

HONG KONG / JUDGMENT

HKSAR v. CHOI MAN KIN

COURT

Court of Appeal

DECIDED

20 May 2003

CASE / FILE NUMBER

CACC644/2002

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bjbj CACC 644/2002 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL CRIMINAL APPEAL NO. 644 OF 2002 (ON APPEAL FROM DCCC 867 OF 2002)

BETWEEN HKSAR Respondent CHOI MAN-KIN Applicant

Before: Hon Stuart-Moore VP, Yeung JA and Seagroatt J Date of Hearing: 20 May 2003 Date of Judgment: 20 May 2003

J U D G M E N T

Stuart-Moore VP (giving the judgment of the Court): On 20 November 2002, following a trial in the District Court before Deputy Judge E. Yip, the Applicant, aged twenty, was convicted of robbery. He now seeks leave to appeal against his conviction. The two grounds of appeal, advanced by Mr Stirling on the Applicant's behalf, were focused upon what is alleged to have been the unsatisfactory nature of the evidence given by a crucially important witness (PW4) as to identification. The prosecution's case was almost entirely dependent on PW4's evidence because, although other evidence in the case clearly identified PW4's taxi as the vehicle which drove the two culprits responsible for this robbery away, only PW4 was able to identify the Applicant as someone who had been a passenger in his taxi at the material time. The facts revealed that on 22 June 2002, during the early hours of the morning, two men attacked and robbed a woman (PW2) in Sai Ching Street, Yuen Long. Her handbag containing a number of valuables was taken. PW2 gave chase, shouting out as she did so. This alerted PW1 and PW3 to what was going on and they could see PW2 chasing the two robbers. In a most public-spirited way, PW1 joined the chase and one of the robbers, whose identity is unknown, fell down and dropped the handbag. PW1 picked it up and saw the other robber who had been chased by PW2 hail a taxi which was stationary at a

red light. This man was subsequently identified by the driver (PW4) as the Applicant. The Applicant then urged the robber whose identity is unknown to hurry up. Both men got into the taxi and PW1 noted down its number. Meanwhile, PW3, who was PW1's girlfriend, had very sensibly telephoned for the police. Leaving aside, for the moment, the evidence given by PW4 relating to his identification of the Applicant as the man who had hailed his cab, PW4 drove both passengers by a route which deliberately involved taking a wrong turn, with the intention of bringing them back to the vicinity where they had first boarded his vehicle. Perhaps realising that they were not being taken in the direction they wanted to go, PW4's passengers asked to be let out. They got out without paying and were then seen running quickly towards Castle Peak Road. Very soon afterwards, PW4's taxi was intercepted by police who had been supplied with the taxi's registration number. PW4 gave police a brief description of the men. At about 4.32 a.m., PW6 and other police officers saw two men who appeared to fit the description of the men for whom they were looking. The men quickened their pace as police came abreast of them in a van. PW6 got out and asked the Applicant what he was doing. The Reasons for Verdict describe what happened next in these terms: The defendant looked at him without answering. The unknown man (Mr Lo) told the defendant not to say anything and he would pay the fee for briefing a lawyer for him (the defendant). At 4.35 a.m. PW5 arrested the defendant for robbery. After caution, the defendant replied that he did not do it; he just got up from sleep. (Appeal bundle p. 12) It is useful, before turning to the identification evidence given by PW4, who four days later, on 26 June 2002, picked out the Applicant at an identification parade, to consider Mr Stirling's two grounds of appeal. These asserted, firstly, that the judge made an error by failing to rule that PW4's evidence was inadmissible in that the evidence was tenuous and vague and inherently unreliable such that no jury properly directed could rely upon it alone to find guilt. This ground reiterated part of the second limb of *R v Galbraith* [1981] 73 Cr R 124 at 127. By way of alternative, it was submitted in a second ground that the conviction was unsafe or unsatisfactory in that PW4's evidence, being unreliable, had left a lurking doubt as to the Applicant's guilt. In his written response to these grounds, Mr Vincent Wong, whose detailed argument has been of the greatest assistance, contended that during the Applicant's trial, the judge had dealt with all the factual issues raised by the defence and had properly applied the law. Most importantly, he submitted that the judge had been fully aware of the guidelines, to be considered in all cases where the prosecution rely solely or substantially on identification evidence, which were given in *R v Turnbull & Anor* [1977] 1 QB 224, and had borne these in mind when deciding whether PW4's identification of the Applicant as one of the passengers who had got into his taxi at the red light had been correctly identified. As the Applicant gave no evidence in his own defence and called no witnesses, and we should add that we have been told that no submission of no case to answer was ever made, we can now turn to the judge's approach to the crucial issue of identification. In his Reasons for Verdict, the judge described how the Applicant had hailed the stationary taxi from the front of the vehicle. He went on to say that: (PW4) was sure of his identification because during the incident he had observed the defendant clearly for 30 seconds until the defendant finally moved to the rear to board his taxi. There were sufficient streetlights at the pedestrian crossing area. Besides, the headlights of his taxi were lit on. (Appeal bundle p. 12) The judge then considered four matters upon which the defence at trial had placed considerable reliance as

factors which tended to cast doubt on PW4 s identification of the Applicant, namely:

- (a) PW1 told the presiding CIP that the person I recognised on that day seems not present and the one I chased was also not present in the lineup.
 - (b) PW2, the victim, told the presiding CIP at one time that the people in the lineup looked not similar to the robbers, but at another time that a few of them looked quite similar. She picked out 3 numbers which she was certain but she was not very sure . She did not pick out the defendant or .
 - (c) PW3, the female friend of PW1, told the presiding CIP that at the scene, she could not see clearly; it was very dark; she could not remember.
 - (d) PW4, the taxi-driver, picked out the defendant and an actor as the two passengers on board his taxi. (Appeal bundle p. 13) The judge found that there were valid reasons why PW1, PW2 and PW3 would not have been able to identify the robbers. As to PW4, the judge also noted that his description to the police of the people who had been his passengers was brief and unspecific and could have fitted many others. He went on to say, amongst other things:
21. I consider PW4 s observation. In sufficient streetlamps and headlights of his taxi, PW4 saw the first man running towards him from his right hand side from Kau Yuk Road and Tai Tong Road. This man ran all the way up to the front of PW4 s taxi, where he raised his hand to hail it. He shouted at the direction from where he came. Then he went to the left hand side rear of the taxi. He shouted again. Finally he boarded, so did another man. PW4 had observed the first male for 30 seconds before he went to board at the rear of the taxi. Throughout, the taxi was stationary as the traffic light was red. The two males travelled on his taxi for 2 minutes. Sometime after 4.27 a.m. but before 4.32 a.m., PW4 was intercepted by the police near Hong Lok Road. PW4 described to the police how the two males looked. The police spotted and soon arrested the defendant and Mr Lo at another location in Yuen Long. PW4 described the first man to be in a black shirt with collar and blue jeans .. PW6, who shortly afterwards arrested the defendant, says the defendant was in a black jacket with a zipper; there was no hood to the jacket . PW11 told PW4 to pick from the lineup if PW4 was sure. PW4 picked out the defendant and an actor. This can be explained by his lack of a sufficient and good opportunity to observe the face and clothing of the other male who boarded his taxi after the defendant .. I am aware of the Turnbull directions and their underlying concerns. I am satisfied that PW4 had a sufficient and good opportunity to observe the defendant s facial features and clothing as the first male who hailed and boarded his taxi before his male company at the scene on 22 June 2002; he could pick out the defendant in the lineup on 26 June 2002. I am satisfied that his identification is credible, reliable and unmistakable. (Appeal bundle pp. 16-17) To these comments the judge added a carefully considered appraisal of the evidence given about a number of possible routes which the Applicant, if he had been one of the passengers in PW4 s taxi, could have taken in order to have been found at the place where police arrested him at about 4.35 a.m., having stopped him a few minutes earlier. PW4 had driven the two passengers who had robbed PW2 for a

matter of about 2 minutes before dropping them at about 4.27 a.m. This time was established from Exh. P10 which was a mechanical receipt from the taxi meter also showing the start of the journey to have been 4.25 a.m. The evidence, when looked at carefully, including tests conducted by police to ascertain how long each of the routes would take to complete by a combination of jogging and walking, satisfied the judge that it was quite possible for the Applicant to have reached the point where he was arrested in the time available. The shortcomings in the prosecution's case were all examined with care. Perhaps one of the most important was concerned with PW4's ability to identify the Applicant with accuracy bearing in mind that he had, on the same occasion, erroneously picked out an actor on the identification parade as the second passenger. However, as to this, the judge commented that PW4's opportunity to see the second man was far less than the time in which he had been able to see the Applicant in well-lit conditions. The judge's evaluation of the evidence was meticulous and his application of the law appears to have been faultless. Plainly, if PW4's identification of the Applicant was reliable, as the judge found it to have been, the Applicant was guilty of the offence with which he was charged. We are satisfied that there is no reason to interfere with the verdict recorded by the judge. We are, in the light of all the circumstances, satisfied that the conviction was neither unsafe nor unsatisfactory. Accordingly, the application is dismissed. (M. Stuart-Moore) Vice-President (W. Yeung) Justice of Appeal (Conrad Seagroatt) Judge of the Court of First Instance Mr Vincent Wong, SGC, of the Department of Justice, for the Respondent. Mr W.N.C. Stirling, instructed by Messrs Weir & Associates, for the Applicant. - PAGE - 4T8S *`IY \*`IY 4T8S & 6" CACC Connie SK NgFoo Normal.dot setup Microsoft Word 9.0 CACC Title Microsoft Word Document MSWordDoc Word.Document.8

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