

HONG KONG / JUDGMENT

HKSAR v. BUTT UMMAR

COURT

Court of Appeal

DECIDED

27 September 2017

CASE / FILE NUMBER

CACC324/2016

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CACc 324/2016

in the high court of the

hong kong special administrative region

court of appeal

CRIMINAL appeal no 324 of 2016

(on appeal from DCCC NO 458 of 2016)

BETWEEN

HKSAR

Respondent

and

BUTT Ummar

Applicant

Before: Hon Lunn VP, Yuen JA and Kwan JA in Court

Date of Hearing: 27 September 2017

Date of Judgment: 27 September 2017

J U D G M E N T

Hon Kwan JA (giving the judgment of the Court):

This is a renewed application for leave to appeal against conviction. The applicant pleaded not guilty to one charge of burglary, contrary to section 11(1)(b) and (4) of the Theft Ordinance, Cap 210; one charge of resisting police officers in the execution of their duties, contrary to section 63 of the Police Force Ordinance, Cap 232; and one charge of possession of a dangerous drug,

namely 0.12 gm of a crystalline solid containing methamphetamine hydrochloride (commonly known as “Ice”), contrary to section 8(1)(a) and (2) of the Dangerous Drugs Ordinance, Cap 134. On 11 October 2016, he was convicted of all charges after trial in the District Court by Deputy Judge Chainrai and was sentenced to a total term of imprisonment of three years.

On 18 October 2016, the applicant filed a Notice of Application for leave to appeal (“Form XI”) in respect of conviction only. That application was heard by Macrae JA on 12 April 2017 and was dismissed on the same day. A warning was given to the applicant in the judgment as well as in the Notice of Order (“Form XII”) dated 12 April 2017 that a renewal of the leave application to the Court of Appeal may well result in a direction for the loss of time, if the court comes to the conclusion that there was no justification for the renewal.

On 13 April 2017, the applicant submitted the form to renew his application for leave to appeal against conviction (“Form XIII”), which again contained the above warning. No new grounds were stated in the form.

On 19 June 2017, directions were given by the court for the case to be listed for hearing with submissions of the applicant and the respondent to be filed in advance. Notwithstanding the applicant was directed to file written submissions no later than 28 days before the hearing, he did not do so. He made oral submissions before us, and relied on his previous letter to the court which was received on 4 January 2017.

The applicant was represented by counsel in the trial in the District Court. He has since been acting in person in seeking leave to appeal against conviction.

As the judgment of Macrae JA has set out in detail the prosecution case, the defence case, the parties’ closing submissions and the reasons for verdict, it is unnecessary to repeat the details here. The only issue of the case turned on the credibility of the prosecution witnesses, whose evidence was accepted by the judge. According to the prosecution case, two police officers, PW1 and PW2, saw the applicant ransacking a sub-divided unit within a flat. The applicant was subdued by PW1 and PW2 after a struggle, in the course of which PW1 sustained minor injuries to his fingers. PW1 and PW2 found a crowbar upon a search of the applicant’s person. When he was searched again at the police station, a plastic bag containing the dangerous drug was found on him.

The applicant elected to give evidence and his testimony was that he was framed up by the police officers. He had not been to the burgled premises, the crowbar and dangerous drug were not found on him, and the injuries of one of the police officers were sustained through his own carelessness. The judge rejected his evidence as incredible.

The main ground that had been relied on by the applicant in seeking leave to appeal against conviction was that there was “no fingerprint report and no DNA report.” It was an admitted fact that the crowbar (Exhibit P2) was not examined for the presence of fingerprints or DNA.

The applicant's counsel had raised this issue at the trial. Counsel had accepted "if in fact the crowbar had been handled by a number of persons not wearing gloves, then it's no point in trying to lift fingerprints or DNA, because it could have all been mixed in, and that wouldn't be practical." But he submitted that the hairdryer on the bed of PW3 (the tenant of the burgled premises) was "wholly different", because according to PW3 the hairdryer was left hanging in a bag upon a peg on the side of the bed. It could be inferred that the person who entered the premises unlawfully had taken down the bag and touched the hairdryer, and the hairdryer could have been seized and tested for fingerprints and DNA.

In the Reasons for Verdict, the judge dealt with the submission in this way at §27:

"[Defence counsel] accepted that as Exhibit P2 the crowbar had been handled by persons not wearing gloves, it was unlikely that any DNA or fingerprints could be lifted. However, the hairdryer found on the bed as depicted in photo 12 of Exhibit P1 should have been. The same could be said for the cigarette packet on the bed next to the hairdryer. Whether the hairdryer was examined for fingerprints or DNA was not put to any of the Prosecution witnesses. I found nothing in that submission in respect of the hairdryer not having been examined for fingerprints or DNA."

Before Macrae JA and again before us, the applicant relied on his complaint that his convictions were not supported by fingerprint or DNA evidence.

We do not think there is anything of substance to this complaint.

As rightly accepted by the applicant's counsel at the trial, it would not be practicable to examine the crowbar for fingerprints or DNA as this object had been handled by a number of persons not wearing gloves. As for the hairdryer and cigarette packet, the possibility of testing them for fingerprints or DNA was simply not put to the prosecution witnesses in cross-examination.

It has been held in various authorities that the absence of fingerprint evidence is just a neutral factor. In *HKSAR v Law Wing Hong*, CACC 169/1998, 11 November 1998, Power VP said at p 8:

"In the fourth ground, the applicant complains that there was no evidence of fingerprints on the knife. It is true that there was not, but lack of fingerprint evidence is a neutral factor. Of course if fingerprint evidence is given and either implicates an accused or exonerates him by establishing that the fingerprints are those of some other person, then it can be evidence of very substantial importance. Where, however, there is no fingerprint evidence at all, it proves nothing either way."

This passage was cited with approval in *HKSAR v Pham Thi Nga*, CACC 224/2011, 16 July 2012 at §40.

In *R (Ebrahim) v Feltham Magistrates' Court* [2001] 1 WLR 1293 at §27, Brooke LJ had this to say:

"It must be remembered that it is a commonplace in criminal trials for a defendant to rely on "holes" in the prosecution case, for example, a failure to take fingerprints or a failure to submit evidential material to forensic examination. If, in such a case, there is sufficient credible evidence, apart from the missing evidence, which, if believed, would justify a safe conviction, then a trial should proceed, leaving the defendant to seek to persuade the jury or justices not to convict because evidence which might

otherwise have been available was not before the court through no fault of his. Often the absence of a video film or fingerprints or DNA material is likely to hamper the prosecution as much as the defence.”

Here, the judge was alive to the criticism of the applicant’s counsel as to the lack of fingerprint or DNA evidence for objects other than the crowbar, namely, the hairdryer and the cigarette packet on the bed. There was no evidence of malice or dereliction of duty on the part of the prosecution witnesses as it was not even put to them they should have tested these objects for fingerprints or DNA. The lack of such evidence, which is a neutral factor, cannot be fatal to the prosecution case.

The judge correctly observed that the main issue was one of credibility, and had reminded herself of the standard and burden of proof and the requirement for drawing inferences. She had considered carefully all the evidence adduced as well as the submissions on both sides. The question is whether there is sufficient credible evidence to find the charges proved. She was entitled to accept the evidence of the prosecution witnesses in its entirety (§§3 to 5, 26 and 35 of the Reasons for Verdict). It has not been shown that her evaluation of the evidence was flawed in any or any material way. There is simply no basis to interfere with the findings of the judge.

The applicant also raised before us the allegation that the address in Charge 1 does not exist. This allegation was not made at the trial. He raised this when he first sought leave to appeal before Macrae JA. There is nothing in this argument. The precise description of the address is immaterial. PW1 and PW2 gave evidence of the address of the premises where the applicant was found. The judge was entitled to accept their evidence.

We dismiss the renewed application for leave to appeal against conviction as it is wholly without merit.

After the delivery of the above reasoned judgment, we gave an opportunity to the applicant to address us whether an order for loss of time should not be made under section 83W(1) of the Criminal Procedure Ordinance, Cap 221. The applicant has been warned sufficiently of the consequence of renewing his application where there is no justification in doing so. No new grounds were advanced and his submissions in the present application were merely a repetition of the arguments that had been rejected by Macrae JA. Due to the total lack of merits, it is appropriate to make a direction that one month of the time spent in custody pending this application should not count towards the sentence imposed, and we so order.

(Michael Lunn)

Vice President

(Maria Yuen)

Justice of Appeal

(Susan Kwan)

Justice of Appeal

Mr Franco Kuan, Senior Public Prosecutor, of the Department of Justice, for the Respondent

The Applicant appeared in person

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