

HONG KONG / JUDGMENT

HKSAR v. CHAN KAM BUN

COURT

Court of First Instance

DECIDED

23 January 2007

CASE / FILE NUMBER

HCMA783/2006

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bjbj Appellant

Before: Deputy High Court Judge Line in Court Date of Hearing: 23 January 2007 Date of Judgment: 23 January 2007

J U D G M E N T

The Appellant, who was the 2nd Defendant at the nine handed trial, was convicted of acting as a member of a triad society, contrary to section 20(2) of the Societies Ordinance. He was sentenced to 6 months imprisonment and he appeals both his conviction and sentence. A number of points are taken on appeal, the most powerful of which was in relation to the sufficiency of evidence going to support the charge. The evidence in relation to the charge was summarised by the magistrate and appears at the appeal bundle between pages 40 and 42: In December 2005, PW1 was not working. In most of the evenings he went out with friends to have drinks and fun in disco for the whole night. He would only consume one to two mouthfuls of beer on each occasion. On 11 December, 2005, he went out with Dai Kau and others whole night to have fun and alcohol. At small hours on 12 December 2005, PW1 s godfather Dai Kau whom he came to know under operation asked PW1 whether he got anybody next day i.e. 12th December, because his Big Brother on Hong Kong Region had to show his manpower. At that time Dai Kau did not know the location but he asked PW1 just to look for people first. PW1 knew Dai Kau s Big Brother was called Hung Fan but he had not seen nor talked to Hung Fan before. At about 4 pm on 12 December, 2005, Dai Kau called PW1 again and asked PW1 how many people he could get hold of. PW1 replied that he could not find any. Dai Kau told PW1 to go to Jordan as soon as possible. At Jordan, PW1 saw Dai Kau, Sze Ngan Tung and others. There were about 11 to 12 people. Dai Kau introduced some males to PW1. Dai Kau then instructed PW1 to stop taxi. PW1, Dai Kau and 3 other people got on a taxi. Other people got on different taxis. They took a total of 3 taxis to go to the East Harbour Restaurant in Yue Wan Estate, Chai Wan. At about 5.30 pm PW1 arrived at the

restaurant. PW1, Dai Kau and 3 other people went to the 2nd floor of the restaurant. In the restaurant Dai Kau went up to Hung Fan (D2) and said aloud, Big Brother Hung, he s my youngster (pointing at PW1), some more were coming up . It was the first time PW1 saw Hung Fan (D2). Dai Kau then sat at Hung Fan (D2) s table. PW1 sat down at the table next to Hung Fan (D2) s table. The other people PW1 met in Jordan also came to the restaurant and seated. PW1 paid attention to the conversation between Dai Kau, Hung Fan (D2) and other people, but since he was about 15 feet away from them he could not hear each and every word. Then a man wearing a cap sat next to Hung Fan (D2) and talked to him. They talked for an hour. The man who was wearing a cap then stood up and left. Over 10 people from the tables at the two corners followed the man who was wearing a cap and left. After these people left, Hung Fan (D2) said to the man on his left, Even if they are very aggressive they can only do it in the village. Hung Fan (D2) then instructed the waiter to serve food and said loudly to people (including PW1) at the next table, Thank you. You can order whatever drink you like . Before that, no food was served. After meal, PW1 left with Hung Fan (D2) and others. When they were leaving the restaurant, Dai Kau told PW1 that he was going to introduce his Big Brother to PW1. He said to Hung Fan (D2) that PW1 was his godson and told PW1 to call Hung Fan (D2) Hung Kor. PW1 did so. Then Hung Fan (D2) said OK. Hung Fan (D2) then talked to other people while Dai Kau continued to talk to PW1. In determining whether or not there was sufficient evidence to support the conviction, the first question I find it helpful to ask myself is this: were PW1 and Dai Kau acting as members of a triad society in the restaurant themselves? Leave aside the appellant for the moment. The answer to that question, in my judgment, is yes. They were there as a result of a calling together of a group of people. They travelled from Jordan to Chai Wan to be there. Certainly what Dai Kau and PW1 understood themselves was that the reason for it was that there should be a show of manpower for a Big Brother . In saying this, I am careful not to use the information that Dai Kau communicated to PW1 in a way that breaches the hearsay rule, in other words, testimonially. I do not for these purposes. The information might have been quite wrong. But based on what PW1 said, it is clear they thought they were going to show manpower for a Big Brother . PW1 pretended to look for people for that purpose and Dai Kau successfully recruited another 11 or 12 others who joined together to go to the restaurant. I have no doubt that in that restaurant, PW1 and Dai Kau were themselves acting as members of a triad society, notwithstanding that the word triad never fell from the lips of PW1. The next question I find it helpful to ask is this: did the Appellant join in himself and himself act as a member of a triad society in the restaurant? I answer that question in the affirmative. What he did is set out in the facts that have been summarised. I point to these matters: that he was the person who talked for an hour, without eating, in the restaurant with the man with the flat hat. When that man with the flat hat left, from two separate tables in the far corners of the restaurant, a group of 10 others left at the same time and followed him out. It was then that the Appellant addressed the table at which PW1 was sitting, saying, You can order whatever drink you like and the food was then served after that. When they arrived at the restaurant, PW1 and Dai Kau and the group, it was to the Appellant that PW1 was introduced with the words Big Brother Hung, he is my youngster. Some more are coming up . And at the end, when the other group had left, PW1 was reintroduced as the godson and told to call the Appellant Hung Kor . Then there is the overheard remark, Even if they are

very aggressive, they can only do it in the village . What these events describe is a classic of a settlement talk in a restaurant where the parties have triad backup. Mr Beel, who has argued this appeal very attractively on behalf of the Appellant, says the worst that one could find is that this was some triad members, or people acting as triad members, having dinner together; and they were not acting as triads at the time, they were just socialising. I have to say that, in my view, the evidence establishes much more than that. Whilst there was no sizing-up or overt force, this was about producing manpower, showing how many men were available as back up. In the course of argument, Mr Beel has been able to say, in relation to any individual feature that I have mentioned or as appears in the facts, that it could easily have an innocent explanation by itself. He is right in that. Where we differ is what happens when you take all of those matters together. It could just be coincidence that two other tables of men get up and leave when the man with the flat cap leaves, taken by itself. But put that together with the reason that PW1 thought he was there for, it occurring at the end of the hour s talking between the Appellant and the man with the flat hat, and the remark made by the Appellant to say Drinks on me, in effect, and the eating then beginning, they all show that it was not coincidental. The individual matters are all strands that, taken together, forge a rope that will bear the weight of the conviction, and support the inference, in my judgment, that the Appellant was himself acting as a member of a triad society. I have asked myself what competing inference is available to me on the evidence. The only realistic one I can think of is maybe the Appellant was not a member of the triad society or acting as such himself, maybe he was a customer who was going to pay the triad society or could otherwise call on them to provide a show of manpower. Having posed that as a possible competing inference, in fact, I dismiss it because of the introductions at the beginning and at the end. They are much more consistent with membership, or acting as a member, by the Appellant than him being a customer. The result of which, in my judgment, is that there is only one inference to be drawn on the evidence and the potential competing inference of customer should rightly be dismissed. It is worthy of remark as well, that even if the Appellant had been there as a customer, he would still be a guilty man by reason of his aiding and abetting the others in their acting as members of a triad society. But I wish to make clear, I do not support the conviction on that basis, I merely point it out. In the course of argument, I asked Mr Beel what else would explain all these events, taken together, if it was not the scenario for which the prosecution argue, and other than the question of being a customer, nothing presented itself. If there was an innocent explanation, it would have been capable of being advanced. This is a case where the considerations set out in the case of Li De Fan are engaged, in my judgment, for it is the fact that the Appellant did not give evidence. Of course there is no burden upon him to prove anything, but if facts are capable of an innocent explanation and you have one and you choose not to tell the court about it, what can human reason do, other than let the election provide some support for the drawing of the inference? Accordingly, when it comes to sufficiency of evidence, even though it was very capably argued in favour of the Appellant, I support the conviction. In the course of argument, Mr Beel said there is no evidence that PW1, in that hour when they were all waiting there, said What s going on? or something like that, or asked Dai Kau who was on the other side, what it was all about and the like. It is a point that has two edges because it seems to me the reason that question was not asked was that it did not need to be asked: it was so obvious.

What was obvious to PW1 was that he was there to be part of a manpower display, not sword rattling itself but just a display of numbers, and that the persons engaged in that activity clearly included the Appellant and it explained why he acted the host to the group that Dai Kau got together. There was a separate point taken about whether or not an application for separate trials should have been granted. Mr Beel realistically acknowledged that, in cases like this where the central issue is the credibility of an undercover policeman, in most normal cases, there would be no severance of separate events involving the same undercover policeman. He argued that because there was absolutely no link at all between the facts that attached directly to this charge and the others, (some eight other defendants shared the dock) that his case was so unusual in that respect that the risk of some prejudice about triad involvement leaking or bleeding from the cases of the others into this case, where the word triad was not even mentioned, was so great that the application should have been granted and, because it was not granted, it makes this conviction worthy of review by me. There is no indication at all, in the workmanlike state of the findings that the magistrate produced, that she relied on anything she should not have relied on in respect of the other cases. But the point is one of subconscious reliance. However, taking the usual considerations that make such a joint trial where one undercover policeman is involved into account and balancing it against the risk of unconscious influence, the balance comes down firmly, in my view, in the favour of one joint trial. Today I have concentrated, of course, on the evidence as it concerns the Appellant - in fact, I am ignorant of the other evidence in the other cases - and I can see a case that supports his conviction here for sure. I have been scrupulous to put aside the fact that PW1 was acting or thought he was acting as an undercover policeman in respect of any other offences in relation to the 14K or any triad society and I have concentrated on the facts as are set out at the beginning of the judgment. The final point argued was in relation to the reliability of the undercover policeman, PW1. He gave evidence at first without reference, in the witness-box, to the record he made of these events, some 16 hours later. I believe that to be a matter of regret. He had an awful lot to remember, given he was giving evidence not just about this case but about others. Without having the contemporaneous document - and I regard, in these circumstances, 16 hours as being well in the frame of contemporaneity - it is just asking for trouble if you ask someone, even if they have a very good memory and they have done their best to learn their evidence, to repeat it without getting a time or a date wrong. What Mr Beel is able to point to is that he made mistakes and that he got into difficulty in the witness-box from cross-examining counsel about it. I can see that happening on the transcript. However, what strikes me about the account that PW1 gave is how it sticks to some not particularly overtly incriminating facts as it relates to the Appellant. If he was a conscious exaggerator, or even prone to any unconscious exaggeration, there was plenty of scope for it. It seems to me he stuck to the bare essential facts that he would have observed and which would have been memorable 16 hours later. I take on board the point that he had been up for a long time, he must have been tired and the like, but the matters he speaks to are mostly matters about which, in their main thrust, it would be difficult to be mistaken. Even if the detail was the subject of some error, what would happen is that several strands of the inferential rope might break, but in terms of reliability it would not come anywhere near a demonstration that sufficient strands would have been broken by mere innocent unreliability that it would have compromised the strength of the rope or its

ability to support the conviction. Accordingly, the appeal against conviction is dismissed. The sentence passed was one of 6 months imprisonment. Mr Beel concedes that the offence itself is worthy of a custodial sentence but urges me to suspend it. Whilst he cannot claim a clear record, he does make the point that it is a long time since the Appellant s last conviction, which was back in 1986. However, that was for being a member of a triad society. The Probation Report revealed that he had the status of an adviser in the society at that time. He had been bound over in 1975 for being a member of a triad society. Triad societies are a menace as those who are minded to can call on the blind loyalty of young men who will do violence at their bidding, if asked, or they will show force, if asked. There is bound to be a custodial sentence in this case and the fact is it is too serious to suspend the sentence. As to the length of sentence, 6 months I regard as being on the merciful side. I remember that it is 20 years since there has been a conviction and that the Appellant has held down a decent job and has a family, but to pass anything other than an immediate custodial sentence for involvement by a man in his middle to late years with a show of number of young men acting as triads would send quite the wrong message. Accordingly, I dismiss the appeal against sentence and confirm the sentence of 6 months that was passed. (P Line) Deputy High Court Judge Representations: Mr Joseph Wong, Senior Government Counsel of the Department of Justice, for the Respondent (HKSAR) Mr Trevor Beel, instructed by Louis K Y Pau & Co., for the Appellant PAGE - PAGE - CRT3/23.1.2007/CC HCMA783/2006/Judgment 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 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 & `#\$ bZ < =RM/L\$t\ [g\k [g\k =RM/ Normal.dot setup Microsoft Word 9.0 judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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