

HONG KONG / JUDGMENT

HKSAR v. CHIU KEUNG

COURT

Court of Appeal

DECIDED

19 March 1999

CASE / FILE NUMBER

CACC397/1998

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bjbj ` %b ^ CACC397/98 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL CRIMINAL APPEAL NO. 397 OF 1998 (ON APPEAL FROM DCCC 480 OF 1998) BETWEEN HKSAR and CHIU KEUNG

Coram: Hon. Power, Ag. Chief Judge, H.C., Mayo & Stuart-Moore, JJ.A. Date of Hearing: 19th March 1999 Date of Judgment: 19th March 1999

J U D G M E N T

Power, Ag. C.J.H.C. (giving the judgment of the Court): The applicant along with two other defendants faced one charge of robbery. Each of the defendants also faced a charge of remaining without authority in Hong Kong. The applicant was D1 at trial and he was tried together with D2, both of whom having pleaded not guilty. They were found guilty after trial before Judge H.C. Wong in the District Court. The applicant now seeks leave to appeal against conviction on the charge of robbery. There was no issue at trial that a robbery had taken place. The only question before the judge was whether the applicant and D2 had been involved. The judge outlined the facts in her Reasons in the following way: The prosecution called the two victims in the robbery, PW1 and PW2. Their evidence is that on 24 March 1998 at about 8.30 p.m. in the evening, PW1 and PW2, his girlfriend, were taking an after-dinner walk at the Island House Park in Tai Po where they were approached by four males. One of the males, upon confronting them, grabbed PW1 s neck from behind, pointed the knife against his neck while another said, Robbery . The third searched PW1 and the fourth was guarding PW2. They took away \$40 from PW1 and from PW2 s purse they took \$120 and removed a bag of crisps from the backpack carried by PW1. It was PW1 s evidence that the man in front of him spoke the word Robbery (in Cantonese), but he said some other things in Mandarin. PW1 also said he saw the face of the man standing in front of him. The four men then left in the direction of Tolo Harbour but they had walked away rather than running away. It was PW2 s evidence that although she did not look at the faces of the four

robbers at the time, she did look at them when the four men walked away and that two of the men had turned back and looked back, therefore, she was able to see them. PW1 went home after taking his girlfriend, PW2, home in Tai Po. Then PW2 decided after returning home to make a report to the police. So sometime after 9 p.m. PW2 had gone to make a report at the Tai Po Police Station. After making the initial report, she took the police back to the spot where she was robbed and then she was taken back to the police station and there she made a witness statement. PW1, on the other hand, upon the request of his girlfriend by phone, went to Tai Po Police Station from his home in Shau Kei Wan in Hong Kong at about 11.30 p.m. He made a witness statement to the police there at Tai Po Police Station. Both PW1 and PW2 attended an ID parade at Tai Po Police Station two days later on 26 March 1998. PW1 identified both the 1st and the 2nd defendants at the parade, while PW2 identified also both the 1st and 2nd defendants separately. Neither the 1st defendant or the 2nd defendant called any evidence, nor did they give evidence in their own defence. The trial judge was satisfied as to the identity of the two accused and she convicted them. The thrust of this appeal is that there was no satisfactory identification evidence and that the charges should, that being so, have been dismissed. It was the evidence of both of the witnesses that the lighting had been rather dim. PW1 in his evidence-in-chief answered questions regarding his identification in the following way: Q. How many did you identify at the identification? A. Two. Q. These two that you identified at the identification parade, what were their respective roles in the robbery? A. Guarding my girlfriend. Q.. Both of the ones that you identified. A. One of them. Q. What was the other one's role in the robbery? A. The one who searched my body. Q. So the one who had the knife pointed at your neck was not a person you identified at the identification. A. Correct. Q. The one facing you doing all the talking was not a person you identified. A. Correct. Q. Could you tell us they were in fact the other two taking part in the robbery? A. Correct. Q. Have you seen any of these men before, Mr. Ng? A. No. The witness PW1 gave details of the appearance of three of the robbers but as to the fourth he said he was only able to say that he was a male aged about 30. He agreed in cross-examination that this was because the lighting was not very good. He agreed also that because the lighting was not very good he had said nothing about their look. This appears to be an admission by him that he had said nothing about their facial appearance. He also gave the following evidence which bears upon identification. He was asked: Q. Can I assume that the reason why you were not able to tell the details of the description of that male was the fact that the lighting was not very good in the park. A. Correct. He was finally asked by Mr. Chan, who appeared for the applicant at trial: Now, Mr. Ng, you had given description about the four males in terms of their height, their clothing, et cetera, but you said nothing about their look. Am I correct in also assuming that it was because of the dim light in the circumstances. He answered to that. We refer to one further passage when he was being cross-examined by Mr. Fung for D2: Q. You said one male search you. How did he search you? A. Searched my trousers pocket, took out my wallet, took out money. Q. Could you see that man? A. Yes. Q. Was he the same man who took away your girlfriend's wallet? A. I cannot say for sure. Q. Why? A. Too long ago. I cannot remember. Q. You have said to us that this is your first time you had been robbed. A. Yes. Q. Were you scared at that time when you were surrounded by four males. A. Yes. Q. That's the reason why you cannot give a description of these four males. A. Yes, correct. We turn to the final questions in cross-examination which was as

follows: Q. Apparently, the reason why you picked out these two persons at the two different parades was because they look like those ones who robbed you. A. Yes. Q. You re not quite sure about that. A. Correct. We are puzzled as to what exactly was meant by this answer. Was the witness really saying that he was not sure of his identifications? When this sort of equivocal answer is given it is proper for the judge to step in immediately and ask the witness to say exactly what he means when he says Correct . The judge not having done so it certainly called for a question seeking clarification by prosecuting counsel in re-examination. In fact no clarification was sought. We feel ourselves bound, the answer standing as it does, to take it to mean that the witness was saying that he was not quite sure about his identification. The girlfriend, PW2, said that the lighting was average but dim , that she had got a better look at the robbers as they were leaving and that she had hardly looked at them during the robbery as she was scared. At the first identification parade she had picked out one robber, i.e. the 2nd defendant. When she was asked in cross-examination whether she was sure of this identification she said Average . Again, there was no question from the judge in an endeavour to elucidate exactly what was meant by the word average , nor did prosecuting counsel seek elucidation when he re-examined. Again we are not sure exactly what she meant. She said that she was not able to say what part the 2nd defendant had played. She went on to tell of the second identification parade which was about half an hour later. At that parade she picked out three persons the applicant, the third person involved in the offence and an actor. She was unable to say what part each had played. The final question in cross-examination was: Q. I mean the mistake (i.e. the mistake as to the actor) could have come about because of the fact that during the actual robbery you hardly looked as you have told the court. A. Correct. The trial judge in her findings said: I remind myself and paid particular attention to the rule in Turnbull. She was here referring to R. v. Turnbull, (1977) 1 Q.B.224, and to the rule which commences, at p.229, as follows: When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification. The court goes on to indicate that such evidence need not be corroboration in the technical sense. It gives an example of an accused who is charged with robbery and who has been identified by three witnesses in different places on different occasions with each having had only a moment of opportunity for observation. The court continues: It was an odd coincidence that the witnesses should have identified a man who had behaved in this way. In our judgment odd coincidences can, if unexplained, be supporting evidence. Given the flaws in the identification evidence we feel bound to ask whether the judge did in fact follow the rule in Turnbull? She said: I remind myself that honest witnesses can make honest mistakes. I warn myself of the danger of relying on identification evidence alone and I exercise special caution in my assessment of the evidence and the quality of the evidence of identification from the two victims. I find there is clear evidence that PW2 was positive in the identification when she picked out the 2nd defendant in the first parade. She further picked out three persons in the second parade, one of whom was an actor. In Mr. Fung, the 2nd defendant s counsel s opinion, this actor resembled the 2nd defendant. Mr. Fung submitted that therefore PW2 could not have been sure when she picked out someone who

resembled the 2nd defendant in the second parade, after picking out the 2nd defendant in the first parade only half an hour before. I cannot agree that that itself means PW2 was not sure of her identification of the 2nd defendant. Looking at PW2's identification of the 2nd defendant, it is in fact supported by PW1's own identification of both the 1st and 2nd defendants separately and independently. Both witnesses were cross-examined as to whether they had any discussion before they made a statement to the police on the night of 24 March. It is quite clear that they had not the opportunity or time to discuss the descriptions before they each independently and separately at different times made their own witness statements to the police in Tai Po. The judge found finally: There is clear evidence that PW1 and PW2 had no hesitation and were never indecisive in the way they made the identifications of the 1st and 2nd defendant in the identification parade. I therefore have no doubt that PW1 and PW2 were positive when they identified the 1st and 2nd defendants. I have reminded myself of the rule in *Turnbull*. For the above reasons, I find that prosecution have discharged the burden of proof and there is strong evidence of identification and the case was proved beyond all reasonable doubt. The judge was of course, entitled to place emphasis on her finding that the witnesses were truthful and had made positive identifications but the real issue was whether their evidence was correct. She did, it is true, following *Turnbull*, look for supporting evidence from each of the witnesses for the evidence of the other. She found support for PW2's identification of D2 in the evidence of PW1. It must, however, be remembered that PW2 had characterized her own degree of certainty as average and that PW1 had, as we have pointed out, agreed, when asked about his identification, that he was not quite sure about that. We are, however, not called upon to examine the finding of guilt as regards D2 but are concerned only with that of the applicant. The identification evidence as to the applicant came from both of the witnesses. We return to the cross-examination, during which PW1 agreed that he was not quite sure about his identification. His evidence was, it is true, supported by the evidence of PW2 who had also identified the applicant at the second parade. The trial judge was clearly relying upon the evidence of each witness to support that of the other. She was entitled so to do. What concerns us is whether she correctly addressed herself to the quality of that evidence. We have been referred to the case of *Thomas Henry Weeder*, (1980) 71 Cr.App.R. 228, where two witnesses, one the victim, gave evidence of a brief but brutal assault. The judge there told the jury that they were entitled to look for support for the identification evidence of each of the witnesses in the evidence of the other. It is pertinent to look at the kind of evidence with which he was dealing. The victim, Mr. Tierney, said he had a good look at his assailant who was wielding a bat. The street lamp provided a bright light and Mr. Tierney was looking up at his assailant while he was being attacked. He had, further, identified the assailant shortly afterwards at a street identification and he said at trial that he was in no doubt that the applicant was the one who had attacked him. Miss Massam, the other witness to give identification evidence, said that she knew the appellant because her friend used to go out with him. She had seen him about 50 times. She used to live not far away from where he lived. When giving evidence, she firmly rejected the suggestion that she was mistaken. She said the light outside was a very bright light and that she knew that it was the appellant. The identification evidence in the present case does not bear contrast with evidence in the prosecution of *Thomas Henry Weeder*. Are we satisfied that the judge gave proper consideration to the quality of the

identification evidence in the present case? She characterized that evidence as strong evidence of identification . Mr. Saw, S.C., who appears for the respondent today, was unable to support that finding, and understandably so, as, given what we have set out above, it clearly feel considerably short of being strong evidence of identification. The evidence from neither of the witnesses was satisfactory and the evidence of each gave little support to that of the other. We cannot help but feel that the judge, when she came to the conclusion that there was strong evidence of identification , was relying upon her finding that the witnesses were truthful and that they had made positive identifications and that she had, somehow, lost sight of the fact that their evidence, on their own admissions, was far from strong. We are left with a lurking doubt as to the propriety of the conviction. That being so, we allow the application, treat the hearing of the application as the hearing of the appeal, allow the appeal and order that the conviction be quashed. (N.P. Power) Ag. Chief Judge, H.C. (Simon Mayo) Justice of Appeal (M. Stuart-Moore) Justice of Appeal Mr. D.G. Saw, S.C., leading Ms. Vivien Chan (D.P.P.) for the Respondent Mr. Edward Laskey assigned by D.L.A. for the Applicant. PAGE & 6" CACC440 /98 Connie SK NgFoo Normal Microsoft Word 8.0 CACC440 /98 Title _PID_GUID @8= ^ Mk ^ Microsoft Word Document MSWordDoc Word.Document.8

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