

HONG KONG / JUDGMENT

HKSAR v. CHAN KIN KWOK AND ANOTHER

COURT

Court of First Instance

DECIDED

30 July 2007

CASE / FILE NUMBER

HCMA235/2007

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bjbj HCMA235/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE (Appellate Jurisdiction) MAGISTRACY APPEAL NO. 235 OF 2007 (ON APPEAL FROM STCC 2236 OF 2006)

BETWEEN HKSAR Respondent and

AUTONUMOUT Both appellants were convicted after trial at Shatin Magistracy of separate offences of professing to be a member of a triad society, contrary to section 20(2) of the Societies Ordinance, Cap.

151. Each was sentenced to 12 months imprisonment. The 1st appellant appeals both his conviction and sentence. The 2nd appellant appeals his sentence only. AUTONUMOUT I will firstly deal with the appeal against conviction. The prosecution case at trial was based on the evidence of PW1, an undercover police officer, who at the time of these offences had successfully penetrated the ranks of the 14K triad society and had been accepted by them as one of their own. In the early hours of 3 May 2004, PW1 attended a gathering at a nightclub in the basement of the Regal Hotel in Tsim Sha Tsui which was attended, in part at least, by persons who were apparently triad members. PW1 had as his big brother in the 14K, a person Siu Po. Siu Po, who had invited PW1 to the gathering, introduced him there to other persons; one was called Uncle Ling . AUTONUMOUT In the nightclub the 2nd appellant joined the group and spoke to Uncle Ling about an incident in Shenzhen which involved an assault on Uncle Ling s natural younger brother at an establishment owned by the 2nd appellant. It was agreed that the 2nd appellant pay to Uncle Ling some compensation for that assault and the 2nd appellant passed some \$1,000 notes to Uncle Ling. AUTONUMOUT Other persons who were associated with the 2nd appellant then joined the group and the 2nd appellant referred to them and himself as being of 14 Hung Fat Shan . Later the 1st appellant, a serving police officer, also arrived at the nightclub and was introduced to those

in the group by the 2nd appellant. AUTONUMOUT Subsequently, PW1 was present at a conversation between Siu Po, who was himself an ex-police officer, and the 1st appellant and heard the 1st appellant inform Siu Po that he, the 1st appellant, was also a police officer and was stationed at Sham Shui Po, and later heard him say that he was a member of the 14 Hung Shan and that his big brother was a person called Ma Fung. Subsequently Siu Po asked the 1st appellant for his phone number and told him that if he needed his assistance or if people were going out for drinks he would call him. AUTONUMOUT Later PW1 together with Siu Po and Uncle Ling left the hotel and went elsewhere. AUTONUMOUT The prosecution called also PW2 who was a police officer and was qualified to give evidence as an expert concerning matters pertaining to triads in Hong Kong. He confirmed that Hung Shan was a way in which older members referred to the 14K triad. AUTONUMOUT No other witnesses were called by the prosecution. Neither appellants gave evidence but the 2nd appellant called the person Uncle Ling. Uncle Ling claimed that the incident involving an assault in Shenzhen was free of any triad overtones and that the 2nd appellant was a friend of the owner of the bar where the assault had occurred and simply paid money to him, Uncle Ling, on the night of the gathering as a matter of sympathy for Uncle Ling and his brother on behalf of the owner of the bar. AUTONUMOUT The magistrate rejected the evidence of Uncle Ling and accepted that of the two prosecution witnesses. AUTONUMOUT Selwyn Yu, for the 1st appellant, advanced two, initially rather awkwardly, phrased grounds of appeal which were refined during submissions into the following : Ground : The magistrate did not sufficiently take into account other possibilities which may have cast doubt on the 1st appellant s claiming to be a triad. Ground : That the magistrate wrongly inferred from the 1st appellant s presence at the meeting with other persons who were apparently triads that he had professed himself to be a triad. AUTONUMOUT The 1st appellant argued also a general ground of appeal that his conviction was unsafe and unsatisfactory. But it is apparent that this ground was dependant on Mr Yu establishing one at least of his first two grounds. Ground 1 AUTONUMOUT At a starting point, it should be pointed out that the magistrate accepted PW1 as a truthful witness and no complaint as to this finding is made by Mr Yu. AUTONUMOUT s complaint is effectively that there was insufficient evidence to clearly establish that the 1st appellant had in fact professed himself to be a triad, even accepting he had said the words attributed to him by PW1. He says given the fact the conversation when these words were said was between the 1st appellant and Siu Po, PW1 may have heard them out of context, so that their real meaning may not have been apparent to PW1 or therefore to the court. AUTONUMOUT There is no doubt the prosecution s evidence against the 1st appellant in this regard was contained within the relatively narrow ambit of PW1 s recollection of the conversation he heard occurring between Siu Po and the 1st appellant during the course of the evening in the nightclub. But because that ambit was narrow does not mean the evidence was inadequate or insufficient. The evidence of PW1 in this regard was as follows And then this male name Sap-Chai [the 1st appellant] sat down at our table and chatted with Siu Po and had liquor with Siu Po as well. From their conversation, I came to know about this Sap-Chai, surname Chan and he became a police officer since 81, At that time he was attached to crime of Sham Shui Po district and he was a

detective. Then later on, this Sap-Chai said to Siu Po, saying that he was of Number 14, Hung Fat Chan as well, and the big brother was Ma Gau Fung. And later on Q. Well, after the 1st defendant said these words, did Siu Po give any response? A. Siu Po asked Sap-Chai for his phone number and said if there would be any assistance required from him, or going out to have drinks, he would call him. AUTONUMOUT Contrary to Mr s submissions there is nothing to suggest that the 1st appellant s claim of membership of the 14K triad was equivocal or unclear or taken out of context. Mr Yu spent considerable time in the court below establishing the context of this conversation and in my view succeeded in doing so. Having read the transcript of PW1 s evidence it is clear that PW1 recounted this conversation in the context of the 1st appellant, after making his claim of triad membership, being then informed by Siu Po that if Siu Po needed the 1st appellant s help in anything, he would contact him and being then provided by the 1st appellant with the 1st appellant s phone number. AUTONUMOUT It is not a viable criticism to say, as Mr Yu argued, that PW1 could have been distracted by conversing with others sitting nearby him, or that there may have been dialogue prior to the 1st appellant s claim of triad membership which gave that claim a different meaning. The example suggested in this particular regard by Mr Yu in his argument was that the 1st appellant may simply have been repeating what someone else had told him. That is to say the least is far-fetched. But in any event all that is wholly speculative. AUTONUMOUT The magistrate was entitled to proceed as he did on the basis of the concrete evidence before him. That evidence was, as I say, quite clear and established in an obvious context the actus reas of the offence. It was not undermined by any evidence given by the 1st appellant. Ground AUTONUMOUT s argument under this ground was based on the proposition that the magistrate had inferred from the 1st appellant s mere presence at a meeting of the apparent triads and their associates that the 1st appellant had in fact uttered his profession of membership of the 14K triad. He relies on the contents of paragraph 60 of the Reasons for Verdict in support of that argument. That paragraph is as follows

60. I accept the evidence of PW1 that Wu So Yung (D2) brought D1 to the table and introduced him as Sap Chai saying he was a police officer. I am satisfied on all the evidence the only inference to draw was that this was a meeting of triads. Although D1 did not partake in the settlement talk he was introduced by one of the main protagonists Wu So Yung (D2). It is therefore not surprising in the context of the evening that D1 declared his allegiance AUTONUMOUT It can be seen from the plain terms of paragraph 60 that the magistrate was drawing no such inference as asserted by Mr Yu. That that is so is made even clearer from the contents of the preceding paragraph
59. Mr Yu submits that with Club Uno being open to the public D1, a serving police officer would not run the risk of professing to PW1, a stranger, that he was a member of a triad society. This submission is based on the fact PW1 never testified he was introduced to D1. Whilst PW1 was not individually introduced to D1 the submission of Mr Yu with respect takes the evidence out of context. AUTONUMOUT It is quite obvious that in paragraph 60 of his Statement of Findings that the magistrate was doing no more than rebutting the submission made on behalf of the 1st appellant at trial, and set out in paragraph 59, that it

was unlikely that a police officer would profess to be a member of a triad society in a public place and in the presence of a stranger. AUTONUMOUT In no way had the magistrate assumed or inferred from the 1st appellant's mere presence at the gathering that he had made the claim the subject of the offence. AUTONUMOUT This ground as with the 1st ground was misconceived and the 1st appellant's appeal against conviction is dismissed. Sentence AUTONUMOUT Both appellants appeal their sentence of 12 months imprisonment as being manifestly excessive. I agree. That is a sentence commensurate with the claim being made in circumstances of threat or oppression. Here the circumstances of both claims were relatively more benign. The claims were made by both the 1st and the 2nd appellants in a social setting amongst other persons who were apparently either themselves triads or associates of triads. AUTONUMOUT The claims were made not to threaten or coerce but to identify the purported status of the claimant. Both the 1st and the 2nd appellants, it is apparent, made their claims during casual and even friendly conversation with persons they no doubt regarded as associates or at least as like minded individuals. AUTONUMOUT A claim of triad membership can involve various and sometimes subtle degrees of culpability. For that reason it has long been recognised there are no tariffs involved in sentencing. Culpability can range, at one end of the scale from the foolish, for example, a plainly unthreatening claim of membership made on the spur of the moment during an argument : see HKSAR v. Khan Umer, HCMA932/2001, to the terrifying where, for example, an individual may be forced to give up his property or livelihood in response to a threat accompanying the claim to membership : see HKSAR v. Hung Shing Chung & Anor, HCMA790/2005. There are a multitude of circumstances where claims may be made falling between those extremes. AUTONUMOUT While not of the worst sort the present case was not, so far as each appellant was concerned, a merely foolish and spontaneous outburst made during an argument. Nor were the claims mere acts of bravado. Both the 1st and the 2nd appellants made their claims in a calculated and deliberate manner so as to identify themselves to other individuals at a gathering in which there were overtones of something more than a merely social setting. So far as the 1st appellant is concerned, he introduced himself as a member of the 14K triad to the person Siu Po in circumstances where that introduction could result in some future connection between him and Siu Po whereby, as Siu Po said, Siu Po would possibly call upon the 1st appellant for help if anything was needed in the future. At the time of making this profession of membership of the 14K triad, the 1st appellant was a serving police officer. That is plainly an aggravating factor of very considerable impact. Nothing could be better calculated to undermine regard for the integrity of the Hong Kong Police Force than its members professing membership of triad societies amongst a gathering of apparent triad members. AUTONUMOUT In my view an appropriate starting point of sentence for the 1st appellant would have been six months imprisonment. The aggravating factor of the 1st appellant's membership of the Hong Kong Police Force enhances the starting point of sentence to nine months imprisonment. I appreciate the 1st appellant has lost a 21-year pension as a result of this offence and that, together with his years of service in the police force as a person of apparent unblemished record, allows him a one month discount from the starting point. Accordingly the sentence

of 12 months imprisonment imposed by the magistrate is set aside and substituted with a sentence of eight months imprisonment. AUTONUMOUT The 2nd appellant was involved in some form of settlement talks with the person referred to as Uncle Ling immediately prior to and in close nexus with his claim to be a triad member. Additionally the 2nd appellant made a point of introducing at least one other person to the gathering as his follower within the 14K triad. Regardless of the overtly friendly and perhaps merely formal nature of those earlier settlement talks , from the overall context in which they occurred it seems obvious that some form of business was being conducted between persons holding themselves out as members of triad groups though with the absence of threat or coercion. I regard an appropriate starting point of sentence for the 2nd appellant to be six months imprisonment. AUTONUMOUT I take into account the 2nd appellant has recently suffered from bowel cancer and that it is at risk of recurring. But I do not regard the past illness of the appellant to be a material mitigating factor. He is currently clear of cancer. There is no other mitigation. Accordingly the magistrate s sentence of 12 months imprisonment is set aside and substituted with a sentence of six months imprisonment. AUTONUMOUT The appellants were convicted and imprisoned on 5 February 2007. The reduction in their sentences will, I understand, result in their immediate release. (M.A. McMahon) Judge of the Court of First Instance, High Court Mr John Reading, SC, DDPP and Ms Irene Fan, GC of the Department of Justice, for HKSAR Mr Selwyn Yu, instructed by Messrs Wat & Co., for the 1st Appellant (on 27 July 2007) Mr Yuen Chi Keung of Messrs Wat & Co., for the 1st Appellant (on 30 July 2007) Mr John Griffiths, SC and Mr Andrew Bullett, instructed by Messrs Tsun & Partners, for the 2nd Appellant PAGE - PAGE A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk H I J K L M N O P Q R S T U V & `#\$ & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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