

HONG KONG / JUDGMENT

HKSAR v. CHAN ERNEST

[2019] HKCA 869

COURT

Court of Appeal

DECIDED

1 August 2019

CASE / FILE NUMBER

CACC191/2018

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bjbj

Before: Hon Zervos JA in Court Date of Hearing: 1 August 2019 Date of Judgment: 1 August 2019

J U D G M E N T

This is an application by the applicant for leave to appeal against his conviction. On 28 June 2018, the applicant was convicted after trial before Deputy High Court Judge Saw and a jury of trafficking in a dangerous drug and sentenced to 8 years and 4 months imprisonment. The brief facts In the early hours of 2 April 2016, Police Constable Wat Ka-wing (PW1) and Police Constable Lai Ka-chung (PW2) were on patrol together near Tin Shui Wai Park, Tin Shui Wai, New Territories. At around 4:32 am, the police officers noticed the applicant and a woman, Lam Pik-ye, behaving suspiciously in the area and intercepted them. The prosecution alleged that PW1 then produced his warrant card and searched the applicant. He discovered three bags in his jacket pocket, containing a total of 30.56 grammes of methamphetamine hydrochloride (commonly known as), a mobile telephone and approximately \$1,622 in cash. The applicant was then immediately arrested and cautioned for the offence of trafficking in a dangerous drug. He told the police officer: Someone asked me to deliver the to Tin Shui Wai Park and said that I would get money after the delivery. I planned to buy some late night snacks after the delivery, so I asked Lam Pik-ye to buy late night snacks with me. The has nothing to do with Lam Pik-ye. He was then escorted to Tin Shui Wai Police Station. Whilst at the police station, the applicant was given a Notice to Persons in Custody which he read and signed. At that time, PW1 wrote in his notebook what took place at the scene of the arrest. The applicant was invited to read the notebook entry, as well as having it read out to him. He signed it, declaring it to be correct. The applicant also participated in a video-recorded interview in which he confirmed parts of what he had said earlier when apprehended by the police officers. In contrast, the applicant, who testified

at his trial, alleged that he was apprehended around 3 am, not 4:32 am and that he was neither cautioned, nor told he was going to be arrested for trafficking in dangerous drugs. However, he did not dispute that the drugs were found in his jacket pocket as claimed by the police officers. He alleged that PW1 said to him: I am going to arrest you. But, if you can arrange someone to come here with 250 grammes of for me to arrest, then I will release you people, and the drugs would be returned to you. He additionally stated that he did not admit that he was trafficking in dangerous drugs, neither did he intend to acknowledge any admission when he signed the record in PW1 s notebook. He signed the notebook entry and participated in the video recorded interview because he was tired and in a state of withdrawal from drug usage. The grounds of appeal The applicant advances four grounds of appeal. First, that the judge erred in not giving the Mushtaq direction to the jury in circumstances which suggested the oral admission at the scene might have been induced by oppression, even where the applicant denied making the admission (Ground 1). Secondly, that the judge failed to direct the jury that they should not draw an adverse inference from the applicant s refusal to answer questions during the video interview (Ground 2). Thirdly, that the judge erred in failing to sufficiently direct the jury of the evidential value of the statements of Inspector Lo Kwok Kin and Dr Dong Yurt Sun Jimmy. Specifically, that whilst the two statements were read to the jury, they were not exhibited as evidence. In addition, the judge did not explain to the jury the evidential value of Dr Dong s statement, who gave evidence as an expert (Ground 3). Fourthly, that the conviction is unsafe and unsatisfactory in all the circumstances (Ground 4). Discussion Under Ground 1, it is complained that the judge only asked the jury to consider whether the applicant in fact made the admissions and said nothing about the fact that if they found that the admission was or may have been made or given as a result of oppression. In other words, the judge failed to give a Mushtaq direction, as set out in Specimen Direction 39. In HKSAR v Pang Hiu San (2014) 17 HKCFAR 545, the Court of Final Appeal explained in paragraph 4 that a Mushtaq direction provides that a judge must direct the jury as to the voluntariness where the circumstances of the case suggest that the confession was, or may have been, induced by oppression and, if they conclude that the confession may have been obtained as the result of oppression they must disregard it. Later in paragraph 62, the Court quoted Lord Kerr s description of a Mushtaq direction in Benjamin v The State [2012] UKPC 8, where he said that it is one which instructs the jury that if they consider that written or oral statements were, or may have been, obtained by oppression or in consequence of anything said or done which was likely to render it unreliable, they should disregard it. The Court in paragraph 56 followed Wizzard v The Queen [2007] LRC 457, that a Mushtaq direction was only required where there was a possibility that the jury might conclude: (i) that a statement was made by the defendant; (ii) the statement was true but (iii) the statement was, or might have been, induced by oppression. The Court added in paragraph 57 that in relation to (iii) that if circumstances existed from which the jury could reasonably conclude that the confession was, or might have been, induced by oppression, the jury should be given a Mushtaq direction. Mr Jonathan Man, who appears together with Mr Ivan Shiu, for the respondent, acknowledges that the law is settled that if the circumstances of the case suggest that the confession was, or may have been induced by oppression, a Mushtaq direction should be given, even if the defendant denies making the confession. The crucial question, therefore, is whether there were such circumstances in the

present case. Mr Man submits that there is no evidence of any oppression exerted on the applicant in urging him to make a confession. And that is the case even on the applicant's own account as to what happened at the time he was stopped by the police. Mr Henry Ma, for the applicant, accepts that, other than what was allegedly said to the applicant by the police officer, there was no other circumstance that prevailed at the time that could be viewed as constituting oppression. He submits that if the jury was of the view that the applicant's account was or may be true, namely that he was told by PW1 that he was going to arrest him and that he would be released if he could arrange someone to come to the location with 250 grammes of Ice, this would constitute oppression that warranted a Mushtaq direction. Mr Man submits that it was not in dispute that the applicant was in possession of the drugs, for which he was or would be arrested, and this was not a circumstance from which a jury could reasonably conclude that the admission was, or might have been, induced by oppression. I agree, and I do not find that this ground is reasonably arguable. I should add that the matter was raised with the judge when the defence raised an objection to the admissibility of the applicant's oral confession, the police notebook entry, and the record of interview. He addressed the matter in his reasons for ruling dated 4 July 2018 where he found the circumstances suggested in Pang Hiu San did not arise in the present case. The judge noted that the defence case was that his admission was a fabrication by the police officers and that he signed the notebook entry, setting out his admission, and answered questions in his video recorded interview as a result of oppression. He determined that there were circumstances from which the jury could reasonably conclude that the statements in the notebook entry and the video recorded interview were, or might have been, induced by oppression, and directed them accordingly. He gave a Mushtaq direction in relation to the notebook entry and the applicant's video recorded interview, in relation to which the applicant alleged that he was, at the time, exhausted and suffering with drug withdrawal symptoms. I am of the view that the judge correctly dealt with the issue and I find that this ground is not reasonably arguable. Under Ground 2, it is complained the judge failed to direct the jury adequately that they should not draw an adverse inference against the applicant for his refusal to answer questions during the video interview. Mr Ma also complains that the judge, when summarizing the record of interview to the jury, was highlighting to them that the applicant had on occasions refused to answer questions. This is not correct. The judge was reminding the jury of the defence case that he was suffering from fatigue and drug withdrawal symptoms when he was answering questions during the record of interview. Mr Man submits that, in any event, there is no basis for complaint because the judge did correctly direct the jury that they must not hold the fact the defendant in this case refused to answer some of the video-recorded interview against him and also that the exercise by a defendant of the right to refuse to answer questions cannot amount to an admission of any kind nor can it be taken to reflect a guilty mind. There is no substance in this ground of appeal. Under Ground 3, it is complained that the judge failed to direct the jury sufficiently about the evidential value of the statements in question and did not properly exhibit them or admit them into evidence. Mr Ma abandoned this ground of appeal at the leave hearing. In my view, it was clearly devoid of merit, as both statements were read out to the jury pursuant to section 65B of the Criminal Procedure Ordinance, Cap 221. The judge informed the jury at the time the statements were read to them that those statements constitute evidence in this case, just as if the

witnesses had stood up in the witness-box and given that oral evidence. The nature and evidential value of the statements of these witnesses was clearly apparent to the jury and no further elaboration was required from the judge. The final ground of appeal is a general complaint that the conviction was unsafe and unsatisfactory based on the remaining two grounds of appeal. Like those grounds, there is no substance in this ground as well.

Conclusion

It follows from what I have said that the grounds of appeal are not reasonably arguable and leave is therefore refused. The applicant is reminded of his right to renew his application for leave to the Court of Appeal, but he is also warned of the consequences of doing so, which may include a direction for any loss of time spent in custody pending his appeal, if the Court were to come to the view that there was no justification for the renewal of his application. (Kevin Zervos) Justice of Appeal Mr Jonathan Man, SADPP and Mr Ivan Shiu, SPP (Ag) of the Department of Justice, for the respondent Mr Henry Ma, instructed by C M Chow & Co, for the applicant Appeal Bundle, 211I K. At paragraph 5. Appeal Bundle, 236 243, see paragraph 5 15. Appeal Bundle 27J 30J. Appeal Bundle, 21M P. Appeal Bundle, 40M P. PAGE - A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N hw{v h^-v h^-v gd) gd~4y gd_j gdi< hRQ8 h(&= hQ9M gdHg h zg hWDu hWDu uouoi hB,V hB,V gd:U gdQi2 gdQi2 gd zg gdQi2 hQi2 h zg hQi2 h3r; gdg~& uqgc]W]cM hWDu hWDu hg~& gdhX O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V :p7"@ [Content_Types].xml _rels/.rels theme/theme/themeManager.xml K Y, sQ} # theme/theme/theme1.xml \$O}) Xp90 +PHI| PP yu 9xu5 fs+W VF7H q=. 8}d- qyI@!Q_ jyV` |Pz+ T ""p < 4V O&x\$ A8>v ;EUC n 8r *~P(5 .}x E /EE\} 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"/>* setup hca.dot Windows User Microsoft Office Word Judiciary Hong Kong Title <?xml version="1.0" encoding="UTF-8" standalone="no"?><b:Sources SelectedStyle="\APA.XSL" StyleName="APA" xmlns:b="http://schemas.openxmlformats.org/officeDocument/2006/bibliography" xmlns="http://schemas.openxmlformats.org/officeDocument/2006/bibliography"></b:Sources> <?xml version="1.0" encoding="UTF-8" standalone="no"?> <ds:datastoreItem ds:itemID="{4B7CF6C4-EFD8-4EAF-85E4-ACC80CA4D76C}" xmlns:ds="http://schemas.openxmlformats.org/officeDocument/2006/customXml"><ds:schemaRefs><ds:schemaRef ds:uri="http://schemas.openxmlformats.org/officeDocument/2006/bibliography"/></ds:schemaRefs></ds:datastoreItem> Microsoft Word 97-2003 Document MSWordDoc Word.Document.8

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