

HONG KONG / JUDGMENT

HKSAR v. CHAN CHING MAN

COURT

Court of Appeal

DECIDED

5 December 2007

CASE / FILE NUMBER

CACC48/2007

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Before : Hon Ma CJHC and McMahon J in Court Date of Hearing : 5 December 2007 Date of Judgment : 5 December 2007

J U D G M E N T

Hon Ma CJHC (giving the judgment of the Court) : On 26 January 2007, the Applicant pleaded guilty before Deputy High Court Judge Line to three charges : two of theft and one of possession of an imitation firearm, an air pistol (contrary to section 17(2) of the Firearms and Ammunition Ordinance, Cap. 238). The same day, the Applicant was sentenced to 2 years 8 months for one of the theft charges, this to run concurrently with the sentence of 6 years for the firearms charge. As for the other theft charge, the Applicant was sentenced to 2 years imprisonment, one year of which was to run consecutively to the other sentences. In all, the Applicant was sentenced to 7 years imprisonment. It is the sentence for the firearms charge against which the Applicant now seeks leave to appeal. The sentence of 6 years (which was based on a starting point of 9 years) is said to be excessive. Mr Chong Chun (who represents the Applicant) has referred us to a number of authorities which deal with sentences for firearms charges. He accepts, however, that there is no tariff sentence or even sentencing guidelines. Much of course depends on the circumstances, as he acknowledges. The circumstances were these. On 20 2006, the Applicant entered the King Fook Jewellery Store in the Miramar Hotel together with another person (who was the 1st Defendant in the relevant indictment). The 1st Defendant was armed with a knife. There, the Applicant tried on a Rolex watch (priced at \$291,250) and then ran away together with the 1st Defendant. At the exit to the shop, a member of staff tried to stop the Applicant, at which point the Applicant produced the imitation firearm, pointing it at the member of staff who immediately squatted down. The Applicant then escaped into a taxi in which another accomplice (the 3rd Defendant at trial) was waiting for him. The 1st Defendant was subdued in the shop and was not

able to escape. These were the relevant facts of one of the theft charges and the firearms charge. The other charge related to a theft committed by the Applicant a month earlier (on 17 April

2006) when, after trying on a Rolex wristwatch, he ran out of the shop (the La Suisse Watch Company Limited in Mongkok). In sentencing the Applicant, the judge regarded as serious the fact that while escaping, he produced the air pistol and pointed it at a person to threaten him. The judge said this It does not need me to illustrate or say more about the gravity of theft occurring in jewellers shops and a thief departing and displaying an imitation firearm to make good his escape. The mischief is obvious. If this had been a robbery and it very nearly was you would have faced a starting point of something like 12 years, but I remember it is only theft that is involved and not a robbery and I will generously reflect that difference by taking a starting point of nine years. And I say generously because it would be the production of the pistol in the course of the dishonest removal of property from a jeweller s shop in the course of ordinary trade where people are around in the streets and the like, is a robbery if you produce it a second or two before; it is theft if you produce it just after. The facts are not all that different but the difference in the starting point you have is big. With respect, we entirely agree with the judge that the production of a firearm (albeit an imitation one) is to be regarded with much seriousness. All the more so when it is used to threaten. Although Mr Chong is correct to point out that this was not a robbery, we agree with the judge that in looking at the matter overall, one is driven to the conclusion that the circumstances were nevertheless extremely serious and the sentence ought to reflect this. Afterall, one must not lose sight of the fact that the production of the imitation firearm was hardly unintentional. The Applicant and the 1st Defendant were armed. It is presumed that they fully intended to use their weapons should the occasion arise for their use. In this respect, the case of Attorney General v Lam Wing kwong [1993] 2 HKCLR 227 at 229 is of assistance considerable emphasis must therefore be placed upon the ingredient of intent to use the fire arm in the course of an arrestable offence In R v Hui Fuk Ming, unreported, CACC 513/1992, 14 January 1994, Macdougall VP said this (although in the context of a robbery and an offence under section 18(1) of the Firearms and Ammunition Ordinance) If an offender takes the matter one step further and puts his intention into action by actually carrying a genuine or an imitation firearm during the course of a robbery, his conduct is more culpable and therefore deserving of a more severe punishment. Regrettably, the use of firearms, both genuine and imitation, has become far too prevalent in Hong Kong in recent times. Such conduct calls for the imposition of heavy sentences, and the general level of sentencing has increased accordingly. The sentence of 6 years was therefore in our view entirely justified. In some cases, the better sentencing approach may be to impose consecutive terms or partly consecutive terms, since afterall the section 17(2) offence is a separate one which assumes that a scheduled offence has also been committed. But in the present case, the sentence imposed was neither manifestly excessive nor wrong in principle. Like the judge, we have noted the Applicant s age (he is now 20). At the time of the relevant crimes he was 18 but his previous record is poor. He has previously been convicted of robbery, theft, criminal

intimidation and possession of dangerous drugs. For the above reasons, the application is dismissed. (Geoffrey Ma) (M. A. McMahon) Chief Judge, High Court Judge of the Court of First Instance Mr John Reading SC & Ms Winnie Lam of the Department of Justice for the Respondent Mr Cho 1udk 1udk O P Q R S T U V !0 !0 !0 !0 !0 !0 !0 !0 1A \ @\$_"D & 6" Normal.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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