TMCC 2282/2021

[2023] HKMagC 9

**IN THE TUEN MUN MAGISTRATES’ COURTS OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

CRIMINAL CASE NO. 2282 OF 2021

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| BETWEEN | HKSAR |  |
|  | *v* |  |
|  | KWONG Tak-wing | Defendant |

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Before: Mr Tobias CHENG Yun-chung, Deputy Magistrate

Date of Verdict: 30 March 2023

Offence: Assault occasioning actual bodily harm

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| VERDICT |

# *BACKGROUND*

1. The Defendant (“D”) pleaded not guilty to an amended charge of assault occasioning actual bodily harm (“AOABH”), contrary to common law and punishable under section 39 of the offences against the person ordinance, Cap 212 of the Laws of Hong Kong.
2. The particulars of the offence are that on 28th November 2021 at Taxi Stand, Outside Exit A, MTR Siu Hong Station, Siu Hong Road, Tuen Mun, New Territories, Hong Kong (“the Location”), that D assaulted CHAN Kwok-leung Berry (“Chan”), thereby occasioning actual bodily harm to Chan.

# *ADMITTED FACTS*

1. Facts have been admitted pursuant to section 65C of the Criminal Procedure Ordinance, Cap 221 include:
   1. At about 1845, D parked his private car at the Location. D’s wife was on board, both alighted from D’s car;
   2. At about 1850, Chan parked light goods vehicle in front of D’s car. Chan’s 9-year-old son was on board Chan’s vehicle;
   3. At about 1851, D and his wife returned to D’s car;
   4. At about 1852, a dispute erupted;
   5. At about 1855 hours, Chan’s son alighted from Chan’s vehicle;
   6. At about 1902, uniformed and plain-clothed police officers arrived at the Location. Emergency first-aid was performed on Chan;
   7. The following dashcam footages[[1]](#footnote-1) which capture the events that ensued:
      1. Footage from Vehicle RD9672 (P3). Time on P3 depicts the actual time;
      2. Footage from Vehicle WR6053 (P4). Time on P4 is about 10 minutes behind the actual time;
         1. P4 is a compressed file, as such the replay speed is faster than normal. Slowed down version of P4 was also admitted as evidence as P4B;
   8. Autopsy report of Chan (P8); and
   9. Expert opinion of cardiologist, Dr LEE Pui-wai, who formed the opinion that Chan died of sudden cardiac arrest (P9).
2. Dashcam footage of Chan’s vehicle (D3) is also not in dispute. The time on D3 is about 10 minutes ahead of actual time.
3. Medical reports admitted under section 65B of the Criminal Procedure Ordinance, Cap 221 include:
   1. Chan’s medical report (P5). P5 states Chan was taken to Tuen Mun Hospital at 1925 on 28/11/2021 and was pronounced dead at 2001 on the same day;
   2. Medical report of D’s wife (P6); and
   3. Medical report of D (P7).

# *PROSECUTION CASE*

1. Prosecution called 2 witnesses, and relied on the dashcam footages. I shall describe the dashcam footages in detail later in my analysis.

#### PW1

1. PW1 was a plain clothed police officer on duty. When he arrived at the Location at 1902, he found Chan was already in an unconscious state. PW1 conducted CPR on Chan. PW1 later escorted D to Tuen Mun Hospital, where PW1 arrested D.

#### PW2

1. Dr MOK Ka-kin gave evidence as an expert in the field of forensic pathology. He took court through his medical report, P8.
2. Under cross-examination, he explained to the court the difference between offensive and defensive injuries, in particular regarding those as stated under “remarks” in paragraph 2, page 3 of P8. “Offensive injuries” being injuries received when causing injuries to others, while “defensive injuries” are injuries received when defending oneself from violence.
3. Prosecution did not call any witnesses to give evidence in relation to prior to Chan becoming unconscious.
4. After careful consideration, I ruled that there was a case to answer.

# *DEFENCE CASE*

#### D

1. D elected to give evidence.
2. D is retired, but used to work for the Hong Kong Government.
3. He admitted that it was him in the different dashcams. He had parked his car at the Location in order to buy sweet soup with his wife.
4. Upon D’s return to his car, and when D was about to drive away, D saw Chan at the driver seat of Chan’s vehicle. Chan opened the window, used foul language towards D and said would beat D to death. D and his wife yelled back at Chan. D was of the view that Chan had instigated the course of events. D became angry. D stopped his car. Chan was emotional and swore at D continuously. D never thought they would end up fighting. D’s goal when he got off his car was to tell Chan to stop yelling at him.

##### The Push

1. Both Chan and D alighted from their respective vehicles and were standing face to face. Verbal arguments ensued. D admitted to have pushed Chan at P3-185319 (“the Push”). D explained this was only to keep a distance away from Chan, as Chan had suddenly moved forward and Chan’s chest had hit D’s body. D was acting in self-defence.

##### The Elbow

1. After the Push, Chan went to the driver’s side of Chan’s vehicle, opened the door and swore at D’s wife. The force of Chan opening the door caused D’s wife to move back. D then used his left elbow to block Chan and to prevent Chan from further injuring D’s wife (“the Elbow”). This is shown in P3-185338.

##### The Grappling

1. Chan struck D’s head with Chan’s fist. D lifted his arm to protect himself, D did not want to punch Chan, as he felt doing so would break the law. Chan then grabbed D’s neck and Chan used his body weight to push D to the rear of Chan’s vehicle. D lost balance and fell to the ground. As depicted from P4/P4B-064339 onwards, Chan’s legs had straddled over D’s body and Chan was sitting on D, attacking D. D tried to control Chan’s fists. During which, D’s wife was also punched in the face. D never kicked or punched Chan (these series of acts collectively, “the Grappling”).

##### Chan’s collapse

1. Chan eventually let go of D and both stood up. Chan collapsed to the ground at P4/P4B-064500.
2. D and D’s wife both called the police and both suffered injuries.

##### Cross-examination

1. Under cross-examination, D agreed that before D alighted from his car, D could have driven his car away instead. There was nothing stopping him from doing so. D and his wife were in no physical danger at this point. D disagreed that when D alighted from his car, he was clouded by temper and had acted aggressively.
2. When asked about the Push, D stated Chan had rushed towards D.
3. D alleged Chan had slammed Chan’s vehicle door on his wife.
4. Regarding the Grappling, D denied it was common sense that D’s behaviour in pushing and shoving Chan would lead to further altercations.

# *LEGAL PRINCIPLES*

1. In reaching my verdict I remind myself of the burden and standard of proof, and that the burden is on the prosecution throughout. D has nothing to prove. I direct myself that I must be sure of the D’s guilt before I can convict. On the other hand, if the court thinks that the defence evidence pointing to innocence is true or may be true, it would follow that the defence has raised sufficient doubt in the prosecution case and the defendant is to be acquitted.
2. D raised self-defence. It is for the prosecution to prove beyond reasonable doubt that the defendant was not acting in self-defence. I remind myself the criteria of self-defence by referring to the following passage in Archbold HK 2023 at paragraphs 20-66:

“It is relatively settled law that the test of whether or not a person had acted in self-defence is partly objective and partly subjective. The jury must decide whether the defendant actually and honestly believed that they were compelled to act as they did in order to defend themself, and then must decide whether, in all the circumstances, their response was reasonable.”

1. D is a person of clear record. It is relevant to his propensity to commit such an offence, and the credibility of the testimony given by him.

# *ANALYSIS*

1. Before coming to my verdict, I have carefully considered all the oral testimonies, exhibits, dashcam footages and submissions of the parties.
2. The prosecution’s basis is not that D is responsible for Chan’s death. According to the expert opinion of cardiologist Dr Lee, Chan *“experienced sudden arrhythmic cardiac arrest with ventricular fibrillation, which eventually led to sudden cardiac death despite bystander CPR and defibrillation[[2]](#footnote-2)…In my opinion, the apparent emotional stress, in form of anger, of (Chan), in additional to the physical exertion, during the altercation are likely triggers of the arrhythmic cardiac arrest which eventually led to his death[[3]](#footnote-3).”*
3. The prosecution’s basis for the charge of AOABH is that when D alighted from his car, he had behaved in a highly aggressive manner. The Push and the Elbow occurred. It was reasonably foreseeable that this would set off a chain of events and thus, reasonably foreseeable that the injuries suffered by Chan during the Grappling were attributed to D’s acts, specifically, mainly the abrasions on the limbs of Chan as listed at points 18 to 27 and 29 to 37 on pages 1 to 2 of P8.

##### The Push

1. I agree with prosecutions submissions at paragraphs 13 to 16. D was in no danger before he alighted from his vehicle. He had already driven his car from the parking position to the middle of the road to a point where he was blocking traffic. He could have driven away and there was nothing stopping him from doing so. After D had alighted from his car, he was behaving aggressively. He was pointing and shouting at Chan. I do not accept his reason to alight from his vehicle was to tell Chan to stop yelling at him.
2. At P3-185318, very shortly before the Push, Chan can be seen stepping to his right and looking downwards. At this juncture, D continued to shout loudly.
3. I have carefully reviewed the dashcam footages at D3-190308 and P3-185318. I find D’s suggestion that Chan had bumped D on the chest or Chan had suddenly moved quickly towards D, to be contradictory to the objective dashcam footages. Chan’s arms were to his side. D and D’s wife were in no physical danger at this stage. D’s claim that he was acting in self-defence at this juncture is rejected.
4. I am sure D could not have honestly believed that it was necessary to defend himself. At this juncture, the Push was not a proportionate response nor was there any imminent threat. There was no necessity for the Push. Self-defence does not arise in relation to the Push.
5. I am certain D had intentionally applied unlawful force onto Chan by pushing him. The Push was accompanied by a hostile intent calculated to cause apprehension to Chan.

##### The Elbow

1. After the Push at P3-185326, Chan walked to his left, looked down, walked around D, and returned to his car. Chan had opened his vehicle door. At P3-185329, D’s wife said something which angered Chan and caused Chan to shut the door of his vehicle and turn his body back to face D and his wife.
2. At P3-185335, Chan tried to return to his vehicle again. D and D’s wife continued to speak and behave aggressively. Chan opened the door again at P3-185337. D’s wife was standing in the path of the door. The door hit D’s wife with some strength that caused D’s wife to stutter behind, but she did not lose her balance.
3. D, who was behind his wife when the door hit her, immediately moved in between Chan and his wife. At P3-185338, D used his right hand to nudge his wife, and immediately used the left side of his body, including his elbow, to create space between Chan and D’s wife. I note at this stage D’s left fist was close to his body. Although D had used some force to cause Chan to move backwards, D did not strike Chan, but had used his body weight and his elbow to push Chan away.
4. I cannot rule out the possibility that the Elbow was an act of self-defence in trying to prevent injuries to his wife. I find that by using his elbow to create distance was of reasonable force.

##### The Grappling

1. According Dr Mok and D’s autopsy report, *“(t)he blunt force trauma on the upper limbs could be compatible with defensive and offensive injuries. The overall pattern of injuries could be compatible with the history of altercation shortly before collapse.”[[4]](#footnote-4)* There is no evidence before me to suggest Chan had such abrasion injuries to his limbs before the Push, nor can I see how the Push or the Elbow could have caused the same. The abrasions are consistent with what the dashcam footages show during the Grappling. I find that the abrasions to Chan’s limbs were due to the bodily contact during the Grappling.
2. At P3-185339 immediately after the Elbow, Chan struck D’s head area with his right fist, thereafter, both men tried to grab one another. Eventually, D fell backwards and was being grappled by Chan and both fell out of view of P3. D did not throw any punches.
3. It can be seen on P4/P4B from 064338 onwards, once on the ground, Chan was sitting on top of D, forcing D on the ground with Chan’s own body weight. D was on the defensive. It can be seen D had tried to get up, but failed. D had outstretched his right arm as if D was trying to protect himself and to keep Chan away. D’s wife was trying to pull Chan away.
4. I cannot rule out the possibility that during the Grappling, D was acting in self-defence. It is possible that the injuries Chan had received during the Grappling were due to D acting in self-defence.

##### Causation and foreseeability

1. I agree with Defence submissions that if self-defence suffices, there is no issue of causation,[[5]](#footnote-5) but I shall also consider the same for completeness.
2. Prosecution submitted *R v Lee Kau On[[6]](#footnote-6)*. In it, *Alphacell Ltd v Woodward[[7]](#footnote-7)*was quoted:

“in my opinion, “causing” here must be given a common sense meaning and I deprecate the introduction of refinements, such as causa causans, effective cause or novus actus. There may be difficulties where acts of third persons or natural forces are concerned but I find the present case comparatively simple.”

1. Prosecution also submitted Archbold HK 2023 para 20-248, which reads:

“where the harm is not the direct result of the defendant’s act, as, for example, where their conduct was such as to provoke the victim to jump from a moving car, the test is whether the victim’s act was the natural result of the defendant’s action or words, in the sense that it was something that could reasonably have been foreseen as the consequence of what they were saying or doing: R v Roberts (1971)56 CAR 95, CA. The chain of causation will only be broken if what the victim did was something that no reasonable man could be expected to foresee.”

1. Prosecution added *“(i)n* *Regina v A [2020] 1 WLR 2320, 2324H-2326A,* *after citing Canadian and English authorities, the English Court of Appeal accepted that the test should be whether consequence was reasonably foreseeable at the time of the initial unlawful act.”* *[[8]](#footnote-8)*
2. Returning to the present case, I have not lost sight to the that fact that Prosecution need not proof *specifically or precisely* what was to entail in the element of “occasioning” or “causing”. However, I cannot be sure that any reasonable man would expect a fight or the Grappling would ensue.
3. Chan could have returned to his vehicle, and let the matter slide. Chan could have called the police, and let the authorities handle the matter.
4. I also note that both D and Chan are of comparable build, with D being taller but slimmer. D was accompanied by his wife, who was also behaving equally viciously. Chan was outnumbered. Chan’s young son was in the vicinity at the material time, it would not be unreasonable that D was aware of this. As Chan was outnumbered and for the safety of his child, Chan may not have wanted to escalate the matter further. After the Push and the Elbow, based on the information available to D at the time, I cannot be sure that what entailed would have been reasonably foreseeable.
5. Moreover, I consider the punch that Chan threw at P3-185839 and the subsequent act of Chan forcing D to the ground to have broken the chain. Up until this point, Chan, D or D’s wife had not punched, kicked or grabbed hold of one another. This punch greatly escalated the situation to a full-blown physical struggle. I find the unpredictable human element of Chan’s punch to be what the Court held *“difficulties where acts of third persons or natural forces are concerned”* as stated in *Alphacell* above.

# *FINDINGS*

1. For the above reasons, I am not satisfied that the charge of AOABH has been proved beyond reasonable doubt and thus, D is acquitted.
2. Common assault[[9]](#footnote-9) is an alternative verdict open to the Court. Based on my analysis, in particular at paragraphs 31 to 35 above, I find that D had pushed Chan once and D was not acting in self-defence. This act was clearly captured by the objective piece of evidence in P3-185319. By virtue of section 51(2) of the Criminal Procedure Ordinance, Cap 221, which empowers the Court to substitute a conviction for an offence not charged but whose ingredients were established by the prosecution in the trial of another charge, D is convicted on a charge of common assault in relation to the Push.
3. This was a most unfortunate event where temper caused a trivial matter to needlessly escalate. Chan would later die of a pre-existing heart condition. I have great sympathy for Chan’s young son, who had to witness the loss of his father before him.

(Tobias YC CHENG)

Deputy Magistrate

Tuen Mun Magistrates’ Courts

Mr Gordon Wong, counsel on fiat, for HKSAR

Mr David Boyton, instructed by TK Tsui and Co, for the defendant

1. When referring to dashcam footages, XX-XXXXXX denotes [exhibit number]-[time], i.e. P3-185319 refers to exhibit P3, at time 18:53:19, as depicted on the video footage of P3 [↑](#footnote-ref-1)
2. Paragraph 4.1 of P9 [↑](#footnote-ref-2)
3. Paragraph 4.5 of P9 [↑](#footnote-ref-3)
4. Remark 2, Page 4 of P8 [↑](#footnote-ref-4)
5. Paragraph 35 of page 8 of D’s closing submissions [↑](#footnote-ref-5)
6. [1990] HKLRD 269 [↑](#footnote-ref-6)
7. (1972) AC 824 [↑](#footnote-ref-7)
8. Prosecution closing submissions at paragraph 28 of page 12 [↑](#footnote-ref-8)
9. Contrary to common law, and punishable under s40 of the offences against the person ordinance, Cap 212 [↑](#footnote-ref-9)