

HONG KONG / JUDGMENT

HKSAR v. CHEUNG HON MING

COURT

Court of Appeal

DECIDED

10 August 2007

CASE / FILE NUMBER

CACC490/2006

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bjbj CACC 490/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL CRIMINAL APPEAL NO. 490 OF 2006 (ON APPEAL FROM HCCC NO. 186 OF 2006)

BETWEEN HKSAR Respondent and Applicant CHEUNG HON MING 5_"o he Court):

AUTONUMOUT This is an application for leave to appeal against the sentence totalling 11 years imprisonment imposed by Deputy Judge Poon in the Court of First Instance on 22 November 2006. AUTONUMOUT There were three charges in respect of which the applicant was committed to the Court of First Instance for sentence, and to which he pleaded guilty: an attempted robbery in Sheung Wan on 6 June 2006; possession of arms and ammunition, namely, one revolver and six rounds of live ammunition, at the time of that attempted robbery; and possession of arms, namely, one stun gun, without a licence, at his flat in Tuen Mun. AUTONUMOUT At the time of these offences the applicant was aged 59 years and is a man with a string of previous convictions going back to 1968, though none for actual violence. The victim of the attempted robbery was a 25-year old Korean lady who had just exchanged money at an exchange company in Central. After that transaction, she had HK\$12,000 in her possession. She was on her way back to her office in Sheung Wan when, outside a fruit stall in Morrison Street, she was struck twice on the left side of her neck by the applicant with an axe, though, not with the blade of that axe. He then struck her on her legs and attempted to snatch her handbag. She fell to the ground. AUTONUMOUT What then followed was a course of extraordinary bravery by a number of members of the public. A fruit stall proprietor separated the applicant from his victim and pulled him away and then helped the lady to stand. The applicant, however, was persistent and rushed forward towards the two of them. Three passers-by then went forward to assist the victim and a struggle ensued during which the applicant produced a revolver which he pointed at them. One of the citizens placed his finger through the trigger guard to prevent the applicant from firing the revolver whilst another held the barrel of the revolver upwards. They pushed the applicant to the ground and the revolver was dropped. In the course of the struggle, the applicant bit two of the rescuers on the hand, but he was subdued until the police arrived. Upon his arrest he said that he had armed himself with an axe and revolver intending to commit a robbery because he had no money.

AUTONUMOUT When the police searched the applicant's residence they found a stun gun. It was capable of generating an electric arc from electrodes at its head and of generating 22.399 kilovolts. The applicant said that he had acquired it as a collector's item and had not used it.

AUTONUMOUT The revolver had no safety features and was test-fired and found to be in working order. It was a .38 special US Colt revolver. It contained six rounds of ammunition, live, of US origin. AUTONUMOUT The applicant said that he had test-fired the revolver but that when he did so, it did not work. Forensic examination suggested that there had been such a test-firing which may at the time have suggested that the firearm was not then working. Upon interview, the applicant repeated the contention that he had needed money, for he had been unemployed, he said, for several months. He knew that the revolver was a genuine one and had purchased it he said for \$3,000. He had carried an axe and a revolver, intending to find a target to rob. His plan had been to use the revolver to bolster himself in the robbery. AUTONUMOUT In relation to the first charge, the judge took a starting point of 15 years imprisonment and after according a one-third discount for the plea of guilty, imposed a sentence of 10 years imprisonment. In relation to the second charge, she adopted a starting point of 12 years imprisonment and sentenced the applicant to eight years imprisonment after recognising his plea of guilty and she ordered those two sentences to run concurrently. For the third charge, she adopted a starting point of two years imprisonment, sentenced him to 16 months imprisonment for that offence and ordered 12 months to run consecutively to the sentence imposed in respect of the first two charges, the remainder concurrently; thereby making a total of 11 years imprisonment. AUTONUMOUT Whitehouse, for the applicant, argues that the sentence for the first charge was manifestly excessive. He says that this was an opportunistic robbery drawing on a phrase used in *R v Yu Tai-wing* [1995] 2 HKCLR

119. The applicant was opportunistic in the sense that he was looking for an opportunity to rob, but the fact of the matter is that this robbery was planned by him even if this victim was not a person targeted by the applicant ahead of the event. There is also a suggestion in his written argument that in *Yu Tai-wing* the court said that in cases of bank robberies and the like no distinction should be made between cases where genuine firearms were used but not discharged and those in which imitation firearms were used, and it may be that there is implied a suggestion that a genuine firearm should not be treated in the circumstances more seriously than had there been an imitation firearm. If that is the suggestion, although it was not argument pursued orally before us today, we should make it clear that the court there was simply saying that the use of an imitation firearm could give rise to precisely the same dangers, namely, shooting by law enforcement authorities thinking the gun to be genuine. In this regard it is important to note lest it be misunderstood, that the court was not saying that the genuine firearm should be treated as if it were an imitation one. We cannot in this case ignore the fact that this was a genuine firearm loaded with live ammunition which could have been discharged if only accidentally. AUTONUMOUT Whitehouse then asserts that the sentence for the first offence is entirely out of line with the guidelines in *Mo Kwong Sang v The Queen* [1981] HKLR

610. In this contention, he has a point. It is to be remembered that the firearm was not in fact used for the purpose of the robbery. Its use in this case falls, strictly speaking, to be reviewed under the umbrella of the second offence even though, and looked at in the round, this approach might be said to be importing a degree of artificiality. We think that an appropriate starting point for the first offence was one of seven years imprisonment with a resulting sentence, given the plea of guilty, of four years and eight months imprisonment. AUTONUMOUT However, there is a consequence to this strictly compartmentalised approach which is that the sentences in relation to the first and second offences ought not to run concurrently. The sentence imposed for the second offence, namely, the possession of the firearm and ammunition at the time of the robbery must give due weight to the fact that the possession of the firearm at that time is a factor that has not, under the approach we have adopted, been taken into account in relation to the first offence. It is a very serious additional matter. In addressing the appropriate sentence we are entitled indeed, we are duty-bound to take into account the nature of the possession, namely that the applicant flourished it and thereby caused grave danger. We think that the result of which the judge arrived for the first two offences, namely 10 years imprisonment cannot be criticised, and accordingly we will order that five years and four months of the sentence imposed in relation to the second offence should run consecutively to, the rest concurrently with, that imposed for the first offence. AUTONUMOUT Whitehouse then argued that the sentence imposed in relation to the third offence was manifestly excessive being out of line, he said, with the sentences imposed for similar offences in the past. There is no tariff for this offence and we do not agree that the sentence was manifestly excessive, nor shall we disturb the consecutive period in relation to it that the judge imposed. AUTONUMOUT Accordingly, we shall grant the applicant leave to appeal against sentence and we treat the hearing of the application as the appeal. In relation to the first charge we allow the appeal, set aside the sentence of 10 years imprisonment and substitute a sentence of four years and eight months imprisonment. The sentences of eight years, and of 16 months imprisonment in relation to the second and third charges respectively shall stand but we order that five years and four months of the sentence imposed for the second offence shall run consecutively to, the remainder to run concurrently with, the sentence imposed in relation to the first offence, making a total for those two offences of 10 years imprisonment. One year of the sentence imposed for the third offence shall run consecutively to that term, the remainder concurrently. The result is a sentence of 11 years imprisonment, which is the total sentence imposed by the trial judge. (Frank Stock) Justice of Appeal (A.R. Suffiad) Judge of the Court of First Instance Mr Frederic Whitehouse, instructed by DLA for the Applicant Mr David Leung, SADPP(Ag) of the Department of Justice for the Respondent PAGE 1udk 1udk &`#\$ v? _.. J[6 CfT(.l^L k1B[p J[6 .l^L k1B[v?_.. & 6" CACV Jeannie MY MokSo ABC.dot setup Microsoft Word 9.0 Judiciary CACV Title Microsoft Word Document MSWordDoc Word.Document.8

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