Neutral Citation no. [2008] NICC 4 | *Ref:* **HAR7073**

Judgment: approved by the Court for handing down | *Delivered:* **23/1/2008**

*(subject to editorial corrections)**

BELFAST CROWN COURT

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THE QUEEN

-v-

CHANG HAI ZHANG

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RULING (1)

HART J

[1] The defendant is charged with the murder of Qu Mai Na between the 30th of May and the third of June 2004. He admits that he strangled her but denies that he is guilty of murder, having pleaded guilty to manslaughter of her on the grounds of provocation. This plea has been rejected by the prosecution.

[2] It is sufficient to say at this stage that the alleged provocation can be described as the effect upon the defendant of his discovery that Qu, also referred to as Tina, was a prostitute, and then by her later statement that she would continue to be a prostitute, all of which caused him to lose control of himself because he loved her and had given her considerable sums of money.

[3] As part of the defence case a report has been prepared by Professor Felice Lieh Mak, Emeritus Professor and Honorary Clinical Professor of the Department of Psychiatry of the University of Hong Kong. In her report, Professor Mak gave a very detailed history of the defendant's education, family background, social and employment history in China, as well as an account of his relationship with Qu and the circumstances of her death.

At paragraphs 17.7, 17.8 and 17.9:

> "The precipitating (situational) factors are as follows:
>
> A: Tina betrayed his love and trust by cheating and

> lying to Mr Chang. Given his background, it is understandable for him to react with extreme anger. From the perspective of his personality make up, the tying up of Tina as a form of punishment is reasonable, for the simple reason that he had eschewed physical assault and clothes lines were readily available.
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> B: After having cooled down somewhat, Mr Chang had the foundation of his being shaken and was provoked into a state of rage when Tina resumed her attack on his pride and manhood, when she challenged him to kill her, when she reminded him that he was no better than one of her clients, and when she did not give him 'face'. It was during this state of rage that Mr Chang allegedly strangulated her.
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> The cultural, personal experiential and situational factors worked together to create a perfect storm that led to the death of Tina allegedly in the hands of Mr Chang.
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> There is a caveat to my opinion, in that it is mainly based on the information provided by Mr Chang, and the documents made available to me. I had no opportunity to interview third parties. Having said so, I would like to comment that because of the general consistency in the facts of the case given by Mr Chang, his lack of attempts at embellishment and exaggeration, the information is reliable to a large extent".

[4] This report was dated the 5th of July 2006. However, inquiries by the Police Service of Northern Ireland with the relevant authorities in China ascertained that the defendant had been convicted of rape of a woman in China on the 10th of July 1996 when he was aged 17 years and four months of age, and on the 13th of November 2006 a notice containing an application to admit the rape conviction was lodged by the prosecution.

[5] Because the rape conviction was by a court outside this jurisdiction, it is necessary for the prosecution to comply with the procedural requirements of the Evidence Act 1851 in order to prove that conviction. Accordingly, a number of statements of additional evidence were served by the prosecution by letter dated the 27th of February 2007, and I shall refer to these later.

[6] Subsequently I understand that it was agreed by the parties, and accepted by Mr Justice Morgan who was the trial judge at that time, that the bad character application should be decided at the trial. I should state for the sake of

completeness that although the defendant pleaded guilty, he was later permitted to change his plea, and therefore the question of bad character, which had ceased to be as significant upon the defendant's plea of guilty, assumed renewed significance when he was permitted to change his plea back to not guilty.

[7] In the light of Professor Mak's report, the prosecution then arranged to have the defendant examined by Dr Christine Kennedy who reported on the 26th of November 2007. In her report she recounted the defendant's explanation of how he came to be convicted of rape in the following passage:

> "Forensic History:
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> Mr Chang told me that he had a criminal record in China and that, when aged 16 or 17, he had been accused of rape. He said that the circumstances were that following his starting employment in a car maintenance company, that he had gone to a girlie bar to lose his virginity. He said he had agreed a price with the girl of 150 Yuan, but when they went to a back room she had increased her price to 200 Yuan. He said that he was not prepared to give her this money, but that she had stripped off her clothes and insisted that he leave 100 Yuan. He felt that he should not have to pay and said that she tried to grab him. He shook her off and that she then screamed rape. He said that he was taken to the police station where his version of events was not believed. He stated that he was beaten for half an hour and had electric batons put below his arms. He said he pleaded guilty to the offence charged (unsure what this was), as he had been advised that pleading not guilty would lead to a larger sentence. He said that the further offence of using a prostitute had a three year custodial term. Mr Chang explained he knew it was illegal to go to the girl's room for sex. He further said that the girlie bar was run by a police officer. He stated that he spent about eight months in a police detention centre, rather than prison, where he carried out chores for the police officers. He said he was not subject to any restrictions at the end of his sentence, but it was very shameful to him and his family. He denied any other contact with police in China or indeed in Ireland".

[8] At this stage it is appropriate that I should describe the documents upon which the prosecution propose to rely to prove the rape conviction. These consisted of documents in Chinese that were accompanied by translations and

copies of fingerprints, all of which are plainly sufficient to comply with the procedural requirements of section 7 of the Evidence Act of 1851 (the 1851 Act) which requires documents such as details of convictions to be authenticated by seal in order to be admissible in evidence.

[9] However, the document containing the conviction is quite unlike a certificate of conviction of the type familiar in this jurisdiction. It comprises two pages of narrative, describing the defendant's age, address, date of arrest and remand status. It also refers to his legal representative, together with a description of the course of the proceedings.

[10] In particular, it recounts the nature of the evidence against him; that the defendant confessed, and the arguments advanced on his behalf by his lawyer, and the reasoning of the court that led the court to convict the defendant and to impose a sentence of one year's imprisonment.

[11] The nature of the offence, and the reasons for the sentence, are contained in the following extract from the certificate:

> "The defendant Zhang Changhai, and the legal agent Zhang Wangxu, had no excuse for the charge; the defender argued that the defendant was not yet 18 year old when committing the crime, attempted at crime, and there was not criminal and notorious past records. So asked for mitigation of penalty below the minimum statutory prescript.
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> Upon examination we found that the defendant, and the injured [L], were neighbors. At 9.00 am on July 10th 1996, the defendant saw [L's] gate was open, then intruded upon the room. He forced the injured with a knife, threatened by language and acted in indecency and attempted to rape. At that time [L's] daughter returned and knocked at the door and the injured took the chance and left. The rape was uncommitted.
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> As to the above fact, it is supported by the affirmation of the injured and her daughter, and record of investigation and examination at the scene of the crime. The defendant Zhang Changhai candidly confessed, so it is no doubt that he committed the crime.
>
> Our Court thinks that the act that the defendant Zhang Changhai committed the crime of rape is clear,

> the evidence is conclusive and complete which should be supported; the reasons for that the defender asked for giving a lesser punishment or mitigation are complete, which should be adopted. The defendant Zhang Changhai threatened by means of force and attempted to rape the woman, which has composed the crime; he should be punished according to the law. In view of that he is underage, and this is first offence, his attitude to admission of guilt is good, and uncommitted, he can be sentenced mitigation of penalty below the minimum statutory prescript. According to the stipulations of Section 1 of Article 139, Article 20, Section 1 and 3 of Article 14, Article 60 of the Criminal Law of the People's Republic of China, the judgment is as below:
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> 1. The defendant Zhang Changhai committed the rape, and he is sentenced to imprisonment for one year.
> 2. The tool for criminal purpose, a pointed knife with wood handle is confiscate according to law".

[12] From this it can be seen that the defendant admitted the allegation against him, and that he did not rape the complainant, but attempted to do so.

[13] Mr Magill for the Prosecution submitted that the conviction should be admitted by virtue of Articles 6(1)(d), (f) and (g) of the Criminal Justice Evidence (Northern Ireland) Order 2004 (the 2004 Order), although he accepted that his principal ground was under Article 6(1)(f): namely the conviction is evidence to correct a false impression given by the defendant.

[14] Mr Hopley QC for the defendant, whilst not taking issue with the mode of proof of the conviction, sought to argue that it would be unsafe, unfair, unjust and not in the interests of justice to permit the Prosecution to rely upon the conviction in view of the defendant's allegation to Doctor Kennedy, in the passage already quoted from her report, that his account had not been believed by the police, that he had been beaten for half an hour, and had electric batons put below his arms. The reasons given by the defendant for his pleading guilty clearly imply that his plea was not a voluntary one.

[15] Mr Hopley further submitted that the Court should take judicial notice of the existence of torture in China, and relied upon Articles 6 and 14 of the European Convention on Human Rights, and upon Article 12 of the 2004 Order, as well as Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989 (the 1989 Order).

[16] I pointed out to Counsel that in order to determine issues of this sort the proper course to follow would be to conduct a *voir dire*, during which the Prosecution could seek to prove the documents relied upon and the defendant could, if he wished, give evidence to raise the issues of torture and his unwilling plea of guilty or, at least, his false confession. Having raised the issue in that way, it would then be for either party to call such expert evidence as they wished upon the issues raised by the defendant, in particular dealing with the question of torture or ill-treatment, and the means open to a defendant to challenge such behaviour in the proceedings before the Chinese Courts.

[17] That expert evidence is necessary to deal with such matters because they raise issues of foreign law and court procedures, can be seen from Phipson on Evidence, 16th Edition, at 33-57, where it is stated:

> "*Foreign law... must... be proved as a fact by skilled witnesses, and not, as was, at one time held, by the production of the books in which it is contained, because the Court is not competent to interpret such authorities*".

[18] The skilled witness will, no doubt, usually be a lawyer qualified to practice in and having experience of, the legal system of the jurisdiction in question, but it is not essential that he should be a lawyer, as may be seen from the numerous examples contained in Phipson at 33-57 and 58.

[19] It is also pointed out in Phipson at 33-58 that: "*foreign law must, in general, be proved on oath, either orally or, in some cases, by affidavit or witness statement, and not by the mere certificates of experts; although this strictness has occasionally been relaxed*".

[20] In this case the Defence sought to rely on two documents, appended by Professor Mak to her addendum report dated the 3rd of April 2007, in which she commented upon the defendant's failure to mention his rape conviction to her when she interviewed him on the 26th of June 2006. One of these was a document apparently taken from an internet website of an organization called "Human Rights Solidarity" and bearing the title "The problem of torture in China's criminal justice system". The second is an article entitled: "Severe and swift justice in China", by Susan Trevaskes, who appears to hold a post at an Australian university. The article appears in the British Journal of Criminology for 2007, Volume 47, at pages 23-41. These articles suggest that torture is resorted to by police in China, and that deficiencies in the legal system there mean that defendants, in some cases, cannot adequately challenge confessions that may have been obtained by such means.

[21] It must be said immediately that these articles are not admissible unless the parties agree, because there is nothing to suggest that Professor Mak (who is a Consultant Psychiatrist) could be regarded as an expert witness on the criminal justice system of the People's Republic of China, nor do the articles prove

themselves.

[22] On my raising with Counsel the need for a *voir dire*, and expert evidence to deal with any allegation the defendant might make that he was tortured as he alleged to Doctor Kennedy, it became apparent that neither side had retained any expert witnesses to deal with the torture allegations and their relevance to the Chinese criminal justice system.

[23] After an adjournment, Mr Magill invited me to determine the bad character application upon the assumption that were the defendant to repeat the account he gave to Dr Kennedy, then the prosecution would have to rely upon the witnesses and proofs available in respect of the conviction. He was not seeking an adjournment to call evidence to rebut the defendant's allegations, because he did not believe that he would be in a position to call such evidence if an adjournment were granted. Mr Hopley said that he was content with that formulation of the basis upon which the Court should approach the issue.

[24] Whilst this method of dealing with issues of this nature is unorthodox and inherently unsatisfactory because the Court does not have evidence before it to enable the issues to be properly considered, nevertheless it is a pragmatic approach that recognizes the evidential difficulties that the prosecution face in meeting the defendant's allegations, and with some hesitation I approach the issues on the basis suggested.

[25] The substantive application rests primarily upon Article 6(1)(f); that is that the defendant gave a false impression when he failed to mention the rape conviction to Professor Mak, and in view of the defendant's allegations, I do not consider it necessary to consider the other grounds relied upon, because if the prosecution application fails under this heading, it cannot succeed under the others.

[26] Applications to rely upon convictions have to surmount two distinct hurdles. The first is that the conviction has to be proved, and the second is that, if it is proved, should it be admitted? This can be seen from R v Kordasinski, [2007]1 Cr. App. R. 17, to which Mr Magill referred me, the relevant passage being at paragraph 73.

[27] In the present case I accept that if evidence was given of the matters relied upon in the additional evidence, the prosecution would be able to prove the rape conviction in accordance with section 7 of the 1851 Act.

[28] It is then necessary for the Court to consider what amount of detail should be put before the jury if the conviction is admitted, because much of the record is irrelevant. That some restriction be imposed upon the details of the conviction to be given to the jury is clear. See Kordasinski at [74]. However, Kordasinski also makes it clear that it is open to a defendant: "...to give evidence denying or

challenging the underlying factual basis for the convictions".

[29] Mr Magill submitted that were that the case then the prosecution would be faced with the need to produce the original complainant, with all of the difficulties that would entail. That may be so, but in R v Humphris, [2005] EWCA Crim 2030, to which reference was made in Kordasinski, Lord Woolf CJ, referred to this very eventuality at [21] in the context of convictions which the prosecution sought to prove by producing entries from police records, which not only contained bare details of the convictions but brief details of the method used to commit the crime. See [7]. In general terms, these details were of a similar nature to parts of the certificate in the present case quoted earlier. In that case the documents were wrongly placed before the jury, but the Court of Appeal pointed out at [19] that the defendant had given evidence about the matters in the certificates. Lord Woolf concluded his judgment with the following observation:

> "Before we leave this case we point out that it has a moral for other cases of this sort. First it emphasises the importance of the Crown determining whether they need any more evidence than the actual previous conviction, to achieve the purpose for which they want the evidence to be admitted.
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> Second, it emphasises the importance of the Crown deciding that if they want more than the evidence of the conviction, and the matters that can be formally established by relying on PACE, they must ensure that they have available the necessary evidence to support what they require. That will normally require the availability of either a statement by the complainant relating to the previous convictions in a sexual case, or the complainant to be available to give firsthand evidence of what happened. Care must be exercised to ensure that it is necessary to go to the lengths of requiring the complainant in a sexual case, which has occurred in the past, to be brought before the Court. It is because of the need to comply with the formalities of the sort which were not complied with in this case that the procedure indicated by the Vice-President in Hanson is so important".

[30] Therefore, it is clear that in the event the prosecution are faced with a challenge to the background facts of a conviction, then they may (unless the challenge can be countered in some other fashion) have to produce the original complainant to prove the background facts relied upon by the prosecution, although every effort must be made to avoid satellite issues arising. See R v Ainscough, [2006] EWCA Crim 694 at [19].

[31] So far as the reliability of a foreign conviction is concerned, it is noteworthy that in Kordasinski there was evidence before the Court as to the relevant provisions of Polish law, both in the form of what was referred to as "accurate internet information", and a statement from the British Embassy in Warsaw dealing with matters such as the burden of proof. As I have already stated, no such expert evidence was available to either party in the present case.

[32] This brings me to the final issue, namely whether the Court should admit the Chinese conviction, despite the defendant's allegations to Dr Kennedy that he had been tortured and had made a false confession. On the basis that I have been asked to deal with this application, I think I must approach this on the basis that the defendant's allegations to Dr Kennedy are sufficient to raise the issue of the propriety and reliability of the conviction. The issue having been raised, then it is for the prosecution to disprove the allegations beyond reasonable doubt. Whatever may be the truth or otherwise of the defendant's allegation, in the absence of evidence from the original complainant in China, or evidence as to the credibility or otherwise of the defendant's allegations, I have to proceed on the basis the prosecution has failed to disprove those allegations beyond reasonable doubt.

[33] Where does that leave the prosecution? As Mr Hopley pointed out, where there is an application to prove any conviction, the Court retains the power to exclude evidence of a conviction by virtue of Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989 (the 1989 Order), a power expressly preserved by Article 30(2) of the 2004 Order. If the confession made by the defendant during the Chinese proceedings was, or may have been, induced by torture, inhuman or degrading treatment, then that treatment would render the confession inadmissible because of oppression within the meaning of Article 74(2)(b) of the 1989 Order because the burden is on the Prosecution to prove, beyond reasonable doubt, that the confession was not so obtained: See Archbold 2008, 15-384. In the alternative, Article 76 would bring about the same result, because no court in this jurisdiction would permit a jury to rely upon a conviction that may have been obtained as the defendant alleges. Therefore, as the prosecution cannot disprove the defendant's allegations about the way he was treated by the police, or his account of what happened when the alleged attempted rape (which is the appropriate description of that offence) occurred, I consider that it would have such an adverse effect on the fairness of the proceedings were I to admit the Chinese conviction for rape, and I therefore exclude it under Article 76 of the 1989 Order.

[34] This case highlights some of the difficulties that can arise when the prosecution seek to rely upon foreign convictions in criminal proceedings, and such applications are likely to arise much more frequently in future. The prosecution should, therefore, consider carefully whether such applications are necessary in each case, and both prosecution and defence must be alert to the need

to have suitably qualified experts in the relevant foreign law available to give evidence. Such issues should be clearly identified well in advance of the trial, even if the application is to be dealt with at the trial. For example, where the prosecution serve a notice relying on a foreign conviction, the defence should be required to serve a skeleton argument well in advance of the trial identifying exactly what issues arise, and advance notice of any expert evidence relied upon should also be served in accordance with the Crown Court Rules, having been initially identified in the Trial Status Report.

[35] In the present case I understand that Professor Mak's addendum report, which referred to the articles dealing with the alleged deficiencies of the Chinese legal system, in the context of torture, was only served on the Prosecution a few days ago although it was completed in April 2007. That report should have been served as soon as it was received because it materially altered the basis of Doctor Mak's conclusion, although she adhered to her initial conclusion. That failure was unacceptable, particularly given the many problems that had arisen in this case in the past, and the length of time that it has taken to get the case to trial.