

HONG KONG / JUDGMENT

HKSAR v. CHEUNG KA HO

COURT

Court of First Instance

DECIDED

22 March 2007

CASE / FILE NUMBER

HCMA24/2007

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bjbj HCMA24/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE (Appellate Jurisdiction) MAGISTRACY APPEAL NO. 24 OF 2007 (ON APPEAL FROM TWCC 2249 OF 2006)

BETWEEN HKSAR Respondent and CHEUNG KA HO(fendant at his trial, appeals against both conviction and sentence. On 22 November 2006 the appellant was convicted after trial by Mr J.T. Glass of the single amended charge of possession of an offensive weapon, namely a hammer, being an instrument fit for unlawful purposes with the intent to use the same for an unlawful purpose, contrary to section 17 of the Summary Offences Ordinance, Cap.

228. The appellant, together with three co-defendants had stood trial on a single joint charge of possession of an offensive weapon, contrary to section 33(1) of the Public Order Ordinance, Cap.

245. On 6 December 2006, the court having called for and received various reports on the appellant, the appellant was sentenced to be detained in custody in a Rehabilitation Centre. THE PROSECUTION CASE AUTONUMOUT The prosecution case was that the appellant, together with his three co-defendants, had been detained by detectives at about 5 p.m. on the afternoon of 14 November 2005 as they sat on a bench by a park opposite the Methodist Lee Wai Lee College in Kwai Yip Street, Tuen Mun. The 1st defendant at trial, Leung Chuen, was found to be holding a bag in which there was a hammer, the handle of which had been sawn off in order to shorten it. Inside the bag, was a receipt dated the same day, which Mr Ming Kwai, the proprietor of a hardware shop situated in Kwai Shing Estate market, identified as one that he had made having sold a 10 pound hammer to a young man at about 4:40 p.m. on the afternoon of 14 November 2005. He had reduced the size of the handle to 16 inches at the request of the purchaser. AUTONUMOUT Police Constable 53318 testified that he had been a member of a five-man plain clothed police patrol in the area in which subsequently the appellant and his three co-defendants were arrested. At about 4:30 p.m. he had observed the appellant, together with his three co-defendants, at a bus stop opposite the Methodist Lee Wai Lee College at Kwai Shing circuit near the market. Two other members of

his party, WPC 56910 and PC 58618, also testified of the observation of the four men. PC 53318 testified that the four men were looking around, as if to find something. After he had observed them for about five minutes they walked towards the market entrance. About five minutes later, they emerged from the market and walked to a bench on the road opposite the college. The 1st defendant was carrying a red plastic bag, from which protruded a brown handle. Earlier, he had carried nothing in his hands. He said that the four men were concentrating their intention on the exit to the college observing students walking past. After the arrival of other police officers at 4:55 p.m. the police party intercepted the four men at about 5 p.m. AUTONUMOUT Following a voire dire, the judge having determined that the answers given to questions asked by a police officer were voluntarily made by the appellant, the judge exercised his discretion to exclude from evidence most of the dialogue between the two of them, except for the reply to a single question asked of the appellant by a police officer, which was admitted into evidence Q. Why have you and your friends come here? A. I came here to look for somebody. DEFENCE CASE AUTONUMOUT The 1st and 3rd defendants at trial, Leung Chuen, Alex and Hui Kuen, Henderson gave evidence on the general issue. The 2nd defendant and the appellant did not exercise their right to give or call evidence on the general issue. The appellant's case, as put in cross-examination of the 1st and 3rd defendants was that none of the co-defendants had discussed in front of the appellant the purpose of their going to the area where they were arrested and, in particular, that the 2nd defendant's cousin had been beaten up earlier. The 1st defendant confirmed that was the case, whereas the 3rd defendant said that although the defendant had been present and in their view when the latter matter had been discussed he did not know if he had heard what had been said between the other defendants. THE COURSE OF THE TRIAL AUTONUMOUT On 22 November 2006, following the closure of the defence case and after speeches by counsel on behalf of the defendants had concluded on 14 November 2006, the magistrate exercised his power to amend the charge to a charge of possession of an offensive weapon, contrary to section 17 of the Summary Offences Ordinance, Cap.

228. Thereafter, the 1st, 2nd and 3rd defendants pleaded guilty to the offence as amended. Then, the magistrate proceeded to give his oral Reasons for Verdict in respect of the appellant. STATEMENT OF FINDINGS AUTONUMOUT In his Statement of Findings the magistrate said (appeal bundle page 24, paragraph I found the following facts in the main issue from the prosecution evidence (A) At about 4.40 pm on 14th November 2005, at Kwai Shing East Estate market, PW1 had sold a young male, aged about 16-17 years of age, a 5 kg hammer and he had on the male's request cut the handle shorter to a length of 15/16 inches. He had also issued a receipt to the male for his payment of \$95 for the hammer. I found this hammer and the receipt were both later found in the red bags held by D1 at the bench when the police intercepted the defendants. (B) At about 4.30 pm on 14th November 2005, the 4 defendants had been observed by the police witnesses hanging around the bus stop area on Kwai Shing Circuit for about 5 minutes showing interest in the students from the nearby college. They then disappeared into the estate market, but were not followed by the police. About 5 minutes later they returned and it was noticed that one of them carried a red plastic

bag in his right hand, which had a wooden handle protruding out of it. This I found was D1. I found that neither D1, nor any of the other defendants had had a similar bag in his possession when they had entered the estate market earlier. All defendants then proceeded to walk to Kwai Yip Street where they eventually went to a park and sat down on a single bench on the opposite side of the road to the College. D1 put the hammer head down on the ground but he was still holding the red bag in his right hand with the hammer in it whilst sitting. I found that they were then seen talking with each other and looking towards the college entrance direction observing the students walking past. Then at 5pm the police (both Team A and Team B in a group of about 10 persons) intercepted the defendants, and after they revealed their identities and showed their warrant cards they questioned each defendant individually. (C) I found by irresistible inference that before the four defendants had gone into the market and the hammer had been purchased there had been a common intent decided upon by all the defendants (including D4) to buy the hammer and to use it to threaten the victim during the confrontation they knew would take place when they found him coming out of the college later that day. I found the following proven facts assisted me in drawing this irresistible inference.

- (a) The defendants had all been seen hanging around the bus stop prior to going into the estate market and they were seen taking notice of the students from the college.
 - (b) The defendants had all then gone into the estate market together, and the hammer had been bought by one of them.
 - (c) The hammer had been carried to the bench, where the police arrested the defendants, by D1, which was I found near to the college entrance (I found D1 was carrying it for them all.).
 - (d) I found all defendants were intending to confront the victim with the hammer. I also found it was the common design agreed upon by all defendants for the hammer to be initially used to frighten and scare the victim in the confrontation. AUTONUMOUT Of the appellant's three co-defendants the magistrate found it proved as a fact that (appeal bundle page 26, paragraph each of those 3 defendants (D1, D2 and D3) had had the future intention when buying the hammer and whilst sitting on the bench to scare the victim, when they found him, by using the hammer carried by D1. I found that negotiations were to take place, and only if they broke down and the defendants did not get what they wanted out of the negotiations, would the defendants resought (sic) to physical violence using the hammer. I found it was only in those circumstances that the hammer would be used to cause injury and thus I found there was a conditional intention upon its use. AUTONUMOUT Next, the magistrate went on to make findings of fact in respect of the appellant and to indicate on what basis he had reached the determinations
13. With regard to D4, whilst he did not make any admission upon (sic) what he was doing at the time of his apprehension apart from saying that I came here to look for somebody. , and whilst the admissions by the other defendants were not evidence against him at all, I found by irresistible inference that he was a voluntary party to the joint enterprise, and that with

full knowledge of that common design he had gone into the estate market with the other defendants and one of them had purchased the hammer, and then he had gone to the bench with the other defendants in pursuance of that common design to wait for the victim. The following proven facts assisted me in drawing that irresistible inference:-

- (a) I found that D4 had been in the company of the other three defendants for a long period of time during which time I found the hammer had been purchased by one of them and the handle had been sawn shorter.
- (b) I found that D1 carried the hammer in plastic bags and had it with him when they walked from the market to the bench, and I found D1 held it at the bench. I found the handle was protruding from the bags clearly after its purchase.
- (c) I believed that D4 knew about the purchase of the hammer and he knew that D1 had carried the hammer to the bench and he knew D1 was holding it whilst he was sitting on the bench.
- (d) D4 admitted that he was on the bench with his co-defendants because I came here to look for somebody .
- (e) I found that a common intention by D1, D2 and D3 had been hatched before buying the hammer and their intention had continued whilst they sat on the bench. This common intention was to confront the victim with the hammer when he came out of the college and to use it initially to frighten him.
- (f) I found it inconceivable that D4 did not know the full intention of D1, D2 and D3 at the time he was apprehended by the police. I found that he had spent much time with the others chatting and then he had gone into the market with them and the hammer had been purchased by one of them. He had then walked together with them to the same bench and sat with them chatting until the police apprehended them.
- (g) I believed his admission was a brief reference to this intended situation. AUTONUMOUT Then, the magistrate adverted to the fact that the appellant had not given evidence on the general issue at trial (appeal bundle page 27, paragraph I reminded myself that it was his right to remain silent and that I should not assume his guilt merely because he had so elected. However, his silence left me without any explanation from him to undermine, contradict or explain the prosecution evidence against him. I also gave myself both of the Berrada directions before making any finding against him. AUTONUMOUT Finally, the magistrate went on to consider proof of the ingredients of the offence and, in particular, in the circumstances of this case, proof of a shared common intention on the magistrate said (appeal bundle page 28, paragraph I found as a fact that D4 had legal possession of the instrument, which was fit for an unlawful purpose, and intended to use it for an unlawful purpose as there was the common intention agreed upon by D4 and the other defendants to use the hammer (the instrument) for the unlawful purpose of frightening the victim when he came out of the college. I found that such a hammer was fit for causing fear in the victim. Self-defence was not raised in the trial. REASONS FOR SENTENCE AUTONUMOUT In his

Reasons for Sentence the judge stated (appeal bundle page 29, paragraph I found that D4 and his co-defendants, whom I found had a triad connection, had deliberately waited for the victim intending to negotiate with him and threaten him, and if those negotiations broke down to use the hammer for violence. I also found that the victim was a student attending the college and that any confrontation was to take place in the street immediately outside the college in clear view of the many students, whom I believed would be passing by. I therefore took the view that the seriousness of this offence fell within the upper levels of the sentencing limits for this offence. AUTONUMOUT In determining to sentence the appellant, a young man of 16 years of age, to be detained in custody in a Rehabilitation Centre the judge adverted to observations made in the reports obtained in respect of the appellant after which he concluded (appeal bundle page 29, paragraph I therefore took the view that the defendant was a young man, who was out of control and that unless he received a short sharp period of punishment combined with some career training he would likely continue as he had into the future. I did not believe his studies would take him any further as his results were very poor, and therefore I did not believe that probation even with residential training or community service was appropriate in this case despite his having a clear record. I further noted that D4 was recommended for both Detention Centre and Rehabilitation Centre, but I believed that Rehabilitation Centre with its career training and career assistance would be far more beneficial than Detention Centre. I therefore ordered he be detained in a Rehabilitation Centre. GROUNDS OF APPEAL AGAINST CONVICTION AUTONUMOUT Complaint is made on behalf of the appellant that his conviction was against the weight of the evidence. By Ground 2 it is said that there was no evidence that the appellant was ever in possession of the hammer. By Grounds 5 and 6 it is submitted that the magistrate failed to deal, or deal adequately, with the evidence said to be favourable to the appellant, in particular the fact that there was no evidence of a nexus between the appellant and the hammer let alone that he had been the purchaser and the evidence on the general issue of the 1st and 3rd defendants at trial of the non-communication of information to the appellant of the reason for their presence at the area of their arrest. By Ground 7 it is submitted that the magistrate erred in drawing any inference adverse to the appellant from his statement to the police that he was at the place of arrest because he had come to look for somebody. By Grounds 3, 4 8 it is submitted that the judge erred in determining that the appellant was a party to a joint enterprise. SUBMISSIONS IN SUPPORT OF THE GROUNDS OF APPEAL AGAINST CONVICTION AUTONUMOUT In his oral submissions in support of the grounds of appeal against conviction Mr Chau invited the court to regard those grounds as constituting a single ground : namely, that there was insufficient evidence on which it had been established to the requisite standard that the appellant was a party to the joint enterprise. At the conclusion of the oral submissions the court drew the attention of counsel to the judgment of the House of Lords in R. v. Hayter [2005] 2 Cr

3. Counsel were invited to consider the relevance or otherwise of the judgment in light of the sequence in which the magistrate had dealt with his findings, firstly in respect of the co-defendants (see paragraph 12 of the Statement of Findings, cited earlier) together with his

reliance in part on the admissions of the respective defendant s in reaching the determination that they were all parties to a joint enterprise and secondly, in respect of the findings he made in respect of the appellant and, in particular, his reference to what he had determined were the proven facts of the long period of time in which the appellant was in their company immediately before his arrest (paragraph 13(a), (e)

- (f) of the Statement of Findings). For his part, Mr Chau said that he accepted that the magistrate had honoured his oft-repeated statement in his Statement of Findings that out-of-court statements by one defendant were not admissible in respect of a consideration of the case against a co-defendant and he had no submissions to make in this respect. THE SUBMISSIONS OF THE RESPONDENT AUTONUMOUT For the respondent, Ms Poon submitted that the magistrate had not only dealt with the evidence of the appellant s co-defendants that was in his favour but had done so appropriately and was entitled to rejected it, as he did (Grounds 5 and 6). She went on to contend that support for a joint charge of possession of the hammer did not require proof that the appellant was possessed of it physically, that is holding it, and there was overwhelming evidence that he was in joint possession of it legally with the others (Ground 2). The evidence that supported that finding, namely his presence together with the other accused over a lengthy period of time during which they chatted and moved from place to place together also supported that the inference that the magistrate drew that the appellant was a party to the joint enterprise, in particular to possess the hammer with intent to use it for an unlawful purpose. THE GROUNDS OF APPEAL AGAINST SENTENCE AND SUBMISSIONS ON BEHALF OF THE APPELLANT AUTONUMOUT By the grounds of appeal against sentence it is contended that, having regard to the age of the appellant at the time of the commission of the offence, namely 15 years and 10 months, the fact that he was possessed of no criminal convictions and his role as a mere follower , the magistrate erred in determining that the seriousness of the offence fell in the upper levels of sentencing for this offence and ought to have acceded to the recommendation contained in the probation officer s report that the appellant be placed on probation subject to various conditions, including the condition that he receive residential training in the Christian New being Fellowship AUTONUMOUT Chau acknowledged in his submissions that, in addition to being recommended, on the one hand, to being suitable to be placed on probation on the other hand the appellant had been determined to be mentally and physically fit for detention in a Detention Centre or a Rehabilitation Centre, the former having been recommended as more suitable. Also, he accepted that in the probation report the appellant s academic record was poor, he having obtained average marks of only 30% during the year in which he repeated Form One. Further, notwithstanding his age he was only in Form Two. A CONSIDERATION OF THE SUBMISSIONS MADE IN RESPECT OF THE GROUNDS OF APPEAL AGAINST CONVICTION AUTONUMOUT The evidence before the court of the movements of the appellant and his co-accused prior to their arrest came not only from witnesses called in the prosecution case but also from the 1st and 3rd defendants at trial. Hui kuen, the 3rd defendant, testified in cross-examination by the prosecution that on 14 November 2005, whilst he was at the home of the

1st defendant, Leung Chuen, he received a phone call from the 2nd defendant, Wong Yuen, who told him that his cousin had been beaten up. The 2nd defendant asked for his assistance of the 1st and 3rd defendants. They were asked to go to the Kwai Shing area (transcript page 163K-Q). The 1st defendant said that the 3rd defendant had told him what the 2nd defendant had said to him. He said that he and the 3rd defendant had acceded to that request and the 2nd defendant had been told that on the telephone (transcript page 155 B-F). Afterwards, but in the same time period, namely 1 p.m. to 2 p.m., the 1st defendant testified that he had telephoned the appellant and arranged to meet him between 1 p.m. and 2 p.m. at a bus stop near his residence in Sham Shui Po. AUTONUMOUT The 1st defendant testified that he and the 3rd defendant met the appellant at around 2:05-2:10 p.m. and travelled together by bus to the bus terminus in Kwai Chung, near the Lee Wai Lee College. There, they met the 2nd defendant, who repeated to them that his cousin had been beaten up earlier and said that he wished to pick up his cousin to prevent him from being beaten again (transcript page R-158). Grounds 5 and 6 [The magistrate's consideration of the evidence favourable to the appellant] AUTONUMOUT The 1st defendant's evidence of the appellant's knowledge of the purpose of their travels and their presence outside the college was addressed in cross-examination by counsel for the appellant thus : (transcript page H-L) Q. And you've related a conversation to the court when you said, words to the effect that, the 2nd defendant told us to go there because his cousin had been beaten up. You said that? A. Yes. Q. You never related this conversation to the 4th defendant over the telephone, did you? A. Because I had already arranged to meet D4 before D2 calls. Q. So the answer is no? A. That's right. Later, the 1st appellant testified (transcript page H-L) Q. Can I suggest this, that up until the time of the arrest, that nobody had talked to the 4th defendant, in your presence, about waiting for people. A. That's right. Q. And just to be clear, nobody said, in your presence, to the 2nd defendant, that they were to go there to assist in beating up the cousin, or to frighten the cousin, or words to that effect, of the 2nd defendant? A. In fact, at that time, the three of us didn't know what was going on. Q. So you accept what I said? A. Yes, I agree. AUTONUMOUT However, in cross-examination by counsel for the prosecution the 1st defendant testified (transcript page 157) Q. Now, during this conversation, D3 and D4 were also there, right? A. D4 had walked away, within our view but he should not have heard what was talking about. Q. Why did he walk aside? A. Because we told him that we were going to pick up the person and so he didn't want -- he didn't know what we were doing. Q. He didn't know what you wanted to do, is it? A. That's right. Q. Isn't that what you wanted to do, just to go there and pick up someone? A. That's right. Q. So he knew about it? A. Yes, he knew that we went there to pick up his cousin. Q. So what else did you want to do? A. Nothing, I just wanted to pick him up and left. AUTONUMOUT The 1st defendant's evidence of the movements of the group, in what he agreed was more than an hour before their arrest, and what they had done, was A. Nothing. We just thought over what we could do after picking up D2's cousin. AUTONUMOUT The 1st defendant went on to deny that the four of them had walked into the market, that when they emerged he was carrying a red plastic bag in which there was a hammer of which he was in possession of the time of his arrest. AUTONUMOUT The 3rd defendant testified in cross-examination by counsel for the appellant that (transcript page

162T) Q. I think it s right, is it not, that nothing was mentioned in the 4th defendant s presence, regarding D2 s cousin? Nothing was mentioned. A: He was within my view, my vision, but possibly he didn t hear that. AUTONUMOUT In cross-examination, by counsel for the prosecution, the 3rd defendant testified (transcript page 164R-165E) Q. It appeared that you purposely did not tell D4 about the cousin s matter. A. He walked away to smoke cigarettes. Whether or not he heard that, I didn t know. Q. But during the journey, from Sham Shui Po to Kwai Shing Circuit, did you tell D4 where you were going and why you were going there? A. I don t know - I don t remember. I t remember. Q. So do you agree with me that, you could have told D4 where you were going and why you were going there? A. I disagree. Q. Did he ask you where you were going? A. D4 didn t ask. Q. On that day, did you intend to meet D4 for fun and celebration for D1? A. Yes. Q. So during the journey from Sham Shui Po to Kwai Shing, D4 did not even ask where you were going? A. That s right. Q. Did he ask what you were going to do? A. No. Q. Did you tell him? A. The same way, also within my eyesight -- I didn t know whether he heard that or not. Q. What I mean was, did you tell him about it directly? A. No. AUTONUMOUT Like the 1st defendant the 3rd defendant went on to deny suggestions made to him by counsel for the prosecution that all four of the defendants had entered the market, that there he had bought the hammer from a hardware shop, requesting that its handle be shortened, after which the four of them had walked out of the market, the 1st defendant carrying the hammer in a red plastic bag. AUTONUMOUT In the course of his oral delivery of his Reasons for Verdict the magistrate stated that he rejected the evidence of the 1st and 3rd defendants and accepted the evidence of the prosecution witnesses where there were conflicts. In particular, he rejected the denial of the 1st defendant that he carried the hammer from the market where it had been purchased and his denial that he was holding it in the bag at the time that he was arrested (transcript page 86G-I). Following his general rejection of the evidence of the 1st and 3rd defendants the magistrate went on to say specifically that he rejected their evidence that the appellant did not hear the discussion of what was the purpose of the whole exercise (transcript page 86O) and the intended plan (transcript page 87C). It follows that there is no merit in the assertion made in Grounds 5 and 6 of the grounds of against conviction that the magistrate had failed to deal with or give appropriate weight to evidence led in support of the appellant. AUTONUMOUT Obviously, the magistrate s findings that he preferred the evidence of the prosecution witnesses over that of the 1st and 3rd defendants of the movement of the four defendants into the market, their emergence together with the hammer carried by the 1st defendant and his related findings were clearly relevant to his consideration of their credibility in their testimony of what was discussed in front of or with the appellant, that being relevant to the latter s knowledge and role in the events. Clearly, the magistrate was perfectly entitled to reject their evidence in that respect. AUTONUMOUT In addressing the issue of whether or not the appellant was in joint possession of the hammer with intent to use it for an unlawful purpose, the magistrate found, first of all that the ingredients of that offence were proved against the 1st, 2nd and 3rd defendant (see paragraph 12 of the Statement of Findings). Then, the magistrate set out the evidence, which he described as proven facts , from which he drew the irresistible inference that the

appellant was a party to the joint enterprise between all four of them to be in possession of the hammer with intent use it for an unlawful purpose (appeal bundle page 26, paragraph 13). The proven facts (cited earlier), on which the magistrate concluded the appellant was a party to the joint enterprise that existed between his co-defendants, were :

- (a) I found that D4 had been in the company of the other three defendants for a long period of time during which time I found the hammer had been purchased by one of them and the handle had been sawn shorter.
 - (b) I found that D1 carried the hammer in plastic bags and had it with him when they walked from the market to the bench, and I found D1 held it at the bench. I found the handle was protruding from the bags clearly after its purchase.
 - (c) I believed that D4 knew about the purchase of the hammer and he knew that D1 had carried the hammer to the bench and he knew D1 was holding it whilst and he was sitting on the bench.
 - (d) D4 admitted that he was on the bench with his co-defendants because I came here to look for somebody .
 - (e) I found that a common intention by D1, D2 and D3 had been hatched before buying the hammer and their intention had continued whilst they sat on the bench. This common intention was to confront the victim with the hammer when he came out of the college and to use it initially to frighten him.
 - (f) I found it inconceivable that D4 did not know the full intention of D1, D2 and D3 at the time he was apprehended by the police. I found that he had spent much time with the others chatting and then he had gone into the market with them and the hammer had been purchased by one of them. He had then walked together with them to the same bench and sat with them chatting until the police apprehended them.
 - (g) I believed his admission was a brief reference to this intended situation. AUTONUMOUT From that evidence, the magistrate stated that he had concluded (Statement of Findings page 26, paragraph ... whilst the admissions by the other defendants were not evidence against him at all I found by irresistible inference that he was a voluntary party to the joint enterprise, and that with full knowledge of that common design he had gone into the estate market with the other defendants and one of them had purchased the hammer, and then he had gone to the bench with the other defendants in pursuance of that common design to wait for the victim. AUTONUMOUT At an earlier stage of his Statement of Findings the magistrate had made a similar statement of principle as to the inadmissibility of the out-of-court admissions by one defendant in the case of another (see paragraph 10 of the Statement of Findings)
10. I was aware of out-of-court statements made by one defendant were not evidence against another defendant. AUTONUMOUT Notwithstanding his findings that the 1st defendant was in physical possession of the hammer, from the time that he emerged from the market

together with the others until the time of their arrest, the magistrate went on to find that the appellant was in legal possession of the hammer (appeal bundle page 28, paragraph I found as a fact that D4 had legal possession of the instrument, which was fit for an unlawful purpose, and intended to use it for an unlawful purpose as there was the common intention agreed upon by D4 and the other defendants to use the hammer (the instrument) for the unlawful purpose of frightening the victim when he came out of the college. AUTONUMOUT In my judgment the circumstantial evidence admissible against all four defendants, namely :

- (i) their presence in each other s company s for a lengthy period of time; (ii) the fact that the appellant, together with the 1st and 3rd defendants had travelled together by bus to Kwai Chung where they met up with the 2nd defendant; (iii) their movements together from place to place, in particular their visits to the market and their re-emergence with the 1st defendant now possessed of the hammer with the especially shortened handle, which was retained by him in the immediate presence of the others until their collective arrest a little while later as they waited opposite the college paying attention to students; together with their admissions in their respective cases, in particular the appellant s admission I came here to wait for somebody was clearly sufficient for the magistrate to be satisfied, as he stated he was (page 25, paragraph 11C(d)) I found all defendants were intending to confront the victim with the hammer . AUTONUMOUT Clearly, that finding, together with the other findings open to the magistrate on the circumstantial evidence, satisfied proof of the requisite ingredients of the offence in the appellant.

CONCLUSION

AUTONUMOUT In the result, in my judgment there is no merit in the grounds of the against conviction and the appellant s appeal against conviction is dismissed. A CONSIDERATION OF THE SUBMISSIONS IN RESPECT OF THE APPEAL AGAINST SENTENCE AUTONUMOUT In my judgment the magistrate was entitled to come to the determination of the circumstances of the commission of this offence that they fell in the upper levels for sentencing for the offence. The offence occurred in an area immediately outside a school from which students were emerging and was a direct response to alleged violence inflicted on one of the students. AUTONUMOUT It is clear from the reports available to the magistrate that there was available to the magistrate a whole range of sentencing options, including a Probation order, a Detention Centre order and a Rehabilitation Centre order. The magistrate articulated his reasoning succinctly for selecting the Rehabilitation Centre order : firstly, the appellant required a short sharp period of punishment and secondly, that was to be combined with career training. His poor academic record resulted in the magistrate concluding that a probation order, even with residential training, was not appropriate. He rejected the suggested options for a Detention Centre order in favour of a Rehabilitation Centre order, determining that the career training and career assistance available in the latter would be more beneficial to the appellant. AUTONUMOUT In his commendably candid approach to the court Mr Chau placed before the court two reports on the appellant compiled on behalf of the Commissioner of Correctional Services, one from Lai Chi Rehabilitation Centre where the appellant is detained. They are dated 26 and 27 February 2007

respectively. In the former, the appellant described as having settled down, to be more responsive towards training, to having been able to adjust well to disciplinary training and to have maintained a stable performance . The latter report describes the appellant as having overcome some initial adjustment problems to the institutional environment of the Centre and to have achieved acceptable performances in various areas, including psychological, educational and vocational units. He was described as having exerted effort in the training programme and to have incurred no adverse disciplinary reports. In particular the appellant was described as having shown strong sense of remorse on his misdeeds and determination to turn a new leaf of life .

CONCLUSION

AUTONUMOUT In my judgment, it is clear that the magistrate imposed the correct sentence on the appellant, the success of which order, to the credit of the appellant, is immediately apparent in the reports from Lai Chi Rehabilitation Centre. There is no merit in the appeal against sentence, which is dismissed. (Michael Lunn) Judge of the Court of First Instance High Court Ms Irene Poon, GC of the Department of Justice, for the Respondent Mr Phil Chau, instructed by the Director of Legal Aid, for the 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 &`#\$ ^in\ s5?!t_4= @W 5 cgp HfBw@b HfBw s5?! @W 5 & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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