

HONG KONG / JUDGMENT

HKSAR v. CHEUNG KAI CHUNG

COURT

Court of Appeal

DECIDED

5 June 2007

CASE / FILE NUMBER

CACC36/2007

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Before: Hon Stuart-Moore VP and Wright J in Court Date of Hearing: 5 June 2007 Date of Judgment: 5 June 2007

JUDGMENT

Hon Wright J (giving the judgment of the Court): The applicant applies for leave to appeal sentences imposed upon him by Beeson J. on 24 January 2007. After his arrest the applicant was charged with 13 counts. Upon committal on 22 August 2003 he pleaded guilty to all. He was committed, in custody, to the High Court for sentence. Sentencing was delayed as a result of his offering to give evidence against various co-accused. There were two separate indictments preferred against various persons. Two accused, both with the family name Wong, were common to each indictment. The applicant gave evidence in a trial in the High Court under HCCC58/2004 in which four persons were convicted. He was willing to give evidence, further, in HCCC77/2004 but this was rendered unnecessary by the pleas of the two Wongs in that matter: they had earlier been convicted and sentenced in HCCC58/2004. When sentencing the applicant, Beeson J. set out in detail the matters which she took into account on his behalf in mitigation. In doing so she made a finding that he fell into the category of a supergrass. On five counts of robbery she took a starting point of 15 years imprisonment, on three counts of robbery one of nine years imprisonment, on one count each of attempted robbery and conspiracy to rob one of 15 years imprisonment, on a count of possession of arms and ammunition without a licence a 12-year starting point and on a count of possession of ammunition without a licence a 6-year starting point. On a count of possession of a false instrument she imposed a sentence of 12 months. The starting points on counts 1 to 12 were then discounted by two thirds to reflect the applicant's status arising from his co-operation with the police, his personal circumstances, the delay in sentencing and the potential ongoing threat, even after his release, to him and his family. Orders

were then made that some be served concurrently, some consecutively, including the sentence of 12 months on Count 13. The result is that the applicant is to serve a term of 10 years. The applicant makes four points in his application: first, that the starting point in respect of the count of possession of arms and ammunition without a licence is too high; second, that in the three years and seven months prior to his being sentenced he has been subject to a lot of stress both in terms of awaiting sentence and of being kept separate from other prisoners for most of the time; third, that he is under stress due to his concern for the welfare of his family in the Mainland; and, fourth, his son suffers from aplastic anaemia which requires expensive medical treatment which his wife is unable to finance. The offences of which the applicant was convicted were grave. Beeson J., when passing sentence, said:

30. In respect of these offences, they are very serious, they were also well planned and executed. The major protagonists were the Wong brothers. They were assisted by Au who sheltered the Mainland recruits at his home when necessary and who gave access to his home for storage of weapons. The sophistication of planning is exemplified by the fact that this was a group activity organised by Hong Kong residents with Mainlanders assistance, as required, for each robbery. It appeared from the evidence at trial that fresh recruits were obtained for each robbery and they were returned to China as soon as possible after the robbery was committed. They were paid generously for their help.
31. It has been put before me that in this particular series of offences, the accused was a foot soldier . However although I accept that he was not a mastermind, he was party to the plans and acted as a trusted lieutenant for the main protagonists of the robbery. He took part in reconnaissance and visited the target areas, as well as taking the assistants, when they arrived, to view the targets. He distributed weapons when told to do so and recovered them after the robberies. He was paid substantial sums for his work, but I accept that he did not share in the major profits of the enterprise. He had obtained the forged ID card at the behest of one of the Wong brothers to facilitate his travelling in and out of Hong Kong. To underline the gravity of these offences it is only necessary to add that in every one of the robberies and the attempted robbery the perpetrators carried weapons, on occasions a firearm, and had no hesitation whatsoever in using them at an early stage of the offences. As to the discrete complaint concerning the starting point adopted in respect of the count relating to possession of arms and ammunition, we are satisfied that, on the facts, 12 years was appropriate as was the starting point adopted in respect of each of the other counts. Nothing has been put before us today which was not already before the sentencing judge and taken into account by her. There has been no change in circumstances in respect of any of those factors made known to us. With a final sentence of 10 years imprisonment after a discount of two thirds on counts 1 to 12, the notional overall starting point is one of 30 years imprisonment. Although the judge described the Wongs as the masterminds the applicant's role was vital to the execution of their plans: the distinction between their respective roles is theoretical rather than real. Having regard to the gravity and number of the offences in which the applicant was involved, the active and important role which he played throughout and to the sentences imposed on the two Wongs, we are satisfied that such a notional

starting point is fully justified. We have also considered whether the applicant should have received the same percentage discount in respect of Count 13, possession of a false instrument, as he did on the other counts. On the facts, he possessed that document to facilitate his movements between Hong Kong and China. Those movements related, at least in part, to recruitment of persons to conduct the robberies. There is a clear nexus between the offences such as, in our view, to entitle the applicant to the full discount on this final count as a matter of principle. The notional starting point was 18 months: the final sentence should have been 6 months. We give leave and treat the hearing as the appeal. The appeal is allowed to the extent that the sentence on Count 13 is reduced to 6 months which is to be served consecutively to the other sentences. The total sentence is 9 years 6 months. (M. Stuart-Moore) (A R Wright) Vice-President Judge of the Court of First Instance Mr Robert S K Lee, SADPP, Department of Justice, for Respondent Applicant in person 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 &`#\$ r p# r p# Normal.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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