

HONG KONG / JUDGMENT

HKSAR v. CHEN PING FENG

COURT

Court of Appeal

DECIDED

30 October 2012

CASE / FILE NUMBER

CACC98/2010

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Before : Hon Stock VP, Chu & Lunn JJA in Court Date of Hearing : 21 December 2011 & 28 September 2012 Date of Judgment : 28 September 2012 Date of Reasons for Judgment : 30 October 2012

REASONS FOR JUDGMENT

Hon Chu JA (giving the judgment of the Court): The applicant was charged with one count of trafficking in a dangerous drug, namely, 269.05 grammes of a mixture containing 265.40 grammes of methamphetamine hydrochloride, contrary to section 4(1)(a) and (3) of the Dangerous Drugs Ordinance, Cap.134. The applicant was tried before Line J and a jury. On 8 March 2010, the jury unanimously found him guilty. He was sentenced to 14 years imprisonment. The applicant sought leave to appeal both the conviction and the sentence. After hearing submissions, we dismissed both applications. We said we would give our reasons later, this we now do. The admitted facts The facts admitted by the applicant show that on 19 January 2009, the applicant and three men boarded a ferry in Zhuhai, departing for the SkyPier Terminal of the Hong Kong International Airport. The ferry tickets on which the four of them travelled were issued by the same ticket office and at the same time. The seats assigned were next to each other. After arriving in Hong Kong International Airport, the applicant and the three men checked in for a flight departing for Japan in the same afternoon. They checked in one after another and were assigned seats on the same row. The air tickets on which they travelled were all purchased on 18 January 2009 through the same agent in Guangzhou and under two separate bookings. Each of them also had valid return tickets for the same flight departing Japan for Hong Kong on 22 January 2009. The three men mentioned above are Chen Yao-ming (Chen), Tsai Wen-yu (Tsai) and Hsu Tien-ruei (). Chen, Tsai and Hsu were later intercepted and arrested at the Hong Kong International Airport by customs officers. They were found to have carried the dangerous drug in pellets which

each of them had inserted into their rectums. Four pellets containing 193.56 grammes of ice were recovered from Chen, who also had one packet containing 23.59 grammes of ice hidden underneath his underpants. Three pellets were also recovered from Tsai, but they were damaged while being discharged from his body and only 0.37 gram of ice was retrieved. In the case of Hsu, he carried one pellet containing 47.88 grammes of ice. The applicant was also intercepted and arrested by a customs officer. No dangerous drugs were found on him. On the following morning, a written record of interview was taken from him. The voluntariness and admissibility of the record was not disputed at the trial. The applicant stated in the record of interview that he came from Zhuhai to Hong Kong for the purpose of travelling to Japan to sell tea leaves. When in Japan, he was to meet a lady who would be his interpreter. He did not have her telephone number, but they had arranged to meet in a hotel. The applicant said he travelled alone, but when he was on the ferry, he saw a man who owned a coffee shop in Zhuhai. He had known this man for half a year or so, but he did not know his name. As it happened that this man was also going to Japan, the applicant gave him his passport and asked him to complete the formalities and to obtain the boarding pass for him. In his oral evidence, the applicant identified this man to be Hsu. The total retail price of the dangerous drugs involved is HK\$152,013.25. The prosecution case The prosecution case against the applicant was that he was the person who organized the drug trafficking and supplied the dangerous drugs in question to Chen, Tsai and Hsu. Chen, who had pleaded guilty in separate proceedings, gave evidence for the prosecution. He testified that two days before their arrival in Hong Kong, the applicant arranged for the three of them to check into a hotel in Zhuhai. On the following day, the applicant brought eight pellets of dangerous drugs and told them they were to be inserted into their rectums to be brought to Japan. On the morning of 19 January 2009, he inserted four of the pellets into his rectum, but Tsai could only insert three pellets. The last pellet was therefore split into two, with one packet being carried by Chen, hidden underneath his underpants, and the other one being inserted into Hsu's rectum. The applicant purchased the ferry tickets for them and they took the ferry to the Hong Kong International Airport together. The applicant also supplied them with the air tickets to Japan. It was also Chen's evidence that the applicant had promised to pay him 20,000 Renminbi as reward. The defence case The applicant elected to give evidence, but called no witness. In a nutshell, he denied knowledge of the dangerous drugs and involvement in the plan to carry the dangerous drugs from Zhuhai to Hong Kong and then to Japan. He claimed that Chen framed him up and used him as a scapegoat so that he would receive a lighter sentence. The applicant testified that he was a tea leaf trader. Two days before he was in Hong Kong, he met Tsai in a caf in Zhuhai. In the course of their conversation, it was revealed that Tsai was going to Japan for business and the applicant had previously been to Japan. Later, they were joined by Chen, who was Tsai's friend and was travelling to Japan with him. Upon their suggestion and persuasion, the applicant agreed to go with them to Japan. He went with them to a hotel in Zhuhai. The applicant denied making arrangement or payment for Tsai and Chen to stay in the hotel. He said the hotel was suggested by Tsai. The following day, he went to the hotel to see them with a view to making arrangement for the trip to Japan. Then on 19 January 2009, together with Hsu, the four of them went to the ferry pier. On the suggestion of one of them, he bought the ferry tickets for all of them and they reimbursed him for the fare. The applicant said he purchased his own air ticket on 18 January

2009 by calling a travel agent in Zhuhai. He did not know how the other three got their air tickets. He also did not know how it came about that their air tickets were purchased from the same travel agent on the same day and that their return flight from Japan to Hong Kong was the same as his.

Appeal against conviction The applicant, who acted in person, put forward four main grounds of appeal in his written submissions. First, he complained that one of the jurors was drawing pictures and dozing off during the trial while another juror (the foreman) was late on the last day of the trial when it was towards the end of the Judge's summing up. Secondly, the applicant complained that the trial Judge did not properly direct the jury on how to handle the discrepancies between his answers in the record of interview and his testimony in court. Thirdly, the applicant said that the counsel and solicitor who represented him at the trial failed in their duties to properly advise him on a number of things and he did not have a fair trial. Fourthly, the applicant said there were doubts in the case and the evidence of Chen.

In respect of the first ground, the Judge had in the afternoon of the first day of the trial raised with counsel that a juror might have been fiddling with his phone and asked counsel to keep an eye on him. He later told the jury not to be distracted by their phones or electronic devices. On the second day of the trial, defence counsel informed the Judge that the same juror was seen to be drawing pictures and had on occasions closed his eyes. The Judge indicated he had been observing the juror and was aware he had been doodling and leaning back, but he did not notice any significant sleeping. The Judge also said he would keep an eye on the somnolence factor. After taking instructions from the applicant, counsel confirmed she would not ask for a discharge of the jury. On the next day, however, defence counsel informed the Judge that the applicant instructed her to apply for a discharge of the whole jury because of the lack of concentration of the juror. She explained she did not seek a discharge of only the juror in question because the applicant wanted a full jury. The Judge considered there was no basis to discharge the whole jury. He also refused to discharge the juror in question as there was nothing that made him judge that the juror had not been concentrating and was not able to do his job, pointing out that on the day before when he asked him not to close his eyes, the juror immediately responded and said he had been listening and his response demonstrated he had not been asleep.

In *R v. Tam Chung-shing and Others* [1990] 1 HKLR 718 at 722F-G, Kempster JA said that for an appeal to be allowed on the present ground, it must be shown that by reason of somnolence [the juror] may well have incapacitated himself from hearing significant evidence or from assessing the demeanour of witnesses for periods so appreciable as to render him incompetent to give a true verdict according to the evidence and to his oath. In *R v. Wong Wai Bor* (unreported) CACC 465 of 1986, 19 March 1987, Hunter J (as he then was) said that this is very much a matter of fact and degree, upon which the judge in the court below has to rule in the light of what he sees and hears in the course of that hearing. We had looked at the transcript relevant to this issue. In our view, the Judge was fully alert to the matter and had kept the juror in question under close observation. He did not consider the juror to have been inattentive, nor was he unable to discharge his duties. His view was based on what he had seen and heard from the juror. We see no basis to differ from the decision of the Judge, who was clearly in the best position to decide on the matter. There was in any event no justification for a discharge of the whole jury. About the late arrival of the foreman, this happened on the last day of the trial when the Judge was about to come to the final part of his

summing up. The foreman telephoned to say he was in Macau and was trying to get on a ferry to return to Hong Kong. The trial had to be stood down. When the trial resumed at 12:35 pm, the trial Judge told the foreman to calm down and not to be worried. He also enquired of the foreman whether he was alright and whether there was anything on his mind or difficulties that made it difficult for him to discharge his duties, to which the foreman twice replied he was alright. The Judge then proceeded with the last part of his summing up, which did not last long, and the jury was sent out for deliberation. Later in the afternoon, the jury returned a unanimous guilty verdict. In our view, the Judge had dealt with the matter properly. There was no basis to believe that the foreman of the jury was unable to continue with his jury duty fully and properly. The defence had neither applied for a discharge of the jury nor complained of any possible prejudice. On the contrary, defence counsel specifically confirmed that the defence preferred a full jury. We saw no substance in the applicant's present complaint. The applicant's second ground was that the trial Judge failed to properly direct the jury on how to handle the discrepancies between his answers in the record of interview and the oral testimony. In his closing speech, prosecuting counsel asked the jury to consider the record of interview when assessing the applicant's evidence and credibility. He referred to some discrepancies between what was said in the record of interview and the applicant's oral evidence. Firstly, while the applicant testified that he was persuaded by Tsai and Chen to travel to Japan, his account in the record of interview was that as early as 12 or 13 January, he had already made an appointment to meet the lady interpreter in Japan. Secondly, although he said in court that the lady had interpreted for him on two previous occasions, he stated in the interview that he did not know her name or telephone number. Thirdly, there was no mention in the record of interview of the meeting in the coffee shop or the fact that the four of them were travelling together. Instead in reply to the question whether anyone he knew was travelling with him from Zhuhai to Japan, the applicant answered no one travelled with him. Fourthly, while he said in the record of interview that he gave his passport to Hsu to complete the formalities, his evidence was that the airline staff took his passport. In his summing up, the Judge gave a summary of the answers in the record of interview and also the applicant's oral evidence. He told the jury the applicant was not obliged to give evidence and the jury must take the applicant's evidence into account when considering the issues in the case, and that it was for them to decide what weight, if any, to give to it. He also reminded the jury to consider the applicant's evidence when considering whether the other evidence tended to support the evidence of Chen, the accomplice. The Judge directed the jury that even if they did not believe the applicant's evidence, that would not relieve the prosecution from its burden of proof; and if they thought the applicant might be telling the truth, that would mean they had a doubt about the prosecution's evidence, in which case they should find the applicant not guilty. In respect of the record of interview, the Judge directed the jury to look at it as a whole and to view it against the applicant's oral evidence. When referring to the prosecuting counsel's submissions on the discrepancies between the record of interview and the applicant's oral evidence, the Judge also reminded the jury of the explanations and responses given by the applicant when he was cross-examined on the discrepancies. In our view, notwithstanding the discrepancies identified by prosecuting counsel, the case presented by the applicant in his oral evidence was broadly the same as that in his record of interview. His case was that he was

travelling to Japan for his own business; it was a coincidence that he agreed to travel with Chen, Tsai and Hsu and that he neither knew nor took part in their drug trafficking activities. The directions given by the trial Judge on how to approach the applicant's evidence and the discrepancies between the oral evidence and the answers in the record of interview were sufficient and proper. There was no merit in this ground. The applicant's third ground of appeal was that there was serious neglect of duties on the part of his former legal representatives. He complained that they did not explain to him the prosecution's evidence, his right of silence and the possible consequences of his election, that they did not understand his defence and had not ascertained what his evidence would be, that they did not find out from him whether the record of interview was given voluntarily, and that they failed to guide him to deal with the discrepancies between his testimony and the record of interview. On the Court's direction, the solicitor and counsel who represented the applicant at the trial filed affirmations in which they denied the applicant's allegations against them. They exhibited to their affirmations several written Chinese confirmations and declarations given and signed by the applicant on the conduct of the case. Among them was the applicant's confirmation of the accuracy and voluntariness of the record of interview and that he had no objection to its admissibility. He also confirmed he had been explained his rights and the legal position, and that he decided to plead not guilty, to give oral evidence and not to call defence witness. The solicitor also exhibited a Chinese instruction letter in which the applicant, with the assistance of a Minnan dialect interpreter, acknowledged that counsel had analyzed the case and rendered advice on it. At the hearing of the appeal, when being asked about these documents that he had signed, the applicant claimed that a law clerk had told him to sign on a number of documents, the content of which was not explained to him. We noted that the documents exhibited by his counsel and solicitor were in Chinese and the applicant signed in Chinese to acknowledge understanding and agreement of their contents. We consider the applicant should have no difficulty seeing and reading the content of these documents either before or at the time he signed them. It was not the applicant's claim that he was not allowed to read the documents or that he was not conversant with the Chinese language. The applicant had not offered any credible explanation as to why he nevertheless signed these documents if their contents were incorrect. We did not accept the allegations of neglect of duties that he made against his former legal representatives. Neither did we agree that he did not have a fair trial. As to the fourth ground of appeal, the applicant contended there are doubts in the prosecution case. He queried why it was necessary to involve four people and incur so much expense when the dangerous drugs in question only worth \$150,000 to \$200,000. He also called into doubt the evidence of Chen that because Tsai could only insert three pellets of the dangerous drug, the last pellet had to be split into two packets to be carried by Chen and Hsu respectively, arguing that there was a difference between the weight of the packet carried by Chen and that carried by Hsu. The applicant further asserted that Chen had passed a message to him, saying that he would retract his lies in return for a payment to his wife. The applicant said that the note he gave to his counsel at the trial was indeed written by Chen, yet the trial Judge in his summing up told the jury that Chen had denied it. The applicant complained, too, that the trial Judge had misdirected the jury as the record of interview did not say that the airline staff took away his passport. We did not see how these points would raise doubts in the prosecution case or render

the conviction unsafe. The applicant in his written and oral submissions also made criticisms of the evidence and credibility of Chen. It is repeatedly said that Chen had a motive to lie and that he had fabricated a case against the applicant in order that he would receive a shorter sentence. We noted from the transcript that similar allegations had been put to Chen in cross-examination and they were denied by Chen. The trial Judge had in the summing up also reminded the jury of the challenges made by defence counsel to the evidence and credibility of Chen. It was a matter for the jury whether to accept the evidence of Chen. There was no basis for this court to interfere with their decision. We were not satisfied that there was any ground for disturbing the guilty verdict. We therefore dismissed the application for leave to appeal against conviction.

Appeal against sentence

The applicant also sought leave to appeal against the sentence of 14 years imprisonment, which he said was too heavy. According to the guidelines laid down in Attorney General v. Ching Kwok Hung [1991] 2 HKLR 125, a starting point of 10 to 14 years is called for where the quantity of ice involved is 70 to 300 grammes. The total quantity of drugs involved in this case is 265.40 grammes. The trial Judge considered that this would attract a starting point of 13 years. He however reduced it to 13 years having regard to the admissions of facts made by the applicant at the trial. The trial Judge then took into account two aggravating factors. The first was the applicant's role and involvement as the man organizing the drug trafficking, which is more serious and greater than that of a courier. The second was that it was a case of international drug trafficking in that drugs were carried from Zhuhai into Hong Kong for the purpose of being taken to Japan. He therefore increased the sentence to 14 years. In our view, the trial judge's approach and reasoning cannot be faulted. The sentence imposed is neither wrong in principle nor manifestly excessive. Therefore we also dismissed the application for leave to appeal against sentence.

(Frank Stock) Vice-President (Michael Lunn) Justice of Appeal (Carlye Chu) Justice of Appeal

The applicant, unrepresented, appeared in person. Mr Edmond Lee, SADPP, of the Department of Justice for the respondent.

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