

HONG KONG / JUDGMENT

Attorney General v. Chan Wai Chung

COURT

Court of Appeal

DECIDED

31 July 1996

CASE / FILE NUMBER

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bjbj in the court of APPEAL of hong kong Criminal Jurisdiction application for review no.9 of 1996 (district Court Case No. DCC801 of 1995)

Between The Attorney General Applicant and Chan Wai Chung Respondent

Coram : Hon Yang CJ, Nazareth V P & P Chan J in Court Date of Hearing : 31st July 1996 Date of Judgment : 31st July 1996

J U D G M E N T

Nazareth : This is an application for review of sentence made by the Attorney General under s.81A of the Criminal Procedure Ordinance, Cap.221. The respondent Chan Wai Chung who is aged 21 pleaded guilty to the offence of unlawful wounding, contrary to s.19 of the Offences against the Person Ordinance, on 18th March 1996 before HH Judge Caird in the District Court. He was sentenced to 10 months imprisonment. His co defendant and girlfriend Miss Tsang Kit Yee, who was aged 17 years at the time of the offence and 18 years at the time of the sentence and who will appear in the next appeal before us, was sentenced to detention in a training centre. The charge to which the respondent Chan pleaded guilty was that between 4th March 1995 and 13th April 1995 at Room 358, Tig Ying House, Tuen Mun, he unlawfully and maliciously inflicted grievous bodily harm on Liu Sin, a baby girl aged about 7 months. It was a bad case of baby battering. The baby was in fact about 6 months old for most of the time she was being subjected to violence. The facts are these. The respondent was Miss Tsang s, i.e. the co defendant s, boyfriend. They lived together in Room

358. The baby had been left by its father in the care of Miss Tsang on 4th March 1996 while he went to China. At that time, the baby's mother was in prison. The arrangement was that Miss Tsang was to receive \$4,000 for looking after the baby. When the father returned on 13th April 1995, he found that his baby daughter's left arm was swollen. He took her to Tuen Mun Hospital where an examination revealed that the baby had multiple injuries and fractures at different places and that these had occurred at different times. It is not necessary to detail the injuries. Their description in the two medical examination reports are little short of horrifying. When the police interviewed the respondent, he admitted that he had picked up the baby from the sofa and thrown her back onto it several times in the period covered by the charge. He also told the probation officer that he had beaten the child. Miss Tsang made a similar admission of throwing the child, but she did not say she had beaten the child. Counsel acting for the respondent told the judge that the respondent and Miss Tsang were inexperienced and immature in so far as caring for the baby was concerned, that he was unemployed for most of the time, that he had personal problems, and when they quarrelled over lack of money he vented his anger on the child. The judge took into account, as a factor in the respondent's favour, that he had admitted to the probation officer that he had beaten up the victim and thrown the victim onto the sofa in the heat of quarrels so as to ventilate his anger. The respondent expressed remorse. He had two previous convictions both for theft and for breaching a probation order supervision scheme which arose in respect of the second of those two offences. He was sentenced to detention in a training centre. By reason of that and of course his age, before the judge detention in a training centre was no longer an option. The probation officer said the respondent was rather impulsive, subject to tantrums and that it was likely that he battered the victim at times when he was angry and that his determination to change was not very obvious. The judge acknowledged that this was a serious case. He noted that the maximum penalty was 3 years. Indeed that is so, the charge being only one of unlawful wounding. But the respondent could very well have been charged with wounding with intent in which case he would have been subject to a far greater penalty. Reverting to the judge's reasons, he observed that it was in the respondent's favour that he had not used a weapon or hard object to batter the child and that the child was thrown onto a relatively soft surface. We pause here to mention that it is one of the slightly mystifying aspects of this case that a baby of 6 months could be thrown onto a sofa and sustain the sort of injuries that it did in this case, in particular the multiple fractures at different points. However, reverting to the reasons, the judge attached little weight to the respondent's youth and he adopted a starting point of 15 months imprisonment as appropriate and then proceeded to allow a reduction of one third for the plea of guilty. For the applicant, Mr Grenville Cross, who appears for the Attorney General with Mr Wesley Wong, in his written submissions submits that the sentence was manifestly inadequate or wrong in principle. In particular, he contends first that as the respondent admitted, he had repeatedly thrown the baby against the sofa over a period of 5 weeks, and as, in consequence of that, and similar assaults by Miss Tsang, the baby sustained multiple fractures and bruises, the judge ought more fully to have reflected in his sentence what was said by Lawton LJ in *R v Prime* (1983) 54 Cr 127 at 133 There are offences

which are so grave that the only way that judges can demonstrate that society will not tolerate a particular kind of conduct is by passing a sentence which truly reflects the abhorrence which right minded members of the public have of the offender's conduct. Mr Cross also refers to what Scarman LJ said in *R v Inwood* In the balance that the court has to make between the mitigating factors and society's interest in marking its disapproval for this type of conduct, we come to the irresistible though unpalatable conclusion, that we must not yield to mitigating circumstances. Second, Mr Cross submits that a sentence was required which adequately demonstrated the duty of the courts to show that the public is not prepared to tolerate any such child abuse. He relies upon the following words of Huggins J (as he was then) in *R v Lui Wai Chun* [1946-1972] HKC 111, 113C Courts ... must bear in mind that society has, in taking from the victims of crime and their relatives the satisfaction of personal vengeance, transferred to the courts the duty of ensuring that punishments are not so lenient that the victims or relatives will be tempted to take the law into their own hands.... The sentence must fit not only the offender but also the offence. More recently, the same point was made by Stuart Smith LJ in *R v Nottingham Crown Court, Ex p DPP* [1996] 1 Cr App R (S) 283, 288 It is a cardinal principle of sentencing that the court should take into account when considering the gravity of the offence and the appropriate sentence, the consequences to the victim. This is because one of the purposes of the criminal law is to assuage the feelings of victims and their friends and relations. The law must redress their grievance by inflicting an appropriate punishment and then there is no excuse for the victim or his friends to exact their own retribution. We pause to observe in the light of those dicta that the sentence of 10 months, it seems to us, does not take into account those matters. Third, Mr Grenville Cross submits that the judge fell into error in adopting a starting point of only 15 months imprisonment and then reducing it by one third. Although the public interest generally requires that a sentencing discount should follow a guilty plea, there are rare cases where there can be deviation from that principle (*R v Cheng Cheuk Man* [1994] 3 HKC 235, 237). Although, with the offence of unlawful wounding there is a considerable spectrum of criminality, the conduct of which the judge found the respondent to be guilty, he submits, placed the offence at the top end of the range. In addition, he submits, the judge ought to have given full weight to the maximum penalty for the offence, i.e. 3 years imprisonment, and then accepted that the offence before him fell within the worst case of its type (*R v Lam Wai Mei* Cr App 197/95 unreported). The judge ought also, he says, to have more fully borne in mind that, as McMullin P said in *Attorney General v Ho Chun Chau* [1985] 1 HKC 40, 45 ... the proper approach of the court should, when considering sentence, be to have regard to the intention of the legislature as indicated in the penalties provided and to measure the case before it against the kind of case capable of attracting the maximum penalty. We agree generally and consider that the seriousness of the offence, upon which the judge remarked, would place it in the sentencing band for the worst offences of its type, albeit at the bottom of that band. However, we are not persuaded that the respondent should not be accorded the usual one third discount for his plea of guilty. For his part, Mr Nelson Lam for the respondent submits that the sentence was imposed in the exercise of the judge's discretion and that such discretion ought not to be

lightly interfered with. He relies for that proposition on the judgment of Sir Alan Huggins V P in the Attorney General v Lau Chiu Tak [1984] HKLR 24, 25G I. We do not find it necessary to say more in response than that in the light of all the foregoing considerations we have mentioned and the circumstances of this case that we do not think a sentence as low as 10 months could reasonably be passed. We are satisfied that in the light of the principles and considerations mentioned, the multiplicity of injuries to the helpless victim and the protracted period over which they were inflicted, that the starting point should be much higher. As we have indicated, it should be at the bottom end of the highest band, about 24 months instead of the starting point of 15 months that the judge used. The judge referred to the co operation with the authorities, meaning the police initially and the Probation Services latterly. We see little of significance in such co operation or assistance that did not form part of his plea of guilty. We acknowledge that since we propose to increase the sentence that some discount should be given particularly as that increase can be regarded as being greatly in excess of the original sentence. See Attorney General v Wong Kwok Wai [1991]2 HKLR 384 at 349. Accordingly, taking the starting point of 24 months and allowing a discount in respect of his plea of guilty and a further reduction having regard to the substantial excess of what we propose over the original sentence, we think a proper sentence should be 15 months instead of the 10 months imposed. That may not seem to be a sufficiently high sentence, but applying the principles by which we are constrained and having regard to the charge that was actually preferred, we think that is the only increase we can properly make. We accordingly allow the application, treat this as the hearing of the appeal, set aside the sentence below and substitute a sentence of 15 months. (T.L. Yang) (G.P. Nazareth) (Patrick Chan) Chief Justice Vice-President Judge of the High Court Mr I Grenville Cross QC & Wesley Wong (AG s Chambers) for Respondent Mr Nelson H W Lam (M/s Ho, Tse, Wai & Partners) for Applicant - PAGE - @\\SERVER\HP LaserJet 4 Plus Ne01: winspool HP LaserJet 4 Plus \\SERVER\HP LaserJet 4 Plus \\SERVER\HP LaserJet 4 Plus & 6" IN THE COURT OF APPEAL OF HONG KONG Registrar, Supreme Court Normal.dot sslai Microsoft Word 8.0 JPMU IN THE COURT OF APPEAL OF HONG KONG Title _PID_GUID C\$g@ Lai Documents LAIDOC~ Microsoft Word Document MSWordDoc Word.Document.8

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