

HONG KONG / JUDGMENT

HKSAR v. CHENG SIK KWONG

COURT

Court of Appeal

DECIDED

30 July 2007

CASE / FILE NUMBER

CACC64/2006

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bjbj CACC 64/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL CRIMINAL APPEAL NO. 64 OF 2006 (On Appeal From District Court Criminal Case No. 880 of 2005) BETWEEN HKSAR Respondent and CHENG SIK KWONG Applicant Before : Hon Tang VP, Cheung JA and Yeung JA in Court Date of Hearing : 18 July 2007 Date of Judgment : 18 July 2007 Date of Reasons for Judgment : 30 July 2007 Reasons for Judgment Hon Cheung JA (giving Reasons for Judgment of the court) : AUTONUMOUT The applicant (D3) was convicted of the offence of burglary by H H Judge Chua in the District Court. His application for leave to appeal against conviction was dismissed by this Court on 18 July 2007. These are the reasons for our judgment. The arrest AUTONUMOUT On 21 June 2005 at between 2 p.m. and 3 p.m., a flat on the 17th floor, Block 3, Richland Gardens situated at Ngau Tau Kok, Kowloon (the flat) was burgled. 72 gold ornaments, cash \$25,690 and a Hang Seng Bank Visa Card were some of the things stolen from the flat. AUTONUMOUT Shortly after 3 p.m. three persons namely, D1, D2 and D4 left Block 3 and boarded a taxi outside. The applicant was already sitting at the front passenger seat of the taxi. AUTONUMOUT Shortly thereafter the police, who was keeping surveillance nearby, stopped the taxi and arrested the applicant and the three other defendants. AUTONUMOUT The applicant together with D1, D2 and D4 and the applicant s wife (D5) were charged with the offence of burglary of the flat. AUTONUMOUT D1, D2 and D4 pleaded guilty to the offence while the applicant and D5 pleaded not guilty. The applicant was found guilty after trial while D5 was acquitted. The events leading to the arrest AUTONUMOUT The evidence against the applicant is as follows. AUTONUMOUT A group of police officers were keeping a surveillance at Block 3, Richland Gardens. At 1:35 p.m. D1, D2 and D4 and the applicant alighted from a taxi at Richland Gardens. D1 was carrying a black bag. D1 and D2 went to a restaurant in the shopping mall. The applicant and D4 entered Block 3 and stopped on the 3rd floor. D5 s mother lives on the 3rd floor. Five minutes later, the applicant left Block 3 and went to the restaurant. Three minutes later, D5 left Block 3 to join the applicant. AUTONUMOUT At 1:58 p.m. D1, D2 and D5 left the restaurant and entered Block 3. They emerged from the lift on the 3rd floor. Five minutes later D5 left Block 3 and joined the applicant in the restaurant. 19 minutes later, the applicant and D5 left the restaurant and wandered in the vicinity. AUTONUMOUT At 2:43 p.m. the applicant walked to Block 3. He talked on his mobile phone. He did not enter Block 3 but pressed the intercom at the entrance of the building. AUTONUMOUT Four minutes later,

the applicant and D5 separated. D5 walked to the bus terminal. AUTONUMOUT At 3:05 p.m. the applicant boarded a taxi outside Block

1. He was sitting in the front passenger seat. The taxi then stopped outside Block 3. D1, D2 with a black bag and D4, having entered the lift on the 3rd floor, left Block 3 together and got into the waiting taxi. AUTONUMOUT Shortly thereafter the police moved in, stopped the taxi and arrested the applicant, D1, D2 and D4. D1, D2 and D4 admitted the bag seized in the taxi contained the stolen items from the flat as well as seven labourer s gloves, two crowbars and one screwdriver. Telephone calls AUTONUMOUT Telephone call records showed that there were calls between the applicant and D1, D2 and D4 from after midnight of 20 June 2005 to about 3:13 a.m. of 21 June 2005. There were also telephone calls between the applicant and D1, D2 and D4 from 12:34 p.m. to 3:04 p.m. on 21 June 2005. There was no telephone call between the applicant and D4 in the morning of 21 June 2005. The applicant s evidence AUTONUMOUT The applicant chose to give evidence himself and also called D4 to give evidence on his behalf. The applicant s case is summarised below. AUTONUMOUT The applicant and his wife D5 had had dinner with D5 s mother who lived on the 3rd floor in Richmond Gardens on the night of 20 June. D5 stayed at her mother s place overnight. The applicant went home himself and promised to fetch D5 the following day. AUTONUMOUT The applicant said that D4 had promised to find him a job at a karaoke bar where he worked. The intended interview for the job was on 21 June but no time had been fixed for the interview. AUTONUMOUT On 21 June the applicant met D4 at a restaurant between 11 a.m. and noon for breakfast. D4 came to the restaurant together with D1 and D2. After finishing breakfast at the restaurant the applicant told D4 that he was going to Richland Gardens to fetch his wife. D1, D2 and D4 then told him that they had to go to Richland Gardens as well in order to collect a debt from a debtor who lived in Block 3. AUTONUMOUT The applicant then went to Richland Gardens together with D1, D2 and D4. AUTONUMOUT Upon arriving at Richmond Gardens the applicant went to his mother in law s flat to fetch his wife. He was joined by D4. They used the lift. D4 told him that he would be going up somewhere above the 20th floor. When they reached the 3rd floor, D4 followed him out and told him that he had come out from the lift by mistake and he would change to another lift to go up. AUTONUMOUT The applicant then went to meet his wife. As D5 was then doing household work the applicant told her that he would meet her at the restaurant downstairs. AUTONUMOUT When he went to the restaurant he saw D1 and D2 in the restaurant as well. It was not a prearranged meeting. D5 later joined the applicant in the restaurant. The applicant introduced her to D1 and D2. AUTONUMOUT D5 then said she had left a key at her mother s home so she went back to fetch the key. At that stage D1 and D2 said they would be going to Block 3 as well to help D4. AUTONUMOUT After D5 left, the applicant called her on the mobile phone and she told him that D1 and D2 had stopped on the 3rd floor. The applicant then called D1 and asked why did he and D2 followed his wife to the 3rd floor. D4 answered the phone and told him that D1 and D2 left the lift by mistake and they changed to another lift to go to the upper floor to collect the debt. AUTONUMOUT Later on D5 returned to the restaurant and the applicant and D5 left the restaurant. They went shopping and later

separated. D5 went towards a bus stop. AUTONUMOUT The applicant returned to Block 3 because D4 called him on the telephone and told him that no one answered the door on the 17th floor and he asked the applicant to press the intercom button outside Block 3 for him. The applicant did as he was told. D4 also told the applicant that he would take him to the interview soon because he would be coming down soon. AUTONUMOUT The applicant then went to meet his wife and told her to leave first because he would be attending a job interview. AUTONUMOUT D4 then called the applicant again at 3:04 p.m. and asked him to hail a taxi for him. The applicant did as he was told and later on D1, D2 and D4 entered the taxi. They were then stopped by the police. D4 s evidence AUTONUMOUT The gist of the evidence of D4 was that the applicant and D5 were not involved with the burglary at all. D4 said that on 20 June 2005 D1 had told him that he would commit burglary with him on the following day although the place of burglary was not mentioned. On 21 June 2005 when he was having breakfast at the restaurant with the applicant and D1, D2, the applicant told him he was going to Richland Gardens. D1 made an eye signal to others and said they would go together as they were collecting a debt there. D4 then understood D1 was seizing the chance to burgle a place there. AUTONUMOUT D4 said as the caretaker in Block 3 might not permit, or at the least would be suspicious of three strangers trying to enter together, he split up with D1 and D2 on arrival and he went up to Block 3 with the applicant. As he saw a CCTV in the lift, he got out on the 3rd floor with the applicant. AUTONUMOUT He also said that D1 and D2 also took advantage of D5 without her knowing by following her into Block 3 and left the lift with her on the 3rd floor. AUTONUMOUT When D1 and D2 joined D4 they went up to the 31st floor and walked down to see which flat could be burgled. If D1 heard any noise from any of the eight flats on each floor they would leave and go down to the next floor. There was no indication anyone was at home on the 17th floor flat. He called the applicant to press the intercom to that flat to double check if anyone was at home. He told the applicant that was where the debtor lived. AUTONUMOUT After the burglary he told the applicant to get a taxi and he would take him to the interview. In order to avoid suspicion and detection, D1, D2 and D4 went by stairs to the 3rd floor after the burglary and got into the lift together before they left Block 3. The judge s finding AUTONUMOUT The judge rejected the evidence of the applicant and D4. This is what the judge said

14. In all the circumstances I disbelieve D3 and D4. From all the evidence I infer it was not a coincidence that D3 had telephone conversations with D1 and D2 in the early hours of 21 June, the very persons he met up with at the breakfast meeting. It was not fortuitous for the three defendants to go along with D3 to Richland Gardens. It was not luck that the defendants burgled the one flat on the 17th floor where the absent owner had a hoard of gold ornaments and ready cash. It was not a spontaneous decision that they could take advantage of D3 and D5 to gain entry separately into the building. It was not an odd meeting of minds by the defendants separately to get out on the 3rd floor to allay suspicion.

15. I am satisfied beyond reasonable doubt the phone calls between D3 and D4 and D2 in the afternoon had nothing to do with this fictitious job interview, or to find out why D1 and D2 had got out on the 3rd floor with his wife, but to monitor the progress of the planned burglary. Grounds of appeal AUTONUMOUT The applicant raised a number of grounds of appeal. They can be summarised as follows : the judge was biased towards him; irregularities at the trial; the judge did not analyse the evidence properly; and the untrustworthy nature of the prosecution evidence. AUTONUMOUT We would deal with them in term. Bias AUTONUMOUT The applicant claimed that before the prosecution examined any of the witnesses the judge had made the comment that D5 committed the offence unwittingly and that the applicant used her to commit the offence. AUTONUMOUT Transcript of the proceedings was obtained. It did not support the applicant's allegation. AUTONUMOUT The applicant said the judge stated in the Reason for Verdict that D5 had a clear record. He submitted that the implication was that the judge considered that he had a criminal record and therefore convicted him. AUTONUMOUT There is no substance in this ground. The applicant and D5 were legally represented by the same solicitor. According to the written closing submission made on behalf of D5 dated 24 January 2006 her solicitor expressly stated that D5 has a clear criminal record while no similar reference was made in respect of the applicant in the written submission for him at the hearing. In any event the judge was a professional judge. There was no indication whatsoever that she had considered that the applicant had previous convictions and convicted him because of that. AUTONUMOUT The applicant said that he was on bail during the trial and had not breached any bail conditions. Yet the judge revoked his bail in the course of the trial at the request of the prosecution. AUTONUMOUT The applicant's bail was revoked after he had completed his evidence. We agree with Miss Sin's observation that it frequently happens in the criminal courts that the court would revoke a defendant's bail when the risk of the defendant absconding became likely after the prosecution evidence has been completed, tested and shown to be strong. This is not an indication that the judge was biased towards the applicant. Irregularities at the trial AUTONUMOUT The applicant submitted that the judge frequently interrupted his solicitor during the cross-examination of PW1 and PW2, his own examination-in-chief and D4 and the closing submission of his solicitor. AUTONUMOUT It is apparent from the transcript of the proceedings that the judge had intervened frequently both when evidence was adduced and when the applicant's solicitor made his final submission. The judge is an experienced judge and is known to take a proactive approach in the conduct of her trials. The judge intervened for the purpose of clarification and invited the parties to focus on the real issues in dispute. Whatever may be said about the intervention, we do not find that there was any actual bias on the part of the judge. AUTONUMOUT However, even if, for the purpose of argument (and we are not conclusively deciding on this), because of the frequency of the interruption there was appearance of bias and there was an irregularity in the conduct of the trial, one still has to ask whether the verdict was unsafe and unsatisfactory. We do not consider this to be the case. The evidence against the applicant was overwhelming. AUTONUMOUT This is a case where because of the conduct of the applicant who took the burglars to the scene of burglary, was present in the

vicinity during the course of burglary, carried out acts which were connected to the flat which was burgled, and left with them after the burglary had committed, that the Court could draw the inference that he was a participant in the burglary. AUTONUMOUT The applicant's defence is one of denial of involvement with the burglary. The defence is flatly contradicted by independent evidence such as records of telephone calls. The applicant claimed that after he left D5 with his mother-in-law on 20 June he went home and went to sleep at 10 p.m. However the telephone records revealed that in the early morning of 21 June he had regular telephone conversations with D1, D2 and D4. These conversations viewed in the context of the events that took place on the following day further supported the prosecution's case that the applicant was an active participant in the crime. AUTONUMOUT The breakfast meeting between the applicant and D1, D2 and D4 could not be an innocent meeting when by D4's admission he had already agreed with D1 to commit a burglary by then. Likewise for the subsequent departure by all of them from the restaurant to Richland Gardens; he taking D4 to the 3rd floor and D5 taking D1 and D2 to the same floor; his conduct in terms of checking if anyone was present at the burgled flat and the frequent telephone contacts between the parties while the D1, D2 and D4 were inside the building were evidence that the applicant was also actively involved with the burglary which was physically committed by D1, D2 and D4. AUTONUMOUT This is not a case where the issue of credibility is to be decided solely by the demeanour of the applicant and D4 without the support of other independent evidence. This is a case which is based more on inference to be drawn from the facts. On the evidence the judge was clearly right to reject the defence of innocent presence of the applicant in the vicinity of the scene of crime. Proper evaluation of the evidence AUTONUMOUT In our view the judge had properly evaluated the evidence. The objective evidence clearly supported the prosecution's case against the applicant. Nature of the prosecution evidence AUTONUMOUT D4 claimed that he had two telephones at the time of his arrest and yet the prosecution only produced one telephone. He produced a newspaper report in which a photograph was taken of his arrest when he was shown wearing a mobile telephone on his neck. That telephone was different from the one produced by the prosecution. It was suggested that the prosecution had concealed material evidence and the evidence adduced by the prosecution was not truthful. AUTONUMOUT Again there were no merits on this argument. The discrepancy concerning the telephones is not relevant in this case. D5's lawyer accepted this. D4 pleaded guilty to the charge of burglary. He admitted that he had committed the burglary. The evidence of the prosecution detailed what the police officers observed at the scene. There is no substantial dispute that the events took place as disclosed by what the police officers observed, what the CCTV had recorded and what the telephone records had shown.

Conclusion

AUTONUMOUT As we do not detect any error in the conviction we accordingly dismissed the application. (Robert Tang) Vice-President (Peter Cheung) Justice of Appeal (Wally Yeung) Justice of Appeal Miss Mary Sin, SADPP of Department of Justice, for the Respondent Applicant, 1udk 1udk G H I J K L M N O P Q R S T U V r p# r p# "@AB9D bIT, / Jz @m2z]C]6 uxB26I]C]6 bIT, & 6" abc-Cheung-CACC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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