

HONG KONG / JUDGMENT

HKSAR v. CHAN CHI KEUNG

COURT

Court of Appeal

DECIDED

17 August 2011

CASE / FILE NUMBER

CACC457/2010

Source: legalref.judiciary.hk · Research copy typeset by Esheria. Not court-issued or certified.

bjbj cacC 457/2010 in the high court of the hong kong special administrative region court of appeal CRIMINAL appeal no. 457 of 2010 (on appeal from DCCC NO. 663 of 2010) BETWEEN HKSAR Respondent CHAN Chi-keung Applicant Before: Hon Hartmann, Fok JJA and Tong J in Court Date of Hearing: 17 August 2011 Date of Judgment: 17 August 2011 J U D G M E N T Hon Fok JA (giving the Judgment of the Court):

Introduction

On 19 November 2010, the applicant was convicted after trial in the District Court of one count of robbery, contrary to section 10 of the Theft Ordinance (Cap. 210). Following his conviction, he was sentenced by His Honour Judge E. Yip to 4 years imprisonment. The applicant now applies for leave to appeal against his conviction. The prosecution case It was the prosecution case at trial that, on 25 April 2010 in Ivy Street, Mongkok, the applicant and another unknown man acted together to rob a Ms Ho Wing-huen of her handbag, containing various personal items. There were three witnesses called for the prosecution. PW1 was a Mr Tse Kin-wing (PW1), who witnessed the attack on Ms Ho. PW2 and PW3 were PC 2094 and WPC 57138 respectively, who were patrolling police officers who gave chase to and, in the case of PW2, apprehended the applicant. The evidence of PW1 was that at around 9:40 PM on 25 April 2010, whilst he was in Ivy Street, he saw two men at a distance of about 20 metres, each dressed in a dark long-sleeved windbreaker, and Ms Ho on the pavement outside No. 33 Ivy Street. He saw one of the two men pulling Ms s bag and Ms Ho and that man scrambling for the bag. The man punched and pushed Ms Ho to the ground. Thereupon one of the men (and it was the prosecution case that this was the applicant) grabbed Ms s handbag and fled. The other man followed suit and the two men ran off towards the junction of Ivy Street and Elm Street, a distance of about 2 to 3 metres, turned right into Elm Street and disappeared from PW1 s sight. PW1 then approached Ms Ho and offered assistance. PW2 and PW3 were in a group of Emergency Unit officers patrolling along Ivy Street in a police vehicle. As the vehicle approached the junction with Elm Street, they saw Ms Ho sitting on the ground outside No. 33 and a man in a dark blue top and dark trousers holding a black handbag running along Ivy Street and turning right into Elm Street. The vehicle was coming in the opposite direction along Ivy Street to that in which the man was running. It then

turned left into Elm Street and stopped, whereupon PW2, PW3 and PC 1110 alighted from the vehicle and gave chase. According to PW2, the distance between the police officers and the man carrying the handbag was approximately 6 to 7 metres when they alighted from the police vehicle and gave chase. PW2, who called out to the man to stop, led the chase which continued along Elm Street with the distance between the man and the police officers remaining constant. After running between 20 and 30 metres along Elm Street, the man turned right into Anchor Street. The police officers did likewise and, after turning the corner into Anchor Street, PW2 increased his speed and caught up with the man carrying the handbag at a petrol station situated at No. 82 Anchor Street, near the junction of that street and Tai Kok Tsui Road. When he caught up with the man, PW2 seized him and pinned him to the ground. PW3, who was following at a distance of 5 to 6 feet behind PW2, caught up. It was PW3's evidence that the handbag was still being held by the man, whilst PW2's evidence was that the bag was found next to the man after he was pinned to the ground. The man who PW2 had apprehended was the applicant and, in his presence, PW2 opened the handbag and found a wallet containing HK\$90 cash, Ms's identity card and two bank cards in her name. In response to PW2's inquiries, the applicant remained silent and PW2 arrested him. In the meantime, PW3 returned to Ivy Street to attend to Ms Ho. It was an admitted fact that Ms Ho was treated at Kwong Wah Hospital and found to have tenderness over both temporo-maxillary regions, redness over the right temporo-maxillary region, both elbows and left foot and bruising over the left temporo-maxillary region, left-hand dorsum and right knee. It was PW2's evidence that he never lost sight of the man he was pursuing during the chase although his view might have been blocked for less than a second by vehicles parked along Elm Street and Anchor Street and that no one was in the vicinity of that man during that time. PW3 also confirmed that she never lost sight of the applicant throughout the chase. Neither PW2 nor PW3 observed the applicant having any difficulty in running. The defence case The applicant gave evidence on his own behalf but called no other defence witnesses. It was his case that the police officers had mistakenly identified him as one of the robbers. He was not the man who PW3 had chased. Instead, at that time, he had walked along Elm Street and turned into Anchor Street. When he reached the petrol station on Anchor Street, he heard noises of quick footsteps and people calling out from behind him. He turned his head and body to the right and a running man suddenly bumped into him. That man ran past him and dropped a handbag next to him before fleeing. At this point PW2 pinned him to the ground. According to the applicant, he protested his innocence throughout the police enquiries. The applicant challenged the prosecution case that he had been the man running with the handbag on the basis of various physical problems. First, he had fractured the shaft of his right tibia during a football game in 1980 and had been in plaster for six months. Secondly, he had suffered from right chest wall pain after playing volleyball on 21 February 2007. An x-ray examination revealed an old fracture of his right 7th and 8th ribs. Thirdly, on 19 July 2010, he complained of varicose veins in both lower limbs, for which he was prescribed painkillers. Finally, although he was neither fat nor thin, he was quite fit apart from the previously mentioned ailments and could perform daily activities and walk without difficulty but could not run fast due to his varicose veins which he said he had had for many years. The Judge's reasons for verdict The Judge noted that the applicant's complaint of varicose veins was made in July 2010, which was three months after the robbery. He also noted that the applicant

was sufficiently fit to play volleyball in February 2007 and also that, according to the applicant's own evidence about the incident, he was steady enough in his gait to regain his balance immediately despite being unexpectedly bumped into by a running man. He therefore concluded that, apart from the applicant's own testimony, there was no proof that the applicant's varicose veins were so serious as to render him unable to run fast on the date of the incident. The Judge considered the applicant's evidence about the collision between him and the running man. Given that he managed to keep his balance and did not suffer or complain of having sustained any injury as a result of the collision, the Judge did not consider it to have been a forceful bump at all or that there was any changing of positions between him and the running man. Other than the applicant's evidence that the running man was wearing a similar dark windbreaker, there was no evidence suggesting the latter's outward appearance was the same as the applicant. Accordingly, the Judge found no grounds for suggesting that PW2 or PW3 had mistaken the applicant for the running man. Having rejected the possibility of mistaken identification, the Judge went on to consider whether PW2 and PW3 had colluded to frame the applicant. The Judge found there was no reason for them to have done so. The Judge concluded that the prosecution witnesses were credible and reliable and rejected the applicant's evidence and the defence case of mistaken identity or frame-up. He found all the elements of the charge proved beyond reasonable doubt and convicted the applicant. The grounds of appeal The applicant has advanced five grounds of appeal in his amended perfected grounds of appeal dated 28 March 2011. The first ground of appeal alleged is that the Judge erred in finding there was a robbery on the strength of the testimony of PW1, in that there was insufficient evidence to prove that a theft had been committed by the applicant. We have no hesitation in rejecting this ground of appeal. PW1's evidence that he saw two men struggling with Ms Ho over a handbag, that he saw her being punched and knocked to the ground, and that he then saw one of the men seizing the handbag before making off along Ivy Street in the direction of its corner with Elm Street was not substantially challenged. On the question of whether there was sufficient evidence to establish the theft of the handbag from Ms Ho, we accept that PW1's unchallenged evidence was a sufficient basis for the Judge to infer the stealing of the handbag. Whilst the case would obviously have been much stronger had there been direct evidence from Ms Ho to the effect that it was her handbag and that it was forcibly taken from her and not given by her voluntarily to her two assailants, we consider that it was open to the Judge to infer this from the events witnessed by PW1. Ms's identity card and two bank cards bearing her name were found in the handbag, those items clearly belonging to her, and their presence in the handbag which she was carrying at the time of the incident, together with the resistance she put up when the men tried to take it from her, give rise to the inference that the handbag and its contents were her property and that this was misappropriated from her. PW1 clearly saw Ms Ho struggling to retain the handbag. She was not prepared to give it to the two men and they forcibly took it from her. Having done so, the man carrying the handbag continued to run away when the police gave chase and ignored calls to stop. We are satisfied the evidence fully supports the conclusion that the men stole Ms's handbag. The second ground of appeal is that, in his evaluation of the testimony of PW2 and PW3, the Judge failed to direct himself properly in respect of PW1's evidence. In particular, two alleged inconsistencies of evidence are relied upon: first, as to the number of men running away from

Ms Ho after the snatching of the handbag; and secondly, as to the position of the handbag when the applicant was seized by PW2. There was a difference between, on the one hand, the evidence of PW1, who said he saw two men running away from Ms Ho and, on the other hand, PW2 and PW3, who both said they saw only one man running away. It is not clear what submission, if any, was made to the Judge on the basis of this difference in the evidence. The Judge does not address it in his reasons for verdict. However, we do not think the alleged inconsistency undermines the evidence of PW2 and PW3 that the man they chased was the applicant and that he was carrying the handbag. The other man seen by PW1 disappeared from his view when the two men turned the corner from Ivy Street into Elm Street. The events described by the evidence of PW2 and PW3 were those occurring immediately after the two men seen by PW1 fled the scene. This is understandable since it is apparent that the police came upon the incident slightly later than PW1. It would appear from their evidence that PW2 and PW3 only saw the applicant holding the handbag and not the other man at the point in time at which their observation of the events began. Given their observation of Ms Ho sitting on the pavement and a man running away clutching a handbag, it is understandable that their focus would be on that man. Furthermore, there is no evidential basis to support the fact that the other man continued to run along Elm Street in the same direction as the applicant, i.e. towards Anchor Street. If he had turned off Elm Street before the police alighted from their vehicle, this might explain why PW2 and PW3 did not see the other man. In any event, there is no reason to think that PW2 or PW3, in giving evidence of having seen only one man running away from them, were seeking to embellish the prosecution case. The crucial question is the credibility of PW2 and PW3's evidence that the man they were chasing and who PW2 eventually apprehended was the applicant and that he was the man carrying the handbag. We do not think the Judge's acceptance of that evidence is undermined by PW1's evidence that he saw another man taking part in the robbery and running away. Turning to the difference concerning the position of the handbag upon the applicant being apprehended, PW2's evidence was that the applicant had been holding the handbag all along while he was chasing him but that when he seized the applicant and pinned him to the ground the bag was next to him. PW2 suggested that the applicant had dropped the handbag when he fell to the ground. For her part, PW3 gave evidence that the applicant was holding the handbag all along until he was pushed down onto the ground by PW2. It was contended on behalf of the applicant that this discrepancy undermines the reliability of the evidence of PW2 and PW3. We do not agree. Whilst the position of the handbag described by PW2 and PW3 is different, this difference is explicable, in our view, on the basis that the two police officers were describing the situation at different points in time. It seems clear to us that PW3 was describing the position of the handbag at the point in time when PW2 was seizing the applicant and forcing him to the ground, whereas PW2 was describing the position of the handbag after he had subdued the applicant by bringing him to the ground. In the physical process of being apprehended by PW2, it is understandable that the applicant would have relinquished his hold on the bag at the point when he hit the ground. We would add the Judge alluded to the apparent discrepancy between the evidence of PW2 and PW3 in this regard in paragraph 20 of his reasons for verdict. He noted there that the point had not been specifically raised by defence counsel and concluded, correctly in our view, that there was no significance in the disparity in the evidence as to the position of the

handbag after the applicant was apprehended. The third ground of appeal is that the Judge erred in finding that there was no ground that PW2 and PW3 had mistaken the applicant for the running man. It is submitted on behalf of the applicant that PW2 and PW3 must have lost sight of the running man when he ran around the corner of Elm Street into Anchor Street. However, we accept the submission made on behalf of the respondent that this does not necessarily follow. It would depend on whether the running man and the chasing police officer turned abruptly at the corner or took the corner on a wide arc. If the latter, there is no particular reason why a pursuer running approximately 6 to 7 metres behind his target would lose sight of the target. In any event, the matter must be looked at in context and as a matter of common sense. The defence case was that the running man bumped into the applicant and dropped the handbag on the ground. But for that to happen opposite the petrol station at No. 82 Anchor Street, the chase must have continued along the length of Anchor Street. Even if the police officers giving chase had momentarily lost sight of the running man as he turned the corner from Elm Street into Anchor Street, the chase continued along the length of Anchor Street almost to its corner with Tai Kok Tsui Road, a distance estimated to be between 20 to 30 metres. The continuation of the chase along that length of Anchor Street would have served to confirm the identity of the running man as the person who stole Ms s handbag. It was also submitted on behalf of the applicant that PW2 s evidence suggested that he relied on the clothing of the running man rather than the fact that he did not lose sight of him to conclude that the applicant was the running man. It is true that PW2 gave the answer relied upon by the applicant in support of this submission but it is to be read in context of his evidence under cross-examination in which he emphatically denied the suggestion put to him that he had lost sight of the running man and had not been able to keep him in sight as he contended he had. The question put to PW2 proceeded on the premise that PW2 could only have identified the running man by reference either to his clothing or to the fact that he had kept him in sight during the entirety of the chase. These are not mutually exclusive bases for PW2 s identification of the applicant as the running man. On a fair reading of PW2 s evidence, we think it is clear that PW2 was saying that his identification was based both on the clothing worn by the running man as well as his visual observation of that man during the chase. The fourth ground of appeal is that the Judge erred in failing to give proper consideration to the case of the defence. It is submitted that the Judge misdirected himself on two matters. First, in paragraph 16 of his reasons for verdict, the Judge discounted the applicant s defence that some other running man had bumped into him and dropped the handbag. Secondly, in paragraph 17 of his reasons for verdict, the Judge considered that there was no reason for PW2 and PW3 to frame the applicant. It was submitted that, in addressing these matters in the way he did, the Judge erred in posing the issue before him as a choice between the prosecution and defence cases and thereby failed to focus on the relevant question, which was whether the defence might be true: see *Lee Fuk Hing v HKSAR* (2004) 7 HKCFAR 600 at 612F-613G. We reject this submission. In our view, the Judge s reference to the absence of any suggestion that the running man was of the same outward appearance as the applicant in terms of their style, facial features, height and body build was made in the context of testing the defence case of mistaken identity as a matter of common sense. It was the applicant s evidence that the running man who bumped into him was wearing a dark windbreaker, similar to the windbreaker he was wearing. It was the applicant therefore who

introduced the suggestion that he might have been mistaken for the running man due to the similarity in their clothing. We do not think that the Judge can be criticised for making the point that this was the only similarity suggested in the applicant's evidence and that no other physical similarities were in evidence. This was relevant in the context of the Judge's task of deciding the credibility and weight of the evidence of PW2 and PW3 that they had not lost sight of the applicant during the chase and that the applicant was the only running man. As to the Judge's consideration of the possibility of a frame up, it is to be noted that he addressed this issue after having rejected the possibility of a mistaken identification of the applicant on the part of PW2 and PW3. The Judge noted that the defence had never directly put to them that they had framed the applicant. However, the transcript shows that it was put to PW2 that he had not arrested the applicant at the scene and that, having chased the runner, he ceased his pursuit and arrested the applicant instead when he saw the running man pass the applicant and throw the handbag to the ground. A similar suggestion was put to PW3. In these circumstances, the Judge's consideration of the issue of whether there was a frame up was, in our view, proper. The fifth and final ground of appeal is that the conviction was in all the circumstances unsafe and unsatisfactory. We reject this contention. The case was a simple one in which the only real issue was one of identification. We are satisfied that the Judge's finding of guilt on the part of the applicant was fully supportable on the evidence before him. For these reasons, the application for leave to appeal against conviction is dismissed. (M.J. Hartmann) Justice of Appeal (Joseph Fok) Justice of Appeal (Louis Tong) Judge of the Court of First Instance Mr Andy Hung, instructed by Messrs Shea & Co., assigned by Director of Legal Aid, for the Applicant Mr Ira Lui, SPP of the Department of Justice, for the Respondent

1udk h=p? yt=p? yt=p? yt=p? hK_ hK_ h,nV h,nV hK_ 1udk yt=p? yt=p? yt=p? [Content_Types].xml Iw}, \$yi} _rels/.rels theme/theme/themeManager.xml K Y, sQ}# theme/theme/theme1.xml w toc'v)I`n 3Vq%`#q x}r :TZaG I u3 L+M2 e\O* \$*c?)6-r IqbJ#x ,AGm T[XF64 E)`# R>QD =(K& =al- 4vfa 0%M0 theme/theme/_rels/themeManager.xml.rels 5 6?\$Q K(M&\$R(.1 [Content_Types].xmlPK _rels/.relsPK theme/theme/themeManager.xmlPK theme/theme/theme1.xmlPK theme/theme/_rels/themeManager.xml.relsPK <?xml version="1.0" encoding="UTF-8" standalone="yes"?> <a:clrMap xmlns:a="http://schemas.openxmlformats.org/drawingml/2006/main" bg1="lt1" tx1="dk1" bg2="lt2" tx2="dk2" accent1="accent1" accent2="accent2" accent3="accent3" accent4="accent4" accent5="accent5" accent6="accent6" hlink="hlink" folHlink="folHlink"/> H; <jFen ABC Final Judiciary ABC Final (FOK).dotx setup Microsoft Office Word Judiciary ABC Final ABC Final Title Source Erica Microsoft Office Word 97-2003 Document MSWordDoc Word.Document.8

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=77859

CASE PAGE <https://chat.esheria.ai/case-law/hong-kong/hksar-v-chan-chi-keung-2011>

Prepared on 28 October 2026 · Esheria