that the appellant was justified in acting as he did in Episode 1, was whether the appellant’s response to the deceased’s punch or push in Episode 2 was in reasonable self-defence; or to put it more correctly, whether the prosecution could prove to the required standard that his response was not in reasonable self-defence. Ultimately, that issue was to be resolved by determining whether the prosecution could show that the appellant over-reacted by turning a legitimate defensive action into a retaliatory, punitive one, which resulted in the death of the deceased.
12. It is perhaps unfortunate that the issue was not crystallised in this way at the trial by either the parties in their closing speeches or by the judge in her summing-up. In the legal direction on self-defence, there are essentially two questions to be asked: first, did the defendant honestly believe, or may he have honestly believed, that it was necessary to defend himself (the necessity limb); secondly, taking the circumstances as the defendant honestly believed them to be, was the amount of force which he used reasonable (the reasonableness limb)? In most cases which come before the court where self-defence is advanced, the issue usually centres on the first limb, and whether the defendant could ever honestly have believed that it was necessary to defend himself in the first place. Where the defendant is himself the aggressor, self‑defence seldom gets past the necessity limb. That, however, was not the position in this case. Quite apart from Mr Lai’s realistic concession in respect of Episode 1, the deceased was also the initial aggressor in respect of Episode ‍2, when he suddenly lunged at the appellant again, complaining in a highly agitated state, according to the transcript, that it was no coincidence that he should have bumped into the appellant and PW1 together again[[31]](#footnote-31).
13. Once one accepts that the only real issue in this case was the second limb, namely, whether the appellant was acting in reasonable (and **‍**thereby, lawful) self‑defence or whether he unlawfully over-reacted, the directions on the appellant’s belief as to the necessity of defending himself and the reasonableness of the force used in the circumstances as he honestly believed or may have honestly believed them to be become very important. And they become critical when, as seems clear from the jury’s question during their deliberations, the jury needed further guidance on the question of what constituted self-defence.
14. The question which the jury posed, some two hours after retiring to consider their verdict, was in these terms:

“The defendant honestly believes that: (a) the act or acts is/are defending himself; (b) the violence used is excessive. (If fall into one of the criterias, does it consider as self-defence?) Is it an ‘either/or’ or an ‘and’ case?”

Although parts (a) and (b) of the question seem to be couched in terms of a finding or conclusion on the jury’s part, that may not necessarily have been the case; and it would not matter even if it were. We note that the jury were out deliberating for a further five hours after the judge’s re‑direction before delivering a majority verdict. In any event, it was incumbent on the judge to provide a complete answer as to what would constitute self-defence in the circumstances of this particular case, where the only real issue was the reasonableness (or unreasonableness) of the appellant’s response to the deceased’s assault upon him.

1. Having discussed the matter with counsel, the direction the judge gave to the jury’s question was this:

“It is neither an “either/or” or “and” case. It’s a two-step process, one after the other. So let me explain it further. The first thing you should consider is: did the defendant honestly believe or may he have honestly believed that he was being attacked by the deceased and that force was necessary to protect himself? That is the first step. Did he honestly believe that he was being attacked and that force was necessary to protect himself?”

Pausing here, we have no difficulty with this direction on the necessity limb, save that it would have been more accurate to include the words “or may he have honestly believed”, as they appear in Specimen Direction 48, when inviting the jury to ask themselves “Did he honestly believe…?”[[32]](#footnote-32). Nevertheless, these words were included in the next part of the direction:

“If you find that the defendant may have honestly believed that he was being attacked and that force was necessary to protect himself, it is then that you go to step two to consider whether the force was reasonable or excessive in the circumstances. And when you have considered the force that if you find the force to be excessive, then the prosecution has proved that the defendant was not acting in self-defence. On the other hand, if you should find that the force used was reasonable, then you should acquit the defendant.”

1. The direction in respect of the jury’s approach to the reasonableness limb of self-defence is correct as far as it goes, although, again, it omits the words “or may have been reasonable” used in Specimen Direction 48, when addressing the question of whether the force was reasonable. By itself, such an omission may not have been fatal, even though we notice that these words were also missing from the text of the judge’s original directions on the reasonableness of the appellant’s response before the jury retired to consider their verdict.
2. Since the thrust of Mr Percy’s argument is the absence of a proper, timely *Liberato* direction, we have to say that the substance of the direction was conveyed to the jury when the summing-up is read in its entirety. We would not have allowed the appeal on the basis of Ground **‍**1. Nor do we accept that the judge failed to bring home to the jury that it is what the appellant *may have honestly believed*, rather than did honestly believe, as to the necessity of defending himself. Had this been the only complaint under Ground 2, we would not have allowed the appeal on this Ground either.
3. However, that is not the only complaint under Ground 2. What in our view is far more significant is the absence from the judge’s re‑direction of any reference to the appellant’s subjective view concerning the issue of reasonableness; in other words, 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. That is the clear import of the full terms of the direction in Specimen Direction 48:

“It is for you, the jury, to decide whether the force used by this defendant was reasonable. Here consider all the circumstances. In deciding this question use your common sense, experience, knowledge of human nature and, of course, your assessment of what actually happened at the time of this incident.

In deciding this, judge what the defendant did against the background of what he honestly believed the danger to be. You should also bear in mind that a person who is defending himself cannot be expected in the heat of the moment to weigh precisely the exact amount of defensive action which is necessary. The more serious the attack [or threatened attack] upon him the more difficult his situation will be. If, in your judgment 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.

And so, bearing in mind what I have said, are you sure that the force used by the defendant was unreasonable? If it was unreasonable he cannot have been acting in lawful self-defence [and he is ‘Guilty’], but if the force used was or may have been reasonable, then he is ‘Not Guilty’.”

1. What the defendant thought or may have thought about the necessity of responding or reacting as he did is also an important consideration according to the authorities. While it is for the jury to make the ultimate determination whether the defendant’s reaction or response in defending himself was reasonable (or unreasonable), which is an objective question, they must also consider whether the defendant may ‘in the heat of the moment’ have honestly and instinctively thought that it was necessary to defend himself in the way that he did, which is a subjective question. The answer to the subjective question does not resolve the matter in a defendant’s favour simply by what he thought or may have thought, for it is for the jury to determine whether such response or reaction was unreasonable. 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. Nevertheless, it is a matter for the jury to consider what the defendant thought, or **‍**may **‍**have thought, about the necessity of his response. As Specimen **‍**Direction **‍**48 emphasises, if “…the defendant believed or may honestly have believed that he had to defend himself and he did no more than what he honestly and instinctively thought was necessary to do so, that would be *very strong evidence* that the amount of force used by him was reasonable”. (Emphasis supplied)
2. The interplay between the subjective element and the jury’s objective assessment of the reasonableness of the defendant’s response or reaction was comprehensively explained by Hughes VP (as he then was) in *R v Keane and McGrath*[[33]](#footnote-33):

“Once it has thus been decided on what factual basis the defendant’s actions are to be judged, either because they are the things that actually happened and he knew them all because he genuinely believed in them even if they did not occur, then the remaining and critical question for the jury is: was his response reasonable, or proportionate (which means the same thing)? Was it reasonable (or proportionate) in all the circumstances? Unlike the earlier stages which may involve the belief of the defendant being the governing factor, the reasonableness of his response on the assumed basis of fact is a test solely for the jury and not for him. In resolving it to the jury must usually take into consideration what are often referred to as the ‘agony of the moment’ factors. That means that the jury must be reminded when it arises, as it very often does, that there is in a confrontation no opportunity for the kind of hindsight or debate which can take place months afterwards in court. The defendant must act on the instant at any rate in a large number of cases. If he does so, and does no more than seems honestly and instinctively to be necessary, that is itself strong evidence that it was reasonable. It is strong evidence, not conclusive evidence. Whilst the jury’s attention must be directed to these factors if they arise, the jury must also be made to understand that the decision of what is a reasonable response is not made by the defendant, it is made by the jury. We should perhaps add that ‘in all the circumstances’ means what it says. There can be no exhaustive catalogue of the events, human reactions and other circumstances which may affect the reasonableness or proportionality of what the defendant did.”

1. The importance of the jury considering in an appropriate case the subjective element of what the defendant may have thought when assessing the reasonableness of his response or reaction was emphasised in the Divisional Court decision of **‍***Duffy v Chief Constable of Cleveland* ***‍****Police*[[34]](#footnote-34), where Henriques J, giving the judgment of the Court, with which Dyson LJ (as he then was) agreed, said:

“The real question for our consideration is this: did the judge consider the subjective element of self-defence? Reading the case stated, I cannot be satisfied that the Deputy District Judge did have regard to that subjective element. Had she done so, she would have at least summarised what the appellant had to say about his continued acts of violence and she would have expressed herself as either accepting or not accepting the submissions as made by the defendant. There is a very real possibility here that she adopted a purely objective approach to the law of self-defence.”

1. The Court observed that the appellant (Duffy) had “sought to justify his continued use of violence because he believed that, had he desisted, he would have sustained and been subject to a continued attack by Stokes. That is an aspect of the case which was simply not dealt with by the Deputy District Judge”[[35]](#footnote-35). We have already noted that the whole of Episode 2 in the present appeal before us took about five seconds, and that the appellant was specifically cross-examined on the issue of whether what he did was reasonable. The judge summarised this aspect of his evidence in her summing-up[[36]](#footnote-36):

“He disagreed that he used excessive force in the first episode, and what he did was retaliation in the second episode. *He said that there was no way to get out of the situation other than by throwing the second punch.*” (Emphasis supplied)

The claim that the appellant thought he had no way to escape from the situation, other than by throwing what seems to us to have been the decisive punch at the deceased, sounds not dissimilar to Duffy’s claim that he could not have desisted because Stokes would otherwise have continued his attack. Whether such a claim was true and amounted to an honest and instinctive response or reaction to the deceased’s assault on him in the circumstances and ‘in the heat of the moment’ was a matter for the jury to consider, upon a proper direction being given in accordance with Specimen **‍**Direction 48. Without it, there was a danger of the jury applying a purely objective approach to the reasonableness limb of the test for self-defence.

1. That was where, with respect, the judge’s re-direction to the jury when they asked for assistance fell short. Once one recognises that the appellant was entitled to be present since he was aware of PW1 being assaulted, once one accepts that he was entitled to defend himself in Episode 1, and once one realises that he was not the aggressor at least at the outset of either episode of violence, then the real question for the jury was whether he over-reacted in Episode 2, so as to take himself outside the legitimate purpose of lawful self-defence. That required a consideration of what the appellant may honestly and instinctively have thought ‘in the heat of the moment’ it was necessary for him to do, when faced with the assault initiated by the deceased in Episode 2.
2. In remarking that the appellant was entitled in the circumstances to be present at the scene, we noticed one intriguing aspect of the dialogue in the CCTV transcript. There are three references to the deceased hitting PW1: two by PW1, and one by the appellant[[37]](#footnote-37), at least one of which seems to refer to an occasion other than the incident in question[[38]](#footnote-38). Accordingly, in the absence of a transcript of PW1’s evidence, we asked Mr Lai, who had also prosecuted at the trial, whether there was any suggestion in the evidence of previous violence by the deceased towards PW1. We were properly informed that PW1 had given evidence to that effect and, furthermore, that the appellant knew of PW1’s allegations at the time of the incident on 23 July 2018. It seems to us that the appellant’s knowledge or belief as to the type of person the deceased was, or may have been, that is, someone who was prone to using violence against PW1, was also a relevant circumstance, which may have influenced the way he reacted on the night in question. It certainly did not give the appellant licence to teach the deceased a lesson, but it does explain why he got out of his car and, more particularly, why he remained at the scene rather than disengaging and retreating; and we think his knowledge or belief about the deceased could well have affected the way he behaved when he himself was assaulted by the deceased.

Proviso

1. It was for the above reasons that we concluded that the directions to the jury were deficient. Mr Lai has invited us to consider the application of the *proviso* to section 83(1) of the Criminal Procedure Ordinance, Cap 221 and uphold the conviction. However, we did not find it appropriate to apply the *proviso* in all the circumstances of the case. Whilst the appellant seemed to us to be have been superior in terms of strength and ability to the deceased, which ought to have been obvious to him after Episode 1, and while there was a valid issue for the jury to consider as to whether he had gone too far and over-reacted in Episode 2, the resolution of that issue was not so obvious as to persuade us that the jury would inevitably have come to the same conclusion even with a complete and correct re-direction on the law relating to self-defence. Accordingly, the appeal must be allowed, the conviction overturned and the sentence set aside.

Re-trial

1. Mr Lai invited the Court, in the event that we were to allow the appeal against conviction, to order a re-trial. As we have just accepted, there was a valid issue for the jury to decide, which Mr Lai has valiantly and in an entirely measured and sensible way presented before us, as he did before the jury, but it was not, with respect, one that was clear‑cut in the circumstances. Whilst in no way determinative of the issue, since it was opinion evidence, albeit from someone who had an intimate, first-hand knowledge of events that evening because she was there herself, it is interesting to note PW1’s assessment of the appellant’s actions, as summarised by the judge in her summing-up[[39]](#footnote-39):

“She agreed that the deceased had at all times been the aggressor and the defendant was merely doing what he had to (do) to defend himself and that the fall was not caused by the defendant, but rather by the deceased’s own kick on the defendant which caused him to lose balance and fall down.”

Although we could see no firm evidence of any attempt by the deceased to kick the appellant, and it may well be that the jury did not accept this aspect of PW1’s evidence, her view of why the appellant did what he did is nevertheless of some relevance, albeit in no way a decisive factor, for the very limited purposes of deciding whether, in the exercise of our discretion, we should order a re-trial.

1. More significantly, the appellant has served 10 months’ imprisonment of his sentence thus far, before being bailed pending his appeal on 9 April 2020. Although we have not ultimately had to determine the question of sentence, we have heard full argument from the parties as to whether 3 years’ imprisonment can or cannot be said to be manifestly excessive and/or wrong in principle in the circumstances. The facts were, on any view, somewhat unusual. The appellant was not out looking for trouble; nor when speaking to the deceased did he provoke it; and nor did he start the fight. Indeed, he expressly told the deceased he did not want to have a fight with him. He might even on one view be said to have been acting gallantly by getting out of his car and remaining at the scene following PW1’s scream. He was not the initial aggressor in either episode of violence. To that extent, the facts of *R v Lo* ***‍****Bing Sun*[[40]](#footnote-40), which had been cited to the court in mitigation and relied upon by the judge in sentencing, may be distinguished: that was not a case involving self‑defence, or the reasonableness (or **‍**unreasonableness) of the appellant’s actions, at all.
2. Nevertheless, a life was lost and that is an important consideration for the Court when considering the issue of retrial. However, in our judgment, and in the particular circumstances of this case, even if the offence had been made out on the basis of an over‑reaction by the appellant, we would not have considered a sentence of more than 18 **‍**months’ imprisonment to be appropriate after trial.
3. Given the totality of the evidence in the case, and since the appellant has nearly served what we would have considered appropriate as a sentence, assuming good behaviour, had he been re-convicted, which is by no means certain, we do not think it is in the interests of justice to remit the case for re-trial. There will accordingly be no order for re‑trial.

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| (Andrew Macrae)  Vice President | (Ian McWalters)  Justice of Appeal | (Kevin Zervos)  Justice of Appeal |

Mr Derek Lai DDPP (Ag) and Mr Kelvin Tang SPP, of the Department of Justice, for the Respondent

Mr Duncan Percy, instructed by Francis Kong & Co, assigned by the Director of Legal Aid, for the Appellant

1. Macrae VP. [↑](#footnote-ref-1)
2. *HKSAR v Shum Man-fai* [2020] HKCA 232, 22 April 2020. [↑](#footnote-ref-2)
3. AB, p 31A-D. [↑](#footnote-ref-3)
4. Admitted Facts: AB, p 8, para 4. [↑](#footnote-ref-4)
5. Admitted Facts: AB, p 9, para 9. [↑](#footnote-ref-5)
6. Exh P5: AB, p 96, Entries 17-23. [↑](#footnote-ref-6)
7. Exh P5: AB, p 96, Entry 40. [↑](#footnote-ref-7)
8. AB, pp 29N-R, 33B-F, 33T-34H. [↑](#footnote-ref-8)
9. Admitted Facts: AB, p 14, para 23. [↑](#footnote-ref-9)
10. Admitted Facts: AB, p 8, para 3. [↑](#footnote-ref-10)
11. AB, p 19G- J. [↑](#footnote-ref-11)
12. AB, p 36F-G. [↑](#footnote-ref-12)
13. Exh P5: AB, p 102, Entry 118; p 106, Entry 171; p 114, Entry 268; p 118, Entries 320, 322. [↑](#footnote-ref-13)
14. Exh P5: AB, p 113, Entry 265; p 114, Entries 270, 278; [↑](#footnote-ref-14)
15. Exh P5: AB, p 103, Entry 125. [↑](#footnote-ref-15)
16. AB, p 37B-G. [↑](#footnote-ref-16)
17. AB, pp 30A-D, 37F-R. [↑](#footnote-ref-17)
18. AB, p 38M-P. [↑](#footnote-ref-18)
19. AB, p 39B-C. [↑](#footnote-ref-19)
20. AB, p 39C-D. [↑](#footnote-ref-20)
21. AB, p 23N-R. [↑](#footnote-ref-21)
22. *Liberato v R* (1985) 159 CLR 507, at 515. [↑](#footnote-ref-22)
23. *Sze Kwan Lung & Others v HKSAR* (2004) 7 HKCFAR 475, at [27]. [↑](#footnote-ref-23)
24. AB, p 30F-I. [↑](#footnote-ref-24)
25. *Sze Kwan Lung & Others*, at [27]. [↑](#footnote-ref-25)
26. AB, p 27E-H. [↑](#footnote-ref-26)
27. AB, p 28C-D. [↑](#footnote-ref-27)
28. AB, p 28P-S. [↑](#footnote-ref-28)
29. AB, p 62A-B; see also p 62C-D and G-H. [↑](#footnote-ref-29)
30. AB, p 39K-L. [↑](#footnote-ref-30)
31. Exh P5: AB, p 97, Entries 40-42. [↑](#footnote-ref-31)
32. It should be noted that the most recent formulation of the Specimen Direction on self-defence, namely Specimen Direction 104A of the Specimen Directions in Jury Trials, promulgated by the Hong Kong Judicial Institute in November 2020, uses the word “genuinely” rather than “honestly”. [↑](#footnote-ref-32)
33. *R v Keane and McGrath* [2010] EWCA Crim 2514, at [5]. [↑](#footnote-ref-33)
34. *Duffy v Chief Constable of Cleveland Police* [2007] EWHC 3169 (Admin), at [11]. [↑](#footnote-ref-34)
35. *Ibid.*, at [9]. [↑](#footnote-ref-35)
36. AB, p 39B-D. [↑](#footnote-ref-36)
37. Exh P5: AB, p 95, Entry 27; p 96, Entry 33; p 101, Entry 107. [↑](#footnote-ref-37)
38. Exh P5: AB, p 96, Entry 33. [↑](#footnote-ref-38)
39. AB, p 33N-P. [↑](#footnote-ref-39)
40. *R v Lo Bing Sun* (Unrep., Crim App No 660 of 1993, 23 May 1994). [↑](#footnote-ref-40)